



# Immigrant Offenders in Drug Court

## The Promise, the Peril, and the Need for Legislative Reform<sup>1</sup>

By Steven Weller and John A. Martin

### I. Background

By now it is well established that participation in a drug court is one of the more effective ways for offenders whose criminal behavior is intertwined with addiction and substance abuse to serve their debt to society, clean up their lives, and refrain from further criminal

behavior.<sup>2</sup> Moreover, across the nation drug courts have been able to adapt the four guiding principles for drug courts shown in Figure 1 to meet diverse, local jurisdiction-based client needs and justice system environments. As one result, drug courts continue to thrive in the midst of ongoing budget crises and resource reductions. At last count

early in 2011, there were nearly 2,200 drug court programs across the country, with programs either in operation or in planning stages in all 50 states.<sup>3</sup>

Recently, however, many professionals who work with offenders who might be good candidates for drug court programs — including the defense bar, prosecutors, treatment providers,

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and immigrant support organizations — have raised concerns about the risks to immigrant offenders of participation in drug courts.<sup>4</sup> General knowledge among state court practitioners about the risks both illegal and lawful immigrants face when they come in contact with the state courts has increased greatly in the past few years. Likely this knowledge has increased in part as a result of increased awareness of stepped-up federal enforcement of immigration laws and clarification by the United States Supreme Court of the serious burdens on attorneys to take into account immigration consequences when serving immigrant clients.<sup>5</sup> Moreover, state court sophistication about the complexities of cases involving immigrants likely has increased as a result of the dramatic growth in the size and widespread dispersion across the nation of the immigrant population over the past decade or so.<sup>6</sup>

Still, our recent experience leading the national Immigration and the State Courts Initiative has revealed that far less clear to state court practitioners has been the very serious consequences faced by lawful immigrants who, except for their immigration status, might otherwise even be model candidates

for participation in a drug court. In particular, state court practitioners need to be aware that:

- the eligibility requirements for drug court may carry negative immigration consequences for lawful immigrants, including making the offender deportable or ineligible for naturalization;
- the goals and principles of drug courts may be incompatible with federal immigration law as both are presently constituted;
- there is no guarantee that an immigrant can be made safe from negative immigration consequences in a drug court program;
- there are steps throughout the drug court process where an immigrant defendant may have to take actions or make decisions that carry a risk of negative immigration consequences;
- the responsibilities of different drug court professionals for assuring that an immigrant defendant is adequately advised of immigration risks at each step in the process are not clearly delineated; and, as a result of all the above,

- there are federal immigration policy issues that need to be addressed before we can be confident that the immigration rights of drug court participants can be protected.

In this article we examine how participation in a drug court may affect a person's immigration status, raise some policy concerns courts must address, and provide some suggestions for how changes in federal immigration law might allow lawful immigrants to participate in drug courts without jeopardizing their lawful immigrant status and opportunities to eventually become naturalized U.S. citizens. We begin in Section II by inventorying the types of adverse consequences to immigrants that might occur as a result of state drug court participation, such as deportability, inadmissibility, ineligibility for discretionary relief from a removal order, and ineligibility for naturalization. We continue with a summary of the ways in which key aspects of federal immigration law and various models of drug court align or, more accurately, do not align.

Next, in Section III, we examine the potential immigration consequences of conviction for non-drug crimes that

also might be involved in an offender's drug court participation, such as the unique federal immigration law view of aggravated felonies, crimes involving moral turpitude, and crimes of domestic violence. Section III concludes with examples of the immigration consequences of hypothetical, but not unusual, examples of offenses often accompanying drug court cases, such as theft, forgery, possession of stolen property, malicious mischief, and non-residential burglary.

In Section IV we examine the thorny issue of advising immigrant

offenders about potential participation in drug courts as a result of the recent U.S. Supreme Court decision in *Padilla v. Kentucky*, and what the decision might mean for drug court team members. Finally, we conclude this article in Section V by indicating it is unlikely that without changes in federal immigration law, immigrant participants in drug court can be "made safe" from negative consequences on their immigration status. We then offer a few reform suggestions.

Again, let us stress that the focus of this article is on immigrants who

are lawfully in the United States. Undocumented, that is, illegal, immigrants are potentially removable at any time from the United States regardless of whether or not they have contact with a state court. Note also that throughout this article we focus on adult criminal drug courts, although we recognize that there are a variety of other specialized drug courts in operation across the country, including juvenile drug courts, dependency drug courts, and family drug courts.

## FIGURE 1 KEY DRUG COURT ELEMENTS

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Early and continued close involvement of the courts, including ongoing monitoring by the judge, to promote compliance by imposing legally enforceable sanctions for non-compliance.

A focus on measures that reduce drug dependence and promote ultimate sustained abstinence, including continued monitoring of participant drug use.

A non-adversarial, multidisciplinary team approach that coordinates all the services provided as part of the program.

A focus on promoting participants to admit to and take responsibility for their drug addiction and work with the drug court team members to overcome it.

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## II. The Risks To Immigrants From Drug Court Participation

Participation in drug court carries a variety of risks for the immigration status of legal immigrants in the United States. In particular, conviction for certain specified crimes or for engaging in certain types of behavior can affect the immigration status of a lawful permanent resident in the following four ways.

First, the immigrant offender may become **deportable**, possibly even after having lived many years in the United States as a lawful permanent resident. Being deportable means the immigrant is subject to an order of removal from the United States by an immigration court.

Second, the immigrant offender may become **inadmissible**, to include preventing the defendant from reentry if the defendant leaves the country. There are some crimes that do not make a defendant deportable but still make the

defendant inadmissible. An immigrant who is inadmissible can be denied entry to the United States by an immigration officer if they leave the United States and attempt to return from abroad.

Third, the conviction may make the defendant **ineligible for relief from a removal order**. Relief from a removal order, which means cancellation of a legally entered order that the immigrant be deported, may be available at the discretion of the immigration judge. An immigrant must be able to show that he or she is of good moral character to



be eligible for such relief. Engaging in certain specified behavior or conviction of certain crimes will negate good moral character.

Fourth, the conviction may make the defendant **ineligible for naturalization** as a U.S. citizen. Eligibility for naturalization is conditioned on the applicant's ability to show that he or she is of good moral character, and engaging in certain specified behavior or conviction of certain crimes will negate good moral character.

### Risks to Good Moral Character

Good moral character is a requirement for eligibility for naturalization and other immigration rights such as protections for immigrants who are victims of some types of crime. Good moral character is not determined by a single act, but rather by a person's actions generally. It does not require perfection but is a measure of a person's character

measured by the sum of all his or her actions. The following are specifically listed in federal immigration law as negating good moral character:

- being a habitual drunkard;
- conviction of an aggravated felony;
- conviction of a crime involving moral turpitude, with exception for commission of one crime involving moral turpitude if the maximum penalty did not exceed imprisonment for one year and the actual sentence did not exceed six months;
- conviction of crime related to a controlled substance, with an exception of one conviction of simple possession of 30 grams or less of marijuana for personal use;
- multiple convictions with aggregate sentence of more than five years; and
- confinement, as a result of conviction, in a penal institution for an aggregate of 180 days or

more during the period required for good moral character.

In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship, the applicant's conduct and acts at any time prior to the filing of the application may be considered.

### Risks Due to Substance Abuse Involvement Either With or Without A Conviction

While conviction of any crime related to a controlled substance makes an immigrant deportable, being a drug abuser or addict makes a person potentially deportable without conviction of a crime. In addition, even though alcohol is not a controlled substance, under federal immigration law it is still a drug for purposes of drug abuse or addiction. As alcohol is the primary drug for about 30 percent of all drug court participants,<sup>8</sup> drug courts pose a deportation risk for immigrants

A central component of all of the above models is the participation of the **judge by presiding over** all drug court sessions and serving as the source of sanctions where the **defendant** is not meeting the expectations and requirements placed on him or her by the drug court team.

that may not arise without the drug court sentence, if the defendant admits to the addiction or abuse in order to get into drug court. Moreover, if drug abuse or addiction is shown through drug court assessment for entry or through continuing follow-up drug testing, that may constitute evidence of drug abuse or addiction.

In addition, federal immigration law provides that being a habitual drunkard negates good moral character and thus will make an immigrant ineligible for naturalization and relief from removal as well as other immigration rights such as protections for immigrants who are victims of some types of crime.

### Risk From Conviction of a Crime Related to a Controlled Substance

As noted above, conviction of any crime related to a controlled substance makes an immigrant deportable and, with limited exception, ineligible for naturalization.

**What is a conviction under federal law?** The term “conviction” means, with respect to an alien (both lawful and unlawful immigrants are considered aliens under federal immigration law), a formal judgment

of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:

- a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and
- the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Especially important for drug courts, something considered a conviction under federal immigration law may not be considered a conviction under state law. For example, the following all constitute a conviction under federal immigration law if coupled with some form of punishment, penalty, or restraint on liberty:

- admission on the record of facts supporting a conviction;
- diversion, if there is a finding of guilt;
- deferred adjudication where plea of guilty or nolo contendere is entered;
- deferred adjudication coupled with rehabilitative treatment; and

- a suspended sentence, which is considered a conviction for the length of the entire sentence, including the part that was suspended.

**What constitutes a conviction in the drug court context?** The following typical drug court actions are convictions under federal immigration law:

- guilty plea with sentence to drug court following entry of guilty plea;
- sentence to drug court with admission on record of facts sufficient to support a conviction;
- deferred prosecution or pretrial diversion with admission of responsibility or stipulation of facts that would support a conviction, if coupled with court imposed conditions for drug court; and
- adjudication withheld after entry of guilty plea or admission of facts that would support a conviction coupled with sentence to rehabilitative treatment.

In addition, deferred prosecution is generally not considered a conviction, but a deferred prosecution coupled with admission of responsibility or

stipulation of facts and court-imposed conditions may be a conviction. This may be true even if accompanied by a disclaimer that the admissions or stipulations are not to be used in a subsequent prosecution. Moreover, even if the deferred prosecution is done without admissions, if the drug court agreement is approved by the judge or if the judge monitors the case and serves as the source of authority for continuing sanctions, this may constitute court-imposed sanctions and classify the agreement as a conviction.

Also, if the crime leading to a drug court sentence is a crime related to a controlled substance, any of the above would constitute a conviction that would make an immigrant deportable. If the defendant is sentenced to drug court for committing another crime that may carry immigration consequences, with drugs involved, the above would constitute a conviction of that crime for immigration purposes.

Finally, the following are other mechanisms routinely used in drug courts that may carry negative immigration consequences:

- admission or diagnostic assessment of drug abuse or addiction to enter program;
- entry of guilty plea to a crime relating to controlled substance, which will make the defendant removable;
- entry of guilty plea to crimes such as theft, prostitution, or child abuse that may make the defendant removable or ineligible for naturalization;
- admission to facts in a charging document or police report;
- possibility of continued evidence of addiction through follow-up drug testing;

- a history of drug abuse or drug dependence as a stated requirement for admission into the drug court program (which may constitute an admission of drug abuse or dependence); and
- positive drug test or Addiction Severity Index score indicating drug abuse or addiction.

### Immigration Consequences of Different Drug Court Models

Although there are a variety of drug court models, immigrants participating in a drug court risk their lawful immigration status regardless of the model. For example, Marlowe and Meyer summarized the following six primary types of approaches to drug court structure and organization.<sup>9</sup>

In **pre plea diversion drug courts**, no guilty plea is entered, and prosecution is deferred. Charges are dismissed if the defendant successfully completes the program. In the pure diversion program, the defendant's participation is purely voluntary, the defendant admits to nothing, and the prosecutor has no authority to impose sanctions for non-compliance. If the defendant is not successful, the prosecutor's only sanction is to file the case. The prosecutor must assemble all the relevant evidence at that point.

In the **pre plea diversion with stipulation of facts** model, no guilty plea is entered, but the defendant is required to admit to an addiction or admit to the elements of the offense as contained in the police report. Charges are dismissed if the defendant successfully completes the program. If the defendant is not successful, the prosecutor's only sanction is to file the case, but in this model the prosecution can be based on the defendant's admissions.

As part of the **post plea with adjudication withheld** model, the defendant enters a guilty plea, but adjudication and judgment are withheld. The guilty plea may be withdrawn if defendant successfully completes the program. The defendant is sentenced if unsuccessful.

In the **post plea probation approach**, the defendant enters a guilty plea, and the court enters judgment with a sentence to drug court as a condition of probation. Probation is deemed satisfied on successful completion of the program. The defendant is sentenced if unsuccessful.

In the **probation violation** model, the defendant is sentenced to drug court in lieu of probation revocation. The probation is deemed satisfied on successful completion of the program. The defendant is sentenced if unsuccessful.

A central component of all of the above models is the participation of the judge by presiding over all drug court sessions and serving as the source of sanctions where the defendant is not meeting the expectations and requirements placed on him or her by the drug court team. In addition, admission or diagnosis of an addiction is typically a prerequisite for admission into a drug court program. A central premise is that the offender must own up to his or her addiction and accept responsibility for it.

Unfortunately for lawful immigrants, the peculiarities of federal immigration law described earlier result in great risk to the lawful immigration status for immigrant drug court participants under each of the approaches. For example, as shown in Figure 2, entering a drug court can be viewed as a conviction under federal immigration law regardless of the type of model used.

FIGURE 2

DRUG COURT MODELS AND FEDERAL IMMIGRATION LAW DEFINITIONS OF A CONVICTION

Drug Court Model	Description	Effect on Conviction for Immigration Purposes
<b>Pre-plea diversion</b>	<ul style="list-style-type: none"> <li>• No guilty plea taken and prosecution deferred.</li> <li>• Charges dismissed in successful completion of drug court.</li> <li>• Prosecution continued if drug court is unsuccessful.</li> </ul>	<ul style="list-style-type: none"> <li>• No conviction if case has no court involvement.</li> <li>• May be a conviction if court signs off on the drug court contract and enforces compliance.</li> </ul>
<b>Pre-plea diversion with stipulation of facts</b>	<ul style="list-style-type: none"> <li>• No guilty plea taken but defendant required to admit addiction or admit to the elements of the offense and the court imposes drug court as a sanction.</li> <li>• Charges dismissed on successful completion of drug court.</li> <li>• Prosecution continued if drug court is unsuccessful.</li> </ul>	<ul style="list-style-type: none"> <li>• Admission of facts coupled with court-imposed sanctions will constitute a conviction.</li> <li>• If admission is to the facts recited in a police report, the police report becomes admissible in a subsequent immigration court hearing to determine the elements of the crime.</li> </ul>
<b>Post-plea with adjudication withheld</b>	<ul style="list-style-type: none"> <li>• Guilty plea taken but adjudication and judgment withheld.</li> <li>• Guilty plea may be withdrawn on successful completion of drug court.</li> <li>• Defendant sentenced if drug court is unsuccessful.</li> </ul>	<ul style="list-style-type: none"> <li>• Guilty plea is a conviction even if later withdrawn.</li> </ul>
<b>Post-plea probation</b>	<ul style="list-style-type: none"> <li>• Guilty plea taken and judgment entered, sentence to probation with drug court required as a condition of probation.</li> <li>• Probation satisfied on successful completion of drug court.</li> <li>• Defendant sentenced if drug court is unsuccessful.</li> </ul>	<ul style="list-style-type: none"> <li>• Guilty plea is a conviction.</li> </ul>
<b>Probation violation</b>	<ul style="list-style-type: none"> <li>• Sentence to drug court in lieu of probation revocation.</li> <li>• Probation satisfied on successful completion of drug court.</li> <li>• Defendant sentenced if drug court is unsuccessful.</li> </ul>	<ul style="list-style-type: none"> <li>• As the initial guilty plea constituted a conviction, the sentence to drug court in lieu of a probation violation may do no more harm to the immigrant defendant.</li> </ul>

### III. Potential Immigration Consequences Of Convictions Of Other, Non-Drug, Crimes That May Be Involved In A Drug Court Case

One important feature of drug courts is that a wide variety of other case types might be bundled into a drug court sentence, particularly for offenders convicted of crimes committed as a result of a drug addiction or under the influence of drugs, if drug addiction or abuse is determined to be the underlying cause of the criminal behavior. Many of those crimes may carry immigration consequences. In particular, there are three major categories of crimes affecting immigration rights under federal immigration law that may be involved in a drug court case and bundled into a guilty plea: aggravated felony, crime of moral turpitude, and crime of domestic violence.

With regard to an **aggravated felony**, federal immigration law contains a long list of crimes that are classified as aggravated felonies, some of which may not be classified as felonies under the laws of some states. Conviction of an aggravated felony makes an immigrant deportable, ineligible for discretionary relief from a removal order, and ineligible for naturalization. For example, the following is a partial list of some of the more common aggravated felonies:

- murder;
- rape;
- sexual abuse of a minor;
- crime of violence with an actual sentence of one year or more;



- theft with an actual sentence of one year or more;
- burglary with an actual sentence of one year or more; and
- drug trafficking.
- assault;
- unlawful imprisonment;
- menacing or threatening;
- coercion; and
- theft.<sup>10</sup>

A crime that meets the definition of crime of violence under 18 U.S.C 16 may be an aggravated felony. Note that some misdemeanors may meet this definition. If they also involve an actual sentence of one year or more, they qualify as aggravated felonies. This includes the following crimes:

- use, attempted use, or threatened use of physical force against the person or property of another, or
- a felony that involves a substantial risk that physical force against the person or property of another may be used.

Finally, of special concern for drug courts, examples of typical state court misdemeanors that could be aggravated felonies under federal immigration law if the actual sentence is one year or more include:

- offensive touching;
- reckless endangerment;

**Crimes involving moral turpitude** are crimes that contain an element of fraud or other behavior considered morally offensive. This category is deceptive, as many crimes classified as crimes involving moral turpitude may be considered very minor, and even classified as misdemeanors, under state law. Still, as indicated previously, conviction of a crime involving moral turpitude makes an immigrant deportable, inadmissible, and ineligible for naturalization. Further, there is no definition of these crimes in the federal immigration statutes, so all of the crimes so classified depend on case law from the immigration courts or federal circuit courts. Case law is not all that helpful either. For example, the most commonly applied definition of a crime of moral turpitude from the federal case law is the rather vague: “a crime that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and



the duties owed between persons.” The courts have interpreted this to include crimes that involve:

- evil or malicious intent or inherent depravity;
- intent or reckless behavior to commit great bodily harm; or
- intent to defraud, including theft.

In addition, to be deportable, a crime involving moral turpitude must involve:

- a *possible* sentence of one year (365 days) or more, or
- two convictions not arising out of the same incident, regardless of possible sentence.

There are some common crimes that are considered minor in state law

that can qualify as a crime involving moral turpitude and put a lawful permanent resident at risk of removal. These include misdemeanors that could be crimes of moral turpitude if the possible sentence is one year or more, or if a person commits two of them, such as:

- petty theft (e.g. turnstile jumping);
- fraud;
- perjury; and
- prostitution.

A **crime of domestic violence** can include violation of a civil protection order. Conviction of a crime of domestic violence makes an immigrant deportable. It may also be classified as an aggravated felony or crime involving moral turpitude in certain

circumstances. Crimes of domestic violence include the following under federal immigration law:

- stalking;
- domestic violence, if it qualifies as a crime of violence (could also be an aggravated felony, with actual sentence of one year or more);
- criminal child abuse, neglect, or abandonment; and
- violation of a civil or criminal protective order.

Figure 3 indicates how some of the more common types of cases found in drug courts might be classified under federal immigration law.

**FIGURE 3:  
FEDERAL IMMIGRATION LAW CLASSIFICATION OF TYPICAL DRUG COURT CRIMES**

<b>Crime</b>	<b>Possible Immigration Classification</b>
Drug possession	<ul style="list-style-type: none"> <li>• Crime related to a controlled substance</li> </ul>
Drug sale	<ul style="list-style-type: none"> <li>• Crime related to a controlled substance</li> <li>• Aggravated felony if drug trafficking</li> </ul>
Theft	<ul style="list-style-type: none"> <li>• Crime involving moral turpitude</li> <li>• Aggravated felony if actual sentence is one year or more</li> </ul>
Forgery	<ul style="list-style-type: none"> <li>• Crime involving moral turpitude</li> </ul>
Possession of stolen property	<ul style="list-style-type: none"> <li>• Crime involving moral turpitude</li> </ul>
Malicious mischief	<ul style="list-style-type: none"> <li>• Aggravated felony as crime of violence if actual sentence is one year or more, even if not classified as a felony under state law</li> </ul>
Burglary (non-residential)	<ul style="list-style-type: none"> <li>• Crime involving moral turpitude</li> <li>• Aggravated felony if actual sentence is one year or more</li> </ul>

The court went on to say that to be **eligible for relief**, the defendant must also show prejudice, that is, show that there is **“a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”** In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation.

#### IV. Advice To Offenders In Drug Courts And *Padilla v. Kentucky*

Nearly two years ago, the United States Supreme Court made a decision about the role of defense counsel in cases involving immigrants that likely has significant implications for drug courts. In *Padilla v. Kentucky*, 559 U.S. \_\_\_\_, 130 S.Ct. 1473 (2010) the court held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment’s right to counsel, so that failure to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment. The court determined that “deportation is an integral part of the penalty that could be imposed on non-citizen defendants who plead guilty to specified crimes.” The court rejected the respondent’s argument that deportation is a collateral consequence that does not fall within the defense attorney’s scope of representation. Further, the court held that the defective representation

went beyond the affirmative misadvice provided to Padilla and applied to failure to advise as well.

The court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation. The U.S. Supreme Court remanded the case to the Kentucky Supreme Court to make that determination.

With regard to the case particulars, Jose Padilla was arrested driving a tractor-trailer truck containing more than 1,000 pounds of marijuana. He was charged in state court with two drug possession misdemeanors, felony drug trafficking, and a tax-related crime. He entered a guilty plea in return for a sentence of five years, as opposed to the 10 years he might have received had he been convicted at trial.

Padilla was a native of Honduras who had been living in the United States as a lawful permanent resident for more than 40 years. He had served in the U.S. armed forces honorably in Vietnam. Due to his immigrant status, Padilla asked his counsel before accepting the plea if the conviction carried any adverse immigration consequences and was advised that it did not, given his length of residence in the United States. That advice was incorrect, as it is clear under federal immigration law that the conviction was for a removable offense. Padilla subsequently sought post-conviction relief to have his plea set aside for ineffective representation of counsel.

#### The Role of Defense Attorneys in Advising Immigrant Defendants

It is clear that *Padilla* will affect the practice of criminal defense attorneys in cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation for a wide range of criminal convictions.

There are a number of steps in the drug court process where defendants may be taking actions or making decisions that may affect their immigration status and thus where they may need advice. Some of the key steps include the following:

- agreeing to diagnosis of drug abuse or addiction to enter program;
- entering a guilty plea either to a crime relating to controlled substance or to some other crime carrying immigration consequences;
- admitting or stipulating to facts in a charging document or police report that would support a conviction or constitute an admission of drug abuse or addiction;
- accepting adjudication withheld after entry of guilty plea or admission of facts that would support a conviction, coupled with sentence to drug court;
- accepting deferred prosecution if the defendant admits to facts that would support a conviction and court imposes conditions for completion of drug court; and
- undergoing follow-up drug testing, which may provide continued evidence of addiction.

### The Role of the Judge in Advising Immigrant Defendants

It is not clear from the *Padilla* decision, however, how state criminal court judges will be affected by the decision. The Supreme Court was silent on the issue of whether state criminal court judges have a duty to assure that immigrant defendants have been advised of the immigration consequences of a guilty plea, despite the fact that the issue was raised in

the oral argument of the case. Still, a growing number of states now require, either through statute, court rule, or plea acceptance form, that judges investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea. Most states that require such an advisement provide for a standard advisement that if the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

### The Possible Roles of Other Drug Team Members in Advising Immigrants

Typically, there are a variety of drug court team members who are involved with a defendant throughout the term of drug court participation. In addition to the criminal court judge, drug court judge, and defense attorney, the following might be involved with an immigrant defendant as drug court team members:

- prosecutors;
- substance abuse evaluators;
- probation officers;
- drug court coordinators; and
- treatment providers.

At present there are no clear guidelines as to what responsibilities, if any, the above team members might legitimately assume in advising immigrant defendants of the potential immigration consequences that entry into or continuing participation in a drug court program may carry. This may be a key area for future consideration by drug court professionals who deal with immigrants.



## V. Conclusion

We believe that without alterations in federal immigration law, it is not possible to fully shield immigrants from the potential immigration consequences of participation in drug court programs. In this article we have shown that regardless of the drug court model used, the nexus of federal immigration law and state law for a broad range of factors important in the drug court context — including notions such as conviction, good moral character, addiction, and crime of moral turpitude — put lawful immigrants at risk to become deportable, inadmissible, ineligible for relief from a removal order, and ineligible for naturalization. As one consequence we strongly urge drug court programs across the nation to meet with immigration lawyers to review their structure and processes to see if there are potential ways for reducing risks to lawful immigration status.

This is not to say that there are never reasons why an immigrant might want to participate in a drug court program even given the potential consequences. Even if participation

makes an immigrant defendant potentially deportable, it does not mean that the immigrant will actually be deported. In addition, participation in a drug court program will help the offender avoid a jail term and hopefully overcome his or her drug addiction, both positive outcomes for the offender.

Further, while it may be the case that the only way to assure that immigrants, particularly those who are here legally, can participate in a drug court program without risking their immigration rights is through changes in federal immigration law, it may take only some modest changes in federal immigration law to make drug courts as suitable for lawful immigrants as they are for other residents. One possible reform might be to provide that, with regard to lawful permanent residents:

- participation in a drug court program suspends any potential immigration consequences stemming from the offense as long as the defendant continues to meet the requirements of participation; and
- successful completion of a drug court program, as certified by the drug court, erases the underlying conviction for immigration purposes.

Some variations might be to:

- limit the relief to first offenders;
- make the relief discretionary with the immigration court based on avoiding hardship to the defendant or his or her family;
- exclude certain state crimes, such as domestic violence, from availability for relief;
- provide for erasing the conviction for purposes of certain categories of crimes under federal immigration law, such as crimes involving moral

turpitude and crimes related to a controlled substance, but not for other categories; or

- provide for relief from deportability but not from loss of other immigration rights.

With the widespread support for drug courts across the whole political spectrum, we believe that some reform to federal immigration law to enable lawful permanent residents to participate safely in drug court programs may be achievable. Further, given the benefits of addressing problems of drug addiction and abuse and their effects on criminal behavior, we believe such reforms are desirable.

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#### NOTES

1. This article was developed under the multi-year Immigration and the State Courts Initiative, conducted by the Center for Public Policy Studies (CPPS) in partnership with the State Justice Institute (SJI). The Immigration and the State Courts Initiative is focused on four strategic priorities:

- increasing understanding and awareness about the impacts of immigration in the state courts;
- developing and testing state and local approaches for assessing and addressing the impact of immigration in the state courts;
- enhancing state and local court capacity to improve court services affected by immigration; and

- building effective national, state, and local partnerships for addressing the impact of immigration in the state courts.

To visit the CPPS Immigration and the State Courts website, go to <http://www.centerforpublicpolicy.org/>.

2. See for example, Rempel, M., Fox-Kralstein, D., Cissner, A., Cohen, R., Labriola, M., Farole, D., Bader, A., and Magnani, M. (2003). *The New York State Drug Court Evaluation*. New York, NY: Center for Court Innovation; New Jersey Courts (2010). *A Model for Success: A Report on New Jersey's Adult Drug Courts*. Administrative Office of the Courts; Solop, F. and Wonders, N. (2003). *Coconino County DUI/ Drug Court Evaluation*. Flagstaff, AZ: Northern Arizona University; and Marchand, G., Waller, M., and Carey, S. (2006). *Barry County Adult Drug Court Outcome and Cost Evaluation Final Report, Submitted to The Michigan Supreme Court*. Portland, OR: NPC Research.

3. See for details, Huddleston, W. and Marlowe, D. (2011). *Painting the Current Picture: A National Report on Drug Courts and Other Problem Solving Court Programs in the United States*. Alexandria, VA: National Drug Court Institute.

4. For example, concerns about immigrant participation in drug courts were discussed in detail at two well-attended sessions during the recent July 2011 National Association of Drug Court Professionals annual conference held in Washington, D.C.

5. See for details our discussion of the role of attorneys, judges, and court staff in providing advice to immigrants in the state courts that appeared previously in *Court Manager*: "Implications of *Padilla v. Kentucky* for the Duties of State Court Criminal Judges and Court Administrators," Volume 25, Issue 4 (Winter 2010).

6. For discussions of these issues, see our two previous *Court Manager* articles, "Addressing Immigration in the State Courts," Volume 24, Issue 1, (Spring 2009) and "Immigration and the State Courts Assessment Framework," Volume 25, Issue 2 (Summer 2010).

7. Information about the nexus of federal and state court law summarized in this section and Section III is presented in greater detail in our *Bench Guide for State Trial Court Judges on the Consequences of State Court Criminal Actions* (2010), available in downloadable PDF format at the CPPS Immigration and the State Courts website: <http://www.centerforpublicpolicy.org/>.

8. Marlowe, D. and Meyer, W. (2011). *The Drug Court Judicial Benchbook*. Alexandria, VA: National Drug Court Institute.

9. These models are described in detail in Marlowe and Meyer (2011) *The Drug Court Judicial Benchbook*. Alexandria, VA: National Drug Court Institute.

10. This list may change over time with changes in immigration law.