

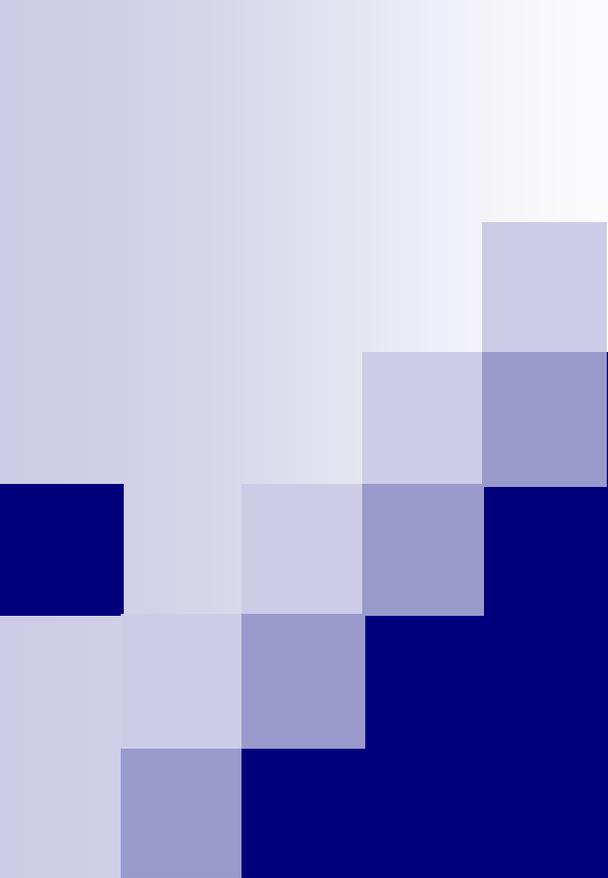


**NEW YORK STATE DEFENDERS
ASSOCIATION
CRIMINAL DEFENSE
IMMIGRATION PROJECT**

**IMMIGRATION ISSUES
AND LOCAL COURTS**

**Oneida County Bar Association
Continuing Legal Education Seminar
Kunsela Hall, SUNY IT Campus
Marcy, NY**

May 15, 2010



IMMIGRATION ENFORCEMENT AND TRENDS

Immigrant Census Data

- 25 million people in the US have limited proficiency in English (LEP)
- 13 million have no mandatory requirement and 6 million are charged for translation services

(Source: Language Access In State Courts, Brennan Center for Justice;
<http://www.brennancenter.org>)

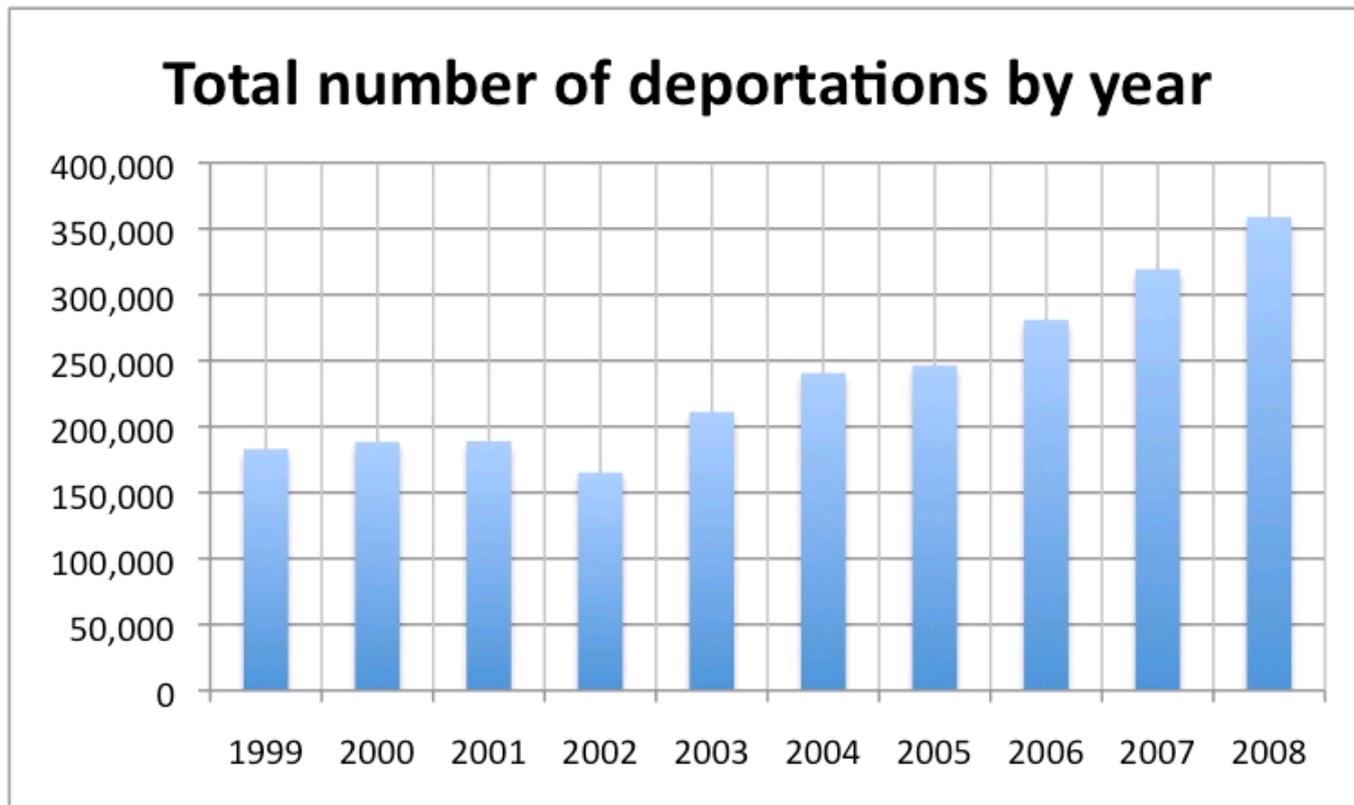
- In 2007, New York, Northern New Jersey and Long Island are the leading states reporting residence of new LPR's (est. 17% or 176,000 of the total population, 1,052,415 of new LPR's in 2007.

(Source: Department of Homeland Security 2007 Statistical Yearbook)

- It is estimated that 1.6 million family members in the U.S. are separated from their husbands, wives and children to removal since immigration reform legislation was passed in 1996 (i.e., est. 540,000 reported to be U.S. citizen family members directly impacted by removal of loved ones from the United States).

(Source: Human Rights Watch Report Forced Apart: Families Separated and Immigrants Harmed By United States Deportation Policy; 2007 Report)

TOTAL NUMBER OF DEPORTATIONS PER YEAR



Source: Office of Immigration Statistics/Department of Homeland's 2008 Yearbook of Immigration Statistics



THE FACTS ABOUT "ICE ACCESS"

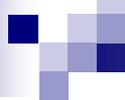
What is ICE ACCESS?

ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS):
A series of different programs and services designed to enhance the cooperation of local law enforcement agencies with ICE in enforcing immigration laws.

Incentives for participation in ICE ACCESS

- ▶ Equitable Sharing in Asset Forfeiture
- ▶ Increased Jurisdiction & Legal Enforcement Authority
- ▶ Increased Resources (Advanced Enforcement Technology/Infosharing)



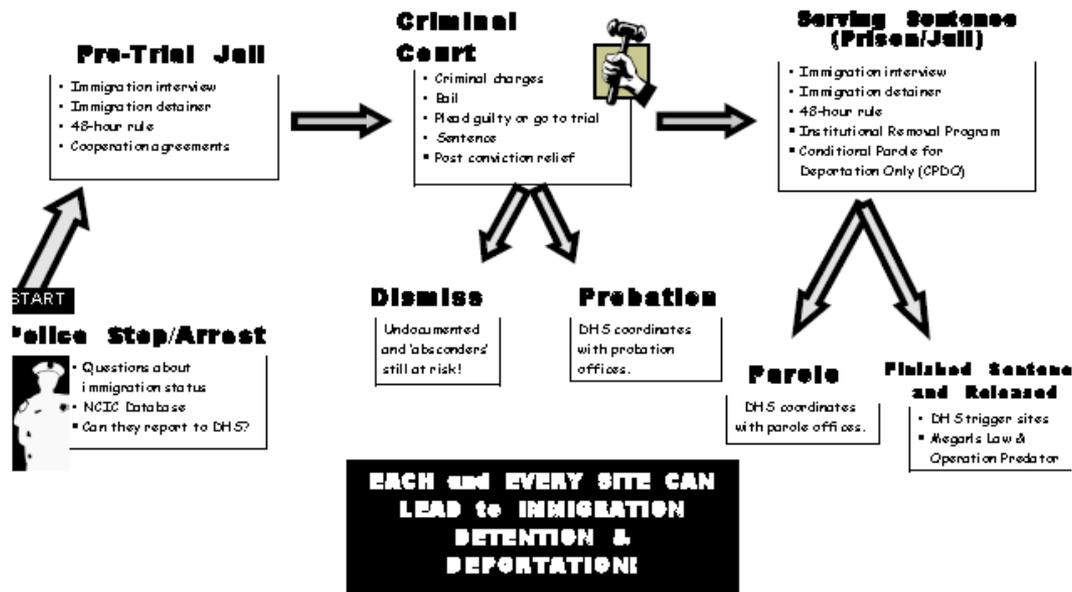


NYS CRIMINAL ALIEN PROGRAM

- State and local agencies working closely with ICE to identify and deport criminal aliens:
 - Div. of Criminal Justice Services
 - Dept. of Correctional Services
 - Div. of Parole
 - Div. of Probation and Correctional Alternatives
 - New York State Police
 - New York City Police Department
 - District Attorneys' Offices
 - Local Police Agencies

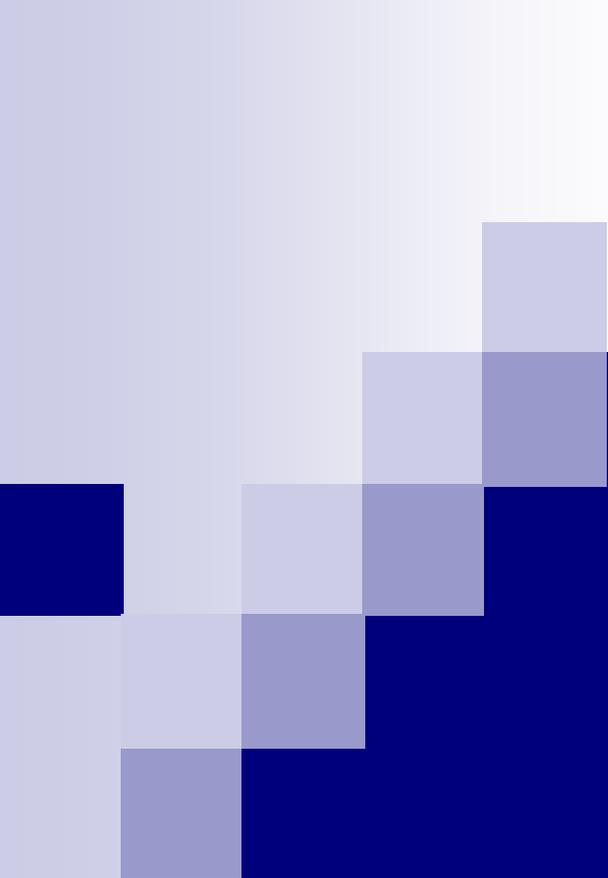
Increasing Federal Immigration Enforcement and State and Local Collaboration

IMMIGRATION IN THE CRIMINAL JUSTICE SYSTEM



Increasing Federal Immigration Enforcement and State and Local Collaboration

- **IMMIGRATION DETAINER** is a “hold” that will prevent a client’s release.
- Pursuant to 8 C.F.R. Sec. 287.7(d):
“... such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.”



Life After
Padilla v. Kentucky

**What Defense
Attorneys Should Know**

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Padilla v. Commonwealth of Kentucky 599 U.S.
___ (2010); (Docket No. 08-651)

- 6th Amendment guarantee of effective assistance requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.

Life After *Padilla*: Defending In Criminal Court

- Unique nature of deportation is “particularly severe penalty” that is intimately tied to criminal process.

Id. at 8-9.

- Preserving the client’s right to remain in the U.S. may be more important to the client than any potential jail sentence.”

Id. at 10.

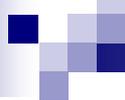
Affirmative Advice & The Strickland Standard

- Court expressly rejected option of limiting application of *Strickland* to claims of affirmative misadvice:
- “[T]here is no relevant difference between an act of commission and an act of omission in this context.” *Id.* at 13.

What Is Effective Assistance?

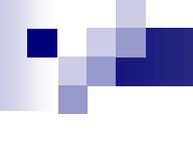
- Scope of 6th Amendment duty extends to not just avoiding deportation but also to the possibility of **preserving discretionary relief from deportation.**
- “[P]reserving the possibility of discretionary relief from deportation...would have been one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead of proceed to trial.”

Id. at 10.



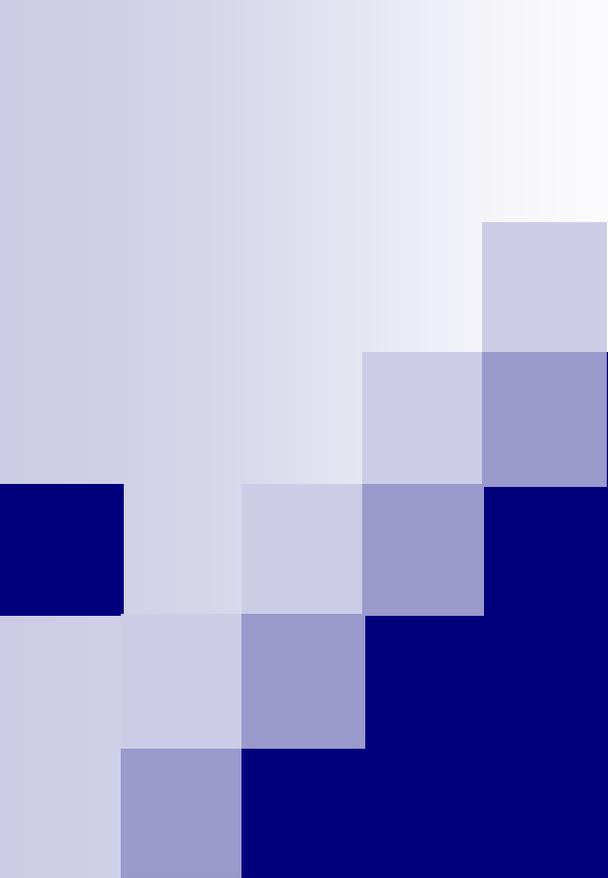
Life After *Padilla v. Kentucky?*

- Non-advice (silence) is insufficient (ineffective)
- Deportation is a “penalty,” not a “collateral consequence”
- “Informed consideration” of deportation consequences required during plea-bargaining
- Professional standards require counsel to determine citizenship/immigration status



What Is Effective Assistance?

1. Investigate Facts
2. Determine client's defense goals
3. Analyze immigration consequences
4. Defend the case according to client's priorities



LOST IN TRANSLATION

**Representing the Non-
English Speaking Client**

FEDERAL LAW

- U.S. CONSTITUTION: 6th and 14th Amendments- Due process; access to courts and counsel and equal protection

NYS defendants in criminal and asylum cases have a constitutional right to an interpreter

See, e.g., U.S. ex rel Negron v. N.Y., 434 F.2d 386, 387 (2d Cir. 1970) (criminal case);

Agustin v. Sava, 735 F.2d 32, 37-38 (2d Cir. 1984) (asylum case);

Yellen v. Baez, 676 N.Y.S.2d 724, 727 (N.Y. Civ. Ct. 1997) (landlord tenant dispute); and

Lizotte v. Johnson, 777 N.Y.S.2d 580, 586 (N.Y. Sup. 2004) (in a child welfare case, holding that the “failure to provide adequate translation services here deprived petitioner of fundamental due process”).

FEDERAL LAW

- Title VI of the Civil Rights Act of 1964

“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

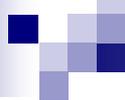
(See *e.g. Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (“[d]iscrimination is barred which has that effect even though no purposeful design is present.”))

- Federal Court Interpreters Act of 1978; 28 U.S.C. §1827
- 2000 Executive Order 13166 and Department of Justice guidance document confirm that Title VI of the Civil Rights Act of 1964 requires most state and county courts to provide language services to LEP persons.
- 2002 DOJ issues policy guidance document on 2000 Executive Order

NEW YORK STATE LAW

New York Judiciary Law §387

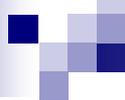
- Written Statewide mandate to cover all parties;
- Eligibility Standard and Guidelines (i.e., bench card);
- Procedure for appealing denials
(<http://www.nycourts.gov/courtinterpreter/>);
- Inform of Interpretation Right at first contact;
- Legal Obligation – no charge, fee or means test;
- Court assessment before assignment;
- Court-Certification process of interpreters;
- Rely on non-certified interpreters and allow for *voir dire*;
- State Interpreter Code of Ethics; and
- Legal obligation – ensure training for judges and court personnel



ART OF TRANSLATION: TECHNIQUES

- Simultaneous Mode
- Consecutive Mode
- Sight Translation

GENERAL RULE: simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken



Canons of Professional Responsibility for Court Interpreters

Canon 1 Interpret accurately and objectively

Canon 2 Maintain impartiality – avoid contact of defendant/witnesses

Canon 3 Proper decorum, dignity and respect

Canon 4 Avoid conduct that will discredit the court

Canon 5 Do not disclose confidential information

Canon 6 Do not engage in conflict-based activities

Canon 7 Disclose prior involvement with parties

Canon 8 Work with full awareness of proceedings.

Canon 9 Refrain from giving advice

Canon 10 Work within specified qualifications

Canon 11 No gifts in excess of authorized compensation

Canon 12 Do not use official records for gain

Canon 13 Advise of Canon impediments or efforts to violate Canons

RIGHT TO AN INTERPRETER: STAGES OF PROCEEDING

- **INDICTMENT:** *United States v Quesada Mosquera*, 816 F Supp 168 (EDNY 1993) (translation and interpretation pursuant to U.S. Const. Amend. 6)
- **PREEMPTORY CHALLENGE:** *Hernandez v. New York*, 111 S.Ct. 1859 (1991) (upheld prosecutor's use of preemptory challenges to strike Spanish-speaking jurors. Prosecutor claimed that he doubted juror's ability to deter to official translation of anticipated Spanish-language testimony)
- **JURISDICTIONAL HEARING:** *United States v Paroutian*, 299 F2d 486 (2d Cir. 1962) (pretrial hearing only if involves question of fact at issue)

RIGHT TO AN INTERPRETER: STAGES OF PROCEEDING

- **SUPPRESSION OR EVIDENTIARY HEARING:** *People v Fogel*, 97 AD2d 445, 467 NYS2d 411 (2d Dept. 1983) (Wade Hearing); *People v Robles* 203 AD2d 172, 614 NYS2d 1, *app gr* 83 NY2d 971, 616 NYS2d 24, 639 NE2d 764 (1st Dept. 1994) (Sandoval hearing)
- **TAPE RECORDED STATEMENTS:** No entitlement to translation but entitled to interpretation at the time of admission.
- **PLEA HEARING AND DOCUMENTS:** *United States v Quesada Mosquera*, 816 Fsupp 168 (EDNY 1993) (plea agreements)

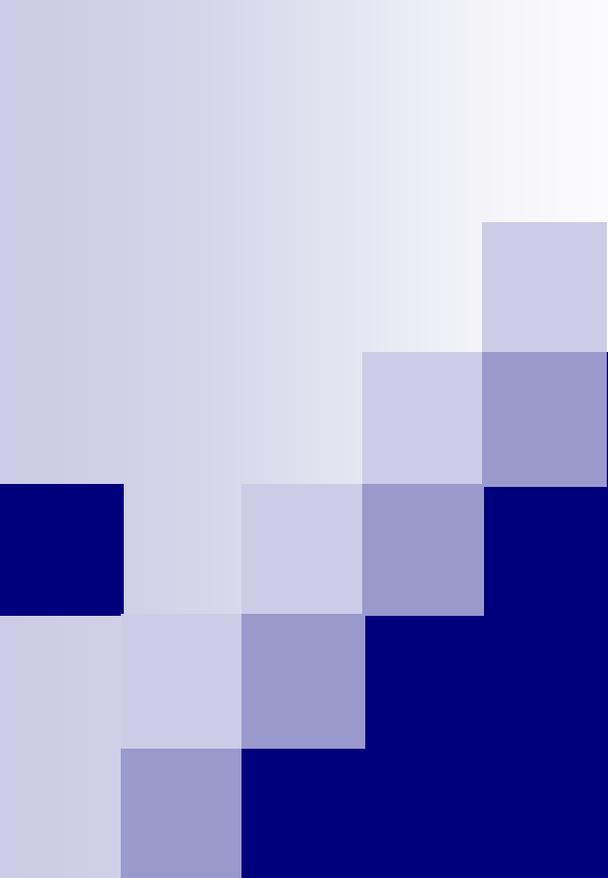
RIGHT TO AN INTERPRETER: STAGES OF PROCEEDING

- **PRESENTENCE REPORT AND SENTENCING HEARING:**

United States v Quesada Mosquera, 816 F Supp 168 (EDNY 1993) ;
People v Diaz, 212 App Div 2d 412, 622 NYS2d 686 (1st Dept.
1995).

- **ALLOCUTION:** *People ex rel. Berrios v Murphy*, 31 Misc 2d 966,
222 NYS2d 254 (1961) (entitled to the assistance of an interpreter at
the time of allocution, that is, when the court asks the defendant
whether he has any legal cause why judgment should not be
pronounced against him)

- **JURY TRIAL:** *U.S. v. Londono-Tabarez*, 121 Fed. Appx. 882 (2d
Cir. 2005) (No absolute entitlement to interpretation of jury
instructions)



IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION

**POSSIBLE STRATEGIES
&
ALTERNATIVE DISPOSITIONS**

WHO CAN BE REMOVED?

- **LAWFUL PERMANENT RESIDENT**
- (i.e., “Green Card Holders”)

- **REFUGEES & ASYLEES**
- (i.e., Those granted humanitarian protection in U.S.)

- **NONIMMIGRANTS**
- (ex. temporary visitors, students, workers)

- **UNDOCUMENTED**
- (ex. entered the U.S. without being inspected and admitted)

= SUBJECT TO REMOVAL FROM THE U.S.

**NYSDA Immigrant Defense Project
Immigration Consequences of Convictions Summary Checklist***

GROUND OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUND OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)	INELIGIBILITY FOR US CITIZENSHIP
<p>Aggravated Felony Conviction</p> <p>➤ <i>Consequences</i> (in addition to deportability):</p> <ul style="list-style-type: none"> ◆ Ineligibility for most waivers of removal ◆ Ineligibility for voluntary departure ◆ Permanent inadmissibility after removal ◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal <p>➤ <i>Crimes covered</i> (possibly even if not a felony):</p> <ul style="list-style-type: none"> ◆ Murder ◆ Rape ◆ Sexual Abuse of a Minor ◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam) ◆ Firearm Trafficking ◆ Crime of Violence + 1 year sentence** ◆ Theft or Burglary + 1 year sentence** ◆ Fraud or tax evasion + loss to victim(s) > \$10,000 ◆ Prostitution business offenses ◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence** ◆ Obstruction of justice or perjury + 1 year sentence** ◆ Certain bail-jumping offenses ◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ◆ Attempt or conspiracy to commit any of the above 	<p>Conviction or <i>admitted commission</i> of a Controlled Substance Offense, or DHS has reason to believe individual is a drug trafficker:</p> <p>➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)</p> <p>Conviction or <i>admitted commission</i> of a Crime Involving Moral Turpitude (CIMT)</p> <p>➤ Crimes in this category cover a broad range of crimes, including:</p> <ul style="list-style-type: none"> ◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ◆ Most sex offenses <p>➤ <i>Petty Offense Exception</i>—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months</p>	<p>Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:</p> <p>➤ Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana)</p> <p>➤ Crime Involving Moral Turpitude (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)</p> <p>➤ 2 or more offenses of any type + aggregate prison sentence of 5 years</p> <p>➤ 2 gambling offenses</p> <p>➤ Confinement to a jail for an aggregate period of 180 days</p>
<p>Controlled Substance Conviction</p> <p>➤ EXCEPT a single offense of simple possession of 30g or less of marijuana</p>	<p>Prostitution and Commercialized Vice</p> <p>Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years</p>	<p>Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) <i>permanently</i> bars a finding of moral character and thus citizenship eligibility</p>
<p>Crime Involving Moral Turpitude (CIMT) Conviction</p> <p>➤ For crimes included, see Grounds of Inadmissibility</p> <p>➤ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)</p> <p>➤ Two CIMTs committed at any time *not arising out of a single scheme*</p>	<p>CONVICTION DEFINED</p>	
<p>Firearm or Destructive Device Conviction</p>	<p>A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:</p> <p>(i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND</p> <p>(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.</p>	
<p>Domestic Violence Conviction or other domestic offenses, including:</p> <ul style="list-style-type: none"> ➤ Crime of Domestic Violence ➤ Stalking ➤ Child abuse, neglect or abandonment ➤ Violation of order of protection (criminal or civil) 	<p>THUS:</p> <ul style="list-style-type: none"> ➤ 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 disposition without a guilty plea (e.g., NY ACD) is NOT a conviction ➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction 	
<p>INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL</p>		
<p>➤ Aggravated felony conviction</p> <p>➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States</p>		
<p>INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL</p>		
<p>*"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:</p> <ul style="list-style-type: none"> ➤ Aggravated felonies <ul style="list-style-type: none"> ◆ All will bar asylum ◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding ◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding ➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F) 		

*For the most up-to-date version of this checklist, please visit us at <http://www.immiggranddefenseproject.org>.
**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

See reverse ➤

What Is a “Conviction” for Immigration Purposes?

“Conviction” (8 USC 1101(a)(48)(A), INA 101(a)(48)(A)):

FORMAL JUDGMENT OF GUILT entered by a court;

or

IF ADJUDICATION HAS BEEN WITHHELD, where:

- a. A judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt;
- and**
- b. The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

WHICH NEW YORK DISPOSITIONS ARE “CONVICTIONS” ?

CONVICTION	NOT A CONVICTION
Formal judgment of guilt in adult criminal court (including juvenile offender conviction)	Youthful offender disposition (even though entered in adult court)
Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT made by defendant	Diversion, drug treatment or family counseling IF PLEA OR ADMISSION OF GUILT WAIVED**
Conditional Discharge	Adjournment in contemplation of dismissal
Conviction on collateral challenge	Conviction on direct appeal (NOTE: late notice of appeal???)
Disposition vacated/expunged in the interest of justice	Disposition vacated based on legal defect in criminal case (i.e., NYCPL 440.10 motion)

****DRUG DIVERSION PROGRAMS**

ROCKEFELLER DRUG LAW REFORM: N.Y. CPL Sec. 216.05(4)

- “Prior to the court's issuing an order granting judicial diversion, the eligible defendant shall be required to enter a plea of guilty to the charge or charges...”

****DRUG DIVERSION PROGRAMS**

....**no** such guilty plea shall be required when:

(a) the people and the court consent..., **or**

(b) based on a finding of exceptional circumstances, the court determines that a plea of guilty shall not be required...

...**exceptional circumstances** exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences.

OTHER DEFENSE STRATEGIES & TIPS

DRUG OFFENSES:

- KEEP OUT reference to drug type or weight
- If a marijuana case (and no prior drug offenses), plead guilty to possession of 30 grams or less of marijuana, if possible
- In some cases, plea to accompanying non-drug charge
- Avoid SALE or INTENT TO SELL (negotiate higher possession charge)
- Avoid plea to second drug possession offense OR avoid sentencing or treatment as “recidivist” drug offender

SEX OFFENSES:

- Avoid conviction under statute that punishes sexual activity, sexual activity with a minor OR sexual activity without consent with reference to the victim as a “minor”
- CAUTION: OPERATION PREDATOR

OTHER DEFENSE STRATEGIES & TIPS

ASSAULT OFFENSES:

- Avoid crimes where intent or knowledge is the *mens rea* (ex. focus on “negligence,” “reckless” or less as a statutory element of offense)
- Plead to imprisonment sentences that total 364 days or less
- Create affirmative record that offense did not involve “moral turpitude”
- Avoid reference to victim (domestic relationship, minor)
- Avoid aggravating factors (use of firearm, serious bodily injury)

THEFT OR BURGLARY OFFENSES:

- Seek a sentence of less than 1 yr (i.e., 364 days)
- Seek an alternate plea to an offense that punishes mere temporary conversion (e. unauthorized use of vehicle or “joyriding” to “grand larceny”) to effect a temporary taking

OTHER DEFENSE STRATEGIES & TIPS

FRAUD AND DECEIT OFFENSES:

- Seek theft offense (no fraud or deceit element) if loss is \$10,000 +
- Create an affirmative record where loss is less than \$10,000

Remember: Still may be a CIMT

FIREARM OFFENSES:

- Seek plea that does not include a “firearm” or “destructive device”
- Keep the record clean of the nature of the weapon
- Seek statute that punishes mere possession of a weapon with no intent to use the weapon and affirmatively include in the record that the defendant did not intend to use the weapon unlawfully

OTHER GENERAL DEFENSE STRATEGIES & TIPS

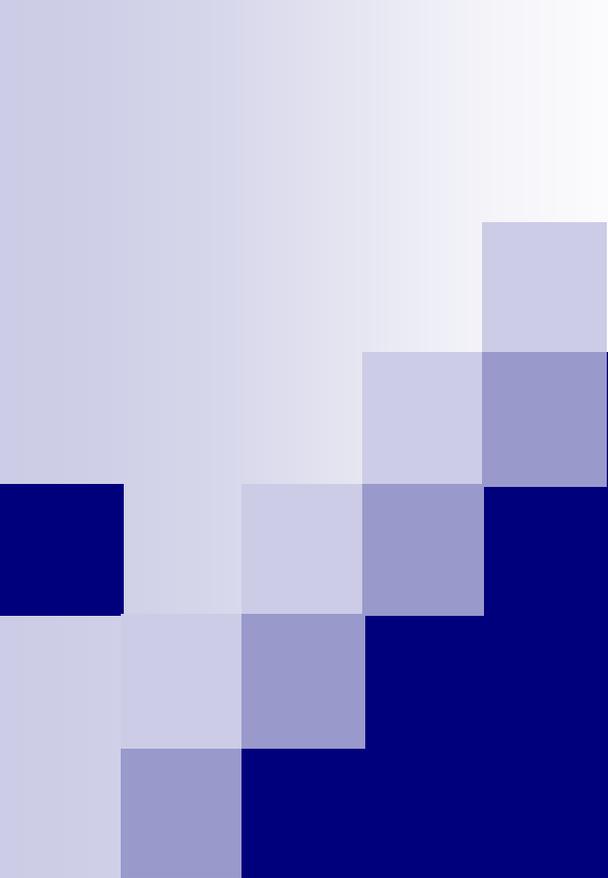
- ❑ **If possible, move to remove case of a juvenile offender to family court**
- ❑ **Seek youthful offender treatment when possible**
- ❑ **If client is cooperating with law enforcement, or is a victim of certain crimes and assisting law enforcement, seek an informer or other special visa U or T visa**
- ❑ **Avoid admissions of conduct beyond elements of offense**
- ❑ **Move to withdraw an uninformed guilty plea prior to sentencing (*Padilla v. Kentucky*, 6th Amendment right to effective assistance)**
- ❑ **File an appeal or seek post-judgment relief**

EARLY CONDITIONAL RELEASE FOR REMOVAL ONLY & “RAPID REPAT”

NEW YORK EXECUTIVE LAW Section § 259-i (d)(i)

(amended on July 18, 2007, S.6228/A.3286)

- The Board of Parole may grant discretionary early release to non-citizen inmates sentenced to determinate and indeterminate sentences for purposes of turning them over to federal immigration authorities for deportation only
- Statutorily barred if convicted of either a violent felony offense or an A-1 felony offense, other than a section 220 controlled substance A-1 felony offense.
- Requires a FINAL removal order & assurances from DHS that removal will occur promptly.

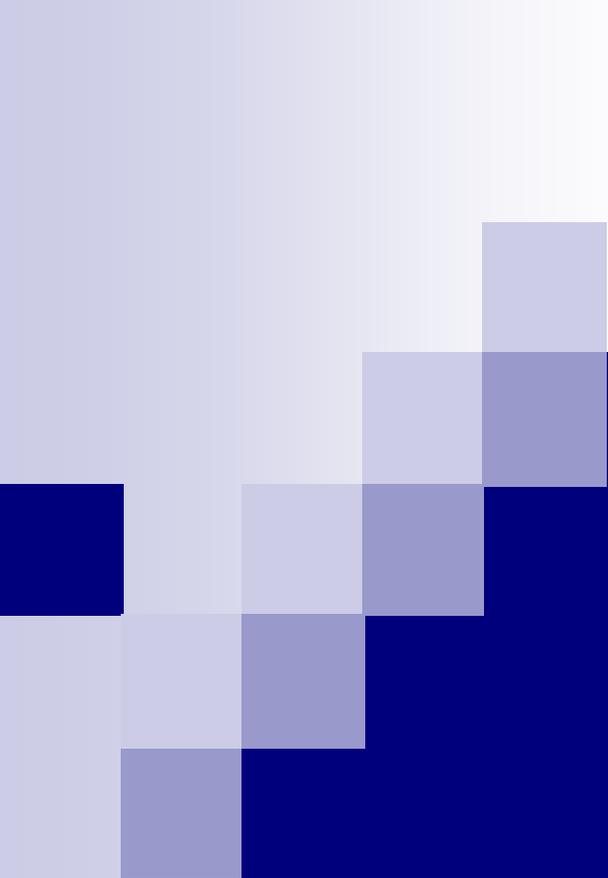


IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION

FORMS OF RELIEF FROM REMOVAL

FORMS OF RELIEF FROM REMOVAL

- CANCELLATION OF REMOVAL
- INA § 212(c) RELIEF
- ADJUSTMENT OF STATUS
- INA § 212(h) WAIVER
- ASYLUM
- WITHHOLDING OF REMOVAL
- CONVENTION AGAINST TORTURE
- TEMPORARY PROTECTED STATUS
- VAWA
- U VISA
- S VISA
- SPECIAL IMMIGRANT JUVENILE STATUS (“SIJS”)
- VOLUNTARY DEPARTURE
- CLAIM TO DERIVATIVE CITIZENSHIP



WHERE TO GET HELP

**Immigration
Resources**

ATTORNEY RESOURCES

□ **Seek assistance:**

NYSDA CDIP - JOANNE MACRI

(716) 913-3200 or (518) 465-3524; jmacri@nysda.org

IMMIGRANT DEFENSE PROJECT – HOTLINE

(212) 725-6422; www.immigrantdefenseproject.org

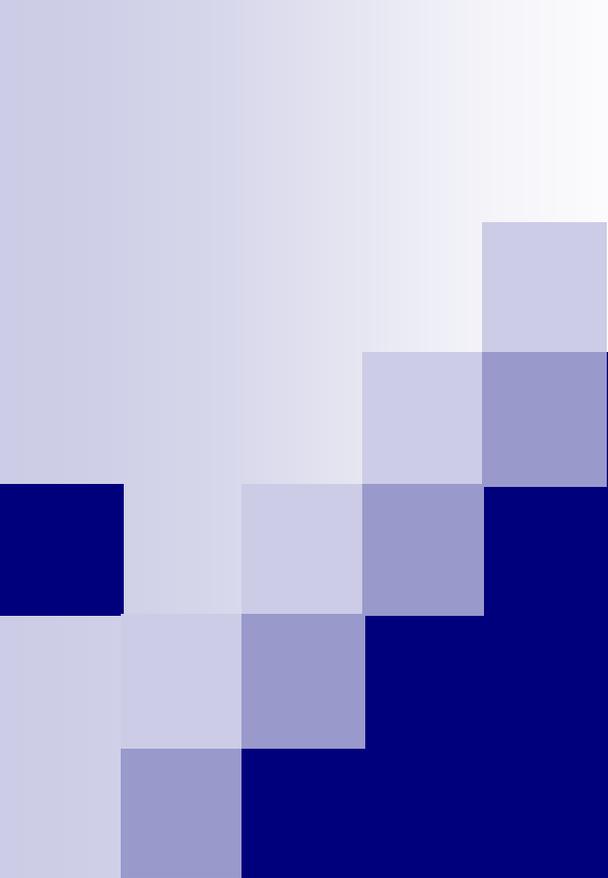
DEFENDING IMMIGRANTS PARTNERSHIP

WWW.defendingimmigrants.org

- ***Representing Immigrant Defendants in New York, 4th Edition (*5th Edition expected for release by IDP)***

Immigration/Criminal Website Resources

- **NYSDA**
www.nysda.org
- **Immigrant Defense Project**
www.immigrantdefenseproject.org
- **Defending Immigrants Partnership**
www.defendingimmigrants.org
- **NLG National Immigration Project**
www.nationalimmigrationproject.org
- **Immigrant Legal Resource Center**
www.ilrg.org



Questions & Answers