

Informing Criminal Defendants of the Immigration Consequences of Their Convictions:

The Trial Judge's Duty

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A noncitizen charged with a criminal offense faces a dual risk of serious consequences: in addition to the sentence that could be imposed as a result of his criminal conviction, a noncitizen defendant may also face severe immigration consequences, including removal from the United States, if he is convicted of a crime. We recommend that trial court judges advise noncitizen defendants of the potential immigration consequences of their criminal convictions so that immigrants are fully informed of their rights. In section I, we first explain the United States Supreme Court's decision in *Padilla v. Kentucky*, which held that attorneys must advise their clients of the immigration consequences of their convictions. We demonstrate that trial court judges have a similar duty to advise noncitizen defendants because they have always played a role in ensuring effective assistance of counsel and ensuring knowing and voluntary pleas.

In section II, we summarize the areas of immigration law in which a criminal conviction or the sentence imposed by a trial court judge can have serious implications for noncitizens. In section III, we examine the various approaches currently taken by states that have imposed a statutory duty on judges to advise noncitizens about the immigration consequences of their convictions. Based on an analysis of the strengths and weaknesses of these statutory advisements, we present a model judicial advisement in section IV that ensures a non-immigrant defendant receives adequate advice and is fully informed about the potential immigration consequences of a criminal conviction.

I. TRIAL COURT JUDGES' DUTY TO UPHOLD DEFENDANTS' RIGHTS INCLUDES PROTECTING THE RIGHT TO ACCURATE, INFORMED IMMIGRATION INFORMATION

In this section, we examine the role of trial court judges when noncitizen criminal defendants appear before them. This section starts by addressing the recent United States Supreme Court

decision in *Padilla v. Kentucky*, which created affirmative obligations for defense attorneys to advise their clients regarding the immigration consequences of criminal convictions. Next, we demonstrate that trial court judges have a similar duty based on their preexisting duties to ensure effective assistance of counsel and to ensure guilty pleas are knowing and voluntary.

A. PADILLA V. KENTUCKY: IMMIGRANT DEFENDANTS HAVE A RIGHT TO KNOW ABOUT POTENTIAL REMOVAL FROM THE UNITED STATES

The United States Supreme Court decision in *Padilla v. Kentucky* clarified defense counsel's obligations with respect to immigration advice but left open the question of judges' roles in ensuring noncitizen defendants understand the immigration consequences of their criminal convictions. We recommend that judges should also play a role in advising immigrants of the consequences of their criminal convictions based on judges' preexisting obligations to protect the due-process rights of criminal defendants.

1. *Padilla v. Kentucky*: Facts and Holding

In 2010, the United States Supreme Court decided *Padilla v. Kentucky*, which held that criminal defense attorneys are required to advise their clients of the potential immigration consequences of their guilty pleas.¹ Jose Padilla was a lawful permanent resident and native of Honduras who had been legally present in the United States for 40 years.² Mr. Padilla was also a veteran of the Vietnam War, a fact the Supreme Court noted in the first paragraph of its opinion.³ Mr. Padilla was charged with transporting a large quantity of marijuana in his trailer and pled guilty on the basis of his attorney's erroneous advice.⁴ His attorney advised him to plead guilty because the attorney believed that Mr. Padilla "did not have to worry about immigration status since he had been in the country so long."⁵ This advice was, unfortunately, incorrect. The federal Immigration and Nationality Act ("INA") dictates that

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Footnotes

1. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
2. *Id.* at 1477.

3. *Id.* Justice Stevens authored the majority opinion of the court, joined by Justice Kennedy, Justice Ginsberg, Justice Breyer, and Justice Sotomayor. Justice Alito concurred, joined by Justice Roberts, and Justice Scalia authored a dissenting opinion in which Justice Thomas joined. *Id.* at 1477, 1487, 1494.
4. *Id.* at 1477–78.
5. *Id.* at 1478 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)) (internal quotation marks omitted).

an alien who is convicted of a controlled-substance violation is automatically subject to removal.⁶

As a result of his conviction following his guilty plea, Mr. Padilla was placed in removal proceedings. He raised a post-conviction challenge to his criminal conviction, alleging that his attorney's incorrect advice amounted to ineffective assistance of counsel.⁷ The Supreme Court of Kentucky denied Mr. Padilla's claim without a hearing, holding that removal was a mere "collateral consequence" of a criminal conviction and therefore did not fall under the purview of the Sixth Amendment's effective-assistance doctrine.⁸ Under the collateral-consequences doctrine, a defendant must make a plea with full knowledge of the *direct* consequences of his conviction in order to satisfy due process.⁹ If a defendant makes a plea and is unaware of the *collateral* consequences, however, the plea still withstands constitutional scrutiny.¹⁰ On appeal, the United States Supreme Court held that effective assistance of counsel requires an attorney to advise her client whether a criminal conviction carries a risk of removal.¹¹ The Court held that the collateral-consequences doctrine did not apply to severe immigration consequences, such as removal from the United States. Instead, the Court summarily concluded that the Sixth Amendment itself requires affirmative immigration advice.¹²

The Court referenced recent changes in immigration law, noting that the system had evolved from one that allowed trial court judges to influence which convictions would result in removal to one that requires automatic removal as the result of many criminal convictions.¹³ The Court stated that these "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction."¹⁴ In light of these serious consequences, the Court concluded that counsel's failure to provide immigration advice could constitute ineffective assistance of counsel.¹⁵

The test for ineffective assistance of counsel was set forth in a 1984 United States Supreme Court case, *Strickland v. Washington*. *Strickland* states that for a defendant to prove he received ineffective assistance of counsel, he must prove first

that his counsel's performance was deficient, and second, that but for counsel's deficient performance, the outcome of the case would have been different.¹⁶ In the specific context of Mr. Padilla's case, the Court concluded under *Strickland's* first prong that counsel's performance was deficient. The Court stated that the consequence of automatic removal resulting from a conviction of transporting marijuana was clear from the plain text of the immigration statute and that counsel was therefore deficient for failing to advise his client of that fact.¹⁷ With regard to *Strickland's* second prong, the court remanded to the lower Kentucky courts to determine whether Mr. Padilla would not have pled guilty but for his counsel's erroneous statement that he would suffer no immigration consequences.¹⁸

2. What Padilla Requires from Attorneys

Before *Padilla*, state courts and the United States Courts of Appeals had split on the issue of whether defense counsel had a duty to advise his client of the immigration consequences of a guilty plea or conviction.¹⁹ Despite attempting to standardize and clarify defense counsel's duty with respect to immigration advice, the *Padilla* opinion did not address how specific defense counsel's advice must be.²⁰

Under the specific facts of *Padilla*, the Court stated that Mr. Padilla's attorney should have advised him that a guilty plea would have resulted in removal because the immigration statute at issue was clear that any controlled-substance violation triggered automatic removability.²¹ The Court was less forceful, however, in declaring the type of advice that would be required in other scenarios.²² Acknowledging that immigration law is "complex" and "a legal specialty of its own," the Court opined that when the immigration consequences of a conviction were less certain than in Mr. Padilla's case, a defense attorney would not be required to provide a detailed warning on the specific immigration consequences.²³ Instead, in those scenarios, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."²⁴

6. INA § 237(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

7. *Padilla*, 130 S. Ct. at 1478.

8. *Id.*

9. *Brady v. United States*, 397 U.S. 742, 455 (1970).

10. *Id.*

11. *Padilla*, 130 S. Ct. at 1486.

12. *Id.* at 1482.

13. *Id.* at 1479–80.

14. *Id.* at 1480.

15. *Id.* at 1486 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

16. *Strickland v. Washington*, 466 U.S. 668 (1984).

17. *Padilla*, 130 S. Ct. at 1483. ("This is not a hard case in which to

find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

18. *Id.* at 1484.

19. See IMMIGRANT DEFENSE PROJECT & NEW YORK UNIVERSITY SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY* 12 (2011) [hereinafter JUDICIAL OBLIGATIONS], available at <http://immigrantdefenseproject.org/wp-content/uploads/2011/05/postpadillaFINALnew.pdf>.

20. Another issue left open by the Court and later resolved was whether *Padilla* would apply to incorrect immigration advice given before 2010. See *infra* Section I.B.2.

21. *Id.* at 1483; see also INA § 237(a)(2)(B)(i).

22. *Padilla*, 130 S. Ct. at 1483.

23. *Id.*

24. *Id.* The Court explained that it was attempting to strike a balance between the necessary nature of immigration advice and the complexity of immigration law. See *id.* at n.10 ("Lack of clarity in the law . . . does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.").

Justice Alito concurred in the judgment but disagreed that defense attorneys should have an affirmative duty to provide immigration advice.²⁵ Rather, he stated his belief that counsel should either refrain from giving any immigration advice at all or provide noncitizen clients with a general warning of potential immigration consequences while encouraging them to consult an immigration attorney for specific advice.²⁶ The majority opinion rejected this approach, citing the “absurd” effect it would have of incentivizing attorneys to remain silent on immigration matters, even where accurate and rudimentary immigration advice was readily available.²⁷ The majority’s rejection of Justice Alito’s approach demonstrates the Court’s concern that noncitizens receive accurate and informed advice and militates in favor of judicial advisements in addition to those provided by attorneys.

Padilla makes clear that although defense attorneys are not expected to become immigration-law experts, they are expected to research the relevant immigration statutes and apply settled caselaw when giving their clients immigration advice. In contrast to this affirmative duty on attorneys, the Court did not explicitly address the role of trial court judges in advising noncitizen defendants. The next section explains why trial court judges should also take steps to uphold noncitizens’ rights.

B. WHY PADILLA REQUIRES TRIAL COURT JUDGES TO ENSURE NONCITIZEN DEFENDANTS ARE INFORMED ABOUT THE IMMIGRATION CONSEQUENCES OF A CONVICTION

The *Padilla* opinion was clear with respect to the fact that defense attorneys have an affirmative duty to provide immigration advice, even though it is not entirely certain how specific this advice must be. For judges presiding over criminal prosecutions of noncitizens, however, the implications of *Padilla* were less explicit. This section will examine judges’ preexisting duties to protect defendants’ rights. We conclude that these preexisting duties, combined with the Court’s concern for noncitizen defendants as expressed in *Padilla*, require trial court judges to take steps to protect noncitizen defendants, including advising them of their rights and the risk of removal.

1. Trial Court Judges’ Preexisting Duty to Ensure Effective Assistance of Counsel Includes the Right to Accurate Immigration Advice

In *Strickland v. Washington*, the United States Supreme Court recognized the right to the effective assistance of counsel for all criminal defendants.²⁸ *Strickland* set a high bar for criminal defendants attempting to allege their trial counsel was ineffective.²⁹ In the context of a plea, *Strickland* requires a showing that the defendant would have chosen to proceed to trial rather than pleading guilty, but for his counsel’s deficient advice.³⁰

The trial judge is responsible for ensuring that criminal defendants receive due process of law, including verifying that a defendant is aware of all her Sixth Amendment rights and that counsel is performing effectively.³¹ Appellate judges see claims of ineffective assistance of counsel in criminal appeals. Now, under *Padilla*, the Sixth Amendment right to effective counsel includes accurate advice on the removal consequences of a criminal conviction,³² meaning that trial and appellate judges must also be concerned about whether counsel is complying with this new requirement.³³

This concern for a noncitizen defendant’s right to accurate immigration advice may arise in a number of different scenarios. For example, trial court judges need to consider defense counsel’s ability to provide immigration advice when appointing counsel to an indigent defendant who faces immigration consequences as the result of a conviction.³⁴ Furthermore, even for non-appointed counsel, an attorney’s general ability to provide competent immigration advice is an important aspect of the Sixth Amendment following the *Padilla* decision. We recommend that judges ensure defense counsel’s ability to provide accurate immigration advice by asking the attorney whether he feels he can properly advise his client on the immigration consequences of a conviction. Trial court judges cannot inquire into the exact nature of immigration advice an attorney gives his client, however, because of attorney–client confidentiality.³⁵

Furthermore, the *Padilla* mandate presents a special concern for noncitizen defendants who are not entitled to an appointed attorney. The United States Supreme Court has determined which indigent defendants are entitled to an appointed attorney in a set of three cases, *Argersinger v. Hamlin*, *Scott v. Illinois*, and *Alabama v. Shelton*.³⁶ These cases state that an indigent criminal defendant charged with a misdemeanor is not entitled to appointed counsel if he does not

25. *Id.* at 1487 (Alito, J., concurring).

26. *Id.*

27. *Id.* at 1484.

28. *Strickland v. Washington*, 466 U.S. 668 (1984).

29. *See id.*

30. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

31. *See generally id.*

32. *See infra* Section II.A.

33. While this duty may arise more commonly on appeal when a defendant raises an ineffective-assistance-of-counsel claim, many commentators agree that judges nevertheless have a duty to ensure effective assistance during trial-level proceedings to the extent possible. *See* JUDICIAL OBLIGATIONS, *supra* note 19, at 16 (“From the inception of a criminal process, judges have a general duty to be attentive to the quality of defense counsel.”).

34. *See* Steven Weller and John A. Martin, Implications of *Padilla v. Kentucky* on the Duties of State Court Criminal Judges 5-6 (work in progress), http://www.sji.gov/PDF/Implications_of_Padilla_for_State_Court_Judges.pdf (hypothesizing that in addition to judicial concerns for attorney competence in appointing counsel for indigent defendants, *Padilla* might also be implicated when judges select attorneys for inclusion in an indigent defense pool or select private counsel to represent defendants pro bono).

35. *See* ABA, MODEL RULES OF PROFESSIONAL CONDUCT § 6.1 (2012) (designating attorney-client communications as confidential).

36. *Alabama v. Shelton*, 535 U.S. 654 (2002); *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (setting forth the “actual imprisonment” standard for appointment of counsel in misdemeanor cases).

receive jail time for his sentence.³⁷ The United States Supreme Court has not addressed what happens when an indigent criminal defendant is charged with a non-jailable offense that may nevertheless lead to his removal.³⁸ Given the *Padilla* Court's concern for noncitizens, we recommend that trial court judges err on the side of protecting noncitizens' rights by appointing counsel to indigent defendants charged with non-jailable offenses that carry the risk of removal.

2. When Defendants Can Challenge Inaccurate Immigration Advice Given Before *Padilla*

At the time *Padilla* was decided, it was not clear whether it applied to pre-2010 criminal convictions. Lower courts split on the issue of whether *Padilla* should have retroactive effect, but in a 2013 case, *Chaidez v. United States*, the United States Supreme Court clarified that it read *Padilla* to apply only prospectively.³⁹ The Court applied the test of retroactivity set forth in *Teague v. Lane*. The *Teague* retroactivity test states that new rules of criminal procedure apply prospectively, while mere clarifications of existing law are given retroactive effect.⁴⁰ The Court concluded that *Padilla* announced a new rule because the *Padilla* Court first had to determine whether immigration advice even fell within the ambit of the Sixth Amendment.⁴¹ The Court stated that *Padilla* was the first time that a court had recognized counsel's affirmative duty to provide accurate immigration advice, despite the fact that many states already required trial courts to ensure counsel had advised his client on the immigration consequences of a plea.⁴² The Court held that *Padilla* did not have retroactive effect based on its conclusion that requiring defense attorneys to advise their clients on immigration matters was a new rule.⁴³

Justices Sotomayor and Ginsburg authored a strong dissent in *Chaidez*, asserting that *Padilla* "did nothing more than apply the existing rule of *Strickland*" to the new scenario of defective immigration advice.⁴⁴ The dissent cited other cases in which *Strickland*'s application to new factual situations did not trigger prospective-only application⁴⁵ and noted that professional norms regarding immigration advice had evolved with the

changing stakes of immigration law to require accurate immigration advice even before the *Padilla* decision.⁴⁶

Despite the majority opinion in *Chaidez* declining to retroactively apply *Padilla*, the Supreme Judicial Court of Massachusetts has decided to give *Padilla* retroactive effect within Massachusetts.⁴⁷ Before the United States Supreme Court's ruling in *Chaidez*, the Massachusetts high court had decided that *Padilla* should have retroactive effect.⁴⁸ After the *Chaidez* decision, the Supreme Judicial Court of Massachusetts affirmed that it would continue to apply *Padilla* retroactively by deciding *Commonwealth v. Sylvain*.⁴⁹ In *Sylvain*, the defendant pled guilty in 2007 to a drug charge based on his attorney's erroneous advice that he would not be removed as a consequence.⁵⁰ The issue in *Sylvain* was whether the defendant should be permitted to bring a *Padilla* claim despite the fact his conviction predated the *Padilla* decision.⁵¹ The Massachusetts high court affirmed its prior decision and re-stated that *Padilla* should apply retroactively despite the United States Supreme Court's ruling to the contrary in *Chaidez*.⁵² The court relied on its ability to independently apply the *Teague* framework in determining whether a constitutional criminal-procedure rule should have retroactive effect or not.⁵³ Under its independent application of *Teague*, the Massachusetts court sided with the *Chaidez* dissent in concluding that *Padilla* did not announce a new rule of criminal procedure and therefore had retroactive effect.⁵⁴ The court also held that the Massachusetts constitution independently required accurate immigration advice and that *Padilla* therefore did not announce a new rule under either the federal or state constitutions.⁵⁵

The *Sylvain* decision opened up the possibility that other state courts might choose to apply *Padilla* retroactively in spite of the United States Supreme Court's decision in *Chaidez*.⁵⁶ For example, the New Mexico Supreme Court recently permitted the New Mexico Legal Academics and the National Immigration Project of the National Lawyers Guild to file an amicus brief on the question of *Padilla* retroactivity.⁵⁷ A *Padilla*-retroactivity case is also pending in New York.⁵⁸

The United States Supreme Court's opinion in *Padilla* and

37. *Shelton*, 535 U.S. at 662.

38. See also Weller & Martin, *supra* note 34, at 6 (recognizing the special challenges presented by unrepresented defendants who face immigration consequences).

39. *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

40. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

41. *Chaidez*, 133 S. Ct. at 1111.

42. Many states had rules in place before *Padilla* that required trial court judges to ensure defendants understood the immigration consequences of their pleas. See *infra* Section III.B.

43. *Chaidez*, 133 S. Ct. at 1112–13.

44. *Id.* at 1114 (Sotomayor, J., dissenting).

45. *Id.* at 1115 (Sotomayor, J., dissenting).

46. *Id.* at 1116 (Sotomayor, J., dissenting) ("Our application of *Strickland* in *Padilla* followed naturally from these earlier observations about changes in immigration law and the accompanying evolution of professional norms.")

47. *Commonwealth v. Sylvain*, 466 Mass. 422 (2013).

48. *Commonwealth v. Clarke*, 949 N.E.2d 892 (Mass. 2011).

49. *Sylvain*, 466 Mass. at 423.

50. *Id.*

51. *Id.*

52. *Sylvain*, 466 Mass. at 423–24.

53. *Id.* at 434 ("[B]ased on our authority to conduct an independent review, [we] are not required to blindly follow [the Supreme Court's] view of what constitutes a new rule.") (quoting *Rhoades v. State*, 233 P.3d 61 (Idaho 2010)).

54. *Id.* at 435.

55. *Id.* at 436 ("For the same reasons that we determined that the Sixth Amendment right enunciated in *Padilla* was not a 'new' rule, we conclude that the defendant's coextensive right under art. 12 [of the Massachusetts Constitution] does not constitute a 'new' rule.")

56. See Christopher N. Lasch, *Mass. High Court Breathes New Life into Padilla in Commonwealth v. Sylvain*, CRIMMIGRATION BLOG, <http://cimmigration.com/2013/09/16/mass-high-court-breathes-new-life-into-padilla-in-commonwealth-v-sylvain/> (Sept. 16, 2013, 4:00 A.M.). Professor Lasch authored an amicus brief in the *Sylvain* case on behalf of Massachusetts Legal Academics.

57. Brief of Amici Curiae, *Ramirez v. State*, No. 33,604 (New Mexico Supreme Court).

58. *People v. Baret*, 952 N.Y.S.2d 108 (N.Y. App. Div. 2012).

the divergent approaches to retroactivity taken by the nation's high court and state courts leave this an area of flux. It is possible that in the coming months and years, other states will follow Massachusetts's lead and elect to apply *Padilla* retroactively under either an independent application of *Teague* or on state constitutional grounds. We recommend that trial court judges ensure noncitizen defendants' rights are protected in all future cases to avoid unnecessary appeals implicating *Padilla*.

3. Trial Court Judges Must Ensure Noncitizen Defendants Are Aware of the Immigration Consequences of Pleading Guilty

Trial court judges presiding over criminal proceedings will frequently encounter noncitizen defendants who want to enter a plea of guilty rather than proceeding to trial. Due process and many state and federal rules of criminal procedure place an affirmative duty on judges to ensure that guilty pleas are made knowingly and voluntarily. After *Padilla*, the trial court should verify that a defendant is aware of the immigration consequences of a conviction before allowing the defendant to enter a guilty plea. For example, the New York Court of Appeals recently decided *People v. Diaz*, which held that as a matter of due process, the trial court is required to advise a noncitizen defendant that a criminal conviction may result in removal from the United States.⁵⁹ We recommend that all trial court judges follow New York's lead and ensure noncitizen defendants are fully informed before pleading guilty.

a. Basic Principles of Due-Process Fairness Require Advising Defendants of Potential Immigration Consequences of Pleading Guilty

The Fifth Amendment and Fourteenth Amendments require that no defendant be deprived of life or liberty without due process of law.⁶⁰ For trial judges, this means ensuring that criminal defendants are aware that pleading guilty to a crime constitutes a waiver of certain rights and that defendants undertake such a waiver with full knowledge of its consequences. Rules of criminal procedure in various jurisdictions may also require certain safeguards to protect a defendant's rights during a plea proceeding.⁶¹ *Padilla* itself was silent on whether its holding extended to require trial judges to determine a defendant's awareness of immigration consequences before accepting a guilty plea. However, the *Padilla* Court emphasized the severity of removal as a consequence of a criminal conviction and placed an affirmative duty on defense

counsel to advise a criminal defendant on immigration consequences before the defendant accepts a plea.⁶² *Padilla's* implications for trial judges during a plea colloquy are complicated by the Court's refusal to classify immigration consequences as either collateral or direct, but given the Court's acknowledgment that immigration advice is essential information and that removal is a serious consequence, we recommend that judges ensure defendants are aware of the immigration consequences of their guilty pleas.⁶³

b. Trial Court Judges Should Advise Defendants of the Risk of Removal, Despite the *Padilla* Court's Unwillingness to Label Removal a "Direct Consequence" of a Criminal Conviction

Courts have struggled to determine what information due process requires a defendant to know and understand before entering a guilty plea. In *Brady v. United States*, the United States Supreme Court determined that a defendant must make a guilty plea with a full understanding of the direct consequences of his plea.⁶⁴ In *Hill v. Lockhart*, the Court clarified that a plea made without full understanding of the collateral consequences could nevertheless be voluntary, as long as the direct consequences of the plea were made clear.⁶⁵ This collateral/direct distinction led courts to debate what qualifies as a direct, as opposed to collateral, consequence of a criminal conviction.⁶⁶ Before *Padilla*, a number of state courts and United States Courts of Appeals had applied the collateral-consequences doctrine to the immigration consequences of a guilty plea and concluded that immigration consequences were collateral.⁶⁷

Padilla itself did not explicitly state whether immigration consequences fell under the ambit of due process required when courts accept guilty pleas. Rather than declaring that immigration consequences are direct consequences of a guilty plea, the Court declined to apply the direct/collateral framework at all.⁶⁸ Although the court did not define removal as a "direct" consequence, it nevertheless acknowledged the severity of removal and the importance of accurate immigration advice.⁶⁹ We recommend, therefore, that trial court judges ensure defendants are aware of the immigration consequences of their convictions before accepting guilty pleas.

For trial court judges to be able to assess whether defense counsel has given accurate immigration advice and defendants are well-informed when accepting a plea, an understanding of some aspects of immigration law is necessary. The next section

59. *People v. Diaz*, 3 N.E.3d 617 (N.Y. 2013).

60. U.S. CONST. amend. V, XIV.

61. See, e.g., FED. R. CRIM. P. 11(b) (requiring the court to conduct a colloquy before acceptance of a guilty plea); IOWA R. CRIM. P. 2.8(2)(b) (same).

62. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010).

63. *Id.* at 1482 ("The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.").

64. *Brady v. United States*, 397 U.S. 742, 455 (1970) ("A plea of guilty entered by one fully aware of the direct consequences . . . must stand.") (quoting *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957)).

65. *Hill v. Lockhart*, 474 U.S. 52, 55 (1985) (affirming defendant's conviction and holding that parole eligibility is a mere collateral consequence of a guilty plea of which defendant need not be informed).

66. See Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 41 ST. LOUIS U. PUB. L. REV. 87, 96–98 (2011) (explaining that punishment for a crime is a direct consequence, but civil consequences such as license revocation are collateral).

67. See JUDICIAL OBLIGATIONS, *supra* note 19, at 12.

68. *Padilla*, 130 S. Ct. at 1482.

69. *Id.* at 1486.

turns to the relevant portions of the INA that might be implicated when a trial court convicts and sentences a noncitizen defendant.

II. FEDERAL IMMIGRATION LAW DEFINING THE CONSEQUENCES OF CRIMINAL CONVICTIONS

The federal Immigration and Nationality Act (INA) imposes statutory consequences for immigrants that have been convicted of certain crimes.⁷⁰ Only an immigration judge may issue a removal order, but this section illustrates the extent to which a sentence from a criminal proceeding could have the added effect of removal from the United States in an immigration context. This additional consequence makes immigration concerns very important for criminal sentencing by trial court judges.

A. OVERVIEW OF A NONCITIZEN'S REMOVAL BY IMMIGRATION COURT POST CRIMINAL CONVICTION

Immigrants who have been convicted of certain qualifying crimes are removable from the United States by U.S. Immigration and Customs Enforcement (ICE). An immigrant must be convicted of the crime in order to be found removable by an immigration judge: a conviction includes all formal judgments of guilt entered by a court as well as all suspended sentences following a plea of guilty or nolo contendere or where the defendant has admitted sufficient facts to warrant a finding of guilt.⁷¹ Upon conviction, an individual immigrant will generally serve her sentence as mandated by the court; when she is eligible for release from state custody, ICE is notified to take her into custody under a 48-hour maximum detainer.⁷² An immigration detainer (Form I-247) is a request from ICE for local law enforcement to temporarily hold an immigrant pending an immigration proceeding or removal.

At this point, removal proceedings may occur: only an immigration court can issue an order for removal from the United States.⁷³ An immigration court will compare the crime the individual has been convicted of with the relevant federal criminal act, according to the references in the Immigration and Nationality Act. The court will apply either a categorical or a modified categorical approach (discussed in subsection C, below) to determine whether the crime the immigrant has been convicted of matches the statutory requirements under federal law that are identified in the INA. If it does, and the immigrant does not qualify for various forms of relief under immigration law, the immigration judge may issue an order of

removal or allow the immigrant to leave the country on her own under “voluntary departure.”⁷⁴

B. IMMIGRATION AND NATIONALITY ACT PROVISIONS REGARDING CRIMINAL CONVICTIONS

Section 237(a)(2) of the INA outlines various criminal offenses that make an alien removable in broad categories, including crimes involving moral turpitude, aggravated felonies, and other miscellaneous offenses, each of which is discussed in this subsection.⁷⁵ These specific offenses make an immigrant removable under the procedure outlined in subsection II.A., above. To determine whether a state criminal conviction qualifies as a removable offense under federal law, an immigration judge compares the elements of the state statute with the generic federal definitions: an immigration judge looks at the “ordinary, contemporary, and common meaning” of the [criminal] term [indicated by the INA] by looking to the common law, the contemporary meaning of the term as expressed in state and federal law, and other respected sources such as the Model Penal Code.⁷⁶ This immigration-court determination compares state and federal criminal statutes to ascertain the purpose and scope of removability under the INA.

In outlining the qualifying crimes that result in removability, the INA makes distinctions between the “term of imprisonment,” “sentence,” and potential sentence that is imposed on a criminal defendant. A term of imprisonment is defined by the INA as “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”⁷⁷ This term includes any detention time and the entirety of the sentence imposed. “Sentence” is used for the same definition and includes what is ordered by the court without respect to actual time served by the noncitizen.⁷⁸ Conversely, certain INA provisions condition a removable offense on the maximum potential sentence available for the crime under state law.⁷⁹ Other removable offenses are conditioned on the time the crime is committed⁸⁰ or financial minimums of the crime.⁸¹

The subsections of INA 237(a)(2) detail the various other criminal offenses that result in removal from the United States: controlled-substance offenses, other than a single offense of personal possession of 30 grams or less of marijuana;⁸² convictions that show the immigrant is a drug abuser or addict;⁸³ possession or sale of unlawful firearms or destructive devices;⁸⁴ crimes related to espionage, sabotage, treason, or sedition;⁸⁵

70. See IMMIGRATION AND NATIONALITY ACT (1965).

71. INA § 101(a)(48)(A).

72. See 8 C.F.R. § 287.7 (2003).

73. CENTER FOR PUBLIC POLICY STUDIES, A BENCH GUIDE FOR STATE TRIAL COURT JUDGES ON THE IMMIGRATION CONSEQUENCES OF STATE COURT CRIMINAL ACTIONS 9 (2009), available at http://www.sji.gov/PDF/Criminal_Bench_Guide_on_Immigration_Consequences.pdf [hereinafter BENCH GUIDE].

74. INA § 240B.

75. INA § 237(a)(2).

76. In re V-Z-S-, 22 I. & N. 1338, Interim Decision 3434 (BIA 2000) (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990)).

77. INA § 101(a)(48)(B).

78. *Id.*

79. See INA § 101(a)(43)(J), (T).

80. See, e.g., INA § 237(a)(2)(A)(i)(I) (“is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission.”).

81. See, e.g., INA § 101(a)(43)(D) (“if the amount of funds exceeded \$10,000.”).

82. INA § 237(a)(2)(B)(i).

83. INA § 237(a)(2)(B)(ii).

84. INA § 237(a)(2)(C).

85. INA § 237(a)(2)(D).

domestic violence, stalking, criminal child abuse, child neglect, or child abandonment;⁸⁶ violation of a protection order related to domestic violence;⁸⁷ and human trafficking.⁸⁸

Some alternative qualifications for removability in the INA are also crimes, even when they are not codified under Section 237(a)(2) of the Act. For example, an immigrant who is present in the United States without lawful admission (someone who has “entered without inspection”) is in violation of the law but is removable according to Section 237(a)(1)(B) of the INA.⁸⁹ Entering into a marriage for the fraudulent purposes of obtaining immigration benefits⁹⁰ and document fraud⁹¹ are also crimes located in other subsections of INA Section 237. However, Section 237(a)(2) of the INA is the proper scope for trial court judges: this section includes the circumstances where the conviction of a noncitizen in a criminal court may be reviewed by an immigration judge for removability. The various other removable offenses in the INA are generally litigated only in immigration courts, even when they are also crimes under federal law.

1. Federal Immigration Definition of “Aggravated Felony”

Section 237(a)(2)(A)(ii) of the INA makes immigrants that have been convicted of an aggravated felony removable.⁹² “Aggravated felony” as an immigration-specific term refers to a broad class of crimes in federal immigration law, defined in Section 101(a)(43) of the Act.⁹³ This broad category includes, among others, murder, rape, theft, crimes of violence against a person or property, domestic abuse, stalking, trafficking in drugs or persons, fraud, child pornography, and false documents.⁹⁴ Several of these aggravated-felony crimes require that a “term of imprisonment of at least one year” may be imposed or set certain minimums for crimes to qualify (such as “amount of the funds exceeded \$10,000.”)⁹⁵

3. Federal Immigration Definition of “Crimes Involving Moral Turpitude”

There is no definition of a “crime involving moral turpitude” (CIMT) in the Immigration and Nationality Act or other federal laws.⁹⁶ Therefore, the definition of such a crime must be assessed through judicial interpretation by the Board of Immigration Appeals.⁹⁷ A CIMT, defined generally, is one “that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed

between persons, either to individuals or society in general.”⁹⁸ Such a crime “must involve evil or malicious intent or inherent depravity.”⁹⁹ “Neither the seriousness of the crime nor the severity of the sentence is determinative of whether a crime is a crime of moral turpitude.”¹⁰⁰ Determining whether a crime involves moral turpitude requires an examination of the elements of the crime under a categorical or modified categorical approach as described in subsection C, below.¹⁰¹ The determination of construction is driven “by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.”¹⁰²

Some common examples of crimes involving moral turpitude include: “crime[s] involving intent or reckless behavior to commit great bodily harm . . . crimes involving an intent to defraud [theft, fraud, perjury] . . . prostitution . . . [and] money laundering.”¹⁰³ A simple case of driving under the influence (DUI) is not a CIMT, but committing a DUI while knowingly driving on a license previously revoked for a different DUI is a CIMT.¹⁰⁴ Assault may be a CIMT but only if there is an aggravating factor that is charged.¹⁰⁵

C. RULES OF STATUTORY CONSTRUCTION IN IMMIGRATION LAW

Following a criminal conviction by a trial court judge, an immigration judge must determine whether a noncitizen is removable by comparing her conviction under state law with the applicable federal law described in the INA. This process of statutory construction only involves the immigration courts, but understanding the process may benefit trial judges by demonstrating the full consequences of a conviction that is imposed in criminal court. To determine whether a conviction renders an immigrant removable, the immigration judge uses either a categorical or modified categorical approach. A categorical approach requires that “the judge must determine if there is a realistic probability, not a theoretical possibility that the criminal statute would be applied to reach [removable] conduct.”¹⁰⁶ This categorical approach requires that the full range of the criminal statute under which an immigrant is convicted yields a removable offense under federal law. Therefore, vague or overbroad statutes that include conduct that does not result in removability under relevant federal law does not yield immigration consequences. A modified categorical approach allows the reviewing immigration judge to conduct a limited examination of the record to determine whether the elements

86. INA § 237(a)(2)(E)(i).

87. INA § 237(a)(2)(E)(ii).

88. INA § 237(a)(2)(F).

89. INA § 237(a)(1)(B).

90. INA § 237(a)(1)(G).

91. INA § 237(a)(3)(C).

92. INA § 237(a)(2)(A)(iii).

93. INA § 101(a)(43).

94. *Id.*

95. *Id.*

96. INA § 237(a)(2)(A)(i).

97. BENCH GUIDE, *supra* note 73, at 37–40.

98. *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001).

99. *Id.*

100. *In re Liber Remberto Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007) (referencing *Matter of Serna*, 20 I. & N. Dec. 579, 581 (BIA 1992)).

101. *See Matter of Torres-Varela*, 23 I. & N. at 84–85.

102. *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980).

103. BENCH GUIDE, *supra* note 75, at 38.

104. *Id.*

105. *Id.*

106. U.S. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Standard Language for CIMT Categorical Approach*, in IMMIGRATION JUDGE BENCHBOOK, available at http://www.justice.gov/eoir/vll/benchbook/resources/sfoutline/standard_language_CIMT.html.

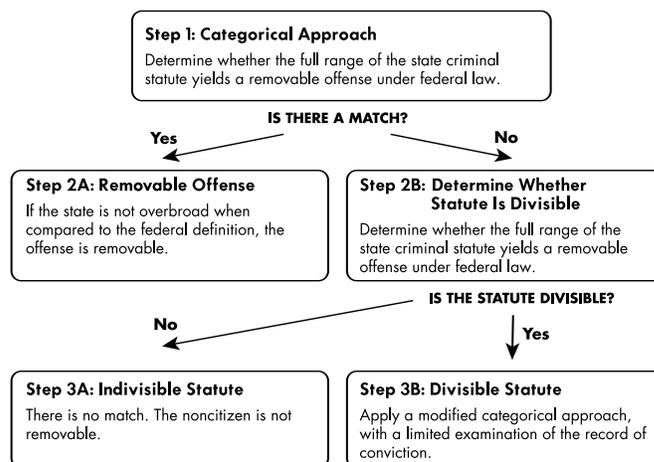
of the state crime demonstrate removability.¹⁰⁷ The limited examination of the record of conviction may include “documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.”¹⁰⁸

A series of decisions by the United States Supreme Court in summer 2013 clarified the approach to rules of construction regarding criminal convictions that carry immigration consequences. *Descamps v. United States* involved a criminal case where the defendant, Descamps, was convicted in 1978 for the burglary of a grocery store.¹⁰⁹ The 1978 conviction was under a state statute that did not include unlawful entry as an element of the crime. This charge was the defendant’s third violent felony in violation of the federal Armed Career Criminal Act (ACCA), which imposes an enhanced conviction on the defendant; however, the language of the ACCA includes “unlawful entry” as an element of the crime.¹¹⁰ This presented the question of whether the 1978 conviction could qualify under the ACCA, which would require a modified categorical approach to examine the facts of the 1978 conviction. The Ninth Circuit found this element of the 1978 conviction satisfied by Descamps’s plea bargain; however, the United States Supreme Court disagreed and reversed Descamps’s enhanced conviction under ACCA.¹¹¹ In her opinion, Justice Kagan stated that the modified categorical approach is inapplicable to a statute such as the ACCA, which contains a single, indivisible set of elements.¹¹²

The United States Supreme Court held in *Moncrieffe v. Holder* that the traditional categorical approach to statutory construction applies under a Georgia statute for marijuana possession with intent to distribute.¹¹³ This result was due to the mismatch of the Georgia statute to federal law under a categorical approach: the Georgia statute covers some criminal conduct that falls outside the aggravated felony definition at federal law, which carries immigration consequences.¹¹⁴ This case reaffirms the court’s traditional reliance on the categorical approach when comparing convictions under state criminal statutes to applicable federal law.

Descamps and *Moncrieffe* assert a specific framework for immigration judges in constructing statutes to determine whether they match the general federal definition of a particular crime and can result in removal from the United States. The initial step is always to use the categorical approach, sometimes known as the “minimum conduct” test: “does the minimum conduct necessary to violate the statute match the generic immigration definition at issue?”¹¹⁵ If the answer is no,

the modified categorical approach may be used but is restricted to divisible statutes: it “is reserved only for statutes which set forth multiple, separately defined offenses, one of which would trigger the generic immigration definition.”¹¹⁶ Taken together, the court’s holdings in *Descamps* and *Moncrieffe* can be conceptualized as a three-part test. The following graphic represents the test that immigration judges engage in to determine removability, which is further explained in subsections 1–3.



1. Step 1: Apply the Categorical Approach

Under both *Descamps* and *Moncrieffe*, the traditional categorical approach is the first step of analysis. There must be a definitive categorical match—the state criminal offense the immigrant was convicted under must necessarily involve all the facts required by the generic definition at federal law—for a statute to qualify under the generic federal immigration definition.

2. Step 2: Determine Whether the Statute Is Divisible

If there is no definitive categorical match, the next step in the analysis is to determine whether the statute of conviction is divisible; that is, whether the statute contains one or more offenses in the alternative that a defendant may be charged under. A keyword to identify such a statute is language such as “or” (as in, “consuming alcohol or drugs”). An indivisible statute is one that includes different elements an immigrant could be convicted under but which cannot be separated under the statute. Indivisible statutes often have general terms (e.g., “weapon”) instead of specific terms to differentiate offenses (e.g., “knife or gun”).

107. *Id.*

108. *Id.*

109. See *Descamps v. United States*, 133 S. Ct. 2276 (2013).

110. *Id.* at 1–2.

111. *Id.* at 22–23.

112. *Id.*

113. See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

114. NATIONAL IMMIGRATION PROJECT, *MONCRIEFFE V. HOLDER: IMPLICATIONS FOR DRUG CHARGES AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH* (2013), available at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Moncrieffe%20v.%20Holder%205-2-13.pdf.

115. WASHINGTON DEFENDERS ASSOCIATION’S IMMIGRATION PROJECT, *ANALYZING WASHINGTON GENERAL ASSAULT CONVICTIONS AFTER MONCRIEFFE, DESCAMPS, AND OLIVAS-MOTTA: AN OVERVIEW GUIDE FOR IMMIGRATION COUNSEL 2* (2013), available at <http://www.defensenet.org/immigration-project/immigration-resources/moncrieffe-descamps-analysis-for-immigration-attorneys/AILA-WA%20Post%20Moncrieffe%20%20Descamps%20Assault%20Crimes%20Advisory%20%20208-1-13.pdf/view> [hereinafter *GENERAL ASSAULT CONVICTIONS AFTER MONCRIEFFE, DESCAMPS, AND OLIVAS-MOTTA*].

116. *Id.* at 3.

3. Step 3: If the Statute Is Indivisible, There Is No Match, and the Defendant Is Not Removable. If the Statute Is Divisible, Apply a Modified Categorical Approach.

If the statute is indivisible, there is no match for the state statute to federal law: the conviction cannot carry immigration consequences because it is overbroad and includes conduct that could reach nonremovable crimes. If the statute is divisible, the immigration court may conduct a very limited modified categorical approach, including an examination of the record of conviction by a trial court. The United States Supreme Court is explicit that reviewing courts may not examine specific facts or evidence in the record, even under a modified categorical approach; instead, immigration courts may look at pleadings, sentencing, and other limited records by the trial court.

III. CURRENT STATUTORY APPROACHES FOR ADVISING NONCITIZEN CRIMINAL DEFENDANTS IN A TRIAL COURT

Section I demonstrated the ambiguity of judges' affirmative duties with respect to noncitizen criminal defendants following *Padilla*. Section II outlined the black letter federal law regarding removal of noncitizens in criminal-conviction contexts. In this section, we discuss current statutory obligations on trial court judges regarding informing noncitizen defendants of potential removal consequences of convictions. Although such advisements may not be explicitly required by *Padilla*, the U.S. Constitution, or state constitutions, certain jurisdictions have chosen to affirmatively require various types of advisements to noncitizen criminal defendants.

A. CONSIDERATIONS FOR APPROACHING STATUTORY ADVISEMENTS

There is currently some form of statutory judicial advisement for immigrant criminal defendants in at least 28 jurisdictions.¹¹⁷ These statutory obligations impose different models of compliance with *Padilla* and subsequent decisions, along with ethical obligations imposed on judges.¹¹⁸ This section discusses a sampling of five statutory obligations imposed on judges—from California, the District of Columbia, Massachusetts, Minnesota, and Connecticut—representing a variety of alternatives that courts have adopted to address the complicated issue of ensuring a criminal immigrant defendant understands her rights regarding the intersection of criminal and immigration law.

When evaluating potential approaches to statutory obligations on a trial court, it is important to consider certain factors that impact how effective an advisement is. First, the immigrant criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment due-process rights should be protected under *Padilla*.¹¹⁹ There are also various positive and negative consequences to different models of

advisement. Boilerplate language is easily administered and broad, but it is also vague and potentially misunderstood by a defendant. Allowing a defendant additional time to consider her plea in light of the advisement ensures that she understands potential immigration consequences, but it is potentially inefficient for the trial court by opening it up to delay tactics by defense counsel. Placing the burden on the defendant to move to vacate a judgment if her advisement is insufficient allows for efficiency in the court and allows a defendant a typical defense through criminal proceedings, but immigrant defendants unfamiliar with English or the American judicial system may be unaware of these rights. The trial court should always balance efficiency for the judicial system against stronger protections for defendants and should consider unique issues facing immigrant defendants (such as language barriers, unfamiliarity with the legal system, disparate education levels, and fear of removal). In evaluating the proper approach, a trial court should employ the strongest practical protections from noncitizen defendants to ensure they fully understand the potential consequences in immigration court.

Concerns regarding whether trial court judges are able to consider immigration consequences in convictions and sentencing have been clarified in part by the Board of Immigration Appeals (BIA). “[I]mmigration courts must determine immigration consequences to an [immigrant] based on the crime as charged and convicted and the sentence as determined by the state court judge, even if the criminal charge or sentence was shaped by the prosecutor or judge in part to mitigate or maximize adverse immigration consequences on the defendant.”¹²⁰ The immigration judge will consider the sentence and conviction, without regard to a trial court judge's consideration of immigration consequences, even when a conviction is retroactively modified to alter immigration consequences.¹²¹ These decisions by the BIA make it clear that a trial court judge has the discretion to consider federal immigration consequences of a conviction, and a judge should accordingly be aware of and prevent unduly adverse consequences that might arise from conviction.

B. STATUTORY OBLIGATIONS: FIVE EXAMPLES

This subsection will illustrate five of the current approaches taken by legislatures in various jurisdictions to impose some obligation on the court to inform noncitizen defendants of potential immigration consequences from a criminal conviction. Each model trial-court advisement serves as an exemplar for a specific category of statutes. The statutes are quoted in part to highlight their differences; some provisions have similar language and impact in their full text, but the purpose of this illustration is to demonstrate the various individual provisions used by trial courts. Following this chart is a substantive discussion of the model advisements.

117. JUDICIAL OBLIGATIONS, *supra* note 19, at 22 (Jurisdictions that have a statutory obligation for advising immigrant criminal defendants include: Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Puerto Rico,

Rhode Island, Texas, Vermont, Washington, and Wisconsin.)

118. *See generally supra* Section I.

119. *See supra* Section I.B.3.a.

120. BENCH GUIDE, *supra* note 73, at 9.

121. *Matter of Victor Ramon Velazquez-Herrera*, 24 I. & N. Dec. 503 Interim Decision 3610 (BIA 2008).

It is important to note that these statutory duties create mandatory minimums for courts. Individual courts or jurisdictions may be permitted—depending on statutory language—to provide additional protections for criminal defendants by internal rules and procedures. For example, the Superior Court of California, County of San Diego, provides more detailed explanations of potential immigration consequences on its plea form than is required by the California statute, including a list of aggravated felonies under federal immigration law.¹²²

1. Sample Policy #1: Broad Language (California)¹²³

The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

California was the first state to impose an obligation to ensure effective assistance of counsel and inform immigrant criminal defendants of potential immigration consequences. The statutory language has been very influential and has been repeated in other state statutes, including the District of Columbia and Massachusetts (Model Advisements #2 and #3). This language offers criminal defendants a quick summation of the fact that there may be immigration consequences but is standard language applied broadly to every defendant. While this is a highly efficient option, this model alone does not offer any protection to a noncitizen criminal defendant, nor does it ensure any sort of informed plea that includes a full understanding of potential immigration consequences of a plea of guilty or nolo contendere. Taken alone, this language is inadequate to meet the needs of immigrant defendants and does nothing to prevent claims of ineffective assistance of counsel under *Padilla*.

MODEL ADVISEMENTS	RELEVANT STATUTORY LANGUAGE	EFFECT OF THE LANGUAGE
BROAD LANGUAGE (CALIFORNIA)	The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.	This boilerplate language informs a defendant in the most general manner that there may be potential immigration consequences if she is convicted.
ADDITIONAL TIME IN PLEA COLLOQUIES (DISTRICT OF COLUMBIA)	Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of advisement.	This statutory language allows the defendant to consult with her attorney if she has not already, to determine what immigration effects may result from a conviction.
STATUTORY CONSEQUENCES FROM A TRIAL COURT'S FAILURE TO INFORM (MASSACHUSETTS)	If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty	If a trial court does not inform a criminal defendant of potential immigration consequences, the court is mandated to vacate the conviction and allow a new plea to be entered if the defendant so moves.
ENGAGING WITH THE DEFENDANT AND HER COUNSEL (MINNESOTA)	The judge must also ensure defense counsel has told the defendant and the defendant understands: . . . That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.	This statutory provision mandates that courts verify that defense counsel has done her duty under <i>Padilla</i> to inform her client of potential immigration consequences.
IMPOSING A BURDEN ON THE COURT (CONNECTICUT)	The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization	This provision mandates that a court must ensure a defendant knows about potential immigration consequences that may arise from a conviction. The burden is on the court to ensure that this has been done.

122. SDSC CRM-012 7d (Sept. 2011).

123. CALIFORNIA PENAL CODE ANN. § 1016.5 (West 1985).

SAMPLE POLICIES	BENEFITS TO THE DEFENDANT	BENEFITS TO THE COURT
BROAD LANGUAGE (CALIFORNIA)	The defendant will be aware of the possibility of immigration consequences of a conviction.	This is efficient for a court: the trial court judge reads the statement for each defendant, regardless of immigration status. There is no duty to do anything more than read the mandated language.
ADDITIONAL TIME IN PLEA COLLOQUIES (DISTRICT OF COLUMBIA)	This allows a defendant and her counsel to have the necessary time to make an informed plea decision to avoid adverse immigration consequences.	While there exists a potential for delay tactics, this may be efficient for the court over time by reducing potential claims of ineffective assistance of counsel under <i>Padilla</i> .
STATUTORY CONSEQUENCES FROM A TRIAL COURT'S FAILURE TO INFORM (MASSACHUSETTS)	This protects a defendant by creating statutory consequences for the failure by a trial court to inform a defendant of her potential immigration consequences.	This language provides a clear statutory result of a failure to inform a defendant. This encourages compliance with the statute, and a statutory basis for vacating a judgment upon failure to inform.
ENGAGING WITH THE DEFENDANT AND HER COUNSEL (MINNESOTA)	This requires that the defendant is not only informed of, but also understands, the potential immigration consequences of a conviction.	By engaging with defense counsel and the defendant, personally, the trial court judge creates a clear record that the defendant knows and understands immigration consequences of a criminal conviction.
IMPOSING A BURDEN ON THE COURT (CONNECTICUT)	A guilty plea or plea of nolo contendere will not be accepted by the trial court without an affirmative showing that the defendant knows about potential immigration consequences.	This protects against uninformed pleas. This places a burden on the court to show that it has verified a defendant's understanding of potential immigration consequences, further encouraging judicial compliance with the statutory obligation to inform a defendant.

2. Sample Policy #2: Additional Time in Plea Colloquies (District of Columbia)¹²⁴

Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of advisement.

The District of Columbia has adopted California's statutory language in subsection (a) of its judicial obligation.¹²⁵ Additionally, D.C. courts allow a "reasonable amount of additional time to consider the appropriateness of the plea in light of advisement."¹²⁶ This statutory language provides additional protection for the immigrant criminal defendant by allowing sufficient time to make an informed plea. The additional time for the defendant to consider her plea after the advisement may open the court to delay tactics and the potential for lengthy continuances in some cases. However, limiting this to "reasonable" additional time prevents improper delays. This type of advisement should be used by courts to safeguard against ineffective counsel: allowing additional time to consider a plea, if needed, further encourages defense counsel to fully inform her client of immigration consequences.

3. Sample Policy #3: Statutory Consequences from a Trial Court's Failure to Inform (Massachusetts)¹²⁷

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or

has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty

Massachusetts statutory language creates specific consequences if a court fails to inform a noncitizen criminal defendant of the potential for immigration consequences upon conviction: the court will vacate the judgment upon defendant's motion and allow her to withdraw a plea of guilty or nolo contendere. This sample advisement really conveys a consequence and demonstrates the process a court will take in the absence of a full advisement. The language provides a clear path for the court to take if it fails to inform a noncitizen defendant. However, this consequence is only available upon the defendant's motion: noncitizen defendants, especially ones unfamiliar with the American legal system, who may not speak English as a first language, or who have deficient counsel, may go unaware of this potential to vacate their judgment and enter a new plea.

The extended language of this statute also offers additional protection to an immigrant criminal defendant by protecting her Fifth Amendment right against self-incrimination: she "shall not be required . . . to disclose to the court [her] legal status in the United States" at any time.¹²⁸ This statutory protection is essential protection for a noncitizen defendant against revealing her immigration status.

124. D.C. CODE ANN. § 16-713 (1997).
 125. *Id.*
 126. *Id.*

127. MASSACHUSETTS GEN. LAWS § 278:29D (1996 Supp.).
 128. *Id.*

4. Sample Policy #4: Engaging with the Defendant and Her Counsel (Minnesota)¹²⁹

The judge must also ensure defense counsel has told the defendant and the defendant understands: . . . That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

Minnesota imposes an obligation to engage with both the criminal defendant and her counsel to ensure that the defendant understands potential consequences of a conviction. This judicial obligation protects the defendant's Sixth Amendment due-process rights but is silent on her Fifth Amendment right against self-incrimination. While it offers a strong addition to the repertoire of potential advisements by ensuring that a defendant understands her potential consequences, this falls short by omitting from statutory language that the court should not inquire into a defendant's citizenship status. The statutory language appears to only apply to noncitizen defendants; unless such a statutory scheme is applied to every criminal defendant regardless of citizenship status, this may pressure a noncitizen to divulge her status or feel she must keep it secret, even from her lawyer. A judicial advisement should not place this uncertainty on a noncitizen defendant or in any way deter client-attorney communication.

5. Sample Policy #5: Imposing a Burden on the Court (Connecticut)¹³⁰

The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization

The Connecticut statute regarding *Padilla* advisement goes the furthest of the state statutes to impose a burden on the court to determine whether the defendant understands the possible immigration consequences of a guilty plea or a plea of nolo contendere.¹³¹ The full statute provides many of the protections other courts have imposed (additional time to consider a plea, Fifth Amendment protection from disclosing her legal status in the United States, and the ability to withdraw her plea if the court fails its obligation) but goes a step further to impose the burden on the court to not accept a guilty plea or plea of nolo contendere until the court addresses the defendant and determines that she "fully understands" potential immigration consequences. This requires that a trial court judge ensure the defendant has effective assistance of counsel, potentially eliminating the need for a *Padilla* claim if done properly and consistently. However, the language also imposes a three-year statute of limitations on the defendant if she qualifies to withdraw a guilty plea or plea of nolo contendere.¹³² This limits the opportunity for noncitizen defendants to take advantage of their rights under *Padilla* if they do not take affirmative action before the tolling of the statute of limitations, which could negatively affect the very noncitizen defendants the statute seeks to protect if they are unaware of their rights and have ineffective defense counsel.

C. SHORTCOMINGS OF CURRENT STATUTORY OBLIGATIONS

It is apparent that trial court judges' statutory obligations to inform noncitizen criminal defendants of potential immigration consequences during proceedings is not widely understood, even by the courts themselves. After an unsuccessful survey¹³³ of the courts in various jurisdictions, we have concluded that statutory obligations must better serve their purpose in their respective jurisdictions: education regarding potential immigration consequences from criminal convictions should be made available not only to trial court judges, but also to court administrators. This readily available information would be valuable to various parties: criminal defendants, who may be directly affected by an advisement; criminal lawyers, who may not have a background in immigration law; individual judges, who may need clarification of their judicial obliga-

129. MINNESOTA RULE CRIM. PROC. 15.01, Subd.1, 6(l) (2012).

130. CONNECTICUT GEN. STAT. § 54-1J (2001).

131. Weller & Martin, *supra* note 36, at 4.

132. CONNECTICUT GEN. STAT. § 54-1J (2001).

133. We contacted the offices of the state courts in six jurisdictions that have a statutory obligation for trial court judges to inquire about the effectiveness of their statutory advisement. The jurisdictions we contacted included the five discussed in our model advisements above (California, District of Columbia, Massachusetts, Minnesota, and Connecticut) and Iowa. Our research plan was to contact the administrative offices and ask the following five questions:

1. How has *Padilla v. Kentucky* affected or influenced how your state's guidelines about noncitizen defendants have been implemented?
2. Has your court seen very many *Padilla* claims on appeal (anecdotally)?

3. Do you think your state's statutory language about advisements is adequate following *Padilla*? If not, what changes should be made to it?

4. Do you keep any data on the number of *Padilla* claims?

5. How do you think judges feel about the statutory advisement and the *Padilla* decision generally?

Each of the offices of our model advisements communicated a lack of understanding that there was a statutory obligation imposed on trial court judges, and nobody was clear who would be able to answer our questions. Ultimately, most were unable or unwilling to answer any of our questions. We received one reply from the Communications Officer of the Iowa Judicial Branch, who informed us that the state keeps no data on *Padilla* claims and, because the state's judicial advisement (Iowa Rule of Crim. Procedure 2.8(2)(b)(3) (2002)) predates *Padilla*, Iowa courts have not seen any significant changes since the Supreme Court decision.

tions; and court administrators, to verify that each court is fulfilling its statutory obligations.

IV. PROPOSED MODEL ADVISEMENT

It is our recommendation that a trial court should use the following model advisement for every criminal defendant each time she appears before the court, including before accepting a plea of guilty or nolo contendere:

This court will not inquire into your citizenship status during this criminal proceeding. You should know, however, that if you are not a citizen of the United States, a criminal conviction may have adverse immigration consequences, such as removal from the United States or ineligibility for certain forms of immigration benefits or relief. A conviction in this court may also affect your immigration status and the ability for you to travel to other countries, depending on their respective immigration laws and policies.

If you do not understand or have had insufficient time to consult with your attorney regarding your immigration status and the potential consequences of a conviction, the court shall grant you reasonable additional time to consult privately and confidentially with your attorney. Have you had sufficient time to consult with your attorney regarding your immigration status and the potential consequences of a conviction? Do you fully understand the potential immigration consequences of a conviction, if applicable? Counsel, can you verify that you have discussed the potential immigration consequences of a guilty plea with your client?

This court will not accept a plea of guilty or nolo contendere without first confirming that you have had the opportunity to consult with your attorney regarding your immigration status and the potential consequences of a criminal conviction. If the court fails to verify that you are aware and understand the potential consequences of your conviction, the court shall, on the defendant's motion, vacate the judgment and permit you to withdraw your plea and enter a plea of not guilty.

A. PROVISIONS OF THE MODEL ADVISEMENT

Our proposed model advisement for trial court judges should apply to all criminal defendants, regardless of whether they are noncitizens. A judge should not inquire into a defendant's citizenship status, nor should a defendant ever feel pressured to reveal her status to the trial court. This initial statement of the proposed advisement will protect the defendant's Fifth Amendment right against self-incrimination and make it clear there should be no pressure to divulge immigration status to the trial court.¹³⁴ To effectively ensure against self-incrimination, this advisement should be given to all criminal

defendants at every hearing.

The proposed advisement allows a defendant additional time to consider her plea in light of potential immigration consequences that result from a criminal conviction (including a plea of guilty or nolo contendere) if she has not consulted with her attorney or does not fully understand the potential consequences of a plea. This additional time should be reasonable under the circumstances of the case, and the length of the additional time should be discretionary.¹³⁵ It is essential to remember when deciding the reasonable length of additional time to consider a plea that, despite the severity under criminal law, a conviction may carry more severe consequences—including removal—in immigration law.¹³⁶

The advisement engages with both the defendant and her defense counsel to verify that she fully understands the potential consequences of a conviction and that her counsel has adequately informed her. This places an affirmative duty on the defense counsel to fulfill its obligations under *Padilla* while allowing the court to safeguard against ineffective assistance. The questions directed at the defendant and her counsel encourage them both to listen to and understand the advisement in its totality and creates a record that the court attempted to ensure proper representation by the defense counsel under *Padilla*.

Further, this advisement places a burden on the court to ensure that it does not accept a plea until it verifies that a defendant understands the potential immigration consequences.¹³⁷ If the record is silent regarding judicial advisement, there should be a presumption that the court has not properly informed the defendant, and the judgment should be vacated upon defendant's motion. There should be no statute of limitations on the defendant's right to move to vacate the judgment if there has been no effective judicial advisement: noncitizen defendants who do not fully understand the potential immigration consequences should be able to effectively navigate the trial court system and take full advantage of their protections under the law. This final paragraph in the advisement could alternatively be adopted as a model principle: instead of advising each criminal defendant of the process, the trial court may instead adopt the purpose of the confirmation in practice and allow the defendant additional time to confer with her lawyer if necessary.

To ensure the defendant's protection, this advisement should be given every time a defendant appears before the court. In preliminary hearings, the advisement will direct the defense counsel to consult with her client before entering a plea. During a plea colloquy, it will ensure that proper representation has occurred before entering a plea of guilty or nolo contendere. During sentencing, such a statement will remind a defendant of potential consequences and her ability to raise a claim under *Padilla* if she has not been effectively represented or, alternatively, to move to vacate the judgment by the court

134. See Colin Miller, *Crossing Over: Why Attorneys (and Judges) Should Not Be Able to Cross-Examine Witnesses Regarding Their Immigration Statuses for Impeachment Purposes*, 104 NW. U. L. REV. 290, 294–99 (2010) (explaining that probing a defendant or witness's immigration status may implicate her Fifth Amendment

privilege against self-incrimination).
135. See BENCH GUIDE, *supra* note 73, at 4.
136. See generally *supra* Section II.
137. See BENCH GUIDE, *supra* note 73, at 6.

and enter a new plea of not guilty if the court has not previously informed her.

B. WHAT SHOULD NOT BE INCLUDED IN THE MODEL ADVISEMENT

We did not include examples of specific crimes as a provision of the model advisement. For example, an advisement could potentially inform a criminal defendant: “*Some common crimes that carry immigration consequences include drug offenses, theft, assault, and battery.*” Alternatively, as the Superior Court of California, County of San Diego, has done, courts could provide plea forms that include specific aggravated felonies that are removable offenses.¹³⁸ Although including common crimes as examples of removable offenses, such as drug possession or crimes involving moral turpitude, would more effectively inform a defendant of potential immigration consequences specific to her offense, it is likely that such an advisement could have a negative—and improper—effect in immigration court. If it becomes necessary for an immigration judge to use a modified categorical approach to determine removability, the immigration judge will have access to limited records of conviction, including the judicial advisement. If the immigration judge reads the specific crime in the advisement without the context of the case, she may rule a noncitizen is removable in circumstances where a silent record would not result in removal. For example, signaling “drug offenses” as a removable offense may lead an immigration court to conclude that an immigrant is removable on a modified categorical approach for a divisible statute, even when the charge is only for simple personal possession of marijuana under 30 grams (which is not a removable offense).¹³⁹ Additionally, where crimes involving moral turpitude are unclear under the federal definition, crime-specific advisements may lead to improper removal: if the advisement signals removability, this may lead an immigration judge to incorrectly conclude removability where the elements of the potential CIMT are unclear at federal law.¹⁴⁰ Stating specific examples of removable offenses in a judicial advisement would ultimately be counterproductive and result in increased removal of convicted noncitizens in circumstances where they may otherwise be permitted to remain in the United States. It may be possible to avoid these consequences with careful consideration of what to include on a plea form or in an oral judicial advisement, but this determination should be made by individual jurisdictions; our model proposal is meant to provide adequate protections for noncitizen criminal defendants in any jurisdiction and may be modified to become more effective in specific jurisdictions.

C. ADDITIONAL CONSIDERATIONS FOR THE TRIAL COURT

We recommend that trial courts without statutory obligations adopt our proposed model advisement to effectively allow noncitizen criminal defendants to assert their rights under *Padilla*. To maximize the utility of the judicial advisement, the court should apply the effect retroactively by court

precedent. This would allow a noncitizen previously unprotected by such an advisement to assert her rights under *Padilla*, vacate her judgment and enter a plea of not guilty, and maximize her rights under the law, even if she has already been removed following a conviction in a criminal proceeding.

Even if a state legislature has not created a judicial duty that requires an advisement, courts should adopt some form of this proposed advisement to ensure that all defendants are aware of potential immigration consequences from conviction. Trial courts in jurisdictions that already have statutory obligations to advise noncitizen defendants should take steps to further maximize their advisement’s utility by incorporating our model language and ensuring that all defendants’ rights are sufficiently protected.

CONCLUSION

Trial court judges have always played a crucial role in safeguarding criminal defendants’ due-process rights, such as access to effective assistance of counsel and the ability to make knowing, intelligent pleas. Through the *Padilla* decision, the United States Supreme Court has now expressed an interest in protecting the unique interests of noncitizens appearing in state and federal criminal proceedings. The *Padilla* decision applies directly to defense attorneys, but we have demonstrated the benefits when trial court judges also adopt procedures to uphold the rights of noncitizen criminal defendants. This is best illustrated by our recommended model advisement in section IV. We recommend that all trial court judges become familiar with the relevant immigration consequences that come from criminal convictions as stated in the INA, discussed in section III, and employ an advisement to inform noncitizens of their rights and the potential immigration consequences of their criminal convictions.



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138. See SDSC CRM-012 7d (Sept. 2011).

139. See INA § 237(a)(2)(B)(i).

140. See GENERAL ASSAULT CONVICTIONS AFTER *MONCRIEFFE*, *DESCAMPS*, AND *OLIVAS-MOTTA*, *supra* note 115, at 6.