

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

Docket No. 2023-04231  
Ind. No. 505/2018

-against-

NOTICE OF MOTION FOR  
LEAVE TO FILE A BRIEF  
*AS AMICI CURIAE*

MARCO A. MARTINEZ,  
Defendant-Appellant

-----X

PLEASE TAKE NOTICE that upon the attached affirmation of Andrew Wachtenheim, the undersigned will move this Court, at 10:00 a.m. on August 14, 2023, or as soon as counsel may be heard, for an order granting leave to proposed *amici curiae* the National Association of Criminal Defense Lawyers, New York State Defenders Association, Immigrant Defense Project, *et al.* to file a brief as *amici curiae* in support of Defendant-Appellant Marco A. Martinez and in support of reversing the decision of the County Court below. Attached to this Notice of Motion is the Affirmation of Andrew Wachtenheim in Support of Motion for Leave to File a Brief as *Amici Curiae*. Individual statements of interest of proposed *amici curiae* are attached at Exhibit A. A copy of the proposed brief is attached at Exhibit B. Additional materials in support of the brief are attached at Exhibit C. Proposed *amici*

*curiae* respectfully request that this Court grant them leave to file the attached brief and supporting exhibits for consideration in this Court’s adjudication of this appeal.

Respectfully submitted,

Dated: August 3, 2023

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,  
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Docket No. 2023-04231  
Ind. No. 505/2018  
AFFIRMATION OF SERVICE

-against-

MARCO A. MARTINEZ,  
Defendant-Appellant

-----X

Andrew Wachtenheim, an attorney admitted to practice law in the courts of the  
State of New York, affirms under the penalties of perjury:

1. On August 3, 2023, I served the attached Motion for Leave to File Brief as

*Amici Curiae* and supporting exhibits on the following interested parties:

a. Served by email and by U.S. Postal Service regular mail:

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Dated: August 3, 2023

Respectfully submitted,

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AFFIRMATION IN SUPPORT  
OF MOTION FOR LEAVE TO  
FILE A BRIEF AS *AMICI*  
*CURIAE*

MARCO A. MARTINEZ,  
Defendant-Appellant

-----X

Andrew Wachtenheim, an attorney admitted to practice law in the courts of the State of New York, affirms under the penalties of perjury:

**INTRODUCTION**

1. I am an attorney employed by the Immigrant Defense Project. This affirmation is based on information and belief, from my review of the briefs and record in this case. I make this affirmation in support of a motion for leave to file a brief as *amici curiae* on behalf of the National Association of Criminal Defense Lawyers, New York State Defenders Association, Immigrant Defense Project, New York State Office of Indigent Legal Services (“ILS”) Regional Immigration Assistance Center 1–Western New York, ILS Regional Immigration Assistance Center 2–Central New York, ILS Regional Immigration Assistance Center 3–

Northern New York, ILS Regional Immigration Assistance Center 4–Hudson Valley, ILS Regional Immigration Assistance Center 5–New York City, New York County Defender Services, The Legal Aid Society, and Brooklyn Defender Services, in support of Defendant-Appellant Marco Martinez in the above-captioned matter. Additional information and statements of interest about proposed *amici curiae* are attached at Exhibit A. I received these statements of interest directly from *amici curiae* by email.

2. A copy of the proposed brief is attached at Exhibit B. Additional materials in support of the brief are attached at Exhibit C. Proposed *amici curiae* respectfully request that this Court grant them leave to file the attached brief and supporting exhibits for consideration in this Court’s adjudication of this appeal.

3. Consistent with Rule 1250.4(f) of the Practice Rules of the Appellate Division, proposed *amici curiae* further submit that this brief provides information, analysis, and argumentation that is distinct from what Defendant-Appellant Martinez has provided to this Court in his brief on appeal, and can assist this Court in evaluating the legal framework for deciding ineffective assistance of counsel claims brought under the U.S. Supreme Court’s decision in Padilla v. Kentucky, 559 U.S. 356 (2010), and the professional norms for representing noncitizen defendants in the wake of Padilla.

**ISSUES TO BE BRIEFED**

4. In this case, Defendant-Appellant Martinez, who is not a U.S. citizen, pleaded guilty to a conviction and sentence that rendered him ineligible for statutory relief from removal (cancellation of removal) for which he was otherwise qualified and eligible. In his C.P.L. § 440.10(1)(h) motion, he argues that his retained defense attorney's representation was constitutionally deficient and that he was prejudiced by defense counsel's deficient performance. See generally Brief for Defendant-Appellant (arguing, *inter alia*, deficient performance under Padilla, and prejudice under Lee v. United States, 582 U.S. 357 (2017)). Proposed *amici curiae* seek to submit argument concerning specific issues within Mr. Martinez's claims of a Padilla violation and deficient performance by his defense counsel.

5. The attached brief of proposed *amici curiae* appends as exhibits, and discusses, a number of professional trainings and practice guides showing that experts and practitioners nationally and throughout New York interpret and implement Padilla to require defense counsel to advise and negotiate regarding a broad range of immigration consequences, including eligibility for relief from removal. See Proposed Brief of *Amici Curiae* at 15-24; see also Professional Trainings, attached at Exhibit C. In addition, the proposed brief of *amici curiae* provides in-depth discussion of the U.S. Supreme Court's decision in Padilla, as well as analysis of this Court's decisions and decisions of the other Appellate Divisions



and other state high courts implementing and interpreting Padilla and its obligation for defense counsel to attend to eligibility for relief removal as part of their constitutional duty to noncitizen defendants. See Proposed Brief of *Amici Curiae* at 6-15.

6. Finally, because proposed *amici curiae* include several organizations staffed by experienced specialists in criminal-immigration law, the proposed brief provides analysis, context, and information about specific questions at the complex intersection between criminal and immigration law, that can support a full and fair adjudication of this appeal.

#### **AMICI CURIAE INTERESTS IN THE ISSUES**

7. Proposed *amici curiae* are the National Association of Criminal Defense Lawyers, the New York State Defenders Association, five of the six New York State Office of Indigent Legal Services Regional Immigration Assistance Centers, the Immigrant Defense Project, and large New York public defender organizations. Collectively, proposed *amici* are criminal and criminal-immigration law practitioners and experts who work across New York State—and some, nationally—representing and advising noncitizens accused of crimes, pursuant to *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Padilla v. Kentucky*, 559 U.S. 356 (2010).

8. Several *amici* are regarded as national and New York state experts on the immigration consequences of criminal convictions, and the rights of noncitizens

accused and convicted of crimes. Several *amici* produce and publish the dominant legal resources, practice guides, and legal trainings on these issues, including obligations of defense counsel in representing noncitizen defendants.

9. Because *amici* are members of the legal profession who hold the constitutional duty to provide effective representation and counsel to noncitizens accused of crimes in New York, *amici* have an interest in ensuring that New York law appropriately recognizes the full range of constitutional rights held by noncitizen defendants.

## **CONCLUSION**

10. For the above-stated reasons, proposed *amici curiae* NACDL, NYSDA, IDP, *et al.* respectfully request that an order be entered granting them leave to file a brief as *amici curiae* in the above-captioned appeal.

Dated: August 3, 2023

Respectfully submitted,

/s/Andrew Wachtenheim  
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Counsel for Proposed *Amici Curiae*

**EXHIBIT A:**  
**STATEMENTS OF INTEREST OF**  
**PROPOSED *AMICI CURIAE***

## **STATEMENTS OF INTEREST OF AMICI CURIAE**

1. The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

2. The New York State Defenders Association (“NYSDA”), a not-for-profit membership organization, has been providing support to New York’s public defense community since 1967. NYSDA’s mission is to improve the quality and scope of legal representation for people who cannot afford an attorney in the State’s criminal and family courts. Since 1981 under a state grant, the Public Defense Backup Center (“Backup Center”) has carried out the State’s public defense support

obligation required by the Sixth Amendment and the New York State Constitution, which guarantee New Yorkers the right to effective public defense representation regardless of their ability to pay. The Backup Center serves approximately 6,000 attorneys in more than 130 county-based programs. The Backup Center supports attorneys who practice in institutional defender offices, conflict defender offices, legal aid societies, and assigned counsel attorneys. NYSDA has been granted *amicus curiae* status in numerous appellate cases dealing with the rights of criminal defendants. NYSDA has an interest in helping attorneys provide quality representation including to clients who may face immigration consequences in criminal cases. Immigration consequences have life changing implications for clients and their families and, therefore, individuals must have meaningful and accurate advice from their counsel. To that end, NYSDA has conducted dozens of Continuing Legal Education trainings since the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356 (2010), to ensure attorneys are aware of their obligations and familiar with resources available to assist them with determining possible immigration consequences. These trainings have been offered in locations around the State.

3. The New York State Office of Indigent Legal Services Regional Immigration Assistance Centers ("ILS RIACs") were created in 2016 to provide expert immigration legal resources to indigent defense providers across the entire

state, to improve the quality of indigent legal services, and to ensure the right to effective representation of counsel for noncitizens, as prescribed in Padilla v. Kentucky, 559 U.S. 356 (2010). There are six RIACs, each covering a region of the state: western New York, central New York, Albany, Hudson Valley, New York City, and Long Island. Two of the essential functions of the RIAC attorneys are: providing defense counsel with advisals (commonly called “Padilla advisals”) for their noncitizen clients, and training defenders on criminal-immigration law and their duties to their noncitizen clients. By state mandate, the RIACs provide Padilla advisals and additional counsel to public defenders working for indigent defense providers, and for members of the state’s 18B panel. Each RIAC services multiple counties. The RIACs advise trial court and appellate defenders and family court practitioners. The RIACs also provide training to members of the Judiciary on criminal-immigration law. RIAC Directors have provided these trainings through conferences and meetings of the Judicial Districts, New York State Association of City Court Judges, and the New York State Magistrates Association. The RIACs seek to improve the quality of justice for immigrants accused or convicted of crimes and, therefore, have a great interest in ensuring that courts correctly construe the Supreme Court’s holding in Padilla v Kentucky.

4. Immigrant Defense Project (“IDP”) is a New York-based nonprofit legal resource and training center that promotes fundamental fairness for immigrants

accused or convicted of crimes. IDP is recognized nationally and in New York State as an expert organization on criminal-immigration law. IDP is the Regional Immigration Assistance Center for New York City's 18B panel and appellate defense providers. Since 1997, IDP has published the premier legal resource and treatise on criminal-immigration law for defense counsel in New York State, which is updated annually. See Manuel D. Vargas, Representing Immigrant Defendants in New York (6th ed. 2017). IDP regularly appears as *amicus curiae* before the U.S. Supreme Court, federal courts, and state courts on matters of criminal-immigration law and the rights of noncitizens accused and convicted of crimes. See, e.g., Pereida v. Wilkinson, 141 S. Ct. 754 (2021); Mathis v. United States, 579 U.S. 500 (2016); Lee v. United States, 582 U.S. 357 (2017); Chaidez v. United States, 568 U.S. 342 (2013); Padilla v. Kentucky, 559 U.S. 356 (2010); I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (cited in St. Cyr, 533 U.S. at 323 n.50); People v. Delorbe, 31 N.Y.3d 112 (2020); People v. Harrison, 27 N.Y.3d 281 (2016); People v. Peque, 22 N.Y.3d 168 (2013) (cited in Peque, 22 N.Y.3d at 23, 25 n.4); People v. Ventura, 17 N.Y.3d 675 (2011).

5. New York County Defender Services ("NYCDS") is a public defender office serving clients in Manhattan since 1997. Operating at the immigrant crossroads of the world, NYCDS represents over one thousand noncitizen defendants every year. To serve this client population, NYCDS maintains a dedicated



Immigration Unit, which is staffed by highly experienced attorneys with expertise in the intersection of criminal and immigration law. All consultations by Immigration Unit attorneys are conducted with the ultimate goal of helping noncitizen defendants make informed decisions about their criminal cases and ensuring their fundamental Sixth Amendment right to the effective assistance of counsel.

6. The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. The Legal Aid Society's Immigration Law Unit is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. The Society's Criminal Defense Practice ("CDP") represents well over 200,000 clients in trial, appellate, and post-conviction matters each year. The Society's Criminal Immigration Unit is committed exclusively to the intersection of criminal and immigration law, and its team of attorneys work with CDP attorneys to protect the constitutional rights of non-citizens who are accused of crimes.

7. Brooklyn Defender Services ("BDS") is one of the largest public defense offices in New York State, representing low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. A significant portion of the people BDS represents are immigrants. BDS's criminal-immigration specialists protect the rights of immigrant New Yorkers by providing support, expertise, and advice to defense attorneys across BDS to meet the unique needs of

immigrants facing criminal legal proceedings. Since 2009, BDS has counseled more than 16,000 people in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system.

**EXHIBIT B**  
**Proposed Brief of *Amici Curiae***

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**BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS, NEW YORK STATE DEFENDERS ASSOCIATION,  
IMMIGRANT DEFENSE PROJECT, REGIONAL IMMIGRATION  
ASSISTANCE CENTER 1–WESTERN NY, REGIONAL IMMIGRATION  
ASSISTANCE CENTER 2–CENTRAL NY, REGIONAL IMMIGRATION  
ASSISTANCE CENTER 3–NORTHERN NY, REGIONAL IMMIGRATION  
ASSISTANCE CENTER 4–HUDSON VALLEY, REGIONAL  
IMMIGRATION ASSISTANCE CENTER 5–NYC, NEW YORK COUNTY  
DEFENDER SERVICES, THE LEGAL AID SOCIETY, AND BROOKLYN  
DEFENDER SERVICES IN SUPPORT OF DEFENDANT-APPELLANT  
MARCO MARTINEZ AND IN SUPPORT OF REVERSING THE  
DECISION OF THE COUNTY COURT**

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**INTEREST OF AMICI CURIAE**

Amici curiae are New York State public defender organizations, New York State Office of Indigent Legal Services Regional Immigration Assistance Centers, and associations of criminal defense and criminal-immigration lawyers. Amici annually represent and advise thousands of noncitizens accused of crimes in New York, pursuant to Gideon v. Wainwright, 372 U.S. 335 (1963), and Padilla v. Kentucky, 559 U.S. 356 (2010). Amici hold the constitutional responsibility to provide adequate representation and advice to noncitizen defendants. Moreover, amici are the members of the legal profession who have implemented the Supreme Court’s mandate in Padilla. Amici respectfully submit this brief in support of Defendant-Appellant Marco A. Martinez, who received constitutionally deficient representation in this case and experienced prejudice as a result. In particular, amici attach to this brief nearly a dozen trainings—which are just representative

examples—that we have given to defenders across New York State conveying to defense counsel that the constitutional duty to noncitizen defendants includes, where called for, the duty to advise fully and accurately as to eligibility for relief from removal and to negotiate to avoid ineligibility for relief from removal.

This is because amici understand Padilla to unequivocally require defense counsel to advise about and negotiate to avoid adverse immigration consequences, including relief from removal. Several decisions of this Court already affirm this principle. See, e.g., People v. Abdallah, 153 A.D.3d 1424, 1426 (2d Dep’t 2017); People v. Alexander, 208 A.D.3d 1247, 1249 (2d Dep’t 2022). Amici respectfully submit this brief to highlight for this Court the importance of continuing to adhere to this principle from Padilla, and thus the need to overturn a decision like the County Court’s decision in this case that fails to recognize that part of the Padilla duty includes attending to eligibility for relief from removal.

Amici agree with Mr. Martinez that, under clear federal immigration law, Padilla, and this Court’s precedents, defense counsel in this case misadvised him as to eligibility for relief from removal, failed to fully advise him as to eligibility for relief from removal, and failed to negotiate effectively to avoid relief ineligibility and mandatory deportability in his case. See Brief for Defendant-Appellant at 26-35. Amici further agree with Mr. Martinez that he experienced cognizable prejudice as a result of his defense counsel’s deficient performance. See Brief for

Defendant-Appellant at 35-38; see generally Lee v. United States, 582 U.S. 357, 364-71 (2017).<sup>1</sup> However, amici submit this brief specifically to address the first prong of Strickland v. Washington, 466 U.S. 668 (1984), Padilla, and New York’s “meaningful representation” test (see People v. Benevento, 91 N.Y.2d 708, 712 (1998)): the deficiencies in defense counsel’s performance in this case, and the numerous errors of law in the County Court’s decision that fail to recognize defense counsel’s deficient performance. In denying his C.P.L. § 440.10(1)(h) motion, the County Court failed to apply Padilla and failed to find that defense counsel’s performance was proven constitutionally deficient. Amici respectfully submit that this Court must reverse the decision of the County Court because it is contrary to law.

### **PRELIMINARY STATEMENT**

Defendant-Appellant Marco A. Martinez has lived in the United States for nearly 30 years and lives in New York with his longtime wife and three U.S. citizen children. In 2019, when he was charged with driving while intoxicated, Mr. Martinez placed the utmost importance on remaining in the United States with his family. The record in this case shows that his retained defense attorney failed to

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<sup>1</sup> It is evident from the record in this case that the County Court’s prejudice finding is erroneous and contrary to law. See People v. Saunders, 193 A.D.3d 766, 770 (2d Dep’t 2021) (“The rationality standard set by the United States Supreme Court in Padilla does not allow the courts to substitute their judgment for that of the defendant. In applying that standard, we do not determine whether a decision to reject a plea of guilty was the best choice, but only whether it is a rational one[.]” (quoting People v. Picca, 97 A.D.3d 170, 185 (2d Dep’t 2012))).

advise him completely and accurately about severe immigration consequences and failed to negotiate to avoid such consequences, and thereby provided constitutionally inadequate representation. See Brief for Defendant-Appellant at 12-20. As a result of defense counsel's incomplete and inaccurate advice and flawed negotiations, Mr. Martinez pled guilty to driving while intoxicated and was sentenced to 364 days' jail, a result that causes mandatory deportability by eliminating Mr. Martinez's eligibility for statutory relief from removal.<sup>2</sup>

The County Court improperly denied Mr. Martinez's § 440.10(1)(h) motion to vacate the conviction and sentence. Amici respectfully submit this brief to make clear to this Court that defense counsel's performance fell below objective standards of reasonableness and violated Mr. Martinez's Sixth Amendment right. The County Court's decision is unclear and confusing on this point, but it states that "the record does not cast doubt on the apparent effectiveness of counsel." See

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<sup>2</sup> As Mr. Martinez correctly explains in his brief on appeal, the combined plea and sentence in his case rendered him statutorily ineligible to apply for cancellation of removal, a form of relief for which he was qualified until he pleaded guilty and was sentenced. See Brief for Defendant-Appellant at 16-18. Prior to his plea and conviction, Mr. Martinez had lived in the United States for more than ten years, had U.S. citizen children, and was not otherwise disqualified from cancellation of removal. See INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (enumerating statutory criteria for cancellation of removal). He therefore was eligible to make an evidentiary showing in immigration court that his three children would suffer extreme and exceptionally unusual hardship if he were not granted cancellation of removal. See id. However, because he was sentenced to and served more than 179 days in jail pursuant to his conviction, he became statutorily ineligible to apply for cancellation and therefore mandatorily deportable. See INA § 101(f)(7), 8 U.S.C. § 1101(f)(7) (clearly stating that a person who "has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" cannot establish "good moral character," which is one of the statutory criteria for cancellation of removal).

Decision and Order (Apr. 4, 2023), p. 9 (internal citations omitted).<sup>3</sup> This statement is incontrovertibly wrong. The record in this case conclusively establishes that defense counsel’s performance violated Padilla. At a minimum, the record establishes that defense counsel provided incomplete and wrong advice about eligibility for relief from removal and failed to negotiate to avoid ineligibility for relief from removal. See Brief for Defendant-Appellant at 12-20.

In Section I of this brief, amici discuss Padilla and this Court’s decisions interpreting and applying Padilla, which conclusively hold that wrong and incomplete advice as to relief eligibility is ineffective assistance of counsel. As such, the record in this case establishes that defense counsel’s performance was

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<sup>3</sup> In a subsequent paragraph, the County Court decision quotes an unpublished Bronx County Court decision, but supplies no analysis or explanation for why it does so:

‘Notably, because of the defendant's lack of immigration status, even an outright acquittal on all charges would not... insulate [the defendant] from deportation. Unlike . . . lawful permanent residents for whom the only basis of removal [is] their criminal convictions, here . . . the defendant is removable pursuant to section 212(a)(6)(A)(I), since he entered the United States illegally.’

Decision and Order, p. 6 (quoting People v. Clemente, 58 Misc. 3d 266, 273 (Sup. Ct., Bronx County 2017) (alterations original)). The County Court says nothing further about this quote from Clemente, which it presents entirely out of context. This unpublished trial court decision is irrelevant to Mr. Martinez’s case and should be entirely disregarded in this appeal. In addition, to the extent that the County Court relied on Clemente for a principle that a noncitizen removable on a preexisting basis cannot experience further immigration consequences due to the resolution of criminal charges, both the County Court and the Clemente court are clearly wrong and their reasoning and holdings violate both Padilla and multiple decisions of this Court. See infra Section I (discussing Padilla, decisions of this Court and the other Appellate Divisions, and decisions of the high courts of multiple other states, holding that preserving eligibility for relief for noncitizens removable on another basis is part of defense counsel’s constitutional duty).

ineffective and the County Court was wrong to conclude otherwise. In Section II, amici discuss and attach numerous publicly available legal resources and practice guides, as well as professional trainings given to defense attorneys in New York, all showing that defense counsel are trained to advise about and negotiate to preserve eligibility for relief from removal, both nationally and in New York. By failing to do so in this case, defense counsel's performance fell below professional norms and objective standards of reasonableness. The County Court was wrong to conclude otherwise, and its decision must be reversed.

## ARGUMENT

### **I. The U.S. Supreme Court's and this Court's Precedents Conclusively Obligate Defense Counsel to Advise About and Negotiate to Avoid Clear Immigration Consequences, Including Ineligibility for Relief from Removal.**

As this Court is well-aware, the first prong of an ineffective assistance of counsel claim under federal and New York law is whether counsel's performance fell below an objective standard of reasonableness, as informed by professional standards. In Padilla, the Supreme Court clarified that professional standards require defense counsel to provide competent advice regarding, and to negotiate to avoid, clear immigration consequences of a criminal conviction and sentence. 559 U.S. at 366-69. The County Court's decision does not mention Padilla even once, even though it is the determinative legal standard for this case. By misadvising and failing to advise fully and accurately as to relief from removal, and by failing

to negotiate to avoid ineligibility for relief (in this case, cancellation of removal) and thereby causing Mr. Martinez mandatory deportability,<sup>4</sup> defense counsel in this case provided substandard representation that violated Mr. Martinez’s federal and state rights to effective assistance of counsel. Both Padilla and this Court’s precedents implementing Padilla make this clear, and the County Court’s decision is irreconcilable with these precedents.

Pursuant to Padilla and cases implementing that precedent, defense counsel has a constitutional obligation to provide competent advice about, and negotiate to avoid, clear immigration consequences that may result from a guilty plea and sentence, including ineligibility for relief from removal. Indeed, preserving a noncitizen’s “right to remain” in the United States (Padilla, 559 U.S. at 368) necessarily requires defense counsel to advise about preserving eligibility for immigration relief, as that relief is frequently what determines whether an individual will be deported or not. Because the County Court’s decision fails to

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<sup>4</sup> Mr. Martinez avers that his defense counsel misadvised him about an aggravated felony designation, misadvised him that he would remain eligible for all relief from removal, and failed to negotiate to avoid ineligibility for cancellation of removal. See Brief for Defendant-Appellant at 12. His defense counsel does not contend that he negotiated to avoid relief ineligibility. See id. at 12-13. His defense counsel also admits misadvice as to the aggravated felony designation. See id. As Mr. Martinez correctly identifies in his brief on appeal, under clear U.S. Supreme Court case law, his statute of conviction is not an aggravated felony regardless of the sentence imposed, and thus imposition of a 364 day sentence was irrelevant to any aggravated felony determination. See Brief for Defendant-Appellant at 7, 32-33. See also Leocal v. Ashcroft, 543 U.S. 1 (2004). However, a 364 day sentence imposed and served disqualified Mr. Martinez from relief from removal for other reasons having nothing to do with an aggravated felony designation. See Brief for Defendant-Appellant at 7, 32-33. See also INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(1)(b)(B); INA § 101(f)(7), 8 U.S.C. § 1101(f)(7).



recognize and apply this binding precedent, it is wrong and must be overturned.

The County Court decision says only, “the record does not cast doubt on the apparent effectiveness of counsel.” Decision and Order, p. 9. It says nothing else about what would constitute effective representation in Mr. Martinez’s case, or why the County Court found defense counsel’s representation to be effective.

Contrary to the County Court’s opinion, the record in this case conclusively establishes that defense counsel’s representation violated Padilla, because he failed to advise accurately and completely and failed to negotiate to avoid clear immigration consequences to Mr. Martinez—ineligibility for relief from removal through cancellation of removal and thus mandatory deportability.

In Padilla, the Supreme Court held that noncitizens’ Sixth Amendment right to effective assistance of counsel includes competent advice from defense counsel regarding clear immigration consequences prior to pleading guilty, and competent plea negotiation to avoid those immigration consequences. See Padilla, 559 U.S. at 366, 373-74; see also Lafler v. Cooper, 566 U.S. 156, 162 (2012) (“During plea negotiations defendants are entitled to the effective assistance of competent counsel.” (internal quotations marks omitted)). The Court applied the standard for ineffective assistance of counsel announced in Strickland v. Washington, 466 U.S. 668, 686 (1984). Under that familiar standard, a court must determine “whether counsel’s representation ‘fell below an objective standard of reasonableness.’ ”

Padilla, 559 U.S. at 366 (quoting Strickland, 466 U.S. at 688). Next, a court must determine whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Padilla, 559 U.S. at 366 (quoting Strickland, 466 U.S. at 694).

Constitutional deficiency under the first prong depends on “the practice and expectations of the legal community” and is measured by “reasonableness under prevailing professional norms.” Padilla, 559 U.S. at 366 (quoting Strickland, 466 U.S. at 688). Examining its own precedent and professional norms, the Court found the constitutional duty requires counsel to advise and negotiate regarding immigration consequences of a plea. Padilla, 559 U.S. at 367-68, 373-74. The Court explicitly described those immigration consequences to include eligibility for relief from removal, referring to “removal consequence,” “risk of deportation,” the “right to remain in the United States,” and eligibility for “discretionary relief measures.” *Id.* at 367-68. The Court further discussed the importance of preserving eligibility for discretionary relief in some depth, citing its decision in I.N.S. v. St. Cyr, 533 U.S. 289 (2001):

We too have previously recognized that “ ‘[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.’ ” Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, “would have been one of the principal benefits sought by defendants deciding whether to accept

a plea offer or instead to proceed to trial.” We expected that counsel who were unaware of the discretionary relief measures would “follo[w] the advice of numerous practice guides” to advise themselves of the importance of this particular form of discretionary relief.

Padilla, 559 U.S. at 368 (citations omitted) (quoting St. Cyr, 533 U.S. at 322-23, 323 n.50). The Court’s own explanation demonstrates how preserving a client’s “right to remain in the U.S.” (Padilla, 559 U.S. at 368) and avoiding removal necessarily require *both* avoiding removability *and* preserving eligibility for relief from removal.<sup>5</sup> See also Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010)

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<sup>5</sup> While unnecessary to deciding Mr. Martinez’s appeal, amici provide this additional information about the structure of federal immigration proceedings in order to assist this Court in adjudicating this case. Like many laws, the Immigration and Nationality Act (“INA”) is comprised of many numbered and lettered subsections of a large statute. The immigration consequences of charges, convictions, and sentences are found throughout the INA: for example, in the sections titled “deportable” noncitizens (INA § 237, 8 U.S.C. § 1227), “inadmissible” noncitizens (INA § 212, 8 U.S.C. § 1182), “removal proceedings” (INA § 240, 8 U.S.C. § 1229a), “cancellation of removal; adjustment of status” (INA § 240A, 8 U.S.C. § 1229b), “asylum” (INA § 208, 8 U.S.C. § 1158), “adjustment of status of refugees” (INA § 209, 8 U.S.C. § 1159). All of these statutory provisions contain clear immigration consequences of convictions and sentences. Procedurally, these immigration consequences can arise in multiple ways. For example, convictions and sentences are charged in “notices to appear,” which are the case-initiating documents in removal proceedings. See INA § 239(a), 8 U.S.C. § 1229(a). They arise in ineligibility for asylum, adjustment of status through family members and employers, temporary protected status, naturalization, and protection for survivors of human trafficking, violent crimes, and domestic violence—this is a nonexhaustive list of statutory provisions and immigration circumstances where convictions and sentences can trigger clear immigration consequences. Amici wish to emphasize that no one or two provisions of the INA contains the clear immigration consequences of convictions and sentences, which is consistent with how the Supreme Court understands immigration law, including in Padilla. Two good examples are: (1) conviction for “crimes involving moral turpitude” falls within two separate INA provisions (deportable noncitizens and inadmissible noncitizens) and also operates to bar multiple forms of relief from removal and eligibility for immigration benefits such as naturalization or Violence Against Women Act relief; and (2) conviction for an “aggravated felony” is a ground of deportability, relief ineligibility, and asylum and withholding of removal relief ineligibility, and these grounds are spread across more than five separate INA statutory provisions.

(stating that the ability to “seek cancellation of removal” was a way for the noncitizen to “avoid the harsh consequence of mandatory removal”).

Where the text of the immigration statute is “succinct, clear, and explicit,” defense counsel’s deficiency in providing a noncitizen client with false assurances, failing to advise, or providing incorrect advice is clear. Padilla, 559 U.S. at 368–69. The Supreme Court emphasized that “there is no relevant difference between an act of commission and an act of omission in this context,” and that distinguishing between affirmative misadvice and failure to advise would lead to “absurd results”:

A holding limited to affirmative misadvice . . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement.

Padilla, 559 U.S. at 370 (internal quotations marks omitted). A prominent resource relied on by the Padilla Court explains that competent defense counsel must:

[T]horoughly inform the client of the immigration consequences, defense counsel should tell the client a) what DHS will do to them as a result of the conviction, b) the different forms of immigration relief that will be foreclosed to them as a result of this conviction, and c) the forms of immigration relief that will be open to them, even with this conviction, and what they must do to qualify for each.

N. Tooby, *Criminal Defense of Immigrants* § 8.19 (3d ed. 2003) (emphasis added); see Padilla, 559 U.S. at 368 (citing N. Tooby, *Criminal Defense of Immigrants* § 1.3 (3d ed. 2003)). “[E]ffective counsel will in fact research the exact immigration consequences that attach to the conviction of the offense(s) charged, and each likely alternative, so that the case can be defended so as to minimize the immigration effects[.]” N. Tooby, *Criminal Defense of Immigrants* § 8.19.

Defense counsel’s representation in this case clearly fell below the professional standards established in Padilla. It is undisputed that defense counsel failed to advise Mr. Martinez that he would become ineligible for the only form of immigration relief for which he qualified, failed to negotiate to avoid this dire immigration consequence (mandatory deportation), and misadvised him as to the effect of his flawed and erroneous negotiation to avoid an “aggravated felony” conviction.<sup>6</sup> See Brief for Defendant-Appellant at 12-13. His representation was ineffective.

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<sup>6</sup> The record indicates a dispute as to whether defense counsel misadvised Mr. Martinez that he would remain eligible for relevant immigration relief. Mr. Martinez avers that defense counsel told him he would remain eligible, while defense counsel has stated he only told Mr. Martinez he was avoiding an aggravated felony conviction. Amici believe defense counsel’s account is implausible, as amici cannot imagine why defense counsel would provide the erroneous aggravated felony assessment if he did not believe that would in some way benefit Mr. Martinez. Nevertheless, this contested fact is irrelevant, because uncontested facts establish that defense counsel’s performance was deficient under Padilla: at a minimum, defense counsel concededly (a) failed to advise Mr. Martinez as to ineligibility for relief from removal, (b) failed to negotiate to avoid this immigration consequence, and (c) wrongly advised Mr. Martinez that this conviction would not be an aggravated felony due to the 364-day sentence. This representation was objectively unreasonable under prevailing professional standards and was unconstitutional.

Consistent with federal and New York law, this Court applies the Padilla obligation where the immigration consequence at issue is statutory eligibility for discretionary relief from removal, as is the case here. This is consistent with the Supreme Court’s understanding of ineligibility for discretionary relief as being a critical immigration consequence that noncitizen defendants require information about before deciding to plead guilty. See Padilla, 559 U.S. at 368 (explaining that preserving eligibility for relief would be “one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial”); People v. Abdallah, 153 A.D.3d 1424, 1426 (2d Dep’t 2017) (“Courts have recognized the significance to a defendant, in pleading guilty, of a possibility of discretionary relief from removal[.]”).

In People v. Abdallah, the noncitizen had pled guilty to an offense that made him “mandatorily deportable and ineligible for cancellation of removal.” Id. In finding defense counsel in the case ineffective, this Court explained that “counsel had a duty to give correct advice as to the immigration consequences of the plea.” Id. Because counsel “misadvise[ed] the defendant that there was a possibility of receiving a cancellation of removal,” the defense attorney’s performance “fell below an objective standard of reasonableness under Strickland.” Id. at 1426-27.

In People v. Alexander, this Court similarly found that the defendant’s averments that his counsel misadvised him as to immigration consequences were

not contradicted by the record, where his defense counsel’s representations suggested that “counsel did not realize that the defenses to deportation which the defendant might have raised in immigrant court would be barred by his plea.” 208 A.D.3d 1247, 1249 (2d Dep’t 2022).<sup>7</sup>

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<sup>7</sup> These holdings are consistent with the decisions of the First and Third Departments, and high courts outside of New York. In People v. Lantigua, the noncitizen alleged that his defense counsel did not properly advise him that his guilty plea would cause “permanent ineligibility for legalization of his immigration status” and argued this subjected him to ineffective assistance of counsel. 184 A.D.3d 80, 83-84 (1st Dep’t 2020). The court held that, if true, these facts would establish deficient performance by defense counsel that fell below an objective standard of reasonableness. Id. at 85. In People v. Reynoso, the court acknowledged that “providing incorrect information concerning the deportation consequences of the plea”—which in that case included “eligib[ility] to have the United States Attorney General cancel his or her deportation”—would constitute ineffective assistance. 88 A.D. 3d 1162, 1163-64 (3d Dep’t 2011). See also Commonwealth v. Lavrinenko, 473 Mass. 42, 50-54 (2015) (holding defense counsel’s general warning about immigration consequences fell below professional standards where counsel failed to advise that guilty plea would effectively eliminate noncitizen’s chances of receiving inadmissibility waiver for adjustment of status to lawful permanent resident); Araiza v. State, 149 Hawai’i 7, 9 (2021) (“Despite her attorney’s reference to deportation being ‘almost certain,’ when taken as a whole, his advice conveyed that there was a realistic possibility Araiza would not be deported. In reality, Araiza was precluded from discretionary relief from deportation because of her conviction. Araiza is therefore entitled to relief.” (citation omitted)); State v. Nunez-Diaz, 247 Ariz. 1, 4-5 (2019) (holding that counsel’s failure to give correct advice about clear consequence of the plea—ineligibility for cancellation of removal under INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1)—was deficient under Padilla and satisfied the first prong of Strickland); Diaz v. State, 896 N.W.2d 723, 729, 732 (Iowa 2017) (concluding professional norms show counsel must advise regarding “all” adverse immigration consequences, including bars to relief from removal; stating that “deportation is a broad concept, and the adverse immigration consequences of a criminal conviction to a noncitizen under the immigration statute are not limited to removal from this country,” but also includes “consequences associated with removal, such as exclusion, denial of citizenship, immigration detention, and bar to relief from removal”); Daramola v. State, 294 Or. App. 455, 467-68 (2018) (approvingly citing Diaz, 896 N.W.2d at 729); Budziszewski v. Commissioner of Correction, 322 Conn. 504, 507 (2016) (“In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, [defense] counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty.”).

Both Padilla and this Court’s precedents hold unambiguously that defense counsel has an obligation to advise noncitizen defendants fully and accurately as to eligibility for relief from removal, and to negotiate to avoid relief ineligibility. In Mr. Martinez’s case, the uncontested facts in the record establish that his defense counsel did not do so. See Brief for Defendant-Appellant at 12-20. As such, defense counsel’s representation fell below objective standards of reasonableness and violated his constitutional rights to effective assistance of counsel. Because the County Court failed to recognize this constitutional violation, the decision is contrary to law and must be reversed.

**II. Professional Norms Implementing Padilla Clearly Obligate Defense Counsel to Advise About and Negotiate to Maintain Eligibility for Relief from Removal.**

The members of the legal profession who implement Padilla—the immigration law experts and criminal defense counsel who collectively represent and advise noncitizen defendants as to immigration consequences—train and instruct criminal defense lawyers on their critical constitutional duty to advise about and negotiate to avoid clear ineligibility for statutory relief from removal. This principle pervades the professional practice guides, trainings, and other resources for defense attorneys issued since Padilla, including numerous professional resources available at the time of Mr. Martinez’s plea in 2019. The American Bar Association Criminal Justice Standards, for example, provide that



defense counsel “should investigate and identify particular immigration consequences” that may result from criminal proceedings, including “removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client’s immediate family[.]” ABA Criminal Justice Standards of the Defense Function 4-5.5 (4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) (“Special Attention to Immigration Status and Consequences”); see also Padilla, 559 U.S. at 367 (citing ABA Standards for Criminal Justice Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed.1999)).

In addition, in New York specifically, robust resources provided by the State’s Office of Indigent Legal Services (“ILS”) for criminal defense counsel include—and often highlight—relief eligibility as a core feature of the duty to noncitizen defendants. See New York Office of Indigent Legal Services, ILS Standards for Establishing and Administering Assigned Counsel Programs: Black Letter Standards with Commentaries § 9.2.1, p. 25 (July 1, 2019), available at <https://www.ils.ny.gov/files/ACP%20Standards%20with%20Commentary%20070119.pdf>.

It is also likely that, had Mr. Martinez’s defense counsel sought immigration expertise to assist him in giving competent representation to Mr. Martinez, he

could have done so through the ILS RIAC servicing defenders in Orange County. See id., p. 25 n.42 (directing defenders representing non-citizens to consult with the RIAC in their region). The ILS has created six RIACs—covering all of New York State—to provide comprehensive Padilla advice and counsel to indigent noncitizen defendants. See Affirmation of Andrew Wachtenheim in Support of Motion for Leave to File a Brief of Amici Curiae, ¶ 1; Exhibit A, ¶ 3. The criminal-immigration law specialists in the RIACs frequently provide these services to privately retained counsel, particularly where such counsel also sits on a county 18B panel, like defense counsel in this case. See Trachte Law Office PC, <http://www.trachtelaw.com/>. Yet the record in this case shows that defense counsel did not contact the RIAC, instead providing wrong and incomplete advice to Mr. Martinez, and impermissibly instructing Mr. Martinez to consult with an immigration attorney rather than providing him the requisite immigration advice under Padilla. See Brief for Defendant-Appellant at 6-7, 12-13, 42. Because defense counsel’s performance fell below these clear professional norms, he was ineffective.

After the Supreme Court delineated defense counsel’s obligation in Padilla, experts in the field of immigration law and criminal defense—including national organizations and local and regional defender offices and immigration legal support centers—took note, and they incorporated Padilla into professional

practice guides, trainings for defense counsel, and other resources for defense attorneys. Across the board, these practice guides and professional trainings explicitly require defense counsel to advise regarding eligibility for relief from removal and to negotiate to avoid relief ineligibility, before a client pleads guilty and is sentenced. Indeed, numerous professional resources, training materials, and practice guides available at the time of Mr. Martinez's plea show that prevailing professional norms required his defense counsel to advise him fully and accurately about the statutory ineligibility for cancellation of removal that would inevitably result from his plea and sentence, and to negotiate to avoid that clear immigration consequence. See Padilla, 559 U.S. at 366-68; supra Section I. Defense counsel's failure to do so is constitutionally deficient representation that falls far below an objective standard of reasonableness.

National practice guides and resources instruct defense counsel to advise noncitizen defendants regarding eligibility for relief from removal and to negotiate to avoid disqualification from relief, in order to avoid deportation. For example, shortly after the Supreme Court decided Padilla, the Defending Immigrants Partnership, which is a national network of immigration law and criminal defense experts and service providers and includes several amici, issued practice guides that instruct defense counsel to advise about relief eligibility in order to comply with their constitutional obligations. See, e.g., Defending Immigrants Partnership,

“Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky” (Apr. 9, 2010), available at <https://nysba.org/NYSBA/Coursebooks/Fall%202013%20CLE%20Coursebooks/Best%20Immigrant%20Outcomes/2.DutyofCriminalDefenseCounselRepresenting.pdf>. Similarly, for over a decade amicus Immigrant Defense Project has published online the two-page “Immigration Consequences of Crimes Summary Checklist,” which extensively covers the conviction and sentence bars to relief from removal. See Immigrant Defense Project, “Immigration Consequences of Crimes Summary Checklist” (last updated June 2017), available at <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf>. It is amici’s direct experience that immigration and criminal defense lawyers across the country keep this resource posted in their workspaces and carry this with them in their daily practice. The Immigrant Legal Resource Center, another nationally recognized expert in this field, publishes a free online resource, “Immigration Relief Toolkit for Criminal Defenders: How to Quickly Spot Possible Immigration Relief for Noncitizen Defendants,” which informs defense lawyers about the importance of advising about and negotiating to preserve immigration relief for any noncitizen who is already removable on another basis, and specifically advises about cancellation of removal ineligibility. See Immigrant Legal Resource Center, “Immigration Relief Toolkit for Criminal

Defenders: How to Quickly Spot Possible Immigration Relief for Noncitizen

Defendants” § N.17 (Jan. 2016), available at

[https://www.ilrc.org/sites/default/files/resources/17\\_questionnaire\\_jan\\_2016\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/17_questionnaire_jan_2016_final.pdf).<sup>8</sup>

In New York, countless training materials and practice guides created by public defender offices and recognized experts in criminal defense of immigrants throughout the state consistently reiterate that, consistent with Padilla, defense counsel must advise clients about preserving eligibility for relief from removal, among other immigration consequences. As an example, a “Crimmigration” training for public defenders, legal aid attorneys, and 18B attorneys presented by two public defender offices—amicus RIAC – Hudson Valley and the Legal Aid Society of Westchester County—discussed “Applications to Avoid Being Deported; ‘Relief’ from Removal,” which included cancellation of removal and other applications for relief. (Regional Immigration Assistance Center of the Hudson Valley, “Crimmigration Update 2019: Immigration Proceedings and Relief from Removal,” at 2 (October 25, 2019), attached as Exhibit C-8). This training specifically covered in detail the eligibility requirements and bars for cancellation

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<sup>8</sup> See also “Life After Padilla v. Kentucky: What Defense Attorneys Should Know,” New York State Defenders Association, Inc. (2011) (advising defenders that Padilla requires advising about and negotiating to preserve relief, and also training defenders on aspects of relief and providing information about expert resources they can consult), available at <https://ocgov.net/assets/PublicDefender/Docs/2011/LifeAfterPadilla.pdf>.

of removal. (Id. at 3). Notably, the Regional Immigration Assistance Center that gave this training is the designated RIAC for the Orange County 18B panel, and defense counsel in this case is an attorney on that panel. See Trachte Law Office PC, <http://www.trachtelaw.com/>.

A separate training given to defense attorneys by an amicus Regional Immigration Assistance Center in New York explains that in order to “ensure Padilla compliance,” defense counsel must be aware of and advise regarding immigration consequences including “relief from removal” and “future applications (e.g. green card and citizenship).” (Regional Immigration Assistance Center Region 2, “Padilla Principles in Practice: Implications on Immigration from Family and Criminal Court Matters,” at 2 (April 24, 2019), attached as Exhibit C-4). In addition to deportation and inadmissibility, negative immigration consequences of a plea include eligibility for “relief in immigration court”—including “cancellation of removal, asylum, withholding of removal, CAT, etc.”—as well as eligibility for green card, citizenship, and waiver of inadmissibility. (Id. at 4). See also Regional Immigration Assistance Center Region 2, “Padilla Principles in Practice 2019” (November 4, 2019) (reiterating that defense counsel must advise regarding relief from removal and immigration status and benefits), attached as Exhibit C-5.

A training for defense attorneys conducted by amicus New York County Defender Services teaches that a defense attorney must advise noncitizen clients about “ineligibility for or denial of application for” lawful status, green card, or citizenship, among other immigration consequences. (New York County Defender Services, “Effective Representation of Immigrant Clients,” at 6-7 (October 2019), attached as Exhibit C-1). The training explains that undocumented noncitizens “may be eligible to become documented” and that criminal case dispositions can bar eligible noncitizens from that immigration relief. (Id. at 8).

A training by amicus Brooklyn Defender Services instructs that defense attorneys “have a duty to ensure that noncitizen clients understand how the existence and resolution of the criminal case may affect their ability to lawfully remain in the United States.” (Brooklyn Defender Services, “Immigration Consequences: Background, Strategies, and Protocol for Working with BDS Padilla Counsel,” at 3 (October 7, 2019), attached as Exhibit C-3). This duty includes advising about immigration concerns such as “avoiding deportation or preserving future eligibility for a visa.” (Id. at 3). The training further explains statutory grounds for removal and ineligibility for relief from removal. (Id. at 6 (specifically noting the INA prohibits a “good moral character” finding where a person is imprisoned for 180 days or more pursuant to conviction)). All defense

attorneys must determine: “If my client takes this plea . . . Will they become ineligible for LPR status or some other relief from deportation?” (Id. at 7-8).

A training given by the Neighborhood Defender Services of Harlem’s Immigration Defense Practice explains the ways a conviction can bar a noncitizen’s eligibility for relief from removal, discretionary waivers, adjustment of status, and persecution-based relief such as asylum. (Neighborhood Defender Services of Harlem, “Immigration Consequences of Criminal Dispositions,” at 3-4 (2019), attached as Exhibit C-7).

A CLE program given by amicus New York State Defenders Association (“NYSDA”) and public defender office Queens Law Associates—also given to defender offices and audiences across New York State—instructed on what Padilla requires of defense attorneys. Citing the text of Padilla, this training explained that the “Scope of 6<sup>th</sup> Amendment duty extends to not just avoiding deportation but also to the possibility of preserving discretionary relief from deportation.” (New York State Defenders Association Criminal Defense Immigration Project and Queens Law Associates, “Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know,” at 6 (May 4, 2010), attached as Exhibit C-12). The training further instructs defense counsel to investigate and learn the client’s goals, which may include to “Preserve eligibility to get future immigration benefits” and to “preserve ability to ask immigration judge to stay in US.” (Id. at 10). And further, defense



counsel must “[a]nalyze immigration consequences of a plea/sentence” and “[d]etermine impact of charge/plea offer on ‘discretionary relief’ or other immigration status.” (Id. at 11).

A quick-reference guide for appointed defense counsel in New York City Criminal Courts states that convictions may cause adverse immigration consequences, for documented and undocumented individuals, including ineligibility for relief from deportation. (Immigrant Defense Project, “Immigration Status Guide for Assigned Counsel,” at 2 (May 2019) (citing Padilla), attached as Exhibit C-11). And finally, a training given by amicus Immigrant Defense Project’s Padilla Support Center in 2018 specifically highlights that “deportation is not the only possible consequence” of criminal cases, and that consequences include “[b]ar to relief from deportation.” (Immigrant Defense Project Padilla Support Center, “2018 Updates Crim-Imm 101: Understanding Immigration Status,” at 11-12 (March 2018), attached as Exhibit C-10). The training further advises defense counsel that “[p]eople who are undocumented may be eligible to become documented” and that criminal contacts can “[b]ar eligibility for pending or future applications.” (Id. at 13-14).

Because Padilla requires that defense counsel attend to relief eligibility as part of effective representation of noncitizen defendants, defense counsel are trained to do so, and professional legal resources and practice guides advise

defense counsel to do so. In this case, defense counsel's performance fell clearly short of this objective standard of reasonableness.

### CONCLUSION

Defense counsel provided constitutionally deficient performance to Mr. Martinez, causing him mandatory deportability and ineligibility for critical relief from removal that would have allowed him to remain in the United States indefinitely as a lawful permanent resident with his family. Because counsel's performance was clearly deficient under Padilla and this Court's precedents, the County Court decision denying the § 440.10(1)(h) motion is contrary to law and must be reversed.

Date: August 3, 2023

Respectfully submitted,

/s/Andrew Wachtenheim

Andrew Wachtenheim  
(NY Bar #4916813)

Nabilah Siddiquee  
(NY Bar #5048996)

Amelia Marritz  
(NY Bar #5483235)

Ryan Muennich  
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*Counsel for amici curiae*

## **PRINTING SPECIFICATIONS STATEMENT**

Counsel prepared this brief using Microsoft Word for Mac 2023, Times New Roman 14 point for the body, and Times New Roman 12 point for footnotes. According to the processing system, the portions of the brief that counsel must include in a word count under contains 6,340 words.

**EXHIBIT C**  
**Legal Training Materials for**  
**Defense Attorneys**

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

Docket No. 2023-04231  
Ind. No. 505/2018

-against-

DECLARATION OF AMELIA  
MARRITZ, ESQ.

MARCO A. MARTINEZ,  
Defendant-Appellant

-----X

Amelia Marritz, an attorney admitted to practice law in the courts of the State of New York, affirms under the penalties of perjury:

1. I, Amelia Marritz, am a Senior Litigation Attorney employed by the Immigrant Defense Project.
2. On July 13, 2023, I emailed public defender organizations, New York State Office of Indigent Legal Services Regional Immigration Assistance Centers (hereinafter, "RIACs"), and organizations of criminal defense and immigration lawyers across New York State to request training materials used by their offices to instruct criminal defense attorneys how to comply with their constitutional obligations pursuant to Padilla v. Kentucky.

3. On July 19, 2023, I received an email from New York County Defender Services (“NYCDS”) that attached slides excerpted from a NYCDS training entitled “Effective Representation of Immigrant Clients,” dated October 2019. This document is attached to this Affirmation as Exhibit C-1.
4. On July 19, 2023, I received an email attaching a document entitled “Complying with Padilla and Peque: A Skills & Diversity Training,” which contains slides excerpted from a training program presented by RIAC–Western New York. The attorney who emailed this document to me is currently an attorney working for the RIAC–Western New York and stated in the email that this training was given as a Continuing Legal Education (CLE) training in 2019. This document is attached to this Affirmation as Exhibit C-2.
5. On July 19, 2023, I received an email from Brooklyn Defender Services that attached slides excerpted from a training program entitled “Immigration Consequences: Background, Strategies, and Protocol for Working with BDS Padilla Counsel,” dated October 7, 2019. This document is attached to this Affirmation as Exhibit C-3.
6. On July 19, 2023, I received several materials by email from RIAC–Central New York. I received slides excerpted from a training program entitled “Padilla Principles in Practice: Implications on Immigration from Family and

Criminal Court Matters,” which state that the training was held on April 24, 2019, in Oneonta, NY. I received slides excerpted from a second training entitled “Padilla Principles in Practice 2019,” which state that the training was held on November 4, 2019, in Elmira, NY. Finally, I received a RIAC newsletter, dated January 2019, containing an article entitled “Anatomy of an Advisal: Relief from Removal.” These three documents are attached to this Affirmation as Exhibits C-4, C-5, and C-6, respectively.

7. On July 20, 2023, I received an email from the Neighborhood Defender Services of Harlem (“NDS”) attaching slides excerpted from a training entitled “Immigration Consequences of Criminal Dispositions,” given by NDS’s Immigration Defense Practice. The email stated that this training was given in 2019. This document is attached to this Affirmation as Exhibit C-7.
8. On July 20, 2023, I received an email from RIAC–Hudson Valley that attached a document entitled “Crimmigration Update 2019,” which contained a program agenda and slides from a training program entitled “Immigration Proceedings and Relief from Removal: Defenses in Immigration Court and Benefits Available to Non-citizens.” The document states the training was held on October 25, 2019, in Hudson, NY. This document is attached to this Affirmation as Exhibit C-8.

9. On July 20, 2023, I obtained from the records of my own office, the Immigrant Defense Project (“IDP”), which is also RIAC–NYC, slides excerpted from a training program entitled “The Intersection of Immigration, Criminal, and Family Law: An Overview,” a training given by IDP and other presenters at the New York State Court of Appeals. The training is dated March 28, 2019. This document is attached to this Affirmation as Exhibit C-9.
10. On July 20, 2023, from IDP’s files, I obtained slides excerpted from a training program entitled “2018 Updates Crim-Imm 101: Understanding Immigration Status.” This training was presented in March 2018 by IDP’s Padilla Support Center and in our role as RIAC–NYC. This document is attached to this Affirmation as Exhibit C-10.
11. On July 20, 2023, I obtained from IDP’s files an excerpt from a document entitled “Immigration Status Guide for Assigned Counsel,” dated May 2019. This document is attached to this Affirmation as Exhibit C-11.
12. On July 23, 2023, I received an email from the New York State Defenders Association (“NYSDA”) attaching slides excerpted from a training program entitled, “Life After Padilla v. Kentucky: What Defense Attorneys Should Know.” The document states that this training was presented by the NYSDA



Criminal Defense Immigration Project and Queens Law Associates on May 4,  
2010. This document is attached to this Affirmation as Exhibit C-12.


13.I declare under penalty of perjury that the foregoing is true and correct to the  
best of my knowledge.

Respectfully submitted,

/s/ Amelia Marritz  
Amelia Marritz, Esq.  
Immigrant Defense Project  
P.O. Box 1765  
New York, NY 10027

Dated: New York, NY  
August 3, 2023

# **EXHIBIT C-1**







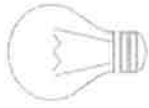
# **EFFECTIVE REPRESENTATION OF IMMIGRANT CLIENTS**

NYCDS Immigration Unit

October 2019

# WHAT WILL WE LEARN TODAY?

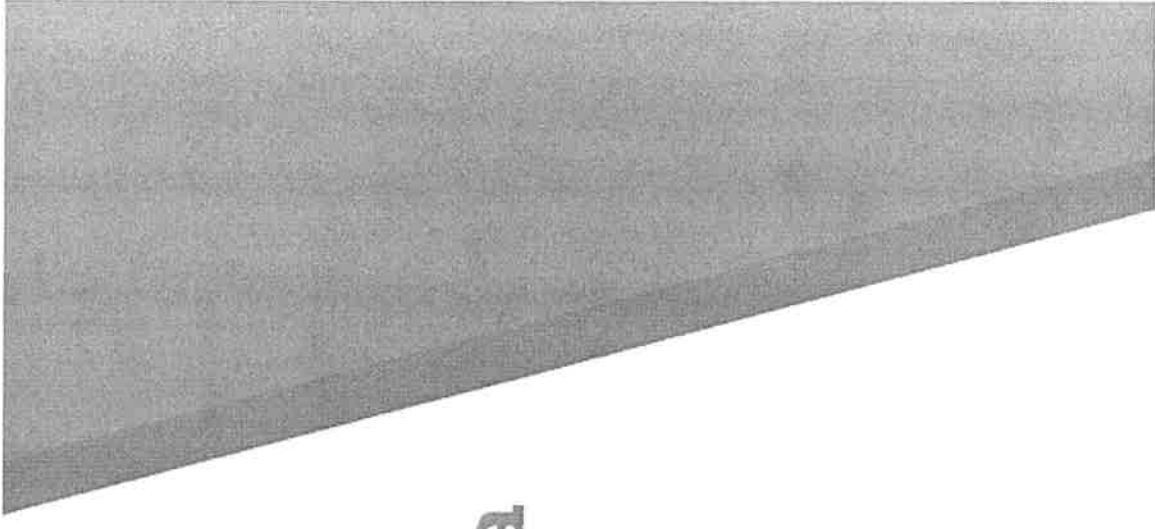
-  Basics of immigration law
-  How contacts with Family & Criminal Court can adversely impact immigration status
-  Types of immigration status & consequences
-  Practice tips for talking to your clients about immigration status



**You have a constitutional duty to give affirmative, individualized and accurate advice about the immigration consequences of a criminal case.**

*See Padilla v. Kentucky*, 559 U.S. 356 (2010).

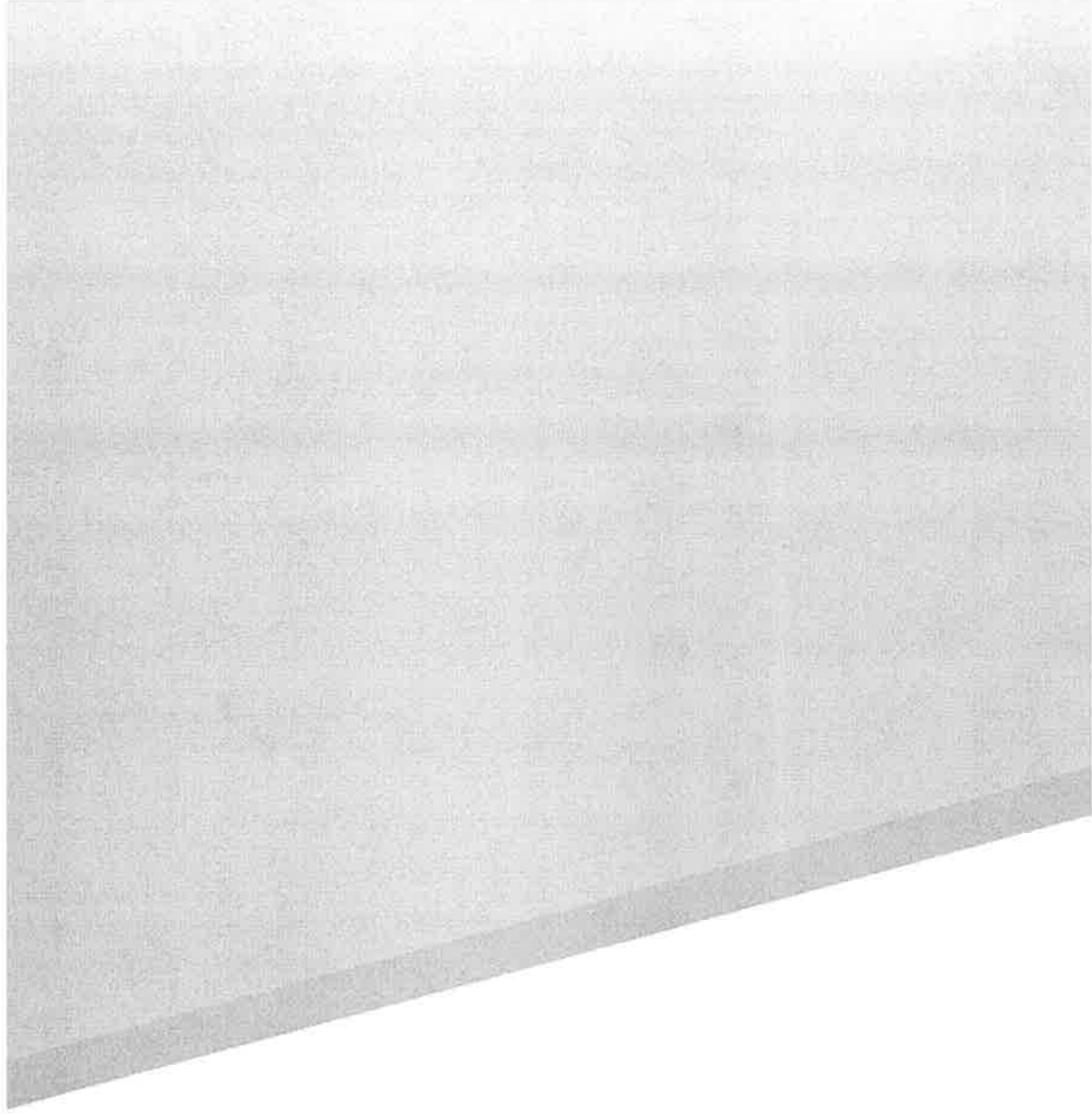
**If you do not provide affirmative, competent advice, a client may seek a claim of ineffective assistance of counsel.**



**This includes:**

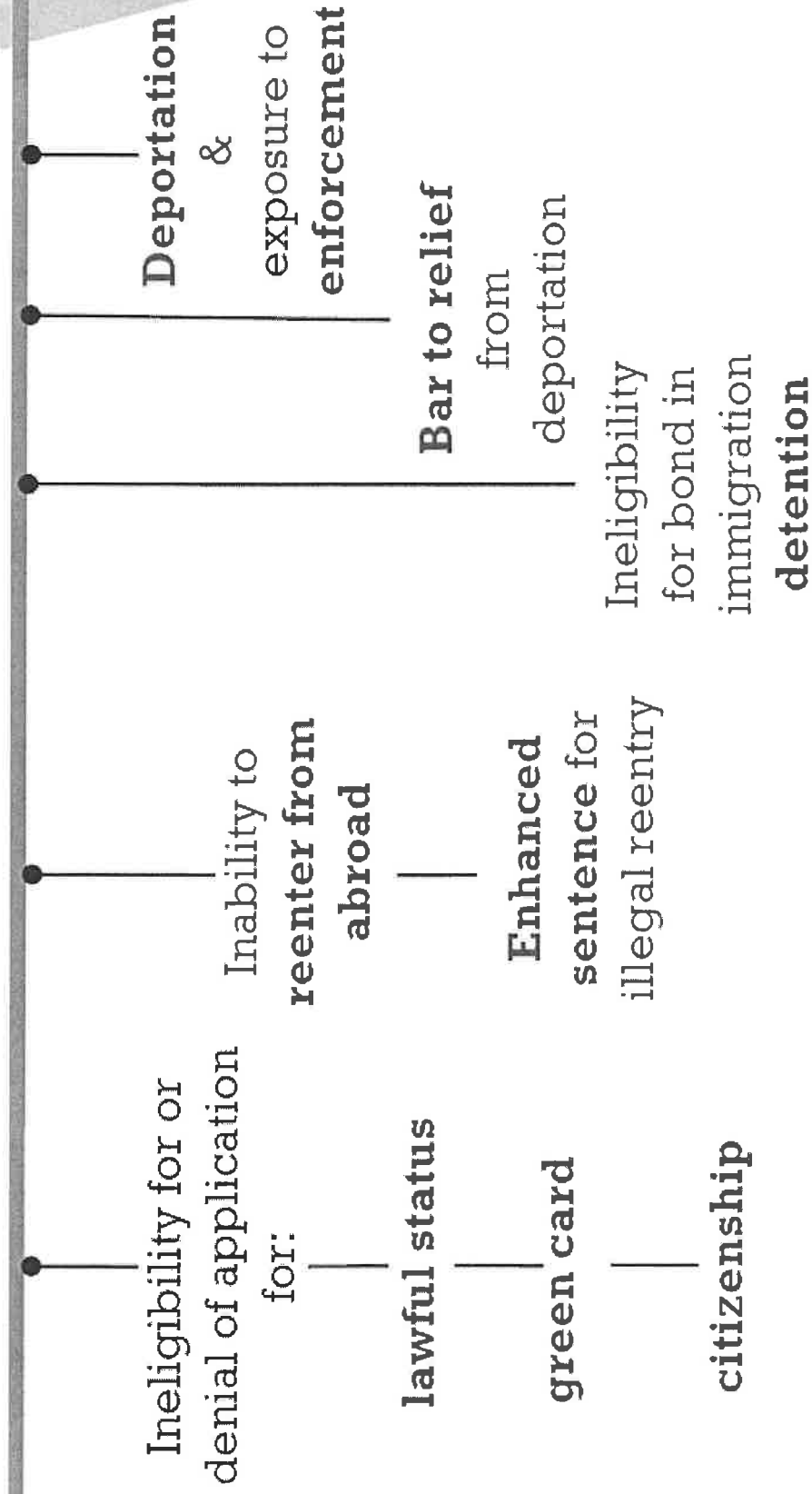
- **negotiating to minimize adverse immigration consequences**
- **advising about the immigration consequences of alternate dispositions & sentencing options.**

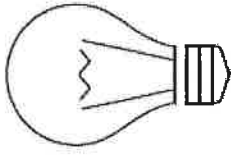
However,  
deportation is not  
the only possible  
consequence of  
Criminal/Family  
Court contacts!





# Possible consequences of Family & Criminal Court contacts





## **ABOUT UNDOCUMENTED CLIENTS**

People who are undocumented may be eligible to become documented.

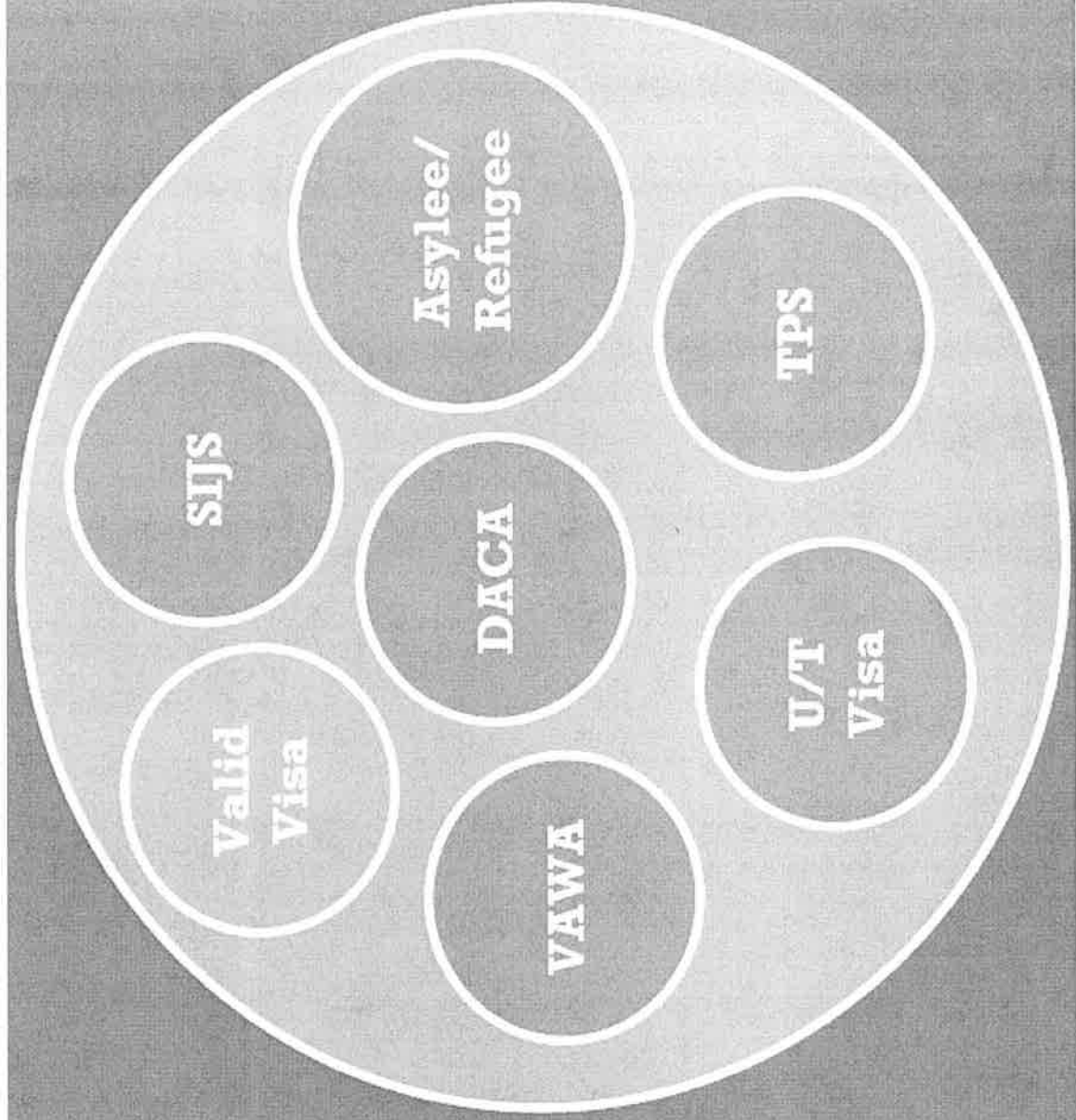
Criminal and Family Court contacts  
can bar eligible clients.

**Refer, refer, refer!**

**Questions to ask if you think your client is undocumented**

- When and how they entered the U.S.
- Current status and when received it
- Any past contact with immigration, including when entered the US
- Any pending applications or removal proceedings

**Grey Zone:  
Documented  
People**



# **EXHIBIT C-2**

# COMPLYING WITH *PADILLA* AND *PEQUE*: A SKILLS & DIVERSITY TRAINING

---

**Daniel E. Jackson**

Immigration Staff Attorney,

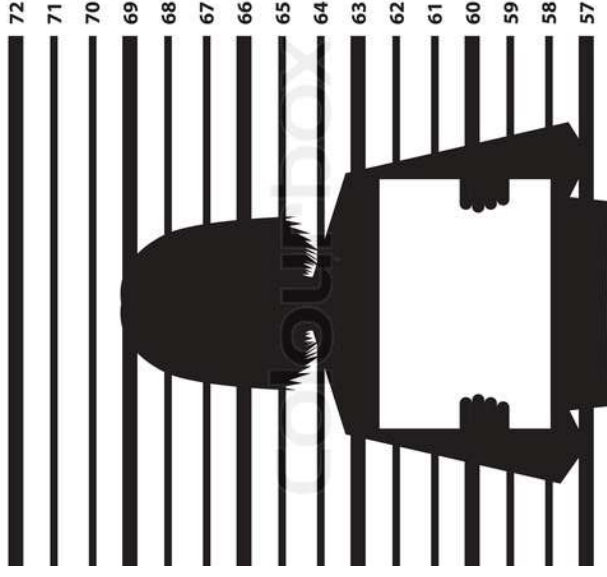
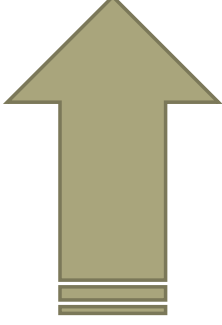
Western New York Immigration  
Assistance Center

Tel: 716-847-0662 x314

Email: [djackson@ecbavlp.com](mailto:djackson@ecbavlp.com)

# NEGATIVE EFFECTS OF CRIMINAL ACTIVITY ON USC:

- ❖ Criminal Record
- ❖ Sentencing

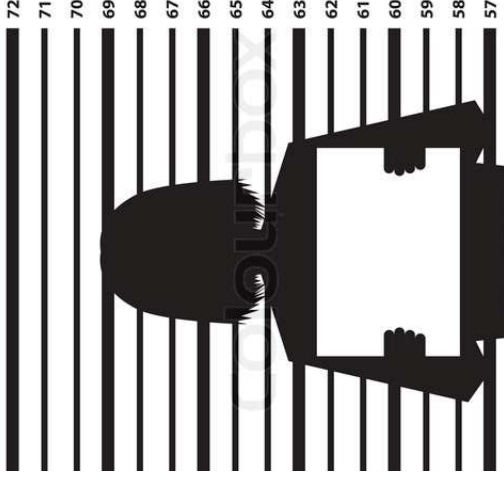


# NEGATIVE EFFECTS OF CRIMINAL ACTIVITY ON NON-CITIZENS:

- ❖ Criminal Record
- ❖ Sentencing

**AND**

- ❖ Removability
- ❖ Admissibility
- ❖ Effect on Discretion
- ❖ Bars to relief
- ❖ Eligibility for a waiver
- ❖ Visa Violation/Revocation
- ❖ Mandatory Detention





# **EXHIBIT C-3**

**Immigration Consequences:  
Background, Strategies, and  
Protocol for Working with  
BDS *Padilla* Counsel**

October 7, 2019



# Immigration Consequences of Criminal Offenses can be Extraordinarily Harsh

- Deportation (sometimes “virtually guaranteed”)
- Immigration detention (sometimes mandatory) for the duration of removal proceedings
- Barred from permanent residence, asylum, or other forms of status or relief from deportation
- Barred from U.S. citizenship – for several years or permanently
- Prohibited from lawfully returning to the U.S. after deportation

In a given case, the potential consequences will depend on:

1. Client’s particular immigration status/history; and
2. Client’s criminal history.



# WHAT DOES ALL THIS MEAN FOR US?

## Why should defenders care?

Attorneys have a duty to ensure that noncitizen clients understand how the existence and resolution of the criminal case may affect their ability to lawfully remain in the United States.

- Immigration-related considerations—like avoiding deportation or preserving future eligibility for a visa—may override other typical client objectives, like avoiding jail or prison.

Attorneys also have a duty to keep clients reasonably informed about significant and material developments in their case.

- The prospect of ICE arrest may be reasonably foreseeable in some circumstances, and clients who are at risk should be advised about how such developments could complicate or frustrate their criminal cases.

# Grounds of Inadmissibility

## (INA § 212; 8 USC § 1182)

### *Obstacles to obtaining entry / status*

- **General rule** - a noncitizen who is inadmissible cannot:
  - Enter the U.S. (this includes LPRs returning from trip abroad);
  - Get a green card or other lawful status;
  - Show “good moral character” needed for some forms of relief from removal.
- Some inadmissibility grounds, in some situations, carry exceptions or can be waived at the discretion of an immigration officer/judge.

## Criminal Grounds for Removability

- A conviction can trigger removability under more than one ground.
- Some convictions bar eligibility for relief from removal; some do not.

# Significance of (Potential) Sentence

- Some offenses are AFs only if a sentence of 1 year or more is imposed (e.g. crime of violence, theft, forgery, counterfeiting, obstruction of justice, perjury, bribery)
- Some CIMT convictions cause inadmissibility/ deportability depending on potential and/or imposed sentence. INA §§ 212(a)(2)(A)(ii)(II), 237(a)(2)(A)(i).
- Inadmissible if total imprisonment for 2+ offenses is 5 yrs, even if suspended. INA § 212(a)(2)(B).
- 212(c) ineligible if 5+ years served.
- Some forms of relief are impacted by sentence
  - Ex: Good Moral Character as defined by INA prohibits a GMC finding if person imprisoned 180 days or more, regardless of type of conviction.
- *N.B.* VOPs (Probation) & VOCDs (Cond. Discharge) can trigger imm. consequences even where original sentence was safe

## Step 4: Preliminary advisal from Padilla atty

- If my client takes this plea:
  - Will they become deportable or inadmissible?
  - Will they become ineligible for LPR status or some other relief from deportation?
  - Will they end up in immigration custody?
  - Will they be subject to mandatory detention in immigration custody?
  - Will they be able to travel and/or naturalize?



# Step 7: Advice

- Advise client with specificity and certainty on both the clear and unclear consequences of
  - the charge,
  - the offer, and
  - any alternate plea dispositions that may be attainable in the case
  - the immigration consequences of going to trial and losing
- Specificity includes
  - Risk of deportability
  - Eligibility for future relief from deportation
  - Eligibility for immigration status and/or citizenship in the future
  - Impact on discretionary grants of relief or status
  - Risk of traveling
  - Chance of detection
  - Application of mandatory detention

# **EXHIBIT C-4**

Wednesday, April 24, 2019  
3:00 pm - 5:00 pm

Hosted by Del-Chen-O WBASNY  
at Bella Michael's Restaurant  
57 River Street  
Oneonta, NY

# PADILLA PRINCIPLES IN PRACTICE:

Implications on Immigration from  
Family and Criminal Court Matters

Regional Immigration Assistance Center, Region 2, 302 N. James Street, Rome, NY 13440  
RIAC2@ocgov.net 315-356-5794 (p) 315-356-5795 (f)

# ANATOMY OF AN ADVISAL

➤ *With the documentation we receive, the RIAC will provide to defense counsel a written advisal letter that will ensure Padilla compliance. The advisal letter covers:*

## ❖ YOUR CLIENT

- ✓ *Client's Immigration Status/History*
- ✓ *Client's Prior Criminal History*
- ✓ *Current Criminal/Family Offenses*
- ✓ *Current Offer*

## ❖ IMMIGRATION CONSEQUENCES

- ✓ *Deportability*
  - *Aggravated Felonies (AF)*
  - *Crimes Involving Moral Turpitude (CIMT)*
  - *Controlled Substance Offenses (CSO)*
  - *Crimes of Domestic Violence (CODV)*
  - *Crimes of Stalking*
  - *Crimes against a Child (CAC)*
  - *Violations of Orders of Protections (VOOP)*
  - *Firearms Offenses (FO)*
- ✓ *Inadmissibility*
  - *CIMT*
  - *CSO (or "reason to believe drug trafficker")*
  - *Previous Immigration Violations*
  - *Previous Orders of Deportation*
  - *Medical Grounds (e.g. alcohol or drug related convictions, mental health)*
- ✓ *Relief from Removal (in Immigration Court)*
- ✓ *Future Applications (e.g. green card and citizenship)*

## ❖ LANGUAGE ACCESS

## ❖ CURRENT OFFER

## ❖ OPTIONS FOR DISPOSITIONS

## ❖ SUMMARY

# IMMIGRATION CONSEQUENCES

- *Deportability*
- *Inadmissibility*
- *Relief from Removal*
- *Future Applications*

# NEGATIVE IMMIGRATION CONSEQUENCES OF A PLEA

DEPORTATION	INADMISSIBILITY	FUTURE APPLICATIONS
Aggravated Felonies (AF)	CIMT or admission to conduct <u>that is</u> a CIMT	Green Card
Crimes Involving Moral Turpitude (CIMT)	Controlled Substance Offense (CSO)	Citizenship
Controlled Substance Offense (CSO)	“Reason to believe” drug trafficker	Waiver of Inadmissibility
Firearms Offense (FO)	Medical Grounds (alcohol/ drug abuse or mental health issues)	Relief in Immigration Court removal proceeding (e.g. Cancellation of Removal, Asylum, Withholding of Removal, CAT, etc.)
Crimes of Domestic Violence (CODV)	Previous Removal Orders	
Stalking		
Violation of Orders of Protection (OOP)		
Crimes Against Children (CAC)		

# INADMISSIBILITY

Laws of Inadmissibility apply to anyone who is seeking admission to the U.S. at a port of entry; anyone who entered the U.S. illegally (without being lawfully admitted after inspection by an immigration officer); and those who are applying for a green card.

# **EXHIBIT C-5**



Regional Immigration Assistance Center, Region 2, 302 N. James Street, Rome, NY  
[RIAC2@ocgov.net](mailto:RIAC2@ocgov.net) 315-356-5794 (p) 315-356-5795 (f)

# PADILLA PRINCIPLES IN PRACTICE 2019

---

Tuesday, November 5, 2019  
12:30pm – 2:30pm  
Chemung County PD Office  
163 Lake Street  
Elmira, NY

# ANATOMY OF AN ADVISAL

- With the documentation we receive, the RIAC will provide to defense counsel (or family court counsel) a written advisal letter that will ensure *Padilla* compliance.
- The advisal letter covers:
  - ❖ YOUR CLIENT
    - ✓ Client's Immigration Status/History
    - ✓ Client's Prior Criminal History
    - ✓ Current Criminal/Family Offenses
    - ✓ Current Offer
  - ❖ IMMIGRATION CONSEQUENCES
    - ✓ Deportability
      - Aggravated Felonies (AF)
      - Crimes Involving Moral Turpitude (CIMT)
      - Controlled Substance Offenses (CSO)
      - Crimes of Domestic Violence (CODV)
      - Crimes of Stalking
      - Crimes against a Child (CAC)
      - Violations of Orders of Protections (VOOP)
      - Firearms Offenses (FO)
    - ✓ Inadmissibility
      - CIMT
      - CSO (or "reason to believe drug trafficker")
      - Previous Immigration Violations
      - Previous Orders of Deportation
      - Medical Grounds (e.g. alcohol or drug related convictions, mental health)
    - ✓ Relief from Removal (in Immigration Court)
    - ✓ Future Applications (e.g. green card and citizenship)
  - ❖ LANGUAGE ACCESS
  - ❖ CURRENT OFFER
  - ❖ OPTIONS FOR DISPOSITIONS
  - ❖ SUMMARY

# NEGATIVE IMMIGRATION CONSEQUENCES OF A PLEA

DEPORTATION	INADMISSIBILITY	FUTURE APPLICATIONS
Aggravated Felonies (AF)	CIMT or admission to conduct <i>that is</i> a CIMT	Green Card
Crimes Involving Moral Turpitude (CIMT)	Controlled Substance Offense (CSO)	Citizenship
Controlled Substance Offense (CSO)	“Reason to believe” drug trafficker	Waiver of Inadmissibility
Firearms Offense (FO)	Medical Grounds (alcohol/ drug abuse or mental health issues)	Relief in Immigration Court removal proceeding (e.g. Cancellation of Removal, Asylum, Withholding of Removal, CAT, etc.)
Crimes of Domestic Violence (CODV)	Previous Removal Orders	
Stalking		
Violation of Orders of Protection (OOP)		
Crimes Against Children (CAC)		

# WHICH LAWS APPLY?

- **Laws of Deportability** apply to anyone who is present in the U.S. after a lawful admission, whether permanently or temporarily.
- **Laws of Inadmissibility** apply to anyone who entered the U.S. illegally (without being lawfully admitted after inspection by an immigration officer).

There are exceptions to these laws (of course) depending on circumstances!

# INADMISSIBILITY

(applies to anyone who is seeking admission to the U.S., including those individuals who entered the U.S. without being lawfully admitted after inspection by an immigration officer)



**Inadmissibility also applies to anyone seeking to be come a Lawful Permanent Resident (LPR)- green card holder. The applicant cannot be “inadmissible” to the U.S.**

**This is important if your client is applying for or will apply for a green card, as denial of that application most often means your client becomes deportable from the U.S. !**



## CRIMINAL INADMISSIBILITY GROUNDS

– Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.

Conviction or admitted commission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admitted commission of a **Crime Involving Moral Turpitude (CIMT)**, which category includes a broad range of crimes, including:

- ◆ Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- ◆ Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- ◆ Most sex offenses

*Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

## Prostitution and Commercialized Vice

Conviction of two or more offenses of any type + aggregate prison sentence of 5 yrs.

## CRIMINAL GROUNDS OF INADMISSIBILITY

DRUGS – NO EXCEPTIONS

CIMTs

“CONVICTION” or “ADMITTED COMMISSION” such as crimes with:

- intent to steal or defraud
- bodily harm
- most sex offenses

PROSTITUTION!!

CATCH ALL PROVISION

# CRIMINAL GROUNDS OF INADMISSIBILITY

## THE “PETTY OFFENSE EXCEPTION” for CIMTs:

The “petty offense” exception applies if a person has only **one** conviction for a CIMT AND the possible sentence is less than one year AND the sentence imposed is less than 180 days in jail.

(In other words, if it is a felony CIMT conviction, the “petty offense exception” does not apply! A felony CIMT conviction will make your client inadmissible!



# CITIZENSHIP

- Criminal arrests and/or convictions can affect a person's eligibility for U.S. citizenship. RIAC advisals include the consequences relating to your client's eligibility for naturalization as a result of a disposition in criminal and/or family court.
- Examples of dispositions that affect citizenship: AF (permanently ineligible); CIMT(s) within the statutory five year period or beyond; DWIs(habitual drunkard)

# **EXHIBIT C-6**



### HAPPY NEW YEAR!

As we start the 2019 new year, we are sitting on a mountain of non-citizen cases, yet we do not have the information needed to provide the advisals. Please review your cases and get us the information we need or give us an update so that your client's case gets the necessary attention. We appreciate your cooperation!

### In This Issue: Relief from Removal

#### UPCOMING EVENTS

Oswego County, Criminal Law  
CLE, March 22, 2019

Oswego County, Family Law  
CLE, September 13, 2019

BOOK YOUR NEXT TRAINING  
SESSION NOW!

*The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.*

*\*RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

### ***ANATOMY OF AN ADVISAL:***

#### **RELIEF FROM REMOVAL**

Although we do our best to avoid any client being placed in removal proceedings, there are often times when your client is "otherwise removable" for reasons unrelated to your criminal or family court case. In those circumstances, if your client's goal is to remain in the U.S. (as opposed to wanting to be deported and obtaining a shorter jail sentence), it is imperative to preserve your client's eligibility for relief in Immigration Court.

There are many types of relief that may be available to someone in removal proceedings: Adjustment of Status (AOS); Cancellation of Removal (COR) for LPRs and, though more difficult, non-LPRs; COR for victims protected under the Violence Against Women Act (VAWA\*); eligibility for certain special visas: T Visa (victims of trafficking), U Visa (victims of certain crimes); Special Immigrant Juvenile Status (SIJS); Temporary Protected Status (TPS), Asylum, Withholding of Removal, Application under Convention Against Torture (CAT); waivers of inadmissibility and deportation; and, Voluntary Departure. Depending on the circumstances, one or more criminal convictions will disqualify your client for most, if not all, forms of relief from removal.

What criminal convictions disqualify someone from these types of relief? Here are a few examples:

1. Aggravated Felony (AF): precludes relief in all but CAT claims.
2. CIMT: precludes relief in non-LPR COR applications and AOS (unless petty offense exception applies).
3. Controlled Substance Offense (CSO): precludes COR and AOS.

(\*VAWA: if it is re-enacted, as of this writing, it has expired with no action from Congress.)



### CONTACT US!

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sames@ocgov.net  
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Tina Hartwell, Esq.  
thartwel@ocgov.net  
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### Chief Defenders & Assigned Counsel Administrators:

Contact the RIAC2 to schedule your 2019 training, lunch hour or other session in your office/county. We will provide CLE credit!

The best way to illustrate this is with a hypothetical that represents a common scenario:

You have been assigned to represent Samuel, who is charged with Attempted Robbery 2d. Based on the thorough intake that you got from your client, you know that he entered the U.S. as a refugee in 2011 and got his green card after he was here for a year. The copy of his green card that you were able to obtain says he has been a resident since July 1, 2011. The date the alleged offense is December 15, 2018. He has never left the U.S. since his arrival. He has two prior convictions for Petit Larceny from June 2013 and September 2018. He was sentenced to a CD for the first PL conviction (2013) and 3 years of probation for the second (2018); a VOP has been filed. On the current charge, the ADA has offered a plea to Petit Larceny with a sentence of one-year in jail in satisfaction of the Attempted Robbery 2d; the VOP sentence is 179 days in jail concurrent. He is not eligible for YO treatment.

**Can he accept the offer?**

**Answer: No.**

**Why?**

Samuel is “otherwise removable” because he has two CIMT convictions. No matter what he pleads to, he is at risk of being placed in removal proceedings based on those two CIMT convictions. However, because he has been a LPR for five years and has been continuously present in the U.S. for a period of 7 years prior to the commission of the second CIMT, he is eligible for Cancellation of Removal for LPRs as long as he has not been convicted of an Aggravated Felony (see, INA §240A(a)). Because the offer to plead to Petit Larceny with a sentence of one-year in jail is an Aggravated Felony (“theft offense” with a sentence of one year or longer; see, INA §101(a)(43)(G)), Samuel will be ineligible for any relief from removal other than a possible claim under the CAT, which is extremely difficult to win.

The advice from the RIAC will be to ask the ADA for a reduction of the sentence by one day to 364 days in jail (i.e. they can have their Petit Larceny conviction), so that Samuel’s eligibility for relief from removal will be preserved. This is one possible way to protect his ability to remain in the United States even though he is “otherwise removable.”

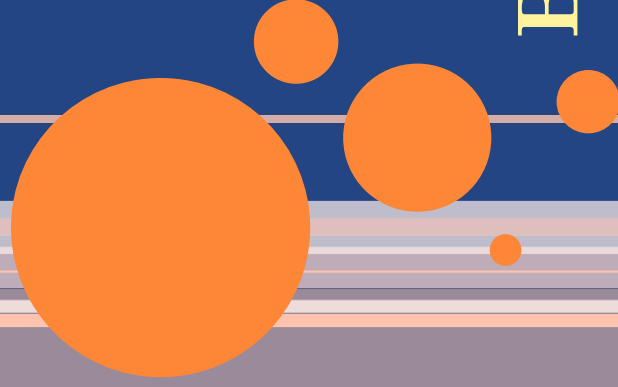
The lesson here is that just because your client may be subject to removal from the U.S., you should not assume that there is “nothing to be done” to protect your client from being deported. Avoiding the AF, or a CIMT, or a CSO can make all the difference to your client. You will have this information as part of the RIAC’s advisal. If you are certain that your client will be placed in removal proceedings, give your client a copy of the advisal to show to an immigration attorney who will be able to investigate the avenues of relief available.

To avoid disastrous consequences of post-indictment plea restrictions, contact the RIAC immediately upon your assignment so that you can take a proactive approach in getting an immigration “friendly” disposition for your client.

# **EXHIBIT C-7**

# IMMIGRATION CONSEQUENCES OF CRIMINAL DISPOSITIONS

By: Immigration Defense Practice

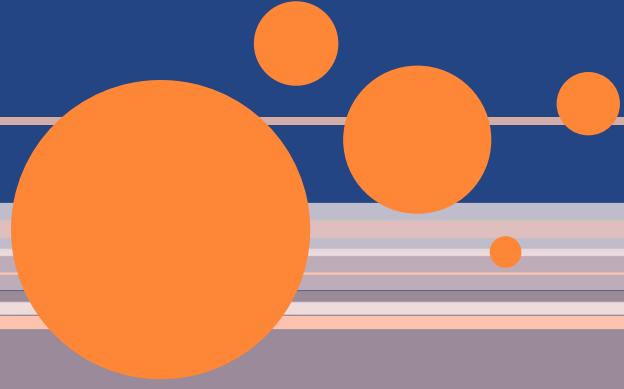


# HOW CAN A CONVICTION AFFECT A NON-CITIZEN?

- Removal a/k/a Deportation
- Inability to receive a visa or permanent residence
- Mandatory immigration detention during removal proceedings
- Bars to relief from removal including hardship waivers and persecution-based protection such as asylum
- Inability to travel internationally
- Inability to naturalize (become a U.S. Citizen)
- Inability to renew an expired green card
- Enhanced sentence for illegal re-entry



**CRIMINAL BARS TO RELIEF  
FROM REMOVAL AND  
CITIZENSHIP**





# PRESERVE ELIGIBILITY FOR RELIEF: TYPES OF RELIEF AND BARS

## **Types of Relief:**

- Discretionary waivers
  - LPR cancellation of removal
    - Criminal bar: aggravated felony
  - Non-LPR cancellation of removal
    - Criminal bar: “good moral character” requirement
  - “212(h)” hardship waiver
    - Criminal bar: CSOs, aggravated felony for LPRs
  - 212(c) waiver
- Adjustment of status through family member
  - Criminal bar: ground of inadmissibility
- Persecution-based relief: asylum, withholding, CAT
  - Criminal bar: “Particularly serious crime” except for CAT
- DACA
  - Criminal bar: single felony conviction, a significant misdemeanor, three non-significant misdemeanor convictions (possibly includes NY violations and a gang offense)



# ELIGIBILITY FOR CITIZENSHIP

- Eligibility requirements:
  - At least 18 years;
  - LPR for 5 years, in U.S. at least half that time;
  - “good moral character” for 5 year period
- Bars to good moral character finding:
  - Murder;
  - Any aggravated felony on or after 11/29/90;
  - Most of the grounds of removability during 5 year period;
  - Other categories not requiring conviction, e.g. “habitual drunkard”
- Risk of naturalization application for deportable LPRs



# **EXHIBIT C-8**

# Crimmigration Update 2019

## PROGRAM AGENDA

- Client Intake and Meeting Obligations under *Padilla v. Kentucky*; Legislative/Case Law Update.
- Immigration Court and Defenses to Removal: What are We Trying to Preserve?

**Robert Horne, Esq. &  
Craig J. Small, Esq.**

Regional Immigration Assistance Center,  
Region 4

**October 25, 2019**

**1:00 pm – 3:00pm**

(Registration begins at 12:30 pm)

**Columbia-Greene  
Community College**

4400 Rt. 23  
Hudson, NY 12534  
Room PAC 614

Presented by

**Columbia County Public Defender's  
Office**

**Greene County Public Defender's Office**

**The Regional Immigration Assistance  
Center**

**Legal Aid Society of Westchester County**

## MCLE Credit 2.0

The Legal Aid Society of Westchester County has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York. This transitional/nontransitional program has been approved in accordance with the requirements of the Continuing Legal Education Board for a maximum of 2 credit hours. No CLE credit may be earned for repeat attendance at any accredited CLE activity within any one reporting cycle.

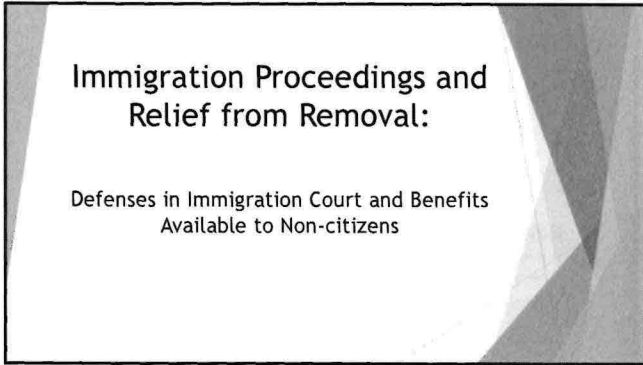
**Robert Horne** is the Managing Attorney of the Regional Immigration Assistance Center, Region 4 (RIAC). Prior to joining the RIAC, Mr. Horne engaged in criminal, immigration and family court representation for over 25 years while in private practice.

**Craig J. Small** is a Staff Attorney for the Regional Immigration Assistance Center, Region 4 (RIAC). Prior to joining the RIAC, Mr. Small worked with the Immigrant Defense Project and the Catholic Charities of Newark Immigration Assistance Program.

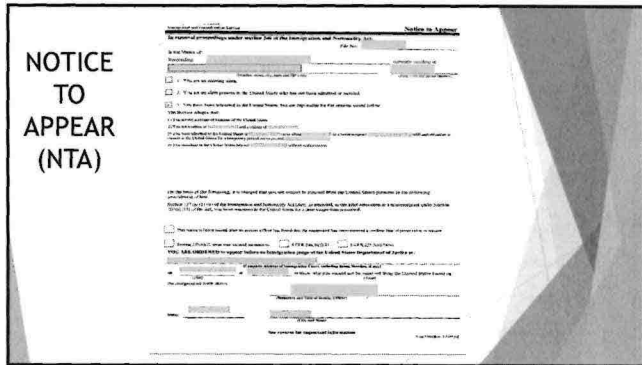
\*\*\*\*\*

This program is open to Public Defenders, Legal Aid Attorneys and 18B Attorneys. The program is free, but pre-registration by October 21, 2019 is required.

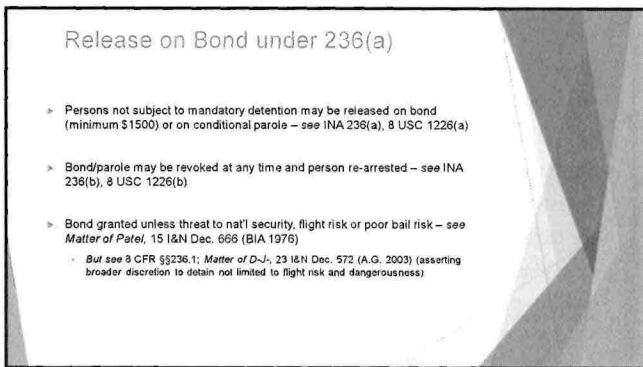
To register, please email the Regional Immigration Assistance Center at [cjsmall@laswest.org](mailto:cjsmall@laswest.org). Be sure to include your name, address, telephone number and email address so the certificate of CLE attendance can be delivered to you.



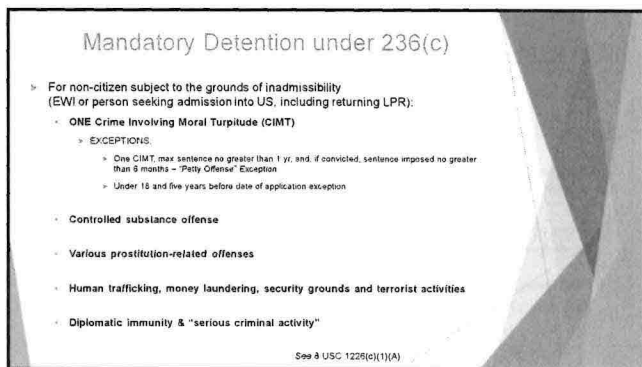
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2



3



4

## Mandatory Detention under 236(c)

- For non-citizen subject to the grounds of deportability (LPR currently in US or person who entered lawfully with inspection):
  - Two or more CIMT (anytime after admission)
  - One CIMT conviction and sentence of at least one year
    - **NOTE:** No longer includes A misdemeanor offenses in NYS
  - Aggravated felony
  - Controlled substance offense (other than a single offense for possession of 30g or less MJ)
  - Deportable "Firearms offense"
  - Various security and terrorist activity grounds

See 9 USC 1226(c)(1)(B),(C)

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## Proceedings in Immigration Court

### Master Calendar Hearings

- These are **short** immigration hearings
- There may be several master calendar appearances
- Admit or deny allegations alleged in the Notice to Appear (NTA)
- Inform the immigration judge of what relief is being sought
- Set up schedules to file applications with the court

### Individual/Merits Hearing

- If there is an application for relief or if denying allegations of removability
- This is the immigration trial

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## Immigration Proceedings: While Serving Criminal Sentence

### Institutional Removal Program (IRP)/Institutional Hearing Program (IHP):

- These are immigration hearings that are held while noncitizen is in prison serving a criminal sentence
- Many of these hearings are done in state/federal prisons by telephone or video conferencing
- Noncitizen has the right to object to these video and telephone hearings (But they will likely still happen)

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## Applications to Avoid Being Deported - "Relief" from Removal

- Adjustment of Status - (applying or re-applying for a green card)
- Cancellation of Removal - (i.e. non-LPR and LPR cancellation of removal)
- Waiver of Inadmissibility - (i.e. 8 USC 1182(h))
- Persecution-based relief - (i.e. asylum, withholding of deportation, CAT)
- Special visas - (i.e. T, U ft S visas)
- Citizenship - (i.e. acquire or derive citizenship through parent's citizenship)
- Voluntary departure - (leaving the U.S. on your own; IJ can grant up to 120 days to depart)

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### Defense to Removal: Adjustment of Status

- Must have an:
  - United States Citizen spouse
  - United States Citizen child 21 years old or older
  - United States Citizen parent (if under 21 years old and unmarried)
- Certain criminal convictions or conduct can prevent Adjustment of Status if it renders the noncitizen inadmissible
  - A waiver of inadmissibility may be available. See 8 USC 1182(h)
- Generally, must have entered the US in lawful status (with a visa or green card)

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### Defense to Removal: Cancellation of Removal

#### Lawful Permanent Resident Cancellation of Removal (Green Card Holders)

- ☐ Requires:
  - ☐ 7 years continuous residence in the United States after "admission"
  - ☐ 5 years as a green card holder
  - ☐ Have not been convicted of an "aggravated felony"
- ☐ Discretionary decision: Positive factors outweigh negative factors

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### Defense to Removal: Cancellation of Removal

#### Non-Lawful Permanent Resident Cancellation of Removal

- ☐ Requires:
  - ☐ 10 years physical presence in the United States
  - ☐ Good moral character for 10 years prior to and through the application process
  - ☐ Not convicted of an offense under 8 AACR § 212(a)(2) (Criminal Grounds of Inadmissibility), INA § 237(a)(2) (Criminal Grounds of Deportability), or INA § 237(a)(3) (Failure to Register/Fraud Deportability Grounds)
    - ☐ Ex: 1 CIMT punishable by a year or more in jail, regardless of sentence (No longer includes Class A misdemeanors in NYS), OR 1 CIMT with a sentence of more than 6 months in jail
  - ☐ Deportation would cause "exceptional and extremely unusual hardship" to US citizen or Lawful Permanent Resident spouse, child, or parent ("qualifying relative")
- ☐ Discretionary decision: Positive factors outweigh negative factors

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### Notes on: Cancellation of Removal

- Lawful Permanent Residence Cancellation of Removal terminates removal proceedings and allows noncitizen to maintain LPR status
- Non-Lawful Permanent Residence Cancellation of Removal terminates removal proceedings and grants noncitizen LPR status
- Can only receive either form of Cancellation of Removal once
- Can only apply for Cancellation of Removal while in removal proceedings

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## Cancellation of Removal: Stop Time Rule

- The "stop-time" rule defines when continuous residence or continuous physical presence ends.
- Continuous residence/physical presence ends when either the noncitizen commits a designated criminal offense or is served with a Notice to Appear (NTA) placing him/her in removal proceedings.
- **Designated Criminal Offense:** Offense referred to in INA § 212(a)(2) (Criminal Grounds of Inadmissibility) that renders noncitizen inadmissible under INA § 212(a)(2) or deportable under INA § 237(a)(2) (Criminal Grounds of Deportability) or INA § 237(a)(4) (Security Related Grounds)

8 USC 1229b(d)

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## Defense to Removal: Persecution Based Applications

### Asylum, Withholding of Removal, and Convention Against Torture:

- Ask judge to not deport or remove your client because afraid of being persecuted or tortured in their native country
- Being afraid of having economic troubles or hardships not enough

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## Persecution Based: Asylum

- **Eligibility:**
  - Meet the definition of Refugee under INA § 101(a)(42)(a)
    - Outside country of nationality
    - Unable or unwilling to return
    - Unable or unwilling to avail themselves of the protection of that country
    - Because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion
  - Present in the United States or arriving to the United States
  - Applied for asylum within 1 year of their arrival to the United States
    - Except if exceptional circumstances or a change in circumstances
- **Ineligible if:**
  - Ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a PSG, or political opinion
  - Convicted of a "particularly serious crime" (i.e., aggravated felony)
  - Reasonable grounds for regarding noncitizen as a danger to national security
  - Was firmly resettled in another country prior to arriving in the United States
    - **NOTE: Recent Update/Displaces Litigation**
- **Benefits:**
  - Allows family to join or be included (parents, children, or spouse)
  - Provides lawful status in the United States
  - After one year can apply for Lawful Permanent Resident Status

8 USC 1158

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## Persecution Based: Withholding of Removal

- **Must be applied for while in removal proceedings**
- **No one year filing deadline**
- **Permission to remain in the US and employment authorization, but no pathway to LPR status**
- **Government retains right to deport individual to a third country**
- **Family members cannot join or be included**
- **Eligibility**
  - Life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion
    - *Proof of past persecution or can establish that it is "more likely than not" that would be persecuted upon removal to that country*
- **Ineligible if:**
  - Convicted of a "particularly serious crime" (i.e., aggravated felony) with aggregate sentence of 5 years or more
  - Ordered, incited, assisted, or participated in persecution of others because of race, religion, nationality, membership in a PSG, or political opinion
  - Reasonable grounds to believe the noncitizen is a danger to national security
  - Deportable under INA § 237(a)(4)(D) (Participation in Nazi persecutions, genocide, or acts of torture or extrajudicial killings)
  - **NOTE: No "firm resettlement" Bar**

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### Persecution Based: Convention Against Torture

- Must be applied for while in removal proceedings
- No one year filing deadline
- Permission to remain in the United States and employment authorization, but no pathway to LPR status
- Government retains right to deport individual to another third country
- Family members cannot join or be included
- Eligibility:
  - It is "more likely than not" that they will be tortured if removed to the proposed country of removal
- Ineligible if:
  - Convicted of a "particularly serious crime" (i.e., aggravated felony(ies) with aggregate sentence of 5 years or more)
  - Ordered, incited, assisted, or participated in persecution of others because of race, religion, nationality, membership in a PSG, or political opinion
  - Reasonable grounds to believe the noncitizen is a danger to national security
  - Deportable under INA § 237(a)(4)(D) (Participation in Nazi persecutions, genocide, or acts of torture or extrajudicial killings)
  - NOTE: No "firm resettlement" bar

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### Special Visas

- ❑ By working with law enforcement or certain government agencies, a noncitizen may be eligible for a visa to temporarily remain in the United States and potentially a pathway to Lawful Permanent Resident status and United States Citizenship. Law enforcement and certain government agencies must cooperate in the application process.
  - ❑ **T Visa**
    - For victims of human trafficking
  - ❑ **U Visa**
    - For victims of certain serious crimes
  - ❑ **S Visa**
    - For providing important information on a criminal organization

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### T Visa: VICTIM OF TRAFFICKING

- ❑ Eligibility:
  - Victim of severe form of trafficking in persons;
  - Comply with reasonable request for assistance in investigation or prosecution of acts of trafficking (except <18 years of age);
  - Will suffer extreme hardship involving unusual and severe harm if removed from the U.S.
- ❑ Benefits:
  - Enables residence and employment in the U.S. for up to 4 years
  - Provides pathway to Lawful Permanent Resident (i.e., green card) status
  - Allows foreign family to join (i.e., spouses, children or parents of children under 21)
- ❑ Maximum annual number of visas available = 5,000 T visas annually available

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### U Visa: VICTIM OF CRIME

- ❑ Eligibility
  - ❑ Must be victim of a qualifying crime/criminal activity violating US law or occurring in the US
  - ❑ Must suffer substantial physical or mental abuse as a result of the criminal activity
  - ❑ Must have knowledge and information about the details of the criminal activity
  - ❑ Must have been, is being, or is likely to be helpful to a "Certifying agency"
    - i.e., federal, state, or local law enforcement agency, prosecutor, judge, or other authority responsible for the investigation and/or prosecution of a qualifying crime or criminal activity; May also include Family court and certain other government agencies.
  - ❑ Must obtain signed U visa certification signed within the previous 6 months by:
    - (I) The head of the certifying agency or any person(s) designated by the certifying agency
    - (II) Can include: Federal, State, or local Judge, DA's offices, Police Department, State Troopers, etc.
- ❑ Benefits
  - Enables residence and employment in the U.S. for up to 4 years
  - Provides pathway to Lawful Permanent Resident (i.e., green card) status
  - Allows foreign family to join (i.e., spouses, children or parents of children under 21)
- ❑ Maximum annual number of visas available = 10,000 U visas annually available

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### U Visa: QUALIFYING CRIMES

The U Visa applicant must be DIRECT or INDIRECT victim of one of the following crimes:

Abduction	Abusive Sexual Contact	Blackmail	Domestic Violence	Extortion	False Imprisonment	Female Genital Mutilation
Felonious Assault	Fraud in Foreign Labor Contracting	Hostage	Incest	Involuntary Servitude	Kidnapping	Manslaughter
Murder	Obstruction of Justice	Peonage	Perjury	Prostitution	Rape	Sexual Assault
Sexual Exploitation	Slave Trade	Stalking	Torture	Trafficking	Witness Tampering	Unlawful Criminal Restraint

NOTE:

- Includes any similar activity where the elements of the crime are substantially similar
- Includes attempt, conspiracy, or solicitation to commit any of the above and other related crimes

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### U Visa: Who Can Sign a U Visa Certification?

- Any entity that detects, investigates, prosecutes, convicts, or sentences criminal activity may sign a certification including:
  - Based on probable cause or detection of criminal activity
    - Judges, Magistrates, Commissioners, Other Judicial Officers
    - EEOC, State and federal departments of labor
  - Based on investigation or prosecution of criminal activity
    - Police and prosecutors
    - Child or Adult Protective Services
    - Family Court
    - Federal agencies (DHS, ATF, FBI, DOL)
  - Based on Conviction or Sentencing
    - Prosecutors
    - Judges, magistrates, commissioners, and other judicial officers

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### S Visa: INFORMANT VISA

- Eligibility
  - Possess critical and reliable information concerning a criminal organization or enterprise
  - Willing to share or has shared this information with federal or state authorities or court
  - Presence in the US is critical to the success of a criminal investigation or prosecution

OR

  - Possess critical and reliable information concerning a terrorist organization
  - Willing to supply or has supplied such information to federal authorities or court
  - Will be or has been placed in danger as a result of providing the information
- Benefits
  - Enables residence and employment in the U.S. for up to 3 years
  - Provides pathway to Lawful Permanent Resident (i.e., green card) status
  - Allows foreign family to join (i.e., spouses, children or parents)

Maximum annual number of visas available = 200 under first basis for eligibility and 50 under second basis for eligibility

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### Temporary Protect Status (TPS)

- The Department of Homeland security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from safely returning or where country is unable to handle the return of its nationals
  - Ongoing armed conflict
  - An environmental disaster or an epidemic
  - Other extraordinary and temporary condition
- Generally authorized for 18 month period with an option to renew if DHS re-designates the country for TPS
- Those with TPS:
  - Are not removable from the United States
  - Can obtain employment authorization
  - May be granted authorization to travel
- Does not provide a pathway to apply for Lawful Permanent Resident status
- May be revoked or application to renew denied if individual no longer eligible

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### Temporary Protect Status (TPS)

- Eligible if:
  - National of a country designated for TPS
    - Extended: Somalia, South Sudan, Syria, and Yemen
    - Termination Enjoined: El Salvador, Honduras, Nicaragua, Haiti, Sudan, and Haiti
  - Have been continuously physically present in the US since the effective date of the most recent designation of the specific country
    - Exception: brief, casual and innocent departures from the US
  - Have continuously resided in the US since the dates specified for the specific country
    - Exception: brief, casual and innocent departures from the US
  - Admissible to the United States as an Immigrant under INA § 212
    - No waivers of inadmissibility for the criminal or national security related grounds of inadmissibility
- Not Eligible If:
  - Convicted of any felony
  - Convicted of any 2 or more "misdemeanors"
    - Punishable by a year or less in jail, but more than 5 days
  - Subject to any of the mandatory bars of asylum
    - Including, being convicted of a "Particularly Serious Crime" (i.e., an aggravated felony conviction)
  - Rendered inadmissible under INA § 212

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### Special Immigrant Juvenile Status (SIJS)

- Eligibility
  - State court (generally family court) order finding:
    - Noncitizen is dependent on a juvenile court or is legally placed into the custody of a state agency, a private agency, or a private person
    - Reunification with one or both of the noncitizen's parents is not viable due to abuse, abandonment, neglect, or a similar reason under state law AND
    - It is not in the noncitizens best interest to return to their home country
  - Under 21 years of age
  - Not married
  - Present in the United States
- Grant of Special Immigrant Juvenile Status (Form I-360) provides a basis to apply to Adjust Status to Lawful Permanent Resident (green card holder)
- NOTE: Child granted SIJS cannot petition for either of their parents

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### CITIZENSHIP: Derivative or Acquisition

- Some people are US citizens but are not aware
- This could be possible if:
  - Their parent(s) were US citizens when they were born
  - OR
  - They got their green card as a minor and their parent(s) became US citizens before they turned a certain age (usually 18)
- If an individual is a US citizen, generally CANNOT be deported

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• UNDER THE AGE OF 18 (on or after February 27, 2001)

+

• ONE PARENT IS A U.S. CITIZEN (note: If adopted – adoption completed before client's 16<sup>th</sup> birthday)

+

• RESIDED IN PHYSICAL & LEGAL CUSTODY OF U.S. CITIZEN PARENT

+

• CLIENT LAWFULLY ADMITTED TO THE U.S. AS AN IMMIGRANT (i.e., admitted as a green card holder)

U.S. Citizenship Act of 2000  
See 8 USC §1431

AUTOMATICALLY DERIVES U.S. CITIZENSHIP

NOTES:

- If US Citizenship Act of 2000 does not apply specific requirements dependent on the specific law at the time last condition met
- Can file Form N-600, Application for Certificate of Citizenship, or apply for US passport for proof of citizenship

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## Voluntary Departure

- ❑ Voluntary Departure: Request to the immigration judge to not issue an order of deportation. Noncitizen agrees to leave on his/her own.
- ❑ Immigration Judge can be given up to 120 days to depart.
- ❑ If allowed to leave voluntarily, noncitizen must have a travel document (i.e., passport) and must buy their own ticket with the assistance of family or the Immigration Service if in custody.
- ❑ Once your client departs, he/she may be prevented from coming back to the US.
- ❑ CANNOT be granted if convicted of an aggravated felony or deportable based on terrorism grounds.
- ❑ Additional requirements if requesting Voluntary Departure at the conclusion of removal proceedings:
  - ❑ Physical presence for at least one year prior to issuance of NTA
  - ❑ Person of "good moral character" for at least 5 years immediately preceding application for Voluntary Departure
  - ❑ Establish that have means to depart US and intends to do so

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## If Lose Your Immigration Case...

- ❑ An appeal must be within 30 days of losing an immigration case
- ❑ A motion to reopen or to reconsider an immigration decision can be filed
- ❑ If individual is in custody: Custody Review
- ❑ Each person in custody has the right to 90-day, 6 month, and 1-year reviews of their immigration custody
- ❑ Immigration cannot detain indefinitely unless they can show that they will deport noncitizen in the near future or noncitizen is a threat to the community

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## Early/Conditional Parole for Deportation Only (E/CPDO)

- ❑ Allows a noncitizen serve less time in New York State prison
- ❑ Board of Parole can release noncitizen – but only to let Immigration deport him/her
- ❑ ECPDO: Need to serve at least half of the minimum sentence
  - ❑ Cannot have been convicted of Violent Felony Offense
  - ❑ Have no other unsettled criminal charges or appeals pending
- ❑ CPDO: Need to have served minimum sentence
  - ❑ Have no other unsettled criminal charges or appeals pending
- ❑ Procedure:
  - ❑ Get ordered deported by an immigration judge or sign an order to deport  
Means giving up or using up all immigration appeals
  - ❑ Ask Parole Board to grant ECPDO or CPDO

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# **EXHIBIT C-9**

# THE INTERSECTION OF IMMIGRATION, CRIMINAL & FAMILY LAW IN NEW YORK

## AN OVERVIEW

Evelyn Kinnah, Esq.  
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# DEPORTABILITY v. INADMISSIBILITY

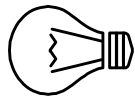
INA § 237, 8 U.S.C. § 1227

INA § 212, 8 U.S.C. § 1182

- *Technically:*
  - Deportability applies to non-citizens whom the government has “admitted” into the United States (e.g. LPRs, refugees)
  - Inadmissibility applies to those seeking lawful admission or permanent residency status (e.g. undocumented, visa overstays applying for permanent residency, LPRs applying for admission)
- *Practically:*
  - Each set of rules, or both, may apply to the same person in various situations

# **EXHIBIT C-10**





**2018 Updates**  
**CRIM-IMM 101:  
UNDERSTANDING  
IMMIGRATION  
STATUS**

March 2018

# WHO ARE WE?



**IMMIGRANT  
DEFENSE  
PROJECT**



The Padilla Support Center is one of six Regional Immigration Assistance Centers funded by an innovative grant from the New York State Office of Indigent Legal Services through the New York City Mayor's Office of Criminal Justice.



**NYC** Criminal  
Justice

**WHO ARE WE?**  
**IMMIGRANT DEFENSE PROJECT**  
**PADILLA SUPPORT CENTER**

- Advise defenders and appointed counsel on immigration consequences of Criminal & Family Court contacts
- Provide trainings & resources on criminal-immigration issues

**Learn how to talk to your client about immigration history so you can ask the right questions and properly advise them.**

**Learn when to call us.**



**WHY ARE**  
**WE HERE**  
**TODAY?**

# WHAT WILL WE LEARN TODAY?



Basics of immigration law



How contacts with Family & Criminal Court can adversely impact immigration status



Types of immigration status & consequences



Practice tips for talking to your clients about immigration status

**AS A DEFENSE  
ATTORNEY,  
WHY SHOULD I  
CARE ABOUT  
IMMIGRATION  
LAW?**



## *Padilla v. Kentucky*

Immigration consequences are “**enmeshed**” in the criminal process. “Deportation is an integral part—indeed, sometimes **the most important part**—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”



**You have a constitutional duty to give affirmative, individualized and accurate advice about the immigration consequences of a criminal case.**

*See Padilla v. Kentucky*, 559 U.S. 356 (2010).



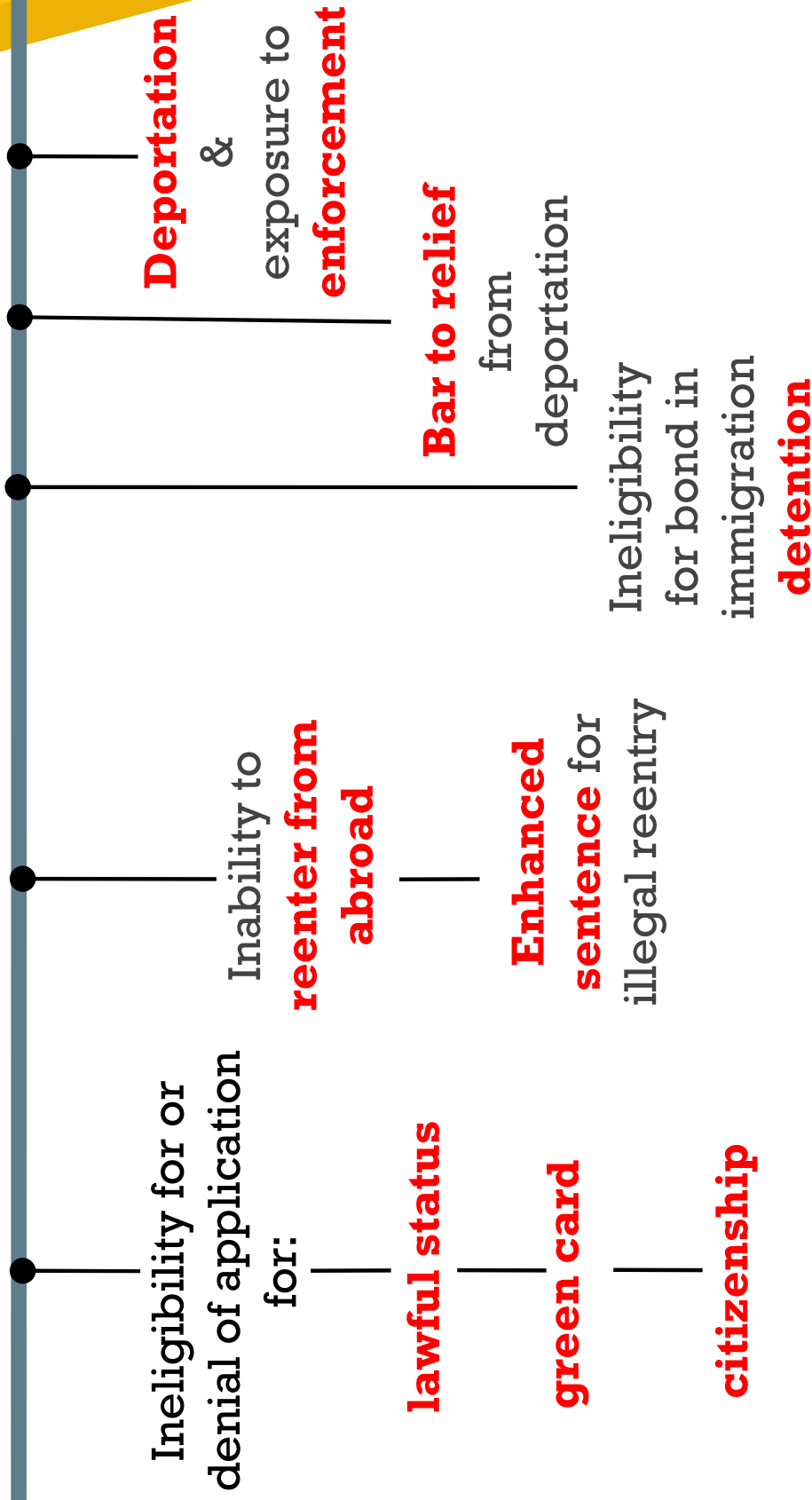
**If you do not provide  
affirmative, competent advice, a  
client may seek a claim of  
ineffective assistance of  
counsel.**

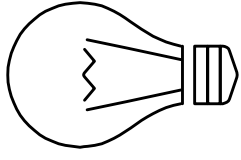
**This includes:**

- **negotiating** to minimize adverse immigration consequences
- advising about the immigration consequences of **alternate dispositions & sentencing options.**

**However,**  
**deportation** is not  
the only possible  
consequence of  
Criminal/Family  
Court contacts!

# Possible consequences of Family & Criminal Court contacts





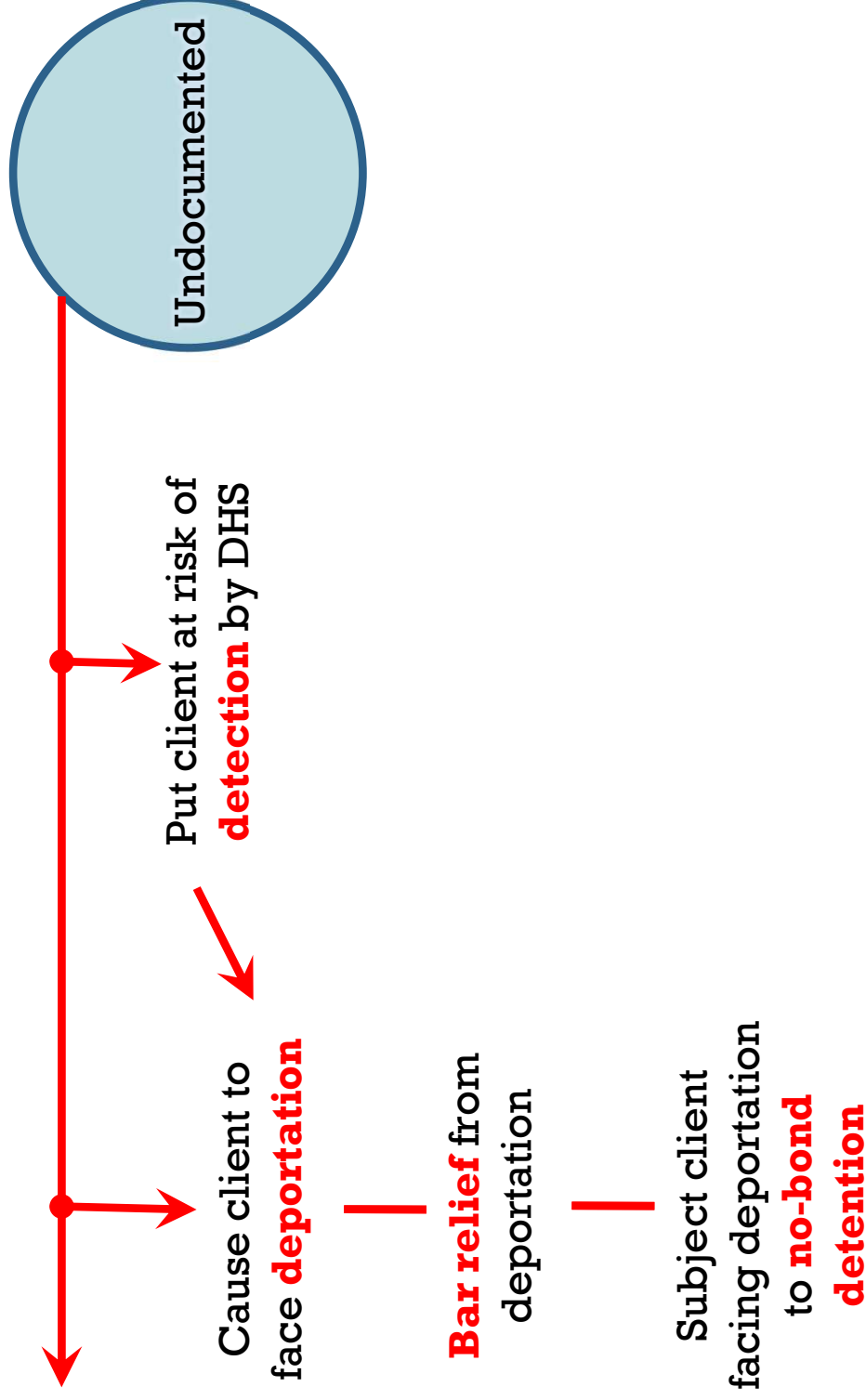
## **ABOUT UNDOCUMENTED CLIENTS**

**People who are undocumented may be eligible to become documented.**

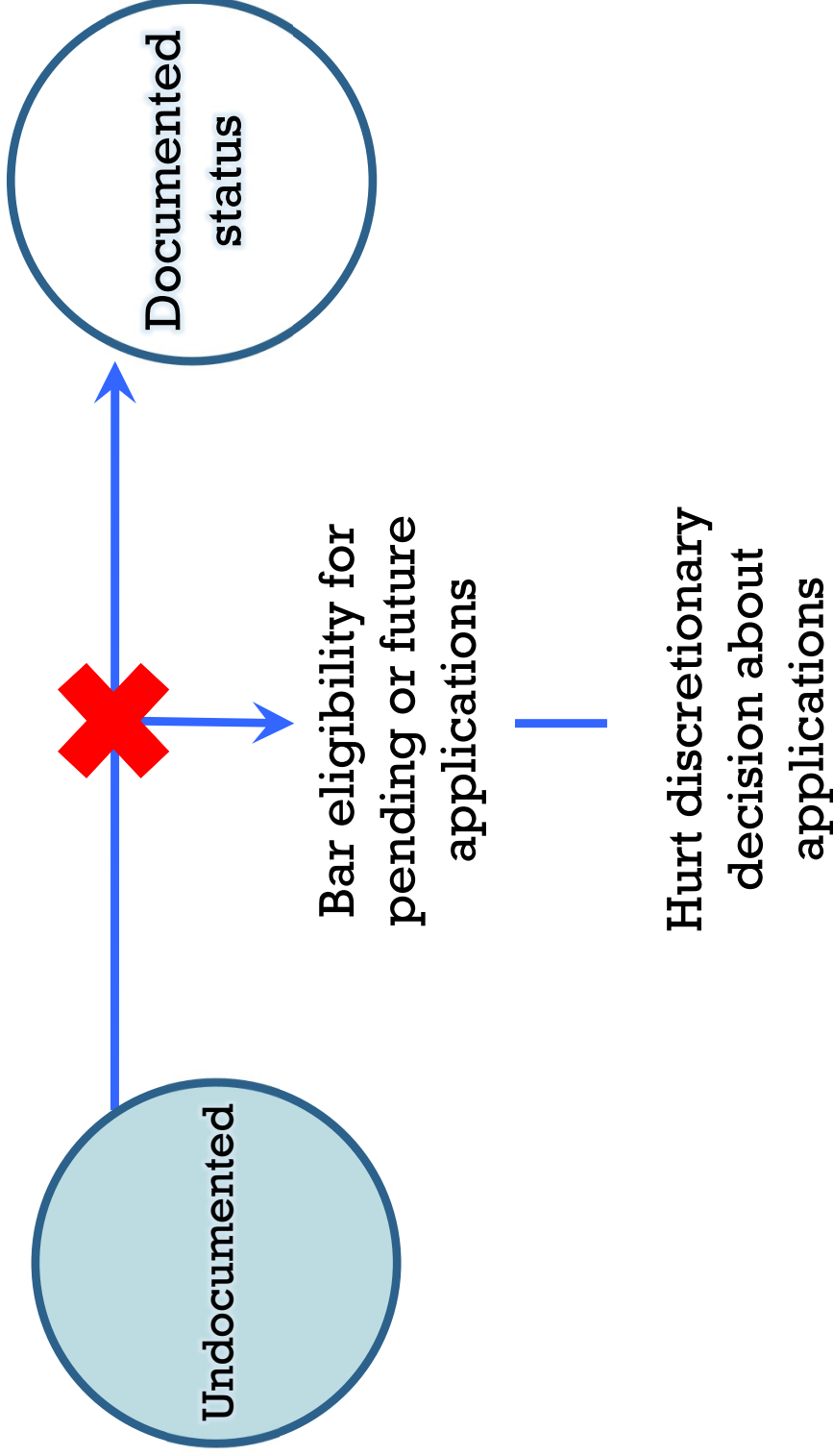
Criminal and Family Court contacts  
can bar eligible clients.

**Refer, refer, refer!**

# Family/Criminal Court contacts can:

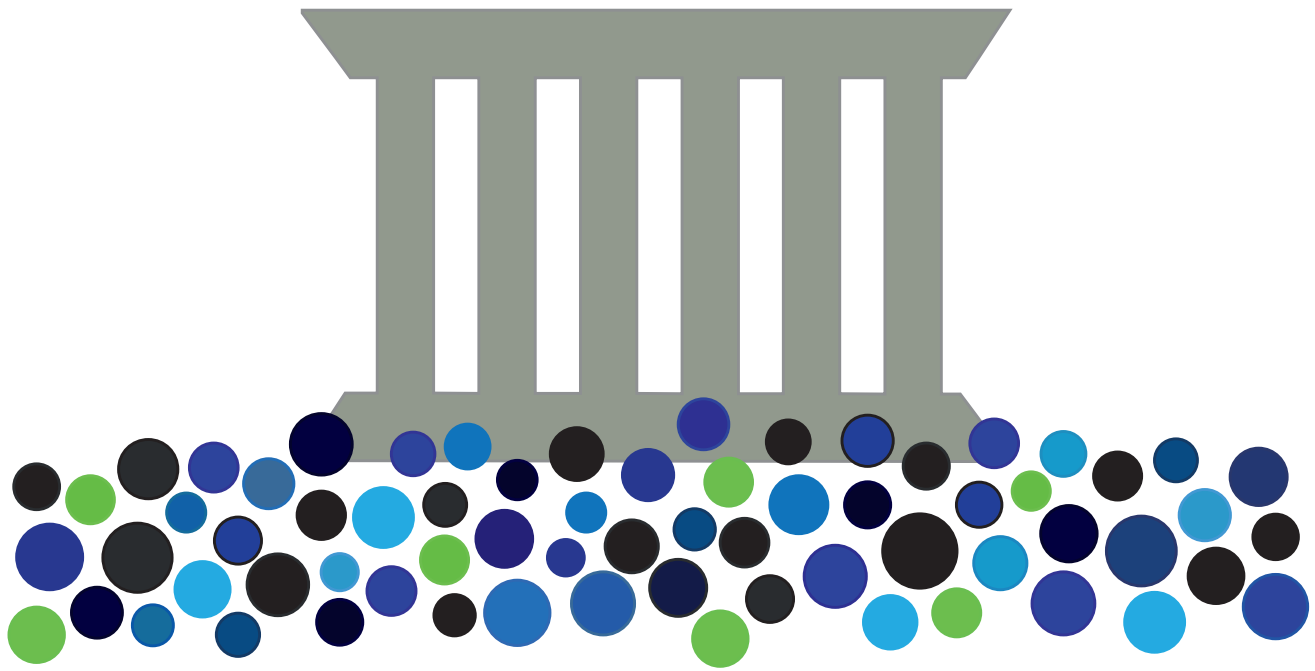


# Family/Criminal Court contacts can:



# **EXHIBIT C-11**





# IMMIGRATION STATUS GUIDE FOR ASSIGNED COUNSEL

This quick-reference guide is designed to help appointed counsel in NYC Criminal Court and Family Court interview clients and identify common immigration statuses for the purposes of receiving accurate legal consults from the Padilla Support Center.

This guide is not exhaustive. It is for informational purposes only and is not a substitute for individualized legal advice.



**IMMIGRANT  
DEFENSE  
PROJECT**



**Immigrant Defense Project | Padilla Support Center**  
**212-725-6422 | [immdefense.org/psc](http://immdefense.org/psc)**

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Illustrations by Bishakh Som, [www.archicomix.com](http://www.archicomix.com)

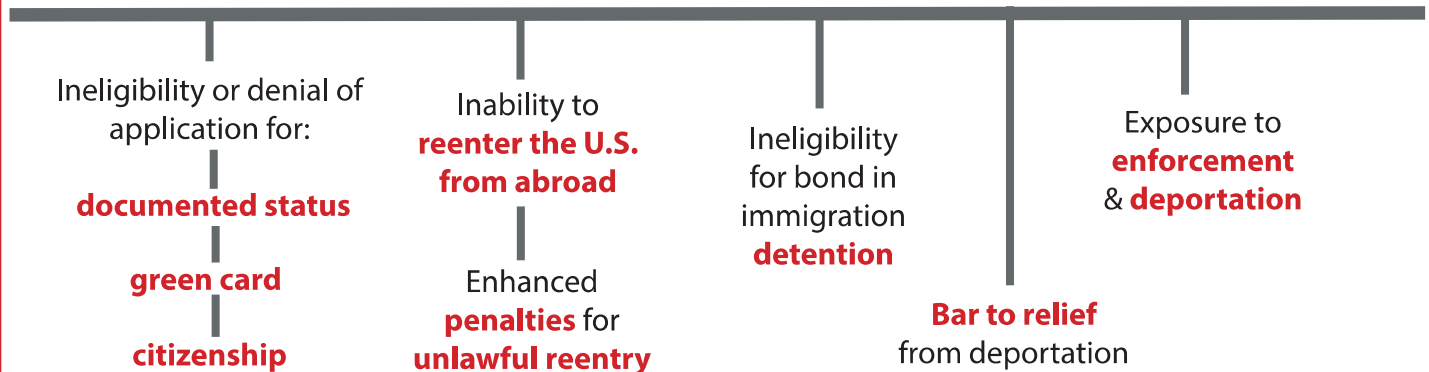
# INTRODUCTION: USING THIS GUIDE

**Contact with the Criminal & Family Court systems can lead to a broad range of adverse immigration consequences—including deportation—for both documented and undocumented people.** These consequences are not always immediately obvious and can impact clients years after the resolution of a case. Moreover, even a *pending* Criminal or Family Court case can impact clients who are not U.S. citizens.

It is crucial to seek expert immigration advice early in a case so that you can try to mitigate these potentially devastating consequences and your client can make informed choices prior to the outcome of the case.

Moreover, **Criminal Court defenders**, in 2010, the U.S. Supreme Court held that **it is your constitutional duty** to provide affirmative, accurate and individualized advice about the immigration consequences of criminal charges prior to any plea. See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

## The broad spectrum of immigration consequences that can flow from Criminal & Family Court contacts



## The foundation of an accurate immigration consult

In order to get an accurate consult, it is important to gather the following information unique to your client:

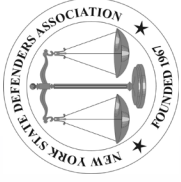
**1** Immigration history, including past & current immigration status

**2** Information about prior Criminal/Family Court contacts

**3** Information about current Criminal/Family Court case

This guide will help you identify common immigration statuses so that you can have a productive conversation with clients and gather the most accurate information possible. On the next page, we detail some of the **fundamental questions** to ask clients about their immigration histories. Throughout the guide, we provide **follow-up questions** you may ask clients to verify their immigration status. Additionally, the appendices lay out definitions for common **immigration terms/abbreviations** and depict common **immigration documents**.

# **EXHIBIT C-12**



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

# **Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know**

**Queens Law Associates  
Advanced CLE On Immigration Consequences  
of Criminal Convictions  
Forest Hills, NY**

**May 4, 2010**



# **OVERVIEW: PADILLA V. KENTUCKY**

# INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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

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

# Life After *Padilla*: Defending In Criminal Court

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

*Id.* at 8-9.

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

*Id.* at 10.



# Affirmative Advice & The Strickland Standard

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

# What Is Effective Assistance?

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

Id. at 10.



# Life After *Padilla v. Kentucky?*

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



# What Is Effective Assistance?

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



# STEP ONE: Relevant Facts?

1. Client's Immigration Status
2. Client's U.S. Family Ties
3. Any lodged ICE Detainer
4. Client's Criminal History, Charges, Plea Offers

# STEP TWO: Client's Defense

## Goals

- Avoid conviction that triggers deportation
- Preserve eligibility to get future immigration benefits (lawful permanent resident or “green card” status, citizenship, TPS, U, V or T visa, etc.)
- Preserve ability to ask immigration judge to stay in U.S.
- Get out of jail ASAP to avoid ICE detainer and transfer
- Immigration consequences not a priority for your client
- Client seeks expedited transfer to ICE for removal from the US

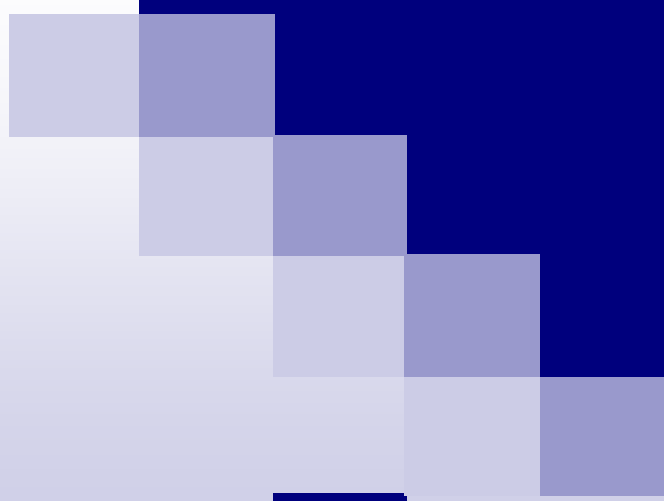
# **STEP THREE: Analyze Immigration Consequences of Plea/Sentence**

- Determine likelihood that charge/plea will trigger deportation
- Determine likelihood that charge/plea will trigger inadmissibility
- Determine impact of charge/plea offer on “discretionary relief” or other immigration status (i.e., LPR status or citizenship, etc.)

# **STEP FOUR: Prioritize Client's Defense Strategies**

- Negotiate to non-deportable offense
- Sterilize record of conviction
- Obtain sentence of less than 365 (or 180 for CIMT) days
- File an appeal of conviction/sentence
- Get client out of jail before ICE detainer





**Who is at risk of  
removal and how?**

# WHO CAN BE REMOVED?

- **LAWFUL PERMANENT RESIDENT**
- (i.e., “Green Card Holders”)
- **REFUGEES & ASYLEES**
- (i.e., Those granted humanitarian protection in U.S.)
- **NONIMMIGRANTS**
- (ex. temporary visitors, students, workers)
- **UNDOCUMENTED**
- (ex. entered the U.S. without being inspected and admitted)

**= SUBJECT TO REMOVAL FROM THE U.S.**

# DEPORTABILITY vs. INADMISSIBILITY

## DEPORTABILITY

NON-U.S. CITIZENS  
inspected and  
lawfully admitted to  
the United States

## INADMISSIBILITY

NON-U.S. CITIZENS  
who entered illegally (i.e.,  
not inspected and  
admitted) **OR** who are  
seeking lawful admission  
to the United States

# DEPORTABILITY

VS.

# INADMISSIBILITY

## DEPORTABILITY

LPR's ("Greencard Holder)

**Nonimmigrants**

(ex. visitors, students, workers on valid status)

**Visa "Overstayers"**

(ex. overstayed authorized period of stay in U.S.)

## INADMISSIBILITY

Refugees, Asylees, Undocumented, Non-LPRs

**Returning LPR's (Green Card Holders)** (i.e., even after brief departure from U.S.)

**Nonimmigrants** (i.e., persons seeking permission to visit, work or go to the school in the U.S.)

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

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

➢ See reverse ➢

# GROUNDS OF INADMISSIBILITY

- ◆ **Controlled substance offense**  
**(NO EXCEPTIONS!)**
- ◆ **Crime involving moral turpitude (CIMT)**  
**(Admissions or Convictions)**
- ◆ **Prostitution**
- ◆ **2 or more offenses w/ aggregate sentence of 5 years + sentence**