

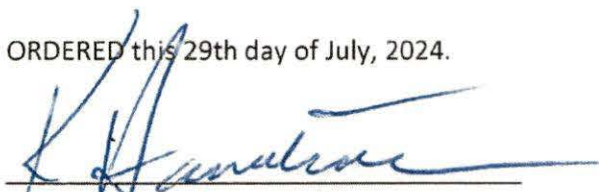
Administrative Order 2024-A

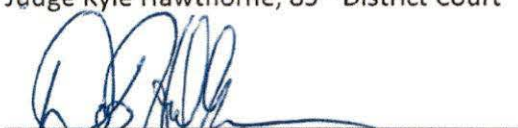
IN RE: IMMIGRATION ADMONITIONS	§	IN DISTRICT COURTS AND
FOR DEFENDANTS IN CRIMINAL CASES	§	COUNTY COURTS AT LAW
AND COURT APPOINTED ATTORNEYS	§	OF
	§	BRAZOS COUNTY, TEXAS

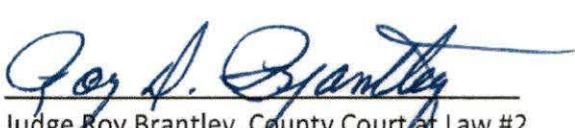
ADMINISTRATIVE ORDER

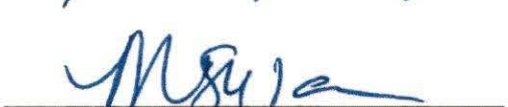
The Courts, on their own motion, enter this administrative standing order requiring all attorneys on the criminal court appointed wheel to provide proof to the Brazos County Associate Court #1 that they have read the attached documents from the Immigrant Defense Project regarding the duty of criminal defense attorneys after *Padilla v. Kentucky*. All court appointed attorneys must return the attached written acknowledgement of having read the attached document to Brazos County Associate Court #1 by August 30, 2024. Any attorney who has not provided written acknowledgement by the due date will be suspended from the appointment wheel until such written proof is provided.

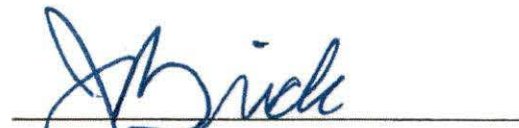
ORDERED this 29th day of July, 2024.

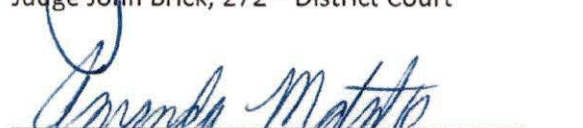

Judge Kyle Hawthorne, 85th District Court


Judge David Hilburn, 361st District Court


Judge Roy Brantley, County Court at Law #2


Judge Misty Swan, Felony Associate Court


Judge John Brick, 272nd District Court


Judge Amanda Matzke, County Court at Law #1


Judge Dana Zachary, Associate Court #1


Judge George Jerrell Wise, 472nd District Court

Attached documents:

- (1) A Defending Immigrants Partnership Practice Advisory Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*
- (2) Summary & Key Points of the *Padilla* Decision for Defense Lawyers
- (3) Immigration Consequences of Crimes Summary Checklist
- (4) Advising Non-U.S. Citizens about Marijuana Violation Convictions
- (5) Certificate of Compliance



A Defending Immigrants Partnership Practice Advisory*
**DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING
AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY***

April 6, 2010 (revised April 9, 2010)

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). The Court held that, in light of the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment 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.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

- The Court found that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.
- Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel. In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; **non-advice (silence) is insufficient (ineffective)**. In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer’s silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining. The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

- I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers** (pp. 2-4)
- II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
 - Duty to inquire about citizenship/immigration status at initial interview stage
 - Duty to investigate and advise about immigration consequences of plea alternatives
 - Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources)

#1

I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

A. *Summary*

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Mr. Padilla stated that he relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court’s Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.¹

The U.S. Supreme Court’s Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Padilla*, slip op. at 2. The Court observed that “[t]he landscape of federal immigration law has changed dramatically over the last 90 years.” *Id.* at 2. The Court stated:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that “accurate legal advice for noncitizens accused of crimes has never been more important” and that “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.” *Id.* at 6.

In Mr. Padilla’s case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an “objective standard of reasonableness.”²

The Supreme Court’s Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at 17.

B. *Key Points For Defense Lawyers*

- 1. The Court found that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the

scope of the constitutionally “reasonable professional assistance” required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a “particularly severe penalty” that is “intimately related” to the criminal process. *Id.* The Court stated:

Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.

Id. (citations omitted).

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.

In assessing whether the counsel's representation in the *Padilla* case fell below the familiar *Strickland* “objective standard of reasonableness,” the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

We long have recognized that that “[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable” . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.

Padilla at 9-10 (citations omitted).

3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).

Finding that the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation,” *id.* at 9, the Court concluded that counsel's misadvice in the *Padilla* case fell below the familiar *Strickland* “objective standard of reasonableness.” The Court further noted that “[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context.” *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

A holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.

Id. (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 11-12. But the Court then went on to say that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel’s representation “fell below an objective standard of reasonableness,” and that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Id.* at 14 (citation omitted).

4. The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that “informed consideration” of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

[I]nformed consideration of possible deportation can only benefit both the State and the 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. . . . 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 At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel’s failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as “valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.” *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, “NLADA Guidelines”), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, “ABA Pleas of Guilty Standards”).

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of *every* client at the *initial* interview. See NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. See *State v. Paredes*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states³ require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 (“[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.”).

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called “collateral” consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to “see that justice is accomplished.” National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep’t of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, “the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted”) (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

Duty to investigate and advise about immigration consequences of sentencing alternatives:

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be “familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation”; and *id.* 8.3(a) requires the client be informed of “the likely and possible consequences of sentencing alternatives.” For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered. See, e.g., 8 U.S.C. 1101(a)(43) (prison sentence of one year for theft offense results in “aggravated felony” mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation).

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association’s Immigration Project.

¹ Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the “collateral consequences” rule. See, e.g., *People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. See, e.g., *State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) (“[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.”).

² The Court remanded Mr. Padilla’s case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*’s second prong—prejudice as a result of his constitutionally deficient counsel.

³ Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Appendix A

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
Aggravated Felony Conviction > <i>Consequences</i> (in addition to deportability): ◆ 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 > <i>Crimes covered</i> (possibly even if not a felony): ◆ 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	Conviction or <i>admitted commission</i> of a Controlled Substance Offense , or DHS has reason to believe individual is a drug trafficker > No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana) Conviction or <i>admitted commission</i> of a Crime Involving Moral Turpitude (CIMT) > Crimes in this category cover a broad range of crimes, including: ◆ 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 > <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 Prostitution and Commercialized Vice Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years	Conviction or admission of the following crimes bars a finding of good moral character 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 is 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 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
Controlled Substance Conviction > EXCEPT a single offense of simple possession of 30g or less of marijuana		
Crime Involving Moral Turpitude (CIMT) Conviction > For crimes included, see Grounds of Inadmissibility > 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) > Two CIMTs committed at any time "not arising out of a single scheme"		
Firearm or Destructive Device Conviction		
Domestic Violence Conviction or other domestic offenses, including: > Crime of Domestic Violence > Stalking > Child abuse, neglect or abandonment > Violation of order of protection (criminal or civil)	CONVICTION DEFINED 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 contendere 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 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	
INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL		
> Aggravated felony conviction > Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States		
INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL		
"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include: > Aggravated felonies ◆ 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.immigrantdefenseproject.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.]

[12/06]

See reverse ➤

Immigrant Defense Project

Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a **REFUGEE or PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and (4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (TPS) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City's five boroughs, has an immigration unit that counsels attorneys in the organization's criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** (www.defendingimmigrants.org), which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, see *Defending Immigrants Partnership, Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website:** www.defendingimmigrants.org.

- DIP partner **Immigrant Defense Project (IDP)** is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone:** 212-725-6422. **Website:** www.immigrantdefenseproject.org.
- DIP partner **Immigrant Legal Resource Center (ILRC)** is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone:** 415-255-9499. **Website:** www.ilrc.org.

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org.**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled "Federal System, Regional, or State-Specific Resources."

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at <http://defendingimmigrationlaw.com>.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at <http://criminalandimmigrationlaw.com>.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***The Criminal Lawyer's Guide to immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at <http://www.abanet.org>.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at <http://www.aialpubs.org>.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at <http://www.jurispub.com>.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: <http://west.thompson.com>.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/practiceTips.htm>.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>.
- ***Tooby's Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at <http://www.criminalandimmigrationlaw.com>.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserv, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at <http://www.criminalandimmigrationlaw.com>.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@pubdef.lacounty.gov.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at <http://www.in.gov/ipdc/general/manuals.html>.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at <http://www.michiganlegalaid.org>.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at <http://www.ailaoregon.com>.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and <http://www.defensenet.org/immigration-project/immigration-resources>.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at <http://www.defensenet.org/immigration-project/immigration-resources>.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.

Defense Counsel's Obligation Under Padilla

Competent counsel should:

1. Understand their client's immigration status;
2. Advise the non-citizen defendant whether they will be placed in removal proceedings based on the current charge(s) or priors; The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).
3. Advise whether the defendant will be eligible for future immigration relief based on the current charge(s) or priors;
4. Advise whether the defendant will be subject to mandatory detention; can travel abroad; or can naturalize based on the current charge(s) or priors; and
5. Negotiate with the district attorney to avoid negative outcomes.

While not required, there are key advantages to giving the defendant advice in writing. Because the defendant is often advised about a myriad of topics before a plea, from discovery rights to appellate rights. Relevant immigration advice can often get lost in the shuffle. Providing advice in writing allows the defendant to consider their options before their plea and, should they choose, share key information with their family. Ideally, if the defendant consents, the advisal should also be sent to the defendant's immigration attorney and/or family, in case their documents are confiscated.

Additionally, because most indigent non-citizen defendants will not have any counsel when they get to immigration court, a written advisal letter allows the defendant to have some documentation regarding their plea. This advisal letter is particularly essential if counsel has preserved relief and the argument is complex. So how does one comply with this standard of representation of non-citizens?

Research

The Court in Padilla notes that defense counsel must conduct at least a basic level of immigration research to understand the requirements of their client's immigration status, available forms of immigration relief, immigration consequences of a charged offense, and to identify immigration-neutral alternative dispositions. The Court in Padilla also distinguishes between clear and unclear immigration consequences, noting that advice must be specific if the outcome is clear, but can be less so if the outcome is unclear. But, to even begin to assess if advice is clear or unclear, defense counsel must do initial immigration research.

Advice

Once defense counsel has completed the necessary immigration research, it is important to discuss the options with the defendant. Counsel may be surprised to know that non-citizen defendants often are less concerned about avoiding time in jail or prison and more concerned about the immigration outcome of their case. Explaining the risks and benefits, while understanding the defendant's priorities, allows defense counsel to be ready to negotiate with the prosecution.

Negotiate

The Court in Padilla makes clear that negotiation between the prosecution and defense counsel is essential in order to create proportionate outcomes. Being armed with the immigration research and an understanding of the defendant's priorities, defense counsel can hopefully suggest a plea that will protect the defendant for immigration purposes, but also meet the prosecution's needs.

Resolve

If an agreement cannot be reached, defense counsel can consider trial or discuss with the defendant if they wish to plead, understanding the immigration consequences.

What is Insufficient Under Padilla

General Advice

As Batamula made clear, while it is appropriate for the judge to give a generalized judicial admonition, this fails to satisfy defense counsel's obligation under the law. Defense counsel's advice needs to be specific and based on research on the individual defendant's particular situation including the defendant's immigration status, available forms of immigration relief, and the specific consequences of a particular charge. If, after researching the issue there is ambiguity in the law, counsel can explain that there is ambiguity, and give advice about general outcomes. However, giving generalized advice right "off the bat" is never appropriate. As a judge once aptly framed this issue: "I know every time I get on a plane that it might crash, but if I'm told specifically it will crash that will lead to a different outcome."

Advice that is Wrong

In an attempt to avoid being found ineffective, defense counsel—or courts—often try to give what they believe is overarching, stern warnings, such as telling all defendants they will be deported if convicted. This is a bad practice because there are criminal offenses that clearly do not result in deportation. Defense counsel has not protected their clients and has, in actuality, committed ineffective assistance of counsel by giving a defendant incorrect legal advice.

Referring Out

Asking the defendant to contact an immigration attorney to get this same advice is inappropriate because Padilla places the burden on defense counsel to advise the defendant about the immigration consequences of a plea. Just as counsel would not require the defendant to do their own discovery, here too the burden is on defense counsel to give the advice. That being said, a defense counsel untrained in immigration law may indeed contact an immigration attorney themselves. Also there is no reason defense counsel should not work with an immigration attorney if the defendant has already hired one. But it is essential that defense counsel speak themselves with immigration counsel so they can understand the exact advice they need to give the defendant. Developing a working relationship with an immigration attorney is the best way for defense counsel to meet their obligations.

Relying on Judicial Admonition

As Batamula made clear, if defense counsel does not adequately advise their defendants of the immigration consequences of the charge and plea, there is nothing a judge can say that will cure this error. Padilla advisals are a Sixth Amendment obligation and cannot be cured by a Fifth Amendment admonition from the judge.

Failing to Negotiate for an Immigration Neutral Disposition

Although there may not be a way to resolve all cases so that they avoid immigration consequences, defense counsel is obligated to at least negotiate with this in mind. Both Padilla and Batamula made clear that negotiation with the prosecution with the goal of creating an immigration neutral plea is required. Once defense counsel understands the priorities of the client, there are a variety of ways that defense counsel may be able to offer plea options that satisfy both the prosecution and the defendant.

Inadmissible Person (person who is not legally in the country at the time of the offense):

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe-

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(D) Prostitution and commercialized vice

Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

Deportable Person (person who is legally in the country at the time of the offense):

Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under [section 1255\(j\) of this title](#)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of [section 758 of title 18](#) (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under [section 2250 of title 18](#) is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [section 802 of title 21](#)), **other than a single offense involving possession for one's own use of 30 grams or less of marijuana**, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in [section 921\(a\) of title 18](#)) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate-

- (i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;
- (ii) any offense under section 871 or 960 of title 18;
- (iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) [now 50 U.S.C. 3801 et seq.] or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) [now 50 U.S.C. 4301 et seq.]; or
- (iv) a violation of section 1185 or 1328 of this title, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

What is a conviction for immigration purposes?

- Where there is "a formal judgment of guilt of the alien entered by a court" or,
- "if adjudication of guilt has been withheld, where ... 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 ... the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed (Deferred adjudication)"

Once a conviction exists, what can erase it? In general, a conviction is not eliminated for immigration purposes by mere "rehabilitative relief" – meaning, where a state permits withdrawal of a plea or dismissal of charges because the defendant completed probation or other requirements,

rather than because of some legal error. Immigration authorities will not accept rehabilitative relief to eliminate a conviction even if state law provides that there absolutely no conviction or even arrest record remains. In California, people who complete all requirements and have pleas withdrawn or charges dismissed under “expungements”

Exception: Rehabilitative Relief Eliminates a Conviction as an Absolute Bar to Eligibility for Deferred Action for Childhood Arrivals (DACA), Rehabilitative relief will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), the relief for people brought to the U.S. as children. DACA may or may not continue in 2018. DACA materials refer to rehabilitative relief as “expungement.” For more information, see materials at www.ilrc.org/daca. The conviction still may be considered as a negative factor in the discretionary decision of whether to grant DACA.

Who falls under DACA:

A request for DACA may be granted only if USCIS determines in its sole discretion that you meet each of the following threshold criteria and merit a favorable exercise of discretion:

1. Were under the age of 31 as of June 15, 2012 (that is, you were born on or after June 16, 1981);
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the time of filing your request for DACA;
4. Were physically present in the United States on June 15, 2012, and at the time of filing your request for DACA with USCIS;
5. Had no lawful immigration status on June 15, 2012, and at the time of filing your request for DACA, meaning that:
 - You never had a lawful immigration status on or before June 15, 2012, or
 - Any lawful immigration status or parole that you obtained had expired as of June 15, 2012, and
 - Any lawful status that you had after June 15, 2012, expired or otherwise terminated before you submitted your request for DACA;
6. Are currently enrolled in school, have graduated or obtained a certificate of completion from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the United States Coast Guard or armed forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor (that is, a misdemeanor as described in 8 CFR 236.22(b)(6)), or 3 or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Age Guidelines

Anyone requesting DACA must have been under the age of 31 as of June 15, 2012 (this means you must have been born on or after June 16, 1981).

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at immdefense.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)**, including:

- Offenses with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Offenses 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 offenses)
- 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 (except one who adjusted to LPR status inside U.S. and who has not entered as an LPR from outside U.S.), conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminally Inadmissible offense** 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/in 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 – money laundering, certain firearms and explosive materials offenses (including arson), alien smuggling, etc. – and analogous state offenses**
 - ◆ **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 is 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 contendere* 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



IMMIGRANT
DEFENSE
PROJECT #3

IMMIGRATION CONSEQUENCES OF CONVICTIONS SUMMARY CHECKLIST – DACA Supplement

Criminal bars relating to DACA temporary administrative status program (Updated June 16, 2017).



© 2017 Immigrant Defense Project

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) IS BASED IN PART ON:

- ◆ entry into the U.S. as a child under age 16 before June 15, 2007
- ◆ continuous residence in the U.S. since June 15, 2007
- ◆ currently in school, high school degree or GED, or honorably discharged veteran

But certain convictions will generally prevent non-citizens from obtaining DACA:

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

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

- Convictions or other information indicating that the applicant is a threat to national security or public safety. DHS considers that such a threat includes, but is not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the U.S.

DISPOSITIONS THAT AVOID AUTOMATIC DISQUALIFICATION

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

IMPORTANT: Potential DACA 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, could affect the person’s future ability to obtain formal lawful status

Note: Anyone who has had contact with the criminal legal system who is considering an application to initiate or renew DACA status should proceed with caution. There is uncertainty about how the DACA criminal bars will be applied under the Trump administration, and there are some preliminary indications that any contact with the criminal legal system may lead to heightened scrutiny of the application

Advising Non-U.S. Citizens about Marihuana Violation Convictions

A plea to a marihuana offense, even a violation like N.Y. Pen. Law §§ 221.05 or 221.10, can result in devastating immigration consequences. Immigrants convicted of marihuana offenses may become deportable or ineligible for immigration status, will be unable to return to the U.S. after a trip abroad, and may face mandatory immigration detention. It is best practice to get individualized advice using an expert for each client. The below resource was developed for educational purposes only. It is not a substitute for individualized legal advice.



IMMIGRANT
DEFENSE
PROJECT

Step 1: Ask all clients: Where were you born?

☐ U.S. or U.S. territory (Puerto Rico, Guam, U.S. Virgin Islands) People born in the U.S. are citizens who do not need immigration advice	☐ A place outside the U.S. Your client may suffer negative consequences as a result of a plea. This chart may be able to help you determine some immigration consequences of a plea to N.Y. Pen. Law §§ 221.05 or 221.10. Move on to step 2.
---	--

Step 2: Ask clients born outside the U.S. and its territories:

Do you have any pending immigration applications, including renewal applications?	☐ Yes ☐ No	If your client answers yes to any of these questions, call an immigration expert to ensure your client gets accurate, complete advice before taking a plea. This resource cannot help you because the type of application, posture of the immigration case, and/or criminal records will impact the advice. If the answer to all three questions is no, move on to step 3.
Do you have a pending Immigration Court case?	☐ Yes ☐ No	
Do you have any prior convictions (including convictions for NY violations or convictions that were sealed, vacated, or expunged)?	☐ Yes ☐ No	

Step 3: For clients born outside of the U.S. and its territories, who answer no to three questions above, ask: What is your immigration status?

Naturalized Citizen <i>*Ask your client: When did you take the oath of citizenship?</i>	The citizenship oath ceremony was before the alleged offense date.	A plea will not impact your naturalized citizen client's immigration status because your client was a citizen at the time of the alleged offense.
	The citizenship oath ceremony was after the alleged offense date.	This resource cannot provide advice about the impact of a plea in this case. You should get time to call an immigration expert by adjourning the case or asking for a second call.
Lawful permanent resident (also referred to as "LPR" or "greencard holder")	A lawful permanent resident who pleads guilty to a marihuana N.Y. Pen. Law §§ 221.05 or 221.10 may become deportable, will be unable return to the U.S. after a trip abroad, and will face barriers to becoming a U.S. citizen for five years from the date of the conviction. The following is the minimum general advice about deportability, travel, and citizenship that should be conveyed to lawful permanent resident clients: Deportability: This conviction will make your lawful permanent resident client deportable if the government can prove that they possessed more than 30g of marihuana or have more than one simple possession conviction. (Note, by law, the maximum amount of marihuana possessed in connection with a N.Y. Pen. Law § 221.10 conviction is less than 30g. This is not the case with a N. Y. Pen Law §§221.05 conviction.)	

	Travel: The 30g exception explained above does not apply to your lawful permanent resident client returning from a trip abroad. On return from a trip abroad, lawful permanent residents with any controlled substance conviction including a N.Y. Pen. Law §§ 221.05 or 221.10 can be placed in deportation proceedings and subject to mandatory detention. In proceedings your client's ability to fight their deportation will depend on the amount of time they've been in the U.S., their family in the U.S. and their status, and other individual factors. An immigration expert can provide more advice about what might happen in removal proceedings. Citizenship: Your lawful permanent resident client who has a conviction for N.Y. Pen. Law §§ 221.05 or 221.10 should speak to an immigration expert before submitting any application for citizenship. If your client applies for citizenship in the next five years, they will have to affirmatively prove that this conviction was related to less than 30g of marihuana (in addition to the normal citizenship requirements). An immigration expert can provide more advice on how to do this successfully.	
DACA (Deferred Action for Childhood Arrivals)	A conviction for N.Y. Pen. Law §§ 221.05 or 221.10 does not disqualify your client from DACA. However, DACA is a discretionary benefit and may be denied as a result of even a minor conviction. If your DACA recipient clients is convicted of any offense, including N.Y. Pen. Law §§ 221.05 or 221.10, they should consult with a trusted immigration expert before submitting a renewal application. In addition, this plea can negatively impact DACA recipients in the future (see panel to the right with advice about future applications and travel).	Future applications: If your client becomes otherwise eligible for lawful permanent resident status in the future, a conviction under N.Y. Pen. Law §§ 221.05 or 221.10 will be considered a controlled substance offense conviction which will make them ineligible for lawful permanent resident status and could limit their ability to fight their deportation. A waiver is available for individuals whose criminal history consists of a single offense who can prove that the conviction involved less than 30g of marihuana. (Note, by law, the maximum amount of marihuana possessed in connection with a N.Y. Pen. Law § 221.10 conviction is less than 30g. This is not the case with a N. Y. Pen Law § 221.05 conviction.) The waiver is only available to those who can prove their deportation will result in hardship to an LPR or U.S. citizen spouse, parent, or child or their conviction was more than 15 years ago. The waiver is difficult to obtain. In addition, a conviction under N.Y. Pen. Law §§ 221.05 or 221.10 will make your client subject to mandatory detention. Travel: If your client with DACA or TPS is granted permission and does travels internationally after being convicted of N.Y. Pen. Law §§ 221.05 or 221.10, on return from a trip abroad, they can be placed in deportation proceedings and subject to mandatory detention. Note that approval by an immigration agency of advanced permission to travel is not a guarantee they will be permitted to re-enter the U.S. DACA and TPS recipients can still be placed in deportation proceedings and subject to mandatory detention if they have any controlled substance conviction including a N.Y. Pen. Law §§ 221.05 or 221.10 conviction.
TPS (Temporary Protected Status)	Your client with TPS does not risk losing their status as a result of a N.Y. violation conviction, including a conviction for N.Y. Pen. Law §§ 221.05 or 221.10. In addition, TPS is not a discretionary benefit so a plea to N.Y. Pen. Law §§ 221.05 or 221.10 cannot lawfully result in a denial. However this plea can still negatively impact people with TPS (see panel to the right with advice about future applications and travel).	
Undocumented	Your undocumented client is already vulnerable to deportation. But they can still face negative consequences from criminal matters and they should be advised about these consequences. A guilty plea to any controlled substance offense, including N.Y. Pen. Law §§ 221.05 or 221.10 will make your undocumented client ineligible for lawful permanent resident status in the future (see panel to the right with advice about future applications). In addition, if your client was fingerprinted in connection with this offense, they are at increased risk of being targeted for ICE enforcement using the information provided at the time of fingerprinting.	
None of the Above	You should get time to call an immigration expert by adjourning the case or asking for a second call.	

THE STATE OF TEXAS	X
	X
COUNTY OF BRAZOS	X

IMMIGRATION CONSEQUENCES COMPLIANCE CERTIFICATE

I, _____, certify that I have read and understood Administrative Order 2024-A and the documents attached thereto. I understand that I have a duty to inquire about my clients' immigration status and advise my criminal clients of potential immigration consequences. I understand that my duty is not fulfilled by referring my client to immigration counsel or by referring to the judicial admonishments regarding potential immigration consequences. .

ATTORNEY'S SIGNATURE

Date