

Representing Noncitizens At Arraignment

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Course Outline

- I. What Are Defender Goals In Representing Noncitizen Defendants?**
- II. What Are Immigration Detainers (a.k.a. Immigration "Holds") and What Do They Mean For A Noncitizen Defendant?**
- III. What is the Vienna Convention Art. 36(b) and what does it mean for a noncitizen defendant?**
- IV. What Are the Issues Involved In A Noncitizen's Disclosure – or Nondisclosure – of Immigration and Citizenship Status to Law Enforcement Officers or the Courts?**

Appendix A: WDA's Immigration Project Intake Questionnaire

Appendix B: Immigration-Safe Language For Deferred Adjudication Agreements

Appendix C: Sample Forms For Addressing The Vienna Convention Art. 36(b) and Bilateral Treaty Obligations

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I. Defender Goals In Representing Noncitizen Defendants

PRACTICE POINTS:

- 1. It is imperative that you ask EVERY client if s/he is a US citizen;**
- 2. Your office MUST have an established procedure for identifying and tracking noncitizen defendants and the immigration issues they present. See attached one page Immigration Intake Questionnaire. This can be edited and adapted as necessary. At a minimum, there should be a written notation in any confidential file created by defense counsel.**

3. Defender Representation of a Noncitizen Defendant is a Three Step Process:

Step One: Determine immigration status;

Step Two: Develop a working understanding of the basic crime-related sections of immigration law and which ones apply to a particular noncitizen defendant;

Step Three: Determine the defense priorities for this noncitizen client.

A. STEP ONE: Determining Immigration Status

1. Immigration Status

a). Immigration Status refers to persons classification under US immigration laws See Title 8 USC;

b.) Immigration Status is the most significant factor in determining consequences, options and rights -

- Which immigration (and possibly federal criminal) laws subject to;
- Amount of due process s/he will receive.

2. Immigration Status & United States Citizenship

- Three ways to acquire US citizenship: Birth in the US; Birth to US citizen parent(s); Naturalization

3. Citizens and Nationals

- No U.S. citizen (“USC”) or national can be deported (or prosecuted for a crime for which alienage is an element);
- Citizen = born in U.S. or Puerto Rico, sometimes Guam.;
- National = born in American Samoa, Swains Island.

4. Your Client May be a Citizen

Many persons born abroad are unknowing USC's. Ask:

- When you were born, did you have a USC parent or grandparent?
- While under age of 18, (a) did you get a green card and (b) did a parent with custody of you become a citizen through naturalization?

If answer yes to either question, you must get further consultation to see if client is USC.

5. Noncitizens a.k.a. "Aliens" (Non-USC's)

- All non-USC's, including persons who've had a green card for 20 years and have USC children, can be deported, easily, for a criminal conviction –

NONCITIZENS ARE ALWAYS SUBJECT TO DEPORTATION IF THEY VIOLATE IMMIGRATION LAWS, REGARDLESS OF EQUITIES SUCH AS LENGTH OF TIME IN U.S., FAMILY TIES, AGE;

- Lawful Permanent Resident (LPR, Green Card-Holder) can work and live in U.S. unless becomes deportable;
- Undocumented – "illegal alien" – may hope to get lawful status;
- In between are various forms of status.

6. Immigration Status - Lawful Permanent Resident – LPR

- Greencard holder
- Entitled to live & work indefinitely in US
- Can apply for citizenship after 3/5 years
- Conditional Permanent Residents

7. Immigration Status - Refugee/Asylee

- Granted safe haven due to persecution
- Can live and work legally in US
- Can apply to be LPR after one year

8. Immigration Status - Nonimmigrant Visa Holder

- Temporary visa
- Issued for specific purpose
- Subject to deportation if terms violated

9. Immigration Status - Undocumented Persons

- Nonimmigrant visa holders who violate
- Persons who illegally enter US

B. STEP TWO: Developing a Working Understanding of the Basic Crime-related Sections of Immigration Law and Determining Which Laws Apply to Your Noncitizen Defendant

1. Selected Crime-Related Provisions of the Immigration & Nationality Act

- Grounds of Inadmissibility - 8 USC 1182(a)(2);
- Grounds of Deportability - 8 USC 1227(a)(2);
- Aggravated Felony Definition - 8 USC 1101(a)(43).

2. Grounds of Inadmissibility Apply to:

- Any noncitizen seeking entry to US;
- Any noncitizen applying for lawful status;
- Basis for removal/deportation of undocumented persons who illegally entered US;
- LPRs who apply for citizenship.

3. Crime Related Grounds of Inadmissibility

- Crimes of Moral Turpitude;
- Controlled Substance Violations;
- 2 or more convictions where aggregate sentence is 5 years or more;
- Reason to believe involvement in drug trafficking, or received proceeds from family member who is/was;
- Determined to have physical/mental disorder that poses threat;
- Determined to be drug abuser;
- Engaged in prostitution.

4. Crime Related Grounds of Deportability

Apply to noncitizens who were LAWFULLY ADMITTED to US:

- Anyone with a greencard;
- Anyone with a nonimmigrant visa (even if expired);
- Persons granted asylum or refugee status;
- These are legal grounds for removing people with lawful status or who were lawfully admitted.

5. Grounds of Deportability

- Conviction(s) for crimes of moral turpitude;
- Conviction for an aggravated felony;
- Conviction for controlled substance;
- Conviction for firearms offense;
- Conviction for DV, child neglect, stalking offense offense;
- Judicial determination of PO/NCO violation.

6. Aggravated Felony Provision

- Applies to all noncitizens all the time;

- 21 provisions encompassing hundreds of offenses;
- 8 circuit courts have held that definition includes misdemeanors.

7. Aggravated Felonies

Triggers most severe consequences:

- Almost certain deportation/removal
- Renders noncitizen ineligible for all benefits (e.g. greencard, citizenship);
- Triggers severe restrictions on due process;
- Highest priority for removal;
- Severe sentence enhancements in illegal reentry prosecution

8. Aggravated Felonies – Selected Provisions

- Murder, rape, SAM;
- Drug trafficking;
- Firearms offenses;
- Crimes of violence with one year sentence imposed;
- Theft, PSP, burglary with one year sentence imposed;
- Crimes of fraud or deceit where loss = \$10k or more;
- Failure to appear;
- Attempt or conspiracy to commit any listed offense.

C. STEP THREE: Determining Defense Priorities for Your Noncitizen Client.

1. Client has NO lawful immigration status

...either because she entered US illegally and has never gotten lawful status; or she had lawful status that has expired (e.g.. tourist visa).

- Note: LPR status won't expire;
- **Subject to removal regardless of conviction**

DEFENDER GOALS:

GOAL #1 – To preserve any avenues that the noncitizen client may have for obtaining lawful status (e.g. via family member, asylum), whenever possible, do not plead guilty to an offense that falls under either:

- Grounds of inadmissibility (8 USC 1182(a)(2)) apply – avoid these crime-related grounds to prevent bars to possible avenues to obtaining lawful status (relief);
- Aggravated Felony provision (8 USC 1101(a)(43)) applies – avoid grounds to prevent: bars to getting status; expedited removal proceedings; illegal reentry sentence enhancements.

GOAL #2 - Avoid custody whenever possible.

PRACTICE POINTS:

1. Pleading guilty at arraignment to get out of custody may be the best thing for a noncitizen without lawful status. HOWEVER, it is imperative that the noncitizen know that there is a strong likelihood that the resulting conviction will foreclose any future possibilities for getting lawful immigration status.

2. Where there is an ICE detainer already lodged against the noncitizen, he will not be released from custody. Rather, he will (with few exceptions) be taken into ICE custody and charged with removal/deportation. Thus, in this instance, it may be advisable to remain in custody and take the time to negotiate a deal that could preserve his options for obtaining lawful status.

2. Noncitizen has no lawful status and has previously been deported or has an outstanding order of deportation:

No realistic possibility of ever getting lawful immigration status;

Noncitizen is at risk for the following:

- Reinstatement of removal order;
- sentence enhancement in illegal reentry prosecution;
- Risk of revocation of release under an Order of Supervision (ICE issues when they release someone who cannot be deported to home country (e.g., Vietnam).

DEFENDER GOALS:

GOAL #1 – Get out of jail asap/avoid custody whenever possible;

GOAL #2 - Avoid conviction that will trigger 8 USC 1326 illegal reentry sentence enhancement under United States Sentencing Guideline 2L1.2¹.

#2: Client has current lawful immigration status

...such as greencard (= lawful permanent resident); refugee/asylee; student visa

¹ USSG §2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest: If the defendant previously was deported, or unlawfully remained in the United States, after—(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels; (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels; (C) a conviction for an aggravated felony, increase by **8** levels; (D) a conviction for any other felony, increase by **4** levels; or (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

DEFENDER GOALS:

- It is IMPERATIVE to avoid a conviction that will trigger one of the grounds of deportation (8 USC 1227(a)(2)) or a conviction that will constitute an aggravated felony under 8 U.S.C. 1101(a)(43).

PRACTICE POINTS:

Where client has lawful status, do NOT plead guilty at arraignment (or any other time) to get client out of custody unless defense counsel has consulted with competent immigration counsel and determined:

- 1. the offense of conviction will not trigger deportation; or**
- 2. there are not going to be any options to negotiate an alternative to avoid deportation; or**
- 3. client's priors already make him deportable.**

3. Client's Immigration Status Is Unclear

Client has some type of temporary status - Work permit is evidence of this

Examples:

- Temporary protected status
- Asylum application pending
- Some other application for immigration benefits pending

DEFENDER GOALS:

GOAL #1 - Consult with immigration lawyer to determine specific status in order to properly analyze the immigration consequences;

GOAL #2 – If goal #1 is not possible, then avoid a conviction that will trigger any of the grounds of inadmissibility, grounds of deportation or the aggravated felony provisions.

PRACTICE POINTS:

1. Pleading guilty at arraignment to get out of custody may be the best thing for a noncitizen without lawful status. HOWEVER, it is imperative that the noncitizen know that there is a strong likelihood that the resulting conviction will foreclose any future possibilities for getting lawful immigration status. Additionally here, if the client has any temporary status, there is a significant risk of losing that status if she pleads guilty prior to getting expert immigration advice.

2. Where there is an ICE detainer already lodged against the noncitizen, he will not be released from custody. Rather, he will (with few exceptions) be taken into ICE custody and charged with removal/deportation. Thus, in this instance, it may be advisable to

remain in custody and take the time to negotiate a deal that could preserve his options for obtaining lawful status.

D. Deferred Adjudication Agreements (e.g., pre-trial diversions) and How To Avoid A Conviction Under Immigration Law

1. Convictions Under Immigration Law - Statutory definition 8 USC 1101(a)(48)(A)

Any formal judgment of guilty by court is a conviction under immigration law.

A deferred adjudication – such as pre-trial diversion or SOC- is a conviction under immigration law IF there is:

- A finding of guilt;
- Admission of guilt;
- Admission of sufficient facts to warrant finding of guilt

And the Judge orders punishment or restraint.

2. Deferred adjudications are problematic

where deferral requires admission of guilt or stipulation to facts or admission of police report into evidence as a factual basis

3. What is and is not a conviction under immigration law

- Deferred sentence agreements ARE convictions, even if defendant complies with the terms and the plea is subsequently withdrawn (remains conviction in perpetuity for immigration purposes);
- Juvenile delinquency dispositions ARE NOT convictions;
- Convictions on direct appeal ARE NOT final convictions for deportation purposes;
- Expunged convictions ARE (remain) convictions for immigration purposes;
- Gubernatorial pardons ARE NOT convictions for CERTAIN offenses but ARE convictions for other types of offenses.

4. Deferred Adjudications that are NOT convictions under immigration law

Deferred adjudications that do not require defendant to plead guilty and use “immigration-safe” language that ensures no admission to facts, nor submission of the police report or affidavit of probable cause into the record, will NOT be convictions.

PRACTICE POINTS:

If your noncitizen clients are doing deferred adjudications at arraignment (or any time) it is imperative to ensure that these agreements use the “immigration-safe”

language to ensure that the agreement will not constitute a conviction for immigration purposes.

The agreement must strike any boilerplate language requiring stipulations and/or admissions to facts or the police report (or affidavit of probable cause) and, instead, use the immigration-safe language. See Appendix B for immigration-safe language.

II. What Are Immigration Detainers (a.k.a. Immigration “Holds”) and What Do They Mean For A Noncitizen Defendant?

A. Immigration Detainers (a.k.a. “holds”)?

1. Immigration Regulatory Authority to Issue Detainer

Regulations at 8 C.F.R. 287.7 authorize the following:

“Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. **A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.**”

For noncitizens in criminal custody, the Immigration and Customs Enforcement (ICE) section of the Department of Homeland Security will almost always be the agency issuing the detainer.

2. When/How Immigration Detainers Are Issued

Contact with ICE initiated by local law enforcement where the officer:

- makes an arrest for a controlled substance offense;
- believes that that the suspect is not in the United States lawfully;
- and asks the INS to investigate the suspect's immigration status.
- NOTE: Often contact is initiated also for non-controlled substance offenses.

ICE officials routinely visit local/county jails, obtain jail records, interview noncitizen defendants and issue detainers upon them.

Regulations now require local authorities to provide the DHS with records in their possession that will help the ICE to make its determination regarding whether the suspected noncitizen is subject to removal

B. What does having an immigration detainer mean for a noncitizen defendant?

1. No Release From Custody

- If granted release (either OR or on bond) by criminal court, ICE will assume custody;
- Not advisable to post criminal court bond;
- Once in ICE custody, deportation/removal proceedings initiated;
- ICE not likely to return noncitizen to criminal court.

2. How long can noncitizen be held under immigration detainer?

- Local officials authorized to detain noncitizen up to 48 hours upon release from criminal custody;
- Where noncitizen is held beyond authorized time, state habeas petition can facilitate release or threat of habeas can prompt ICE action.

PRACTICE POINTS:

In order to better advise your clients, it is important to become familiar with how ICE detainers are issued at your local jail and how ICE conducts jail visitations. Look for Form I-247 in the jail records.

Knowing that there is – or is not – an immigration detainer on an undocumented noncitizen defendant (or whether that is likely given local practice) can be the deciding factor in whether to plead guilty at arraignment and get out (before a detainer is issued) or plead not guilty and have more time to resolve the case with potentially fewer immigration consequences.

Always advise your clients that they have a right to refuse to talk to (be interrogated by) ICE agents who visit the jail.

III. What is the Vienna Convention Art. 36(b) and what does it mean for a noncitizen defendant?

A. Overview of the issue & Problem

The Issue: What are a non-citizen's rights under Art. 36(b) of the Vienna Convention on Consular Relations (VCCR), which requires a foreign consulate to be notified when one of its citizens is being detained by government authorities and what are best practices for ensuring compliance with the VCCR?

The Problem: In an effort to comply with obligations under the VCCR, the U.S. State Department, and some prosecutors and courts have implemented practices that require or encourage a non-citizen to disclose information about their citizenship, nationality and/or immigration status. Non-citizens are a particularly vulnerable group within the criminal justice

system.² While exercising her right to talk to her consulate might be a good thing for some non-citizens, disclosing citizenship information risks exposing her to immigration authorities and possible deportation. The rights embodied in the VCCR are important and useful. However those rights must be administered and exercised in such a manner as to not violate or foreclose other equally important rights and protections.

B. Why Is This Issue Coming Up Now?

Increased litigation on this issue and host of recent developments including a 2004 International Court of Justice (ICJ) ruling against the US on this issue, have brought renewed attention to this issue by prosecutors.³ Notification of VCCR rights should be given by law enforcement officers upon arrest of all defendants. However, since this does not appear to be standard practice, numerous prosecutors and courts have taken up the practice by attempting notification at arraignments. While motivated to ensure that a noncitizen defendant has an opportunity to exercise her VCCR rights, these practices also work to foreclose future attacks on convictions due to VCCR claims. However the practice of attempting notification at arraignment is extremely problematic for non-citizens if it requires them to make affirmative disclosures regarding their citizenship, nationality or immigration status.

This practice advisory provides an overview of Art. 36(b)(1) of the VCCR, the current state of the law, ' rights and best practices for defense counsel in addressing the issue.

C. What Are The Vienna Convention And The Bilateral Treaties?

-- **The Vienna Convention on Consular Relations (VCCR)** is an international treaty to which the United States adhered in 1969.⁴ The treaty mainly deals with the establishment and duties of consular relations between states. While its preamble states that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,” Article 36 of the VCCR guarantees free communication between nationals of a “sending state” and consular officials.

Article 36(1)(b) applies to noncitizen defendants. In particular, Article 36 §(1)(b) requires the “receiving state” (e.g. the United States government) to inform a foreign consulate if one of their nationals is “arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

-- In addition to Article 36 of the VCCR, **there are a series of bilateral treaties on consular relations between the United States and individual nations**, some of which include a

² See, e.g.: *In the Matter of Hammermaster*, 139 Wn.2d 211, 244; 985 P.2d 924, 941 (1999)

³ Although so far no form of post-conviction relief based on a violation of an individual right created by the VCCR has been upheld, (other than through “comity” or voluntary action in cases involving the most severe penalties) the International Court of Justice (ICJ) judgment in *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. 12, P151 (Mar. 31); the subsequent statement by President Bush and withdrawal from ICJ jurisdiction on VCCR issues; the Supreme Court’s actions in *Medellin v. Dretke*, 125 S. Ct. 2088 (2005); and the granting of writs of certiorari in November, 2005, by the Supreme Court in *Sanchez-Llamas v. Oregon*, 04-10566; and *Bustillo v. Johnson*, 05-51; have shown that the law is not settled on this question.

⁴ 21 U.S.T. 77 (U.S.T. 1969)

mandatory requirement that the two countries notify each other when their nationals are detained. The State Department's (DOS) advisory material emphasizes that the notification in these cases is mandatory, regardless of the desires of the non-citizen.⁵ Moreover, the DOS material starts from the presumption that an arrested person's citizenship status is already known to the detaining agency. These advisory materials do mention privacy concerns and fears of excessive disclosure that may exist, for example in the case of refugees; but do not discuss a situation where a person is afraid, or chooses not to, reveal her citizenship status at all.⁶ So for that reason the DOS materials are problematic in regard to the rights of non-citizens to decline to disclose information about their citizenship, nationality or immigration status.

Although the notification is an obligation of one State to another, neither the bilateral treaties nor the VCCR create an affirmative individual legal obligation by a non-citizen to reveal information that he does not otherwise need or want have to reveal, especially where that would violate legal protections to which he or she has a right.

The starting point for the bilateral treaties is that a foreign national's status has become known, and that once that is known the notification is obligatory. The purpose of the bilateral consular notification treaties is to facilitate consular functions, one of which is protection of foreign nationals; but not to subject them to additional legal penalties or hunt them out against their will.

Like the VCCR's voluntary consular notification requirement, the bilateral treaties' mandatory consular notification requirement is best served by informing all defendants of the treaty obligations, without subjecting them to an unnecessary judicial inquiry into citizenship status, prohibited by RCW 10.40.200(1), and the Fifth Amendment.

D. Who Is Responsible For Ensuring Compliance With The VCCR?

The primary obligation for treaty compliance rests with the Department of State (DOS). The DOS calls on state and federal criminal agencies to assist. The VCCR does *not* make state courts responsible for compliance in the first instance. According to the State Department, "[t]he law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification. . . . Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification."⁷ However, the State department encourages judges and prosecutors to ask whether consular notification has been complied with, to promote compliance. As noted below, however, this suggestion by the State Department runs afoul of a non-citizen's right to not disclose her status and does not take into consideration that in so doing she may be exposing herself to apprehension by immigration authorities. The Ninth Circuit noted that the State Department has historically worked directly with detaining authorities to facilitate compliance with the VCCR.⁸

⁵ http://travel.state.gov/law/consular/consular_737.html#notification

⁶ http://travel.state.gov/law/consular/consular_747.html

⁷ http://travel.state.gov/law/consular/consular_748.html

⁸ "The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. . . . Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct" " *US v Lombera-Camorlinga* 206 F.3d 882; 887 (CA9 2000).

E. What Happens If The VCCR Is Violated And A Noncitizen Is Not Notified Of His Right To Contact His Consulate?

At present, the remedies available for failure to notify a noncitizen of the VCCR right to contact her consulate are unclear and the law is in a dynamic state of flux. No US Court of Appeals has yet found that the VCCR creates individually enforceable rights, although some trial courts have done so. The 9th circuit has ruled that a motion to suppress evidence is not the appropriate remedy for a VCCR violation-- that such a violation does not require the exclusion of evidence.⁹

When the US signed the VCCR it also signed an "Optional Protocol" making the ICJ the forum for resolving disputes about the VCCR.¹⁰ In *Avena*, the recent case before the ICJ concerning over 50 Mexicans on death row,¹¹ the ICJ found the US to be in violation of the consular notification requirement and required the US to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention."¹² The ICJ finding is specifically put in the context of those individuals sentenced to "severe penalties."

President Bush then issued a memorandum saying that United States would discharge its international obligations under the ICJ's *Avena* judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."¹³ (The US then promptly took its marbles and withdrew from the Optional Protocol, on Mar. 7, 2005).

In *Medellin*, after laying out many likely obstacles to relief, the Supreme Court dismissed a writ by an *Avena* petitioner, to allow Texas courts to consider the matter after the ICJ ruling and Bush's statement. The Court had already ruled, prior to *Avena*, that even if a VCCR claim could be brought, it can be procedurally defaulted under state and federal habeas rules.¹⁴

Although there is as yet no exclusionary rule, whether the VCCR grants *any* individual judicially enforceable rights is still open. In November, 2005, The Supreme Court granted certiorari in the cases of *Sanchez-Llamas* and *Bustillo*; an attempted aggravated murder case from Oregon and a

⁹ "We need not decide whether to accept the government's argument that Article 36 creates no individually enforceable rights, however. We agree with the government's alternative position that assuming that some judicial remedies are available for the violation of Article 36, the exclusion in a criminal prosecution of evidence obtained as the result of post-arrest interrogation is not among them." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000). This was prior to the ICJ ruling in *Avena*, *infra*.

¹⁰ Optional Protocol; 21 U.S.T. 325, (entered into force for the United States, Dec. 24, 1969; United States withdraws, Mar. 7, 2005).

¹¹ Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J. 12, P151 (Mar. 31).

¹² "[S]hould Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention..." 2004 ICJ LEXIS 11, 135-136 (ICJ 2004)

¹³ George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005).

¹⁴ *Breard v. Greene*, 523 U.S. 371, 375-376 (U.S. 1998). The subsequent interpretation of Article 36 by the ICJ eliminated one rationale for *Breard*: the absence of a clear ruling by an international court with jurisdiction. *Id.*

Virginia first-degree murder case, respectively. Neither were sentenced to death. Bustillo presents a strong claim of prejudice and factual innocence.¹⁵

F. How Should I Respond If The Court Or The Prosecutor Makes A Citizenship Inquiry On The Record?

- If you know that this is going to be asked you should talk about it with your client before arraignment. The best practice is for your client to let you speak for her, and to decline to answer the question. If your client does want to speak to her consulate then you can help that go forward, outside of court. No defendant should have to answer such a question on the record.
- You should point out that this practice violates Washington state law¹⁶ and that defendants can be informed of the consular notification option and requirements, and the prosecutor can make a record of having done so, without an improper inquiry into legal status in court. The Fifth Amendment's protection against self-incrimination also arguably applies. (See below.)
- You can use the revised King County felony prosecutor's form as an example of a way of making sure defendants are told about consular notification rights without violating other rights, or conducting an unnecessary courtroom inquiry into immigration status. (See attachment)
- The revised form agreed to by the King County prosecutor has one place to sign to request notification, and another that says "I do not wish to provide citizenship information and I waive any consular notification right at this time," but allows the person to request consular notification at a later moment. Ideally, if presented with such a form, all defendants would decline to sign in the place indicating non-citizenship, and either sign the acknowledgment/waiver, or have their attorney simply acknowledge receipt of the form and advise. Then, if the client is a non-citizen, they should decide whether or not to reveal that fact, and allow either the optional Vienna Convention consular notification, or the mandatory notification for certain countries, to go forward.
- Even if the client desires to have their consul notified, they should not have to go through the judge and the prosecutor to obtain this. The jail authorities who are detaining them should simply fax the consulate in question, as the State Department recommends. Additionally, defense counsel themselves can facilitate contact with consulates on behalf of detained non-citizens. The Washington Defender Association Immigration Project is willing to help you with this if needed.
- If you are ever in position to represent a defendant *before* booking or an interview with Court services, they should be encouraged to politely decline to answer all questions about citizenship, legal status, or "place of birth," even if they need to request an interpreter for court. They can be told to refer such questions to you.

¹⁵ http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/05-51_Petitioner.pdf

In another Virginia murder case, the State Supreme Court recently overturned a judge's decision to take the death penalty off the table due, to a VCCR violation. <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/19/AR2006011903029.html?referrer=emailarticle>

¹⁶ RCW § 10.40.200(1) "It is ... the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court."

G. Rights of non-citizens to not disclose citizenship or legal status

Washington State Law Prohibits Requiring A Person To Identify His Immigration Status

Washington State's advisal statute on potential immigration consequences, requires both that defendants be told that a guilty plea have potential immigration consequences, but also unambiguously prohibits requiring that *any* defendant "at the time of the plea.... be required to disclose his or her legal status to the court."¹⁷

Article 36(2) of the VCCR requires that the consular notification rights be exercised in accordance with US law. The two requirements can be harmonized by making all defendants aware of the VCCR and other treaty notification requirements, without conducting an inquisition into citizenship status in open Court. As a practical matter— and given current trends towards greater criminalization of undocumented immigrants-- a public interrogation by the Court or a prosecutor may also cast a chill on any desire to actually seek consular consultation, to avoid exposure.

Immigrant Defendants Have A Fifth Amendment Right Not To Disclose Their Legal Status¹⁸

The Fifth Amendment applies to even undocumented non-citizens.¹⁹ The privilege against self-incrimination applies at all times, not just after arrest.²⁰ It applies in any proceeding: civil or criminal, administrative or judicial, investigatory or adjudicatory.²¹ Its protections continue even through sentencing.²² The privilege extends to disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt can be established.²³ Moreover,

¹⁷ RCW § 10.40.200(1)

¹⁸ Art. 1, § 9, the "Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution." *State v. Moore*, 79 Wash.2d 51, 57, 483 P.2d 630 (1971).

¹⁹ "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. (citations omitted) Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. (citations omitted)." *Mathews v. Diaz*, 426 U.S. 67, 77 (U.S. 1976)

²⁰ [T]he Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also *privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.*" *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). *Baxter v. Palmigiano*, 425 U.S. 308, 316 (U.S. 1976) (emphasis added)

²¹ *Kastigar v. United States*, 406 U.S. 441, 444 (U.S. 1972)

²² *Estelle v. Smith*, 451 U.S. 454, 467 (U.S. 1981)

²³ *Kastigar v. U. S.*, 92 S.Ct. 1653, 406 U.S. 441, 32 L.Ed.2d 212, rehearing denied 92 S.Ct. 2478, 408 U.S. 931, 33 L.Ed.2d 345

that link may be provided not simply by use of the response itself as evidence, but also by its use as an investigatory lead to other evidence that could lend support to a prosecution.²⁴

Numerous federal crimes contain either nationality or current immigration status as elements of the offense, or implicate people who may ever have used a false name or document in order to work.²⁵ Just to give some examples: every non-citizen over 18 is required to “have in his personal possession” and to carry his or her ‘green-card’ “at all times.” Violation of this subsection is a federal misdemeanor.²⁶ Every non-citizen over 14, including long-term legal residents, are required to be registered and fingerprinted, with the exception of specified non-immigrants.²⁷ Every non-citizen required to register is also required to notify the Attorney General, in writing, of address change, within 10 days.²⁸ Failure to register, or to make a written notification of every address change, is a federal crime.²⁹ Most permanent residents are not aware of these provisions, nor of the criminal penalties. Washington State itself has a criminal offense where alienage— non-citizen status-- is an element.³⁰

Given all these and other possibilities of criminal exposure, the threat that the privilege protects against is "real and appreciable," and not “imaginary and unsubstantial” nor “trifling.”³¹ A non-citizen has an arguable right to invoke the 5th Amendment and refuse to answer any questions about his alienage, nationality or citizenship, posed by prosecutors or judges in open court.

IV. What Are the Issues Involved In A Noncitizen’s Disclosure – or Nondisclosure – of Immigration and Citizenship Status to Law Enforcement Officers or the Courts?

A. The Scope of a Noncitizen’s Fifth Amendment Right Against Self-Incrimination In Relation to Possible Exposure to Criminal Prosecution and Deportation By Disclosure of Immigration Status and Place of Birth

²⁴ On investigatory leads being sufficient, see *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 78, 86 S.Ct. 194, 198, 15 L.Ed.2d 165 (1965); *Kastigar* at 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972).

²⁵ 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 within 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. 911, 1015 – False claim to U.S. citizenship.

²⁶ INA § 264(e); 8 USC 1304(e)

²⁷ INA §262; 8 USC 1302

²⁸ INA §265(a); 8 USC 1305(a)

²⁹ INA §266(a), (b); 8 USC 1306(a),(b). The fact that the failure must be willful provides a defense; however many legal residents are often technically in breach of these requirements, and are exposed to the consequences if a violation were found, which also include deportation as well as criminal prosecution.

³⁰ RCW 9.41.170 Alien's license to carry firearms.

³¹ *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Marchetti v. United States*, 390 U.S. 39, 53 (1968)

1. Deportation/Removal Dangers of Disclosing Immigration Status and Place of Birth

- Establishing “alienage” is a jurisdictional element in any deportation or removal proceeding since the government only has power to seek to deport/remove noncitizens;
- Establishing alienage is also, obviously, a substantive element of any deportation/removal process since the government can actually deport only noncitizens.
- The initial burden of proof in any deportation/removal proceeding is on the government to establish that the respondent is not a U.S. citizen. As the 9th Circuit articulated in Ramon-Sepulveda v. I.N.S., 743 F.2d 1307 (9th Cir. 1984):

“Evidence of foreign birth gives rise to a presumption that the person so born is an alien” and once the government submits such evidence [in removal/deportation proceedings], the burden of proof shifts to the alien to “demonstrate the time, place, and manner of [his or her] entry into the United States... However, the government must *first* present “clear, convincing, and unequivocal” evidence of foreign birth. Woodby v. INS, 385 U.S. 276, 286, 87 S. Ct. 483, 488, 17 L. Ed. 2d 362 (1966); Corona-Palomera, 661 F.2d at 817. “

- In the overwhelming number of removal cases, the government’s evidence of foreign birth and immigration status comes from admissions by the noncitizen.

2. Criminal Prosecution Dangers of Disclosing Immigration Status and Place of Birth

The following are some of the federal criminal offenses where a person’s “alienage” or immigration status and manner of entry are elements of the offense:

8 U.S.C. 1282(c) – **Alien crewman overstays**; 8 U.S.C. 1306(a) – **If overstay after 30 days and fail to provide fingerprints/registration**; 8 U.S.C. 1304(e) – **18 or over not carrying immigration status 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**.

NOTE: Current legislation pending in Congress would significantly and dramatically expand this list of offenses by doing such things as, for the first time ever, making it a federal crime (currently proposed as a felony with a 10 year maximum sentence) to simply be in the U.S. without lawful immigration status.

3. A Noncitizen’s Fifth Amendment Right to Remain Silent as to Questions Regarding Her Immigration Status, Alienage and/or Place of Birth

1. Any individual, regardless of citizenship status, may invoke the Fifth Amendment privilege to remain silent in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. Kastigar v. U.S., 406 U.S. 441, 444 (1972).
2. Courts are permitted to draw a negative inference against someone who refuses to testify as to such information. Ramon-Sepulveda v. I.N.S., 743 F.2d 1307 (9th Cir. 1984); U.S. v. Solano-Godines, 120 F.3d 962 (9th Cir. 1997). However, this negative inference alone is insufficient to

establish the government's burden to prove someone is deportable/removable. Matter of Guevara, 20 I&N Dec. 238 (BIA 1991).

4. Does Questioning that Would Illicit and Admission of Illegal Presence (or Some Other Offense Related to Alienage) Constitute Interrogation and, Thus, Require Miranda Warnings?

a. The Test – What Constitutes Interrogation?

- The Ninth Circuit recently stated in U.S. v. Chen, 2006 U.S. App. LEXIS 5286 (March 2, 2006):

“*Miranda* prohibits "custodial interrogation" unless the government first provides the suspect with certain warnings. 384 U.S. at 444. Not every question asked in a custodial setting, however, constitutes "interrogation." United States v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1982). The test is whether, under all the circumstances involved in a given case, the questions are "reasonably likely to elicit an incriminating response from the suspect." *Id.* (quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant. United States v. Moreno-Flores, 33 F.3d 1164, 1169 (9th Cir. 1994).”

- Washington State courts have held that a question which is not required for purely booking purposes is “interrogation” for purposes of Miranda warnings. See State v. Wheeler, 108 Wash. 2d 230, 737 P.2d 1005 (Wash. 1987); State v. Sargent, 111 Wash. 2d 641, 761 P. 2d 1127 (Wash. 1988); State v. Walton, 64 Wash. Ap. 410, 824 P.2d 533 (Wash. App. 1992).

b. Questioning “Solely for the Administrative Purpose” of Deportation/Removal

- In a poorly reasoned decision, the Ninth Circuit held that questioning of a defendant in criminal custody by an immigration officer “solely for the administrative purpose” of determining whether he was deportable after release from jail did not constitute “interrogation” requiring Miranda warnings. See U.S. v. Salgado, 292 f.3d 1169 (9th Cir. 2002).
- Since it is impossible to determine prior to questioning whether the information illicitly obtained by jail officials, immigration officials, pre-trial services officials, or law enforcement officers will ultimately be used to facilitate a subsequent criminal prosecution (in addition to any “administrative” deportation/removal proceeding), the current caselaw referenced herein (and cited within those cases) is prolematic.
- These cases make clear that where the totality of the circumstances reveals that the questions regarding alienage and immigration status are, or reasonably could be, linked to certain criminal prosecutions (such as for illegal reentry after deportation), the information obtained is subject to suppression unless the requisite Miranda warnings were provided.
- However, there is no bar to using any information obtained through either “routine booking” questions or under improper or proper custodial interrogation in subsequent deportation/removal proceedings.

PRACTICE POINTS

Advise ALL noncitizen clients of their right to remain silent as to questioning regarding their immigration and citizenship status and place of birth.

Advise noncitizen clients that any information that they provide to law enforcement officers, immigration officers, pre-trial and court services, probation officers and the court can be used against them to facilitate their deportation.

While information obtained about immigration status and alienage may not always be used against a noncitizen in criminal prosecution, that information can and will be used against them for deportation or removal purposes.

Find out procedures for how the local jails and court services obtain information about defendants' immigration status and place of birth and become familiar with how this information is passed on to immigration officials, prosecutors and courts. Also become familiar with the specific practices of immigration officials at the local jail.

5. Immigration Status as a Factor in Custody/Bail Hearings

a. No Washington State statute or caselaw requires a trial court judge to determine immigration status or mandates that this must be, or even needs to be, a factor in determining whether to release a defendant.

RCW 10.40.200 requires that all defendants must be advised that entering a plea of guilty could result in their deportation, exclusion or denial of naturalization. This advisal statute specifically states that no defendant shall be required to disclose her or his immigration status at the time she or he enters a plea.

This specific prohibition would be rendered meaningless if the defendant has already been forced to disclose her immigration status at a bail hearing.

Defendants must not be compelled to forfeit their Fifth Amendment right to remain silent at a bail hearing in order to safeguard their Eighth Amendment right to reasonable bail. See U.S. v. Simmons, 390 U.S. 377 (1968); see also, Criminal Procedure, Wayne La Fave, Jerold Israel, Nancy King, Sec. 12.1 Pretrial Release Procedures (2005).

Federal law specifically provides for consideration of a defendant's immigration status in release from custody determinations. See 18 U.S.C. 3142.

b. Fundamental Rules of Determining Release Apply: Risk of Flight and Danger to the Community.

As a general principle, courts apply the same fundamental criteria for ALL defendants to determine whether to release him from custody and what, if any, conditions to impose on that release, regardless of immigration status: does the defendant pose a risk of flight; does the defendant pose a danger to the community.

c. Considerations for When a Trial Court Does Consider Immigration Status as a Factor in Releasing Defendant From Custody.

- From Pretrial Services Programs: Responsibilities and Potential, B. Mahoney, B. Beaudin, D. Ryan, J. Carver, 4, NCJ 181939 (U.S. Dept. of Justice, national Institute of Justice, March 2001):

“Although lack of U.S. citizenship may be one factor among many in assessing whether to release a defendant from custody...it has not been found to be a per se factor or even one that carries more weight than other factors. The underlying presumption is that defendants ought not be held in custody pending trial absent factually supported finding that the person poses a risk of danger...to the community, or poses a risk of flight.”

- The fact of alienage does not point conclusively to a determination that a person poses a serious risk of flight. U.S. v. Motamedi, 767 F.2d 1403 (9th Cir., 1985).
- When assessing an alien defendant’s ties to the U.S., the factors to be considered include how long the defendant has resided in the U.S., whether the defendant has been employed in the U.S., whether the defendant owns any property in the U.S., and the defendant’s family ties to the U.S. and her community. U.S. v. Townsend, 897 F.2d 989 (9th Cir. 1990).
- No defendant is required to provide specific information about whether she or he is lawfully present in the U.S. in the context of a custody hearing.

d. Confidentiality of Information Obtained by Release Agency

Information obtained from or concerning the defendant by a release agency must not be disclosed to any person other than the defendant’s lawyer, except as necessary to advise the appropriate magistrate or court concerning prescribing or amending conditions of release. Unif. R.Crim.P. 341(b) (1987).

PRACTICE POINTS

Whenever possible, argue against defendant’s immigration status being used as a factor in determining release from custody per the information above.

If defendant’s citizenship/alienage becomes a factor in a custody hearing, ensure that she is not required to disclose her specific immigration status, particularly if she is undocumented.

Become familiar with any procedures used by local pretrial services agencies for obtaining information regarding the defendant’s place of birth, immigration or citizenship status and ensure that that information remains confidential.

Appendix A

WDA's Immigration Project Intake Questionnaire

This information is confidential and protected by attorney-client privilege.

**For technical assistance, please provide the following information to us, either by email or telephone to:
Email: jonathan@defensenet.org Telephone: (206) 726-3332**

Information About You

Name: _____ Date of Inquiry: _____

Relationship to Noncitizen Defendant: (e.g., defense attorney) _____

Agency or Firm: _____ County: _____

Telephone: _____ Email address: _____

Information About the Noncitizen Defendant

1. Client's country of origin _____.
2. Client's current immigration status _____.
NOTE: some possibilities are: Refugee/Asylee; US citizen; Undocumented; Lawful Permanent Resident (LPR) (this means s/he has a greencard). If client has lawful status, how and when did s/he get it? (E.g., Client entered the U.S. in 1981 as a refugee from Cambodia; client got her greencard through her U.S. citizen spouse in 1993; client entered on a tourist visa.)
3. Starting with client's first entry into the United States, how many times, and for how long each time, has s/he departed and returned to the US
Entry Date: _____
Departure Date: _____
Length of Departure: _____
4. Client's current charge and criminal history (include all arrests and dispositions, sentences and juvenile offenses).
5. List client's immediate relatives (spouse, parent(s) and/or child(ren)) who are U.S. citizens or lawful permanent residents (greencard holders).

APPENDIX B

IMMIGRATION-SAFE LANGUAGE FOR DEFERRED ADJUDICATION AGREEMENTS

[NOTE: If boilerplate forms are used, it is necessary to cross-out/eliminate language referencing admissions or stipulations of guilt/police reports/facts and substitute in the following language.]

I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.

I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will read and review that evidence in determining my guilt or innocence.

APPENDIX C

SAMPLE FORMS FOR ADDRESSING THE VIENNA CONVENTION ART. 36(B) AND BILATERAL TREATY OBLIGATIONS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | | | | | |
|----------------------|------------|---|-----|--|------------------------------|
| STATE OF WASHINGTON, |) | | | | |
| | Plaintiff, |) | | | |
| vs. | |) | No. | | |
| | |) | | | |
| | Defendant, |) | | | VIENNA CONVENTION AND |
| | |) | | | BILATERAL TREATY |
| | |) | | | NOTIFICATION, |
| | |) | | | ACKNOWLEDGEMENT AND |
| | |) | | | WAIVER OR REQUEST |
| | |) | | | |

Pursuant to Article 36(1)(b) of the Vienna Convention on Consular Relations, if you are a non-U.S. citizen who is being arrested or detained, you are entitled to have your country's consular representatives here in the United States notified of your situation. A consular official from your country may be able to help you to obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want your country's consular officials notified, you may request this notification now, or at any time in the future.

In addition, the United States has entered into treaties that require notification to a consular representative of a treaty country if one of their citizens has been arrested or detained. If you are a foreign national of any of the following countries, the King County Prosecuting Attorney's Office is prepared to notify your country's consular officials as soon as possible. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things.

- | | | |
|---------------------|------------|--------------------------|
| Algeria | Guyana | Saint Kitts and Nevis |
| Antigua and Barbuda | Hong Kong | Saint Lucia |
| Armenia | Hungary | Saint Vincent/Grenadines |
| Azerbaijan | Jamaica | Seychelles |
| Bahamas, The | Kazakhstan | Sierra Leone |
| Barbados | Kiribati | Singapore |
| Belarus | Kuwait | Slovakia |
| Belize | Kyrgyzstan | Tajikistan |
| Brunei | Malaysia | Tanzania |

| | | |
|--------------------|-------------|---------------------|
| Bulgaria | Malta | Tonga |
| China (not R.O.C.) | Mauritius | Trinidad and Tobago |
| Costa Rica | Moldova | Tunisia |
| Cyprus | Mongolia | Turkmenistan |
| Czech Republic | Nigeria | Tuvalu |
| Dominica | Philippines | Ukraine. |
| Fiji | Poland | United Kingdom |
| Gambia, The | Romania | U.S.S.R. |
| Georgia | Russia | Uzbekistan |
| Ghana | | Zambia |
| Granada | | Zimbabwe |

Defendant's Acknowledgement and Waiver of Immediate Consular Notification

I acknowledge the above notification and understand it. I do not wish to provide citizenship information and I waive any right to consular notification at this time. I understand that my refusal to provide information will release United States authorities from their notification obligations under the Vienna Convention or bilateral treaties. If I change my mind and wish to have a consulate representative notified, I will request my defense attorney to notify the King County Prosecuting Attorney's Office or, if I am pro se, I will ask the Court to notify the King County Prosecuting Attorney's Office.

Date: _____

DEFENDANT

Defendant's Acknowledgement and Request for Immediate Consular Notification

I acknowledge the above notification and understand it. I choose not to waive my right to notification and I ask that you notify my country, _____, of my arrest or detention.

Date: _____

DEFENDANT

Appendix D – Exercises

Section I and II Exercises:

1. You are interviewing a client in jail prior to his arraignment hearing. You ask him if he is a U.S. citizen and he says no. What additional questions would you then ask him regarding his immigration situation?
2. Assume this defendant reveals that he is undocumented from Mexico and charged with a misdemeanor theft offense. How would you advise him regarding custody and whether or not to plead guilty at arraignment? What additional information would you need?
3. Assume this same client is a lawful permanent resident (greencard holder). How would you advise him regarding custody and whether or not to plead guilty at arraignment? What additional information would you need?

Section III Exercises:

1. Briefly, what is Art. 36(b) of the Vienna Convention on Consular Relations and how does it differ from bilateral treaty agreements?
2. The court or the prosecutor in your case has asked your client to reveal his citizenship status in open court for the alleged purpose of compliance with the Vienna Convention Art. 36(b). How do you respond?
3. Your local prosecutor has adopted the forms at Appendix B. How would you advise your client regarding these forms. What would you do if your client wishes to invoke these rights and have her consulate notified of her detention?

Section IV Exercises:

1. True or False: An undocumented person does not have a Fifth Amendment right to remain silent regarding questioning of her immigration status by an immigration agent.
2. A police officer arrests someone and asks her whether she is a U.S. citizen. Does this question constitute “interrogation” requiring a Miranda warning? Explain.
3. An immigration officer questions a defendant in jail about his immigration status without giving him a Miranda warning. The defendant reveals that he is undocumented. Can this information be used in a deportation proceeding? In a criminal prosecution?
4. The trial judge at an arraignment hearing asks your client in open court whether she is a U.S. citizen. How would you respond? What if the judge has information that she was born in Guatemala and asks her if she is lawfully present in the U.S.?