SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 5, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4269 The People of the State of New York, Respondent, Ind. 3845/12

-against-

Moussa Doumbia,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Renee A. White, J.), rendered April 2, 2013, as amended September 11, 2013, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of two years, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

The existing, unexpanded record is sufficient to establish that defendant received ineffective assistance of counsel. Defendant was deprived of effective assistance when his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation. Since an aggravated

felony results in mandatory deportation (*see People v Corporan*, 135 AD3d 485, 486 [1st Dept 2016] [a guilty plea to an aggravated felony "triggered mandatory deportation under federal law"], counsel is under a duty to provide clear advice as to that consequence. It is thus ineffective assistance to advise a noncitizen of a mere risk or possibility that he "could be deported" (*see e.g. United States v Bonilla*, 637 F3d 980, 984 [9th Cir 2011] ["(a) criminal defendant who faces almost certain deportation (for committing an aggravated felony) is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty"]; *Encarnacion v State*, 295 Ga 660, 663 [Ga 2014] ["where, as here, the law is clear that deportation is mandatory (for the aggravated felony of burglary) ... an attorney has a duty to accurately advise his client of that fact" and it is not sufficient that the client is merely advised deportation might occur or was a risk of conviction]).

The dissent misses the point. Contrary to the dissent's assertion, defendant's "unique circumstances" do not change the fact that defendant was subject to mandatory deportation. Lawyers have an affirmative duty to adequately inform their clients about the serious effects of criminal convictions to the extent, and with as much specificity, as possible. Once a defense attorney

determines that a client is not a U.S. citizen, the attorney is required to implement the Sixth Amendment protection to which noncitizen defendants are entitled. As *Padilla v Kentucky* (559 US 356 [2010]) clarified, if "the deportation consequence is truly clear" from reading the Immigration and Nationality Act, "the duty to give correct advice is equally clear" (559 US at 369).

In this case, the dissent cannot, and does not, argue that the immigration consequences of defendant's guilty plea to an aggravated felony were truly clear. Instead, the dissent excuses defense counsel's nebulous advice because "it is unclear from the record whether counsel's strategy included pursuing youthful offender status to avoid removal." The dissent also excuses defense counsel's vague advice because defense counsel may have been pursuing other strategy for avoiding the virtual certainty of deportation. In essence, what the dissent proposes is that since there may be avenues available for avoiding even certain deportations, defense counsel only has a duty to inform a noncitizen that there is a risk or possibility that he or she may be deported. Such a standard would not only seriously undermine the Sixth Amendment protection to which noncitizen defendants are entitled, but would also conflict with the concept of a truly informed plea agreement (*see Padilla*, at 373-374 ["In sum, we

have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"]; *see generally Strickland v Washington*, 466 US 668, 664 [1984] [holding that the right to counsel is protected by the Sixth Amendment, making a claim of ineffective assistance a constitutional claim]).

On remand, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea *(see People v Peque*, 22 NY3d 168, 199-200 [2016]; *see also People v Corporan*, 135 AD3d 485; *People v Chacko*, 99 AD3d 527 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]). Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and hold the appeal in abeyance for that purpose.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

In order to properly review defendant's ineffective assistance claim, a CPL 440.10 motion is needed to establish additional information regarding defense counsel's advice and strategy as to the immigration consequences of defendant's plea agreement. Accordingly, I respectfully dissent.

Defendant's claim that his attorney rendered ineffective assistance by providing inaccurate or misleading advice about the immigration consequences of his plea is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Peque*, 22 NY3d 168, 202 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]). It was incumbent on defendant to substantiate his claims about his attorney's advice and strategy by filing a CPL 440.10 motion, and the majority fails to address this critical failure.

In any event, the brief interchange between the attorney and the plea court about whether defendant "could be deported" does not necessarily establish ineffective assistance under *Padilla v Kentucky* (559 US 356 [2010]), and the present record does not reveal counsel's reasons for proceeding with the plea after he had spoken with and was awaiting a response from an immigration attorney regarding the legal ramifications thereof. Although the

crime for which defendant has been convicted has been held to be an "aggravated felony" triggering removal under 8 USC § 1227(a)(2)(A)(iii) (*see Brown v Ashcroft*, 360 F3d 346, 353-354 [2d Cir 2004]; *see also United States v Hanson*, 2017 WL 1040403, *2, 2017 US Dist LEXIS 39167, *4-7 [ED NY 2017]), defense counsel's advice that defendant "could be deported" does not appear to be incorrect. In particular, while counsel may have believed defendant was deportable, it is unclear from the record whether counsel's strategy included pursuing youthful offender status to avoid removal. Nor does the record reveal whether counsel, in conjunction with the immigration attorney, was considering pursuing or awaiting possible relief under the Convention Against Torture (CAT), given defendant's family background of persecution in his native Ivory Coast (*see De la Rosa v Holder*, 598 F3d 103, 109 [2d Cir 2010] ["Article 3 of the CAT prohibits the deportation of any person to a country where it is more likely than not that '[the individual] would be in danger of being subjected to torture'"]; *Garcia v Attorney General of the United States*, 271 Fed Appx 160, 160 [3d Cir 2008] [noting that an aggravated felon could potentially be eligible for relief from removal under CAT]). Counsel may have also been considering that, given his family's history of persecution and the agreed upon sentence of less than five years, defendant could also apply

for withholding of removal under 8 USC § 1231(b)(3)(A) if his life or freedom can be jeopardized based on his "race, religion, nationality, membership in a particular social group, or political opinion" (*see Bromfield v Mukasey*, 543 F3d 1071 [9th Cir 2008]).

The majority ignores the uncertain nature of immigration proceedings and sets forth an impossible standard for counsel given the circumstances in this case. The record establishes that the court and counsel advised defendant that he could be deported should he plead guilty to these crimes. A more fully fleshed out record is needed to determine what else counsel specifically advised the defendant off-the-record and what the immigration attorney may have advised him before he pleaded guilty. However, since counsel potentially knew that the CAT, youthful offender treatment, or 8 USC § 1231(b)(3)(A) could help defendant avoid deportation, on this record it cannot be expected that counsel would advise defendant it was certain that he would be deported. Indeed, to the contrary, it was not a virtual certainty that defendant would be deported since his age and family circumstances presented the unique aforementioned avenues of relief from deportation. This reality is made clear by the fact that although defendant was released from prison in 2014 he remains in the United States, having been released from ICE

detention and placed on postrelease supervision.

Thus, while the crime to which defendant pleaded guilty may have made him presumptively deportable, the ultimate immigration consequences were not truly clear because of defendant's unique circumstances. Contrary to the majority's claim, requiring a CPL 440.10 motion to determine what specific advice counsel gave to defendant or counsel's strategy would not undermine the Sixth Amendment protections to which defendant is entitled.

Thus, given that counsel's advice that defendant "could be deported" is not exactly wrong, and the lack of clarity on the record as to counsel's reasons for proceeding with the plea especially after consultation with an immigration attorney regarding the ramifications of the plea, defendant should be required to raise his ineffective assistance claim in a CPL 440.10 motion to develop a proper record.

Defendant misplaces reliance on *People v Corporan* (135 AD3d 485 [1st Dept 2016]) in support of his claim that he should be allowed to raise his ineffective assistance claim on direct appeal. In *Corporan*, the court failed to warn defendant of the potential for deportation during the initial plea proceeding and it was plain from the record that later, the defense counsel misadvised the defendant regarding the deportation consequences of his plea. Specifically, although the defendant pleaded guilty

to drug offenses that triggered mandatory deportation, counsel "undermined the court's warning and understated the potential for deportation" (135 AD3d at 485), circumstances that do not exist on this record. Moreover, the potential reliefs to avoid removal, such as youthful offender status or the CAT were not available to the defendant in *Corporan*.

Since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Moreover, assuming that counsel's advice to defendant was only that he "could be deported," which was the same advice that the court itself provided, defendant has not shown that this constituted ineffective assistance. Accordingly, I would affirm defendant's conviction.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 5, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4364 In re 322 West 47th Street HDFC, Index 570908/15
Petitioner-Respondent,

-against-

Margie Loo,
Respondent-Appellant,

"John Doe,"
Respondent.

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The Law Offices of Edward Alper, New York (Edward Alper of counsel), for appellant.

Travis Law Firm PLLC, New York (Christopher R. Travis of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about February 25, 2016, which affirmed a final judgment of the Civil Court, New York County (Arlene H. Hahn, J.), entered on or about July 30, 2015, which, after a nonjury trial, awarded possession of respondent tenant's apartment to petitioner landlord in this summary holdover proceeding, unanimously affirmed, without costs.

We decline to reach in the interest of justice tenant's unpreserved argument, raised for the first time in reply papers, that she was not served with a pretermination notice that is required where, as here, the catch-all "good cause" ground is cited by the landlord as the basis to terminate her tenancy (*see*

generally 24 CFR 247.3). Were we to entertain the argument, we would find it unavailing as the purpose of such notice is to provide tenant with advance notice of his or her alleged conduct that would be grounds for termination pursuant to 24 CFR 247.3(a)(4). Here, tenant admitted that she had been fully aware that her nonpurchase of apartment 5R's shares upon the building's conversion to a subsidized low income cooperative housing project, pursuant to an eviction offering plan, could subject her to eviction. Moreover, tenant's failure to raise the notice issue constituted a waiver of such claim and does not implicate the court's subject matter jurisdiction (*see generally 433 W. Assoc. v Murdock*, 276 AD2d 360 [1st Dept 2000]).

Tenant's claim of an alleged inability to purchase the shares to her apartment upon the building's conversion is also unpreserved, and we decline to reach it in the interest of justice.

Tenant's argument that landlord's issuance to her of successive rent-stabilized leases following the building's cooperative conversion constituted a waiver of landlord's rights under the eviction offering plan, or otherwise afforded a basis to estop landlord from evicting pursuant to the terms of the eviction offering plan, is unavailing. A nonprofit cooperative corporation organized under article XI of the Private Housing

Finance Law, as here, is statutorily exempt from rent stabilization (*see 546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 11 [1st Dept 2007]; *Matter of Georgetown Unsold Shares, LLC v Ledet*, 130 AD3d 99, 103-106 [2d Dept 2015], *appeal dismissed* 26 NY3d 1141 [2016]). As stated by this Court in *Smalls*, "That the parties [associated with a Housing Development Fund Corporation (HDFC)] may have treated the premises as subject to rent stabilization does not defeat the statutory exclusion from regulation. 'Such an exemption is not subject to waiver or equitable estoppel'" (43 AD3d at 11, quoting *512 E. 11th St. HDFC v Grimmet*, 181 AD2d 488, 489 [1st Dept 1992], *appeal dismissed* 80 NY2d 892 [1992]). Here, notwithstanding the passage of 20 years since the instant HDFC's conversion, its statutory existence and management terms as to tenant's apartment remained unchanged, and may not be waived.

We find no basis to estop landlord from now evicting tenant simply because it could have done so nearly 20 years ago, pursuant to the terms of the eviction offering plan. Landlord's challenged actions were not entirely inconsistent with the terms of its eviction offering plan. As previously noted, landlord is exempt from the rent stabilization laws. Further, the parties themselves cannot simply agree to opt into or out of rent stabilization (*see generally Smalls*, 43 AD3d at 14). Tenant's

rights to a rent-stabilized lease expired, when her first postconversion lease ended (General Business Law § 352-eeee[2][d][ii]).

Finally, tenant's argument that the traverse hearing court erred in sustaining service of the termination notice upon her because "reasonable application" to effect such service was not established (RPAPL 735[1]), is unavailing. The credited evidence at the traverse hearing established that the process server attempted to serve tenant at her residential building both during reasonable business hours and nonbusiness hours, on two separate days that she was admittedly likely to be at home; however, since the process server could get no closer to tenant's apartment than the building's front door, after repeatedly ringing the doorbell to her apartment, he affixed the notice of termination conspicuously to the building's front door and subsequently complied with the attendant mailing requirement (*see generally*

F.I. duPont, Glore Forgan & Co. v Chen, 41 NY2d 794 [1977]; *cf. Eight Assoc. v Hynes*, 102 AD2d 746 [1st Dept 1984], *affd* 65 NY2d 739 [1985]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 5, 2017

CLERK

Friedman, J.P., Renwick, Webber, Gesmer, Kern, JJ.

4372 James Daly, Index 158991/14
Plaintiff-Respondent,

-against-

9 East 36th LLC,
Defendant-Appellant.

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Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about September 13, 2016, which denied defendant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendant is the owner of a building located at 9 East 36th Street. On June 19, 2013, plaintiff, a tenant in the building, sustained personal injuries from a fire in his rent-stabilized studio apartment. The fire was described in the Fire Incident Report of the fire department's Bureau of Fire Investigation as originating "in [an] area of electrical wiring"; the report also noted the presence of "multiple extension cords plugged in to one outlet with [a] power strip."

The apartment building was built in the 1930s. Plaintiff's apartment, which he shared with his wife, had three electrical

outlets in the main living space, with additional ones in the hall, the bathroom, and the kitchen, and there is no evidence that any interior electrical upgrade had ever been done. Before the fire, on several occasions, plaintiff had requested of defendant, through the building superintendent, that more outlets be installed, and he had shown the superintendent that the existing receptacles were in disrepair. Plaintiff wanted to alleviate the insufficient number and placement of outlets, which required him to use extension cords for many of his appliances. He had told the superintendent that he "didn't feel comfortable with using the extension cords," and did not use them for long periods of time because they would get hot. Plaintiff also complained that once or twice a week the fuses in the apartment would blow and shut down the electric current in his apartment; until the building's circuitry was upgraded in the basement, the blown fuses in his apartment sometimes shut down the current in the whole building.

The superintendent testified that he had had several conversations with plaintiff over time about updating the electrical system in the apartment and that defendant had repeatedly refused to make the repairs due to their cost. The superintendent testified that plaintiff's use of the air conditioner in particular had been the cause of many of the fuse

blowouts in the past. He said that he had advised plaintiff not to use too many appliances at one time and to use power strips because they would decrease the number of blown fuses.

Defendant had upgraded the electrical outlets and power in at least one other apartment in the building. Plaintiff contends that this is proof that defendant was aware that plaintiff's apartment's electrical outlets and wiring had become inadequate for current appliances, requiring cobbled-together solutions such as the use of extension cords and decisions about which appliances to use when. Plaintiff argues that defendant's decision not to upgrade the electricity in his apartment, despite the apartment's history and his requests over the years, was a breach of its duty to keep the building safe and functional for all tenants.

Under these circumstances, the court properly denied defendant's motion for summary judgment. There is a triable issue of fact as to whether defendant had actual or constructive notice that a dangerous condition existed in plaintiff's apartment that it failed to remedy (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713 [1st Dept 2005]). Specifically, plaintiff's expert raised factual issues as to whether the building's 1930s electrical system constituted a dangerous condition and whether defendant was on notice of same. Although

the expert, a professional engineer, did not personally inspect the premises, he based his opinion that the fire was caused by overloaded electrical wires on specific factual evidence in the record and his knowledge of consumers' changed needs since the 1930s because of the invention and development of power-hungry personal appliances that simply require more electrical power (*see Concord Vil. Owners, Inc. v Trinity Communications Corp.*, 61 AD3d 410 [1st Dept 2009]).

The dissent concludes that defendant cannot be found negligent because plaintiff's expert did not say that the wiring failed to meet applicable code standards. However, "[a]n owner of property has a nondelegable duty to maintain its property in a reasonably safe condition, taking into account the foreseeability of injury to others" (*Basso v Miller*, 40 NY2d 233, 241 [1976]). A multiple dwelling "shall be kept in good repair," and "[the] owner shall be responsible for compliance" with that obligation (Multiple Dwelling Law § 78[1]). An owner must "exercise reasonable care in maintaining the property, *including the wiring*" (*Onetti v Gatsby Condominium*, 111 AD3d 496, 497 [1st Dept 2013] [emphasis added]). The question before us, therefore, is whether defendant's decision not to upgrade the electricity kept the apartment reasonably safe.

The dissent contends that plaintiff should adapt his

electrical usage to the building's limitations rather than seek any kind of upgrade. Of course, he and his wife have adapted to the apartment's limitations by refraining from running certain appliances simultaneously, using a surge protector for plaintiff's computer and plugging cords into it, and using URL-certified extension cords to arrange the items in their living quarters. In addition to the air conditioner, plaintiff testified that he and his wife had a television, a microwave, a computer, at least three or four standing lights, and two or three fans. Plaintiff testified that in the area where the fire occurred, there were two extension cords in use, primarily for the television, the VCR and a lamp. On the night of the fire, a Vornado fan was also plugged in.

We are unwilling to conclude as a matter of law that plaintiff's lifestyle and electrical consumption are above and beyond the reasonable needs of any modern tenant. It will therefore be for the jury to decide if defendant had a duty that it breached to keep the apartment building, and plaintiff's apartment, reasonably safe.

All concur except Friedman, J.P. and Webber, J. who dissent in a memorandum by Webber, J. as follows:

WEBBER, J. (dissenting)

I would reverse and grant defendant's motion for summary judgment. In moving for summary judgment, defendant submitted admissible evidence, in the form of a fire marshal's report, establishing prima facie that the subject apartment fire originated from an extension cord or the multiple appliances plaintiff had plugged into it, and not from the building's internal wiring. In opposition, plaintiff failed to rebut this evidence, nor did he offer any evidence that the building's wiring failed to meet code requirements or was otherwise defective.

As noted, defendant, plaintiff's landlord, moved for summary judgment on the ground that plaintiff's negligent use of extension cords to operate numerous appliances simultaneously, as opposed to any alleged defect in the apartment's electrical wiring, was the sole cause of the fire. In support of its motion, defendant submitted the fire marshal's report, which concluded that the fire had originated in the apartment's living room, in an "area of electrical wiring" located 3 feet from the west wall and 12 feet from the south wall. The report further indicated that the fire marshal observed "multiple extension cords plugged in to one outlet with power strip present," and noted a "2x4 area of charring to wooden floor boards with a

plastic residue in area of charring." The report also noted that other than the charring to the specific portion of the wooden floor boards, there was no damage to the furniture lining the wall of the apartment closest to the charred floor boards and no damage to the wall itself.

In opposition, plaintiff argued that the fire marshal's report was ambiguous as to which electrical wiring caused the fire, asserting that the report "could be referring to the wire of the fan or some other appliance and not an extension cord." Plaintiff also submitted an affidavit by an expert who opined that defendant should have upgraded the building's wiring. Conspicuously absent from the expert's report, however, is any claim that the building's wiring failed to meet applicable code standards or was otherwise defective. Indeed, the expert did not even inspect the apartment.

The majority ignores the fire marshal's report and therefore does not address its conclusion that the fire originated in an area where the only present electrical wiring was plaintiff's extension and appliance cords or his observations of multiple extension cords plugged into one outlet, along with a "plastic residue in [the] area of charring."

The majority also ignores plaintiff's deposition testimony conceding that he knew using extension cords to operate numerous

appliances simultaneously was dangerous, and that the extension cords would regularly become hot within an hour of use, necessitating that they be disconnected. The majority also errs to the extent it bases its result on the affidavit by plaintiff's expert, who (contrary to the majority's assertion) identified no "specific factual evidence in the record" to support the view that the fire originated from the building's wiring. Again, the expert - who never inspected the scene - simply opined that the building's electrical wiring should have been upgraded to support plaintiff's desired usage, without identifying any evidence that the building's wiring failed to meet applicable legal standards or was otherwise defective.

The record establishes that the fire resulted from plaintiff's use of more power, through plugging multiple appliances into an extension cord, than the building's wiring could support. The premise of plaintiff's action is that, rather than moderating his use of power to conform to the building's electrical capacity (or at least using different outlets for different appliances), plaintiff was entitled to have defendant upgrade the building's wiring to accommodate his demand. However, in the absence of any evidence that the building's wiring did not meet code standards or was otherwise defective, no basis exists for imposing liability on defendant for declining to

upgrade the building's wiring to suit plaintiff's desire for electrical usage.

What the majority refers to as plaintiff's "lifestyle and electrical consumption" must still be in accord with the building's electrical capacity. Since nothing in the record supports the view that defendant was obligated to upgrade the wiring, it follows that the fire must be attributed to plaintiff's use of more power than the building's wiring could support - conduct in which plaintiff persisted in spite of his admitted realization of the danger it presented - and that defendant is entitled to summary judgment (*see Robertson v New York City Hous. Auth.*, 58 AD3d 535 [1st Dept 2009]; *Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359-360 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]).

I therefore respectfully dissent.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 5, 2017

CLERK

Tom, J.P., Sweeny, Richter, Kapnick, Webber, JJ.

4104 The People of the State of New York, Ind. 2609/12
Respondent,

-against-

Luis Bonilla,
Defendant-Appellant.

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Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered November 22, 2013, reversed, on the law, and the matter remanded for a new trial.

Opinion by Kapnick, J. All concur.

Order filed.