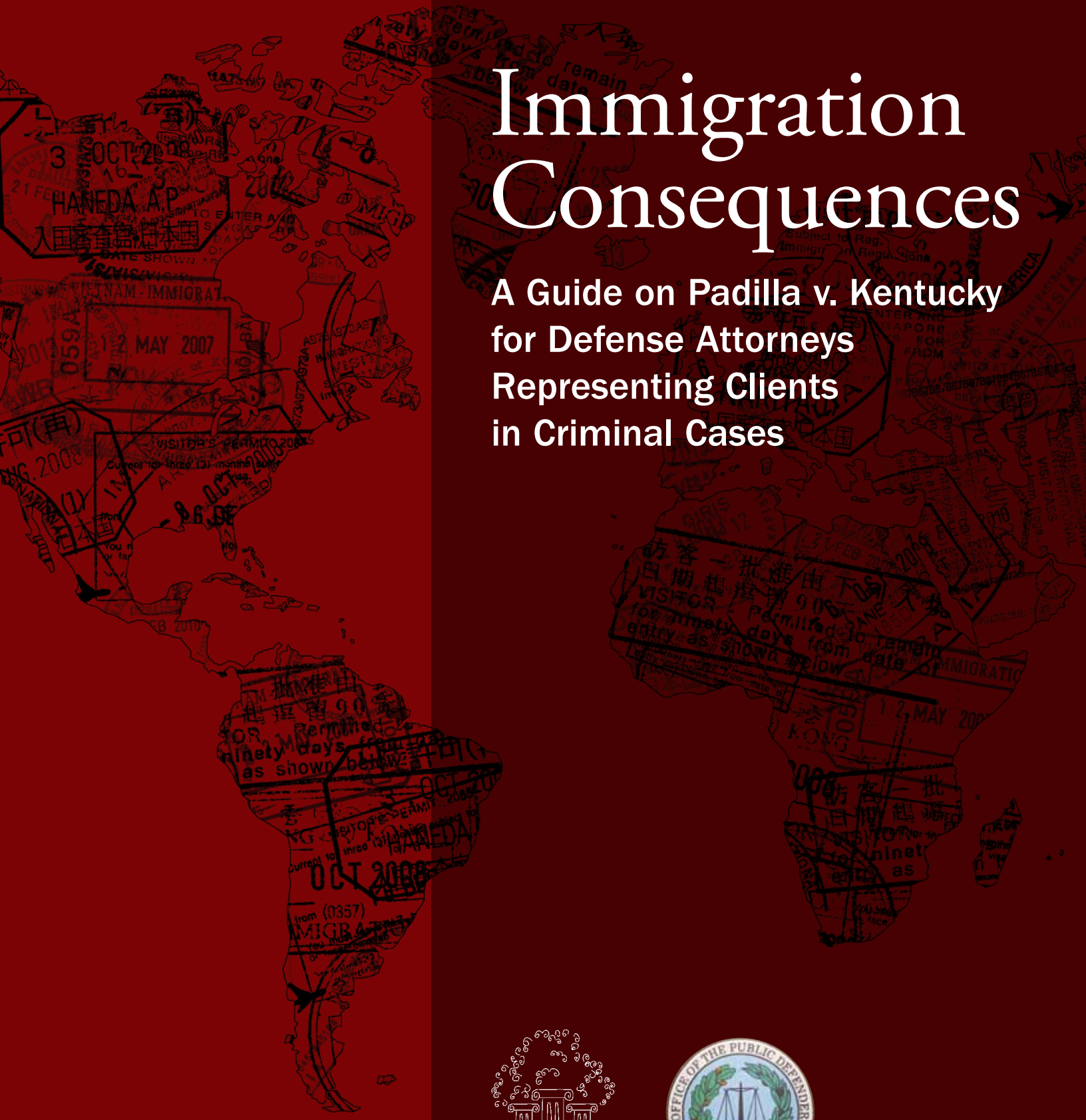

Immigration Consequences

A Guide on Padilla v. Kentucky for Defense Attorneys Representing Clients in Criminal Cases

Texas APPLESEED

OFFICE OF THE PUBLIC DEFENDER · DALLAS COUNTY, TEXAS ·

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About the Dallas County Public Defender's Office

The mission of the Dallas County Public Defender's Office is to ensure that all its clients receive quality legal representation in the most effective and efficient manner. The office is comprised of felony, misdemeanor, juvenile, CPS, family, mental health, DNA, appellate and capital murder defense attorneys, who are assigned to thirty-six courts in four different buildings. Its attorneys also staff and represent defendants who participate in each of the specialty and diversion courts in Dallas County. Additionally, the Dallas County Public Defender's Office was the first public defender's office in Texas to create a formal immigration advisal program, with a full-time immigration attorney on staff. This program, which began in 2014, is now a model for similar programs statewide.

www.DallasCounty.org/government/public-defender

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*(*affiliation listed for identification purposes only)*

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This guide is available online and will be periodically updated here: www.ImmigrationConsequencesTX.org

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A Guide on Padilla v. Kentucky for Defense Attorneys Representing Clients in Criminal Cases

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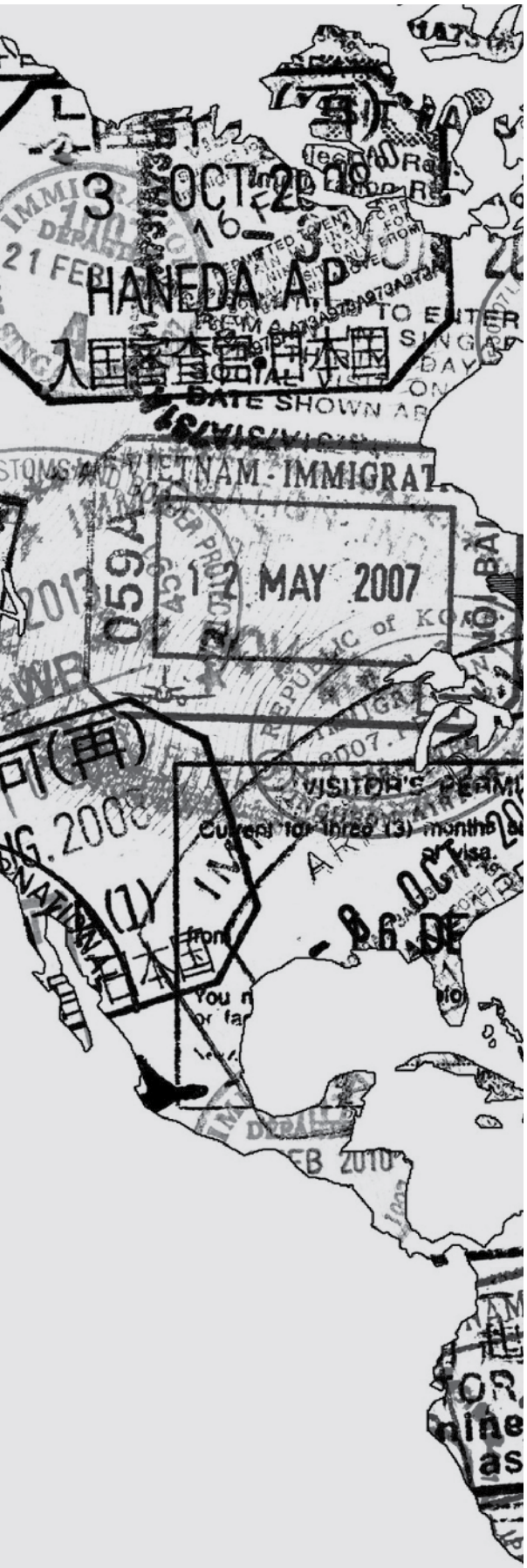


Introduction

Why Make This Manual?

We are in a time of unprecedented overlap between the criminal justice and immigration systems. These systems were fused together by major changes to the immigration code, formally titled The Immigration and Nationality Act, in 1996. Before 1996, immigration judges had broad discretion to balance positive factors against criminal conduct when deciding the fate of a non-citizen in removal proceedings. State court criminal judges could even issue a judicial recommendation against deportation as part of a criminal sentence.

After 1996, the immigration code was rewritten to include many mandatory bars to immigration relief, creating new grounds of removability for those lawfully present in the United States. Consequently, a criminal case is now the determining factor in whether a non-citizen can remain in the country. In fact, according to Transactional Records Access Clearinghouse (TRAC), 96% of all interior deportations occur as a result of contact with the criminal justice system. The criminal courts are **the** gateway to the deportation pipeline for non-citizens that reside in the United States.

These sweeping changes to the immigration code affect all immigrants—even immigrants who are lawfully present and have extensive ties to the United States Finally, over 85% of all immigrants in removal proceedings do not have access to counsel. Thus, for many non-citizens, defense counsel is the **only** attorney they will ever have.

Padilla v. Kentucky and its Progeny

In 2010, the Supreme Court issued *Padilla v. Kentucky*, 559 U.S. 356 (2010), a watershed decision requiring criminal defense counsel to competently advise their client of the potential immigration consequences of criminal charges or plea bargains.

Mr. Padilla, a Vietnam War veteran, had been a Lawful Permanent Resident (LPR) for forty years when he was charged with transporting a large quantity of marijuana. Mr. Padilla pled guilty to drug trafficking after his defense attorney told him he was not at risk for deportation because he was a long-term resident and a war veteran.

When Mr. Padilla found out he was subject to what was essentially automatic deportation as an "Aggravated Felon" under the immigration code, he filed for post-conviction relief, alleging ineffective assistance of counsel. The Kentucky Supreme Court held that deportation was a collateral consequence of his criminal plea and thus, outside the scope of the Sixth Amendment. Mr. Padilla appealed to the U.S. Supreme Court.

The U.S. Supreme Court observed the increasing harshness of changes in immigration laws since 1996. The Court noted that immigration outcomes are direct consequences of the criminal charge and thus not categorically removed from the ambit of the Sixth Amendment. The Court found that immigration consequences were not properly characterized as "collateral," but were instead an "integral part–indeed, sometimes the most important part–of the penalty. Furthermore, the Court found that constitutionally-competent counsel would have advised Mr. Padilla that his conviction made him subject to automatic deportation.

Padilla is also a decision about proportionality. The Court recognized that immigrants are often punished twice for a crime: once by the criminal court, and again via the immigration court, with the latter punishment often being more severe and more consequential to the defendant. With this in mind, for a non-citizen to receive proportionate and just punishments, immigration status must come into play in the negotiations between the prosecutor and the defense. In fact, the Court references the role of a prosecutor and the defense in trying to fashion immigration-neutral pleas, which can result in "agreements that better satisfy the interests for both parties."

In the eight years since *Padilla* was decided, federal courts have continued to elaborate on defense counsel's obligations to non-citizen defendants. Violations of *Padilla* are evaluated under the *Strickland* test for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). For a defendant to succeed under *Strickland* they must show two things: (1) that their lawyer's performance fell below an "objective standard of reasonableness" and was thus ineffective, and (2) that there was a reasonable probability that, but for counsel's unprofessional errors, a rational defendant would have proceeded differently, i.e., prejudice. There is extensive caselaw on how *Padilla* violations play out in both steps of this test.

In *United States v. Batamula*, 788 F.3d 166 (5th Cir. 2015), the Fifth Circuit outlines what an objective standard of reasonableness is for counsel of a non-citizen defendant. Although *Batamula* was overruled *en banc* on the second prong of *Strickland*, the discussion relating to counsel's obligations under *Padilla* remains undisturbed. In *Batamula*, the Fifth Circuit held that the entry of a guilty plea, despite a judicial admonition regarding immigration consequences, does not foreclose the defendant from demonstrating that the defendant's counsel provided ineffective assistance under *Padilla*. The court discussed the "unique and critical" role of the defense attorney to give specific and detailed immigration advice on the charge and any plea offers. The Fifth Circuit also discussed the manner in which defense counsel can negotiate for better immigration outcomes, in contrast to the general and "laconic" admonition of the judge.

More recently, the Supreme Court addressed the second prong of *Strickland* within the *Padilla* context in *Lee v. U.S.*, 582 U.S.___(2017). In *Lee*, the Court held that a non-citizen can establish he was prejudiced by taking a plea with negative immigration consequences even though the evidence of his guilt was strong and his likelihood of success at trial was low. The Court found it rational for an immigrant defendant to decide to go to trial if it gave him or her even a small chance of avoiding deportation.

Reading *Padilla* and its progeny together, it is clear that understanding a client's immigration status and goals, providing specific and detailed immigration advice, and attempting to negotiate an immigration neutral disposition, is the obligation of competent defense counsel.

Defense Counsel's Obligations Under *Padilla*

The Standard Under *Padilla*

Although the *Padilla* decision itself does not go into much detail on what a defense attorney must do for each case, reading the decision with its progeny offers insight on the variety of things competent defense counsel should do. Competent counsel should:

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

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

Additionally, because most indigent non-citizen defendants will not have any counsel when they get to immigration court, a written advisal letter allows the defendant to have some documentation regarding their plea. This advisal letter is particularly essential if

counsel has preserved relief and the argument is complex. So how does one comply with this standard of representation of non-citizens?

Research

The Court in *Padilla* notes that defense counsel must conduct at least a basic level of immigration research to understand the requirements of their client's immigration status, available forms of immigration relief, immigration consequences of a charged offense, and to identify immigration-neutral alternative dispositions. The Court in *Padilla* also distinguishes between clear and unclear immigration consequences, noting that advice must be specific if the outcome is clear, but can be less so if the outcome is unclear. But, to even begin to assess if advice is clear or unclear, defense counsel must do initial immigration research. A detailed primer on how to do this research can be found on page 24.

Advice

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

Negotiate

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

Resolve

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

What is Insufficient Under *Padilla*

Given the ongoing discussion regarding the standard of representation for a non-citizen defendant, it is important to know some common ways that counsel may be attempting to comply with *Padilla*, but unfortunately fall short of the standard, as currently established.

General Advice

As *Batamula* made clear, while it is appropriate for the judge to give a generalized judicial admonition, this fails to satisfy defense counsel's obligation under the law. Defense counsel's advice needs to be specific and based on research on the individual defendant's

particular situation including the defendant's immigration status, available forms of immigration relief, and the specific consequences of a particular charge. If, after researching the issue there is ambiguity in the law, counsel can explain that there is ambiguity, and give advice about general outcomes. However, giving generalized advice right "off the bat" is never appropriate. As a judge once aptly framed this issue: "I know every time I get on a plane that it *might* crash, but if I'm told specifically it *will* crash that will lead to a different outcome."

Advice that is Wrong

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

Referring Out

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

Relying on Judicial Admonition

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

Failing to Negotiate for an Immigration Neutral Disposition

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

What Happens After the Plea or Trial

With the current surge of immigration enforcement, careful pleading is especially critical, as many defendants will end up before an immigration judge immediately after their criminal case concludes. U.S. Immigration and Customs Enforcement (ICE) detainers, which ask local law enforcement to hold non-citizens until ICE takes custody, are present in virtually all cases for incarcerated undocumented immigrants in Texas. They are also increasingly present for immigrants with lawful status but who have criminal history. Although most defendants will have contact with immigration enforcement, there is a great deal of valuable work for a defense attorney to do. Careful pleading can help lawful immigrants avoid being placed in removal proceedings and can preserve relief for undocumented defendants. Even in cases where removal seems likely, a good plea deal can leave open the opportunity for the defendant to return lawfully in the future.

Procedurally, after being picked up on an ICE detainer, the non-citizen will go to an ICE office for book-in; ICE will then have the ability to make a custody determination. ICE can set a bond, release the defendant under an Order of Recognizance (or other non-detention alternative), or they can send them to an ICE detention center, asserting either that the defendant is bond ineligible or that the bond decision will be left to the immigration judge. The rules for bond determination are discussed on page 41. Detained defendants will have court dates usually within a few weeks.

The first immigration court hearing is called a Master Hearing, where the immigration charges are read, and the defendant can request more time to find a lawyer. If the defendant is found removable but wishes to seek relief, then a Merits Hearing is scheduled, and the defendant has the chance to put forward applications for specific relief with supporting documents. At the Merits Hearing, testimony is given and the judge will either issue a verbal ruling or reset the case to provide a written ruling. **There is no right to court-appointed counsel in immigration proceedings, so most defendants appear *pro se*.** The Florence Project has excellent *pro se* guides in English and Spanish on various forms of relief that are

available online: https://firrp.org/resources/prose/. Defense counsel may wish to print some of these resources for their client at the conclusion of the criminal case.

If the defendant is granted relief in immigration court and no appeal is taken, they are released. If they are denied relief, ICE will try and arrange removal except in a few limited exceptions where due to diplomatic reasons, ICE cannot effectuate physical removal. The defendant and the government both have a right to appeal, and removal is stayed at the first level of appeal only.

Key immigration definitions and concepts

There are a variety of terms used in the immigration code that mean something entirely different from what the same term would mean in the Texas Criminal Code. For example, the immigration code references "Aggravated Felonies," but offenses that qualify as Aggravated Felonies are often not aggravated under the Texas Criminal Code and are often not even felonies in Texas. While there are many immigration terms that defense counsel needs to know, there are two specific definitions that will affect pleading on any Texas charge: convictions and sentences.

Convictions

Instead of relying on the state law definition of conviction, the immigration code defines a "conviction" as a formal judgment of guilt, or if adjudication is withheld:

- a judge has found the defendant guilty OR the defendant entered a plea of guilty or nolo contendere OR the defendant has admitted sufficient facts to warrant a finding of guilt, AND
- the judge ordered some form of punishment, penalty, or restraint on liberty.

This means Deferred Adjudication in Texas is a conviction. Diversion programs that require a plea or admission on the record (or an admission that ICE could access) are convictions. To better understand if a particular diversion program would count as a conviction, it may be helpful to read the Board of Immigration Appeals discussion in *Matter of Mohammed*, 27 I&N 92 (BIA 2017). Additionally, because the offense becomes a conviction at time of plea and punishment, some expunged or dismissed convictions will count as convictions for immigration purposes.

Sentences

The immigration code defines a sentence as any period of incarceration or confinement ordered by court of law, regardless of suspension. This means for straight probation in Texas, any prison time suspended counts as a sentence (i.e., 3/10 is a three-year sentence). On the other hand, a term of probation on Deferred Adjudication is not a sentence, as there is no period of confinement contemplated. But note that if the court orders the defendant to a period of confinement in rehabilitation as a condition of Deferred Adjudication (particularly if it is a lock-down facility), the maximum time noted in the order will count as the sentence for immigration purposes. For example, if the judge orders a period of confinement not to exceed one year in Substance Abuse Felony

Punishment Facility (SAFPF), that is a one-year sentence for immigration purposes. It is important for defense counsel to carefully read the conditions of probation, and it may be necessary to ask the judge to make modifications on the order (i.e., to alter the SAFPF provision to read "for a period of confinement up to 364 days").

Criminal Removal Terms

The immigration code has its own terminology for what crimes trigger immigration consequences. Instead of relying on the terminology in the state criminal codes, the immigration code references certain categories of crimes, and it is the job of defense counsel to understand if the state violation triggers one of these categories. While there is a glossary at the conclusion of this guide, here are the most essential removal terms:

- **Crime Involving Moral Turpitude (CIMT)** is a term that immigration law uses frequently but that has no statutory or common law definition beyond a crime that shocks the conscience. Basically, defense counsel will see if a crime is a CIMT based on the case law and not based on a statutory definition. As a rule of thumb, crimes with no *mens rea* are not likely to be CIMTs as the CIMT analysis often hinges on "evil intent," which is why Driving While Impaired (DWI) is not a CIMT. Examples of common CIMTs:
    1. Some Sex Offenses
    2. Fraud
    3. Theft with the intent to deprive

- **Aggravated Felonies** are defined in the immigration code, although the specificity of their definitions vary. There are many different types of Aggravated Felonies. Even misdemeanors can qualify as Aggravated Felonies. These offenses are among the most dangerous for immigrants.

  Some are based on specific types of offenses regardless of sentence, such as:
    1. Murder
    2. Sexual Abuse of a Minor
    3. Drug Trafficking
    4. Rape

  Some offenses become an Aggravated Felony only if a sentence of a year or more is imposed, such as:
    1. Theft or Burglary with a one-year sentence or more
    2. Obstruction of Justice or Perjury with a one-year sentence or more
    3. Commercial Bribery, Counterfeiting, or Forgery with a one-year sentence or more
    4. Crimes of Violence with a sentence of a year or more. (Crime of Violence previously had two sub-components but only the first section remains valid after *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018)

(held 8 USC § 16(b) void for vagueness): Statutorily, a Crime of Violence is defined as a crime that involves use, attempted use or threatened use of physical force against a person or property. (8 USC § 16(a).) There are many court decisions interpreting this section.)

Some offenses only become Aggravated Felonies if there is a loss of $10,000 or more, such as:

1. Money Laundering over $10,000
2. Fraud or Tax Evasion over $10,000

- **Particularly Serious Crime (PSC)** are a broad category of offenses that hurt those applying for, or those who have humanitarian relief (i.e., asylum, withholding of removal, or Convention against Torture (CAT) relief. PSCs break into several groups:
    1. Presumptively, for asylum only, if it is an Aggravated Felony; or
    2. Presumptively, if it is an Aggravated Felony with a five-year sentence; or
    3. Presumptively, if it is a conviction for drug trafficking after May 2, 2002; or
    4. Judicially determined. For judicially determined, the court will look to the actual circumstances of the offense but rarely find misdemeanors to be PSC.
- **Crime of Domestic Violence:** Crime of Violence against someone protected by state family violence law.
- **Crime of Child Abuse:** Very broad definition, but requires the child be an element of the offense.
- **Firearms Offense**
- **Controlled Substance Offense**

Where to find the statutory definitions of the criminal grounds in the immigration code

- Conviction: INA § 101(a)(48)(a); 8 USC § 1101(a)(48)(a)
- Sentence: INA § 101(a)(48)(b); 8 USC § 1101(a)(48)(b)
- Aggravated Felonies: INA § 101(a)(43)(A)-(U); 8 USC § 1101 (a)(43)(A)-(U)
- Crime Involving Moral Turpitude: No statutory definition
- Criminal Grounds of Inadmissibility: INA § 212(a)(2); 8 USC § 1182(a)(2)
- Criminal Grounds of Deportability: INA § 237(a)(2); 8 USC § 1127(a)(2)
- Particularly Serious Crime: INA § 208(b)(2)(B)(i); 8 USC § 1158(b)(2)(B)(i)

The Categorical Approach

The categorical approach refers to the analysis utilized to determine if a state offense triggers an immigration result. Under the categorical approach, the court compares the exact state statute of conviction against the generic or federal definition referenced in the immigration code. If they match, the state offense triggers the immigration result.

When comparing the statutes, **the court must look at the statute of conviction—NOT the underlying conduct that led to the offense**. In other words, the court is looking at the minimum conduct required to trigger conviction under the state statute, not the actual conduct of the defendant. There is one exception: **The court may only look at the defendant's actual charging document if the statute is "divisible," and only to see which subsection the defendant was convicted under.**

How to Conduct the Categorical Approach:

a. Identify the generic or federal definition that appears in the removal ground or bar to relief.

b. Identify the minimum conduct required to violate the statute.

c. Compare them to see if there is a match, or if there is any way the defendant could violate the state statute that would not violate the federal definition.

d. If there is a match, or all the conduct under the state statute would be punishable under the federal definition, then it is a match that triggers the immigration result.

e. If there is not a match, it does not trigger the immigration result, as long as the statute does not set out multiple distinct offenses.

What if the Statute Defines Multiple Offenses?

Determine if the state statutes actually defines multiple offenses, or if it outlines one offense with various means. A statute is only divisible if it sets out phrases in the alternative, and if the statutory alternatives are different crimes. This means that existing within one statute are offenses with different elements, **not just various means,** and at least one of the offenses created by these alternatives is a categorical match to (or comes within) the generic/federal definition. If the statute is divisible, careful pleading could avoid negative immigration consequences.

How to Distinguish Elements vs. Means

For it to be an element, there must be jury unanimity between the statutory alternatives to find a defendant guilty. Also, different levels of punishment are a clear indicator of separate offenses, as opposed to separate means. If a unanimous decision is not required, that alternative is merely a means of committing the offense.

If they are separate offenses (i.e., offenses with different elements), do the above analysis based on the subsection at issue in the defendant's case. Defense counsel can tell the subsection at issue by looking at the charging document.

If they are means, compare the **least culpable conduct** under the whole statute to the federal definition.

Realistic Probability of Prosecution

Finally, it is important for defense counsel to check that the state offense they are using as a point of comparison to the federal statute (the minimum conduct) has a realistic probability of actually being charged or pled to in Texas. Meaning defense counsel may need to show that this theory of violating the statute has been prosecuted in the past. This can be shown with an indictment or judicial confession from another case, the defendants own case, or from the case law.

For a more detailed explanation of the Categorical Approach, please refer to the excellent guide from the Immigrant Legal Resource Center, available at: https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_april_2017.pdf

Advising Non-Citizens: A 3-Piece Puzzle

Part 1: Gathering Information

To advise a non-citizen defendant, defense counsel will need to do some information gathering before they can even begin to start legal research.

There are three key categories of information defense counsel will need from the defendant:

1. The defendant's current and prior immigration statuses;
2. The defendant's prior criminal history; and
3. The defendant's future immigration goals and options.

We have included a sample intake form on the following page that should help counsel obtain the key information they need to analyze the possible immigration consequences for a defendant. Once defense counsel knows what status the defendant has, and what relief the defendant may want to seek, then defense counsel can analyze what plea options would protect that status or leave open the possibility of relief.

EXAMPLE INTAKE FORM

Dallas County Public Defender's Office: Immigration Advisal Program

REFERRAL FORM AND GUIDE

HOW TO REFER A CASE FOR IMMIGRATION ADVICE

- **FILL OUT THE ATTACHED FORM COMPLETELY**
  - **There are <u>new questions</u> relating to <u>arresting officer</u> and client's <u>meeting with ICE</u>**
- **RE-SET CASE WITH AT LEAST 48 HOURS FOR ADVISAL**
- **PRINT OUT THE INFORMATION/INDICTMENT, JI55 (JUST PAGE SUMMARIZING PRIOR HISTORY) AND ATTACH THEM TO THE FORM**
- **PUT THE FORM WITH ATTACHMENTS IN THE BOX OUTSIDE OFFICE C5-5**
- **APPOINTED ATTORNEYS: PLEASE WRITE YOUR EMAIL NEXT TO YOUR NAME**
- **APPOINTED ATTORNEYS ONLY: Please have your client sign the following statement either in Spanish or English:**

Formulario de Divulgación para Remisión a Especialista en Inmigración

Yo, _____ (nombre del cliente), permito que mi abogado/a solicite la asociación de la Especialista en Inmigración en la Oficina del Defensor Público del Condado de Dallas en este caso, y entiendo que el privilegio de abogado/a-cliente se extiende para incluir la Especialista en Inmigración, según la Regla de Texas Reglas Disciplinarias de Conducta Profesional 1.01 (A)(1) y la Regla 105.

_____ _____

Firma del Cliente Fecha

Disclosure Form for Referral to Immigration Specialist

I, _____ (client name), allow my attorney to seek the association of the Immigration Specialist at the Dallas County Public Defender's Office in this case, and I understand that the attorney-client privilege is extended to include the Immigration Specialist, as per Rule Texas Disciplinary Rules of Professional Conduct 1.01(A)(1) and Rule 105.

_____ _____

Signature of Client Date

Non-Citizen Defendant Worksheet/Referral

Defendant Name: _____ Referring Attorney: _____
DOB: _____ Language: _____ Referral Date: _____
Defendant is: ❑ Not in custody ❑ In custody Booking #: _____
ICE Detainer? ❑ Yes ❑ No Detainer Copy? ❑ Yes ❑ No **Arresting Officer**: _____
Met with ICE? ❑ Yes, on (date) _____ ❑ No **Reset Date**: _____

Immigration Status:

Place of Birth/ Citizenship (note if more than 1): _____

❑ LPR – Lawful Permanent Resident (greencard)
Since when? _____

❑ Refugee or granted asylum status
Since when? _____

❑ Entered without documentation
Date of entry _____ Age on entry _____

❑ Entered with a visa that expired on _____

❑ Previously deported? If yes, when? _____
❑ By ICE ❑ Saw Immigration Judge

Alien/ A number _____

U.S./Family Ties:

*Other may be Asylee/Refugee or other valid immigration status

SPOUSE: ❑ USC ❑ LPR ❑ Undocumented ❑ Other _____
PARTNER: ❑ USC ❑ LPR ❑ Undocumented ❑ Other _____
CHILDREN: How many? _____ Ages? _____
❑ USC ❑ LPR ❑ Undocumented ❑ Other _____
MOTHER: ❑ USC ❑ LPR ❑ Undocumented ❑ Other _____
FATHER: ❑ USC ❑ LPR ❑ Undocumented ❑ Other _____
# of USC Grandparents? _____ # of USC Siblings? _____

Options for Relief:

Currently in H.S.? _____ Diploma? _____ GED? _____

Did your family or an employer ever file a petition for you? _____
If so, when? _____

Have you ever filed for any immigration relief in past? _____
If so, what type of relief? _____

Were you ever a victim of crime and reported it to the police? _____
(Qualifying crimes: incest, assault, DV, false imprisonment, extortion, obstruction of justice, sex abuse or related crimes)

Do you fear return to home country/suffered past persecution? _____

Were you ever a victim of Domestic Violence or Trafficking?_____

Contact Info:

Name of closest relative: _____
Phone: _____
Permission to contact? ❑ Yes ❑ No

Current Charge(s):

Cause #: _____ Court: _____
Offense and level: _____
Plea offer: _____

Cause #: _____ Court: _____
Offense and level: _____
Plea offer: _____

Cause #: _____ Court: _____
Offense and level: _____
Plea offer: _____

Complete Criminal History:

(ATTACH Information/Indictment, JI55 and include offense, date of conviction and sentence here, even if it appears on FORVUS. Include arrests, Deferred Adjudications, memo agreements or divert programs, juvenile history and any other resolutions) IF NO CRIMINAL HISTORY, INDICATE THAT BY WRITING "NONE".

_____
_____
_____
_____

Defendant's Goals re: Immigration Consequences

❑ Avoid conviction that triggers deportation/
❑ Preserve eligibility to obtain future immigration benefits (e.g. LPR status or citizenship) or keep lawful status & stay in U.S.
❑ Get out of jail ASAP
❑ Immigration consequences, including deportation, are not a priority
❑ Other goals re immigration consequences:

_____
_____
_____

Part 2: Determining the Potential Immigration Consequences

This analysis is rooted in immigration law, and it is best for defense counsel to contact an immigration attorney to confirm defense counsel's analysis and conclusions. However, included here is a helpful overview of the major areas of immigration law defense counsel should evaluate if they choose to do this analysis themselves.

Inadmissibility vs. Deportability

The first inquiry asks if the defendant can be placed in removal proceedings. There are two different standards that are used. Generally, inadmissibility is the standard used to see if undocumented people will be placed in removal, and deportability is the standard used to see if those with valid immigration status (or who entered with valid status) will be placed in removal proceedings. This difference in standard is why defense goals are immigration status specific. For example, with an undocumented defendant the focus is on relief, where as with a defendant with lawful status, the focus is on avoiding deportability. These standards will come up in other places in the immigration code, but they first will be examined at this initial inquiry: will the defendant be placed in removal proceedings? Non-citizens may be found removable from the United States for criminal violations that fall under both the inadmissibility grounds under INA § 212(a)(2) and the deportability grounds under INA § 237(a)(2).

Non-Criminal Inadmissibility and Deportability Grounds

It is important to understand that the grounds of inadmissibility and deportability are not limited to criminal conduct. There are many more grounds than can be detailed here that could trigger inadmissibility and deportability, from health-related grounds to terrorism. But there are two non-criminal grounds that are particularly essential to know.

1. Inadmissibility for being present without inspection - Under INA § 212(a)(6), a person can be placed in removal proceedings for being in the United States without having been lawfully admitted, i.e., for having entered illegally, regardless of how long ago that occurred. This means for many undocumented defendants, defense counsel can advise that the defendant can be placed in removal merely for being here without a valid admission to the U.S.
2. Deportability for being present after the expiration of lawful status - Under INA § 237(a)(1) a person can be placed in removal proceedings if they remain in the U.S. after the expiration of their lawful status (and without any other application for status pending). This means for defendants who came on a visa that has since expired, defense counsel can advise that the defendant could be placed in removal just based on their lack of valid immigration status.

Criminal Inadmissibility Grounds [INA § 212(a)(2)]

Applies when the non-citizen does not have immigration status (e.g., undocumented), is seeking status, or sometimes when a resident is returning from travel abroad.

1. The defendant has been convicted of, or admits to having committed:
    a. A **Crime Involving Moral Turpitude** (other than a purely political offense) or an attempt or conspiracy to commit such a crime;
        i. Exception for a single offense if:
            1. person was under the age of 18 when the crime was committed **and** the crime was committed more than five years before the date of an application (Youthful Offender Exception); **OR** maximum penalty possible for the crime is 1 year, **and** the person was not sentenced to a term of imprisonment exceeding 6 months (Petty Offense Exception).
    b. A violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country **relating to a controlled substance (as defined in section 102 of the Controlled Substances Act)**.

2. **Multiple criminal convictions** – person is convicted of two or more offenses (other than purely political offenses), for which the aggregate sentences of confinement were five years or more.
3. Person (i) is or has been an **illicit trafficker of any controlled substance** or of any listed chemical, under 21 U.S.C. § 802, or is or has been a known aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any such controlled or listed substance, or endeavored to do so; (ii) spouse, son, or daughter of person inadmissible under (i), has, within the previous five years, obtained any financial or other benefit from the illicit activity of the person, and knew or reasonably should have known that the benefit was the product of such illicit activity.
4. Person (i) came to the United States to engage in **prostitution**, or has engaged in prostitution within ten years of the date of application, (ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives (or within such 10-year period) received, the proceeds of prostitution, or (iii) is coming to the United States to engage in **any other unlawful commercial vice**.
5. Committed a **serious criminal offense** in the United States, as defined by 8 U.S.C. § 1101(h), for whom **immunity** from criminal jurisdiction was granted, who as a consequence of the offense and exercise of immunity **departed** from the United States, and who has not subsequently submitted to the **jurisdiction** of the federal court with jurisdiction over such offense.
6. Person (i) commits or conspires to commit **human trafficking** offenses in or outside of the United States, or the person is known or believed to be a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons; (ii) known or believed to be the spouse or child of a person in (i), and has, within the past five years, obtained any financial or other benefit from

the illicit activity, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity.

7. Person (i) believed to have engaged, is engaging, or seeks to enter the United States to engage, in **money laundering** (as described in 18 U.S.C. §§ 1956-57); (ii) known to be a knowing aider, abettor, assister, conspirator, or colluder with others in a money laundering offense.

Criminal Deportability Grounds [INA § 237(a)(2)]

Applies when the non-citizen has or had some sort of immigration status (e.g., lawful permanent resident). This is what ICE has to prove to try and remove someone with immigration status.

1. Convicted of a **Crime Involving Moral Turpitude** committed within five years after date of admission, **and** a sentence of one year or longer may be imposed.
2. Convicted of **two or more** Crimes Involving Moral Turpitude after admission.
3. Convicted of an **Aggravated Felony** at any time after admission.
4. Convicted of **high speed flight** from an immigration checkpoint (18 U.S.C. § 758).
5. Fails to register as a **sex offender** (18 U.S.C. § 2250).
6. Convicted after admission of violating any federal or state or foreign law **relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act)**.
    a. Exception: a single offense involving possession of marijuana (up to 30 grams) for personal use.
7. **Drug abuser** or addict at any time after admission.
8. Convicted under any **firearm** or destructive device law after admission.
9. At any time has been convicted of, or has been convicted of a conspiracy or attempt to violate, any offense relating to **espionage** (18 U.S.C. Chapter 37), **sabotage** (18 U.S.C. Chapter 105), or **treason or sedition** (18 U.S.C. Chapter 115) for which a term of imprisonment of five or more years may be imposed; **threats against the President or expedition against friendly nation** (18 U.S.C. §§ 871, 960); **Military Selective Service Act** (50 U.S.C. §§ 3801, et seq.); **Trading with the Enemy Act** (50 U.S.C. §§ 4301, et seq.); **travel of citizens and aliens** (8 U.S.C. §§ 1185, 1328).
10. Convicted of **domestic violence**, stalking, **child abuse**, child neglect, or child abandonment any time after admission; violates the terms of a protective order at any time after admission.
11. Person (i) commits or conspires to commit **human trafficking** offenses in or outside of the United States, or the person is known or believed to be a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons; (ii) known or believed to be the spouse or child of a person in (i), and has, within the past 5 years, obtained any financial or other benefit from the illicit activity, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity.

Eligibility for Relief

For many defendants, this is where the key advocacy needs to be done. If the defendant already has an ICE detainer and will be placed in removal, defense counsel needs to focus on trying to avoid a conviction that will destroy the defendant's eligibility for relief. Again, this inquiry relates to detailed provisions of the immigration code and warrants contacting an immigration attorney. Below is some basic information on the most common forms of relief.

1. Family-based immigration
    a. Who can get it?
        i. Can apply for residence now if they are the spouse, parent of a child over 21, or child under age 21 of a U.S. citizen.
        ii. Will have to wait to file for residence if they are spouse or child under 21 of a resident, the child over 21 of a citizen or resident, married child of a citizen, or sibling of a citizen.

    b. What bars this relief?
        i. If the person is inadmissible
            1. Unless subject to one of two exceptions (Petty Offense and Youthful Offender)
            2. Or unless granted a discretionary 212(h) waiver
                a. 212(h) waives: Crime of Moral Turpitude; two convictions with aggregate 5 years imposed; Prostitution; first offense of "simple possession of 30 grams or less of marijuana"; a 212(h) waiver is unlikely to waive a "violent or dangerous crime."
                b. Who can request it?
                    i. Must be spouse, parent, or child of citizen or LPR who would suffer extreme hardship; OR
                    ii. Became inadmissible more than 15 years ago and inadmissible only for prostitution; OR
                    iii. Violence Against Women Act-eligible.
                c. Note that there are other bars to relief regarding prior immigration violations, mental health disorders that pose a risk to people or property, health grounds, etc.

2. Cancellation of Removal for Non-Residents
    a. Who can get it?
        i. Persons with 10 years of continuous presence in the U.S.;
        ii. Whose citizen/LPR spouse, child or parent would suffer exceptional and extremely unusual hardship.

b. What bars this relief?

   i. Lack of good moral character (under INA § 101(f));

   ii. Conviction for an inadmissible offense;

   iii. Conviction for a deportable offense.

3. Cancellation of Removal for Lawful Permanent Residents

   a. Who can get it?

      i. Continuous residence of seven years after being "admitted" in any status, e.g., tourist, student, LPR

         1. Note time stops counting at commission of a removable offense listed in 212(a)(2).

      ii. LPR at least five years

   b. What bars this relief?

      i. Aggravated Felony conviction;

      ii. Can only be granted once.

4. Asylum, Withholding, and Relief under the Convention Against Torture

   a. Who can get it?

      i. Those who fear persecution based on their race, religion, national origin, or membership in a particular social group.

   b. What bars this relief?

      i. Asylum: Aggravated Felony.

      ii. Withholding: Particularly Serious Crime (PSC).

5. Adjustment of Status for Asylum Recipients (Asylees) and Refugees

   a. Who can get it?

      i. People are already Asylees or Refugees who have not yet applied to become residents who have been present for at least one year in Asylee/Refugee status.

      ii. Asylum status can be terminated for conviction of an Aggravated Felony or PSC—but the asylee can ask as a removal defense to adjust status to that of a resident. Refugees are subject to deportability but can also seek to adjust their status as a removal defense.

   b. What bars this relief?

      i. Inadmissibility, but there is a good waiver:

         1. The INA § 209(c) waiver is discretionary, but technically can waive any ground except "reason to believe" a drug trafficker.

         2. The waiver could be denied as a matter of discretion, or if conviction is for a "dangerous or violent" offense.

6. U/T Visas and Violence Against Women Act (VAWA)
    a. Who can get it?
        i. The U visa is for a victim of certain crimes (assault, incest, domestic violence, sexual abuse, etc.) who has, will, or would cooperate in the investigation or prosecution of the crime. Requires law enforcement certification of helpfulness and victimization. Person gets temporary status and can later apply for permanent status.
        ii. T is for trafficking victims. Requires law enforcement certification. Person gets temporary status and can later apply for permanent status.
        iii. VAWA: Married to Citizen/LPR, abused.
    b. What bars this relief?
        i. U and T are subject to inadmissibility, but there is a discretionary waiver of all grounds, except terrorism and national security. Note, this waiver can be hard to obtain, if the offenses are serious.
        ii. VAWA must show Good Moral Character, but can use the 212(h) waiver.

7. Deferred Action for Childhood Arrivals (DACA)
    a. Who can get it?
        i. As of February 2018, only renewals permitted; no new filings.
    b. What bars this relief?
        i. Any felony;
        ii. A "significant misdemeanor:"
            1. DWI, domestic violence, Sex abuse, Burglary, Unlawful firearm, Drug sales;
        iii. More than two misdemeanors (unless same scheme of misconduct);
        iv. A misdemeanor with sentence of 90 days or more.

8. Temporary Protected Status (TPS)
    a. What bars relief?
        i. Inadmissible offenses;
        ii. Two misdemeanors;
            1. Class C offenses may not count as misdemeanors, in this context;
        iii. One felony.

9. Maintaining Current Non-Immigrant Visas (i.e., student and tourist visas)
    a. What bars relief?
        i. Deportable offense;
        ii. Inadmissible offense that would have barred them from getting a visa in the first place.
        iii. As of 2016, even an arrest for a DWI could lead to a discretionary revocation, but revocation is not required.

10. Voluntary Departure
    a. Who can get it?
        i. Any person in removal who does not wish to fight their case, but also does not want the additional penalty of a deportation on their record.
        ii. What bars relief?
            1. Pre-hearing Voluntary (i.e., asking before they seek any other relief)
                a. Aggravated Felony.
            2. Post-hearing Voluntary (i.e., they sought other relief and lost)
                a. Lack of Good Moral Character in past five years;
                b. Aggravated Felony.

11. Naturalization
    a. Who can apply?
        i. Five years of LPR status (three in special circumstances);
        ii. Special Rules for Veterans/Active Duty Military.
    b. What are the bars?
        i. Lack of Good Moral Character for five years before filing.
        ii. Barred for five years, if convicted of a:
            1. CIMT (unless Petty Offense Exception);
            2. Two + offenses with aggregate five years' incarceration;
            3. Two gambling offenses;
            4. Actual confinement to jail for aggregate of 180 days.
        iii. Conviction of an Aggravated Felony after November 29, 1990, is a permanent bar.
    c. Danger: If a deportable LPR applies for naturalization, likely to be placed in removal proceedings.

12. Preserving Ability to Travel
    a. LPRs returning from abroad after having certain criminal convictions will be evaluated under the grounds of inadmissibility and could be barred from re-entry if they have:
        i. A CIMT that is not subject to Petty Offense;
        ii. A drug offense (there is no exception for 30 grams of marijuana);
        iii. Any offenses with an aggregate of five years in jail; or
        iv. Prostitution (generally, a pattern).

Mandatory Detention

Mandatory Detention references when a person is statutorily not able to bond out of ICE custody. A person is subject to mandatory detention if they are inadmissible (undocumented defendants) or deportable (defendants who have/or had lawful status for certain criminal offenses under INA § 236(c).

Inadmissible	Deportable
Crime Involving Moral Turpitude (CIMT), if no exception	Two CIMTs convictions
Controlled Substance Offenses	CIMT conviction with a sentence of a year or more
Multiple convictions with aggregate sentence of 5 years	Controlled Substance conviction (except less than 30 grams of marijuana)
Reason to believe a drug or human trafficker	Firearms conviction
Prostitution	Aggravated Felony conviction

Part 3: Analyzing Texas Statutes

Now that defense counsel knows which immigration grounds are relevant, they can turn to the Texas statute at issue and begin the legal analysis to see if the Texas criminal statute will trigger the immigration grounds specific to the defendant.

A Note About Texas Sentences

Because the grounds of inadmissibility and deportability reference both actual sentences and potential sentences, it is important to understand the maximum potential charges for Texas offenses.

Overview: Texas Crimes by Class and Sentences

	Texas Penal Code Section	Jail	Fine (Maximum)	Both Jail and Fine Possible
Class C Misdemeanor	12.23	--	$500	No
Class B Misdemeanor	12.22	Up to 180 Days	$2,000	Yes
Class A Misdemeanor	12.21	Up to 1 Year	$4,000	Yes
State Jail Felony	12.04 and 12.35	180 Days – 2 Years	$10,000	Yes
Third Degree Felony	12.34	2-10 Years	$10,000	Yes
Second Degree Felony	12.33	2-20 Years	$10,000	Yes
First Degree Felony	12.32	Life | 5-99 Years	$10,000	Yes
Capital Felony	12.31	Death | Life without Parole	--	No

A Primer on Researching the Texas Statutes

In order to research the Texas statute in the context of the immigration grounds, it is helpful to understand some of the sources of law at issue. Below is a basic primer on how to complete the legal research to see if a Texas criminal statute triggers a specific immigration outcome.

Immigration Law Background & Issues

Case Law & Appeals Process

All immigration cases begin in one of two places:

If the person is <u>not</u> being deported, but is simply seeking an immigration benefit, it is an *affirmative* case and will be adjudicated by USCIS or the U.S. Consulate abroad (none of these cases are available online).

1. Affirmative cases are appealed first to Administrative Appeals Office (AAO).
2. Find these cases under the Administrative Tab in Lexis/Westlaw.
3. Generally, AAO cases are never "published" but can be used as persuasive authority.

If the person is in removal proceedings, they will be seeking relief *defensively* in the Immigration Court (none of these cases are available online).

1. Defensive cases from the Immigration court are appealed to the Board of Immigration Appeals (BIA).
2. Find these cases under the Administrative Tab in Lexis/Westlaw.
3. Only some BIA cases are "published."

After the first level of appeals, all cases can be appealed to the Fifth Circuit and then to the Supreme Court. These decisions will be under the Cases Tab in Lexis/Westlaw.

Sources of Law

Supreme Court and Fifth Circuit Case Law:

- Immigration Cases: As noted above, affirmative and defensive cases that go beyond the initial level of appeal will go to the Circuit Court and then to the Supreme Court.
- Sentencing Cases: Defense Counsel can understand some immigration consequences by looking at Federal Sentencing Cases.
    - The categorical approach (discussed below) is used in both the immigration context and the sentencing context. Thus, much of the case law involving certain sections of the Texas Penal Code will apply in the same manner, whether the case is in the immigration or sentencing context.
    - Caveat re: Federal Sentencing Cases: Sentencing cases are good if the analysis relates to the Aggravated Felony ground (or helps us understand a generic definition), but be careful, as the term Crime of Violence used in sentencing cases has a slightly different definition than the Aggravated Felony grounds.

- Federal District Court: Defense counsel will see a few district court cases dealing with immigration. They are usually Habeas cases and a few specific immigration matters, like declaration of citizenship.

Administrative Case Law:

- Administrative appeals found in AAO (non-deportation cases).
- Board of Immigration appeals found in BIA (deportation cases).

Texas State Court Cases:

- *Padilla* claim cases: Generally, there will be a discussion of the immigration consequences of a particular Texas statute as the Court analyzes if the attorney did or did not properly advise the defendant about these consequences.
- State court cases are the best way to parse what the elements are versus what the means are in a statute. Additionally, state court cases help defense counsel prove what conduct has a realistic probability of prosecution in Texas.
- Jury instructions are another way to find elements vs. means in state statute

How to Research the Immigration Consequences of a Texas Statute

Lexis/Westlaw Queries

NOTE: As with any area of the law, there is no one-size-fits-all approach to researching immigration cases. However, the following are tried and true suggestions that should serve as a strong starting point.

Suggested Methods:

General Search:

Search Texas and Penal Code and # and immigra!

- Look at 5th Circuit cases
- Look at administrative cases (DOJ)

Search Texas and Penal Code and # and Moral Turpitude

- Look at 5th Circuit cases
- Look at administrative cases (DOJ)

Search Texas and Penal Code and # and Aggravated Felony

- Look at 5th Circuit cases
- Look at administrative cases (DOJ)

If there is reason to believe the penal code section at issue is a Crime of Child Abuse, Crime of Domestic Violence, Firearm Offense, Controlled Substance Offense or Particularly Serious Crime, search that term and Texas and the penal code section.

Run the above with the offense name instead of the statute number.

*The **Categorical Analysis** in Action*

1. Determine the relevant generic federal definition or statute
    a. Look at the INA to see if it points to a federal statute; defense counsel may need to look at case law to see the generic definition
2. Determine the elements of the state statute
    a. Are there multiple subsections? Is it phrased in the alternative? If so, are there separate offenses with their own elements or is it just various means of committing one offense?
        i. Key ways to tell if it is an element:
            1. Jury unanimity (case law, jury instructions)
            2. It alters punishment
    b. Once defense counsel knows what the elements are and how many offenses they are dealing with, compare the elements of each offense to the generic/federal definition or statute.
        i. If the federal statute is broader or the same as the state one, it is a match and triggers the immigration consequence.
        ii. If the state statute is broader or it is not a match it does not trigger the outcome.
        iii. Also, defense counsel needs to confirm that the least culpable conduct under the state statute has a realistic probability of being prosecuted. Meaning that at some point someone has been charged or pled to this particular conduct under the state statute.

EXAMPLE 1: The immigration code states Burglary with a sentence of a year or more is an Aggravated Felony. But does Texas Burglary qualify as a "Burglary," as the immigration code contemplates it?

The Federal Definition of Burglary is in a SCOTUS case called *Taylor*.

The Texas Statute has several subsections:

- Subsections (a)(1) and (a)(2) match the federal definition;
- Subsection (a)(3) does not.
- New case indicates that these subsections are means not elements

Even if the defendant violated under (a)(1), defense counsel still compares (a)(3) because it is the least culpable conduct under the statute to the federal definition. Because it encompasses conduct that would not be prohibited under the federal statute it would not be considered a Burglary Aggravated Felony. Finally, defense counsel would want to note that various state law cases confirm (a)(3) prosecutions occur, thus meeting the realistic probability test. Technically, for the research, defense counsel would likely also want to look to see if the Texas Burglary is a Crime of Violence, which would mean doing the same comparison, but to 18 USC § 16(a).

EXAMPLE 2: Is Texas Assault a Crime Involving Moral Turpitude?

The federal case law states that generally for a crime to be a CIMT, it needs to be intentional and knowing (unless there is a very high harm). Although Texas Assault has three subsections, the different *mens rea* options in Texas Penal Code § 22.01(a)(1) are means of committing the offense and NOT elements. Because Texas Assault can be committed recklessly and the harm is not egregious, it is categorically not a CIMT regardless of what the indictment says.

Tips & Other Suggestions

If defense counsel is unable to find any 5th Circuit cases or any administrative (DOJ) cases, search the other circuits. Often another circuit will analyze a Texas statute, as immigrants often get picked up by ICE in different places. Search the name of the offense and see if other circuits deal with similar statutes.

Driving While Intoxicated, Tex. Penal Code § 49.04 (DWI and DWI 2nd)

(a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

(b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

(c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

(d) If it is shown on the trial of an offense under this section that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor.

Practice Tips:

Ideally plead to an Obstruction of a Roadway to protect DACA
Avoid actual confinement of 180 days for Good Moral Character
Warn about risk of habitual drunkard for Good Moral Character purposes

Aggravated Felony (AF)	Crime Involving Moral Turpitude	Other Immigration Consequences
DWI, DWI Open Container, DWI over 0.15: Not an AF	**DWI, DWI Open Container, DWI over 0.15:** Not a CIMT	**DWI, DWI Open Container, DWI over 0.15:** State Department guidance indicates even an arrest for DWI could result in discretionary revocation of a non-immigrant visa DWI is a bar to DACA
DWI 2nd: Not an AF	**DWI 2nd:** Not a CIMT	**DWI 2nd:** Additionally, there is a "habitual drunkard" bar to Good Moral Character for relief such as Cancellation and Naturalization.

Aggravated Felony

DWI (including Open Container and over 0.15): **Not an Aggravated Felony** because the Texas DWI statute does not have any *mens rea*. In analyzing the Florida DWI statute, which also has no *mens rea*, the Supreme Court found a Crime of Violence requires some level of intent. *See Leocal v. Ashcroft*, 543 U.S. 1, 9, 11 (2004). The Court said that the "use of physical force" language in 18 USC § 16(a) implied violent, active crimes that do not normally include DWI offenses. *See id*. Additionally, DWI cannot be an Aggravated Felony under 18 USC § 16(b) as this statute was found unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)

DWI 2nd: Not an Aggravated Felony because there is no *mens rea*, therefore it is also not considered an Aggravated Felony for immigration purposes. *See Leocal v. Ashcroft*, 543 U.S. 1, 9, 11 (2004); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Crime Involving Moral Turpitude

DWI 1st: Open Container and 0.15: Not a CIMT. Historically, a simple DWI offense is not considered a CIMT because there is no *mens rea* and evil intent is the hallmark of moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

DWI 2nd: Not a CIMT because the Texas statute does not have any additional *mens rea*, unlike the Arizona code analyzed in *Lopez-Meza*, which requires a finding that the driver knowingly drove despite their license being suspended. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). Furthermore, the BIA found in *Matter of Torres-Varela*, since a single DWI does not count as a CIMT, multiple DWIs in aggregate could not constitute a CIMT. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

Other Immigration Consequences: Deferred Action for Childhood Arrivals (DACA)

Even a single DWI will bar a non-citizen from qualifying for DACA, or subject a DACA recipient to potential revocation.

Other Immigration Consequences: Student and Other Non-Immigrant Visas

The Department of States issued a new policy that gives consular posts the authority to revoke a non-immigrant visa based on even an arrest for DWI. *See* 9 FAM 403.11-3(B)(U). Now, the guidance only indicates this can be done, but it is unclear how consular posts are deciding to revoke, if they are deciding to do so at all.

Other Immigration Consequences: Good Moral Character (required for Naturalization, Cancellation of Removal, etc.)

It is important to note that a DWI 2nd does raise issues of propensity for drunkenness. Being a "habitual drunkard" is a bar to "good moral character," under 8 USC § 1101(f).

Other Immigration Consequences: Controlled Substance Offenses

A DWI based on anything relating to drugs could lead to inadmissibly as an "offense that relates to" a Controlled Substance on the Federal List of Controlled Substances. *See* INA § 212(a)(2)(A). Since the drug is not an element of the statute (which only discusses impairment), language referencing a specific drug should be struck from the indictment (if the client pleads to the indictment) or left out of any judicial confession. The fact that the drug is not an element of the offense means it is unlikely to trigger the deportability ground, which requires conviction, but it is still better to clean the record of any reference to drugs. *See* INA § 237(a)(2).

Other Immigration Consequences: Mental Health Inadmissibility

There is a specific inadmissibility ground for persons with physical or mental disorders with associated harmful behavior to themselves, others, or property. *See* INA § 212(a)(1)(A)(iii). Alcohol abuse is considered to be one such mental disorder, and while the abuse does not need to rise to the level of addiction, it is required that there is an associated harmful behavior (such as driving while intoxicated). *See* (FAM), Title 9, 40.11 N11.2

Advising the Defendant

Once defense counsel has collected the information from the client, determined the key immigration consequences, and researched if the criminal charge triggers those consequences, it is time to discuss options with the defendant. On the next page is a sample advisal letter addressing Inadmissibility/Deportability, Relief in Removal, Detention, Naturalization, and Travel.

EXAMPLE ADVISAL MEMORANDUM

Memorandum **CONFIDENTIAL**

To: Public Defender XXXXX

From: Immigration Specialist XXXXX

Date: 3/21/2019

Re: XXX, Cause #FXXXXX

In response to your request for advice on the immigration consequences of felony Possession of a Controlled Substance (Cocaine)/Texas H.S.C § 481.115 for your client Mr. XXXXX, please see below.

The Referral

From what I understand from the referral, your client entered the United States on a tourist visa that expired in 2010. His partner is a U.S. citizen and his siblings have Deferred Action, but he has no other family with immigration status. He is currently working on his GED. He has no prior convictions and no deportations. He was in a diversion program for this charge, but did not complete the program. His goal is to avoid deportation, and preserve future relief. He is not in custody and does not have an ICE hold.

Inadmissibility/Deportability

Because your client is already in the United States after his visa expired, he can be placed in removal proceedings at any time regardless of criminal history as those present without a valid visa are removable. *See* INA § 237(a)(1)(C).

Eligibility for Relief

If your client finds a means of being petitioned in the future (i.e., by his partner) **he would be evaluated for admissibility.** *See* INA § 212(a)(2). **An immigrant can be found inadmissible if they are convicted of** (or admit to having committed acts that constitute the essential elements of) **a Controlled Substance Offense**. *See* INA § 212(a)(2)(A)(i)(II). There is a waiver available for a single possession of less than 30 grams of Marijuana, but a **cocaine offense is a non-waivable Controlled Substance Offense** (regardless of reduction to a misdemeanor). *See* INA § 212(a)(2)(A)(i)(II); INA § 212(h). **Deferred Adjudication is a conviction for immigration purposes**. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 368 (5th Cir. 2009). **This means your client would not be eligible for family-based immigration.** Unfortunately, the diversion program he didn't complete was likely the only way to avoid this outcome absent a complete dismissal.

He would not be eligible for Cancellation of Removal for non-residents, as even a reduced drug conviction would bar the required finding of Good Moral Character. *See* INA § 240A(b); INA § 101(f)(3).

If the Deferred Action for Childhood Arrivals (DACA) program were to come back into effect, he would only be eligible if **this charge can be reduced under 12.44(b) to a misdemeanor**. *See* www.uscis.gov/immigrationaction. While 12.44(a) is still a felony conviction for immigration purposes, a 12.44(b) is a misdemeanor, so would preserve DACA. *See U.S. v. Rivera-Perez*, 322 F.3d 350, 352 (5th Cir. Tex. 2003). His eligibility for DACA also hinges on his not being sentenced to 90 days or more. *See* www.uscis.gov/immigrationaction**. Nevertheless, if in-patient drug treatment is a requirement of probation, that period of mandated confinement would be a sentence for immigration purposes**. *See Calvillo Garcia v. Sessions,* 870 F.3d 341, 343 (5th Cir. 2017).

If your client is placed in removal proceedings and can show he will be persecuted in his home country, he could apply for Asylum or Withholding of Removal. *See* INA § 208; 241(b)(3).

He may want to talk to an immigration attorney if he was a victim of a crime and helped the police, as he could be eligible for a U visa. *See* INA § 101(a)(15)(U).

Detention

If ICE apprehends your client, **a conviction on this offense would trigger your client's mandatory immigration detention**. *See* INA § 236(c). This means your client would have to fight his immigration case from ICE custody.

Naturalization and Travel

Your client would not be eligible to naturalize until after several years of having lawful permanent residence. *See* INA § 316. **While this offense would not be a bar to future naturalization** (so long as he does not apply in the next five years), **it would be a negative discretionary factor**. *See id*. Any time your client leaves the U.S. he would be subject to inspection on return and even a reduced conviction on this charge would bar his lawful return. *See* INA § 212(h). **If your client is deported, attempts to re-enter without inspection, and is caught, he could be charged with the federal offense of illegal re-entry.** *See* 8 USC § 1326.

Consulting with an Immigration Attorney

Given the complexity of the immigration consequences analysis, it is always best practice to speak with an immigration attorney. This area of the law is very complex, and there is no substitute to having a trained immigration attorney look at the facts of the case.

Negotiating with the Prosecutor

Once defense counsel has spoken to the defendant about the risks associated with their charge and their client's ultimate immigration goals, defense counsel has the information needed to begin negotiation with the prosecutor.

Getting the Prosecutor to Consider Immigration Consequences

Often prosecutors do not understand their role in the system set up in the *Padilla* decision. If the prosecutor is resistant to discussing the immigration consequences of the charges, here are a few good arguments for defense counsel to make:

It is part of the system *Padilla* lays out

Many prosecutors are unaware that the *Padilla* decision also addresses the role of the state. In *Padilla*, the Court encouraged

both the defense and the prosecution to consider immigration consequences in the plea bargaining process in order to "reach agreements that better satisfy the interests of both parties" and "to plea bargain creatively...in order to craft a conviction and sentence that reduce the likelihood of deportation." *See Padilla* at 373. This makes sense, as the entire system outlined in *Padilla* would not function if the state were unable to consider immigration consequences.

Often prosecutors will say they have no responsibility when it comes to the immigration consequences because that is a separate proceeding, but remember that if immigration consequences are within the ambit of the Sixth Amendment for defense counsel, they clearly flow directly from the actions of the prosecutor, as well.

Proportionality

As the *Padilla* Court noted, considering immigration consequences is an essential way to achieve proportional punishments. Banishment is among the harshest punishments imaginable. Thus, considering the immigration consequences that are triggered by the criminal charge is integral to the prosecutor's duty to promote proportionate punishments. In fact, in *Padilla*, the Court refers to the immigration consequences as an "integral" part of the criminal penalty. Knowing the immigration consequence flows directly from the state criminal charge means the prosecutor should be tailoring a punishment appropriate to the offense.

Avoiding double punishment

When a prosecutor tells defense counsel that they cannot offer a better deal to a non-citizen than they would to a citizen, it is helpful to reframe the issue for the prosecutor. Considering immigration consequences is not asking for a better deal, but rather trying to avoid a double and more serious punishment for the non-citizen.

Remind the prosecutor that they will defend the writ

If there is any issue with the initial plea, the defendant may well file a writ, and the prosecutor is the person in Texas who will be tasked with defending the conviction. It is helpful to remind the prosecutor that it is better to get the plea done right the first time. Additionally, prosecutors are charged with serving the public and are expected to "respect the constitutional and legal rights of...defendants." (Standards for Criminal Justice: Prosecution Function Standard 3-1.2 (Am. Bar Ass'n, 4th ed. 2015)). Considering immigration consequences is an excellent way to promote the integrity of convictions and also to protect the defendant's constitutional rights.

Serving the community at large

As part of the prosecutor's duties to serve the public, it can be helpful to remind them of the impact on the community if the defendant is removed. Defense counsel can explain how losing the sole breadwinner of a family or removing the emotional support to a traumatized child has large community impacts. There are many ways to help the prosecutor see that their charter to serve the public is met by considering the immigration consequences.

Give them something in writing for their file

While making these points verbally to a prosecutor is helpful, it can help to also have something in writing. Since often a prosecutor's decision is reviewed by other attorneys in their office, giving them a written document about why they should consider these issues may help them feel more comfortable working out a creative plea.

Not asking for a dismissal

Finally, it is important that the prosecutor understand that considering immigration consequences during plea bargaining does not necessarily mean a dismissal. In some instances, during the plea bargaining phase, a non-citizen defendant may need to take more jail time or plead to a potentially more serious offense, if it is better for immigration purposes.

Creative Pleading with the Prosecutor

The Court in *Padilla* repeatedly references creative pleading, but does not give a roadmap on how to do that. Creative pleading requires digging back into the initial research defense counsel did about what immigration consequences are at issue. Then counsel figures out if there is a plea option that does not trigger those consequences, but would give the prosecutor the punishment they find appropriate. Below are a few potential ideas for creative pleading, although there are many more options than those outlined below.

Suggest pre-plea diversion, if possible

Pre-plea diversion programs are probably the best bright line solution for creative pleading. These programs allow prosecutors to address the root cause of the crime, such as substance use and mental health issues, thus promoting public safety while also minimizing immigration consequences for non-citizens.

Even if there is no formal pre-plea program available, there may be a way to create a similar informal program where the defendant agrees to do classes, community service, and/or voluntary testing in exchange for a dismissal or a plea to an offense that does not trigger immigration consequences. Even defendants in custody may be able to attend classes in jail in exchange for a dismissal or reduction.

Pleading to different subsections or creating an ambiguous record

Sometimes it is the particular subsection of the offense that is risky for a defendant and defense counsel can suggest doing a judicial confession to another subsection to protect immigration relief. In some cases, particularly if the defendant is a lawful permanent resident and it is the government's burden to prove deportability, creating an ambiguous record could preserve the defendant's immigration status or relief.

Pleading to a particular offense, sometimes with a larger punishment in exchange for dismissal of other charges

If a defendant is charged with multiple offenses, sometimes it could be advantageous to agree to a longer sentence on the charge that does not trigger immigration consequences in exchange for a reduction or dismissal on the charges that do have immigration consequences. This is why if defense counsel is only appointed on one of several pending charges, it is not a good practice to resolve that charge alone, since negotiating the charges as a group is likely advantageous.

Talking to the Judge

The judge also has a unique role to play under *Padilla*. Because the judge has a Fifth Amendment duty to assure the defendant enters a knowing and voluntary plea, the judge has an express interest in ensuring compliance with *Padilla*. Additionally, the judge is in a unique position to help ensure the defendant's constitutional rights under *Padilla* are protected.

Grant Continuances

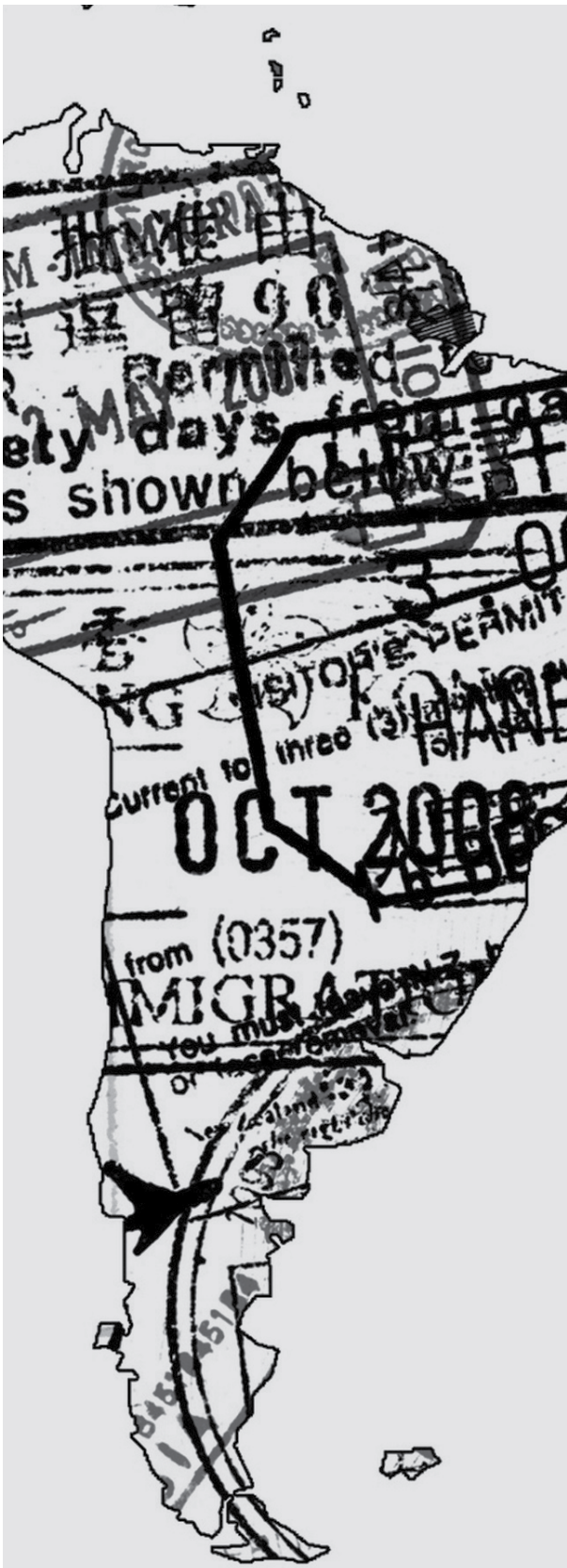
Defense counsel should not hesitate to ask a judge for a continuance if it is to get qualified immigration advice. If the judge pushes back, this is the moment for defense counsel to remind the judge of their duty to protect the defendant's rights and to enter a knowing and voluntary plea, which can only be done once the defendant is properly informed.

Encourage Collaboration

Additionally, in the interest in judicial economy, it is advantageous to have the prosecutor and defense work out a plea that does not cause severe immigration consequences, as the case will be less likely to come back on writ. Thus, judges should encourage the collaboration between the prosecutor and defense, with immigration consequences in mind.

Not Overstep on Admonition

While judges in Texas have a duty to admonish the defendant on the record, under the Texas Criminal Procedures Code, that a plea could result in negative immigration consequences, it does not give the judge carte blanche to solicit prejudicial immigration information on the record, nor to offer specific legal advice to a defendant. The admonition is essentially a way for the judge to ensure the plea is knowing and voluntary. It is not an opportunity for the judge to give legal advice to the defendant. Additionally, because state court records are public, defense counsel should urge the judge not to solicit detailed immigration information on the



record. Defense counsel can tell the judge the defendant has been advised, particularly if it was in writing, without putting that advice or any information about the defendant's immigration status into the record.

Allocate Funds for Hiring an Immigration Attorney for Consultation

Finally, defense counsel should absolutely push the judge to provide funds to pay for an immigration consultation for indigent defendants. Just as the judge would allocate funding for an investigator or other expert, there is no reason defense counsel should not push for similar funding allocations to meet the requirements of *Padilla*.

Encountering Immigration and Customs Enforcement (ICE)

Most defense attorneys will only have to deal with ICE in limited contexts, generally in the form of an ICE detainer that is placed on the defendant in criminal custody.

What is a Detainer?

The short answer is that it is a request from an ICE officer to hold a non-citizen when the non-citizen would normally be released from custody for up to 48 hours in order for ICE to retrieve them. It is not a warrant, and there is no factual basis required for ICE to issue a detainer. The detainer is not a mandate from the federal government, nor does it even prove the defendant is removable. It is simply a faxed request from ICE to the local law enforcement entity asking them to hold the defendant for up to 48 hours.

A lot has been written and litigated relating to detainers, but currently because of Texas Senate Bill 4, all Texas counties are complying with these requests.

The 48-Hour Rule

The 48 hours, excluding weekends and holidays, begins when the jail's lawful authority to detain the individual expires. Here are the most common ways that the 48 hours is triggered:

- The defendant satisfies release conditions by posting bail or getting an order of release on personal recognizance;
- The court dismisses the case or prosecution is not pursued; or
- The defendant completes his or her sentence for the conviction.

Once the 48-hour period has lapsed, the immigration detainer has expired, and the jail lacks authority to hold someone, if ICE has not already assumed custody. ICE cannot "extend" the 48-hour rule. Additionally, a detainee in a facility authorized to hold immigrant detainees is not in immigration custody unless ICE has "officially" transferred them to immigration custody. If the local jail has a contract to house detainees for ICE, this may mean that the defendant will be officially transferred from criminal custody into "ICE custody" without ever leaving the jail.

What to do if the 48 hours has lapsed

Ideally, if defense counsel is within a jurisdiction where ICE does not regularly retrieve defendants within 48 hours, counsel would have already prepared a writ of habeas and a letter to the jail.

Advise the Sheriff/Jail

Hopefully the sheriff/jail will release the defendant when defense counsel explains that the 48 hours has expired. Defense counsel can point the sheriff to 8 C.F.R. § 287.7, which makes clear that the period of detainer is limited. The 48-hour rule is also written on the individual detainer forms.

File habeas in state or federal court and seek civil damages

If the request for release is unsuccessful, defense counsel may need to pursue other tactics. There are many great materials online about how to do a habeas writ based on 48-hour violations so they will not be detailed here, but defense counsel should be aware these remedies exist and can be of tremendous help to defendants with ICE detainers.

Getting the Defendant Back from ICE Detention

If the defendant is transferred to ICE custody before the resolution of their criminal case, defense counsel should try and contact the defendant in ICE custody. There is an online ICE detainee locator that should help defense counsel figure out where the defendant is housed. Counsel can contact the main office of the ICE facility and hopefully set up a call with the defendant, explaining they are counsel on the criminal case. If the defendant gets a bond in immigration, defense counsel can proceed normally with the defendant on bond. If the defendant does not get a bond from ICE custody, but they wish to face their charges, defense counsel can ask the judge to sign a bench warrant. Finally, the defendant may wish to be removed without resolving their criminal case, but defense counsel should warn the defendant that they will have a warrant that could jeopardize future relief and bring them back into the deportation pipeline if they re-enter without permission.

ICE in the Courthouse

Because, in Texas, ICE detains most defendants in the jail, ICE courthouse arrests are less common. Nevertheless, they do occur, and defense counsel should be prepared if ICE officers appear in court wishing to detain the defendant. Below are some suggestions on what to do from the Immigrant Defense Project.

Invoke the defendant's rights. Identify yourself as the person's lawyer. Tell ICE not to question the defendant. Tell the defendant not to sign anything and to exercise his/her right to remain silent. Answering questions will only help ICE deport him/her.

Request to call or recall the criminal case while the defendant is present to avoid the issuance of a warrant.

Get info from ICE. Ask for agents' names and contact information. Ask for the basis of the arrest and to see a warrant (note, if signed by a judge or an ICE supervisor). Ask where they are taking the defendant.

Get on the record. Explaining the situation may prevent a bench warrant and possibly help in immigration court. If possible, talk to the defendant about the impact that going into *criminal* custody via bail revocation or a plea, instead of ICE custody, would have on his/her interests.

Glossary

IMPORTANT NOTE: This glossary exists primarily because there are a variety of terms used in this guide that are unique to the immigration context or mean something entirely different from what the same term(s) mean when used in other legal contexts.

212(h) Waiver: A discretionary waiver of certain inadmissibility grounds.

Affirmative Case: When a non-citizen files for immigration relief (i.e., such as status through a spouse), but is not in removal proceedings.

Aggravated Felony: A category of criminal offenses with serious immigration consequences, although these offenses may not even be felonies under the state criminal code.

Asylee: A person who has been granted Asylum.

Asylum: Humanitarian relief granted in the U.S. to persons fleeing specific types of persecution.

Categorical Approach: The method for determining if a state conviction triggers an immigration result.

Charging Document: The document filed by the prosecutor with the state court to allege a criminal offense.

Controlled Substance Offense: An offense relating to a substance on the Federal list of Controlled Substances.

Convictions: Generally, in the immigration context, a conviction is any adjudication or admission of guilt with some form of punishment.

Crime Involving Moral Turpitude (CIMT): A category of criminal offenses with immigration consequences but no statutory definition in the immigration code.

Crime of Domestic Violence, Stalking and Child Abuse: A category of criminal offenses that trigger deportability.

Defensive Case: A case heard in immigration court where the non-citizen is defending themselves against the government's attempt to have them deported.

Deferred Action for Childhood Arrivals (DACA): Special temporary relief granted during the Obama Administration for non-citizens brought to the U.S. as children who meet certain requirements; the program is currently under litigation.

Deportability: Generally, the standard used to decide if a person who has or had valid status can lose their status and be placed in removal proceedings.

Divisible: A term to describe if a criminal offense encompasses a variety of separate offenses.

Elements: What a jury must find beyond a reasonable doubt to convict someone of a particular offense.

Firearms Offense: Any offense in which a firearm is an element of the offense; this is a ground of deportability.

ICE Detainer: A request from ICE to local law enforcement to hold a non-citizen for up to 48 hours after the termination of the criminal case (or posting bond) so that ICE can come retrieve the person.

Inadmissibility: Generally, the standard used to decide if a person can qualify for many forms of immigration relief or admission at the border, the standard to decide if an undocumented person can be placed in removal proceedings, and the standard that certain returning residents are subjected to after travel abroad.

LPR: Lawful Permanent Resident or a "green-card" holder, this is not the same as being a U.S. citizen. A person who has the right to live and work in the U.S. permanently, unless they become deportable or travel outside the U.S. under certain conditions.

Mandatory Detention: A group of offenses that require non-citizens to be detained by ICE during the pendency of their removal proceedings.

Master Hearing: Preliminary immigration court hearing where the government alleges why the non-citizen can be removed and where the non-citizen responds to the allegations and states their options for relief.

Means: A term to describe the various ways a single offense may be violated, but which do not need to be found beyond a reasonable doubt by the jury.

Merits Hearing: The final immigration court hearing; basically a trial on immigration relief.

Naturalization: The process by which a Lawful Permanent Resident (LPR) applies to become a U.S. citizen.

Particularly Serious Crime: A category of crimes that bar Withholding of Removal.

Prostitution: A specific ground of inadmissibility in the immigration code.

Refugee: A status a person is granted abroad based on specific types of persecution.

Relief: The term used to refer to any application for lawful status. Family visas, asylum, and DACA are all examples of relief. For a free resource written for defenders, which provides charts and a two-page summary of each kind of relief and their criminal bars, see § N.17 Immigration Relief Toolkit for Defenders (2018) at www. irlc.org/chart.

Sentence: In the immigration context, any period of confinement contemplated by the court, even if suspended.

Student Visa: A non-immigrant visa granted to a student for a specific period of time/course of study that can be terminated based on criminal violations.

Temporary Protected Status (TPS): A temporary status granted to non-citizens from certain designated countries (usually based on natural disaster), which is renewed annually until the designation for that country is terminated (or until the TPS holder no longer meets the qualifications).

Tourist Visa: Also known as a B-2 visa, although often granted for 10 years, the visa holder is only permitted to enter the U.S. for a specific period of time on each visit indicated by Border Patrol, usually six months.

T Visa: A visa for victims of trafficking who cooperate with law enforcement.

U Visa: A visa for victims of a series of enumerated crimes who cooperate with law enforcement.

Voluntary Departure: Immigration relief granted by ICE or the Immigration judge to a non-citizen in removal where the non-citizen agrees to depart the U.S. voluntarily and thus avoid the additional penalties associated with a formal deportation order.

Withholding of Removal: A form of relief which is similar to Asylum but with slightly different requirements.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