IMMIGRANT DEFENSE PROJECT

3 West 29th Street, Suite 803, New York, NY 10001
Tel: 212.725.6422 • Fax: 800.391.5713
www.ImmigrantDefenseProject.org

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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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:

Immigrant Defense Project (IDP)
Website: www.immigrantdefenseproject.org
Email: info@immigrantdefenseproject.org
Phone: (212) 725-6422

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)).