REPORT OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2009 – 2011 TERM

February 15, 2011

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I. Rule Amendments Recommended for Adoption

A. Rule 2:9-6 – Bail Forfeiture Appeals

The Criminal Practice Committee considered a proposal to amend R. 2:9-6(c) which would require that when a bail forfeiture appeal is filed, the notice of appeal must contain proof that the full amount of the judgment has been deposited with the Superior Court Clerk's Office or that a supersedeas bond has been approved by the court. See N.J.S.A. 17:31-12. The proposal provides that the required proof may be submitted by affidavit, unless the court requires otherwise. The language requiring proof by affidavit is consistent with the language in R. 4:64-2 governing the submission of supporting instruments in certain civil cases. The proposal has been forwarded to the Civil Practice Committee and the Appellate Rules Committee for consideration.

The proposed amendments to R. 2:9-6(c) follow.

2:9-6. Supersedeas Bond; Exceptions

(a) . . . no change.

(b) . . . no change.

(c) Bail Forfeiture Appeals.

(1) Notice of Appeal. [Simultaneous with the filing of] In addition to the requirements of R. 2:5-1, the notice of appeal filed in respect of a bail forfeiture judgment by or on behalf of an insurer[, the appellant] shall contain proof that the appellant has deposited the full amount of the judgment with the Clerk of the Superior Court in cash or by certified, cashiers or bank check or that the appellant has posted a supersedeas bond. Such proof maybe submitted by affidavit, unless the court requires otherwise.

(2) Supersedeas Bond. The court for good cause shown may allow the posting of a supersedeas bond in lieu of the cash deposit. Good cause, however, shall not be satisfied by an application to extend the time to locate the defendant or to stay payment of a forfeited bond, entry of a judgment, or preclusion from the bail registry maintained by the Superior Court.

Source-R.R. 1:4-8(a) (c); paragraph (a) amended and paragraph (c) adopted July 28, 2004 to be effective September 1, 2004[.]; paragraph (c) amended to be effective .

B. Rule 3:4-2 – Waiver of First Appearance

The Conference of Municipal Court Presiding Judges requested that the Committee consider an amendment to R. 3:4-2 to permit a defendant represented by counsel to waive the first appearance in municipal court for indictable matters. Additionally, the Municipal Court Presiding Judges asked that consideration be given to having all first appearances held in Superior Court.

Regarding the waiver proposal, the Municipal Presiding Judges are of the view that because R. 7:6-1(b) provides that a defendant can waive an arraignment if the defendant is represented by counsel and is entering a guilty plea, a represented defendant should be able to waive a first appearance as well. The Municipal Presiding Judges suggested that the waiver language be modeled after R. 7:6-1(b), which provides in part, that a defendant wishing to waive an arraignment must file a written statement, signed by an attorney, certifying that the defendant has received a copy of the complaint and has read it and understands it.

The Conference of Criminal Presiding Judges considered this request. The unanimous consensus of the Criminal Presiding Judges was that first appearances should not all be moved to Superior Court. The Criminal Presiding Judges supported a rule revision permitting the waiver of a first appearance in municipal court for indictable matters if the defendant is represented by an attorney.

The Committee agreed with the Criminal Presiding Judges' opposition to requiring that all first appearances for indictable offenses be held in Superior Court. Regarding the waiver of first appearances, several members suggested that the proposal should

distinguish between defendants who are incarcerated and defendants who are not incarcerated. It was discussed that if private defense counsel represents the defendant at the first appearance, prior to indictment, the attorney is not required to remain as counsel of record in the case. As such, many members expressed that counsel who appears at the first appearance does not necessarily remain as counsel post-indictment. Consequently, if a waiver of the first appearance was permitted for indictable offenses and a defendant is incarcerated, it is possible that the defendant will be left unrepresented in jail, if the attorney does not remain in the case.

A lengthy discussion ensued and the Committee reached an agreement in principle to permit the waiver of first appearances held in municipal court for indictable offenses, so long as there is a distinction between incarcerated and non-incarcerated defendants charged with indictable offenses and an exception for Central Judicial Processing (CJP) cases. The Committee recommends that the proposal should include language that a defendant may waive his or her first appearance in municipal court for indictable offenses, provided that the defendant is represented by counsel and is not incarcerated. The Committee suggested that the language contained in R. 3:4-2(b) should guide the requirements for the waiver. The Committee reached a consensus that this matter should be explored further by the Conference of Criminal Presiding Judges, including the proposal to distinguish between incarcerated and non-incarcerated defendants charged with indictable offenses.

Thereafter, the Criminal Presiding Judges reviewed this topic and supported a rule proposal permitting a defendant who is represented by counsel to waive the first

appearance in municipal court or superior court provided that the defendant is not incarcerated. The Committee also revised the proposal to include a requirement that a copy of the written waiver of the first appearance must be provided to the criminal division manager's office, and the county prosecutor or the Attorney General, if the Attorney General is the prosecuting attorney. Finally, it was suggested that the AOC should create a standard form to be used for waivers of first appearances.

The proposed revisions to R. 3:4-2 follow.

3:4-2 First Appearance After Filing Complaint

(a) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) Waiver of First Appearance By Written Statement. Unless otherwise ordered by the court, a defendant who is represented by an attorney and is not incarcerated may waive the first appearance by filing, at or before the time fixed for the first appearance, a written statement, signed by the attorney, certifying that the defendant has:

(1) received a copy of the complaint and has read it or the attorney has read it and explained it to the defendant;

(2) understands the substance of the charge;

(3) been informed of the right to remain silent and that any statement may be used against the defendant;

(4) been informed that there is a pretrial intervention program and where and how an application to it may be made; and

(5) been informed of the right to have a hearing as to probable cause, the right to indictment by the grand jury and trial by jury, and if applicable, that the offense charged may be tried by the court upon waiver of indictment and trial by jury, if in writing and signed by the defendant.

At the time the written statement waiving the first appearance is filed with the court, a copy of the written statement shall be provided to the criminal division

manager's office and the County Prosecutor or the Attorney General, if the Attorney General is the prosecuting attorney.

Source-R.R. 3:2-3(b), 8:4-2 (second sentence). Amended July 7, 1971 effective September 13, 1971; amended April 1, 1974 effective immediately; text of former Rule 3:4-2 amended and redesignated paragraphs (a) and (b) and text of former Rules 3:27-1 and -2 amended and incorporated into Rule 3:4-2**,** July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (b) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; caption amended, paragraphs (a) and (b) deleted, new paragraphs (a), (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000[.]; new paragraph (e) adopted _____ to be effective _____.

C. Rule 3:6-6 – Electronic Discovery of Grand Jury Proceedings

The Committee was asked to consider a proposal to amend R. 3:6-6(b) to permit the electronic discovery of grand jury proceedings. With the conversion to digital sound recording of grand jury proceedings in Middlesex County, and the roll-out of the CourtSmart back up recording system across the state, the Committee proposes to revise R. 3:6-6(b) to permit distribution of grand jury proceedings on compact disks, or by other electronic means. The proposed amendments to R. 3:6-6 are not designed to limit the ability of the parties to obtain grand jury transcripts, irrespective of a digital sound recording being provided. Rather, paragraph (b) will now provide that when a digital sound recording of the grand jury proceedings has been made, after an indictment has been returned and if the indictment is not sealed, the court shall make a copy of the proceedings available on compact disk or by other electronic means.

The proposed amendments to R. 3:6-6 (b) follow.

3:6-6. Who may be present; Record and Transcript

(a) . . . no change.

(b) Record; Transcript. A stenographic record or sound recording shall be made of all testimony of witnesses, comments by the prosecuting attorney, and colloquy between the prosecuting attorney and witnesses or members of the grand jury, before the grand jury.

When a digital sound recording of the grand jury proceedings has been made, after an indictment has been returned and if the indictment is not sealed, the court shall furnish or make available a copy of the grand jury proceedings to the parties on compact disk or by other electronic means. After an indictment has been returned, at the request of the defendant, a transcript of the grand jury proceedings shall be made. The request shall designate the portion or portions of the proceedings to be transcribed and the person or persons to whom the transcript is to be furnished. A copy of the request for a transcript will be served contemporaneously by the defendant upon the prosecutor, who may move for a protective order pursuant to R. 3:13-3(f). The prosecutor may request a copy of the transcript at any time.

(c) . . . no change.

Source-R.R. 3:3-6(a)(b)(c); paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (b) amended and second paragraph added to paragraph (b) July 13, 1994, new text in paragraph (b) amended December 9, 1994, to be effective January 1, 1995; paragraph (c) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (b) amended to be effective .

D. Rule 3:13-3 – Nicole's Law Restraining Orders and Discovery

Directive #01-10 (March 2, 2010), issued by the Administrative Office of the Courts, promulgated the "Nicole's Law" Sex Offender Restraining Order and Notification Procedures. The "Nicole's Law" statute, N.J.S.A. 2C:14-12c (L. 2007, c. 133), provides that "[t]he victim's location shall remain confidential and shall not appear on any documents or records to which the defendant has access." The Committee considered whether it was necessary to amend R. 3:13-3, which addresses discovery and the State's obligation to provide the defendant with "names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses," R. 3:13-3(c)(6), or if this issue is adequately covered by R. 3:13-3(f) which governs protective orders. The Committee determined that paragraph (f) of R. 3:13-3 should be amended to provide that protective orders should be entered when required by statute, which would encompass Nicole's Law.

The proposed amendments to R. 3:13-3(f) follow.

3:13-3. Discovery and Inspection

(a) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) . . . no change.

(f) Protective Orders.

(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential relationships and privileges [recognized by law]; or any other relevant considerations.

(2) Procedure. The court may permit the showing of good cause to be made, in whole or in part, in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(g) . . . no change.

Source-R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007[.]; paragraph (f) amended to be effective .

E. Rule 3:19-1 – Review and Distributing Written Verdict Sheets

In the 2007-2009 term, the Committee considered adding a requirement to the court rules that the verdict sheet be reviewed and discussed at the charge conference, as well as the charge itself. Notwithstanding that the judge's oral charge may control, the Committee discussed that the wording and the form of the verdict sheet can sometimes be critical and there should be an opportunity for the parties to object to the verdict sheet and for the objection to be placed on the record. Last term, the Committee discussed the use of verdict sheets in every case, or just in multiple-count cases. It was suggested that written verdict sheets be required for cases involving multiple charges and lesser included offenses and be submitted at the discretion of the judge, for single count indictments, when there are no lesser included offenses being submitted to the jury.

Thereafter, the Committee's discussion revealed that, as a practice, verdict sheets are distributed in almost all cases. As a result, the Committee decided that it was unnecessary to distinguish between cases involving multiple or single counts. Rather, the best practice would be to provide written verdict sheets in all cases.

Regarding the time to review and discuss the verdict sheets, the general consensus of the Committee was that discussions about the verdict sheet occur at various times prior to summation. Some members expressed the view that providing verdict sheets at the charge conference may be premature, because of the possibility for the dismissal of charges or consideration of lesser included offenses.

The Committee agreed that the proposed amendment to R. 3:19-1 should require that written verdict sheets be reviewed with counsel at the charge conference or in all cases prior to summation. The proposed amendments to R. 3:19-1(b) follow.

3:19-1. Several defendants or counts; written verdict sheets

(a) . . . no change.

(b) Written Verdict Sheets. [In the discretion of the court, a] A written verdict sheet [may] shall be submitted to the jury in conjunction with a general verdict to facilitate the determination of the grade of the offense under the Code of Criminal Justice or otherwise simplify the determination of a verdict. [, when multiple charges are submitted to the jury. A] The written verdict sheet shall include [be used in those cases in which the jury must find] the factual predicate for an enhanced sentence or the existence of a fact relevant to sentencing unless that factual predicate or fact is an element of the offense. A written verdict sheet shall be reviewed prior to summation at which time either party may raise an objection. Any objections to the verdict sheet shall be placed on the record. The verdict sheet shall be marked as a court exhibit and retained by the court pursuant to Rule 1:2-3.

Source-R.R. 3:7-9(b); former rule redesignated as paragraph (a), paragraph (b) adopted and caption amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended June 19, 2001 to be effective immediately[.]; paragraph (b) amended to be effective .

F. Rule 3:21-4(g) - Forfeiture of Public Office for Municipal Officials

The Criminal Practice Committee and the Municipal Court Practice Committee were asked to consider recommending a rule proposal or Directive addressing matters involving forfeiture of public office of a municipal official. The Committee discussed this topic and decided that, since it involved municipal officials, it would be best for the Municipal Court Practice Committee to consider this matter first. Upon consideration of this matter the Municipal Court Practice Committee is proposing an amendment to R. 7:9-1(b) that would require the Municipal Court judge to state on the record reasons for ordering or denying forfeiture of public office under N.J.S.A. 2C:51-2, in applicable cases.

The Criminal Practice Committee reviewed this proposal and agreed that the Part III rules should be revised to be consistent with the Part VII revisions. The revisions to R. 3:21-4(g) follow.

3:21-4. Sentence.

(a) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) . . . no change.

(f) . . . no change.

(g) Reasons for Sentence. At the time sentence is imposed the judge shall state reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3; [and] the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence[.]; and, if applicable, the reasons for ordering or denying forfeiture of public office, position or employment, pursuant to N.J.S.A. 2C:51-2.

(h) . . . no change.

(i) . . . no change.

(j) . . . no change.

Source-R.R. 3:7-10(d). Paragraph (f) amended September 13, 1971, paragraph (c) deleted and paragraphs (d), (e) and (f) redesignated as (c), (d) and (e) July 14, 1972 to be effective September 5, 1972; paragraph (e) adopted and former paragraph (e) redesignated as (f) August 27, 1974 to be effective September 9, 1974; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraphs (d) and (e) amended August 28, 1979 to be effective September 1, 1979; paragraph (d) amended December 26, 1979 to be effective January 1, 1980; paragraph (g) adopted July 26, 1984 to be effective September 10, 1984; paragraph (d) caption and text amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended November 2, 1987 to be effective January 1, 1988; paragraph (d) amended January 5, 1988 to be effective February 1, 1988; new paragraph (c) adopted and former paragraphs (c), (d), (e), (f), and

(g) redesignated (d), (e), (f), (g), and (h) respectively June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (i) adopted April 21, 1994 to be effective June 1, 1994; paragraphs (b), (e), (f) and (g) amended July 13, 1994 to be effective January 1, 1995; former paragraphs (f), (g), (h), and (i) redesignated as paragraphs (g), (h), (i), and (j) and new paragraph (f) adopted July 10, 1998 to be effective September 1, 1998; paragraph (j) amended July 5, 2000 to be effective September 5, 2000; paragraph (e) caption and text amended, and paragraph (f) amended June 15, 2007 to be effective September 1, 2007; paragraph (h) caption and text amended July 16, 2009 to be effective September 1, 2009[.]; paragraph (g) amended to be effective .

G. Rule 3:22-13 – McKnight v. Office of the Public Defender

In McKnight v. Office of the Public Defender, 197 N.J. 180 (2008) the Supreme Court held that the attorney who is the subject of a claim of ineffective assistance of counsel in a petition for post-conviction relief (PCR) and who may be subject to a future malpractice lawsuit should receive notice as soon as practicable. The Court asked that the Criminal Practice Committee propose a rule amendment consistent with its opinion.

The Committee considered a rule proposal prepared by the Office of the Public Defender setting forth proposed notice requirements consistent with McKnight. The Committee supported the rule proposal but indicated that the rule should set forth who will provide notice to the attorney whose performance is being challenged. The Committee considered several options on who should provide notice.

First, it was suggested that the prosecutor's office could provide notice, if an ineffective assistance of counsel claim is being raised in the PCR petition. The prosecutor representatives of the Committee were not in favor of that proposal. It was also suggested that once a defense attorney is assigned or retained for the PCR petition, the assigned or retained attorney could provide notice to the attorney whose performance was being challenged. There were concerns raised for this suggestion, particularly because while a defendant is entitled to the assignment of counsel for the first petition for post-conviction relief, but that for subsequent petitions, attorneys are only assigned upon a showing of good cause. Thus, this proposal would leave a gap in PCR petitions filed *pro se.*

Next, there was a suggestion that the *pro se* defendant should provide notice to the attorney. However, concerns were raised of the consequence if the defendant did not provide notice. Additionally, it was noted that often defendants assert that they do not know the name of counsel who provided representation, particularly when they were represented by the Public Defender's Office.

Finally, it was suggested that the Criminal Division Manager's Office could provide the notice. Currently, pursuant to R. 3:22-7, when a petition is filed the Criminal Division Manager's Office transmits a copy to the prosecutor. A question arose of how the Criminal Division Manager will ascertain the name of the attorney about whom the ineffective assistance of counsel claim is being raised. It was suggested that the defendant should provide the name of counsel that he/she is alleging provided deficient representation.

The Committee referred these options to the Conference of Criminal Division Managers and the Conference of Criminal Presiding Judges for their input. The Conference of Criminal Presiding Judges and Conference of Criminal Division Managers endorsed a proposal which would require that the defendant, or if the defendant is represented, defense counsel provide notice to the attorney whose performance is being challenged. The Committee agreed with the proposal endorsed by the Presiding Judges and Criminal Division Managers.

The proposal to adopt a new R. 3:22-13 follows.

3:22-13. Notice Requirements in Petitions for Post-Conviction Relief

(1) In all petitions for post-conviction relief where the ineffective assistance of counsel is being alleged, a copy of the petition shall be forwarded, as soon as practicable, to the attorney whose performance is being challenged. If the defendant is assigned counsel or otherwise represented by counsel, counsel shall provide the notice. If the defendant is appearing pro se, notice shall be provided by the defendant

(2) In cases where the attorney whose performance is being challenged is employed by the Office of the Public Defender or a law firm, those entities shall also receive notice.

Adopted _____ to be effective _____.

H. Proposed Amendments R. 2:7-2, R. 2:7-4, R. 3:23-8 and the Appendix to the Part VII Rules of Court – Guidelines for Determination of a Consequence of Magnitude – Revisions to the Consequence of Magnitude Guidelines and Standard for the Assignment of Counsel for Indigent Defendants in Municipal Appeals

By letter dated June 1, 2010, the Supreme Court requested that the Criminal Practice Committee and Municipal Court Practice Committee form a joint subcommittee to consider and make recommendations on what constitutes a "consequence of magnitude" that would entitle an indigent defendant to assigned counsel, (including counsel on appeal) and transcripts at public expense. The Court asked that the subcommittee propose, if appropriate, amendments to the Guidelines for Determination of Consequence of Magnitude (hereafter "Consequence of Magnitude Guidelines"), which are set forth in the appendix to Part VII of the court rules, and to Rule 2:7, Appeals by Indigent Persons. A joint subcommittee was formed to examine this matter.

The subcommittee considered the following issues: (1) revising the Consequence of Magnitude Guidelines that would trigger the advisement of the right to counsel, and entitle an indigent defendant to the assignment of counsel under Rodriguez v. Rosenblatt, 56 N.J. 281 (1971); (2) modifying the court rules governing the assignment of counsel for indigent defendants in a municipal appeal; and (3) revising the court rules governing the provision of transcripts, at the public expense, for indigent defendants in municipal appeals. The subcommittee met and proposed recommendations to revise the current court rules. It also provided referrals to the Criminal Practice Committee and the Municipal Court Practice Committee for further exploration and resolution.

1. Revising the Guidelines for Determining a Consequence of Magnitude for the Assignment of Counsel Under Rodriguez v. Rosenblatt.

The subcommittee first considered what constitutes a "consequence of magnitude" that would trigger the requirement of giving advice about the right to counsel and entitle an indigent defendant to assigned counsel, and whether the Consequence of Magnitude Guidelines should be modified. In Rodriguez v. Rosenblatt, 58 N.J. 281 (1971), the Court held that "as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Id. at 295. To comply with Rodriguez v. Rosenblatt, supra, in 1971, the Administrative Office of the Courts issued guidance for municipal court judges to adopt appropriate screening procedures to ascertain in advance of trial or a plea, "(a) whether the charge made in the complaint is likely to result, in the event of a conviction, in imprisonment or other consequence of magnitude; and (b) whether the defendant is indigent." Memorandum to All Assignment Judges and Municipal Court Judges from Edward B. McConnell, Administrative Director of the Courts, Re: Assignment of Counsel in Municipal Courts (May 12, 1971) (hereafter "1971 AOC Memorandum").

As early as 1972, R. 3:27-2[1] addressed Rodriguez v. Rosenblatt, supra, and provided:

> Every person charged with a non-indictable offense shall be advised by the court of his right to retain

[1] Prior to the comprehensive revisions to Part VII of the court rules in 1997, Part III of the rules governed this area of municipal court practice.

> counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of his right to have counsel assigned without cost.

Effective January 1, 1995, this language set forth in R. 3:27-2 was incorporated into R. 3:4-2. Thereafter, in 1997, with the adoption of the comprehensive revisions to Part VII of the rules governing municipal courts, the language from R. 3:4-2(b) regarding the assignment of counsel was incorporated into R. 7:3-2(b). The Consequence of Magnitude Guidelines, which became effective in 2004, [2] are set forth in the appendix to Part VII of the court rules. The guidelines provide that in assessing whether a defendant is facing a sentence that constitutes a consequence of magnitude, the judge should consider the following:

> (1) Any sentence of imprisonment;
>
> (2) Any period of (a) driver's license suspension, (b) suspension of the defendant's nonresident reciprocity privileges, or (c) driver's license ineligibility; or
>
> (3) Any monetary sanction imposed by the court of $750 or greater in the aggregate, except for any public defender application fee. A monetary sanction is defined as the aggregate of any type of court imposed financial obligation, including fines, costs, restitution, penalties and/or assessments.[3]

[2] The Guidelines for Determining a Consequence of Magnitude were adopted by the Court on July 28, 2004 and became effective on September 1, 2004.

[3] The Guidelines for Determining a Consequence of Magnitude also provide that "[i]t should be noted that if a defendant is alleged to have a mental disease or defect, and the judge, after examination of the defendant on the record, agrees that the defendant may have a mental disease or defect, the judge shall appoint the municipal public defender to represent that defendant, if indigent, regardless of whether the defendant is facing a consequence of magnitude, if convicted."

Currently, R. 7:3-2(b) references the Guidelines and provides: "[i]f the Court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel, the court shall assign the municipal public defender to represent the defendant."

a. Updating the Monetary Sanction in the Consequence of Magnitude Guidelines

The subcommittee reviewed the guidelines and agreed that they need not be amended with respect to advising defendants of the right to counsel and assigning a municipal public defender when an indigent defendant is facing a sentence of imprisonment[4] or a driver's license suspension.[5] The subcommittee then considered whether the $750 monetary sanction should be revised. In particular, the subcommittee considered whether the $750 sanction should be increased, and if a new amount for the monetary sanction should be recommended.

As set forth above, prior to the promulgation of the Consequence of Magnitude Guidelines, R. 7:3-2 provided for the assignment of counsel "[i]f the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel." To implement this rule, courts were guided by the 1971 AOC Memorandum and Rodriguez v. Rosenblatt, supra. However, at that time, there was no definition, provided either by the Court or through caselaw, for a monetary sanction which would constitute a consequence of magnitude.

[4] Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).

[5] State v. Moran, 202 N.J. 311, 326 (2010) (loss of driving privileges for a reckless driving conviction constitutes a consequence of magnitude that triggers the right to counsel). See State v. Hamm, 121 N.J. 109, 124 (1990), cert. denied, 499 U.S. 947, 111 S.Ct. 1413, 113 L.Ed.2d 466 (1991).

Some guidance was provided by State v. Hermanns, 278 N.J. Super. 19 (App. Div. 1994), which held that an aggregate monetary sanction of $1800 was a consequence of magnitude that triggered the advisement of the right to counsel.

As part of the comprehensive revisions to Part VII of the court rules in 1997, the Municipal Court Practice Committee and Criminal Practice Committee developed the guidelines setting forth factors for the court to consider in determining whether an indigent defendant in a non-indictable matter is facing a consequence of magnitude as a result of the potential sentence that may be imposed, which would trigger advice regarding the right to counsel, and, if indigent, the assignment of counsel. In developing the Consequence of Magnitude Guidelines, the Municipal Court Practice Committee and the Criminal Practice Committee recommended setting forth a $750 monetary sanction. The $750 monetary consequence was originally recommended by the Municipal Court Practice Committee for the following reasons:

(1) The $750 amount was derived from the minimum amount that must be charged to a defendant seeking a conditional discharge. In a conditional discharge, a defendant is charged a $500 Drug Enforcement Demand Reduction penalty, a $50 laboratory analysis fee, a $75 conditional discharge fee, a $50 Victims of Crime Compensation Board assessment and a $75 Safe Neighborhood and Streets penalty for a total monetary sanction of $750.

(2) Most importantly, the decision to select the $750 figure as a fair amount was the result of the Municipal Courts Committee's collective experience in dealing with this subject on a daily basis. Since 1971, with the Supreme Court's decision in Rodriquez v. Rosenblatt, 58 N.J. 281 (1971), $200 has been the figure customarily used as a bright line indicator denoting a monetary consequence of magnitude. According to the anecdotal experience of Municipal Court Judges and practitioners, $750 is as fair as figure today as $200 was in 1971 as a monetary consequence of magnitude for the typical Municipal Court defendant;

(3) The court in State v. Hermanns, cited by the Criminal Practice Committee, did not set the monetary threshold amount at $1,800 but rather determined that it did not need to decide what monetary amount constituted a consequence of magnitude, because the aggregate monetary sanction involved ($1,800) gave rise to the right counsel under Rodriquez v. Rosenblatt, supra; and

(4) Because the $750 figure is not a static amount, the Municipal Courts Committee intends to periodically recommend to the Court any modifications to that amount, as circumstances change.[6]

It was recognized that some indigent defendants facing disorderly persons drug charges may be eligible for conditional discharge and therefore may not necessarily fall within the other criteria set forth in the consequence of magnitude guidelines (i.e., sentence of imprisonment or driver's license suspension) to be entitled to an attorney. The rationale for the monetary sanction, to correspond with the sanction imposed in conditional discharge cases, was to ensure that individuals facing drug charges in municipal court would be advised of the right to counsel, and if indigent, be entitled to an attorney, because of the search and seizure issues involved and motions to suppress that arise in those types of cases. Therefore, when the guidelines were initially developed, the $750 figure was determined to be a fair amount, based upon the Municipal Court Practice Committee's collective experience in dealing with this subject on a daily basis.

In assessing whether a $750 monetary consequence would be appropriate, the Criminal Practice Committee also referred to the income eligibility guidelines for a

[6] This information is excerpted from internal AOC memoranda from 1997 regarding the development of the $750 monetary sanction as a consequence of magnitude to trigger the provision of advise regarding the right to counsel.

public defender that were in effect at the time.[7] When the Committees recommended that the Court adopt the $750 monetary sanction, the Committees recognized that the sanction was not a static amount and the need to periodically recommend to the Court any modifications to that amount, as circumstances change. The Consequence of Magnitude Guidelines, including the $750 monetary sanction, were adopted by the Court and are set forth in the appendix to Part VII of the court rules, effective September 1, 2004.

When reviewing the $750 monetary sanction, the subcommittee considered possible monetary sanctions, including a $1000 sanction. The members ultimately agreed that the monetary sanction should remain aligned with the minimum monetary sanctions that can be imposed for defendants placed on conditional discharge. As set forth above, when the Consequence of Magnitude Guidelines were adopted, the $750 amount was derived from the minimum amount that must be imposed upon a defendant being placed on conditional discharge. The subcommittee recommends increasing the $750 amount to reflect the Drug Abuse Education Fund (DAEF) Penalty, N.J.S.A. 2C:43-3.5, which requires that a defendant be assessed a $50 penalty when being placed on conditional discharge.[8] The Criminal Practice Committee agreed with the subcommittee's recommendation to increase the monetary sanction to $800, exclusive of

[7] At the time, the income eligibility guidelines provided that a defendant may be entitled to a public defender if his or her weekly income is: $193.51 for a household of 1; $260.82 for a household of 2; $328.13 for a household of 3; $395.43 for a household of 4; $462.74 for a household of 5; $530.05 for a household of 6; $597.36 for a household of 7; and $664.66 for a household of 8. Each household member in excess of 8 adds $53.85 per week. These figures were based on the Poverty Guidelines, in effect, and as updated by the U.S. Department of Health and Human Services.

[8] Although the DAEF Penalty went into effect in 1999, as reflected in AOC internal documents from 1997, it was not included in the original calculation for the $750 monetary sanction that was promulgated by the Consequence of Magnitude Guidelines effective September 1, 2004.

court costs, as this is consistent with the minimum sanctions that can be imposed for a conditional discharge and recommends that the guidelines for determination of Consequence of Magnitude be amended accordingly.

b. Immigration Consequences

In light of recent caselaw[9], the subcommittee also considered whether immigration consequences under federal law, such as deportation, that could result from a New Jersey conviction should be added as an additional consequence of magnitude for which a defendant should be advised of the right to counsel, and if indigent, be entitled to an attorney. The municipal judges and practitioners explained that in municipal court at the first appearance and/or arraignment, the court provides the opening statement, R. 7:14-1, which includes an overview of the guidelines for defendants facing a consequence of magnitude. Consistent with the guidance issued by the AOC in 1971, to individually ascertain if the defendant should be advised of the right to counsel or if indigent, assigned a municipal public defender, the judge looks to the possible sentencing consequences that could result from a conviction of the applicable offense. In many cases, it is clear, based on the offense being charged, if a defendant will likely face certain monetary sanctions, imprisonment or a loss of driving privileges upon conviction.

The difficulty with immigration consequences that was recognized by the subcommittee is that the potential consequence, if any, can vary depending on the defendant's immigration status, the conviction and the actual sentence that is imposed.

[9] Carachuri-Rosendo v. Holder, ___ U.S. __, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010); Padilla v. Kentucky, 599 U.S. ___, 130 S.Ct. 1473 177 L.Ed.2d 68 (2010); State v. Nunez-Valdez, 200 N.J. 129 (2009).

The subcommittee recognized several challenges with advising defendants in municipal court about immigration consequences, such as, potential concerns with asking a defendant about his or her immigration status on the record. Additionally, it was noted that, different from criminal court, in municipal court, defendants do not complete written plea forms. The subcommittee discussed the concern that an indigent defendant who is facing a consequence of magnitude, such as a monetary sanction, under the current guidelines may waive the right to an attorney. However, that same defendant may wish to seek counsel if he or she knew that deportation or other immigration consequences potentially may result from the conviction.

The subcommittee considered adding an additional paragraph to the Consequence of Magnitude Guidelines stating: "If any defendant is facing any change in status under the immigration laws of the United States (U.S.A.), because of defendant's alien status in the U.S.A., as a result of a municipal court conviction on any offense, the defendant shall be entitled to counsel or a municipal public defender, if indigent." Alternatively, the subcommittee considered adding a new category (4) to the Consequence of Magnitude Guidelines, which would entitle a defendant be advised of the right to counsel, and if indigent, be entitled to counsel, if the defendant is facing "any sentence resulting from a conviction which could affect a defendant's ability to remain in the United States or apply for any form of U.S. residency."

After a thorough discussion about this issue, the subcommittee decided not to recommend a revision to the Consequence of Magnitude Guidelines to address immigration. Rather, the subcommittee referred this matter to the Municipal Court

Practice Committee for consideration of developing procedures or guidelines to advise defendants of possible immigration consequences and the opportunity to seek counsel and if indigent, be assigned a municipal public defender.

2. Assignment of Counsel For Indigent Defendants in Municipal Appeals

The subcommittee discussed whether to modify the rules governing the assignment of counsel, *pro bono*, in municipal appeals filed in the Law Division and appellate courts, particularly when the sentence imposed upon the indigent defendant does not rise to the level to constitute a consequence of magnitude.

Since February 1993, practicing attorneys have been providing certain *pro bono* services to indigent defendants facing consequences of magnitude, pursuant to guidelines established by the Court in Madden v. Delran, 126 N.J. 591 (1992).[10] Effective March 22, 1998, the Municipal Public Defender Act, N.J.S.A. 2B:24-1 to -17, (L. 1997, c. 256) went into effect and requires the appointment of a municipal public defender in every municipal court. Pursuant to the Act, in advance of a trial or plea, indigent defendants appearing in municipal court are entitled to representation by the municipal public defender if the charge made in the complaint is likely to, upon conviction, result in a consequence of magnitude. The Municipal Public Defender Act essentially eliminated *pro bono* assignments of private counsel, under Madden, to represent indigent

[10] See Final Report of the Supreme Court Ad Hoc Committee on *Pro Bono* Assignments (May 23, 1998).

defendants, in municipal court, who are facing a sentence which constitutes a consequence of magnitude.[11]

The Municipal Public Defender Act provides:

> a. The municipal public defender shall represent an indigent defendant charged in municipal court with a crime as specified in N.J.S.2B:12-18 or, if in the opinion of the municipal court there is a likelihood that the defendant, if convicted, of any other offense will be subject to imprisonment or other consequence of magnitude, the municipal public defender shall represent an indigent defendant.
>
> N.J.S.A. 2B:24-7a.

In making the determination to assign a municipal public defender to represent an indigent defendant, municipal courts are guided by the Consequence of Magnitude Guidelines, set forth in the appendix to Part VII of the court rules.

Our court rules currently can be interpreted to provide that once an indigent defendant is assigned representation by the municipal public defender in the municipal court, the entitlement to the assignment of counsel continues in all further proceedings, despite the sentence that is actually imposed. R. 3:23-8(a); R. 2:7.[12] Thus, even if a

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[11] Under certain circumstances where the Municipal Public Defender has a conflict or is unavailable counsel could be assigned from the Madden list, however, counsel would be entitled to compensation. N.J.S.A. 2B:24-6a; N.J.S.A. 2B:24-7b.

[12] Currently, with respect to the assignment of counsel in appeals for non-indictable offenses, R. 2:7-2(b) provides that:

> All persons convicted of a non-indictable offense who desire to appeal their conviction and who assert they are indigent, shall complete and file, without fee, with the trial court, the appropriate form prescribed by the Administrative Director of the Courts, which shall be made available to them by the court in which they were convicted. If the court is satisfied that they are indigent and are constitutionally or otherwise entitled by law to counsel, it shall assign counsel to represent them on the appeal pursuant to R. 3:4-2(c). If the trial court denies an

sentence imposed for a municipal court conviction does not result in a consequence of magnitude, once a municipal public defender was assigned to the case, an indigent defendant is still entitled to the assignment of counsel throughout the appeals process.

While municipal public defenders are authorized by statute to represent indigent defendants in municipal court, their responsibilities do not include representation in municipal appeals filed in the Law Division or the appellate courts. In fact, the Municipal Public Defender Act specifically excludes representation for municipal appeals from the municipal public defender's responsibilities. N.J.S.A. 2B:24-6b provides:

> b. A municipal public defender shall be responsible for handling all phases of the defense, including but not limited to discovery, pretrial and post-trial hearings, motions, removals to federal district court and other collateral functions reasonably related to the defense. **As used in this subsection, "post-trial hearing" shall not include de novo appeals in Superior Court**.
>
> N.J.S.A. 2B:24-6b (emphasis added).

> application for assignment of counsel, it shall briefly state its reasons therefore, and the application may be renewed within 20 days thereafter before the appellate court in accordance with R. 2:7-3.

Furthermore, R. 2:7-4 states:

> A person who has been granted relief as an indigent by any court shall be granted relief as an indigent in all subsequent proceedings resulting from the same indictment, accusation or criminal or civil complaint in any court without making application therefor upon filing with the court in the subsequent proceeding a copy of the order granting such relief or a sworn statement to the effect that such relief was previously granted and stating the court and proceeding in which it was granted. The filing of such order or statement shall be accompanied by an affidavit stating that there has been no substantial change in the petitioner's financial circumstances since the date of the entry of the order granting such relief.

Moreover, the Office of the New Jersey Public Defender's legal representation for indigent defendants is essentially limited to individuals who are formally charged with the commission of an indictable offense. N.J.S.A. 2A:158A-5. As such, the Office of the Public Defender does not represent indigent defendants on municipal appeals. As neither the municipal public defender nor the New Jersey Office of the Public Defender represent indigent defendants in municipal appeals involving non-indictable matters before the Law Division or the appellate courts, the burden to provide these services has been borne by the Bar, through the assignment of *pro bono* attorneys selected from a list developed pursuant to Madden v. Delran, 129 N.J. 591 (1992) (commonly referred to as the "Madden list").[13]

The subcommittee reviewed the court rules and discussed circumstances where a municipal public defender is assigned to represent a defendant in municipal court, because the defendant is facing a consequence of magnitude based upon the offense(s) being charged, however, the actual sentence that is imposed by the municipal court does not constitute a consequence of magnitude. Discussions ensued regarding whether the court rules could be interpreted, as written, or be revised to permit the Law Division or appellate court to determine that an indigent defendant, who is convicted of a non-indictable offense, is not entitled to counsel for purposes of appeal, if the sentence that actually was imposed does not constitute a consequence of magnitude. The subcommittee was of the view that this interpretation of the court rules would help

[13] Over the years, the Administrative Office of the Courts has reviewed the issue of *pro bono* assignments. See Final Report of the Supreme Court Ad Hoc Committee on *Pro Bono* Assignments (May 23, 1998).

alleviate burden on the Bar to provide representation in municipal appeals, yet ensure that indigent defendants are assigned counsel as required pursuant to Rodriguez v. Rosenblatt.

The Criminal Practice Committee considered this matter and agreed that the Law Division and appellate courts should have discretion to assign counsel, in circumstances where a defendant filing a municipal appeal did not receive a sentence which constitutes a consequence of magnitude, irrespective of whether counsel was assigned in the municipal court. This view was further supported by the Court's recognition in State v. De Bonis, 58 N.J. 182, 188 (1971), that as a matter of policy apart from constitutional compulsion, a defendant who appeals from a municipal court should not risk a greater sentence being imposed as a result of the appeal and, ordinarily cannot receive a greater sentence. The Committee felt that when no actual sentence of magnitude was imposed by the municipal court, the proposed rule amendments provide an equitable solution as defendants, to whom the rule proposal would apply, would not be subject to a sentence constituting a consequence of magnitude as a result of the appeal. The Committee also recognized that if the Law Division remands a matter to municipal court for reconsideration, the municipal court would reassess whether the defendant is entitled to counsel under the Consequence of Magnitude Guidelines.

The Committee therefore recommends that a proper balance favoring where there is no constitutional right to counsel and respect for the rights of practitioners, warrants discretionary assignments in the Law Division and appellate courts if no actual sentence of consequence or magnitude is imposed, regardless of whether counsel was previously assigned in the case. The Criminal Practice Committee is proposing revisions to R. 2:7-

2, R. 2:7-4 and R. 3:23-8 to provide that in a municipal appeal, a defendant who desires to appeal the conviction and who asserts indigency, shall complete and file, without fee, with the superior court, the appropriate form prescribed by the Administrative Director of the Courts. If the court is satisfied that the person is indigent and is constitutionally or otherwise entitled by law to counsel, an attorney shall be assigned. If there is no such entitlement by virtue of the sentence imposed, the court hearing the appeal may, in its discretion, determine whether to assign counsel for purposes of the appeal, irrespective of whether counsel was previously assigned in the case.

3. Provision of Transcripts in Municipal Appeals For Indigent Defendants

Finally, the subcommittee considered whether to modify the rules governing the provision of transcripts, at the public expense, to indigent defendants filing municipal appeals. Pursuant to the court rules, an indigent defendant filing an appeal from a conviction for a non-indictable offense is provided transcripts at the public expense, regardless of whether they are entitled to counsel. R. 2:5-3(d) presently states, in relevant part:

> (d) Deposit for Transcript; Payment Completion. . . .If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. Unless the indigent defendant is represented by the Public Defender or that office is otherwise obligated by law to provide the transcript to an indigent, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance.

Furthermore, R. 2:7-4 provides that:

> An indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial de novo, who has been afforded or had a right to a transcript at public expense of municipal court proceedings pursuant to R. 3:23-8(a), shall be entitled to a transcript of the Law Division proceedings paid for in the same manner as the municipal court transcript.

The subcommittee considered whether these rules could be revised to reduce the expenses associated with the provision of transcripts at the public expense for municipal appeals, particularly where there are non-evidential circumstances and a written opinion is provided by the court. The subcommittee was unable to reach a consensus on a standard with respect to the provision of transcripts on appeal. It referred this issue to the Criminal Practice Committee for resolution. The Criminal Practice Committee considered this issue and decided that transcripts are necessary to file an appeal, and therefore, no rule change should be made.

The proposed revisions to R. 2:7-2, R. 2:7-4, R. 3:23-8 and the Appendix to the Part VII Rules of Court – Guidelines for Determination of a Consequence of Magnitude follow.

N.J. Court Rules, Part VII, Appendix 2 **(2010)**

Appendix 2

GUIDELINES FOR DETERMINATION OF CONSEQUENCE OF MAGNITUDE (SEE RULE 7:3-2)

On October 6, 1997, the Supreme Court adopted the Comprehensive Revision of Part VII of the Rules of Court to be effective on February 1, 1998. *R. 7:3-2* of that Comprehensive Revision provides for the assignment of counsel "[i]f the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel...." The Supreme Court directed that guidelines for the determination of a consequence of magnitude be developed by the Supreme Court Municipal Court Practice Committee to assist municipal court judges in deciding what factors should be considered when determining a consequence of magnitude.

In response to this direction, the Supreme Court Municipal Court Practice Committee developed the following set of guidelines. The Supreme Court, as recommended by the Committee, has included the guidelines as an Appendix to the Part VII Rules.

In determining if an offense constitutes a consequence of magnitude in terms of municipal court sentencing, the judge should consider the following:

(1) Any sentence of imprisonment;

(2) Any period of (a) driver's license suspension, (b) suspension of the defendant's nonresident reciprocity privileges or (c) driver's license ineligibility; or

(3) Any monetary sanction imposed by the court of [$ 750] $800 or greater in the aggregate, except for any public defender application fee or any costs imposed by the court. A monetary sanction is defined as the aggregate of any type of court imposed financial obligation, including fines, [costs,] restitution, penalties and/or assessments.

It should be noted that if a defendant is alleged to have a mental disease or defect, and the judge, after examination of the defendant on the record, agrees that the defendant may have a mental disease or defect, the judge shall appoint the municipal public defender to represent that defendant, if indigent, regardless of whether the defendant is facing a consequence of magnitude, if convicted.

Guidelines adopted July 28, 2004 to be effective September 1, 2004[.]; amended to be effective .

Rule 2:7-2. Assignment of Counsel on Appeal

(a) . . . no change.

(b) Non-indictable Offenses. All persons convicted of non-indictable offenses who desire to appeal their conviction and who assert they are indigent, shall complete and file, without fee, with the trial court, the appropriate form prescribed by the Administrative Director of the Courts, which shall be made available to them by the court in which they were convicted. Counsel shall be assigned consistent with the provisions of R. 3:23-8(a).

(c) . . . no change.

(d) Responsibility of Counsel Assigned by the Trial Court For Non-Indictable Offenses. Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. [An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.]

Source-R.R. 1:2-7(b), 1:12-9(b) (d). Paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (b) caption and text amended, paragraph (c) adopted and former paragraph (c) redesignated paragraph (d) November 5, 1986 to be effective January 1, 1987; paragraphs (b) and (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended June 15, 2007 to be effective September 1, 2007; paragraph (d) caption and text amended July 16, 2009 to be effective September 1, 2009[.]; paragraphs (b) and (d) amended to be effective .

Rule 2:7-4. Relief in subsequent courts

Consistent with the provisions of R. 3:23-8(a) and R. 2:7-2(b), with respect to the assignment of counsel, [A] a person who has been granted relief as an indigent by any court shall be granted relief as an indigent in all subsequent proceedings resulting from the same indictment, accusation or criminal or civil complaint in any court without making application therefore upon filing with the court in the subsequent proceeding a copy of the order granting such relief or a sworn statement to the effect that such relief was previously granted and stating the court and proceeding in which it was granted. The filing of such order or statement shall be accompanied by an affidavit stating that there has been no substantial change in the petitioner's financial circumstances since the date of the entry of the order granting such relief. An indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial de novo, who has been afforded or had a right to a transcript at public expense of municipal court proceedings pursuant to R. 3:23-8(a), shall be entitled to a transcript of the Law Division proceedings paid for in the same manner as the municipal court transcript.

Amended July 13, 1994 to be effective September 1, 1994; amended July 28, 2004 to be effective September 1, 2004[.]; amended to be effective .

Rule 3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents; Assignment of Counsel. If a verbatim record or sound recording was made pursuant to R. 7:8-8 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the criminal division manager's office, and a certified copy served on the prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The court shall provide the municipal court with reasons for the remand. The court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is found to be indigent, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo

without a jury in the court to which the appeal is taken. All persons convicted of non-indictable offenses who desire to appeal their conviction and who assert they are indigent, shall complete and file, without fee, with the superior court, the appropriate form prescribed by the Administrative Director of the Courts. If the court is satisfied that the person is indigent and is constitutionally or otherwise entitled by law to counsel, an attorney shall be assigned. If there is no such entitlement by virtue of the sentence imposed, the court hearing the appeal may, in its discretion, determine whether to assign counsel for purposes of the appeal, irrespective of whether counsel was previously assigned in the case.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) . . . no change.

(f) . . . no change.

Source-R.R. 3:10-13. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a), (b) and (e) amended November 22, 1978 to be effective December 7, 1978; paragraphs (a), (b) and (e) amended July 11, 1979 to be effective September 10, 1979; paragraph (a) amended February, 1983 to be effective immediately; paragraph (a) amended January 5, 1998 to be effective February 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 16, 2009 to be effective September 1, 2009[.]; caption and paragraph (a) amended to be effective .

I. Proposed Amendments to the Appendix of the Court Rules - Model Jury Selection Questions for Criminal Cases

Administrative Office of the Courts' Directive #21-06 (Dec. 11, 2006), as modified by Directive #4-07 (May 16, 2007) set forth jury selection standards and the Model Jury Voir Dire questions for criminal and civil cases, that were recommended by the Special Committee of Peremptory Challenges and Jury Voir Dire, as approved by the Supreme Court. The Civil Practice Committee is considering whether the Model Jury Selection Questions for Civil Cases should be included in the appendix of the Court Rules. The Criminal Practice Committee considered whether to make a recommendation to the Court to include the current Model Jury Selection Questions for Criminal Cases in the appendix of the court rules.

The Committee discussed whether only the Model Jury voir dire questions should be included in the appendix of the court rules or if the Directives, in their entirety, should be included in the appendix of the court rules. Some members were of the view that it would be best to include the Directives in their entirety, because they contain the Model Jury questions, along with necessary explanations for the questions. The Committee believes that the procedures set forth in Directive #21-06 and Directive #4-07 contain valuable information to accompany the Model Jury voir dire questions. The Committee determined that both Directives should be included in the appendix of the Court Rules. During the term, the Committee was informed that the Special Committee on Peremptory Challenges and Jury Voir Dire was considering possible revisions to the Directives.

The Committee was informed that Special Committee on Peremptory Challenges and Jury Voir Dire has completed its work and recommends inserting the procedures set forth in Directive #21-06 and Directive #4-07 in the Appendix to Part III of the Court Rules.

II. Non Rule Recommendations

A. Amendment to the Plea Form and Judgment of Conviction - Computer Crime Prevention Fund Penalty, N.J.S.A. 2C:43-3.8 (L. 2009, c. 143, eff. Oct. 19, 2009)

N.J.S.A. 2C:43-3.8 authorizes the imposition of a Computer Crime Prevention Fund Penalty and provides that:

> a. In addition to any disposition authorized by this Title, the provisions of section 24 of P.L.1982, c.77 (C.2A:4A-43), or any other statute indicating the dispositions that can be ordered for an adjudication of delinquency, every person convicted of or adjudicated delinquent for a violation of subparagraph (b) of paragraph (5) of subsection b. of N.J.S.2C:24-4, N.J.S.2C:34-3, or an offense involving computer criminal activity in violation of any provision of chapter 20 of this title shall be assessed for each such offense a penalty fixed at:
>
> (a) $2,000 in the case of a crime of the first degree;
> (b) $1,000 in the case of a crime of the second degree;
> (c) $750 in the case of a crime of the third degree;
> (d) $500 in the case of a crime of the fourth degree;
> (e) $250 in the case of a disorderly persons or petty disorderly persons offense.

The Committee has recommended that the Plea Form be amended to include question 5i, as follows:

5 i. Computer Crime Prevention Fund Penalty, N.J.S.A 2C:43-3.8 (L. 2009, c. 143). If the crime involves a violation of N.J.S.A. 2C:24-4b(5)(b) (knowingly possessing or knowingly viewing child pornography, N.J.S.A. 2C:34-3 (selling, distributing or exhibiting obscene material to a person under age 18) or an offense involving computer criminal activity in violation of any provision of Title 2C, chapter 20, you will be assessed a mandatory penalty as listed below for each offense for which you pled guilty?

(1) $2,000 in the case of a 1st degree crime
(2) $1,000 in the case of a 2nd degree crime

(3) $ 750 in the case of a 3rd degree crime
(4) $ 500 in the case of a 4th degree crime
(5) $ 250 in the case of a disorderly persons or petty disorderly persons offense

In addition, the Committee recommended adding the Computer Crime Prevention Fund Penalty, N.J.S.A. 2C:43-3.8, to the Judgment of Conviction.

III. Matters Previously Sent to the Supreme Court

A. Revisions to the Plea Form to Address Immigration Consequences

In State v. Nuñez-Valdez, 200 N.J. 129 (2009), the Court held that the defendant was misinformed about the immigration/deportation consequences of his guilty plea, and therefore, under our state constitution, the guilty plea must be vacated due to ineffective assistance of counsel. The Court stated that "our plea procedures should be modified to help ensure that a non-citizen defendant receives information sufficient to make an informed decision regarding whether to plead guilty." Id. at 143. The Court directed that the Criminal Practice Committee and the Administrative Director of the Courts revise the plea form to inform a non-citizen defendant that "if your plea of guilty is to a crime considered an aggravated felony under federal law you will be subject to deportation/removal," and to instruct defendants of "their right to seek legal advice regarding their immigration status." Id. at 144. In Exhibit A of the opinion, the Court suggested language that would address its concerns. Id. By Directive # 08-09, dated September 4, 2009, the Administrative Office of the Courts re-issued the Main Plea Form with amendments to question #17, using the language set forth in Exhibit A of State v. Nuñez-Valdez. The Committee considered revisions to this language, but after a thorough and careful discussion it ultimately agreed that the plea form should contain the language in question #17 as suggested by the Court in State v. Nuñez-Valdez. The Committee agreed to continue to monitor the case law and statutory developments and to revisit this matter when appropriate.

During the 2009-2011 term, the Criminal Practice Committee continued to extensively discuss revisions to question #17 on the Main Plea Form, which addresses immigration consequences, in light of the recent state and federal cases that have revealed complexities within this area of the law. See State v. Nuñez-Valdez, 200 N.J. 129 (2009); Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010); Carachuri-Rosendo v. Holder, ___ U.S. __, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010). At its September 2010 and October 2010 meetings, the Committee examined the relevant cases and focused on comprising language for the Plea Form that would strike a proper balance between the judge's responsibility to ensure that a defendant enters a knowing and intelligent plea and the responsibility of defense counsel to provide adequate advice to their clients. The Committee focused upon possible alternative language to be included on the form.

The Committee has separately forwarded recommendations to revise the plea form to address immigration consequences of a guilty plea to the Court for consideration. The document, entitled "Report on Revisions to the Plea Form to Address Immigration Consequences of a Guilty Plea," which was submitted by the Supreme Court Criminal Practice Committee in February 2011, sets forth the Committee's full recommendation and discussion of this topic, including the dissents and comments that were filed. It is attached as Attachment A to this Report.

B. Post Conviction Relief Rules

In the 2007-2009 term, the Supreme Court approved most of the amendments to the rules governing post-conviction relief that that were proposed by the Committee in its 2007-2009 report, with some adjustments based upon public comments. The rule amendments that were adopted by the Court went into effect on September 1, 2009. The Court asked the Committee to reconsider some of the proposed language in R. 3:22-4, R. 3:22-10(a), R. 3:22-11 and R. 3:22-12. The Committee revised the rules, as requested by the Court. The Court adopted the revisions, effective February 1, 2010.

As adopted by the Court, the procedural bars set forth in R. 3:22-4 were revised to address a defendant's first application for post-conviction relief in R. 3:22-4(a) and a defendant's second and subsequent post-conviction relief application in R. 3:22-4(b). Rule 3:22-4(a) now provides that a ground for relief asserted in a defendant's first petition for post-conviction relief, that was not previously raised, is barred unless it alleges at least one of three grounds for relief: (1) the petition must allege that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; (2) the petition must allege that the "that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice;" or (3) the petition must allege that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Addressing second or subsequent applications for post-conviction relief, R. 3:22-4(b) provides that a second or subsequent petition for post-conviction relief is

procedurally barred, and should be dismissed, unless it is timely filed under R. 3:22-12(a)(2) and it alleges at least one of three grounds for relief: (1) the petition must allege on its face that it "relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings;" (2) the petition must allege on its face "that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted;" or (3) the petition must allege on its face "a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief."

Rule 3:22-10(a) was amended to clarify that a defendant shall be entitled to be present at a post-conviction relief hearing where oral testimony is adduced, however, the defendant's presence can be waived by counsel, upon request of the defendant.

Rule 3:22-11 was amended to establish a time frame for the court considering the post-conviction relief application to issue its final determination on the application. The rule provides that the court shall make its final determination not later than 60 days after the post-conviction relief hearing. If there is no hearing, the final determination shall be made not later than 60 days after the filing of the last amended petition or answer. If the judge needs additional time to issue the final determination, the rule allows for a 30-day extension, if approved by the Criminal Presiding Judge.

Finally, R. 3:22-12 was amended to clarify that the 5-year time period to file a petition for post-conviction relief is 5 years after the date of the entry of the judgment of conviction being challenged. There is a reference in the rule to R. 3:21-5, which states that the judgment "shall set forth the plea, the verdict or findings, the adjudication and sentence, a statement of the reasons for such sentence, and a statement of credits received pursuant to R. 3:21-8." The standard to overcome the time bar has been revised to require a showing of excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice.

As an exception to the 5-year time bar, a post-conviction relief petition dismissed without prejudice because a direct appeal, including a petition for certification is pending shall be treated as a first petition if refiled within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within 5 years after the date of the entry of the judgment of conviction being challenged, whichever is later. R. 3:22-12(a)(3). In addition, a post-conviction relief petition dismissed without prejudice as not cognizable under R. 3:22-2 for insufficient verification or for failing to meet the contents requirements of R. 3:22-8, shall be treated as a first petition if amended and refiled within 90 days after the date of dismissal, or 5 years after the date of the entry of the judgment of conviction being challenged, whichever is later. R. 3:22-12(a)(4).

For a second and subsequent petition for post-conviction relief, the rule provides that no second or subsequent petition for post-conviction relief shall be filed more than one year after the latest of:

(a) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the New Jersey Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review

(b) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence,

(c) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.

IV. Recommendations For Legislative Change

A. State v. Kent, 391 N.J. Super. 352 (App. Div. 2007)

In State v. Kent, 391 N.J. Super. 352 (App. Div. 2007) the Appellate Division held that the Confrontation Clause of the Federal Constitution and the testimonial/non-testimonial standards of admissibility set forth in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) apply to drunk driving prosecutions in municipal court. The Kent court asked the Legislature, the Criminal Practice Committee and the Municipal Court Practice Committee to "consider the adoption of statutes or court rules patterned after N.J.S.A. 2C:35-19 that would create similar notice-demand requirements for State Police lab reports used in DWI trials and also for blood sample certificates generated under N.J.S.A. 2A:62A-11." State v. Kent, 391 N.J. Super. at 382.

The Kent court also asked that the Legislature and Committees "explore means of abating the time and travel burdens upon nurses, chemists and other third-party witnesses who now will be constitutionally required to travel to municipal court for DWI trials," such as "the feasibility of remote video conferences at trials or de bene esse videotaped depositions, so that such witnesses need not physically appear in municipal courts late at night and whether the scheduling or venues of DWI trials might be altered to minimize logistical burdens on medical providers and laboratory personnel, including the creation of special daytime court calendars to accommodate such witnesses." State v. Kent, 391 N.J. Super. at 383.

Shortly after Kent was released, a Joint Municipal/Criminal Subcommittee was formed to address these issues. Thereafter, on May 16, 2007, the Supreme Court granted

certification in State v. Buda, State v. Berezansky, State v. Sweet, and State in the Interest of J.A., which addressed similar confrontation issues as those raised in Kent. The subcommittee decided to await these rulings to reconvene. In June 2008, the Supreme Court decided State v. Buda, State v. Sweet, and State in the Interest of J.A. As set forth in its 2007-2009 report, the Committee decided that in light of these decisions, it need not reconvene the subcommittee or recommend a rule change at that time.

Subsequent to the filing of the Committee's report, on June 25, 2009, the United States Supreme Court decided Melendez v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) where it held that a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the Confrontational Clause as set forth in Crawford v. Washington. The Melendez Court found that the admission of this evidence violated the defendant's 6th Amendment right to confront witnesses against him.

Thereafter, on June 29, 2009, the United States Supreme Court granted certiorari in Briscoe v. Virginia to resolve the following question: "If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?" During the 2009-2011 term, the Criminal Practice Committee decided to revisit Kent after Briscoe was decided.

On January 25, 2010, the Supreme Court decided Briscoe. Briscoe v. Virginia, __ U.S. __, 130 S.Ct. 1316, 175 L.Ed.2d 966 (2010). In Briscoe, the Supreme Court vacated

the judgment of the Virginia Supreme Court and remanded the case for further proceedings not inconsistent with the opinion in Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Upon the release of Briscoe, the Criminal Practice Committee revisited State v. Kent, and the subsequent federal case law and decided not to recommend a rule change. The Committee was of the view that it would be more appropriate to refer this issue to the Court with a recommendation that the Committee supports a legislative change consistent with Kent and the U.S. Supreme Court cases. As a result, the Committee did not see the need to reconstitute the subcommittee at this time. The Committee will revisit this topic and any rule proposals in the future, if necessary.

V. Rule Amendments and Other Issues Considered and Rejected

A. Rule 3:4-2 – First Appearance – Explaining Range of Penal Consequences

Effective September 1, 2009, by recommendation of the Municipal Court Practice Committee, the Court amended R. 7:3-2 of the rules governing municipal courts to provide that at the first appearance, the judge shall inform defendant of the range of penal consequences for each offense charged. R. 3:4-2 is the corollary rule in Part III of court rules, which addresses first appearances. The Committee was asked if R. 3:4-2(b) (procedure in indictable offenses and non-indictable offenses in superior court) and/or (c) (procedure in non-indictable offenses) should be amended to be consistent with R. 7:3-2.

The Committee discussed how the phrase "range of penal consequences for each offense charged" should be interpreted, because of the numerous penal consequences set forth in the criminal code. The Committee acknowledged that at various stages in the pretrial process defendants are advised of the possible sentencing ranges and mandatory periods of parole ineligibility for crimes. Furthermore, unlike the procedure in municipal court regarding non-indictable offenses, all defendants in the criminal system are afforded attorneys to provide advice on the potential consequences of a guilty plea. Additionally, when entering a guilty plea for an indictable offense, defendants complete the necessary plea forms, which also set forth penal consequences that would be applicable for the offense for which they will enter a guilty plea. In light of the different procedures for indictable and non-indictable offenses, the Committee reached the consensus that is was not necessary to amend R. 3:4-2.

B. Rule 3:21-10 – Amendments to N.J.S.A. 2C:35-7 (L. 2009, c. 192)

The Committee discussed the amendments to N.J.S.A. 2C:35-7 (L. 2009, c. 192), which authorizes the court to waive or reduce a period of parole ineligibility or grant probation for drug-free school zone violations under certain circumstances. Section 2 of the law provides that:

> notwithstanding any court rule limiting the time period within which a motion to reduce or change a sentence may be filed, any person who, on the effective date of this act, is serving a mandatory minimum sentence as provided by [N.J.S.A. 2C:35-7] and who has not had his sentence suspended or been paroled or discharged may move to have his sentence reviewed by the court.

The Committee discussed whether R. 3:21-10(b) should be amended in light of these statutory amendments and the line of cases which hold that where a parole ineligibility term is required by statute, an application pursuant to R. 3:21-10(b) may not be granted to reduce or change the sentence until after the completion of the mandatory minimum term. See State v. Mendel, 212 N.J. Super. 110 (App. Div. 1986); State v. Brown, 384 N.J. Super. 191 (App. Div. 2006). Rule 3:21-10(b)(4) also permits amendment of sentences as authorized by the Code of Criminal Justice.

The Committee decided that no rule amendment is necessary.

C. State v. Trietsman, 416 N.J. Super. 195 (App. Div. 2010) – Standards for Charging the Grand Jury

In State v. Trietsman, 416 N.J. Super. 195 (App. Div. 2010), the Appellate Division referred to the Criminal Practice Committee for consideration, the adoption of standards for prosecutors to follow in charging the grand jury. State v. Triestman, 416 N.J. Super. at 207 n4. In Trietsman, the prosecutor read relevant statutes to the grand jury panel on September 23, 2008. Two months later, on December 12, 2008, the grand jury considered the criminal sexual contact charges against defendant. In the interim, the grand jury had considered a variety of crimes. The Appellate Division stated: "[a]t the very least, the prosecutor on December 12, 2008 should have provided the jury with a written charge on the elements of criminal sexual contact, including relevant definitions and the pertinent portions of N.J.S.A. 2C:14-2c. As a result, the instructions given were so misleading that the indictment cannot stand." State v. Triestman, 416 N.J. Super. at 207.

The Committee considered this matter and whether the judiciary should prescribe the way that prosecutors instruct the grand jury. For instance, it was questioned whether the court can issue a Directive requiring that prosecutors give case-specific instructions to the grand jury. The Committee agreed that in Trietsman, the primary issue was that the instructions provided to the grand jury were incorrect and incomplete. The Committee was informed that in light of Trietsman, the Attorney General's Office will provide guidance to prosecutors on charging the grand jury. The Committee was satisfied that the Attorney General's Office would provide guidance on this matter to prosecutors and,

therefore, did not recommend a rule change. Upon request, the Committee will review this matter in the future, if necessary.

VI. Other Business

A. Amendment to RPC 1.6

By memo dated May 21, 2010, the Professional Responsibility Rules Committee (PRRC) requested that the Criminal Practice Committee consider the following question:

> Should an attorney be required to maintain the confidentiality of information relating to the representation of a client where the information demonstrates that an innocent person has been wrongly convicted of a crime with significant penal consequences?

The Committee discussed this matter extensively with the focus being on whether the issue of correcting the injustice of a wrongful conviction should trump the confidentiality of information relating to representation of a client. The Committee was unable to reach a consensus on whether or not a rule requiring an attorney to divulge information demonstrating that an innocent person has been convicted of a crime with significant penal consequences should be adopted. The Committee submitted a memorandum to the PRRC expressing concerns raised by the members on how a rule proposal requiring disclosure of confidential information could impact upon the attorney-client relationship in criminal cases. More specifically, the Committee discussed whether the intent of the rule would be to address a current case involving a client, an unrelated case involving the wrongful conviction of someone else, or both. The Committee also identified the complex application of such a rule in criminal cases involving co-defendants, particularly when one defendant desires to shift blame to a cohort. Among other issues, the Committee discussed the potential for an attorney to become a witness against the client and whether a client should be given immunity with regard to a

statement that is provided. With regard to language that may be proposed for the rule, most members agreed that the terms “demonstrates” and “significant penal consequences” would have to be defined to guide attorneys on the circumstances for which disclosure would be required.

Ultimately, the Criminal Practice Committee was divided on whether or not a rule requiring an attorney to divulge information demonstrating that an innocent person has been convicted of a crime with significant penal consequences should be adopted. The Committee recognized that almost all of its members are also representatives of various groups that were also asked to comment on this matter. The Committee requested an opportunity to review and comment upon any rule amendment that is proposed by the PRRC, prior to its submission to the Court. Alternatively, the Committee would consider commenting upon any proposal to amend RPC 1.6 during the normal public comment period.

B. Disposition of Municipal Matters in Superior Court

In the last term, the Committee discussed a proposed Directive from the Conference of Criminal Presiding Judges and the Conference of Municipal Presiding Judges who have been jointly working on clarifying a paperwork flow when Superior Court judges dispose of Municipal matters that accompany indictable charges. At that time, the Committee determined that, because issues regarding the prosecution and representation of defendants in municipal matters were involved, this proposal should be considered by the County Prosecutors Association and by the Office of the Public Defender (OPD) for their input.

The OPD and the Prosecutors Association have filed their responses for the Committee's consideration. The Office of the Public Defender "would be most comfortable with a Directive that does not require the OPD to provide representation for the adjudication of motor vehicle offenses unless it involves the dismissal of such offenses as part of a plea agreement including drunk-driving cases." It was explained that municipal matters fall outside of the OPD's statutory jurisdiction to provide representation. It was noted that, as recognized in In Re Cannady, 126 N.J. 486 (1991), the Public Defender Act has been interpreted to require that the OPD provide ancillary services and necessary expenses of representation for an indigent defendant, regardless of whether that defendant is represented by the OPD. Thus, representatives from the OPD were opposed to possibly extending the requirement to provide ancillary services to municipal matters, such as breathalyzer challenges that arise in DWI cases, or other disputes that arise in municipal court. In its response, the County Prosecutors

Association "voted to support the draft Directive," but raised one item of concern regarding assistant prosecutors handling cases that cannot be pled out in Superior Court.

The Committee had no objections to the section of the Directive that set forth the process for Superior Court judges to adjudicate municipal court matters. It recommended, however, that the Conference of Criminal Presiding Judges and the Conference of Municipal Court Presiding Judges revisit the issue with regard to the response provided by the OPD regarding representation of defendants on municipal matters and the County Prosecutors Association's concern that assistant prosecutors might have to try municipal cases that cannot be pled out in Superior Court. The Conferences are also being asked to consider developing a process to better track matters, particularly traffic tickets that are forwarded for disposition as part of a case with indictable charges. This Committee will revisit this matter, if requested, in the future.

C. Procedures to Consider a Reduction in Bail When a Defendant is Charged With a Crime or Offense Involving Domestic Violence

The Committee was asked to consider proposing a court rule to set forth a procedure by which a superior court judge can consider a reduction in bail when a defendant is charged with a crime or offense involving domestic violence. N.J.S.A. 2C:25-26e states as follows:

> Once bail is set it shall not be reduced without prior notice to the county prosecutor and the victim. Bail shall not be reduced by a judge other than the judge who originally ordered bail, unless the reasons for the amount of the original bail are available to the judge who reduces the bail and are set forth in the record.
>
> [N.J.S.A. 2C:25-26e].

It was discussed that currently there are no uniform procedures in place for municipal court judges or superior court judges to set forth the reasons for the original bail when a defendant is charged with a crime or offense involving domestic violence. Some Committee members noted, however, that in circumstances when specific reasons for the imposition of the bail are not provided by the judge who ordered the bail, when superior court judges preside over bail reduction motions, they are often provided with information from the prosecutor and/or victim regarding the matter.

The Committee decided to refer this matter to the Municipal Court Practice Committee to consider creating a form and procedure to memorialize the statement reasons, consistent with N.J.S.A. 2C:25-26e, for the amount of the original bail that is set when defendant is charged with a crime or offense involving domestic violence for

consideration by another judge in a bail reduction motion. The Committee will revisit this topic, in the future, if necessary.

D. Uniform Discovery Fees

The Committee was asked to consider clarifying: (1) what is to be included in automatic discovery under R. 3:13-3(b) and what is not; (2) what the State may charge for reproduction of paper and digital discovery; and (3) the rights of defense counsel to copy digital discovery, rather than pay a reproduction charge. The Committee was informed that the Special Supreme Court Committee addressing E-Discovery, is considering similar rule proposals related to automatic discovery and reproduction fees. The Criminal Practice Committee referred this matter to the E-Discovery Committee for consideration of appropriate amendments to Part III and Part VII of the rules of court. The Committee will revisit this topic and any rule proposals in the future, if necessary.

VII. Matters Held for Future Consideration

A. Pretrial Intervention (PTI) Guidelines

In the 2004-2007 term, the Committee was asked to consider whether the PTI Guidelines should be updated in light of State v. Moraes-Pena, 386 N.J. Super. 569 (App. Div. 2006) in which the Appellate Division reversed the trial court's order admitting the defendant into the Pretrial Intervention (PTI) Program over the prosecutor's objection. In the current term, the Committee continued its consideration of this topic and considered State v. Werkheiser, App. Div. Dkt. No. A-2355-07T4 (unpublished opinion) (App. Div. May 12, 2010) in which the Appellate Division affirmed the order denying defendant's enrollment into PTI, but stated that "PTI was not designed to be a prosecutor's tool to gain cooperation, and in fact acknowledgement of guilt is not required under the guidelines." (Slip. op. at 2). A month later, in State v. Green, 413 N.J. Super. 556 (App. Div. 2010), the Appellate Division considered circumstances surrounding a defendant's application for PTI. It stated that the "Criminal Practice Committee may wish to consider developing a uniform set of PTI application forms and directions, and uniform procedures to be used in processing those applications." Id. at 562.

In State v. Randall, 414 N.J. Super. 414 (App. Div. 2010), the Appellate Division stated that "[i]n this case, the Prosecutor's Office incorrectly attempted to condition defendant's participation in PTI upon her pleading guilty." Id. at 421. The court quoted Guideline 4 governing the PTI program, which states:

> Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilt. Enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective.
> Id. at 421 (quoting Pressler, Current New Jersey Court Rules, Guideline 4 at 1067.]

In Randall, the court also referenced the official comment to Guideline 4 governing PTI, which explains that "[n]either admission of guilt nor acknowledgment of responsibility is required. Steps to bar participation solely on such grounds would be an unwarranted discrimination." Id. at 421. Thus, the Appellate Division concluded that "the Prosecutor's Office erred in requiring defendant to plead guilty as a prerequisite for admission into PTI." Id. at 421.

The Committee discussed whether a subcommittee should be formed to address PTI matters. The Committee was informed that the Conference of Criminal Presiding Judges is considering a proposed report with revisions to PTI guidelines and procedures. The Committee decided to wait until the Presiding Judges have reviewed the PTI package to determine if it is necessary to form a subcommittee to handle the issues raised in State v. Moraes-Pena, State v. Werkheiser, State v. Randall and State v. Green. The Committee agreed to revisit this topic in the future.

B. State v. Delgado, 188 N.J. 48 (2006) – Recording Requirements For Out-Of-Court Identifications

This is a matter held for future consideration from the 2007-2009 term. In State v. Delgado, 188 N.J. 48 (2006), the New Jersey Supreme Court exercised its supervisory powers under the New Jersey Constitution "to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witnesses and the interlocutor, and the results." The Court added that "[w]hen feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared." Id. at 63. The Court also noted that although electronic recordation was advisable in stationhouse interviews where recorders might be available, it was not mandated. Ibid. The Court requested that the Committee prepare a rule requiring that law enforcement officials record out-of-court identification procedures consistent with the opinion. Last term, the Committee considered a rule proposal and had several comments.

The Committee discussed whether this matter relates to the integration of technology, which is currently being considered by a special committee formed by the Supreme Court to address issues involving electronic discovery. The Committee also discussed whether this topic overlaps or may have an impact upon issues that are being considered in State v. Henderson which is pending before the Supreme Court. Henderson involves the issue of whether evidence of eyewitness identification against the defendant

was impermissibly suggestive and thus inadmissible under Manson v. Braithwaite, 432 U.S. 98 (1977) and State v. Madison, 109 N.J. 223 (1988). The Committee agreed to revisit State v. Delgado after the resolution of the Henderson litigation and in consideration of the progress of the Discovery Committee.

C. State v. O'Brien, 200 N.J. 520 (2009) – Distribution of Written Jury Instructions

In State v. O'Brien, 200 N.J. 520, 541 (2009), the Court referred to the Civil and Criminal Practice Committees consideration of standards for submission of written jury instructions to the jury during deliberations. A subcommittee was formed to make recommendations in accordance with the Supreme Court's directive. The subcommittee conducted a survey of Criminal Division judges in the State to determine their practices and opinions about written jury instructions. The survey revealed that a low percentage of judges have used written jury instructions, and only a few have routinely provided a full set of instructions. While several judges expressed a negative view of written instructions, the majority seemed receptive to providing written instructions but had doubts about the technical ability of their chambers to prepare written instructions and keep trials moving without undue delay.

The full Committee discussed the issue at length and reached a consensus that written jury instruction would be beneficial, if not necessary, to a criminal jury's understanding of the law applicable to its determination of the issues. The committee also favored providing the jury with a full set of written of jury instructions rather than only part of the instructions in writing. No valid reasons were found for avoiding written instructions other than potential delay in the trial. Several judges on the committee who have used written jury instructions in their own trials commented that they experienced no or minimal delays in their trials, and that they could assist other judges and their staffs in learning how to prepare written instructions efficiently as a trial progressed.

The Committee eventually voted to recommend that written jury instructions be used in all criminal trials unless good cause was shown to forego them. However, the Committee believed that its recommendation could not be immediately implemented because many judges and their staffs are not able to prepare timely written instructions at this time. Therefore, the Committee's proposal was conditioned upon delayed implementation of a rule amendment pending training of judges and staff.

Subsequently, the Committee learned that the Civil Practice Committee was just beginning its consideration of the matter for civil trials because of its report cycle. Because Rule 1:8-8 applies to both criminal and civil jury trials, the Committee determined to seek postponement of its recommendation to attempt coordination with the Civil Practice Committee's proposals that has already been reported to the Supreme Court.

D. Presentence Investigation Reports

In the 2007-2009 term, the Committee submitted a package of recommendations to the Supreme Court addressing corrections to presentence investigation (PSI) reports, including: developing a uniform protocol to memorialize challenges and corrections made to the presentence investigation report; incorporating the court's findings regarding challenges and corrections; and forwarding revised presentence investigation reports to the parties and interested entities. The Committee also recommended adding "disclaimer" language to the "offense circumstances" section of the presentence investigation report to clarify that the offense circumstances includes descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to and that the offense circumstances section should be read in conjunction with the final charges and the defendant's version of the offense. The Court considered these recommendations and the Committee was asked to further consider the following:

1. Developing a procedure to ensure that a defendant's challenge to a criminal or court history record is resolved, memorialized and forwarded to the appropriate parties and entities.

2. Reconsidering the recommendation to add "disclaimer" language to the offense circumstances section of the PSI report, in that it may not sufficiently address the impact upon the use of PSI reports by outside agencies and during post-sentencing proceedings, such as in Sexually Violent Predator cases and parole board hearings, where PSI reports are relied upon in subsequent hearings to determine the actual facts of the case.

The Committee reconstituted the PSI subcommittee to explore these issues. The subcommittee is continuing to review this topic.

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E. Trial *De Novo* Standard of Review – Municipal Appeals

With the increasing high caliber and experience of municipal court judges, the Committee considered whether the *de novo* standard of review for municipal court appeals should be revised and to consider alternative standards of review for these matters.

Over the years, as evidenced in the governing statutes, court rules and administration through the Administrative Office of the Courts (AOC), there has been substantial improvement in the municipal court system. As a centralized division of the AOC, the Municipal Court Services Division provides comprehensive training and technological support to the municipal courts across the state. The AOC also provides a vast informational site for municipal court judges and staff, which includes correspondence, training, statistics and valuable resources to enable the municipal courts to run smoothly and efficiently. See Judiciary Infonet, Municipal Courts Web. Newly-appointed municipal court judges attend an orientation seminar covering legal topics ranging from bail to search and seizure and from motor vehicle offenses to domestic violence. Administrative areas, such as budget and fiscal management, court management techniques and systems are covered as well. At an annual conference of Municipal Court Judges, training has been provided on a wide variety of subject matters, including bench demeanor and professionalism, court management, and updates on recent legislation and caselaw. Municipal court judges are also encouraged to participate in brainstorming efforts to improve the court rules and procedures. This training, along with the increasing high caliber and experience of municipal court judges, since R. 3:23

was developed provides strong support that the *de novo* review for municipal appeals is no longer necessary.

The Committee has formed a subcommittee to explore alternative standards of review for municipal appeals. The subcommittee is continuing to review this topic.

F. **Preservation of Evidence.**

Several years ago the Office of the Public Defender proposed a rule recommendation mandating the preservation of evidence by prosecuting authorities. Shortly thereafter, the Division of Criminal Justice issued a Directive addressing the storage of DNA evidence. As a result, storage of DNA evidence has not been a problem and the rule proposal was not considered extensively by the Committee. The Public Defender's office has reported, however, that the preservation of large physical evidence is still an issue. Given technological advances, the Office of the Public Defender asked that the Committee reconsider this topic. A discussion ensued and the Committee created a subcommittee comprised of representatives from the Attorney General's Office, Prosecutor's Office, Office of the Public Defender and private defense bar to address this issue. The Committee is continuing to review this topic.

G. R. 3:14-1(j) – Technical Amendment

The Committee considered a technical amendment to R. 3:14-1(j) in recognition of the rights accorded civil partners. The Civil Practice Committee is making similar amendments to the Part I and Part IV rules. Several members pointed out that other paragraphs of R. 3:14-1 many need to be amended because they may be outdated. The Committee is continuing to review this topic.

Respectfully submitted,

Honorable Edwin H. Stern, Chairman
Honorable Lawrence Lawson, Vice-Chairman
Honorable Christine Allen – Jackson
Honorable Victor Ashrafi
Honorable Marilyn C. Clark
Honorable Gerald J. Council
Honorable Frederick P. DeVesa
Honorable Garry J. Furnari
Honorable Albert J. Garofolo
Honorable Pedro J. Jimenez, Jr.
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<u>Attachment A</u>

Report on Revisions to the Plea Form to Address Immigration Consequences of a Guilty Plea

Report on Revisions to the Plea Form to Address Immigration Consequences of a Guilty Plea

Submitted by:
Supreme Court Committee on Criminal Practice

February 14, 2011

RECOMMENDATION

Based on the comprehensive report attached, the Committee recommends that Question #17 of the plea form, which addresses immigration consequences, be amended to read as follows:

a.	Do you understand that pursuant to federal law that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?	[Yes]	[No]
b.	Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty?	[Yes]	[No]

A dissent and comments including alternative proposed questions that were filed by Committee members are contained in the Appendices of this report.

I. OVERVIEW

In State v. Nuñez-Valdez, 200 N.J. 129 (2009), the Court held that the defendant was misinformed about the immigration/deportation consequences of his guilty plea, and therefore, under our state constitution, the guilty plea must be vacated due to ineffective assistance of counsel. The Court stated that "our plea procedures should be modified to help ensure that a non-citizen defendant receives information sufficient to make an informed decision regarding whether to plead guilty." Id. at 143. The Court directed that the Criminal Practice Committee and the Administrative Director of the Courts revise the plea form to inform a non-citizen defendant that "if your plea of guilty is to a crime considered an aggravated felony under federal law you will be subject to deportation/removal," and to instruct defendants of "their right to seek legal advice regarding their immigration status." Id. at 144. In Exhibit A of the opinion, the Court suggested language that would address its concerns. Id. By Directive # 08-09, dated September 4, 2009, the Administrative Office of the Courts re-issued the Main Plea form with amendments to question #17, using the language set forth in Exhibit A of State v. Nuñez-Valdez. The current questions on the Plea Form as promulgated by Directive #08-09 are set forth in Appendix A .

Thereafter, the Plea Form Subcommittee of the Criminal Practice Committee reviewed Nuñez-Valdez and agreed that the plea form should contain the language in question #17 as suggested by the Court therein. The Committee thoroughly discussed and carefully considered all of the issues involved, however, at that time, the Committee was unable to reach a consensus on how to revise the questions that the Court suggested in Nuñez-Valdez to address aggravated felonies. Nor could the Committee agree upon any additional language that would encompass all of the other important concerns that were raised regarding a defendant's immigration status. In all, the Committee determined that because there are so many caveats and nuances in immigration law, question #17 should remain as is, with the Nuñez-Valdez revisions as promulgated in Directive #08-09. The Committee felt it was riskier to amend the

question in light of the intricacies of immigration law. The Committee agreed to continue to monitor the case law and statutory developments and to revisit this matter when appropriate.

During the 2009-2011 term, the Criminal Practice Committee continued to extensively discuss revisions to question #17 on the Main Plea Form, which addresses immigration consequences, in light of State v. Nuñez-Valdez, supra, and subsequent federal cases that have revealed complexities within this area of the law. In Padilla v. Kentucky, 559 U.S. __, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and Carachuri-Rosendo v. Holder, ___ U.S. __,130 S.Ct. 2577, 177 L.Ed.2d 68 (2010), the United States Supreme Court provided further guidance on this issue.

In Padilla, the Court decided "whether as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in removal from this country." Padilla, 130 S.Ct. at 1479. The United States Supreme Court agreed with the defendant "that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." Id. Thus, the Supreme Court found that the defendant "has sufficiently alleged constitutional deficiency" to satisfy the first prong of Strickland v. Washington, 466 U.S. 668 (1984). Padilla, 130 S.Ct. at 1483. The Supreme Court did not decide whether the defendant satisfied the second prong of Strickland. It left to the Kentucky state court to determine whether the defendant in this specific case was prejudiced by counsel's failure to give that advice. Padilla, 130 S.Ct. at 1483-84. The Padilla Court provided, in dicta:

> Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal

> charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.[1]
>
> Padilla, 130 S.Ct. at 1483.

The Court provided that Padilla "was 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." [2] Padilla, 130 S.Ct. at 1483.

Thereafter, in Carachuri-Rosendo v. Holder, decided on June 14, 2010, the United States Supreme Court further defined the term "aggravated felony" under federal immigration law. The Court held "that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' under § 1229b(a)(3) of a 'felony punishable' as such under the Controlled Substances Act," 18 U.S.C. § 924(c)(2)." Carachuri-Rosendo v. Holder, 130 S.Ct. at 2589. The Court pointed out that "[t]he prosecutor in Carachuri-Rosendo's case declined to charge him as a recidivist" and therefore

---

[1] However, in footnote 10, the majority also provided:

> "As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice."
>
> Padilla, 130 S.Ct. at 1483.

[2] As set forth in 8 U.S.C. § 1227, there are numerous classes of deportable aliens, including, but not limited to aliens convicted of: (1) a crime of moral turpitude (8 U.S.C. § 1227(a)(2)(A)(i)); multiple criminal convictions (8 U.S.C. § 1227(a)(2)(A)(ii)); aggravated felony (8 U.S.C. § 1227(a)(2)(A)(iii)) and 8 U.S.C. § 1101(a)(43)(A)-(U)); high speed flight (8 U.S.C. § 1227(a)(2)(A)(iv)); failure to register as a sex offender (8 U.S.C. § 1227(a)(2)(A)(v) and 18 U.S.C. § 2250)); controlled substances (8 U.S.C. § 1227(a)(2)(B) and 21 U.S.C § 802)); certain firearms offenses (8 U.S.C. § 1227(a)(2)(C) and 18 U.S.C § 921(a)); crimes of domestic violence stalking or violation of protection order, crimes against children (8 U.S.C. § 1227(a)(2)(E)); trafficking (8 U.S.C. § 1227(a)(2)(F)); failure to register and falsification of documents, including document fraud (8 U.S.C. § 1227(a)(3)(A)-(C));security and related grounds, including terrorist activities, (8 U.S.C. § 1227(a)(4)); public charge (8 U.S.C. § 1227(a)(5)); and unlawful voters (8 U.S.C. § 1227(a)(6)).

the defendant has not been convicted of a felony punishable under the federal Controlled Substances Act. Carachuri-Rosendo v. Holder, 130 S.Ct. at 2590.

At its September 2010 and October 2010 meetings, the Committee examined the relevant cases and focused on comprising language for the plea form that would strike a proper balance between the judge's responsibility to ensure that a defendant enters a knowing and intelligent plea and the responsibility of defense counsel to provide adequate advice to their clients. The Committee focused upon possible alternative language to be included on the form.

While the Committee was split on many issues, the general view was that many different crimes in New Jersey could possibly fall within different categories of crimes with federal immigration consequences. Much of the determination of potential immigration consequences requires consideration of a defendant's immigration status, the actual crime and the sentence that is imposed. The general consensus among the members was that any meaningful information or advice that is provided to a defendant about possible immigration consequences is primarily dependent on the defendant's immigration status. Therefore, the Committee was of the general view that any questions listing possible crimes or categories of crimes with immigration consequences on the Plea Form would be incomplete. Unlike the current language in question #17 on the Main Plea Form, which references aggravated felonies, the amendments being proposed by the Committee, which are set forth below, do not references specific crimes or categories of crimes. In that respect the proposed language differs from the current version of question #17 of the Main Plea Form that was promulgated in Directive #08-09 in light of State v. Nuñez -Valdez and which addressed aggravated felonies.

II. COMMITTEE'S DISCUSSIONS

A. September 2010 Proposed Revisions to the Plea Form - Retracted at the October 13, 2010 Meeting

At the September meeting, the Committee also considered questions set forth on a proposed "Supplemental Plea Form For Persons Who are Not United States Citizens or

Nationals," submitted by Judge Jimenez, as well as modifications to Judge Jimenez's form, provided by Richard Barker, Esq. The Supplemental Plea Form, which is appended to this report, sets forth a series of questions designed to focus on possible immigration consequences a defendant may be facing and to initiate discussions between defense attorneys and their clients. Unlike the current language contained in question #17 on the Main Plea Form, which references aggravated felonies, the proposed Supplemental Plea Form does not include references to specific crimes or categories of crimes.

With regard to the Main Plea Form, the Committee agreed to delete questions 17(b), (c) and (d) from the Plea Form, which provide as follows:

> (b) Do you understand that if you are not a United States citizen or national, you **may** be deported by virtue of your plea of guilty?
>
> (c) Do you understand that if your plea of guilty is to a crime considered an aggravated felony" under Federal law you **will** be subject to deportation/removal
>
> (d) Do you understand that you have the right to seek legal advice on your immigration status prior to entering a plea of guilty?

The Committee voted to keep the question: "Are you a Citizen of the United States?" as question #17a, with the option for the defendant to answer yes or no, and to add language stating: "If you have answered **'No'** to this question, you must complete the **'Supplemental Plea Form for Persons Who Are Not United States Citizens.'"**

The Committee voted 22-2 in favor of submitting to the Court the proposed Supplemental Plea Form and changes to question #17 of the Main Plea Form, as set forth above, with the understanding that the questions may be supplemented orally. Two members objected and indicated that they may file a dissent. The complete proposals to amend the plea form and to promulgate the supplemental plea form are appended to this report.

B. <u>October 2010 - Proposed Revisions to the Plea Form</u>

After the September meeting, the Office of the Public Defender (OPD) filed a dissent to the Committee's proposed revisions to question #17 on the Main Plea Form and the new

questions set forth on the Supplemental Plea Form addressing immigration consequences. The OPD'S dissent is fully set forth in Appendix C of this Report. The OPD's dissent was discussed by the Committee, as it was recognized that the OPD represents the vast majority of criminal defendants who may be impacted by the proposed revisions to the Plea Form.

1. Question #17a – Are You A United States Citizen?

At both the September and October meetings, the Committee engaged in a lengthy discussion on whether question #17a, which states: "Are You a Citizen of the United States?" should remain on the Plea Form. The Committee's discussion focused on whether the court should ask a criminal defendant about his/her immigration status.

2. Potential 5th Amendment Violation and Impact on Defense Counsel's Representation

It was expressed that this question could infringe upon the attorney-client privilege, impact the responsibility of defense counsel to provide adequate representation, and possibly create 5th amendment concerns. Some members, including the OPD, expressed that this question raises 5th amendment concerns because citizenship is an element of federal criminal offenses. Therefore, it was expressed that such an admission on the NJ plea form could violate a non-citizen defendant's 5th amendment right to remain silent. Moreover, it was expressed that requiring a non-citizen to indicate on the record in a criminal matter their citizenship status, either orally or in writing, amounts to compelling that person to incriminating themselves as this information could be used as basis for adverse immigration actions. As cited in the OPD's dissent, in a number of jurisdictions a defendant shall not be required to disclose his or her legal status in the United States to the court.

It was also expressed that the recent United States Supreme Court cases place the responsibility on defense counsel to ascertain a defendant's immigration status and inform their clients of the potential immigration consequences. In that respect, several members were

opposed to the court asking extensive questions of defendants, including whether the defendant is a United States citizen or where the defendant was born.

3. Ensuring Fairness to the Defendant to Enter a Knowing and Voluntary Plea

Other members, including some judges, were of the view that it is necessary for the court to inquire into a defendant's immigration status and, if necessary, to ascertain where the defendant was born, for purposes of providing a knowing and intelligent plea. It was expressed that question #17a should remain on the plea form to draw attention to the issue and to alert defendants who may be confused about their immigration status. From the perspective of some members it is necessary to ask if a defendant is a citizen of the United States to ensure fairness to defendants who may be confused about their immigration status. A member provided an example of a defendant who may come to the United States at a young age and may be unclear of or not know his or her status.

By asking these pointed questions, the judge who is taking the guilty plea can determine whether or not it is appropriate to probe further about a defendant's understanding of the potential immigration consequences. Several Committee members understood the role of the court to ensure that the defendant has discussed immigration consequences with his or her attorney, so that the defendant can enter a knowing and intelligent plea. The inquiry into a defendant's status has become more paramount as recent caselaw stresses the importance of defendant understanding immigration consequences prior to entering a guilty plea.

4. Finality to Victims

It was expressed that it is important to ensure that a non-citizen understands potential immigration consequences when entering a guilty plea because petitions for post-conviction relief and motions to vacate guilty pleas will be filed based upon a defendant's misunderstanding about immigration consequences. Ensuring that a defendant is advised of immigration consequences furthers the need to provide finality to victims, particularly when a post-conviction challenge is raised on this basis.

5. Alerting Defendants To Immigration Issues Throughout The Pretrial Process.

In the dissent, the OPD suggested that the court alert defendants and defense counsel to discuss immigration issues early in the pretrial process. The Supplement to Directive # 6-03, issued by the AOC on August 20, 2010, revised the Arraignment/Status Conference Order to address State v. Nunez-Valdez. Question #7 on the Arraignment/Status Conference Order now provides: "Defense counsel is to discuss with the defendant his/her immigration status, the potential consequences of the guilty plea or conviction and his/her right to seek legal advice on his/her immigration status. (State v. Nunez-Valdez, 200 N.J. 129 (2009))."

III. CONCLUSION – FINAL PROPOSED REVISIONS TO THE PLEA FORM

After a lengthy discussion, at the October 2010 meeting, the Committee voted 11-7 to (1) retract the September 2010 proposal (Appendix D) ; (2) to replace the current language of question #17 with the language proposed by the OPD, as modified by the Committee (Appendix B); and (3) to add question #7 from the proposed Supplemental Plea form (from the September 15, 2010 meeting) as question #17b on the Main Plea Form. The Committee unanimously voted in support of this suggestion, with the understanding that some members were originally opposed to retracting the September 15, 2010 proposal. Based upon the Committee's final vote, the proposal to amend question #17 is as follows:

17. a.	Do you understand that pursuant to federal law that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?	[Yes]	[No]
b.	Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty?	[Yes]	[No]

Additionally, AOC Directive #6-03 has been supplemented, effective August 20, 2010, to revise the Arraignment/Status Conference order to alert defendants and defense counsel to begin discussion about possible immigration consequences, early in the pretrial process.

IV. DISSENT AND COMMENTS

A. Dissent Filed by Honorable Marilyn C. Clark, P.J. Cr., Passaic County (Appendix E)

Joined By:
Honorable Lawrence M. Lawson, A.J.S.C., Vice-Chair, Criminal Practice Committee
Honorable Christine Allen-Jackson, J.S.C.
Honorable Pedro J. Jimenez, J.S.C.
Honorable Sheila A. Venable, P.J.Cr.

The Honorable Marilyn C. Clark, P.J.Cr., Passaic County, filed a comprehensive dissent to the Committee's final proposed revisions to the Plea Form as agreed upon at the October 13, 2010 meeting. Judge Clark's dissent is attached in Appendix E. Her dissent focuses upon the inquiry into the Citizen/Non-Citizen status of a defendant and highlights her disagreement with the deletion of question #17a on the plea form which asks a defendant "Are you as citizen of the United States?" Set forth in her dissent, Judge Clark proposes asking additional questions to those posed by the Committee. Judge Clark's full dissent, including proposed questions for the Plea Form and attached Exhibits are contained in Appendix E of this Report.

Judge Clark was joined by the Honorable Lawrence M. Lawson, A.J.S.C., Vice-Chair, Criminal Practice Committee, Honorable Christine Allen-Jackson, J.S.C., Honorable Pedro J. Jimenez, J.S.C., and Honorable Sheila A. Venable, P.J. Cr.

B. Comments Filed By The Honorable Pedro J. Jimenez, Jr. (Appendix F)

The Honorable Pedro J. Jimenez, Jr. joined in Judge Clark's dissent and filed separate comments, including alternative questions that are derived from the Committee's September 15, 2010 proposal. Judge Jimenez's full comment and proposed questions are set forth in Appendix F of this Report.

C. <u>Comments Filed By Boris Moczula, Esq., Assistant Attorney General</u> (Appendix G)

Joined By:
Ronald Susswein, Esq., Assistant Attorney General
John McNamara, Esq., Assistant Prosecutor
Philip Degnan, Esq. Assistant United States Attorney

Assistant Attorney General Boris Moczula, Esq. filed a separate comment to clarify that his vote regarding final proposed revisions to the Plea Form at the October 13, 2010 meeting and the issue of "advising the defendant that a criminal plea "may v. will" result in deporatation. AAG Moczula's comment, joined by AAG Ronald Susswein, Esq.; AP John McNamara, Esq.; and AUSA Philip Degnan, Esq. and is fully set forth in Appendix G of this Report

D. <u>Comments Filed By Richard Barker, Esq., Designee for the New Jersey State Bar Association</u> (Appendix H)

Richard Barker, Esq. filed a separate comment concerning the summary of the Committee's discussions on the immigration questions on the plea form and Judge Clark's dissent. Mr. Barker's comments about the question inquiring into a defendant's citizenship and the impact of immigration consequence in municipal courts, are fully set forth in Appendix H to this Report.

TABLE OF APPENDICES

APPENDIX	TITLE
Appendix A	Current Question # 17 on the Main Plea Form
Appendix B	Final Plea Form Amendments Agreed Upon By The Committee at the October 13, 2010 Criminal Practice Committee Meeting
Appendix C	Dissent to the September 15, 2010 Proposal to Amend the Plea Forms and Exhibit Filed By The Office of the Public Defender on September 24, 2010
Appendix D	Initial Plea Form Amendments Agreed Upon By The Committee at the September 15, 2010 Criminal Practice Committee Meeting and Retracted at the October 13, 2010 Meeting
Appendix E	Dissent to the October 13, 2010 Final Plea Form Amendments Addressing Immigration and Exhibits Filed By The Hon. Marilyn C. Clark, P.J.Cr. on January 11, 2011 – Joined By Hon. Lawrence M. Lawson, A.J.S.C., Vice-Chair, Criminal Practice Committee; Hon. Christine Allen-Jackson, J.S.C.; Hon. Pedro J. Jimenez, J.S.C.; and Hon. Sheila A. Venable, P.J.Cr.
Appendix F	Comments to the October 13, 2010 Final Plea Form Amendments Addressing Immigration and Attachment Filed By The Hon. Pedro J. Jimenez, Jr. on January 17, 2011
Appendix G	Comments to the October 13, 2010 Final Plea Form Amendments Addressing Immigration Filed by Boris Moczula, Esq., Assistant Attorney General on January 18, 2011 - Joined by Ronald Susswein, Esq., Assistant Attorney General; John McNamara, Esq., Assistant Prosecutor; and Philip Degnan, Esq., Assistant United States Attorney
Appendix H	Comments to the October 13, 2010 Final Plea Form Amendments Addressing Immigration and Attachment Filed By Richard Barker, Esq., Designee for the New Jersey State Bar Association on January 18, 2011

Appendix A

Current Question #17
on the Main Plea Form

Current NJ Plea Form Question #17

17. a.	Are you a citizen of the United States?	[Yes]	[No]
b.	Do you understand that if you are not a United States citizen or national, you **may** be deported by virtue of your plea of guilty?	[Yes]	[No]
c.	Do you understand that if your plea of guilty is to a crime considered an “aggravated felony” under Federal law you **will** be subject to deportation/removal?	[Yes]	[No]
d.	Do you understand that you have the right to seek legal advice on your immigration status prior to entering a plea of guilty?	[Yes]	[No]

Appendix B

Final Plea Form Amendments
Agreed Upon By the Committee
at the October 13, 2010
Criminal Practice Committee Meeting

FINAL PROPOSED REVISIONS TO PLEA FORM

New Jersey Judiciary
Plea Form

County_____
Prosecutor File Number _____

Defendant's Name:
before Judge:

List the charges to which you are pleading guilty:

Ind./Acc./Comp.#	Count	Nature of Offense	Degree	**Statutory Maximum**	Time	Fine	VCCO Assmt*
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
Your total exposure as the result of this plea is:				**Total**	_____	_____	_____

			Please Circle Appropriate Answer	
2.	**a.**	Did you commit the offense(s) to which you are pleading guilty?	[Yes]	[No]
	b.	Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)?	[Yes]	[No]
3.		Do you understand what the charges mean?	[Yes]	[No]
4.		Do you understand that by pleading guilty you are giving up certain rights? Among them are:		
	a.	The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt?	[Yes]	[No]
	b.	The right to remain silent?	[Yes]	[No]
	c.	The right to confront the witnesses against you?	[Yes]	[No]
	d.	Do you understand that by pleading **you are not waiving** your right to appeal (1) the denial of a motion to suppress physical evidence (*R.* 3:5-7(d)) or (2) the denial of acceptance into a pretrial intervention program (PTI) (*R.* 3:28(g))?	[Yes]	[No]
	e.	Do you further understand that by pleading guilty **you are waiving** your right to appeal the denial of all other pretrial motions except the following: _____ _____ _____	[Yes]	[No]

* Victims of Crime Compensation Office Assessment

Defendant's Initials_____

5. Do you understand that if you plead guilty:

a. You will have a criminal record? [Yes] [No]

b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Victims of Crime Compensation Agency Assessment? [Yes] [No]

c. You must pay a minimum Victims of Crime Compensation Agency assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) [Yes] [No]

5. d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [Yes] [No]

e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [Yes] [No]

f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [Yes] [No]

g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [Yes] [No]

h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [Yes] [No]

i. Computer Crime Prevention Fund Penalty, N.J.S.A 2C:43-3.8 (L. 2009, c. 143). If the crime involves a violation of N.J.S.A. 2C:24-4b(5)(b) (knowingly possessing or knowingly viewing child pornography, N.J.S.A. 2C:34-3 (selling, distributing or exhibiting obscene material to a person under age 18) or an offense involving computer criminal activity in violation of any provision of Title 2C, chapter 20, you will be assessed a mandatory penalty as listed below for each offense for which you pled guilty?

(1) $2,000 in the case of a 1st degree crime
(2) $1,000 in the case of a 2nd degree crime
(3) $ 750 in the case of a 3rd degree crime
(4) $ 500 in the case of a 4th degree crime
(5) $ 250 in the case of a disorderly persons or petty disorderly persons offense

Total CCPF Penalty $_____

Defendant's Initials_____

6. Do you understand that **the court could**, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? [Yes] [No]

7. Did you enter a plea of guilty to any charges **that require** a mandatory period of parole ineligibility or a mandatory extended term? [Yes] [No]

a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

b. If you are pleading guilty to such a charge, the minimum mandatory extended term is _____ years and _____ months (fill in the number of years/months) and the maximum mandatory extended term can be _____ years and _____ months (fill in the number of years/months).

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [Yes] [No]

9. Are you presently on probation or parole? [Yes] [No]

a. Do you realize that a guilty plea may result in a violation of your probation or parole? [Yes] [No] [NA]

10. Are you presently serving a custodial sentence on another charge? [Yes] [No]

a. Do you understand that a guilty plea may affect your parole eligibility? [Yes] [No] [NA]

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [Yes] [No] [NA]

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

_____

_____

_____

_____

_____

_____

Defendant's Initials_____

14. Has the prosecutor promised that he or she will **NOT**:

a. Speak at sentencing? [Yes] [No]

b. Seek an extended term of confinement? [Yes] [No]

c. Seek a stipulation of parole ineligibility? [Yes] [No]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [Yes] [No] [NA]

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [Yes] [No] [NA]

17. a. Do you understand that pursuant to federal law if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status? [Yes] [No]

b. Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty? [Yes] [No]

18. a. Do you understand that pursuant to the rules of the Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence? [Yes] [No]

b. Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender? [Yes] [No]

19. Have you discussed with your attorney the legal doctrine of merger? [Yes] [No] [NA]

20. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [Yes] [No] [NA]

21. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

_____

_____

_____

_____

_____

Defendant's Initials_____

22. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [Yes] [No]

23. **a.** Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [Yes] [No]

b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [Yes] [No]

c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [Yes] [No]

24. Are you satisfied with the advice you have received from your lawyer? [Yes] [No]

25. Do you have any questions concerning this plea? [Yes] [No]

Date:_____ Defendant:_____

Defense Attorney: _____

Prosecutor: _____

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

Defendant's Initials_____

Appendix C

Dissent to the September 15, 2010 Proposal to Amend the Plea Forms and Exhibit Filed by The Office of the Public Defender on September 24, 2010

Office of the Public Defender Dissent to Proposed Changes to Plea Forms
To Reflect Nunez-Valdez and Padilla Issues
(filed September 24, 2010)

In light of State v. Nunez-Valdez [cite omitted] and Padilla v. Kentucky [cite omitted], the time has come to alter the practice and related forms utilized in New Jersey for processing criminal cases through the pre-trial and plea retraction stages in order to ensure *both* that non-citizens understand the immigration consequences of exercising case disposition choices *and* that they are not compelled to incriminate themselves through interactions with the court. For a defendant in criminal matters who is a non-citizen, the question of immigration consequences is a critically important component of the decision about whether to take his/her matter to trial or to enter into a negotiated plea. That same defendant should nevertheless be able to retain the Fifth Amendment right to avoid self-incrimination.

To a non-citizen defendant, the immigration consequences can be as important - or even more important – than the questions of likelihood of conviction, incarceration vs. liberty, length of sentence, parole implications, or financial penalties. All of these issues must be considered and discussed thoroughly between the defendant and his/her defense counsel within the bounds of the attorney/client relationship so that the defendant, armed with the most accurate information and advice that can be ascertained, can make an informed decision about whether to take his/her case to trial or resolve it through a bargained-for result. Determining with and for the client what the immigration consequences will be to either choice is an essential component of effective assistance of counsel to that defendant. It is also a challenging task, as the particularities of the potential immigration consequences to each individual vary considerably.

The role of the Court in interacting with a defendant who may be a non-citizen must be to ensure that s/he has sufficient time and opportunity to consult with counsel, prepare a defense, make informed choices, understand the consequences of choices to the extent those consequences can be ascertained, and avoid unnecessary self-incrimination. The Court should not be in the business of inquiring into and determining the immigration status of a defendant even as it should be concerned with assuring that the defendant adequately receives affective assistance of counsel.

For the Court to navigate the Scylla and Charybdis of these two concerns, it must utilize carefully worded inquiries and advisements that accomplish what needs to be accomplished yet at the same time avoid what needs to be avoided.

The proposed alterations to the criminal plea form which has been approved by the majority of the Criminal Practice Committee do not do this for three reasons:

A. Both the current version and the proposed alterations unconstitutionally require a defendant to indicate on the record whether or not s/he is a United States citizen.

It is indisputable that citizens and non-citizens alike are entitled to fundamental constitutional protections. It would no more be right to withhold from non-citizens the 4th Amendment right to be free from unreasonable searches and seizures than it would be to compel that non-citizens incriminate themselves. Requiring on the record in a criminal matter that a non-citizen indicate both orally [almost always under oath] and in writing that s/he is a non-citizen amounts to compelling that person to incriminate him/herself both because such information can and likely will be reported to federal immigration authorities and used as the basis for adverse immigration action and because it could be used as the basis for federal criminal charges since alienage (non-US citizenship) is an element of several federal crimes, such as illegal entry and reentry. A number of jurisdictions in this country have recognized this concern and have enacted statutes and/or determined through their jurisprudence that such inquiries should not be made.[3] New Jersey should certainly follow suit. Consequently the proposed revised Question # 17 should be stricken from the proposed revision to the standard guilty plea form, substituted language for Question #17 should be added, as discussed below, and the entire Supplemental Plea Form for Persons Who are Not United States Citizens should be withdrawn.

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[3] *See, e.g.*, Ariz. R. Crim. P. 17.2(f) ("The defendant shall not be required to disclose his or her legal status in the United States to the court"); Cal. Penal Code 1016.5(d) ("at the time of the plea no defendant shall be required to disclose his or her legal status to the court"); Conn. Gen. Stat. 54-1j(b) ("The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court"); Fla. R. Crim. P. 3.172(c)(8) ("It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the admonition regarding immigration consequences] shall be given to all defendants in all cases"); Haw. Rev. Stat. ss802E-1 ("at the time of the plea no defendant shall be required to disclose the defendant's [immigration] legal status to the court"); Md. R. Ann. 4-242(e) note ("the court should not question defendants about their citizenship or immigration status"); Mass. Ann. Laws ch. 278, 29D ("The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States"); Ohio Rev. Code Ann. 2943.031(C) ("the defendant shall not be required at the time of entering a plea to disclose to the court his legal status in the United States"); R.I. Gen. Laws 12-12-22(d) ("The defendant shall not be required at the time of the plea to disclose to the court his or her legal status in the United States"); Wash. Rev. Code Ann. 10.40.200(1) ("It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court"). At least one state ethics board has issued an ethics opinion specifying that judges should not compel defendants to discuss their citizenship/immigration status during criminal proceedings. *See* Maryland Judicial Ethics Committee Op. No. 2008-43 (January 30, 2009) (attached).

B. The proposed alterations, while well-intentioned, do not adequately advise an individual defendant of what the immigration consequences of the guilty plea will be to that defendant because they cannot accomplish this task in this way.

Although considerable effort has been made to craft Questions 1 through 7 on a Supplemental Plea Form for Persons Who are Not United States Citizens in order to correctly advise non-citizen defendants of possible immigration consequences to guilty pleas, at the end of the day neither these questions from a Court nor any others from a Court can adequately advise a non-citizen defendant of the immigration consequences which would be attendant to his/her guilty plea as contemplated by the proposed plea agreement. The Court simply cannot be the entity that thoroughly, adequately and with particularity discusses the immigration consequences of a guilty plea for an individual non-citizen defendant. The very nature of the attorney/client relationship between the defense attorney and the non-citizen criminal defendant dictates that this task be accomplished as a component in that relationship, a facet of the 6th Amendment right to counsel recognized in Padilla v. Kentucky (cite omitted). While some immigration consequences are clear to foresee, many others are not and require careful analysis by those versed in immigration law, sometimes leading to certain advice about clearly foreseeable consequences but other times leading at best to general probability predictions. Some convictions will not have any immigration consequences. Some convictions will result in possible or mandatory deportation for certain immigrants only. Whether a particular plea "will," "will not," or "may" have any immigration consequences depends on individual facts, including the defendant's immigration history, family ties and full criminal history. Without an individualized analysis, a general Court advisement is almost always incomplete and may sometimes be inaccurate.

In all cases, a defendant is entitled to the most specific analysis and advice that can be ascertained as to adverse immigration consequences, and this advice necessarily must be provided by and/or through the defendant’s criminal counsel. In some cases criminal defense counsel are able to adequately advise their clients based upon their own understanding of immigration law; in other cases, criminal defense counsel will need to consider and/or consult with external immigration authorities and resources. The vehicle for delivering the best information that can be ascertained to the non-citizen client in order to make informed choices must be the defense attorney, not the Court. New Jersey certainly adopts the same approach with regard to other components of a defendant’s informed choice in a criminal matter. For example, it is through defense counsel, not the Court, that a defendant should learn and can best receive particularized advice about the likely dimensions and realities of, say, an anticipated sentence of incarceration.

C. The effort which should be made by the Court to adequately advise non-citizen defendants of the importance of determining through the assistance of counsel the particularized immigration consequences of their choices in their criminal cases must include earlier advisements built into the processing of criminal matters and culminate with a plea retraction form that reflects this.

The Court, of course, should be concerned with ensuring that criminal defendants have enough time and attention from defense counsel to adequately address all relevant concerns and issues. Because what is contemplated by all is that non-citizen defendants will be able to learn of and consider all that is ascertainable and relevant to their informed choices in the processing of their criminal cases, it is certainly proper for the Court to give certain advisements at various stages, as long as those advisements are properly confined. The best way to accomplish this is to have the Court build into all of its interactions with all defendants a generic set of advisements that gives notice to all about a series of rights, but does not require any individual defendants to reveal information to the Court that does not need to be and should not be revealed. This is not an unfamiliar role for the Court. For example, in all sentencing proceedings, the Court advises defendants of their appeal rights - regardless of whether or not the defendants actually plan to appeal their sentences – but does not ask defendants to reveal whether or not they intend to appeal.

Ideally, the Criminal Court should advise each defendant in every court appearance, beginning with arraignment, that if s/he is not a United States citizen, it is incumbent upon him/her to discuss this with his/her defense attorney and obtain particularized advice from his/her defense attorney about the possible immigration consequences which could and/or would result from any sentence being contemplated or anticipated. Suggested language could be:

> *"If you are not a United States citizen, you should tell your lawyer so your lawyer can advise you about the possible effect on your immigration status of any guilty plea or conviction at trial. Your lawyer must investigate and advise you about the immigration consequences of your case, if any."*

Only if this kind of advisement is given by the Court throughout the processing of a criminal case does it make sense to inquire at the time of a plea allocution as to whether or not the defendant has had adequate time to obtain this advice, if relevant. Of course, it is important to give each defendant adequate time along the way in order to have his/her defense attorney accomplish this part of his/her preparation of the client's defense.

While the Court has a legitimate concern about and interest in whether or not a non-citizen defendant has been able to obtain advice about immigration consequences, the current and proposed plea forms are framed in a way that invites self-incrimination. If a non-citizen criminal defendant does enter into a plea agreement, the question(s) to be

answered on the record – both orally and in writing – about whether or not the defendant has had enough time to have all questions about immigration consequences answered should be posed, but not in such a way as to reveal that defendant's citizenship status. This approach is already utilized elsewhere on the plea agreement form in Question #18, which uses language that asks a defendant whether s/he understands that if a certain circumstance exists in that defendant's individual situation, then a certain consequence can apply, but does not ask the defendant to concede that such a circumstance does exist.

Thus, the best way to address the Court's concern about whether a non-citizen defendant has been advised about and had the opportunity to consider the immigration consequences of entering into the contemplated plea agreement is to do so in a combination question/advisement that is put to every defendant that does not confirm immigration consequences as an issue, but nevertheless clearly alerts any defendant who is not a citizen that 1) s/he needs to understand the issue of immigration consequences as it applies to his/her individual situation and 2) that it is his/her defense counsel's responsibility to advise him/her with particularity on this issue, if applicable.

This could be accomplished by substituting for the current and proposed Question #17 the following question:

> "Do you understand that pursuant to federal law that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, your defense attorney must give you individualized advice about the effect your guilty plea will have on your immigration status?"

and give only "Yes" or "No" answer options, ***not*** an "N/A" option.

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Ensuring Compliance With *Padilla v. Kentucky* Without Compromising Judicial Obligations

Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status*

In *Padilla v. Kentucky*,[1] the Supreme Court confirmed that defendants have a right to advice from counsel about the potential immigration consequences of their criminal charges and convictions, and that failure to provide such advice constitutes ineffective assistance of counsel, in violation of the Sixth Amendment. As courts around the country consider what role they should play in ensuring that defense counsel comply with their obligations post-*Padilla*, judges should refrain from asking about defendants' citizenship/immigration status. This document outlines the constitutional, statutory, and ethical reasons that judges should not solicit or otherwise require defendants to disclose, orally or in writing, their citizenship/immigration status when that status is not a material element of the offense with which they are charged.

Judges play an important role in ensuring that defendants are advised about potential immigration consequences of a conviction and have an opportunity to obtain such advice. However, they need not ask about a defendant's citizenship/immigration status on the record to do so. Judges can assure the voluntariness of a plea and support compliance with *Padilla* without inadvertently triggering additional immigration consequences for a defendant, requiring disclosures that would breach attorney-client privilege, violating state laws, or undermining constitutional protections against discrimination, unreasonable interrogation, and self-incrimination.

For the constitutional, statutory and ethical reasons discussed below, judges should refrain from asking about defendants' citizenship/immigration status when ensuring compliance with *Padilla*.

I: The law counsels against requiring disclosure of citizenship/immigration status.

- Judicial obligations under the Bill of Rights, judicial codes of conduct and some state laws preclude inquiry into defendants' citizenship/immigration status. By not requiring disclosure of status, judges can:
  - Avoid compelling individuals to incriminate themselves, in violation of the Fifth Amendment;
  - Uphold their obligations of impartiality and neutrality;
  - Protect the confidentiality essential to honest attorney-client communication and to the ability of counsel to provide competent advice about the immigration consequences of conviction; and
  - Comply with the growing number of state statutes that prohibit on-record inquiry into defendants' legal status.

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

- By limiting on-record questions to those relevant to the criminal charges at issue or necessary for compliance with judicial obligations, judges can avoid triggering adverse immigration consequences for defendants and promote public confidence in the criminal justice system.

III: When issuing advisals, it is in the court's interest to issue them to a*ll* defendants, without distinguishing between citizens and non-citizens.

- When providing *Padilla* advisals, judges can prevent the complications that may ensue from raising status on the record and still fulfill their responsibility to ensure that guilty and nolo contendere pleas are knowing and voluntary by providing those advisals to all defendants regardless of citizenship/immigration status.

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* This document was prepared on behalf of, and under the guidance of the Immigrant Defense Project (IDP) by Nikki Reisch and Sara Rosell of the Immigrant Rights Clinic (IRC) at New York University School of Law. November 2010.

I: The law counsels against requiring disclosure of citizenship/immigration status.

Questioning defendants about citizenship/immigration status on the record could tread on Fifth Amendment protections against self-incrimination.[2] All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment. In *Mathews v. Diaz,* the Supreme Court held that every person, "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[3] An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings."[4] Statements about alienage made on the record in criminal court, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325, 1326, respectively.[5] Thus, requiring defendants to disclose their citizenship/immigration status risks compelling individuals to incriminate themselves. Although a defendant could invoke the right to remain silent,[6] he or she may not be adequately informed that this right exists in the context of a plea allocution,[7] or could be intimidated into disclosure.[8] Furthermore, asking about citizenship/immigration status may force a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required for entry of a plea. To avoid such complications, judges should not ask about or require written indication of alienage on the record.

Asking about a defendant's citizenship/immigration status may be contrary to judicial codes of conduct. The public controversy surrounding the presence of immigrants implicates issues of race, ethnicity and class. Thus even if a judge's intention is to protect the defendant's interests, inquiring into a defendant's citizenship/immigration status may undermine the appearance of judicial neutrality. The American Bar Association (ABA) Model Code of Judicial Conduct instructs judges to "avoid impropriety and the appearance of impropriety," and perform their duties without bias or prejudice, including based on race and national origin.[9] Most state codes of judicial conduct contain identical or substantially similar provisions.[10] At least one state judicial ethics body has found "reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or a bail hearing."[11] Another state disciplined a judge because his selective inquiry into defendants' citizenship/immigration status raised serious concerns about his motivations, undermined public confidence in the judiciary, and violated codes of judicial conduct. [12]

Furthermore, citizenship/immigration status inquiry could jeopardize attorney-client confidentiality and hinder the ability of counsel to provide effective assistance. The Federal Rules of Criminal Procedure require a judge to inquire whether a defendant is aware of the consequences of his plea, but "[t]he court must not participate" at all in discussions concerning a plea agreement.[13] By eliciting information about a defendant's citizenship/immigration status on record, a judge may be unwittingly intruding into confidential attorney-client communication,[14] undermining counsel's ability to predict and advise his or her client regarding immigration consequences, or upsetting the terms of a negotiated plea designed to avoid disclosure of status.[15] If individuals fear that the information they share with their attorneys about their citizenship/immigration status may be divulged on the record in court, they may withhold facts that are essential for their attorneys to provide accurate advice. It would no more be appropriate for a judge to inquire into the health status of a defendant at the time of a plea, when it is not relevant to the offense charged and was not voluntarily disclosed by the defendant, than it would be to inquire into a defendant's citizenship/immigration status.

A growing number of states prohibit courts from requiring disclosure of a defendant's citizenship/immigration status. Recognizing the concerns associated with disclosure of citizenship/immigration status on the record, ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship/immigration status,[16] one deems such inquiry unnecessary,[17] and others are considering legislation that would impose similar restrictions.[18] The relevant legal codes in the ten states with existing statutory bars to inquiry prohibit requiring a defendant to disclose his or her citizenship/immigration status to the court at the time of a plea. For example, Arizona's rule on pleas of guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."[19] Even state plea forms that do address immigration consequences typically do not require a defendant to indicate his or her citizenship/immigration status.[20]

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

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

* Prohibits inquiry into citizenship/immigration status

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

Ensuring effective assistance of counsel does not require ascertaining the content of that assistance. In fact, attorney-client privilege protects the confidentiality of advice provided to a client. In *Padilla*, the Supreme Court emphasized the duty of *defense attorneys* to advise their clients of the immigration consequences of conviction, holding that failure to so do may constitute ineffective assistance of counsel. Only defense counsel can assure that the assistance they provide is effective. In promoting compliance with *Padilla* and protecting Sixth Amendment rights,[21] judges' primary role is to notify all defendants of their right to receive advice from counsel about potential immigration consequences. Defense attorneys have an obligation to determine whether their client is a noncitizen and then to provide such advice based on his or her individual facts (such as, *inter alia*, family relationships, length of time in country, complete immigration and criminal history and risk of persecution in country of origin). *Padilla* did not mandate judges to take part in providing immigration advice. Thus, judges need not inquire into citizenship/immigration status to determine whether the advice is necessary in the defendant's case nor elicit information about the content of any advice provided.

Disclosure of citizenship/immigration status is not necessary for a judge to confirm that a plea is knowing and voluntary, make a finding of guilt, or confirm the factual basis of a plea.[22] A judge has a responsibility to confirm that a guilty plea is free from coercion, and that the defendant understands the nature of the charges and knows and understands the consequences of pleading guilty.[23] However, it is for defense counsel, not a judge, to identify those consequences to which a defendant is vulnerable as a result of conviction and to advise the client accordingly. Judges can fulfill their obligations to ensure that pleas are knowing and voluntary, without inquiring into a defendant's citizenship/immigration status. Just as a judge seeking to confirm that a plea is knowing and voluntary does not ask if a defendant resides in public housing—leaving it to counsel to determine whether the defendant faces any risk of eviction as a result of conviction and advise him or her

accordingly—it would be inappropriate for a judge to ask about a defendant's citizenship/immigration status, rather than simply ensuring that a defendant is aware of his or her rights to discuss potential consequences with an attorney. Furthermore, with the exception of those criminal laws that include citizenship/immigration status as an element of the offense,[24] an individual's nationality, citizenship or alienage has no bearing on his or her guilt or innocence regarding a criminal charge, or the factual basis of his or her plea.[25]

Inducing a defendant to indicate his or her citizenship/immigration status on record in a criminal proceeding can have significant adverse consequences for the defendant. Citizenship/immigration status is sensitive information and its disclosure on the record in public courtrooms could trigger adverse action against defendants or their families.[26] Department of Homeland Security/ICE officers may be present in the courtroom or alerted to statements made by individuals present, including local law enforcement agents and prosecutors. It is possible that DHS may use evidence from court transcripts to pursue deportation—a measure which the Supreme Court has described as a "drastic," severe consequence that is "virtually inevitable" for a vast number of noncitizens convicted of crimes, because deportation is often mandatory despite any favorable factors.[27]

If courtrooms are seen as places in which individuals' citizenship/immigration status will be exposed, some defendants and witnesses may lose faith in the fairness and impartiality of the criminal justice system. Studies have found that increased collaboration between local law enforcement agencies and immigration authorities (the Bureau of Immigration and Customs Enforcement), and the associated fear among immigrant communities that any contact with police could trigger consequences, has a chilling effect on reporting of crimes, resulting in further marginalization of already vulnerable populations.[28] Just as law enforcement agents depend on the cooperation of local communities to prevent, investigate, and prosecute crime, so too do courts require the cooperation of defendants and witnesses in proceedings to effectively adjudicate charges and issue sentences. If judges require disclosure of citizenship/immigration status, some defendants and witnesses may be afraid to appear in court at all.

On-record disclosures may have chilling effects on individuals outside of the criminal proceeding. If people believe that pressing criminal charges could lead the accused to be deported, they may be discouraged from reporting crimes. This is particularly true in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to detention and deportation.[29] Such fear and mistrust of the criminal justice system could have dangerous consequences, especially for the most vulnerable populations of women and children.

III: When issuing advisals, it is in the court's interest to issue them to *all* defendants, without distinguishing between citizens and non-citizens.

Selectively issuing advisals to some defendants and not others runs the risk of being under-inclusive. Providing advisals only to those who state that they are non-citizens or whom the court believes to be noncitizens may mean that people who face potential immigration consequences of a conviction may not be informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.[30] This approach could cost courts time in the long run. When judges issue advisals to all defendants without trying to single out noncitizens, they are less likely to face future motions to vacate for failure to issue a notification, especially in those states where it is statutorily required.[31] It also may take more time to accurately distinguish between citizens and non-citizens than it would to issue advisals to everyone. As Florida's statute makes clear, universal administration of an advisal renders inquiry into citizenship/immigration status unnecessary: "It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the required] admonition shall be given to all defendants in all cases."[32]

Furthermore, non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases for law enforcement agents to

question someone about their citizenship.[33] According to the Second Circuit, "The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status."[34] When it is not necessary to a finding of guilt, judicial questioning regarding a defendant's citizenship/immigration status could appear to be gratuitous. Furthermore, selectively questioning defendants about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters could be in tension with Fourth Amendment protections against racial and ethnic profiling. Regardless of whether the motives for asking about citizenship/immigration status are to protect and not to prosecute defendants, judges should refrain from asking any defendant about his or her citizenship/immigration status and thereby avoid any constitutional concerns that could arise from selective questioning.

In certain sentencing or custody determinations, judges may take citizenship/immigration status into account when defense counsel voluntarily submits it for the court's consideration.

Prohibiting judges from affirmatively inquiring into citizenship/immigration status on the record does not mean that a defendant, under advice of counsel, cannot voluntarily disclose such information for the judge's consideration during sentencing or custody determinations. Just as judges may consider an offender's health status when it is voluntarily disclosed by defense counsel, but may not independently solicit medical information on record, so too may judges consider immigration status when it is voluntarily divulged. Defendants and their counsel should be able to control whether and when to disclose information about immigration status on the record, when it is not an element of the criminal offense.

For further information, please contact:

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Endnotes

[1] 130 S. Ct. 1473 (2010) (holding that Sixth Amendment requires defense counsel to provide affirmative, competent advice to noncitizen defendants regarding immigration consequences of guilty plea and that absence of such advice may be basis for claim of ineffective assistance of counsel).

[2] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. However, its invocation is not limited to criminal trials. *See, e.g. United States v. Balsys*, 524 U.S. 666, 672 (1998) (" '[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'" when individual believes information sought or discoverable through testimony, "could be used in a subsequent state or federal criminal proceeding") (citing *Kastigar v. United States*, 406 U.S. 441, 444-445, (1972)); *see also McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (making Self-Incrimination Clause of Fifth Amendment applicable to states through Fourteenth Amendment Due Process Clause).

[3] 426 U.S. 67, 77 (1976).

[4] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[5] *See infra*, note 24.

[6] Citizens and non-citizens alike may invoke the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law…Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (internal citations omitted); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) ("[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (individual subject to removal proceedings invoked Fifth Amendment, but court did not reach question of whether invocation was proper because it deemed the issue "not relevant to [its] decision ….").

[7] Fifth Amendment protection applies to communication that is testimonial, incriminating, and compelled. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). What is considered custodial interrogation depends on whether a reasonable person, in view of the totality of the circumstances, would feel free to leave. *See Stansbury v. California*, 511 U.S. 318 (1994). A court may constitute a "custodial setting" but the test is whether, under all the circumstances involved in a give case, the questions are "reasonably likely to elicit an incriminating response from the suspect." *United States v. Chen*, 2006 U.S. App. LEXIS 5286 (March 2, 2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). "The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant." *Id.* (quoting *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994)).

[8] Practitioners have expressed concern that defendants, when directly addressed by the judge, are often too intimidated to assert their right to remain silent or to ask for more time, when needed, to speak to their attorneys. When immigration status is not relevant to a material issue in the case, judges should not seek its disclosure because such inquiry may have an *in terrorem* effect upon a defendant, who may be intimidated and inhibited from pursuing his or her legal rights. *See Campos v. Lemay*, 2007 U.S. Dist. LEXIS 33877, 24-25 (S.D.N.Y. 2007) (recognizing that danger of intimidation from inquiring into defendant's legal status during proceedings could affect defendant's ability to vindicate his or her legal rights). Other courts have similarly recognized the risk related to questioning immigration status on the record. *See, e.g. Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Sup. Ct. Tex. 2010). Asking about citizenship/immigration status may have the effect of forcing a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required.

[9] *See* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 1.2, 1.3, 2.2, 2.3, & associated cmts. (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

[10] For some representative examples, see ALA. CANONS OF JUDICIAL ETHICS Canons 1-3; 22 NYCRR §§ 100.1, 100.2, 100.3(B)(3)-(4); ALASKA C.J.C. Pts. R1-R3 (2010); GA. CODE OF JUDICIAL CONDUCT Canons 2 -3 (2009), OHIO JUD. RULES R. 2.2, 2.3 (2010) ("Rule 2.3 is identical to [ABA] Model Rule 2.3."); CAL. CODE JUDICIAL ETHICS Canons 2-3 (1996); N.Y. CODE OF JUDICIAL CONDUCT, Canons 2-3 (1996).

[11] Maryland Judicial Ethics Committee, Op. Request No. 2008-43 (January 30, 2009) ("At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant's Immigration Status"), 2-3, *available at* http://www.courts.state.md.us/ethics/opinions/2000s/2008_43.pdf.

[12] *See In re Hammermaster*, 139 Wn.2d 211, 244-45 (Wash. 1999) (finding that judge's practice of inquiring about citizenship of some defendants in criminal cases violated Washington's Code of Judicial Conduct, requiring judges to be patient, dignified, and courteous).

[13] FED. R. CRIM. P. 11(c)(1).

[14] The Supreme Court has repeatedly recognized "the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion." *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications. …The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.") (internal citations omitted); *United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 336 (4th Cir. 2003) ("[U]nder normal circumstances, an attorney's advice provided to a client, and the communications between attorney and client are protected by the attorney-client privilege."); *Sarfaty v. PNN Enters.*, 2004 Conn. Super. LEXIS 1061, 10-11 (Conn. Super. Ct. 2004) ("The attorney-client privilege applies to communications: (1) made by a client; (2) to his or her attorney; (3) for the purpose of obtaining legal advice; (4) with the intent that the communication be kept confidential.").

[15] As the Supreme Court recognized in *Padilla*, both the prosecution and defense have an interest in taking immigration consequences into consideration in off-record negotiations: "Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486.

[16] The states with statutes explicitly prohibiting inquiry into citizenship/immigration status at the time of a guilty or no contest plea are Arizona, California, Connecticut, Maryland, Massachusetts, Nebraska, Ohio, Rhode Island, Washington, and Wisconsin. *See* ARIZ. R. CRIM. P. §17.2; CAL. PEN. CODE § 1016.5(d); CONN. GEN, STAT. § 54-1j(b); MD. RULE 4-242 (specifying in Committee note that court should not question defendants about citizenship status); MASS ALM GL. ch. 278, § 29D; R.R.S. Neb. §29-1819.03; ORC ANN. § 2943.031; R.I. GEN. LAWS §12-12-22(d); REV. CODE WASH. (ARCW) §10.40.200(1); WIS. STAT. § 971.06(c)(3). It should be noted that Ohio's statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031. Maine is the only state in the country that affirmatively requires courts to ask about the citizenship of criminal defendants at the time of accepting a plea.

[17] Florida's statute indicates that it is "not necessary for the trial judge to inquire" about immigration status when giving an admonition about immigration consequences of a plea. FLA. R. CRIM. P. § 3.172(c)(8).

[18] *See, e.g.*, NY Assem. Bill A04957, Feb. 10, 2009, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+A04957%09%09&Summary=Y&Text=Y. The text of the bill includes a statement of legislative intent that "at the time of the plea no defendant shall be required to disclose his or her legal status to the court," and repeats the following provision in all proposed new or amended subsections of the N.Y. CRIMINAL PROCEDURE LAW §§ 170.10, 180.10, 210.15, 220.50: "This advisement shall be given to all defendants and no defendant shall be required to disclose his or her legal status in the United States to the court." *See id.*, proposed text of:

§170.10(4), §180.10(7), §210.15(4), §220.50(7), § 220.60 (5)-(6). For further discussion, see also http://www.nycbar.org/pdf/report/advisal_bill.pdf.

[19] Ariz. R. Crim. P. 17.2(f).

[20] Of at least thirty-six states that use written plea forms for pleas of guilty or nolo contendere, New Jersey and Ohio are the only two to require the party submitting the plea to indicate his or her citizenship status. Question 17(a) of New Jersey's form, for example, asks "Are you a citizen of the United States?" Question 8 of Ohio's form contains a brief advisal and the following language: "With this in mind, I state to the court that: "I am a United States citizen [ ] I am not a United States citizen [ ]."

[21] The Sixth Amendment of the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]." Courts have interpreted the Sixth Amendment, read together with the Due Process clause of the Fifth Amendment, to confer a right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

[22] A judge's obligation to ensure that a plea is knowing and voluntary stems from the Due Process Clause. The Supreme Court has held that the Due Process Clause requires a plea to be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (overruled in part on other grounds by *Edwards v. Arizona*, 451 U.S. 477 (1981)). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. However, a judge need not know a defendant's immigration status to assure him or herself that a plea is knowing and voluntary.

[23] *See, e.g.*, *United States v. Hernandez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000) ("Before it accepts a guilty plea, the court must address three core concerns underlying Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea.").

[24] Examples of federal crimes for which "alienage" is an element of the offense include:

8 U.S.C. 1282(c) – Alien crewman overstays;
8 U.S.C. 1306(a) – If overstay after 30 days and no fingerprints/registration;
8 U.S.C. 1304(e) – 18 or over not carrying INS documentation;
8 U.S.C. 1306(b) – Failing to comply with change of address w/in 10 days;
8 U.S.C. 1324c(e) – Failure to disclose role as document preparer;
8 U.S.C. 1324(a) – Alien smuggling;
8 U.S.C. 1325 – Entry Into United States without inspection or admission;
8 U.S.C. 1326 – Illegal Reentry after deportation;
18 U.S.C. 1546 – False statement/fraudulent documents;
18 U.S.C. 1028(b) – False documents;
18 U.S.C. 1001 False statement;
18 U.S.C. 911, 1015 – False claim to U.S. citizenship.

[25] A judge should limit his or her questions to those relevant to the criminal charges at issue. *See Ochoa v. Bass*, 2008 OK CR 11, P15 (Okla. Crim. App. 2008) (finding that court had legal authority to question defendants regarding their immigration status during sentencing hearing, without deciding whether trial court can or should ask such questions in any other stage of criminal proceedings, whether defendant is obliged to answer or whether Miranda warnings should precede questioning); *see also* N.Y. Judicial Ethics Op. 05-30 (2005) (holding that judges are not required to report information that individual is in violation of immigration laws); *see also*, GA. CODE OF JUDICIAL CONDUCT Canon 3(7) cmt. ("Judges must not independently investigate facts in a case and must consider only the evidence presented.").

[26] Courts have recognized that the disclosure of immigration status can have harmful impacts. *See e.g.*, *Perez v. United States*, 968 A.2d 39, 71 (D.C. Ct. App. 2009) (discussing potential prejudicial impact of disclosure of immigration status); *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 280 (App. Div. 2009) (acknowledging chilling effect that disclosure of immigration status may have outside of particular case and requiring further proffer of admissibility (probative value outweighing prejudicial impact) before allowing inquiries regarding immigration status); *Arroyo v. State*, 259 S.W.3d 831, 836 (Tex. App. 2008) (holding that information regarding legal status in United States is admissible when relevant and finding court's refusal to allow questions about citizenship to be valid exercise of discretion); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (Cal. App. 4th Dist. 2003) ("[E]vidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question.").

[27] *Padilla*, 130 S. Ct. at 1478.

[28] Many law enforcement agencies, public officials and civil society organizations have raised concerns about the impact that local enforcement of immigration laws could have on immigrant confidence in and cooperation with the criminal justice system. *See*, *e.g.*, MAJOR CITIES CHIEFS (M.C.C.) IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES: M.C.C. NINE (9) POINT POSITION STATEMENT, 5-6 (June 2006) (describing concerns with local enforcement of federal immigration laws, including risk of undermining trust and cooperation of immigrant communities), http://www.houstontx.gov/police/pdfs/mcc_position.pdf; National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070* (June 2010), http://www.nilc.org/immlawpolicy/LocalLaw/police-chiefs-oppose-sb1070-2010-06.pdf; America's Voice, *Police Speak Out Against Arizona Immigration Law* (May 18, 2010), http://amvoice.3cdn.net/cffce2c401fc6b2593_p6m6b9n1l.pdf; United States Conference of Mayors, 2010 Resolutions, 78th Conference, "Opposing Arizona Law SB1070", "Calling Upon the Federal Government to Pass Comprehensive Immigration Reform that Preempts Any State Actions to Assert Authority Over Federal Immigration Law," at 67-70, http://www.usmayors.org/resolutions/78th_Conference/adoptedresolutionsfull.pdf; United States Conference of Mayors, 2004 Measure to Amend the CLEAR and HSEA Acts of 2003 (expressing concern about distracting local law enforcement from primary mission, undermining federal legislation protecting immigrant victims, and creating "an atmosphere where immigrants begin to see local police as federal immigration enforcement agents with the power to deport them or their family members, making them less likely to approach local law enforcement with information on crimes or suspicious activity"), *available at* http://www.usmayors.org/resolutions/72nd_conference/csj_08.asp; ACLU AND IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNC-CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf; CHRISTINA RODRIGUEZ ET AL, MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G), at 8-9 (March 2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf.

[29] For a discussion of these issues, see NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES, 1-4 (April 2009), *available at* http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf. The report explains how the immigration consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

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

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

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

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

[32] FLA. R. CRIM. P. 3.172(c)(8).

[33] *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific 'articulable' facts that warrant suspicion vehicle contains "aliens who may be illegally in the country" and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion ("the Supreme Court has repeatedly held that reliance "on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"") (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986)). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (finding that officer's stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986) (upholding finding that INS engaged in pattern of unlawful stops (seizures) to interrogate individuals based on Hispanic appearance, in violation of Fourth Amendment). *But see Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful

detention/custody); *Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) ("The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen … ."). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny. *See Nyquist v Manclet*, 432 U.S. 1 (1977); *Castro v. Holder*, 593 F3d 638, 640-41 (7th Cir. 2010).

[34] *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) ("The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status. For example, government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage.")(citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

Appendix D

Initial Plea Form Amendments
Agreed Upon By the Committee
at the September 15, 2010
Criminal Practice Committee Meeting and
Retracted
at the October 13, 2010 Meeting

SEPTEMBER 2010 PROPOSED AMENDMENTS – RETRACTED

New Jersey Judiciary
Plea Form

County _____

Prosecutor File Number _____

Defendant's Name:

before Judge:

List the charges to which you are pleading guilty:

Ind./Acc./Comp.#	Count	Nature of Offense	Degree	**Statutory Maximum**	Time	Fine	VCCO Assmt*
				Max			
				Max			
				Max			
				Max			
				Max			
Your total exposure as the result of this plea is:				**Total**			

			Please Circle Appropriate Answer	
2.	**a.**	Did you commit the offense(s) to which you are pleading guilty?	[Yes]	[No]
	b.	Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)?	[Yes]	[No]
3.		Do you understand what the charges mean?	[Yes]	[No]
4.		Do you understand that by pleading guilty you are giving up certain rights? Among them are:		
	a.	The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt?	[Yes]	[No]
	b.	The right to remain silent?	[Yes]	[No]
	c.	The right to confront the witnesses against you?	[Yes]	[No]
	d.	Do you understand that by pleading **you are not waiving** your right to appeal (1) the denial of a motion to suppress physical evidence (*R.* 3:5-7(d)) or (2) the denial of acceptance into a pretrial intervention program (PTI) (*R.* 3:28(g))?	[Yes]	[No]
	e.	Do you further understand that by pleading guilty **you are waiving** your right to appeal the denial of all other pretrial motions except the following: _____ _____ _____	[Yes]	[No]
5.		Do you understand that if you plead guilty:		
	a.	You will have a criminal record?	[Yes]	[No]
	b.	Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Victims of Crime Compensation Agency Assessment?	[Yes]	[No]

* Victims of Crime Compensation Office Assessment

RETRACTED - PROPOSED REVISIONS TO THE MAIN PLEA FORM – Agreed Upon at the September 15, 2010 Criminal Practice Committee Meeting

Defendant's Initials_____

c. You must pay a minimum Victims of Crime Compensation Agency assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) [Yes] [No]

5. d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [Yes] [No]

e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [Yes] [No]

f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [Yes] [No]

g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [Yes] [No]

h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [Yes] [No]

6. Do you understand that **the court could**, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? [Yes] [No]

7. Did you enter a plea of guilty to any charges **that require** a mandatory period of parole ineligibility or a mandatory extended term? [Yes] [No]

a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

b. If you are pleading guilty to such a charge, the minimum mandatory extended term is _____ years and _____ months (fill in the number of years/months) and the maximum mandatory extended term can be _____ years and _____ months (fill in the number of years/months).

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [Yes] [No]

9. Are you presently on probation or parole? [Yes] [No]

a. Do you realize that a guilty plea may result in a violation of your probation or parole? [Yes] [No] [NA]

10. Are you presently serving a custodial sentence on another charge? [Yes] [No]

Defendant's Initials_____

a. Do you understand that a guilty plea may affect your parole eligibility? [Yes] [No] [NA]

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [Yes] [No] [NA]

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

_____

_____

_____

_____

_____

_____

14. Has the prosecutor promised that he or she will **NOT**:

a. Speak at sentencing? [Yes] [No]

b. Seek an extended term of confinement? [Yes] [No]

c. Seek a stipulation of parole ineligibility? [Yes] [No]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [Yes] [No] [NA]

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [Yes] [No] [NA]

17. a. Are you a citizen of the United States? [Yes] [No]

If you have answered **"No"** to this question, you must complete the **"Supplemental Plea Form for Persons Who Are Not United States Citizens"**

18. a. Do you understand that pursuant to the rules of the Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence? [Yes] [No]

Defendant's Initials_____

b. Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender? [Yes] [No]

19. Have you discussed with your attorney the legal doctrine of merger? [Yes] [No] [NA]

20. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [Yes] [No] [NA]

21. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

_____

_____

_____

_____

_____

_____

22. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [Yes] [No]

23. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [Yes] [No]

b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [Yes] [No]

c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [Yes] [No]

24. Are you satisfied with the advice you have received from your lawyer? [Yes] [No]

25. Do you have any questions concerning this plea? [Yes] [No]

Defendant's Initials_____

New Jersey Judiciary

Supplemental Plea Form For Persons who are not United States Citizens

1.	Do you understand that if you are not a United States citizen you could become deportable under Federal immigration law by virtue of your guilty plea?	[YES]	[NO]
2.	Do you understand that if you are not a United States citizen your guilty plea could affect your ability to re-enter the United States if you leave the country?	[YES]	[NO]
3.	Do you understand that if you are not a United States citizen your guilty plea could affect your ability to apply for United States citizenship or any other form of residency?	[YES]	[NO]
4.	Do you understand that if you become deportable by virtue of your plea of guilty you could become ineligible to obtain most of the waivers of deportation, you could become ineligible for voluntary departure, you could become permanently inadmissible into the United States after your deportation, and you could be exposed to a federal prison sentence if you are convicted of illegally re-entering the United States after being deported?	[YES]	[NO]
5.	Do you understand that this Court has no jurisdiction or control over any decisions made by a Federal Court regarding your deportation, your ability to re-enter the United States, or your application for United States citizenship or any other form of residency?	[YES]	[NO]
6.	Do you understand that you may seek legal advice from an attorney prior to entering your plea today about the affect your guilty plea will have on your immigration status, including your ability to remain in the United States, or your ability to re-enter the United States should you leave for any reason, or your ability to apply for United States citizenship or any other form of residency?	[YES]	[NO]
7.	Having been advised of the possible immigration consequences do you still wish to plead guilty?	[YES]	[NO]

DATE:_____ DEFENDANT:_____

DEFENSE ATTORNEY:_____

PROSECUTOR:_____

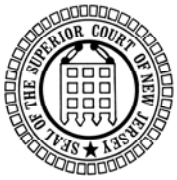
Appendix E

Dissent to the October 13, 2010 Final Plea Form Amendments Addressing Immigration and Exhibits Filed By The Hon. Marilyn C. Clark, P.J.Cr. on January 11, 2011

Joined By
Hon. Lawrence M. Lawson, A.J.S.C., Vice-Chair, Criminal Practice Committee
Hon. Christine Allen-Jackson, J.S.C.
Hon. Pedro J. Jimenez, J.S.C.
Hon. Sheila A. Venable, P.J.Cr.

SUPERIOR COURT OF NEW JERSEY

MARILYN C. CLARK
PRESIDING JUDGE, CRIMINAL DIVISION



PASSAIC COUNTY COURTHOUSE
77 HAMILTON STREET
PATERSON, NEW JERSEY 07505
(973) 247-8314

January 11, 2011

Hon. Edwin H. Stern, P.J.A.D.
Chair, Criminal Practice Committee
North Tower, Suite 101
158 Headquarters Plaza
Morristown, New Jersey 07960-3965

Re: Criminal Practice Committee – Dissent as to issues of:
(1) Proposed plea form amendments.
(2) Judicial inquiry to defendants as to citizen/non-citizen status.

Dear Judge Stern,

I respectfully submit this memo on behalf of those members of the Criminal Practice Committee who have dissented with respect to the above cited issues. I will briefly summarize the recent discussions at the Committee as to these topics.

On September 15, 2010, the Committee extensively discussed the issue of amending the current AOC plea form with respect to the questions pertaining to a non-citizen defendant's understanding of deportation consequences. This meeting ended with a number of questions, by a majority vote, being approved. We understood that these questions would be submitted to the Supreme Court with a recommendation that they be adopted. A copy of these questions is attached hereto as Exhibit A.

Thereafter, Assistant Public Defender Dale Jones, a member of the Committee, filed a written dissent on behalf of the Office of the Public Defender, objecting to the proposed amendments to the plea form, and particularly to question 17a, which is already on the plea form, that specifically asks "Are you an American citizen?"

On October 13, 2010, the Committee met again and discussed the issues raised in the Public Defender's dissent. Mr. Jones reiterated that the Public Defender's Office was especially concerned with the continued presence of question 17a. He asserted that this written question, as well as any similar judicial verbal inquiry of the defendant, violates the defendant's Fifth Amendment privilege against self-incrimination.

Mr. Jones opined that the right against self-incrimination is implicated by this question because such information may be reported to federal immigration authorities and may be used as the basis for adverse immigration action. He further noted that alienage (non-U.S. Citizenship)

is an element of several federal crimes, such as illegal entry and re-entry. He stated that at least several other states have enacted statutes or otherwise ordered that such inquiry of defendants should not be made, and opined that New Jersey should do the same.

The Committee engaged in lengthy discussion as to the propriety of this question, as well as the propriety of direct judicial inquiry on the record to the defendant as to citizen/non-citizen status. Ultimately, the majority of the Committee voted to eliminate the specific question as to citizenship and to limit the other questions on the plea form to warnings to the defendant that, if he or she is not a citizen, the plea could result in removal and/or prevent legal re-entry if the defendant leaves the country. The questions also advise the defendant that he or she has the right to seek individualized advice regarding the immigration consequences of the plea. A copy of the currently proposed questions is attached hereto as Exhibit B.

We first wish to stress that the formal vote of the Committee only related to the written questions on the plea form. There was no formal vote as to the basic issue of whether the question which directly asks if the defendant is an American citizen actually does violate the Fifth Amendment privilege against self-incrimination. There was also no formal vote as to whether judges may continue to directly question the defendant on the record regarding citizen status. While certainly these issues were a substantial part of the Committee's discussion, we submit that some of the majority votes may have been based upon the conclusion that, particularly in light of the strong objection from the Public Defender's Office, the issue of warnings to the defendant regarding deportation consequences could be adequately covered without this direct written question being on the plea form.

We believe that these comments regarding the majority vote are important because the Supreme Court will have the written dissent of the Public Defender's Office when it considers the proposed plea form questions. We want to ensure that the Court is not under the impression that each vote of the majority necessarily represented an agreement that the direct written question, or any direct judicial inquiry of the defendant as to citizen status, constitutes a Fifth Amendment violation.

The following are the reasons why the members of the Committee who dissented from this vote, and who substantially disagreed with the Public Defender's position, believe strongly that it is important that the plea form retain the specific question as to citizen status, currently question 17a. We also strongly recommend the continuance of the practice, utilized by most judges, of asking every defendant at both the arraignment and the plea proceeding, where they were born, whether they are American citizens, and then pursuing follow-up questions as needed. We have also herein addressed our concern that the current proposed questions, Exhibit B, which warn a defendant that he or she **may** be deported based upon the plea, do not sufficiently advise defendants that there are many instances where deportation will be mandatory or virtually mandatory. We will first address the issue of the specific question regarding citizen status.

Inquiry as to Citizen/Non-Citizen Status

Judges in New Jersey have for many years advised defendants that deportation is a possible consequence following a plea or conviction for a crime. Our official plea form has since 1988 contained questions designed to inform defendants that they may be deported as a result of a plea to a crime. Question 17a, the direct question to the defendant regarding citizen status, has been on the plea form for over two years, pursuant to AOC Directive 14-08, issued by Acting AOC Director Judge Glenn A. Grant on October 8, 2008. In at least several counties, non-citizens comprise a substantial percentage of our cases and the issues pertaining to deportation consequences have become constant and most difficult. Non-citizens range from those who hold legal residence, i.e., green cards, to those who entered the country legally on work or tourist visas that have since expired, often many years ago, to those who entered illegally and have never had any documentation at all.

On July 27, 2009, the New Jersey Supreme Court issued State v. Nuñez-Valdẽz, 200 N.J. 129 (2009). In this case, the defendant filed a petition for post-conviction relief and argued that his June, 1998 plea to fourth degree criminal sexual contact, with a State recommendation for probation, had not been made knowingly and voluntarily. At the time of his plea, the defendant was a legal permanent resident of the United States. He asserted that his attorney had told him that his immigration status would not be affected by this guilty plea.

In September, 2000, the United States Immigration Court ordered that the defendant be deported to his native country, the Dominican Republic. The defendant testified at his post-conviction relief hearing that he never would have pled guilty if he had known that he would be deported.

Justice John Wallace, writing for the Court in Nuñez-Valdẽz, indicated that its decision did not depend on whether deportation is a penal or collateral consequence but rather on whether it was "ineffective assistance of counsel for counsel to provide misleading, material information that results in an uninformed plea and whether that was what had occurred here." Id. at 139.

The Court noted the following:

> Congress passed two statutes in 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 8. U.S.C.A. §1189, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub.L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified in various sections of 8 U.S.C.A.), both of which had expanded offenses for which an immigrant could be removed from this country and also eliminated the traditional judicial review of final removal orders. (citations omitted). Specifically, IIRIRA "made the classification of a legal permanent resident as an 'aggravated felon' a complete bar to relief from deportation." Id. at 200; 8 U.S.C.A. §1227(a)(2)(A)(iii). "Aggravated felony" is defined as "murder, rape, or sexual abuse of a minor." 8 U.S.C.A. §1101(a)(43)(A). Thus, the crime to which the defendant pled

> guilty as part of the plea agreement, one count of fourth-degree criminal sexual contact with a seventeen-year-old girl, required mandatory deportation.
>
> [Id. at 140].

The Court held that the record supported the defendant's assertion of ineffective assistance of counsel by showing that he would not have pled guilty but for the inaccurate information from defense counsel concerning the deportation consequences of his plea. The Court directed that the plea be vacated and that the matter be remanded for trial.

In rendering this decision, the Court emphasized the importance of assisting a non-citizen defendant in making an informed decision as to whether to plead guilty. It noted that it had revised the plea form, effective October 8, 2008, "to address the concern that it did not adequately advise non-citizen defendants about immigration consequences." The Court stated that, at that time, question 17 had been divided to reflect the following:

17a. Are you a citizen of the United States?	[Yes] [No]
If no, answer question #17b.	
17b. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?	[Yes] [No]
[Id. at 143; see also AOC Directive from Judge Grant, #14-08, dated October 8, 2008.]	

The Court concluded its decision by directing that the plea form be amended again and proposed several questions for the Criminal Practice Committee to consider. The Court stressed that the amended form should advise the defendant that a plea to an aggravated felony under federal law will subject the defendant to deportation/removal and should also instruct defendants of their right to seek legal advice regarding their immigration status. The Court further stated that **"… it is preferable that the trial court inquire directly of defendant regarding his knowledge of the deportation consequences of his plea."** Id. at 144. (emphasis added).

The proposed questions by the Court were formally implemented via AOC Directive #08-09, Supplementing Directive #14-08, from Judge Grant, dated September 4, 2009. A copy of these questions is attached hereto as Exhibit C.

On March 31, 2010, the Supreme Court of the United States issued Padilla v. Kentucky, 130 S.Ct. 1473 (2010). In this case, Mr. Padilla, a lawful permanent resident of the United States for over 40 years and a Vietnam veteran, had pled guilty to transporting a large amount of marijuana in his tractor trailer. In post-conviction proceedings, Mr. Padilla argued that his attorney had told him that he did not have to worry about his immigration status because he had been in this country for a long time. Mr. Padilla asserted that he never would have pled guilty if

he had known that his plea would subject him to deportation, which was virtually mandatory for this drug offense. See id. at 1477-1478.

The Padilla Court noted that it had never applied a distinction between direct and collateral consequences in defining the scope of "reasonable assistance" required under Strickland v. Washington, 466 U.S. 668, 689 (1984). The Court stated that it need not consider any distinction in this case "because of the unique nature of deportation." Id. at 1481.

The Court indicated that it recognized that preserving a defendant's right to remain in the United States may be more important to him than any potential jail sentence. It noted that, "although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." Id. at 1481.

The Court held that existing immigration law at the time of Padilla's plea indicated that deportation was "presumptively mandatory" and that his attorney could have easily ascertained this exposure by reviewing the appropriate statute. The Court, while acknowledging that "immigration law can be complex," stated the following:

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward, (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.
>
> [Id. at 1483].

The Court held that Mr. Padilla had relied upon erroneous advice and accepted his assertion that he would otherwise have gone to trial. It ruled that his plea and sentence would be vacated and his case remanded.

In his concurring opinion, Justice Alito indicated that he agreed with the Court's decision "because a criminal defense attorney fails to provide effective assistance within the meaning of Strickland (citations omitted) if the attorney misleads a non-citizen client regarding the removal consequences of a conviction." Id. at 1487. Justice Alito then explained his disagreement with the Court's conclusion regarding an attorney's obligation to provide immigration advice where the outcome would be "clear." He wrote the following:

> In my view, such an attorney must (1) refrain from giving inaccurate advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an

> immigration attorney. I do not agree with the Court that the attorney must attempt to explain what the consequences may be.
>
> [Id. at 1487].

Justice Alito then cited some of the many scenarios where it is not at all clear if the defendant will be deported and the extreme difficulty for defense counsel who attempt to accurately advise their clients as they consider proffered plea offers. He wrote that the majority's "vague and halfway test will lead to much confusion and needless litigation." Id.

We have herein referenced Justice Alito's concurring opinion recognizing that his views regarding an attorney's obligations were not adopted by the majority. His opinion does, however, powerfully demonstrate the complexity of this area and, we respectfully assert, the need for probing inquiry of defendants regarding their status and their understanding of their deportation exposure.

Given the holdings of these cases, it is most important that defendants be informed, as much as reasonably possible, of the deportation consequences of a plea or conviction at trial. We further note that, while these cases have indicated that such advice is the responsibility of the defense counsel, it is also undoubtedly the responsibility of the judge to make all reasonable effort to ensure a plea which is knowing, voluntary, and intelligent, and which results in finality, both in fairness to the defendant and also in fairness to the State. We submit that such finality is particularly important where the case involved a violent crime such as homicide, sexual assault, aggravated assault, or robbery. Following the Nuñez-Valdẽz and Padilla decisions, numerous post-conviction motions have been filed which allege ineffective assistance of counsel in cases where non-citizen defendants pled guilty and now, often many years later, seek to withdraw their pleas as they face deportation.

The following are the areas where we respectfully assert that it is particularly important to address the defendant directly as to whether he or she is a citizen of the United States. These areas include not only court proceedings but also other stages of the criminal process where any eventual prohibition on direct inquiry to the defendant, if that occurred, would have enormous and negative impact.

Bail Hearings

Rule 3:26-1 delineates the factors that must be considered by a judge when setting bail and/or considering a reduction of existing bail. Included in these factors are (4) "the defendant's length of residence in the community" and (8) "any other factors indicating defendant's mode of life, or ties to the community, or bearing on the risk of failure to appear." A defendant who is undocumented, and who may be facing a substantial prison term if convicted, can ordinarily be deemed to be a substantial risk of flight. Likewise, a legal resident facing incarceration and mandatory or likely deportation if convicted may or may not be a substantial risk of flight.

It is imperative that judges ascertain the accurate citizen/non-citizen status of defendants, as well as all other relevant factors, when setting bail or when considering a bail reduction, so

that the risk of flight can be properly assessed. This information is often obtained by direct inquiry to the defendant. Additionally, judges often require the surrender of the defendant's passport as a condition of bail. While many defendants who have illegally entered the country do not have passports, some others do and it is a reasonable condition to require surrender of it while the case is pending. A defendant surrendering a passport from another country is obviously indicating that he is not an American citizen.

Police/Prosecutor Notification to ICE

On August 22, 2007, then New Jersey Attorney General Anne Milgram issued Law Enforcement Directive 2007-3. In this Directive, attached hereto as Exhibit D, she instructed that local, county, and State law enforcement officers, who arrest a defendant for any indictable crime or for driving while intoxicated, **"…as part of the booking process, shall inquire about the arrestee's citizenship, nationality and immigration status."** (emphasis added). Id. at 3. The Directive further states that "if the officer has reason to believe that the person may not be lawfully present in the United States, the officer shall notify Immigration and Customs Enforcement (ICE) during the arrest booking process." It further directs the officer to notify the appropriate County Prosecutor and the court setting bail or conditions of pre-trial release.

While of course such Directive does not bind our Supreme Court on any of these issues that will be before them, any possible future Court directive that a defendant may not be directly asked about his status by a judge, on the ground of self-incrimination, could eventually be applied to police inquiry of the defendant for purposes of this ICE notification procedure, thus making this process of legitimate and important notification to ICE immensely more difficult. We further note that on October 25, 2007, then Acting AOC Director Judge Philip S. Carchman issued Directive # 11-07. This Directive references the Attorney General's Directive and ordered that, if a judge in an indictable or DWI case "discovers that a defendant may be an undocumented immigrant, but the defendant is not identified as such on the complaint, the court should forward this information to the prosecutor in the case." Id. at 2.

In State v. Fajardo-Santos, 199 N.J. 520 (2009), the Prosecutor moved to increase the defendant's original bail on first degree aggravated sexual assault charges. While incarcerated in lieu of bail, an ICE detainer was lodged on the defendant. The defendant had thereafter posted the original bail and had then been transferred to federal detention pending "likely deportation." The Prosecutor, concerned that the defendant would be deported before prosecution on the underlying very serious charges had taken place, moved for an increase in bail and argued that the "changed circumstances" involving the federal detention justified the increase. The Supreme Court ruled that the Prosecutor's motion was permissible.

In ruling on this matter, Chief Justice Stuart Rabner noted the importance of accurate information regarding the defendant's status. He wrote the following:

> When bail is set, it is entirely appropriate to consider a defendant's immigration status in evaluating the risk of flight or non-appearance. See e.g., United States v. Miguel-Pascual, 608 F.Supp.2d 83 (D.D.C. 2009); United States v. Chavez-Rivas, 536

> F.Supp.2d 962, 969 (E.D.Wis. 2008). Defendant does not suggest otherwise. Rather, he challenges the trial court's decision to tie an increase in bail to the lodging of a detainer under the facts of the case.
>
> [Id. at 531].

As noted above, it is routine in court hearings for the defendant to provide this kind of information. Often, part of the defendant's own argument may be that, while not a citizen, he is a long-time legal resident with a family and a job and is not a risk to flee. Indeed, even undocumented defendants, some of whom have literally grown up in the United States, often make similar argument and stress that their families reside here and that there are little or no ties to the country of origin. Such arguments, potentially beneficial to the defendant on the issue of bail, also reiterate the fact that he or she is not an American citizen.

Post-Indictment Arraignment/Status Conference Order/Court Inquiry as to Status

On August 20, 2010, Judge Grant issued a supplement to Directive #6-03. This supplement authorized the revision, in light of State v. Nuñez-Valdẽz, of the post-indictment arraignment/status conference order. This order now, at paragraph #7, specifically references the defense counsel's obligation to discuss with the defendant his/her immigration status, the potential consequences of a plea or conviction, and his/her right to seek legal advice on his/her immigration status. A copy of the Directive, which includes the revised order, is attached hereto as Exhibit E.

We further note that judges have been instructed in training sessions to specifically address this topic at the arraignment. The purpose is to ensure that the issue is addressed early in the case so that defendants may seek appropriate advice and also to minimize the delays that often occur as defendants do seek such advice and attempt to reach decisions on plea offers.

We respectfully submit that it has become the routine for judges to inquire of a defendant at the arraignment as to where he was born and whether he is an American citizen. It has been the frequent experience of the judges that many defendants are not aware of their status. Many defendants came to this country as young children, have grown up here, and have never really thought about their status until a judge has posed the question. In posing such questions to defendants, judges often first hear that the defendant is an American citizen and, with several questions thereafter respectfully posed, ascertain that the defendant is not a citizen and may not even be a legal resident. While some defendants may seek to intentionally mislead the court, many others are simply unaware or mistaken about their status. Such probing questions have frequently led to the revelation of enormously important status information or serious status questions that are critical for the defendant and defense counsel to further investigate and consider.

Under these circumstances, we strongly recommend that these specific questions continue to be posed by the judge. Additionally, the judge needs to be certain of the defendant's status so that the case can be properly managed on the calendar. As referenced above, reasonable

time may need to be given to the defendant for the purpose of seeking immigration advice from an attorney specializing in that area. Judges are frequently told that the defendant's family is trying to raise money for the consultation with an attorney specializing in the immigration area.

Plea Negotiations

It has become routine for most non-citizen defendants to readily acknowledge on the record that they are not American citizens and to thereafter actively seek lower charges from the prosecutor in an effort to resolve the case with a lessened exposure to deportation. Most legal residents greatly fear deportation and judges are often informed at status conferences that negotiations regarding lesser charges, as well as consultation with immigration attorneys regarding the impact of lesser charges, are ongoing. There are also many cases of undocumented defendants who have literally grown up in the United States and seek lower charges in the hope that a successful application for legal residency can be made.

A particularly sensitive area is that of cases involving alleged domestic violence. It is most important that these cases be treated with the utmost care and, if the defendant is guilty, appropriate punitive and/or rehabilitative conditions must be imposed. Judges and prosecutors, however, frequently hear distressed statements from alleged victims of domestic violence, imploring that the charges be downgraded or dismissed so that deportation of the defendant can be avoided. While some alleged victims seek reconciliation and others do not, many wish for the defendant to continue his relationship with the children, who often have been born in this country and are themselves American citizens. Alleged victims frequently express deep fear of the emotional and economic impact upon their children if deportation occurs. Again, these defendants readily admit that they are not citizens and proffer all positive personal information in an effort to receive Pretrial Intervention, if eligible, or otherwise receive an offer from the prosecutor to plead to reduced charges and hopefully avoid deportation.

This area of active negotiation for lesser charges was referenced in Padilla v. Kentucky, *supra*. The Court said:

> Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.…Counsel who possesses the most rudimentary understanding of deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.
>
> [Id. at 1486].

We reiterate that it is critical to have accurate citizen status information, which, again, will often emanate from the defendant himself. It is also most important for the defendant to acknowledge at the time of the plea, as encouraged in Nuñez-Valdẽz, *supra*, his or her understanding of the risk of deportation. One issue that has arisen frequently in recent post-conviction relief proceedings is the assertion by the defendant that, notwithstanding the completed plea form and his acceptance of the deportation risk on the record, his attorney had advised him, similar to the defendants' claims in Padilla and Nuñez-Valdẽz, not to worry about deportation because it would not occur. Probing questions of the defendant as to his understanding of his risk, and whether or not he has been told anything different, will prevent most such claims in the future. It has been the experience of the judges that most attorneys welcome such inquiry since it establishes a complete record and, in addition to ensuring a knowing and voluntary plea, protects the attorney in the future from claims by a defendant that the attorney had misinformed him.

Pretrial Intervention/Pleas /Pre-Sentence Reports/ Probation

Defendants who apply for Pretrial Intervention are routinely asked questions by Criminal Division staff, utilizing the AOC Uniform Defendant Intake Superior Court of New Jersey form. Information obtained includes name, date of birth, address, place of birth and citizen/non-citizen status. This form is attached hereto as Exhibit F.

Accurate information is most important for a number of reasons. In considering such application, the PTI Director will evaluate whether the defendant will succeed on the program and lead a law-abiding life. Steady employment is nearly always a positive factor in the defendant's application, particularly if restitution would be a condition of enrollment. A defendant who is not documented is unable to have "on the books" employment and often has serious difficulty finding any employment.

In State v. Leviaz and State v. Claros-Benitez, 389 N.J. Super. 401 (App. Div. 2007), the Appellate Division considered consolidated appeals from two defendants, both undocumented aliens, who had been accepted into PTI by the PTI Director but had been rejected by the County Prosecutor. Both defendants had charges involving false documents. The Panel ruled that a defendant's undocumented status was a legitimate, though not dispositive factor that may be considered in evaluating a PTI application. It affirmed the Prosecutor's denials by noting factors in these cases which included long-time undocumented status, possession and use of false documents regarding identity and driver's licenses, and previous bench warrants. It ruled that the defendants had not been rejected solely because of their undocumented status.

Likewise, in considering a plea offer to a defendant, the Prosecutor will ordinarily consider the defendant's status, in conjunction with many other factors, for similar reasons. A defendant who is able to have employment and otherwise has stable living circumstances is generally more likely to succeed on probation and make restitution if that is applicable. If a defendant pleads guilty, a Pre-Sentence Investigation Report is ordered and the same AOC Intake form is utilized and becomes part of that report. Additionally, a probation officer must be aware of the defendant's status since employment is usually a condition of probation. An

undocumented defendant cannot obtain lawful employment and the probation officer obviously must be aware of such status in seeking to properly supervise the case.

Omission of Reference on Plea Form to Mandatory Deportation

We will next address our above referenced concern regarding the omission in the currently proposed plea form questions of any reference to the consequence of mandatory or virtual mandatory deportation. These questions, hereto attached as Exhibit B, only indicate to the defendant that he or she **may** be removed upon plea to the offense. We believe that, given the Padilla and Nuñez-Valdẽz cases, language should be inserted which refers to both mandatory deportation and possible deportation. We have proffered, on pages 12-13 herein, in our "Conclusion" section, the questions which we conclude would satisfy the holdings in these cases.

We believe that, given the Padilla Court's requirement that the attorney must inform the defendant when deportation consequences are "clear," and otherwise inform them when deportation may occur, and the similar Nuñez-Valdẽz mandate that the attorney must not misinform the defendant and must seek to ensure that deportation advice results in a knowing and voluntary plea, these questions, with specific notice to the defendant that some pleas **will** result in deportation, are appropriate.

Conclusion

We respectfully submit that the issue of a defendant's citizen/non-citizen status is highly relevant in many areas of the criminal process. As noted above, such information is very often ascertained by inquiry to the defendant himself. If the defendant cannot be questioned regarding status, we will often have little or no information on his status.

While we acknowledge that non-citizen status is an element of the offenses of illegal entry/re-entry, deportation proceedings, as noted by the Padilla Court, are civil in nature. Notably, the United States Supreme Court has ruled that the Fourth Amendment exclusionary rule does not apply to evidence offered in a deportation proceeding. Justice O'Connor, in Immigration and Naturalization Service v. Adan Lopez-Mendoza et al, 468 U.S. 1032 (1984), wrote the following:

> A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, through entering or remaining unlawfully in this country is itself a crime. (citations omitted.) The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain silent.
> [Id. at 1038].

We submit that it is extremely rare that defendants are indicted for illegal entry and, as just noted, removal proceedings are almost always civil proceedings.

It should also be noted that courts have recognized other circumstances where information obtained by questioning the defendant in the ordinary ministerial booking process is permissible, even if such information is later used against a defendant. See State v. Mallozzi, 246 N.J. Super. 509 (App. Div. 1991). During the booking process, an arrested defendant is routinely asked for age, date of birth, height, weight, address, and citizen status. A copy of a typical arrest pedigree sheet from the Paterson Police Department is attached hereto as Exhibit G. We note that a defendant's age is itself an element of the offense for certain statutory sex crimes and a defendant's address can also be an element of offenses related to certain violations of Parole/Community Supervision for Life and/or violations of probation, i.e., if the defendant is not living at an approved address. We submit, however, that such information is still basic and ministerial.

As the case law has held, the defense attorney certainly has the primary responsibility to properly advise defendants of deportation consequences. We believe, however, that it is critical that judges, particularly where it is obvious that counsel has not adequately delved into the issue with defendant, be permitted to engage in probing inquiry of him as to where he was born, his current status, his knowledge of any deportation consequences, and whether he has sought additional immigration advice. The judge should also ensure that the defendant, who may be greatly concerned about deportation, has fully considered the risks of going to trial and thereby, if convicted, losing the benefit of the plea offer and thus ordinarily being exposed to a substantially higher sentence .

We respectfully submit that such probing inquiry of the defendant as to his status, and the retention of the specific question as to citizen status on the plea form, will greatly assist in achieving the goals that we all seek. One such goal is to ensure that the defendant is treated fairly and ultimately makes an informed decision as to whether to plead guilty, attempt to further negotiate, or go to trial. An equally important goal is that a victim, particularly of a violent crime, has finality and is not informed years later, to his or her great distress, that the case has been reversed because of a deportation issue, thus requiring further court proceedings and possibly even a trial.

As noted above, such inquiry is also most important to ensure proper police notification to ICE after arrest, proper information for the judge during the setting of bail, proper evaluations of PTI applications, appropriate plea offers, accurate pre-sentence reports, and proper supervision of defendants on probation. It is also most important that county jails and prisons have accurate status information to further ensure that careful review for any immigration detainers is conducted prior to the release of a defendant who has posted bail or who has finished serving a custodial sentence.

Finally, we recommend, as referenced above, that additional language be added to the plea form questions to reference that deportation can be either possible or mandatory. We propose that the plea form be amended as follows:

1. Keep current Question 17a:

17a. Are you a citizen of the United States? [Yes] [No]

2. **Add the following Question as 17b:**

17b. Do you understand that if you are not a United States citizen you [will be] [may be] deported as a result of your guilty plea to _____? [Yes] [No]
(list the offense(s))

3. **Reword the Committee's proposed Question 17a as follows:**

17c. Do you understand that pursuant to federal law if you are not a citizen of the United States, this guilty plea may result in your ~~[removal from the United States and/or stop you from]~~ not being able to legally enter or re-enter the United States; that the immigration consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status? [Yes] [No]

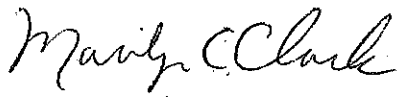
4. **Adopt the Committee's proposed Question 17b as follows:**

17d. Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences, do you still wish to plead guilty? [Yes] [No]

5. **Delete current Questions 17b, 17c, and 17d from the current plea form.**

We appreciate your consideration of our position.

Respectfully submitted,



Marilyn C. Clark, P.J.Cr.

Cc. Hon. Lawrence M. Lawson, A.J.S.C.,Vice-Chair, Criminal Practice Committee
Criminal Practice Committee Members
Joseph J. Barraco, Esq. Assistant Director, Criminal Practice

Exhibit A

Proposed Question #17 and Supplemental Plea Form Initial Recommendation at Criminal Practice Committee September 2010 Meeting

Proposed Question #17 and Supplemental Plea Form
Initial Recommendation at Criminal Practice Committee - September 2010 Meeting

17. a. Are you a citizen of the United States? [Yes] [No]

If you have answered **"No"** to this question, you must complete the **"Supplemental Plea Form for Persons Who Are Not United States Citizens"**

New Jersey Judiciary

Supplemental Plea Form For Persons who are not United States Citizens

1. Do you understand that if you are not a United States citizen you could become deportable under Federal immigration law by virtue of your guilty plea? [YES] [NO]
2. Do you understand that if you are not a United States citizen your guilty plea could affect your ability to re-enter the United States if you leave the country? [YES] [NO]
3. Do you understand that if you are not a United States citizen your guilty plea could affect your ability to apply for United States citizenship or any other form of residency? [YES] [NO]
4. Do you understand that if you become deportable by virtue of your plea of guilty you could become ineligible to obtain most of the waivers of deportation, you could become ineligible for voluntary departure, you could become permanently inadmissible into the United States after your deportation, and you could be exposed to a federal prison sentence if you are convicted of illegally re-entering the United States after being deported? [YES] [NO]
5. Do you understand that this Court has no jurisdiction or control over any decisions made by a Federal Court regarding your deportation, your ability to re-enter the United States, or your application for United States citizenship or any other form of residency? [YES] [NO]
6. Do you understand that you may seek legal advice from an attorney prior to entering your plea today about the affect your guilty plea will have on your immigration status, including your ability to remain in the United States, or your ability to re-enter the United States should you leave for any reason, or your ability to apply for United States citizenship or any other form of residency? [YES] [NO]
7. Having been advised of the possible immigration consequences do you still wish to plead guilty? [YES] [NO]

DATE:_____ DEFENDANT:_____

DEFENSE ATTORNEY:_____

PROSECUTOR:_____

Exhibit B

Proposed Question #17
Final Recommendation at the Criminal Practice Committee
October 13, 2010 Meeting

Proposed Question #17
Final Recommendation at the Criminal Practice Committee
October 13, 2010 Meeting

17. a.	Do you understand that pursuant to federal law if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?	[Yes]	[No]
b.	Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty?	[Yes]	[No]

Exhibit C

Current Question #17 – Promulgated By Directive #08-09 (September 4, 2009) (excerpt from Directive #08-09)

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

_____

_____

_____

_____

_____

_____

14. Has the prosecutor promised that he or she will **NOT**:

a. Speak at sentencing? [Yes] [No]

b. Seek an extended term of confinement? [Yes] [No]

c. Seek a stipulation of parole ineligibility? [Yes] [No]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [Yes] [No] [NA]

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [Yes] [No] [NA]

17. a. Are you a citizen of the United States? [Yes] [No]

b. Do you understand that if you are not a United States citizen or national, you **may** be deported by virtue of your plea of guilty? [Yes] [No]

c. Do you understand that if your plea of guilty is to a crime considered an "aggravated felony" under Federal law you **will** be subject to deportation/removal? [Yes] [No]

d. Do you understand that you have the right to seek legal advice on your immigration status prior to entering a plea of guilty? [Yes] [No]

18. a. Do you understand that pursuant to the rules of the Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence? [Yes] [No]

b. Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender? [Yes] [No]

19. Have you discussed with your attorney the legal doctrine of merger? [Yes] [No] [NA]

Defendant's Initials_____

Exhibit D

Attorney General
Law Enforcement Directive No. 2007- 3

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON NJ 08625-0080

JON S. CORZINE
Governor

ANNE MILGRAM
Attorney General

ATTORNEY GENERAL
LAW ENFORCEMENT DIRECTIVE NO. 2007-3

These guidelines shall establish the manner in which local, county, and State law enforcement agencies and officers shall interact with federal immigration authorities.

While enforcement of immigration laws is primarily a federal responsibility, State, county, and local law enforcement agencies necessarily and appropriately should inquire about a person's immigration status under certain circumstances. Specifically, after an individual has been arrested for a serious violation of State criminal law, the individual's immigration status is relevant to his or her ties to the community, the likelihood that he or she will appear at future court proceedings to answer State law charges, and the interest of the federal government in considering immigration enforcement proceedings against an individual whom the State has arrested for commission of a serious criminal offense. When there is reason to believe that the arrestee may be an undocumented immigrant, the arresting agency is responsible for alerting federal immigration officials, the prosecuting agency, and the judiciary.

The overriding mission of law enforcement officers in this State is to enforce the State's criminal laws and to protect the community that they serve. This requires the cooperation of, and positive relationships with, all members of the community. Public safety suffers if individuals believe that they cannot come forward to report a crime or cooperate with law enforcement. Moreover, Article 1, Paragraph 22 of the New Jersey Constitution mandates that "a victim of a crime shall be treated with fairness, compassion and respect by the Criminal Justice System." Consistent with that constitutional mandate, as well as basic

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principles of effective policing, victims, as well as witnesses and other persons requesting police assistance, should not be discouraged from approaching police officers out of fear of inquiry into their immigration status.

In 1996, Congress authorized federal authorities to delegate civil and criminal immigration enforcement authority to local, county and State agencies that enter into a written agreement with Immigration and Customs Enforcement (ICE).[1] Regardless of any additional enforcement powers granted pursuant to an agreement with ICE, however, the primary function of local, county and State agencies must be to enforce State law and to ensure public safety in the community. The exercise of federal immigration enforcement authority by State, county or local law enforcement officers must therefore be consistent with, and in support of, their State law enforcement mission. In addition, unlike federal task forces, to which participating officers are assigned on a full-time basis and are under direct and constant federal supervision, Section 287(g) officers need not obtain federal approval before taking enforcement actions in the name of the federal government.

To further the priorities of strong relationships between law enforcement and all members of the community, as well as other fundamental principles of equal protection and civil rights, New Jersey has taken a leadership position in eliminating racially-influenced policing, or racial profiling. In 2005, the Attorney General issued Attorney General Law Enforcement Directive 2005-1, which prohibits law enforcement officers from engaging in racially-influenced policing. In that directive, the Attorney General formalized and mandated the great advances that have been made in the State in eliminating racially-influenced policing practices. Additionally, the Legislature has affirmed that it is against the policy of this State for law enforcement officers to use race or ethnicity as a basis for initiating an investigation. See N.J.S.A. 2C:30-5. Consistent with public policy, statute, and Attorney General Directive, law enforcement agencies must refrain from any law enforcement strategies that risk undermining – or which create the impression of undermining – the prohibitions on racially-influenced policing.

Accordingly, by virtue of the authority vested in me by the Constitution and the Laws of this State, and in furtherance of securing

---

1 See Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g).

the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, N.J.S.A. 52:17B-97 et. seq., I do hereby promulgate the following directives:

I. Arrest of Undocumented Immigrants for Indictable Offenses and Driving While Intoxicated (Applicable to all Agencies and Officers)

1. **When a local, county, or State law enforcement officer makes an arrest for any indictable crime, or for driving while intoxicated, the arresting officer or a designated officer, as part of the booking process, shall inquire about the arrestee's citizenship, nationality and immigration status. If the officer has reason to believe that the person may not be lawfully present in the United States, the officer shall notify Immigration and Customs Enforcement (ICE) during the arrest booking process. The only exception to this requirement shall be if the County Prosecutor or the Director of the Division of Criminal Justice determines, in writing, that good cause exists to refrain from notifying ICE during the arrest booking process.**

2. **Notification to ICE may be made telephonically, by facsimile transmission, or by such other means as ICE may provide. The officer shall document when and by what means notification to ICE was made and the factual basis for believing that the person may be an undocumented immigrant.**

3. **Whenever a law enforcement officer notifies ICE about a suspected undocumented immigrant, notification shall also be made to the prosecuting authority that will handle the matter (*e.g.*, the County Prosecutor in the case of an indictable charge), and to any court officer setting bail or conditions of pretrial release.**

4. **County Prosecutors shall on an annual basis report to the Director of the Division of Criminal Justice on the total number of notifications made pursuant to this Directive and the Director shall make the aggregate data public on an annual basis.**

II. Prohibition on Immigration Status Inquiries of Victims and Witnesses (Applicable to all Agencies and Officers)

5. **No State, county, or local law enforcement officer shall inquire about or investigate the immigration status of any victim, witness, potential witness, or person requesting or receiving police assistance. An exception to this requirement shall exist if: (a) the County Prosecutor or the Director of the Division of Criminal Justice determines, in writing, that good cause exists to inquire about or investigate the person's immigration status; (b) the person has been arrested for an indictable offense or for driving while intoxicated as set forth in Section 1 above; or, (c) as may be constitutionally or otherwise legally required during the criminal litigation discovery process.**

III. Standards for Agencies and Officers Who Enter Agreements to Exercise Federal Immigration Authority Pursuant to Section 287(g) (Applicable only to Section 287(g) Agencies and Officers)

Directives 6 through 12 apply only to those local, county, and State law enforcement agencies and officers performing functions of a federal immigration officer pursuant to an agreement with federal authorities under 8 U.S.C. § 1357(g). As used in this Directive, the term "Section 287(g) agency" means a State, county or municipal law enforcement agency that is a signatory to a written agreement with Immigration and Customs Enforcement (ICE) authorized by Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g). The term "Section 287(g) officer" means a law enforcement officer employed by a Section 287(g) agency who has received the training required by Section 287(g) and is authorized by ICE to act as a federal immigration officer.

A. Provisions Applicable to Section 287(g) Officers in Detention Facilities

6. **A Section 287(g) officer may invoke or exercise federal authority under Section 287(g) with respect to any undocumented immigrant who is being detained in a county jail or State detention facility.**

B. Provisions Applicable to All Other Section 287(g) Officers

7. **A Section 287(g) officer may not exercise federal law enforcement authority under Section 287(g) unless and until the officer has arrested an individual(s) for violation of an indictable offense, or for driving while intoxicated, under State law.**

8. **Any law enforcement officer making inquiry or investigation into the immigration status of an individual arrested for an indictable offense, or for driving while intoxicated, shall document and report the inquiry to the officer's supervisor during the arrest booking process. The report shall include the individual's name, address, gender, date of birth, country/place of birth, race, ethnicity, location encountered, and shall specify the criminal offense that formed the basis for the arrest, the outcome of inquiry and investigation into immigration status, and indicate whether the individual was taken into custody or otherwise ordered detained based on immigration status. The officer shall attach the arrest report to the reporting document.**

9. **A Section 287(g) agency shall submit on a monthly basis to the Director of the Division of Criminal Justice all reports (with arrest report attached) produced pursuant to No. 8 of this Directive to ensure that immigration enforcement efforts are being performed in compliance with all applicable State laws, directives, and guidelines. The Director shall compile the information and shall make the aggregate data public on an annual basis.**

10. **A Section 287(g) agency shall enter into a written agreement with an appropriate ICE-approved detention facility or facilities to ensure that there is adequate space to hold potential federal detainees in addition to local, county, or State detainees. The agreement shall set forth the procedures established to ensure that the**

detention of any individual solely on the basis of immigration charges comports with the requirements of 8 C.F.R. § 287.7. No agency shall exercise the authority granted by Section 287(g) prior to reaching agreement with a detention facility that meets the requirements set forth in this paragraph.

11. Nothing in this Directive shall limit the ability of local, county, or State law enforcement agencies to enter into written agreements authorized by Section 287(g) that impose greater restrictions on the agency's performance of functions under that agreement.

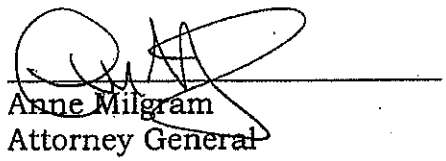
12. Directives 6 through 12 inclusive shall not apply to any officer who has been detailed on a full-time basis to a federal law enforcement agency or to a task force operated under the direct supervision of a federal law enforcement agency, provided that the officer is acting exclusively under the authority of federal law.

IV. General Matters

13. No law enforcement officer shall at any time engage in conduct constituting racially-influenced policing, as defined in Attorney General Law Enforcement Directive No. 2005-1. An officer or employee of a police agency in this State acting either under the authority of the laws of the State of New Jersey or pursuant to an agreement authorized by Section 287(g) shall not consider a person's race or ethnicity as a factor in drawing an inference or conclusion that the person may be an undocumented immigrant.

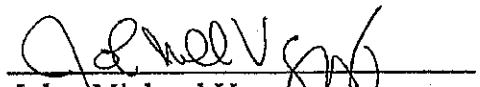
14. All questions concerning the interpretation, implementation or enforcement of this Directive shall be addressed to the Director of the Division of Criminal Justice, or his designee.

15. **This Directive shall take effect immediately and shall remain in full force and effect unless and until repealed, amended or superseded by Order of the Attorney General.**



Anne Milgram
Attorney General

ATTEST:



John Michael Vazquez
First Assistant Attorney General

Dated: August 22, 2007

Exhibit E

Supplement to Directive # 6-03
(August 20, 2010)
Criminal – Arraignment/Status Order –
Revisions to address State v. Nuñez - Valdẽz

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

GLENN A. GRANT, J.A.D.
ACTING ADMINISTRATIVE
DIRECTOR OF THE COURTS

RICHARD J. HUGHES
JUSTICE COMPLEX
PO BOX 037
TRENTON, NEW JERSEY 08625-0037

[Questions and/or comments may be directed to 609-292-4638.]

TO: **Assignment Judges**
Criminal Presiding Judges

Supplement to Directive # 6-03

FROM: **Glenn A. Grant, J.A.D.**

SUBJ: **Criminal – Arraignment/Status Conference Order – Revision to Address State v. Nuñez-Valdẽz**

DATE: **August 20, 2010**

This Supplement to Directive # 6-03 ("Implementation of Criminal Division Court Event Forms," issued July 22, 2003) promulgates a revised Arraignment/Status Conference Order form (Attachment 1 to Directive #6-03).

In State v. Nuñez-Valdẽz, 200 N.J. 129 (2009), the Supreme Court instructed that the plea form should inform a non-citizen defendant that "if your plea of guilty is to a crime considered an aggravated felony under federal law you will be subject to deportation/removal." 200 N.J. at 144. The Court also determined "that the form should instruct defendants of their right to seek legal advice regarding their immigration status." Ibid. Those revisions to the plea forms have been promulgated by Directive #08-09.

The Conference of Criminal Presiding Judges is of the view that the defendant and defense counsel should be aware of and discuss potential immigration consequences early in the court process before a guilty plea or trial is considered. So doing will reduce the chances that this issue will delay case-processing. The Conference thus recommended a revision to the Arraignment/Status Conference Order form as well so as to include a statement (#7 on the form) alerting counsel to the issues raised by the Nuñez-Valdẽz decision, including the defendant's right to seek advice on his/her immigration status. Attached is the revised Arraignment/Status Conference Order form reflecting this additional language. This revised form of order supersedes the version attached to Directive # 6-03, effective immediately.

Any question or comments regarding this revised form of Arraignment/Status Conference Order may be directed to the Criminal Practice Division at 609-292-4638.

Attachment (Revised Arraignment/Status Conference Order)

cc: Chief Justice Stuart Rabner
AOC Directors and Assistant Directors
Trial Court Administrators
Criminal Division Managers
John J. Wieck, Criminal Practice Division
Melaney S. Payne, Criminal Practice Div.
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CRIMINAL PART, _____ VICINAGE
(To be executed on day of Arraignment/Status Conference)

STATE OF NEW JERSEY

vs.

_____
(Defendant)

INDICTMENT NO. _____

PROS. NO. _____

ARRAIGNMENT/STATUS CONFERENCE ORDER

Status: Jail _____ Bail _____

An arraignment/status conference was held on _____, 20_____. As a result thereof, it is hereby **ORDERED:**

1. **PLEA OFFER:** Terms of plea agreement offered by the State: _____

2. **DISCOVERY:** STATE
   - ☐ All Discovery has been provided.
   - ☐ The following Discovery is to be provided: _____

   DEFENSE
   - ☐ No Discovery has been provided.
   - ☐ All Discovery has been provided.
   - ☐ The following Discovery is to be provided: _____

   All Discovery shall be completed no later than _____, 20 ____.

3. **CO – DEFENDANT STATUS:** _____

4. **MOTION:** With the exception of Sands/Brunson, all DISPOSITIVE motions shall be heard prior to the imposition of the plea cutoff and execution of the TRIAL MEMO.

   Dispositive Motions: _____

   Non-Dispositive Motions: _____

5. All motions must be filed no later than _____, 20____

   The State's brief must be filed no later than _____, 20____

[Revised form of order promulgated by August 20, 2010 Supplement to Directive # 6-03.]

The Defense brief must be filed no later than _____, 20 ___

6. **Hearings on motions in this case shall be conducted as follows:**

Dispositive Motions – on _____, 20___ at _____AM or _____PM

Non Dispositive Motions
immediately before trial on _____, 20___ at _____AM or _____PM

7. Defense counsel is to discuss with the defendant his/her immigration status, the potential consequences of a guilty plea or conviction and his/her right to seek legal advice on his/her immigration status. (State v. Nunez-Valdez, 200 N.J. 129 (2009).)

8. **PLEA CUT OFF DATE:** _____, 20___.

9. Immediately upon conclusion of the hearing and disposition of DISPOSITIVE motions, all cases as to all defendants that are not disposed of by plea or dismissal shall be immediately scheduled for trial, with the plea cutoff imposed.

10. **STATUS CONFERENCE:** The parties shall next appear and be ready for the next Status

Conference on: _____, 20___.

A FAILURE TO APPEAR ON THE DATE AND TIME SPECIFIED HEREIN WILL RESULT IN THE ISSUANCE OF A BENCH WARRANT AND THE FORFEITURE OF BAIL.

11. **OTHER:** _____

_____

_____

_____ _____
Prosecutor (print name) **Defense Counsel (print name)**

_____ _____
Signature **Signature**

_____
HONORABLE **, J.S.C.**

Original: Court File Pink: Prosecutor Gold: Defense Counsel COPY: CCMO

[Revised form of order promulgated by August 20, 2010 Supplement to Directive # 6-03.]

Exhibit F

AOC Uniform Defendant Intake Form reissued by Directive # 1-06 (January 3, 2006)

Uniform Defendant Intake
Superior Court of NJ

LAST NAME	FIRST NAME	MIDDLE NAME

ALSO KNOWN AS	SPN	SBI #	DRIVER'S LICENSE NUMBER

DATE OF BIRTH	AGE	PLACE OF BIRTH	SOCIAL SECURITY NUMBER	SEX	RACE
				☐ M ☐ F	

HEIGHT	WEIGHT	EYE COLOR	HAIR COLOR	DISTINGUISHING MARKS

ALIEN STATUS	CITIZENSHIP	OTHER CITIZENSHIP (NATIONALITY)	INTERPRETER NEEDED	LANGUAGE
	☐ US ☐ OTHER		☐ YES ☐ NO	

ATTORNEY'S NAME	COMPLAINT DATE	ARREST DATE

POLICE AGENCY	COUNTY	COURT OF FILING

COMMITMENT NO.	INITIAL BAIL AMOUNT	INITIAL BAIL TYPE	BAIL STATUS
	$	☐ FULL SURETY ☐ 10% CASH ☐ ROR ☐ OTHER _____	☐ JAIL ☐ ROR ☐ BAIL

CHARGES	COMPLAINT NUMBERS	PROMIS NUMBERS	INDICTMENT / ACC. NUMBER

CODEFENDANTS' NAMES	COMPLAINT NUMBERS	PROMIS NUMBERS	INDICTMENT / ACC. NUMBER

1. Criminal History

PRIOR RECORD	PENDING CHARGES
☐ YES ☐ NO	☐ YES ☐ NO

2. Residence

NUMBER OF YEARS IN	RESIDENCE STATUS	HOW LONG AT CURRENT ADDRESS
COUNTY: NJ: US:	☐ RENT ☐ OWN ☐ OTHER	

ADDRESS	ZIP CODE

NAME OF COHABITANT	RELATIONSHIP TO DEFENDANT	RESIDENCE PHONE	EMERGENCY PHONE

PRIOR ADDRESS	ZIP CODE

NAME OF COHABITANT	RELATIONSHIP TO DEFENDANT	HOW LONG AT THIS ADDRESS

MARITAL STATUS	NUMBER OF DEPENDENTS	PAY SUPPORT
☐ SINGLE ☐ MARRIED ☐ SEPARATED ☐ DIVORCED ☐ WIDOWED		☐ YES ☐ NO

DOES THE DEFENDANT HAVE PRIMARY CARE OF CHILDREN OR OTHER DEPENDENTS?	IF YES, HAS THE DEFENDANT MADE ALTERNATE CARE ARRANGEMENTS?	HAS ALTERNATE CARE INFORMATION BEEN OBTAINED OR REFERRAL MADE?
☐ YES ☐ NO ☐ N/A	☐ YES ☐ NO	☐ YES ☐ NO

DEFENDANT SUPPLEMENTAL CONTACT	RELATIONSHIP TO DEFENDANT	TELEPHONE NUMBER

CONTACT PERSON'S ADDRESS	ZIP CODE

COMMENTS

Exhibit G

Patterson Police Department
Arrest Report

PATERSON POLICE DEPARTMENT

ARREST REPORT

Exhibit G
(1 page)

NBC

SNO#

DATE

PIN

PRISONERS NAME
LAST, FIRST M

RACE _____
W - WHITE J - JAPANESE
B - BLACK A - ASIAN
I - AM. INDIAN U - UNK
H - HISPANIC

SEX _____
M - MALE
F - FEMALE

MARC CASE #

DOB ____/____/____

SS #: _____-_____-_____

HEIGHT

WEIGHT

HAIR COLOR _____
0 - BLACK 5 - GRAY
1 - BROWN 6 - SANDY
2 - BLONDE 7 - BALD
3 - RED 8 - UNK
4 - WHITE

EYE COLOR _____
0 - BLACK 6 - HAZEL
1 - BROWN 7 - MAROON
2 - BLUE 8 - UNK
3 - GRAY
4 - GREEN

GLASSES _____
Y - YES
N - NO
C - CONTACTS
S - SUNGLASSES

FACIAL HAIR _____
1 - CLEAN SHAVEN 6 - MUSTACHE
2 - FULL BEAD 7 - NONE/ FUZZ
3 - BUSHY 8 - SIDEBURNS
4 - GOATEE 9 - UNSHAVEN
5 - LOWER LIP

SKIN/COMPLEXION _____
1 - ACNE 6 - PALE
2 - DARK 7 - POCKED
3 - FRECKLED 8 - RUDDY
4 - LIGHT 9 - SALLOW
5 - MEDIUM 10 - TANNED

PRISONER'S ADDRESS ☐ PATERSON NJ

PHONE

PLACE OF BIRTH ☐ PATERSON NJ

US CITIZEN ☐ YES ☐ NO

MARITAL STATUS _____
S - SINGLE M - MARRIED D - DIVORCED W - WIDOW

SCARS / MARKS / TATTOOS

OCCUPATION

EMPLOYER

ADDRESS ☐ PATERSON NJ

PHONE

NEXT OF KIN

ADDRESS ☐ PATERSON NJ

RELATIONSHIP

VEH ☐ TOWED | MAKE | MODEL | YEAR | STATE | LICENSE # | DL # | STATE

DATE OF ARREST | TIME OF ARREST | LOCATION OF ARREST | DISTRICT

DATE OF CRIME | TIME OF CRIME | LOCATION OF CRIME | DISTRICT

WEAPON: _____
00 - DNA
01 - HANDGUN
02 - RIFLE
03 - SHOT
04 - FIREARM
05 - KNIFE
06 - BLUNT OBJECT
07 - HANDS / FEET
08 - POISON
09 - EXPLOSIVES
10 - FIRE
11 - THREATS
12 - SIMULATED
13 - DRUGS
14 - UNKNOWN
15 - OTHER

BUILD _____
THIN
MEDIUM
STOCKY
MUSCULAR
OBESE

HAIR STYLE _____
BALD
THINNING
SHORT
LONG
AFRO
CURLY / WAVY
STRAIGHT
PROCESSED
DREAD LOCKS
BUSHY
GREASY
PONYTAIL

CHARGES (1) | (2) | (3) | (4)

BKT / WAR (1) | (2) | (3) | (4)

VICTIM / ARRESTED RELATIONSHIP _____
00 - DNA
01 - UNDETERMINED
02 - STRANGER
03 - SPOUSE
04 - EX-SPOUSE
05 - CO-HABITAT
06 - PARENT
07 - BRO / SISTER
08 - CHILD
09 - STEPPARENT
10 - STEP-CHILD
11 - IN-LAW
12 - OTHER FAMILY
13 - STUDENT
14 - TEACHER
15 - CHILD OF BOY / GIRLFRIEND
16 - BOY / GIRLFRIEND
17 - FRIEND
18 - NEIGHBOR
19 - SITTER / DAY CARE
20 - EMPLOYEE
21 - EMPLOYER
22 - LANDLORD / TENANT
23 - ACQUAINTANCE
99 - OTHER KNOWN

GANG AFFILIATION

OTHER KNOWN ADDRESS ☐ PATERSON NJ

NARRATIVE

COMPLAINANT _____ HOME ADDRESS _____

ARRESTING OFFICER _____

REV. 4/91 6/19

Appendix F

Comments to the October 13, 2010 Plea Form Amendments Addressing Immigration and Attachment filed by the Hon. Pedro J. Jimenez on January 17, 2011

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
PEDRO J. JIMENEZ, JR.
JUDGE
(609) 571-4155 (SECRETARY)
(609) 571-4152 (LAW CLERK)

MERCER COUNTY COURTHOUSE
209 S. Broad Street, COURTROOM A
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068

January 17, 2011

The Honorable Edwin H. Stern, P.J.A.D.
Chair, Criminal Practice Committee
North Tower, Suite 101
158 Headquarters Plaza
Morristown, New Jersey 08625-0085

Re: Dissent filed by Hon. Marilyn C. Clark, P.J.Cr., to the proposed amendments to the plea form regarding the immigration consequences of a guilty plea.

Dear Judge Stern:

I have already communicated to Melaney Payne, Esq., my desire to join Judge Clark's dissent. I only write to propose my own variation to the language to be considered regarding the questions on the plea form referencing the immigration consequences of a guilty plea. I do so because I believe this inquiry (both via the plea form and the judge's voir dire) must be presented to a defendant as simple, clear and concise as possible given our efforts to ensure that any plea agreement is entered into, among other things, knowingly and intelligently. In doing so, we are also more capable of accounting for the varying levels of education and comprehension of each non-U.S. citizen defendant we address.

What I respectfully submit as an alternative are the questions originally drafted and voted upon by the Committee (as depicted in Exhibit A of Judge Clark's dissent), with some revisions. I have kept the topics to be addressed with each defendant as separate questions so that we can engage in a piecemeal and, therefore, more complete and thorough inquiry of the defendant's understanding of each of the immigration consequences resulting from his/her plea. I do so because I believe the amendment to Question 17 proposed by Committee vote at our October 13, 2010, is one which a defendant would have trouble understanding, especially one who does not speak the English language, given the number of topics it attempts to address. As it is presently drafted, it is also one which I believe would require a lengthy, complex and, likely, convoluted translation for those defendants who speak another language.

My proposal is aimed at, among other things, making it clearer to a defendant who is not a U.S. citizen that a guilty plea **will** make him/her deportable, **will** affect his/her ability to re-enter the United States, and **will** affect his/her ability to obtain any form of legal residency. I phrase these considerations as I have because my understanding of immigration law leads me to believe that while a conviction makes this type of defendant deportable/inadmissible, it does not mean that he/she will actually be

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deported/barred from admission. I understand that whether or not someone is deported/barred from admission is a decision only to be made by federal authorities. Furthermore, pending a removal proceeding, non-U.S. citizen defendants are capable of securing their release from federal detention via the posting of bail. In addition, while some non-U.S. citizen defendants are deported/barred from admission soon after their state court conviction, others sometimes complete their state sentence and either go years without ever being subjected to removal proceedings or escape being subjected to these proceedings altogether. Accounting for this inconsistency within the federal system, I believe it is incumbent upon us, then, as state court judges to consider adopting the type of plea voir dire where we refrain from advising a non-U.S. Citizen defendant that they **will** be deported/barred from admission.

In the end, I have attached the questions I propose for review and consideration. I have done so with all due respect to the Committee's votes on the amendments to Question 17 of our plea forms, as well as to Judge Clark's dissent (of which I remain fully subscribed to with the exception outlined above). I also do so with thanks for this opportunity to have been able to offer my own thoughts on this issue.

Respectfully submitted,

Pedro J. Jimenez, Jr., J.S.C.
Superior Court of New Jersey

c. Hon. Lawrence M. Lawson, A.J.S.C., Vice Chair, Criminal Practice Committee
Criminal practice Committee Members
Joseph J. Barraco, Esq., Assistant Director, Criminal Practice

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
PEDRO J. JIMENEZ, JR.
JUDGE
(609) 571-4155 (SECRETARY)
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MERCER COUNTY COURTHOUSE
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TRENTON, NEW JERSEY 08650-0068

Proposed Questions

1) Are you a citizen of the United States?

2) Do you understand that if you are not a United States citizen you will become deportable under federal immigration law by virtue of your guilty plea?

3) Do you understand that if you are not a United States citizen and your plea of guilty is to a crime considered an "aggravated felony" under Federal law you will be subject to deportation/removal?

4) Do you understand that if you are not a United States citizen your guilty plea will affect your ability to re-enter the United States if you leave the country?

5) Do you understand that if you are not a United States citizen your guilty plea will affect your ability to apply for United States citizenship or any other form of residency?

6) Do you understand that this court has no jurisdiction or control over any decisions made by a federal court regarding your deportation, your ability to re-enter the United States, or your application for United States citizenship or any other form of residency?

7) Do you understand that you may seek legal advice from an attorney prior to entering your plea today about the affect your guilty plea will have on your immigration status, including your ability to remain in the United States, or your ability to re-enter the United States should you leave for any reason, or your ability to apply for United States citizenship or any other form of residency?

8) Do you understand that you have the right to have the State contact your consulate/consular representative to advise them that you have been arrested and/or incarcerated?

9) Having been advised of the possible immigration consequences do you still wish to plead guilty?

Appendix G

Comments to the October 13, 2010 Plea Form Amendments Addressing Immigration Filed by Boris Moczula, Esq., Assistant Attorney General on January 18, 2011

Joined By

Ronald Susswein, Esq., Assistant Attorney General
John McNamara, Esq., Assistant Prosecutor
Philip Degnan, Esq. Assistant United States Attorney

"Boris Moczula"
<moczulab@njdcj.org>

01/18/2011 10:15 AM

To <Melaney.Payne@Judiciary.State.NJ.US>
cc "Ron Susswein" <sussweinr@njdcj.org>
Subject CPC Report -- immigration inquiry (J. Clark dissent)

Hi Melaney.

I write, as set forth in Judge Clark's dissent, "to ensure that the Court is not under the impression that each vote of the majority [on the proposed immigration inquiry] necessarily represented an agreement that the direct written question, or any direct judicial inquiry of the defendant as to citizen status, constitutes a Fifth Amendment violation." (J. Clark dissent at 2). My affirmative vote was for the purpose of building consensus, based on the fact that "the issue of warnings to the defendant regarding deportation consequences could be adequately covered without this direct written question being on the plea form." (Judge Clark dissent at 2). My vote was not premised on the belief that a direct judicial inquiry of the defendant as to citizen status, either at a plea colloquy or at some other judicial proceeding, violates the Fifth Amendment.

With respect to the issue of advising the defendant that a criminal plea "may v. will" result in deportation, I only add that we cannot ignore the practical realities attendant to actions by immigration authorities. A criminal plea may make a defendant subject to deportation, but we cannot predict with certainty that immigration authorities will actually act on it or, if they do, that defendant will actually be deported. Issues such as agency resources, priorities, policy shifts, alien status, relief from removal, country of origin, etc. come into play. Our experience with ICE has taught us that just because a defendant is deportable as a matter of law does not mean he/she actually will be deported.

Ron Susswein has authorized me to tell you that he joins in my comments.

Appendix H

Comments on the October 13, 2010 Final Plea Form Amendments Addressing Immigration and Attachment Filed By Richard Barker, Esq., Designee for the New Jersey State Bar Association on January 18, 2011

Richard D. Barker, Esq.

New Jersey State Bar Association Representative to
The New Jersey Supreme Court Criminal Practice Committee
c/o 172-A New Street, New Brunswick, New Jersey 08901
Phone 732 937-6400 Fax 732 246-5932

January 18, 2011

Hon. Edwin H. Stern, P.J.A.D.
Chair, Criminal Practice Committee
North Tower, Suite 101
158 Headquarters Plaza
Morristown, New Jersey 07960-3965

Dear Justice Stern:

Re: Criminal Practice Committee – Comments as to
(1) Proposed plea form amendments
(2) Judicial inquiry to defendants as to citizen/non-citizen status

As you are aware I am the New Jersey State Bar Association representative to The New Jersey Supreme Court Criminal Practice Committee and it is in that capacity that I make the following comments concerning the December 8, 2010 Summary of Committee's Discussions of the Immigration Question on the Plea Form and Judge Marilyn C. Clark's "dissent" dated January 11, 2011.

For the reasons set forth below I fully support the revisions that were agreed upon at the Committee's October 2010 meeting based upon a dissent filed by the Office of the Public Defender which appears as Appendix B to the December 8th report:

Appendix B

Plea Form Amendments
Agreed Upon By the Committee
at the October 13, 2010
Criminal Practice Committee Meeting

17.	**a.**	Do you understand that pursuant to federal law if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status?	[Yes]	[No]
	b.	Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty?	[Yes]	[No]

UNITED STATES CITIZENS
MUST ALSO BE QUESTIONED CONCERNING
THE IMMIGRATION CONSEQUENCES OF THEIR CONVICTION

The Dissent believes that "…it is particularly important to address the defendant directly as to whether he or she is a citizen of the United States" in order to determine if it is necessary to further voir dire a defendant who has now been identified as a non-citizen with respect to the questions pertaining to a non-citizen defendant's understanding of deportation consequences. The fact that the Committee's extensive discussions have focused solely on non-citizens demonstrates how little is known by the criminal part of the bench and the bar concerning the immigration consequences of a criminal conviction.

The Adam Walsh Act [8 USC 1154(a)(1), (b)(i)(1)] specifically provides that a United States Citizen convicted of a specified offense against a minor cannot file a family visa petition on behalf of his/her immigrant family member. Is it any less like that a citizen defendant could argue that he/she would never had pled guilty if he/she had known that they would be unable to apply for "status" for their wife, step-children, parents, grandparents, etc. While there is an exception if the Department of Homeland Security (hereinafter DHS, formerly INS) decides that the United States Citizen does not pose a threat to the immigrant family member there is no review of a negative finding.

Asking about a defendant's citizenship/immigration status would not and is not necessary to ensure and insure compliance with State v. Nuñez-Valdẽz, 200 N.J. 129 (2009) and Padilla v. Kentucky, 130 S.Ct. 1473 (2010).

Question 17a "Are you an American citizen?"
Violates A Defendant's Fifth Amendment
Privilege Against Self-Incrimination

The Dissent opines that the mere fact that said answer "may" be used against a defendant to subsequently prosecute them in Federal Court after having been deported for illegal re-entry to the United States should not bar the Court from making such an inquiry. I rely upon and refer the reader to Dale Jones' dissent on-behalf of the New Jersey Office of the Public Defender (Appendix C of the December 8th report) and the below Immigrant Defense Project on "Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status."

The reality of such prosecutions is easily demonstrated by DHS' creation of the Secure Communities (SCOM) program to establish a database solely for the purpose of identifying and tracking non-citizens in conjunction with the Criminal Alien Program (CAP), the FBI and the NCIC database using fingerprints, place of birth and other booking information so that ICE agents can interview and detain such persons for Federal prosecution for illegal re-entry. County jails regularly admit such ICE agents to interview defendants despite their having counsel representing them on their State pending charges, if any.

In some Circuit's approximately one-third of Federal Public Defender cases are defending persons charged with illegal re-entry for which a sentence of five (5) years real time is often imposed. The sentence for illegal re-entry is often far greater than the sentence that was or could have been imposed for the charge resulting in the defendant's deportation.

The Dissent also argues that revelation by a defendant of their non-citizenship status will actually result in a benefit to the defendant because the Prosecutor, knowing that the defendant will be deported, will permit the defendant to plead to a lesser-charge. This is a mistaken notion. For example: a defendant is charged with possession of less than 30 grams of marijuana and possession of drug paraphernalia – rolling papers. Logically it would seem that the best deal would be to have the possession of marijuana dismissed and plead to possession of the rolling papers. However, a plea to possession of drug paraphernalia would subject a Legal Permanent Resident (LPR) to deportation/inadmissibility while the plea to possession of the marijuana would not subject the LPR to deportation because Immigration Law provides for a one time exception for personal use possession of 30 grams or less but the LPR would be subject to Inadmissibility should they ever leave the United States.

TEN TIMES AS MANY DEFENDANTS' FACE DEPORTATION, REMOVAL, INADMISSBILITY AS THE RESULT OF A CONVICTION IN MUNICIPAL COURT

In 2010 New Jersey Municipal Courts handled approximately seven (7) million cases, almost **66 times more than Superior Court case filings**. Yet, we seem to be unconcerned with the exact same immigration consequences resulting from a conviction in Municipal Court for such a vast number of people. Municipal Courts use no plea form, there is no uniformity in the warnings given to persons appearing in municipal courts concerning their various rights (see Court Rule 7:14-1 Opening Statement), many of our 600 plus municipal courts provide no warnings in a language other than English and the Administrative Office of the Courts has not required the Municipal Courts to provide any warning regarding the immigration consequences of a conviction. See the New Jersey Lawyer Magazine, December 2010/ No. 267 "Collateral Consequences: The Potential for Deportation and Exclusion as a Result of a Municipal Court Shoplifting Conviction at page 25. Given our current level of technology the AOC should at a minimum provide each Municipal Court, to be played in conjunction with the Opening Statement, pre-recorded warnings in at least English and Spanish.

By way of example while Driving Under the Influence is not a crime of moral turpitude subjecting a defendant to deportation Driving Under the Influence while your driver's license is suspended is a crime of moral turpitude subjecting the defendant to deportation. Driving under the influence of drugs could be a controlled substance offense subjecting the defendant to deportation and/or inadmissibility. See also the above discussion relating to possession of 30 grams or less of marijuana for personal use and drug paraphernalia-rolling papers which is often the subject of Municipal Court proceedings.

IS THE USE OF A PLEA FORM OF SUCH CONSTITUTIONAL SIGNIFICANCE THAT A DEFENDANT CANNOT ENTER A VALID GUILTY PLEA WITHOUT SIGNING IT OR WITHOUT ANSWERING ALL THE QUESTIONS

I raised this issue at the Committee meetings and received no firm answer. Despite whatever form the plea form takes can a defendant plead guilty, refuse to sign the plea form and/or answer the question concerning citizenship? Evidently, this is no bar to a conviction in the Municipal Courts.

THE FORUM SHOPPING DILEMMA

After having informed defense counsel at the time of arraignment of their obligation to: discuss with the defendant their immigration status, the potential consequences of a plea or conviction and to inform the defendant of their right to seek other/expert legal advice regarding immigration consequences; after the Court has voir dire'd the defendant at the time of the plea and following sentencing the defendant who subsequently finds themselves in DHS custody may be in for another surprise. DHS can transfer a detainee to any of its detention facilities anywhere in the United States, i.e. any of the Federal Circuits. This transfer can effectively nullify the advice given to a defendant concerning the consequences of his plea/conviction. This can involve issues such as: whether a NJ disorderly persons offense is a "crime" under immigration law such that someone has been "convicted of a crime involving moral turpitude (see the unpublished 3rd Circuit opinion in Bernardo Castillo v. Attorney General of the United States, On Petition for Review of an Order of the Board of Immigration Appeals, No. A090-260-288, Immigration Judge Hon. Henry S. Dogin, (Opinion Filed January 11, 2011); some Circuits only look at the elements of an offense to determine if it is a crime of moral turpitude requiring deportation while other Circuits look at the facts (see Silva-Trevino, 24 I. &. N. Dec. 687 – AG 2008 and Jean-Louis, 582 F. 3d. 462, 3d. Cir. 2009; in cases arising in the Ninth Circuit only a non-citizen with an <u>expunged conviction</u> for first time possession of a controlled dangerous substance will not be deportable or inadmissible based on the expunged offense (Lujan-Armendariz v. INS, 222 F. #d 728, 9th Cir. 9/24/00 pending reconsideration); Juvenile-like dispositions that can result in adult sentences is not a conviction for immigration purposes under New York youthful offender (see In Matter of Devison, 22 I. & N. Dec. 1362, BIA 2000).

I could go on and on. The point is that the Federal Circuit Courts disagree with each other concerning substantive issues affecting deportation, removal, inadmissibility and the availability of various forms of relief. Immigration officials in essence have a choice of laws which enables them to deport a defendant who would not have been deportable in the Circuit in which they were convicted by detaining that defendant in another Circuit. The finality of a conviction which the Dissent seeks is simply not possible by endlessly questioning a defendant and his counsel.

CONCLUSION

The Dissent also "…strongly recommend the continuance of the practice, utilized by most judges, of asking every defendant at both the arraignment and the plea proceeding, where they were born, whether they are American citizens, and then pursuing follow-up questions as needed." Being born outside of the United States does not mean you are not a citizen. Such a question must be followed-up with: what is your status (the Dissent admits many defendants may not know the correct answer and this often involves investigation and obtaining documents going back years and in other countries), what is/was the status of your parent or parents/grandparents at the time of your birth, were they in the military, were they married, did they subsequently marry, etc. Were a defendant to disclose to the Court that they are an LPR that information alone is insufficient and must be followed with: what was your date of admission (a complex question that does not refer to the date you entered the US), how long from that date have you been an LPR (more or less than 5 years), etc.

But, what can Judges do with the information that they might glean from such questioning. They certainly do not have the training and expertise to answer any query directed to them by the defendant in response to such questioning and any such answer that they might give will undoubtedly become a ground for challenging the finality of the conviction which is exactly what the Dissent seeks to avoid. Such a colloquy between the defendant and the Court will in the end result in the Judges simply repeating to the defendant the warnings contained in the proposed question 17a:

Do you understand that pursuant to federal law if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States; that the immigrations consequences to you, if any, are not necessarily the same as they would be to anyone else; and that if you are not a citizen, **you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status? (Emphasis added).**

Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences do you still wish to plead guilty?

Having returned to the beginning I recommend the adoption of the proposed question.

Respectfully submitted,

Richard D. Barker, Esq.
NJSBA Representative to The NJ
Supreme Court Criminal Practice Committee

cc: Richard Steen, President, NJSBA

IMMIGRANT DEFENSE PROJECT

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Ensuring Compliance With *Padilla v. Kentucky* Without Compromising Judicial Obligations

Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status*

In *Padilla v. Kentucky*,[1] the Supreme Court confirmed that defendants have a right to advice from counsel about the potential immigration consequences of their criminal charges and convictions, and that failure to provide such advice constitutes ineffective assistance of counsel, in violation of the Sixth Amendment. As courts around the country consider what role they should play in ensuring that defense counsel comply with their obligations post-*Padilla*, judges should refrain from asking about defendants' citizenship/immigration status. This document outlines the constitutional, statutory, and ethical reasons that judges should not solicit or otherwise require defendants to disclose, orally or in writing, their citizenship/immigration status when that status is not a material element of the offense with which they are charged.

Judges play an important role in ensuring that defendants are advised about potential immigration consequences of a conviction and have an opportunity to obtain such advice. However, they need not ask about a defendant's citizenship/immigration status on the record to do so. Judges can assure the voluntariness of a plea and support compliance with *Padilla* without inadvertently triggering additional immigration consequences for a defendant, requiring disclosures that would breach attorney-client privilege, violating state laws, or undermining constitutional protections against discrimination, unreasonable interrogation, and self-incrimination.

For the constitutional, statutory and ethical reasons discussed below, judges should refrain from asking about defendants' citizenship/immigration status when ensuring compliance with *Padilla*.

I: The law counsels against requiring disclosure of citizenship/immigration status.

- Judicial obligations under the Bill of Rights, judicial codes of conduct and some state laws preclude inquiry into defendants' citizenship/immigration status. By not requiring disclosure of status, judges can:
  - Avoid compelling individuals to incriminate themselves, in violation of the Fifth Amendment;
  - Uphold their obligations of impartiality and neutrality;
  - Protect the confidentiality essential to honest attorney-client communication and to the ability of counsel to provide competent advice about the immigration consequences of conviction; and
  - Comply with the growing number of state statutes that prohibit on-record inquiry into defendants' legal status.

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

- By limiting on-record questions to those relevant to the criminal charges at issue or necessary for compliance with judicial obligations, judges can avoid triggering adverse immigration consequences for defendants and promote public confidence in the criminal justice system.

III: When issuing advisals, it is in the court's interest to issue them to a*ll* defendants, without distinguishing between citizens and non-citizens.

- When providing *Padilla* advisals, judges can prevent the complications that may ensue from raising status on the record and still fulfill their responsibility to ensure that guilty and nolo contendere pleas are knowing and voluntary by providing those advisals to all defendants regardless of citizenship/immigration status.

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* This document was prepared on behalf of, and under the guidance of the Immigrant Defense Project (IDP) by Nikki Reisch and Sara Rosell of the Immigrant Rights Clinic (IRC) at New York University School of Law. November 2010.

I: The law counsels against requiring disclosure of citizenship/immigration status.

Questioning defendants about citizenship/immigration status on the record could tread on Fifth Amendment protections against self-incrimination.[2] All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment. In *Mathews v. Diaz,* the Supreme Court held that every person, "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[3] An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings."[4] Statements about alienage made on the record in criminal court, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325, 1326, respectively.[5] Thus, requiring defendants to disclose their citizenship/immigration status risks compelling individuals to incriminate themselves. Although a defendant could invoke the right to remain silent,[6] he or she may not be adequately informed that this right exists in the context of a plea allocution,[7] or could be intimidated into disclosure.[8] Furthermore, asking about citizenship/immigration status may force a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required for entry of a plea. To avoid such complications, judges should not ask about or require written indication of alienage on the record.

Asking about a defendant's citizenship/immigration status may be contrary to judicial codes of conduct. The public controversy surrounding the presence of immigrants implicates issues of race, ethnicity and class. Thus even if a judge's intention is to protect the defendant's interests, inquiring into a defendant's citizenship/immigration status may undermine the appearance of judicial neutrality. The American Bar Association (ABA) Model Code of Judicial Conduct instructs judges to "avoid impropriety and the appearance of impropriety," and perform their duties without bias or prejudice, including based on race and national origin.[9] Most state codes of judicial conduct contain identical or substantially similar provisions.[10] At least one state judicial ethics body has found "reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or a bail hearing."[11] Another state disciplined a judge because his selective inquiry into defendants' citizenship/immigration status raised serious concerns about his motivations, undermined public confidence in the judiciary, and violated codes of judicial conduct. [12]

Furthermore, citizenship/immigration status inquiry could jeopardize attorney-client confidentiality and hinder the ability of counsel to provide effective assistance. The Federal Rules of Criminal Procedure require a judge to inquire whether a defendant is aware of the consequences of his plea, but "[t]he court must not participate" at all in discussions concerning a plea agreement.[13] By eliciting information about a defendant's citizenship/immigration status on record, a judge may be unwittingly intruding into confidential attorney-client communication,[14] undermining counsel's ability to predict and advise his or her client regarding immigration consequences, or upsetting the terms of a negotiated plea designed to avoid disclosure of status.[15] If individuals fear that the information they share with their attorneys about their citizenship/immigration status may be divulged on the record in court, they may withhold facts that are essential for their attorneys to provide accurate advice. It would no more be appropriate for a judge to inquire into the health status of a defendant at the time of a plea, when it is not relevant to the offense charged and was not voluntarily disclosed by the defendant, than it would be to inquire into a defendant's citizenship/immigration status.

A growing number of states prohibit courts from requiring disclosure of a defendant's citizenship/immigration status. Recognizing the concerns associated with disclosure of citizenship/immigration status on the record, ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship/immigration status,[16] one deems such inquiry unnecessary,[17] and others are considering legislation that would impose similar restrictions.[18] The relevant legal codes in the ten states with existing statutory bars to inquiry prohibit requiring a defendant to disclose his or her citizenship/immigration status to the court at the time of a plea. For example, Arizona's rule on pleas of guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."[19] Even state plea forms that do address immigration consequences typically do not require a defendant to indicate his or her citizenship/immigration status.[20]

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

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

* Prohibits inquiry into citizenship/immigration status

II: Asking about a defendant's citizenship/immigration status is not necessary to ensure compliance with *Padilla* and may trigger unintended harms.

Ensuring effective assistance of counsel does not require ascertaining the content of that assistance. In fact, attorney-client privilege protects the confidentiality of advice provided to a client. In *Padilla*, the Supreme Court emphasized the duty of *defense attorneys* to advise their clients of the immigration consequences of conviction, holding that failure to so do may constitute ineffective assistance of counsel. Only defense counsel can assure that the assistance they provide is effective. In promoting compliance with *Padilla* and protecting Sixth Amendment rights,[21] judges' primary role is to notify all defendants of their right to receive advice from counsel about potential immigration consequences. Defense attorneys have an obligation to determine whether their client is a noncitizen and then to provide such advice based on his or her individual facts (such as, *inter alia*, family relationships, length of time in country, complete immigration and criminal history and risk of persecution in country of origin). *Padilla* did not mandate judges to take part in providing immigration advice. Thus, judges need not inquire into citizenship/immigration status to determine whether the advice is necessary in the defendant's case nor elicit information about the content of any advice provided.

Disclosure of citizenship/immigration status is not necessary for a judge to confirm that a plea is knowing and voluntary, make a finding of guilt, or confirm the factual basis of a plea.[22] A judge has a responsibility to confirm that a guilty plea is free from coercion, and that the defendant understands the nature of the charges and knows and understands the consequences of pleading guilty.[23] However, it is for defense counsel, not a judge, to identify those consequences to which a defendant is vulnerable as a result of conviction and to advise the client accordingly. Judges can fulfill their obligations to ensure that pleas are knowing and voluntary, without inquiring into a defendant's citizenship/immigration status. Just as a judge seeking to confirm that a plea is knowing and voluntary does not ask if a defendant resides in public housing—leaving it to counsel to determine whether the defendant faces any risk of eviction as a result of conviction and advise him or her

accordingly—it would be inappropriate for a judge to ask about a defendant's citizenship/immigration status, rather than simply ensuring that a defendant is aware of his or her rights to discuss potential consequences with an attorney. Furthermore, with the exception of those criminal laws that include citizenship/immigration status as an element of the offense,[24] an individual's nationality, citizenship or alienage has no bearing on his or her guilt or innocence regarding a criminal charge, or the factual basis of his or her plea.[25]

Inducing a defendant to indicate his or her citizenship/immigration status on record in a criminal proceeding can have significant adverse consequences for the defendant. Citizenship/immigration status is sensitive information and its disclosure on the record in public courtrooms could trigger adverse action against defendants or their families.[26] Department of Homeland Security/ICE officers may be present in the courtroom or alerted to statements made by individuals present, including local law enforcement agents and prosecutors. It is possible that DHS may use evidence from court transcripts to pursue deportation—a measure which the Supreme Court has described as a "drastic," severe consequence that is "virtually inevitable" for a vast number of noncitizens convicted of crimes, because deportation is often mandatory despite any favorable factors.[27]

If courtrooms are seen as places in which individuals' citizenship/immigration status will be exposed, some defendants and witnesses may lose faith in the fairness and impartiality of the criminal justice system. Studies have found that increased collaboration between local law enforcement agencies and immigration authorities (the Bureau of Immigration and Customs Enforcement), and the associated fear among immigrant communities that any contact with police could trigger consequences, has a chilling effect on reporting of crimes, resulting in further marginalization of already vulnerable populations.[28] Just as law enforcement agents depend on the cooperation of local communities to prevent, investigate, and prosecute crime, so too do courts require the cooperation of defendants and witnesses in proceedings to effectively adjudicate charges and issue sentences. If judges require disclosure of citizenship/immigration status, some defendants and witnesses may be afraid to appear in court at all.

On-record disclosures may have chilling effects on individuals outside of the criminal proceeding. If people believe that pressing criminal charges could lead the accused to be deported, they may be discouraged from reporting crimes. This is particularly true in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to detention and deportation.[29] Such fear and mistrust of the criminal justice system could have dangerous consequences, especially for the most vulnerable populations of women and children.

III: When issuing advisals, it is in the court's interest to issue them to *all* defendants, without distinguishing between citizens and non-citizens.

Selectively issuing advisals to some defendants and not others runs the risk of being under-inclusive. Providing advisals only to those who state that they are non-citizens or whom the court believes to be noncitizens may mean that people who face potential immigration consequences of a conviction may not be informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.[30] This approach could cost courts time in the long run. When judges issue advisals to all defendants without trying to single out noncitizens, they are less likely to face future motions to vacate for failure to issue a notification, especially in those states where it is statutorily required.[31] It also may take more time to accurately distinguish between citizens and non-citizens than it would to issue advisals to everyone. As Florida's statute makes clear, universal administration of an advisal renders inquiry into citizenship/immigration status unnecessary: "It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as [the required] admonition shall be given to all defendants in all cases."[32]

Furthermore, non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases for law enforcement agents to

question someone about their citizenship.[33] According to the Second Circuit, "The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status."[34] When it is not necessary to a finding of guilt, judicial questioning regarding a defendant's citizenship/immigration status could appear to be gratuitous. Furthermore, selectively questioning defendants about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters could be in tension with Fourth Amendment protections against racial and ethnic profiling. Regardless of whether the motives for asking about citizenship/immigration status are to protect and not to prosecute defendants, judges should refrain from asking any defendant about his or her citizenship/immigration status and thereby avoid any constitutional concerns that could arise from selective questioning.

In certain sentencing or custody determinations, judges may take citizenship/immigration status into account when defense counsel voluntarily submits it for the court's consideration.

Prohibiting judges from affirmatively inquiring into citizenship/immigration status on the record does not mean that a defendant, under advice of counsel, cannot voluntarily disclose such information for the judge's consideration during sentencing or custody determinations. Just as judges may consider an offender's health status when it is voluntarily disclosed by defense counsel, but may not independently solicit medical information on record, so too may judges consider immigration status when it is voluntarily divulged. Defendants and their counsel should be able to control whether and when to disclose information about immigration status on the record, when it is not an element of the criminal offense.

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Endnotes

[1] 130 S. Ct. 1473 (2010) (holding that Sixth Amendment requires defense counsel to provide affirmative, competent advice to noncitizen defendants regarding immigration consequences of guilty plea and that absence of such advice may be basis for claim of ineffective assistance of counsel).

[2] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. However, its invocation is not limited to criminal trials. *See, e.g. United States v. Balsys*, 524 U.S. 666, 672 (1998) (" '[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'" when individual believes information sought or discoverable through testimony, "could be used in a subsequent state or federal criminal proceeding") (citing *Kastigar v. United States*, 406 U.S. 441, 444-445, (1972)); *see also McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (making Self-Incrimination Clause of Fifth Amendment applicable to states through Fourteenth Amendment Due Process Clause).

[3] 426 U.S. 67, 77 (1976).

[4] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[5] *See infra*, note 24.

[6] Citizens and non-citizens alike may invoke the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law…Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (internal citations omitted); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) ("[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (individual subject to removal proceedings invoked Fifth Amendment, but court did not reach question of whether invocation was proper because it deemed the issue "not relevant to [its] decision ….").

[7] Fifth Amendment protection applies to communication that is testimonial, incriminating, and compelled. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). What is considered custodial interrogation depends on whether a reasonable person, in view of the totality of the circumstances, would feel free to leave. *See Stansbury v. California*, 511 U.S. 318 (1994). A court may constitute a "custodial setting" but the test is whether, under all the circumstances involved in a give case, the questions are "reasonably likely to elicit an incriminating response from the suspect." *United States v. Chen*, 2006 U.S. App. LEXIS 5286 (March 2, 2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). "The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant." *Id.* (quoting *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994)).

[8] Practitioners have expressed concern that defendants, when directly addressed by the judge, are often too intimidated to assert their right to remain silent or to ask for more time, when needed, to speak to their attorneys. When immigration status is not relevant to a material issue in the case, judges should not seek its disclosure because such inquiry may have an *in terrorem* effect upon a defendant, who may be intimidated and inhibited from pursuing his or her legal rights. *See Campos v. Lemay*, 2007 U.S. Dist. LEXIS 33877, 24-25 (S.D.N.Y. 2007) (recognizing that danger of intimidation from inquiring into defendant's legal status during proceedings could affect defendant's ability to vindicate his or her legal rights). Other courts have similarly recognized the risk related to questioning immigration status on the record. *See, e.g. Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Sup. Ct. Tex. 2010). Asking about citizenship/immigration status may have the effect of forcing a defendant to choose between asserting his or her Fifth Amendment right and accepting a plea that both parties feel is proper, because responses to plea forms and allocution questions are generally perceived to be required.

[9] *See* ABA MODEL CODE OF JUDICIAL CONDUCT, R. 1.2, 1.3, 2.2, 2.3, & associated cmts. (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

[10] For some representative examples, see ALA. CANONS OF JUDICIAL ETHICS Canons 1-3; 22 NYCRR §§ 100.1, 100.2, 100.3(B)(3)-(4); ALASKA C.J.C. Pts. R1-R3 (2010); GA. CODE OF JUDICIAL CONDUCT Canons 2 -3 (2009), OHIO JUD. RULES R. 2.2, 2.3 (2010) ("Rule 2.3 is identical to [ABA] Model Rule 2.3."); CAL. CODE JUDICIAL ETHICS Canons 2-3 (1996); N.Y. CODE OF JUDICIAL CONDUCT, Canons 2-3 (1996).

[11] Maryland Judicial Ethics Committee, Op. Request No. 2008-43 (January 30, 2009) ("At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant's Immigration Status"), 2-3, *available at* http://www.courts.state.md.us/ethics/opinions/2000s/2008_43.pdf.

[12] *See In re Hammermaster*, 139 Wn.2d 211, 244-45 (Wash. 1999) (finding that judge's practice of inquiring about citizenship of some defendants in criminal cases violated Washington's Code of Judicial Conduct, requiring judges to be patient, dignified, and courteous).

[13] FED. R. CRIM. P. 11(c)(1).

[14] The Supreme Court has repeatedly recognized "the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion." *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications. …The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.") (internal citations omitted); *United States v. Under Seal (In re Grand Jury Subpoena)*, 341 F.3d 331, 336 (4th Cir. 2003) ("[U]nder normal circumstances, an attorney's advice provided to a client, and the communications between attorney and client are protected by the attorney-client privilege."); *Sarfaty v. PNN Enters.*, 2004 Conn. Super. LEXIS 1061, 10-11 (Conn. Super. Ct. 2004) ("The attorney-client privilege applies to communications: (1) made by a client; (2) to his or her attorney; (3) for the purpose of obtaining legal advice; (4) with the intent that the communication be kept confidential.").

[15] As the Supreme Court recognized in *Padilla*, both the prosecution and defense have an interest in taking immigration consequences into consideration in off-record negotiations: "Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486.

[16] The states with statutes explicitly prohibiting inquiry into citizenship/immigration status at the time of a guilty or no contest plea are Arizona, California, Connecticut, Maryland, Massachusetts, Nebraska, Ohio, Rhode Island, Washington, and Wisconsin. *See* ARIZ. R. CRIM. P. §17.2; CAL. PEN. CODE § 1016.5(d); CONN. GEN, STAT. § 54-1j(b); MD. RULE 4-242 (specifying in Committee note that court should not question defendants about citizenship status); MASS ALM GL. ch. 278, § 29D; R.R.S. Neb. §29-1819.03; ORC ANN. § 2943.031; R.I. GEN. LAWS §12-12-22(d); REV. CODE WASH. (ARCW) §10.40.200(1); WIS. STAT. § 971.06(c)(3). It should be noted that Ohio's statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031. Maine is the only state in the country that affirmatively requires courts to ask about the citizenship of criminal defendants at the time of accepting a plea.

[17] Florida's statute indicates that it is "not necessary for the trial judge to inquire" about immigration status when giving an admonition about immigration consequences of a plea. FLA. R. CRIM. P. § 3.172(c)(8).

[18] *See, e.g.*, NY Assem. Bill A04957, Feb. 10, 2009, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=+A04957%09%09&Summary=Y&Text=Y. The text of the bill includes a statement of legislative intent that "at the time of the plea no defendant shall be required to disclose his or her legal status to the court," and repeats the following provision in all proposed new or amended subsections of the N.Y. CRIMINAL PROCEDURE LAW §§ 170.10, 180.10, 210.15, 220.50: "This advisement shall be given to all defendants and no defendant shall be required to disclose his or her legal status in the United States to the court." *See id.*, proposed text of:

§170.10(4), §180.10(7), §210.15(4), §220.50(7), § 220.60 (5)-(6). For further discussion, see also http://www.nycbar.org/pdf/report/advisal_bill.pdf.

[19] Ariz. R. Crim. P. 17.2(f).

[20] Of at least thirty-six states that use written plea forms for pleas of guilty or nolo contendere, New Jersey and Ohio are the only two to require the party submitting the plea to indicate his or her citizenship status. Question 17(a) of New Jersey's form, for example, asks "Are you a citizen of the United States?" Question 8 of Ohio's form contains a brief advisal and the following language: "With this in mind, I state to the court that: "I am a United States citizen [ ] I am not a United States citizen [ ]."

[21] The Sixth Amendment of the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]." Courts have interpreted the Sixth Amendment, read together with the Due Process clause of the Fifth Amendment, to confer a right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."); *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

[22] A judge's obligation to ensure that a plea is knowing and voluntary stems from the Due Process Clause. The Supreme Court has held that the Due Process Clause requires a plea to be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (overruled in part on other grounds by *Edwards v. Arizona*, 451 U.S. 477 (1981)). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. However, a judge need not know a defendant's immigration status to assure him or herself that a plea is knowing and voluntary.

[23] *See, e.g.*, *United States v. Hernandez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000) ("Before it accepts a guilty plea, the court must address three core concerns underlying Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea.").

[24] Examples of federal crimes for which "alienage" is an element of the offense include:

8 U.S.C. 1282(c) – Alien crewman overstays;
8 U.S.C. 1306(a) – If overstay after 30 days and no fingerprints/registration;
8 U.S.C. 1304(e) – 18 or over not carrying INS documentation;
8 U.S.C. 1306(b) – Failing to comply with change of address w/in 10 days;
8 U.S.C. 1324c(e) – Failure to disclose role as document preparer;
8 U.S.C. 1324(a) – Alien smuggling;
8 U.S.C. 1325 – Entry Into United States without inspection or admission;
8 U.S.C. 1326 – Illegal Reentry after deportation;
18 U.S.C. 1546 – False statement/fraudulent documents;
18 U.S.C. 1028(b) – False documents;
18 U.S.C. 1001 False statement;
18 U.S.C. 911, 1015 – False claim to U.S. citizenship.

[25] A judge should limit his or her questions to those relevant to the criminal charges at issue. *See Ochoa v. Bass*, 2008 OK CR 11, P15 (Okla. Crim. App. 2008) (finding that court had legal authority to question defendants regarding their immigration status during sentencing hearing, without deciding whether trial court can or should ask such questions in any other stage of criminal proceedings, whether defendant is obliged to answer or whether Miranda warnings should precede questioning); *see also* N.Y. Judicial Ethics Op. 05-30 (2005) (holding that judges are not required to report information that individual is in violation of immigration laws); *see also*, GA. CODE OF JUDICIAL CONDUCT Canon 3(7) cmt. ("Judges must not independently investigate facts in a case and must consider only the evidence presented.").

[26] Courts have recognized that the disclosure of immigration status can have harmful impacts. *See e.g.*, *Perez v. United States*, 968 A.2d 39, 71 (D.C. Ct. App. 2009) (discussing potential prejudicial impact of disclosure of immigration status); *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 280 (App. Div. 2009) (acknowledging chilling effect that disclosure of immigration status may have outside of particular case and requiring further proffer of admissibility (probative value outweighing prejudicial impact) before allowing inquiries regarding immigration status); *Arroyo v. State*, 259 S.W.3d 831, 836 (Tex. App. 2008) (holding that information regarding legal status in United States is admissible when relevant and finding court's refusal to allow questions about citizenship to be valid exercise of discretion); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (Cal. App. 4th Dist. 2003) ("[E]vidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question.").

[27] *Padilla*, 130 S. Ct. at 1478.

[28] Many law enforcement agencies, public officials and civil society organizations have raised concerns about the impact that local enforcement of immigration laws could have on immigrant confidence in and cooperation with the criminal justice system. *See*, *e.g.*, MAJOR CITIES CHIEFS (M.C.C.) IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES: M.C.C. NINE (9) POINT POSITION STATEMENT, 5-6 (June 2006) (describing concerns with local enforcement of federal immigration laws, including risk of undermining trust and cooperation of immigrant communities), http://www.houstontx.gov/police/pdfs/mcc_position.pdf; National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070* (June 2010), http://www.nilc.org/immlawpolicy/LocalLaw/police-chiefs-oppose-sb1070-2010-06.pdf; America's Voice, *Police Speak Out Against Arizona Immigration Law* (May 18, 2010), http://amvoice.3cdn.net/cffce2c401fc6b2593_p6m6b9n1l.pdf; United States Conference of Mayors, 2010 Resolutions, 78th Conference, "Opposing Arizona Law SB1070", "Calling Upon the Federal Government to Pass Comprehensive Immigration Reform that Preempts Any State Actions to Assert Authority Over Federal Immigration Law," at 67-70, http://www.usmayors.org/resolutions/78th_Conference/adoptedresolutionsfull.pdf; United States Conference of Mayors, 2004 Measure to Amend the CLEAR and HSEA Acts of 2003 (expressing concern about distracting local law enforcement from primary mission, undermining federal legislation protecting immigrant victims, and creating "an atmosphere where immigrants begin to see local police as federal immigration enforcement agents with the power to deport them or their family members, making them less likely to approach local law enforcement with information on crimes or suspicious activity"), *available at* http://www.usmayors.org/resolutions/72nd_conference/csj_08.asp; ACLU AND IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNC-CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf; CHRISTINA RODRIGUEZ ET AL, MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G), at 8-9 (March 2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf.

[29] For a discussion of these issues, see NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES, 1-4 (April 2009), *available at* http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf. The report explains how the immigration consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

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

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

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

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

[32] FLA. R. CRIM. P. 3.172(c)(8).

[33] *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific 'articulable' facts that warrant suspicion vehicle contains "aliens who may be illegally in the country" and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion ("the Supreme Court has repeatedly held that reliance "on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"") (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986)). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (finding that officer's stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1986) (upholding finding that INS engaged in pattern of unlawful stops (seizures) to interrogate individuals based on Hispanic appearance, in violation of Fourth Amendment). *But see Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful

detention/custody); *Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) ("The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen … ."). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny. *See Nyquist v Manclet*, 432 U.S. 1 (1977); *Castro v. Holder*, 593 F3d 638, 640-41 (7th Cir. 2010).

[34] *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) ("The Fourth Amendment does provide protection against random or gratuitous questioning related to an individual's immigration status. For example, government agents may not stop a person for questioning regarding his citizenship status without a reasonable suspicion of alienage.")(citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).