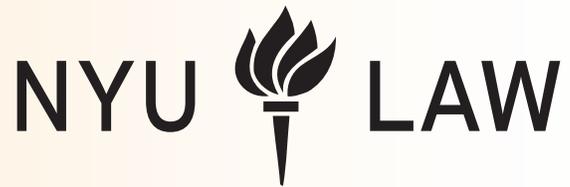




**IMMIGRANT  
DEFENSE  
PROJECT**



New York University School of Law

# **JUDICIAL OBLIGATIONS AFTER *PADILLA v. KENTUCKY***

**THE ROLE OF JUDGES IN  
UPHOLDING DEFENDANTS' RIGHTS TO ADVICE  
ABOUT THE IMMIGRATION CONSEQUENCES  
OF CRIMINAL CONVICTIONS**

by  
**Immigrant Defense Project**  
and  
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## Summary of Recommendations

- Judges should encourage the provision of enhanced technical and financial resources and support services to defense counsel to facilitate compliance with the Padilla obligations of defense counsel.
- Judges who elect or are required to provide advisals should issue them universally to all defendants, and for all pleas, admissions, and findings of guilt. Judges should assume that any criminal charge has potential immigration consequences, but should leave to defense counsel the duty to provide specific individualized advice about the actual immigration consequences.
- In issuing advisals, judges should not ask about a defendant's immigration or citizenship status. Advisals should also not include any questions posed to defendants and counsel that risk eliciting information about citizenship/immigration status which could unlawfully or unfairly prejudice a defendant in later criminal or immigration proceedings.
- To enable meaningful communication between defendants and their attorneys, judges providing advisals should issue them early in criminal proceedings and afford defendants reasonable time to obtain specific, individualized advice about the actual immigration consequences of a plea or conviction. Providing additional time upon request will result in fairer pleas.
- Courts should not allow the prosecution to force a plea before defense counsel has had an opportunity fully to comply with Padilla by investigating, advising the defendant concerning, or attempting to minimize the immigration consequences of a plea through negotiation, as the prosecution would in effect be preventing defense counsel from rendering effective assistance.
- Prior to accepting a plea, courts should ensure that defendants without counsel have an opportunity to retain or request appointment of counsel to provide them with individualized advice about the immigration consequences of a plea or conviction. Judges should warn defendants that the lack of such advice is one of the risks of proceeding pro se. In particular, judges should be attentive to the fact that while an offense may not be punishable by jail time, it may nevertheless carry immigration consequences for some noncitizen defendants.
- Courts using or contemplating use of written advisals on plea forms to alert defendants to potential immigration consequences should consider whether an oral advisal would be more effective or more strongly signal the importance of attorney compliance with Padilla.



## Introduction

In its March 2010 decision in *Padilla v. Kentucky*<sup>1</sup>, the Supreme Court acknowledged both the severity of the immigration consequences of criminal convictions and the importance of ensuring that defendants are informed of those consequences before entering pleas. Although *Padilla* only addressed the obligations of defense counsel to provide individualized advice to their clients, the decision shed new light on judges' preexisting legal and professional obligations to safeguard the constitutional rights of the accused, including the rights to effective assistance of counsel and Due Process.

Judges can play a key role in promoting compliance with *Padilla* by informing defendants of their right to individualized immigration advice from their attorneys and providing an opportunity for defendants to obtain that advice before entering a plea or proceeding to trial. However, there is little consensus on appropriate judicial practices across the country. In some jurisdictions, judges are statutorily required to provide judicial advisals—oral statements of rights or admonitions to defendants—regarding possible immigration consequences of pleas and convictions, and were doing so even before *Padilla*. In others, court involvement varies widely; some judges are experimenting with administration of advisals while many are not actively engaged in *Padilla* implementation at all.

These divergent practices raise questions about what judges should be doing. Should they provide an advisory about potential immigration consequences to all defendants, only in some cases, or not at all? If they do elect to provide an advisory, what should it say and when should it be issued? Do judges need to inquire into defendants' citizenship/immigration status in order to carry out their duties or would such inquiries jeopardize defendants' constitutional rights to protections against self-incrimination, privacy, and freedom from discrimination? This

report responds to those questions, examining judicial obligations with respect to immigration consequences and offering best practice guidance for judges as they seek to ensure compliance with *Padilla*.

**Part I** provides an overview to the increasing links between the immigration and criminal justice systems, and the Supreme Court's recognition of this reality in *Padilla*. As the report describes, reforms of immigration law since the 1990s have made detention and deportation a harsh and nearly automatic penalty for many criminal defendants. Under these laws, a large number of criminal convictions, including even some minor misdemeanor or lesser offenses, carry severe immigration consequences for non-citizens. As a result, courts increasingly recognize that the effects of a plea or conviction on an individual's immigration status cannot be ignored in criminal proceedings. However, before *Padilla*, courts had been split in their treatment of claims for post-conviction relief when defendants were not advised or were misadvised by their attorneys as to the immigration consequences of their pleas. Some courts held that immigration consequences were merely 'collateral', and thus outside the scope of constitutionally mandated assistance of counsel. In *Padilla*, however, the Supreme Court disagreed. Finding that immigration consequences could not be easily classified as either direct or collateral and that the distinction was inapposite to the evaluation of a Sixth Amendment claim, the Court held that defense counsel's failure to provide a defendant with competent advice about the immigration consequences of a plea or conviction may constitute ineffective assistance. While it clarified the affirmative duty of defense attorneys, *Padilla* did not specifically address the responsibility of judges to ensure that defendants receive advice from counsel regarding immigration consequences before they enter pleas or proceed to trial in their case.

**Part II** addresses the role of judges by examining constitutional, statutory, and ethical sources of judicial obligations with respect to the acceptance of pleas in light of *Padilla*. As the report shows, judges bear a responsibility to protect defendants' rights to effective assistance of counsel and Due Process, as well as to follow both statutory and ethical guidance in addressing immigration issues. Since well before *Padilla*, judges have had an obligation to ensure that defendants' pleas are knowing and voluntary, and that defendants have had access to effective assistance of counsel prior to entry of a plea. Similarly, statutory and ethical provisions predating *Padilla* required that judges inform defendants of the possibility that a plea may trigger immigration consequences. More than half of states require courts to provide a defendant with a warning stating in general that, if she or he is not a citizen of the United States, a plea or conviction could carry serious immigration consequences, including mandatory detention and deportation. The American Bar Association (ABA) guidelines long have encouraged judges to warn defendants that a criminal conviction could carry immigration consequences, while cautioning judges to refrain from inquiring into defendants' citizenship/immigration status when they do so. In clarifying the meaning of constitutionally adequate assistance of counsel in this context, *Padilla* protects a defendant's right to specific and individualized advice from his or her defense counsel about the immigration consequences of a plea or conviction. The Supreme Court's decision also called into question the characterization of immigration penalties as "collateral" rather than "direct" consequences of criminal conviction, and emphasized the importance of ensuring defendants are aware of consequences, like deportation, that are "enmeshed" with criminal convictions. Some judges have reacted to *Padilla* by issuing more immigration-related warnings in criminal proceedings. In addition, discussion about *Padilla* has opened the door to revision of the Federal Rules of Criminal Procedure and other statutory and ethical requirements regarding judicial

duties in the acceptance of pleas. Courts also must now consider whether immigration consequences may necessitate the appointment of counsel for certain non-jailable offenses. While these trends suggest that judges may play a role in upholding defendants' rights to individualized immigration advice from counsel under *Padilla*, there remains significant debate over just what that role should be, and whether court-issued advisals are an appropriate vehicle for fulfilling judicial responsibilities. No matter what form judicial advisals may take, they do not substitute for individualized advice from defense counsel, and may only complement, not abrogate, defense counsel duties under *Padilla*.

**Part III** considers the potential advantages of such court-issued advisals, if designed to pursue clear and limited objectives and consistent with guiding principles, and presents practice recommendations for judges. All judges are encouraged to assist defense counsel in complying with *Padilla* by providing attorneys with additional time and resources when needed. Those judges who elect or are statutorily required to take a more active role through the administration of advisals must be careful not to infringe upon the rights of defendants or interfere with the Sixth Amendment obligations of defense attorneys, who bear the responsibility for providing specific, individualized immigration advice to their clients. A standard judicial warning to a defendant is not a substitute for individualized advice from counsel. Nevertheless, a court-issued advisal can perform an important function in encouraging and enabling counsel to meet their obligations under *Padilla*, so long as it is administered in a manner that does not intrude upon defendants' rights or interfere with matters that should be left to attorneys and their clients.

To fully realize their potential advantages, court-issued advisals should be structured around clear and limited objectives and administered in a manner that respects defendants' rights. Those objectives should be:

- To emphasize the duty of defense counsel to investigate and advise their clients regarding the actual immigration consequences of any plea, admission of guilt or conviction at trial;
- To inform defendants of their rights to individualized advice from their defense attorneys about the actual immigration consequences of a plea, admission of guilt or conviction, in their specific case;
- To encourage defendants to speak to their attorneys about their immigration status and any potential immigration consequences prior to entry of a plea, admission of guilt or decision to proceed to trial in their case; and
- To allow for additional time, upon request, to ensure that defendants and counsel have an opportunity to investigate and discuss the immigration consequences specific to each case and attempt to negotiate a disposition in light of those consequences, prior to the entry of a plea or other disposition.

These objectives, together with constitutional, statutory, and ethical considerations, should guide and constrain judicial practices post-*Padilla*.

The report concludes with details on best practice recommendations for judges and proposed language to be used by courts that elect or are required to administer advisals to defendants concerning the immigration consequences of pleas or convictions.



## I. Immigration consequences of criminal convictions and *Padilla v. Kentucky*

In *Padilla*, the Supreme Court held that immigration penalties are so intimately tied to the criminal court process that defendants have a constitutional right to competent advice from their defense attorneys regarding the specific immigration consequences of their pleas and convictions. To satisfy their duty to affirmatively and competently advise their clients, defense counsel must consult available resources. While this decision has groundbreaking implications for how immigration issues are handled in criminal courts, the debate is not new. This section of the report provides an overview of the relationship between criminal and immigration law, and the concerns that gave rise to the Supreme Court's decision in *Padilla*. This context will inform the discussion in Part II of judicial obligations vis-à-vis defendants' rights to attorney advice about immigration consequences pre- and post-*Padilla*, and provide a foundation for the guidelines and best practice recommendations offered in Part III.

### A. COURTS AND THE “CRIMMIGRATION SYSTEM”

U.S. immigration laws have grown more complex and intertwined with criminal statutes over the past decades, especially since the 1996 immigration reforms.<sup>2</sup> This merger has given rise to what some have dubbed the “crimmigration system.”<sup>3</sup> Current statutes not only criminalize the violation of immigration laws, such as by classifying entry without inspection as a crime and subjecting people to physical detention under ICE custody for purely civil law infractions, but also attach mandatory immigration penalties to criminal convictions. Under federal law, immigrants who are convicted of certain types of offenses face deportation, detention, and the denial of immigration status or eligibility for naturalization.<sup>4</sup> These laws affect all noncitizens—including lawful permanent residents (i.e., “green card holders”), asylees and refugees, people on temporary visas, and people without current status. Consequently,

deportation and other immigration penalties have become a common and severe consequence of guilty pleas and convictions obtained at trial for many criminal defendants, making it an important factor in the legal advocacy and decision-making process. This is especially true for immigrants who plead guilty to an offense for which detention and deportation are mandatory (i.e., an immigration judge will not be able to exercise discretion in waiving the grounds of detention and deportation).<sup>5</sup>

Federal law has long attached immigration consequences to certain criminal convictions. However, in 1996, immigration legislation both dramatically expanded the list of offenses that subject non-citizens to mandatory deportation and decreased the avenues through which non-citizens can obtain discretionary relief from removal.<sup>6</sup> These changes have made deportation an unexpectedly harsh and nearly certain penalty for many defendants taking plea offers under the advice of counsel. In some cases, deportation may be a far more severe consequence of a conviction than even the maximum possible criminal sentence.<sup>7</sup> This is partially the result of significant discrepancies between the way in which criminal violations are treated under federal immigration law and the way in which they are classified under state laws. For example, a misdemeanor shoplifting conviction may translate into an “aggravated felony” for immigration purposes, resulting in mandatory deportation and a permanent bar to return for a crime that many in the criminal justice system consider relatively minor.<sup>8</sup> As a result, many immigrants face unexpected and seemingly disproportionate risks of deportation depending on the interplay between federal immigration law with the state statutes under which they have been charged or convicted. While Congress still defines deportation as a civil consequence of conviction rather than a form of criminal punishment,<sup>9</sup> courts and practitioners increasingly recognize that deporta-

tion constitutes a particularly harsh penalty that cannot be ignored in criminal proceedings.

## **B. PRE-PADILLA: JUDICIAL DEBATES ABOUT IMMIGRATION CONSEQUENCES OF CONVICTIONS**

Courts have been grappling with how to manage the intersection of criminal and immigration law for years, particularly as increasing numbers of defendants began to bring ineffective assistance of counsel claims for post-conviction relief based on the lack of advice about immigration consequences or affirmative misadvice they received during the course of their criminal proceedings. Courts split over how to handle these claims, adopting different interpretations regarding the scope of advice that a defense attorney was constitutionally required to provide under the *Strickland v. Washington* standard,<sup>10</sup> and the treatment of advice on immigration consequences more generally.<sup>11</sup> Prior to *Padilla*, some U.S. Courts of Appeal held that the failure of an attorney to advise his or her client accurately about deportation consequences was not cognizable as an ineffective assistance of counsel claim, because immigration consequences were “collateral” and outside the scope of required attorney advice.<sup>12</sup> However, other Circuits had rejected application of this “collateral consequences rule” in the context of some Sixth Amendment claims of ineffective assistance of counsel. Prior to *Padilla*, at least three Circuit courts had found that misadvice regarding immigration consequences could give rise to ineffective assistance of counsel claims under the Sixth Amendment, even if those consequences might be deemed “collateral.”<sup>13</sup> Some state supreme courts had also recognized defense counsel’s obligation to advise. For example, in 2004, the New Mexico Supreme Court held that defense attorneys have an affirmative duty to determine their clients’ immigration status and provide specific advice regarding the impact that a guilty plea would have on that status.<sup>14</sup> Thus, before the Supreme Court’s decision in March 2010, there was no consensus among courts as to whether an attorney’s failure to investigate, disclose or

accurately represent the immigration consequences of a conviction constitutes ineffective assistance of counsel.<sup>15</sup>

State laws pertaining to judicial advisals on the immigration consequences of criminal pleas revealed a similar split, albeit related to courts’ obligations, not those of defense counsel. Well before the Supreme Court’s decision in *Padilla*, more than half of all states already had statutes on the books requiring judges to admonish defendants that pleas of guilty and criminal convictions could result in adverse immigration consequences for non-citizens.<sup>16</sup> However, nearly as many lacked requirements, and even in jurisdictions where the laws exist, they were inconsistently applied. For instance, New York only requires a warning in cases concerning felony charges,<sup>17</sup> while most other states extend the requirement to individuals facing misdemeanors as well. Some judges only advise defendants whom they know or suspect to be non-citizens of potential immigration consequences, while others universally administer the advisal to everyone before accepting a plea.

Much like the statutes of many states, the American Bar Association (ABA) Criminal Justice Standards for Pleas of Guilty already recognized the significance of the immigration consequences of conviction prior to *Padilla* and encouraged judicial advisals regarding those consequences.<sup>18</sup> Although these non-binding professional standards are treated as ‘rules of the court,’ judicial implementation of them has not been consistent across jurisdictions.

## **C. PADILLA IN PRINT: THE COURT’S RULING**

Recognizing this lack of uniformity, the Supreme Court granted certiorari in the case of *Padilla v. Kentucky* to decide whether the Sixth Amendment right to effective assistance of counsel encompasses the right to advice regarding the immigration consequences of criminal conviction. The petitioner, Jose Padilla, 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 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.

In reversing the lower court and finding that Mr. Padilla’s counsel was constitutionally deficient, the Supreme Court emphasized its duty to ensure that no criminal defendant is left to the “mercies of incompetent counsel,” no matter what the defendant’s citizenship/immigration status.<sup>19</sup> 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, by consulting available resources. Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.<sup>20</sup> The Court found the provision of such advice to be in the interests of both a defendant and the State in the plea-bargaining process.<sup>21</sup>

According to the Court, deportation has such a “close connection to the criminal process” that it is “uniquely difficult to classify as either a direct or a collateral consequence” of a plea or conviction at trial.<sup>22</sup> Immigration consequences were thus marked as distinct from other non-penal effects of a criminal conviction. The Court rejected the direct/collateral binary that many lower courts had invoked in the past to

find that counsel were not required to advise defendants about immigration consequences of guilty pleas, as they were merely “collateral.” It noted that it has never applied such a distinction to define the scope of the constitutionally “reasonable professional assistance” of counsel required under *Strickland v. Washington*.<sup>23</sup> In refusing to import the collateral consequences doctrine into the analysis of a Sixth Amendment ineffective assistance of counsel claim, the Court concluded, “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”<sup>24</sup>

#### **D. PADILLA IN PRACTICE: INITIAL JUDICIAL RESPONSES**

Over the past year since the Court decided *Padilla*, various actors have been considering how to implement it. Defense attorneys face resource constraints in meeting their obligations to advise their clients. Prosecutors in some jurisdictions have been making efforts to include reference to potential immigration consequences in documents and forms provided to defendants, with varying degrees of accuracy. In this context, many judges are left with questions about their role and what to do, if anything, to address these issues in a given proceeding.

In a January 2011 survey of 85 public criminal defense practitioners from across the country, the vast majority of whom practice in state court (81.2%), less than one quarter reported that judges offer court advisals on immigration consequences. Over forty percent (42.4%) of the practitioners reported that judges ask attorneys or defendants if immigration advice has been given, but less than 30% said that judges offer defendants more time to discuss immigration issues when the advice has not been provided or additional information is needed. Nearly a third said that judges have begun asking about citizenship/immigration status of defendants since *Padilla* (32.9%).<sup>25</sup>

Several documents have been published since *Padilla* describing state statutory requirements

that judges administer advisals before accepting pleas and identifying questions about judicial practices that arise in light of *Padilla*.<sup>26</sup> This report seeks to fill a gap in this existing literature by highlighting the impetus for, and potential advantages of, careful judicial involvement in *Padilla* implementation, and exploring the constitutional and ethical obligations of judges to promote compliance with *Padilla* to ensure that a defendant's plea is voluntary even in the absence of a specific state statute. It offers best practice recommendations for courts across the country to guarantee Due Process in the criminal system. In particular, this report provides recommendations to judges who elect or are statutorily required to give advisals, about how they can do so in a manner that protects rather than infringes upon defendants' rights and attorney obligations under *Padilla*.

## II. Sources of judicial obligations relating to immigration consequences and the implications of *Padilla*

By acknowledging the unique interconnectedness of the immigration and criminal justice systems, *Padilla v. Kentucky* clarified preexisting rights of noncitizen defendants and concomitant defense counsel duties. In so doing, it begged the question of how courts should respond to these newly elucidated rights and responsibilities. Judges have a longstanding duty to carry out certain statutory, constitutional, and ethical obligations by the time a defendant enters a plea of guilty or nolo contendere or decides to proceed to trial. This section reviews those obligations on the part of state and federal judges that existed prior to *Padilla* and discusses how the Supreme Court's decision may impact compliance with them. Although focused on the responsibility of defense lawyers to provide specific and individualized advice about immigration consequences of pleas and conviction, the Court's holding may ultimately require judges to alter their practices in order to ensure respect for the principles underlying *Padilla* and the concerns driving the decision.

### A. CONSTITUTIONAL OBLIGATIONS

Since well before *Padilla*, judges have had an obligation to protect defendants' constitutional rights during the criminal court process. With respect to immigration consequences, these obligations stem from two independent, but interrelated, constitutional guarantees: Due Process and effective assistance of counsel. Judges have an overarching duty to ensure that defendants receive the Due Process guaranteed by the Fifth and Fourteenth Amendments. This requires, among other things, verifying that any plea is knowing and voluntary before accepting it, as codified, per 18 U.S.C. §3438, in Rule 11 of the Federal Rules of Criminal Procedure.<sup>27</sup> At the same time, judges also have a duty to ensure that defendants receive effective assistance of counsel in criminal proceedings, as guaranteed by the Sixth Amendment.<sup>28</sup> Access to constitutionally adequate counsel prior to the entry of

a plea is an important determinant of whether or not the waiver of rights comports with Due Process. The Supreme Court has indicated that the competence of advice from counsel affects whether entry of a plea is knowing and voluntary.<sup>29</sup> Supreme Court dicta and various circuit court decisions prior to *Padilla* suggest that ineffective assistance of counsel may undermine the acceptability of a plea.<sup>30</sup> Given this interrelationship, although *Padilla* did not address judicial Due Process duties, the standard of effective assistance of counsel clarified in *Padilla* may be relevant to the judicial determination of whether or not a defendant's plea is knowing and voluntary. Moreover, judicial obligations to uphold Sixth Amendment rights must be carried out in a manner that protects the attorney-client privilege so that defense counsel may meet their obligation to provide meaningful advice to their clients.

This subsection of the report discusses each of these constitutional duties in both pre- and post-*Padilla* contexts. The following discussion begins with the judicial duty to ensure effective assistance of counsel, examining judicial responsibilities with respect to defendants' Sixth Amendment rights and limitations on judges' involvement in attorney-client interactions. Within that broader discussion, it briefly addresses a renewed Sixth Amendment debate in the wake of *Padilla*: whether courts must appoint counsel in *pro se* cases involving non-jailable offenses, given the severe immigration penalties at stake. This report then turns to an examination of the separate, but related, duty that judges have toward defendants under the Due Process Clause, as that is the primary and direct source of judges' constitutional responsibility vis-à-vis defendants who are entering pleas. Since well before *Padilla*, courts have discussed the extent to which the court itself must address various consequences of criminal conviction, including immigration, as part of their

Due Process obligations. *Padilla* breathes new life into those debates.

### **i. Effective Assistance of Counsel**

The constitutionality of a plea is partially determined by whether the criminal defendant has been informed of his or her right to assistance of counsel,<sup>31</sup> and whether competent counsel provided the defendant with *effective* assistance.<sup>32</sup> Thus judges have dual and related obligations to ensure that defendants have access to competent counsel because it is an independent right under the Constitution, and because it is a predicate for the entry of a knowing and voluntary plea, in accordance with the Due Process Clause, as discussed in the next section. *Padilla* clarified how courts should evaluate the effectiveness of assistance. This resultant change in the scope of effective assistance of counsel should be reflected in judicial considerations prior to accepting a plea. This sub-section discusses the obligations of judges as guarantors of the right to effective assistance of counsel, and the limitations on the role judges play in view of attorney-client privilege and protections against self-incrimination. It also addresses an emerging question in the wake of *Padilla*—whether courts should appoint counsel in cases involving non-jailable offenses given the immigration stakes involved.

#### ***Pre-Padilla***

The Supreme Court long has recognized the responsibility of courts “to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.”<sup>33</sup> This judicial duty may manifest most evidently post-hoc, when defendants move for vacatur of a past conviction or other relief on the basis of having received ineffective assistance of counsel, since *Strickland* established a presumption that counsel is competent.<sup>34</sup> This does not mean that judges have no role to play in affirmatively ensuring defendants receive constitutionally adequate counsel throughout criminal proceedings in the first place. From the inception of a criminal process, judges have a general duty to be atten-

tive to the quality of defense counsel.<sup>35</sup> While defense counsel bear the burden of providing constitutionally adequate advice,<sup>36</sup> courts have a role to play in ensuring defendants’ access to competent counsel, particularly because it is integral to meaningful Due Process in criminal proceedings.<sup>37</sup> As discussed *infra*, in Part II.A.ii on Due Process, part of a judge’s duty is to verify whether a criminal defendant is aware of his or her Sixth Amendment right to assistance of counsel, and has in fact received such assistance of counsel. Judges must vacate convictions where defendants meet the Supreme Court’s two-part test to demonstrate the ineffectiveness of counsel’s assistance by demonstrating that: 1) the representation “fell below an objective standard of reasonableness” and 2) prejudice resulted from the deficiency—but for counsel’s unprofessional errors, the result of the proceeding would have been different.<sup>38</sup> As such, some judges try to take a more active role in determining that counsel is meeting his or her obligations under the law in providing effective assistance of counsel.<sup>39</sup>

Before *Padilla*, however, courts’ involvement in ensuring that defendants were being advised about immigration consequences prior to their pleas was limited. As discussed *infra at* Part II.b, some states required courts to provide limited warnings as part of or prior to plea allocutions. However, this was not necessarily viewed as a codification of any constitutional duty. Since courts were not, by and large, considering the failure to advise an immigrant about the immigration consequences of a plea to be cognizable as a Sixth Amendment violation, many courts did not feel compelled by constitutional concerns to ensure that immigration issues were being considered prior to the plea.

#### ***Post-Padilla***

*Padilla* clarifies now that immigration consequences *do* fall under the purview of a criminal defense attorney’s Sixth Amendment duties. This provides a motivation for courts to ensure that criminal defense attorneys are complying with the Sixth Amendment, so as to ensure that the plea is valid. Courts of course wish to

ensure that the plea results from the effective assistance of counsel in the first place, to avoid the waste caused by the necessity otherwise of vacating the plea and relitigating the case.

In *Padilla*, the Supreme Court held that, under the *Strickland* test, assistance of counsel is only effective if the defense counsel provides legal advice and advocacy regarding the immigration consequences of a client's guilty plea. It is not enough for attorneys to inform defendants of potential consequences. To provide effective assistance, they should also try to negotiate for a disposition that will not result in deportation or other adverse immigration effects.<sup>40</sup> Thus, judges, in continuing to fulfill their duty to ensure that defendants receive effective assistance, should take steps to enable defense attorneys to provide the necessary advice on immigration consequences.

However, it is equally critical that judges fulfill this duty without inquiring into the content of the advice provided by defense counsel, as compelling disclosure of communications between a defendant and counsel could violate attorney-client privilege.<sup>41</sup> *Padilla* does not state that courts themselves should be providing individualized immigration advice—and indeed it is neither appropriate nor feasible for a court to do so. A court cannot itself ask all necessary questions or do the necessary legal research to provide complete and accurate individualized immigration advice to each defendant. As with respect to other advisory responsibilities that fall within defense counsel's Sixth Amendment duties, the role of the court is limited to upholding defendants' rights to access competent advice.

Courts have recognized that attorney-client privilege is integral to the Sixth Amendment right to effective assistance of counsel.<sup>42</sup> This privileged relationship not only protects the client's privacy and legal rights, but also better enables the attorney to provide effective counsel. The Supreme Court has insisted that in order for an individual to obtain proper legal advice and advocacy, a lawyer needs to be

fully informed by his or her client<sup>43</sup> Although the attorney-client communication may not be invoked to prevent a judge from compelling the disclosure of a *relevant* fact, where the citizenship/immigration status of a defendant is not relevant to his or her criminal proceedings, compelling the disclosure of a client's communications with his or her lawyer, made in the pursuit of legal advice, would violate the spirit of Federal Rule of Evidence 501 by requiring such information.<sup>44</sup>

***Padilla* does not state that courts themselves should be providing individualized immigration advice—and indeed it is neither appropriate nor feasible for a court to do so.**

Thus, there are limits on what judges should do to uphold defendants' rights to effective assistance of counsel. In order for attorneys to provide defendants with competent, affirmative advice regarding the actual immigration consequences of a plea or conviction, attorneys need to be able to confidentially ask their clients about their immigration/citizenship status and other immigration details—making such communications subject to attorney-client privilege.<sup>45</sup> Therefore, a judge must not intrude upon an attorney's provision of legal advice regarding immigration consequences, when seeking to ensure that defendants can enjoy their Sixth Amendment rights to effective legal assistance. By eliciting information about a defendant's citizenship/immigration status on record, a judge may be unwittingly intruding into confidential attorney-client communication,<sup>46</sup> undermining counsel's ability to predict and advise his or her client regarding immigration consequences, or upsetting the terms of a negotiated plea designed to avoid disclosure of status. If a defendant may be subject to judicial inquiry into citizenship/immigration status, then the defense attorney's ability to act as an advocate in the adversarial process is compromised.<sup>47</sup>

Inquiring into the citizenship/immigration status of the accused can have other adverse consequences, not only for individual defendants, but also for the criminal justice system as a whole.<sup>48</sup> If individuals fear that the information they share with their attorneys about their citizenship/immigration status may be divulged on the record in court, they may withhold facts that are essential for their attorneys to provide accurate advice.

Questioning defendants about citizenship/immigration status on the record could additionally tread on Fifth Amendment protections against self-incrimination.<sup>49</sup> All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment.<sup>50</sup> An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings."<sup>51</sup> Statements about alienage made on the record in criminal court, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325, 1326, respectively. Thus, requiring defendants to disclose their citizenship/immigration status risks compelling individuals to incriminate themselves. Although a defendant could invoke the right to remain silent,<sup>52</sup> he or she may not be adequately informed that this right exists in the context of a plea allocution,<sup>53</sup> or could be intimidated into disclosure.<sup>54</sup> Furthermore, asking about citizenship/immigration status may force a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required for entry of a plea. To avoid such complications, judges should not ask about or require written admission of alienage on the record.

It may be appropriate for judges to take a more active role where a defendant receives no legal representation at all—for example, in cases involving non-jailable offenses. In *Shelton v. Alabama*, 535 U.S. 654 (2002) the Supreme Court held that what determines if a defendant is entitled to assistance of counsel is whether or not the offense carries any possibility of incarceration. Some lower courts have interpreted this to mean that when an offense carries no penalty of jail time, a charged defendant is not entitled to court-appointed counsel. However, many non-jailable offenses raise severe immigration penalties – penalties that the Supreme Court has acknowledged may be of even greater concern to a defendant than incarceration.<sup>55</sup> Defendants who are denied court-appointed counsel because they are facing non-jailable offenses are particularly at risk of entering pleas without knowledge of their prejudicial immigration effects. *Padilla* therefore may call into question whether certain defendants have a Sixth Amendment right to counsel in cases involving non-jailable offenses. In such cases, or at a minimum when a defendant requests advice regarding immigration consequences, judges should appoint counsel so that defendants may receive individualized advice regarding immigration consequences and plea bargain accordingly. Only counsel can provide such advice, since judges are not in a position to conduct the detailed factual investigation and legal analysis required to advise each individual defendant regarding his or her specific case.

## ii. Due Process

Since well before *Padilla*, judges have had the responsibility under the Fifth and Fourteenth Amendments to ensure that a defendant is not deprived of life, liberty or property without Due Process of law. In the context of criminal proceedings, this obligation requires judges, *inter alia*, to confirm that a waiver of the right to trial, in the form of a plea of guilt or nolo contendere, is entered in full awareness of its consequences and free of duress or coercion. The Supreme Court has held that judges are obliged

to inform defendants of the direct consequences of a plea, but it has declined to extend that requirement to collateral consequences.<sup>56</sup> Interpreting this obligation through Rule 11 of the Federal Rules of Criminal Procedure, most federal circuits have classified immigration consequences as “collateral” rather than “direct,” and thus outside the scope of those consequences of which judges must advise defendants prior to accepting a plea.

In *Padilla*, the Supreme Court did not address the judicial responsibilities with respect to warning defendants. However, the Court did eschew the direct/collateral distinction and the “collateral consequences rule” altogether in the context of effective assistance of counsel, emphasizing the severe and nearly automatic nature of deportation. Following its decision in *Hill v. Lockhart*, which declined to import the collateral consequences doctrine into Sixth Amendment analysis, the Court confirmed that the direct/collateral distinction is not relevant to a defense lawyer’s duty to provide effective assistance. Such reasoning does not necessarily affect the direct/collateral distinction as it pertains to judges’ responsibility to ensure that pleas are knowing and voluntary. However, in light of the Court’s emphasis in *Padilla* on the severe and automatic nature of deportation and its intimate relationship to criminal court proceedings, lower courts may no longer be able to ignore immigration consequences in criminal proceedings in the future. It is neither appropriate nor feasible for a court to give specific, individualized advice to defendants, in place of counsel, about the immigration consequences of a conviction. Nonetheless, there are early indications that some judges are already reading *Padilla* as requiring a change to their Due Process obligations of issuing warnings to defendants prior to accepting pleas.<sup>57</sup> The following sub-section situates the Supreme Court’s decision in the context of evolving judicial Due Process obligations.

### **Pre-*Padilla***

Long before *Padilla*, judges in criminal court have had the responsibility under the Due

Process Clauses of the Fifth and Fourteenth Amendments to ensure that a defendant’s plea is knowing, voluntary and intelligent prior to accepting it.<sup>58</sup> A court must make a determination regarding a plea’s voluntariness on the record by “canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”<sup>59</sup> In *Brady v. United States*, the Supreme Court clarified that a plea was voluntary if intentionally “entered by one fully aware of the *direct* consequences,” absent coercion, threats, or improper promises or representations.<sup>60</sup> The Court explained that its view was “based on [its] expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants *with adequate advice of counsel*.”<sup>61</sup> This assumption that constitutionally adequate assistance of counsel is a predicate for a knowing and voluntary plea was outlined in the above section on effective assistance of counsel.

These requirements are codified in Rule 11(b) of the Federal Rules of Criminal Procedure. Rule 11 identifies steps that a trial judge must take before accepting a plea, to ensure that the plea entered is “knowing and voluntary.”<sup>62</sup> According to Rule 11 of the Federal Rules of Criminal Procedure, judges may advise defendants of “collateral” consequences, but they are not required to do so.<sup>63</sup> Thus courts have found that judges must advise a defendant of the direct consequences of a plea, but they need not address collateral consequences before it can be said that the defendant’s plea “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.”<sup>64</sup> While the Federal Rules of Criminal Procedure require a judge to inquire whether a defendant is aware of the consequences of his plea, at the same time, they stress that “[t]he court must not participate” at all in discussions concerning a plea agreement.<sup>65</sup> As discussed below, *Padilla*’s holding appears to have prompted proposals to revise Rule 11 so as to require judges to warn defendants about

general immigration consequences as part of their plea colloquies.<sup>66</sup>

Before *Padilla*, most circuits agreed that the distinction between “direct” and “collateral” consequences turns on “whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”<sup>67</sup> Collateral consequences have been described as impacts that result from actions taken by agencies or individuals not controlled by the sentencing court.<sup>68</sup> U.S. Courts of Appeal have defined the term “direct” in contradistinction to “collateral” consequences of a plea, finding that defendants need only be informed of the direct consequences prior to entry of a plea in order to ensure that their plea is voluntary.<sup>69</sup> Because the Supreme Court has not “delimited comprehensively the particular consequences that are direct or collateral for purposes of evaluating the voluntariness of a guilty plea”<sup>70</sup> lower courts have developed contradictory case law regarding the direct-collateral dichotomy and how to categorize certain plea consequences, such as parole eligibility and deportation.

The majority of courts prior to *Padilla* considered immigration effects to be “collateral” consequences.<sup>71</sup> A Ninth Circuit decision from 2002 captures the view of many courts: “[Because] immigration consequences continue to be a collateral consequence of a plea and the resulting conviction ... district courts are not constitutionally required to warn defendants about potential removal in order to assure voluntariness of a plea.”<sup>72</sup> However, the court went on to emphasize that this “does not mean that they *should* not do so.”<sup>73</sup> The court commended district judges for including a warning regarding the immigration consequences of a plea in their Rule 11 colloquies, noting that there is “no question that immigration consequences of a conviction are important to aliens contemplating a plea.”<sup>74</sup>

There is evidence that some courts have been chipping away at this direct/collateral binary in other areas. The treatment of sex offender

registration is one such example. The requirement in many states that an individual register as a sex offender following conviction for certain crimes is similar, in some respects, to the near certain immigration consequences of certain criminal convictions. Although it is not imposed as part of a sentence, some courts have considered sex offender registration to be an “inexorable result” of conviction, and thus among those factors of which a defendant must be aware prior to entering a plea.<sup>75</sup> While it may not be certain whether and how a conviction will lead to sex offender registration in each case, California courts have held that the speculative nature of what is a nearly automatic consequence does not relieve a judge from his or her duty to advise defendants of those potential consequences.<sup>76</sup>

### **Post-*Padilla***

The Supreme Court’s decision in *Padilla* called into question both the labeling of immigration consequences as “collateral” and the utility of the direct/collateral distinction in the immigration context overall. While acknowledging disagreement among the circuits,<sup>77</sup> the Court refused to categorize immigration consequences as “direct” or “collateral” for the purposes of assessing ineffective assistance of counsel, rejecting the direct/collateral distinction altogether as inapposite to the adjudication of Sixth Amendment claims concerning defense attorney duties.<sup>78</sup> The Court did not opine on the continued relevance of the direct/collateral binary for judicial procedures with respect to the voluntariness of a plea, nor did the Court suggest that judges can or should usurp the role of defense counsel in analyzing the immigration consequences of a particular plea or conviction. Nonetheless, the Court’s emphasis on the close relationship between deportation consequences and the criminal proceeding suggests that judges may no longer be able to completely ignore immigration consequences on the grounds that they are merely collateral.

The Court did not explicitly state that immigration consequences are direct, rather than

collateral, explaining that “because of its close connection to the criminal process, [deportation is] uniquely difficult to classify as either a direct or a collateral consequence.”<sup>79</sup> The Court held: “We have long recognized that deportation is a particularly severe ‘penalty,’ and that while not a criminal sanction in a strict sense, ‘deportation is nevertheless intimately related to the criminal process.’”<sup>80</sup> Noting that the law “enmesh[es]” criminal convictions and deportation, the Court described recent changes in immigration law as having “made removal nearly an automatic result for a broad class of noncitizen offenders.”<sup>81</sup>

**... the Court refused to categorize immigration consequences as “direct” or “collateral” for the purposes of assessing ineffective assistance of counsel, rejecting the direct/collateral distinction altogether as inapposite to the adjudication of Sixth Amendment claims concerning defense attorney duties.**

The Court’s analysis was confined to the context of effective assistance of counsel. A separate body of law governs defendants’ constitutional right to be fully informed of the “definite, immediate and largely automatic effect” of their pleas before knowingly and voluntarily waiving any rights.<sup>82</sup> Although the Court did not address this context in *Padilla*, its analysis—finding immigration consequences to be largely automatic results of conviction in many cases—may have some applicability to the scope of judicial responsibilities in ensuring a knowing and voluntary plea.<sup>83</sup>

There are early indications that some judges are already reading *Padilla* as requiring a change to their Due Process obligations prior to accepting pleas.<sup>84</sup> The Advisory Committee on Criminal Rules is considering a revision to the Federal Rules of Criminal Procedure,

Rule 11(b)(1)(O). The proposed amendment would include a requirement that judges warn defendants before entry of a plea: “[I]f convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.”<sup>85</sup> Recognition that a growing number of states require judges to issue advisals, and the desire to harmonize practices across federal and state jurisdictions, may have provided further impetus for this proposal.

Thus, while the Court clearly held that the direct/collateral distinction has no impact on defense counsel duties to advise their clients, its erosion of the significance of the direct/collateral distinction for immigration consequences overall may affect whether judicial advisals are also required. *Padilla* does not address Due Process rights directly, but it has certainly sparked a renewed discussion of whether judges must play some role in providing a generalized warning to defendants about immigration consequences. However, as discussed in further detail above, no entity has suggested that courts should usurp the role of defense counsel in providing specific, individualized immigration advice to their clients about the consequences of a disposition. It is both inappropriate and practically impossible for courts to conduct the detailed factual investigation and legal research required to provide accurate, individualized advice to defendants about the actual immigration consequences of a conviction in their case. Thus any changes to the content or frequency of judicial advisals spurred by *Padilla* should serve to complement, and not substitute for, the provision of advice by counsel.<sup>86</sup>

## **B. STATUTORY OBLIGATIONS**

By the time the Supreme Court granted certiorari in *Padilla*, approximately half of all states already required courts to provide criminal defendants with advisals about immigration consequences prior to taking their pleas. In fact, the Court cited the prevalence of state

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

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

\* Prohibits inquiry into citizenship/immigration status

statutes requiring such judicial advisals as evidence of “how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”<sup>87</sup> Beyond reflecting the importance of counsel’s advice, these state statutes illustrate the widespread belief that criminal courts themselves have a responsibility to address immigration consequences in some manner. *Padilla* has only increased interest in state statutory instructions regarding judicial advisals. As judges across the country attempt to understand what the Supreme Court’s decision means for them, many will look to existing state advisal statutes and ask whether they satisfy judicial responsibilities. This increased attention makes it all the more important that states review the accuracy of existing statutes and the appropriateness of the judicial involvement they mandate.

**Pre-*Padilla***

Prior to *Padilla*, more than half of U.S. states and territories had statutes in place establish-

ing judges’ roles in helping inform defendants of the immigration consequences of their pleas. At least twenty-eight jurisdictions have statutes requiring judges to advise defendants of potential immigration consequences of criminal convictions before accepting pleas of guilty or nolo contendere.<sup>88</sup> These requirements suggest that legislatures in over half of the states in the country consider deportation and other immigration penalties to be severe enough that a court cannot simply ignore them; judges may not accept a waiver of the right to a trial without first ensuring that the defendant is aware of those potential consequences.

The language varies among the statutes that require immigration advisals, although all are geared towards warning defendants of potential immigration consequences. Ten of the state statutes

explicitly allow a defendant to move to vacate his or her plea and seek to enter a new plea if a court fails to provide the requisite warning regarding immigration consequences.<sup>89</sup> Only three of the state statutes—those in Florida, Maryland, and New York—explicitly deny any remedy when a defendant has not received an advisal, but there are movements to reform those provisions.<sup>90</sup>

In this current statutory landscape, judges are widely relied upon to serve a safeguard function, ensuring that criminal defendants are warned, and promoting an efficient legal system by minimizing motions for post-conviction relief. However, this judicial responsibility to warn criminal defendants is not without limitations; judges must ensure that immigrant criminal defendants are not unlawfully or unfairly disadvantaged in the process. The majority of states that require courts to advise defendants of potential immigration consequences do not call for inquiry into a defendant’s citizenship

or immigration status.<sup>91</sup> Recognizing the concerns associated with disclosure of citizenship/immigration status on the record, at least ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship/immigration status,<sup>92</sup> one deems such inquiry unnecessary,<sup>93</sup> and others are considering legislation that would impose similar restrictions.<sup>94</sup> The relevant legal codes in the ten states with existing statutory bars to inquiry prohibit requiring a defendant to disclose his or her citizenship/immigration status to the court at the time of a plea. For example, Arizona's rule on pleas of guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."<sup>95</sup> Even written state plea forms that do address immigration consequences typically do not require a defendant to indicate his or her citizenship/immigration status.<sup>96</sup>

### **Post-*Padilla***

By clarifying the applicable legal standards, *Padilla* may require several states to revisit their current statutes. The states that have statutes requiring court-issued advisals all had such laws on the books before the Supreme Court decided *Padilla*. Consequently, some of them include instructions to courts and advisal text that is either outdated or should be revised in light of *Padilla*. For example, none of the statutes mention the obligation of defense attorneys to advise their clients of immigration consequences,<sup>97</sup> and none indicate that some convictions trigger mandatory detention and deportation. Those, such as New York's, that only require advisals for certain types of offenses belie the potential for misdemeanor or even lesser convictions to result in immigration consequences and appear to be in tension with *Padilla*. Furthermore, those that do not prohibit judicial inquiry into defendants' citizenship/immigration status, or go so far as to require such inquiry, run afoul of the constitutional requirements discussed above and are at odds with the ethical obligations examined in the next section.

Some states, such as Washington, are reportedly considering revisions to the advisal statutes and court rules in light of recent court rulings interpreting *Padilla* and increased awareness about the risks of judicial inquiry into defendants' immigration/citizenship status.<sup>98</sup> In its recent decision applying *Padilla*, the Washington State Supreme Court expressly held that the state's advisal statute did not satisfy defense counsel's Sixth Amendment duties under *Padilla*.<sup>99</sup> In Florida, a court of appeals found the state's advisal statute constitutionally deficient and stated that Florida's advisal rule will need to be amended to comport with *Padilla*.<sup>100</sup>

### **C. ETHICAL OBLIGATIONS**

In addition to their constitutional and statutory obligations, judges are ethically bound to ensure that defendants are aware of the immigration consequences of criminal pleas and convictions. These obligations predated *Padilla*, but may take on new meaning or need to be strengthened in light of the Supreme Court's decision.

#### **Pre-*Padilla***

Long before *Padilla*, the American Bar Association (ABA) specified ethical standards to provide guidance to courts. Under the ABA Criminal Justice Section Standard 6-1.1, for example, trial judges have general responsibility for "safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice."<sup>101</sup> In furtherance of this responsibility to protect defendants' rights, both national and state-specific professional guidelines recommend judicial advisals on immigration consequences as best practice.

The ABA's *Standards for Criminal Justice Pleas of Guilty*<sup>102</sup> stipulate that courts should advise defendants as to immigration consequences, but avoid inquiring about or requiring disclosure of citizenship or immigration status. Standard 14-1.4(c) states: "Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional

consequences including but not limited to ... if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea."

While acknowledging that the failure to advise a defendant will not impact the soundness of a plea, the ABA commentary on the standard recommends, "the better practice is to include such a notice in the court's colloquy with the defendant."<sup>103</sup> The ABA cautions: "[s]uch a notice should not, however, require the defendant to disclose to the court his or her immigration status."<sup>104</sup> At least one state judicial ethics body has found that "reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or a bail hearing."<sup>105</sup>

Similarly, the *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, recommend that judges inform defendants of "collateral sanctions" such as change in immigration status that could result from a guilty plea or conviction.<sup>106</sup> Although it uses the word "collateral," "collateral sanctions" should not be confused with the "collateral consequences" of which judges are not constitutionally required to inform defendants before accepting a plea. As the definition in the ABA standards suggests, a "collateral sanction" is "a legal penalty, disability or disadvantage, however denominated, that is imposed on a person *automatically* upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence."<sup>107</sup> Commentary to the standards states: "To the extent a non-citizen's immigration status changes as a result of a criminal conviction, so that the offender becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a "collateral sanction."<sup>108</sup> The "automatic" nature of the sanction makes it seem like a "direct" consequence, falling within the scope

of those things about which judges must ensure a defendant is informed before accepting his or her plea as voluntary.<sup>109</sup>

### **Post-*Padilla***

*Padilla* might require these standards to be strengthened, given the Court's recognition of the severity of immigration consequences and their "intimate" relationship to the criminal process. If, as the Court held in *Padilla*, immigration consequences fall within the ambit of the Sixth Amendment right to effective assistance of counsel, the ABA may want to incorporate the Court's reasoning in *Padilla* into its recommendations to judges regarding their responsibility to ensure that defendants receive effective assistance and are in a position to enter knowing and voluntary pleas.

Thus, although *Padilla* did not create new judicial obligations, it did call into question whether current judicial practices are adequate to fulfill existing judicial duties, in light of evolving expectations of defense counsel and the expanding reality of the "cimmigration" system. In this shifting landscape of judicial responsibilities regarding immigration consequences, however, it is important that judges who take on or anticipate a more active role in ensuring proper compliance with *Padilla* avoid interference with the defense lawyer's duties under *Padilla*. With this concern in mind, judges should abide by the recommendations and guidance set out in the following section.

## TABLE: JUDICIAL OBLIGATIONS IN LIGHT OF *PADILLA*

### Constitutional Obligations

#### *Due Process*

**Pre-*Padilla*.** The Due Process Clause requires a criminal court to ensure that a defendant's guilty plea is voluntary, knowing, and intelligent before accepting it. In making that determination, judges must verify that a defendant is fully aware of the consequences of his or her plea. While this necessarily encompasses awareness of *direct* consequences, judges are not obliged to address *collateral* consequences. Most federal courts and many state courts have treated immigration consequences of a plea as collateral rather than direct, placing them outside the scope of what judges must ensure a defendant knows prior to accepting his or her plea. Due Process, however, requires effective assistance of counsel, placing an obligation on courts to ensure that defendants receive effective assistance as a component of Due Process.

**Post-*Padilla*.** The Supreme Court in *Padilla* characterized immigration consequences as severe and nearly automatic penalties of criminal conviction, suggesting that courts may no longer be able to disregard them in criminal proceedings as merely collateral impacts. There are early indications that judges are already reading *Padilla* as requiring a change to their Due Process obligations prior to accepting pleas, including proposals to amend Rule 11 of the Federal Rules of Criminal Procedure.

#### *Effective Assistance of Counsel*

**Pre-*Padilla*.** Part of a judge's duty is to verify whether a criminal defendant is aware of his or her Sixth Amendment right to assistance of counsel, and has in fact received such assistance. Although judges have a general responsibility to be attentive to the quality of defense counsel, this judicial duty mostly manifests *ex-post*, when defendants move for vacatur of a prior conviction or other forms of relief on the basis of having received ineffective assistance of counsel. Before *Padilla*, courts were divided as to whether failure to advise a defendant about the immigration consequences of a plea was cognizable as a Sixth Amendment violation.

**Post-*Padilla*.** *Padilla* held that providing affirmative and competent advice to a client about the immigration consequences of a plea or conviction *does* fall under the purview of a criminal defense attorney's Sixth Amendment duties. Now that the Supreme Court has clarified what effective assistance entails with respect to immigration consequences, in order to protect defendants' Sixth Amendment rights, judges should ensure that defendants are aware of their entitlement to receive specific, individualized advice about immigration consequences from their attorneys and have an opportunity to obtain such advice, without inquiring into the content of that advice.

### Statutory Obligations

**Pre-*Padilla*.** More than half of U.S. states and territories had statutes in place identifying a role for judges in alerting defendants to the possibility that their pleas could carry immigration consequences. At least twenty-eight jurisdictions have laws or regulations requiring judges to advise defendants of the potential for immigration consequences of criminal convictions before accepting pleas of guilty or *nolo contendere*.

**Post-*Padilla*.** In light of the applicable legal standards, some states, but not all, may need to revisit their current statutes. Recognizing the need not to weaken any existing protections for defendants, several states may need to modify statutory text to: reflect the primary responsibility that defense attorneys bear for providing individualized advice to clients regarding the specific immigration consequences of a plea or conviction in their case; require universal administration of advisals irrespective of whether a defendant faces a misdemeanor or felony charge; ensure that advisals neither over- nor under-state the likelihood of immigration penalties; and proscribe inquiry into the defendants' status on the record.

### Ethical Obligations

**Pre-*Padilla*.** National professional guidelines recommend judicial advisals on immigration consequences as best practice. ABA Standards require courts to advise defendants about immigration consequences, but urge judges to avoid inquiring into or requiring disclosure of defendants' citizenship or immigration status.

**Post-*Padilla*.** *Padilla* clarified the importance of informing defendants of immigration consequences, citing the severity of immigration penalties and their "intimate" relationship to the criminal process. The ABA, other judicial groups and professional associations may need to strengthen existing ethical standards to reflect the Court's reasoning.



### III. Best Practice Recommendations for Judges

As the foregoing discussion demonstrates, there are constitutional, statutory and ethical reasons why judges have a role to play in ensuring that defendants are informed of their right to individualized immigration advice from defense counsel and have an opportunity to obtain that advice before entering a plea or proceeding to trial. Opinions differ, however, as to what form that role should take. Some modes of judicial involvement are less controversial than others. For example, judges can encourage the allocation of greater resources and support services to defense counsel, who bear the primary duty of complying with *Padilla*, including in-house and fee-for-service immigration experts, and trainings on immigration consequences of criminal convictions. Crucially, judges can afford defendants and defense counsel more time to discuss the potential immigration consequences of a plea or conviction, when needed, before proceeding to a disposition in a given case.

Increasingly, however, courts are taking a more direct role. While there is a growing tendency for courts to issue advisals—oral notices, warnings, questions and/or statements of rights—regarding immigration consequences of a plea or conviction and counsel’s duty to advise defendants about those consequences, there remains debate over whether this form of judicial involvement in ensuring *Padilla* implementation is appropriate and compatible with defense counsel’s primary obligation under the Sixth Amendment. These changes stem from the growing number of states requiring courts to provide such oral warnings before accepting pleas, the evolution in professional standards and guidelines, and the erosion of the direct/collateral consequence distinction on the constitutional front. As discussed above, in the wake of *Padilla*, there are indications that Federal Rule 11 of the Rules of Criminal Procedure might be modified to require judges to

include an advisal related to immigration consequences in their plea colloquies.

Such advisals may help protect the integrity of plea, which benefits both parties in the criminal justice system. However, a defendant must have sufficient time to act on this and other rights of which he or she is warned during a plea colloquy. If not administered in a manner that permits a defendant sufficient time to enforce those rights and supports the primary role of defense counsel in providing individualized advice, judicial advisals could present risks as well as potential advantages. The following section provides recommendations to judges who elect or are required to provide advisals regarding the timing and content of those advisals, as well as the legal and ethical constraints that should guide their administration.

#### A. JUDICIAL ADVISALS: ADVANTAGES, OBJECTIVES, AND GUIDELINES

##### i. Potential Advantages

As many states have already recognized through legislation,<sup>110</sup> one of the ways for judges to carry out their safeguarding role is by administering an advisal regarding immigration consequences of pleas or convictions. The provision of an advisal is also encouraged in federal and state judicial ethics standards and professional guidelines.<sup>111</sup> Carefully phrased and consistently administered judicial advisals to defendants and defense counsel regarding their respective rights and responsibilities under *Padilla* may fulfill important functions: formally reminding defense counsel of their Sixth Amendment duties clarified in *Padilla*, notifying defendants of their right to individualized advice from counsel about potential immigration consequences, legitimating the negotiation of alternative pleas to minimize immigration consequences as per *Padilla*’s acknowledgement of the benefits to both parties of such negotiations, and building in an

opportunity for defense counsel or defendants to request more time to discuss immigration matters before entering a guilty or nolo contendere plea or proceeding to trial.

Now that the Supreme Court has explicitly acknowledged the interconnection between the criminal and immigration systems, as well as the nearly automatic nature of detention and deportation following some pleas and convictions, judges may conclude that they have a judicial responsibility to make some effort to address the immigration consequences of a plea or conviction. An advisal, issued early in criminal proceedings and accompanied by an option of additional time for consultation may encourage greater communication between defendants and attorneys, inculcate a habit of *Padilla* compliance among counsel, and help prevent the entry of pleas that are not in the interests of the defendant or the government. Given defense counsel obligations under *Padilla*, prosecutors should not force defense counsel to recommend a plea prior to carrying out their immigration due diligence. Judges should seek to prevent prosecutors from doing so, pointing out the Court's finding that well counseled pleas are better for all parties in the criminal process. Furthermore, even if court-issued advisals take time, and thus may be seen as a burden on judges, ensuring well negotiated and informed pleas may help reduce the number of defendants who move for post-conviction relief because of ineffective assistance of counsel.

Judicial advisals are no substitute for defense counsel advice under *Padilla* and they do not, on their own, guarantee compliance with *Padilla*. However, they may help to increase the likelihood that defendants seek out, and attorneys provide, individualized advice regarding immigration consequences, and that all parties negotiate fairer, informed pleas.

***Advisals may have the advantage of:***

- **Conveying the severity of immigration consequences:** advisals acknowledge the interconnection between criminal and

immigration law, which helps to underscore the seriousness of potential immigration consequences and the importance of individualized attorney advice.

- **Encouraging communication between defendants and counsel:** advisals can be used to institutionalize an opportunity for a defendant, or his or her attorney, to request more time to discuss the consequences of a conviction before proceeding with the entry of a plea.
- **Enabling more effective plea negotiations:** advisals should signal to defense counsel and prosecutors the importance of considering immigration consequences when negotiating a plea agreement.

In order for advisals to deliver these advantages, they must be structured around clear and limited objectives, and designed and administered to avoid interfering with defense counsel's obligations under *Padilla*.

**ii. Key Objectives**

As discussed above, in Part II, *Padilla* clarifies the way in which judges should fulfill their existing constitutional, statutory, and ethical duties with respect to defendants' rights to effective assistance of counsel and Due Process. Given the severity and certainty of the immigration consequences of some pleas and convictions, judges can play an important role in encouraging defendants to discuss these matters with their counsel, reminding attorneys of their obligations to investigate and advise about potential immigration consequences, and affording additional time to do so, if necessary, before accepting pleas.

When providing any such advisal, judges should seek to ensure sufficient notice and an opportunity for defendant and defense counsel to investigate and discuss the *specific* immigration consequences of any decision to plead guilty, make an admission, or proceed to trial on any particular charge, and to negotiate with the district attorney's office in full knowledge of the potential immigration consequences of alter-

native dispositions of the case. As the Supreme Court explained in *Padilla*, such “informed consideration” of these consequences can only benefit both the State and noncitizen defendants during the plea-bargaining process.<sup>112</sup>

Such advisals are particularly important in the context of *pro se* defendants. Before letting a defendant proceed without counsel, a judge should consider mentioning the lack of advice from an attorney regarding immigration consequences as one of the disadvantages of choosing to go *pro se*. Furthermore, because in some states, indigent defendants charged with non-jailable offenses are not entitled to appointed counsel,<sup>113</sup> judges should advise defendants prior to accepting a plea of guilty that they have the right to request counsel to obtain advice regarding immigration consequences of a conviction. Some convictions carry immigration consequences even if they impose no risk of incarceration.

***In light of these obligations, if courts elect or are required to issue any Padilla-related judicial advisal, its primary objectives should be:***

- **To emphasize the duty of defense counsel** to investigate and advise their clients regarding the actual immigration consequences of any plea, admission of guilt or conviction at trial
- **To inform defendants of their rights to individualized advice from their defense attorneys** about the actual immigration consequences of a plea, admission of guilt or conviction, in their specific case.
- **To encourage defendants to speak to their attorneys about their immigration status** and any immigration consequences prior to entry of a plea, admission of guilt or decision to proceed to trial.
- **To allow for additional time**, upon request, to ensure that defendants and counsel have an opportunity to investigate and discuss the immigration consequences specific to each case and attempt to negotiate a disposition

in light of those consequences, prior to the entry of a plea or other disposition.

### **iii. Guidelines for Judges Who Provide Advisals**

If improperly designed and administered, a judicial advisal related to immigration consequences of a plea or conviction may do more harm than good. The impact of an advisal ultimately depends upon its framing, content and timing. Some courts routinely provide defendants with an advisal regarding immigration consequences of pleas because doing so is required by statute. Others are experimenting with particular advisal language for the first time.

In those jurisdictions where advisals are in use, judges should be attentive to three overarching concerns regarding: 1) the timing of the advisals in the criminal process; 2) the questions judges are posing to defendants and defense counsel; and 3) the accuracy of the warnings they are providing. All of these have the potential to create risks of undermining Due Process for noncitizen defendants.

- **Ensure sufficient time.** If an advisal is given too late in the criminal proceedings and if judges are not willing to provide defense with more time to discuss immigration matters following advisement and before taking a plea, the advisal may have little or no practical effect. For example, if a defendant receives a judicial advisal just prior to entering a plea, that defendant is most likely going to be under more pressure to simply proceed with the plea arrangement as already discussed with his or her attorney. By receiving a judicial advisal early on, such as at arraignment, defendants are in a better position to make use of the information provided by the advisal. This is consistent with the Supreme Court expectation in *Padilla* that informed consideration would lead to improved plea bargaining.<sup>114</sup> However, even if a judicial advisal is provided later in the proceeding, a judge should make every effort to allow additional time, upon

request, for the defendant to discuss his or her specific immigration consequences with counsel. The advisal must also be issued at the moment of the plea to communicate clearly that the defendant's particular plea, and not just pleas in general, may carry immigration consequences. In the case of *pro se* defendants or those who are deemed ineligible for appointed counsel because the offenses for which they are charged do not carry a risk of incarceration, judges should be particularly attentive to informing defendants' of their rights under *Padilla* to individualized advice from an attorney regarding the immigration consequences of a conviction in their case.

- **Avoid prejudicial inquiries.** Advisals framed as questions to defendants or their attorneys are problematic when they require or trigger disclosure of a defendant's citizenship/immigration status.<sup>115</sup> This is because such inquiry could elicit information that may prove prejudicial to the defendant in later criminal or immigration proceedings. As discussed *infra*, at Part III(d) (3), any judicial questioning which may lead to disclosure of defendant's citizenship/immigration status is not only unnecessary for the administration of an advisal, but also may tread on defendants' constitutional rights and violate judges' ethical and statutory obligations.

Judicial questioning that requires defendants to reveal whether they have discussed immigration consequences, or understand the nature of those consequences, raises additional concerns. It may elicit rote affirmative responses, even when a defendant has received inadequate advice or misadvice about potential immigration consequences. Thus, such on-record inquiry does not guarantee the constitutional adequacy of defense counsel and may only reflect the imbalanced power dynamics between a judge and defendant.<sup>116</sup> Instead, judges should encourage defendants to communicate with their defense lawyers

and provide additional time for so doing when needed, which is an approach more likely to avoid a later motion to withdraw a guilty plea.

- **Provide accurate advisals.** It goes without saying that courts should strive to ensure that any advisal they provide is accurate. Providing an advisal that misstates the severity or likelihood of immigration consequences or that may be misconstrued as specific immigration advice necessarily applicable to a defendant's case could deter defendants from seeking individualized advice from counsel or make them doubt the tailored advice they have already received.<sup>117</sup> This could have a distorting effect on plea negotiations. For example, advising a non-citizen defendant charged with a deportable offense that he or she *will* be subject to detention and deportation may undermine a carefully negotiated plea that did not avoid deportability but preserved the possibility of later relief from deportation. On the other hand, if a judge advises a non-citizen defendant charged with a deportable offense for which there is no possibility of relief from deportation that he or she *may* be subject to detention and deportation upon pleading guilty, the defendant might mistakenly believe that there is some chance he or she will not become removable as a result of the guilty plea. As a result, the defendant may fail to seek to plead to a lesser charge that would avoid such consequences.<sup>118</sup> The precise immigration consequences that may ensue from a given plea, admission of guilt or conviction, vary widely depending on the particular facts and circumstances of a defendant's case, his or her current immigration status and past record. Thus, while judges may be required or choose to generally identify the range of immigration consequences that may result from a conviction and may remind counsel about their duty to investigate which, if any, may affect their client, judges should refrain from providing any specific information

themselves regarding immigration law and the implications of a particular criminal plea or conviction.

Moreover, accuracy may be difficult to achieve because some immigration consequences are so counterintuitive. For example, one might assume that if an individual is already removable for past crimes or lack of lawful status, the immigration consequences of a pending charge are irrelevant to the individual's immigration case. However, whether or not a defendant is already "removable" does not mean that a defendant will suffer no harm from the failure to receive such advice. Because admissions of guilt or convictions may bear on an individual's eligibility for lawful status or for relief from removal, an attorney's failure to advise his or her client about potential immigration consequences may harm a defendant regardless of her or his legal status or past criminal record. A person who is removable may nonetheless be able to receive a new green card if he or she is not inadmissible due to a criminal conviction. Counsel should therefore try to avoid inadmissibility in this situation.

For example, undocumented individuals who are the victims of human trafficking, having been brought into the country through force, fraud or coercion and placed into servitude, may be able to obtain a T-visa. T-visas are available to individuals who are victims of "a severe form of trafficking in persons." Others who are the victims of certain serious, violent or sexual crimes, such as rape, torture, trafficking, domestic violence, sexual exploitation, kidnapping, or murder, among others, may be eligible for a U-visa.<sup>119</sup> A plea or conviction to certain offenses could compromise that eligibility, and in some cases *will bar* eligibility altogether.

For these reasons and others described above, a judicial advisal is neither a substitute for individualized advice from an attorney, nor determinative of the adequacy of that advice.<sup>120</sup> The responsibility to provide

the advice mandated by *Padilla* rests with defense counsel. While a judicial advisal may increase the likelihood of compliance by reminding counsel of their obligation and raising defendants' awareness of their rights to such information, it should not bear on whether or not the advice provided *by the defense attorney* prior or subsequent to the advisal satisfies the requirements that were set forth in *Strickland* and clarified in *Padilla*.<sup>121</sup>

**... a judicial advisal is neither a substitute for individualized advice from an attorney, nor determinative of the adequacy of that advice. The responsibility to provide the advice mandated by *Padilla* rests with defense counsel.**

Those judges who elect to take an active role by providing an oral advisal to defendants and/or defense counsel, or who are required to do so under state law, should ensure that they do not in any way impede attorneys' ability to fulfill their Sixth Amendment duties or defendants' access to the requisite advice from counsel. Judges should abide by the guidelines above and implement the best practice recommendations identified below.

## TABLE: Practices Judges Should Avoid Post-*Padilla* if Providing Advisals

**1. Do not provide an advisal too late in a criminal proceeding to enable a defendant to act upon it, or at least do not provide it without allowing additional time, if necessary.**

A judicial advisal is most effective when the defendant is in the early stages of receiving legal advice and has time to ask questions and make an informed decision as to how to proceed at the plea stage. However, if a late advisal is unavoidable, judges should allow defense counsel additional time to discuss immigration consequences before taking a plea. Issuing an advisal at the moment of plea is not necessarily too late, provided additional time is afforded as needed to investigate and discuss immigration consequences. If given earlier in the criminal proceeding, the advisal should be provided again at the time of plea to make clear that it applies to the specific plea that the defendant is about to enter.

**2. Do not ask defendants or defense counsel about the defendant's immigration or citizenship status.** Such an inquiry is neither necessary nor advisable at the arraignment or plea stage of a criminal proceeding, and may raise concerns about potential constitutional, statutory and ethical violations. See, *infra*, Part III(B)(3).

**3. Do not directly ask defendants on record whether they have adequately discussed with their attorneys or fully understand the immigration consequences of their plea.** Many defendants may feel pressured into giving a response, regardless of the adequacy of the advice they have received from counsel. Given the speed with which most plea colloquies are given and the common expectation that defendants will provide scripted responses (simple “no” or “yes”), questions directly to defendants are unlikely to promote the Due Process objectives of *Padilla*. Judicial statements of rights that encourage defendants to communicate with their counsel and provide an opportunity for counsel to request more time, if needed, are preferable, and more likely to avoid later motion to withdraw a guilty plea.

**4. Do not selectively issue advisals.** The risks of under-inclusiveness or potential charges of bias or discrimination outweigh any expected advantages of timesaving. In fact, failing to provide an advisal to certain defendants on the basis of judicial assumptions about the defendant's citizenship/immigration status, potentially erroneous information obtained from the defendant, or the nature of the criminal charge, could render a subsequent conviction vulnerable to vacatur, particularly in states where advisals are required by statute.

**5. Do not over- or understate the immigration consequences of a plea, admission of guilt or conviction.** Judges who opt to give advisals should take care to explain that while the immigration consequences of some pleas, admissions and convictions may or may not result in deportation or other loss of immigration benefits, others automatically will lead to deportation. Failing to indicate that there are cases in which detention and deportation are mandatory could mislead defendants as to the severity of immigration consequences or the importance of obtaining advice tailored to their case. At the same time, suggesting that deportation is an automatic consequence of all convictions is inaccurate and could indirectly prejudice defendants. Scaring defendants or defense counsel into thinking that there is no way to mitigate or avoid immigration consequences may prejudice and confuse individuals who could have obtained more favorable dispositions had their attorneys engaged in further investigation and/or negotiation with prosecution, and may even discourage defendants from obtaining immigration counsel and seeking relief in immigration court. Ultimately, judges should underscore that the interaction of immigration and criminal law is highly dependent on the facts of each case, and that the court is not in a position to provide the individualized advice that each defendant requires. The judicial advisal does not constitute case-specific advice; rather, defense attorneys are obligated to provide such advice.

## B. RECOMMENDATIONS

### 1. All judges should encourage the provision of enhanced technical and financial resources and support services to defense counsel to facilitate their compliance with *Padilla* obligations.

Immigration law and its interaction with the criminal justice system are highly complex. Criminal defense attorneys, whether public or private, frequently have full dockets and limited time to spend on individual cases. Given that they bear the burden of inquiring about clients' citizenship/immigration status, investigating and providing affirmative, competent advice to non-citizen clients about the immigration consequences of alternative dispositions (with attention to both pleas and sentences), defense counsel need effective resources and support to navigate the law and fulfill their duties. Some defender organizations have established immigrant service plans or in-house immigration law expertise. However, there are still great numbers of defenders who lack access to immigration experts when advising their clients. Similarly, although there are a growing number of written materials and hotlines providing guidance for defense attorneys on how to counsel clients regarding the immigration consequences of pleas and convictions (see, for example, the Defending Immigrants Partnership website, [www.defendingimmigrants.org](http://www.defendingimmigrants.org)), there is still considerable need for additional resources, including funding to cover referrals to immigration experts and more regular trainings for defenders. Some states that have several years of experience enforcing defense counsel immigration-related obligations may have lessons to offer other jurisdictions in which *Padilla* represented a change. For example, since the 2004 New Mexico Supreme Court decision in *State v. Paredes*,<sup>122</sup> New Mexico has managed to increase resources available to defenders, despite fiscal constraints.

Advocating for enhanced availability of effective resources to enable defenders to make individualized determinations about immigra-

tion consequences is perhaps one of the most important things that judges can do. Judges can enhance the availability of resources in multiple ways, including by approving expert fees for immigration experts, supporting funding of in-house immigration experts at indigent defender offices, and calling for mandatory or voluntary immigration consequences training for defense lawyers. In addition to reminding counsel of their duties under *Padilla*, judges should also inform attorneys about resources available to assist in their counseling of clients regarding immigration consequences. As members of committees within the judicial community and as influential figures in the legal field more broadly, judges can go a long way toward helping to ensure compliance with *Padilla* by calling for the allocation of greater resources to support defenders in the provision of competent advice to their non-citizen clients.

### 2. Judges who elect or are required to provide advisals should issue them universally to all defendants, and for all pleas, admissions, and findings of guilt.

Selectively issuing advisals to some defendants and not to others runs the risk of being under-inclusive. Providing advisals only to those who state that they are non-citizens or whom the court believes to be non-citizens may mean that people who face potential immigration consequences of a conviction are not informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.<sup>123</sup>

Universal administration of advisals will save courts time and resources in the long run. When judges issue advisals to all defendants without trying to single out noncitizens, they are less likely to face future motions to vacate for failure to issue a notification, especially in

those states where it is statutorily required.<sup>124</sup> It also may take more time to accurately distinguish between citizens and non-citizens than it would to issue advisals to everyone. As Florida's statute on pleas makes clear, blanket administration of an advisal renders inquiry into citizenship/immigration status unnecessary: "It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the required] admonition shall be given to all defendants in all cases."<sup>125</sup>

Furthermore, selective administration of an advisal on the basis of a judge's belief or potentially erroneous information about a defendant's citizenship or immigration status could tread on Fourth Amendment protections against racial and ethnic profiling. Questioning some defendants and not others about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters, risks violating constitutional protections. Non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases for law enforcement agents to question someone about their citizenship.<sup>126</sup>

When advisals are issued, it is important that they be administered regardless of the charge an individual is facing, as some convictions classified as misdemeanors and even alternative dispositions and sentences that do not constitute a "conviction" in criminal court may nevertheless carry potentially serious immigration consequences, including deportation. The potential impact of a given plea, admission or conviction on an individual's immigration status can only be determined in view of the specific individual's personal history, citizenship/immigration status, and past criminal record—specific facts that a judge does not have before him or her when processing a defendant at the arraignment or plea stage. Given the complex

and intertwined nature of criminal and immigration law, any charge should be treated as though it may have the potential to impact an individual's immigration status presently, or in the future. Whether that potential exists, and whether it can be avoided or mitigated through an alternative disposition, is to be ascertained by the defense counsel, in conjunction with his or her client—not assumed by the judge.

### **3. If issuing advisals, judges should not ask about a defendant's immigration or citizenship status.**

Courts may be tempted to simply inquire into a defendant's immigration/citizenship status in order to identify non-citizens to whom to give the advisals. However, as detailed in our earlier publication, *Ensuring Compliance With Padilla v. Kentucky Without Compromising Judicial Obligations: Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status*,<sup>127</sup> judicial obligations under the U.S. Constitution, judicial codes of conduct and some state laws preclude inquiry into defendants' citizenship/immigration status. Furthermore, asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

Questioning defendants about citizenship/immigration status on the record could tread on Fifth Amendment protections against self-incrimination. Statements about alienage made on the record in criminal court, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325, 1326, respectively.

Furthermore, probing a defendant's citizenship/immigration status could jeopardize attorney-client confidentiality and hinder the ability of counsel to provide effective assistance. By eliciting information about a defendant's citizenship/immigration status on

record, a judge may be unwittingly intruding into confidential attorney-client communication, undermining counsel's ability to predict, and advise his or her client regarding, immigration consequences, or upsetting the terms of a negotiated plea designed to avoid disclosure of status.

Inquiring into a defendant's citizenship/immigration status also may be contrary to judicial codes of conduct. The public controversy surrounding immigration in the United States implicates issues of race, ethnicity and class. Thus even if a judge's intention is to protect the defendant's interests, inquiring into a defendant's citizenship/immigration status may undermine the appearance of judicial neutrality. The American Bar Association (ABA) Model Code of Judicial Conduct instructs judges to "avoid impropriety and the appearance of impropriety," and perform their duties without bias or prejudice, including that based on race and national origin.<sup>128</sup> Most state codes of judicial conduct contain identical or substantially similar provisions.<sup>129</sup> At least one state judicial ethics body has found "reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or a bail hearing."<sup>130</sup> Another state disciplined a judge because his selective inquiry into defendants' citizenship/immigration status raised serious concerns about his motivations, undermined public confidence in the judiciary, and violated codes of judicial conduct.<sup>131</sup>

According to the Second Circuit, "[t]he Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status."<sup>132</sup> When it is not necessary to a finding of guilt or the disposition of a case, judicial questioning regarding a defendant's citizenship/immigration status is gratuitous. Thus, regardless of whether the motives for asking about citizenship/immigration status are to protect and not to prosecute defendants, judges should refrain from asking any defendant about his or her citizenship/immigration status and thereby avoid any

constitutional concerns that could arise from selective questioning.

Moreover, inducing a defendant to indicate his or her citizenship/immigration status on record in a criminal proceeding can have detrimental impact on the fairness—real or perceived—of the criminal justice system. If courtrooms are seen as places in which individuals' citizenship/immigration status will be exposed, some defendants and witnesses may lose faith in the fairness and impartiality of the criminal justice system. Just as law enforcement agents depend on the cooperation of local communities to prevent, investigate, and prosecute crime, so too do courts require the cooperation of defendants and witnesses in proceedings to effectively adjudicate charges and issue sentences. If judges require disclosure of citizenship/immigration status, some defendants and witnesses may be afraid to appear in court at all. Furthermore, on-record disclosures may have chilling effects on individuals outside of the criminal proceeding. If people believe that pressing criminal charges could lead the accused to be deported, they may be discouraged from reporting crimes.<sup>133</sup>

At least ten states with existing statutory advisal requirements prohibit inquiry into a defendant's citizenship/immigration status. While most states provide that a defendant "shall not be required" to disclose his or her status at the time of entering a plea, Wisconsin and Maryland directly prohibit the court from inquiring into status. Florida takes a somewhat more neutral position by stating only that "it shall not be necessary" for the judge to inquire into status, and Maine, alone among the 50 states, requires courts to ascertain a defendant's immigration or citizenship status ("[T]he court shall inquire...[into defendant's legal status].").

**4. To enable meaningful communication between defendants and their attorneys, judges providing advisals should issue them early in criminal proceedings and, upon request, afford defendants reason-**

**able time to obtain specific, individualized advice about the actual immigration consequences of a plea or conviction in their case.**

The responsibility for compliance with *Padilla* ultimately rests with defense counsel. Judges should provide advisals early enough in the proceeding to allow defendants to obtain specific, individualized advice from their attorneys about the actual immigration consequences of a plea or conviction, before proceeding to a disposition in a given case. Whether or not a judge intervenes at arraignment and/or at the plea phase of a proceeding to provide a reminder to defendants and defense counsel of their respective rights and obligations vis-à-vis *Padilla*, the most important thing that the judge can do is provide the defendant with reasonable time, should it be needed, to obtain the advice to which he or she is entitled. At first blush, this recommendation may appear likely to slow down proceedings or stall a court's docket. However, it may in fact save the court time in the long run by reducing the likelihood that cases will come back before a judge on motions for post-conviction relief due to defendant's receipt of inadequate or misleading advice from his or her attorney. Furthermore, several states have had statutes on the books for years mandating that courts provide such additional time, and there is little evidence that the practice has generated problems in their court systems. Practice indicates that providing additional time upon request will result in fairer pleas.

Currently, five states, including California, Connecticut, District of Columbia, Oregon, and Nebraska, mandate that courts should afford defendants additional time if they require advice from counsel regarding immigration consequences of their plea or conviction or further negotiations with the prosecution in light of those potential consequences. In California, for example, Cal Pen Code § 1016.5(d) expresses the intent of the legislature that the court "shall grant the defendant a reasonable amount of time to negotiate with the prosecut-

ing agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction."

**5. Courts should not allow prosecutors to force a plea before defense counsel has had an opportunity to fully comply with *Padilla* by investigating, advising the defendant concerning, or attempting to minimize the immigration consequences of a plea through negotiation.**

If prosecutors were able to precipitate a plea, without affording defense counsel an opportunity to address immigration consequences with his or her client, they would in effect be preventing defense counsel from rendering effective assistance. This would not only thwart compliance with *Padilla*, jeopardizing defendant rights, but would also be counter-productive for the State. As the Court emphasized in *Padilla*, "informed consideration of possible deportation can benefit both the State and non-citizen defendants, who may be able to reach agreements that better satisfy the interests of both parties."<sup>134</sup> It is in the interest of judges, as well, to enable both parties to reach a plea that minimizes any immigration consequences, as such pleas are less likely to come back before the court on motions for vacatur due to counsel's failure to provide effective assistance.

**6. Prior to accepting a plea, courts should ensure that defendants without counsel may retain or request appointment of counsel to provide them with individualized advice about the immigration consequences of a plea or conviction, and warn them that the lack of such advice is one of the risks of proceeding *pro se*.**

Because *Padilla* held that defense attorneys have an obligation to advise their clients about the immigration consequences of pleas and convictions, those defendants who lack counsel altogether, either because they choose to proceed *pro se* or have been denied court-appointed counsel on the grounds that they are

charged with a non-jailable offense, are especially vulnerable to the immigration penalties of criminal conviction. In *Alabama v. Shelton*, the Supreme Court held that a defendant was constitutionally entitled to appointed counsel in all proceedings that may result in incarceration, whether immediate or suspended.<sup>135</sup> This has been interpreted in some states to mean that when the offense with which a defendant is charged carries no possibility of jail time, the defendant is not entitled to appointed counsel. However, even offenses that carry no risk of incarceration may lead to immigration consequences. Judges should be particularly sensitive to the risks faced by defendants who lack counsel and warn individuals that in some cases, a conviction may carry immigration consequences regardless of the sentence imposed. Both defendants proceeding *pro se* and those denied counsel because they are facing non-jailable offenses should be informed prior to pleading that they have the right to retain or request an attorney to obtain individualized advice regarding the immigration consequences of a plea or conviction.

Immigration consequences can be severe regardless of whether an offense carries jail time. For example, for some controlled substance offenses in Florida, the government states that a defendant cannot be sentenced to jail time and thus is not entitled to appointed counsel. However, under federal immigration law, controlled substance convictions can trigger mandatory detention and deportation, regardless of their sentence. Similarly, in Massachusetts, first and second offense shoplifting convictions do not carry any potential prison sentence, only a fine. Consequently, Massachusetts courts have held that defendants have no right to appointed counsel in those cases. However, because federal immigration officials typically consider shoplifting to be a “crime involving moral turpitude” for immigration purposes, it may lead to detention and/or deportation for some noncitizen defendants.

*Padilla* held that the right to effective assistance of counsel encompasses the right to spe-

cific, individualized advice about immigration consequences. The Court did not address what happens to indigent defendants who would otherwise be deemed not to have a right to counsel at government expense because they are charged with crimes that do not carry the risk of incarceration, but who nevertheless face the risk of detention and deportation should they plead to or be convicted of the crimes charged. However, *Padilla* recognized the severity of the immigration consequences of criminal convictions and the importance of ensuring that defendants are informed of those consequences before entering pleas which may affect their immigration status or eligibility for immigration benefits. Indeed, the Court acknowledged that avoiding the immigration consequences of a conviction may be more important than any potential jail sentence.<sup>136</sup> It follows that defendants should receive assistance from criminal defense counsel whenever a conviction carries potential immigration consequences, not simply when it carries a potential prison term.

**7. Courts using or contemplating use of written advisals on plea forms to alert defendants to potential immigration consequences should consider whether an oral advisory would be more effective and better signal the importance of attorney compliance with *Padilla*.**

Like oral advisals, written advisals cannot replace defense counsel’s obligation to provide specific, individualized advice regarding the potential immigration consequences of a plea or conviction in a particular case. While the form may provide another reminder of the potential for severe immigration consequences and the importance of discussing those consequences with counsel before entering a plea or proceeding to trial, it does not diminish the responsibility of counsel to *investigate and advise* clients about those consequences nor eliminate the role for judges in ensuring that defendants and attorneys are aware of their respective rights and responsibilities. A written statement on a plea form cannot serve the func-

tion that an oral advisal may fulfill of reminding defense counsel of their *Padilla* obligations on record and providing them with more time to meet those obligations should it be necessary. Thus courts should carefully consider whether or not provision of a written plea form satisfies judicial duties post-*Padilla*.

If a court chooses to use plea forms as a vehicle for informing defendants of their rights to such advice from counsel before entering a plea of guilty or nolo contendere, or deciding to proceed to trial, those forms should be provided uniformly and should not require the defendant to disclose his or her citizenship/immigration status when completing the form. In fact, of at least 36 states that have written plea forms for pleas of guilty or nolo contendere, only two states currently require the party submitting the plea to indicate his or her citizenship status.<sup>137</sup>

### **C. PROPOSED TEXT OF ADVISALS AT ARRAIGNMENT AND PLEA ALLOCUTION**

If judges choose to administer advisals addressing the right of defendants to information regarding the immigration consequences of pleas, admissions of guilt and convictions, and the responsibility of defense counsel to advise their clients on these matters, they should do so consistently and as early as possible in the criminal proceedings. To increase their efficacy at achieving the objectives discussed in the preceding sections, when provided, advisals should be given at both the arraignment and plea allocution stages.

The following proposed text of advisals builds upon the text of existing advisals currently administered by courts in states with statutes requiring judges to warn defendants regarding the possibility of immigration consequences prior to accepting a plea. In light of *Padilla*, the recommended language clarifies defendants' rights to specific, individualized advice from their attorneys about the actual immigration consequences of a conviction in their case.

### **If they choose to issue a *Padilla*-related advisal to defendants at arraignment, judges should consider using language such as the following:**

If you are not a citizen of the United States, whether or not you have lawful immigration status, you should tell your lawyer because you have the right to receive advice from your lawyer about the specific impact that this case will have, if any, on your immigration status. A plea of guilt [or no contest/nolo contendere], admission of guilt or conviction *may* result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits pursuant to federal law, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Your lawyer must investigate and advise you about these issues before you take a plea or admit guilt to any offense.

### **If they do so at plea allocution, judges should consider using advisal language such as the following, which is based largely on the text of existing statutorily required advisals in some states, modified in light of *Padilla*:**

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

## Conclusion

The continuing applicability of the guidance and recommendations provided in this report will depend on how individual courts, state legislatures, ethical and professional bodies revise their rules and practices in light of *Padilla* going forward. There are various efforts underway to change court practices, from ad-hoc judicial experimentation with oral advisals, to the proposed revision of Rule 11 of the Federal Rules of Criminal Procedure and the updating of state statutory requirements pertaining to court-administered advisals. However they choose to approach their duties, courts should seek to support and not infringe upon defense attorneys' compliance with their Sixth Amendment obligations under *Padilla* to provide clients with effective assistance of counsel.

## Endnotes

- 1 *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (holding that Sixth Amendment requires defense counsel to provide affirmative, competent advice to noncitizen defendants regarding immigration consequences of guilty plea and that absence of such advice may be basis for claim of ineffective assistance of counsel).
- 2 *See generally*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).
- 3 Professor Juliet Stumpf has been credited with coining the term “crimmigration system,” which has been used subsequently by other scholars. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006); *see also* Andrew Moore, *Criminal Deportation, Post-Conviction Relief And The Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008).
- 4 *See, e.g.* Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006) (criminal grounds of deportation); § 212 (a)(2), 8 U.S.C. § 1182 (2006) (criminal and related grounds of inadmissibility); Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c) (2006) (criminal grounds for mandatory detention); Immigration and Nationality Act § 101(f), 8 U.S.C. § 1101(f) (2006) (defining “good moral character,” which is an eligibility requirement for naturalization).
- 5 For example, after the 1996 amendments to the INA, offenses qualifying as aggravated felonies make noncitizens automatically deportable, and controlled substance offenses (except simple possession of 30g or less of marijuana) make noncitizens deportable and inadmissible. Both aggravated felonies and controlled substance offenses will generally trigger mandatory detention pending removal. *See generally* Morawetz, *supra* note 2, at 1938-50 (describing the features of the new laws that mandate ; DEFENDING IMMIGRANTS PARTNERSHIP, REPRESENTING NON-CITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE (2008), <http://www.tulsalaw.com/pdfs/DIP-National-Training-2008-Manual.pdf>; *see also* Moore, *supra* note 3, at 710 (arguing that discretion regarding immigration penalties of criminal convictions should be restored to federal officials); *see also* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1724-29 (1999) (discussing concerns about the lowering of the INA sentencing threshold to make misdemeanors into aggravated felonies); Andrew Moore, *Matter of Jacque Martin*, 7 BENDER’S IMMIGR. BULL. NO. 23, 1502 (2002) *cited in* Moore, *supra* note 3, at n. 323.
- 6 *See* Judge Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT’L L.J. 245, 255 (2004) (describing the “1996 Immigration Acts,” AEDPA and IIRIRA).
- 7 *See* John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea*, 36 U. MICH. J. L. REFORM 691(2003) (arguing that post-1996 immigration law reforms, deportation is unique in its severity and certainty).
- 8 *See* Morawetz, *supra* note 2, at 1939 (“For example, a conviction for simple battery or for shoplifting with a one-year suspended sentence—either of which would be a misdemeanor or a violation in most states—can be deemed an aggravated felony.”).
- 9 *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”).
- 10 *Strickland v. Washington*, 466 U.S. 668 (1984).
- 11 Over the years, a number of courts, citing the “collateral consequences rule,” have dismissed ineffective assistance of counsel claims based on failure to give advice about immigration consequences. *See, e.g., People v. Ford*, 86 N.Y.2d 397 (N.Y. 1995). Many lower courts that had decided the issue prior to *Padilla* held that counsel is not ineffective for failure to advise defendants of deportation. *See, e.g.,*

*Alanis v. State*, 583 N.W.2d 573, 579 (Minn. 1998); *State v. Dalman*, 520 N.W.2d 860, 863 (N.D. 1994); *People v. Huante*, 571 N.E.2d 736, 741 (Ill. 1991); *Commonwealth v. Frometa*, 555 A.2d 92, 93-94 (Pa. 1989); *Mott v. State*, 407 N.W.2d 581, 582 (Iowa 1987); *Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972). However, some of these courts found that advice to defendants regarding deportation consequences of conviction, although not required, should be encouraged. See *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *Durant v. Coughlin*, 1999 Conn. Super. LEXIS 1815, 1999 WL 528832, \*3 (Conn. Super. Ct. 1999). Several courts in other states, including *inter alia* Indiana, California, and Colorado, have rejected the collateral consequences rule, holding that inadequate advice to a client about deportation consequences of conviction constitutes ineffective assistance of counsel, in violation of the Sixth Amendment. See, e.g. *State v. Nunez-Valdez*, 200 N.J. 129, 138 (N.J. 2009) (“[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.”); *State v. Paredes*, 101 P.3d 799, 805 (N.M. 2004) (finding affirmative duty to advise client of immigration consequences under Sixth Amendment); *People v. Pozo*, 746 P.2d 523, 527, 529 (Colo. 1987) (same); *State v. Creary*, No. 82767, 2004 WL 351878, at \*2 (Ohio Ct. App. Feb 26, 2004) (same); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994) (finding that failure to inform noncitizen of immigration consequences constitutes ineffective assistance); *People v. Soriano*, 240 Cal. Rptr. 328, 335-36 (Cal. Ct. App. 1987) (finding ineffective assistance of counsel where defendant was not advised of immigration consequences of her plea); *Lyons v. Pearce*, 694 P.2d 969, 977 (Or. 1985) (holding that counsel is required to inform noncitizen client that conviction “may” result in deportation).

12 See, e.g., *Santos-Sanchez v. United States*, 548 F. 3d 327 (5th Cir. 2008); *Broomes v. Ashcroft*, 358 F. 3d 1251 (10th Cir. 2004); *United States v. Gonzalez*, 202 F. 3d 20 (1st Cir. 2000); *United States v. Del Rosario*, 902 F. 2d 55 (D.C. Cir. 1990); *United States v. Yearwood*, 863 F. 2d 6 (4th Cir. 1988); *United States v. Campbell*, 778 F. 2d 764 (11th Cir. 1985).

13 See *Padilla*, 130 S. Ct. at 1493 (Alito, J. concurring) (citing *United States v. Kwan*, 407 F. 3d 1005, 1015–17 (9th Cir. 2005) (misadvice regarding immigration consequences of plea failed to satisfy professional standards of competent counsel); *United States v. Couto*, 311 F. 3d 179, 188 (2d Cir. 2002) (holding that attorney’s affirmative misadvice regarding deportation constituted ineffective assistance of counsel and noting the persuasiveness of, without ruling on, defendant’s argument that certain and automatic nature of deportation makes it consequence of which court must ensure defendant is aware prior to entry of plea); *Downs-Morgan v. United States*, 765 F. 2d 1534, 1540–1541 (11th Cir. 1985) (limiting holding to the facts of the case)); see also *Janvier v. United States*, 793 F. 2d 449, 452 (2d Cir. 1986) (finding that impact of conviction on noncitizen’s ability to remain in country was not collateral, but rather central issue). As Justice Alito noted in his concurrence in *Padilla*, prior to the Court’s decision, “several other Circuits [had] held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed “collateral.” *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) (citing *Hill v. Lockhart*, 894 F. 2d 1009, 1010 (8th Cir. 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 (6th Cir. 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 (4th Cir. 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 of his constitutional right to counsel.”)).

14 *State v. Paredes*, 101 P.3d 799 (N.M. 2004). Since the *Paredes* decision, New Mexico has increased resources available to defense counsel, despite being a resource-strapped state. For discussion of the *Paredes* decision, see Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 143-44, 173-76 (2009); see also

Sarah Keefe Molina, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation May or May Not Violate Strickland's Performance Prong*, 51 ST. LOUIS L.J. 267 (2006) (presenting critical analysis of the bright line rule in *Paredes* which held attorneys' failure to address immigration consequences to be categorically unreasonable and discussing the difference between collateral consequences rule in Due Process arena and ineffective assistance of counsel).

- 15 For a discussion of the merits of addressing collateral consequences of conviction and the problems associated with the collateral consequences rule, see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 718-19 (2002) ("Understanding collateral consequences helps lawyers and their clients evaluate the risks and benefits of taking or rejecting a particular plea. A lawyer can also use her knowledge of collateral consequences to change what the risks and benefits are: Identifying and explaining collateral consequences to the prosecutor or court may influence the decision to bring charges at all, the particular charges that are brought, the counts to which the court or prosecution accept a plea, and the direct consequences imposed by the court at sentencing. The collateral consequences rule is troubling, then, because it assumes that competent counsel can systematically ignore a significant share of the resources they may be able to deploy on behalf of their clients.").
- 16 See *infra* Part II.B (discussing state statutory requirements); *infra* note 82 (listing jurisdictions with state statutes requiring judicial advisals); Appendix 2 (listing relevant provisions of state statutes requiring judicial advisals).
- 17 See, e.g. N.Y. CRIM. PROC. LAW § 220.50(7) (requiring judicial advisal only of defendants facing felony charges). A proposed bill would eliminate the felony specification, extending the requirement that a judge provide a warning of potential immigration consequences to all defendants. See N.Y. Assemb. B. A04957, 2009-2010 Reg. Sess. (N.Y. 2009), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A04957&term=2009&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A04957&term=2009&Summary=Y&Text=Y) (last visited July 4, 2011). The text of the bill includes a statement of legislative intent that "at the time of the plea no defendant shall be required to disclose his or her legal status to the court," and repeats the following provision in all proposed new or amended subsections of the N.Y. Criminal Procedure Law: "This advisement shall be given to all defendants and no defendant shall be required to disclose his or her legal status in the United States to the court." See *id.* (proposing text of N.Y. CRIM. PROC. L. §§170.10(4), 180.10(7), 210.15(4), 220.50(7), 220.60 (5)-(6)). For further discussion, see also N.Y. City Bar Committee on Immigration and Nationality Law, A.5285 M. of A. Lopez, [http://www.nycbar.org/pdf/report/advisal\\_bill.pdf](http://www.nycbar.org/pdf/report/advisal_bill.pdf).
- 18 See, e.g. ABA CRIMINAL JUSTICE STANDARDS PLEAS OF GUILTY, §14-1.4(c) ("Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea."), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_guiltypleas\\_blk.html#1.4](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#1.4) (last visited July 4, 2011); see also *infra*, Part II.C (discussing judges' ethical obligations).
- 19 See *Padilla*, 130 S. Ct. at 1486 (citing *McMann v. Richardson*, 397 S. Ct. 759, 771 (1970)).
- 20 See *id.* at 1482.
- 21 See *id.* at 1486.
- 22 See *id.* at 1482; see also *Leading Cases: I. Constitutional Law: A. Criminal Law and Procedure: 3. Sixth Amendment—Effective Assistance of Counsel*, 124 HARV. L. REV. 199, 199 (2010).
- 23 See *Padilla*, *supra* note 1, at 1481 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

- 24 *See id.* at 1482.
- 25 This survey was administered at the Fifth National Training on the Immigration Consequences of Criminal Convictions, a conference for defense lawyers around the country, organized by the Defending Immigrants Partnership (DIP) on January 10-11, 2011 in Albuquerque, New Mexico.
- 26 *See* Appendix 1: Additional Resources for Judges on *Padilla* and its Implications for Courts.
- 27 Rule 11 of the Federal Rules of Criminal Procedure states in relevant part: “(2) Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).”
- 28 *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14 (U.S. 1970) (“It has long been recognized that the right to counsel is the right to effective assistance of counsel.”).
- 29 *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“[T]he voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorney in criminal cases.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion.”); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (holding that “a counseled plea of guilty” has sufficient reliability to justify the State’s imposition of punishment”); *McMann*, 397 S. Ct. at 770-71 (finding plea intelligent where “based on reasonably competent advice”); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (“Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.”).
- 30 *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may . . . only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.”); *Boyd v. Warden*, 579 F.3d 330, 349 (3d Cir. 2009) (“Ineffective assistance of counsel during plea negotiations can invalidate a guilty plea and make granting withdrawal appropriate, to the extent that the counsel’s deficient performance undermines the voluntary and intelligent nature of defendant’s decision to plead guilty.”) (quoting *United States v. Arteca*, 411 F.3d 315, 320 (2d Cir. 2005)); *United States v. Couto*, 311 F.3d 179, 191 (2d Cir. 2002) (holding that plea was rendered “involuntary” by counsel’s ineffective assistance in affirmatively misrepresenting immigration consequences); *Hammond v. United States*, 528 F.2d 15, 18 (4th Cir. 1975) (“If counsel was ineffective, it follows that Hammond’s pleas were involuntary. The *Brady* trilogy . . . makes it perfectly plain that the sine qua non to a voluntary plea of guilty is the assistance of counsel within the range of competence required of attorneys representing defendants in criminal cases.”); *People v. Correa*, 485 N.E.2d 307 (Ill. 1985) (“If the defendant’s pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant’s pleas were not voluntary . . .”); *Thacker v. Workman*, 2010 U.S. Dist. LEXIS 92322 (N.D. Okla. 2010) (“Performance by defense counsel that is constitutionally inadequate can render a plea involuntary.” (quoting *Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (discussing interlinked nature of 6<sup>th</sup> Amendment right to adequate assistance of counsel and 5<sup>th</sup>/14<sup>th</sup> amendment requirement that plea be knowing and voluntary))).
- 31 *See* 18 U.S.C. § 3501(b) (2006) (“The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including . . . (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.”).
- 32 *See McMann*, 397 U.S. at 771 & n.14 (1970) (holding that defendants are entitled to “effective assistance of competent counsel” whose advice is “within the range of competence demanded of attor-

neys in criminal cases,” and noting that “[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel”); *see also United States v. Cronin*, 466 U.S. 648, 653-57 (1984) (describing the substance and purpose of the Constitution’s guarantee of effective assistance of counsel); *Strickland v. Washington*, 466 U.S. 668 (1984) (elaborating a two-part test for effective assistance of counsel).

33 *See McMann*, 397 U. S. at 771 (1970); *see also Beasley v. United States*, 491 F.2d 687, 693 (6th Cir. 1974) (citing *McMann*).

34 *See Strickland*, 466 U.S. at 689 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”).

35 *See ABA STANDARDS FOR TRIAL JUDGES*, § 6-1.1 (“This standard recognizes that it is ultimately the responsibility of the trial judge to maintain the atmosphere appropriate for a fair and rational determination of the issues and to govern the conduct of all persons in the courtroom, including the attorneys.”); *see also id.*, Commentary to § 6-1.1(c) (“The trial judge should remain sensitive to the various functions and interests of all involved in the criminal justice system. Of utmost importance, of course, are the constitutional rights of the defendant, and the roles constitutionally assigned to the prosecution and to defense counsel. For example, the defendant has the right to effective assistance of counsel. It is the responsibility of the defense attorney to ‘render effective, quality representation and to ensure that the prosecution meets its burden of proving guilt beyond a reasonable doubt. The trial judge should be sensitive to the defense attorney’s duty to protect the defendant’s rights’”).

36 Constitutionally adequate assistance of counsel must satisfy the two-part standard for ineffective assistance of counsel (IAC) set forth by the Court in *Strickland*, 466 U. S. 668 (1984). That standard requires the criminal defendant to show that 1) his or her counsel’s advice was deficient, in that it fell below an objective standard of reasonableness, as determined by prevailing standards of the legal profession; and 2) that this deficiency prejudiced the defendant’s ability to receive a fair trial. Under *Strickland’s* presumption of competent counsel, the claimant alleging IAC bears the burden of proving these two prongs of the test.

37 *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (“The assistance of counsel is often a requisite to the very existence of a fair trial.”).

38 *See Strickland*, 466 U.S. at 694.

39 For a critique of *Strickland’s* emphasis on ex post review and showing of prejudice, rather than ex ante safeguards, see Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243, (1997) (arguing that “the *Strickland* inquiry into counsel’s effectiveness ex post should be supplement [sic] by an ex ante inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution”); *see also* Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 505 (1993) (arguing that the *Strickland* test fails to provide adequate counsel in the first place).

40 The California Court of Appeals has held that failing to *defend against* immigration consequences, and not simply failing to *advise of* them, can constitute ineffective assistance. *People v. Bautista*, 8 Cal. Rptr. 3d 862 (2004).

41 Compelling the disclosure of attorney-client communications could constitute a violation of privilege particularly when the information sought by the judge is not a fact relevant to the charge at issue in the case.

42 The Supreme Court has repeatedly recognized “the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion.” *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); *see also Swidler & Berlin v. United States*, 524

U.S. 399, 403 (1998) (“The attorney-client privilege is one of the oldest recognized privileges for confidential communications. ...The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice”) (internal citations omitted); *United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 336 (4th Cir. 2003) (“[U]nder normal circumstances, an attorney’s advice provided to a client, and the communications between attorney and client are protected by the attorney-client privilege.”); *Sarfaty v. PNN Enters.*, 2004 Conn. Super. LEXIS 1061, 10-11 (Conn. Super. Ct. 2004) (“The attorney-client privilege applies to communications: (1) made by a client; (2) to his or her attorney; (3) for the purpose of obtaining legal advice; (4) with the intent that the communication be kept confidential.”).

- 43 See *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (“[S]ound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer’s being fully informed by the client”).
- 44 FED. R. EVID. 501 (establishing general rule with regard to privileges); see also *Upjohn*, 449 U.S. at 396; S. Rep. No. 93-1277, at 13 (1974) (emphasizing that “the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis,” depending on the facts relevant to a particular case); *Trammel*, 445 U.S. 40, 47 (1980) (“In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to ‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis’ . . .”) (citations omitted); *United States v. Gillock*, 445 U.S. 360, 367 (1980) (explaining congressional intent to afford courts flexibility in developing privilege rules on a case-by-case basis).
- 45 See, e.g., *Upjohn*, 449 U.S. at 454.
- 46 See *supra* note 80 and accompanying text.
- 47 See *United States v. Cronin*, 466 U.S. 648, 656 (1984) (“[T]he adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’”) (citation omitted).
- 48 See *infra* Part II (discussing constitutional and ethical prohibitions against, and the adverse consequences of, judicial inquiry into citizenship/immigration status).
- 49 The Fifth Amendment states, “No person shall ... be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. However, its invocation is not limited to criminal trials. See, e.g., *United States v. Balsys*, 524 U.S. 666, 672 (1998) (finding that the Fifth Amendment “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,” when an individual believes information exposed through testimony “could be used in a subsequent state or federal criminal proceeding”) (citing *Kastigar v. United States*, 406 U.S. 441, 444-445, (1972)); see also *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege “applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it”). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the Self-Incrimination Clause of Fifth Amendment against the states through Fourteenth Amendment Due Process Clause).
- 50 *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”).
- 51 *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).
- 52 Citizens and non-citizens alike may invoke the Fifth Amendment. See *Mathews*, 426 U.S. at 77 (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection”); see also *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (“[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could

be used in a criminal prosecution or could lead to other evidence that might be so used.”); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (deciding the case without addressing whether invocation of Fifth Amendment by individual subject to removal proceedings was proper).

- 53 Fifth Amendment protection applies to communication that is testimonial, incriminating, and compelled. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). What is considered custodial interrogation depends on whether a reasonable person, in view of the totality of the circumstances, would feel free to leave. *See Stansbury v. California*, 511 U.S. 318 (1994). A court may constitute a “custodial setting” but the test is whether, under all the circumstances involved in a given case, the questions are “reasonably likely to elicit an incriminating response from the suspect.” *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). The Ninth Circuit explained, “[t]he investigating officer’s subjective intent is relevant but not determinative, because the focus is on the perception of the defendant.” *Id.* (quoting *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994)).
- 54 Practitioners have expressed concern that defendants, when directly addressed by the judge, are often too intimidated to assert their right to remain silent or to ask for more time, when needed, to speak to their attorneys. When immigration status is not relevant to a material issue in the case, judges should not seek its disclosure because such inquiry may have an *in terrorem* effect upon a defendant, who may be intimidated and inhibited from pursuing his or her legal rights. *See Campos v. Lemay*, 2007 U.S. Dist. LEXIS 33877, 24-25 (S.D.N.Y. 2007) (recognizing that danger of intimidation from inquiring into defendant’s legal status during proceedings could affect defendant’s ability to vindicate his or her legal rights). Other courts have similarly recognized the risk related to questioning immigration status on the record. *See, e.g. Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Sup. Ct. Tex. 2010). Asking about citizenship/immigration status may have the effect of forcing a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required.
- 55 *See Padilla*, 130 S. Ct. at 1483 (citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).
- 56 *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing the Fifth Circuit for the proposition that a plea of guilty must be entered by one fully aware of the direct consequences); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (declining to find that either the Constitution or Rule 11 of the Federal Rules of Criminal Procedure requires courts to inform the defendant about the collateral consequence of a conviction on parole eligibility in order for a plea to be voluntary).
- 57 *But see Garces v. U.S. Atty. Gen.*, 611 F.3d 1337, 1344, n. 7 (11th Cir. 2010) (“[N]either the Supreme Court nor this Court has specifically held that a defendant’s ignorance of immigration consequences renders his guilty plea involuntary”).
- 58 *Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941).
- 59 *Boykin v. Alabama*, 395 U.S. 238, 242, 243-44 (1969); *see also Ford*, 86 N.Y.2d at 402-03 (A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences.”).
- 60 *Brady*, 397 U.S. at 755; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) (“For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege”); *Boykin*, 395 U.S. at 244 (requiring that the record demonstrate “a full understanding of what the plea connotes and of its consequence”); *United States v. Cottle*, 355 Fed. Appx. 18 (6th Cir. 2009) (holding that for plea to be voluntary, defendant need only be aware of direct consequences); *People v. Gravino*, 14 N.Y.3d 546, 559 (2010) (holding that because issues of concern to defendant were not direct consequences of plea, the “judge’s failure to mention them does not, by itself, demonstrate that a plea was not knowing, voluntary and intelligent”).

- 61 *Brady*, 397 U.S. at 758 (emphasis added).
- 62 *United States v. Vonn*, 535 U.S. 55, 58, (2002) (explaining that Rule 11 is “meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea.”).
- 63 See FED. R. CRIM. P. 11, Advisory Committee’s Note (1974) (“Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant.”).
- 64 *People v. Latham*, 90 N.Y.2d 795, 798 (1997) (citations omitted).
- 65 FED. R. CRIM. P. 11(c)(1).
- 66 See discussion of proposed revisions, *infra* notes 84-85.
- 67 *Cuthrell*, 475 F.2d at 1366; see also *United States v. Hubbard*, 304 Fed. Appx. 524, 526 (9th Cir. 2008) (“A consequence is ‘direct’ where it presents ‘a definite, immediate and largely automatic effect’ on the defendant’s range of punishment.” (quoting *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir.1997) and *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir.1988) (“The distinction between a direct and collateral consequence of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment”))); *United States v. Bouthot*, 878 F.2d 1506, 1511 (1st Cir. 1989).
- 68 See, e.g., *People v. Ford*, 86 N.Y.2d, at 403; *Appleby v. Warden, N. Reg’l Jail & Corr. Facility*, 595 F.3d 532, 540 (4th Cir. 2010); see also *U.S. v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000); see also *Smith v. State*, 287 Ga. 391, 392 (Ga. 2010) (“Direct consequences may be described as those within the sentencing authority of the trial court, as opposed to the many other consequences to a defendant that may result from a criminal conviction.” (quoting *Padilla*, 130 S. Ct. at 1481)).
- 69 See, e.g., *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971) (per curiam) (“We presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded collateral consequences”); see also *Appleby v. Warden, N. Reg’l Jail & Corr. Facility*, 595 F.3d 532, 540 (4th Cir. 2010) (explaining that, like many of its sister circuits, it has defined the term “direct” used by the *Brady* Court by focusing on a dichotomy between “direct” and “collateral” consequences of a plea) (citations omitted); *Virsnieks v. Smith*, 521 F.3d 707, 715 (7th Cir. 2008) (“[A]lthough a defendant must be informed of the direct consequences flowing from a [guilty] plea, he need not be informed of collateral consequences”); *Meyer v. Branker*, 506 F.3d 358, 367-68 (4th Cir. 2007) (“For a guilty plea to be constitutionally valid, a defendant must be made aware of all the ‘direct,’ but not the ‘collateral,’ consequences of his plea”), *cert. denied*, 128 S. Ct. 2975, 171 L. Ed. 2d 899 (2008).
- 70 *Virsnieks*, 521 F.3d at 716.
- 71 Most federal circuits to consider the matter prior to *Padilla* have held deportation to be a collateral consequence of a guilty plea about which courts are not required to inform a defendant. See e.g., *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002); *United States v. Amador-Leal*, 276 F.3d 511, 517 (9th Cir. 2002); *Gonzalez*, 202 F.3d at 27-28; *United States v. Osiemi*, 980 F.2d 344, 349 (5th Cir. 1993); *United States v. Montoya*, 891 F.2d 1273, 1292-93 (7th Cir. 1989); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988); *Campbell*, 778 F.2d at 767; *United States v. Russell*, 686 F.2d 35, 39 (D.C. Cir. 1982); *Michel v. United States*, 507 F.2d 461, 464-66 (2d Cir. 1974); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973). The remaining federal circuits that have not directly addressed the issue have signaled that they would reach the same holding if they received a case involving similar facts. E.g., *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 n.4 (10th Cir. 2004) (citing with approval cases from sister circuits holding that trial court is under no duty to inform defendants of immigration consequences of guilty pleas); *Kandiel v. United States*, 964 F.2d 794, 796 (8th Cir. 1992) (holding that immigration consequences remain collateral to a criminal conviction and citing circuit cases with this holding with approval). For an overview of cases in which state courts have

come down on both sides of this question, see Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L. J. 31, n. 17 (2010).

72 *United States v. Amador-Leal*, 276 F.3d 511, 517 (9th Cir. 2002).

73 *Id.* (emphasis added).

74 *Id.* (citing *INS v. St. Cyr*, 121 S. Ct. 2271, 2291 (2001) and *Magana Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)).

75 *See People v. Zaidi*, 147 Cal. App. 4th 1470, 1485 (Cal. Ct. App. 2007) (“A collateral consequence to a plea is one that does not ‘inexorably follow’ from the conviction of the offense to which the plea is made.”).

76 *See id.* (“The fact a court has discretion not to impose the registration requirement for some offenses does not relieve it of the obligation to advise the defendant that registration is a possible consequence.”).

77 *Padilla*, 130 S. Ct. at 1481 n.8.

78 *See id.* at 1481 (“This Court has] 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. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.”).

79 *See also Garces v. United States AG*, 611 F.3d 1337, 1344 n.7 (11th Cir. 2010) (“[N]either the Supreme Court nor this Court has specifically held that a defendant’s ignorance of immigration consequences renders his guilty plea involuntary.” (citing *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985) (holding that because deportation is merely a collateral consequence of criminal conviction, there is no federal constitutional right to be warned of it); *Padilla*, 130 S.Ct. at 1481-82 (recognizing disagreement among courts as to whether deportation is a direct or a collateral consequence of conviction, and declining to decide the question))).

80 *Padilla*, 130 S. Ct. at 1473 n.8.

81 *Id.* at 1482.

82 *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988); *see also People v. Ford*, 86 N.Y.2d 397, 403 (N.Y. 1995).

83 According to Evelyn Cruz, the majority did not address Justice Alito’s concern that the Court’s holding in *Padilla v. Kentucky* would derail efforts to require criminal courts to provide noncitizen warnings. However, she argues that the majority’s silence “should not be interpreted to mean that the Court finds that noncitizen warnings are superfluous after *Padilla v. Kentucky*. Rather, Justice Stevens seems to be limiting the court’s attention to the role of counsel in the criminal process and not closing the door on the utility of [judicial] noncitizen warnings.” Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 65 (2010).

84 In discussing the proposed amendment, one member of the Criminal Rules Committee reportedly stated “spoke out in strong support of the amendment, arguing that it is necessary because immigration cases now comprise a huge portion of the federal caseload and because *Padilla* emphasized the importance of immigration consequences.” Advisory Committee on Criminal Rules, Draft Minutes, Sept. 27-28, 2010 Cambridge, Massachusetts, at 13, in Advisory Committee on Criminal Rules, April 11-12, 2011, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2011-04.pdf> [hereinafter Advisory Committee on Criminal Rules]. The report from the Committee meeting goes on to state, “Several other members spoke in favor of the proposed amendment. One agreed that *Padilla* was limited to the duty of defense counsel to warn a defendant about immi-

gration consequences, but argued that the Supreme Court’s logic also supported requiring a judge to issue a similar warning.” *Id.*, at 14.

85 Advisory Committee on Criminal Rules, at 54.

86 Underlying *Padilla* was an acknowledgment that a fair criminal justice system must take into account the reality that convictions are “enmeshed” with a range of significant and predictable consequences for people beyond the actual criminal sentence meted out by the judge. While the Court’s decision concerned deportation specifically, criminal convictions carry a range of other serious, identifiable penalties including public housing termination, loss of employment, sex offense registration, disenfranchisement, and student loan ineligibility. For a discussion of the range of collateral consequences of criminal convictions, see THE BRONX DEFENDERS, PADILLA CHECKLIST FOR JUDGES: PROPER CONSIDERATION OF “ENMESHED PENALTIES” (OR COLLATERAL CONSEQUENCES) IN A CRIMINAL CASE (2010), <http://www.reentry.net/ny/search/attachment.192904>.

87 *Padilla*, 130 S. Ct. at 1486 & n.15.

88 See ALASKA R. CRIM. P. 11(c)(3); ARIZ. R. CRIM. P. 17.2(f); CAL. PENAL CODE § 1016.5 (West 2011); CONN. GEN. STAT. ANN. § 54-1j (2011); D.C. CODE ANN. § 16-713 (2001); FLA. R. CRIM. P. 3.172(c)(8) (West 2011); GA. CODE ANN. § 17-7-93(c) (West 2010); HAW. REV. STAT. § 802E-2 (West 2011); IDAHO CRIM. R. 11 (West 2011); 725 ILCS 5/113-8 (West 2011); IOWA CT. R. 2.8(2)(b)(3), (5) (2011); ME. R. CRIM. P. 11(h) (2010); MD. RULE 4-242(e) (2011); MASS. GEN. LAWS ANN. ch. 278, § 29D (2011); MINN. R. CRIM. P. § 15.01(1)(10)(d), 15.02(2) (2011); MONT. CODE ANN. § 46-12-210(1)(f) (West through 2009 legislation); NEB. REV. STAT. § 29-1819.02 (West through 101<sup>st</sup> Legis. Sess. 2010); N.M. DIST. CT. R. CR. P. 5-303(F)(5) (West 2011); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2011); N.C. GEN. STAT. § 15A-1022(a)(7); OHIO REV. CODE ANN. § 2943.031 (Baldwin through 129<sup>th</sup> Legis. Sess. 2011-2012); OR. REV. STAT. § 135.385(2)(d) (West through Ch. 236 of 2011 Legis. Sess.); P.R. LAWS ANN. tit. 34, App. II, Rule 70 (2010); R.I. GEN. LAWS § 12-12-22 (West 2010); TEX. CODE CRIM. PROC. ANN. art. § 26.13(a) (4) (Vernon through Ch. 41 of 2011 Legis. Sess.); VT. STAT. ANN. tit. 13 § 6565(c) (West through No. 13 of 2011 portion of 2011-2012 Legis. Sess.); WASH. REV. CODE § 10.40.200 (West 2011); WIS. STAT. § 971.08(1)(c) (West 2011).

In Colorado and Indiana, courts require advice of possible deportation in at least some cases. *See, e.g.* *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

89 These statutes come from California, Connecticut, District of Columbia, Oregon, Nebraska, Rhode Island, Massachusetts, Vermont, Washington, and Wisconsin. *See* CAL. PENAL CODE § 1016.5(b); CONN. GEN. STAT. § 54-1j(a), (c) (allowing motions to vacate within three years of a plea); D.C. CODE ANN. § 16-713(a); NEB. REV. STAT. § 29-1819.02(2); MASS. GEN. LAWS ANN. ch. 278, § 29D; OHIO REV. CODE ANN. § 2943.031(A), (D); R.I. GEN. LAWS § 12-12-22(a); 13 VT. STAT. ANN. tit. 13 § 6565(c)(2); WASH. REV. CODE (ARCW) § 10.40.200(2), (3); WIS. STAT. § 971.08.

90 For example, see the New York City Bar proposals to amend N.Y. Criminal Procedure Law sections 170.10, 180.10, 210.15 and 220.50 to permit, *inter alia*, “a plea withdrawal pre-sentencing and a conviction vacatur and plea withdrawal post-judgment, respectively, if the court fails to give the requires advisal prior to entry of a guilty plea, and the defendant shows that plea acceptance my have negative consequences.” *Supra* note 17 & accompanying text.

91 Maine is the only state in the country that affirmatively requires courts to ask about the citizenship of criminal defendants at the time of accepting a plea. Of at least thirty-six states that use written plea forms for pleas of guilty or nolo contendere, New Jersey and Ohio are the only two to require the party submitting the plea to indicate his or her citizenship status. Question 17(a) of New Jersey’s form, for example, asks “Are you a citizen of the United States?” *See* New Jersey Judiciary Plea Form, N.J. Dir. 14-08, at 3 ¶ 17 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9) ([http://www.judiciary.state.nj.us/forms/10079\\_main\\_plea\\_form.pdf](http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf)); *see also* N.J. Dir. 08-09, supplementing 14-08, at [http://www.judiciary.state.nj.us/directive/2009/dir\\_08-09.pdf](http://www.judiciary.state.nj.us/directive/2009/dir_08-09.pdf). Question 8 of Ohio’s form contains

a brief advisal and the following language: “With this in mind, I state to the court that: “I am a United States citizen [ ] I am not a United States citizen [ ].”

- 92 The states with statutes explicitly prohibiting inquiry into citizenship/immigration status at the time of a guilty or no contest plea are Arizona, California, Connecticut, Maryland, Massachusetts, Nebraska, Ohio, Rhode Island, Washington, and Wisconsin. *See* ARIZ. R. CRIM. P. 17.2(f); CAL. PENAL CODE § 1016.5(d); CONN. GEN. STAT. ANN. § 54-1j(b); MD. RULE 4-242(e) (specifying in Committee note that court should not question defendants about citizenship status); MASS. GEN. LAWS ANN. ch. 278, § 29D; NEB. REV. STAT. §29-1819.03 (providing legislative findings and intent); OHIO REV. CODE ANN. (ORC Ann.) § 2943.031(C); R.I. GEN. LAWS § 12-12-22(d); WASH. REV. CODE (ARCW) § 10.40.200(1); WIS. STAT. § 971.06(c)(3). Ohio’s statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031(C).
- 93 Florida’s statute indicates that it is “not necessary for the trial judge to inquire” about immigration status when giving an admonition about the immigration consequences of a plea. FLA. R. CRIM. P. § 3.172(c)(8).
- 94 *See* N.Y. Assemb. B. A04957, 2009-2010 Reg. Sess. (N.Y. 2009), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A04957&term=2009&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A04957&term=2009&Summary=Y&Text=Y) (last visited July 4, 2011). The text of the bill includes a statement of legislative intent that “at the time of the plea no defendant shall be required to disclose his or her legal status to the court,” and repeats the following provision in all proposed new or amended subsections of the N.Y. CRIMINAL PROCEDURE LAW §§ 170.10, 180.10, 210.15, 220.50: “This advisement shall be given to all defendants and no defendant shall be required to disclose his or her legal status in the United States to the court.” *See id.*, proposed text of: 8 §170.10(4), §180.10(7), §210.15(4), §220.50(7), § 220.60 (5)-(6). For further discussion, see also [http://www.nycbar.org/pdf/report/advisal\\_bill.pdf](http://www.nycbar.org/pdf/report/advisal_bill.pdf).
- 95 ARIZ. R. CRIM. P. 17.2(f).
- 96 *See supra* note 91 (discussing written plea forms).
- 97 Although some state statutes, including those in New Mexico, Connecticut and California, stipulate that courts should ascertain whether defendants have received advice from their attorneys and permit time for them to do so, none currently indicate that the provision of such advice by counsel is mandatory.
- 98 *See supra* Part II.A.i and *infra* Part III.B.3 (discussing why judges should not require defendants or their attorneys to disclose immigration/citizenship status in the course of ensuring compliance with *Padilla*).
- 99 *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011).
- 100 *See Hernandez v. State*, 2011 WL 1262148 (Fla. Dist. Ct. App. Apr. 6, 2011) (finding judicial advisal required under Florida Rule of Criminal Procedure 3.172(c)(8) law to be constitutionally deficient because it requires judges to warn defendants at plea colloquy that they “may” suffer immigration consequences even when automatic deportability is “ ‘truly clear,’ non-discretionary consequence”). The Florida appellate court stated:

Until *Padilla* was announced, it was understood in Florida that the specific, but equivocal, language in Rule 3.172(c)(8) was sufficient to survive post-conviction challenge—including claims of ineffective assistance of counsel. ... But this orderly landscape has been repainted. It is now the law in this and every other state that constitutionally competent counsel must advise a noncitizen/defendant that certain pleas and judgments will, not “may,” subject the defendant to deportation. ...[I]n our view the ruling in *Padilla* does not turn on the fact that the Kentucky trial court and plea colloquy failed to include a “may subject you to deportation” type of warning. It turns on the fact that a “may” warning is deficient (and is actually misadvice) in a case in which the plea “will” subject the defendant to

deportation. We anticipate that Rule 3.172(c)(8) will require an amendment to comport with the holding in *Padilla*.

*Id.* at 6.

- 101 See ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, 3D ED., available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_trialjudgeold.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudgeold.html) (last visited July 4, 2011).
- 102 ABA CRIMINAL JUSTICE STANDARDS PLEAS OF GUILTY, [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pleas\\_guilty.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf).
- 103 *Id.* at 58-59.
- 104 *Id.* at 59.
- 105 Maryland Judicial Ethics Committee, Op. Request No. 2008-43, at 2-3 (Jan. 30, 2009) (“At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant’s Immigration Status”), [http://www.courts.state.md.us/ethics/opinions/2000s/2008\\_43.pdf](http://www.courts.state.md.us/ethics/opinions/2000s/2008_43.pdf).
- 106 ABA CRIMINAL JUSTICE SECTION STANDARDS, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, 19-2.3 (“The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law.”), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_standards\\_collateralsanctionwithcommentary.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf) [hereinafter ABA COLLATERAL SANCTIONS].
- 107 ABA COLLATERAL SANCTIONS, Standard 19-1.1 at 15 (emphasis added).
- 108 See Commentary to Standard 19-1.1, in ABA COLLATERAL SANCTIONS, at 16.
- 109 Courts have held that the distinction between a direct and collateral consequence of a plea turns on whether the consequences is “a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” See discussion, *supra* at Part II.A.ii.
- 110 See *supra* Part II.B (discussing state statutory advisal requirements that existed pre-*Padilla*). In light of *Padilla*, some of the existing statutes requiring court-issued advisals on immigration consequences may be inaccurate or outdated. For example, some states, such as New York, only require the issuance of an advisal in cases involving felony pleas, despite the fact that some misdemeanors also may have severe immigration consequences. None of the statutory advisal requirements currently in effect references the obligation of defense counsel to provide specific, individualized advice to their clients about immigration consequences.
- 111 See *supra* Part II.C (discussing judges’ ethical obligations).
- 112 *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010) (“[I]nformed 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.”).
- 113 See *Shelton v. Alabama*, 535 U.S. 654 (2002) (holding that whether defendant is entitled to assistance of counsel depends on whether criminal punishment includes possibility of incarceration, even if as a suspended sentence).
- 114 *Padilla*, 130 S. Ct. at 1477 (“[I]nformed 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.”).
- 115 See *infra*, recommendations III.B.3 (discussing problems with judicial inquiry into status).

- 116 *See, Ellington v. U.S.*, 2010 WL 1631497 (S.D.N.Y. Apr. 20, 2010) (suggesting that even judicial warning of possibility removes prejudice). In that case, the judge asked “Do you recognize that your plea of guilty to the offense outlined in the indictment may affect your ability to remain within the United States?” to which Ellington responded, “Yes, sir.” From this exchange, cited in the court’s opinion, the court concluded: “Therefore, any failure to inform “is of no consequence since Judge Fox explained the issue in open court.”
- 117 *See, e.g., U.S. v. Bonilla*, 2011 WL 833293, 4 (9th Cir. 2011) (citing *Padilla* for the proposition that “a criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty” and holding that defendant could withdraw his plea due to counsel’s failure to advise him that he would almost certainly be deported).
- 118 *See, e.g. Hernandez v. State*, 2011 WL 1262148, 6 (Fla. Dist. Ct. App. Apr. 6, 2011).
- 119 For a description of T- and U-visa eligibility criteria, *see* U.S. Citizenship and Immigration Services (USCIS), Other Ways to Get a Green Card, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=5a97a6c515083210VgnVCM10000082ca60aRCRD&vgnnextchannel=5a97a6c515083210VgnVCM10000082ca60aRCRD> (last visited July 4, 2011).
- 120 The ABA *Standards for Criminal Justice* acknowledge that a court’s last minute, formal inquiry into the defendant’s understanding of the consequences of the plea is not an adequate substitute for advice by counsel. ABA STANDARDS FOR CRIMINAL JUSTICE, § 14-1.4(c) cmt. The Standards suggest that only tailored advice from counsel can produce the “mature reflection” necessary to ensure that the defendant’s acceptance of the plea is in fact knowing, voluntary, and intelligent. *Id.* at § 14-3.2 cmt.
- 121 There is a split in the case law regarding the impact that a court advisal has on defendants’ later ineffective assistance of counsel claims and motions for post-conviction relief. A recent decision by the Supreme Court of Washington, one of the states that requires judicial advisement by statute, concludes that “the guilty plea statement warnings required by RCW 10.40.200(2) cannot save the advice that counsel gave.” It roots this argument in *Padilla*; the Supreme Court cited to the fact that “many States require trial courts to advise defendants of possible immigration consequences” as evidence of “how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” *Padilla*, 130 S. Ct. at 1486 & n.15. The Court did not suggest that such warnings excuse defense attorneys from providing the requisite advice, but rather that they underscore the importance of individualized advice from counsel regarding potential immigration consequences. *See State v. Sandoval*, 2011 Wash. LEXIS 247, 13-14 (Wash. Mar. 17, 2011); *see also People v. Garcia*, 907 N.Y.S.2d 398, 407 (N.Y. Sup. Ct. 2010) (“Court’s general warning will not automatically cure counsel’s failure nor erase the consequent prejudice.”); *but see State v. Gallegos-Martinez*, 2010 WL 5550237, 2010 Ohio 6463, ¶ 39 (Ohio Ct. App. 2010) (denying post-conviction relief for individual who received court advisal and plea form containing statement regarding immigration consequences for non-citizens on grounds that defendant failed to show prejudice as result of lack of advice from counsel, “ i.e. that he would not have pleaded guilty had his attorney rather than the trial court given the advice”); *U.S. v. Gonzalez*, 2010 WL 3465603 (S.D.N.Y. 2010) (holding that defendant failed to establish prejudice where court told him that he would be deported if he pled guilty: “Assuming that Gonzalez’s trial attorney failed to advise him that he could be deported as a result of pleading guilty, that failure was not prejudicial since, prior to accepting his plea, I [the judge] advised Gonzalez that he could be deported as a result of his guilty plea.”).

However, those courts that have interpreted judicial advisals to eliminate any prejudice resulting from an attorney’s failure to advise her client about immigration consequences of a plea or conviction misunderstand the distinction between individualized attorney advice based on the particular facts of a defendant’s case immigration status and a generic blind warning or statement of rights that a judge might provide. Under no circumstances can a judicial advisal substitute for the tailored advice

that counsel has an obligation to provide. The complexities of immigration law are such that the consequences of a given plea or conviction could vary substantially between one defendant and another, depending on the defendant's specific circumstances, prior immigration and criminal history, and a host of other facts. A judge neither has the capacity nor the responsibility to investigate the individual facts of a case or take all those factors into consideration and tailor an advisal accordingly to ensure its accuracy.

122 101 P.3d 799 (N.M. 2004).

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

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

125 FLA. R. CRIM. P. 3.172(c)(8).

- 126 *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific ‘articulable’ facts that warrant suspicion vehicle contains “aliens who may be illegally in the country” and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion. *Id.* (“[T]he Supreme Court has repeatedly held that reliance ‘on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.’” (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986))). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9<sup>th</sup> Cir. 1994) (finding that officer’s stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986) (upholding finding that INS engaged in pattern of unlawful stops (seizures) to interrogate individuals based on Hispanic appearance, in violation of Fourth Amendment). *But see Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) (“The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen ...”), *vacated and remanded by Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful detention/custody). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny. *See Nyquist v. Manclot*, 432 U.S. 1 (1977); *Castro v. Holder*, 593 F.3d 638, 640-41 (7th Cir. 2010).
- 127 Immigrant Defense Project, *Ensuring Compliance With Padilla v. Kentucky Without Compromising Judicial Obligations Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status* (Nov. 2010), [http://www.immigrantdefenseproject.org/docs/2011/IDP\\_Judicial\\_Inquiry\\_Into\\_Status\\_Nov2010\[1\].pdf](http://www.immigrantdefenseproject.org/docs/2011/IDP_Judicial_Inquiry_Into_Status_Nov2010[1].pdf).
- 128 *See* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 1.2, 1.3, 2.2, 2.3, & associated cmts. (2007), *available at* [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf).
- 129 For some representative examples, see ALA. CANONS OF JUDICIAL ETHICS Canons 1-3; 22 N.Y. COMP. CODES R. & REGS. §§ 100.1, 100.2, 100.3(B)(3)-(4); ALASKA C.J.C. Pts. R1-R3 (2010); GA. CODE OF JUDICIAL CONDUCT Canons 2 -3 (2009), OHIO JUD. RULES R. 2.2, 2.3 (2010) (“Rule 2.3 is identical to [ABA] Model Rule 2.3.”); CAL. CODE JUDICIAL ETHICS Canons 2-3 (1996); N.Y. CODE OF JUDICIAL CONDUCT, Canons 2-3 (1996).
- 130 Maryland Judicial Ethics Committee, *supra* note 105, at 2-3.
- 131 *See In re Hammermaster*, 985 P.2d 924, 941-42 (Wash. 1999) (finding that judge’s practice of inquiring about citizenship of some defendants in criminal cases violated Washington’s Code of Judicial Conduct, requiring judges to be patient, dignified, and courteous).
- 132 *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) (“The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual’s immigration status. For example, government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage.” (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975))).
- 133 For a discussion of the chilling effect on reporting of crime and cooperation with police, see NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES, 1-4 (April 2009), <http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf>. The report explains how the immigration

consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

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

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

134 *Padilla*, 130 S. Ct. at 1477.

135 535 U.S. 654 (2002) (“[A] suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime.”).

136 See *Padilla*, 130 S. Ct. at 1483 (citing *St. Cyr*, 533 U.S. at 323).

137 See *supra* note 91 (discussing written plea forms).



## Appendix 1:

### Additional Resources for Judges on *Padilla* and its Implications for Courts

1. ***Ensuring Compliance with Padilla v. Kentucky without Compromising Judicial Obligations: Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status***, Immigrant Defense Project (Jan. 2011) [http://www.immigrantdefenseproject.org/docs/2011/IDP\\_Judicial\\_Inquiry\\_Into\\_Status\\_Nov2010%5B1%5D.pdf](http://www.immigrantdefenseproject.org/docs/2011/IDP_Judicial_Inquiry_Into_Status_Nov2010%5B1%5D.pdf)
2. ***Padilla and Beyond: An ABA Criminal Justice Section Publication***, Featuring materials and an instructional video from The Criminal Justice Section Symposium at the Newseum in Washington, D.C. (2010) <http://adwww2.americanbar.org/sections/criminaljustice/CR109200/PublicDocuments/padilla.pdf>
3. ***Implications of Padilla v. Kentucky on the Duties of State Court Criminal Judges***, Steven Weller and John A. Martin, Center for Public Policy Studies (Jul. 2010) [www.sji.gov/PDF/Implications\\_of\\_Padilla\\_for\\_State\\_Court\\_Judges.pdf](http://www.sji.gov/PDF/Implications_of_Padilla_for_State_Court_Judges.pdf); also published as Steven Weller & John A. Martin, *Implications of Padilla v. Kentucky for the Duties of the State Court Criminal Judge*, **JUDGES' J.**, Winter 2011, at 13
  - Describes the growing number of state statutory requirements of judges with regard to noncitizen criminal defendants, including simple advisement and more detailed investigation of the advice that defendant has received.
  - Explains that judges may feel ethical duty to assure fundamental fairness for immigration defendants.
  - Discusses judicial duties in appointing counsel and addressing unrepresented defendants.
  - Identifies questions and issues of debate regarding judicial responsibility that have arisen post-*Padilla* and recommends that judges be aware of how different alternative approaches may affect federal regulation of immigration, the effectiveness of state and local justice systems, and fairness to individual defendants and their families.
4. **New York City Bar Association, *Padilla v. Kentucky: The New York City Criminal Court System One Year Later: A Report of the Criminal Courts and Criminal Justice Operations Committees of the New York City Bar Association*** (June 2011) <http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOREportFINAL6.15.11.pdf>
5. **Immigr. Law & Crimes § 4:3.50 (2011) (Motion to withdraw plea of guilty—Published cases discussing *Padilla*)**
  - Summarizes published federal and state decisions through April 5, 2011, which address motions to vacate guilty pleas and other forms of post-conviction relief. Note: many of the decisions addressing these issues post-*Padilla* are unpublished.



## Appendix 2:

### Excerpts from State Statutes Requiring Judicial Advisals

The following are excerpts from state statutes requiring courts to issue advisals (otherwise known as advisements) to defendants prior to accepting pleas of guilty or nolo contendere. The excerpts include statutory instructions to judges and mandated advisal language, where provided in the text of the law.

#### **Alaska**

Alaska R. Crim. Proc. 11(c)(3)(C) – amended by Supreme Court Order 1590, effective Apr. 15, 2006

##### 11. PLEAS

(c) Pleas of Guilty or Nolo Contendere. — The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

[...] (3) informing the defendant:

[...] (C) that if the defendant is not a citizen of the United States, a conviction of a crime may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to federal law

#### **Arizona**

Ariz. R. Crim. P. 17.2(f) – (f) added in December 1, 2004

17.2. Duty of court to advise of defendant's rights and of the consequences of pleading guilty or no contest, or of admitting guilt, or of submitting on the record.

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:

[...] f. That if he or she is not a citizen of the United States, the plea may have immigration consequences. Specifically, the court shall state,

“If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.”

The court shall also give the advisement in this section prior to any admission of facts sufficient to warrant finding of guilt, or prior to any submission on the record. The defendant shall not be required to disclose his or her legal status in the United States to the court.

#### **California**

Cal Pen Code § 1016.5 – 1977

1016.5. (Operative Term Contingent) Required advisement to alien before acceptance of guilty or nolo contendere plea.

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

(c) With respect to pleas accepted prior to January 1, 1978, it is not the intent of the Legislature that a court's failure to provide the advisement required by subdivision (a) of Section 1016.5 should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

(d) The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction. It is further the intent of the Legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court.

## **Connecticut**

Conn. Gen. Stat. § 54-1j — enacted in 1982, by P.A. 82-177; amended in 1997 by P.A. No. 97-256 and in 2003 by P.A. 03-81

54-1j. Ascertainment that defendant understands possible immigration and naturalization consequences of guilty or nolo contendere plea.

(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea.

(b) The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court.

(c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.

## **D.C.**

D.C. Code § 16-713(a) – 1981; amended by Mar. 10, 1983, D.C. Law 4-202, § 2, 30 DCR 173

16-713. Alien sentencing

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant:

“If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

(b) Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement. If the court fails to advise the defendant as required by subsection (a) and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by subsection (a), the defendant shall be presumed not to have received the required advisement.

## **Florida**

Fla. R. Crim. P. 3.172(c)(8) – (c)(8) added by 536 So. 2d 992 in 1988

3.172. Acceptance of Guilty or Nolo Contendere Plea

(c) *Determination of Voluntariness.* --Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:

[...] (8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the **plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service.** It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases;

**\*\*Note:** In April 2011, a Florida district court of appeals found the statute to be constitutionally deficient post-*Padilla* because it requires judges to warn defendants at plea colloquy that they “may” face immigration consequences when, in some cases, deportation is a “truly clear,” non-discretionary consequence”) See *Hernandez v. State*, 2011 WL 1262148, Fla. App. 3 Dist. (Apr. 6, 2011).

## **Georgia**

O.C.G.A. § 17-7-93(c) – 1982

17-7-93. Reading of indictment or accusation; answer of accused to charge; recordation of “guilty” plea and pronouncement of judgment; withdrawn guilty pleas; pleas by immigrants [...] (c) In addition to any other inquiry by the court prior to acceptance of a plea of guilty, the court shall determine whether the defendant is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status. This subsection shall apply with respect to acceptance of any plea of guilty to any state offense in any court of this state or any political subdivision of this state.

## **Hawaii**

HRS § 802E-2 – 1988

802E-2. Court advisement concerning alien status required.

Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.

## **Idaho**

I.C.R. Rule 11(d) – adopted 1979, amended 1984, 1985, 1987, 1988, 1991, 2007

Rule 11. Pleas.

(d) Other advisories upon acceptance of plea.

The district judge shall, prior to entry of a guilty plea or the making of factual admissions during a plea colloquy, instruct on the following:

(1) The court shall inform all defendants that if the defendant is not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal status in the United States, or denial of an application for United States citizenship.

## **Illinois**

725 ILCS 5/113-8 – 2004

113-8. Advisement concerning status as an alien.

Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court:

“If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.”

## **Iowa\***

Iowa R. Crim. P. 2.8(2)(b)(3)

2.8 Arraignment and plea.

(2) Pleas to the indictment or information.

[...] b. Pleas of guilty. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:  
[...]

(3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.

## **Maine\***

Me. R. Crim. P. 11(h)

Rule 11. Pleas; Acceptance of A Plea to A Charge of A Class C or Higher Crime; Notice as to Possible Immigration Consequences

[...] (h) Immigration Consequences of the Plea. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any immigration consequences.

## **Maryland**

Md. Rule 4-242(e) – 1999

4-242. Pleas

(e) Collateral consequences of a plea of guilty or nolo contendere. Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship, (2) that by entering a plea to the offenses set out in Code, Criminal Procedure Article, § 11-701, the defendant shall have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, § 11-701 (p), and (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

Committee note. -- In determining whether to accept the plea, the court should not question defendants about their citizenship or immigration status. Rather, the court should ensure that all defendants are advised in accordance with this section. This Rule does not overrule *Yoswick v. State*, 347 Md. 228 (1997) and *Daley v. State*, 61 Md. App. 486 (1985).

## **Massachusetts**

Mass ALM GL. ch. 278, § 29D – 1978 (language amended by 1996 Mass. ALS 450 in 1996)

29D. Conviction Upon Plea of Guilty or Nolo Contendere; Motion to Vacate.

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following:

“If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.”

The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States. If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission to sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

## **Minnesota\***

Minn. R. Crim. P. § 15.01(Subd. 1)(6)(l)

15.01 FELONY AND GROSS MISDEMEANOR CASES

Subdivision 1. Guilty Plea. Before the judge accepts a guilty plea, the defendant must be sworn and questioned by the judge with the assistance of counsel as to the following:

6. The judge must also ensure defense counsel has told the defendant and the defendant understands:

l. If the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

## **Montana**

Mont. Code Ann. § 46-12-210(1)(f) – (f) added by 1991 Mt. ALS 73 in 1991

46-12-210 Advice to defendant.

(1) Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

(f) if the defendant is not a United States citizen, a guilty or nolo contendere plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law.

## **Nebraska**

R.R.S. Neb. § 29-1819.02 – 2002

29-1819.02. Plea of guilty or nolo contendere; advisement required; effect

(1) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.

(2) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

(3) With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required by subsection (1) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

## **New Mexico**

N.M. Magistrate Ct. R. Cr. P. 6-502(B)(5) – December 15, 2007

6-502 Pleas and plea agreements

B. Advice to defendant. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 6-110A NMRA, informing the defendant of and determining that the defendant understands the following:

[...]

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

## **New York**

NY CLS CPL § 220.50(7) – June 15, 1995 (repealed September 1, 2011)

220.50. Plea; entry of plea

7. [Repealed Sept 1, 2011] Prior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. Where the plea of guilty is to a count or counts of an indictment charging a felony

offense other than a violent felony offense as defined in section 70.02 of the penal law or an A-I felony offense other than an A-I felony as defined in article two hundred twenty of the penal law, the court must also, prior to accepting such plea, advise the defendant that, if the defendant is not a citizen of the United States and is or becomes the subject of a final order of deportation issued by the United States Immigration and Naturalization Service, the defendant may be paroled to the custody of the Immigration and Naturalization Service for deportation purposes at any time subsequent to the commencement of any indeterminate or determinate prison sentence imposed as a result of the defendant's plea. The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization.

### **North Carolina\***

N.C. Gen. Stat. § 15A-1022(7)

15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

[...] (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

### **Ohio**

ORC Ann. 2943.031(A) – October 2, 1989

2943.031. Advice as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea

(A) Except as provided in division (B) of this section, prior to accepting a plea of guilty or a plea of no contest to an indictment, information, or complaint charging a felony or a misdemeanor other than a minor misdemeanor if the defendant previously has not been convicted of or pleaded guilty to a minor misdemeanor, the court shall address the defendant personally, provide the following advisement to the defendant that shall be entered in the record of the court, and determine that the defendant understands the advisement:

“If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

Upon request of the defendant, the court shall allow him additional time to consider the appropriateness of the plea in light of the advisement described in this division.

(B) The court is not required to give the advisement described in division (A) of this section if either of the following applies:

(1) The defendant enters a plea of guilty on a written form, the form includes a question asking whether the defendant is a citizen of the United States, and the defendant answers that question in the affirmative;

(2) The defendant states orally on the record that he is a citizen of the United States

(C) Except as provided in division (B) of this section, the defendant shall not be required at the time of entering a plea to disclose to the court his legal status in the United States.

(D) Upon motion of the defendant, the court shall set aside the judgment and permit the defendant to withdraw a plea of guilty or no contest and enter a plea of not guilty or not guilty by reason of insanity, if, after the effective date of this section, the court fails to provide the defendant the advisement described in division (A) of this section, the advisement is required by that division, and the defendant shows that he is not a citizen of the United States and that the conviction of the offense to which he pleaded guilty or no contest may result in his being subject to deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(E) In the absence of a record that the court provided the advisement described in division (A) of this section and if the advisement is required by that division, the defendant shall be presumed not to have received the advisement.

## **Oregon**

ORS § 135.385 (d) – 1973 or 1979 (Laws 1973, c. 836, § 167; Laws 1979, c. 118, § 1)

135.385 Defendant to be advised by court.

(2) The court shall inform the defendant:

[...] (d) That if the defendant is not a citizen of the United States conviction of a crime may result, under the laws of the United States, in deportation, exclusion from admission to the United States or denial of naturalization.

## **Rhode Island**

R.I. Gen. Laws § 12-12-22(a) – 1984 (subsections (b), (c) and (d) added by 2000 R.I. ALS 500 in 2000)

12-12-22. Arraignments and Pleas -- Notices to aliens

(a) At the time of criminal arraignment in the district or superior court, each defendant shall be informed that if he or she is an alien in the United States, a plea of guilty or nolo contendere may affect his or her immigration status. Failure to so inform the defendant at the arraignment shall not invalidate any action subsequently taken by the court.

(b) Prior to accepting a plea of guilty or nolo contendere in the district or superior court, the court shall inform the defendant that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States. Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of this advisement.

(c) If the court fails to so inform the defendant as required by this section, and the defendant later shows that his plea and conviction may have immigration consequences, the defendant shall be entitled, upon a proper petition for post-conviction relief, to have the plea vacated. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not have received the advisement.

(d) The defendant shall not be required at the time of the plea to disclose to the court his or her legal status in the United States.

## **Texas\***

Tex. Code Crim. Proc. art. 26.13(a)(4)

Art. 26.13. Plea of Guilty

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

[...] (4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law

## **Vermont**

V.R.Cr.P. Rule 11(c)(7) – 2006

Rule 11. Pleas

[...]

(c) Advice to Defendant. -- The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

[...] (7) if the defendant is not a citizen of the United States, admitting to facts sufficient to warrant a finding of guilt or pleading guilty or nolo contendere to a crime may have the consequences of deportation or denial of United States citizenship.

## **Washington**

Rev. Code Wash. (ARCW) § 10.40.200 – 1983

10.40.200. Deportation of aliens upon conviction -- Advisement -- Legislative intent

(1) The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court.

(2) Prior to acceptance of a plea of guilty to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall determine that the defendant has been advised of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. A defendant signing a guilty plea statement containing the advisement required by this subsection shall be presumed to have received the required advisement. If, after September 1, 1983, the defendant has not been advised as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty and enter a plea of not guilty. Absent a written acknowledgement by the defendant of the advisement required by this subsection, the defendant shall be presumed not to have received the required advisement.

(3) With respect to pleas accepted prior to September 1, 1983, it is not the intent of the legislature that a defendant's failure to receive the advisement required by subsection (2) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid.

### **Wisconsin\***

Wis. Stat. § 971.06 – 1985; § 971.08

971.06. Pleas.

(3) At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status.

971.08. Pleas of guilty and no contest; withdrawal thereof.

(1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:

[...] (c) Address the defendant personally and advise the defendant as follows:

“If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

[...]

(2) If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

(3) Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.

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