Immigration Consequences Of Criminal Cases

Speakers:
Benita Jain, Esq., ***Managing Attorney***
Defending Immigrants Partnership
Immigrant Defense Project

Dawn Seibert, Esq., ***Staff Attorney***
Defending Immigrants Partnership
Immigrant Defense Project

Sponsored by the:
Oneida County Bar Association
In Cooperation with:
New York State Defenders Association, Inc.
Oneida County Public Defender, Criminal Division
Oneida County Supplemental Assigned Counsel Program

Chair: Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

Saturday, April 11, 2015
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive
Utica, New York
IT Building 225

MCLE Credits: 2 Skills and 1 Ethics

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program and the New York State Defenders Association, Inc. as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel. A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full-day course provides continuing legal education credits in skills, professional practice and ethics.

Again this year, under a grant from the New York State Office of Indigent Legal Services, the Oneida County Supplemental Assigned Counsel Program is sponsoring an Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There will be two, full day sessions this spring – one on criminal trial practice and one on family law. All programs will be held on Fridays at Mohawk Valley Community College, IT Building, Room 225 from 9 a.m. – 4 p.m. The fee for ***each session*** is nominal. To register, contact Kimberly Flint at the Oneida County Supplemental Assigned Counsel Office, 800 Park Avenue, Utica, NY 13501, Telephone: 315-793-6042, Fax 315-797-3047, email kflint@ocgov.net.

Friday, April 24th: "Criminal Trial Practice" with Prof. Todd Berger, Syracuse Law; Prof. John Blume, Cornell Law; Ray Kelly and Rob Wells

Friday, May 29th: "Family Court: Article 101"

The Oneida County Bar Association also offers a number of Saturday morning 3-hour Criminal Track programs focusing on various aspects of criminal defense. Past seminars included computer forensics, trial practice, appeals from local criminal court, immigration consequences of criminal convictions, alternative sentencing, motion practice, competency and the affirmative defense of not responsible by reason of mental disease or defect. These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A $25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. All programs are posted on the Oneida County Public Defender, Criminal Division's website at *http://www.ocgov.net/oneida/pdcriminal/training* and the Oneida County Bar Association's website at *www.oneidacountybar.org*. Also, the Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

The Oneida County Bar Association offers a wide range of CLE programs throughout the year. A full calendar of programs is available at their website. The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. Our special thanks to Mohawk Valley Community College who continue to offer their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

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Saturday, March 7, 2015
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive, ACC Room 116
Utica, New York

8:30 a.m. – 9:00 a.m.	**REGISTRATION**
9:00 a.m. – 10:30 a.m.	**Overview and Basics of Immigration Consequences** **• Defense counsel's duties when representing immigrant clients** **• How you can meet these duties** **• 2014 Executive Action deferred action programs**
10:30 a.m. – 10:50 a.m.	**BREAK**
10:50 a.m. – 11:10 a.m.	**Deportation Pipeline and New Federal Enforcement Priorities**
11:10 a.m. – 11:50 a.m.	**Court Notifications About Immigration Consequences** **• The Risks of a Court Notification to an Immigrant Client** **• How You Can Protect Your Immigrant Clients from These Risks**
11:50 a.m. – 12 p.m.	**Question & Answer Session**

MCLE Credits: 2 Skills and 1 Ethics

Speakers

Benita Jain, Esq., ***Managing Attorney, Defending Immigrants Partnership, Immigrant Defense Project***
28 W. 39th St., Suite 501, New York, NY 10018
Hotline: (212) 725-6422 | info@immigrantdefenseproject.org

Benita Jain, formerly Co-Director of the Immigrant Defense Project (IDP), now coordinates IDP's work with the Defending Immigrants Partnership, a national collaboration that trains public defenders on immigration consequences of criminal convictions and strategies to avoid deportation triggers for their immigrant clients. Benita has assisted defender offices in several states set up and improve their office-wide immigration advisal programs, and has trained criminal defense and immigration attorneys around the country. She has written several *pro se* guides for immigrants fighting deportation and is an original co-author of the "Deportation 101″ curriculum. She graduated from NYU School of Law and joined IDP on a Soros Justice Fellowship in 2003.

Dawn Seibert, Esq., ***Staff Attorney, Defending Immigrants Partnership, Immigrant Defense Project***

Dawn Seibert works with the Immigrant Defense Project's (IDP) litigation team to protect the US Supreme Court *Padilla* decision by monitoring and supporting post-conviction relief litigation to remedy uninformed pleas. She consults with practitioners on trial strategy in post-conviction relief cases, provides model post-conviction relief materials and sample briefs, and files amicus briefs in impact cases regarding the scope and retroactivity of *Padilla*. Dawn also provides training to criminal defense attorneys on the effective representation of non-citizen clients. Judicial education is another focus of her work, addressing the role of the judiciary in ensuring that non-citizens receive the accurate immigration advice mandated by *Padilla*. Originally from Buffalo, Dawn is a graduate of Cornell University and Vermont Law School. Prior to joining IDP, she worked in the Vermont Office of the Defender General where she represented indigent clients at trial and appellate levels in post-conviction relief and "conditions of confinement" cases.

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Benita Jain
Immigrant Defense Project
28 West 39th Street, Suite 501
New York, NY 10018
www.immigrantdefenseproject.org

Getting the Best Deal for Your Immigrant Client

Who We Are

IDP's mission is to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system. We do this by educating immigrants, their criminal defense attorneys, and other advocates and by working to transform unjust deportation laws.

The Era of Mass Deportation

"Felons, not families. Criminals, not children… We'll prioritize."
– President Obama, 11/20/2014

- Obama has deported more than 2 million people, more than any other president in U.S. history.
- People deported in 2014 = 316,000
- Immigration detention monthly bed quota = 34,000
- 1996 laws target immigrants with criminal justice contact
- Today's enforcement focus is on so-called "criminal aliens"

How do criminal justice contacts impact immigrants?

- Deportation (sometimes mandatory)
- Immigration detention (sometimes mandatory)
- Bars to hardship waivers, asylum or other forms of relief from deportation
- Bars to lawful status
- Bars to U.S. citizenship
- Discretionary impact on applications for immigration benefits
- Bars to lawful return to U.S. after deportation
- Aggressive criminal prosecution and enhanced sentencing for unlawful return after deportation

What dispositions trigger deportation?

- Many, but not all, felonies
- Many, but not all, misdemeanors
- Some violations
- Many convictions without any jail sentence
- Many first time offenses
- Many diversion agreements and vacated pleas

~~What~~ Who Are We Talking About?

How many immigrants live in Oneida County?

7.4%

of Oneida residents were born outside of the U.S.

In Utica: **18%**

What is the top country of birth for Utica immigrants?

A. Mexico
B. Bosnia-Herzogovina
C. Cambodia
D. Puerto Rico

AGENDA

TOPIC 1: *Padilla* Duties & Basics of Immigration Consequences

TOPIC 2: Deportation Pipeline & Enforcement Priorities

TOPIC 3: Judicial Notifications of Immigration Consequences

1

Padilla Duties and Basics of Immigration Consequences

A Criminal Defense Attorney's Duties

Padilla Duties

1) Interview competently – ask whether the client is a noncitizen (i.e. "where were you born?")
2) Provide accurate, complete advice regarding immigration consequences
3) Negotiate to avoid immigration consequences
4) Do #1-3 for clients who lack lawful status

Sixth Amendment norms continually evolve…

"As post-*Padilla* litigation continues, and as criminal defense counsel become more familiar with the intricacies of immigration law, it can be anticipated that more sophisticated advice and representation in this area will become the rule."

Sources of Sixth Amendment Duties

- Case law (*Padilla* and progeny)
- ABA Standards for Criminal Justice: Defense Function (Feb. 2015)
- ILS standards
  - Appellate Standards and Best Practices (Jan. 2015)
  - Non-Citizen Representation Best Practices (anticipated)
- Resources (Immigration Assistance Centers)
- Practice Guides/Trainings

First Duty – To Inquire

Interview competently:
Find out whether
every client is a noncitizen

"Where were you born?"

How do we know??

New ABA Standard!

- Special Attention to Immigration Status & Consequences (4-5.5)

  (a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege.

New ILS Standards!

- Appellate Standards and Best Practices

  Standard XVII – Representing Non-U.S. Citizen Clients

  Counsel must promptly determine the client's immigration status.

Appellate Case Law

1st & 2nd Depts.

Must ascertain in every case whether client is a non-citizen

- *People v. Picca*, 97 A.D.3d 170 (2d Dep't 2012) (absurd to expect defendant to volunteer info, leads to result that only defendants who already understand relevance will receive *Padilla* advice)
- *People v. Chacko*, 99 A.D.3d 527 (1st Dep't 2012) (echoes *Picca*)

3rd Dept.

Duty to inquire when defense counsel has reason to believe client is non-citizen

- *People v. Carty*, 96 A.D.3d 1093 (3rd Dep't 2012)(no duty to inquire unless defense counsel knew/should have known that citizenship was at issue)
- *People v. Rajpaul*, 100 A.D.3d 1183 (3rd Dep't 2012) (duty to inquire where info in record points to non-citizen status)

Who wins??

Picca/Chacko vs. Carty

And the winner is……Picca/Chacko!

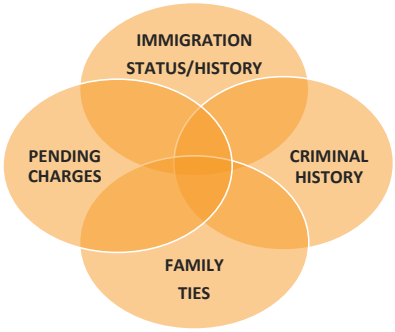
Carty does not describe the duty to inquire in 2015.

- ✓Limited to facts – strong implication that defendant lied about immigration status
- ✓Relies on outdated 1999 ABA standards
- ✓Decided before 2015 ILS standards
- ✓*Carty* Court did not have benefit of *Picca*/*Chacko*
- ✓Analyzed the *Peque* claim incorrectly

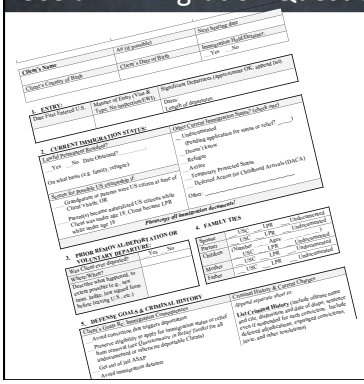
Meeting Your Duty to Inquire: Client Interviews

FreeDigitalPhotos.net, David Castillo Dominici

Get The Facts!



Use an Immigration Questionnaire



* Sample in materials

Complete, accurate information is crucial!

- Is there a family member, immigration attorney or other person who can help?
- Copy immigration documents (e.g., green card, work permit, immigration court papers)

Building Trust With Clients

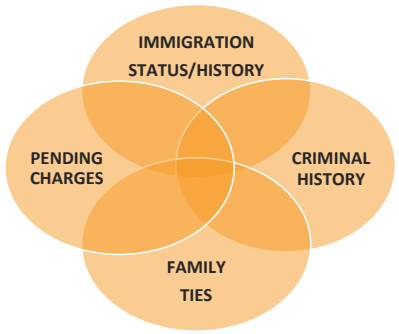
"Why are you asking me about immigration?"

Building Trust With Clients

- I am not from immigration authorities (DHS, ICE). I work for you.
- I need this information to help you avoid getting deported based on this charge, if possible.
- To do this, I need all of your immigration information and documents. I will keep it all confidential unless you give me permission to share it.

Building Trust With Clients

- Thinking about immigration later is usually too late. If staying here is important to you, we need to think about it now, before you plead guilty.
- Even if you only care about getting out of jail quickly, it's worth finding out whether this case could affect immigration. We still might want to handle the case differently.



Immigration Status and History

- Current immigration status
- When client got that status
- When/how client came to U.S.
  - Entered with green card, temp visa, Entered without inspection ("EWI"), Parole, Other?
- Ever ordered deported?

Also important: Absences from U.S.

U.S. citizens…

… Cannot be deported

U.S. citizens

- Born in the U.S. & territories (this includes Puerto Rico!)
- Naturalization
- Automatic derivation/acquisition from citizen parents
  - Requires information about parents' naturalization and residency. Specific requirements depend on client's date of birth.

Major Types of Immigration Status

IN STATUS	OUT OF STATUS
Lawful Permanent Resident (LPR)	Entered without inspection (EWI) + never got status
Valid nonimmigrant status (e.g., visitor; student; H1 worker; H2 seasonal worker)	Overstayed Visa
Refugee, Asylee	Ordered deported previously

Lawful Permanent Residents

- LPR, Green card, Residencia
- Often result of a family member or employer sponsoring person's status, lottery, refugee/asylee adjusting
- Card must be renewed every 10 years. (LPR doesn't lose status if card expired, only if ordered deported)
- Can apply for naturalization
- A# is on this card!

The Many Shades of Gray

Temporary Protected Status (TPS)
Withholding / Convention Against Torture (CAT)
Deferred Action for Childhood Arrivals (DACA)
Deferred Action for Parental Accountability (DAPA, not available yet, litigation pending)

- Immigration knows they are in the U.S.
- At some point, they have asked not to be deported and, for specific reasons, the government has agreed not to deport them at this time.
- At this point in time, none of them are pathways to permanent status.
- May apply for work authorization

Executive Actions 2012, 2014

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA, 2012)	DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA, 2014 expansion, pending litigation)	DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA, 2014, pending litigation)
Came to US under age 16 and before 6/15/2007	Came to US as child under age 16 before **1/1/2010**	Parent on 11/20/2014 of a USC or LPR child
Continuous residence in the US since 6/15/2007	Continuous residence in the US since **1/1/2010**	Continuous residence in the US since before 1/1/2010
Currently in school, HS degree, GED, or honorably discharged vet	Currently in school, HS degree, GED, or honorably discharged vet	Physical presence in the US on 11/20/2014 and at time of application
Born on/after 6/16/1981	No age bar	No age bar

CRIMINAL BARS TO DACA/DAPA ARE IN MATERIALS AND COVERED LATER.

2014 DACA Expansion/DAPA… Delayed

- *Texas v. United States*
- Federal district court in Brownsville, Texas
- Preliminary injunction
- DHS not accepting application for new DAPA or expanded DACA
- DACA under 2012 Executive Order not impacted by litigation

Work Permit ("Permiso") is Not a Status

- People with work permits are on Immigration's radar
- May be evidence of pending application or immigration supervision

Family Ties

Family ties are often critical to relief.

- ✓Family Relationship + Immigration Status
- ✓Spouse, Partner
- ✓Children (ages)
- ✓Parents (get naturalization dates, if any)

Criminal History

You need all prior charges, dispositions

- ✓Felony, misdemeanor, violations, municipal
- ✓Diversion, ATI, drug court, deferred prosecutions & judgments, juvenile dispos, expunged, sealed
- ✓All jurisdictions

Criminal History

- ✓Sentence – imprisonment (including suspended sentence), probation, anger management, anything else ordered by court. Suspended sentenced (some jd have these). Restitution.
- ✓Exact penal statute, including subsection
- ✓Dates for everything

Criminal History

All Priors

Current Charges

- Date of alleged commission of crime
- Exact charges, including penal law subsections
- Plea offers
- Where is there room to negotiate?

Review Question

List three things you could say to a client who is hesitant to discuss immigration issues with you.

1. _____
2. _____
3. _____

Second Duty – To Advise

Provide accurate, complete advice regarding immigration consequences

How do we know??

PADILLA V. KENTUCKY, 559 U.S. 356 (2010)

"The importance of accurate legal advice for noncitizens accused of crimes has never been more important….Deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."

6th Am duty to advise client of immigration consequences *prior* to pleading guilty → Failure to advise client of immigration consequences constitutes ineffective assistance of counsel

2015 ABA Standard, 4-5.5

- If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions.
- Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances.
  - Regional Immigration Assistance Center

2015 ABA Standard, 4-5.5 (con't)

- Counsel should advise the client of all such potential consequences, including:
  - Deportation
  - exclusion
  - bars to relief from removal
  - immigration detention
  - denial of citizenship

Meeting Your Duty to Advise: Basics of Immigration Consequences

Consult with immigration expert!

- Provide intake info, NYSID/rap sheet, and current charges
- Do it early, don't wait until last minute

If you want to do it yourself: consult written resources and research current law
  - Law changes, litigation abounds

Red flag issues: use your cheat sheet!

* In your materials

Deportability vs. Inadmissibility

Technically:

DEPORTABILITY 8 USC § 1227	INADMISSIBILITY 8 USC § 1182
Applies to those lawfully admitted (e.g., LPRs & refugees)	Applies to those seeking lawful admission or permanent residency (e.g., Undocumented, asylees, visa overstays, those with temporary status). Also LPRs returning from trip abroad.

Practically:
Each set of rules, or both, may apply to the same person in various situations.

Priorities for Clients Who Are LPRs

Remember!

LPRs have permission to stay in the U.S. permanently – unless they lose that status.

Priorities for Clients Who Are LPRs

1. Primary goal is usually to keep LPR status. Advise about and avoid disposition that will trigger deportation. ("deportability grounds")
2. If client has a prior that triggers deportability, or you cannot avoid deportability in this case, then advise about and avoid dispo that will bar relief to deportation (like a pardon to deportation). Consider putting in a notice of appeal.
3. Also Important: Advise about and avoid dipso that will prevent international travel or naturalization ("inadmissibility grounds")
4. Consider immigration enforcement triggers.

Clients Who Are Out of Status

What my undocumented clients all be deported anyway?

NO! ALL HOPE IS NOT LOST!

THERE MAY BE OPTIONS!

Clients Who Are Out of Status

- Subject to deportation just for being out of status.
- But many people may be eligible for getting lawful status or "relief from deportation." If successful, they will not be deported
- Some criminal dispos will prevent them from applying for lawful status.

Duty to Clients Who Are Out of Status

People v. Burgos, 950 N.Y.S.2d 428 (N.Y. Sup. Ct. 2012)

- Immigrant had green card application pending at time of plea
- Plea fell into category of crimes that permanently bar green card application
- Violated 6th A & N.Y. Const. to fail to advise

Priorities for Clients Who Are Out of Status

1. Warn immediately not to talk to ICE.
2. Identify possible path to lawful status.
3. Advise about and negotiate away from criminal bars (analysis must include priors and pending charges)
   - Usually, most concerned with avoiding grounds of inadmissibility
   - However, the various legal options have different eligibility requirements and different criminal bars. So, you can't just focus on inadmissibility!
4. Consider immigration enforcement triggers. Especially if you cannot avoid bars, avoid immediate ICE arrest.
   - Get dispo that would keep client out of jail to avoid ICE triggers
   - Get dispo not on PEP priority list to decrease chances ICE will want to initiate removal proceedings right away

Who Are the Shades of Gray Clients Again?

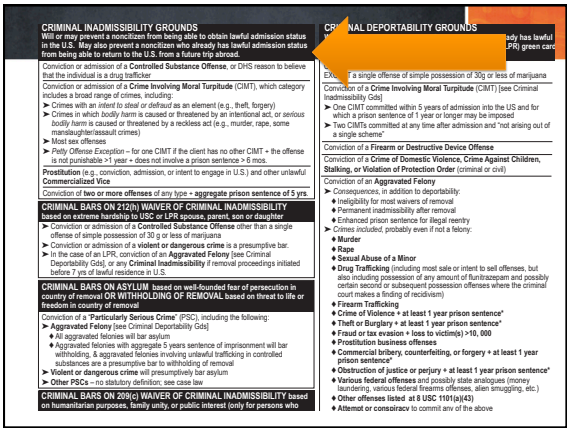
Most commonly, you will see:

- Clients with TPS
- Clients with DACA
- Clients with DAPA (depending on outcome of litigation)

They have a slightly different set of priorities and goals!

Priorities for Shades of Gray Clients

1. Advise about and avoid dispo that will knock them out of their current, temporary status.
2. Advise about and avoid dispo that will bar a future adjustment to permanent residency.
3. If you can't negotiate safe disposition, avoid immediate ICE arrest.



CRIMINAL INADMISSIBILITY GROUNDS
Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude** (CIMT), which category includes a broad range of crimes, including:
- ➢ Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- ➢ Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- ➢ Most sex offenses
- ➢ *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs.**

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY based on extreme hardship to USC or LPR spouse, parent, son or daughter
- ➢ Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- ➢ Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- ➢ In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:
- ➢ **Aggravated Felony** [see Criminal Deportability Gds]
  - ♦ All aggravated felonies will bar asylum
  - ♦ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- ➢ **Violent or dangerous crime** will presumptively bar asylum
- ➢ **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who

CRIMINAL DEPORTABILITY GROUNDS
Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

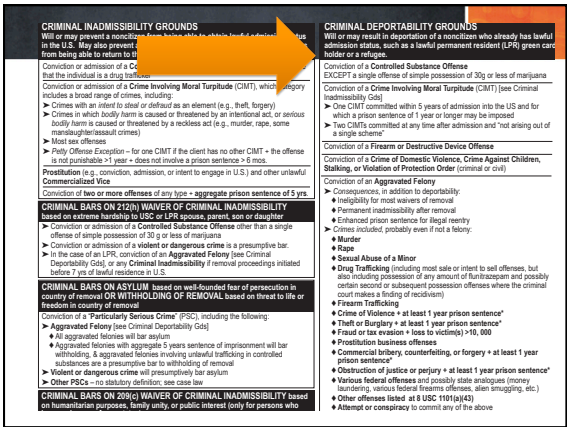
Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]
- ➢ One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- ➢ Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**
- ➢ *Consequences*, in addition to deportability:
  - ♦ Ineligibility for most waivers of removal
  - ♦ Permanent inadmissibility after removal
  - ♦ Enhanced prison sentence for illegal reentry
- ➢ *Crimes included*, probably even if not a felony:
  - ♦ **Murder**
  - ♦ **Rape**
  - ♦ **Sexual Abuse of a Minor**
  - ♦ **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - ♦ **Firearm Trafficking**
  - ♦ **Crime of Violence + at least 1 year prison sentence***
  - ♦ **Theft or Burglary + at least 1 year prison sentence***
  - ♦ **Fraud or tax evasion + loss to victim(s) >10, 000**
  - ♦ **Prostitution business offenses**
  - ♦ **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - ♦ **Obstruction of justice or perjury + at least 1 year prison sentence***
  - ♦ **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - ♦ **Other offenses listed at 8 USC 1101(a)(43)**
  - ♦ **Attempt or conspiracy** to commit any of the above



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- ➢ Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- ➢ In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:
- ➢ **Aggravated Felony** [see Criminal Deportability Gds]
  - ♦ All aggravated felonies will bar asylum
  - ♦ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- ➢ **Violent or dangerous crime** will presumptively bar asylum
- ➢ **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who

CRIMINAL DEPORTABILITY GROUNDS
Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]
- ➢ One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- ➢ Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**
- ➢ *Consequences*, in addition to deportability:
  - ♦ Ineligibility for most waivers of removal
  - ♦ Permanent inadmissibility after removal
  - ♦ Enhanced prison sentence for illegal reentry
- ➢ *Crimes included*, probably even if not a felony:
  - ♦ **Murder**
  - ♦ **Rape**
  - ♦ **Sexual Abuse of a Minor**
  - ♦ **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - ♦ **Firearm Trafficking**
  - ♦ **Crime of Violence + at least 1 year prison sentence***
  - ♦ **Theft or Burglary + at least 1 year prison sentence***
  - ♦ **Fraud or tax evasion + loss to victim(s) >10, 000**
  - ♦ **Prostitution business offenses**
  - ♦ **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - ♦ **Obstruction of justice or perjury + at least 1 year prison sentence***
  - ♦ **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - ♦ **Other offenses listed at 8 USC 1101(a)(43)**
  - ♦ **Attempt or conspiracy** to commit any of the above

More on Aggravated Felonies

- ✓Doesn't need to be a felony
  - E.g., Petit larceny, assault can be AF
- ✓Doesn't need to be aggravated
  - Non-violent
  - No jail time

Aggravated Felonies

Conviction-Based AFs

Conviction of Specified Offense

Example: NYPL 220.31 sale of a controlled substance (cocaine) = drug AF

Sentence-Based AFs

Conviction of Specified Offense + Sentence of 1Year or more

Example:

NYPL 160.05 robbery with 365-day sentence = COV and theft AF

Circumstance-Specific AFs

Conviction of Specified Offense + Other Factor (e.g. > $10k loss of victim)

Example: NYPL 165.73 trademark counterfeiting with > $10k loss might be AF

Some offenses may fit more than category!

Aggravated Felonies

Most important ground for an LPR client to avoid

Deportation is a near certainty

- Loss of lawful permanent residency
- Permanent ineligibility for most relief (pardons from deportation)
- Permanent ineligibility for citizenship
- Mandatory detention without bond
- Permanent bar to return after deportation

Aggravated Felonies

- Big sentence enhancement for federal illegal re-entry conviction after removal
- ICE can deport non-LPR without a hearing before an immigration judge
- Bar to "voluntary departure"

How to Talk About AF Deportability

Nothing is certain except death and taxes, but deportation after an aggravated felony conviction is close behind.

Encarnacion v. State, 295 Ga. 660 (2014)

How to Talk About AF Deportability

The certainty of the warning will impact your client's decision to take a plea.

More on Moral Turpitude (CIMT)

- No statutory definition
- Offenses that are inherently base, vile, depraved, immoral
  - Intent to steal or defraud
  - Intent to cause bodily harm
  - Reckless conduct + serious bodily harm
  - sex offenses
- Reckless offenses – sometimes
- Negligent offenses – should not be CIMT

NYPL AND CIMTs

- Minor New York offenses are routinely charged by the government as CIMTs:
  - Theft of services (turnstile jumping), NYPL §165.15(3)
  - Petit larceny (shoplifting), NYPL §155.25
  - Harassment violation, NYPL §240.26
- BUT some surprisingly may not be CIMTs
  - Resisting arrest, NYPL §205.30

CIMTs and Removability

Inadmissible if:	Deportable if:
Convicted of OR admits to having committed **one CIMT, EXCEPT:** Petty Offense Exception • Only one CIMT conviction; • Max penalty possible does not exceed 1 yr imprisonment; & • Sentence does not exceed 6 months **Petty offense: In NY, one A-misd CIMT w/sentence of 6 mos. or less** 8 USC 1182 (a)(2)(A)(i)(I) 8 USC 1182 (a)(2)(A)(ii)(II)	Convicted of **One CIMT** that was **committed** within 5 years of admission for which a sentence of a year or longer may be imposed* OR **Two CIMTs** at any time & not arising out of single scheme of criminal misconduct **IN NY, one A-misd CIMT committed within 5 years of admission to US or two CIMTs at any time if not "single scheme"** 8 USC 1227 (a)(2)(A)(i), (ii) *Date of admission can be tricky! In this context, it includes date of lawful entry into U.S., as well as some changes to status while in the U.S.

Controlled Substance Offense ("CSO")

- "Controlled substance" refers to a substance that appears on the federal Controlled Substances Act, **including marijuana**.
- Very broad - Including violations of a law "relating to" a controlled substance
- Offenses that can trigger this deportability ground include:
  - Simple possession
  - Possession with intent to sell or distribute
  - DUI if under the influence of a controlled substance
  - Paraphernalia offenses
  - Some medical fraud offenses
- US Supreme Court reviewing this ground's reach in Mellouli v. Holder (the "sock" case)

CSO and Removability

Inadmissible if:	Deportable if:
Convicted of OR admits to having committed a controlled substance offense No exceptions! * waiver available in limited circumstances for one time 30g marijuana possession 8 USC 1182 (a)(2)(A)(i)(II)	Convicted of a controlled substance offense Exception: Single offense for simple possession of 30g or less of marijuana for personal use 8 USC 1227 (a)(2)(B)

A Word on Diversion Programs

Dismissal of charges after completion of a diversion program (drug treatment):

✓ Without upfront guilty plea: not a "conviction" for immigration (e.g. CPL 216.05(4))

✗ After guilty plea: is a "conviction" for immigration!

Definition of "Conviction" Under Immigration Law

A formal judgment of guilt entered by a court

or

– Where adjudication of guilt has been withheld,
  - Client admits facts sufficient to warrant a finding of guilt ***and***
  - Court has ordered some form of punishment, penalty, or restraint on liberty.

Full definition at 8 USC 1101(a)(48)

Definition of "Conviction" Under Immigration Law

A formal judgment of guilt entered by a court

or

– Where adjudication of guilt has been withheld,
  - Client admits facts sufficient to warrant a finding of guilt ***and***
  - Court has ordered some form of punishment, penalty, or restraint on liberty.

Full definition at 8 USC 1101(a)(48)

NY Dispos: Convictions?

Conviction	Not a Conviction
• Felonies	• Adjournment in Contemplation of Dismissal (ACD) – unless terms violated/convicted
• Misdemeanors	• Youthful offender (YO)
• Violations	• Juvenile delinquency (JD)
• Juvenile offender (JO)	• Family Court offenses (but OP violations can trigger deportability!)
• Post-plea diversion	• Pre-plea diversion

Bars to DACA and DAPA

Convictions Barring DACA	Convictions Barring DAPA

• One felony (not minor traffic, state immigration offenses)
• One significant misdemeanor
  • DV, Sex abuse, Burglary, Firearm possession or use, Drug distribution, DUI
  • Any misdemeanor sentenced to more than 90 days
• 3 misdemeanors (not minor traffic, state immigration offenses)
	• One felony (not minor traffic, state immigration offenses)
	• One significant misdemeanor
	  • DV, Sex abuse, Burglary, Firearm possession or use, Drug distribution, DUI
	  • Any misdemeanor sentenced to 90 days or more
	• Misdemeanor that is an AF
	• 3 misdemeanors (not minor traffic, state immigration offenses)
	• Gang offense

** Juvenile dispos and expungments don't count as convictions for DACA. Expecting guidance on this for DAPA, so assume they count for now. More details in your materials!

Review Question

List three things you can do for an undocumented client

1. _____
2. _____
3. _____

Third Duty – Negotiate Effectively

Defense counsel must attempt to negotiate any reasonably available alternative disposition that avoids or mitigates the immigration consequences, consistent with the client's priorities.

How do we know??

Padilla v. Kentucky

"Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation."

How to Meet Your Duty to Negotiate

Determine Client's Goals (Review)

- Avoid offenses that trigger deportation
- Preserve eligibility for relief (ask government to give or allow you to keep lawful immigration status)
- Preserve eligibility to obtain future immigration benefit

Determine Client's Goals, cont.

- Get out of jail/custody ASAP, immigration consequences not a priority
- Quicker deportation *if* that means less prison

Defense Goals for Those Without Relief to Deportation

Undocumented with no hope of relief; Deportable LPR with no waiver; Most immigrants who have been deported before

- ✓Avoid contact with immigration authorities by avoiding jail time
- ✓Warn of federal criminal penalties for illegal re-entry following removal and avoid convictions (such as AFs) that will enhance re-entry sentences
- ✓Remember to consider PCR by filing an appeal or withdrawing old plea(s)

Strategy:
Negotiate away from a “conviction”

Strategy:
Negotiate a different offense

Strategy:
Negotiate a safer sentence

Strategy:
Allocute away from harmful facts, insert safer facts

How to Talk About Likelihood of Enforcement

- Should defense counsel discuss?
  - *People v. Glasgow*, 95 A.D.3d 1367 (3d Dep't 2012) (Don't worry, you are a "small fish" and federal authorities have "bigger fishes to fry.")
- Be careful how to approach – client might perceive deportation as avoidable

Enforcement Difficult to Predict

- After the break…..

Enforcement policy In 2015

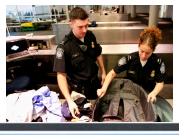
2

The Deportation Pipeline and Enforcement Priorities

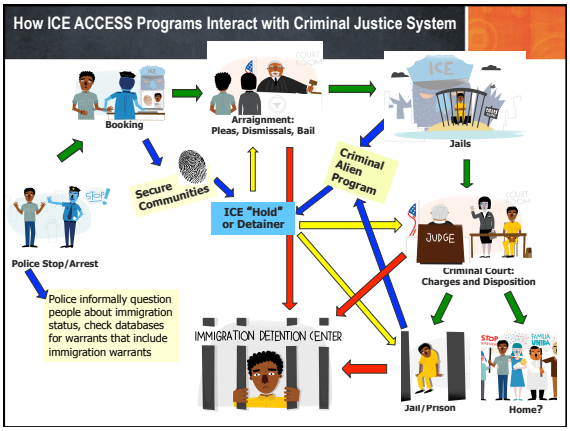
How do people get caught in the deportation apparatus?

Department of Homeland Security

Immigration & Customs Enforcement (ICE)	Customs and Border Patrol (CBP)	U.S. Citizenship & Immigration Services (USCIS)
CRIMINAL JUSTICE CONTACTS	*INTERNATIONAL TRAVEL*	*APPLICATIONS FOR IMMIGRATION BENEFITS*


How ICE ACCESS Programs Interact with Criminal Justice System



Is Secure Communities Dead?

- November 2014 – New enforcement priorities announced
- S-Comm rebranded as Priority Enforcement Program (PEP)
- New criteria for immigration enforcement priority targets
- Immigration holds/detainers to be [mostly] replaced with requests for notification of release dates, possibly limited to certain priority levels
- Fingerprint sharing continues!

Priority Enforcement Program: Targets

PRIORITY 1:
- Felony conviction
- "Aggravated felony" conviction
- An offense for which an element was active participation in a criminal gang

PRIORITY 2:
- 3 or more misdemeanor convictions (not minor traffic infractions)
- 1 "significant misdemeanor" conviction *(may include vios!)*
  - DV
  - Sex abuse
  - Burglary
  - Firearm poss or use
  - Drug distribution;
  - DUI; or
  - **Any** conviction with sentence of 90 days or more;
- EWI after January 1, 2014

PRIORITY 3:
Final order of removal on or after January 1, 2014

Full priority list is in your handouts!

NOTE: PEP and removability triggers are different!

Priority Enforcement Program

- Guides ICE holds, requests for notification, and arrests.
  - This did **not** change laws governing who can be deported or dispositions that trigger deportation
- ICE may choose not to seek immediate enforcement/arrest if your client:
  - does not fall into any of the priorities; or
  - is on a lower priority level

More aggressive enforcement?

Advocates have reported increased enforcement:

- People with old deportation orders and DUI convictions
- LPRs with old convictions (especially drug-related) picked up at home

What type of immigration enforcement do you see?

- Detainers? To hold or notify?
- ICE arrests upon release from jail?
- In/outside court?
- Probation?
- Traffic stops?
- ICE takes client and refuses to produce them for criminal court appearance?
- Other?

Judicial Notifications of Immigration Consequences

Court Notification Topics

1) Source of Court's Duty
2) Risks to Client from Court Notification
3) How to Protect Client from Risks

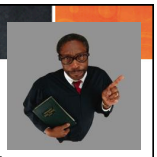
Sources of Court Duty to Notify

- NYCPL 220.50(7)(since 1995)
- *People v. Peque*, 22 N.Y.3d 168 (2013)

NYCPL 220.50(7)(applies to felony pleas)

"[I[f the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States."

People v. Peque



What happened?

In three separate cases, trial court failed to notify defendant that guilty plea to a felony offense might result in deportation. Defendants argued on direct appeal that Due Process clause required court notification of possible deportation.

People v. Peque

Wonderful discussion of the severity of detention and deportation, the interconnected nature of the criminal and immigration systems, and the importance of the defendant being made aware of the immigration consequences of a guilty plea.

22 N.Y.3d at 186-93.

People v. Peque - 5th A Obligations:

- In a felony case, the judge "must inform the defendant that, if the defendant is not a citizen of this country, he or she may be deported as a result of this plea"

22 N.Y.3d at 197.

Peque Remedy – Very Little Benefit

- Remand for defendant to file a 440 motion to establish prejudice
- Prejudice same as under *Padilla* = Reasonable probability that defendant would have rejected the plea in favor of trial
- Unlikely to prevail on *Peque* unless would also prevail under *Padilla*

Risks of Court Notification

1) Makes it more difficult to withdraw plea based on *Padilla* (even if attorney's advice was incorrect)
   - *Padilla* protects client's interests, not *Peque*
2) Judges are more likely to inquire about immigration status/immigration advice on record
3) Judges may insist that client agree that she wants to plead guilty even if deportation is mandatory – "will be deported" not "may"

Why does court notification ≠ attorney advice?

- Defendant is entitled to rely on attorney's counsel re: advisability of accepting plea agreement in light of immigration/penal consequences
- Given blind
- Too little, too late
- Can't remedy failure to negotiate

Why protect client's right to file 440…..against me?

- Advice may prove incorrect – we all make mistakes!
- Changes in immigration law can apply retroactively
- Conflict between self- and client's interest must resolve in favor of client
  - NY Rule of Professional Conduct 1.7
- You can protect yourself with file notes

To protect against prejudice to plea withdrawal

- "I have advised my client regarding all relevant attendant consequences, and he is taking the plea in reliance on my advice"
- DO NOT accept notification of immigration consequences from the prosecutor. Make record of refusal.
  - *People v. Rampersaud*, __ N.Y.S.2d __, 2014 WL 4851639 (2d Dep't Oct. 1, 2014) (no prejudice because prosecutor notified defendant on record of possibility of deportation) (defendant seeking leave to appeal).

Court Inquiries into Immigration Status/Advice

We Must Fight!!

Risks of Disclosing Immigration Info on Record

1) Gov't must prove alienage in removal proceeding
2) Alienage is element in some federal offenses
3) Discloses confidential information
4) ICE presence in courthouses
5) Anyone can report client to ICE

How to Protect Client

- *Peque* & 220.50(7) specifically avoid requiring this
- Not relevant to taking of the plea
- Jeopardizes atty-client confidences
- Assert 5th A: alienage is element of certain federal offenses (incl. failure to notify of address change; illegal entry)
- May trigger immigration consequences
- Risks being under-inclusive

To Protect Client Against "Will be deported"

- Might be inaccurate
  - Ex) One felony crime involving moral turpitude committed after 5 years as LPR
- Intrudes on attorney/client relationship
- Judges not supposed to give legal advice
- May cause defendant to reject favorable plea

Consider systemic response to judge's behavior

- May be difficult to push back in individual case where client desires to enter plea
- Handouts include sample letters to judges on:
  - Inquiry into citizenship
  - "Will be deported" as opposed to "may be deported

Review Question

Name 4 reasons why a court notification of immigration consequences cannot substitute for attorney advice.

a. _____
b. _____
c. _____
d. _____

Resources

- ✓ Regional Immigration Assistance Centers on the horizon!
- ✓ Until then: Call IDP Hotline for plea consults and post-conviction relief analysis: 212-725-6422
- ✓ Advisories and charts at immigrantdefenseproject.org and defendingimmigrants.org
- ✓ IDP's Manual: *Representing Immigrant Defendants in New York State*

CLIENT IMMIGRATION QUESTIONNAIRE – BASIC

Interviewer's name	Phone number	Email address

Client's Name	A# (if possible)	Next hearing date
Client's Country of Birth	Client's Date of Birth	Immigration Hold/Detainer:
		___Yes ___No

1. ENTRY:

Date First Entered U.S.	Manner of Entry (Visa & Type, No inspection/EWI)	Significant Departures (approximate OK; append list)
		Dates: Length of departures:

2. CURRENT IMMIGRATION STATUS:

Lawful Permanent Resident?	Other Current Immigration Status? (check one)
___Yes ___No Date Obtained?_____. On what basis (e.g. family, refugee):	__ Undocumented (Pending application for status or relief? _____) ___Doesn't know ___Refugee ___Asylee ___Temporary Protected Status ___ Deferred Action for Childhood Arrivals (DACA) Other: _____
Screen for possible US citizenship if:	
____Grandparent or parents were US citizen at time of Client's birth; OR ____Parent(s) became naturalized US citizens while Client was under age 18; Client became LPR while under age 18	
Photocopy <u>all</u> immigration documents!	

3. PRIOR REMOVAL/DEPORTATION OR VOLUNTARY DEPARTURE:

Was Client ever deported?	___Yes ___No
Where/When?	
Describe what happened, to extent possible (e.g., saw imm. judge, just signed form before leaving U.S., etc.)	

4. FAMILY TIES

Spouse	___ USC ___ LPR ___ Undocumented
Partner	___ USC ___ LPR ___ Undocumented
Children	(Number _____ Ages: _____) ___ USC ___ LPR ___ Undocumented
Mother	___ USC ___ LPR ___ Undocumented
Father	___ USC ___ LPR ___ Undocumented

5. DEFENSE GOALS & CRIMINAL HISTORY

Client's Goals Re: Immigration Consequences	Criminal History & Current Charges
___Avoid conviction that triggers deportation ___Preserve eligibility to apply for immigration status or relief from removal (see *Questionnaire in Relief Toolkit* for all undocumented or otherwise deportable Clients) ___Get out of jail ASAP __ Avoid immigration detainer ___Immigration consequences/deportation not a priority ___Other goals re: imm consequences:	*Append separate sheet to:* **<u>List Criminal History</u>** (include offense name and cite, disposition and date of dispo, sentence even if suspended for each conviction. Include deferred adjudications, expunged convictions, juvie, and other resolutions) **<u>List Current Charge/s, Plea Offer/s</u>**

DETERMINING IMMIGRATION STATUS/ELIGIBILITY
(BASIC QUESTIONS)

Where were you born?
(¿Donde nació ud?)_____

When did you enter the U.S.?
(¿Cuando entró ud. EE.UU?)_____

Did you enter the U.S. with or without papers?
(¿Entró EE.UU con papeles or sin papeles?)_____

Have you ever been deported? When?
(¿Había sido deportado? ¿Cuando?)_____

Are any of your parents or grandparents U.S. citizens?
(¿Son ciudadanos unos de sus padres o abuelos?)_____

Did you ever get your permanent residence or any other type of permit? What type? When?
(¿Ha conseguido su residencia permanente o otro tipo de permiso? ¿Qué tipo?¿Cuando?)
_____

Has anyone ever submitted papers for you? When?
(¿Alguien ya ha metido papeles para ud.? ¿Cuando?)_____

Are your spouse or kids U.S. citizens or permanent residents? How old are your kids?
(¿Su esposo/a o hijos son ciudadanos/as o residentes permanente? ¿Cuántos años tienen sus hijos)?
_____

Did you ever apply for asylum? When?
(¿Ha aplicado para asilo politico? ¿Cuando?)_____

Have you ever cooperated in a criminal investigation?
(¿Ha cooperado en una investigación criminal?)_____

Have you been in the U.S. for ten or more years?
(¿Ha pasado diez años o más en EE.UU?)_____

Do you think anyone will try to harm you if you return to your country?
(¿Cree que alguien le causaría daño si regresara a su país?)_____

** Attach past criminal history – for every previous arrest: date, charges (including subsection if any), plea or trial, disposition and date, sentence. Include everything – including low-level violations, delinquency, deferred dispositions, drug court/ATI.

Adapted from Kara Hartzler, Florence Immigration and Refugee Rights Project

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at **www.immigrantdefenseproject.org** or call **212-725-6422** for individual case support.

CRIMINAL INADMISSIBILITY GROUNDS

Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude** (CIMT), which category includes a broad range of crimes, including:

- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses
- *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs**.

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY

based on extreme hardship to USC or LPR spouse, parent, son or daughter

- Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- In the case of an LPR (maybe not if adjusted to LPR in U.S.), conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:

- **Aggravated Felony** [see Criminal Deportability Gds]
  - All aggravated felonies will bar asylum
  - Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- **Violent or dangerous crime** will presumptively bar asylum
- **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- DHS reason to believe that the individual is a **drug trafficker**
- **Violent or dangerous crime** is a presumptive bar

CRIMINAL BARS ON NON-LPR CANCELLATION OF REMOVAL based on continuous physical presence in U.S. for 10+ years; and "exceptional and extremely unusual" hardship to USC or LPR spouse, parent or child

- Conviction of an offense described under the criminal inadmissibility or deportability grounds, regardless of whether or not the ground would apply to the person, e.g., one CIMT with a potential sentence of 1 year or longer [see Criminal Deportability Gds] even if the offense was not w/n five years of an admission to the US
- Conviction or admission of crimes barring required finding of good moral character during 10 year period [see Criminal Bars on Obtaining U.S. Citizenship]

CRIMINAL DEPORTABILITY GROUNDS

Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense** EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]

- One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**

- *Consequences*, in addition to deportability:
  - Ineligibility for most waivers of removal
  - Permanent inadmissibility after removal
  - Enhanced prison sentence for illegal reentry
- *Crimes included*, probably even if not a felony:
  - **Murder**
  - **Rape**
  - **Sexual Abuse of a Minor**
  - **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - **Firearm Trafficking**
  - **Crime of Violence + at least 1 year prison sentence***
  - **Theft or Burglary + at least 1 year prison sentence***
  - **Fraud or tax evasion + loss to victim(s) >10, 000**
  - **Prostitution business offenses**
  - **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - **Obstruction of justice or perjury + at least 1 year prison sentence***
  - **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - **Other offenses listed at 8 USC 1101(a)(43)**
  - **Attempt or conspiracy** to commit any of the above

* The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- Conviction of an **Aggravated Felony**
- **Offense** triggering removability referred to in **Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- **Crime Involving Moral Turpitude** (unless single CIMT and the offense in not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- 2 or more offenses of any type + aggregate prison sentence of 5 years
- 2 gambling offenses
- **Confinement** to a jail for an aggregate period of 180 days

Conviction of an **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) permanently bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:

(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contedere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) The judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

THUS:

- A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication without a guilty plea **IS NOT** a conviction
- **NOTE:** A youthful offender adjudication **IS NOT** a conviction if analogous to a federal juvenile delinquency adjudication

IDP IMMIGRANT DEFENSE PROJECT

IMMIGRATION CONSEQUENCES OF CONVICTIONS SUMMARY CHECKLIST – DACA and DAPA Supplement

Criminal bars relating to DACA and DAPA temporary administrative status programs as announced by DHS on 11/20/14

(Last updated December 4, 2014. Note: DACA/DAPA program specifics are likely to be interpreted further and clarified as these programs are implemented.)

IMMIGRANT DEFENSE PROJECT

CRIMINAL BARS ON DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

Will generally prevent a noncitizen from being able to obtain DACA status, which is based in part on:

- ♦ entry into the U.S. as a child under age 16 before 1/1/10
- ♦ continuous residence in the U.S. since before 1/1/10
- ♦ currently in school, high school degree or GED, or honorably discharged veteran

One felony conviction

➤ Any federal, state or local offense that is punishable by imprisonment for a term exceeding one year
- ♦ Does not include state immigration-related offenses

One "significant misdemeanor" conviction, including:

➤ An offense punishable by imprisonment of one year or less but greater than five days (regardless of sentence actually imposed) that is:
- ♦ **Domestic violence**
- ♦ **Sexual abuse or exploitation**
- ♦ **Burglary**
- ♦ **Unlawful possession or use of a firearm**
- ♦ **Drug distribution or trafficking**
- ♦ **Driving under the influence**

NOTE: The above list may include certain offenses that are not classified as misdemeanors in the convicting jurisdiction, e.g. domestic violations or driving under the influence traffic infractions, if punishable by more than five days in prison

➤ Any other offense punishable by imprisonment of one year or less for which the person received a **sentence of time in custody of more than 90 days**
- ♦ Suspended sentences do not count towards the 90 days

Three misdemeanor convictions

➤ Three or more misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct
- ♦ Includes only federal, state, or local offenses punishable by imprisonment of one year or less but greater than five days (thus, may include certain low level offenses not classified as misdemeanors if punishable by more than five days in prison)
- ♦ Does not include minor traffic offenses (such as driving without a license)
- ♦ Does not include state immigration-related offenses

CRIMINAL BARS ON DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA)

Will generally prevent a noncitizen from being able to obtain DAPA status, which is based in part on:

- ♦ being the parent on 11/20/14 of a son or daughter who is a U.S. citizen or LPR
- ♦ continuous residence in the U.S. since before 1/1/10
- ♦ physical presence in the U.S. on 11/20/14 and at the time of application for DAPA status

One felony conviction

➤ Any offense classified as a felony in the convicting jurisdiction, regardless of whether the offense is punishable by imprisonment of more than one year
- ♦ Does not include state/local offenses for which an essential element is one's immigration status

One "significant misdemeanor" conviction, including:

➤ A misdemeanor that is:
- ♦ **Domestic violence** (but may be mitigated if convicted person also victim of domestic violence)
- ♦ **Sexual abuse or exploitation**
- ♦ **Burglary**
- ♦ **Unlawful possession or use of a firearm**
- ♦ **Drug distribution or trafficking**
- ♦ **Driving under the influence**
- ♦ NOTE: DHS initial 11/20/14 guidance memos are unclear on whether the offense must be classified as a misdemeanor in the convicting jurisdiction or be punishable by more than five days in prison as for DACA.

➤ Any other misdemeanor for which the person is **sentenced to time in custody of 90 days or more**
- ♦ Suspended sentences do not count towards the 90 days

One misdemeanor conviction constituting an "aggravated felony" (even though not a felony) under the law at the time of conviction – For a list of offenses deemed aggravated felonies under the law in effect since 9/30/96, see "Aggravated Felony" crimes listed under "Criminal Deportability Grounds" on the reverse side of this Checklist.

Three misdemeanor convictions

➤ Three or more misdemeanors, provided the offenses arise out of three separate incidents
- ♦ See NOTE above re: uncertainty over applicable definition of misdemeanor for DAPA purposes
- ♦ Does not include minor traffic offenses (such as driving without a license)
- ♦ Does not include state/local offenses for which an essential element is one's immigration status

Gang offense conviction

➤ Offense for which an element was active participation in a criminal street gang (as defined in 18 U.S.C. §521(a))

SOME OTHER OFFENSES/CONDUCT THAT CAN LEAD TO A DENIAL OF PROSECUTORIAL DISCRETION TO GRANT DACA OR DAPA STATUS

➤ DACA -- Convictions or other information indicating that the applicant is a threat to national security or public safety, such as convictions/information that indicate gang membership, participation in criminal activities, or participation in other activities that threaten the U.S.

➤ DAPA -- Convictions or other information indicating that the applicant is engaged in or suspected of terrorism or espionage or otherwise poses a danger to the national security, has unlawfully entered or reentered the U.S., or has intentionally participated while age 16 or older in an organized criminal gang

DISPOSITIONS THAT AVOID AUTOMATIC DISQUALIFICATION (at least for DACA)

➤ Juvenile dispositions do not bar DACA (but adult convictions of juveniles may do so)

➤ Expunged convictions do not bar DACA

DHS, in its initial 11/20/14 guidance memos, did not say anything on the effect of juvenile dispositions or expunged convictions on eligibility for DAPA -- guidance on this is expected later

IMPORTANT: Potential DACA/DAPA applicants who may wish to seek LPR or other formal lawful admission status in the future should also consider the Criminal Inadmissibility Grounds on the reverse side because a conviction triggering inadmissibility, even if it does not bar DACA/DAPA, could affect the person's future ability to obtain formal lawful status.

What Happens in Deportation Proceedings?
A Guide for Immigrants in the CA Criminal Justice System

WHAT SHOULD I KNOW WHILE I'M STILL FIGHTING MY CRIMINAL CASE?

What should I tell my Public Defender? If you are not a United States Citizen, tell your public defender! Your public defender is required to advise you of how any criminal conviction could affect your immigration case. Do not agree to plead guilty or go to trial until your public defender has given you this information.

If I am convicted of a crime, will I be deported? Maybe, but your public defender may be able to reduce the chances of this happening. If you have a green card or have any other legal status, certain convictions may make you deportable. If you are undocumented, certain convictions may make it difficult or impossible to get legal status (such as a green card). Tell your public defender about your immigration status so that they can protect you as much as possible.

How will ICE find out that I am an immigrant? Jails give ICE every inmate's fingerprints and sometimes the information you gave when you were booked into jail, such as place of birth. ICE uses this information to tell who is an immigrant.

ICE officials may also come into the jail and ask you questions about where you were born and your immigration status. **You have a right NOT to ANSWER any questions or SIGN any documents and should NOT do so if you want to fight your immigration case.** See the back of this page for tips if you are sure that you DO want to take voluntary departure or sign a deportation order.

ICE may put an **"ICE detainer"**[1] on you. An ICE detainer is a document asking the jail to **hold you** for **an extra 48 hours** (plus weekends and federal holidays) after you would be released from your criminal case, so that ICE can detain and try to deport you. **If the jail does not release you after this time, contact your public defender immediately** so that they can try to get you released. If you are told that you have an ICE detainer, ask the jail for a copy. Also ask if the hold may be honored under the CA **TRUST Act** or other local policy.

You may be able to get your **ICE detainer "lifted" (removed)** if any of the following circumstances exist. Tell your public defender[2] **1)** If you were a victim or a witness to a crime; **2)** if you are mentally ill or have another serious medical condition; or **3)** if you are the sole wage-earner for your family, you are the only custodian of minor children, you have extensive family ties that have legal status in the U.S., you are very active in your community, or you've lived in the U.S. for a very long time.

Should I pay my criminal bail? If you have an ICE detainer, you may not want to pay your criminal bail because ICE will still detain you once you are released from criminal custody, even if your criminal case is still pending. You could lose your bail money and get an arrest warrant because ICE doesn't transfer people back to attend any pending criminal hearings. If you have an ICE detainer, consult with your public defender before you pay your criminal bail.

What happens to the legal documents and other important documents from my criminal case? Your criminal documents may not be transferred with you when you are transferred into immigration custody.

- Memorize contact information for your friends, family and public defender.
- Tell your family members not to send originals of important documents (e.g. birth certificates, passports) in your criminal or immigration case, unless specifically instructed to do so by your attorney.
- If you have a trusted friend or family member, give them copies of criminal documents or other important documents.

What happens after I am released from jail in my criminal case? If you have an ICE detainer, ICE only has **48hrs** (plus weekends and federal holidays) to come and get you. If ICE comes and gets you during that time, you will be transferred to an immigration detention facility in California, Arizona or or other city. If ICE has failed to make the transfer when they are supposed to, notify your public defender or other attorney that your detention may be unlawful.

- Family members can **locate you** by checking the following website: **https://locator.ice.gov** OR
- By contacting the local field office: **http://www.ice.gov/contact/ero/**

WHAT WILL HAPPEN DURING MY IMMIGRATION CASE?[3]

What are my rights in Immigration Proceedings?

- You have the right to **remain silent**. If you want to fight your immigration case, **do not sign anything** and do not give ICE any information, including where you were born or where you are from.

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[1] Also known as an ICE hold or Immigration hold.
[2] For guidance on how to lift an ICE detainer, Public Defenders may refer to the ILRC guide at http://www.ilrc.org/policy-advocacy/immigration-enforcement
[3] **This is not intended as legal advice in your immigration case. Consult an immigration attorney for options in your individual case.**

What Happens in Deportation Proceedings?
A Guide for Immigrants in the CA Criminal Justice System

- You have a right to a **court interpreter** so that your hearings are translated to you in a language that you understand.
- Many people will have a right to see an **immigration judge** to see if there is a way to fight their case.
- You have a **right to an immigration attorney**, but not at the government's expense. If you are **mentally ill tell ICE,** since you may have a right to a **free attorney**.
- You have a right to get a **list of available legal services**, such as free or low cost attorneys.
- You have a right to contact your **consulate**.

What if I want to take "voluntarily return" or sign my deportation? Sometimes ICE will ask people if they want to sign a *voluntary return* or a *voluntary departure*. ICE may say that you can fight your case from your home country, that you will not lose your green card, or that you will be able to return after three or ten years.

- What you are usually signing is a deportation order. You cannot fight your immigration case from your home county. Most people will never be able to legally return to the U.S., especially if you have criminal convictions. If you have a green card, you will lose it.
- If you are certain that you do not want to fight your immigration case and that you do not want to return to the United States, you can sign for your deportation. If you are deported and you try to return unlawfully, you can be prosecuted in federal court for illegal reentry, which carries a sentence of up to 20 years.

What happens in Immigration court? If you are detained, an immigration case can take months or longer. If you are not detained, it can take years.

- **Master Calendar Hearing:** These are short hearings. At the first one, you can ask the judge for more time to find an immigration lawyer or to prepare your case.
- **Bond Hearing:** See section below.
- **Merits/Individual Hearing:** If you want to fight your case, the merits or individual hearing is where you present all of your evidence and argue your case. Prepare very well for this hearing!

To find out the date of your next immigration court hearing, call 1-800-898-7180 and enter your "A" number.
** may not list bond hearings**

How do I get released from Immigration Detention? There are two points **1)** by an ICE agent when booked, and **2)** by the immigration judge after a bond hearing. If ICE gives you a bond, pay it as soon as possible. If the bond is too high or you do not get one, you can ask the judge for a bond hearing. Not everyone is eligible for a bond; this will depend upon your criminal history.

How do I get a bond hearing? You must ASK the judge for a bond hearing, it is not automatic. You can do this in writing or in person in front of the judge. Not everyone is eligible for bond but if ICE says you're not, check with the judge to make sure. You usually only get ONE bond hearing so be prepared! The judge will want to see that you're **1)** not a flight risk AND **2)** not a danger to the community. If you don't have an attorney, submit proof of the following to the judge:

(1) Proof that you have a fixed address and long residence in the U.S. (letters from friends/family, copy of your lease, copy of property taxes)
(2) Proof of family ties (letters from friends/family with examples of your good character, include proof of lawful status if available, people with lawful status should attend hearings and tell judge that they are there)
(3) Proof of education and employment history (pay stubs, letters from employers, copy of certificates)
(4) Criminal history (Be ready to discuss what happened during your convictions and arrests, take responsibility, show proof of rehabilitation). Do NOT give your criminal documents to the government. If your criminal case is still pending, assert your Fifth Amendment Right to Remain Silent and do NOT answer any questions.

How do I pay an Immigration Bond? Someone other than you must pay the bond. That person must show that he or she has legal status. People who are undocumented should not try to pay your bond. Once the bond is paid, you will be released from the detention center. Try to have someone ready to pick you up. They can call the ICE office to see when this will be.

Your bond can be paid at any ICE field office in the U.S., found here: **http://www.ice.gov/contact/ero/**

How do I get an Immigration Attorney? You have a right to an attorney, but not at the government's expense.

- If you can afford an attorney, hire one right away. Ask a nonprofit agency or your consulate for referrals to reliable immigration attorneys.
- There are no free attorneys or public defenders in immigration court unless you are mentally ill. If so, tell ICE.
- The court will give you a list of free legal service providers. Write or call these attorneys to see if they can take your case.
- Some detention centers have "Know Your Rights" or "Legal Orientation Programs" which provide presentations on immigration proceedings and sometimes provide free case consultations and representation.
- Sometimes there are attorneys at "master calendar" hearings who can give you brief, free advice.

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

CRIMINAL BARS

(WITH NOTES FOR NEW YORK OFFENSES)

IMMIGRANT DEFENSE PROJECT

CRIMINAL BARS TO DEFERRED ACTION

FELONY

Any federal, state, or local offense that is punishable by imprisonment of more than one year.

INCLUDES ANY NEW YORK FELONY

SIGNIFICANT MISDEMEANOR

Any federal, state, or local offense that is punishable by imprisonment of one year or less but greater than five days and is an offense of...

- Domestic violence
- Sexual abuse or exploitation
- Unlawful possession or use of a firearm
- Drug sales (distribution or trafficking)
- Burglary
- Driving under the influence of alcohol or drugs

CERTAIN SINGLE NY MISDEMEANORS OR VIOLATIONS (e.g., NY PL 240.26) OR TRAFFIC INFRACTIONS (e.g., NY VTL 1192-1) FITTING INTO ONE OF THE ABOVE CATEGORIES

Or any other misdemeanor not listed above for which the person received a jail sentence of more than 90 days. Suspended sentences do not count towards the 90 days.

ANY NY CLASS A MISDEMEANOR WITH A JAIL SENTENCE > 90 DAYS

THREE NON-SIGNIFICANT MISDEMEANORS

Three or more non-significant misdemeanors that do not occur on the same day nor arise from the same act or scheme of misconduct.

Includes only federal, state, or local offenses punishable by imprisonment of one year or less but greater than five days and the person is sentenced to 90 days or less in jail, including a sentence of time served.

ANY THREE NY CLASS A, CLASS B OR OTHER MISDEMEANORS (AS WELL AS CERTAIN NY VIOLATIONS OR TRAFFIC INFRACTIONS THAT HAVE A POSSIBLE JAIL SENTENCE > 5 DAYS)

Call the IDP Hotline at 212-725-6422 for individual case support. The IDP expresses its appreciation to the ILRC for granting permission to use and modify its original version of this chart to include NY-specific notes.

OFFENSES THAT DO NOT LEAD TO AUTOMATIC DISQUALIFICATION

STATE IMMIGRATION OFFENSES

Any state **immigration-related** felony or misdemeanor will not automatically disqualify a person from deferred action.

TRAFFIC OFFENSES

Minor traffic offenses, such as driving without a license will not be considered a non-significant misdemeanor.

(e.g., NY VTL 509 UNLICENSED DRIVING TRAFFIC INFRACTIONS).

JUVENILE DELINQUENCIES

Juvenile delinquencies do not automatically disqualify an individual from deferred action

(e.g., NY FAMILY CT DISPOSITIONS).

EXPUNGED CONVICTIONS

Expunged convictions do not automatically disqualify an individual from deferred action.

(e.g., MAYBE CONVICTIONS FOR WHICH A NY CERT. OF RELIEF FROM CIVIL DISABILITIES HAS BEEN GRANTED).

NOTE: Even though these offenses do not trigger the "automatic" criminal bars, DHS can consider them under the **discretionary public safety threat** and **totality of circumstances analysis**, described below. If you think you fall into any of these categories, please call the IDP hotline at 212-725-6422

ANY CRIMINAL HISTORY CAN RESULT IN A DISCRETIONARY DENIAL

THREAT TO PUBLIC SAFETY

DHS may deny any application if it claims a public safety threat. This includes gang membership or participation in criminal activities (e.g., annotation on NY rap sheet that person in on a gang watchlist).

An individual may receive deferred action only after showing "exceptional circumstances."

THREAT TO NATIONAL SECURITY

DHS may deny any application if it claims the applicant has participated in activites that are a threat to national security (e.g., annotation on NY rap sheet that person is on a terrorist watchlist).

An individual may receive deferred action only after showing "exceptional circumstances."

ANY CRIMINAL HISTORY

Even where no criminal bar is present, an individual is not guaranteed a grant of deferred action. DHS may consider an individual's total criminal history, including non-significant misdemeanor convictions, juvenile delinquency, and expunged convictions. DHS will determine under the **"totality of circumstances"** of the individual's application whether to grant deferred action.

Call the **IDP Hotline at 212-725-6422** for individual case support.

ADMINISTRATIVE
RELIEF
RESOURCE CENTER

CHART: Crimes-Related Bars to DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and DACA (Deferred Action for Childhood Arrivals)

Bar	*USCIS FAQ Webpage[1] (DACA) and Enforcement Memo[2] (DAPA) Text*	*Comments*
Any Three Misdemeanor Convictions Exceptions for: --Multiple convictions from same incident (DAPA) or occurring on the same date or "arising out of the same act, omission, or scheme of misconduct" (DACA) • Minor traffic offenses • State immigration offenses • Possibly Infractions	DACA refers to these convictions as "non-significant misdemeanors." DAPA: "…aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents"	*Definition of misdemeanor:* In sum, DACA defines a misdemeanor based on potential sentence, while DAPA relies upon state classification of misdemeanor versus a felony. DACA defines a non-significant misdemeanor as an offense that does not meet the definition of significant misdemeanor and that is punishable by imprisonment of more than five days but not more than one year. DAPA does not explicitly define misdemeanor. This may result in two differences between DAPA and DACA. First, DAPA should treat a state offense that has a potential sentence of more than a year (e.g., 18 months) as a misdemeanor if the *state* classifies it as a misdemeanor. This is because DAPA's definition of felony is limited to an offense that the state classifies as a felony. (See definition of felony, below.) Second, DAPA does not explicitly define a misdemeanor as an offense punishable by imprisonment for more than five days. Therefore an offense punishable by five days or less still might be considered a misdemeanor for DAPA. Advocates are requesting clarification on this.

Bar	*USCIS FAQ Webpage[1] (DACA) and Enforcement Memo[2] (DAPA) Text*	*Comments*
		Other offenses. For both DACA and DAPA, see exceptions for state immigration offenses and traffic offenses, below. *Definition of conviction.* For both programs, a disposition *might* not count as a criminal conviction at all, if the proceeding did not provide for a jury trial, require guilt "beyond a reasonable doubt," or have other key legal protections.[3] For example, some DACA applications were approved despite alcohol-related driving infractions where (a) the infraction carried a potential sentence of more than five days, and so could have been held to be a significant misdemeanor as a DUI, but (b) the disposition did not meet the definition of "conviction" due to lack of the constitutional protections cited above.
Conviction of a Significant Misdemeanor: **90-Day Sentence**	DACA: "…for which the individual was sentenced to time in custody of **more than 90 days**. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE." DAPA: "…for which the individual was sentenced to time in custody of **90 days or more** (the sentence must involve time to be served in custody, and does not include a suspended sentence)."	Any misdemeanor is a "significant misdemeanor" if the person was sentenced to custody for 90 days or more (DAPA) OR 91 days or more (DACA). This appears to include, for example: --Someone sentenced to jail for 100 days who served only 60 days due to good behavior -- Imposition of sentence is suspended, ordered to jail for 100 days as a condition of probation This would NOT include, for example, a one-year sentence that is imposed and suspended. (But see discussion of aggravated felonies and suspended sentence, below). This one-day discrepancy between DAPA and DACA will be addressed by advocates.

Bar	*USCIS FAQ Webpage[1] (DACA) and Enforcement Memo[2] (DAPA) Text*	*Comments*
Conviction of a Significant Misdemeanor: **Domestic Violence**	"Offense of domestic violence" DACA does not provide any further information about an "offense of domestic violence." The Enforcement Memo (governing DAPA) provides: "In evaluating whether the offense is a significant misdemeanor involving 'domestic violence,' careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor.[4]	Conviction of simple battery against a spouse, which in many states is an offense that is a good immigration plea, may not be safe. Where DV was originally charged, even if the plea was to a non-DV offense such as disturbing the peace or disorderly conduct, some DACA cases have been denied either as a matter of discretion or because the initial charge was interpreted as having triggered the significant misdemeanor bar. This might happen in DAPA as well.
Conviction of a Significant Misdemeanor: **Sexual Abuse or Exploitation**	"Sexual abuse or exploitation"	ICE will search sex offender registries. In some regions, misdemeanor consensual sex with a minor may be held an "aggravated felony," which is a bar to DAPA. It is not known if that also would come within this significant misdemeanor category. The DACA application form asks if the applicant has ever participated in "any kind of sexual contact or relations with any person who was being forced or threatened." This question indicates that simple prostitution (e.g. for having been a one-time sex worker) should not be included within this DACA bar, but may nonetheless be a negative factor in discretion.
Conviction of a Significant Misdemeanor: Firearm	"Unlawful possession or use of a firearm"	

CLIENT QUESTIONNAIRE -- RELIEF

If the answer to any question is "yes," the client might be eligible for the relief indicated. Be sure to photocopy any immigration document. See referenced sections for more information.

"USC" stands for U.S. citizen and "LPR" stands for lawful permanent resident (green card-holder).

1. ***Might client already be a USC – and not know it?*** If the answer to *any* question is "yes", investigate whether client is a USC or national. *See §3 Is Your Client a U.S. Citizen?*
   a. Was the client born in the United States or its territories (almost always a citizen or national)? Or,
   b. At time of birth abroad, did client have a USC parent or grandparent? Or,
   c. Before age of 18, in either order: did client become an LPR, and is one of the client's parents a USC, by birth or naturalization? Or, was the client adopted by a USC before the age of 16 and became an LPR before age 18?

2. ***LPR for five or three years, or military personnel, veteran, or spouse, who wants to apply for U.S. citizenship.*** An LPR can apply to naturalize to U.S. citizenship after five years LPR status, or three years of marriage to a USC while an LPR; must establish good moral character and should not be deportable. But some current and former military personnel can naturalize without being LPRs and while in removal proceedings. *See §4 Naturalization.*

3. ***LPR who is deportable and who has lived at least seven years in U.S.*** Client is an LPR who has lived in the U.S. at least seven years since being admitted in any status (e.g. as a tourist, LPR, border crossing card). No aggravated felony. *See §5 LPR Cancellation.*

4. ***LPR who is deportable for pre-April 24, 1996 convictions, including one or more aggravated felonies.*** Convictions after that date might bar this relief, however. *See §6 Former § 212(c) Relief.*

5. ***Parent, spouse, or child is USC or LPR.*** Client has a USC spouse; USC child at least age 21; or USC parent if the client is unmarried and under age 21 ("immediate relative" visa). Or, client has an LPR spouse; an LPR parent if client is unmarried; or a USC parent if client is at least age 21, and/or married ("preference system" visa). *See §7 Family Visas.*

6. ***Abused by USC or LPR spouse, parent, or adult child.*** Client, or certain family member/s, have been abused (including emotional abuse) by a USC or LPR spouse, parent, adult child. *See §8 VAWA Relief. (If the abuser is not a USC or LPR, consider U Visa, below.)*

7. ***Juvenile under court jurisdiction is a victim of abuse, neglect, or abandonment.*** Client is in delinquency, dependency, probate, etc. proceedings and can't be returned to at least one parent due to abuse, neglect or abandonment. *See §9 Special Immigrant Juvenile.*

8. ***Crimes inadmissibility waiver, INA § 212(h).*** Client is LPR now, or is eligible to apply for LPR on a family, VAWA (see # 4, 5 above), or employment visa. Client is inadmissible for: crimes involving moral turpitude or prostitution (even if these are non-drug aggravated felonies, in some cases), and/or conviction relating to use or simple possession of 30 grams or less marijuana or the equivalent in hashish. *See §10 Section 212(h) Waiver*.

9. ***Domestic Violence Waiver.*** Client was convicted of a deportable DV or stalking offense, but in fact client is the victim in the relationship. *See §11 Domestic Violence Waiver.*

10. ***DACA for younger persons.*** Client entered U.S. while under age 16 and before 6/15/2007, and was under 31 as of 6/15/2012. *See §12 Deferred Action for Childhood Arrivals.*

11. ***Ten years in the U.S.*** Client has lived in U.S. at least ten years and has a USC or LPR parent, spouse or child. Strict criminal bars. *See §13 Non-LPR Cancellation.*

12. ***Ten years in the U.S. and conviction/s from before 4/1/97.*** If all deportable convictions pre-date April 1, 1997, client may qualify for relief even with deportable convictions, e.g. for drugs, and even without a USC or LPR relative. An aggravated felony conviction after Nov. 29, 1990 is a bar. *See §14 Former Suspension of Deportation.*

13. ***Victim and witness to a crime in U.S.*** Client is victim of a crime such as incest, DV, assault, false imprisonment, extortion, obstruction of justice, or sexual assault/abuse, and is or was willing to cooperate in investigation or prosecution of the crime. *See §15 The "U" Visa.*

14. ***Victim of "severe" alien trafficking.*** Client is victim of (a) sex trafficking of persons under age 18, or (b) trafficking and indentured servitude of persons by use of force, fraud, etc. *See §16 The "T" Visa.*

15. ***Can provide valuable information about organized crime or terrorism.*** A very small number of visas may be given each year to key informants. *See §17 The "S" Visa.*

16. ***Terrible events in home country.*** Client fears persecution or even torture if returned to the home country. *See §§18 Asylum and Withholding,* and*19 Convention Against Torture.*

    Client already has asylee or refugee status. *See §20 Refugees and Asylees.*

    Client is from a country that the U.S. designated for Temporary Protected Status, based on terrible natural disaster, war. *See §21 Temporary Protected Status*.

17. ***Client is from the former Soviet bloc, El Salvador, Guatemala, or Haiti*** and applied for asylum or similar relief in the 1990's, or is a dependent of such a person. *See §22 NACARA for Central Americans,* and *§23 HRIFA for Haitians and Dependents.*

18. ***Client's case from 1980's amnesty programs or Family Unity is still alive.*** *See §24.*

19. ***Client is not eligible for any relief, and will go home. Client needs beneficial "voluntary departure" instead of removal.*** Voluntary departure has numerous benefits, and the only requirement is no aggravated felony conviction. Voluntary departure is very important for clients who wish to return to the U.S. legally, and equally important for clients whom you think might return to the U.S. illegally. *See §25 Voluntary Departure.*

20. ***Client must establish "good moral character."*** Establishing "good moral character" for a certain period of time is required for some of the applications described above, including naturalization, non-LPR cancellation, and VAWA. *See §26. Good Moral Character* for details.

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Advisory on Immigration Enforcement
Summary of New Priorities and Program Changes Announced by President Obama

Introduction

On November 20, 2014, the Obama Administration announced new policies regarding immigration enforcement. Simultaneously, the administration announced other modifications and immigration benefits, including a program for deferred action for parents of U.S. citizens and permanent residents. Analyses of the other, non-enforcement related announcements are available at www.adminrelief.org.

The enforcement announcements fall into three primary categories:

- Shifts in enforcement "priorities," including detention resources
- Changes to the Secure Communities program and detainers
- Updated objectives for Southern Border enforcement[1]

Enforcement "Priorities"

The new enforcement priorities memo, entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants"[2] covers the categories of people who will be at greatest risk of deportation, and applies to ICE, CBP and USCIS.[3] It also provides guidance on prosecutorial discretion and immigration detention. Finally, it supersedes and rescinds several previous memos on enforcement priorities and operations. The changes are set to take effect on January 5, 2015.

There are three civil enforcement priority levels, although as before, the new memo states that anyone who is legally deportable under immigration law may still be deported.

- **Priority One** focuses on people who are "threats to national security, border security, and public safety." This includes: persons suspected of having involvement with gangs, spies, or terrorists; persons convicted of a felony (defined under state law) or an "aggravated felony;" and persons apprehended at the borders while attempting to enter unlawfully.[4]
- **Priority Two** focuses on people who are "misdemeanants and new immigration violators." This includes: persons convicted of three or more misdemeanors, not including minor traffic offenses and state convictions where immigration status is an element; visa "abusers;" persons without status who have not been continuously present in the U.S. since January 1, 2014; and persons with convictions for a significant misdemeanor. A "significant misdemeanor" is defined as an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or any misdemeanor for which the person was sentenced to serve 90 days or more in jail, not counting suspended sentences.
- **Priority three** focuses on people who have "other immigration violations." This priority only names "those who have been issued a final order of removal on or after January 1, 2014."

Note that eligibility for Deferred Action for Parents (DAPA) depends on **NOT** being listed in any one of these enforcement priority categories above. Eligibility for Deferred Action for Childhood Arrivals (DACA) does not depend upon these enforcement priority categories, but upon the original DACA criteria. For more information on DACA, please see www.adminrelief.org and www.ilrc.org/daca.

Immigration Detention

The enforcement policy memo directs that DHS *should* use detention resources to detain:

- Individuals who fall in the priority categories described above
- Individuals subject to mandatory detention under current immigration law

DHS *should not* detain any of the following, absent "extraordinary circumstances" or unless they are subject to mandatory detention as required by law: those who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. DHS officers or special agents must obtain approval from the ICE Field Office Director before detaining any of these individuals.

Secure Communities and Immigration Detainers

Although the administration says they have ended Secure Communities, it has actually just been renamed: "Priority Enforcement Program (PEP)." The fingerprints sent to the FBI of anyone arrested will continue to be checked against ICE databases at the point of arrest.

The new policy is primarily about reforms to immigration detainers. Detainers will now generally be requests for notification of release date, not hold requests for extra detention. The memo is ambiguous, but it appears to intend that ICE shall primarily make only notification requests to local law enforcement, but may request a hold for transfer to ICE under "special circumstances." "Special circumstances" is not defined. However, the memo also provides that if such a hold is requested, ICE will have to specify that there is probable cause for that detention. How ICE would specify this to the satisfaction of the constitution is unknown.

The memo also states, again with some ambiguity, that these notification requests or hold requests should be issued according to the enforcement priorities, focusing specifically on: persons suspected of being involved with terrorists, gangs, or spies, persons convicted of felonies or "aggravated felonies," and persons with convictions for significant misdemeanors or three or more non-significant misdemeanors. As a result, because these enforcement priorities are mostly for people convicted of certain crimes, ICE should not issue detainers on individuals who only been charged, or have pending criminal cases, unless they have a prior conviction that meets the priorities. How strictly ICE will follow this requirement will require close monitoring.

Border Enforcement

This announcement builds on the "Southern Border and Approaches Campaign Plan" that DHS launched in May, 2014. In contrast to the border strategies of some recent years, which focused on facilitating trade and ensuring functioning ports, this plan emphasizes immigration enforcement and surveillance.

Southern Border operations will be divided into three Joint Task Forces: East, West, and "investigations."

The overarching goals of the Southern Border and Approaches Campaign are:

- Enforce immigration laws and interdict individuals crossing borders without permission;
- Targeting transnational criminal organizations; and
- Decreasing terrorist threats.

The plan also identifies ten objectives, which focus on deterrence, increased surveillance, heightened inspections, targeting organized crime, and infrastructure improvements.

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[1] No new policies or priorities were announced regarding the Northern Borders.

[2] The memo addresses "Undocumented Immigrants" in the title, and it is unclear whether it also applies to immigrants with valid visas or permanent residence.

[3] *See* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. This memo from DHS Secretary Jeh Johnson applies to ICE, CBP, and USCIS.

[4] This level 1 priority for those apprehended at the border appears to apply to those apprehended now and in the future, not necessarily anyone who has been apprehended at the border at some time in the past.

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ENSURING COMPLIANCE WITH *PADILLA V. KENTUCKY* WITHOUT COMPROMISING JUDICIAL OBLIGATIONS

WHY JUDGES SHOULD NOT ASK CRIMINAL DEFENDANTS ABOUT THEIR CITIZENSHIP/IMMIGRATION STATUS*

In *Padilla v. Kentucky*,[1] the Supreme Court confirmed that defendants have a right to advice from counsel about the potential immigration consequences of their criminal charges and convictions, and that failure to provide such advice constitutes ineffective assistance of counsel, in violation of the Sixth Amendment. As courts around the country consider what role they should play in ensuring that defense counsel comply with their obligations post-*Padilla*, judges should refrain from asking about defendants' citizenship/immigration status. This document outlines the constitutional, statutory, and ethical reasons that judges should not solicit or otherwise require defendants to disclose, orally or in writing, their citizenship/immigration status when that status is not a material element of the offense with which they are charged.

Judges play an important role in ensuring that defendants are advised about potential immigration consequences of a conviction and have an opportunity to obtain such advice. However, they need not ask about a defendant's citizenship/immigration status on the record to do so. Judges can assure the voluntariness of a plea and support compliance with *Padilla* without inadvertently triggering additional immigration consequences for a defendant, requiring disclosures that would breach attorney-client privilege, violating state laws, or undermining constitutional protections against discrimination, unreasonable interrogation, and self-incrimination.

For the constitutional, statutory and ethical reasons discussed below, judges should refrain from asking about defendants' citizenship/immigration status when ensuring compliance with *Padilla*.

I: The law counsels against requiring disclosure of citizenship/immigration status.

- Judicial obligations under the Bill of Rights, judicial codes of conduct and some state laws preclude inquiry into defendants' citizenship/immigration status. By not requiring disclosure of status, judges can:
  - Avoid compelling individuals to incriminate themselves, in violation of the Fifth Amendment;
  - Uphold their obligations of impartiality and neutrality;
  - Protect the confidentiality essential to honest attorney-client communication and to the ability of counsel to provide competent advice about the immigration consequences of conviction; and
  - Comply with the growing number of state statutes that prohibit on-record inquiry into defendants' legal status.

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

- By limiting on-record questions to those relevant to the criminal charges at issue or necessary for compliance with judicial obligations, judges can avoid triggering adverse immigration consequences for defendants and promote public confidence in the criminal justice system.

III: When issuing advisals, it is in the court's interest to issue them to a*ll* defendants, without distinguishing between citizens and non-citizens.

- When providing *Padilla* advisals, judges can prevent the complications that may ensue from raising status on the record and still fulfill their responsibility to ensure that guilty and nolo contendere pleas are knowing and voluntary by providing those advisals to all defendants regardless of citizenship/immigration status.

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* This document was prepared on behalf of, and under the guidance of the Immigrant Defense Project (IDP) by Nikki Reisch and Sara Rosell of the Immigrant Rights Clinic (IRC) at New York University School of Law. November 2010.

I: The law counsels against requiring disclosure of citizenship/immigration status.

Questioning defendants about citizenship/immigration status on the record could tread on Fifth Amendment protections against self-incrimination.[2] All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment. In *Mathews v. Diaz*, the Supreme Court held that every person, "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[3] An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings."[4] Statements about alienage made on the record in criminal court, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325, 1326, respectively.[5] Thus, requiring defendants to disclose their citizenship/immigration status risks compelling individuals to incriminate themselves. Although a defendant could invoke the right to remain silent,[6] he or she may not be adequately informed that this right exists in the context of a plea allocution,[7] or could be intimidated into disclosure.[8] Furthermore, asking about citizenship/immigration status may force a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required for entry of a plea. To avoid such complications, judges should not ask about or require written indication of alienage on the record.

Asking about a defendant's citizenship/immigration status may be contrary to judicial codes of conduct. The public controversy surrounding the presence of immigrants implicates issues of race, ethnicity and class. Thus even if a judge's intention is to protect the defendant's interests, inquiring into a defendant's citizenship/immigration status may undermine the appearance of judicial neutrality. The American Bar Association (ABA) Model Code of Judicial Conduct instructs judges to "avoid impropriety and the appearance of impropriety," and perform their duties without bias or prejudice, including based on race and national origin.[9] Most state codes of judicial conduct contain identical or substantially similar provisions.[10] At least one state judicial ethics body has found "reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or a bail hearing."[11] Another state disciplined a judge because his selective inquiry into defendants' citizenship/immigration status raised serious concerns about his motivations, undermined public confidence in the judiciary, and violated codes of judicial conduct. [12]

Furthermore, citizenship/immigration status inquiry could jeopardize attorney-client confidentiality and hinder the ability of counsel to provide effective assistance. The Federal Rules of Criminal Procedure require a judge to inquire whether a defendant is aware of the consequences of his plea, but "[t]he court must not participate" at all in discussions concerning a plea agreement.[13] By eliciting information about a defendant's citizenship/immigration status on record, a judge may be unwittingly intruding into confidential attorney-client communication,[14] undermining counsel's ability to predict and advise his or her client regarding immigration consequences, or upsetting the terms of a negotiated plea designed to avoid disclosure of status.[15] If individuals fear that the information they share with their attorneys about their citizenship/immigration status may be divulged on the record in court, they may withhold facts that are essential for their attorneys to provide accurate advice. It would no more be appropriate for a judge to inquire into the health status of a defendant at the time of a plea, when it is not relevant to the offense charged and was not voluntarily disclosed by the defendant, than it would be to inquire into a defendant's citizenship/immigration status.

A growing number of states prohibit courts from requiring disclosure of a defendant's citizenship/immigration status. Recognizing the concerns associated with disclosure of citizenship/immigration status on the record, ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship/immigration status,[16] one deems such inquiry unnecessary,[17] and others are considering legislation that would impose similar restrictions.[18] The relevant legal codes in the ten states with existing statutory bars to inquiry prohibit requiring a defendant to disclose his or her citizenship/immigration status to the court at the time of a plea. For example, Arizona's rule on pleas of guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."[19] Even state plea forms that do address immigration consequences typically do not require a defendant to indicate his or her citizenship/immigration status.[20]

At least twenty-eight jurisdictions have statutes requiring judges to advise defendants of potential immigration consequences of criminal convictions. Ten prohibit inquiry into defendants' status.

Alaska R. Crim. P. 11(c)(3)
Ariz. R. Crim. P. 17.2(f)*
Cal. Penal Code § 1016.5*
Conn. Gen. Stat. Ann. § 54-1j*
D.C. Code Ann. § 16-713
Fla. R. Crim. P. 3.172(c)(8)
Ga. Code Ann. § 17-7-93(c)
Haw. Rev. Stat. § 802E-2
Idaho Crim. R. 11
Ill. Code. Crim. P. 725 ILCS 5/113-8
Iowa R. Crim. P. 2.8(2)(b)(3), (5)
Me. R. Crim. P. 11(h)
Md. Rule 4-242(e)*
Mass. Gen. Laws Ann. ch. 278, § 29D*
Minn. R. Crim. P. 15.01(1)(10(d), 15.02(2)
Mont. Code Ann. § 46-12-210(1)(f)
Neb. Rev. Stat. § 29-1819.02*
N.M. Dist. Ct. R. Cr. P. 5-303(F)(5)
N.Y. Crim. Proc. Law § 220.50(7)
N.C. Gen. Stat. § 15A-1022(a)(7)
Ohio Rev. Code Ann. § 2943.031*
Or. Rev. Stat. § 135.385(2)(d)
P.R. Laws Ann. tit. 34, App. II, Rule 70
R.I. Gen. Laws § 12-12-22*
Tex. Code Crim. Proc. Ann. art. § 26.13(a)(4)
Vt. Stat. Ann. tit. 13, § 6565(c)
Wash. Rev. Code § 10.40.200*
Wis. Stat. § 971.08(1)(c)*

* Prohibits inquiry into citizenship/immigration status

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

Ensuring effective assistance of counsel does not require ascertaining the content of that assistance. In fact, attorney-client privilege protects the confidentiality of advice provided to a client. In *Padilla*, the Supreme Court emphasized the duty of *defense attorneys* to advise their clients of the immigration consequences of conviction, holding that failure to so do may constitute ineffective assistance of counsel. Only defense counsel can assure that the assistance they provide is effective. In promoting compliance with *Padilla* and protecting Sixth Amendment rights,[21] judges' primary role is to notify all defendants of their right to receive advice from counsel about potential immigration consequences. Defense attorneys have an obligation to determine whether their client is a noncitizen and then to provide such advice based on his or her individual facts (such as, *inter alia*, family relationships, length of time in country, complete immigration and criminal history and risk of persecution in country of origin). *Padilla* did not mandate judges to take part in providing immigration advice. Thus, judges need not inquire into citizenship/immigration status to determine whether the advice is necessary in the defendant's case nor elicit information about the content of any advice provided.

Disclosure of citizenship/immigration status is not necessary for a judge to confirm that a plea is knowing and voluntary, make a finding of guilt, or confirm the factual basis of a plea.[22] A judge has a responsibility to confirm that a guilty plea is free from coercion, and that the defendant understands the nature of the charges and knows and understands the consequences of pleading guilty.[23] However, it is for defense counsel, not a judge, to identify those consequences to which a defendant is vulnerable as a result of conviction and to advise the client accordingly. Judges can fulfill their obligations to ensure that pleas are knowing and voluntary, without inquiring into a defendant's citizenship/immigration status. Just as a judge seeking to confirm that a plea is knowing and voluntary does not ask if a defendant resides in public housing—leaving it to counsel to determine whether the defendant faces any risk of eviction as a result of conviction and advise him or her

accordingly—it would be inappropriate for a judge to ask about a defendant's citizenship/immigration status, rather than simply ensuring that a defendant is aware of his or her rights to discuss potential consequences with an attorney. Furthermore, with the exception of those criminal laws that include citizenship/immigration status as an element of the offense,[24] an individual's nationality, citizenship or alienage has no bearing on his or her guilt or innocence regarding a criminal charge, or the factual basis of his or her plea.[25]

Inducing a defendant to indicate his or her citizenship/immigration status on record in a criminal proceeding can have significant adverse consequences for the defendant. Citizenship/immigration status is sensitive information and its disclosure on the record in public courtrooms could trigger adverse action against defendants or their families.[26] Department of Homeland Security/ICE officers may be present in the courtroom or alerted to statements made by individuals present, including local law enforcement agents and prosecutors. It is possible that DHS may use evidence from court transcripts to pursue deportation—a measure which the Supreme Court has described as a "drastic," severe consequence that is "virtually inevitable" for a vast number of noncitizens convicted of crimes, because deportation is often mandatory despite any favorable factors.[27]

If courtrooms are seen as places in which individuals' citizenship/immigration status will be exposed, some defendants and witnesses may lose faith in the fairness and impartiality of the criminal justice system. Studies have found that increased collaboration between local law enforcement agencies and immigration authorities (the Bureau of Immigration and Customs Enforcement), and the associated fear among immigrant communities that any contact with police could trigger consequences, has a chilling effect on reporting of crimes, resulting in further marginalization of already vulnerable populations.[28] Just as law enforcement agents depend on the cooperation of local communities to prevent, investigate, and prosecute crime, so too do courts require the cooperation of defendants and witnesses in proceedings to effectively adjudicate charges and issue sentences. If judges require disclosure of citizenship/immigration status, some defendants and witnesses may be afraid to appear in court at all.

On-record disclosures may have chilling effects on individuals outside of the criminal proceeding. If people believe that pressing criminal charges could lead the accused to be deported, they may be discouraged from reporting crimes. This is particularly true in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to detention and deportation.[29] Such fear and mistrust of the criminal justice system could have dangerous consequences, especially for the most vulnerable populations of women and children.

III: When issuing advisals, it is in the court's interest to issue them to *all* defendants, without distinguishing between citizens and non-citizens.

Selectively issuing advisals to some defendants and not others runs the risk of being under-inclusive. Providing advisals only to those who state that they are non-citizens or whom the court believes to be noncitizens may mean that people who face potential immigration consequences of a conviction may not be informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.[30] This approach could cost courts time in the long run. When judges issue advisals to all defendants without trying to single out noncitizens, they are less likely to face future motions to vacate for failure to issue a notification, especially in those states where it is statutorily required.[31] It also may take more time to accurately distinguish between citizens and non-citizens than it would to issue advisals to everyone. As Florida's statute makes clear, universal administration of an advisal renders inquiry into citizenship/immigration status unnecessary: "It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the required] admonition shall be given to all defendants in all cases."[32]

Furthermore, non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases for law enforcement agents to

question someone about their citizenship.[33] According to the Second Circuit, "The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status."[34] When it is not necessary to a finding of guilt, judicial questioning regarding a defendant's citizenship/immigration status could appear to be gratuitous. Furthermore, selectively questioning defendants about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters could be in tension with Fourth Amendment protections against racial and ethnic profiling. Regardless of whether the motives for asking about citizenship/immigration status are to protect and not to prosecute defendants, judges should refrain from asking any defendant about his or her citizenship/immigration status and thereby avoid any constitutional concerns that could arise from selective questioning.

In certain sentencing or custody determinations, judges may take citizenship/immigration status into account when defense counsel voluntarily submits it for the court's consideration.

Prohibiting judges from affirmatively inquiring into citizenship/immigration status on the record does not mean that a defendant, under advice of counsel, cannot voluntarily disclose such information for the judge's consideration during sentencing or custody determinations. Just as judges may consider an offender's health status when it is voluntarily disclosed by defense counsel, but may not independently solicit medical information on record, so too may judges consider immigration status when it is voluntarily divulged. Defendants and their counsel should be able to control whether and when to disclose information about immigration status on the record, when it is not an element of the criminal offense.

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Endnotes

[1] 130 S. Ct. 1473 (2010) (holding that Sixth Amendment requires defense counsel to provide affirmative, competent advice to noncitizen defendants regarding immigration consequences of guilty plea and that absence of such advice may be basis for claim of ineffective assistance of counsel).

[2] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. However, its invocation is not limited to criminal trials. *See, e.g. United States v. Balsys*, 524 U.S. 666, 672 (1998) (" '[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'" when individual believes information sought or discoverable through testimony, "could be used in a subsequent state or federal criminal proceeding") (citing *Kastigar v. United States*, 406 U.S. 441, 444-445, (1972)); *see also McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (making Self-Incrimination Clause of Fifth Amendment applicable to states through Fourteenth Amendment Due Process Clause).

[3] 426 U.S. 67, 77 (1976).

[4] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[5] *See infra*, note 24.

[6] Citizens and non-citizens alike may invoke the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law…Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (internal citations omitted); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) ("[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (individual subject to removal proceedings invoked Fifth Amendment, but court did not reach question of whether invocation was proper because it deemed the issue "not relevant to [its] decision ….").

[7] Fifth Amendment protection applies to communication that is testimonial, incriminating, and compelled. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). What is considered custodial interrogation depends on whether a reasonable person, in view of the totality of the circumstances, would feel free to leave. *See Stansbury v. California*, 511 U.S. 318 (1994). A court may constitute a "custodial setting" but the test is whether, under all the circumstances involved in a give case, the questions are "reasonably likely to elicit an incriminating response from the suspect." *United States v. Chen*, 2006 U.S. App. LEXIS 5286 (March 2, 2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). "The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant." *Id.* (quoting *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994)).

[8] Practitioners have expressed concern that defendants, when directly addressed by the judge, are often too intimidated to assert their right to remain silent or to ask for more time, when needed, to speak to their attorneys. When immigration status is not relevant to a material issue in the case, judges should not seek its disclosure because such inquiry may have an *in terrorem* effect upon a defendant, who may be intimidated and inhibited from pursuing his or her legal rights. *See Campos v. Lemay*, 2007 U.S. Dist. LEXIS 33877, 24-25 (S.D.N.Y. 2007) (recognizing that danger of intimidation from inquiring into defendant's legal status during proceedings could affect defendant's ability to vindicate his or her legal rights). Other courts have similarly recognized the risk related to questioning immigration status on the record. *See, e.g. Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Sup. Ct. Tex. 2010). Asking about citizenship/immigration status may have the effect of forcing a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required.

[9] *See* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 1.2, 1.3, 2.2, 2.3, & associated cmts. (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

[10] For some representative examples, see ALA. CANONS OF JUDICIAL ETHICS Canons 1-3; 22 NYCRR §§ 100.1, 100.2, 100.3(B)(3)-(4); ALASKA C.J.C. Pts. R1-R3 (2010); GA. CODE OF JUDICIAL CONDUCT Canons 2 -3 (2009), OHIO JUD. RULES R. 2.2, 2.3 (2010) ("Rule 2.3 is identical to [ABA] Model Rule 2.3."); CAL. CODE JUDICIAL ETHICS Canons 2-3 (1996); N.Y. CODE OF JUDICIAL CONDUCT, Canons 2-3 (1996).

[11] Maryland Judicial Ethics Committee, Op. Request No. 2008-43 (January 30, 2009) ("At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant's Immigration Status"), 2-3, *available at* http://www.courts.state.md.us/ethics/opinions/2000s/2008_43.pdf .

[12] *See In re Hammermaster*, 139 Wn.2d 211, 244-45 (Wash. 1999) (finding that judge's practice of inquiring about citizenship of some defendants in criminal cases violated Washington's Code of Judicial Conduct, requiring judges to be patient, dignified, and courteous).

[13] FED. R. CRIM. P. 11(c)(1).

[14] The Supreme Court has repeatedly recognized "the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion." *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications. …The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.") (internal citations omitted); *United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 336 (4th Cir. 2003) ("[U]nder normal circumstances, an attorney's advice provided to a client, and the communications between attorney and client are protected by the attorney-client privilege."); *Sarfaty v. PNN Enters.*, 2004 Conn. Super. LEXIS 1061, 10-11 (Conn. Super. Ct. 2004) ("The attorney-client privilege applies to communications: (1) made by a client; (2) to his or her attorney; (3) for the purpose of obtaining legal advice; (4) with the intent that the communication be kept confidential.").

[15] As the Supreme Court recognized in *Padilla*, both the prosecution and defense have an interest in taking immigration consequences into consideration in off-record negotiations: "Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486.

[16] The states with statutes explicitly prohibiting inquiry into citizenship/immigration status at the time of a guilty or no contest plea are Arizona, California, Connecticut, Maryland, Massachusetts, Nebraska, Ohio, Rhode Island, Washington, and Wisconsin. *See* ARIZ. R. CRIM. P. §17.2; CAL. PEN. CODE § 1016.5(d); CONN. GEN, STAT. § 54-1j(b); MD. RULE 4-242 (specifying in Committee note that court should not question defendants about citizenship status); MASS ALM GL. ch. 278, § 29D; R.R.S. Neb. §29-1819.03; ORC ANN. § 2943.031; R.I. GEN. LAWS §12-12-22(d); REV. CODE WASH. (ARCW) §10.40.200(1); WIS. STAT. § 971.06(c)(3). It should be noted that Ohio's statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031. Maine is the only state in the country that affirmatively requires courts to ask about the citizenship of criminal defendants at the time of accepting a plea.

[17] Florida's statute indicates that it is "not necessary for the trial judge to inquire" about immigration status when giving an admonition about immigration consequences of a plea. FLA. R. CRIM. P. § 3.172(c)(8).

[18] *See, e.g.*, NY Assem. Bill A04957, Feb. 10, 2009, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+A04957%09%09&Summary=Y&Text=Y. The text of the bill includes a statement of legislative intent that "at the time of the plea no defendant shall be required to disclose his or her legal status to the court," and repeats the following provision in all proposed new or amended subsections of the N.Y. CRIMINAL PROCEDURE LAW §§ 170.10, 180.10, 210.15, 220.50: "This advisement shall be given to all defendants and no defendant shall be required to disclose his or her legal status in the United States to the court." *See id.*, proposed text of:

§170.10(4), §180.10(7), §210.15(4), §220.50(7), § 220.60 (5)-(6). For further discussion, see also http://www.nycbar.org/pdf/report/advisal_bill.pdf.

[19] Ariz. R. Crim. P. 17.2(f).

[20] Of at least thirty-six states that use written plea forms for pleas of guilty or nolo contendere, New Jersey and Ohio are the only two to require the party submitting the plea to indicate his or her citizenship status. Question 17(a) of New Jersey's form, for example, asks "Are you a citizen of the United States?" Question 8 of Ohio's form contains a brief advisal and the following language: "With this in mind, I state to the court that: "I am a United States citizen [ ] I am not a United States citizen [ ]."

[21] The Sixth Amendment of the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]." Courts have interpreted the Sixth Amendment, read together with the Due Process clause of the Fifth Amendment, to confer a right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

[22] A judge's obligation to ensure that a plea is knowing and voluntary stems from the Due Process Clause. The Supreme Court has held that the Due Process Clause requires a plea to be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (overruled in part on other grounds by *Edwards v. Arizona*, 451 U.S. 477 (1981)). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. However, a judge need not know a defendant's immigration status to assure him or herself that a plea is knowing and voluntary.

[23] *See, e.g.*, *United States v. Hernandez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000) ("Before it accepts a guilty plea, the court must address three core concerns underlying Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea.").

[24] Examples of federal crimes for which "alienage" is an element of the offense include:

8 U.S.C. 1282(c) – Alien crewman overstays;
8 U.S.C. 1306(a) – If overstay after 30 days and no fingerprints/registration;
8 U.S.C. 1304(e) – 18 or over not carrying INS documentation;
8 U.S.C. 1306(b) – Failing to comply with change of address w/in 10 days;
8 U.S.C. 1324c(e) – Failure to disclose role as document preparer;
8 U.S.C. 1324(a) – Alien smuggling;
8 U.S.C. 1325 – Entry Into United States without inspection or admission;
8 U.S.C. 1326 – Illegal Reentry after deportation;
18 U.S.C. 1546 – False statement/fraudulent documents;
18 U.S.C. 1028(b) – False documents;
18 U.S.C. 1001 False statement;
18 U.S.C. 911, 1015 – False claim to U.S. citizenship.

[25] A judge should limit his or her questions to those relevant to the criminal charges at issue. *See Ochoa v. Bass*, 2008 OK CR 11, P15 (Okla. Crim. App. 2008) (finding that court had legal authority to question defendants regarding their immigration status during sentencing hearing, without deciding whether trial court can or should ask such questions in any other stage of criminal proceedings, whether defendant is obliged to answer or whether Miranda warnings should precede questioning); *see also* N.Y. Judicial Ethics Op. 05-30 (2005) (holding that judges are not required to report information that individual is in violation of immigration laws); *see also*, GA. CODE OF JUDICIAL CONDUCT Canon 3(7) cmt. ("Judges must not independently investigate facts in a case and must consider only the evidence presented.").

[26] Courts have recognized that the disclosure of immigration status can have harmful impacts. *See e.g.*, *Perez v. United States*, 968 A.2d 39, 71 (D.C. Ct. App. 2009) (discussing potential prejudicial impact of disclosure of immigration status); *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 280 (App. Div. 2009) (acknowledging chilling effect that disclosure of immigration status may have outside of particular case and requiring further proffer of admissibility (probative value outweighing prejudicial impact) before allowing inquiries regarding immigration status); *Arroyo v. State*, 259 S.W.3d 831, 836 (Tex. App. 2008) (holding that information regarding legal status in United States is admissible when relevant and finding court's refusal to allow questions about citizenship to be valid exercise of discretion); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (Cal. App. 4th Dist. 2003) ("[E]vidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question.").

[27] *Padilla*, 130 S. Ct. at 1478.

[28] Many law enforcement agencies, public officials and civil society organizations have raised concerns about the impact that local enforcement of immigration laws could have on immigrant confidence in and cooperation with the criminal justice system. *See*, *e.g.*, MAJOR CITIES CHIEFS (M.C.C.) IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES: M.C.C. NINE (9) POINT POSITION STATEMENT, 5-6 (June 2006) (describing concerns with local enforcement of federal immigration laws, including risk of undermining trust and cooperation of immigrant communities), http://www.houstontx.gov/police/pdfs/mcc_position.pdf; National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070* (June 2010), http://www.nilc.org/immlawpolicy/LocalLaw/police-chiefs-oppose-sb1070-2010-06.pdf; America's Voice, *Police Speak Out Against Arizona Immigration Law* (May 18, 2010), http://amvoice.3cdn.net/cffce2c401fc6b2593_p6m6b9n1l.pdf; United States Conference of Mayors, 2010 Resolutions, 78th Conference, "Opposing Arizona Law SB1070", "Calling Upon the Federal Government to Pass Comprehensive Immigration Reform that Preempts Any State Actions to Assert Authority Over Federal Immigration Law," at 67-70, http://www.usmayors.org/resolutions/78th_Conference/adoptedresolutionsfull.pdf; United States Conference of Mayors, 2004 Measure to Amend the CLEAR and HSEA Acts of 2003 (expressing concern about distracting local law enforcement from primary mission, undermining federal legislation protecting immigrant victims, and creating "an atmosphere where immigrants begin to see local police as federal immigration enforcement agents with the power to deport them or their family members, making them less likely to approach local law enforcement with information on crimes or suspicious activity"), *available at* http://www.usmayors.org/resolutions/72nd_conference/csj_08.asp; ACLU AND IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNC-CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf; CHRISTINA RODRIGUEZ ET AL, MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G), at 8-9 (March 2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf.

[29] For a discussion of these issues, see NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES, 1-4 (April 2009), *available at* http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf. The report explains how the immigration consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

> Criminal proceedings, with their concomitant danger of deportation, are another kind of obstacle for abused immigrant women, who have reason not only to fear their own forced removal from the United States but that of their abuser.... Danger lurks for abused immigrant women in the possibility of their own arrests as well as the arrest of their abusers….Abusers, too, may be subjected to deportation if criminal cases are pursued against them, and this is not necessarily a desirable outcome for abused immigrant women. If a victim depends on her abuser for support, the last thing she may want is to see him transported thousands of miles away, where he may be unable to earn a living and where support enforcement mechanisms may be meaningless. Immigrant victims also may need their abusers' presence in the United States to legalize their own status. VAWA self-petition remedies are often unavailable when abusers have been deported. Beyond these considerations, victims may have family, even children, who remain in their home countries. An abuser returning to a victim's village or locale may take revenge on family members he finds there.

See also, ASSISTING IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: LAW ENFORCEMENT GUIDE, *available at* http://www.vaw.umn.edu/documents/immigrantdvleguide/immigrantdvleguide.pdf.

[30] In a case in which a defendant who erroneously represented himself as a U.S. Citizen at a plea hearing later moved to vacate his plea on the grounds that he did not receive the statutorily required immigration advisal from the judge, the Illinois Supreme Court held that a court's failure to admonish a defendant about the immigration consequences of a guilty plea is not automatically grounds for vacatur, while confirming that issuance of the advisal is nonetheless mandatory under state law and must be administered to defendants on the basis of the plea they are entering, not their citizenship or immigration status. See *People v. DelVillar*, 235 Ill. 2d 507, 516, 519 (2009) ("The statute imposes an obligation on the court to give the admonishment.The admonishment must be given regardless of whether a defendant has indicated he is a United States citizen or whether a defendant acknowledges a lack of citizenship….[The statutory provision] is mandatory in it imposes an obligation on the circuit court to admonish all defendants of the potential immigration consequences of a guilty plea. However, … failing to issue the admonishment does not automatically require the court to allow a motion to withdraw a guilty plea. Rather, the failure to admonish a defendant of the potential immigration consequences of a guilty plea is but one factor to be considered by the court when ruling on a defendant's motion to withdraw a guilty plea.").

[31] For examples of cases in which defendants sought motions for vacatur on the basis of failure to issue a required advisal, see: *State v. Weber*, 125 Ohio App. 3d 120 (Ohio Ct. App. 1997) (vacating conviction and withdrawing guilty plea due to failure to issue required advisal, finding no showing of prejudice necessary to be eligible for remedy of withdrawal); *Commonwealth v. Hilaire*, 437 Mass. 809, 813 (Mass. 2002) (finding that judge's brief mention that plea might affect defendant's status and defendant's signature of written waiver were insufficient to comply with the requirements of MASS. GEN. LAWS ch. 278, § 29D, including that court advise defendant of specific immigration consequences of plea, without inquiring into status); *State v. Feldman*, 2009 Ohio 5765, P45 (Ohio Ct. App. 2009) (holding that failure to provide warning meant plea was not entered into knowingly, voluntarily, and intelligently and thus subject to vacatur); *Rampal v. State*, 2010 R.I. Super. LEXIS 76 (R.I. Super. Ct. 2010) (vacating plea of nolo contendere and remanding due to failure to issue required advisal); *Commonwealth v. Mahadeo*, 397 Mass. 314, 318 (Mass. 1986) (reversing dismissal of motion to vacate on grounds that court failed to give advisal when defendant admitted facts sufficient for finding of guilt); *State v. Douangmala,* 646 N.W.2d 1 (Wis. 2002) (holding defendant entitled to vacatur of judgment and withdrawal of plea if court failed to advise him about deportation consequences as required by § 971.08(1)(c) and plea is likely to result in deportation); *see also Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459, 460 (Mass. App. Ct. 2001). *But see Rodgers v. State*, 902 S.W.2d 726, 728 (Tex. App. 1995) ("We hold that by inquiring into the citizenship of Appellant, the trial court substantially complied with article 26.13(a)(4) and further admonishment was immaterial to his plea. We find this only because Appellant affirmed that he was a citizen of the United States. Although the better practice is to comply with the statute and to give the admonishment as required by article 26.13(a)(4), the clear intent of the provision was to prevent a plea of guilty that results from ignorance of the consequences."); *Sharper v. State*, 926 S.W.2d 638, 639 (Tex. App. 1996) ("The courts of appeals that have considered the issue have held that the immigration admonition is immaterial when the record shows that the defendant is a United States citizen.") (citing *Rodgers v. State*, 902 S.W.2d 726).

[32] FLA. R. CRIM. P. 3.172(c)(8).

[33] *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific 'articulable' facts that warrant suspicion vehicle contains "aliens who may be illegally in the country" and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion ("the Supreme Court has repeatedly held that reliance "on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"") (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986)). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (finding that officer's stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986) (upholding finding that INS engaged in pattern of unlawful stops (seizures) to interrogate individuals based on Hispanic appearance, in violation of Fourth Amendment). *But see Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful

detention/custody); *Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) ("The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen … ."). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny. *See Nyquist v Manclet*, 432 U.S. 1 (1977); *Castro v. Holder*, 593 F3d 638, 640-41 (7th Cir. 2010).

[34] *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) ("The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status. For example, government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage.")(citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

SAMPLE LETTER TO JUDGE ADDRESSING INQUIRY INTO STATUS/ADVICE

Dear Judge _____,

I write this letter to explain the Public Defender's position regarding the disclosure of immigration advice provided to our clients. I hope that this letter serves to clarify any questions or concerns that the Court may have regarding our position.

Public Defender takes its *Padilla* obligation very seriously. We are highly conscious of the extreme consequences that criminal convictions can have for our noncitizen clients and are committed to minimizing such harm whenever possible.

The intersection between criminal and immigration law requires a very detailed and fact specific analysis. It is not merely the conviction that determines the immigration impact, but rather a myriad of facts specific to each individual defendant, including prior convictions, immigration status, and the date of entry, to name a few. It is our firm position that the disclosure of the substance of attorney-client discussions regarding immigration consequences of pleas: 1) are protected by attorney-client privilege; 2) are protected in many cases by the 5th amendment right against self-incrimination; 3) may trigger adverse immigration consequences; and 4) are irrelevant to the taking of the plea. Therefore as a matter of policy, PD office will not be disclosing the contents of our immigration advice, which includes, among other things, questions regarding citizenship. A more detailed explanation for this policy is provided below.

1. Advice Is Protected By Attorney-Client Privilege:

When faced with a noncitizen client, an attorney's advice regarding the overall strategy of the criminal case inherently encompasses the specific advice surrounding the potential immigration consequences of a conviction. Often, the impact a conviction may have on a client's immigration status drives the manner in which the defense attorney proceeds. The immigration advice cannot be examined in isolation and is specifically and generally, as part of the overall advice, protected by attorney-client privilege. *See* NYRPC Rule 1.6. If the privilege were not to attach to the immigration advice, it would severely prohibit defense attorneys' ability to speak openly and honestly with their clients and would likely result in clients' unwillingness to disclose their true immigration status.

Further immigration advice likely cannot be explained without also divulging other confidential information such as the underlying strategies of the case. For example, a client may be advised that taking a certain plea would not trigger deportability but could result in inadmissibility, which mean that the client would likely face a bar to return if she traveled outside the U.S. It may be that because of certain facts and admissions told to the attorney in confidence, proceeding to trial would be extremely risky and if unsuccessful, would likely result in the client's removal. In that instance, the client may reasonably choose to take the plea. There, an explanation of the immigration advice could not be fully provided without revealing other privileged information, including the underlying weaknesses of the case.

2. Advice Is Protected By The 5th Amendment:

Admissions about immigration status made on the record in criminal court proceedings can be used against defendants in later federal court proceeding. Even divulging that a defendant is not a U.S. citizen can be detrimental because alienage is an element of certain federal offenses, including illegal entry and failure to notify of a change in address, which is the government's burden to prove at trial.

Additionally, even if a defendant avoids answering specific questions related to alienage, the disclosure of immigration advice in general requires (whether inadvertently or explicitly) the disclosure of the client's alienage. If immigration advice was provided, then it follows that the defendant is not a U.S. citizen. Further, the disclosure could also reveal the noncitizen's specific immigration status (i.e. lawful permanent resident, undocumented, etc.). If for example, an attorney states the immigration advice provided on the record and purports that the client was advised that the conviction would not trigger inadmissibility, everyone present in the court room, including any ICE officers (who are known to frequent court rooms), would be alerted to the likelihood that the defendant does not have lawful admission status.

3. Disclosure Of Advice May Trigger Adverse Immigration Consequences:

In the prior example, a defendant that may not have had an ICE detainer or any prior contact with ICE may, as a result of the disclosure, now be faced with significant and immediate immigration problems. If an ICE officer was present in court for the admission, ICE is now on notice that the defendant is a potentially removable alien. Further, as explained above, any admissions made on the record could be used as evidence against the client in a later immigration or criminal proceeding.

4. Advice Is Irrelevant To The Taking Of A Plea:

Notably, although *People v. Peque*, requires the trial court when taking a felony plea to issue its own immigration notification, it specifically avoids requiring inquiry into citizenship or the specifics of the advice provided by defense counsel. 22 N.Y.3d 168 (2013). In *Peque,* the Court of Appeals distinguished the obligation of the criminal attorney from that of the trial court by stating:

> The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, give the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea. *Id.* at 27.

The Court further explained the independent responsibility placed on the trial courts by stating:

> …the court has an independent obligation to ascertain whether the defendant is pleading guilty voluntarily**, which the court must fulfill by alerting the defendant that he or she may be deported.** *Id*. at 32 (citations omitted).

> …to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, **trail courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation**….**As long as the court assures itself that the defendant knows of the possibility of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary.** *Id*. at 38.
>
> The trial court must provide a short, straightforward statement on the record **notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea.** The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in CPL 220.50(7)…. *Id*. at 38.

In addition to potentially resulting in a great deal of harm to the defendant, the disclosure of any immigration advice provided by counsel simply is not relevant to the taking of a plea. The Court has an obligation to ensure that a plea is entered knowingly, intelligently and voluntarily and it cannot be deemed as such where a noncitizen defendant has not been advised on the immigration consequences of his or her plea. However, as the Court of Appeals in *Peque* articulated, if during the plea colloquy the Court notifies the defendant of the possibility of deportation and offers an adjournment in the event the defendant needs further time to confer with defense counsel, the Court can adequately assure itself that the defendant is entering into a guilty plea knowingly, intelligently and voluntarily. At the same time, this will provide that the defendant is not disclosing any confidential, constitutionally protected and potentially very damaging information on the record.

Thank you for your time and attention to this matter. I hope that this letter has served to clarify Public Defender's position on the disclosure of immigration advice. Please let me know if you have any additional questions or concerns or would like to discuss this further.

Respectfully,

Public Defender

SAMPLE LETTER TO JUDGE ADDRESSING "WILL BE DEPORTED" WARNING

Dear Judge _____,

I write to discuss the role of the court in advising defendants on the immigration consequences of their convictions during plea allocutions – specifically, whether it is appropriate for the court to tell a defendant that she "will be deported" based on the plea. I recently came across a report published by the Immigrant Defense Project and New York University School of Law, entitled "Judicial obligations after *Padilla v. Kentucky*: The role of judges in upholding defendants' right to advice about the immigration consequences of criminal convictions" (the "Report," available at http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf). I thought it might be of interest to you and have enclosed a copy with this letter.

The Report encourages use of the following language during plea allocutions:

> If you are not a citizen of the United States citizen, whether or not you have lawful immigration status, your plea or admission of guilt [or no contest/nolo contendere] may result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits pursuant to federal law, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Your lawyer must investigate and advise you about the issues before you take a plea or admit guilt to any offense. Upon request, the court will allow you and your lawyer additional time to consider the appropriateness of the plea in light of the advisal. You should tell your lawyer if you need more time. You are not required to disclose your immigration or citizenship status to the court. *See* p. 38.

I support the adoption of the above language as it fulfills the court's obligations under *People v. Peque* and provides assurance that the plea will be entered knowingly, intelligently and voluntarily, while at the same time, protects the attorney-client relationship and confidentialities and encourages honest and meaningful communication. *See People v. Peque*, 22 N.Y. 3d 168 (2013) (enclosed hereto).

The New York Court of Appeals in *Peque,* distinguished the obligation of the criminal attorney from that of the trial court by stating:

> The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, give the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea. *Id*. at 190-91.

The *Peque* Court went on to describe the obligations of the trial court by stating:

> …the court has an independent obligation to ascertain whether the defendant is pleading guilty voluntarily, which the court must fulfill by alerting the defendant that he or she may be deported. *Id*. at 209 (citations omitted).
>
> …to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trail courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation….As long as the court assures itself that the defendant knows of the *possibility* of deportation prior to entering a guilty plea, the plea will be deemed knowing, intelligent and voluntary**.** *Id*. at 197 (emphasis added).
>
> The trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she *may* be deported upon a guilty plea. The court may also wish to encourage the defendant to consult defense counsel about the possibility of deportation. In the alternative, the court may recite the admonition contained in CPL 220.50(7)[1]…. *Id*. (emphasis added).

Notably in *Peque*, the Court did not place an obligation on the trial court to give "essential advice specific to [the defendant's] personal circumstances" as is required of a defense attorney. *Id*. at 90-91. Similarly, as the Report notes, "*Padilla* does not state that the courts themselves should be providing individualized immigration advice- and indeed it is neither appropriate nor feasible for a court to do so." *See* p. 17; *Padilla v. Kentucky*, 559 U.S. 356 (2010).

There is no inherent conflict between the obligation placed on the trial court under *Peque* and that of the defense attorney under *Padilla*. However, an infringement upon the attorney-client relationship arises when a court advises a defendant that he or she "will," rather than "may," be deported. Without fully understanding the defendant's background and the specific circumstances of his or her particular situation, a statement that a plea affirmatively results in deportation and/or a statement that any advice stating otherwise is incorrect, may be wholly contradictory to the defense attorney's advice and unsubstantiated by the law.

Although state convictions deemed "Crimes Involving Moral Turpitude" ("CIMT") can have adverse immigration consequences, there are exceptions for both deportability and inadmissibly which allow for certain defendants to plead to a CIMT conviction without being at risk of deportation or inadmissibility. Additionally, certain convictions (including both misdemeanors and felonies) only trigger deportability and not inadmissibility thereby impacting noncitizens who are lawful permanent residents differently than those who are visa holders or undocumented aliens. Other such felonies may only trigger deportability if a certain sentence is imposed. For example, for an immigrant who has lived here

[1] CPL 220.50(7) states: "If the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States."

lawfully for many years, a grand larceny conviction will only result in a "Theft Aggravated Felony" triggering deportability if the term of imprisonment imposed is one year or longer. With a sentence of less than one year, a felony larceny conviction might not make that immigrant deportable at all.

Further, in addition to creating a tension on the attorney-client relationship, such an advisal may prevent a defendant from having any recourse for misadvice improperly provided by his or her attorney. These problems can be easily remedied however, by replacing plea colloquy language that affirmatively establishes that deportation *will* result with language that notifies the defendant that deportation *may* result. An advisal such as the one suggested in the Report, provides an opportunity for the court to give an accurate, general notification in conformity with defense counsel's fact-specific advice. For the reasons stated in this letter, along with those set forth in the Report, I respectfully suggest that you consider using language analogous to that in the Report during plea allocutions. I am happy to discuss this further with you at your convenience. Please let me know if you have any additional questions. I very much look forward to working with your honor in the future.

Respectfully,

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Defense attorney