

**Post Conviction Relief and Immigration Proceedings: *Padilla v. Kentucky* and Other Relevant Post Conviction Remedies for Noncitizens 85**

This panel will review major forms of post-conviction relief, and the impact of remedies such as pardons, vacated judgments, and re-opened adjudications on immigration proceedings. The discussion will emphasize how attorneys have pursued relief under the Supreme Court Decision *Padilla v. Kentucky*, and highlight pro bono opportunities for attorneys.

**Directions for completing this form:** Place the title of your workshop in the space indicated, followed by the name and contact information for each of the presenters. Provide a brief description of your workshop by placing the cursor on the line below "Brief Description" and commence typing. You must include program goals, similar to what was requested on the EJC RFP. To complete the "Topical Outline", place cursor next to each Roman numeral and begin typing. Then place the cursor next to the "a." to begin listing sub-topics. To list more than one sub-topic, push "Enter" and "b." should appear on the next line, and so on. Place the cursor on the line under "Notes" to begin providing your notes. To list bibliographic information, place the cursor next to "1." and start typing. Push "Enter" to move on to "2." and etc.

ABA / NLADA 2011 Equal Justice Conference

**Post Conviction Relief and Immigration Proceedings: Padilla v. Kentucky and Other Relevant Post Conviction Remedies for Noncitizens**

**Speakers:**

1. **Karen Grisez**, Fried, Frank, Harris, Shriver & Jacobson LLP (moderator)  
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## **Brief Description:**

This panel will review major forms of post-conviction relief, and the impact of remedies such as pardons, vacated judgments, and re-opened adjudications on immigration proceedings. The discussion will emphasize how attorneys have pursued relief under the Supreme Court Decision *Padilla v. Kentucky*, and highlight pro bono opportunities for attorneys.

## **Program Goals (what you will learn):**

1. The relevance of criminal convictions, and post conviction relief to immigration proceedings.
2. The impact of the *Padilla* decision, cutting edge legal issues surrounding post conviction relief and the ineffective assistance of counsel, and areas which remain ripe for litigation.
3. Essential practice tips for attorneys, and ways to become involved.

## **Topical Outline:**

- I. The Intersection of Criminal and Immigration Law (Holly Cooper)
  - a. The impact of crimes on an immigration case.
  - b. The effect of post-conviction relief on immigration charges.
- II. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (Isaac Wheeler)
  - a. Ineffective assistance of counsel in criminal and immigration proceedings, including the *Padilla* decision and subsequent case law.
  - b. The impact of post-conviction relief on an immigration case.
- III. Post-Conviction Practice (Sara Dill)
  - a. Types of relief, including coram nobis, habeas, etc.
  - b. Specific areas of concern, retroactivity, prejudice, judicial advisals
  - c. Legal practice tips, retainer agreements, client expectations, and timing.
- IV. Discussion of Emergent Legal Issues (all speakers, moderated by Karen Grisez)
- V. Conclusion
  - a. Why take a post-conviction case, and how to get involved.
  - b. Pro bono opportunities.

## **Bibliography and Website Links:**

1. California Public Defender Association, *Immigration Consequences of Felony Convictions* (2010).
2. Center for Appellate Litigation, *Sample Client Risk Advisal Letter* (2010).
3. Center for Appellate Litigation, *Sample Motion Pursuant to C.P.L. § 440* (2010).
4. Immigrant Defense Project, *Immigration Consequences of Crimes Summary Checklist* (2010), at [http://www.immigrantdefenseproject.org/docs/10\\_IDP%20Checklist-6-17-10.pdf](http://www.immigrantdefenseproject.org/docs/10_IDP%20Checklist-6-17-10.pdf).
5. Immigrant Defense Project, *Post-Conviction Relief Under Padilla v. Kentucky* (2011).

6. Immigrant Defense Project, *Duty of Criminal Defense Counsel Representing an Immigrant Defendant after Padilla v. Kentucky* (2010), at [http://www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf).
7. Immigration Law Clinic, UC Davis School of Law, *The Intersection of Criminal and Immigration Law* (2010).
8. Immigration Law Clinic, UC Davis School of Law, *The Supreme Court's Decision in Padilla v. Kentucky: What Padilla means for public defenders* (2010).
9. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
10. Yuba County Jail, *Yuba Detention Intake Sheet*.

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2011 Equal Justice Conference



AMERICAN BAR ASSOCIATION

**Commission on  
Immigration**

**Post Conviction Relief and Immigration Proceedings:  
*Padilla v. Kentucky* and Other Relevant  
Post Conviction Remedies for Noncitizens**

Friday, May 20, 2011  
10:30 am – 12:00 pm  
Las Vegas Hilton  
3000 Paradise Road, Ballroom E, Las Vegas, NV 89109

The ABA Commission on Immigration  
740 Fifteenth Street, NW, Washington, DC 20005  
Phone: (202) 662-1005 Fax: (202) 638-3844  
Email: [immcenter@americanbar.org](mailto:immcenter@americanbar.org)  
Website: [www.americanbar.org/immigration](http://www.americanbar.org/immigration)



American Bar Association / National Legal Aid & Defender Association  
2011 Equal Justice Conference



## Post Conviction Relief and Immigration Proceedings: *Padilla v. Kentucky* and Other Relevant Post Conviction Remedies for Noncitizens

Friday, May 20, 2011 – 10:30 am – 12:00 pm  
Las Vegas Hilton  
3000 Paradise Road, Ballroom E, Las Vegas, NV 89109

### Panel Presenters:

Karen T. Grisez, Fried, Frank, Harris, Shriver & Jacobson LLP (Moderator)  
Holly Cooper, UC Davis School of Law  
Sara Dill, Law Offices of Sara Elizabeth Dill  
Isaac Wheeler, Immigrant Defense Project

This panel will review major forms of post conviction relief, and the impact of remedies such as pardons, vacated judgments, and re-opened adjudications on immigration proceedings. The discussion will emphasize how attorneys have pursued relief under the Supreme Court Decision *Padilla v. Kentucky*, and highlight pro bono opportunities for attorneys.

### Topics discussed in the panel include:

- The relevance of criminal convictions, and post conviction relief to immigration proceedings.
- The impact of the *Padilla* decision, cutting edge legal issues surrounding post conviction relief and the ineffective assistance of counsel, and areas which remain ripe for litigation.
- Essential practice tips for attorneys and ways to become involved.

### **For additional information, please contact:**

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**Email:** [immcenter@americanbar.org](mailto:immcenter@americanbar.org)

**Website:** [www.americanbar.org/immigration](http://www.americanbar.org/immigration)

The Equal Justice Conference brings together all components of the legal community to discuss equal justice issues as they relate to the delivery of legal services to the poor and low-income individuals in need of legal assistance. The emphasis of this Conference is on strengthening partnerships among the key players in the civil justice system. Through plenary sessions, workshops, networking opportunities and special programming, the Conference provides a wide range of learning and sharing experiences for all attendees. More information on the 2011 ABA/NLADA Equal Justice Conference can be found here:

<http://www2.americanbar.org/calendar/equal-justice-conference/Pages/GeneralInformation.aspx>



# **Post Conviction Relief and Immigration Proceedings: *Padilla v. Kentucky* and Other Relevant Post Conviction Remedies for Noncitizens**

Friday, May 20, 2011  
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## **Speakers:**

**Holly Cooper** graduated from University of California, Davis School of Law in 1998. Ms. Cooper worked for six years at the Florence Immigrant & Refugee Rights Project. At the Florence Project she initiated a pilot project for the hundreds of detained immigrant children in Arizona who were in removal proceedings without representation. She assisted in federal litigation against the Department of Homeland Security alleging DHS failed to provide detained immigrant children access to state dependency proceedings. Later Ms. Cooper was the managing attorney at the Florence Project working out of the Eloy Detention Center where approximately 1,000 men are currently detained in DHS custody. Ms. Cooper represented hundreds of detained men, women and children before the immigration court, Board of Immigration Appeals, Ninth Circuit and assisted thousands proceeding in pro se.

Ms. Cooper is currently the Associate Director of the Immigration Clinic at the UC Davis School of Law where she supervises students to represent detained immigrants. Ms. Cooper has served as an expert witness on immigration consequences, trained public defenders and immigration lawyers on both the state and national level and served as a liaison to the Office of Chief Immigration Judge. Ms. Cooper authored a chapter in a comprehensive immigration guide on defending immigrants in custody.

**Sara Elizabeth Dill** is a founding partner in the Chicago and Miami offices of the Law Offices of Sara Elizabeth Dill. Her practice focuses on immigration and criminal defense domestically and internationally. Ms. Dill represents individuals and corporations before the immigration service, immigration courts, and provides criminal defense representation in state and federal courts, both pre and post-indictment. Prior to that, she was a trial and appellate lawyer for a private law firm, a non-profit immigration agency and the Miami-Dade Public Defender's Office.

Ms. Dill is currently serving as the co-chair of the American Bar Association Criminal Justice Section's Immigration Committee. For the last three years Ms. Dill has been appointed as a Commissioner for the ABA Commission on Immigration. She also serves on the ABA Criminal Justice Council. Ms. Dill served as the chair of the ABA Young Lawyer Division Criminal and Juvenile Justice section from 2006-2007. In these roles Ms. Dill has been active in drafting policy on criminal justice and immigration issues, including a comprehensive report on immigration reform that was sent to Congress in February 2010.

Most recently, Ms. Dill authored amicus briefs in the ACLU and Department of Justice lawsuits against the State of Arizona and its controversial immigration law, SB 1070. She also authored an amicus brief on behalf of the League of Women Voters before the Wisconsin Supreme Court in the same-sex marriage amendment cases.

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Ms. Dill also has an extensive pro bono practice, representing victims of human trafficking and domestic violence, as well as successfully litigating asylum cases for refugees from Rwanda, Cameroon, Sudan, Haiti, and Colombia.

Presently, Ms. Dill is admitted to practice before all Wisconsin, Illinois, and Florida courts, the United States District Courts for the Eastern District of Wisconsin and the Middle and Southern Districts of Florida, the United States Court of Appeals for the Seventh and Eleventh Circuits, the United States Supreme Court, and all immigration courts. She is a member of the Wisconsin, Florida, Illinois, Chicago, and American Bar Associations. Ms. Dill is also a member of the American Immigration Lawyers Association, the National Association of Criminal Defense Lawyers, and the Florida Association of Criminal Defense Lawyers.

Ms. Dill has also published numerous articles in recent years, including the following:

*Practice Pointers for the Criminal Defense Attorney in the Aftermath of Padilla v. Kentucky.* American Bar Association Criminal Justice Section. April 2010.

*Immigration Law Update. The State of Criminal Justice.* American Bar Association. 2008.

*Not All Refugees Are Created Equal: The Gender-Based Exclusionary Tactic of United States Asylum Law. ABA Section of International Law Fall Meeting CLE Materials.* November 2006.

*Old Crimes in New Times: Human Trafficking and the Modern Criminal Justice System. Criminal Justice,* Volume 21, Number 1, Pages 12-18. American Bar Association, Spring 2006.

In addition to publishing, Ms. Dill has spoken at international and national legal conferences and educational seminars regarding the immigration consequences of criminal convictions, human trafficking, refugee determination, and representing non-citizens in criminal court.

Ms. Dill attended Marquette University, where she majored in political science, with an emphasis in economics, criminology, and international affairs. She then continued her education at Marquette Law School.

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***Karen T. Grisez*** is full time Public Service Counsel in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP. Ms. Grisez currently serves as Chair of the ABA Commission on Immigration and is a former co-chair of the ABA Section of Litigation's Immigration Committee. She is a member of the American Immigration Lawyers Association, and a member of its national Pro Bono Committee. She is also a member of the Board of Trustees of the American Immigration Council, as well as a member of the Board of Trustees of the Washington Lawyers' Committee for Civil Rights & Urban Affairs, the Board of Directors of the Capital Area Immigrants' Rights (CAIR) Coalition and the Washington Council of Lawyers. Ms. Grisez received her Bachelor's degree from the University of Maryland and her J.D. from the Columbus School of Law, Catholic University of America. She has successfully represented numerous asylum applicants and other immigrants before the Asylum Offices, Immigration Judges, the BIA and in federal court and litigates a variety of other immigration-related matters. She also speaks frequently on immigration-related topics.

***Isaac Wheeler*** is a Litigation Staff Attorney with the Immigrant Defense Project, engaging in litigation in defense of the rights of noncitizens accused or convicted of crimes in federal and state courts and before the Board of Immigration Appeals. Before joining IDP, Mr. Wheeler was an immigration attorney at The Bronx Defenders, where he advised immigrant defendants and their criminal defense counsel on the immigration consequences of criminal dispositions and represented immigrants in removal proceedings. Mr. Wheeler is a 2003 graduate of NYU School of Law, where he was Editor in Chief of the NYU Review of Law & Social Change, a Root-Tilden-Kern Scholar, a Sinsheimer Service Scholar, and a Florence Allen Scholar. He served as a law clerk to then-Judge Sonia Sotomayor of the Second Circuit Court of Appeals and Judge Allyne R. Ross of the Eastern District of New York. He has taught as an adjunct clinical professor at NYU Law School.



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- III. Post Conviction Practice
- IV. Emergent Legal Issues



# PART ONE:

# THE INTERSECTION OF CRIMINAL AND IMMIGRATION LAW





# THE INTERSECTION OF CRIMINAL AND IMMIGRATION LAW

Holly S. Cooper  
University of California, Davis School of Law

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## Meeting Padilla's Challenge: Defense Steps

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### Step 1

#### **Investigate the Facts: Questionnaire**

- Immigration status
- Criminal history
- Prior deportations
- Family ties

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## Step 1: Tips

– Use the Noncitizen Defendant Worksheet –

a) Immigration Status is a bit complicated and a bit sensitive – be aware of your client’s potential reluctance to discuss it

- a) Immigration status + entry to U.S. + time in status
- b) LPR – Lawful Permanent Resident (green card)
- c) Undocumented folks
- d) Refugee or asylee
- e) Current visa (what kind) or visa overstay (what kind)
- f) U.S. citizen?

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## Step 1: Tips

b) You need ALL prior criminal convictions

- a) Includes felony & misdemeanor
- b) This includes diversion, deferred prosecutions & judgments, etc...
- c) If statute is divisible – you need the EXACT statutory citation of conviction
- d) Get details on any sentence to imprisonment, including any suspended sentence
- e) Find out length of probation, amount of restitution
- f) Dates of convictions

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## Step 1: Tips

c) Prior deportations (i.e. removals) are sometimes difficult to identify

- a) Did your clients see an immigration judge
- b) Did your client sign his removal with ICE
- c) Did your client do something else (VD, vol. return)
- d) Call the Immigration Court System – (800) 898-7180

d) Family ties are critical to potential relief

- a) Family Relationship + Immigration Status = potential relief
- b) Spouse, common law, fiancé
- c) Children (ages) and parents

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## Step 2

### Analyze the immigration impact of key defense decisions and advise the client

- Determine likelihood that charge/plea will trigger deportation and impact on "discretionary relief"
  - This analysis determines whether the consequences of the plea are clear or unclear
- *Padilla* slip opinion at \* 13 and *People v. Soriano*, 194 Cal.App.3d 1470 (1987)

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## Step 2: Tips

- a) Investigation + crim history + goal = advisement
- a) Develop the expertise yourself through trg, consultation with experts & written charts and resources; or
  - b) Get information to a criminal immigration expert;\*
- and
- c) Advise on both the clear and unclear consequences of the charge, the offer and any alternate plea dispositions that may be attainable in the case

*\*Different Advisement models exist*

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## Step 3

### Ascertain the Client's Wishes

- Does the client want to prioritize mitigation immigration consequences or a lesser criminal penalty?

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### Step 3: Tips

- a) The client goal spectrum
  - a) Avoid consequences that trigger deportation
  - b) Preserve eligibility to ask immigration judge to get or keep lawful immigration status
  - c) Preserve eligibility to obtain future imm. benefit
  - d) Get out of jail/custody ASAP
  - e) Immigration consequences not a priority
  - f) Desire to be deported as part of resolution

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### Step 4

#### **Defend the case according to the client's priorities**

- If client states imm consequences are highest priority, conduct the defense with this in mind
  - Padilla slip opinion at \* 16 and *People v. Barocio*, 216 Cal.App.3d 99 (1989)

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### Quick Overview of Immigration Status

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# Citizenship:

## *First Line of Defense*

- Born in the U.S.
- Derivative Citizenship
- Acquired Citizenship
- Naturalization

*The Point: First Check if Citizen. Defense Priorities for Citizen May Be Different Than For Non-Citizen.*

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# Immigration Status

*Non-Citizens:*

- Green Card (Lawful Permanent Resident)
- Tourist or Student Visa (ex. B-1, F-1)
- Undocumented
  - Entered Without Inspection
  - Legally Admitted Then Status Expired
- Granted Asylum or Refugee Status

*The Point: Immigration Status Matters. Any inquiry about immigration consequences starts with status.*

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# Immigration Consequences of Crimes

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## Primary Crime-Related Provisions of Immigration Law

- Grounds of Inadmissibility, 8 USC 1182(a)(2).
- Grounds of Deportability, 8 USC 1227(a)(2).
- Aggravated Felony Definition, 8 USC 1101(a)(43).

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## Inadmissibility vs. Deportability

- If client has been lawfully admitted to the U.S. (LPR, Visa, etc.), may be charged with Grounds of Deportability pursuant Section 237 of the INA (8 USC 1227).
- If client is seeking entry or admission to the United States, may be charged with Grounds of Inadmissibility pursuant to Section 212 of the INA (8 USC 1182).

*The Point: Grounds of inadmissibility & deportability are similar but **not identical**; status matters.*

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## Terminology: Inadmissibility vs. Deportability

### Grounds of Inadmissibility:

Crimes that trigger inadmissibility:

- Crimes Involving Moral Turpitude (CIMT)
- Controlled Substances
- Reason to believe engaged in drug trafficking
- Engaged in prostitution
- Determined to have physical/mental disorder that poses threat
- Determined to be drug abuser

### Grounds of Deportability:

Crimes that trigger deportability:

- Crimes Involving Moral Turpitude (CIMT)
- Aggravated Felonies (AF)
- Controlled Substances
- DV, Child Abuse, VPO
- Firearms Offenses
- Document fraud, false claims to citizenship, other crimes

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## Aggravated Felonies

- Almost certain deportation/removal.
- Bars eligibility to most forms of relief from removal and immigration benefits.
- Can't establish good moral character for naturalization.
- Severe due process restrictions (mandatory detention and removal without individualized determination).
- Increases sentence enhancements in illegal reentry prosecutions under 8 USC 1326.

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## Selected Ag Fel Provisions

- Murder, Rape, Sexual Abuse of a minor
- Drug trafficking
- Crimes of violence w/ 1 year or more.
- Theft, Possession of Stolen Property, Burglary w/ 1 year or more.
- Crimes of Fraud or Deceit where loss to the victim exceeded \$10,000.
- Forgery, Perjury, or Obstruction of Justice w/ 1 year or more.

INA 101(a)(43)

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## Defense Priorities

- Everyone wants to avoid an agg felony
- Generally, LPRs care most about avoiding grounds of deportability.
- Undocumented care most about avoiding grounds of inadmissibility.

*The Point: To determine defense priorities, you need to know immigration status and the potential grounds of removability.*

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## Defense Goals for the Person Who Absolutely Will Be Removed

- E.g., undocumented with no hope of relief; deportable LPR with no waiver; immigrant with prior removal/deportation
  - Priority may be to avoid contact with imm authorities. To do that: avoid jail time.
  - Person must be warned of federal crim penalties for illegal re-entry following removal and certain prior convictions. If possible, plea should be made to minimize this.

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## Review Question #1

Prof. Plum is a lawful permanent resident. He is charged with 4 counts of felony forgery. Assume he has no criminal history. What are your defense goals?

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## Review Question #2

Mr. Green entered the country without inspection and is undocumented. He is charged with DUI.

- Assume no criminal history and he's married to a U.S. citizen. What are defense goals?

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## Convictions Under Immigration Law

Statutory definition:

- Formal judgment of guilt by court OR
  - Deferred adjudication = conviction if
    - Finding of guilt
    - Admission of guilt
    - Admission of Facts sufficient to warrant findings of guilt
- AND Judge orders punishment or restraint

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## Convictions Under Immigration Law

The following are NOT convictions under immigration law:

- Juvenile dispositions
- Conviction on direct appeal
- Infraction
- Vacated conviction IF done so for cause (valid legal basis; not rehabilitative relief)
- Conviction resulting in imposition of suspended non-incarceratory penalties

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## Expungements=Convictions

- Rehabilitative expungements have no effect under immigration law and will **not** eliminate the conviction for immigration purposes.

- **ONLY ONE EXCEPTION IN THE NINTH CIRCUIT:**

*First time simple possession of CS or lesser offense & no probation violations before expungement granted. (Estrada v. Holder – 9<sup>th</sup> Cir. 2009)*

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## “Sentence” for Immigration Purposes

### “Term of Imprisonment” OR “Sentence” MEANS...

- Period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that sentence.*
- Does not include probation (unless confinement part of probation conditions Or unless probation violation).
- 8 U.S.C. 1101(a)(48)(B)

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## Probation Violations

- Probation Violation sentence can turn a non-aggravated felony into an aggravated felony!
- **PV sentence added to original sentence & becomes part of sentence for immigration.**
- Ex: Def. pleads to crime of violence & is sentenced to 8 months, violates probation & is sentenced to 5 months, total sentence is 13 months. Offense is now an agg fel b/c crime of violence with sentence of one year or more.

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## Sentencing Options

- Stack sentences, each under 365 days. (3 conv. with sent. of 364 each = no sentences of 1 yr or more).
- When client facing additional sentence for probation violation (& additional sentence will make offense an Agg Fel), try for new conviction w/sentence of 364 or less.
- Waive CTS. If D served 8 months before sentence and waives CTS, he can receive a formal sentence of under one year while serving same amount of time.
- Waive future conduct credits. Seek lower actual sentence but waive future conduct credits in exchange. Prosecutor gets time served that they wanted.

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## Review

**What is the sentence for each client? Are the convictions deportable? Under which ground of removability?**

- Forgery conviction, pleads guilty and receives *suspended* sentence of 1 year. Defendant serves zero days in confinement and is given 3 years probation instead.
- Theft conviction, pleads guilty and sentenced to 365 days *time served*. Defendant not sentenced to any additional time at time of sentencing and goes home.
- Credit card fraud, found guilty at trial, sentenced to 364 days, victim loses 23K.
- Pre-plea diversion program offered after arrest for drug offense. Defendant to complete program and if successful, charge will be dismissed.
- Defendant ordered to complete Prop 36 program.

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## Controlled Substance Convictions

Consequences of Drug Convictions In Immigration Law

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## DRUGS - Part I: Warnings

- *Any* violation of a law *related* to a controlled substance makes a non-citizen deportable or inadmissible.
  - Deportability Exception: 1<sup>st</sup> offense simple poss of mj under 30 gms or being under influence of mj or hash
- Drug trafficking offenses and state offenses analogous to fed felony offenses are Aggravated Felonies.

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## DRUGS - Part I: Warnings

- Must Involve controlled substance specifically listed in the Federal Controlled Substances Act (exception: drug paraphernalia).
- Not all drug offenses are Aggravated Felonies!!!

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## DRUGS - Part II: Agg. Fels

- A drug conviction constitutes an aggravated felony if the analogous offense would be treated as a *felony* under *Federal Law*.
- So Simple Possession is not an Agg. Fel (2 exceptions), but sale or possession with intent to distribute is.
- Possession with intent to distribute a small amount of Marijuana is treated as a Misdo under Federal law, so NOT an Agg Fel.

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## Domestic Violence Convictions

Crimes of domestic violence, violations of protection orders, and child abuse.

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## Domestic Violence Deportation Ground

### DV = COV + domestic relationship

- Must qualify as a “Crime of Violence” defined in 18 USC 16.
- Must Involve a Domestic Relationship.
  - Current or ex-spouse, parent of def’s child, or “similarly situated under state law” (arguably not former cohabitant)

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## Child Abuse Ground

- Any offense involving an intentional, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.
- *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

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## Violation of Protection Order

- Issuance of Protective Order doesn’t trigger deportability.
- Violating a Protective Order can.
- As long as your protection order is issued to prevent domestic/family violence, a violation of the order triggers deportability, **regardless of how you violate the order.** *Alanis-Alvarado v. Mukasey* (9<sup>th</sup> Cir. 2008).

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## Firearms Deportation Ground

- Most firearms offenses fall within this ground (poss, sale, purchasing, carrying, etc.)
- Must involve “firearm”
- Have the record indicate “weapon” or “dangerous instrument” rather than specify a firearm.

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## Crimes Involving Moral Turpitude (CIMTs)

- “refers generally to conduct which is inherently base, vile, or depraved, *and* contrary to the accepted rules of morality and the duties owed between person or to society in general...”

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## Crimes Involving Moral Turpitude

- Broad category impacting both legal and undocumented persons
- Imm consequences depend upon many factors: actual/potential sentence, when committed, prior CIMTs.
- Usually involves offenses with specific intent, fraud, theft, great bodily injury, sex, recklessness, malice.

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## Matter of Silva-Trevino 24 I&N Dec. 687 (A.G. 2008)

- We argue is contrary to established Supreme Court & 9<sup>th</sup> Cir. precedent. But some courts apply it anyway!
- Arguably does two things:
  - Broadens the definition of CIMT
  - Allows Court to go *beyond the record of conviction* in determining whether or not the underlying conduct constitutes a crime involving moral turpitude.

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## This means that Post-Silva...

- Sanitizing the record of conviction such that an offense might *not* constitute a CIMT is not a guaranteed strategy.
- Reckless behavior may constitute a CIMT.
- Prior circuit cases defining CIMTs cannot be relied on 100% as indicative as what will or will not be found to be a CIMT in immigration court.

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## If lawfully admitted, one CIMT makes you deportable if:

- Convicted.
- Max possible sentence = 1 yr
- Offense committed within 5 yrs of admission
  - Admission is usually entry with inspection or adjustment of status (obtaining a green card)

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## If lawfully admitted, 2 CIMTs make you deportable if:

- Two convictions after admission that were not a “single scheme” of criminal misconduct.
  - Doesn't matter when committed.
  - Doesn't matter what potential sentences are.

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## If no lawful admission, just 1 CIMT makes you inadmissible unless:

- It falls within one of two exceptions:
  - Petty Offense Exception - 8 USC 1182(a)(2)(A)(ii)(II)
  - Youthful Offender Exception 8 USC 1182(a)(2)(A)(ii)(I)
- This ground does not require a conviction. Formal admission of CIMT elements is sufficient.

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## Categorical Analysis

- Analytical framework outlined by the US Supreme Court in *Taylor v. US*, 495 U.S. 575 (1990).
- Framework used by the courts & immigration authorities to determine whether a conviction triggers a certain immigration consequence.

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## A statute is either...

**Categorically a CIMT** – **Always**, all conduct punished by statute is [CIMT].

**Categorically not a CIMT** – **Never** [CIMT]. No conduct punished by statute is CIMT.

**Divisible** – **Sometimes** a [CIMT]. Some of the conduct punished by the statute is a [CIMT], some of it is not.

\*Formula works for other grounds of removability, not just CIMTs.

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## Categorical Analysis

- Many statute are broad enough to include various offenses, or various ways of committing the offense, some of which have immigration consequences and others which may not. These are *divisible statutes*.
- Immigration court will want to look at what part of the statute the noncitizen violated.

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## Record of Conviction

- Supreme Court said in *Shepard v. United States*, 125 S.Ct. 1254 (2005) that the court can review only certain permissible documents to determine what portion of the statute the person was convicted of. This group of permissible documents is known as the *record of conviction*.

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## Record of Conviction

- Elements of offense (statute & case law)
- Criminal charge (information, complaint, etc. if incorporated into plea - ie. pled as charged)
- Written plea agreement
- Transcript of plea hearing
- Transcript of judgment
- Sentence
- Jury instructions

*Shepard v. U.S.*, 125 S. Ct. 1254 (2005).

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## WARNING! Docs Outside ROC *may* be consulted under these grounds:

- CIMTs
- Fraud/Deceit with loss of over 10K Agg Felony ground
- *Possibly* DV offenses.

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## Warnings for Your Client!!

- Travel Warning – clients w/convictions should consult imm. atty before traveling.
- Clients with convictions should imm atty before any contact with immigration authorities, including renewal of green card, applying for citizenship, continuing on an existing imm application.

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## California Public Defender Association

### *Immigration Consequences of Felony Convictions*

August 21, 2010

Norton Tooby, Attorney At Law

Holly Cooper, Immigration Law Clinic, UC Davis School of Law

Graciela Martinez, Deputy Public Defender, Los Angeles County

Luis Guerrero, Supervising Attorney, San Diego County PD

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### Why Immigration Consequences Matter

- Lifetime separation from family and home
- 1-20 year prison sentence for illegal reentry
- Mandatory detention
- Deportation
- Cannot become U.S. citizen
- Cannot travel outside USA
- Prison transfer out of state

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### Criminalization of Immigration & Enforcement Cooperation

- Increased inspection of lawful permanent residents at airports/borders
- Secure Communities and increasing collaboration between ICE and criminal law enforcement.
- SB 1070 and copycat legislation

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## No bond detention

- Immigrants may face a detainers pursuant to 8 C.F.R. §287.7
- Detainers last 48 hours
- Once in ICE custody, many immigrants do not qualify for bond bc of criminal pleas
- Detention can last months to years to fight your civil deportation

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## The Supreme Court's Decision in Padilla v. Kentucky:

*What Padilla means for public defenders*

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## Padilla v. Kentucky: Supreme Court Holding

- Sixth Amendment requires defense counsel to provide **affirmative, competent advice** to a noncitizen defendant regarding the immigration consequences of a guilty plea
- Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.

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*Padilla v. Kentucky:*

ABA and NLADA Standards cited:

- Duty to inquire re: imm status at initial interview stage
- Duty to investigate & advise re: imm consequences of plea and sentence

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*Padilla v. Kentucky:*

The Sixth Amendment requires affirmative, competent advice regarding immigration consequences.

*Non-advice (silence) is insufficient (ineffective).*

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*Padilla v. Kentucky:*

Scope of Sixth Amendment duty extends not just to avoiding deportation but also to the possibility of preserving discretionary relief from deportation.

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*Padilla v. Kentucky:*

“Informed consideration” of immigration consequences by the defense *AND THE PROSECUTION* during plea negotiations, in order to reduce likelihood of deportation and promote interests of justice, is appropriate.

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**Meeting Padilla’s Challenge:  
Defense Steps**

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**Step 1**

**Investigate the Facts:  
Questionnaire**

- Immigration status
- Criminal history
- Prior deportations
- Family ties

-ABA Pleas of Guilty Standard 14-3.2(f),  
commentary at p. 127

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## Step 1: Tips

– Use the Noncitizen Defendant Worksheet –

### a) Immigration Status is complicated

- a) LPR – Lawful Permanent Resident (green card)
- b) Undocumented
- c) Refugee or asylee
- d) Current visa (what kind) or visa overstay (what kind)
- e) Pending application
- f) U.S. citizens are often unaware they are U.S. citizens

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## Step 1: Tips

### b) You need ALL prior criminal convictions

- a) Includes felony, misdemeanor & municipal
- b) This includes diversion, deferred prosecutions & judgments, etc...
- c) If statute is divisible – you need the EXACT statutory citation of conviction
- d) Get details on any sentence to imprisonment, including any suspended sentence
- e) Find out length of probation, amount of restitution

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## Step 1: Tips

### c) Prior deportations (i.e. removals) are sometimes difficult to identify

- a) Did your clients see an immigration judge
- b) Did your client sign his removal with ICE
- c) Did your client do something else (VD, vol. return)
- d) Call the Immigration Court System – (800) 898-7180

### d) Family ties are critical to potential relief

- a) Family Relationship + Immigration Status = potential relief
- b) Spouse, common law, fiancé
- c) Children (ages) and parents

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## Step 2

### Ascertain the Client's Wishes

- Does the client want to prioritize getting a good immigration result or a lesser criminal penalty?

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## Step 2: Tips

- a) The client goal spectrum
- a) Avoid consequences that trigger deportation
  - b) Preserve eligibility to ask immigration judge to get or keep lawful immigration status
  - c) Preserve eligibility to obtain future imm. benefit
  - d) Get out of jail/custody ASAP
  - e) Immigration consequences not a priority
  - f) Desire to be deported as part of resolution

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## Step 3

### Analyze the immigration impact of key defense decisions and advise the client

- Determine likelihood that charge/plea will trigger deportation and impact on "discretionary relief"
  - This analysis determines whether the consequences of the plea are clear or unclear
- *Padilla* slip opinion at \* 13 and *People v. Soriano*, 194 Cal.App.3d 1470 (1987)

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### Step 3: Tips

- a) Investigation + crim history + goal = advisement
  - a) Develop the expertise yourself through trg, consultation with experts & written charts and resources; or
  - b) Get information to a criminal immigration expert;\*
  - and
  - c) Advise on both the clear and unclear consequences of the charge, the offer and any alternate plea dispositions that may be attainable in the case

*\*Different Advisement models exist*

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### Step 4

#### Defend the case according to the client's priorities

- If client states imm consequences are highest priority, conduct the defense with this in mind
- Padilla slip opinion at \* 16 and *People v. Barocio*, 216 Cal.App.3d 99 (1989)

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### Step 4: Tips

- a) If current offer fits client goals = take offer
- b) If offer doesn't fit client goals, then:
  - a) Negotiate sentencing concession
  - b) Negotiate plea offer to non-deportable offense/particular section of statute
  - c) Make counter offer with sentencing concession
  - d) Make counter offer plea to specific section of statute
  - e) Litigate case towards motions hearing and trial
  - f) Remember *Padilla's* instruction on prosecutor's duty and *People v. Bautista*, 115 Cal.App.4th 229 (2004)(ineffective assistance of counsel to fail to seek a non-deportable plea to a greater offense)

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## Defense Steps: Hypotheticals

Client considering marijuana possession plea

### Step 1: Facts (2 scenarios)

- a. LPR + no priors + citizen spouse
- b. Undocumented + no priors + citizen spouse

### Step 2: Ascertain Client's Wishes

Avoiding immigration consequences and deportation is a client's priority. LPR wants to maintain status, undoc wants to get status.

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## Defense Steps: Hypotheticals

### Step 3: Analyze Immigration Impact

- a. (LPR) MJ poss will get client deported if >30g. If 30g or less, will affect ability to naturalize or travel.
- b. (Undoc) Client already deportable. MJ poss will bar ability to get legal status. Possibly eligible for waiver of bar if 30g or less (depending on family circumstances).

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## Defense Steps: Hypotheticals

### Step 4: Defend according to client's priorities

- a. (LPR) To avoid deportability, avoid mj conviction, plead to 30g or less, or keep amount of mj out of record. Advise client.
- b. (Undoc) Client already deportable. Avoid mj conviction to maintain eligibility to get status. If client decides must PG to mj, allocute to 30g or less to maintain eligibility for waiver. Avoid contact with ICE. Advise client.

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## Resources to Meet Padilla Challenge

- **Live and online training.** Consult postings at [www.defendingimmigrants.org](http://www.defendingimmigrants.org); request a training for your office
- **Print Resources.** California Quick Reference Chart, Defending Immigrants in the Ninth Circuit Treatise, ongoing legal updates distributed by ILRC, online resource library at [www.defendingimmigrants.org](http://www.defendingimmigrants.org)

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## Resources to Meet Padilla Challenge

- **Consultation.** Many ways to obtain expert consultation: in-house research attorney with mentorship by ILRC, free expert consult or contract with non-profit or private experts.
- **Office-wide models.** See “Protocol for the Development of a Public Defender Immigrant Service Plan” at [www.immigrantdefenseproject.org/webPages/crimJustice.htm](http://www.immigrantdefenseproject.org/webPages/crimJustice.htm)

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## Quick Overview of Immigration Status

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## Citizenship:

### *First Line of Defense*

- Born in the U.S.
- Derivative Citizenship
- Acquired Citizenship
- Naturalization

*The Point: First Check if Citizen. Defense Priorities for Citizen May Be Different Than For Non-Citizen.*

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## Immigration Status

*Non-Citizens:*

- Green Card (Lawful Permanent Resident)
- Tourist or Student Visa (ex. B-1, F-1)
- Undocumented
  - Entered Without Inspection
  - Legally Admitted Then Status Expired
- Granted Asylum or Refugee Status

*The Point: Immigration Status Matters. Any inquiry about immigration consequences starts with status.*

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## Inadmissibility vs. Deportability

- If client has been lawfully admitted to the U.S. (LPR, Visa, etc.), may be charged with Grounds of Deportability pursuant Section 237 of the INA (8 USC 1227).
- If client is seeking entry or admission to the United States, may be charged with Grounds of Inadmissibility pursuant to Section 212 of the INA (8 USC 1182).

*The Point: Grounds of inadmissibility & deportability are similar but **not identical**; status matters.*

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## Defense Priorities

- Generally, LPRs care most about avoiding grounds of deportability.
- Undocumented care most about avoiding grounds of inadmissibility.

*The Point: You need to know immigration status and what imm criminal grounds a noncitizen is subject to in order to determine defense priorities.*

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## Overview of Immigration Consequences of Crimes

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## Convictions Under Immigration Law

Statutory definition:

- Formal judgment of guilty by court OR
  - Deferred adjudication = conviction if
    - Finding of guilt
    - Admission of guilt
    - Admission of Facts sufficient to warrant findings of guilt
- AND Judge orders punishment or restraint

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## Convictions Under Immigration Law

The following are NOT convictions under immigration law:

- Juvenile dispositions
- Conviction on direct appeal
- Infraction (arguably)
- Vacated conviction IF done so for cause (valid legal basis; not rehabilitative relief)

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## Expungements=Convictions

- Rehabilitative expungements have no effect under immigration law and will not eliminate the conviction for immigration purposes.
- **ONE EXCEPTION IN THE NINTH CIRCUIT:**  
*First time simple possession (controlled substance)*

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## “Sentence” for Immigration Purposes

- INA 101(a)(48)(B), 8 U.S.C. 1101(a)(48)(B):  
Term of imprisonment of sentence = the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that sentence.*
- Does not include probation (unless confinement part of probation conditions).

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## Aggravated Felonies

- Almost certain deportation/removal.
- Bars eligibility to most forms of relief from removal and immigration benefits.
- Can't establish good moral character for naturalization.
- Severe due process restrictions (mandatory detention and removal without individualized determination).
- Increases sentence enhancements in illegal reentry prosecutions under 8 USC 1326.

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## Selected Ag Fel Provisions

- Murder, rape, sexual abuse of a minor
- Drug trafficking (*Lopez*)
- Crimes of violence with one year or more sentence imposed
- Theft, possession of stolen property, burglary with one year or more sentence imposed
- Crimes of fraud or deceit where loss to the victim exceeded \$10,000
- Forgery with one year or more sentence imposed.

INA 101(a)(43)

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## Domestic Violence Convictions

Crimes of domestic violence, violations of protection orders, and child abuse.

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## Domestic Violence Ground

- Deportability Only
- Conviction for Domestic Violence – 2 prongs:  
DV = COV + Domestic Relationship.
- Also Stalking or Child abuse
- Violation of a Protection Order (*See Alanis-Alvarado*, 9th Cir. 2008).

INA 237(a)(2)(E)

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## Crime of Violence Ground

18 U.S.C. 16: the term "Crime of Violence" means -

- (a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, **or**
- (b) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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## 9<sup>th</sup> Cir. Interpreting Crime of Violence

- Negligent infliction of injury is not COV. *Leocal v. Ashcroft*, 125 S.Ct. 377 (U.S. 2004).
- Reckless infliction of injury is not a COV. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006).
- Mere offensive touching does not constitute violence required by federal definition, therefore not COV. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

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## Potential Safe Pleas

**243. Battery; punishment.** (e)(1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé..., the battery is punishable by a fine...or by imprisonment in a county jail for a period of not more than one year, or by both fine and imprisonment.

**242. Battery defined.** A battery is any willful and unlawful use of force or violence upon the person of another.

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## Criminal Defense Strategy: Battery PC 242/243(e)

- Keep the record of conviction clear of evidence of actual violence.
- Keep the factual basis either specific to no more than an offensive or insulting touching OR keep the factual basis vague so that no conclusion can be drawn either way.
- Keep record clear of actions requiring more than negligence or recklessness.

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## Other Criminal Defense Strategies for DV offenses

- PC 136.1(b) witness dissuasion not a COV
- PC 236, 237 (false imprisonment) misdo, and probably felony by fraud/deceit are not COV
- Trespass, theft (but may have other imm consequences)
- Plead to committing a COV against a non-listed victim such as former cohabitant or ex's new boyfriend, the neighbor
- Violence must be against person and not property

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## Violation of Protection Order

- INA says - who 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..."
- *Alanis-Alvarado v. Mukasey*, 9th Cir. September 3, 2008 says as long your protection order is issued to prevent domestic violence, doesn't matter how you violate it.
- PC 273.6 v. 166(a)(4)

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## Child Abuse Ground

- Any offense involving an intentional, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation.
- *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

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## Controlled Substance Convictions

Consequences of Drug Convictions In Immigration Law

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## DRUGS - Part I: Warnings

- Any drug related offense makes a non-citizen deportable or inadmissible.
- Not all drug offenses are Aggravated Felonies.
- Ground written broadly - *any* violation of a law *related* to a controlled substance.
- MUST INVOLVE controlled substance named in the Federal Controlled Substances Act.
- **Sometimes** a conviction for Paraphernalia can have a worse immigration consequence than a conviction for possession. Assume nothing.

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## DRUGS - Part II: Agg. Fels

- A drug conviction constitutes an aggravated felony if the analogous offense would be treated as a *felony* under *Federal Law*.
- Simple Possession is not an Agg. Fel (2 exceptions) but sale or possession with intent to distribute is an Agg. Fel.
- Possession with intent to distribute a small amount of Marijuana is treated as a Misdo under Federal law so NOT an Agg Fel.

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## DRUGS - Part III: Safer Pleas

- *Solicitation of or offering* to do a drug offense is not an agg felony. Beware it is an offense relating to CS.
- Sometimes a more serious offense can have lesser immigration consequences. (Transportation for Personal Use is not an Aggravated Felony but Sale is.)
- Keep record clear of *what* controlled substance was involved. California list of controlled substances broader than Federal list. (Cal. H&S 11377 is divisible statute.)

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## SEX CRIMES INVOLVING MINORS

- 261.5(c) is not an aggravated felony as sex abuse of a minor nor is it rape or a crime of violence. *Estrada-Espinoza* (9<sup>th</sup>)
- 647.6 not an AF as sexual abuse of minor unless record indicates abusive behavior occurred. *Pallares-Gallan* (9<sup>th</sup>)

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## Sex Abuse of Minor (cont'd)

- 288(a) is an aggravated felony even if just probation or sentence under 365.
- 288(c)(1) may not be an aggravated felony. *US v. Castro* (9<sup>th</sup>)

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## FIREARMS

- An offense involving trafficking in FA or destructive devices is an Agg felony
- Being a felon or addict in possession of a FA under 12021(a)(1) can be an Agg felony (if underlying offense felony).

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## ENHANCEMENTS

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## SENTENCING

- If a sentence to imprisonment of 365 or more will result in an AF for the following:
  - Crime of violence
  - Theft (including petty theft with a prior section 666)
  - Burglary
  - Bribery
  - Forgery
  - Trafficking in vehicles
  - Perjury
  - Falsifying docs
  - Obstruction of justice

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## Misdemeanors can be felonies

- Misdemeanor offense with suspended one year sentence can be a year sentence for immigration purposes
- Some grounds of removal are considered aggravated felonies regardless of length of sentence
- (sex abuse, rape, drug sales, firearms)

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### If sentence can trigger removal (eg. Theft, COV, etc)

- Try to get sentence of 364 or less
- Plead to two or more counts with less than a year for each count to be served consecutively
- Take jail time on an offense that is not sentence dependent (offering to sell drugs– 3 years, 364 on 273.5)

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### Sentencing cont'd

- Waive credit for time served and try and get shorter official sentence (giving judge/DA same amount of time incarcerated in reality but not making it official sentence)
- Do not take probation violation that adds more time to original offense (burglary 16 months); ask for new conviction and take 364 on new count

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### Crafting Safer Pleas:

**The significance of the Record of Conviction & Factual Basis**

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## Categorical Analysis

- Immigration Court can't re-litigate criminal case.
- Framework used to determine whether a conviction triggers a certain immigration consequence is known as the **Categorical Analysis**. Outlined by the US Supreme Court in *Taylor v. US*, 495 U.S. 575 (1990).
- Categorical Analysis (look at statute) & Modified Categorical Analysis (look beyond statute).

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## A statute is either...

**Categorically a CIMT** – *Always*, all conduct punished by statute is [CIMT].

**Categorically not a CIMT** – *Never* [CIMT]. No conduct punished by statute is CIMT.

**Divisible** – *Sometimes* a [CIMT]. Some of the conduct punished by the statute is a [CIMT], some of it is not.

\*Formula works for other grounds of removability, not just CIMTs.

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## Categorical Analysis

- Many statutes are broad enough to include various offenses, or various ways of committing the offense.
- A statute that contains both offenses that trigger an immigration consequence and those that do not are called *divisible statutes*.
- Immigration court will want to know what part of a divisible statute the noncitizen was convicted of having violated.

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## Record of Conviction

- Supreme Court said in *Shepard v. United States*, 125 S.Ct. 1254 (2005) that the court can review only certain permissible documents during a modified categorical analysis. This group of permissible documents is known as the record of conviction.

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## Record of Conviction

- Elements of offense (statute & case law)
  - Criminal charge (information, complaint, etc. if pled to count "as charged in the complaint")
  - Written plea agreement
  - Transcript of plea hearing
  - Transcript of judgment
  - Sentence
  - Jury instructions
- Shepard v. U.S.*, 125 S. Ct. 1254 (2005).

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## ROC does NOT include:

- Police reports, probation or pre-sentence reports
- Statements by noncitizen outside of judgment and sentence transcript (to police for example)
- Information from co-defendant's case
- **WARNING: Stipulating to facts in a document not otherwise part of the ROC incorporates them by reference into the ROC (ie: stipulation to police reports)**

*The Point: Stipulating to police reports or other fact-specific documents may have the worst outcomes for non-citizen defendants pleading to divisible statutes. Craft your factual basis language carefully.*

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## AMEND YOUR COMPLAINTS

- Please ***amend your complaints*** where possible to avoid immigration consequences. Often complaints are referenced by minute orders or abstracts and relied upon as indications of the factual basis OR underlying facts of a conviction.

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## Available strategies as result of Categorical Analysis

- Sanitize Record of Conviction to make Safe Plea:
  - No mention of controlled substance
  - No mention of domestic relationship
  - Plead to divisible statute in the disjunctive
  - Silent as to which subsection defendant convicted of under divisible statute

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## Review Question

John Stewart is facing deportation for a 2006 DV conviction. Can the government use the following documents to prove that this offense triggers a ground of removal?

- The judgment and sentence?
- The original charging document?
- John's plea statement?

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### Review Question

Under what circumstances could the government use the the police report to establish that the conviction triggers a ground of removal?

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### Review Question

What is wrong with this plea statement and how would you word it differently?

“On April 8, 2006, I, John Stewart, hit my wife, Margaret Cho, during an argument that we were having.”

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### Final Thoughts

- You may be the last lawyer your client sees for a while. Leave your client with documentation demonstrating efforts to mitigate immigration consequences.
- Specify in your file notes that an individual relied on a particular case or understanding of the law in accepting a plea. Law in this area sometimes is constantly changing.

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## Resources

- Quick Reference Chart on Immigration Consequences of California Offenses – [www.ilrc.org/criminal.php](http://www.ilrc.org/criminal.php) (Be careful!)
- Free Defender Resource Library on immigration consequences of crimes and delinquency at [www.defendingimmigrants.org](http://www.defendingimmigrants.org)
- Manual on Immigration Consequences of Crimes: *Defending Immigrants in the Ninth Circuit* – [www.ilrc.org](http://www.ilrc.org)

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Next Hearing: \_\_\_\_\_

**Yuba Detention Intake Sheet**

*UC Davis Immigration Law Clinic & California Rural Legal Assistance Foundation*

**Document Checklist:**

Notice To Appear  Criminal Records  Custody Determination

**Immigration Attorney? Y / N**      \$

**Repeat Intake? Y / N**

**Biographical Information:**    ♂    ♀

Name		A Number	
Date of Birth		Immigration Status	
Citizenship/Birth Place		→ Since when	
Language Preferred		First Entry to US	
Detention ID Number		→ How	

**Family Members**

Name	Relation	Status	Contact Information	Will Help	Consent

**Current Proceedings**

**Y N**

**Additional Information**

Have you received a "Notice to Appear"?			
Have you signed anything from Immigration?			
Have you been before an Immigration Judge?			
→ If so, how many times?			
→ What is the name of your judge?			
Have you had a "Bond Hearing"? Amount?			
How did you end up in removal proceedings?			

**Criminal History**

Conviction	Plea	Where (Fed/State/County)	Date	Sentence (type/length)	Appeal	Post-Conviction	Warned ImmConsq

**Potential Relief**

**Y N**

**Additional Information**

Have you ever been a victim of human trafficking?			
Have you ever been a victim of a crime in the United States?			
Have you been abused by a (USC or LPR) spouse or parent?			

**Yuba Detention Intake Sheet**

*UC Davis Immigration Law Clinic & California Rural Legal Assistance Foundation*

**Y N**

Do you fear return to your country-for example-because of your race, religion, nationality, political opinion/party membership, or your membership to a social group?			
Are you afraid that you might be tortured in your home country?			
Were you, your parents, adopted parents, or grandparents, born or naturalized in the United States?			

**Past Immigration History**

**Y N**

**Additional Information**

Ever <i>lost status</i> ?			
Any <i>previous removal proceedings</i> ?			
Ever been <i>detained/arrested at the border</i> ?			
→Result?			
Any <i>prior order of removal</i> /expedited order of removal/voluntary departure?			
Ever been granted 212(c), Suspension of Deportation, or Cancellation?			
Ever <i>previously filed immigration application</i> (INS or USCIS)? As a derivative?			
Ever left and re-entered the United States?			
→Explain (how, # of times, length of departure)			

**Additional Information [regarding: \_\_\_\_\_]**

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**Case Assessment or Follow-up:**

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**Completed by:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
 (NAME & HOST ORGANIZATION)



# PART TWO:

PADILLA

V.

KENTUCKY



130 S. Ct. 1473, \*; 176 L. Ed. 2d 284, \*\*;  
2010 U.S. LEXIS 2928, \*\*\*; 22 Fla. L. Weekly Fed. S 211



LEXSEE 130 S. CT. 1473

**JOSE PADILLA, Petitioner v. KENTUCKY**

**No. 08-651**

**SUPREME COURT OF THE UNITED STATES**

*130 S. Ct. 1473; 176 L. Ed. 2d 284; 2010 U.S. LEXIS 2928; 22 Fla. L. Weekly Fed. S 211*

**October 13, 2009, Argued**  
**March 31, 2010, Decided**

**NOTICE:**

The LEXIS pagination of this document is subject to change pending release of the final published version.

**PRIOR HISTORY:** [\*\*\*1]

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.  
*Commonwealth v. Padilla*, 253 S.W.3d 482, 2008 Ky. LEXIS 3 (Ky., 2008)

**DISPOSITION:** Reversed and remanded.

**DECISION:**

[\*\*284] Counsel's alleged failure to correctly advise alien legal permanent resident of United States, before he pleaded guilty to trafficking in marijuana, that this was deportable offense under Immigration and Naturalization Act provision (8 U.S.C.S. § 1227(a)(2)(B)(i)) held to be deficient assistance under *Sixth Amendment*.

**SUMMARY:**

**Procedural posture:** Defendant, who pleaded guilty to drug charges, sought postconviction relief based on ineffective assistance of counsel. The Supreme Court of Kentucky denied relief. The United States Supreme Court granted certiorari.

**Overview:** Defendant was a lawful permanent resident who pleaded guilty to transporting marijuana. His crime was a removable offense under 8 U.S.C.S. § 1227(a)(2)(B)(i). He claimed that his counsel incorrectly told him prior to entry of his plea that he did not have to worry about immigration status because he had been in the United States for so long. The state court held that

the *Sixth Amendment* did not protect defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. The Supreme Court held that the distinction between collateral and direct consequences was ill-suited to the deportation context, so advice regarding deportation was not categorically removed from the ambit of the *Sixth Amendment*. Counsel's alleged failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient assistance under prevailing professional norms, as the consequences could easily have been determined from reading the removal statute. Whether defendant was entitled to relief depended on whether he could demonstrate prejudice, a matter for the state courts to consider in the first instance.

[\*\*285] **Outcome:** The state court's judgment was reversed, and the matter was remanded for further proceedings. 7-2 decision; one concurrence in the judgment, one dissent.

**LAWYERS' EDITION HEADNOTES:**

[\*\*LEdHN1]

ALIENS §25.5

REMOVABLE OFFENSE -- RELIEF -- CONTROLLED SUBSTANCE

Headnote:[1]

If a noncitizen has committed a removable offense after the 1996 effective date of amendments to the Immigration and Nationality Act, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. 8 U.S.C.S. § 1229b. Subject to

limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. 8 U.S.C.S. §§1101(a)(43)(B), 1228. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN2]

ALIENS §25.5

DEPORTATION -- SPECIFIED CRIMES

Headnote:[2]

As a matter of federal law, 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. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN3]

CRIMINAL LAW §46.4

GUILTY PLEA -- COUNSEL

Headnote:[3]

Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN4]

ALIENS §33

DEPORTATION -- CRIMINAL SANCTION -- CIVIL PROCEEDING

Headnote:[4]

Deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN5]

CRIMINAL LAW §46.4 CRIMINAL LAW §46.7

DEPORTATION -- ASSISTANCE OF COUNSEL -- EFFECTIVENESS

Headnote:[5]

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. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland

claim concerning the specific risk of deportation. Advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN6]

CRIMINAL LAW §46.7

COUNSEL -- INEFFECTIVE ASSISTANCE -- STANDARDS

Headnote:[6]

Under Strickland, a court first determines whether counsel's representation fell below an objective standard of reasonableness. Then the court asks whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have [\*\*286] been different. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Although they are only guides and not "inexorable commands," these 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. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN7]

CRIMINAL LAW §46.7

DEPORTATION -- ADVICE FROM COUNSEL

Headnote:[7]

Counsel must advise a criminal client regarding the risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN8]

ALIENS §25.5

DEPORTABILITY -- CONTROLLED SUBSTANCE

Headnote:[8]

See 8 U.S.C.S. § 1227(a)(2)(B)(i), which provides in part: "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 . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN9]

CRIMINAL LAW §46.7

ADVICE FROM COUNSEL -- DEPORTATION

Headnote:[9]

When the law is not succinct and straightforward, 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. But when the deportation consequence is truly clear, the duty to give correct advice is equally clear. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN10]

CRIMINAL LAW §46.7

INEFFECTIVE ASSISTANCE OF COUNSEL -- DEPORTATION

Headnote:[10]

It 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. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN11]

CRIMINAL LAW §46.7

COUNSEL'S PERFORMANCE -- SCRUTINY

Headnote:[11]

Judicial scrutiny of counsel's performance must be highly deferential. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN12]

CRIMINAL LAW §46.7

INEFFECTIVE ASSISTANCE OF COUNSEL -- GUILTY PLEA

Headnote:[12]

To obtain relief on an ineffective assistance claim involving a guilty plea, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.) [\*\*287]

[\*\*LEdHN13]

CRIMINAL LAW §46.7

COUNSEL -- EFFECTIVE ASSISTANCE -- PLEA BARGAIN -- DEPORTATION

Headnote:[13]

The negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. The severity of deportation--the equivalent of banishment or exile--only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[\*\*LEdHN14]

CRIMINAL LAW §46.7

INCOMPETENT COUNSEL -- CLIENT'S RISK OF DEPORTATION

Headnote:[14]

It is the United States Supreme Court's responsibility under the U.S. Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the mercies of incompetent counsel. Counsel must inform her client whether his plea carries a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

## SYLLABUS

[\*1475] [\*\*288] Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived [\*1476] in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the *Sixth Amendment's* effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

*Held:* Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether

he has been prejudiced, a matter not addressed here. Pp. \_\_\_-\_\_\_, 176 L. Ed. 2d, at 290-299.

(a) Changes to immigration law have dramatically raised [\*\*\*2] the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. \_\_\_-\_\_\_, 176 L. Ed. 2d, at 290-293.

(b) *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and [\*\*\*3] collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. Pp. \_\_\_-\_\_\_, 176 L. Ed. 2d, at 293-294.

(c) To satisfy *Strickland's* two-prong inquiry, counsel's representation [\*\*289] must fall "below an objective standard of reasonableness," 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id.*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The weight of prevailing professional norms supports [\*\*\*4] the view that counsel must advise her client regarding the deporta-

tion risk. And this Court has recognized the importance to the client of "[p]reserving the . . . right to remain in the United States'" and "preserving the possibility of" discretionary relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined [\*1477] from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland's* first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. [\*\*\*5] Pp. \_\_\_-\_\_\_, 176 L. Ed. 2d, at 294-296.

(d) The Solicitor General's proposed rule--that *Strickland* should be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice--is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203. Pp. \_\_\_-\_\_\_, 176 L. Ed. 2d, at 296-299.

253 S. W. 3d 482, reversed and remanded.

**COUNSEL:** Stephen B. Kinnaird argued the cause for petitioner.

**Michael R. Dreeben** argued the cause for the United States, as amicus curiae, by special leave of court.

**Wm. Robert Long, Jr.**, argued the cause for respondent.

**JUDGES:** Stevens, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C. J., joined. Scalia,

J., filed a dissenting opinion, in which Thomas, J., joined.

## OPINION BY: STEVENS

### OPINION

Justice **Stevens** delivered [\*\*\*6] the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served [\*\*290] this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.<sup>1</sup>

1 Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).

[\*1478] In this postconviction proceeding, Padilla claims 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.' " 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky [\*\*\*7] denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held 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. *Id.*, at 485. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U.S. \_\_\_, 129 S. Ct. 1317, 173 L. Ed. 2d 582 (2009), to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

### I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority [\*\*\*8] 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, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 1.2(a), p. 5 (1959). An early effort to empower the President to order the deportation of those immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon § 1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon § 1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been [\*\*291] convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.<sup>2</sup>

2 In 1907, Congress expanded the class [\*\*\*9] of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 899.

The Immigration and Nationality Act of 1917 (1917 Act) brought "radical changes" [\*1479] to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54-55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . ." 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing [\*\*\*10] or within 30

days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id.*, at 890.<sup>3</sup> This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

3 As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days [\*\*\*11] thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889-890.

This provision was codified in 8 U.S.C. § 1251(b) (1994 ed.) (transferred to § 1227 (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986).

Although narcotics offenses--such as the offense at issue in this case--provided a distinct basis for deportation as early as 1922,<sup>4</sup> the JRAD procedure was generally available [\*\*292] to avoid deportation in narcotics convictions. See *United States v. O'Rourke*, 213 F.2d 759, 762 (CA8 1954). Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving [\*1480] moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics case "was effective to prevent deportation" (citing *Dang Nam v. Bryan*, 74 F.2d 379, 380-381 (CA9 1934))).

4 Congress [\*\*\*12] first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of

May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat*, 8 F.2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung Que Fong v. Nagle*, 15 F.2d 789, 790 (CA9 1926); thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi v. Ebey*, 12 F.2d 922, 923 (CA7 1926); *Todaro v. Munster*, 62 F.2d 963, 964 (CA10 1933).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Second Circuit held that the *Sixth Amendment* right to effective [\*\*\*13] assistance of counsel applies to a JRAD request or lack thereof, see *Janvier*, 793 F.2d 449. See also *United States v. Castro*, 26 F.3d 557 (CA5 1994). In its view, seeking a JRAD was "part of the sentencing" process, *Janvier*, 793 F.2d, at 452, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process--not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),<sup>5</sup> and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, 110 Stat. 3009-596, an authority that had been exercised to prevent the deportation of over 10,000 non-citizens during the 5-year period prior to 1996, *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). Under contemporary law, [\*\*LEdHR1] [1] if a noncitizen has committed a removable offense after the 1996 effective [\*\*\*14] date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.<sup>6</sup> See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related

to trafficking in a controlled substance. See § 1101(a)(43)(B); § 1228.

5 The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U.S.C. § 1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204, 206. The JRAD procedure, codified in 8 U.S.C. § 1251(b) (1994 ed.), applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O'Rourke*, 213 F.2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

6 The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez v. INS*, 533 U.S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001).

These [\*\*\*15] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of [\*\*293] crimes has never been more important. These changes confirm our view that, [\*\*LEdHR2] [2] as a matter of federal law, deportation is an integral part--indeed, sometimes the most important part<sup>7</sup>--of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

7 See Brief for Asian American Justice Center et al. as *Amici Curiae* 12-27 (providing real-world examples).

## II

[\*\*LEdHR3] [3] Before deciding whether to plead guilty, a defendant is entitled to "the effective [\*1481] assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.<sup>8</sup> 253 S. W. 3d, at 483-484 (citing *Commonwealth v. Fuartado*, 170 S. W. 3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the *Sixth Amendment*," [\*\*\*16] and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.<sup>9</sup>

8 There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 *Iowa L. Rev.* 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post*, at \_\_\_, 176 L. Ed. 2d, at 299 (opinion concurring in judgment). See also *post*, at \_\_\_, 176 L. Ed. 2d, at 307 ("I do not mean to suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation"). In his concurring opinion, Justice Alito has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post*, at \_\_\_, 176 L. Ed. 2d, at 300.

9 See, *e.g.*, [\*\*\*17] *United States v. Gonzalez*, 202 F.3d 20 (CA1 2000); *United States v. Del Rosario*, 902 F.2d 55, 284 U.S. App. D.C. 90 (CADC 1990); *United States v. Yearwood*, 863 F.2d 6 (CA4 1988); *Santos-Sanchez v. United States*, 548 F.3d 327 (CA5 2008); *Broomes v. Ashcroft*, 358 F.3d 1251 (CA10 2004); *United States v. Campbell*, 778 F.2d 764 (CA11 1985); *Oyekoya v. State*, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); *State v. Rosas*, 183 Ariz. 421, 904 P.2d 1245 (App. 1995); *State v. Montalban*, 2000-2739 (La. 2/26/02), 810 So. 2d 1106; *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989).

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that [\*\*LEdHR4] [4] deportation is a particularly severe "penalty," *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), deportation [\*\*\*18] is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation [\*\*294] for

nearly a century, see Part I, *supra*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 290-293. 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. *United States v. Russell*, 686 F.2d 35, 38, 222 U.S. App. D.C. 313 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the [\*1482] immigration consequences of their convictions").

[\*\*LEdHR5] [5] 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. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that [\*\*\*19] advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Strickland* applies to Padilla's claim.

### III

[\*\*LEdHR6] [6] Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." *Ibid.*; *Bobby v. Van Hook*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191, and n. 6, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Although they are "only guides," *Strickland*, 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, and [\*\*\*20] not "inexorable commands," *Bobby*, 558 U.S., at \_\_\_, 130 S. Ct. 13, 175 L. Ed. 2d 255, these 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.

The weight of prevailing professional norms supports the view that [\*\*LEdHR7] [7] counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 *Cornell L. Rev.* 697, 713-718 (2002); A. Campbell, Law of Sentencing [\*\*295] § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d [\*\*\*21] ed. 1999). "[A]uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, 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 . . ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Guidelines, *supra*, §§ 6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 *The Champion* 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants [\*1483] § 1.3 (3d ed. 2003); 2 *Criminal Practice Manual* §§ 45:3, 45:15 (2009)).

We too have previously recognized 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." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting 3 *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed [\*\*\*22] by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See 8

*U.S.C. § 1227(a)(2)(B)(i)* ( [\*\*LEdHR8] [8] "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 . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands [\*\*\*23] removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, [\*\*296] and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. [\*\*LEdHR9] [9] When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), 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.<sup>10</sup> But when the deportation consequence [\*\*\*24] is truly clear, as it was in this case, the duty to give correct advice is equally clear.

10 As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, [\*1484] a matter we leave to the Kentucky courts to consider in the first instance.

#### IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent

that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor [\*\*\*25] General's proposed rule unpersuasive, although it has support among the lower courts. See, e.g., *United States v. Couto*, 311 F.3d 179, 188 (CA2 2002); *United States v. Kwan*, 407 F.3d 1005 (CA9 2005); *Sparks v. Sowders*, 852 F.2d 882 (CA6 1988); *United States v. Russell*, 686 F.2d 35, 222 U.S. App. D.C. 313 (CADC 1982); *State v. Rojas-Martinez*, 2005 UT 86, 125 P. 3d 930, 935; *In re Resendiz*, 25 Cal. 4th 230, 105 Cal. Rptr. 2d 431, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . . [and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State v. Paredez*, 2004-NMSC-036, 2004 NMSC 36, 136 N. M. 533, 538-539, 101 P.3d 799.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even [\*\*\*26] 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." *Libretti* [\*\*297] v. *United States*, 516 U.S. 29, 50-51, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995). 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.<sup>11</sup> Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. [\*\*LEdHR10] [10] It 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." *Hill v. Lockhart*, 474 U.S. 52, 62, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (White, J., concurring in judgment).

11 As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client

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and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client [\*\*\*27] of the consequences of his plea. Tr. of Oral Arg. 37-38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgado v. Carmichael*, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id.*, at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203, but nevertheless applied [\*1485] *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.<sup>12</sup>

12 However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland's* second prong. *Hill*, 474 U.S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland's* prejudice prong.

Justice Alito believes that the Court misreads *Hill*, *post*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 305. In *Hill*, the Court recognized--for the first time--that *Strickland* applies to advice respecting a guilty plea. [\*\*\*28] 474 U.S., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 ("We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla's claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.

A flood did not follow in that decision's wake. Surmounting *Strickland's* high bar is never an easy task. See, e.g., 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ([\*\*LEdHR11] [11] "Judicial scrutiny of counsel's performance must be highly deferential"); *id.*, at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, [\*\*LEdHR12] [12] to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under

the circumstances. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). There is no reason to doubt that lower courts--now quite experienced with applying *Strickland*--can effectively and efficiently use its framework to separate [\*\*\*29] specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at [\*\*298] least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See, *supra*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 295-296. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland*, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.<sup>13</sup> But they account for only approximately 30% of the habeas petitions filed.<sup>14</sup> The nature of relief secured by a successful collateral challenge to a guilty plea--an opportunity to withdraw the plea and proceed to trial [\*\*\*30] --imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs [\*1486] whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

13 See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

14 See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36-38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. [\*\*\*31]

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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. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. 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, as by avoiding a conviction for an offense that automatically triggers the removal consequence. 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 in exchange for a dismissal of a charge that does.

In sum, we have long recognized that [\*\*LEdHR13] [13] the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. *Hill*, 474 U.S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203; see also *Richardson*, 397 U.S., at 770-771, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. The severity of deportation--"the equivalent of [\*\*299] banishment [\*\*\*32] or exile," *Delgado v. Carmichael*, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947) --only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.<sup>15</sup>

15 To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (Rev. 2/2003), <http://courts.ky.gov/NR/ronlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf> (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, e.g., Alaska Rule Crim. Proc. 11(c)(3)(C) (2009-2010); *Cal. Penal Code Ann.* § 1016.5 (West 2008); *Conn. Gen. Stat.* § 54-1j (2009); *D. C. Code* § 16-713 (2001); *Fla. Rule Crim. Proc.* 3.172(c)(8) (Supp. 2010); *Ga. Code Ann.* § 17-7-93(c) (1997); *Haw. Rev. Stat. Ann.* § 802E-2 (2007); *Iowa Rule Crim. Proc.* 2.8(2)(b)(3) (Supp. 2009); *Md. Rule* 4-242 (Lexis 2009); *Mass. Gen. Laws*, ch. 278, § 29D (2009); *Minn. Rule Crim. Proc.* 15.01 (2009); *Mont. Code Ann.* § 46-12-210 (2009); N. M. Rule Crim. Form 9-406 (2009); *N. Y. Crim. Proc. Law Ann.* § 220.50(7) [\*\*\*33] (West Supp. 2009); *N. C. Gen. Stat. Ann.* § 15A-1022 (Lexis 2007); *Ohio Rev. Code Ann.* § 2943.031 (West 2006); *Ore. Rev. Stat.* § 135.385 (2007); *R. I. Gen. Laws*

§ 12-12-22 (Lexis Supp. 2008); *Tex. Code Ann. Crim. Proc.*, Art. 26.13(a)(4) (Vernon Supp. 2009); *Vt. Stat. Ann.*, Tit. 13, § 6565(c)(1) (Supp. 2009); *Wash. Rev. Code* § 10.40.200 (2008); *Wis. Stat.* § 971.08 (2005-2006).

## V

[\*\*LEdHR14] [14] It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of incompetent counsel." *Richardson*, 397 U.S., at 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. 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.

Taking as true the basis for his motion for postconviction relief, we have little difficulty [\*1487] concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as [\*\*\*34] a result thereof, a question we do not reach because it was not passed on below. See *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 530, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002).

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

**CONCUR BY: ALITO**

**CONCUR**

Justice **Alito**, with whom The **Chief Justice** joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt [\*\*300] to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing [\*\*\*35] criminal

charges, in either state or federal court or both, may not be well versed in it." *Ante*, at \_\_\_, 176 L. Ed. 2d, at 295. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"--but not, perhaps, in other situations. *Ante*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 296. This vague, halfway test will lead to much confusion and needless litigation.

## I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F.3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States v. Banda*, 1 F.3d 354, 355 (CA5 1993) (holding that "an [\*\*\*36] attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 699 (2002) (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"--including "eleven federal circuits, more than thirty states, and the District of Columbia"--"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante*, at \_\_\_, n. 8, 176 L. Ed. 2d, at 293, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess--and very often do not possess--expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on [\*1488] matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction [\*\*\*37] and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. *Chin & Holmes* 705-706. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are

"seriou[s]," see *ante*, at \_\_\_, 176 L. Ed. 2d, at 299, but this Court has never held that a criminal defense attorney's *Sixth Amendment* duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante*, at \_\_\_, 176 L. Ed. 2d, at 289 ("The weight of prevailing professional [\*\*\*301] norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the *Sixth Amendment* is ultimately a task for the courts. E.g., *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot [\*\*\*38] delegate to these groups our task of determining what the Constitution commands. See *Strickland*, *supra*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante*, at \_\_\_, 176 L. Ed. 2d, at 295, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 296.

The Court's new approach is particularly problematic because providing advice on whether [\*\*\*39] a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, *Immigration Consequences of Criminal Activity* (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, *The Criminal Lawyer's Guide to Immigration*

Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, § 5.2, at 146 (stating that the aggravated felony list at 8 U.S.C. § 1101(a)(43) is not clear [\*1489] with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even [\*\*\*40] more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

[\*\*302] Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit.*" § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)." [\*\*\*41] *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "attempted possession," *id.*, § 5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, § 5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, § 5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably not* a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor

driving [\*\*\*42] under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may not* be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien,<sup>1</sup> or whether a [\*1490] particular state disposition will result in a "conviction" for purposes of federal immigration law.<sup>2</sup> The task of offering advice about the immigration [\*\*\*303] consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration [\*\*\*43] consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes § 2:1, at 2-2 to 2-3.

1 Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook § 4.20, at 113 (explaining that U.S. citizenship conferred by blood is "derivative," and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

2 "A disposition that is not a 'conviction,' under state law may still be a 'conviction' for immigration purposes." *Id.*, § 4.32, at 117 (citing *Matter of Salazar*, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook § 4.37; accord, [\*\*\*44] D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes § 2:1, p. 2-2 (2008) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security

(DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing is ever simple with immigration law"--including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1. I therefore cannot agree with the Court's apparent view that the *Sixth Amendment* requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine [\*\*\*45] those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante*, at \_\_\_, 176 L. Ed. 2d, at 295. But "[w]hen the law is not succinct and straightforward . . . , 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." *Ante*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 296. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes § 2:1, at 2-2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction [\*\*\*46] is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know [\*1491] conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged [\*\*304] with such an

offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook § 4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice [\*\*\*47] may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem--such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, *Chin & Holmes* 708 ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting [\*\*\*48] the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell*, 686 F.2d 35, 39-40, 222 U.S. App. D.C. 313 (CADC 1982) (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in *Sixth Amendment* law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal de-

fense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's *Sixth Amendment* right to counsel. As noted above, the [\*\*\*49] Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far. See, e.g., *Gonzalez*, 202 F.3d, at 28; *Banda*, 1 F.3d, at 355; *Chin & Holmes* 697, 699. The majority appropriately acknowledges that the lower courts [\*1492] are "now quite experienced with applying *Strickland*," ante, at [\*\*305] \_\_\_, 176 L. Ed. 2d, at 297, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the *Sixth Amendment* by claiming that this Court in *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." Ante, at \_\_\_, 176 L. Ed. 2d, at 297. That characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's *Sixth Amendment* right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous [\*\*\*50] advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.' 474 U.S., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

## II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting [\*\*\*51] affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the *Sixth Amendment* duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Strickland*, 466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys in criminal cases." See ante, at \_\_\_, 176 L. Ed. 2d, at 295 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it"). By contrast, reasonably competent attorneys [\*\*\*306] should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are [\*\*\*52] not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on [\*1493] the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'" 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland*, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose--to ensure a fair trial--as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered [\*\*\*53] with the advice of constitutionally competent counsel--or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." [\*\*\*54] Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.<sup>3</sup> And several other Circuits have held that affirmative [\*\*307] misadvice concerning nonimmigration consequences of a conviction can violate the *Sixth Amendment* even if those consequences might be deemed "collateral."<sup>4</sup> By contrast, it appears that [\*1494] no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court's position goes too far.

3 See *United States v. Kwan*, 407 F.3d 1005, 1015-1017 (CA9 2005); *United States v. Couto*, 311 F.3d 179, 188 (CA2 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-1541 (CA11 1985) (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States*, 548 F.3d 327, 333-334 (CA5 2008) (concluding that counsel's advice was [\*\*\*55] not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

4 See *Hill v. Lockhart*, 894 F.2d 1009, 1010 (CA8 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*"); *Sparks v. Sowders*, 852 F.2d 882, 885 (CA6 1988) ("[G]ross misadvice concerning

parole eligibility can amount to ineffective assistance of counsel"); *id.*, at 886 (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader v. Garrison*, 611 F.2d 61, 65 (CA4 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived [\*\*\*56] of his constitutional right to counsel").

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

### III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect [\*\*\*57] information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's *Sixth Amendment* right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

### DISSENT BY: SCALIA

#### DISSENT

Justice **Scalia**, with whom Justice **Thomas** joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of

all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in [\*\*308] order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The *Sixth Amendment* guarantees the accused a lawyer "for his defense" against a "criminal prosecutio[n]"--not for sound advice about the collateral consequences of conviction. [\*\*\*58] For that reason, and for the practical reasons set forth in Part I of Justice Alito's concurrence, I dissent from the Court's conclusion that the *Sixth Amendment* requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders [\*1495] an attorney's assistance in defending against the prosecution constitutionally inadequate; or that the *Sixth Amendment* requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

\* \* \*

The *Sixth Amendment* as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States v. Van Duzee*, 140 U.S. 169, 173, 11 S. Ct. 758, 11 S. Ct. 941, 35 L. Ed. 399 (1891); W. Beane, Right to Counsel in American Courts 21, 28-29 (1955). We have held, however, that the *Sixth Amendment* requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), [\*\*\*59] and that the right to "the assistance of counsel" includes the right to effective assistance, *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the *Sixth Amendment's* textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery v. Gillespie County*, 554 U.S. 191, \_\_\_, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (Alito, J., concurring) (summarizing cases). We have limited the *Sixth Amendment* to legal advice directly related to defense against prosecution of the charged offense--advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States*, 377 U.S. 201, 205-206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); *United States v. Wade*, 388 U.S.

218, 236-238, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). [\*\*\*60] Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb*, 532 U.S. 162, 164, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

There is no basis in text or in principle [\*\*309] to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand--to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). See *id.*, at 769-770, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel--even those extending beyond defense against the prosecution--become constitutional commands. Cf. *Cobb*, *supra*, at 171, n. 2, 121 S. Ct. 1335, 149 L. Ed. 2d 321; [\*\*\*61] *Moran*, *supra*, at 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the *Sixth Amendment* has no application.

[\*1496] Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point. As the concurrence observes,

"[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'serious,' . . . ." *Ante*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 300 (Alito, J., concurring in judgment).

But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante*, at \_\_\_-\_\_\_, 176 L. Ed. 2d, at 307--what would come to be known as the "Padilla warning"--cannot be limited to those consequences [\*\*\*62] except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn--not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante*, at \_\_\_, 176 L. Ed. 2d, at 306. But that concern properly relates to the *Due Process Clauses of the Fifth and Fourteenth Amendments*, not to the *Sixth Amendment*. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of [\*\*310] his claim (and if he has properly preserved it) the state court can address it on remand.<sup>1</sup> But we should not smuggle [\*\*\*63] the claim into the *Sixth Amendment*.

1 I do not mean to suggest that the *Due Process Clause* would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady*, 397 U.S., at 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by *Federal Rule of Criminal Procedure 11(b)* (formerly *Rule 11(c)*), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States*, 516 U.S. 29, 49-50, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995), does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the *Due Process Clause*.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. [\*\*\*64]<sup>2</sup> Moreover, legislation could provide consequences for the misadvice, [\*1497] nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

2 As the Court's opinion notes, *ante*, at \_\_\_-\_\_\_, n. 15, 176 L. Ed. 2d, at 299, many States--including Kentucky--already require that criminal defendants be warned of potential removal consequences.

In sum, the *Sixth Amendment* guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

## REFERENCES

U.S.C.S., *Constitution, Amendment 6*; 8 U.S.C.S. § 1227(a)(2)(B)(i)

27 Moore's Federal Practice § 644.61 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law §§46.4, 46.7

L Ed Index, Deportation or Exclusion of Aliens; Plea Bargaining

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. 83 L. Ed. 2d 1112.

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Validity of guilty pleas--Supreme Court cases. 25 L. Ed. 2d 1025.

130 S. Ct. 1473, \*; 176 L. Ed. 2d 284, \*\*;  
2010 U.S. LEXIS 2928, \*\*\*; 22 Fla. L. Weekly Fed. S 211

Accused's right to counsel under the Federal Constitution--Supreme Court cases. 93 L. Ed. 137, 2 *L. Ed. 2d* 1644, 9 *L. Ed. 2d* 1260, 18 *L. Ed. 2d* 1420.

Post-Conviction Relief Under  
*Padilla v. Kentucky*

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Isaac Wheeler  
Immigrant Defense Project



ABA Equal Justice Conference  
May 20, 2011

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The myth of deportation as a “civil” sanction

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“The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government . . . has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.”

*Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)

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The road to *Padilla*: *Jordan v. DeGeorge*

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- The criminal deportation statute “does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite . . . crimes. Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation.” *Jordan v. De George*, 341 U.S. 223, 230-31 (1951).

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The road to *Padilla*: *Jordan v. DeGeorge*

- "Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If [the] respondent were a citizen, his aggregate sentences . . . would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty . . . ." *Jordan*, 341 U.S. at 243 (Jackson, J., dissenting).

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The road to *Padilla*: *INS v. St. Cyr*

- "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (internal quotation omitted).

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*Padilla v. Kentucky*

- *Padilla v. Kentucky*, 599 U.S. \_\_\_\_, 130 S. Ct. 1473 (2010)  
"[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants . . . ." 130 S. Ct. at 1480.

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***Padilla v. Kentucky, cont'd***

- “[I]mmigration 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.” 130 S. Ct. 1473, 1478 (2010).
- “The collateral vs. direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation.” *Id.* at 1482.

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***Padilla v. Kentucky: Facts***

- Lawful permanent resident for 40 years
- Vietnam War veteran
- Charged with marijuana possession and trafficking for having marijuana in his commercial truck
- Pled guilty after defense attorney told him he did not have to worry about deportation because he had lived in US for so long

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***Padilla v. Kentucky:  
Kentucky Supreme Court Decision***

- Dismissed Padilla’s IAC claim
- Held 6<sup>th</sup> Amendment guarantee of effective assistance does not extend to advice about immigration consequences because they are merely “collateral”

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### *Padilla v. Kentucky*: Holding

- Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea
- Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel

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### *Padilla* Key Point 1:

Deportation as Penalty of Criminal Proceeding

- Deportation is a “particularly severe penalty” that is “intimately related” to the criminal process. Advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

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### *Padilla* Key Point 1, cont'd

- “Preserving the client’s right to remain in the U.S. may be more important to the client than any potential jail sentence.” 130 S. Ct. at 1483.
- “The collateral vs. direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation.” *Id.* at 1482.

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***Padilla* Key Point 2:**

IAC Determined by Professional Standards

- Professional standards, such as ABA pleas of guilty standards and NLADA guidelines for defense lawyers, provide the guiding principles for what constitutes *effective assistance* of counsel. 130 S. Ct. at 1482.

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***Padilla* Key Point 2, cont'd**

- ABA, NLADA, DOJ, etc. Standards Cited:
  - Duty to inquire re: immigration status at initial interview stage
  - Duty to investigate and advise re: immigration consequences of plea
  - Duty to investigate and advise re: immigration consequences of sentence

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***Padilla* Key Points – 2, cont'd**

- ABA Responsibilities of Defense Counsel, Standard 14-3.2(f):

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.

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## Padilla, Key Points – 2, cont'd

- Commentary: "This Standard . . . strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or Alford plea. Further, counsel should 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."

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## Padilla Key Point 3:

6A Requires Affirmative Advice

- "Silence [regarding immigration consequences] would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement."  
130 S. Ct. at 1484.

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## Padilla Key Point 3, cont'd

- Previous lower court consensus was that **affirmative misadvice** regarding immigration was IAC, while **failure to advise** was not IAC.
  - See, e.g., *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002)
- Many courts, including KY, regarded immigration consequences as "collateral" and outside scope of duty of counsel under federal and/or state constitution
  - *Com. v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008)

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***Padilla* Key Point 3, cont'd**

- “Silence [regarding immigration consequences] would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement.” 130 S. Ct. at 1484.

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***Padilla* Key Point 4:**

6A Extends to Preserving Immigration Relief

- This advice includes not just the effect of a plea on a noncitizen’s deportability but also the effect of the plea on his or her eligibility for relief from removal

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***Padilla* Key Point 4 cont'd**

- “[P]reserving the possibility of discretionary relief from deportation ... would have been one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead of proceed to trial.” 130 S. Ct. at 1483 (quoting *St. Cyr*, 533 U.S. at 323).

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**Padilla Key Point 5:**

Specificity of Advice

- “There will . . . be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” 130 S. Ct. at 1483.
- This affects the specificity of the advice that must be given, but not the duty to investigate and advise

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**Padilla Key Point 5, cont'd**

- It is impossible to determine whether deportation consequences are “clear” or “unclear” without investigating the client’s status and the applicable law.
- Every noncitizen client must be advised, as specifically as immigration law allows, of the immigration consequences of pleading guilty: “Lack of clarity in the law . . . does not obviate the need to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.” 130 S. Ct. at 1483 n.10.

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**Padilla Key Point 6:**

Informed Consideration by Prosecutor

- “Informed consideration of possible deportation can only benefit *both the State* and noncitizen defendants during the plea-bargaining process.” 130 S. Ct. at 1486.

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## *Padilla* Key Point 6, cont'd

- This language and the characterization of deportation as an “integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty,” 130 S. Ct. at 1480, may support argument that a non-deportable plea deal was reasonably likely.

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## Elements of a *Padilla* Motion

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## Elements of a *Padilla* Motion

- Deficient performance
  - Nonadvisal
    - Under professional standards cited in *Padilla*, counsel has affirmative duty to inquire whether immigration consequences matter to Δ (Key Points 2, *supra*).
  - Misadvisal:
    - Advised client plea would not result in deportation
    - Advised client plea “may” or “might” result in deportation when in fact that result was inevitable/automatic
    - Gave more specific misadvice

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## Elements of a *Padilla* Motion, cont'd

- Prejudice
  - But for misadvice, client would have rejected plea and gone to trial
  - Alternate theory of prejudice: would have sought & obtained non-deportable plea

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## Showing deficient performance

- Show that consequence was clear and triggered duty of specific advisal
  - "Clear, succinct, and explicit" terms of statute, 130 S. Ct. at 1483
  - Controlling case law
  - Relevant practice guides, *id* (citing *St. Cyr*, 533 U.S. at 323 n.50).

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## Establishing Prejudice

- Traditional prejudice standard under *Strickland* for plea cases:
  - "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).
- Identify trial defense[s] and indicia of weakness in case against Δ
- Reasons why Δ would have tried even a hard case

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Effect of PCR on  
a pending removal proceeding

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Effects of vacatur on removal case

- Termination of proceedings
  - Vacated conviction is sole ground for removal
- Create eligibility for relief
  - Vacated conviction barred relief as
    - Aggravated felony, e.g. 8 USC § 1158(b)(2)(B)(i), 1182(h), 1229b(a)(3), 1229c(a)(1)
    - "Clock-stop" conviction, e.g. 8 USC § 1229b(d)
    - Good moral character bar, 8 USC 1101(f)
- Bond eligibility
  - 8 U.S.C. § 1226(c)

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Vacatur and deportability

- *Matter of Pickering*, 23 I&N Dec 621 (BIA 2003) (rev'd on other grounds sub nom. *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006))
  - Vacatur for substantive or procedural defect is valid for immigration purposes
  - Vacatur or expungement based on rehabilitation or concern to avoid immigration hardships is not
- 5th Cir. does not recognize any vacatur

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## Vacatur and deportability, cont'd

- *Padilla* violation is a legal defect, even though effect of vacatur may be to ameliorate immigration hardship
- Beware consent-based vacatur that does not state vehicle for relief under state law
  - Δ may bear burden of showing reason for vacatur, see *Pickering*.
  - Where state law permits vacatur only for legal defect, IJ will give vacatur full faith and credit and will not look behind judgment. *Matter of Rodriguez-Ruiz*, 22 I&N Dec 1378 (BIA 2000).

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## Timing of PCR

- Pendency of collateral attack does not defeat “finality” of conviction unless/until motion is granted.
  - *Matter of Ponce De Leon-Ruiz*, 21 I&N Dec. 154 (AG 1996)
- Continuance to seek PCR is discretionary, 8 CFR 1003.29, 1240.6, but is not “good cause” & often denied

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## Vacatur and the previously deported

- May or may not be possible to file a Motion to Reopen removal proceedings
  - Time and numerical bars
  - *Sua sponte* reopening
    - Availability of MTR for deportees outside U.S. is unsettled.
- Even where MTR not possible, vacatur may result in future admissibility

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***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)

## 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.<sup>1</sup>

**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.”<sup>2</sup>

**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. Paredez*, 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 states<sup>3</sup> 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.

<sup>1</sup> 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.”).

<sup>2</sup> 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.

<sup>3</sup> 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.

# Immigration Consequences of Crimes Summary Checklist \*

## Immigrant Defense Project

<b>CRIMINAL INADMISSIBILITY GROUNDS</b> – Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.	<b>CRIMINAL DEPORTATION GROUNDS</b> – Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.	<b>CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP</b> – Will prevent an LPR from being able to obtain U.S. citizenship.
Conviction or admitted commission of a <b>Controlled Substance Offense</b> , or DHS reason to believe that the individual is a drug trafficker	Conviction of a <b>Controlled Substance Offense</b> EXCEPT a single offense of simple possession of 30g or less of marijuana	Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years: ➤ <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana) ➤ <b>Crime Involving Moral Turpitude</b> (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 ➤ <b>Confinement</b> to a jail for an aggregate period of 180 days
Conviction or admitted commission of a <b>Crime Involving Moral Turpitude (CIMT)</b> , which category includes 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 + does not involve a prison sentence > 6 mos.	Conviction of a <b>Crime Involving Moral Turpitude (CIMT)</b> [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 “not arising out of a single scheme”	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship <b>“CONVICTION” as defined for immigration purposes</b> A formal judgment of guilt of the noncitizen entered by a court, <b>OR</b> , 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 <i>nolo contendere</i> 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 <b>THUS:</b> ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition <b>IS</b> 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 <b>IS NOT</b> a conviction ➤ NOTE: A youthful offender adjudication <b>IS NOT</b> a conviction if analogous to a federal juvenile delinquency adjudication
<b>Prostitution and Commercialized Vice</b> Conviction of <b>two or more offenses</b> of any type + <b>aggregate prison sentence of 5 yrs.</b>	Conviction of a <b>Firearm or Destructive Device Offense</b>	
<b>CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on extreme hardship to USC or LPR spouse, parent, son or daughter ➤ Conviction or admitted commission of a <b>Controlled Substance Offense</b> other than a single offense of simple possession of 30 g or less of marijuana ➤ Conviction or admitted commission of a <b>violent or dangerous crime</b> will presumptively bar 212(h) relief ➤ In the case of an LPR, conviction of an <b>Aggravated Felony</b> [see Criminal Deportation Gds], or any <b>Criminal Inadmissibility</b> if removal proceedings initiated before 7 yrs of lawful residence in U.S.	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	
<b>CRIMINAL BARS ON ASYLUM</b> based on well-founded fear of persecution in country of removal <b>OR WITHHOLDING OF REMOVAL</b> based on threat to life or freedom in country of removal Conviction of a “ <b>Particularly Serious Crime</b> ” (PSC), including the following: ➤ <b>Aggravated Felony</b> [see Criminal Deportation 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 will presumptively bar withholding of removal ➤ <b>Violent or dangerous crime</b> will presumptively bar asylum ➤ <b>Other PSCs</b> – no statutory definition; see case law	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (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) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence</b> ** ♦ <b>Theft or Burglary + at least 1 year prison sentence</b> ** ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10,000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence</b> ** ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence</b> ** ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	
<b>CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY</b> 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 <b>drug trafficker</b> ➤ Conviction or commission of a <b>violent or dangerous crime</b> will presumptively bar 209(c) relief	<b>CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL</b> 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 <b>Aggravated Felony</b> ➤ <b>Offense</b> triggering removability referred to in <b>Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.</b>	

\*For more comprehensive legal resources, visit IDP at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org) or call 212-725-6422 for individual case support.

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

## 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 Immigrant 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 the so-called 209(c) 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 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, *Representing Immigrant Defendants in New York* (4th ed., 2006).

## 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.

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### 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](http://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](http://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](http://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](http://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](http://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](http://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*** (4<sup>th</sup> 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*** (4<sup>th</sup> ed., 2009), by Mary E. Kramer, available for order at <http://www.ailapubs.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](http://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](http://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](http://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](http://www.ilrc.org) and [www.defendingimmigrants.org](http://www.defendingimmigrants.org).
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at [www.defendingimmigrants.org](http://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](http://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](http://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](http://www.ilrc.org).
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

*California Offenses* (2010), available at [www.ilrc.org](http://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](http://www.ilrc.org).
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at [www.ilrc.org](http://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](mailto: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](mailto: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](mailto:hans@coloradoimmigrant.org).

### **Connecticut**

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://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](http://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](http://www.immigrantjustice.org).
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at [www.defendingimmigrants.org](http://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](http://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](http://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](http://www.ilrc.org) and [www.defendingimmigrants.org](http://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](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://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](http://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](http://www.immigrantdefenseproject.org).
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4<sup>th</sup> ed. 2006), available at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) or [www.immigrantdefenseproject.org](http://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](http://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](http://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](http://www.defendingimmigrants.org).

## **Virginia**

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at [www.defendingimmigrants.org](http://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](http://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](http://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](http://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](http://www.immigrantjustice.org).
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.

# Immigration Consequences of Crimes Summary Checklist \*

## Immigrant Defense Project

<b>CRIMINAL INADMISSIBILITY GROUNDS</b> – Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.	<b>CRIMINAL DEPORTATION GROUNDS</b> – Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.	<b>CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP</b> – Will prevent an LPR from being able to obtain U.S. citizenship.
Conviction or admitted commission of a <b>Controlled Substance Offense</b> , or DHS reason to believe that the individual is a drug trafficker	Conviction of a <b>Controlled Substance Offense</b> EXCEPT a single offense of simple possession of 30g or less of marijuana	Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years: ➤ <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana) ➤ <b>Crime Involving Moral Turpitude</b> (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 ➤ <b>Confinement</b> to a jail for an aggregate period of 180 days
Conviction or admitted commission of a <b>Crime Involving Moral Turpitude (CIMT)</b> , which category includes 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 + does not involve a prison sentence > 6 mos.	Conviction of a <b>Crime Involving Moral Turpitude (CIMT)</b> [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 “not arising out of a single scheme”	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship <b>“CONVICTION” as defined for immigration purposes</b> A formal judgment of guilt of the noncitizen entered by a court, <b>OR</b> , 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 <i>nolo contendere</i> 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 <b>THUS:</b> ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition <b>IS</b> 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 <b>IS NOT</b> a conviction ➤ NOTE: A youthful offender adjudication <b>IS NOT</b> a conviction if analogous to a federal juvenile delinquency adjudication
<b>Prostitution and Commercialized Vice</b> Conviction of <b>two or more offenses</b> of any type + <b>aggregate prison sentence of 5 yrs.</b>	Conviction of a <b>Firearm or Destructive Device Offense</b>	
<b>CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on extreme hardship to USC or LPR spouse, parent, son or daughter ➤ Conviction or admitted commission of a <b>Controlled Substance Offense</b> other than a single offense of simple possession of 30 g or less of marijuana ➤ Conviction or admitted commission of a <b>violent or dangerous crime</b> will presumptively bar 212(h) relief ➤ In the case of an LPR, conviction of an <b>Aggravated Felony</b> [see Criminal Deportation Gds], or any <b>Criminal Inadmissibility</b> if removal proceedings initiated before 7 yrs of lawful residence in U.S.	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	
<b>CRIMINAL BARS ON ASYLUM</b> based on well-founded fear of persecution in country of removal <b>OR WITHHOLDING OF REMOVAL</b> based on threat to life or freedom in country of removal Conviction of a “ <b>Particularly Serious Crime</b> ” (PSC), including the following: ➤ <b>Aggravated Felony</b> [see Criminal Deportation 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 will presumptively bar withholding of removal ➤ <b>Violent or dangerous crime</b> will presumptively bar asylum ➤ <b>Other PSCs</b> – no statutory definition; see case law	Conviction of an <b>Aggravated Felony</b> ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ <b>Murder</b> ♦ <b>Rape</b> ♦ <b>Sexual Abuse of a Minor</b> ♦ <b>Drug Trafficking</b> (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) ♦ <b>Firearm Trafficking</b> ♦ <b>Crime of Violence + at least 1 year prison sentence **</b> ♦ <b>Theft or Burglary + at least 1 year prison sentence **</b> ♦ <b>Fraud or tax evasion + loss to victim(s) &gt;10,000</b> ♦ <b>Prostitution business offenses</b> ♦ <b>Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence **</b> ♦ <b>Obstruction of justice or perjury + at least 1 year prison sentence **</b> ♦ <b>Various federal offenses</b> and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ <b>Other offenses listed at 8 USC 1101(a)(43)</b> ♦ <b>Attempt or conspiracy</b> to commit any of the above	
<b>CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY</b> 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 <b>drug trafficker</b> ➤ Conviction or commission of a <b>violent or dangerous crime</b> will presumptively bar 209(c) relief	<b>CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL</b> 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 <b>Aggravated Felony</b> ➤ <b>Offense</b> triggering removability referred to in <b>Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.</b>	

\*For more comprehensive legal resources, visit IDP at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org) or call 212-725-6422 for individual case support.

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

## 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 Immigrant 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 the so-called 209(c) 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 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, *Representing Immigrant Defendants in New York* (4th ed., 2006).

# CENTER FOR APPELLATE LITIGATION

74 TRINITY PLACE - 11<sup>TH</sup> FLOOR, NEW YORK, NY 10006 TEL. (212) 577-2523 FAX 577-2535

March 31, 2010

Mr.

Marcy Corr. Fac.  
PO Box 3600  
Marcy, NY 13402

Dear Mr

I am writing to advise you that we have received most of the minutes and file papers connected with your 2009 attempted robbery, weapons, and witness-tampering convictions, and to let you know that I am the attorney that has been assigned to handle your appeal. Enclosed are copies of your transcripts and file papers. We do not yet have the court's decision denying your motion to withdraw your guilty plea. It's unclear whether the court rendered a written decision or merely denied it on the record. As soon as we receive it, I'll send you a copy.

Because you pleaded guilty and waived your right to appeal, the issues that we can raise on your appeal are limited. But based upon the information we have thus far, it appears that we can argue on appeal that the court was wrong when it rejected your motion to withdraw your guilty plea. Again, we don't have the court's decision yet, so I can't guarantee we can raise the issue, but it appears we can.

But before you decide that you want us to pursue this issue, you need to understand that raising any issue on your appeal presents a risk, and you need to decide whether you want to proceed with your appeal notwithstanding that risk. Since your case only presents that single issue, you must either raise it, or withdraw your appeal.

If you raise the plea withdrawal issue and win, your conviction and guilty plea would be vacated. But the charges against you would not be dropped or dismissed. The District Attorney would not be required to offer you a plea bargain, or agree to a sentence cap. He could insist that you plead guilty to first-degree robbery with no sentence promise or go to trial. You would basically be returned to square one.

By your plea of guilty, the district attorney allowed you to plead down to attempted first-degree robbery, and you received the lowest prison term available for attempted first-degree robbery, 3½ years. If the court vacated your plea, you would once again face the first-degree robbery charge, with no limitation on the sentence. The range of prison sentences for first-degree robbery is from a minimum of 5 years to a maximum of 25 years. A period of post-release supervision is also mandatory. Therefore, if your plea was vacated, and you proceeded to trial, but were convicted, you could receive a much longer sentence than the one you are serving now.

Of course, I cannot predict whether you would be convicted after trial.

Thus, if we were to succeed in having your plea vacated, you could end up with a longer sentence than the one you are serving now. I know it must seem strange to you that you could "win" your appeal, and end up in a worse position than you are in now, but that is exactly what could happen. I am not telling you this to frighten you, or to encourage you not to pursue the plea withdrawal issue. I understand that you also face difficult immigration consequences if you do not get your guilty plea back. I am only telling you this so that you can make an informed decision about how you want to proceed. The decision is entirely yours. It makes no difference to me.

Please let me know how you want to proceed on the enclosed form without delay. If you want us to raise the plea withdrawal issue for you, you must check the appropriate box on the form, sign and date it, and return it to me in the envelope that I've provided. If you do not want us to raise the plea withdrawal issue, then check the appropriate box on the form, and return it to me. Because the plea withdrawal issue is the only issue presented by your case, if you don't want us to raise it, then you'll also need to withdraw your appeal. Therefore, if you choose not to ask for plea withdrawal on appeal, you'll also need to sign the stipulation withdrawing your appeal and return it to me.

Of course, if you should have any questions, do not hesitate to ask.

Very truly yours,

Senior Supervising Attorney



# PART THREE:

## POST CONVICTION PRACTICE



# PART FOUR:

## EMERGENT LEGAL ISSUES