

# Immigration Consequences and Related Issues

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# Agenda

Padilla and Postconviction Relief

Judicial Advisal Best Practices

Immigration Enforcement in NC

ICE custody and state habeas

*Padilla v. Kentucky* & State  
Post- Conviction Relief

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# Polls

- How many of you have previously adjudicated a *Padilla* claim in the context of a motion for appropriate relief?
- Have any of you granted a *Padilla* claim?

Would you be willing to tell us about that case?

# Hypo

After being taunted with racial slurs, Neil purchases a gun for his safety. One night as he is driving home from work, Neil is stopped by a police officer for reckless driving—for passing a car in a no pass zone with the vehicle lights cut off. The officer searches Neil's car and finds the gun Neil recently purchased. Neil is charged with reckless driving and carrying a concealed gun. The prosecutor will dismiss the charge of reckless driving if Neil pleads guilty to the gun charge. Neil's attorney tells him that a reckless driving conviction could result in a suspension of his driver's license, which he needs to be able to drive to and from work, but not about the immigration consequences of the concealed gun charge. Neil takes the deal.



- *Padilla v. Kentucky*, 559 U.S. 356 (2010): Defense counsel is obligated under the Sixth Amendment to provide **affirmative, correct** advice about immigration consequences of the criminal charges to noncitizen defendants
- Failure to provide advice + prejudice is ineffective assistance of counsel
- Cannot remain silent

# How to comply with *Padilla*?

## Step 1 – Investigate Facts

Determine client's  
immig status

Get criminal record

## Step 2

Analyze key  
consequences

1. Is there a conviction?
2. Does the offense fall into a ground of removal?

## Step 3

Advise client  
and determine  
priorities;  
defend against  
the immigration  
consequences

## *Padilla* ineffective assistance of counsel claim: standard of proof

To establish ineffective assistance of counsel, a defendant must show that

- 1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and
- 2) counsel's deficient performance was prejudicial.

*See State v. Nkiam*, \_\_\_\_ N.C. App. \_\_\_\_, 778 S.E.2d 863, 866 (2015).



# Prong 1: Deficient Performance – counsel has bifurcated duty under *Padilla*; *Nkiam*

Where immigration consequences are clear	Where immigration consequences are not clear
Counsel must provide specific and correct advice: e.g., “plea to cocaine sale subjects you to presumptively mandatory deportation”	Counsel need only advise of the risk of deportation – offense “may” carry adverse immigration consequences
Insufficient to only advise client “that there is a risk of deportation”	Insufficient to not provide any immigration advice or simply refer the client to an immigration lawyer

# Does *Padilla* apply to consequences other than deportation?

- Counsel's failure to advise that plea disqualified defendant from relief of cancellation of removal constituted deficient performance (assuming that cancellation statute applied). *State v. Jeminez*, 275 N.C. App. 278 (2020)
- Counsel's failure to advise that plea would make defendant permanently inadmissible constituted deficient performance. *State v. Jeminez*, 275 N.C. App. 278 (2020)

## Prong 2: Prejudice

- In cases in which the defendant pled guilty, she must show there is a reasonable probability that, but for counsel's errors, she would not have pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Lee v. United States*, 137 S. Ct. 1958 (2017) (applying *Hill* to *Padilla* claim).
- In applying *Hill*, *Padilla* required a defendant to show that “a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, 559 at 372.

# Prejudice analysis under *Nkiam*

- In applying *Hill* to a *Padilla* claim, the Court of Appeals held that a defendant adequately demonstrates prejudice “by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.”  
*Nkiam*, 778 S.E.2d 874.
- The Court of Appeals found the evidence was sufficient to demonstrate prejudice even though the defendant was likely to be convicted at trial.

# Prejudice analysis under *Lee*

- The U.S. Supreme Court has also held that it is not “irrational” for a noncitizen with substantial ties to the U.S. to take his chances at trial and risk additional prison time in exchange for whatever small chance there might be of an acquittal that would let him remain in the US. *Lee*, 137 S. Ct. at 1968–69.
- Under *Lee*, to demonstrate prejudice, one should submit *contemporaneous* evidence of a probability that the client would not have pled guilty if properly advised of the immigration consequences:
  - evidence of expressed concern of the immigration consequences
  - evidence of any strong connections to the US

# Can noncitizens without status show prejudice?

- Trial court found that where undocumented defendant was misadvised, he could not show prejudice because he was here unlawfully and therefore already subject to deportation.
- NC Court of Appeals held that *Lee* applies to the prejudice inquiry: had Defendant “demonstrat[ed] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Jeminez*, 275 N.C. App. 278 (2020)
- Remanded for consideration of the importance defendant placed on remaining in the country

# Other ways to show prejudice?

- In *Nkiam*, the Court of Appeals noted, “trial counsel may have obtained an alternative plea that would not have the consequence of mandatory deportation.” 778 S.E.2d at 875. This observation may support an argument that prejudice can be established or at least bolstered by showing that an alternative, immigration-safe plea was available.
  - *See, e.g., US v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017) (holding that a defendant establishes prejudice if there is a reasonable probability that she could have negotiated a plea agreement that did not affect her immigration status).
- The Supreme Court in *Lee* expressly reserved the question. 137 S. Ct. at 1966 n.2.

# Can a trial court's immigration warning cure prejudice caused by counsel's error?

- In *Nkiam*, the Court of Appeals specifically found that where defense counsel is required to provide specific advice, a boilerplate court warning merely advising of the risk of deportation is inadequate and does not cure any possible prejudice. 778 S.E.2d at 872.
  - not an adequate substitute for specific advice by counsel
  - does not satisfy counsel's Sixth Amendment obligations



# Judicial Advisals

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Did you give the same G.S.15A-1022(a)(7) warning in every criminal case?

# Judicial Advisals: Best practices

1. Provide additional time if necessary.
2. Do not ask defendants or counsel about defendant's immigration or citizenship status. Such an inquiry may raise concerns of potential constitutional, statutory & ethical violations.
3. Do not selectively issue advisals. *See State v. Marzouq*, 268 N.C. App. 616 (2019)

*Judicial Obligations After Padilla v. Kentucky: The Role of Judges in Upholding Defendants' Rights to Advice About the Immigration Consequences of Criminal Dispositions* (October 2011), <https://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf>

# Model advisal language

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

# Immigration Enforcement in North Carolina

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Have you witnessed ICE arrest a defendant  
from your courtroom?

# How immigrants are identified by ICE for deportation?

Processed at jail

Probation  
meeting

Serve sentence  
at DOC

Criminal  
justice and  
court databases

Raids, traffic  
stops

Entering U.S.  
after travel  
abroad

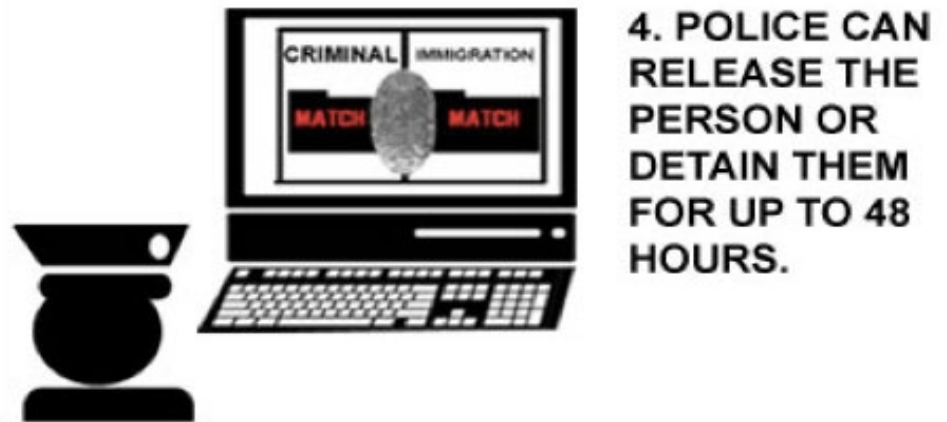
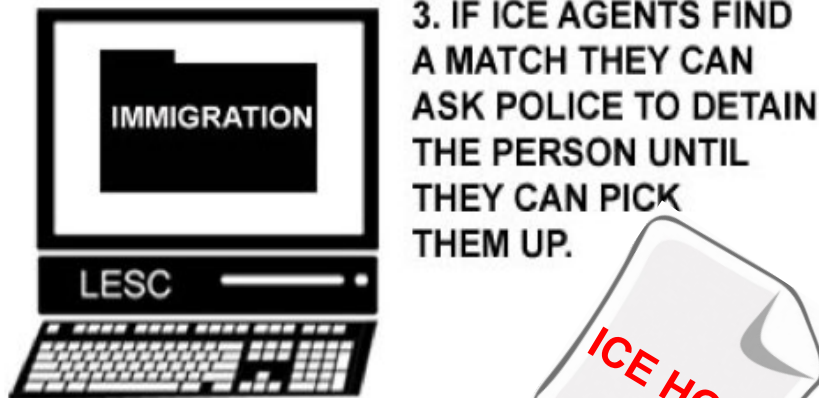
Renewing  
immigration  
benefits

Applying for  
citizenship

# How does ICE work with local law enforcement?

- Secure Communities
- ICE holds (detainers)
- 287(g) agreements

# Secure Communities



# ICE HOLDS: HOW THEY WORK

- ◆ ICE files detainer asking jail to hold immigrant to allow ICE to take into custody for removal purposes
- ◆ Technically a request, not an order or warrant. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014),
- ◆ Duration: up to 48 hours excluding weekends and holidays. *See* 8 C.F.R. § 287.7.
- ◆ Based on belief that immigrant is removable



DEPARTMENT OF HOMELAND SECURITY  
IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:  
Event #:

File No:  
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

Name of Alien: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Citizenship: \_\_\_\_\_ Sex: \_\_\_\_\_

**1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON (complete box 1 or 2).**

- A final order of removal against the alien;
- The pendency of ongoing removal proceedings against the alien;
- Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

**2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION (complete box 1 or 2).**

- Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

**IT IS THEREFORE REQUESTED THAT YOU:**

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling  U.S. Immigration and Customs Enforcement (ICE) or  U.S. Customs and Border Protection (CBP) at \_\_\_\_\_. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
  - **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
  - Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
  - Notify this office in the event of the alien's death, hospitalization or transfer to another institution.
- If checked: please cancel the detainer related to this alien previously submitted to you on \_\_\_\_\_ (date).

\_\_\_\_\_  
(Name and title of Immigration Officer)

\_\_\_\_\_  
(Signature of Immigration Officer) (Sign in ink)

**Notice:** If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

**TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:**

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to \_\_\_\_\_.

Local Booking/Inmate #: \_\_\_\_\_ Estimated release date/time: \_\_\_\_\_

Date of latest criminal charge/conviction: \_\_\_\_\_ Last offense charged/conviction: \_\_\_\_\_

This form was served upon the alien on \_\_\_\_\_, in the following manner:

- in person  by inmate mail delivery  other (please specify): \_\_\_\_\_

\_\_\_\_\_  
(Name and title of Officer)

\_\_\_\_\_  
(Signature of Officer) (Sign in ink)

# Must jails comply with detainers?

- No, just a request
- Some federal courts have found that holding a person on an ICE detainer for any period of time (even less than 48 hours) once they are not subject to state detention, violates the 4<sup>th</sup> Amendment; others have not.
- No apparent state law authority for civil immigration arrest where there is no 287(g) agreement

# NC Counties that do not detain based on immigration detainers

County	Policy	
Durham, Buncombe	Do not detain or notify ICE	
Mecklenburg, Wake	Discontinued 287(g), do not detain or notify ICE	
Orange County	Do not detain, but allow ICE jail access	
Forsyth, Guilford, Chatham(?)	Do not detain, but will notify ICE of release time	

## 287(g) HAS VARIOUS MODELS:

### TASK FORCE MODEL

BROADEST  
SCOPE

Local officers can enforce immigration laws on the streets, make immigration stops and arrests, issue detainers, and process people for deportation.

\*none currently exist

### JAIL MODEL

MEDIUM  
SCOPE

Local officers engage in immigration enforcement only within the jail, investigating immigration history, issuing detainers and warrants, and transferring people to ICE.

\*75 currently exist

### WSO MODEL

VERY LIMITED  
SCOPE

Local officers may arrest immigrants pursuant to ICE warrants in a local jail and detain them to transfer to longer-term ICE custody.

\*10 currently exist

# 287(g) agreements in NC

<b>County</b>	<b>Model</b>	
Cabarrus County Sheriff's Dept	Jail enforcement	
Gaston County Sheriff's Dept	Jail enforcement	
Henderson County Sheriff's Dept	Jail enforcement	

Alamance County Sheriff's Office	Warrant Service Officer
Albermarle District Jail	Warrant Service Officer
Avery County Sheriff's Office	Warrant Service Officer
Brunswick County Sheriff's Office	Warrant Service Officer
Caldwell County Sheriff's Office	Warrant Service Officer
Cleveland County Sheriff's Office	Warrant Service Officer
Duplin County Sheriff's Office	Warrant Service Officer
Lincoln County Sheriff's Office	Warrant Service Officer
Nash County Sheriff's Office	Warrant Service Officer
Randolph County Sheriff's Office	Warrant Service Officer
Rockingham County Sheriff's Office	Warrant Service Officer
Yancey County Sheriff's Office	Warrant Service Officer

# ICE Custody and State Habeas

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Have you adjudicated a habeas filed by a noncitizen being held on an ICE detainer?

Will you share what happened in the case, describe the circumstances and how it was resolved?

# Can state courts hear a habeas challenging detention based on an ICE hold?

- *Chavez v. McFadden*, 374 N.C. 458 (2020) ruled on this issue. Held:
- Court has jurisdiction to determine whether it has authority to act.
- Courts must summarily deny relief if:
  - Pleadings allege that petitioner is being held pursuant to a detainer or immigration warrant by a sheriff who is a party to a 287(g) agreement or
  - If the return confirms such
- Sheriff party to a 287(g) agreement is viewed as a federal actor



# What state court can do under Chavez?

- If trial court determines that the application does not allege that the petitioner is being held on the basis of an immigration-related arrest warrant or detainer by a custodian operating pursuant to a 287(g) agreement, or on any other valid grounds, the trial judge has the authority to issue the writ and require the custodian to make a return.
- Can order relief if no basis to hold

# What about petitions in non-287(g) counties?

- Chavez *expressly vacated* the Court of Appeals' dicta and reserved the question of whether a state or local law enforcement agency that is not a party to a 287(g) agreement with the federal government is entitled to detain a person on the basis of an immigration-related arrest warrant or detainer.
- No law prohibiting state court from hearing such a habeas and granting relief
- It terms of the legality of such detention, a number of state courts have held that such detention is illegal as a matter of state law where there is no state law authorizing civil immigration detention.
- Open argument in NC, no one has ever ruled on that

# Resources

- Immigration Consequences Manual, <https://defendermanuals.sog.unc.edu/defender-manual/6>
- IDS expert advice, <http://www.ncids.org/ImmigrationConsult/Links.htm?c=Immigration%20Consultation>
- Helen Parsonage, [hparsonage@emplawfirm.com](mailto:hparsonage@emplawfirm.com)
- Robert Lamb, [rob@hatchrockers.com](mailto:rob@hatchrockers.com)

# Questions

