2013

Panel Discussion III: Recognizing and Addressing Immigration Concerns in the Criminal Process

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MR. ELKINS: Welcome. Before I send it over to them, I would like to introduce each one of them. In the middle here, we have Dan Kesselbrenner. Mr. Kesselbrenner is the executive director of the National Immigration Project of the National Lawyers Guild and has been in that position since 1986. Mr. Kesselbrenner is an expert on the immigration consequences of criminal convictions and contesting deportability in immigration proceedings. He's the co-author of *Immigration Law and Crimes*, which was cited in *Padilla v. Kentucky*. As a former member of the Clinton-Gore Department of Justice Immigrant Transition Team, Mr. Kesselbrenner's work defending immigrants has earned him numerous awards, including the American Immigration Lawyers Association Jack Wasserman Litigation Award.

Second to my right here, we have Violeta Chapin. Violeta Chapin is a 2002 graduate of New York University Law School, and Professor Chapin now teaches at the University of Colorado Law School in Boulder in the Criminal Defense Clinic. She's been recently published in the *Michigan Journal of Race and Law* in 2011 about the plight of undocumented immigrant witnesses in criminal trials. Before joining Colorado University's faculty, Professor Chapin was a trial attorney at the Public Defender's Service in Washington, D.C., for seven years where she represented indigent defendants charged with serious felonies at all stages of trial.

Last and to my far right, we have Christina Kleiser. Ms. Kleiser is a 1997 graduate of DePaul University College of Law, who has worked for various public interests and organizations in Florida and Ohio, specializing in child advocacy, criminal and immigrant defense. She joined Knox County Public Defender's Community Law Office in March of 2006, and she's been representing the public defender's clients in juvenile court since June of 2006 and counsels the Community Law Office's non-citizen clients about immigration consequences of their criminal charges pursuant to *Padilla*. Christina also teaches immigration law as an adjunct faculty member at the University of Tennessee School of Law. Thank you very much, and we will turn it over to you all.

VIOLETA CHAPIN: Hi, everyone. My part of the talk today is to talk to criminal defense lawyers who are representing non-citizen clients in state court and to give you an idea about the kinds of questions that you need to be asking them so that you can effectively represent them and advise them when it's fairly certain that they're going to be transferred to immigration court after their criminal case is disposed of.

So I'll give you a little bit more background in terms of where I'm coming from on this. I joined the University of Colorado's faculty in 2009 to teach the Criminal Defense Clinic, and what was happening was that we represent poor people charged with misdemeanors in Boulder County. That was a lot different from doing homicides in Washington, D.C., I'll tell that you. What we were seeing was a ton of people coming through with what were called ICE holds. And when I first saw one, I was like, What on earth is that? I had actually seen them when I was a felony trial attorney in D.C., but they weren't executing them necessarily when I left there, which I left the public

defender in 2009. And so in Boulder, we were seeing all these non-citizen clients coming through on really low-level misdemeanors, mostly traffic offenses, coming through with ICE holds, and we didn't really know what that meant. The judges had no idea what that meant. The DAs had less of an idea what that meant. And so we were all sort of floundering around trying to ask some immigration lawyers that we knew what it meant, and then we were probably giving them misadvice like Tricia was about how to resolve their criminal case and then try to sort of muddle their way through the immigration courts. We got a little bit better at it, thankfully, as we went along, and then in 2011 I added an immigration piece.

So now what we do in the clinic is we represent non-citizen clients charged with crimes, and students in the clinic learn how to interview these clients so that they don't screw them over in immigration court later on. What we've learned, what I've learned, students have all learned, and what we have been trying to teach the public defenders and the private criminal defense bar in Colorado is that non-citizen clients are different in very real, tangible ways — and advise and educate the defense bar about how to effectively represent them. That's essentially what I'm going to talk about.

We're talking about figuring out what your client wants to do, determining specific criminal defense goals based on the client's immigration status, and then Chris and Dan are going to talk about those last ones, talking more specifically about what's going on in Tennessee.

So like I said, we learned very quickly that non-citizen clients are different and that they're going to have to be negotiating both systems at once really right from the start. By the time we meet our clients in Boulder, it's the day after they have been arrested on criminal misdemeanor charges. We already know if they have an ICE hold. Is that true here in Tennessee by the time you meet your client

in misdemeanor court? Yeah. So you already know that they have got an ICE hold, and that tends to be the case in sort of smaller jurisdictions, where the jails quickly put people on a list to ICE and say to these people, "Check them out for us." And then ICE calls back and says whether or not you're going to stamp it with the ICE hold.

So by the time we meet our clients, which is literally less than twenty-four hours after they've been arrested, we already know that they have an ICE hold, so does the judge, so does the prosecutor. Big, red stamp on their intake jacket. The students have a little handy worksheet. The first place that I'll send you to — and I know Dan mentioned this earlier — www.defendingimmigrants.org. There is a *Padilla* intake worksheet. Print it out, take it with you to the jail, keep it anywhere you want, but those are all essentially the questions you need to ask the non-citizen clients. And we'll go through those.

As you've heard several times today, what happens in a criminal case is often fairly crucial to what happens later in the immigration case. So the first stuff, like I said, is the *Padilla* worksheet. There it is. Keep copies everywhere you can. My students have to keep it in their glove compartment, they have to keep it anywhere they're going to have to find it and access it quickly, and you are going to have to fill it out when meeting with your client who is a non-citizen who has been charged with a crime.

So how do you know that your client might be a non-citizen? So the first question I found is to ask where your client was born. Don't be like the jail, which is what the Boulder jail sort of slightly shame-facedly told me when I said, "Well, how do you decide who to put on the list and call up ICE and ask them to check?" They're like, "Well, if they're Mexican." I'm like, "What do you mean if they're Mexican? How do you tell if they're Mexican? Do you ask them if they're Mexican?" "Well, they look

Mexican, and they don't speak English." I said, "That is a huge problem. You're racially profiling people all day long." They were like, "Why are you asking all these questions again, Ms. Chapin?" So they are racially profiling clients. Try to be careful not to be racially profiling your clients. You would be surprised at who might be a non-citizen and who might actually be a citizen, but you want to be getting to that question sort of right away by asking — one of the ways to do that is ask if your client was foreign-born. What they do also in Boulder is, if you report that you were foreign-born, they put you on a list to ICE.

That was also made complicated by the fact that I was foreign-born. I was born in Costa Rica, but I'm a U.S. citizen. I've always been a U.S. citizen because my parents were U.S. citizens and they took me right over to the consulate and got me a passport. But if I were to get arrested in Boulder County, they would put me on a list to ICE, and one problem with that is that ICE doesn't have any record of me because I've never naturalized. My mom naturalized when I was twelve. My mom is from El Salvador, she married my dad. But she became a U.S. citizen when I was twelve, so she has an A number, an alien registration number. I don't have an alien registration number because I've never naturalized ever. I've always been a U.S. citizen, even from when I was in Costa Rica.

But that's one of the many ways that you get citizens into sort of the immigration pipeline because ICE doesn't have a record of them; they assume that I'm somebody who just recently entered and they just haven't found me yet, and so they might put a detainer on me. And there you are, a citizen with an immigration detainer. So you want to be figuring out what your client's situation is by asking questions about where they were born and then following up with that, or

ask about immigration status. Sometimes they don't know, and you're going to have to do a little bit more research. But you certainly want to be asking your client right from the beginning.

The existence of an immigration detainer can be one wink to the fact that your client might not be a non-citizen. So there's a couple myths floating out and around, certainly here in Tennessee and I'm sure in Colorado as well, which is that clients who have been issued an immigration detainer by ICE is undocumented. As you've heard, it's not necessarily true. People who have visas, people who are lawful permanent residents, sometimes even people who are citizens can be issued immigration detainers. We have a lot of judges in Colorado who have said the following to us, which is: Well, your client has an ICE hold, they're just going to be deported. Who cares? Also not true at all, and we will talk about that in a little bit about why that's not true.

So step one, and you will see this in the *Padilla* intake worksheet, is ask your client's immigration status, and they have a number of different potential statuses that they have. Just ask the status, and write it down. Hopefully, once you filled out this entire worksheet, if you have someone in-house like they do here in Knox County with Chris or if you have an immigration lawyer that you can call up, then you'll be able to go through this entire worksheet with them. So that's step one.

The last one is undocumented but potential future status. I'll tell you that in the clinic when we started in 2011 — this was before Obama issued the Deferred Action for Childhood Arrival — we had a few clients who I thought were completely screwed. They were totally undocumented. They didn't appear to have any avenue of relief. All of them — there were three clients right in a row — were seniors at Boulder High School. They were these young kids who had been brought over here by their

parents. They were all undocumented, their parents were all undocumented, so they didn't seem to have any obvious avenues for relief. Sometimes you can be undocumented but have some potential for future status, and now with immigration reform pending, that's also true.

Why are you asking about immigration status? Because then you will know whether they are subject to particular grounds of inadmissibility or deportability. Certain criminal dispositions will have adverse immigration consequences for your clients, just depending on their status, so you have to figure out sort of where they are in that realm.

Step two: What is your client's criminal history? These are a lot of the same questions that we just ask our regular citizen clients as well too, but you will see that the checklist gets a little bit longer. I like what Jennifer Chacón said earlier, which is that this is not rocket science. It's really not. It is quite complicated once you really get into the weave, but a lot of cases you can sort of figure it out on the front end. And that's what I'm trying to get the public defenders to realize. A lot of the public defenders are like, "It's so hard," "We don't know anything about immigration law," "It's so complicated." It's not super complicated. There's just a few extra questions that you need to make sure that you ask, and this worksheet gets you literally ninety percent of the way there.

So what's your client's criminal history, and get all of it. Again, traffic offenses, petty offenses, misdemeanors. You would not believe how many clients — "Do you have any convictions," and they're like, no, no, no. They're like, except that weed thing before or all the traffic offenses. So I tend to ask a variety of questions, like have the police ever stopped you, have you ever spoken to a police officer before, since you have been in the United states, have you actually gotten

handcuffed, did they ever make you sit on the side of the road? Sort of a wide variety of questions to really get to the answer that I need, which is everything. Yes?

UNIDENTIFIED SPEAKER: Do you have issues with clients who are afraid to talk to you because they don't understand the meaning of an adversarial process and that it may not exist in the country where they come from?

VIOLETA CHAPIN: Yes. So one of the things that we have a lot of conversation with in the clinic is how do you get the client to have a little bit of trust right at the beginning, and it's especially difficult, I think, with non-citizen clients when you come in there and you start asking them about their status. That is something that they have been taught to essentially hide from people. They know that that's not something that's good for them, if they are here undocumented. So certainly I talk to my students — and, obviously, this is something that all defense lawyers need to do — especially in time-constrained environments about explaining fairly quickly that "I'm here for you," "I don't work with the judge," "I don't work with the prosecutor," "I don't work with immigration at all," "I need to ask you these questions," and "I promise you that nothing you tell me will come out of my mouth unless you give me permission to do so" and try to explain why it is that you're asking them that question.

One fairly problematic question that we have is when we say, So were you born here in the United States? A lot of clients want to know why you're asking them that question, and it's important to answer that question, is that because, "If you are not a citizen, then there can be some problems in the criminal case, and by the way, they've issued a detainer." So we have the students explain to the client what a detainer is and the fact that

there's something holding them here and that, even if they pay their bond or their criminal case gets resolved, they're not going to get relief, they're going to get transferred. So we do do a fair bit of explanation, and that is sort of part and parcel of why non-citizen clients are different from citizen clients and how I think that really what needs to happen is that public defenders need to learn the language of speaking to non-citizen clients as opposed to speaking to citizen clients in answering questions like that.

You also want to know what sentence was received for each and every conviction, so add that into your little worksheet. So how much time exactly did you get? Now, lots of people have absolutely no idea. They don't know. They did it. I know that every single client who's in front of a judge and they're talking to them about pleas, they get sentenced, and they don't hear any of it because I think all they are hearing is jail, jail, jail. That's in their head, and so they're not listening. The judge is telling them all this information, and they're like, jail, jail, jail. So they don't hear it, and I have to then explain to them once again everything that happened once we leave. So a lot of clients don't know. To the extent that you can ask them, get that information, but you can also go back through your state and county records and figure out what the sentence was.

And why are we asking? Because this is what sort of determines clients' bond in immigration court. I had no idea about any of this at first. I didn't realize. My thought was that, if someone was undocumented, they were going to go to immigration court and definitely not get a bond because why would they get a bond if they didn't have any papers? That's not true at all. So asking about criminal history is important because that helps you figure out in your head and starts the wheels turning about whether or not the person is going to get a bond in immigration court and then how high that bond is. That's another reason, so you will know if the person has a certain prior — like if the

person is like, "I just got arrested." We had a client who got arrested on a DV — no, it wasn't even a DV, it was a stupid bar fight in Colorado. But he had a homicide conviction from New Mexico, and I was like, "That's a problem for you, sir." So there are some problems that you know that you have that prior, and the assault is the least of your problems here. The fact that you have a homicide conviction out of Mexico is going to be problematic for you in immigration court. And so there we were. And then I could talk to them sort of more about whether or not to post a bond in the criminal court.

So if your client has lawful status, these are some of your defender goals: So your primary concern wants to be avoiding a conviction that will trigger certain grounds of deportation, including the aggravated felony that I mentioned. We've heard about that because that will leave your client with no avenue for relief. It literally is the death star in immigration, aggravated felonies, just avoid at all costs to the extent you can. Then your secondary concern is to see if your client can get back in the United States sort of while proceedings are pending or afterwards.

Your client has no lawful immigration status. That tends to be the vast majority of the clients that we get in Boulder, is clients who are completely and a hundred percent undocumented and are now in the United States.

Very quickly, in case this wasn't said before, there are clients that are called EWIs. This was another term that I had no idea when I was in criminal court. Entry without inspection is what that means. EWI. Those are your undocumented guys. Those are the people who entered the United States without stopping through a port of inspection essentially. They are going to be subject to the grounds of inadmissibility because they're going to be treated as if they never came in, so they're going to do this whole legal — even though your guy has been there for thirty years, fifteen years, a long time undocumented, they're going to

be subject to the grounds of inadmissibility. They're going to treat them like they never entered and as if they're still physically outside the United States even though they're here. So that's who they're going to be. There it is. If they never had any status, they'll be charged with inadmissibility even though they're here.

If a non-citizen had a temporary status that expired, the government will charge them with grounds of deportability, don't they have to charge them with both?

DAN KESSELBRENNER: If you have been admitted, it's deportability.

VIOLETA CHAPIN: Okay. All right. I'll go back to that. Temporary status that expired.

DAN KESSELBRENNER: A temporary status that involved being inspected.

VIOLETA CHAPIN: Okay, they'll charge them only with deportability. So for these undocumented guys, these are your goals of the criminal defense lawyer: You know that you're focusing on the grounds of inadmissibility, and avoid sort of the crime-related grounds that prevent possible future avenues of relief, again, aggravated felony convictions, things that are going to prevent them from hopping over the good moral character bar.

Maintain eligibility for Deferred Action for Childhood Arrivals. This was a huge thing for us. Deferred Action for Childhood Arrivals is what's called DREAM Act Light. DACA is what we have here. It's relatively new. What I would encourage all criminal defense lawyers do is just literally google Deferred Action for Childhood Arrivals. It will take you to the USCIS web site, and they will tell you sort of the prongs that your clients need to meet in order to be eligible

for that. There's age requirements, there's time of entry requirements, and then there's certain criminal convictions that make you ineligible for that, so you want to be very careful to try to avoid those as much as possible because those are going to be your young people that you're getting that are either in school, in high school, or college, that have been here in the United States almost their whole life, probably only speak English, lots of them do. And so you want to be careful about those.

Step three: interviewing your client, what is your client's immigration history. So asking sort of these sorts of questions so that you figure out where your client might be over in the immigration realm. We have had some clients who have been deported before, unfortunately, and have re-entered, and so by the time you meet them, they've gotten re-arrested. If the person has been deported before, sometimes what's going to happen is called expedited removal, which we heard before, where they're not even going to get a hearing in immigration court. The immigration authorities are just going to reinstate this prior order of removal, which is still valid. It says you have been deported and you can't come back. They'll just reinstate it and send them right out, and then you have to have a really hard and difficult conversation about what your client wants to do. It can sometimes be attacked, but lots of times they just reinstate it. So does your client — that's how you figure out sort of what your client's goals are, and that's where we are going with this.

Again, what are your client's family ties and equities? These are sort of the same kinds of questions you would ask of your citizen clients anyway because these are the arguments that you typically make for bond. My client has family here, he has a lot of community support, he has kids, he works full time, he's worked at these different places, and you can talk

to them about these sorts of things. These specific questions are helpful for immigrants who are non-citizen clients in order to determine whether or not they have any immigration relief, and they can matter later on for an immigration lawyer who is either going to be helping you dispose of the criminal case in a way that's not problematic with the immigration case. Or they can be helpful if the client is able to retain an immigration lawyer and can get this information fairly soon.

Then figure out what your client's goals are. Does the client want to stay in the United States? We typically get a lot of clients who do want to stay in the United States. They have kids here. People do what people do; they move somewhere and put down roots. That's what human beings do. They get married, they have children, they have jobs, they do have a very real interest in remaining in the United States. That has resulted sometimes in our clinic just going to trial more often because we can't get immigration-safe pleas, and so we end up taking the case to trial in the criminal case. But then we have to have hard conversations with our client about whether or not "you can remain in detention pending trial" because, if the client has an ICE hold, then it doesn't make sense to post their bond in the criminal case because then they're going to be whisked off to immigration court and then we can't get them back to criminal court. So we've had clients stay in criminal court for four or five months waiting for their misdemeanor trial. They get their misdemeanor trial, and once it's done, then they get sent over to immigration court. And then those proceedings start going as well, but it's going to require you to have conversations with your client.

If the client's goal is to stay again, sometimes we negotiate for longer jail time; it happens all the time, or we negotiate for a plea that usually for a citizen client would

be terrible. We get a lot of cases because we live in Boulder, where people are driving and they've got weed in the car. So people have weed in the car all the time. So what happens is, the client gets arrested for reckless driving and for possession of drug paraphernalia typically because there's a pipe laying in the passenger seat. For a citizen client, the typical plea is to plea to the PDP, to the possession of drug paraphernalia, but it's a petty offense. And it doesn't carry any jail time, and if you plea to reckless driving, it gets you points on your driver's license. Most citizens don't want points on their driver's license if they can just get a stupid PDP petty offense charge. Non-citizen clients don't want that at all. They don't want anything drug-related. So we're in the position of going back to the DA and saying, "Okay, so we don't want the PDP charge," "We want to plea to the reckless driving," "We don't care about points on our license," "We just want to avoid it." And the prosecutors, because I'm with students, they're like, "Oh, you stupid student," "You don't know anything," "Let me tell you what the right plea is for this," and then we have to go back and tell the prosecutor, "Actually we do know exactly what we're doing, and we don't want the PDP charge."

So that's why, once again, sort of this brain shift when you've got a non-citizen client, drugs bad, bad drugs, don't go anywhere down that road. And so be negotiating for a plea offer that is going to be a little dissonant for the prosecutors or be asking for jail time in a way that is a little bit dissonant for the judge and for the prosecutors. And sometimes the client wants to be deported as quickly as possible, to get out of there, "I'm done." So figure out what those are sort of fairly early on and that will inform how it is how you advise your client later on as well.

Immigration detainers. So there was some questions earlier about how to go in and really sort of fight these immigration detainers and what it is that you

can say and do in immigration courts. It's the form I-247. I couldn't figure out how to get it in — I'm not the most computer-savvy — a picture of an immigration detainer because you can google it and you can see it, and you can see the language has changed. And it is a request from Immigration and Customs Enforcement asking them to advise them when a particular inmate who is in custody is due to be released in the criminal matter. It's a request.

So my first thing that I do now in the clinic with the students is, when we have a client with an ICE hold, we go and get a copy of the detainer, and the jail has been super nice and very willing to give that to us. And I don't see why they wouldn't give it to you; it's part of your client's file. Ask for a copy of the detainer, and then make a copy for the prosecutor and for the judge. And take it with you into court, and say, judge, this is just a request. All they're doing is requesting — we don't necessarily have to honor these at all. Now, the answer that we've gotten in criminal court from the judge is, "Ms. Chapin or Mr. Student, that's not my issue, talk to the jail about whether or not they're going to do it." So we did, and we went and talked to the jail. And we talked to the sheriff, and there has been some movement on this. There have been some jurisdictions that are now refusing to honor detainers in misdemeanor cases, in large part because it's very expensive for the jail; you have to pay the extra money for the forty-eight hours, so we've done that specifically. So they asked for the forty-eight hours.

And immigration detainers will say — usually the box checked is if ICE has — "We're issuing a detainer because we are initiating an investigation into whether or not your client is removable from the country." What does that mean? We are initiating an investigation into whether or not your client is removable from the country. What is ICE conceding that they don't know? They don't know whether your client is removable. They haven't met any

standard of proof to issue a detainer. ICE doesn't have to meet any burden of proof to show that your client is actually removable from the country before they issue a detainer. So I've had some students walk in there and say, they clearly don't know. They haven't met any burden of proof, and I think now this is an unlawful seizure. And we're going to make a Fourth Amendment argument about this. Some judges are delighted to have this conversation in the midst of a very otherwise humdrum day. Other judges are like, move on, they don't want hear to it.

But there are arguments that you can make, and Chris Lasch has pointed to some of the — Mike Wishney filed this out in Connecticut, and he made the Fourth Amendment Search and Seizure Violation. I would highly recommend you go and read the brief and make these arguments in court. The students are doing it. They're scared []less, but they're making the arguments in court. And the judges sometimes are engaging us on these things and really wanting to see what's going on with the detainer.

We also see that in some cases where judges are either refusing to issue the client a bond because of the detainer or they are not giving them a personal recognizance bond only because of the existence of a detainer — otherwise they would have given it to them because no prior and they have been here for twenty years and they work and do all these things, so but for the existence of a detainer, the person would have gotten a personal recognizance bond. We have made these arguments as well. There's actually no proof that the person is actually going to be removed, so it shouldn't make a difference at all.

The existence of a detainer means your client will not be released once they've either pled guilty or paid bond. They will be transferred to immigration detention, and once in immigration detention, they may or may not

get a bond. One thing that our attorney worksheet helps you figure out is whether or not your client is going to get a bond based on their prior convictions and about how high that bond is going to be, so you can have a discussion with your client about whether or not they can also pay the immigration bond. And in certain cases we've talked to the judge in the criminal court about the fact that this client should get a PR bond because a) they're almost definitely going to get a bond in immigration court and they're going to be able to pay it.

DAN KESSELBRENNER: There are also a certain number of cases in which, especially where it was done for investigation purposes only where — and it's a permanent resident — where until there's a conviction, they're not going to be able to pick up the person. So that's why you need to look at the particulars of each situation to see is this going to be the kind of bond — Tricia talked about in the last session that sometimes it doesn't make sense to pay the state bond and get whisked away somewhere else to another jurisdiction, but you also need to check, if it is an investigation-only-type situation, your client won't be — and is a permanent resident and they are expecting the charge to result in a conviction, until that charge becomes a conviction, they can't do anything. So they'll basically on their own either pick the person up and then release the person and not issue charges and not pick the person up once they realize it's investigation-only. So it's just a nuance, but it's like for every rule, there is this sort of exception. That's one that really applies here I would say.

VIOLETA CHAPIN: And in Colorado we're a little bit different from Tennessee in that we have an immigration court in Denver, so they just go take it to Denver, which is just thirty minutes away. So I don't care.

We frequently tell clients that maybe in this case, it makes sense to pay your criminal bond and not plead to anything at all, don't go over to immigration court with a conviction. We're fairly certain that you're going to get an immigration bond. If you can afford to pay the immigration bond, then you're out, and then we're golden. We're much better if you can get out. But we are just logistically different from Tennessee in that our client stays right there. Chris?

UNIDENTIFIED SPEAKER: The current version of the detainer form also has a box that can be checked that says, consider this detainer active only upon conviction. I have no anecdotal evidence whatsoever about how often that bond would (inaudible) because that would also be a situation where you want to go ahead and pay the bond because that's not an active detainer yet in theory.

VIOLETA CHAPIN: Right. Another reason why the first thing to do is get the copy of the detainer and look at it so that you know exactly what it is that ICE is alleging, where you are, and you can show it to the judge in the criminal court and show it to prosecutors, and I think it's a good idea for everybody to just start getting used to them. You're going to see a lot of them, and so it's good that people are used to them and you can talk about them in a way that gives you something else to say. I always like saying more.

So again, getting an immigration bond depends largely on your client's criminal history, not his immigration status, and the existence of a detainer only means if he's going to be transferred. Chris Lasch gave a lecture in my class where he just said, the ICE detainer — it's just a piece of paper. He said it earlier, I love it. It's just a piece of paper, judge. That's all it is. It's just a piece of paper.

Again, no standard of proof, and that means that your client could potentially get a bond. As I said, judges are largely unused to it, and it shouldn't make a difference in the court's bond determination or in the granting of alternatives to jail as a sentence. Request a copy of the I-247 detainer from the jail is sort of the first starting point, and then fill out your worksheet from there. And then if you need to, go talk to an immigration lawyer about who your client is, what's going on with him, and what you should do next. I'm a huge fan of the Defending Immigrants Partnership website. I use the *Padilla* intake sheet. There's also some awesome things like this. That's awesome. Thank you, Dan Kesselbrenner.

Practice advisory — lots of practice advisory for criminal defense lawyers who are representing non-citizen clients, so there's tons of really good stuff.

UNIDENTIFIED SPEAKER: So if we've got a judge to say, no, this detainer is unlawful, what do we do? Get the judge to sign the order and take it over to the jail? Is that how you get the person actually out of jail?

VIOLETA CHAPIN: Well, we have been wholly unsuccessful in it. I wish I could get the ball rolling, and we should be doing something in criminal court to fight these detainers. What we have told the judge to do is that "you have the jurisdiction, judge, to tell this jail to release my client."

UNIDENTIFIED SPEAKER: But even though they're excited about that argument, they still say no?

VIOLETA CHAPIN: Yeah. They are willing to engage us, and we talk about it. And the students have drafted certain pleadings about why they think it's a problem, and they'll read it and be like, what an

interesting exercise. But I think that it's something that really could have some teeth. It has some teeth. It certainly scared the bejesus out of the folks in Connecticut in terms of this Fourth Amendment argument that it's an unlawful search and seizure, especially since there has been no — do you see how it's different from a regular warrant that a judge signed, for example, in New Mexico for your client and they want you to transfer? There was no judicial proceeding in the ICE detainer world. It's literally Department of Homeland Security initiating an investigation, and that's why it's an unlawful search and seizure because there's no reasonable suspicion. They haven't met any standard to say that your client should be held, and "Now you are participating in the violation of my client's rights, and I want you to release him, judge, and tell the jail to release him as well." But I think what's also possible is to go and talk to the jail specifically, the guys with the keys, and say, "You guys shouldn't be honoring them for these reasons."

UNIDENTIFIED SPEAKER: That's the only way I've been ever successful in getting somebody released, is to explain to them that financially you hold them for forty-eight hours and the feds pay you. After forty-eight hours, the county has to pay for that, and on very rare occasions, I've had the jail agree to release somebody just for financial reasons. But I would speak with the attorney for the local sheriff's department and explain to them, send them a copy of the statute, and on two or three occasions, I've been able to convince them — this is only when ICE did not pick them up within the forty-eight hours. Forty-eight hours will run, somebody has already paid bond, and on occasion, just for financial reasons, they will release them.

VIOLETA CHAPIN: They got scared in Colorado. They had to pay an immigrant a whole lot of money for

holding them, I think it was, twenty-seven days over. They were like forty-eight hours, twenty-seven days. So the ACLU came in — I love the ACLU. They do all sorts of things like this. And they came in, and they sued the county, I think it was Jefferson County in Colorado, for holding him over the forty-eight hours. So you can scare them with the money thing because they'll have to pay up if they do it, otherwise they're having to pay as well, and they shouldn't, especially on low-level misdemeanors.

DAN KESSELBRENNER: Chris and I are going to share — we're going to be like a tag-team-back-and-forth kind of thing so we — that's why she's up there with the slides and I'm down here with the microphone for now. I wanted to start off by just talking about what Tim Arnold started up this morning, the slide showing the change of the war or the collision of worlds. There are some things that criminal defense practitioners and immigration practitioners can do to help make peace with each other.

I was once at a session of the Defending Immigrants Partnership, and we asked people who were the criminal defense practitioners in the room, "What are the three most annoying things that immigration practitioners do that make it hard for you to work with immigration practitioners?" And they said, people talk in jargon, they talk about I-130 this, I-589 that, EWI, people don't cite to readily available materials, so people cite the Immigration Nationality Act, which is a parallel citation system, instead of the more generally available and understandable 8 U.S. code. Now, this was a while ago, and maybe now they're equally available but still maybe part of the same jargon idea.

And the third thing complaint was, they asked for the moon. You have a client who is found charged with first-degree murder, and they say, "Do you think you can plead this down to disorderly? That would be great."

There's only one thing I remember that the immigration lawyers complained about at the criminal defense bar, and that was this sort of call from the courthouse bathroom during a break. It's like, "Oh, I've got five minutes between the sessions here," "I've got this client who did this, this, and this," "Would a plea to Tennessee 51-12-36 make him deportable?" Basically how long do you have for me to answer the question? Although I still take those calls, there are some people who said they wouldn't take those calls at all because it was really an affront, and that's why we try to get — but those kinds of mutual give-and-take, again, we can make things a little bit more peaceful between the two groups.

Having said that — what does our first slide say?

CHRISTINA KLEISER: Some of this is repetitive. We've had a couple of panels where we certainly have said some similar things over and over again, but I think some of these — and the three of us have been revising our slide show all day, so we have been trying to eliminate some of the more repetitive stuff. But some things are really worth repeating, and this is one of those. And that's that, in our office, there is a real misconception that if I have my — and the majority of the clients who come through our office who are non-citizens appear to be undocumented, and that is the category that is very often the lowest priority on my caseload of maybe consulting or researching whether this person has something worthy of trying to find a safe plea for or trying to help. And I'm so happy you told your personal story because there are so many ways that that can happen, where you go visit your client and they actually don't know that they're a citizen but it turns out they are or you go visit your client — and one of our misdemeanor clients referred a — and this is not somebody who's currently in our office, so I don't want you to think it's you up there in the back row — referred a no driver's

license case because he wanted to talk to me about the case, and it turned out he had a very, very strong claim to be a citizen. So, even the cases where you feel like there's probably nothing you can do, you need to do that research, your clients need to have that individual assessment. So they have significant interest in avoiding consequences if they have potential future relief.

And like Tricia said at the prior panel, you've just got to go with what we know today. We were talking a little bit about, Well, is there anything in the legislation that might be passed as the comprehensive immigration reform that we can at least be thinking about? And as defenders in trying to give the best advice, you have to just advise your clients that you have really no idea what, if anything, is going to get passed.

DAN KESSELBRENNER: The other thing that I don't think has been said today, but it's been implied when people talk about the civil/criminal distinction, is that the prohibition against ex post facto laws doesn't apply in immigration proceedings, so that you could give state-of-the-art advice today. And if Congress will happen to pass a law tomorrow that says that littering is an aggravated felony and "we want this statute to apply to convictions on or before or after the effective date of this amendment," that would probably pass constitutional muster, at least insofar as if the question was, Would it be barred by the prohibition against ex post facto laws because the Supreme Court decided that several times?

The upshot of this is not that immigration advice — we can't get the right answer anyway, why try? But it is important to let your client know, because your client is giving up significant rights, the right to a jury trial, jury trial charge, right to go to trial, and other things in exchange for your adequate representation.

Now, obviously, none of us can see into the future, so it wouldn't be a breach of your ethical obligation and certainly wouldn't violate *Padilla*. But it does seem to me the best practice is to sort of at least incorporate into your advice with your client that "this is the best advice I can give at the moment."

There was another thing in *Padilla* that I also didn't hear — although I wasn't in the room all day and that's the sort of — part of this decision talks about clear versus unclear, and it says, you have to advise when the consequences are clear. But if the consequences are not clear — and people did allude to — you just have to give this sort of generalized warning that this may create a problem. You can't know whether the consequence is clear unless you investigate the facts, find out what the law is, and try to apply the law to the facts.

Now, after doing that, you can give advice that's specific, but in the specificity, you're saying no one can tell — there's a chance this argument would work, something like that, but I guess the clear versus unclear doesn't — like distinction in the opinion doesn't eliminate your obligation to do an investigation because, until you do the investigation as a citizenship status, as to prior criminal history, as to the charge, investigate whether alternate charges are available, you won't be able to make an assessment as to whether it's clear or not. So there's work that has to happen in every case.

One of the things that was discussed in the prior session about negotiating with district attorneys who will say something like, "I like to treat everyone in this court equally — I don't care if it's non-citizen, citizen, everyone gets treated the same." Well, if that were true — and in the *Padilla* decision, one of the things the Court talked about was that sometimes prosecutors would want to consider immigration consequences in the interest of both sides to negotiate these pleas, and moreover, that creative

charge bargaining was part of what was alluded to in a list of things that an adequate counsel might do. It was dicta, it wasn't the holding of the case, since it didn't happen. But you could certainly point to things in the opinion itself, which if the Supreme Court thought that fashioning specific dispositions for non-citizen defendants was something that was a failure to do, it would be a Sixth Amendment violation. Then it's hard to see how there could be an equal protection problem with offering a different plea to a citizen or a non-citizen.

In other words, the notion that the Court reached its decision about the special importance of advising about immigration consequences is at odds with this notion that oh, I have to give the same disposition to everybody. Now, that might not work with every district attorney because some of the district attorneys may actually be doing it out of etiological reasons, they're being xenophobic or racist, rather than believing that argument, but there may be some people who, in good faith, believe that argument and haven't put the connection between the inconsistency with holding that view and the reasoning of *Padilla* itself. So it might be something you can do for those prosecutors. Just wanted to get that point out.

I know it's basically four or five months since the election, but at this point, I just want to take one or two more polls and get people involved just so we can get some participation going a little bit. And my first poll question: So we've heard about crimes involving moral turpitude, but I don't think we really heard an attempt to define it. So I'm going to throw out the name of a crime, and then there's three possible responses. It's a little bit of a rigid poll, but indulge me. One choice is that the offense always involves moral turpitude, the second choice is the offense never involves moral turpitude, and the third choice is, it sometimes involves moral turpitude. So the first crime is murder, which is the intentional taking of a life with malice

aforethought. So who thinks that a conviction for murder always involves moral turpitude? Who thinks a conviction for murder never involves moral turpitude? Who thinks a conviction for intentional taking of a life with malice aforethought sometimes defines moral turptitude? Okay. Will a person who thought it always involves moral turpitude volunteer, just explain their reasoning briefly for a second?

UNIDENTIFIED SPEAKER: How about by its own definition, with malice aforethought, a violent act.

DAN KESSELBRENNER: So violent act with malice aforethought, that that definition itself creates the —

CHRISTINA KLEISER: Turpitude misconduct.

DAN KESSELBRENNER: Turpitude misconduct. Okay. I didn't see any hands for never. Will someone who said sometimes choose to explain why they thought sometimes?

UNIDENTIFIED SPEAKER: I can't think of every possible circumstance, so I don't want to rule anything out.

DAN KESSELBRENNER: Okay. So the next crime is incest. Who thinks incest always involves moral turpitude? Who thinks incest never involves moral turpitude? Who thinks incest sometimes involves moral turpitude? Chris, do you want to volunteer why you said it always involves moral turpitude?

UNIDENTIFIED SPEAKER: Just so clearly depraved and degrading of the human spirit.

DAN KESSELBRENNER: He says, incest involves degradation of the human spirit, and that is

necessarily turpitudinous. It's not an unreasonable answer. Will someone who said sometimes care to give their — yes.

UNIDENTIFIED SPEAKER: Well, I think a lot of times it's probably defined, and sometimes people may not even know that they're having sex with a second cousin or something.

UNIDENTIFIED SPEAKER: And then there are different laws in different states for incest, so you have a moral turpitude attitude or you don't. And from one state to the next, you can't change that attitude.

DAN KESSELBRENNER: But did you notice — and this is sort of the presenter's trick — I explained to you the elements of murder, but I didn't explain to you the elements of incest? So I think the lesson, the takeaway from this is that, if you don't know the elements of the offense, you can't possibly know whether it's morally turpitudinous or not because that's really what the inquiry is about at bottom, is what the person is convicted for. So the people who said, marrying a second cousin or different states define it differently, in fact, if — and now I'll get into what the definition is, murky as it may be, and that is that moral turpitude is defined as an offense that has some degree of scienter, at least reckless — so reckless, intentional, and involves reprehensible conduct.

So right away there are certain rules that sort of — through that analysis, murder would always involve moral turpitude, and so for that one, I would say murder defined as the way I defined it, intentional taking of a life with malice aforethought, would be always a crime involving moral turpitude under the test I gave you, for the reason that the person in the third row back there mentioned, that

basically elements itself make it — you have to be bad to do that.

Now, obviously we could have philosophical discussions about what's bad and what's reprehensible, but they at least think that there's a certain degree of settledness in what's considered bad. And in fact, if you look at the thing about thou shalt not steal, thou shalt not kill, there is some either literary or historical reference for those particular crimes, although those weren't defined in the Ten Commandments either. That would be an answer you could give back. Now, that said, do you want to turn to the Tennessee statute on —

CHRISTINA KLEISER: Which one?

DAN KESSELBRENNER: Do we have one on joyriding and theft?

CHRISTINA KLEISER: Yes.

DAN KESSELBRENNER: One of the case laws, just to give some practical approaches, how to help give you not the answer but sort of a start to an answer, is that there are certain rules that have been defined based on the elements, that certain elements make something reprehensible or non-reprehensible.

The differentiating factor between when a conviction involving a taking is a crime involving moral turpitude and when it's not is whether the taking is permanent or transitory. So if you have a crime that has only a transitory requirement to deprive the rightful owner of their property, that's not really going to be stealing, regardless of what the state calls it, involving moral turpitude. If the state can call it stealing, it will be stealing for purposes of the state law, but in terms of moral turpitude inquiry, talking about the Ten Commandments,

thou shalt not steal, what the Board of Immigration Appeals cases suggest is, when it says steal, it really means take with intent to deprive the rightful owner of the property. So you have a statute like — joyriding I think was the next line.

CHRISTINA KLEISER: It is. Actually, though, Dan, if you don't mind, I think it would be another poll. I would like to know if folks think that our Tennessee Theft Statute meets the definition you're talking about. This is our Tennessee Theft Statute in Tennessee, and part of this is what Dan was saying earlier, is don't judge the crime by the title. You have to look at the elements to decide whether or not something could be arguably moral turpitude. So our Tennessee Theft Statute is a person commits theft of property, it was intent to deprive the owner of the property, the person knowingly obtains or exercises control over the property without effective consent.

You're the immigration adjudicator and/or the defense counsel or ICE counsel. Who wants to argue for this not being a crime of moral turpitude, if anyone out there thinks that?

UNIDENTIFIED SPEAKER: To the extent you think that it requires an intent to permanently deprive and that permanent depravation is (inaudible) immigration offense, then Tennessee statute is broader than that, the circumstances where there is no intent (inaudible).

CHRISTINA KLEISER: Does anybody want to counter that argument? So theft, if you just heard the word theft, would your gut say that it's a crime of moral turpitude? Mostly yes. But it's extremely important that you look at the elements. Yes, sir?

UNIDENTIFIED SPEAKER: The word *exercising control* would imply that that could be less than a permanent taking; therefore, not a crime of moral turpitude.

CHRISTINA KLEISER: I think our theft statute has a lot of good arguments in it, frankly. Now, when I'm counseling defenders in our office, I don't say that theft is a safe plea, by any stretch, because we certainly have adjudicators and judges out there who can get that wrong or maybe they go pro se and don't have counsel to sit in, and I think it's awesome that these offices have both immigration and criminal defense counsel in their same offices. We certainly don't have that in our office. So once we enter the plea, they're going out to their immigration lawyer, whoever they decide to hire, but they certainly have a good argument. If it's the best plea in the hierarchy of things that you can get from the prosecutor, you need to certainly think that it's not exactly the most unsafe thing you can find, although that's not our first task.

DAN KESSELBRENNER: Although I think we don't have enough information at this point, if I were to answer Professor Chacón — I got a call from Jenny Roberts, whose name I only mentioned so I could refer people to her terrific article on proving prejudice post-*Padilla*, which really lays out what prejudice means in this era, but anyway, Jenny works at a law school clinic, professor there. And she said, "Well, my client is charged with this Maryland Theft Statute," and it was remarkably similar to the Tennessee statute. And so I said, well, you get to look at the statute, but if the highest court in the state has put a gloss on the elements, then it would be a problem. And one thing that they would look at is jury instructions, so she pulled up the Maryland jury instructions for the Maryland theft. And even though the language in the statute said *deprive* — although, I don't know whether

it had *exercise control* over because that would be helpful if it ever went to an immigration court. But the jury instructions said deprive means permanently deprive, and it could be that those jury instructions weren't backed by a Maryland Court of Appeals, who is the highest court in Maryland, case to support it. But at a minimum, I said, stay away from that because a DHS prosecutor can make — often times they might not have worked hard on the defense side, but it isn't that hard to find the jury instructions. And the jury instructions pretty much resolve that question. The point of this is only that you need to also look at the case law interpreting the statute to see if there is a judicial gloss on the elements. Yes, sir, over here.

UNIDENTIFIED SPEAKER: Would it make any difference what was stolen or why, if I'm stealing formula to feed my starving baby?

DAN KESSELBRENNER: No. It should make a difference. If I were the one with the moral — but I'm not, and that's why — the person who said, "I don't know every circumstance that murder could be convicted," in this case, that's true, but it doesn't — you know that if a person got a conviction, they don't re-litigate whether there was a conviction or not. And so they don't re-litigate, whether in fact it was malice aforethought. Presumably if there was some mitigating factor, the person would have gotten second-degree. If it was self-defense, then it was an affirmative defense, and they would have gotten acquitted. And they proved it up. So it's really the fact of the conviction.

Now, it could make a difference in terms of — some states have theft over 500 is a felony, theft under 500 is a misdemeanor, or theft under 500 may be punished by only six months. And so you think you have to look at the

grounds of deportability. So we're not going to this sort of micro-level. But at the micro-level, you would find out. If you look at the grounds of deportability for moral turpitude, it says a single conviction for a crime involving moral turpitude within five years of admission where the crime is punishable by a year, at least a year, so, basically all of those things need to be there for the person to be deportable for that offense. So it turns out it was theft. It was moral turpitude. It wasn't permanent deprivation. It wasn't in five years, but it's only a six-month max. Then for that ground, they wouldn't be deportable. Why? You look on the one side of the ledger of what do they need — this is one good way to do this. This is sort of borrowing this from Mary Holt or Roger Williams. One side of the piece of paper, you put the elements of the grounds of deportability. Another side, you put the elements of the criminal offense or the client situation. So if each of the things match up — and someone said — I think Jennifer said this — that there's no way that you could be — the statute of conviction is broader than the definition. Then in a situation where it's the government's burden — where there's a burden, they won't able to meet the burden. Should we do the drugs, do the marijuana possession?

CHRISTINA KLEISER: Yes. We need to go back and talk about exactly what the record is that the immigration fact finder can look at, but another way that you can make a big difference for your client, under our Misdemeanor Marijuana Statute, is — our Misdemeanor Marijuana Statute, 39-17-418, an offense where a person knowingly possess or casually exchange a controlled substance. And under the immigration laws, you can be deportable, any alien could, any time after admission, have been convicted of a violation of any law relating to a controlled substance other than a single

offense involving possession for one's own use of thirty grams or less of marijuana.

In trying to keep folks awake during the last panel, let's hear from defense counsel as to the safest plea if your client is charged with misdemeanor marijuana, forty-eight grams of marijuana. What might you be able to negotiate with your prosecutor to help your client?

UNIDENTIFIED SPEAKER: Below thirty grams, right?

CHRISTINA KLEISER: And specifically state in your agreement a less-than-thirty-gram possession. Even though they may be possessing forty-eight, they still are possessing less than thirty also. So it's not false that they were possessing less than thirty. You can get a prosecutor to agree to that. They're still going to get their conviction, but you are safely pleading them to that.

VIOLETA CHAPIN: I'll say real briefly, with a couple of these things — and I think you're about to talk about it now — in terms of what it is that the immigration adjudicator can look at — the record of convictions is I guess what you're going to talk about?

CHRISTINA KLEISER: Yes.

VIOLETA CHAPIN: So one thing that we do now in Colorado is, for certain misdemeanors, such as weed charges that we can't get out from under, we have a trespass statute, which has a number of different things that qualifies as trespass, we prefer the trespass on agricultural land. It doesn't usually make a difference to the prosecutors, but we actually have it written out onto the Rules of 35, under the plea form, which is something that they normally don't do for citizen clients. It's odd and unusual for them to do, but again, on the whole non-citizen

clients are different type. We now write it out very clearly as to what specific part of the statute we are pleading to and exactly what the client is admitting guilt to so that it's very clear in immigration court so that they don't get to go look behind ugly things, like the police report, which is never helpful for your client. So that's another thing that we do, typically with those sort of broader statutes, is write it out very specifically on the top of the Rule 35 plea form.

DAN KESSELBRENNER: Basically you can make a difference because the prosecutor shouldn't care because the prosecutor is getting the conviction in the identical statute whether it's twenty-eight grams or whatever was on the original ticket. That statute also referenced that it has to be a federally-controlled substance. So there's a statute 21 U.S.C. 802 and schedules that are promulgated by the Federal Government that lists what are federally-controlled substances. If there is one offense more under the Tennessee schedules than under the federal schedules — it's better living through creative chemistry. There are all sorts of steroids being developed, and until they get basically put on the list, they and other kinds of substances are not federally-controlled substances.

It may be that Tennessee has particular interest in getting one of those on its list earlier. If you can plead to a violation of the Tennessee statute without naming the substance, so how does this work? I don't know that this is where Chris will fill in the gaps. I don't know what you can actually do in a Tennessee criminal court, but the idea would be something like, "We admit to a facie violation of the statute." So you're not admitting to all the allegations — let's say the charging document mentions marijuana, and marijuana is on the federal list, or cocaine. If you just plead to the charging documents, the records indicate that the conviction was for cocaine, cocaine is on the list, it's a deportable offense. And I've

seen these over the years; sometimes the charging documents don't mention the *to wit*. It says possession of controlled substance, to wit: cocaine. Sometimes they leave off the *to wit* in some jurisdictions. If they do that, you don't want to fill in the blank.

Assuming your client is charged with the right schedule, that is, that they are charged with something that they are not getting more time or that their client doesn't want that additional time, the absence of anything on the record as to the identity of the drug actually would inure to your client's benefit in immigration proceedings.

This is sort of consistent with my view, when I started off talking about not asking for the world, in terms of going down from murder to disorderly conduct. It's the hierarchy of outcomes. You really want to get the best possible outcome you can based on the facts and what your client wants to do. So obviously the best choice is no conviction at all. A slightly less good choice would be a conviction for something that is not deportable. Then going up the hierarchy, it will be a conviction for something that is deportable but preserves your client's eligibility for relief. And lastly would be something that — unless this is what your client wants — makes your client deportable and bars her or him from getting any relief. Specifying a facie violation of the statute but not admitting to the indictment, to the charging document, or pleading to — without asking for a statement of particulars — Now, in most cases, if you wanted to get the person — because it didn't mention a drug, it's not a violation, you can move to dismiss. If it was a jury case, once a jury was impaneled, you might be able to beat the charge. But doing that, they might realize their mistake and add the drug long before that, and then your client is both guilty and deportable.

Again, you have to sort of be creative. You don't have to memorize, and no one will, these grounds of deportability, but you want to look to, like I said, what will the government have to prove in immigration reform, what elements necessarily in here, in this offense, by virtue of any conviction. And if there's a match, then the person is in trouble. That is sort of a tool you can use to sort of begin your analysis.

CHRISTINA KLEISER: Do you want to talk about the categorical approach?

DAN KESSELBRENNER: Yes. I have been sort of doing it in a way that I think is actually easier to understand than sort of talking about it, is the categorical approach. That is, the immigration fact finder is not going to look at what you did. This was that what-if-you-stole-milk-to-feed-your-starving-child-instead-of-for-greed-or-gain. At least in the moral turpitude inquiry, the general rule is that you want to keep the record as you — you want to affirmatively get the most benign version of the crime possible. In an example where it's intentional or temporary taking of property, you don't want — unless the charging document just says intentional or temporary, and often times that's what happens — the prosecutor just tracks the statute. The person just pleads guilty to the charging document. You can't tell whether it was temporary or permanent. In the old days, you would win. Now there's a little bit of creed looking at what the person did. And if there's continuing ambiguity in some context, then they can sneak in the stuff that you let them mention that we want to keep out, like the police report. The way to avoid that is to allocate affirmatively to the most benign way to violate the statute possible. So pick your crime.

We've talked about temporary and permanent taking; plead to the temporary taking. Another place this

comes up is — if you remember when I said the definition of moral turpitude — and the same analysis applies in other grounds of deportability — I said, it has to be a scienter of at least recklessness or be for reprehensible conduct. That's what it has to be. If it's less than negligence, it's not reckless. It's not moral turpitude. Negligence is less than reckless. If you have any statute that has — I shouldn't say any because I mentioned when I talked to the public defenders yesterday, generally speaking, statutory rape is a strict liability crime, but that's like a thing unto itself almost because, under this analysis, stat rape shouldn't be a crime involving moral turpitude. I think the 9th Circuit has held that it isn't, but that's the result-oriented decision. And that's just sort of a specific warning.

But if you've got something that is like negligent assault, go for it. If it's even something like negligent homicide where a tragedy causes an accident and someone's life gets lost — if a person was just sort of an inattentive driver, which we've all probably had those moments where we're daydreaming and then quickly realize where we were and avoided an accident — I think the person who hasn't avoided that accident, it doesn't make them a bad person. And so under that kind of analysis, they have been recognized; negligent wouldn't be a crime involving moral turpitude.

In statutes that list elements or define different crimes, temporary, permanent takings, negligent, reckless, intentional, or there are things like possession of various amounts, you want to look to what the disqualifying element would be, and see if you can come away to get out from under it. If you affirmatively plead to the temporary taking, they don't get to look at the police report. The case law has eroded now so that if there's ambiguity after they look at the — first they look at the crime itself — this is the categorical approach — they look at the crime itself. They say, Does this always or never trigger the consequence?

The next step is, they look at the record of conviction, which is the plea, the charging document, the judgment, and the sentence. So then if that doesn't tell you whether it's, in this case, temporary or permanent taking, they then get to look to the things that are outside the record of conviction, like the police report.

VIOLETA CHAPIN: Which is never good for your client.

DAN KESSELBRENNER: You can preclude them getting from that step by pleading to the temporary taking. There are great victories in this. Florida has a thing, taking or conversion. This went to the 11th Circuit. Unfortunately, the people who are deported previously under the conversion — 11th Circuit said, hey, Florida legislature put two different words there: conversion, taking. This conversion isn't the taking because, if it were, they wouldn't need two words for it.

Now, that's the kind of argument that you've got good lawyers from the place Chris used to work arguing at the 11th Circuit, and you have got someone who has the both wherewithal and is out of custody to be able to present that claim. You then make good law for everybody else in the 11th Circuit then to just know, hey, it's theft, conversion. We converted this property. It's like, Who knows what that means? And there probably wasn't even a case in Florida because no one was ever — basically they probably did just mean for it to mean that they were just trying to cover their bases. But the rules of statutory construction can be weapons for people who do appellate litigation and, as a result of their efforts, can create rules which you then can reasonably infer will apply, again, with that caveat I mentioned before about the ex post facto law doesn't apply. Congress could pass a law that would be — Marco Rubio could say, "I'll go for comprehensive immigration reform if you just make sure that you define

theft to include conversion," and Congress goes along because they want comprehensive immigration reform. And this applies on, before, or after. Well, then all those people who pled would be now deportable. I don't think that's going to happen, but I just use it as an illustration to try to pull together the points about what you can really draw from the lessons.

VIOLETA CHAPIN: I'll jump in real quick just to say that one of the ways that this really came out for us in the clinic on the criminal defense side was to go and watch proceedings in immigration court, as Chris Lasch said before. If you have the opportunity — and we went to the detention center, and I know it's far here. But if you get the opportunity to go to a detention center and see how this works sort of on a daily basis, it's pretty shocking. We took some bond hearings for people who were in detention that were either trying to convince the judge — because the first person who makes the bond determination in immigration court is the Department of Homeland Security, which is bizarre; it's the cops who are setting bond first, not a judge. But then everybody has the right to request what is called a Custody Redetermination Hearing in front of an immigration judge and then hear arguments about why the person actually does qualify for a bond or that the bond that was initially set by DHS should be lowered. And one of our first cases was a guy who was from Nigeria, and he had come on a tourist visa with his parents when he was underage. And his parents had then just stayed past the time that they were allowed on the visa, so the kids obviously stayed with the parents. He had been arrested in Colorado several years before on a possession of cocaine charge. His public defender pled it possession of marijuana, straight possession of marijuana, but it didn't say an amount. It just said possession of marijuana. So we are going in, DHS says this guy is

ineligible for bond, can't get a bond because he pled guilty to possession of marijuana. They didn't yet know that he had been arrested initially for possession of cocaine, which would have been really bad, because they hadn't gone and looked, and they just knew that the conviction was for possession of marijuana. We couldn't get him a bond to get out of immigration court because it simply just didn't say on the plea form that it was possession of marijuana less than thirty grams. That's all we needed it to say, and it didn't say.

So then the judge said, well, it's your burden — it gets complicated from here, but the judge says, it's your burden to show it was less than thirty grams. The student very diligently goes out and gets the police report and sees that he was initially arrested for possession of cocaine. So we don't want to tell the judge that. But at this point it's our burden, and we just didn't have any way to prove it. We couldn't show it. So that really brought home for us the necessity, in criminal court, how easy it is to help your client. Really, if you had just gotten the less-than-thirty-grams language written on there, it would have made a huge difference in this person's life. And the criminal defense lawyer probably had all the best intentions but just didn't know. There we were with a vague record, Rule 11 — I said Rule 35 earlier — Rule 11 plea that said just possession of marijuana, didn't help us, and we couldn't get him out of detention. And it was a disaster. Picking the least problematic plea but also being very specific about it and writing it out was really important on the criminal defense side.

CHRISTINA KLEISER: We just wanted to throw up an example of the misdemeanor statute where you have potential for affirmatively helping your client in Tennessee. Now, I get a lot of calls from Felony Sessions saying, "The charge is aggravated assault,

I have an Offer 2 misdemeanor assault. Is that safe?" And my personal opinion on that is that there's a whole bunch of other stuff I need to know, and so we try not to answer those phone calls, even though I will take them. We try to get them to set that off so we can analyze it. But here's a misdemeanor assault statute in Tennessee where we have three separate sections with very different potential immigration consequences.

Dan, is the Tennessee Assault Statute — would that make someone be — if you just pled them to A1, intentionally, knowingly, or recklessly causing bodily injury to another, if I pled my person to potentially a crime of moral turpitude —

DAN KESSELBRENNER: Does it include *de minimis injury*, slight touching?

CHRISTINA KLEISER: It's intentionally, knowingly, or recklessly causing bodily injury to another.

DAN KESSELBRENNER: DHS would think so.

CHRISTINA KLEISER: Why?

DAN KESSELBRENNER: Because it's intentionally causing injury — anyone who has knowingly or recklessly — they would say that the scienters all are higher than reckless, and causing injury is reprehensible. So the two factors in the test of scienter, plus reprehensibility, are both met. The reason I hesitated, there is some dispute as to whether that language is sufficiently reprehensible to be a conviction for a crime involving moral turpitude, is why I said DHS would probably think so.

CHRISTINA KLEISER: DHS might argue yes. What might be a safer plea if you can get it — now, obviously, again the big "if," from going from an aggravated assault to an offense of touching might be a big "if" for the criminal defender. But if you are able to get three, intentionally or knowingly causing physical contact with another person is offensive, so no injury but still have intentional scienter. Now, in Tennessee, the first two are a Class A misdemeanor, and the third is a B misdemeanor. So for a prosecutor, sometimes that's a significant drop. But you are just being much safer for your defendant if you are able to get it lower. And then arguably they will have problems in the state of Tennessee even if you just have a misdemeanor assault for crimes of moral turpitude, if that is part of your analysis.

Our panel only has about twenty minutes, and I wondered if we wanted to leave the rest of the time for questions.

DAN KESSELBRENNER: Could you put the Venn diagram up?

CHRISTINA KLEISER: Sure.

DAN KESSELBRENNER: We have been focusing on moral turpitude just because we wanted to give some practical examples of how you can avoid a certain consequence, but avoiding one consequence isn't enough because I gave you the definition — we had some discussion about moral turpitude, but there's also grounds of deportability for guns. Unlawful possession of a firearm might be a strict liability offense. Certainly no one would say it's morally reprehensible. Someone might, but it's not the conventional view. So it wouldn't involve moral turpitude. But you need to go through the list of possible grounds of deportability, and you'd have

your grounds for deportability for a firearm that would say carrying, possessing, using a fireman as defined in 18 U.S.C. 921(a) or something like. Then you would look at it and say, "I avoided moral turpitude, but possession of a fireman wouldn't be good for my client because it fits under this other ground of deportability."

So the takeaway from this is, you need to not just focus on one of the grounds listed in 8 U.S.C. 1227(a)(2) of criminal grounds of deportability, but look at all of them. And then from that you can get your — do the hierarchy we talked about. I just didn't want people to think they had scored a victory by pleading to something which avoided one consequence but then fell under one of the other grounds.

MR. ELKINS: We have about fifteen minutes left that we will open up for questions, and if you do have a question, please let us use the microphone so we can get it on the record.

UNIDENTIFIED SPEAKER: It sounds to me like lawyers are confused about what crimes are going to trigger immigration consequences. They're calling you, and they're calling you. And they're calling Tricia. Why can't there be a database where you can go and click on your state and someone has figured out which crimes trigger immigration consequences, whether they definitely do or they may, and if so, what you should strive to plead for your client?

DAN KESSELBRENNER: The answer is yes, and I think in your materials, there's a thing that Michael Holley did from the Federal Defender of the Middle District of Tennessee. So the short answer is it's been done, but the ones I've done, I don't always have time to update every time there's a new decision. There's a nuance, and

something would have to move. And it really doesn't give your client an individualized assessment that we think you really need to do. So the answer to your question is, it's not a database, it's not — well, it's online, but you can't plug — it's not interactive. That's a resource to begin your research, and if it says always, there's a good chance that that will always — the category, like you said, always, never, maybe. If it says always, chances are it's not good.

But I did want to answer — I think it was your question from an earlier session about proving the prejudice, mentioned Jenny Roberts's terrific article. Now, it isn't just that I would have gone to trial, but the prejudice would have been — there's a reasonable possibility with a different outcome, and the different outcome could have been I could have gotten a lower sentence. One of the things we didn't show here is that there's a theft aggravated felony, that if it's a theft and you get a year sentence, it's in that killer category of aggravated felonies.

Let's say your client has been a long-term resident. They would have gotten this thing called Cancellation of Removal for Permanent Resident but for this conviction. Where there's a reason for the outcome that it mattered to the person and it was something like, it would have been foreseeable that someone could have gotten a 364-day-suspended-sentence-probation kind of thing instead of a 365-day and that one day would have meant the difference between automatic deportability and the chance to go in front of an immigration judge to qualify for relief, many post-conviction fact finders in many jurisdictions are going along with that. So I just wanted to — for those people who do post-convictions, I don't want the takeaway to be *Strickland* and it's too hard to meet when it's progeny because now — and this was what the Supreme Court decided last term, I think it was in *LaFleur* and in *Frye,* that part of the right to counsel includes the right to

an effective plea bargain. Just to be clear, you don't have a right to say, "I had a right to 364 days," but you had a right to have someone negotiate an effective plea bargain.

Also, historically, there's been a duty to mitigate, and the duty to mitigate includes seeking this sentence that would be lower. And it would also avoid immigration consequences. So there are resources out there. It's not the magic formula. Kevin talked about when *Padilla* was announced. I worked for part of the National Lawyers Guild, which is a very, very, very, very progressive organization, and I heard — we had that march in Nashville that Elliott mentioned, the *Renteria* hearing. There was a march to the courthouse, and the community in Nashville came. And there were Lawyers Guild members with their characteristic green hats being legal observers. So it's the kind of thing in the organization that represents people in struggle or movements in struggle. And then I see this was cited by Justice Alito in its concurrence of *Padilla*. Oh, oh. All these years I've tried to live the good life and be respectful, and then what could I have said that Justice Alito was citing basically a National Lawyers Guild book, being one of the most conservative members of the Justices of the Supreme Court.

As it turned out, it was the things that I had written about how complicated immigration law is which dovetailed with his analysis that it was too complicated for lawyers to do. Fortunately, it wasn't too complicated because I have faith in you out there — and I did want to give a shout out, since we are reaching the end of our time, to people who are doing this work. It isn't very difficult. It's very, very hard to have a limited amount of time, to have someone pressuring you to do more cases than you can reasonably do in the amount of time that exists in the day, and still have a life and still go in front of the judge and say, "Sorry, I need that continuance." So I really applaud — because a lot of what I do is sit in my

office and spit out ideas and write stuff and read stuff that other people do and talk to people on the phone. I have an easy job compared to the jobs you have who actually go into court and represent people on a day-to-day basis, having the stress and pressure of an individual whose life is really going to be affected dramatically by the amount of work you put into it. So I just wanted to not let this session end without sort of at least saluting the people who do that difficult work every day because I certainly would not want to do it.

MR. ELKINS: In reference to the list that he was saying is in your materials on the Tennessee statutes and how they're interpreted, Mr. Holley did, some of the students have tried to update that as best we could, but if you are going to rely on it, obviously check on your own. Any more questions?

UNIDENTIFIED SPEAKER: I just have a real short, quick question. Is there a website we could go to find out if someone has been deported?

DAN KESSELBRENNER: Does the 800 number list —

JEREMY JENNINGS: If you've been ordered deported.

CHRISTINA KLEISER: Yeah, if you've been ordered deported by immigration.

UNIDENTIFIED SPEAKER: Ordered deported, snatched up, gone, whatever.

JEREMY JENNINGS: That doesn't mean physically deported. That just means the court has ordered you to be deported.

DAN KESSELBRENNER: I don't know of one.

CHRISTINA KLEISER: Not a website. Very minutia right now, but if you have the alien registration number, which is a number issued to them when they are issued their first immigration documents basically, the Executive Office for Immigration Review has a 1-800 number. It's 1-800-898-7180, and if you call it, it's an automated system, you put in the A number, and it will tell you if the judge has ordered a prior deportation. Yes. Always helpful to get an A number. I don't care what your client tells you.

DAN KESSELBRENNER: It's not reliable. It will give you information to check further because, the last time I called, it happened to be someone whose case was reversed twice by the 9th Circuit, and he was actually pending somewhere in the administrative proceedings. I believe this person was pro se, got reversed twice by the 9th Circuit, and the thing listed him as having a deportation order, and that was the last entry. So, it can help be a starting place to further research. There is no way to avoid doing the work. These things can save, like the charts and the 800 number, can save time and give you a heads-up to do further factual and legal investigation, but the information isn't sufficiently — even the stuff I do — isn't sufficiently reliable, especially the things I do, sufficiently reliable for your client to decide without an individualized, particularized assessment of how this law applies to her in the case.

UNIDENTIFIED SPEAKER: Thank you.

MR. ELKINS: We have about five minutes left. Does anyone else have anything else? I've got one here that I would like to ask you. If you are advising a client on pleading and they could either plead to a crime that they may not have committed that has no immigration

consequences or go to trial and face conviction to a crime that does have immigration consequences, how would you advise them?

DAN KESSELBRENNER: Well, the ethical issues that I see are, there is some — you have to be honest — you can't perpetrate a fraud on the court, but you have an obligation to represent your client zealously. It's possible I think to fulfill both. If you ask the prosecutor to write up the safe charge and then enter something like an *Alford* plea or no contest, you are not saying that you did it. You are just saying you have — *Alford* is a case where your plea is something like, "I have reasons to plead guilty other than my actual guilt." Alford takes a death penalty in North Carolina. He pled to something else because he didn't want to die because he didn't think he could get a fair trial in the North Carolina system that existed at the time, especially segregated juries. An *Alford* plea I think is a way that you can both maintain your honesty and integrity and your bar license and still help your client.

VIOLETA CHAPIN: It happens in other circumstances too. So with regular citizen clients, sometimes this prosecutor will give you a charge which has nothing to do with what you actually did in order to avoid points on your license, for example, and the judge will ask them ask a question, "Are you pleading to this in order to take the benefit of the plea, and that's the reason why you're doing this?" Yes. And that's perfectly fine to do that. We've had certainly cases where the client's alleged conduct, according to the police report, isn't what he's pleading to, but we're doing it in order to take advantage of an immigration-safe plea. The judge can say it if he wants to say it, but it doesn't matter to us. We're more concerned for the immigration-safe plea if we can get out from under something that's problematic.

MR. ELKINS: If there are no other questions, we will have our closing from our editor in chief of the *Tennessee Journal of Law and Policy*. Is there anything else in closing? All right. Amy.

AMY WILLIAMS: First of all, I just want to thank Katie for putting all this together. Of course, Professor White is conveniently not in here because she probably knew we got her something. Mickey wants me to remind you all to please turn in your CLE forms, which I'm sure you are already aware of, to be sure you get your credits. Thank you.

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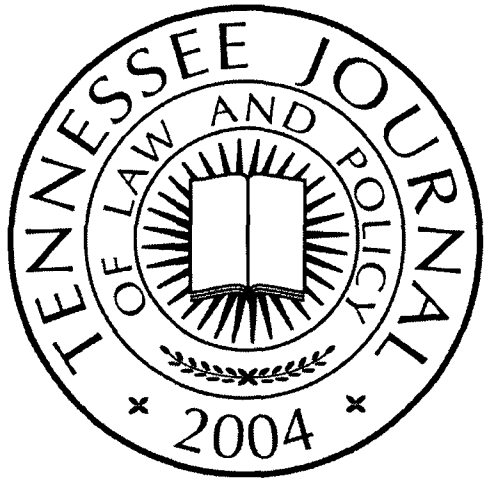

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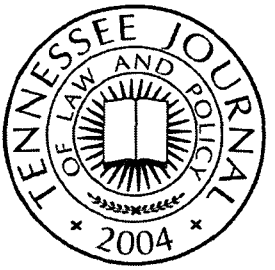

The TENNESSEE JOURNAL OF LAW AND POLICY is published semi-annually and edited by students of the University of Tennessee College of Law. The publisher is the TENNESSEE JOURNAL OF LAW AND POLICY, 1505 West Cumberland Avenue, Knoxville, Tennessee 37996-1810. The domestic subscription rate is $20.00 per volume, and the foreign subscription rate is $25.00 per volume. Unless notice to the contrary is received, the TENNESSEE JOURNAL OF LAW AND POLICY assumes that a renewal of the subscription is desired. All claims of non-receipt of an issue should be made within six months of date of publication if claimant wishes to avoid paying for the missing issue. To order back issues, contact William S. Hein & Co., Inc. at 1285 Main Street, Buffalo, New York 14209-1987, or call toll free at (800) 828-7571. POSTMASTER: Send address changes to TENNESSEE JOURNAL OF LAW AND POLICY, 1505 West Cumberland Avenue, Knoxville, Tennessee 37996-1810.

ISSN 1940-4131

http://www.law.utk.edu/publications/tjlp.sht

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