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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
NEW YORK, NEW YORK

In the Matter of:	)	
[redacted]	)	[redacted]
In removal proceedings	)	

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* BY THE IMMIGRANT DEFENSE PROJECT

Amicus curiae Immigrant Defense Project (IDP) respectfully moves the Court for leave to appear as *amicus* in the matter of Respondent [redacted]. The issues raised therein are questions of exceptional importance to IDP and its affiliates and clients, and IDP respectfully submits this brief to provide assistance to the Court in adjudicating this case. As confirmed by the attached letter, Counsel of Record for Respondent has consented to the filing of this brief.

IDP is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. A leading national expert on issues that arise from the interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and Immigration Court judges, and noncitizens with expert legal advice, training, and publications on such issues since 1997. IDP's publications include *Representing Immigrant Defendants in New York*, which was first published in 1998. IDP is also a partner organization in the Defending Immigrants Partnership, which provides materials, training and technical assistance to criminal defense lawyers and other actors in the criminal justice system in order to improve the quality of justice for immigrants accused or convicted of crimes. As such, IDP has a keen interest in this case and the fair and just administration of the nation's criminal and immigration laws.

Furthering its mission, IDP frequently appears as *amicus curiae* in cases involving both the immigration and criminal justice systems. It has filed briefs or other *amicus* submissions in many key cases involving important criminal and immigration matters before the U.S. Supreme Court, the United States Court of Appeals, and the Board of Immigration Appeals. *See, e.g.*, Brief for NACDL & IDP et al. Supporting Petitioner in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015); Brief of Amici Curiae NACDL & IDP et al. in Support of Petitioner, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); Brief of Amicus Curiae IDP in *Alsol v. Mukasey*, 548 F.3d 207

(2d Cir. 2009); Brief of Amicus Curiae New York State Defenders Association (IDP) in Support of Petitioner in *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003); Brief of Amicus Curiae New York State Defenders Association (IDP) for Respondent in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); Brief of Amicus Curiae New York State Defenders Association (IDP) et al. for Respondent in *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001).

While the regulations do not address appearances by *amicus* in Immigration Court, under 8 C.F.R. § 1240.1(a)(1)(iv), an Immigration Judge has the authority "[t]o take any other action consistent with applicable law and regulations as may be appropriate." Furthermore, the regulations explicitly allow for the appearance of *amicus curiae* before the Board of Immigration Appeals "if the public interest will be served thereby." *See* 8 C.F.R. §1292.1(d); *see also Matter of DeJong*, 16 I&N Dec. 739 (BIA 1979) ("An amicus curiae serves this purpose by making suggestions to the Board, by providing supplemental assistance to existing parties and by insuring a complete presentation of difficult issues so that the Board may reach a proper decision."). Finally, there is precedent for allowing Friend of the Court input before Immigration Judges. *See* Memorandum from Office of the Chief Immigration Judge to All Immigration Judges (Sept. 10, 2014), *available at* https://drive.google.com/file/d/0B_6gbFPjVDoxSEcyc3lNbjJPTzJ1a0ZDTi0xUjlXQlp6RTl3/ (regarding "Friend of the Court Guidance").

IDP therefore submits this *amicus curiae* brief in light of its expertise on the core legal issues in this case and respectfully requests that the Court grant this motion for leave to file the accompanying brief.

Dated: 10/7/15

Respectfully submitted,

By: _____
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New York, New York

In the Matter of: [redacted]
A Number:

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Motion for Leave to File Brief as *Amicus Curiae* by the Immigrant Defense Project, it is HEREBY ORDERED that the Motion be

☐ **GRANTED** ☐ **DENIED** because:

Reasons: _____

_____

Deadlines if motion is denied:

☐ Supporting documents must be filed by: _____

☐ Other: _____

Appeal: ☐ Waived ☐ Reserved

_____ _____
Date Immigration Judge

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NOT DETAILED

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BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

New York Legislative and Regulatory History

PRELIMINARY STATEMENT

The Immigration and Nationality Act ties adverse immigration consequences to the fact that a noncitizen has been convicted of certain crimes. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013). In order to determine whether a noncitizen's conviction triggers such consequences, it must be analyzed under the categorical approach. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 351 (BIA 2014) ("*Chairez I*"); *Mellouli*, 135 S.Ct. at 1986-87. The categorical approach has been central to our immigration system for over a century and is crucial to ensuring "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S.Ct. at 1988-87 (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L.Rev. 1669, 1688, 1690, 1725-42 (2011)); *see also Moncrieffe*, 133 S.Ct. at 1690. Were removability premised on the facts underlying a noncitizen's conviction rather than on the fact of conviction itself, the overburdened immigration courts would face the "daunting" task of essentially relitigating past convictions in mini-trials conducted long after the fact. *Taylor*, 495 U.S. at 601; *see also Mellouli*, 135 S.Ct. at 1986-87 (citing Jennifer Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining Immigration Consequences of Crime*, 26 Geo. Immigr. L.J. 257, 295 (2012)); *Moncrieffe*, 133 S.Ct. at 1690; *Descamps v. United States*, 133 S.Ct. 2276, 2289 (2013).

The categorical analysis is based upon the minimum conduct necessary to sustain a conviction under a given statute. *Moncrieffe*, 133 S.Ct. at 1684; *Mellouli*, 135 S.Ct. at 1986. Therefore, if there is any way to commit the offense that does not categorically overlap with the federal immigration grounds, then the state statute is overbroad and cannot categorically trigger the grounds of removability or inadmissibility. In New York, the definition of a "controlled

substance" includes at least one dangerous substance that is not controlled by the federal government, Human Chorionic Gonadotropin. *See* N.Y. Penal Law § 220.00(5) (McKinney); *compare* N.Y. Pub. Health Law § 3306 (McKinney) *with* 21 U.S.C. § 812 (West). The New York Controlled Substance Schedule reflects deliberate actions of the State Legislature to address serious, ongoing public health and safety concerns in the State.

Human Chorionic Gonadotropin renders New York's low-level controlled substance offenses[1] broader than the federal controlled substance grounds of removability and inadmissibility, which are only triggered by offenses that involve "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." INA §§ 237(a)(2)(B)(i); 212(a)(2)(A)(i)(II); *see also Mellouli*, 135 S.Ct. at 1990-91 (instructing that application of § 237(a)(2)(B)(i) "must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802."). Because a defendant can be convicted of a low-level New York controlled substance offense for conduct involving a substance that is not illegal under federal law, these state offenses cannot trigger a finding of removability or inadmissibility. *See Mellоulli*, 135 S.Ct. at 1990-91.

The Supreme Court has recognized a "narrow range of cases" where the categorical approach includes an additional step, the "modified categorical approach." *Descamps*, 133 S.Ct at 2283–84 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)); *see also Moncrieffe*, 133 S.Ct at 1684. This exception to the categorical approach applies only when the state statute under analysis is divisible, meaning that it sets out multiple offenses in the alternative and at least one of those offenses – the minimum conduct – is not a categorical match to the federal ground at issue. *See, e.g., Chairez I*, 26 I&N Dec at 353. Low-level New York controlled substance

[1] The term "low-level controlled substance offense" is used herein to refer to those New York offenses that incorporate the term "controlled substance" as defined by N.Y.P.L. § 220.00(5). Those offenses are N.Y.P.L. §§ 220.03, 220.06(1), and 220.31. *See infra* n.3.

offenses are not divisible because each sets out only one single offense; New York did not create separate offenses for each of the controlled substances on its schedules. Rather, the element of "controlled substance" is a generic one and the specific controlled substance involved is merely a *means* of satisfying that element.

A further extension of the categorical approach, "realistic probability," is in question in an even more limited subset of cases. Courts need only test the realistic probability that a state would prosecute conduct falling outside the generic offense when the statute is ambiguous about whether it includes such conduct, thus requiring "legal imagination" to interpret the statute as overbroad. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Where overbroad conduct is expressly included in a statute, as is the case with low-level New York controlled substance offenses, no legal imagination is required and the realistic probability standard is automatically satisfied. *See, e.g.*, *Mellouli*, 135 S.Ct. 1980 (finding – without turning to the realistic probability test – that the petitioner was not deportable because, where the state controlled substance schedule was broader than the federal schedule, the state statute unambiguously included conduct outside the generic federal offense); *Matter of Paulus*, 11 I&N Dec. 274, 276 (BIA 1965) (same).

The Government's significantly broader interpretation of when the realistic probability standard requires a showing beyond clear inclusion in a statute would further encumber the already overburdened immigration court system, negating many of the practical benefits that motivated adoption of the categorical approach, such as fairness and judicial and administrative efficiency. *See, e.g.*, *Moncrieffe*, 133 S.Ct. at 1690; *Descamps*, 133 S.Ct. at 2289; *Taylor*, 495 U.S. at 2159-60. Minimum conduct has long been the touchstone of the categorical approach, but

the Government would have the immigration courts abandon their long-entrenched, streamlined methodology in exchange for burdensome mini-trials and unclear legal standards.

Immigration courts are not the only party that would suffer under the Government's overburdensome interpretation of realistic probability. Respondents, especially those who are unrepresented and/or detained, would face an insurmountable burden under the Government's interpretation of the realistic probability standard. Identifying and documenting prosecutions that involve a particular controlled substance is immensely challenging due to the lack of a centralized database for state criminal convictions. This logistical difficulty, coupled with the fact that unrepresented and/or detained noncitizens may have limited or nonexistent access to the Internet, state law materials, and other necessary tools, renders the burden that the Government would have the Court place on respondents truly impossible to meet.

STATEMENT OF INTEREST

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. A leading national expert on issues that arise from the interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and immigration court judges, and noncitizens with expert legal advice, training, and publications on such issues since 1997. IDP's publications include *Representing Immigrant Defendants in New York*, which was first published in 1998. Furthering its mission, IDP has filed briefs or other *amicus* submissions in many key cases involving important criminal and immigration matters. *See*, *e.g.*, Brief for NACDL & IDP et al. Supporting Petitioner, *Mellouli v. Holder*, 135 S.Ct. 1980 (2015) (No. 13-1034); Brief of Amici Curiae NACDL & IDP et al. in Support of Petitioner, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (No. 09-60); Brief of Amicus Curiae IDP, *Alsol v. Mukasey*, 548 F.3d 207 (2d

Cir. 2009) (No. 08-1112-ag); Brief of Amicus Curiae N.Y. State Def. Ass'n (IDP) et al. for Respondent, *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001). *Amicus curiae* has a strong interest in ensuring that the interpretation of immigration laws relating to criminal convictions is fair, consistent, and predictable.

ARGUMENT

I. New York offenses that incorporate the term "controlled substance" as defined by N.Y.P.L. § 220.00(5) are indivisible, overbroad statutes and must be assessed under the longstanding categorical approach.

A. Pursuant to the longstanding categorical approach, recently reaffirmed by both the Supreme Court and the BIA, the modified categorical approach is applicable only to divisible statutes proscribing alternate offenses rather than alternate means for committing the same offense.

The categorical approach is employed to determine whether a prior state criminal conviction triggers certain consequences under federal law, such as sentencing enhancements or immigration consequences. Using this approach, courts must assess indivisible, overbroad controlled substance statutes categorically, without resort to the particular facts underlying a conviction. The modified categorical approach, which allows reference to specific documents in the record of conviction, is permitted *only* where a statute is divisible as described in *Descamps*. 133 S.Ct. at 2283; *see also Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 353 (BIA 2014) ("*Chairez I*"). The Board of Immigration Appeals ("BIA" or "Board") interpretation of *Descamps* divisibility states that a statute is divisible *only* when it sets out multiple offenses in the alternative (e.g. in separate subsections of a disjunctive list) and when one or more of the alternate offenses listed is not a categorical match to the federal ground at issue. *Chairez I*, 26 I&N Dec. at 353. While the Board previously permitted an inquiry into underlying facts whenever the elements of the statute "could be satisfied by either removable or non-removable

conduct," *Matter of Lanferman* 25 I&N Dec. 721, 722 (BIA 2012), it subsequently recognized that its prior interpretation was "not consistent with the approach to statutory divisibility announced by the Supreme Court in *Descamps*." *Chairez I*, 26 I&N Dec. at 353-54.

Furthermore, the BIA declined to adopt the position advanced by the Department of Homeland Security (DHS) in its Motion to Reconsider *Chairez I*, which relied on footnote two of *Descamps* to argue that a modified categorical inquiry is permitted "whenever the language of the statute of conviction lists alternative statutory phrases." *Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 481 (BIA 2015) ("*Chairez II*"). The Board explicitly stated that Immigration Judges "should continue to follow the interpretation of divisibility under *Chairez* [*I*] absent applicable circuit court authority to the contrary." *Chairez II*, 26 I&N Dec. at 481-82, 483 n. 3.

In *Chairez I*, the BIA endorsed the application of the categorical approach as laid out in *Descamps* and *Moncrieffe*. 26 I&N Dec. at 351-52. The categorical approach looks to what "the state conviction necessarily involved" and then compares that to the federal law at issue. *Moncrieffe*, 133 S.Ct. at 1684; *see also Descamps*, 133 S.Ct. at 2283; *Mellouli*, 135 S.Ct. at 1986. This focus on what the state conviction necessarily involved compels the adjudicator to presume that the conviction rested on the "least of the acts criminalized" under the statute. *Mellouli*, 135 S.Ct. at 1986 (quoting *Moncrieffe*, 133 S.Ct. at 1684). The actual conduct that led to the defendant's prosecution is "irrelevant to the inquiry," *id*.; all that matters is whether the statute of conviction *necessarily* requires a finding of conduct that fits the triggering federal offense. *Descamps*, 133 S.Ct. at 2285; *Moncrieffe*, 133 S.Ct. at 1684. If not, the federal consequence is not triggered. *Descamps*, 133 S.Ct. at 2285; *Moncrieffe*, 133 S.Ct. at 1684; *see also Mellouli*, 135 S.Ct. at 1987-88 (reaffirming *Matter of Paulus*, 11 I&N Dec. 274 (1965),

where the BIA ruled that a conviction did not establish deportability because the alien's conviction was not necessarily predicated upon a federally controlled substance).

In both *Descamps* and *Moncrieffe*, the Court also recognized a "narrow range of cases" where the adjudicator employs a "modified categorical approach." *Descamps*, 133 S.Ct. at 2283–84 (quoting *Taylor*, 495 U.S. at 602); *see also Moncrieffe*, 133 S.Ct. at 1684. When a criminal statute defines *more than one offense* and at least one is not a categorical match, the adjudicator cannot perform the required categorical analysis until he or she has identified the provision of the statute under which the individual was convicted. *Descamps*, 133 S.Ct. at 2884; *Moncrieffe*, 133 S.Ct. at 1684. For this purpose only, the adjudicator may look beyond the language of the statute to a limited set of documents from the defendant's prior case (the "record of conviction"). *Descamps*, 133 S.Ct. at 2884. The defendant's particular conduct remains irrelevant under the modified categorical analysis. *Descamps*, 133 S.Ct. at 2886; *see also Moncrieffe*, 133 S.Ct. at 1684. The only issue is which of the multiple offenses defined by the statute underlies the conviction. *Descamps*, 133 S.Ct. at 2285.

This modified analysis is permitted *only* when a statute is divisible. *Chairez I*, 26 I&N Dec. at 353; *see also, e.g.*, *Descamps*, 133 S.Ct. at 2285; *Johnson v. United States*, 559 U.S. 133, 144 (2010); *Shepard v. United States*, 544 U.S. 13, 26 (2005); *see also Moncrieffe*, 133 S.Ct. at 1684 (explaining that the modified categorical approach is only triggered by "state statutes that contain several different crimes, each described separately"). The mere fact that a statute contains a list of alternative terms does not render it divisible. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) ("legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes."). Rather, to determine if such a statute is divisible requires analyzing whether the listed terms are "alternative elements" of

distinct offenses or merely "alternative means" of committing a single offense. *Descamps*, 133 S.Ct. at 2285 n.2. A statute is divisible if and only if it sets forth a "list of alternative *elements*." *Descamps*, 133 S.Ct. at 2285 (emphasis added). *Mellouli* implicitly affirms the *Descamps* means versus elements test of divisibility by focusing on the "elements" of the noncitizen's conviction. *See* 135 S.Ct. at 1991 ("to trigger removal . . . the Government must connect an *element* of the alien's conviction to a drug defined in [§802]) (emphasis added); *id*. at 1990 ("The removal provision is thus satisfied when the *elements that make up the state crime* of conviction relate to a federally controlled substance. . . . the Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions . . . in which '[no] controlled substance (as defined in [§ 802])' figures as an *element* of the offense.") (emphasis added). In turn, an element is defined as something that a jury must find unanimously[2] in order to secure a conviction. *Descamps*, 133 S.Ct. at 2288, 2290; *Chairez I*, 26 I&N Dec. at 353.

Because the BIA does not receive deference on the interpretation of divisibility, the Board remanded *Chairez II* to be analyzed pursuant to the Tenth Circuit's interpretation of divisibility. 26 I&N Dec. at 484. However, the Board explicitly stated that Immigration Judges "should continue to follow the interpretation of divisibility under *Chairez* [*I*] absent applicable circuit court authority to the contrary." *Id.* at 481-82, 483 n. 3. Had the Tenth Circuit not spoken on the issue, or had its analysis been consistent with the Board's, then the BIA's divisibility interpretation in *Chairez I* would have applied. Second Circuit precedent on divisibility as a pure elements-based approach already mirrors *Descamps* and *Chairez I*. *See United States v. Beardsley*, 691 F.3d 252 (2d. Cir. 2010); *see also Flores v. Holder*, 779 F.3d 159, 165-66 (2d Cir. 2015) (confirming that *Descamps* controls application of the modified categorical approach

[2] New York is a jurisdiction that requires jury unanimity to secure a conviction. N.Y.C.P.L. § 310.80. In jurisdictions that do not require unanimity, an element is instead defined as something that must be found by the requisite quorum of jurors. *See Chairez I*, 26 I&N Dec. at 353 n.2

in immigration cases). Therefore, Immigration Judges in New York must analyze the divisibility of controlled substance offenses per the elements-based analysis set forth in *Chairez I*.

B. Under New York law, the specific controlled substance is not an element of low-level controlled substance offenses.

Under New York law, the specific controlled substance is not an element of low-level controlled substance offenses.[3] New York defines a "controlled substance" as any substance listed in schedules I-V of N.Y. Pub. Health Law § 3306, other than marijuana, but including concentrated cannabis. N.Y.P.L. § 220.00(5). The term "controlled substance" is incorporated into the definition of several low-level controlled substances offenses. *See* N.Y.P.L. §§ 220.03, 220.06(1), 220.31. "Controlled substance" is an element of these offenses, whereas the specific substance involved in the commission of the offense is merely a means of satisfying that element. *See People v. Archer*, 929 N.Y.S.2d 201 (Sup. Ct. 2011) (holding that the type of controlled substance possessed is not an element of N.Y.P.L. § 220.03); *see also* Ex. C(1) (*In Re Sicari*, A018-032-055, IJ Removal Proceedings Decision (June 25, 2015)) at 4-5 (finding N.Y.P.L. § 220.03 indivisible because the controlled substances listed in § 3306 "are not disjunctive elements of the offense, but rather interchangeable substances that would qualify as a controlled substance.").

[3] The term "low-level controlled substance offense" is used herein to refer to those New York offenses that incorporate the term "controlled substance" as defined by N.Y.P.L. § 220.00(5). Those offenses are N.Y.P.L. §§ 220.03, 220.06(1), and 220.31. New York has higher-level controlled substance offenses that do categorically overlap with immigration controlled substance and drug trafficking aggravated felony grounds. INA §§ 237(a)(2)(B)(i); 237(a)(2)(A)(iii); 212(a)(2)(A)(i)(II). The categorical approach therefore does not render all New York controlled substance convictions non-deportable or non-inadmissible. These higher-level offenses specify one particular substance, or a smaller category of substances, all of which are federally controlled, and therefore are a categorical match. *See, e.g.*, N.Y.P.L. §§ 220.06(3)-(8), 220.09(10)-(15). The analysis in this brief is limited to low-level offenses that reference "controlled substance" as defined by N.Y.P.L. § 220.00(5). The more serious the offense, the more likely it is to be prosecuted under a higher-level statute not addressed by *amicus curiae*.

i. Reference to a specific substance in a charging document serves independent purposes and does not signify that the substance is an element.

DHS has suggested that, because charging documents[4] may reference the specific substance involved in a low-level controlled substance offense, the substance itself is an element of that offense. However, the myriad reasons for specifying the particular controlled substance in a charging document are unrelated to the means-elements distinction.

In New York, charging documents are subject to certain sufficiency requirements designed to protect the due process rights of both misdemeanor and felony criminal defendants. The sufficiency standards for indictments and informations are "analogous, if not identical." *People v. Brown*, No. 2008NA024264, 2009 WL 424797, at *2 n.2 (N.Y. Dist.Ct. Feb. 20, 2009) (citing *People v. Swamp*, 646 N.E.2d 774, 776 (N.Y. 1995); *People v. Harvin*, 483 N.Y.S.2d 913 (Crim. Ct. 1984); *see also* N.Y. Const. art. I, § 6. Accusatory instruments must list factual allegations that support every element of an offense charged. *See* N.Y. Criminal Procedure Law §§ 100.40, 200.50(7)(a) (McKinney). The allegations must do so "with sufficient precision to clearly apprise the defendant . . . of the conduct which is the subject of the accusation." N.Y.C.P.L. § 200.50(7)(a). These sufficiency requirements protect the due process rights of criminal defendants by serving three purposes: (1) to provide the defendant with "fair notice of the accusations against him so that he will be able to prepare a defense;" (2) to ensure that the crime for which the defendant is tried is the same crime for which he was indicted; and (3) to protect the defendant against double jeopardy by specifying the crime for

[4] There are various accusatory instruments for criminal proceedings in New York. Misdemeanor and felony "complaints" serve to commence criminal proceedings, but cannot be the basis for continued prosecution. N.Y.C.P.L. § 100.10(4)-(5). For misdemeanors, the prosecution must proceed on an "information" unless the defendant consents to proceed on a misdemeanor complaint. N.Y.C.P.L. § 170.10(d). Informations have been cured of hearsay. N.Y.C.P.L. § 100.40(1)(c). Where the offense charged is a felony, the prosecution must proceed on an "indictment" from a grand jury unless the defendant consents to waive indictment and meets other requirements. N.Y.C.P.L. §§ 210.10, 220.15; N.Y.C.P.L. § 195.10.

which he was tried. *People v. Grega*, 531 N.E.2d 279, 282 (N.Y. 1988) (citing *People v. Iannone*, 384 N.E.2d 656, 660 (N.Y. 1978)).

For a low-level controlled substance offense, the relevant elements are: (1) possession or sale; and (2) that such activity involves a "controlled substance." N.Y.P.L. §§ 220.03, 220.06(1), 220.31; *see also Matter of Jahron S.*, 595 N.E.2d 823, 826 (N.Y. 1992), *holding modified by People v. Kalin*, 906 N.E.2d 381 (N.Y. 2009) (listing the elements of N.Y.P.L. § 220.03 as "knowing and unlawful possession of a controlled substance" and referring to the prima facie element of "the existence of a controlled substance"); *People v. Archer*, 929 N.Y.S.2d 201. One manner in which the People can provide factual allegations that establish the element of "controlled substance" is to provide evidence as to which controlled substance was involved in the offense. This, however, does not make the specific substance an element. Rather, identification of the substance acts merely as the means to prove the element of "controlled substance." For instance, in *People v. Archer*, the court determined that although the charging document had to "allege sufficient facts to show that *some* controlled substance was in fact possessed by a defendant," that substance was not an element. 929 N.Y.S.2d 201 at 2 (emphasis added). Likewise, in *People v. Gutierrez*, 48 Misc. 3d 1225(A) (Crim. Ct. 2015), the court found the complaint was not defective even though it alleged possession of methylenedioxymethamphetamine and a subsequent laboratory report showed that the substance recovered was in fact methylone, reasoning that both were "controlled substances under NY Public Health Law § 3306 even though they are defined separately and have distinctive characteristics." 48 Misc. 3d 1225(A) at *3. Thus, the court concluded, the fact that the laboratory report showed a different substance than the complaint alleged did not contravene the sufficiency requirements designed to protect the due process rights of defendants; it did "not

compromise the defendant's ability to prepare a defense and remove[d] the danger of being tried twice for the same offense." *Id*.; *see also People v. Blake*, 791 N.Y.S.2d 912, 960 (Crim. Ct. 2005) (finding that a complaint was not defective even though the laboratory analysis identified two controlled substances that did not match those alleged in the complaint, because "all four are controlled substances within the meaning of Penal Law § 220.03."). As demonstrated by *Gutierrez* and *Blake*, the "controlled substance" *element* alleged in a charging document remains unaltered even when the specific "controlled substance" involved is subsequently revised.

A charging document that fails to specify the controlled substance involved could be found facially insufficient and therefore procedurally defective because it lacks the requisite factual allegation (the *means*) to support the *element* of "controlled substance." *See, e.g., People v. Crisofulli*, 398 N.Y.S.2d 120, 121 (Crim. Ct. 1977) (finding an information that alleged possession of "blue pills" and "purple pills" insufficient because neither is a controlled substance). Thus, charging documents specify the particular substance to sufficiently allege facts supporting the element of "controlled substance," and not because the substance is in fact an element itself.

ii. The specific substance involved in a low-level New York controlled substance offense cannot be an element, because charging multiple substances in a single count does not result in more than one offense.

The specific substance involved in a New York low-level controlled substance offense cannot be an element because charging multiple substances in a single count does not result in more than one offense. New York Criminal Procedure Law § 200.30(1) states that "each count of an indictment may charge one offense only." At the same time, a count charging the possession or sale of multiple controlled substances does not create more than one offense under state law.

See, e.g., *People v. Miller*, 15 A.D.3d 265 (N.Y. App. Div. 2005). Therefore, the specific controlled substance is not an element of low-level New York controlled substance offenses.

As repeatedly recognized by New York courts, an accusatory instrument that charges a defendant with possessing two different controlled substances that are set out under the same offense does not charge more than one offense. For instance, criminal possession of a controlled substance in the third degree, N.Y.P.L. § 220.16(1), "does not distinguish between the types of narcotics[5] possessed, but treats all drugs classified as narcotics interchangeably" so that "there is no basis for multiple counts under this section based on the fact that the narcotics happen to be of different types." *People v. Martin*, 545 N.Y.S.2d 287 (App. Div. 1989); *see also People v. Miller*, 15 A.D.3d 265 (N.Y. App. Div. 2005) (finding that defendant should not have been convicted of two possession counts based on his possession of a single bag containing both cocaine and heroin); *People v. Maldonado*, 271 A.D.2d 328 (N.Y. App. Div. 2000) (stating that the count upon which the defendant was convicted did not charge multiple offenses although it charged both cocaine and heroin); *People v. Rivera*, 257 A.D.2d 425 (N.Y. App. Div. 1999) (finding that the multiple drugs found in the defendant's constructive possession were "properly aggregated"). The fact that multiple substances can be listed in a single count is further demonstrated by several of the attached indictments, which specify HCG and additional substances in the same count. *See* Ex. E; Ex. F; Ex. H.

New York guards against "duplicitous" counts, which are those that charge more than one offense within a single count. N.Y.C.P.L. § 200.30. Were a single count of an indictment to contain more than one offense, a subsequent double jeopardy defense put forth by the defendant

[5] Although *amicus curiae* does not address any overbreadth of the category "narcotics" herein, analysis regarding the particularity of the substance is analogous because "narcotics" are simply a narrower subset of "controlled substances." *See* N.Y.P.L. §§ 220.00(7)-(8) (defining "narcotic drug" and "narcotic preparation," respectively). While "controlled substance" refers to any substance listed in Schedules I, II, III, IV or V of § 3306 of N.Y. Pub. Health Law other than marijuana, "narcotic drug" refers only to those controlled substances listed in Schedule I(b), I(c), II(b) or II(c), other than methadone. N.Y.P.L. § 220.00(5), (7).

would be threatened due to the lack of clarity as to whether the jury had reached a unanimous verdict on each of the offenses. *See People v. First Meridian Planning Corp.*, 658 N.E.2d 1017, 1021 (N.Y. 1995); *see also* N.Y. Const. art. I, § 6. Because New York allows the People to charge multiple substances in one count, the specific substance involved cannot be an element of a low-level controlled substance offense, but is rather a means of committing such an offense.

iii. New York law on amending indictments confirms that the specific controlled substance involved in an offense is a means, not an element.

New York law states that the prosecution may amend a charging document, but only with respect to components not considered to be material elements of the offense, such as the time, place, and manner of commission. N.Y.C.P.L. § 200.70(1). Where the prosecution attempts to change an element, the "theory of prosecution" is altered and amendment of the charging document is not allowed. *Id*. In New York, changing the specific substance listed on charging documents does not change the theory of the prosecution for cases regarding controlled substance offenses. *See, e.g.*, *People v. Pacheco*, 721 N.Y.S.2d 251 (App. Div. 2001). Therefore, the specific substance involved in the offense cannot be a material element of the crime.

In New York, the prosecution may amend an indictment only "with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like" as long as that amendment does not change the theory of the prosecution. N.Y.C.P.L. § 200.70(1); *see also, e.g.*, *People v. Cruz*, 876 N.Y.S.2d 240, 241 (App. Div. 2009) (permitting the amendment of an indictment as to the place where the defendant possessed and sold a controlled substance). In other words, the prosecution may only make such a change if it is not a substantial one that alters a material element of the crime charged.

The particular substance involved in a low-level New York controlled offense cannot be a material element because state courts have clearly held that changing the specific controlled

substance alleged does not change the theory of the prosecution. *See, e.g.*, *People v. Pacheco*, 721 N.Y.S.2d 251 (2nd Dep't 2001) (permitting amendment of an indictment to list heroin rather than cocaine as the substance possessed); *People v. Acevedo*, 626 N.Y.S.2d 89 (App. Div. 1995) (permitting the amendment of an indictment to read "a quantity of heroin" rather than "a quantity of cocaine"); *People v. Heaton*, 398 N.Y.S.2d 177 (App. Div. 1977) (permitting amendment of an indictment to read "a quantity of heroin," instead of "a quantity of cannabis sativa"). In *People v. Archer*, the accusatory instrument specified cocaine residue as the controlled substance involved in a § 220.03 offense, whereas a later lab report showed that the substance was in fact methamphetamine residue. 929 N.Y.S.2d at 1. The court determined that this change represented a mere "variance between the drug referred to in the information and the expected proof at trial." *Id.* at 3; *see also People v. Gutierrez*, 48 Misc. 3d 1225(A) at *3.

Conversely, when an amendment reflects new evidence adduced at trial and "change[s] the substantial elements and nature of the crime charged," *People v. Perez*, 631 N.E.2d 570, 572 (N.Y. 1994), the amendment is improper and the defendant's conviction must be set aside. *See, e.g.*, *People v. Grega*, 531 N.E.2d 279, 281-282, 283 (N.Y. 1988). Even where amendment of a material element is requested due to a clear clerical error, the amendment is not allowed. *See People v. Perez*, 631 N.E.2d 570 (N.Y. 1994) (holding that a court cannot amend an indictment to add a new count even where it was properly voted on by a grand jury but was omitted from indictment due to a clerical error); *see also*, *e.g.*, *People v. Boula*, 966 N.Y.S.2d 259, 262 (App. Div. 2013) (disallowing amendment "regardless of any consistency with the People's theory before the grand jury").

As the controlled substance involved in an offense may be amended, the specific substance falls into the same category as time, place, names of people involved, and other

similarly peripheral facts – none of which are elements. Changing the substance involved does not modify the theory of the prosecution and does not prejudice the defendant, and the specific substance involved is therefore not a material element of the offense.

iv. Reference to a specific substance in jury instructions does not signify that the substance is an element.

The Government may also point to pattern jury instructions to support its argument that the specific controlled substance is an element of the low-level controlled substance offenses. Pattern jury instructions are merely advisory, though. They are not a binding interpretation of statutes.[6] Furthermore, New York allows for the integration of factual allegations (i.e., means) into a model jury instruction "either into the definitions of terms or the listed elements, or both." *See* CJI2d[NY] Overview of Methodology, http://www.nycourts.gov/judges/cji/0-TitlePage/1-Preface.shtml. This does not alter the fact that the factual allegation is not an element.

The jury instructions for hindering the prosecution in the second degree under N.Y.P.L. § 205.60 illustrate this concept. To be found guilty of that offense, a defendant must satisfy the element of having rendered criminal assistance to another person who has committed a class B or class C felony. N.Y.P.L. § 205.60. Proof of the underlying felony is required. *See, e.g.*, *People v. Brodus*, 763 N.Y.S.2d 363 (App. Div. 2003) (holding that the evidence was sufficient to sustain conviction for second degree hindering prosecution because "the people established that defendant's companion committed all elements of offense of third-degree criminal sale of a controlled substance, which was a class-B felony"). The pattern jury instructions for § 205.60

[6] *See, e.g.*, *Ellis v. DiChiara*, 328 N.Y.S.2d 36, 37 (App. Div. 1972) ("The pattern charges are merely guides to aid counsel and trial judges, and, of course, the Court was not required to use the suggested pattern charge."); *People v. Calderon*, 582 N.Y.S.2d 769, 769 (App. Div. 1992) ("the trial court was not required to give verbatim the pattern jury instructions . . . A charge is sufficient as long as it adequately apprises the jury of the applicable law."); N.Y. Crim. Proc. Law § 300.10 (requirements for the court's charge and instructions to jury); *see also Solis*, __ F.3d. __, 2015 WL 5806148, at *8 (calling pattern jury instructions a "useful tool in assessing the divisibility of state statutes" but finding the Government's attempts to "read[] too much into" them unpersuasive).

prompt the judge to "specify" the person who committed the underlying felony. *See* CJI2d[NY] for N.Y.P.L. § 205.60. There is no logical argument that the identity of the underlying offender is an element of this offense. Rather, the existence of the underlying B or C felony offense is the element, and specifying the identity of the felon is a means of supporting the element.

The same holds true for specifying the substance involved in a low-level controlled substance offense. The pattern jury instructions for low-level controlled substance offenses prompt the judge to specify the substance involved in the offense. *See, e.g.*, CJI2d[NY] for N.Y.P.L. § 220.03 (putting the ambiguous "(specify)" in various fields of the pattern instructions). This does not change the fact that the specific substance is merely a means of satisfying the "controlled substance" element. *See supra* Part I.B.i.; s*ee also Solis v. Lynch*, __ F.3d. __, No. 11-73958, 2015 WL 5806148, at *8 (9th Cir. Oct. 6, 2015) (stating that requiring a judge to specify one of numerous alternatives listed in the definition of an element of the offense reveals *only* "that at least one [of the alternatives] must be filled in so that the jury instruction will be complete," not that the alternative itself is an element).

Based on the foregoing, the specific substance involved in a low-level New York controlled substance offense is not an element of the offense, even where identified on a charging document or in jury instructions.

II. Low-level New York controlled substance offenses are categorically broader than the controlled substance grounds of inadmissibility and removability.

A. The New York Controlled Substance Schedule is broader than the federal schedule on its face, as New York controls substances not covered by Section 102 of the Controlled Substances Act.

i. Since 1990, New York has designated Human Chorionic Gonadotropin as a controlled substance, whereas the federal government has not.

The New York definition of "controlled substance" includes at least one dangerous substance that is not controlled by the federal government, Human Chorionic Gonadotropin ("HCG"). *See* N.Y. Penal Law § 220.00(5) (McKinney); *compare* N.Y. Pub. Health Law § 3306 (McKinney) *with* 21 U.S.C. § 812 (West). This disparity renders the State's schedule broader than its federal counterpart, and therefore the minimum conduct necessary to sustain a low-level New York controlled substance offense conviction does not constitute a removable offense under INA § 237(a)(2)(B)(i) or an inadmissible offense under INA § 212(a)(2)(A)(i)(II). *See generally Mellouli*, 135 S.Ct. 1980 (holding that a Kansas conviction could not trigger removal because the state statute proscribed at least one substance not included in the federal schedules).

HCG was added to the New York schedule by legislation approved on July 16, 1989 and effective January 12, 1990. *See* Anabolic Steroids—Schedule III Controlled Substances, 1989 N.Y. Sess. Law Serv. 418. *See also infra* Part III.B.iii (discussing the legislative history of HCG). The State continues to designate HCG as a controlled substance to this day. *See* N.Y. Pub. Health Law § 3306. A review of the relevant federal registers dating back to 1970, on the other hand, reveals no evidence that the federal government has ever included HCG on any of its schedules of controlled substances. *See* 21 U.S.C. § 812; 21 C.F.R. § 1308.

ii. Additional disparities between the New York and federal controlled substance schedules have included Tramadol, Ketamine, and certain synthetic drugs.

The overbreadth of the New York schedule as compared to the controlled substance removability and inadmissibility grounds extends beyond HCG. For instance, Tramadol was added to the state schedule by the Legislature on August 27, 2012, *see* Prescriptions—Controlled Substances—Continuing Education, 2012 Sess. Law News of N.Y. Ch. 447 (McKinney), but it was not added to the federal schedule until nearly two years later, on August 18, 2014. *See* 79 Fed. Reg. 37623 (July 2, 2014) (codified at 21 C.F.R. 1308); *see also* Drug Enforcement Administration, Office of Diversion Control, Tramadol, *available at* http://www.deadiversion.usdoj.gov/drug_chem_info/tramadol.pdf (July 2014); *infra* Part III.B.iii.3. (discussing the legislative history of Tramadol). Similarly, Ketamine was designated as a controlled substance in New York but not under federal law between January 22, 1998 and August 12, 1999. *See* 1997 Sess. Law News of N.Y. Ch. 635 (McKinney); 34 Fed. Reg. 37623 (July 13, 1999) (codified at 21 C.F.R. 1308).[7]

New York has also expressly confirmed an intention to regulate synthetic drugs more exhaustively than the federal government does. In 2012, the Department of Health twice issued emergency rules (and later a permanent rule) to prohibit the possession, manufacture, sale, or distribution of certain synthetic phenethylamines and synthetic cannabinoids. *See* 34 N.Y. Reg. 16 (Aug. 22, 2012) (Notice of Emergency Rulemaking) (effective August 7, 2012); 34 N.Y. Reg.

[7]*Mellouli* instructs that the relevant inquiry for determining if a conviction is "related to" a federally controlled substance for purposes of removability or inadmissibility is whether the state schedule was broader than the federal schedule *at the time of conviction*. *See* 135 S.Ct. at 1984 ("At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists."); *id*. at 1988 (same). *Mellouli* therefore abrogates cases like *Gousse v. Ashcroft*, 339 F.3d 91, 99 (2d. Cir. 2003) that have held that changes to the federal schedule subsequent to the date of conviction are to be applied retroactively such as to eliminate those substances as the basis for a mismatch. Thus, historical disparities like Tramadol and Ketamine are relevant to the categorical analysis of low-level controlled substance convictions entered during the periods when those substances were scheduled in New York but not federally.

25 (Sept. 26, 2012) (Notice of Proposed Rulemaking); 35 N.Y. Reg. 20 (Jan. 2, 2013) (Notice of Adoption). Later in 2013, the Legislature followed the Department of Health's lead and scheduled an even longer list of synthetic phenethylamines than were covered by the preceding regulations. *See* 2013 Sess. Law News of N.Y. Ch. 341 (S. 3469-A) (McKinney); *compare* N.Y. Pub. Health Law § 3306(f) *with* 34 N.Y. Reg. 16 (Aug. 22, 2012).[8] During the rulemaking process, the Department of Health acknowledged in its Regulatory Impact Statement that New York's regulation of synthetic drugs was "broader than the federal Synthetic Drug Abuse Prevention Act of 2012 in that it covers additional classes of stimulant compounds. Further, it anticipates future synthesis of stimulant compounds not yet developed . . ." 34 N.Y. Reg. 16 (Aug. 22, 2012); 34 N.Y. Reg. 25 (Sept. 26, 2012); 34 N.Y. Reg. 18 (Nov. 21, 2012). This statement unequivocally confirms the State's intent to cast a wider prosecutorial net than the federal government in the sea of controlled substances.

B. A state schedule that controls more substances than the federal schedule is by definition overbroad.

New York's inclusion of HCG on the state schedule clearly renders New York's definition of a "controlled substance" broader than the federal government's. In *Matter of Ferreira*, the Board of Immigration Appeals plainly stated that, because Connecticut controlled two substances not on the federal schedule, "the presence of these two substances in the Connecticut schedules at the time of the respondent's conviction meant that the definition of a controlled substance incorporated by [the state controlled substance statute of conviction] was broader than the definition of a controlled substance in 21 U.S.C. § 802(6) . . ." 26 I&N Dec.

[8] A bill that would add "synthetic cannabinoids" to the State's definition of a "controlled substance," N.Y.P.L. § 220.00(5), was also introduced earlier this year. *See* Assemb. 4579, 2015 Leg., 238th Sess. (N.Y. 2015).

415, 418 (BIA 2014). Likewise, New York's definition of a controlled substance is broader than the federal definition because the state definition includes HCG.[9]

In *Mellouli*, the Supreme Court considered Kansas controlled substance laws that, like New York and Connecticut, define "controlled substance" more broadly than 21 U.S.C. § 802. *Mellouli*, 135 S.Ct. at 1988. The Court's decision turned on the inclusion of a handful of substances in Kansas' definition of "controlled substance" that were not covered by the corresponding federal definition. *Id*.; *see also Paulus*, 11 I&N Dec. 274, 276 (BIA 1965) (affirming the termination of proceedings where the substance involved in a state conviction could have been one that was a "narcotic drug" under state but not federal law). Recognizing that "Congress and the BIA have long required a *direct link* between an alien's crime of conviction and a particular federally controlled substance," the Court explicitly rejected the Government's "argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule." *Mellouli*, 135 S.Ct. at 1990-91 (emphasis in original). Because Kansas controlled substances not included in § 802, Mr. Mellouli's conviction could not trigger removal. *Id*. at 1991.

Like Mr. Mellouli's Kansas conviction and the California statute in *Matter of Paulus*, low-level controlled substance offense convictions in New York since January 12, 1990 are "not confined to federally controlled substances" because New York's definition of "controlled substance" has included HCG. *Mellouli*, 135 S.Ct. at 1988; *Paulus*, 11 I&N Dec. at 275. Supreme Court and BIA precedent thus dictate that such convictions may not trigger immigration grounds that explicitly "limit[] the meaning of 'controlled substance,' for removal

[9] Additional historical examples of the overbreadth of New York's schedule include Tramadol (between August 27, 2012 and August 18, 2014) and Ketamine (between January 22, 1998 and August 12, 1999). *See* 2012 Sess. Law News of N.Y. Ch. 447 (McKinney); 79 Fed. Reg. 37623 (July 2, 2014) (codified at 21 C.F.R. 1308); 1997 Sess. Law News of N.Y. Ch. 635 (McKinney); 34 Fed. Reg. 37623 (July 13, 1999) (codified at 21 C.F.R. 1308).

purposes, to the substances controlled under § 802." *Mellouli*, 135 S.Ct. at 1990-91; *see also Paulus*, 11 I&N Dec. at 276.

III. There is a realistic probability that New York prosecutes low-level controlled substance offenses involving substances controlled in New York but not federally.

A. As demonstrated by *Mellouli* and *Chairez*, a state statute that explicitly encompasses conduct outside of the federal grounds demonstrates realistic probably on its face.

The "realistic probability" standard serves as a backstop for the categorical approach, reached only when an ambiguity in the reach of a state law inhibits application of the categorical analysis. Courts need only scrutinize realistic probability when a state statute is ambiguous about whether it includes conduct outside the generic federal definition, thus requiring "legal imagination" to interpret the statute as overbroad. *Duenas-Alvarez*, 549 U.S. at 193; *see also Mellouli*, 135 S.Ct. 1980 (concluding, without referring to the realistic probability test, that a state statute that explicitly included overbroad conduct was categorically not a removable offense). Because low-level New York controlled substance offenses incorporate the state definition of "controlled substance," which by its very terms is broader than the federal definition of the same, no such ambiguity exists. *See supra* Part II. No legal imagination is required to conclude that New York would prosecute crimes expressly defined by its own laws, so the realistic probability standard is automatically satisfied and no further inquiry is needed.

In *Duenas-Alvarez*, the decision that introduced the "realistic probability" inquiry, the respondent relied on California's "natural and probable consequences doctrine" to argue that his statute of conviction could *hypothetically* reach conduct outside the federal generic theft definition. 549 U.S. at 190-91. The Court held that the application of such "legal imagination" was an insufficient basis for finding a state statute overbroad, as there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls

outside the generic definition of a crime." *Id*. at 193; *see also Moncrieffe*, 133 S.Ct. at 1693 (explaining that a noncitizen cannot rely on the *absence* of an explicit antique firearms exception in a state law "[t]o defeat the categorical comparison" unless he demonstrates "a realistic probability, not a theoretical possibility" that the state would actually prosecute the offense in cases involving antique firearms).

Duenas-Alvarez and *Moncrieffe* address the Court's concern with the application of "legal imagination" to state statutes that are ambiguous as to whether they cover the non-generic conduct a noncitizen relies upon to contest removability or inadmissibility. *Duenas-Alvarez*, 549 U.S. at 193; *Moncrieffe*, 133 S.Ct. at 1684-85. On the other hand, when the terms of a state statute make clear that non-generic conduct is included, as is the case with low-level New York controlled substance offenses that explicitly include possession or sale of HCG, there is no legal imagination required to find the state statute overbroad and the realistic probability standard is satisfied without further inquiry. This approach is consistent with the spirit of the categorical analysis, which has historically honored a state statute's own terms because they are fundamental to the elements-based comparison the approach requires.

Unlike the respondent's failed argument in *Duenas-Alvarez* and the hypothetical discussed in *Moncrieffe*, the Court's recent decision in *Mellouli* addresses a state statute that explicitly included conduct not reached by the generic federal offense. *See Mellouli*, 135 S.Ct. at 1988. The Court reversed the decision below and found that Mr. Mellouli was not removable without so much as mentioning realistic probability, but it could not have reached this result without finding either that the realistic probability test had been satisfied or that it did not apply at all. *See* 135 S.Ct. at 1985-91.

The Court's reversal in *Mellouli* – despite the Government's efforts to raise realistic probability in its briefing – further demonstrates that the realistic probability test is inappropriate when a state statute expressly proscribes a broader swath of conduct than the federal removal ground to which it is being compared.[10] This is especially clear in the context of removability or inadmissibility grounds tied to controlled substance offenses because that is the very scenario presented in *Mellouli* as well as *Matter of Paulus*, which *Mellouli* reaffirmed and extended. *See Mellouli*, 135 S.Ct. at 1983-84, 1987-91; *Paulus*, 11 I&N Dec. at 274-75. By embracing the "*Paulus* framework" – which the Board has applied for decades without requiring a showing of realistic probability – the Court made clear that such a showing is not required when a state controlled substance schedule is broader on its face than the federal schedules. *See Mellouli*, 135 S.Ct. at 1988.[11]

The Board's decision in *Chairez I* is consistent with this reading of *Mellouli*. There, contrasting analyses of the respondent's two arguments traced an important line between statutes that clearly and expressly include conduct that falls outside the generic definition and those that are ambiguous about whether such conduct is covered. *See Chairez I*, 26 I&N Dec. 350-58. First, the Board determined that the noncitizen's conviction for discharge of a firearm under Utah law was not categorically a "crime of violence" aggravated felony because the state statute *unambiguously* included reckless conduct, which fell outside the generic offense. *Id*. at 352.

[10] The question of whether or how to apply the realistic probability test was indisputably before the Court, as it was briefed extensively by both parties and several *amici*. *See, e.g.*, Brief for the United States in Opposition, *Mellouli v. Holder*, 134 S.Ct. 2873 (2014) (No. 13-1034) [hereinafter Opp'n Br.]; Petitioner's Brief on the Merits, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (No. 13-1034) [hereinafter Pet'r's Br.]; Brief for the Respondent, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (No. 13-1034) [hereinafter Resp't's Br.]; Brief of Amici Curiae of the Nat'l Immigrant Justice Ctr. and Am. Immigration Lawyers Ass'n in Support of Petitioner, *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (No. 13-1034). Thus, the Court must have considered the realistic probability requirement, whether or not it applied, in order to find that Mr. Mellouli was not removable.

[11] While the Court did not explicitly reach the question of whether *Matter of Ferreira*, 26 I&N Dec. 415 correctly applied the "[*Paulus*] framework," its analysis of Mr. Mellouli's conviction is incompatible with the test laid out in *Ferreira* and thus refutes its suggestion that, even when a state statute expressly includes non-generic conduct, a respondent must further demonstrate realistic probability in some circumstances. *Mellouli*, 135 S.Ct. at 1988 n.8.

Importantly, the Board reached this conclusion without raising a concern for "legal imagination," a test of "realistic probability," or any discussion whatsoever of state case law or evidence that reckless conduct is actually prosecuted under the Utah statute. *Id*. Equally revealing is that the BIA *did*, on the other hand, raise the question of legal imagination and demand that the noncitizen demonstrate realistic probability in its analysis of the respondent's second argument, that the Utah statute was broader than the firearms offense ground of removability because it lacked an exception for antique firearms. *Id*. at 355-58. The Board's divergence in analysis is attributable to the fact that in the latter case, the state statute was ambiguous as to whether it in fact included the conduct (discharge of an antique firearm) that the noncitizen argued fell outside the generic offense. The Board's distinction addressed the Court's concern with the use of "legal imagination" to find a state statute overbroad, while honoring the fundamentals of the categorical approach where the state statute expressly included overbroad conduct.

Several circuit courts have likewise recognized that where the express language of a state statute clearly covers conduct that falls outside a ground of removability or inadmissibility, the realistic probability standard has been satisfied. *See Solis*, __ F.3d. __, 2015 WL 5806148, at *5, *7 (9th Cir. Oct. 6, 2015) ("if 'a state statute explicitly defines a crime more broadly than the generic definition, no "legal imagination" is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.'") (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)); *Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (concluding that, where "the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability," *Duenas-Alvarez* does not require a showing of prosecutions) (internal quotation marks omitted); *Jean-Louis v. Atty' Gen.*, 582 F.3d 462, 481 (3d Cir. 2009)

(questioning the applicability of *Duenas-Alvarez* where the ability to prosecute a defendant for conduct falling outside the generic offense is not disputed); *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008) (finding that where "the state statute plainly and specifically criminalizes conduct outside the contours of the federal definition, we do not engage in judicial prestidigitation by concluding that the statute creates a crime outside the generic definition of a listed crime") (internal quotation marks omitted); *see also Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007) (unpublished) (finding *Duenas-Alvarez* inapposite where the "clear language" of the statute "expressly and unequivocally" included non-generic conduct); *cf. United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (finding that there is no need "to hypothesize about whether there is a 'realistic probability'" that the state would apply a statute to conduct outside the scope of the generic definition where the state's highest court has held as much).

Immigration Judges within this jurisdiction have similarly declined to engage in the realistic probability test when a state statute's terms explicitly encompass conduct outside the generic federal offense on which removability is premised. *See, e.g.*, Ex. C(2) (*In Re S- A-*, AXXX-XXX-901, IJ Removal Proceedings Decision (July 22, 2015)) at 5-6 (finding the *Mellouli* Court's "silence on the issue [of the realistic probability test] to be instructive" and concluding that N.Y.P.L. § 220.03 is categorically overbroad simply because the state schedule includes HCG while the federal schedule does not).

Under the analysis set forth in *Duenas-Alvarez* and *Moncrieffe* and clarified in *Chairez I*[12] and *Mellouli*, the inclusion of HCG on the New York Controlled Substance Schedule plainly renders the State's low-level controlled substance offenses broader than the generic controlled

[12] *Chairez II* did not address the realistic probability standard, thereby leaving the analysis in *Chairez I* undisturbed. *See Chairez II*, 26 I&N Dec. at 483.

substance grounds because HCG is not listed at 21 U.S.C. § 802. *See supra* Part II. The realistic probability that such conduct would be prosecuted is inherent in the plain language of the statute; it is "the statutory language itself, rather than 'the application of legal imagination' to that language, [that] creates the realistic probability that [New York] would apply the statute to conduct beyond the generic definition." *Ramos*, 709 F.3d at 1072 (quoting *Duenas-Alvarez*); *see also Solis*, __ F.3d. __, 2015 WL 5806148, at *5 (stating that where a state statute is facially overbroad, the noncitizen "has no need to point to any actual prosecution."). Therefore, a noncitizen convicted of a low-level New York controlled substance offense is not required to show prosecutions for conduct involving non-federally controlled substances like HCG in order for the Court to find those statutes overbroad. Engrafting a realistic probability test onto the analysis in this context is unsupported Supreme Court and BIA precedent, assumes that New York will not prosecute crimes that its own legislature enacted, and undermines the goals of "efficiency, fairness, and predictability" that underlie the categorical approach. *Mellouli*, 135 S.Ct. at 1987.

B. New York prosecutions and ongoing legislative and regulatory attention to HCG further demonstrate realistic probability that the State prosecutes low-level controlled substance offenses involving non-federally controlled drugs.

As demonstrated above, *Mellouli*'s analysis refutes *Matter of Ferreira*'s suggestion that even when a state statute expressly includes non-generic conduct, a respondent must further demonstrate realistic probability in some circumstances. *See Mellouli*, 135 S.Ct. 1980; *Ferreira*, 26 I&N Dec. at 420-22; *supra* n.11. Nevertheless, even assuming, *arguendo*, that the Court applied the realistic probability test in *Mellouli*, which it did not, it must have concluded that Mr. Mellouli satisfied the test because it reversed the decision below and found him not removable without remanding the case. *Mellouli*, 135 S.Ct. at 1991. The record upon which the Court would

have based such a finding, had it actually applied the realistic probability test, included evidence of one Kansas prosecution and several out-of-state prosecutions involving substances controlled in Kansas but not federally, as well as evidence of news reports, statements by law enforcement, and outreach to small business owners that followed the addition of certain overbroad substances to the Kansas schedule. *See* Pet'r's Br., *supra,* at 51-55.

In New York, prosecution records and a history of consistent legislative and regulatory attention to HCG for over two decades clearly demonstrate a realistic probability that low-level New York controlled substance offenses would be (and in fact have been) applied to conduct involving HCG. To the extent that the realistic probability test is relevant, the Supreme Court in *Mellouli* had before it evidence less powerful than the evidence attached and discussed *infra* in regards to HCG. Thus, this Court must likewise conclude that there is a realistic probability that New York would prosecute low-level controlled substance offenses involving HCG.

i. New York prosecutes offenses involving HCG and other substances that are not proscribed by federal law.

Although a noncitizen is not required to show actual prosecutions or to otherwise demonstrate that the realistic probability test is satisfied if a statute is overbroad on its face, there is nevertheless ample evidence that New York does in fact prosecute conduct involving substances that are proscribed by state law but not included in the federal definition of a "controlled substance." For instance, in 2007 the District Attorney of Albany County announced the arraignment of five defendants on indictments including multiple counts of N.Y.P.L. § 220.31, with Chorionic Gonadotropin specified as one of the substances sold[13]. *See* Ex. D (Press Release, Office of the Albany County District Attorney, Operation "Which Doctor" Defendants

[13] *See Solis*, __ F.3d. __, 2015 WL 5806148, at *6-7 (holding that, even if prosecutions are required to meet the realistic probability test, evidence of prosecutions under one state statute demonstrate realistic probability under any other statute that incorporates the same definitional provision at issue).

Arraigned (Feb. 2007)). Later that year, an additional defendant was added. *See New Charges in Soares' Steroid Investigation*, News 10 ABC, Oct. 17, 2007, *available at* http://news10.com/2007/10/17/new-charges-in-soares-steroid-investigation/. These indictments followed a two-year investigation ("Operation 'Which' Doctor") that culminated in a February 2007 raid conducted by at least seven different agencies. *See* Nicholas Confessore, *4 Tied To Pharmacy Are Arrested In Inquiry Into Steroid Sales*, N.Y. Times, Feb. 28, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E02E0DD1F3EF93BA15751C0A9619C8B63.

Shortly after her indictment, Dr. Claire Godfrey pleaded guilty to felony criminal diversion of prescription medications. *See* Ex. E (Godfrey indictments); *Steroids Investigation: Soares Scores Blueprints to Investigation*, News 10 ABC, July 24, 2007, *available at* http://news10.com/2007/07/24/steroids-investigation-soares-scores-blueprints-to-operation/. The Albany DA invested several more years pursuing convictions against the remaining five defendants. Following their re-indictment on numerous counts (including several specifying HCG) in 2010, the proceedings culminated in a 2013 corporate plea to criminal sale of a controlled substance in the fifth degree (N.Y.P.L. § 220.31). *See* Ex. F (Indictments for N. Loomis, R. Loomis, K. Loomis, Calvert, and Palladino); Ex. G (Press Release, Office of the Albany County District Attorney, Signature Pharmacy Inc. Pleads Guilty (Feb. 8, 2013), *available at* http://www.albanycountyda.com/Media/news/13-02-08/Signature_Pharmacy_Inc_Pleads_Guilty.aspx).

These "Operation 'Which' Doctor" prosecutions were part of a wider effort by the Albany DA to target online sales of substances, like HCG, that relate to steroid abuse. Additional prosecutions stemming from this initiative also specified HCG in the indictments. *See, e.g.* Ex. H (Carlson, Raich, Dumas, Glen Stephanos, George Stephanos Indictments); *see also* Ex. I

(Certificates of Conviction for Carlson, Raich, Glen Stephanos, George Stephanos, and Dumas).[14]

The time and resource-intensive investigations that went into securing the above prosecutions clearly demonstrate the seriousness with which New York views the illegal use and trade of steroids and controlled hormones, like HCG. Moreover, that numerous indictments specified HCG plainly shows that New York "actually prosecute[s]" offenses involving HCG, the very substance that renders New York's state schedule broader than the federal schedule. *Ferreira*, 26 I&N Dec. at 421.

Tramadol, which was controlled by the State of New York but not the federal government between August 27, 2012 and August 18, 2014, *see supra* Part II.A.ii., has also been the target of state prosecutions during the period when its possession or sale would not have been a federal crime. *See, e.g.*, Ex. J (Press Release, New York State Police, Syracuse man arrested on Thruway for marijuana and controlled substance possession (March 24, 2014), *available at* https://www.nyspnews.com/article_display.cfm?article_id=36874; Certificate of Disposition for Scott) (showing charge of § 220.03); Ex. K (Press Release, New York State Police, Essex County Drug Sweep (March 21, 2014), *available at* https://www.nyspnews.com/article_display.cfm?article_id=36838; Indictment and Certificate of Conviction for Kolysko) (showing charges for §§ 220.31, 220.06(1) (specifying Tramadol); Ex. L (Press Release, New York State Police, 30 y.o. vet assistant is arrested following a larceny investigation (April 24, 2013), *available at*

[14] Three defendants were indicted in January 2007. Upon issuance of superseding indictments in July 2007, two additional defendants were added. Superseding indictments were issued in August and September 2007, but were subsequently sealed. Several of the unsealed indictments specify HCG. *See* Ex. B (Marritz Decl.), ¶¶ 10-13. The defendants ultimately pleaded to a range of related offenses. Glen Stephanos, pleaded to attempted sale of a controlled substance in the fifth degree (N.Y.P.L. § 110-220.31). *See* Ex. I(1) (Certificate of Conviction). Ryan Dumas pleaded to conspiracy in the fifth degree (§ 105.05) to commit § 220.31. *See* Ex. I(5) (Certificate of Conviction and excerpt of plea transcript).

https://www.nyspnews.com/article_display.cfm?article_id=30277; Information and Community Service Restitution Program Referral Form for Townes, confirming conviction).

ii. Even if the realistic probability test applies when a state statute explicitly encompasses overbroad conduct, evidence of prosecutions involving overbroad substances must satisfy the test.

Although *Mellouli* implicitly rejects *Matter of Ferreira*'s application of the realistic probability test where a state controlled substance schedule is broader on its face than the federal schedule, *see supra* Part III.A., the Supreme Court's analysis and ultimate conclusion that Mr. Mellouli was not removable mean that even assuming, *arguendo*, that the realistic probability test applies when a statute explicitly encompasses conduct outside the generic federal offense, evidence of *prosecutions* involving overbroad substances must be sufficient to satisfy the inquiry. If the realistic probability test required a showing of *convictions*, as DHS contends, *Mellouli* could not have been decided as it was because the record in that case included evidence of only one Kansas *prosecution* involving a substance that was not on the federal schedule. *See* Pet'r's Br., *supra*, at 52 (pointing to "one example from Saline County District Court of a Kansas *prosecution* for selling, delivering, or distributing" a substance proscribed by Kansas but not federal law at the time) (emphasis added). Thus, at a minimum, *Mellouli* confirms that evidence of prosecution, as opposed to conviction, satisfies the realistic probability test.

The Government premises its argument that only convictions can satisfy the realistic probability test on the Board's sporadic use of the word "successful" to modify "prosecution" in *Chairez I*. *See* 26 I&N Dec. at 356, 358. However, even within *Chairez I*, the Board employs inconsistent language to discuss the required showing and never actually uses the word "conviction" to describe what the realistic probability test demands. *See Id*. at 351, 356-58. The Board's subsequent decision in *Matter of Ferreira*, which directly discusses realistic probability

in the context of controlled substance convictions, never even attaches the word "successful" to the required showing of prosecutions. *See* 26 I&N Dec. 415. There, the Board's remand instructions specified that the parties could submit additional evidence including "evidence of Connecticut *prosecutions* . . . or evidence that the *respondent's conviction* involved these obscure substances." *Id*. at 422 (emphasis added). Had the Board in fact intended to require a showing of Connecticut *convictions* to establish realistic probability, it would not have used different terms to modify "Connecticut" and "respondent's" in the remand instructions. *See id*. Moreover, if the BIA intended to require a showing of *convictions* it simply would have employed the word "conviction," which is clearly defined at INA § 101(a)(48)(A) and which sits at the heart of the categorical approach. *See Moncrieffe,* 133 S.Ct. at 1684-84; *see also Mellouli*, 135 S.Ct. 1980 (finding petitioner not removable without evidence of state convictions involving the overbroad substances).

Furthermore, the issuance of a charging document *is* a successful prosecution because the word "prosecution" means anything along the prosecutorial timeline, from the issuance of a charging document to a conviction. *See* Black's Law Dictionary (10th ed. 2014) (defining "prosecute" as "[t]o *institute* and pursue a criminal action against (a person)") (emphasis added). That an indictment is a prosecution has been settled law for over a century. *See, e.g.*, *Schneider v. Schlang*, 144 N.Y.S. 543, 544 (App. Div. 1913) ("It is now well settled that the mere application for, and issuance of, a warrant on a criminal charge, constitutes a criminal prosecution."); *People v. Zara*, 255 N.Y.S.2d 43, 46-47 (Sup. Ct. 1964) ("[t]he ordinary meaning of the word 'prosecute' . . . connotes the beginning as well as the carrying on of a criminal action."). In order to secure an indictment, the prosecution must convince a Grand Jury that "there exists sufficient evidence and legal reason to believe the accused guilty." *People v.*

Iannone, 384 N.E.2d. 656, 660 (N.Y. 1978); *see also* C.P.L. § 100.40 (sufficiency requirements for other accusatory instruments). Legally sufficient charging documents thus represent successful prosecutorial action and a significant exercise of state power.

DHS's ongoing insistence that a noncitizen must document convictions in order to show realistic probability thus finds no support in Board or Supreme Court jurisprudence. Even the Solicitor General, in briefing *Mellouli*, retreated from the argument that DHS continues to advance before this Court. *Compare* Opp'n Br., *supra*, at 12 (arguing in opposition to certiorari that Mr. Mellouli failed to demonstrate realistic probability that a Kansas paraphernalia conviction would involve a substance listed on the Kansas schedule but not the federal schedule because he "offered no evidence that Kansas has obtained a meaningful number of convictions - or brought any prosecutions at all - in cases involving those substances") *with* Resp't Br., *supra*, at 29, n.6 (relegating the Government's entire discussion of realistic probability in its merits brief to a footnote suggesting that the petitioner had not demonstrated realistic probability because he pointed to "no Kansas paraphernalia prosecutions involving non-federally-controlled substances, and only a single case in which Kansas brought a drug prosecution of any type involving a substance that was not federally controlled," and making no argument that the realistic probability test requires proof of *convictions*).

Several recent decisions by New York Immigration Judges have likewise recognized that evidence of New York *prosecutions* for conduct involving HCG satisfy the realistic probability test if does in fact apply when a state statute expressly encompasses non-generic conduct, which it does not. *See, e.g.*, Ex. C(2) (*In Re S- A-*, XXX-XXX-901, IJ Removal Proceedings Decision (July 22, 2015)) at 6 (dismissing DHS's contention that "successful prosecutions must involve *convictions*" and stating that "even if the *Ferreira* approach to realistic probability is valid, the

Court nonetheless would find that Respondent has provided sufficient evidence that New York has successfully prosecuted individuals for state controlled substance offenses involving [HCG]" by submitting "evidence of New York indictments for controlled substance offenses involving [HCG]") (emphasis in original); Ex. C(1) (*In Re Sicari*, A018-032-055, IJ Removal Proceedings Decision (June 25, 2015)) at 3 n.1, 3-4 (rejecting DHS's position that only evidence of *convictions* for HCG possession could establish realistic probability and finding the realistic probability test satisfied by evidence of prosecutions in the form of indictments).

iii. New York's initial and ongoing legislative and regulatory attention to HCG reflects a deliberate decision by the State to regulate a drug that threatens the health and safety of New Yorkers.

1. *The New York Legislature added HCG to the state schedule in response to widespread abuse of anabolic steroids in the State.*

Just as New York law enforcement entities have invested significant time and resources in the prosecution of illegal conduct involving HCG, the Legislature and Department of Health have also shown serious and ongoing attention to the drug.[15] Faced with widespread and increasing steroid abuse across the state in the late 1980s, the New York Legislature voted unanimously to add HCG, a hormone frequently abused by steroid users, to the state schedule. *See* New York Bill Jacket, 1989 S. 3047, Ch. 418. Since that bill took effect in early 1990, the Legislature and Department of Health have shown ongoing concern with HCG abuse and have taken additional measures to continue to restrict access to HCG and to criminalize its unlawful

[15] Numerous other states have shown similar concern for the danger that HCG poses to public health and safety by designating it as a controlled substance despite its non-inclusion on the federal schedule. *See, e.g.*, Cal. Health & Safety Code § 11056(f)(32) (West); Conn. Agencies Regs. § 21a-243-9(g); N.C. Gen. Stat. Ann. § 90-91(k)(7) (West); Colo. Rev. Stat. Ann. § 18-18-205(e) (West) and Colo. Rev. Stat. Ann. § 18-18-102(3)(a)(x) (West); Nev. Admin. Code 453.530(7)(h); 35 Pa. Cons. Stat. Ann. § 780-104(3)(vii)(1) (West); R.I. Gen. Laws Ann. § 21-28-2.08 (West) at Schedule III(d)(1) ("Chlorionic gonadotropin" [sic]).

possession or sale, reflecting a deliberate decision by the State to regulate a drug that continues to threaten the health and safety of New Yorkers.

HCG is approved to treat a narrow list of health conditions including infertility in both sexes and undescended testes or hormonal imbalances in men and boys. *See Chorionic Gonadotropin*, Mayo Clinic, http://www.mayoclinic.org/drugs-supplements/chorionic-gonadotropin-subcutaneous-route-intramuscular-route-injection-route/description/drg-20062846 (last visited Sept. 14, 2015). HCG is not approved as a weight loss drug, but nevertheless, it is a key component of a decades-old fad diet known as the "HCG Diet," which has recently seen a resurgence in popularity. *See* U.S. Food and Drug Administration, *HCG Diet Products are Illegal*, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm281333.htm (last updated Sept. 20, 2013).

The most common illicit use of HCG is in conjunction with performance-enhancing steroids. HCG helps restore the body's ability to produce testosterone naturally after steroid use, combatting side effects such as testicular atrophy. *See* Lance Williams, *HCG helps steroid users restore testosterone*, San Francisco Chronicle, http://www.sfgate.com/sports/article/HCG-helps-steroid-users-restore-testosterone-3162496.php (May 8, 2009); *see also* State of N.J. Office of the Att'y Gen., Report of the Att'y Gen.'s Steroids Study Group (July 7, 2011) at 12-13, *available at* http://www.nj.gov/oag/newsreleases11/Steroid-Report.pdf; New York Bill Jacket, 1990 S. 8533, Ch. 640 at 6 (Letter from Sen. Tully to Evan A. Davis, Counsel to the Governor (July 23, 1990)) (explaining that HCG "is abused along with anabolic steroids in order to alleviate side effects and hide steroid use."). In addition to street-level abuse, HCG abuse has led to sanctions against professional athletes, such as the 50-game suspension of Major League Baseball star Manny Ramirez in 2009 and the four-game suspension of National Football League

standout Brian Cushing in 2010. *See Sources: Ramirez used fertility drug*, ESPN.com, May 8, 2009, http://sports.espn.go.com/mlb/news/story?id=4148907;[16] Tom Weir, *Report: NFL's Brian Cushing suspended for same drug Manny Ramirez Used*, USAToday.com, May 11, 2010, http://content.usatoday.com/communities/gameon/post/2010/05/report-nfls-brian-cushing-suspended-for-same-drug-manny-ramirez-used---/1#; *see also* State of N.J. Office of the Att'y Gen., *supra*, at 13.

The New York Legislature added HCG to the state schedule at Schedule II (h)(2) in legislation effective January 12, 1990. *See* Anabolic Steroids—Schedule III Controlled Substances, 1989 N.Y. Sess. Law Serv. 418. The addition was part of a broader bill aimed at regulating "the use of anabolic steroids which have been widely abused in our society." New York Bill Jacket, 1989 S. 3047, Ch. 418 at 7 (Memorandum in Support by Sen. Michael J. Tully, Jr.). The bill passed unanimously in both houses of the State Legislature. *See id*. at 2-3, 5.

The bill jacket, a collection of documents gathered to inform the governor's decision on whether or not to sign legislation, did not include a single letter or memorandum in opposition to the bill that scheduled HCG. State entities that provided statements in support included the Division of Substance Abuse Services, Department of Health, Office of the Advocate for the Disabled, and Medical Society of the State of New York. *See id*. at 18-19, 21, 25-26. The Department of Health, for instance, concluded that the bill "could deter improper use . . . by imposing criminal penalties for the possession and sale of the drugs." *Id*. at 21 (Letter from Peter J. Millock, Gen. Counsel, Dept. of Health, to Evan A. Davis, Counsel to the Governor (July 12, 1989)). A letter from Senate sponsor Michael J. Tully explained that "[e]vidence of rampant

[16] In a related scandal, the Biogenesis health clinic alleged to have provided Manny Ramirez with HCG later became the center of a massive investigation surrounding accusations that the clinic provided a variety of performance-enhancing substances to additional Major League Baseball players. The scandal resulted in the suspension of more than a dozen players, including Alex Rodriguez of the New York Yankees. *See* Mike Fish & T.J. Quinn, *Anthony Bosch Surrenders to DEA*, ESPN.com, Aug. 6, 2014, http://espn.go.com/espn/otl/story/_/id/11311178/anthony-bosch-surrenders-dea.

abuse of anabolic steroids by athletes and others . . . continues to mount. Studies continue to reveal new and severe physical, psychological and social/behavioral consequences associated with prolonged use. . . .” and assured that under the new law, “[a]s with illegitimate use of any Schedule II drug, substantial penalties could be applied to persons who would illegally transfer or abuse” the substances. *Id*. at 6 (Letter from Sen. Tully to Evan A. Davis, Counsel to the Governor (July 12, 1989)).

2. *The New York Legislature and Commissioner of Public Health have shown ongoing concern with abuse of HCG.*

Since HCG was first scheduled in 1990, the New York Legislature and Commissioner of Public Health have shown ongoing concern with its abuse and an unwavering intention to keep HCG strictly regulated in the State, thereby demonstrating a realistic probability that illegal conduct involving the substance is prosecuted. The Legislature, for instance, has revisited HCG on three occasions. Shortly after its addition, the Legislature moved HCG within Schedule II (from (h)(2) to (j)) on July 18, 1990. *See* Controlled Substances—Anabolic Steroids, 1990 N.Y. Sess. Law Serv. 640. In a letter supporting the bill, Senate sponsor Michael J. Tully confirmed once again that HCG “is abused along with anabolic steroids in order to alleviate side effects and hide steroid use” and reiterated the “serious, widespread, and increasing” danger of steroid abuse in New York. New York Bill Jacket, 1990 S. 8533, Ch. 640 at 6 (Letter from Sen. Tully to Evan A. Davis, Counsel to the Governor (July 23, 1990)). The Medical Society of the State of New York expressed support for the bill as well, because it would “facilitate dispensation for therapeutic purposes while maintaining the established deterrents to improper use and abuse,” which it called “a very serious societal problem.” *Id*. at 19 (Memorandum from Gerard L. Conway, Director, Medical Society of the State of New York, to Evan A. Davis, Counsel to the Governor (July 17, 1990)).

The Legislature's intent to criminalize unauthorized possession or sale of HCG was again reconfirmed in 2003, when it moved HCG from Schedule II to Schedule III of the state schedule. *See* 2003 Sess. Law News of N.Y. Ch. 591 (McKinney). While the legislative history of this amendment reveals its intention to minimize barriers to the prescription of HCG for legitimate medical purposes, the Memorandum in Support of Legislation also emphasized that the transfer between schedules would not alter the criminal penalties for illegal sale and distribution of HCG and reiterated that HCG was scheduled in the first place due to its "potential for abuse by bodybuilders and steroid abusers." *See* New York Bill Jacket, 2003 A.B. 8146, Ch. 591 at 3, *available at* http://iarchives.nysed.gov/PubImageWeb/viewImageData.jsp?id=155046 (Memorandum in Support of Legislation by Assemblyman DiNapoli). The Memorandum in Support also plainly acknowledged the fact that the federal government did not classify HCG as a controlled substance and that the Legislature believed New York was the only state to classify it as such. *See id*. The fact that the State Legislature nevertheless opted to keep HCG on its schedule of controlled substances clearly evidences its intent to "actually prosecute" possession and sale of the substance. *Ferreira,* 26 I&N Dec. at 420. Furthermore, numerous other states classify HCG as a controlled substance today, demonstrating that it is not merely an obscure drug that New York is the anomaly in controlling. *See supra* n. 15; *Ferreira,* 26 I&N Dec. at 416-17.

The State Legislature most recently affirmed its intent to maintain HCG as a controlled substance in New York with an amendment passed on August 16, 2006. *See* 2006 Sess. Law News of N.Y. Ch. 457 (McKinney). The bill's primary purpose was to better conform the state schedule with the federal schedule. *See* New York Bill Jacket, 2006 S.B. 4331, Ch. 457, *available at* http://iarchives.nysed.gov/PubImageWeb/viewImageData.jsp?id=152300. It added numerous substances to the New York schedule, modified or clarified the definition of others,

and made some technical corrections such as changing the spelling of certain substances, including amending the spelling of HCG from "Gonadotrophin" to "Gonadotropin." *See id*. It is telling that in the midst of comparing the state and federal schedules and actively amending its schedule to better conform with its federal counterpart, the New York Legislature deliberately kept HCG on the state schedule and even clarified its entry. There can be no doubt that the continued inclusion of HCG on the New York schedule is a deliberate choice of the Legislature.

HCG has also been the subject of state-level rulemaking at frequent intervals over the years. In fact, HCG is mentioned in at least 36 issues of the New York State Register since its inaugural publication on April 1, 1979. *See, e.g.*, 1 N.Y. Reg. 17 (Dec. 5, 1979); 12 N.Y. Reg. 8 (Apr. 17, 1991); 30 N.Y. Reg. 4 (Nov. 26, 2008). Most significantly, in 1991 and 2006 to 2008, the Department of Health adopted rules to regulate the prescription of HCG. The 1991 rule, which allowed for a six-month prescription of HCG and anabolic steroids only for the treatment of a few enumerated conditions, included "preserving the legislative intent of preventing steroid abuse" in its statement of purpose. 12 N.Y. Reg. 8 (Apr. 17, 1991) ("Anabolic steroids and chorionic gonadotrophin have only a narrow focus of accepted therapeutic administration. It is estimated that 70% of the anabolic steroids taken in this country are used non-therapeutically for their anabolic strength and mass tissue building effects without medical indication.").

In 2006, the Department of Health halved the amount of time that HCG could be prescribed from six months to three, while nevertheless leaving the steroid prescription cap at six months. *See* 28 N.Y. Reg. 5 (May 10, 2006). This change was initially made as part of an emergency rule and reintroduced as an emergency rule no fewer than 12 times before it was officially adopted as a regulation on November 10, 2008. *See, e.g.*, 28 N.Y. Reg. 11 (Aug. 2, 2006); 29 N.Y. Reg. 6 (Feb. 28, 2007); 29 N.Y. Reg. 4 (Dec.19, 2007); 30 N.Y. Reg. 9 (Nov. 12,

2008) (sample of notices of emergency rulemaking). *See also* 30 N.Y. Reg. 4 (Nov. 26, 2008) (Notice of Adoption). The fact that the Commissioner of Public Health thought it necessary to decrease the allowable duration of a prescription for HCG while leaving the rule for steroid prescriptions undisturbed further demonstrates the seriousness with which state officials treat the potential abuse of HCG.

3. *The New York Controlled Substance Schedule is a constantly evolving list that reflects the law enforcement and public health priorities of State officials.*

HCG, Tramadol, Ketamine, and synthetic phenethylamines are but a few examples of the numerous substances that the New York State Legislature has added to (or removed from) the state schedule since Section 3306 of the N.Y. Pub. Health Law was passed in 1985. The schedule has been amended by legislation more than 20 times since then, evolving as necessary to continue meeting the stated purposes of New York's controlled substance laws: (1) "to combat illegal use of and trade in controlled substances;" and (2) "to allow legitimate use of controlled substances in health care, including palliative care; veterinary care; research and other uses authorized by this article or other law . . ." N.Y. Pub. Health Law § 3300-a (McKinney). As new drugs enter the market or see an increase in abuse, state legislators may respond accordingly, as they did in the case of HCG and steroid abuse. *See supra* Part III.B.iii.1.

Tramadol provides another example of the New York Legislature's response to a state-level public health concern well before the federal government took action. By early 2012, New York was in the midst of what the State Senate Committee on Health described as "the sudden and unprecedented fallout from prescription drug abuse, including a record number of overdoses, suicides, new addictions, and armed pharmacy robberies resulting in casualties." State S. Comm. on Health, The Prescription Drug Crisis in New York State: A Comprehensive Approach (Feb.

15, 2012) at 1, *available at* http://www.nysenate.gov/report/prescription-drug-crisis-new-york-state-comprehensive-approach. Lambasting the "[i]nsufficient safeguards for accessing painkillers" in the state and noting a rise in Tramadol addictions, the Committee highlighted Tramadol alone as a drug that it recommended be added to the state schedule. *Id.* at 3, 5, 7. The report called this measure "not only necessary, but embraced by the medical community" and cited additional support from State law enforcement agencies, pharmacists, and pain management associations. *Id.* at 5, 7. The Committee also noted that scheduling Tramadol would "enhance the tools available to prosecutors" fighting illicit drug use and sales. *Id.* at 20.

The State also has mechanisms in place for situations when the threat posed to public health and safety by a substance is so acute that it cannot wait even for legislative action. The regulatory and legislative history of New York's control of synthetic phenethylamines and synthetic cannabinoids, *see supra* Part II.A.ii, demonstrates how New York's system for responding to such evolving threats can function in practice. Most importantly, the regulatory history of these substances highlights the fact that disparities between the New York and federal schedules are not mere happenstance. *See, e.g.*, 34 N.Y. Reg. 16 (Aug. 22, 2012) (Department of Health Regulatory Impact Statement acknowledging that New York's regulation of synthetic drugs was "broader than the federal Synthetic Drug Abuse Prevention Act of 2012"). Rather, New York's proscription of substances beyond the reach of the Controlled Substances Act reflects the considered policy decisions of State officials about the need to regulate potentially dangerous behavior through criminal laws; in other words, decisions to make certain conduct subject to prosecution in New York.

IV. The realistic probability standard as argued by the Government amounts to an unreasonable burden for respondents.

The realistic probability standard as argued by DHS, in which proof of convictions must be shown in all circumstances where a respondent contends that the state criminal statute does not match the federal deportability or inadmissibility category, amounts to an unreasonable burden for respondents. Moreover, adopting the Government's interpretation would reverse many of the benefits that motivated adoption of the categorical approach, such as judicial and administrative efficiency and avoiding potential unfairness to certain noncitizens. *See*, *e.g.*, *Mellouli*, 135 S.Ct. at 1986-87; *Moncrieffe*, 133 S.Ct. at 1690; *Descamps*, 133 S.Ct. at 2289; *Taylor*, 495 U.S. at 2159-60.

While it is highly unlikely that the attached HCG and Tramadol prosecutions are the only ones pursued in New York during the periods when those substances have been controlled under state but not federal law, it is exceedingly difficult to identify specific cases due to the lack of any centralized database of state criminal records. Even access to a paid legal research database such as Westlaw or Lexis is of little use in identifying specific prosecutions. *See* Ex. A (Kavanagh Decl.), ¶ 4. The attached prosecutions were ultimately identified by *amicus curiae* through Internet search engines, which are not designed to return comprehensive results in the way that a hypothetical database might. *See Id.* ¶ 5. Furthermore, due to the relatively minor nature of low-level controlled substance offenses, they are not generally newsworthy enough to be documented on the Internet.[17] *Id.* ¶ 6. There is no less of a "realistic probability" that low-level controlled substance offenses are being prosecuted than that higher-level controlled

[17] The prevalence of guilty pleas for low-level offenses further hinders access to such records. *See Missouri* v. *Frye*, 132 S.Ct. 1399, 1407 (2012) (94% of state convictions are the result of guilty pleas); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1785 (2013) (the "vast majority" of petty prosecutions result in pleas). These guilty pleas are largely unreported and inaccessible to the average respondent or even attorney.

substance offenses are, but there *is* significantly less probability that such low-level offenses will be memorialized by press releases or media coverage, making them more difficult to identify. The outcome of the categorical analysis should not turn on the newsworthiness of the type of conviction being analyzed, but this would be the inevitable result of the realistic probability standard that DHS advances.

Identifying specific prosecutions for low-level controlled substance offenses through examples that were newsworthy enough to prompt coverage may be challenging for an attorney with legal research training and access to the Internet and paid legal databases, but it amounts to an insurmountable burden for the thousands of *pro se* respondents who appear before the Immigration Courts every year.[18] Limited English language skills and/or education further exacerbate the challenges faced by many unrepresented noncitizens. Approximately 85 percent of noncitizens in removal proceedings are not fluent in English, *see* EOIR FY 2014 Statistics, *supra* n.18, at E1, and nearly half of all foreign-born Hispanics, who make up a large portion of removal cases, have not completed high school. *See* U.S. Census Bureau, Educational Attainment in the United States: 2009 (Feb. 2012), *available at* http://www.census.gov/prod/2012pubs/p20-566.pdf (reporting a 48 percent rate of high school completion among foreign-born Hispanics).

The challenges described above are compounded for detained respondents,[19] whose access to legal resources and the Internet is even more restricted. ICE detention standards do not

[18] In fiscal year 2014, approximately 55 percent of all respondents (regardless of detention status) whose cases were completed were unrepresented. *See* U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2014 Statistics Yearbook (March 2015) at F1 [hereinafter EOIR FY 2014 Statistics], *available at* http://www.justice.gov/eoir/statistical-year-book.

[19] In fiscal year 2014, approximately 37 percent of initial case completions were for detained respondents. *See* EOIR FY 2014 Statistics, *supra* n.18, at G1. Nearly 85 percent of these detained respondents were unrepresented as of FY 2007. *See* Nina Siulc et al., Vera Inst. of Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program* (May 2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf.

require *any* access to state-specific legal materials, which are central to many immigrants' legal claims.[20] Moreover, ICE detention standards do not call for detainees to have any access to email or the Internet, including online legal databases,[21] and only limited access to telephone or facsimile communications is required.[22] The legal resources available to detained respondents also vary significantly from facility to facility. *See* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 568 (2009). If respondents detained at one facility have access to more legal materials than those detained elsewhere, it could result in the development of misleading expectations amongst Immigration Judges.

Given that respondents with even low-level controlled substance offense convictions may be considered subject to mandatory detention pursuant to INA § 236(c)(A)-(B), it is particularly likely that respondents facing removal based on such convictions will have little to no opportunity to perform the kind of research required to identify even one prosecution for possession or sale of a specific controlled substance. Furthermore, the cost of searching for and obtaining criminal records is not *de minimus* and would be particularly taxing for a detained respondent with no income. Most courts charge a fee to search for and/or copy records, with charges for certified copies, should the Court require them, set even higher. *See, e.g.*, Monroe County Court and Land Records, http://www2.monroecounty.gov/clerk-records.php (last visited Sept. 14, 2015).[23] *See also* Ex. A (Kavanagh Decl.) ¶ 7 (confirming that *amicus curiae* spent

[20] *See* U.S. Immigration and Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards (as modified by February 2013 Errata) at Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, *available at* http://www.ice.gov/detention-standards/2011.
[21] *Id*.
[22] *See Id.*, Part 5.6 (Telephone Access), 362-363; Part 5.1 (Correspondence and Other Mail), 334.
[23] Copies of records are 65¢ per page. A $1.30 minimum charge is required. The fee for a certified copy is $5 for a document up to four pages in length, plus a charge of $1.25 per page for each additional page, when applicable. An extra fee of $5 is charged for every two years searched whenever a search of the records is involved. Payment must be made before the records will be provided.

over $175 on court fees alone for the attached prosecution records). Most courts also require that the requester provide return postage. *Id*. Obtaining records directly from local trial courts may be the only way to document specific prosecutions that involved low-level controlled substance offenses, though. Because most low-level controlled substance charges result in plea deals, which are unlikely to be appealed, state case law addressing such convictions is also scarce.

CONCLUSION

For the reasons stated above, *amicus curiae* urges the Court to uphold the proper application of the longstanding categorical approach and to conclude that New York's low-level controlled substance statutes are indivisibly overbroad with respect to the type of substance involved, and therefore do not trigger immigration consequences tied to violations of law relating to a controlled substance as defined by 21 U.S.C. § 802 because the Government cannot demonstrate a "direct link between an alien's crime of conviction and a particular federally controlled drug." *Mellouli*, 135 S.Ct. at 1990. In doing so, the Court should recognize that the realistic probability standard is automatically satisfied where the controlled substances that make a state statute overbroad are expressly encompassed by its terms.

Dated: 10/7/2015

Respectfully submitted,

By: _____
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
NEW YORK, NEW YORK

In the Matter of:	)
[redacted]	)
In removal proceedings	)

EXHIBITS IN SUPPORT OF BRIEF OF *AMICUS CURIAE*
IMMIGRANT DEFENSE PROJECT

Exhibit Page

EXHIBIT A

DECLARATION OF KATHLEEN KAVANAGH

1. My name is Kathleen Kavanagh. I am a law student intern with Washington Square Legal Services, Immigrant Rights Clinic. My partner, Amelia Marritz, and I, under the supervision of Nancy Morawetz, Esq., are representing *amicus curiae* Immigrant Defense Project in this action.

2. I make this declaration in support of Brief of *Amicus Curiae* Immigrant Defense Project on the applicability of the categorical approach and realistic probability to low-level New York controlled substance offenses.

3. In connection with this brief, Ms. Marritz and I performed research relating to New York State prosecutions involving Human Chorionic Gonadotropin (HCG) and Tramadol. We, along with Andrew Wachtenheim, Litigation Staff Attorney at IDP, identified the attached examples of prosecutions involving HCG and Tramadol and obtained the attached records between October 2014 and September 2015. *See* Ex. E through Ex. L.

4. Ms. Marritz and I attempted to identify a database or other means to comprehensively search state criminal records, but found that none appears to exist. Our efforts included meeting with a LexisNexis representative who informed us that their product does not have such a capability. Our research showed that, likewise, Westlaw does not provide access to state criminal dockets.

5. Ms. Marritz and I eventually identified the attached prosecutions by following up on online news articles or press releases about arrests or indictments involving HCG or Tramadol. We also contacted the New York State Police Public Information Office and were granted temporary access to search their online "Newsroom," https://www.nyspnews.com/. We were informed by a Public Information Officer that the ability to search archived press releases on their site is normally reserved for the press. Furthermore, the "Newsroom" only provides information related to arrests by the State Police that led to the issuance of a press release.

6. Ms. Marritz and I found that, because we were limited to arrests or indictments that received online news coverage or resulted in a press release available online, it was difficult to identify potential prosecutions naming particular controlled substances.

7. After identifying each of these potential prosecutions, our team requested records from local courts through mail and facsimile requests. We found contact information for these local courts online and in several instances had to call the courts to clarify the procedures for requesting records. This often took several phone calls. We also had to send multiple requests to some of the courts before we received the requested documents. Even when

we requested certified copies of records, most courts returned uncertified copies to us. Our costs included expenses for phone, fax, and Internet access, postage (including return postage), and the not insignificant charges that some courts charge for record searches, copies, and certification. For instance, the three largest sets of documents our team received incurred charges of $75.95, $62.85 and $39.65, plus shipping costs.

8. Ms. Marritz and I obtained all of the attached records directly from court staff, with the exception of those included at Ex. F and Ex. G, which we understand were obtained by Mr. Wachtenheim through similar means. The documents we received as a result of our requests consisted of a mix of certified and uncertified copies. All documents that our team received from the courts will be maintained at the office of IDP.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/7/2015 at New York, New York.

Kath Kavanagh

Kathleen Kavanagh

EXHIBIT B

DECLARATION OF AMELIA MARRITZ

1. My name is Amelia Marritz. I am a law student intern with Washington Square Legal Services, Immigrant Rights Clinic. My partner, Kathleen Kavanagh, and I, under the supervision of Nancy Morawetz, Esq., are representing *amicus curiae* Immigrant Defense Project in this action.

2. I make this declaration in support of Brief of *Amicus Curiae* Immigrant Defense Project on the applicability of the categorical approach and realistic probability to low-level New York controlled substance offenses.

3. In connection with this brief, Ms. Kavanagh and I performed research relating to New York State prosecutions involving Human Chorionic Gonadotropin (HCG) and Tramadol. We, along with Andrew Wachtenheim, Litigation Staff Attorney at IDP, identified the attached examples of prosecutions involving HCG and Tramadol and obtained the attached records between October 2014 and September 2015. *See* Ex. E through Ex. L.

4. As described in Ms. Kavanagh's declaration (Ex. A), the process of researching and obtaining evidence of prosecutions was logistically challenging. The documents we received as a result of our requests were often incomplete and some were sealed or unavailable for other reasons. In other instances, our requests went unanswered. Our document requests and online research together allowed us to confirm the following information.

5. Exhibits D through G relate to the Albany County prosecutions of Dr. Claire Godfrey, Naomi Loomis, Robert "Stan" Loomis, Kenneth Michael Loomis, Kirk Calvert, and Tony Palladino. Exhibit D is a Press Release from the District Attorney of Albany County announcing the indictment of all but Mr. Palladino.

6. Exhibit E includes the relevant counts from Dr. Godfrey's February 13, 2007 Indictments. Dr. Godfrey was indicted on charges including criminal sale of a controlled substance in the fifth degree (N.Y.P.L. § 220.31) (specifying Chorionic Gonadotropin (HCG) as the substance involved); criminal sale of a prescription for a controlled substance (§ 220.65) (specifying substances including HCG); and criminal diversion of prescription medications and prescriptions in the second degree (§ 178.20). In July 2007, Dr. Godfrey pleaded guilty to § 178.20. *See Steroids Investigation: Soares Scores Blueprints to Investigation*, News 10 ABC, July 24, 2007, *available at* http://news10.com/2007/07/24/steroids-investigation-soares-scores-blueprints-to-operation/.

7. Tony Palladino was subsequently indicted in October 2007. *See New Charges in Soares' Steroid Investigation*, News 10 ABC, Oct. 17, 2007, *available at* http://news10.com/2007/10/17/new-charges-in-soares-steroid-investigation/.

8. Exhibit F includes the relevant counts from the June 16, 2010 Indictments of Naomi Loomis, Robert "Stan" Loomis, Kenneth Michael Loomis, Kirk Calvert, and Tony Palladino. These five defendants were originally indicted in 2007. *See* Ex. D; *supra* ¶¶ 5,7. After several years of legal proceedings, they were re-indicted on June 16, 2010 on charges including six counts of criminal sale of a controlled substance in the fifth degree (§ 220.31) that specified substances including HCG; four counts of attempted criminal sale of a controlled substance in the fifth degree (§ 110-220.31) that specified substances including HCG; and enterprise corruption (§ 460.20(1)(a)). Dozens of "pattern criminal acts" were alleged in support of the enterprise corruption indictment. Exhibit F also includes those alleged pattern criminal acts that involved HCG.

9. Exhibit G is a Press Release from the Office of the Albany County District Attorney, dated February 8, 2013, which confirms that Signature Pharmacy Inc. pleaded guilty to criminal sale of a controlled substance in the fifth degree, in full satisfaction of the indictments against Naomi Loomis, Robert "Stan" Loomis, Kenneth Michael Loomis, Kirk Calvert, and Tony Palladino.

10. Exhibit H includes the relevant counts from a series of indictments involving Dr. Robert Carlson, Glen Stephanos (a/k/a Stefanos), George Stephanos (a/k/a Stefanos), Joe Raich, and Ryan Dumas. Exhibit H(1) includes indictments against Dr. Carlson and the Stephanos brothers, dated January 25, 2007. The charges against them included one count of criminal sale of a controlled substance in the fifth degree (§ 220.31) that specified HCG and one count of criminal sale of a prescription for a controlled substance (§ 220.65).

11. Exhibit H(2) is an order dismissing the January 25, 2007 indictment against Glen Stephanos and explaining the introduction of two sets of superseding indictments dated July 17, 2007.

12. Exhibit H(3) includes the relevant counts from the first of the sets of July 17, 2007 superseding indictments, which charged Dr. Carlson, Glen Stephanos, and George Stephanos, as well as Joe Raich and Ryan Dumas. The charges against the five defendants included two counts of criminal sale of a controlled substance in the fifth degree (§ 220.31) that specified HCG; seven counts of conspiracy in the fifth degree (§ 105.05) to commit § 220.31; and enterprise corruption (§ 460.20(1)(a)). The enterprise corruption indictment accused the defendants of illegally selling steroids and related

substances to consumers in New York State and elsewhere. Numerous "pattern criminal acts" were alleged in support of the enterprise corruption indictment. Exhibit H(3) also includes those alleged pattern criminal acts that involved HCG.

13. Exhibit H(4) includes the relevant counts from the second set of superseding indictments for Dr. Carlson, Glen Stephanos, George Stephanos, Joe Raich, and Ryan Dumas, also dated July 17, 2007. The charges included two counts of attempted criminal sale of a prescription for a controlled substance (§ 110-220.65) that specified HCG and conspiracy in the fourth degree (§ 105.10) to commit § 220.65.

14. Our communication with the Albany County Clerk's office confirmed that there were additional, sealed indictments in this case in August and September 2007.

15. Exhibit I includes the following:

    - Exhibit I(1): Glen Stephanos Certificate of Conviction for attempted criminal sale of a controlled substance in the fifth degree (§110- §220.31);
    - Exhibit I(2): George Stephanos Certificate of Conviction for conspiracy in the fifth degree (§ 105.05);
    - Exhibit I(3): Joe Raich Certificate of Conviction for attempted conspiracy in the fourth degree (§ 110-105.10);
    - Exhibit I(4): Dr. Robert Carlson Certificate of Conviction for attempted insurance fraud in the fourth degree (§ 110-176.15), with Superior Court Information for the same charge, dated August 21, 2007;
    - Exhibit I(5): Ryan Dumas Certificate of Conviction for conspiracy in the fifth degree (§105.05) and excerpt of plea transcript showing that the conspiracy was to commit § 220.31.

16. Exhibit J includes a press release from the New York State Police regarding the arrest of Demmeco Scott and specifies that he was in possession of Tramadol and marijuana. Exhibit J also includes a Certificate of Disposition for Mr. Scott, showing that he was charged with criminal possession of a controlled substance in the seventh degree (§ 220.03) and pled to unlawful possession of marijuana (§ 221.05).

17. Exhibit K includes a press release from the New York State Police regarding the arrest of Gregg J. Kolysko and specifies that he was arrested on charges of two counts of criminal sale of a controlled substance in the fifth degree (Tramadol) (§ 220.31) and two counts of criminal possession of a controlled substance in the fifth degree (Tramadol) (§ 220.06). Exhibit K also includes an indictment filed March 18, 2017, confirming the aforementioned charges and specifying Tramadol as the substance involved in each

count, and a Certificate of Conviction for Mr. Kolysko, showing that he was convicted of attempted criminal possession of a controlled substance in the fifth degree (§ 110-220.06(1)).

18. Exhibit L includes a press release from the New York State Police regarding the arrest of Jennifer M. Townes and confirming charges related to possession of Tramadol. Exhibit L also includes an information charging Ms. Townes with criminal possession of a controlled substance in the seventh degree (§ 220.03), to wit: Tramadol pills, and a Community Service Restitution Program Referral Form confirming that she ultimately pleaded to disorderly conduct (§ 240.20).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/7/2015 at New York, New York.

Amelia Marritz

EXHIBIT C(1)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: A-018-032-055

In the Matter of:	)	
SICARI, Giuseppe	)	**IN REMOVAL PROCEEDINGS**
Respondent	)	

CHARGE: INA § 237(a)(2)(B)(i) Controlled Substance Offense

APPLICATIONS: Motion to Terminate with Prejudice

ON BEHALF OF RESPONDENT:

Olivia Cassin, Esq.
The Legal Aid Society
Immigration Law Unit
199 Water Street, 3rd Floor
New York, NY 10038

ON BEHALF OF DHS:

Henry Katz, Esq.
Assistant Chief Counsel
26 Federal Plaza, Room 1130
New York, New York 10278

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Giuseppe Sicari ("Respondent") is a native and citizen of Italy. He entered the United States ("U.S.") on June 21, 1968, as a lawful permanent resident ("LPR"). On September 15, 1977, Respondent was convicted by a plea of guilty to a misdemeanor violation of NYPL § 220.03 (A), criminal possession of a controlled substance in the seventh degree. He was placed in deportation proceedings. On October 6, 1988, Respondent applied for, and was granted, a 212(c) waiver. On November 17, 2006, Respondent was convicted by a plea of guilty to violating NYPL § 220.03, criminal possession of a controlled substance in the seventh degree. Respondent was sentenced to time served. On December 28, 2012, Respondent attempted to re-enter the United States ("U.S.") following an eighteen day trip to Mexico and was detained by the Department of Homeland Security ("DHS"). On July 11, 2013 DHS served Respondent by regular mail with a Notice to Appear ("NTA"). He was charged with removability pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act ("INA") alleging that

Respondent has been convicted of a controlled substance violation. Respondent now requests that this Court terminate proceedings with prejudices because DHS has failed to establish by clear and convincing evidence that Respondent was convicted of a crime "relating to a controlled substance[,] as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." INA § 237(a)(2)(B).

For the reasons that follow, this Court grants Respondent's motion to terminate with prejudice.

II. LEGAL STANDARDS AND ANALYSIS

A. Removability

DHS bears the burden of establishing by clear and convincing evidence that an alien is deportable as charged. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a); see also Woodby v. INS, 385 U.S. 276, 286 (1966). Thus, to sustain this charge DHS must establish by clear and convincing evidence that Respondent was convicted of a crime "relating to a controlled substance[,] as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." INA § 237(a)(2)(B).

i. Categorical Approach

The categorical approach is applied to the criminal statute at issue in the removability stage to determine whether the "minimum criminal conduct necessary" to sustain a conviction would constitute a crime "relating to a controlled substance [,] as defined in section 102 of the Controlled Substances Act ("CSA") (21 U.S.C. §802))." INA § 237(a)(2)(B); Moncrieffe v. Holder, 133 S.Ct. 1678 (2013).

In Moncrieffe v. Holder, the Supreme Court reaffirmed the application of the categorical approach. 133 S.Ct. 1678, 1684 (2013). Under the categorical approach, the court examines whether "the state statute defining the crime of conviction" fits within the "generic" federal definition of a corresponding violation of the CSA. Moncrieffe, 133 S.Ct. at 1684 (citing Gonzales v. Duenas–Alvarez, 549 U.S. 183, 186 (2007)). The state offense is a categorical match only if a conviction of that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." Moncrieffe, 133 S.Ct. at 1684 (citing Shepard v. United States, 544 U.S. 13, 24 (2005)).

The categorical approach focuses on the "minimal conduct criminalized by the state statute" that is necessary to sustain a conviction under that statute. Moncrieffe, 133 S.Ct. at 1685 (conviction "rested upon [nothing] more than the least of th[e] acts" criminalized) (citing Johnson v. United States, 559 U.S. 133, 137 (2010)); see Gertsenshteyn v. Mukasey, 544 F.3d 137, 143 (2d Cir. 2008) (citing Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001). Under the categorical approach, the court must look only to the statutory elements without considering the facts underlying the conviction. Moncrieffe, 133 S.Ct. at 1684 (citing Gonzales, 549 U.S. at 186); see Gertsenshteyn, 544 F.3d at 143; Martinez v. Mukasey, 551 F.3d 113, 119 (2d Cir. 2008).

Under the categorical test, there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct" that would constitute a violation of

the CSA. Moncrieffe, 133 S.Ct. at 1685 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)); see Matter of Ferreira, 26 I&N Dec. 415, 419 (BIA 2014) (remanding for application of the realistic probability test where a State statute covered a controlled substance not included in the Federal controlled substance schedules, and noting that the "'realistic probability test' is part of the initial inquiry that an Immigration Judge must undertake when applying the categorical approach"); Matter of Chairez, 26 I&N Dec. 349, 357 (finding no realistic probability that a state statute would be applied in a manner constituting a removable offense where the Respondent identified no decision where anyone had been so prosecuted).

First, this Court must analyze the minimum conduct criminalized by the statute. Here, Respondent was convicted of violating NYPL § 220.03, which provides, "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance..." NYPL § 220.03. In New York, controlled substances, are defined in the New York Public Health Law § 3306. New York Public Health Law (NYPHL) § 3306, Schedule III(g). This section lists numerous interchangeable substances, some or all of which could constitute a violation of NYPL § 220.03. In New York, "chorionic gonadotropin" is a controlled substance. New York Public Health Law (NYPHL) § 3306, Schedule III(g). In contrast, the CSA does not list "chorionic gonadotropin" as a controlled substance. See 21 U.S.C. §802 (6) (defining "controlled substance" as "a drug... included in schedule I, II, III, IV, or V"); 21 U.S.C. §812 (Schedules I-V.) Thus, the minimum conduct required for a conviction under NYPL § 220.03 includes conduct that would not constitute a removable offence under INA § 237(A)(2)(B)(i).

Second, this Court must analyze whether there exists "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct" that would not constitute a violation of the CSA. Moncrieffe, 133 S.Ct. at 1685 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The BIA recently affirmed that the "'realistic probability test' is part of the initial inquiry that an Immigration Judge must undertake when applying the categorical approach." Ferreira, 26 I&N Dec. at 419. The BIA thus held when "a State statute on its face covers a type of object or substance not included in the Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside of the generic crime" to overcome the removability charge. *Id.* at 420-21 (relying on Moncrieffe and Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)). Therefore, under the realistic probability test, a respondent must demonstrate, by pointing to his own case or other cases, that the State "'in fact did apply the statute in the special (nongeneric) manner.'" Id. at 422 (citing Duenas-Alvarez, 549 U.S. at 193).

Here, Respondent has provided this Court with documents illustrating that New York State has successfully prosecuted criminal defendants accused of unlawfully possessing "chorionic gonadotropin." Respondent's submission at Tabs J; K (Nov. 18, 2014).[1] Namely,

[1] DHS argues that Respondent must provide examples of cases where a Defendant was *convicted* of possession of chorionic gonadotropin in order to sustain their burden that there exists "a realistic probability, not a theoretical possibility," that New York state would prosecute this as a crime under NYPL § 220.03. I disagree with this position. It is well established that "to prosecute" or to "successfully prosecute" does not connote a successful *conviction*, but rather "to *institute* and pursue a criminal action against (a person)." Black's Law Dictionary (9th ed. 2009)(emphasis added). In addition caselaw supports this notion, "It is now well settled that the mere application for, and issuance of, a warrant on a criminal charge, constitutes a criminal prosecution." Schneider v. Schlang, 159

Respondent has provided the February 2007 indictment from Albany County against Clair Godfrey for selling chorionic gonadotropin. Respondent's submission at Tab J (Nov. 18, 2014). In addition, Respondent has provided the June 2010 indictment from Albany County against multiple defendants for selling chorionic gonadotropin. Respondent's submission at Tab K (Nov. 18, 2014). These indictments demonstrate that there is more than a "theoretical possibility" that people would be prosecuted under the NYPL involving this drug. Moncrieffe, 133 S. Ct. at 1685; see also Matter of Chairez, 26 I&N Dec. 349, 357 (BIA 2014) (finding no realistic probability that a state statute would be applied in a manner constituting a removable offense where the respondent identified no decision where anyone had been so prosecuted). Respondent has therefore demonstrated that there is a realistic probability that New York prosecutes cases under the Penal Law in a "nongeneric" manner. Ferreira, 26 I&N Dec. at 421-22. Accordingly, his conviction for criminal possession of a controlled substance under NYPL § 220.03 is not categorically one for an offense relating to a controlled substance violation under INA § 237(a)(2)(B)(i).

ii. Divisibility

Where a state statute does not categorically match its federal counterpart, this Court may look to see whether the state statute is divisible. A criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. Descamps v. United States, 133 S. Ct. 2276, 2281-83 (2013); see Matter of Chairez, 26 I&N Dec. 349, 353 (BIA 2014) (rejecting Matter of Lanferman "to the extent that it is inconsistent with [the Board's] understanding of the Supreme Court's approach to divisibility in Descamps"). In such a case, "a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea.'" Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (quoting Nijhawan v. Holder, 557 U.S. 29, 35 (2009)).

The modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to *conduct* that fits the generic standard; under Descamps, such crimes are merely "overbroad," not divisible. Descamps v. United States, 133 S. Ct. 2276, 2281-83 (2013); United States v. Beardsley, 691 F.3d 252, 268-69 (2d Cir. 2012). The modified categorical approach may *only* be used when a defendant has been convicted under a divisible statute. Descamps, 133 S. Ct. at 2281.

Here, Respondent was charged under NYPL § 220.03, which states, "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance..." N.Y. Penal Law § 220.03. In New York, controlled substances, are defined in the New York Public Health Law § 3306. New York Public

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A.D. 385, 387, 144 N.Y.S. 543, 544 (App. Div. 1913). Ultimately, there is no evidence that the Board intended to require anything other than then plain meaning of the word "prosecute."

Health Law (NYPHL) § 3306, Schedule III(g). This section lists numerous interchangeable substances, some or all of which could constitute a violation of NYPL § 220.03. These individual substances are not disjunctive elements of the offense, but rather interchangeable substances that would qualify as a controlled substance. Further, Respondent has provided this Court with case law that illustrates that New York Courts often issue single indictments containing multiple controlled substances. See People v. Rivera, 257 A.D.2d 425 (N.Y. App. Div. 1999)(" [W]e would find that the count charging defendant with criminal possession of a controlled substance in the third degree was not duplicitous under the facts presented, since it properly aggregated all the drugs simultaneously found in defendant's constructive possession.") Accordingly, a Defendant could be convicted for any of the interchangeable "controlled substances" listed on their indictment. Thus, I find that NYPL § 220.03 is not divisible.

Even assuming, arguendo, that Criminal Possession of a Controlled Substance in the Seventh Degree is divisible, a thorough review of the record reveals that DHS has failed to meets its burden to establish by clear and convincing evidence that Respondent was convicted of a removable offense. Moncrieffe, 133 S. Ct. at 1684. The modified categorical approach examines the record of conviction to determine whether it establishes that Respondent's conviction involved a drug that is considered a controlled substance under the CSA. Id. The record of conviction in the present matter includes; 1) the certificate of disposition and 2) the criminal complaint.

First, the certificate of disposition does not identify the drug with which Respondent was convicted of possessing. Therefore, this document fails to satisfy the burden of establishing by clear and convincing evidence that Respondent is removable. INA § 240(c)(3)(A). Second, the criminal complaint does not qualify as a charging document. According to New York Law, a defendant has a right to be prosecuted by "information," a document that bears a higher evidentiary standard that a criminal complaint. See New York Criminal Procedure Law ("NYCPL") § § 100.10(1), (4), 170.65(1). Such a document may be converted into a charging document in two instances, 1) if the prosecution provides additional information of the crime charged or 2) the defendant expressly waives his right to be prosecuted by information. See NYCPL § § 170.65(1), (5). Here, DHS has not presented any evidence that either of these conditions have been met. Accordingly, it is cannot be considered a charging document and cannot be used as the basis for finding Respondent removable. INA § 237(a)(2)(B)(i)

III. Conclusion

In sum, DHS failed to establish removability by clear and convincing evidence. Respondent's conviction under NYPL § 220.03 is categorically broader than INA § 237(a)(2)(B) because "Chorionic gonadotropin" is a controlled substance under New York, but not under the CSA. Further, the Respondent has demonstrated there is a realistic probability of prosecution for possession of chorionic gonadotropin pursuant to NYPL § 220.03. Finally, this Court finds that the statute is not divisible, and even assuming arguendo that it was, DHS has failed to prove by clear and convincing evidence that Respondent was charged with a crime that would make him removable pursuant to INA § 237(a)(2)(B)(i).

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that the proceeding be terminated with prejudice.

June 25, 2015
Date

Philip Morace
Immigration Judge

EXHIBIT C(2)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: A[redacted]-901

In the Matter of:	
A[redacted], S[redacted] a.k.a. [redacted][1]	IN REMOVAL PROCEEDINGS
Respondent	
CHARGE: INA § 237(a)(2)(B)(i)	Controlled Substance Offense
APPLICATION:	Motion to Terminate Proceedings

ON BEHALF OF THE RESPONDENT
Aaron Reichlin-Melnick, Esq.
The Legal Aid Society
Immigration Law Unit
199 Water Street, 3rd Floor
New York, NY 10038

ON BEHALF OF DHS
Samia Naseem, Esq.
Assistant Chief Counsel
290 Broadway, 28th Floor
New York, NY 10007

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[redacted] ("Respondent") is a native and citizen of [redacted] [Exh. 1.] She was admitted to the United States ("U.S.") as a lawful permanent resident ("LPR"), on or about February 3, 1973. *Id.* On [redacted] 1997, she was convicted of criminal possession of a controlled substance in the seventh degree, in violation of section 220.03 of New York Penal Law ("NYPL").[2] Certificate of Disposition ("COD") [redacted]. On [redacted], 1997, she was convicted of criminal possession of marijuana in the fifth degree, in violation of NYPL § 221.10.[3] COD #[redacted]

[1] At a master calendar hearing on February 2, 2011, at which Respondent appeared *pro se*, she claimed her sister's name is [redacted] and she has never assumed this name herself.

[2] At the time of Respondent's conviction, the statute stated: "A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance." NYPL § 220.03 (1979).

[3] The statute provides, in relevant part:

On January 14, 2011, the Department of Homeland Security ("DHS") served Respondent by mail with a Form I-862, Notice to Appear ("NTA"), charging her with removability pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), as an alien who, after admission, has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance (as defined by section 102 of the Controlled Substances Act ("CSA"), 21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana. [Exh. 1.]

On March 17, 2015, Respondent filed a motion to terminate ("MTT") proceedings on the basis that DHS failed to substantiate the charge of removability. She argues that her conviction under NYPL § 220.03 is not categorically a violation of a law "relating to a controlled substance" as defined by 21 U.S.C. § 802 because *chorionic gonadotropin*[4] is present in the New York State list of controlled substances but does not appear in the Federal schedule of controlled substances. She also argues that her conviction under NYPL § 221.10 does not support the charge of removability, as it is for a single offense of possession of less than thirty grams of marijuana. On June 26, 2015, she filed a submission in support of her motion ("MTT Supplement"), arguing a recently-issued Supreme Court case, *Mellouli v. Holder*, 135 S. Ct. 1980 (2015), provides additional support for her position. DHS did not submit a response to the MTT or MTT Supplement.[5] For the reasons below, the Court agrees and will grant her motion to terminate proceedings.

II. EXHIBITS

Exh. 1: NTA, served Jan. 14, 2011.

Additional documents received by the Court, which have not yet been marked into evidence:

- Form I-213, Record of Deportable/Inadmissible Alien, dated Jan. 11, 2011;
- COD [redacted] - Respondent's conviction under NYPL § 220.03 on [redacted], 1997;

> A person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses: (1) marihuana in a public place . . . and such marihuana is burning or open to public view; or (2) one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than twenty-five grams.

NYPL § 221.10 (1995).

[4] *Chorionic gonadotropin* was spelled *chorionic gonadotrophin* in the New York State schedule prior to 2006. *See* N.Y. Bill Jacket, 2006 S.B. 4331, Ch. 457. In this decision, the Court will use the terms interchangeably.

[5] The Court notes that DHS failed to submit a timely response to Respondent's MTT. If a response to a motion is untimely, the Court may deem it unopposed. Immigration Court Practice Manual, Chapter 3.1(b), (d)(ii). Respondent filed her MTT on March 17, 2015, more than four months ago, and *Mellouli* was decided on June 1, 2015. To date, the Court has not received a response from DHS.

- COD [redacted] - Respondent's conviction under NYPL § 221.10 on [redacted] 1997;
- Respondent's immigrant visa;
- Form I-215c, Record of Sworn Statement in Affidavit Form,[6] dated Dec. 11, 1998;
- New York State rap sheet; dated Jan. 13, 2011;
- EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents ("cancellation application"), received Feb. 17, 2011;
- DHS's submission, received Mar. 3, 2011:
  - Tab A: COD [redacted] - Respondent's conviction under NYPL § 220.03 on [redacted], 1997;[7]
  - Tab B: Criminal complaint, dated May 24, 1997;
- Respondent's identity documents, received Mar. 10, 2011;
- Document from Criminal Court of the City of New York, Brooklyn, dated Apr. 4, 2011, indicating docket [redacted] was adjourned to Apr. 26, 2011;
- COD # 38167 – indicating dismissal of Respondent's charges from docket # [redacted] on Jun. 3, 2011;
- Revised cancellation application with supplemental documents, received Sep. 11, 2012;
- MTT, received Mar. 17, 2015;
- *Amicus Curiae* brief from Immigrant Defense Project, with Respondent's consent, filed Apr. 7, 2015 ("Amicus Brief");
- MTT Supplement, received June 26, 2015.

III. LEGAL STANDARDS & ANALYSIS

DHS bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the U.S. is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). An alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance (as defined by section 102 of the CSA), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable. INA § 237(a)(2)(B)(i).

In support of the charge of removability, DHS presented a copy of Respondent's conviction record. The disposition states she pleaded guilty to NYPL § 220.03, criminal possession of a controlled substance[8] in the seventh degree. COD [redacted] Additionally, DHS presented a disposition demonstrating she pleaded guilty to NYPL § 221.10, criminal possession of

[6] Respondent refused to sign or initial the document.

[7] This COD has the same docket number [redacted] and conviction date ([redacted], 1997) as previously submitted COD # [redacted] thus, it appears to be a duplicate COD for the same conviction.

[8] New York state law defines a "controlled substance" as "any substance listed in schedule I, II, III, IV or V of" section 3306 of New York Public Health Law. NYPL § 220.00(5).

marijuana in the fifth degree. COD #[redacted]. In the foregoing analysis, the Court will address each of these convictions as they relate to the removability charge.

A. NYPL § 220.03, Criminal Possession of a Controlled Substance in the Seventh Degree

i. Under the categorical approach, the New York statute is overbroad.

The Court begins by applying the categorical approach to determine whether the minimum criminal conduct necessary to sustain a conviction would constitute a controlled substance offense, making Respondent removable. *See Mellouli*, 135 S. Ct. at 1986-89 (discussing the historical significance of the categorical approach in immigration law, and applying the categorical approach to analyze an alien's removability under INA § 237(a)(2)(B)(i)); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (stating that a State offense is a categorical match only if a conviction of that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]") (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)); *see also Flores v. Holder*, 779 F.3d 159, 165 (2d Cir. 2015) (applying *Moncrieffe* in the immigration context). To establish removability under INA § 237(a)(2)(B)(i), the state conviction must "necessarily involve a substance regulated under federal law." *Mellouli*, 135 S. Ct. at 1995. Specifically, DHS must connect an element of the alien's conviction to a drug defined in 21 U.S.C. § 802. *Mellouli*, 135 S. Ct. at 1991 (finding that a paraphernalia conviction for possession of a sock in which the alien had placed four unidentified orange tablets does not trigger removability because it does not connect to an element of the alien's conviction to a drug defined in § 802).

New York criminalizes the possession of a substance that does not appear on the federal controlled substance schedule; specifically, at the time of Respondent's conviction, chorionic gonadotrophin was included on the New York State schedule but not the federal schedule. *See* NYPL § 220.00(5); Anabolic Steroids – Schedule III Controlled Substances, 1989 N.Y. Sess. Law Serv. 418 (adding chorionic gonadotrophin to New York Schedule II(h)); Anabolic Steroids – 1990 N.Y. Sess. Law Serv. 640 (moving chorionic gonadotrophin to New York Schedule II(j)); 21 C.F.R. §§ 1308.11-.15 (listing the federal schedules).[9] Therefore, a categorical mismatch exists. *See Matter of Ferreira*, 26 I&N Dec. 415, 418 (BIA 2014) (finding that the presence of two substances not included on the federal schedule but present in the Connecticut schedules at the time of the respondent's conviction meant that the definition of a controlled substance "was broader than the definition of a controlled substance . . . incorporated by reference into" INA § 237(a)(2)(B)(i)).[10]

[9] The Court notes that chorionic gonadotropin continues to be listed on the New York schedule, and the legislative history indicates its inclusion was deliberate despite a 2006 amendment to New York law intended to harmonize the state and federal schedules of controlled substances. *See* N.Y. Bill Jacket, 2006 S.B. 4331, Ch. 457.

[10] In *Mellouli*, the Supreme Court noted that the BIA recently "adhered to . . . the *Paulus* analysis" in *Ferreira*, but the Supreme Court explicitly declined to reach the question of whether the BIA applied the *Paulus* analysis correctly. *Mellouli*, 135 S. Ct. 1988 & n.8 (citing *Matter of Paulus*, 11 I&N Dec. 274,

When analyzing the "minimum conduct criminalized by the statue," the Court must also consider whether there is a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Moncrieffe*, 133 S. Ct. at 1684-85 (2013) (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007). The Board of Immigration Appeals ("BIA") has articulated the "realistic probability" concept further:

> [E]ven where a State statute on its face covers a type of object or substance not included in a Federal statute's generic definition, there must be a **realistic probability that the State would prosecute conduct falling outside the generic crime** in order to defeat a charge of removability. Given the requirement in *Moncrieffe* to focus on the least culpable conduct under the categorical approach, rather than the alien's actual conduct, the application of the realistic probability test is necessary to prevent the categorical approach from eliminating the immigration consequences for many State drug offenses, including trafficking crimes.

Ferreira, 26 I&N Dec. at 420-21 (emphasis added); *see also id.* at 418-19 (citing *Moncrieffe*, 133 S. Ct. at 1685).[11]

However, Respondent argues that the Supreme Court indicated in *Mellouli* that the BIA's realistic probability holding in *Ferreira* was erroneous, as the Supreme Court did not apply the realistic probability test in finding Mellouli removable. MTT Supplement at 2-3. This Court notes that although the *Mellouli* parties' briefs, as well as multiple amicus curaie briefs, discussed the realistic probability test, the Supreme Court did not apply the realistic probability test articulated in *Ferreira* or discuss its applicability.[12] *See, e.g.*, Brief for Respondent, *Mellouli*, 135 S. Ct. 1980 (2015), 2014 WL 6613094 at 39 n.6; Petitioner's Brief on the Merits, *Mellouli*, 135 S. Ct. 1980 (2015) at *42-56, 2014 WL 4678273; Brief Amici Curiae of the National Immigrant Justice Center and American Immigration Lawyers Association in Support of Petitioner, *Mellouli*, 135 S. Ct. 1980 (2015), 2014 WL 4804043 at *24-37. This Court finds

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276 (BIA 1965) (finding deportability was not established under former INA § 241(a)(11) where the alien's conviction was not necessarily predicated upon a federally controlled "narcotic drug")).

[11] The BIA has indicated that a State statute is categorically overbroad "only if the alien demonstrates the State statute has, in fact, been **successfully** applied to prosecute offenses involving" the conduct falling outside the generic federal definition. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 356 (BIA 2014) ("*Chairez I*") (clarifying that a State firearms statute with no "antique firearms" exception is categorically overbroad relative to INA § 237(a)(2)(C) only if the statute has been successfully applied to prosecute offenses involving antique firearms), *overruled in part by Matter of Chairez-Castrejon*, 26 I&N Dec. 478 (BIA 2015) ("*Chairez II*") (finding no realistic probability that a state statute would be applied in a manner constituting a removable offense where the Respondent identified no decision where anyone had been so prosecuted).

[12] Supreme Court simply stated, "Whether *Ferreira* applied [the *Paulus*] framework correctly is not a matter this case calls upon us to decide." *Mellouli*, 135 S. Ct. at 1988 n.8.

the Supreme Court's silence on the issue to be instructive. Moreover, several circuits have found that realistic probability is sufficiently demonstrated where a statute's terms encompass conduct beyond that in federal law. *See Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (holding that *Duenas-Alvarez* does not require the alien to demonstrate a State would prosecute conduct outside the federal statute "when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"); *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (stating it is not "judicial prestidigitation" to conclude a crime is categorically overbroad where the language of the statute "plainly and specifically criminalizes conduct outside the contours of the federal definition"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572 (6th Cir. 2007) (finding *Duenas-Alvarez* inapplicable because the state statute's "clear language . . . expressly and unequivocally" punished conduct outside the scope of the generic federal definition); *see also United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (*en banc*) (finding it unnecessary to hypothesize about the "realistic probability" where the statutory elements were clear).

Because New York's state schedule of controlled substances includes chorionic gonadotrophin and that substance does not appear on the federal controlled substances schedule, the court finds that a conviction under NYPL § 220.03 is categorically broader than the federal generic crime of "a violation of . . . any law . . . relating to a controlled substance" defined in section 102 of the CSA. *See* INA § 237(a)(2)(B)(i). However, even if the *Ferreira* approach to realistic probability is valid, the Court nonetheless would find that Respondent has provided sufficient evidence that New York has successfully prosecuted individuals for state controlled substance offenses involving chorionic gonadotrophin. *See* Amicus Brief, Tab H (evidence of New York indictments for controlled substance offenses involving chorionic gonadotrophin). To the extent DHS argues that successful prosecutions must involve *convictions*, the Court disagrees. The BIA and Supreme Court have not used the term "conviction"; rather, they have stated the alien must demonstrate the state "prosecutes" the offense. *See Moncrieffe*, 133 S. Ct. at 1693; *Ferreira*, 26 I&N Dec. at 420.

ii. Even if the Court applies the modified categorical approach, DHS fails to meet its burden of establishing Respondent's removability as charged.

Additional analysis is proper only where a criminal statute is divisible (*i.e.*, it does not categorically fit within the definition of a crime relating to a controlled substance offense as defined by the CSA). *See Moncrieffe*, 133 S. Ct. at 1684. "[A] criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Chairez I*, 26 I&N Dec. at 353 (adopting *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013), in the immigration context), *vacated in part by Chairez II*, 26 I&N Dec. at 484 (BIA 2015) (holding that IJs should follow the *Chairez I* approach to

divisibility "absent applicable circuit court authority to the contrary"). To date, the Second Circuit has not clarified an approach to divisibility that diverges from that of the BIA's interpretation of *Descamps*.

Assuming *arguendo* that NYPL § 220.03 is divisible, DHS nonetheless fails to meet its burden to demonstrate Respondent is removable under INA § 237(a)(2)(B)(i). Where a statute is divisible, "a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea.'" *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). Here, DHS submitted the COD and the criminal complaint.[13] In New York, a criminal complaint only functions as a "charging document" if it has been converted into an "information" (a document with higher evidentiary standards), or if the defendant expressly waives prosecution by information. *See* NYCPL §§ 100.10(1), (4), 170.65(1), (3); *see also Thomas v. Att'y Gen.*, 625 F.3d 134, 144-45 (3d Cir. 2010) ("[W]ithout some judicial indication of whether the statement was processed as an information or a misdemeanor complaint, we would be unable to determine if such written statements were the relevant charging documents under New York law"). In the present case, the evidence does not indicate either of these limited circumstances were met. Because the complaint is not a charging document, it is not part of the conviction record for purposes of the modified categorical approach. *See Moncrieffe*, 133 S. Ct. at 1684. The only remaining document the Court may consider for the modified categorical approach is the COD, and it is silent regarding the specific controlled substance. COD # [redacted] Therefore, DHS cannot meet its burden to establish by clear and convincing evidence that Respondent was convicted of possessing a controlled substance on the federal schedule. *See supra*, Part III.A.i.

Therefore, even if the modified categorical approach applies, DHS fails to establish Respondent is removable under INA § 237(a)(2)(B)(i) for his conviction under NYPL § 220.03. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

B. NYPL § 221.10, Criminal Possession of Marijuana in the Fifth Degree

Section 237(a)(2)(B)(i) of the INA contains an exception: if the respondent is convicted of a "a single offense involving possession for one's own use of thirty grams or less of marijuana," she is not removable. The phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" calls for a circumstance-specific approach, not a categorical inquiry into the elements of a single statutory crime. *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014) (citing *Matter of Davey*, 26 I&N Dec. 37, 39 (BIA 2012)). Under the circumstance-specific approach, the Court may examine "particular circumstances in which an offender committed the crime on a particular occasion." *Dominguez-Rodriguez*, 26 I&N Dec. at 411 (citing *Moncrieffe*, 133 S. Ct. at 1691 (citation omitted)); *see also Nijhawan v. Holder*, 557 U.S. at 38-40. DHS bears the burden of establishing that the offense did not involve "possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i); *Dominguez-Rodriguez*, 26 I&N Dec. at 413; *see Davey*, 26 I&N Dec. at 41;

[13] In addition, DHS submitted Respondent's rap sheet and an I-213, but these do not constitute "charging document[s]" or a "plea agreement, plea colloquy, or 'some comparable judicial record'" for purposes of the modified categorical approach. *See Moncrieffe*, 133 S. Ct. at 1684.

Matter of Moncada-Servellon, 24 I&N Dec. 62 (BIA 2007). In seeking to meet its burden, DHS "may proffer any evidence that is reliable and probative, but the respondent should be given a reasonable opportunity to challenge or rebut that evidence." *Dominguez-Rodriguez*, 26 I&N Dec. at 414.

Here, the disposition shows Respondent was convicted under NYPL § 221.10, criminal possession of marijuana in the fifth degree. COD # [redacted] It does not indicate whether Respondent was convicted under sub-section 1 (possession in a public place) or sub-section 2 (possession of more than twenty-five grams). However, DHS submitted a rap sheet that indicates she was convicted of NYPL § 221.10(1). A conviction under this sub-section does not require a certain quantity of marijuana; it only requires knowing and unlawful possession of "marihuana in a public place . . . and such marihuana is burning or open to public view." NYPL § 221.10(1). As DHS presented no further evidence of the particular circumstances in which Respondent committed the crime, the Court finds that DHS failed to carry its burden of establishing the offense did not involve "possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i); *Dominguez-Rodriguez*, 26 I&N Dec. at 413. Thus, her conviction under NYPL § 221.10 does not support the charge of removability.

Because DHS did not meet its burden of demonstrating Respondent is removable as charged under INA § 237(a)(2)(B)(i), the following order is entered:

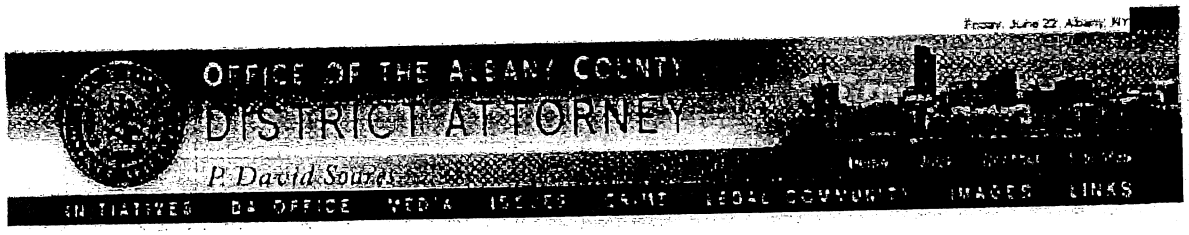
ORDER

IT HEREBY ORDERED that Respondent's Motion to Terminate is **GRANTED**.

Date: July 22, 2015

George T. Chew
Immigration Judge

EXHIBIT D



Office of the District Attorney

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Operation "Which Doctor" Defendants Arraigned

ALBANY , NY – Albany County District Attorney P. David Soares announced today that **CLAIRE GODFREY**, of Seminole County Florida was arraigned today on a (10) count indictment including the Criminal Sale of a Controlled Substance and Conspiracy in the Fourth Degree. Additionally **NAOMI LOOMIS, ROBERT "STAN" LOOMIS, KENNETH MICHAEL LOOMIS,** and **KIRK CALVERT,** all of Orlando Florida, were arraigned on (20) counts including Enterprise Corruption, (9) counts of Criminal Sales of a Controlled Substance in the Fifth Degree, (4) counts of Criminal Diversion of Prescription Medications and Prescriptions in the 1st Degree, (4) counts of Criminal Diversion of Prescription Medications and Prescriptions in the Second Degree, and Insurance Fraud in the Third Degree. The arraignments took place before the Honorable Thomas A. Breslin. If convicted on all counts, **GODFREY** faces a maximum term of up to 15 years in state prison; the **LOOMIS'** and **CALVERT** face up to 25 years.

The indictments allege that on or about the 1st day of February, 2007 between the hours of 12:00 PM and 2:00 PM, at Church Road in the Town of Guilderland, NY, **GODFREY** did, when being a licensed medical practitioner, agree to sell a prescription for the controlled substances Chorionic Gonadotropin, Nandralone and Testosterone for a William Farmer, when she did not examine the patient or know of any legitimate medical need for the controlled substances. The indictment further alleges that she proceeded to sell these controlled substances to Mr. Farmer by receiving and signing a prescription for this customer whom she never saw in person as a patient. She is also alleged to have unlawfully agreed to sell a prescription for the controlled substance Testosterone Cypionate for a Thomas Dinota Jr., when she did not examine the patient or know of any legitimate medical need for the controlled substance. Additionally, the defendant is alleged to have, along with Signature Pharmacy, colluded to fail to report of the prescribing an dispensing of these prescriptions with the New York State Health Department in the City of Albany.

The Enterprise Corruption charge against the **LOOMIS'** and **CALVERT** alleges that the defendants, from January 1, 2005 through January 10, 2007 in the county of Albany and other counties in the State of New York did intentionally conduct or participate in the affairs of a criminal enterprise by participating in a pattern of criminal activity by committing three or more pattern acts with the knowledge of the existence of the criminal enterprise "Signature Pharmacy".

The alleged pattern of criminal acts includes:

Criminal Sale of a Controlled Substance in the 5th Degree in that the defendant on or about the 11th day of September 2006 at FedEx in the Village of Menands, NY did knowingly and unlawfully sell the controlled substances Anastrozole, Chorionic Gonadotropin, and Testosterone to another person through their affiliate MedXLife.

Criminal Sale of a Controlled Substance in the 5thDegree in that on or about the 25 th day of May, 2006, the defendants at 11 Century Hill Lane in the Town of Colonie, County of Albany, State of New York did knowingly and unlawfully sell the controlled substances Testosterone, Nandralone, and Chorionic Gonadotropin to another person through their affiliate MedXLife.

Criminal Diversion of Prescriptions Medications and Prescriptions in the 1st Degree in that between the dates of January 1 st 2005 and September 1 st 12006 at the Department of Health, in the City of Albany, County of Albany, State of New York and 280 Riverside Drive, Manhattan, New York, the defendants accepted and filled bogus prescriptions for drugs totaling in excess of $50,000 from their criminal associate CNA signed by a physician located in the state of New York (Dr. Ahmed Halima of 280 Riverside Drive, Manhattan, NY) with knowledge or reasonable

grounds to know that here was no medical need for the medicine and/or that the prescriptions were bogus.

Criminal Diversion of Prescriptions Medications and Prescriptions in the 1st Degree in that between the dates of January 1 st 2005 and September 1 st 12006 at the Department of Health, in the City of Albany, County of Albany, State of New York and 100-01 Metropolitan Avenue, Suite 2F, Queens, New York, the defendants accepted and filled bogus prescriptions for drugs totaling in excess of $50,000 from their criminal associate Advanced Therapy/Metragen purportedly signed by a physician located in the state of New York (Dr. Abdul Almarashi as signed by Anna Marie Santi, a doctor suspended from practice) with knowledge or reasonable grounds to know that here was no medical need for the medicine and/or that the prescriptions were bogus.

Criminal Sale of a Controlled Substance in the 5th Degree in that on or about the 15 th day of December, 2006, the defendants at 1 FedEx in the Village of Menands, County of Albany, State of New York did knowingly and unlawfully sell the controlled substances Testosterone, Nandralone, and Chorionic Gonadotropin to another person through their affiliate Palm Beach Rejuvenation.

Criminal Diversion of Prescriptions Medications and Prescriptions in the 2nd Degree in that on September 5 th 2006 at 112 State Street, in the City of Albany, County of Albany, State of New York, between the dates of January 1 st 2005 and September 1 st 12006 at the Department of Health, the Capitol, in the City of Albany, County of Albany, State of New York and 100-01 Metropolitan Avenue, Suite 2F, Queens, New York, the defendants accepted and filled bogus prescriptions for drugs totaling in excess of $50,000 from their criminal associate Advanced Therapy/Metragen purportedly signed by a physician located in the state of New York (Dr. Abdul Almarashi as signed by Anna Marie Santi, a doctor suspended from practice) with knowledge or reasonable grounds to know that here was no medical need for the medicine and/or that the prescriptions were bogus.

Criminal Diversion of Prescriptions Medications and Prescriptions in the 1st Degree in that during the months of April through July, 2006, at 259 N. Middletown Road in the Town of Nanuet, County of Rockland, State of New York, the defendants did commit a criminal diversion act when their criminal associates Steven and Karen Lampert, also know as the Anti-Aging Centers did submit prescriptions, some obviously forged, for a drugs totaling in excess of fifty thousand dollars pursuant to an agreement wherein these prescriptions would be filled at Signature Pharmacy, 2200 Kuhl Avenue, Orland Florida with all parties knowing or having reasonable grounds to know that there was no medical need for the medicine and /or that the prescriptions were bogus.

District Attorney Soares acknowledged that these arraignments represented a major milestone in the war against the illegal sale of prescription drugs. "For too long, drug pushers have been selling their wares through the Internet with seeming impunity. This case addresses a major loophole in the practice of the enforcement of our laws against the illegal sale and uncontrolled use of controlled substances," Soares said.

GODFREY was released on $20,000 bond. **LOOMIS** et all were each released on $30,000 bond.

The next court date for all defendants is scheduled to take place in April 2007.

Back to Press Releases

For further information contact: Heather Streeter Orth

EXHIBIT E

UPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0701171

FEBRUARY 13, 2007

JANUARY TERM

-against-

CLAIRE GODFREY,

Defendant.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIRST COUNT:

Criminal Sale of a prescription for a controlled substance in violation of Section 220.65 of the Penal Law of the State of New York, a Class C Felony, in that the defendant, on or about the 1st day of February, 2007, between the approximate hours of 12:00 PM and 2:00 PM, at Church Road, in the Town of Guilderland, County of Albany, State of New York, did knowingly and unlawfully, when being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, sell a prescription for a controlled substance, to wit: at the aforesaid date, time and place, the defendant did, when being a licensed medical practitioner, agree to sell a prescription for the controlled substances Chorionic Gonadotropin, Nandralone and Testosterone for a William Farmer, when she did not examine the patient or know of any legitimate medical need for the controlled substance.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0701171

FEBRUARY 13, 2007

JANUARY TERM

-against-

CLAIRE GODFREY,

Defendant.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SECOND COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 1st day of February, 2007, between the approximate hours of 12:00 P.M. and 2:00 P.M., at Church Road, in the Town of Guilderland, County of Albany, State of New York did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell to William Farmer, the controlled substance Chorionic Gonadotropin, by receiving and signing a prescription for a customer whom she never saw in person as a patient.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0701171

FEBRUARY 13, 2007

-against-

JANUARY TERM

CLAIRE GODFREY,

Defendant.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TENTH COUNT:

Criminal diversion of prescription medications and prescriptions in the second degree, in violation of Section 178.20 of the Penal Law of the State of New York, a Class D felony, in that the defendant, between November 15, 2006 and February 1, 2007, at the Department of Health, the Capitol, in the City of Albany, County of Albany, State of New York and 1721 Marlin Street, Bay City Texas, did commit a criminal diversion act, and the value of the benefit exchanged is in excess of three thousand dollars, to wit: at the aforesaid date, time and place the defendant did commit a criminal diversion act when she did sign or agree to sign prescriptions for drugs totaling in excess of three thousand dollars, with knowledge or reasonable grounds to know that there was no medical need for the medicine and/or that the prescriptions were bogus.

Christopher Baynes
Assistant District Attorney
Albany County

EXHIBIT F

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIFTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 29th day of April, 2005, at 325 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SEVENTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 9th day of November, 2006, at 485 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Oxandrolone, Chorionic Gonadotropin and Stanozolol to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

NINTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 25th day of May, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TENTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 6th day of April, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

ELEVENTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 1st day of February, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

JUNE 16, 2010

APRIL TERM

-against-

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FOURTEENTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 11th day of September, 2006, at FedEx, in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Stanozolol, Chorionic Gonadotropin, and Testosterone to an undercover investigator through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

JUNE 16, 2010

APRIL TERM

-against-

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TWENTY-SECOND COUNT:

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone and Chorionic Gonadotropin to James G____ of 102 Hudson Street, Scranton, Pennsylvania with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

JUNE 16, 2010

-against-

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TWENTY-THIRD COUNT:

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 9th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit:** at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Stanozolol, Chorionic Gonadotropin and Nandrolone to Mike L_____ of 1716 Wood Song Lane, Froxville, Tennessee with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

JUNE 16, 2010

APRIL TERM

-against-

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TWENTY-FOURTH COUNT:

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to Mordecai J_____ of 4400 North Federal Highway 401, Boca Raton, Florida with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

JUNE 16, 2010

APRIL TERM

-against-

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TWENTY-FIFTH COUNT:

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Oxandrolone, Chorionic Gonadotropin and Nandrolone to William W_____ of 550 Sand Creek Road, Colorado Springs, Colorado with knowledge that the prescription was not in good faith.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

FILE NO. 0616252

-against-

JUNE 16, 2010

APRIL TERM

NAOMI LOOMIS,
ROBERT "STAN" LOOMIS,
KENNETH MICHAEL LOOMIS,
KIRK CALVERT,
TONY PALLADINO,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRTY-THIRD COUNT:

Enterprise Corruption, in violation of Section 460.20(1)(a) of the Penal Law of the State of New York, a Class B Felony, in that the defendants, from January 1, 2005 through February 27, 2007 in the County of Albany and other counties in the State of New York, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise did intentionally conduct or participate in the affairs of the enterprise by participating in a pattern of criminal activity, **to wit**: at the aforesaid dates, times and places, the defendants did intentionally participate in the affairs of a criminal enterprise by committing three or more pattern acts with knowledge of the existence of the criminal enterprise "Signature Pharmacy" and its affiliates, and knowing the nature of its activities, and being employed or associated therewith. The alleged pattern criminal acts are set forth below:

Christopher Baynes
Assistant District Attorney
Albany County

Pattern Criminal Act #5

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 29th day of April, 2005, at 325 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #6

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 5th day of June, 2006, at 325 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Stanozolol to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #7

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 9th day of November, 2006, at 485 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Oxandrolone, Chorionic Gonadotropin and Stanozolol to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #8

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 12th day of July, 2005, at 325 Loudon Road, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Stanozolol to John B____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #9

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 25th day of May, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #10

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 6th day of April, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #11

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 1st day of February, 2006, at 11 Century Hill Drive, in the Town of Colonie, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone and Chorionic Gonadotropin to Dan M____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #12

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, between December 28, 2006 to December 29, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: between the aforesaid dates and at the aforementioned place, the defendant did sell the controlled substances Testosterone and Nandrolone to an undercover investigator through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #13

Conspiracy in the Fifth Degree in violation of section 105.05(1) of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, between January, 2005 and February 27, 2007, did, at various points in Albany County, while physically located at 1200 Kuhl Ave., Orlando, Florida, with intent that a felony be performed, agree with one or more persons to engage in or cause the performance of such conduct, **to wit**: at the aforesaid date, time and place the defendant did with intent that the E felony of Insurance Fraud in the Fourth degree be performed agree with one or more persons to aid in wrongfully obtaining more than $1,000, with knowledge that it was fraudulent and with intent to defraud insurance companies, agree to provide prescription claim forms enabling the customer to gain reimbursement from insurance companies and performed the overt acts of dispensing the substances, delivering such substances to Albany County by means of FedEx and filling out a universal claim form for the customer when that person did not have a valid medical need for the substance for which reimbursement was to be requested.

Pattern Criminal Act #14

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 11th day of September, 2006, at FedEx, in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Stanozolol, Chorionic Gonadotropin, and Testosterone to an undercover investigator through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #15

Conspiracy in the Fifth Degree, in violation of section 105.05(1) of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 1st day of September, 2006, did, at 112 State Street, in the City of Albany, County of Albany, State of New York, while physically located at 1200 Kuhl Ave., Orlando, Florida and other locations, with intent that a felony be performed, agree with one or more persons to engage in or cause the performance of such conduct, **to wit**: at the aforesaid date, time and place the defendant did with intent that the D felony of Criminal Sale of a Controlled Substance in the Fifth Degree be performed agree with one or more persons to aid in the sale of controlled substances through CNA wherein a co-conspirator committed the overt act of causing a prescription for Thomas D_____ for Testosterone to be faxed to 112 State Street for the signature of "Doctor Mark Phillips" when said prescriptions would not be valid.

Pattern Criminal Act #22

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit:** at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone and Chorionic Gonadotropin to James G_____ of 102 Hudson Street, Scranton, Pennsylvania with knowledge that the prescription was not in good faith.

Pattern Criminal Act #23

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 9th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit:** at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Stanozolol, Chorionic Gonadotropin and Nandrolone to Mike L_____ of 1716 Wood Song Lane, Froxville, Tennessee with knowledge that the prescription was not in good faith.

Pattern Criminal Act #24

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit:** at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to Mordecai J_____ of 4400 North Federal Highway 401, Boca Raton, Florida with knowledge that the prescription was not in good faith.

Pattern Criminal Act #25

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 14th day of November, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate Oasis employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substances Testosterone, Oxandrolone, Chorionic Gonadotropin and Nandrolone to William W_____ of 550 Sand Creek Road, Colorado Springs, Colorado with knowledge that the prescription was not in good faith.

Pattern Criminal Act #26

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 5th day of September, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate CNA employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substance Testosterone to Lyle P_____ of 134 Mariner Drive, New York, New York with knowledge that the prescription was not in good faith.

Pattern Criminal Act #27

Attempted Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 220.31 of the Penal Law, a Class E Felony, in that the defendant, on or about the 1st day of September, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York, with intent to commit the crime, engage in conduct which tended to effect the commission of such crime, did attempt to knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, through their affiliate CNA employing "Dr. Mark Phillips" as the prescribing physician at 112 State Street, the defendant did attempt to sell the controlled substance Stanozolol to William H_____ of 40 Franklin Avenue, Rockaway, New Jersey with knowledge that the prescription was not in good faith.

Pattern Criminal Act #38

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 6th day of September, 2006, at 441 Park Street, Sherill, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Brian S____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #39

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, between April 5, 2006 and April 6, 2006, at 441 Park Street, Sherrill, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: between the aforesaid dates and at the aforementioned place, the defendant did sell the controlled substances Testosterone, Nandrolone and Oxandrolone to Brian S____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #40

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 21st day of December, 2005, at 441 Park Street, Sherill, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Oxandrolone to Brian S____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #41

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 7th day of September, 2005, at 441 Park Street, Sherrill, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Oxandrolone to Brian S____ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #34

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 2nd day of May, 2005, at 25 East Main Street, Port Jervis, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone and Nandrolone to Arthur C____ through their affiliate Infinity Longevity with knowledge that the prescription was not in good faith.

Pattern Criminal Act #35

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 29th day of August, 2006, at 3402 South Broadway, Saratoga, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone and Oxandrolone to Mark D____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #36

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 21st day of November, 2006, at 1145 Wetnore Street, Utica, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Chorionic Gonadotropin to Daniel T____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #37

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, between May 26, 2006 and May 30, 2006, at 1145 Wetnore Street, Utica, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: between the aforesaid dates and at the aforementioned place, the defendant did sell the controlled substance Chorionic Gonadotropin to Daniel T____ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #46

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 12th day of January, 2007, at 14 Glenlane, Newburgh, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Oxandrolone to Walt L___ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #47

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 5th day of May, 2007, at 14 Glenlane, Newburgh, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone and Stanozolol to Walt L___ through their affiliate Palm Beach Rejuvenation with knowledge that the prescription was not in good faith.

Pattern Criminal Act #48

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 6th day of December, 2006, at 441 Park Street, Sherrill, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Nandrolone, Chorionic Gonadotropin and Oxandrolone to Brian S___ through their affiliate MedXLife with knowledge that the prescription was not in good faith.

Pattern Criminal Act #49

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 6th day of December, 2006, at 134 Mariner Drive, New York, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substance Testosterone to Lyle P___ through their affiliate CNA with knowledge that the prescription was not in good faith.

Pattern Criminal Act #54

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 21st day of July, 2005, at 100-101 Metropolitan Avenue, Queens, State of New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to Jasen B____ through their affiliate American Pharmaceutical Group with knowledge that the prescription was not in good faith.

Pattern Criminal Act #55

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 21st day of July, 2005, at 135 East 50th, Apt. G, New York, New York (prescription signed at 100-101 Metropolitan Avenue, Queens, New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to Jeremy D____ through their affiliate American Pharmaceutical Group with knowledge that the prescription was not in good faith.

Pattern Criminal Act #56

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 20th day of July, 2005, at 100-101 Metropolitan Avenue, Suite 2F, Queens, New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone, Chorionic Gonadotropin and Nandrolone to Michael V____ (located at 2555 Double Tree Place, Orlando, Florida) through their affiliate American Pharmaceutical Group with knowledge that the prescription was not in good faith.

Pattern Criminal Act #57

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 18th day of July, 2005, at 100-101 Metropolitan Avenue, Suite 2F. Queens, New York, did knowingly and unlawfully sell a controlled substance, **to wit**: at the aforesaid date and place, the defendant did sell the controlled substances Testosterone and Chorionic Gonadotropin to Felix B____ (located at 218 West Palmer Street, Florida) through their affiliate American Pharmaceutical Group with knowledge that the prescription was not in good faith.

EXHIBIT G

In The News

All news

Signature Pharmacy Inc. Pleads Guilty

Fighting Crime, Building Hope.

Albany County District Attorney David Soares

Press Release

February 8, 2013

Signature Pharmacy Inc. Pleads Guilty

ALBANY, NY – District Attorney P. David Soares announced today that Signature Pharmacy Inc. pleaded guilty to a Superior Court Information charging them with (1) count of Criminal Sale of a Controlled Substance in the 5th Degree, a Class D Felony, this morning before Judge Herrick in Albany County Court. Signature Pharmacy Inc. was required to pay a total of $100,000 in fines and civil forfeiture.

This plea is in full satisfaction of an indictment that had named ROBERT "STAN" LOOMIS, 61, and NAOMI LOOMIS, 39; both of Windermere, Florida; his brother and former Signature pharmacy operator KENNETH MICHAEL LOOMIS, 64, of Winter Garden, Florida; and former Signature pharmacy business managers K RK CALVERT, 43, of Windermere, Florida, and TONY PALLAD NO, 36, of Ocoee, Florida, as defendants.

This plea concludes a co-operative multi-jurisdictional law enforcement effort between the Albany County District Attorney's Office, New York State Health Department, Orlando Bureau of Investigation, and the Florida Attorney General. These agencies worked together aiming to disrupt a nationwide distribution ring of anabolic steroids, Human Growth Hormone and other controlled substances.

"The resolution of this case marks the conclusion of a long term investigation and prosecution that held individuals, and now a corporation, accountable for the illegal sale of steroids in Albany County. I remain committed to closing the pipeline of illegal drugs that flows in to our community, and will continue to hold perpetrators accountable when they choose to supply and deliver illegal narcotics into Albany County."

To date, 5 clinics have been completely shut down and multiple defendants have pleaded guilty. In addition to their guilty pleas, the people involved in this criminal narcotics distribution ring have forfeited more than $1 million dollars in civil forfeiture to the people of Albany County.

For more information please contact Cecilia Logue.

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EXHIBIT H(1)

COUNTY COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JANUARY 25, 2007

OCTOBER TERM

-against-

DR. ROBERT CARLSON,
GLEN STEFANOS,
GEORGE STEFANOS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRD COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 15th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Chorionic Gonadotropin to another person through their criminal associate Palm Beach Rejuvenation.

Christopher Baynes
Assistant District Attorney
Albany County

COUNTY COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JANUARY 25, 2007

OCTOBER TERM

-against-

DR. ROBERT CARLSON,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SIXTH COUNT:

Criminal Sale of a prescription for a controlled substance, in violation of Section 220.65 of the Penal Law of the State of New York, a Class C Felony, in that the defendant, on or about the 15th day of December, 2006, at the Department of Health, the Capitol, in the City of Albany, County of Albany, State of New York and 900 East Indiantown Road, Suite 308, Jupiter, Florida, did knowingly and unlawfully, when being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, sell a prescription for a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell a prescription for the controlled substance, Testosterone, Nandralone and Chorionic Gonadotropin to another person by receiving and signing a prescription customers whom he never saw in person as a patient.

Christopher Baynes
Assistant District Attorney
Albany County

EXHIBIT H(2)

DA # 86-07

ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

ORDER

–against–

Indictment # 33-1310

GLEN STEPHANOS

Defendant

The within Indictment # 33-1310 having been filed on January 25, 2007 charging the defendant with Criminal Sale of a Controlled Substance in the Fifth Degree (4 counts); Criminal Diversion of Prescription Medications and Prescriptions in the First Degree (1 count); and Criminal Sale of a Prescription for a Controlled Substance (2 counts); and

Superseding Indictments (Indictment # 7-1517A and Indictment # 8-1517B) having been filed with this Court on July 17, 2007 charging the defendant in Superseding Indictment # 7-1517A with Attempted Criminal Sale of a Prescription for a Controlled Substance (8 counts) and Conspiracy in the Fourth Degree (1 count); and charging the defendant in Superseding Indictment # 8-1517B with the crimes of Criminal Sale of a Controlled Substance in the Fifth Degree (9 counts); Conspiracy in the Fifth Degree (7 counts); Criminal Diversion of Prescription Medications and Prescriptions in the First Degree (1 count); Conspiracy in the Fourth Degree (1 count); and Enterprise Corruption (1 count); and the defendant Glen Stephanos having been arraigned upon Superseding Indictment # 7-1517A and Superseding Indictment # 8-1517B on July 20, 2007; and the People of the State of New York by Assistant District Attorney Christopher Baynes, Esq. having moved pursuant to the provisions of Criminal Procedure Law § 200.80 that all seven (7) counts of Indictment # 33-1310 be dismissed because the Superseding Indictment # 7-1517A and Superseding Indictment # 8-1517B charge the defendant Glen Stephanos with those same offenses as charged in the first Indictment; to wit: Indictment # 33-1310; and

The defendant Glen Stephanos having been arraigned upon the Superseding Indictment # 7-1517A and Superseding Indictment # 8-1517B; and having not opposed the People's motion to dismiss all of the counts of Indictment # 33-1310; it is hereby

ORDERED, pursuant to the provisions of Criminal Procedure Law § 200.80, that the First through Seventh Counts of Indictment # 33-1310 are hereby dismissed; therefore, Indictment # 33-1310 against defendant Glen Stephanos is hereby dismissed.

Dated: Albany, New York
July 20, 2007
Signed: August 6th, 2007

DAN LAMONT, Acting J.S.C.

cc: Pamela Clickner, Deputy Chief Clerk, Albany Supreme/County C
Christopher Baynes, Esq., Asst. Dist. Atty.
James Long, Esq., defendant's legal counsel

EXHIBIT H(3)

DA 86 07

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

SUPERCEDING INDICTMENT

8-1517B

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIRST COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Testosterone to another person through their criminal associate Signature Pharmacy.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRD COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Chorionic Gonadotropin to another person through their criminal associate Signature Pharmacy.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FOURTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, during the month of November 2006 and December, 2006, did, at 112 State Street, Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to an undercover investigator and performed the overt act of delivering such substances to Albany County by means of FedEx.

03/27/08

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SIXTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 14th day of August, 2006, did, at FedEx, in the Village of Menands, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to an undercover investigator and performed the overt act of delivering such substances to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

NINTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 26th day of July, 2006, did, at 1034 Central Ave., Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Ben W____ and performed the overt act of delivering such substances to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

ELEVENTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 12th day of December, 2006, did, at 1034 Central Ave., Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Ben W____ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

TWELFTH COUNT:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 12th day of December, 2006, at 1034 Central Ave., in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance chorionic gonadotropin to one Ben W___ through their affiliate Signature Pharmacy.

Christopher Baynes
Assistant District Attorney
Albany County

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRTEENTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 29th day of August, 2006, did, at Crowne Plaza, State and Lodge Streets, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Tommy D___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIFTEENTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 5th day of June, 2006, did, at 325 Loudon Road, Loudonville, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a John B___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SEVENTEENTH COUNT:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 9th day of November, 2006, did, at 485 Loudon Road, Loudonville, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a John B___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

NINTEENTH COUNT:

Enterprise Corruption, in violation of Section 460.20(1)(a) of the Penal Law of the State of New York, a Class B Felony, in that the defendants, from January 1, 2005 through February 26, 2007 in the County of Albany and elsewhere, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise did intentionally conduct or participate in the affairs of the enterprise by participating in a pattern of criminal activity, *to wit*: at the aforesaid dates, times and places, the defendants did intentionally participate in the affairs of a criminal enterprise by committing three or more pattern acts with knowledge of the existence of the criminal enterprise "Palm Beach Rejuvenation", and knowing the nature of its activities, and being employed or associated therewith. The structure of said criminal enterprise consisted of: Glenn Stephanos and Joe Raich as owners of the company; Dr. Robert Carlson as the physician to sign the prescriptions/drug orders; George Stephanos as the marketing director; Ryan Dumas as the "medical director;" and various others employed as salesman. The criminal enterprise illegally sold steroids and related substances to customers throughout the United States, specifically in New York State. The alleged pattern criminal acts are set forth below:

Pattern Act 1:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Testosterone to another person through their criminal associate Signature Pharmacy.

Pattern Act #2:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Nandralone to another person through their criminal associate Signature Pharmacy.

Pattern Act #3:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at FedEx in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Chorionic Gonadotropin to another person through their criminal associate Signature Pharmacy.

Pattern Act #4:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, during the month of December, 2006, did, at 112 State Street, Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to an undercover investigator and performed the overt act of delivering such substances to Albany County by means of FedEx.

Pattern Act #5:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 14th day of August, 2006, at FedEx, in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance Nandralone Decanoate to one Nathan K___ through their affiliate Signature Pharmacy.

Pattern Act #6:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 14th day of August, 2006, did, at FedEx, in the Village of Menands, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to an undercover investigator and performed the overt act of delivering such substances to Albany County by means of FedEx.

Pattern Act #7:

Criminal diversion of prescription medications and prescriptions in the first degree, in violation of Section 178.25 of the Penal Law of the State of New York, a Class C felony, in that the defendant, between the dates of January 1st, 2005 and February 27th, 2007, at the Department of Health, the Capitol, in the City of Albany, County of Albany, State of New York and 900 East Indiantown Road, Suite 308, Jupiter, Florida, did commit a criminal diversion act, and the value of the benefit exchanged is in excess of fifty thousand dollars, to wit: at the aforesaid date, time and place, the defendants did commit a criminal diversion act by selling controlled substances to New York State customers for drugs totaling in excess of $50,000 in contravention of the Rules and Regulations of the Department of Health, with knowledge or reasonable grounds to know that there was no medical need for the medicine and/or that the prescriptions were bogus.

Pattern Act #8:

Conspiracy in the Fourth Degree in violation of section 105.10 of the Penal Law of the State of New York, a class E felony, in that the defendant, between the dates of January 1, 2005 and February 27, 2007, did at various points in the State of New York (including Albany County) in contravention of the rules and regulations of the New York State Department of Health, located at the Capitol, Albany, New York, while physically

located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, did with intent that a class B or class C felony be performed he or she agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the Class C felony of Criminal Diversion of prescription medications and prescriptions in the First Degree (a Class C felony) be performed agree with one or more persons to divert prescription medications to New York customers and performed the overt act of delivering such substances to Albany County by means of FedEx.

Pattern Act #9:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 26th day of July, 2006, did, at 1034 Central Ave., Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Ben W____ and performed the overt act of delivering such substances to Albany County by means of FedEx.

Pattern Act #10:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 26th day of July, 2006, at 1034 Central Ave, in the City of Albany, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substances stanozolol and testosterone to one Ben W___ through their affiliate Signature Pharmacy.

Pattern Act #11:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 12th day of December, 2006, did, at 1034 Central Ave., Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Ben W____ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Pattern Act #12:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 12th day of December, 2006, at 1034 Central Ave., in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substance chorionic gonadotropin to one Ben W___ through their affiliate Signature Pharmacy.

Pattern Act #13:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 29th day of August, 2006, did, at Crowne Plaza, State and Lodge Streets, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, , with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a Tommy D___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Pattern Act #14:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 29th day of August, 2006, at FedEx, in the Village of Menands, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substances testosterone cypionate and nandralone to one Tommy D___ through their affiliate Signature Pharmacy.

Pattern Act #15:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 5th day of June, 2006, did, at 325 Loudon Road, Loudonville, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in

the Fifth degree be performed agree with one or more persons to sell a controlled substance to a John B___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Pattern Act #16:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 5th day of June, 2006, at 325 Loudon Road, Loudonville, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substances testosterone, stanozolol and nandralone to one John B___ through their affiliate Signature Pharmacy.

Pattern Act #17:

Conspiracy in the Fifth Degree in violation of section 105.05 of the Penal Law of the State of New York, a class A misdemeanor, in that the defendant, on or about the 9th day of November, 2006, did, at 485 Loudon Road, Loudonville, Albany, County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a felony be performed he agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the felony of Criminal Sale of a Controlled Substance in the Fifth degree be performed agree with one or more persons to sell a controlled substance to a John B___ and performed the overt act of delivering such substance to Albany County by means of FedEx.

Pattern Act #18:

Criminal Sale of a Controlled Substance in the Fifth Degree, in violation of Section 220.31 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 9th day of November, 2006, at 485 Loudon Road, Loudonville, County of Albany, State of New York, did knowingly and unlawfully sell a controlled substance, to wit: at the aforesaid date, time and place, the defendant did sell the controlled substances testosterone cypionate and stanozolol to one John B___ through their affiliate Signature Pharmacy.

Christopher Baynes
Assistant District Attorney
Albany County

EXHIBIT H(4)

SUPREME COURT - COUNTY OF ALBANY FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRD COUNT:

Attempted Criminal Sale of a prescription for a controlled substance, in violation of Section 110/220.65 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 12th day of December, 2006, at 1034 Central Ave., Albany, County of Albany, State of New York and 900 East Indiantown Road, Suite 308, Jupiter, Florida, did knowingly and unlawfully, when being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, attempt to sell a prescription for a controlled substance other than in good faith in the course of his professional practice, to wit: at the aforesaid date, time and place, the defendant did, when being an out-of-state licensed physician, sell a prescription for chorionic gonadptropin to a Ben W___ by issuing a prescription for consideration for a customer without a legitimate doctor/patient relationship and/or medical need.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY

FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK

JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

EIGHTH COUNT:

01/30/07

Attempted Criminal Sale of a prescription for a controlled substance, in violation of Section 110/220.65 of the Penal Law of the State of New York, a Class D Felony, in that the defendant, on or about the 28th day of December, 2006, at 112 State Street, in the City of Albany, County of Albany, State of New York and 900 East Indiantown Road, Suite 308, Jupiter, Florida, did knowingly and unlawfully, when being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, sell a prescription for a controlled substance other than in good faith in the course of his professional practice, to wit: at the aforesaid date, time and place, the defendant did, when being an out-of-state licensed physician, sell a prescription for the controlled substances Testosterone, Nandralone and Chorionic Gonadotropin to an undercover investigator by issuing a prescription for consideration for a customer without a legitimate doctor/patient relationship and/or medical need.

Christopher Baynes
Assistant District Attorney
Albany County

SUPREME COURT - COUNTY OF ALBANY FILE NO. 0616252

THE PEOPLE OF THE STATE OF NEW YORK JULY 17, 2007

JULY TERM

-against-

DR. ROBERT CARLSON,
GLEN STEPHANOS,
JOE RAICH,
GEORGE STEPHANOS,
RYAN DUMAS,
a.k.a. PALM BEACH REJUVENATION,
Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

NINTH COUNT:

Conspiracy in the Fourth Degree in violation of section 105.10 of the Penal Law of the State of New York, a class E felony, in that the defendant, between the dates of January 1, 2005 and February 27, 2007, did, at various points in the County of Albany, New York, while physically located at 900 East Indiantown Road, Suite 308, Jupiter, Florida, with intent that a class B or class C felony be performed he or she agreed with one or more persons to engage in or cause the performance of such conduct, to wit: at the aforesaid date, time and place the defendant did with intent that the Class C felony of Criminal Sale of a prescription for a controlled substance (a Class C felony) be performed agree with one or more persons to sell prescriptions to Albany customers and performed the overt act of delivering such substances to Albany County by means of FedEx.

Christopher Baynes
Assistant District Attorney
Albany County

EXHIBIT I(1)

...ICATE OF CONVICTION
...60.60 (1)

Albany County Clerk
Document Number 10277152
Rcvd 10/01/2008 3:39:39 PM

...ATE OF NEW YORK
...UNTY COURT COUNTY OF ALBANY

Index # DA 86-07

The People of the State of New York

against

IND/SCI # 8-1517B
Date of Arrest: 01-25-07

GLEN STEPHANOS
a/k/a PALM BEACH REJUVENATION
DOB 04-17-56 Defendant
NYSID # 2549271P

This is to certify that a Judgment of Conviction has been entered in this ...ourt before HON. DAN LAMONT, a Judge-Justice of this Court on March 27, 2008, ...onvicting the above-named defendant of the offense(s) of:

. PL-110-220.31 -EF--Y-001 5-ATT CRIM SALE CONTRL SUBST-

ND sentence was imposed as follows:

. On September 30, 2008 - Sentence Code: P
5 YRS. PROB.

...andatory Surcharge of $270.00 is payable by December 30, 2008.

...LEA IN FULL SATISFACTION OF ANY AND ALL CHARGES RELATING TO PALM BEACH ...EJUVENATION PENDING IN ALBANY COUNTY, 9/30/08 PROBATION TRANSFERRED TO FLORIDA, ...50 DNA DATABANK FEE PAYABLE BY 12/30/08

ADDITIONAL CHARGES FOR THIS CASE CONTINUED ON NEXT PAGE*

...ated at:

...lbany, New York

...ctober 1, 2008

Charles E. Diamond
Chief Clerk

Key to Sentence Codes

C-Custody IC-Indeterminate Custody DC-Determinate Custody
...D-Conditional Discharge UD-Unconditional Discharge OP-Order of Protection
R-Restitution F-Fine TS-Time Served P-Probation CH-House Arrest
PRP-Post Release Parole CS-Community Service

EXHIBIT I(2)

CERTIFICATE OF CONVICTION
C.P.L. 60.60 (1)

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

Index # DA 86-07

The People of the State of New York

against

IND/SCI # 8-1517B
Date of Arrest: 12-22-06

GEORGE STEPHANOS
a/k/a PALM BEACH REJUVENATION
DOB 08-16-47 Defendant
NYSID # 6274096H

This is to certify that a Judgment of Conviction has been entered in this Court before HON. DAN LAMONT, a Judge-Justice of this Court on March 27, 2008, convicting the above-named defendant of the offense(s) of:

2. PL-105.05 -AM--N-001 5-CONSPIRACY -5TH

AND sentence was imposed as follows:

2. On March 27, 2008 - Sentence Code: CD,F
Custody Time: 1Y
$1000.00 Fine payable by April 10, 2008

Mandatory Surcharge of $160.00 is payable by April 10, 2008.

PLEA IN FULL SATISFACTION OF ANY AND ALL CHARGES RELATING TO PALM BEACH REJUVENATION PENDING IN ALBANY COUNTY / CONDITIONAL DISCHARGE TO BE SIGNED ON 04/10/08

~~***ADDITIONAL CHARGES FOR THIS CASE CONTINUED ON NEXT PAGE***~~

Dated at:

Albany, New York

March 28, 2008

Charles E. Diamond
Chief Clerk

Key to Sentence Codes

C-Custody IC-Indeterminate Custody DC-Determinate Custody
CD-Conditional Discharge UD-Unconditional Discharge OP-Order of Protection

EXHIBIT I(3)

CERTIFICATE OF CONVICTION
C.P.L. 60.60 (1)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

The People of the State of New York

against

JOE RAICH
a/k/a PALM BEACH REJUVENATION
DOB 12-01-62 Defendant
NYSID # 2627269N

Index # DA 86-07

IND/SCI # 7-1517A
Date of Arrest: 07-20-07

This is to certify that a Judgment of Conviction has been entered in thi Court before HON. THOMAS A. BRESLIN, a Justice of this Court on January 28 2014, convicting the above-named defendant of the offense(s) of:

2. PL-110-105.10 -AM--Y-001 4-ATT CONSPIRACY -4TH

AND sentence was imposed as follows:

2. On January 28, 2014 - Sentence Code: UD

Mandatory Surcharge of $270.00 is payable by March 31, 2014

PLEA IN FULL SATISFACTION OF THIS AND IND #8-1517B/$50 DNA DATABANK FEE PAYABL BY 3-31-14

Dated at:

Albany, New York

January 31, 2014

Charles E. Diamond
Chief Clerk

Key to Sentence Codes

C-Custody IC-Indeterminate Custody DC-Determinate Custody
CD-Conditional Discharge UD-Unconditional Discharge OP-Order of Protection
R-Restitution F-Fine TS-Time Served P-Probation CH-House Arrest
PRP-Post Release Parole CS-Community Service IID-Ignition Interlock Device

EXHIBIT I(4)

CERTIFICATE OF CONVICTION
C.P.L. 60.60 (1)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

The People of the State of New York

against

ROBERT CARLSON

DOB 01-26-57
NYSID # 2549349Y

Defendant

Index # DA 86-07

IND/SCI # 07-277
Date of Arrest: 07-27-07

This is to certify that a Judgment of Conviction has been entered in this Court before HON. THOMAS A. BRESLIN, a Justice of this Court on January 28, 2014, convicting the above-named defendant of the offense(s) of:

1. PL-110-176.15 -AM--Y-001 4-ATT INSURANCE FRAUD 4TH>$10

AND sentence was imposed as follows:

1. On January 28, 2014 - Sentence Code: UD

Mandatory Surcharge of $270.00 is payable by March 31, 2014

PLEA IN FULL SATISFACTION OF THIS AND IND 7-1517A & 8-1517B/$50 DNA DATABANK FEE

Dated at:

Albany, New York

January 31, 2014

Charles E. Diamond
Chief Clerk

Key to Sentence Codes

C-Custody IC-Indeterminate Custody DC-Determinate Custody
CD-Conditional Discharge UD-Unconditional Discharge OP-Order of Protection
R-Restitution F-Fine TS-Time Served P-Probation CH-House Arrest
PRP-Post Release Parole CS-Community Service IID-Ignition Interlock Device

STATE OF NEW YORK
SUPREME COURT

FILE NO. D056505
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ROBERT CARLSON,

Defendant.

SUPERIOR COURT
INFORMATION
SCI No. 07-277

I, **Christopher P. Baynes**, Assistant District Attorney of Albany County, New York, accuse the above named defendant of the commission of:

FIRST COUNT

Insurance Fraud in the Fourth Degree in violation of Section 176.20 of the Penal Law of the State of New York, a Class E Felony, in that the defendant, on or about November 21, 2006, at 11Corporate Woods Blvd., Albany, County of Albany, State of New York, did commit a fraudulent insurance act and thereby wrongfully take, obtain or withhold, or attempt to wrongfully take, obtain or withhold, property with a property in excess of three thousand dollars ($1,000), to wit: at the aforesaid date, time and place, the defendant did knowingly and with intent to defraud provide materially false information in the form of a bogus prescription which was then used to claim reimbursement from Blue Cross/Blue Shield for a prescription in excess of $2,000.

Dated: Albany, New York
August 21, 2007

Christopher P. Baynes
Assistant District Attorney

EXHIBIT I(5)

CERTIFICATE OF CONVICTION
C.P.L. 60.60 (1)

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

Index # DA 86-07

The People of the State of New York

against

IND/SCI # 8-1517B
Date of Arrest: 07-30-07

RYAN DUMAS
a/k/a PALM BEACH REJUVENATION
DOB 02-02-76 Defendant
NYSID # 2632712L

This is to certify that a Judgment of Conviction has been entered in this Court before HON. DAN LAMONT, a Judge-Justice of this Court on March 27, 2008, convicting the above-named defendant of the offense(s) of:

2. PL-105.05 -AM--N-001 5-CONSPIRACY -5TH

AND sentence was imposed as follows:

2. On October 14, 2008 - Sentence Code: CD,F
$1000.00 Fine payable by November 14, 2008

Mandatory Surcharge of $160.00 is payable by November 14, 2008.

PLEA IN FULL SATISFACTION OF ANY AND ALL POSSIBLE CHARGES RELATING TO PALM BEACH REJUVENATION PENDING IN ALBANY COUNTY,

ADDITIONAL CHARGES FOR THIS CASE CONTINUED ON NEXT PAGE

Charles E. Diamond
Chief Clerk

Dated at:

Albany, New York

October 15, 2008

Key to Sentence Codes

C-Custody IC-Indeterminate Custody DC-Determinate Custody
CD-Conditional Discharge UD-Unconditional Discharge OP-Order of Protection
R-Restitution F-Fine TS-Time Served P-Probation CH-House Arrest
PRP-Post Release Parole CS-Community Service

THE COURT: And are you satisfied with the services of your attorney in this case?

THE DEFENDANT: Very.

THE COURT: I guess at arraignment you were represented by somebody from Mr. Long's office, but you virtually had independent counsel in the form of Mr. Schechter ever since then?

THE DEFENDANT: That's correct.

THE COURT: They just stood in for the arraignment?

THE DEFENDANT: Yes.

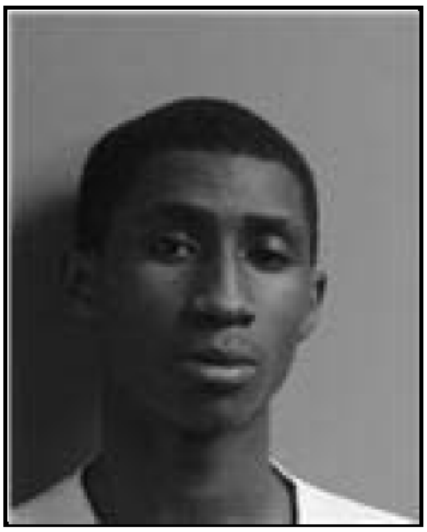
THE COURT: I shouldn't take your plea of guilty unless you're in fact guilty. So reminding you that you're under oath, by pleading guilty do you admit that during the months of November 2006 and December 2006 that at 112 State Street in Albany, city of Albany, Albany County, New York and while you were physically located at 900 East Indian Town Road, Suite 308 in Jupiter, Florida that with the intent that the felony of criminal sale of a controlled substance in the fifth degree, a Class D felony, be performed that you agreed with one or more other persons to engage in the performance of criminal sale of a controlled substance in the fifth degree?

EXHIBIT J

Syracuse man arrested on Thruway for marijuana and controlled substance possession

NEW YORK STATE POLICE
Major Evelyn P. Mallard
Troop T Commander

PRESS RELEASE



(DeWitt, NY)

On March 21, 2014, State Police pulled over a black Chevrolet Impala for an expired inspection sticker on I-90 in the Town of DeWitt, Onondaga County. When the Trooper approached the vehicle and interviewed the driver, he detected an odor of burnt marijuana coming from inside the Impala.

The driver, **Demmeco M. Scott**, 22, of Syracuse, NY was arrested when Troopers located marijuana and 50mg of Tramadol Hydrochloride, a Schedule IV controlled substance, on his person.

Scott was transported to SP Syracuse where he was processed and charged with the following:

- Criminal Possession of a Controlled Substance 7th, Class A Misdemeanor
- Unlawful Possession of Marijuana, Violation
- Possession of a Controlled Substance Outside Original Container, Public Health Law Violation
- Vehicle and Traffic Law Infraction

Scott was issued an Appearance Ticket directing him to return to the Town of DeWitt Court on Tuesday April 1, 2014 at 6:00 p.m.

CERTIFICATE OF DISPOSITION

STATE OF NEW YORK
ONONDAGA COUNTY

DEWITT TOWN COURT
CRIMINAL PART

PEOPLE OF THE STATE OF NEW YORK

VS.

DEMMECO M. SCOTT; Defendant

CASE NO: 14030342

Date of Birth: 02/29/1992
Date of Arrest: 03/21/2014
Disposition Date: / /

JC501 no: 66528227N
NYSID no: 12617474K

Section Charged	Section Disposed	Ticket No & Description	Disposition	Fine	Civil-Fee	Surchg
PL 220.03	PL 220.03	604994 CPCS-7	Dism/Satisfaction	0.00	0.00	0.00
PL 221.05	PL 221.05	605221 POSS MARIHUANA	Fine/Fee	0.00	0.00	125.00
PHL 3345	PHL 3345	CONT SUB VIO	Dism/Satisfaction	0.00	0.00	0.00

Upon a proper request for an official statement of disposition, I certify that the above named defendant having appeared before this court was charged as shown above. Each of the charges was disposed of as indicated.

Dated: The 10th day of November 2014

Justice/Court Clerk

NOTE: A copy of the request will be filed with this certificate in the case records.

CAUTION: This information must not be divulged if the case is sealed or where the defendant has been adjudicated a youthful offender.

Copies: ___ Court, ___ Defendant, ___ Agency, ___ DA

EXHIBIT K

Essex County Drug Sweep

NEW YORK STATE POLICE
Major Richard Smith
Troop B Commander

PRESS RELEASE

On March 21, 2014, the New York State Police took part in a multi-agency round-up of suspects involved in the sale of drugs in Essex County, which resulted in numerous suspects being arrested. As a result of ongoing narcotics investigations by law enforcement agencies throughout Essex County and Essex County District Attorney Kristy Sprague, 18 suspects were apprehended during early morning raids.

Law enforcement officers from the New York State Police, Essex County Sheriff's Office, Ticonderoga Police Department, Lake Placid Police Department, Saranac Lake Police Department and Moriah Police Department commenced this detail at 6 a.m. as part of a coordinated effort to identify, investigate and apprehend drug dealers operating in and around Essex County. The detail resulted in the arrest of the following defendants:

BRANDON M. MARTINEZ, 26 years old of Moriah, New York
Criminal Sale of a Controlled Substance 3RD (2 Cts.)-Crack Cocaine
Criminal Possession of a Controlled Substance 3RD (2 Cts.)-Crack Cocaine

DAMIAN H. SPRAGUE, 20 years old of Moriah, New York, currently incarcerated in Essex County Jail
Criminal Sale of a Controlled Substance 4th-Suboxone
Criminal Possession of a Controlled Substance 5th -Suboxone
Criminal Sale of a Controlled Substance 5th -Methamphetamine
Criminal Possession of a Controlled Substance 5th -Methamphetamine

GREGG J. KOLYSKO, 55 years old of Ticonderoga, New York
Criminal Sale of a Controlled Substance 5th (2 Cts.)-Tramadol
Criminal Possession of a Controlled Substance 5TH (2 Cts.)-Tramadol

ANDREW R. TRUDEAU, 23 years old of Ticonderoga, New York, currently incarcerated in Essex County Jail
Criminal Sale of a Controlled Substance 4th -Suboxone
Criminal Possession of a Controlled Substance 5th -Suboxone

LAURIE B. CAMPNEY, 25 years old of Ticonderoga, New York, currently incarcerated in Essex County Jail
Criminal Sale of a Controlled Substance 4th (2 Cts.)-Suboxone
Criminal Possession of a Controlled Substance 5TH (2 Cts.)-Suboxone

ANTONE P. TERIELE, 23 years old of Ticonderoga, New York

Criminal Sale of a Controlled Substance 3rd -Cocaine
Criminal Poss. of a Controlled Substance 3rd -Cocaine
Criminal Sale of a Controlled Substance 5th (2 Cts.)-Clonazepam
Criminal Possession of a Controlled Substance 5TH (2 Cts.)-Clonazepam

CALEB G. LABATORE, 28 years old of Ticonderoga, New York
Criminal Sale of a Controlled Substance 4th (2 Cts.)-Subutex
Criminal Possession of a Controlled Substance 5TH (2 Cts.)-Subutex

JOHN C. CARR, 29 years old of Ticonderoga, New York
Criminal Sale of a Controlled Substance 3rd (2 Cts.)-Cocaine
Criminal Poss. of a Controlled Substance 3rd (2 Cts.)-Cocaine

CHRISTINE M. SHELDON, 41 years old of Westport, New York
Criminal Sale of a Controlled Substance 3rd - Hydrocodone
Criminal Possession of a Controlled Substance 3rd - Hydrocodone

JOSEPH L. GREGORY, 58 years old of Port Henry, New York
Criminal Sale of a Controlled Substance 3rd - Hydrocodone
Criminal Possession of a Controlled Substance 3rd - Hydrocodone

KATHLEEN A. SAVAGE, 47 years old of Port Henry, New York
Criminal Sale of a Controlled Substance 3rd -Oxycodone
Criminal Poss. of a Controlled Substance 3rd - Oxycodone

TIMOTHY K. EMMONS, 50 years old of Port Henry, New York
Criminal Sale of a Controlled Substance 3rd (2 Cts.)-Nucynta Tapentadol
Criminal Poss. of a Controlled Substance 3rd (2 Cts.)-Nucynta Tapentadol

JUSTIN S. HANDY, 30 years old of Ticonderoga, New York
Criminal Sale of a Controlled Substance 4th -Suboxone
Criminal Possession of a Controlled Substance 5th -Suboxone

MICHAEL J. ROSSELLI, 29 years old of Witherbee, New York
Criminal Sale of a Controlled Substance 3rd - Heroin
Criminal Poss. of a Controlled Substance 3rd- Heroin

JAIMIE L. RUSSELL, 29 years old ofHudson Falls, New York
Criminal Sale of a Controlled Substance 4th (2 Cts.)-Suboxone
Criminal Possession of a Controlled Substance 5th (2 Cts.)-Suboxone

MICHAEL J. GONYEA, 42 years old of Saranac Lake, New York
Criminal Sale of a Controlled Substance 3rd-Cocaine
Criminal Possession of a Controlled Substance 3rd -Cocaine

THOMAS R. SAEHRIG, 24 years old ofAuburn, New York
Criminal Sale of Marijuana 3rd (2 cts)

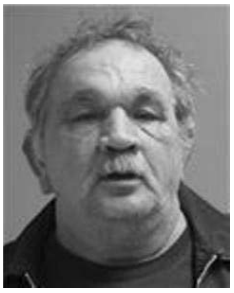
MARCUS RANCOUR, 42 years old of Moriah, New York
Criminal Sale of a Controlled Substance 4th -Suboxone
Criminal Possession of a Controlled Substance 5th –Suboxone

The suspects were committed to the Essex County Jail pending arraignment in Essex County Court before the Honorable Richard B. Meyer


Campney


Carr


Emmons


Gregory


Handy


Kolysko


Labatore


Martinez


Gonyea


Rancour


Roselli


Russell


Saehrig


Savage


Sheldon


Sprague

State of New York

County Court, County of Essex

THE PEOPLE OF THE STATE OF NEW YORK

against

~~GREG~~ J. KOLYSKO,
Gregggg
DEFENDANT.
3/27/14 Amended on the record

INDICTMENT

CASE NO. CR14054

DOB: 12/24/58

COUNT ONE

The Grand Jury of the County of Essex by this indictment accuse the defendant, Greg J. Kolysko, of the crime of Criminal Sale of a Controlled Substance in the Fifth Degree, a class D felony, in violation of § 220.31 of the Penal Law of the State of New York, committed as follows:

> That on or about the 3rd day of August, 2013, in the Town of Ticonderoga, Essex County, New York, the defendant, Greg J. Kolysko, did knowingly and unlawfully sell a controlled substance consisting of Tramadol pills.

COUNT TWO

The Grand Jury of the County of Essex by this indictment accuse the defendant, Greg J. Kolysko, of the crime of Criminal Possession of a Controlled Substance in the Fifth Degree, a class D felony, in violation of § 220.06 (1) of the Penal Law of the State of New York, committed as follows:

> That on or about the 3rd day of August, 2013, in the Town of Ticonderoga, Essex County, New York, the defendant, Greg J. Kolysko, did knowingly and unlawfully sell a controlled substance consisting of Tramadol pills, with the intent to sell them.

COUNT THREE

The Grand Jury of the County of Essex by this indictment accuse the defendant, Greg J. Kolysko, of the crime of Criminal Sale of a Controlled Substance in the Fifth Degree, a class D felony, in violation of § 220.31 of the Penal Law of the State of New York, committed as follows:

> That on or about the 29th day of August, 2013, in the Town of Ticonderoga, Essex County, New York, the defendant, Greg J. Kolysko, did knowingly and unlawfully sell a controlled substance consisting of Tramadol pills.

COUNT FOUR

The Grand Jury of the County of Essex by this indictment accuse the defendant, Greg J. Kolysko, of the crime of Criminal Possession of a Controlled Substance in the Fifth Degree, a class D felony, in violation of § 220.06 (1) of the Penal Law of the State of New York, committed as follows:

> That on or about the 29th day of August, 2013, in the Town of Ticonderoga, Essex County, New York, the defendant, Greg J. Kolysko, did knowingly and unlawfully sell a controlled substance consisting of Tramadol pills, with the intent to sell them.

David Thomas-Train

Foreperson, Essex County Grand Jury

Hon. Kristy L. Sprague
District Attorney, County of Essex

DATE OF FILING: 3/18 **, 2014**

Essex County Supreme & County Court
State of New York, Unified Court System
Essex County Government Center
7559 Court Street, P.O. Box 217
Elizabethtown, New York 12932
Tel: (518) 873-3371

TERRY A. STODDARD
Chief Clerk

NICOLE L. CASSAVAUGH
Deputy Chief Clerk

PRESIDING: Hon. Richard B. Meyer

****

THE PEOPLE OF THE STATE OF NEW YORK

VS.

CERTIFICATE OF CONVICTION

Gregg J. Kolysko DOB: 12-24-1958

Docket #: CR14-054

Defendant

****

Crime Date: 8-3-2013
Arrest Date: 3-21-2014

THIS IS TO CERTIFY THAT THE ABOVE NAMED DEFENDANT PLED GUILTY ON **November 13, 2014** AND WAS SENTENCED ON **January 8, 2015** TO:

CHARGE: Attempted Criminal Possession of a Controlled Substance 5th (PL-110-220.06-01) an "E" Felony

DISPOSITION: Five (5) Years Probation, License Suspended Six (6) Months, Restitution $40.00

Dated at Elizabethtown, New York
This **11th** Day of **February, 2015**

Nicole L. Cassavaugh
Deputy Chief Clerk of the Supreme & County Courts

EXHIBIT L

30 y.o. vet assistant is arrested following a larceny investigation.

NEW YORK STATE POLICE
Major Steven James
Troop G Commander

PRESS RELEASE

(Glen, NY - April 24, 2013)

Jennifer M. Townes, age 30 of Middleburgh NY was arrested by State Police in Fonda for stealing a quantity of tramadol pills from the Amsterdam Animal Hospital in Amsterdam, NY where she is employed as a veterinarians assistant. Townes admitted to the Troopers that she had taken the pills and brought them home. A search of her home revealed that she was in possession of a small amount of marijuana, a switchblade knife, and the stolen tramadol pills. Townes was charged for Criminal Possession of Stolen Property 5th, Criminal Possession of a Weapon 4th, UPM, Criminal Possession of a Controlled Substance outside the original container, and Criminal Possession of a Controlled Substance 7th. She was issued an appearance ticket for the town of Amsterdam Ct., for 05/07/13, at 6:00 pm and also issued an appearance ticket for the town of Middleburgh Ct., for 05/08/13 at 7:00 pm.

STATE OF NEW YORK

TOWN COURT

COUNTY OF SCHOHARIE

TOWN of MIDDLEBURGH

Defendant: NA
(Relationship to alleged victim)

Alleged Victim: NA
(Relationship to defendant)

THE PEOPLE OF THE STATE OF NEW YORK
– VS.–

Defendant(s)	Date of Birth
JENNIFER M TOWNES	12/11/1982

ACCUSATION

BE IT KNOWN THAT, by this INFORMATION, DARIN A JONES, as the Complainant herein, STATIONED at SP FONDA, accuses the above mentioned Defendant(s), with having COMMITTED the MISDEMEANOR of CRIM POSS CONTRL SUBST-7TH in violation of Section 220.03, Subdivision ____ of the PENAL Law of the State of New York.

That on or about 04/12/2013 at about 06:00 PM

in the TOWN of MIDDLEBURGH, County of SCHOHARIE, the defendant(s)

did intentionally, knowingly and unlawfully commit the misdemeanor of CRIMINAL POSSESSION CONTROLLED SUBSTANCE- 7TH DEGREE. A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance.Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor.

FACTS

To Wit; on the aforementioned date and time the defendant, Jennifer M. Townes did knowingly, unlawfully and intentionally possess a controlled substance at her residence of 334 Main Street (apt4b), in the Village of Middleburgh, County of Schoharie, State of New York. Defendant did possess 16 Tramadol Pills in her purse, at her residence during an investigation conducted by the New York State Police. All contrary to the above stated allegations.

The above allegations of fact are made by the Complainant herein on direct knowledge and/or upon information and belief, with the sources of Complainant's information and the grounds for belief being the facts contained in the attached SUPPORTING DEPOSITION(s) of: *JENNIFER TOWNES, YVONNE TORO AND AN INVESTIGATION CONDUCTED BY TROOPER DA JONES*

WHEREAS, an Appearance Ticket was issued to the said Defendant, directing him to appear before this court at *07:00 PM* on *MAY 08, 2013*

NOTICE

In a written instrument, any person who knowingly makes a false statement which such person does not believe to be true has committed a crime under the laws of the State of New York punishable as a Class A Misdemeanor. (PL 210.45)

Affirmed under penalty of perjury

this 24 TH day of APRIL, 2013

--OR--

Subscribes and sworn to before me this _____ day of _____, 20 _____

COMPLAINANT -

CATHOLIC CHARITIES of Schoharie County

Community Service Restitution Program Referral Form

Defendant: Jennifer M. Towns NYSID#: 12255081R D.O.B. 12/11/82

Mailing Address: P.O. Box 666 City: middleburgh NY Zip: 12122

Contact Number: 518.706.0953 Date of arrest: 4/24/13 (MUST PROVIDE)

- The above defendant is sentenced to perform 50 hours of community service as restitution for their convicted offense(s). By order of this court, these service hours must be completed by the following deadline: November 30, 2013
- This service will be administered and supervised by the *Community Service Program Coordinator* at Catholic Charities of Schoharie County, 489 West Main St., Cobleskill, NY
- The client will be contacted in writing by the Coordinator to set up the mandatory intake appointment. Failure to respond may result in a violation of said conditional discharge.
- Other court requests / suggestions: _____

For state reporting purposes please provide the following information. Indicate N/A if not applicable.

Law Section & Name for top charge at arraignment	Maximum Sentence at top charge	Law Section & Name at disposition	Maximum state prison time saved (disposition)	Maximum local jail time saved (disposition)	Maximum probation time saved (disposition)
crim Poss ctrl subst 7th (PL 220.03	1 yr	DISCON (PL 240.20)	N/A	1 yr	3 yrs

SO ORDERED.

Jennifer Towns
Defendant's Signature

6/19/13
Date

Magistrate's Signature

Court

*Signing this form gives Catholic Charities permission to contact my Attorney Thomas F. Gleason at Phone: 702.5040 Address: PO Box 987, middleburgh NY 12122

NOTE: Call Catholic Charities Community Service Restitution Program at the number listed below within 7 days to set up an intake appointment.

489 West Main Street • Cobleskill, New York • 12043-4641

Phone: 518-234-3581 • Fax: 518-234-8423 • E-mail: services@catholiccharitiessc.org

An Agency of Catholic Charities of the Diocese of Albany

6/20/13

[redacted]

PROOF OF SERVICE

On October 7, 2015, I, Amelia Marritz, served a copy of the following:

Motion for Leave to File as *Amicus Curiae* by the Immigrant Defense Project, with Proposed Order

Brief of *Amicus Curiae* Immigrant Defense Project, with Exhibit List and Exhibits

on counsel for Respondent, Conor Gleason, by first class mail at the following address:

The Bronx Defenders
360 E. 161st Street
Bronx, NY 10451

and on the Office of the Chief Counsel, U.S. Immigration and Customs Enforcement,

Department of Homeland Security at the following address:

26 Federal Plaza, Room 1130, New York, NY 10278

by UPS.

Amelia Marritz

(Signature)

10/7/15

(Date)