



Fair and Appropriate  
Policies and Practices  
for Noncitizen  
Defendants and Victims  
**A Guide for Prosecutors**



## *Endorsements*

**Carol Siemon**, *Prosecutor for Ingham County*:

“Every prosecutor’s office needs to ensure fair and equitable treatment for immigrants when they are accused of crimes or the victims of crimes. In Ingham County, we are working with immigrant communities and have developed policies and procedures to achieve that goal. The MIRC Guide for Prosecutors will help us — and hopefully every other prosecutor’s office in Michigan — to keep making progress. It offers model policy language, background information, and great sources of additional information.”

**Eli Savit**, *Prosecutor for Washtenaw County*:

“The MIRC Guide for Prosecutors is an invaluable resource for any prosecuting attorney who wishes to ensure that real justice is done. It’s incumbent on all prosecutors to take stock of all consequences that might accrue from the criminal legal system — and for many of our neighbors, immigration consequences are the most important. The MIRC Guide clearly breaks down the complex interplay between our criminal and immigration laws. It should be a staple in every prosecutor’s office.”

## *About the Contributors*

The **Michigan Immigrant Rights Center** (MIRC) is a legal resource center for Michigan’s immigrant communities. MIRC works to build a thriving Michigan where immigrant communities experience equity and belonging.

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# Introduction

In 2010, in *Padilla v. Kentucky*, the U.S. Supreme Court held that (1) criminal defense counsel have an affirmative duty to advise their noncitizen clients about the immigration consequences of guilty pleas, and (2) failure to provide such advice can constitute ineffective assistance of counsel, rendering the guilty plea invalid. The Supreme Court also encouraged prosecutor offices to give “informed consideration” of immigration consequences and to “plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation.” To that end, this manual aims to inform prosecutors about the collateral immigration consequences of criminal convictions and — for circumstances where minimization is appropriate — the tools to implement policies to minimize those consequences in individual cases. The goal is to preserve conviction integrity and ensure that noncitizens are not doubly punished for crimes.

This manual begins (in Part I) with a brief overview of potential immigration consequences. Part II outlines five commitments that prosecutor offices should make in order to ensure more equitable outcomes for noncitizen defendants, promote trust between noncitizens and the criminal justice system, and foster community safety:

- >> Consider Collateral Consequences at All Stages of Prosecution
- >> Establish/Use Non-Conviction Programs, Such as Pre-Arrest & Pre-Plea Diversion
- >> Build Stronger Relationships with Immigrant Communities
- >> Create a Safe Space for Noncitizen Victims of Crime
- >> Implement an Accessible Post-Conviction Relief Process

A model office policy, Part III, demonstrates how offices can operationalize these commitments. While much of the manual is not Michigan-specific, Part IV offers analysis of the (current) potential immigration consequences of convictions under select Michigan statutes and the available immigration-neutral alternatives. Part v. lists additional resources available on-line. An appendix reprints two useful resources.

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## PART I

# “Crimmigration” 101

This Part provides a very brief primer on immigration-related collateral consequences of criminal convictions for prosecutors. It does not attempt to cover all consequences — inadmissibility, deportability, mandatory detention, eligibility for forms of relief or immigration benefits. That would require an entire course and access to additional, published resources.<sup>1</sup> The term *crimmigration* will be used as shorthand referencing the interrelationship between the criminal justice and immigration systems.<sup>2</sup> The law cited here is the Immigration and Nationality Act (INA)<sup>3</sup>, and its interpretative caselaw.

For noncitizens, criminal convictions for certain crimes (or, in some situations, simply admitting to specific conduct without even being charged) can result in (a) removal proceedings, (b) mandatory detention during those proceedings, (c) limitations on otherwise available immigration relief,<sup>4</sup> and (d) a lifetime bar on return to the United States. Generally, the facts regarding what actually occurred are irrelevant. Instead, the immigration analysis focuses on the text of the statute underlying the conviction or charge. (This type of analysis is referred to as the “categorical approach.”)<sup>5</sup> See **Part IV** for *crimmigration* analyses of select Michigan criminal statutes.

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1 See Mary E. Kramer, *Immigration Consequences of Criminal Activity: A Guide for Representing Foreign-Born Defendants*, 8th ed. (AILA 2020).

2 We are well aware that this term is problematic and may be viewed as supporting portrayals of noncitizens as criminals who pose risks to the health and safety of US citizens. See César Cuahémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014). That is not our intention.

3 Title 8 of the US Code and the statutory basis for almost all immigration laws.

4 The Trump Administration recently promulgated final regulations that bar asylum for noncitizens with a wide range of convictions, including any felony, and certain alcohol-related driving offenses. The bar asylum eligibility to noncitizens accused of acts of domestic violence — even if not prosecuted. 85 Fed. Reg. 67202 (Final Rule Oct. 21, 2020).

5 See *Taylor v. United States*, 495 US 575 (1990); *Descamps v. United States*, 570 US 254 (2013).

*This Part looks at:*

**Inadmissibility** Grounds for denying a noncitizen's entry into the United States, which could also lead to removal proceedings for some noncitizens.

**Deportability** Grounds for placing a noncitizen into removal proceedings. Note that someone who is "deportable" may nonetheless qualify for protection or relief from deportation — that is a separate determination.

**Particularly Serious Crimes** Grounds for barring asylum, withholding of removal, and Temporary Protected Status.

**Mandatory Detention** Grounds that would require indefinite detention during removal proceedings.

### **Convictions and Post-Conviction Relief**

## **Inadmissibility**

A noncitizen seeking physical entry or re-entry into the US (at an airport or land border crossing, for example) may be subject to the grounds of inadmissibility listed at **8 USC § 1182**, which are described below. Even Lawful Permanent Residents (LPRs) — that is, noncitizens with green cards — may be subject to inadmissibility grounds upon re-entry at a port of entry if they committed some type of misconduct that requires an inadmissibility review as per **8 USC § 1101(a)(13)(C)**. Inadmissibility determinations also happen inside the United States. They are relevant for noncitizens who are seeking certain immigration benefits (e.g. adjustment of status) that require them to be "admissible." Inadmissibility can rest on (among other grounds): public health-related grounds (**8 USC § 1182(a)(1)**), crime-related grounds (**8 USC § 1182(a)(2)**), security and terrorism grounds (**8 USC § 1182(a)(2)**), unlawful entry and misrepresentations (**8 USC § 1182(a)(6)**), and prior immigration violations (**8 USC § 1182(a)(9)**). The focus of this section is on criminal-related grounds of inadmissibility.

*Criminal inadmissibility grounds include:*

**Crimes involving moral turpitude (CIMTs)** CIMTs are not clearly defined in immigration law, but *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 (A.G. 2008), describes them as offenses that require a "reprehensible act with some form of scienter, whether specific intent, willfulness, or recklessness." Examples include theft offenses, perjury, insufficient funds, assault with intent to do great bodily harm, arson, and murder. But there are many offenses that are not CIMTs: among these are simple assault and battery, carrying a concealed weapon, and indecent exposure. Regulatory offenses, like driving under the influence or driving without a license, are also not CIMTs.

Noncitizens become inadmissible for a CIMA if they are convicted of, admit to having committed, or admit committing acts that constitute the essential elements of a CIMA. (Note, unlike the CIMA grounds of deportability, a conviction is not required to render a noncitizen inadmissible.) See **8 USC § 1182(a)(2)(A)(i)(I)**. To be operative, the admission must be made under oath to a Department of Homeland Security (DHS) officer/agent or an Immigration Judge.

There are two exceptions to this ground of inadmissibility, but only when the noncitizen has been convicted of only one CIMA:

1. The noncitizen only committed one CIMA while under 18 years of age, and the crime was committed (and the noncitizen was released from any confinement) more than five years before the date of applying for admission to the US. See **8 USC § 1182(a)(2)(A)(ii)(I)**.
2. The maximum penalty possible for the only CIMA conviction did not exceed imprisonment for one year, and the noncitizen was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). See **8 USC § 1182(a)(2)(A)(ii)(II)**.

**Multiple criminal convictions** Under **8 USC § 1182(a)(2)(B)**, noncitizens are inadmissible if they have been convicted of two or more offenses of any type, for which the aggregate sentences to confinement were 5 years or more, *regardless* of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct, and *regardless* of whether the offenses involved moral turpitude.

**Drug offenses** Noncitizens become inadmissible for a drug offense if they are convicted of, admit having committed, or admit committing acts that constitute the essential elements of, a violation of any law or regulation relating to a controlled substance, as defined in Section 102 of the Controlled Substances Act. (Note, unlike with drug grounds of deportability, a conviction is not required to render a noncitizen inadmissible.) See **8 USC § 1182(a)(2)(A)(i)(II)**. This section of the law is construed very broadly and covers most controlled substance offenses. Additionally, **8 USC § 1182 (a)(2)(C)** excludes from the US any noncitizen whom the government knows or has reason to believe is an illicit trafficker in any controlled substance, or is or has been an aider or conspirator in such trafficking (again, a conviction is not required to trigger this ground).

**Prostitution** Under **8 USC § 1182(a)(2)(D)** any noncitizen is rendered inadmissible *who* is coming to the US to engage in prostitution, *or* has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status, *or* directly or indirectly procures or attempts to procure prostitutes

(or did so within the period above), *or* received the proceeds of prostitution, *or* is coming to the US to engage in any other unlawful commercialized vice, whether or not related to prostitution. This ground of inadmissibility has been interpreted as applying to a pattern of continuous conduct, not necessarily isolated acts.

## Deportability

A noncitizen who is in the US after a lawful admission is subject to the grounds of deportability under **8 USC § 1227**. In Immigration Court, it is Immigration and Custom Enforcement's (ICE) burden to prove by "clear and convincing" evidence that a noncitizen is deportable, generally by showing that the noncitizen has been convicted of a crime triggering a ground of deportability.

*Criminal deportability grounds include:*

**Crimes involving moral turpitude (CIMTs)** The same definition of CIMT applies for both inadmissibility and deportability. Noncitizens, including LPRs, become deportable

- *if* they are convicted of a CIMT within five years of admission to the United States and the crime has a potential sentence of "one year or longer" regardless of the time that is actually imposed (this means that a suspended sentence for a CIMT would still negatively impact a noncitizen). See **8 USC § 1227(a)(2)(A)(i)**.
- *And/or* they have been convicted of more than one CIMT since being admitted, provided the offenses did not arise during the same scheme of criminal conduct. See **8 USC § 1227(a)(2)(A)(ii)**.

As a result, if a misdemeanor qualifies as a CIMT and the statute provides for a sentence of 1 year or longer (as is the case for most Michigan misdemeanors, which typically provide for jail sentences of "not more than one year"), then noncitizens convicted of the misdemeanor are deportable if the conviction occurred within five years of their admission.<sup>6</sup> Further, additional eligibility for certain types of immigration relief or deportation waivers may be eliminated if this deportation ground is implicated. Again, this is all based on the statutory possibility of a sentence of 1 year, regardless of the actual sentence imposed or served.

**Aggravated felonies** An "aggravated felony" is an immigration term of art referring to certain types of crimes listed in **8 USC §§ 1101(a)(43)(A) – (U)**. These offenses can be state law felonies or misdemeanors. Noncitizens convicted

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<sup>6</sup> Admission is an immigration term of art defined at 8 USC § 1101(a)(13). An admission can be the actual, physical entry into the United States; admission can also happen weeks or decades after a physical entry. And an entry does not have to be an admission.



of aggravated felonies are deportable and are subject to mandatory detention during removal proceedings. In addition, they are ineligible for almost all forms of deportation relief (unless they fit within a very narrow exception, as an asylee or refugee who never applied for a green card). Furthermore, noncitizens deported as aggravated felons are inadmissible to the US for life (though they can seek a waiver after being outside the United States for twenty consecutive years).

Some of the most common aggravated felonies are not even classified as felonies under Michigan law; rather, they are misdemeanor offenses. Some examples of aggravated felonies include: murder, rape, and sexual abuse of a minor (**8 USC § 1101(a)(43)(A)**); drug trafficking, which includes both “illicit trafficking in a controlled substance” (even under state law)<sup>7</sup> and “federal drug trafficking crimes” (**8 USC § 1101(a)(43)(B)**); recidivist offenses, including for two state-level marijuana possession convictions, which can be considered a “federal drug trafficking crime” and therefore, an aggravated felony. See *Matter of Cuellar Gomez*, 25 I&N Dec. 850 (BIA 2012). “Crimes of Violence,” a legal term of art referring to offenses that are defined at **18 USC § 16**<sup>8</sup> when at least one year of imprisonment is imposed, are also aggravate felonies (**8 USC § 1101(a)(43)(F)**), as are theft and burglary offenses, including home invasion, when at least one year of imprisonment is imposed (**8 USC § 1101(a)(43)(G)**).

A few aggravated felonies, like money laundering and fraud, require that the loss be greater than \$10,000 even if the underlying criminal statute does not specify an amount or range.

**Drug offenses** With the exception of a single conviction for possession of less than 30g of marijuana, almost all drug convictions make noncitizens deportable. See **8 USC § 1227(a)(2)(B)(i)**. This means that noncitizens convicted of a controlled substance violation under **21 USC § 802** (Section 102 of the Controlled Substances Act) can be placed in removal proceedings, subjected to mandatory detention, and severely limited in the immigration relief that is available. Inchoate offenses will generally be considered controlled substance offenses when the underlying substantive crime involves a drug offense.

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<sup>7</sup> Illicit trafficking is “any state, federal, or qualified foreign felony conviction involving the *unlawful trading or dealing*” in a controlled substance as defined by federal law. *Matter of Davis*, 20 I&N Dec. 536, 540–41 (BIA 1992) (emphasis added), *modified on other grounds*, *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002). In other words, a state offense will be considered illicit trafficking if it is classified as a felony and involves an element of trafficking (e.g. commercial sale or dealing).

<sup>8</sup> The term “crime of violence” is subject to substantial litigation in federal courts. Recently, the Supreme Court, in *Sessions v. Dimaya*, 584 US \_\_ (2018), held that the “residual clause” for a crime of violence, referring to a crime “by its nature, involves a substantial risk” of “physical force against the person or property” is unconstitutionally vague. For now, the main takeaway is that collateral immigration consequences are likely to follow from convictions where one year or longer may be imposed, when the underlying offense has an element of violence or physical force.

**Firearm offenses** Noncitizens convicted of most firearm offenses are deportable. See **8 USC § 1227(a)(2)(C)**. However, most forms of relief are still on the table, even if the individual is subject to mandatory detention (unless the offense is also an aggravated felony, as for firearms trafficking offenses). Note that the charge of being a felon in possession, **MCL § 750.224f**, is likely to be considered a CIMT and aggravated felony, in addition to being a firearm offense ground of deportability.

**Domestic violence, stalking, child abuse & violations of protective orders**

Noncitizens convicted of offenses related to domestic violence, stalking, child abuse, and violations of (civil) personal protective orders are deportable. See **8 USC § 1227(a)(2)(E)**. Child endangerment, even without actual injury, can be construed to a ground of deportability as child abuse. Michigan has numerous assault charges, — among them **MCL §§ 769.4a, 750.81(1), (2), (4), (5); 750.81a(1), and 750.82** — that are not considered offenses related to domestic violence, for purposes of deportability.

## Particularly Serious Crimes (PSC)

If the above is not confusing enough, Congress has created another category of crimes, known as “particularly serious crimes” (PSCs), that bar certain kinds of immigration relief (asylum, withholding of removal, and Temporary Protected Status). See generally **8 USC §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii)**. Asylum and withholding of removal are fear-based claims; thus, the result of a PSC conviction is that even someone with a very significant basis to fear injury or death in their country of origin would be ineligible from the outset for this kind of protection from removal. All aggravated felonies are considered PSCs for asylum purposes, but where the sentence is less than five years in prison, it is possible to still be eligible for withholding of removal in some circumstances. Many CIMTs are PSCs. However, some offenses which do not even rise to the level of a CIMT can also be considered a PSC (such as driving under the influence/operating while intoxicated where someone is injured). To decide if a conviction constitutes a PSC, immigration courts examine the nature of the conviction, along with the circumstances and underlying facts of the conviction, per *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982) and *Matter of N-A-M-*, 24 I&N Dec. 336, 342-43 (BIA 2007).

The categorical approach does not apply to a PSC analysis.

**Mandatory Detention** For some noncitizens facing deportation proceedings, the INA requires “mandatory detention” for certain convictions. See **8 USC § 1226(c)**. While their proceedings are pending, sometimes for years, these noncitizens are

ineligible to be released on an immigration bond. That is, even if those subject to mandatory detention can demonstrate that they pose no flight or public safety risk, the INA does not usually allow release while immigration proceedings are pending. Noncitizens affected include:

- Most deemed inadmissible under the criminal inadmissibility grounds at **8 USC § 1182(a)(2)**, e.g., CIMT and drug offenses. See **8 USC § 1226(c)(1)**.
- Those deemed deportable because of multiple CIMTs, an aggravated felony, drug or firearms offense. See **8 USC § 1226(c)(2)**.
- Those deemed deportable because of a CIMT committed within five years of admission with a sentence of at least one year. See **8 USC § 1226(c)(3)**.

## When Do Collateral Consequences Attach? Convictions and Post-Conviction Relief

The collateral consequences just described — inadmissibility, deportability, mandatory detention — attach when there is a “conviction” for immigration purposes.<sup>9</sup> That is not the same as a conviction for state-law purposes. The INA provides the statutory definition of conviction at **8 USC § 1101(a)(48)(A)** requires a “formal judgment of guilt” — whether by the judge, jury, or plea (including nolo contendere) — plus some punishment, penalty, or restraint on liberty.

Because most deferred prosecutions in Michigan (e.g., under the Holmes Youthful Trainee Act (HYTA) or domestic violence deferrals under **MCL § 769.4a**) require an admission of guilt, these are still considered convictions for immigration purposes. Juvenile delinquency offenses, on the other hand, are not considered convictions for immigration purposes.<sup>10</sup>

Some, but not all, post-conviction relief eliminates inadmissibility, deportability, or the other immigration-related collateral consequences of criminal convictions. There are four primary ways to change immigration consequences after a conviction has occurred.

**Expungement** Expungements do not erase convictions because the noncitizen, at one point, was found guilty.

**Pardon** This one is complicated. Pardons do not cure grounds of inadmissibility. But, a “full and unconditional” pardon eliminates deportability if deportability

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<sup>9</sup> *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005).

<sup>10</sup> *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000).

is based only on CIMTs and aggravated felonies. See **8 USC § 1227(a)(2)(A)(vi)**. Remember, if the offense also constitutes another ground of deportability (e.g. drug offense, firearm offense), the noncitizen will still be deportable. Pardons also eliminate the aggravated felony bar to naturalization, and any PSC finding that would otherwise foreclose asylum/withholding/Temporary Protected Status.

**Vacated Conviction** As a general rule, convictions vacated for the sole stated purpose of avoiding immigration consequences are insufficient. To be effective with respect to immigration consequences, vacatur must be on a ground of legal invalidity. See *Matter of Pickering*, 23 I & N. Dec. 621 (BIA 2003) rev'd on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). One such ground is ineffective assistance of counsel. Vacating a conviction usually requires four elements:

1. Appropriate procedural vehicle — Motion for relief from judgment (6.500 motion, for example).
2. Legal error — Failure to understand immigration consequences, ineffective assistance of counsel (affirmative misadvice, failure to investigate, failure to advise, failure to defend), etc. For ineffective assistance of counsel, must demonstrate that the attorney had a duty and the noncitizen was prejudiced by the failure.
3. Safe haven — Identification of either a safe plea that would have worked at the time of the initial plea or a new plea that the noncitizen can now plead to if the prior conviction is vacated.
4. Equities.

**Reduced or Vacated Sentence** Some grounds of inadmissibility and deportability can disappear if the sentence is reduced. This includes aggravated felonies like theft and crimes of violence if the noncitizen is sentenced to less than a year in prison (regardless if the time served exceeded one year). A sentence reduction from over five to under five years can also avoid deportation if the noncitizen is otherwise eligible for asylum or withholding of removal because an aggravated felony with a sentence of less than five years may not be a PSC. Until October 25, 2019, a sentence reduction, for any reason, was sufficient to reverse the above-mentioned grounds. However, under the Attorney General's decision in *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019), modifications of sentences will only be given effect for immigration purposes if those modifications were based on some procedural or substantive defect, akin to *Pickering*, *supra*. The analysis of sentence reductions or vacatur that occurred before October 25, 2019 is unclear.

## PART II

# Commitments for Fair Treatment of Noncitizens

Fair and appropriate treatment of noncitizens by prosecutor offices requires thoughtful, intentional policy — and it is best for that policy to be set out in a public-facing document so that immigrant communities, noncitizen defendants, and their lawyers understand the office's procedures. Here we offer details on the content of five key commitments each prosecutor's office should highlight, to:

- >> Consider Collateral Consequences at All Stages of Prosecution
- >> Establish/Use Non-Conviction Programs, Such as Pre-Arrest & Pre-Plea Diversion
- >> Build Stronger Relationships with Immigrant Communities
- >> Create a Safe Space for Noncitizen Victims of Crime
- >> Implement an Accessible Post-Conviction Relief Process

### Commitment 1

## >> Consider Collateral Consequences at All Stages of Prosecution

The immigration effects that flow from a criminal disposition can expose noncitizen defendants to consequences that are unfair and disproportionate in relation to the underlying criminal offense(s). Even a single, minor offense can lead to deportation. Prosecutors play a crucial gate-keeping role in minimizing the risk of disproportionate outcomes. By developing a collateral consequences policy and educating prosecutors, offices can ensure that, in appropriate cases, they offer immigration-neutral alternatives to noncitizen criminal defendants when making charging, plea, and sentencing decisions. Often, the immigration-neutral alternative can equally, or even better, serve the prosecutor's interests in promoting equity, proportionality, community safety, and trust in law enforcement and the criminal justice system.

A model collateral consequences policy can be found in Part III. The following describes the key components of a collateral consequences policy:

- **Require** prosecutors to consider immigration consequences and, where appropriate, take steps — in charging, plea-bargaining, and sentencing — to mitigate those consequences or arrive at an immigration-neutral outcome in cases involving noncitizen defendants.
- **Start** from the point of view that mandatory detention (immigration detention without the possibility of bond) is usually not an appropriate consequence of a criminal conviction when considering immigration consequences.
- **Take** into account the individual circumstances of noncitizen defendants and the impact that deportation may have on them, their families, and their communities.
- **Develop** standard plea offers for commonly-charged offenses that result in an immigration-neutral outcome or mitigate immigration consequences, to be used in all appropriate cases.
- **Consider** avoiding multiple-count charges where those multiple counts will be seen as distinct and separate offenses for immigration purposes (e.g., multiple CIMT convictions). For some noncitizens, a plea to one count only, even with a higher fine or longer sentence (still under one year), may be preferable.
- **Communicate** with defense counsel. Each noncitizen's immigration situation is unique; counsel can provide additional context and even suggest immigration-neutral alternatives.
- **Hire** experienced immigration advocates to assist prosecutors in understanding immigration consequences as well as developing and negotiating immigration-neutral alternatives.
- **Craft** the language in all documents that are part of the “record of conviction” for immigration purposes (charging documents, plea agreements, plea colloquy transcripts) carefully, so that in appropriate cases that language mitigates potential collateral consequences.
- **Ensure** that in all cases, whether or not the defendant “appears” to be a noncitizen, judges ask the defendants whether they have been advised of potential immigration consequences when accepting a plea.
- **Keep private** all information related to immigration status that is disclosed during negotiations. This information should be considered only when trying to mitigate potential immigration consequences.
- **Direct** staff questions about immigration status to a noncitizen's defense attorney when reviewing potential immigration consequences. Do not call an ICE attorney

to verify the record of a noncitizen. This can, and has, exposed not just defendants but their families to ICE enforcement activities.

- **Consider** limiting prosecution of quality-of-life and low-level offenses such as loitering or public urination. Many of these offenses can be dealt with outside of the criminal justice system by using civil citations and fines, minimizing the exposure of noncitizen defendants to the criminal justice system.<sup>1</sup>

## Commitment 2

### >> Establish/Use Non-Conviction Programs, Such as Pre-Arrest & Pre-Plea Diversion

The definition of “conviction” for immigration purposes is broad, capturing withholding or deferral of adjudication, as well as expunged convictions and designation as a “youthful trainee” under Michigan’s Holmes Youthful Trainee Act (HYTA). See Part I. Deferred adjudication programs in Michigan count as convictions for immigration purposes because they usually require an admission of guilt at the outset. Consequently, pre-arrest and pre-plea diversion programs can be extremely useful in minimizing immigration consequences for noncitizens. By placing defendants in some form of pretrial diversion scheme (e.g., classes or reporting), not requiring a plea or admission of guilt, and then dismissing charges upon successful program completion, severe immigration consequences can be avoided. In addition, these programs frequently address the drivers of crime (e.g., substance abuse and mental health issues), allowing defendants to access treatment services while promoting public safety.

The following is a list of ways that prosecutor offices can minimize the risk of collateral consequences for noncitizens. Where these types of diversion programs already exist, encourage prosecutors to utilize them in appropriate cases that involve noncitizen defendants, even outside the circumstances in which they are normally used:

- **Amend** existing diversion programs that require a defendant to plead guilty or nolo contendere (or even just require a defendant to admit to all of the elements of the offense) so that no plea or admission is required.

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<sup>1</sup> See *Fair and Just Prosecution, Issues at a Glance: Addressing Immigration Issues* 7 (Sep. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf> (explaining that the prosecution of these types of offenses has a minimal deterrent effect, particularly when compared to the wide-reaching negative consequences for disenfranchised communities, including noncitizens, people of color, and homeless people).

For example, California amended its Deferred Entry of Judgment (DEJ) program for minor drug offenses so that it no longer requires a defendant to enter a guilty plea for pre-trial diversion (see Cal Pen C §1000); the previous plea requirement meant that defendants would have a conviction for immigration purposes.

- **Establish** a pre-*charge* diversion program.

After arrest, but before charges are filed, the defendant enters into a diversion agreement with the prosecutors' office; the defendant agrees to complete certain requirements and the prosecutor agrees not to file charges if all the requirements are completed.

- **Establish** a pre-*plea* diversion program.

After charges are filed, the defendant enters into a diversion agreement with the prosecutors' office; the defendant agrees to complete certain requirements and the prosecutor dismisses the charges.

- **Keep** under-age defendants in the juvenile court system when possible.

While designation as a "youthful trainee" under HYTA is still considered a conviction for immigration purposes, a finding of delinquency in a juvenile proceeding is not.

### Commitment 3

## >> Build Stronger Relationships with Immigrant Communities

Immigrant communities are often distrustful of the police and law enforcement generally because of the increased merging of the criminal and immigration systems and because of collaboration with ICE. The results are bad for public safety: crimes go unreported, noncitizen witnesses decline to cooperate in criminal investigations, and noncitizen defendants are sometimes too fearful to even go to court and resolve their cases.<sup>2</sup>

Implementing these strategies can help increase trust between prosecutor offices and immigrant communities, and therefore public safety:

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2 See Tom K. Wong, S. Deborah Kang, Carolina Valdivia, Josefina Espino, Michelle Gonzalez and Elia Peralta, *How Interior Immigration Enforcement Affects Trust in Law Enforcement*, Perspectives on Politics 1-14 (2020), <https://usipc.ucsd.edu/publications/usipc-working-paper-2.pdf> (indicating that the cooperation between local law enforcement and ICE erodes trust with undocumented immigrants and makes them as much as 34% less likely to believe law enforcement will protect them and their communities; also notes that cynicism towards law enforcement in immigrant communities is associated with increased neighborhood crime and decreased cooperation).



- **Meet** with community leaders and immigration advocates on a regular basis to assess the needs of the community.
- **Ensure** that the entire office complies with Title VI of the Civil Rights Act of 1964 by providing appropriate translations and interpretation for all Limited English Proficient (LEP) persons, including victims of crime. Frequently used written documents should be translated in advance into appropriate languages. Telephonic interpretation in many languages should be readily available without special arrangements. All staff should receive training on how to access and utilize telephonic interpreters. Community meetings can, when appropriate, be facilitated by in-person interpreters.
- **Adopt** a policy of not reporting individuals to ICE. Collaboration between local law enforcement and federal immigration enforcement further erodes the community's relationship with law enforcement.
- **Join** (or lead) efforts to create a detainer policy in your jurisdiction that regulates how prosecutors, police officers, and jails share information with ICE. The voices of elected prosecutors in these conversations are pivotal to getting buy-in and political interest; prosecutors are advocates for the communities they represent and are often the only law enforcement officials with the tools to understand the legal and constitutional issues that collaboration with ICE presents for noncitizens.

Detainer policies should require cooperation with ICE only where there is a signed federal judicial warrant. See the Appendix for an example of a detainer policy from Orleans Parish and Seattle's Welcoming City Resolution.

- **Join** (or lead) efforts to establish a robust network of attorneys trained in providing *Padilla* advice to criminal defense attorneys. This will help protect noncitizen defendants from double punishment while also protecting conviction integrity. Providing more defendants appropriate immigration advice increases the finality of criminal case resolutions and minimizes the need for post-conviction relief.
- **Work with** probation and parole offices to ensure that they do not collaborate with ICE if it seeks to arrest probationers or parolees at probation/parole appointments. Immigration enforcement of this kind discourages probation/parole compliance, erodes trust in the criminal justice system, and robs individuals of the opportunity to pay their dues and become productive members of their communities.
- **Work with** judges and courthouses to create policies that bar ICE enforcement from courthouses. This will ensure that prosecutors can resolve cases involving noncitizen victims, and will also help more noncitizen witnesses feel safe going to court and collaborating with law enforcement.

- **Consider** endorsing noncitizen criminal informants or witnesses for an S visa where they have been helpful to a criminal or terrorist investigation. The S visa is a three-year visa that allows witnesses and informants to come to or remain in the US throughout the related investigation and/or prosecution. At the conclusion of the investigation or prosecution and upon completion of all terms of the agreement with law enforcement, S visa recipients may be eligible for a green card. The use of the S visa can be a way for prosecutors to foster cooperation from immigrant communities and resolve open cases. S visas are particularly useful for witnesses or informants who would face danger in their home countries. The S visa is also helpful for witnesses and informants with deep community ties who, due to their criminal record, might not otherwise be legally able to remain in the US.
- **Avoid** pointing to noncitizen status to advocate for higher bonds or longer sentences, or to negatively impact plea offers. When appropriate, advocate for defendants (citizen and noncitizen alike) to be released on their own recognizance or to be released on a bail amount commensurate with the defendant's offense and ability to pay.

## Commitment 4

### >> Create a Safe Space for Noncitizen Victims of Crime

Another crucial way to help build trust between prosecutor offices and immigrant communities is to create safe spaces for noncitizen victims of crime. Implementing the strategies listed below will help increase trust between prosecutor offices and this group of victims. The implementation of these strategies, particularly for T and U visas, would also help bring more stability to immigrant families, many of which are actually mixed status households.<sup>3</sup> For example, a 2017 study found that more than eight million US citizens live with an undocumented family member, and six million of those US citizens are children.<sup>4</sup>

- **Establish** an anonymous hotline residents can use to report whether they have been victims of fraud. Attorney and notario fraud is rampant in the immigrant community, but many victims are too afraid to come forward because of their immigration status.<sup>5</sup>

<sup>3</sup> A mixed-status household is one in which some family members have lawful status and/or citizenship while others do not.

<sup>4</sup> Silva Mathema, *Keeping Families Together: Why All Americans Should Care about What Happens to Unauthorized Immigrants*, Ctr. for Am. Progress (Mar. 16, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/>.

<sup>5</sup> See, for example, efforts by the prosecutor office in Boulder, Colorado. Rachel Estabrook, *Boulder's*

- **Prosecute** notarios and other actors who violate the Michigan Immigration Clerical Assistant Act<sup>6</sup> and/or unlawfully practice law. This will send a strong message to immigrant communities that you are protecting them from abusers who take advantage of their immigration-related needs and vulnerabilities.
  - **Issue** a policy limiting questioning about immigration status of victims and witnesses on the stand. This will help diminish their fear of testifying and cooperating with your office.<sup>7</sup>
  - **Establish** a T and U visa unit: T visa applicants are victims of trafficking who have collaborated with law enforcement. These applicants must prove that they have been helpful to law enforcement in the investigation of their trafficking labor or commercial sex. Certifications from law enforcement agencies that corroborate a victim's helpfulness are often essential for trafficking victims to get their applications approved. U visa applicants are individuals who are the victims of certain crimes and have collaborated with law enforcement. These applicants require certification of their cooperation with law enforcement. When successful, both T and U visa recipients have a long but viable pathway to citizenship. Ensuring that these certifications are provided in a timely manner will help make the application process go smoothly. T and U visa units should:
    - *Participate* in T and U visa trainings or CLEs conducted by a reputable immigration organization.
    - *Create* a streamlined procedure for T and U visa certification. The office should designate at least one point-person for review of certification requests. The point-person should be in a supervisory position.
    - *Ensure* that certifications for detained individuals are processed within two weeks. All other certifications should be reviewed within 60 days.
- T VISAS:** This includes reviewing requests and filling out the I-914 Supplement B declaration form. (See <https://www.uscis.gov/i-914>.)
- U VISAS:** This includes reviewing requests and signing the I-918 Supplement B certification form. (See <https://www.uscis.gov/I-918>.)
- *Implement* a policy that prohibits the requirement of additional documentation

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*Strategies to Protect Immigrants from Fraud Could Go Statewide*, Colo. Pub. Radio News (July 18, 2017), <https://www.cpr.org/show-segment/boulders-strategies-to-protect-immigrants-from-fraud-could-go-statewide/>.

<sup>6</sup> MCL § 333.3471

<sup>7</sup> See Fair and Just Prosecution et al., *21 Principles for the 21st Century Prosecutor* 11-12 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_21st\\_century\\_prosecutor.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf) (noting that San Francisco District Attorney George Gascón issued a policy that ended the questioning of witnesses at trial about their immigration status. His office also assigned victim advocates to escort fearful noncitizen witnesses or victims through the courthouse, and required staff to call nonprofits for help in the event that ICE agents are present in the courthouse).

about a T or U visa applicant's immigration or criminal history. This information is not relevant to the application and might erode trust between victims and your prosecutor office.<sup>8</sup> It is the Department of Homeland Security that determines eligibility for T and U visas. The prosecutor's role is to confirm that the victim was helpful in an investigation or prosecution.

- *Allow* T and U visa applicants to reapply for certification or endorsement if USCIS denies their applications because of lack of information or technical deficiencies.
- *Provide* T visa certifications even where the victim does not cooperate due to trauma or due to being under the age of 18. In these cases, reporting the crime should be sufficient. See **INA § 101(a)(15)(T)(III)**.
- *Provide* U visa certification in appropriate cases, even if no charges are filed as a result of the report and investigation. U visa certifications may still be provided where a victim has failed to cooperate with law enforcement due to extreme hardship (such as threats from their abuser, mental health issues, etc.).
- *Conduct* outreach to let immigrant communities know that the certification and endorsement programs exist.
- *Train* prosecutors about what kinds of crimes might qualify for U visa certification and how to refer noncitizen trafficking victims to this unit. Prosecutor offices should actively inform victims and witnesses to look into these forms of relief if it appears that they qualify.
- *Gather* and publicize data regarding the number of T and U visa certifications reviewed and/or certified monthly.
- *Outline* T and U visa certification and endorsement procedures on the prosecutor office's website.
- *Provide* T and U visa applicants with a referral list of reputable immigration practitioners.

## Commitment 5

### >> Implement an Accessible Post-Conviction Relief Process

Post-conviction relief (PCR) procedures are extremely important and should be created and streamlined. Many noncitizens are not adequately advised of

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<sup>8</sup> See Immigrant Legal Resource Center, *Moving Texas Forward: Local Policies Towards Inclusive Justice* 45 (2019), [https://www.ilrc.org/sites/default/files/resources/2019.08\\_ilrc\\_moving\\_texas\\_forward\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/2019.08_ilrc_moving_texas_forward_final.pdf).

the immigration consequences of their pleas and are therefore at risk for harsh collateral consequences — among others, mandatory detention, green card revocation, and ineligibility for certain kinds of immigration relief. Often, defendants would not have entered pleas in criminal cases if they had understood those consequences, preferring to negotiate different charges or to proceed to trial. Prosecutors can help these noncitizens by creating streamlined internal review processes for considering requests to vacate convictions or amend sentences due to ineffective assistance of counsel. These reviews help to limit or eliminate the unintended consequences of a previous conviction while acknowledging rehabilitation and the importance of granting second chances. To that end, offices should:

- **Create** a PCR review unit. The head of the unit should be in a supervisory position. This person should have set, transparent guidelines for when they will agree to stipulate to re-open or amend convictions/sentences.

The review unit should have at least one experienced immigration advocate on staff to enable accurate assessment of collateral immigration consequences. The head of the unit should ideally be someone who was part of a trial unit at some point and is familiar with the plea negotiation process.

- **Establish** a policy that does not require those seeking PCR to first file a MCR 6.500 motion in order to get your office to review or stipulate to the filing of motion. Instead, allow applicants to submit a proposal letter listing the conviction, their equities, and why a vacatur is required or create an application that individuals or their attorneys can fill out when applying for PCR. Bypassing the need for a 6.500 motion before prosecutor review can increase efficiency and streamline the review process by ensuring that these motions are only filed after a supervisor has reviewed the case and agreed to stipulate. This will save resources for the client, your office, and the court.

If your office creates its own application, this document should give applicants room to discuss the adverse immigration consequences they face as a result of the previous conviction, their good character/equities, and family and community ties.

- **Designate** low-level convictions, like marijuana convictions, or convictions for driving without a license, for blanket PCR.<sup>9</sup>

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<sup>9</sup> For example, in 2018 the Seattle DA vacated all judgments for marijuana possession charges brought from 1996 to 2010, due to evidence of racial disparity in arrests. *21 Principles for the 21st Century Prosecutor*, supra note 16, at 9. In New York City, the DAs from four boroughs together vacated nearly 700,000 warrants for low-level crimes, like disorderly conduct, that were 10 or more years old. CBS New York, *District Attorneys From 4 Boroughs Vacate Nearly 700,000 Warrants Dating Back 10 Years Or More*, (July 26, 2017) <https://newyork.cbslocal.com/2017/07/26/district-attorneys-old-warrants/>. Note that an across-the-board approach still requires an individualized analysis and careful PCR planning to ensure that the immigration consequences are actually minimized.

- **Ensure** that PCR applications and/or motions are reviewed even if the applicant is not currently in removal proceedings. Allowing for review, and vacatur where appropriate, will ensure that noncitizens who have convictions with adverse immigration consequences due to ineffective assistance of counsel or some other legal error do not have to live with the fear of deportation. This will also ensure that noncitizens who end up in removal proceedings will not need to spend needless time in detention or litigating a legal issue that could have been fixed on the front end.
- **Establish** an expedited review process for detained noncitizens.
- **Stipulate** where the disposition that limits or eliminates immigration consequences would have been accepted in the initial proceedings because it satisfies the objectives of public safety and justice.
- **Use** a statute, where possible, that does not require noncitizens to make complicated legal arguments in order to maintain eligibility for certain kinds of immigration relief. (For example, avoid having a lawful permanent resident enter a plea under a statute that requires them to use the categorical approach to argue that the crime of conviction is not an aggravated felony and that they are still eligible for cancellation of removal — an often arduous task even for experienced attorneys.)
- **Direct** any further questions about a noncitizen's immigration status to their defense attorney or if unrepresented, the applicant when reviewing potential immigration consequences. Do not call an ICE attorney to verify the record of the noncitizen. This can, and has, exposed noncitizens to ICE arrest in the middle of applying for PCR.
- **Keep** conversations about immigration status or immigration consequences off of the record at the re-plea. As with trial pleas, the prosecutor working on the re-plea should use carefully crafted language in all documents that are part of the “record of conviction” to help mitigate potential immigration consequences in appropriate cases.
- **Ensure**, where possible, that PCR motions are not brought to the same judge that oversaw the noncitizen's case. This will help remove bias (including implicit bias) for the noncitizen who is seeking PCR.
- **Conduct** record-clearing events in collaboration with community organizations to help vacate damaging convictions from the records of citizens and noncitizens alike.

## PART III

# Commitments in Action: Model Office Policy<sup>1</sup>

In *Padilla v. Kentucky*, the United States Supreme Court recognized the severity of immigration consequences in criminal cases. The Court held that, in light of the severity of deportation as a consequence, the Sixth Amendment duty to provide effective assistance of counsel requires a criminal defense attorney to advise the defendant about the immigration consequences of a guilty plea. The Court also recognized that the immigration consequences of criminal justice involvement are inextricably linked to the criminal justice process itself.

In light of the high potential for unintended immigration consequences, the US Supreme Court expressly encouraged the consideration of immigration consequences by both parties in the plea negotiation process. The Court stated that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” The Court also recognized that it is in the State’s interest to give informed consideration to immigration consequences when seeking to resolve criminal charges or fashion sentences. Indeed, the Supreme Court encouraged the defense and prosecution to work together “to plea bargain creatively... in order to craft a conviction and sentence that reduce the likelihood of deportation.”

*Padilla* relied on the fact that, for noncitizens, deportation or removal can be an integral part of the penalty imposed for criminal convictions. Deportation and/or mandatory detention may result from serious offenses or in many circumstances, a single, minor offense even for lawful permanent residents. Deportation may be by far the most serious penalty flowing from a conviction. While defense counsel, of course, is vested with the primary responsibility of adequately advising the defendant of such consequences, it remains important to the integrity of the criminal case that prosecutors be aware of the possibility of immigration

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<sup>1</sup> This policy is similar to the policy of Ingham County, Michigan, which is available at <https://michiganimmigrant.org/sites/default/files/Ingham-County-Guide.pdf>.

consequences when negotiating pleas, articulating factual bases for convictions, and advocating for particular sentences.

In the immigration context, consequences may be imposed by federal immigration courts, federal administrative agencies, Executive Orders, Congress, local legislative bodies, local administrative agencies, public and private employers, and housing and service providers. While these consequences are outside the terms of a criminal judgment or sentence, they often flow directly from the fact of a disposition, the sentence imposed, or even just in-court admissions. Unless these immigration effects are taken into consideration by assistant prosecuting attorneys in appropriate circumstances, some defendants will be exposed to severe consequences that were not intended by the prosecutor.

**Consideration of the impact of these consequences, particularly in the context of immigration law, is consistent with the duty of all prosecutors to pursue justice and ensure that the punishment fits the crime.**

This office is now implementing a comprehensive policy that considers these consequences for the equitable treatment of noncitizen defendants and victims based on five primary commitments:

- >> Consider Collateral Consequences at All Stages of Prosecution
- >> Establish/Use Non-Conviction Programs, Such as Pre-Arrest & Pre-Plea Diversion
- >> Build Stronger Relationships with Immigrant Communities
- >> Create a Safe Space for Noncitizen Victims of Crime
- >> Implement an Accessible Post-Conviction Relief Process

Considering immigration consequences is likely to increase crime reporting and cooperation within immigrant communities while also safeguarding conviction integrity by rendering fewer pleas open to collateral attack. Accordingly, it is the policy of the prosecutor's office that assistant prosecuting attorneys shall consider the immigration consequences to a defendant in charging, plea bargaining, and sentencing, to the extent they are aware of such and, if appropriate, take reasonable steps to mitigate these consequences.



*The following are our office guidelines and policies:*

## **Consider Collateral Consequences at All Stages of Prosecution**

- We will always consider collateral consequences, including immigration consequences, as a factor in any case when such consequences are known to the assistant prosecuting attorney. Collateral consequences are to be taken into consideration within the context of the whole case. When appropriate, assistant prosecuting attorneys should take reasonable steps to mitigate those consequences, with respect to:
  - Crimes charged
  - Pleas offered
  - Language used in disposition documents (such as mens rea language)
  - Language used in the record of conviction (charging document, plea agreement, plea colloquy transcript, and judgment)
  - Length of sentence proposed
- When considering immigration consequences, we will start from the point of view that mandatory detention (immigration detention without the possibility of bond) is not an appropriate consequence of a criminal conviction.
- Once a case is criminally charged and an assistant prosecuting attorney learns of potential adverse immigration consequences, we will consider those consequences during the plea negotiation process. The assistant prosecuting attorney shall determine, based upon the totality of the circumstances, if an appropriate disposition can be reached that neither jeopardizes public safety nor leads to disproportionate immigration consequences. In making this determination, every case must be evaluated on its merits, including the severity of the crime, the crime's impact on the victim and on the community, the history and character of the defendant (including family and community ties), and the impact of the disposition upon the defendant's present immigration status and potential eligibility for future immigration protection or relief. In particular, assistant prosecuting attorneys should, when appropriate:
  - Consider adjusted sentence proposals (e.g., 364 days rather than 365).
  - Consider pre-plea diversion.
  - Allow potentially prejudicial language to be stricken from charging documents, while maintaining the truthfulness of charging language.
  - Avoid language during a plea colloquy or other in-court appearance that could have collateral immigration consequences.
- When reviewing potential immigration consequences for noncitizens, we will ask their defense attorneys any questions about immigration status. As necessary,

assistant prosecuting attorneys may request that defense counsel provide legal authority or a memo by a reputable immigration attorney analyzing the immigration consequences specific to the defendant. Prosecuting attorneys shall not contact ICE to verify the record of the noncitizen or inform ICE of the pending charge(s). Our office will also not report individuals or in any way collaborate with ICE or other federal immigration enforcement, as this further erodes our relationship with immigrant communities. All information that is disclosed about immigration status will be kept private, only to be used for plea negotiation purposes.

- Where the collateral immigration consequences might be unduly harsh, the assistant prosecuting attorney will:
  - Consider alternative charges with less significant collateral consequences, either because of their elements or because of the unintended consequence of a potential sentence. A one-year sentence under one statute might be an aggravated felony and thereby eliminate all opportunities for immigration relief, whereas a one-year sentence under another, similar statute would not carry the same consequence. Similarly, a local-ordinance 90-day misdemeanor might be more appropriate than a state offense with a higher sentence.
  - Consider eliminating multiple counts of the same charge, where appropriate, to avoid unfair collateral consequences that may attach to multiple convictions (particularly for “crimes involving moral turpitude”). For some noncitizens, a plea to one count only, possibly in exchange for a higher fine or longer sentence (still under one year), may be preferable.
  - Craft the language in all documents that are part of the “record of conviction” for immigration purposes (charging documents, plea agreements, plea colloquy transcripts) to help mitigate potential unintended immigration consequences.
- To further facilitate trust with immigrant communities, assistant prosecuting attorneys will:
  - Not point to noncitizen status to advocate for higher bonds or longer sentences, or to negatively impact plea offers. Similarly, we will more frequently advocate to allow for defendants to be released on their own recognizance or to be released on a bail amount commensurate with the defendant’s offense and ability to pay.
  - Create a list of quality-of-life and low-level offenses (loitering and public urination, for example) that will no longer be prosecuted. Many of these offenses can be dealt with outside of the criminal justice system by using civil citations and fines, thereby minimizing the exposure of noncitizen defendants to the criminal justice system.
- We will refrain from creating forms that require defendants to confirm that they have received immigration advice from us. This is a job best left for defense attorneys, as they are the ones with an affirmative duty to advise under *Padilla*. We will also strive to remind judges before plea colloquies to ask all defendants whether they have been advised of all consequences for accepting a plea, including immigration consequences.

## Establish and Use Non-Conviction Programs, Such as Pre-Arrest & Pre-Plea Diversion

- If potential immigration consequences are known at the time of charging a criminal case, assistant prosecuting attorneys will consider non-conviction alternatives, when appropriate. In appropriate cases, assistant prosecuting attorneys will:
  - Consult with our office's diversion coordinator about accepting defendants into and utilizing:
    - Pre-charge** diversion in lieu of filing charges, under which the defendant agrees to complete certain requirements and this office, in turn, agrees not to file charges if the requirements are met.
    - Pre-plea** diversion after charges are filed, under which the defendant agrees to complete certain requirements and this office, in turn, agrees not to file charges if the requirements are met.
  - Consider whether a noncitizen under the age of eighteen might more appropriately be charged in juvenile court, as juvenile adjudications do not result in immigration consequences.
- This office supports statutory and procedural changes to existing diversion programs that do not require a defendant to plead guilty or admit to the elements of an offense before participation. We will work to establish additional pre-charge and pre-plea programs in collaboration with judges and defense counsel, in the courts where we practice.

## Build Stronger Relationships with Immigrant Communities

- We will work with immigrant communities and meet regularly with community leaders and immigration advocates in order to foster trust between our office and the communities we serve. Our goal is to promote our office as a safe space for noncitizens. To that end, we will:
  - Hire experienced immigration advocates to assist prosecutors in developing and negotiating immigration-neutral alternatives. One of these advocates will be a point-person with whom community members can directly communicate.
  - Advocate for immigrant-friendly policies, like keeping ICE out of courts, probation, and parole appointments. This will ensure that we can resolve cases involving noncitizen victims, that more noncitizen witnesses feel safe going to courthouses and collaborating with law enforcement, and that noncitizen defendants are not robbed of the opportunity to pay their dues and become productive members of their communities.

- Join (or lead) efforts to create a detainer policy in our jurisdiction to ensure that no prosecutor, police officer, or jail shares information with ICE absent a federal judicial warrant. We recognize that as advocates for the communities we serve our voices are pivotal to getting buy-in and political interest.
- Limit questioning about immigration status of victims and witnesses on the stand. This will be done in the hopes that it will diminish the fear of testifying and of cooperating with our office.
- Ensure that our office complies with Title VI of the Civil Rights Act by providing written materials and language access for all Limited English Proficient (LEP) victims, including availability of telephonic interpretation. All office staff will receive training on how to access and utilize telephonic interpreters.

## Create a Safe Space for Noncitizen Victims of Crime

- We will work to ensure that our office is both safe for and helpful to noncitizen victims of crime.
- We will establish an anonymous hotline residents can use if they have been victims of fraud.
- In appropriate cases, we will prosecute notarios and others who unlawfully practice (immigration) law in violation of the Michigan Immigration Clerical Assistant Act. We may also refer cases to the State Bar of Michigan.
- We will protect noncitizen victims of crime by establishing a certification unit for S, T, and U visas. Employees in that unit will create a streamlined, publicly available procedure for S, T, and U visa certification. The office will designate at least one point-person for review of certification requests. The point-person will be in a supervisory position.
  - The unit will not limit certifications based on a victim's immigration or criminal history, nor temporarily limit certification availability.
  - The unit staff will receive regular training from reputable immigrant-serving organizations and train office staff, internally, on the availability of these remedies for noncitizen victims and informants.
  - On a regular basis and when requested, this unit will provide statistics about certifications, including timeliness in responding to certification requests.

## Implement an Accessible Post-Conviction Relief Process

- We will collaborate with noncitizens who have harmful convictions on their record due to the ineffective assistance of counsel or other legal defects. To that end, we will create a Post Conviction Relief (PCR) unit. The office will designate at least one point-person for review of PCR requests. The point-person will be in a supervisory position. This unit will:
  - Not require those seeking PCR to first file a 6.500 motion in order to get us to review or stipulate to the filing of said motion. Instead, we will allow applicants to submit a proposal letter listing the conviction, the defendant's equities, and reasons why a vacatur/re-sentencing is required.
  - Stipulate to plea proposals where the disposition that limits or eliminates immigration consequences would have been accepted in the initial proceedings because it satisfies the objectives of public safety and justice.
  - Designate low-level convictions, like marijuana convictions, for blanket PCR.
  - Ensure timely review for all PCR requests and expedited review for noncitizens who have been detained.
  - Keep conversations about immigration status and/or immigration consequences off the record during re-plea. As with trials, the assistant prosecuting attorney will be careful with all language that is a part of the "record of conviction."
  - Ensure, when possible, that PCR motions are not brought before the same judge that oversaw the noncitizens so as to remove bias (including implicit bias) for the noncitizen seeking relief.
  - Coordinate with community-based organizations to have events for vacating/expunging damaging convictions, even if the vacatur/expungements do not carry direct immigration benefits. The expungements may be useful for employment, housing, and other purposes.

## PART IV

# Crimmigration Analysis of Select Michigan Statutes

This Part provides an analysis of the immigration consequences flowing from certain Michigan offenses. For each offense, the potential collateral effects (e.g., aggravated felony, CIMA) are highlighted, and immigration-neutral alternatives are discussed. It is important to keep in mind that the actual impact of an offense can vary dramatically depending on the individual circumstances of each noncitizen defendant (e.g., whether they have some form of immigration status; whether they have any prior criminal history); thus, conversations with a defense counsel, particularly at the plea stage, are crucial to fully understanding the potential impact of a conviction for a specific defendant. The goal of this Part is simply to provide a basic understanding of the potential consequences of some commonly-charged Michigan offenses and some suggestions for how prosecutors can help minimize or avoid those effects when making charging, plea, and sentencing decisions.<sup>1</sup> Immigration law changes frequently; these consequences and plea alternatives are current as of December 2020.

For a further exploration of Michigan offenses and their attendant immigration consequences, please visit the ACLU of Michigan's website; it contains a 90-minute training and 41-page report that contains substantial immigration consequence details about dozens of Michigan offenses. See <https://www.aclumich.org/en/publications/immigration-consequences-criminal-convictions-michigan-report-and-video-training>.

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<sup>1</sup> Some of the analysis is drawn from ACLU of Michigan, *Immigration Consequences of Criminal Convictions in Michigan* (2020), <https://www.aclumich.org/en/publications/immigration-consequences-criminal-convictions-michigan-report-and-video-training>.

CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	No
INADMISSIBILITY/DEPORTABILITY	Depends, see below
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FAIRER ALTERNATIVES	<b>MCL § 257.904</b> driving on a suspended license

## **MCL § 257.625** Operating While Intoxicated (OWI)

A conviction under **MCL § 257.635** is not a CIMT or an aggravated felony, and is not a basis for mandatory detention. However, alcohol-related driving offenses can lead to the prudential revocation of visas and inadmissibility on medical/health-related grounds. An OWI offense can also create the presumption that a noncitizen lacks required good moral character or is ineligible for discretionary relief. OWI convictions also often result in denials of bond for individuals in removal proceedings.

In appropriate cases, to avoid serious immigration consequences, avoid charging aggravating factors that can turn an OWI into a CIMT (operating under the influence while underage with a child under the age of 16, for example, or reckless driving causing death). If the defendant was driving under the influence of a drug, do not list the drug in the record of conviction — admissions to drugs, especially federally-listed controlled substances, can trigger independent grounds of inadmissibility and deportability.

Prosecutors should consider offering pleas to **MCL § 750.170** (disturbance of lawful meetings) or **MCL § 257.904** (driving on a suspended license). Both are options that are completely immigration-neutral and could increase a noncitizen defendant's chances of being released on bond if placed in removal proceedings.

CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	Yes, unless one offense less than 30g
INADMISSIBILITY/DEPORTABILITY	Yes, inadmissibility and deportability grounds
<hr/>	
FAIRER ALTERNATIVES	Diversion <b>MCL § 750.505</b> accessory after the fact (with sentence under 365 days)

## MCL § 333.7403(2)(d) Possession of Marijuana

A conviction under **MCL § 333.7403(2)(d)**, while unlikely to constitute a CIMT or aggravated felony, is considered a controlled substance offense that can render a noncitizen inadmissible and deportable. There is an exception to the deportability ground for a single offense involving possession for one's own use of 30 grams or less of marijuana (but subsequent offenses could render a noncitizen deportable). There is no exception for the inadmissibility ground. This means that while charging a defendant with a smaller amount of marijuana (30 grams or less) can be useful to certain noncitizens in avoiding a conviction for a deportable offense, there is no way to charge a noncitizen defendant under **MCL § 333.7403(2)(d)** without rendering them inadmissible and ineligible for certain kinds of immigration relief.

Diversion programs that do not require a plea (see Part II, Commitment 2) are a particularly useful tool for disposing of drug offenses in an immigration-neutral way. Another option is to charge or offer a plea to a non-drug offense that does not independently trigger an immigration consequence. For example, accessory after the fact under **MCL § 750.505** may be a safe plea alternative to possession (but ensure the sentence imposed is under 365 days). Another immigration-neutral option is **MCL § 750.157** (disturbance of lawful meetings).

While a conviction for simple possession does result in immigration consequences, it is important to note that offenses with a sale/distribution/trafficking element (e.g., manufacture/possession with intent to deliver > 5kg marijuana under **MCL § 333.7401**) are even worse for a noncitizen defendant. In addition to being controlled substance offenses, offenses with an element of sale or distribution could be CIMTs and aggravated felonies as well. Consequently, a plea to marijuana possession under **MCL § 333.7403(2)(d)** is often a good alternative to a drug charge that contains a sale element (again, this would depend on the immigration and criminal history of the individual).

Not subject to mandatory detention if first offense for less than 30g of marijuana. Otherwise, mandatory detention.



CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	Yes, inadmissibility and deportability grounds
<hr/>	
FAIRER ALTERNATIVES	Diversion <b>MCL § 750.505</b> accessory after the fact (with sentence under 365 days)

## **MCL § 333.7403(2)(a)(iv) Possession of Controlled Substance**

A conviction under **MCL § 333.7403(2)(a)(iv)** is unlikely to be a CIMT or aggravated felony (unless the offense would constitute a federal felony, i.e., more than a certain amount of crack or certain recidivist offenses). However, it would be a controlled substance offense and thus would render a noncitizen inadmissible and deportable, and it is a basis for mandatory detention. Furthermore, unlike with possession of marijuana, there is no exception or waiver for possession of any other controlled substance. Consequently, there is no way to charge non-citizen defendants under **MCL § 333.7403(2)(a)(iv)** without rendering them both inadmissible and deportable.

A diversion program that does not require a plea or offering a plea to a safe non-drug offense would be the best options to achieve an immigration-neutral outcome. Another option is to charge or offer a plea to a non-drug offense that does not independently trigger an immigration consequence. For example, accessory after the fact under **MCL § 750.505** may be a safe plea alternative to possession (but ensure the sentence imposed is under 365 days). Another immigration-neutral option is **MCL § 750.157** (disturbance of lawful meetings). Additionally, a plea to marijuana possession under **MCL § 333.7403(2)(d)** may be a good alternative for noncitizen defendants. See analysis above for more details.

CIMT	Yes
AGGRAVATED FELONY	Yes, if loss exceeds \$10,000
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	N/A
<hr/>	
FAIRER ALTERNATIVES	Let the record reflect less than \$10,000 at issue <b>MCL § 28.295(3)</b> unlawful possession of personal identification of another

## **MCL § 445.65 Identity Theft**

Identity theft is a crime of fraud and therefore a CIMT. It is also a basis for mandatory detention. Should the record of conviction indicate that the defendant obtained more than \$10,000 worth of goods as a result of fraud, this conviction could also be an aggravated felony. Thus, it would be best to keep the record vague or clearly indicate that the value of the goods was less than \$10,000.

In appropriate cases, **MCL § 28.295(3)** (unlawful possession of personal identification of another) would be a good alternative charge because it does not involve an intent to defraud. A conviction under this statute would not be a CIMT or an aggravated felony.

CIMT	Yes
AGGRAVATED FELONY	Yes, if sentenced to 365 or more days
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	Deportability grounds if there is use of a firearm
<hr/>	
FAIRER ALTERNATIVES	Sentence of 364 days or less <b>MCL § 750.110</b> breaking and entering – felony <b>MCL § 750.111</b> entering without breaking – felony (ensure record of conviction does not indicate CIMT or aggravated felony) <b>MCL § 750.115</b> entering without permission <b>MCL § 750.116</b> possession of burglar’s tools

## **MCL § 750.29 Armed Robbery**

Armed robbery is likely a CIMT and a deportable firearms offense if the record of conviction indicates use of a firearm. It is subject to mandatory detention. And because this statute likely meets the crime of violence definition, it would also be an aggravated felony if a sentence of 365 days or more is imposed. See *Sessions v. Dimaya*, supra, at Footnote 9. If appropriate, it is best to offer pleas that impose sentences of less than 365 days (to avoid an aggravated felony consequence for potential crimes of violence).

Prosecutors who want to further minimize the immigration consequences of an armed robbery conviction should instead charge one of the following statutes that are neither a CIMT nor an aggravated felony:

**MCL § 750.110** breaking and entering – felony: See page 39 for details

**MCL § 750.111** entering without breaking – felony: as with **MCL § 750.110**, it is important that the record of conviction not indicate a target offense that is a CIMT or aggravated felony.

**MCL § 750.115** entering without permission: mere unlawful entry alone is not a CIMT; thus, prosecutors should keep the record of conviction vague or indicate that the target offense was not a CIMT or aggravated felony.

**MCL § 750.116** possession of burglar’s tools: possession of burglary tools alone is not a CIMT; thus, prosecutors should keep the record of conviction vague or indicate that the target offense was not for a larceny or other CIMT or aggravated felony.

CIMT	Yes
AGGRAVATED FELONY	Yes, if sentenced to 365 or more days
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	Deportability grounds if there is use of a firearm
<hr/>	
FAIRER ALTERNATIVES	Sentence of 364 days or less <b>MCL § 750.110</b> breaking and entering – felony <b>MCL § 750.111</b> entering without breaking – felony (ensure record of conviction does not indicate CIMT or aggravated felony) <b>MCL § 750.115</b> entering without permission <b>MCL § 750.116</b> possession of burglar’s tools

## **MCL § 750.30** Unarmed Robbery

The same analysis related to armed robbery applies here. Like armed robbery, unarmed robbery is also likely a CIMT and an aggravated felony if the defendant is sentenced to 365 days or more. And it is a basis for mandatory detention. Offering a plea to unarmed robbery has the benefit of not triggering another independent deportability ground. Prosecutors should consider the suggested alternatives listed above to further minimize immigration consequences.

CIMT	No
AGGRAVATED FELONY	No, unless sentenced to 365 or more days
MANDATORY DETENTION	No, unless sentenced to 365 or more days
INADMISSIBILITY/DEPORTABILITY	N/A
<hr/>	
FAIRER ALTERNATIVES	Sentence of 364 days or less avoids crime of violence finding

## **MCL § 750.81(1) Simple Assault & Battery**

A conviction under **MCL § 750.81(1)** is unlikely to be a CIMT or an aggravated felony, and it is not subject to mandatory detention. However, there is a chance it could be considered a crime of violence, and thus avoiding collateral consequences requires ensuring any sentence imposed is less than 365 days. If it is found to be a crime of violence by an immigration judge, it could also constitute a crime of domestic violence (an independent ground of deportability) if the victim is a protected person under **8 USC § 1227(a)(2)(E)(i)**.

If the victim of the crime is of a protected class, immigration neutrality requires keeping the record of conviction vague as to the relationship; exclude from the record any reference to anything more than de minimis touching.

CIMT	No
AGGRAVATED FELONY	No, unless sentenced to 365 or more days
MANDATORY DETENTION	No, unless sentenced to 365 or more days
INADMISSIBILITY/DEPORTABILITY	N/A
<hr/>	
FAIRER ALTERNATIVES	Sentence of 364 days or less avoids crime of violence finding <b>MCL § 750.81(1)</b> simple assault and battery

## **MCL § 750.81(2),(4),(5) Domestic Assault**

A conviction under **MCL §§ 750.81(2), (4), or (5)** is unlikely to be a CIMT or an aggravated felony; however, there is a chance it could be considered a crime of violence, and thus it is important for immigration neutrality to ensure any sentence imposed is less than 365 days. (A sentence of 365 or more days could lead to mandatory detention, too.) If found to be a crime of violence by an immigration judge, this type of conviction could also constitute a crime of domestic violence (an independent ground of deportability) if the victim is a protected person under **8 USC § 1227(a)(2)(E)(i)**. Offering a plea to simple assault under **MCL § 750.81(1)** is more likely to result in an immigration-neutral outcome.

If the victim of the crime is of a protected class, immigration neutrality requires keeping the record of conviction vague as to the relationship.

CIMT	Unclear
AGGRAVATED FELONY	Yes, if sentence is 365 or more days
MANDATORY DETENTION	Yes, if CIMT
INADMISSIBILITY/DEPORTABILITY	Depends, see below
<hr/>	
FAIRER ALTERNATIVES	<b>MCL § 750.81(1)</b> simple assault and battery

## **MCL § 750.81a(1) Aggravated Assault**

It is currently unsettled whether a conviction under **MCL § 750.81a(1)** is a CIMT. Either way, it is likely to be an aggravated felony crime of violence if a sentence of 365 days or more is imposed. (Mandatory detention would follow from such a finding.) If it is found to be a crime of violence by an immigration judge, it could also constitute a crime of domestic violence (an independent ground of deportability) if the victim is a protected person under **8 USC § 1227(a)(2)(E)(i)**. Offering a plea to simple assault under **MCL § 750.81(1)** is more likely to result in an immigration-neutral outcome.

If the victim of the crime is of a protected class, keep the record of conviction vague as to the relationship.

CIMT	Depends
AGGRAVATED FELONY	Depends
MANDATORY DETENTION	Depends
INADMISSIBILITY/DEPORTABILITY	Consequences are based on target offense
<hr/>	
FAIRER ALTERNATIVES	See below

## **MCL § 750.110 Breaking and Entering**

Whether **MCL § 750.110** breaking and entering is a CIMT (and whether it results in mandatory detention) depends on the target offense:

If the defendant intended to commit a larceny, then this conviction is likely a CIMT (because larceny is a CIMT). If sentenced to 365 days or more, this conviction would also be an aggravated felony.

If the defendant intended to commit a felony, then whether the crime is a CIMT or an aggravated felony depends on what the judge can see in the record of conviction. Thus, it is more helpful to offer a plea to a felony than to larceny. Prosecutors should keep the record of conviction vague or indicate that the target felony offense was not an offense that triggers an immigration consequence.



CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	No
INADMISSIBILITY/DEPORTABILITY	No

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FAIRER ALTERNATIVES	This is a good, safe plea
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## **MCL § 750.170** Disturbance of Lawful Meetings

Generally, this is a safe plea and alternative for petty crimes. The statute is broad and covers harmless minimum conduct that is not morally turpitudinous in nature. It is not subject to mandatory detention.

CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	Deportable firearms offense
<hr/>	
FAIRER ALTERNATIVES	<b>MCL § 750.227</b> carrying a concealed weapon

## MCL § 750.227(2) Carrying a Concealed Weapon (Pistol)

A conviction under **MCL § 750.227(2)** is unlikely to be a CIMT or an aggravated felony. However, as a firearms offense, it likely triggers the firearms deportability ground under **8 USC § 1227(a)(2)(C)**. It is subject to mandatory detention.

If all immigration consequences are appropriately avoided, it would be best for prosecutors to charge noncitizens with **MCL § 750.227** (carrying a concealed weapon). A conviction under this statute would not be a CIMT or aggravated felony, regardless of sentence. And, if the record of conviction is vague as to the nature of the weapon, the firearms deportability ground should not be triggered. If the concealed weapon is *not* a firearm, make that clear in the record. This statute would also be a good alternative to other firearms offenses, such as ones that involve trafficking or an unlawful intent to injure someone.

CIMT	Yes
AGGRAVATED FELONY	Yes, if sentenced to 365 or more days <i>or</i> loss exceeds \$10,000
MANDATORY DETENTION	Yes
INADMISSIBILITY/DEPORTABILITY	Yes, inadmissibility and deportability grounds
<hr/>	
FAIRER ALTERNATIVES	Sentence of 364 days or less No record that amount at issue is > \$10,000 <b>MCL § 750.356d(4)</b> retail fraud in the third degree <b>MCL § 750.535</b> receipt or concealment of stolen property

## **MCL § 750.356c(1)(b) Retail Fraud (1st degree, theft)**

A conviction under **MCL § 750.356c(1)(b)** could render a noncitizen inadmissible and deportable, and is a basis for mandatory detention. As mentioned above, fraud and theft offenses are almost universally CIMTs. If the attached sentence (even if suspended) is or exceeds one year, and/or the value of the stolen property exceeds \$10,000, this conviction can also be an aggravated felony. At the same time, remember that a CIMT which is punishable by up to one year in jail that happens within five years of admission is also a ground of deportability.

In order to minimize the impact, do not propose a plea deal with a sentence of more than one year, as this would make the conviction an aggravated felony. Do not state in the record of conviction whether the amount of stolen goods amounts to \$10,000 or more, as this would also turn the conviction into an aggravated felony. And if possible, permit a plea to retail fraud in the third degree, **MCL § 750.356d(4)**, which has a maximum imprisonment of 93 days.

An alternative, immigration-neutral plea could be **MCL § 750.535** (receipt or concealment of stolen property). However, prosecutors should avoid references to intent or allow the record to show that the defendant intended only a temporary deprivation so that the conviction will not be considered a CIMT.

CIMT	No
AGGRAVATED FELONY	No
MANDATORY DETENTION	No
INADMISSIBILITY/DEPORTABILITY	No

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FAIRER ALTERNATIVES	<b>MCL 750.540</b> obstructing phone lines <b>MCL 750.540e</b> malicious use of a telecommunications device
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## **MCL § 750.411h** Stalking

A conviction under **MCL § 750.411h** does not create inadmissibility (or mandatory detention) issues, but it would likely trigger deportability as a crime of stalking under **8 USC § 1227(a)(2)(E)**. Stalking is not an aggravated felony. Stalking under **MCL § 750.411h** is likely not a crime of violence or a CIMT unless certain information is in the record of conviction. As such, prosecutors should avoid language that includes a willful or intentional state of mind and/or credible threat of significant violence, as this could trigger a CIMT finding.

To avoid other serious consequences, avoid charging aggravating factors. For example, felony aggravated stalking (**MCL § 750.411i**) might still be a CIMT. Where a statute might trigger a deportability or domestic violence ground, **MCL § 750.540** (obstructing phone lines) or **MCL § 750.540e** (malicious use of a telecommunications device) might be good alternatives. Convictions under these statutes should not be CIMTs or aggravated felonies. Nonetheless, prosecutors should avoid references to violence or threats to avoid a CIMT finding.

## PART V

# Additional Resources

### Fair and Just Prosecution

21 Principles for the 21st Century Prosecutor: [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_21st\\_century\\_prosecutor.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf)

Addressing Immigration Issues: <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>

### Immigrant Legal Resource Center

Model Prosecutor Policies & Practices on Immigration Issues: <https://www.ilrc.org/ilrc's-prosecutor-policy-recommendations>

The Prosecutor's Role in the Current Immigration Landscape: <https://www.ilrc.org/prosecutor's-role-current-immigration-landscape>

Why Community Prosecutors Should Care About the Immigration Consequences of Convictions: <https://www.ilrc.org/why-community-prosecutors-should-care-about-immigration-consequences-convictions>

Diversion and Immigration Law: <https://www.ilrc.org/diversion-and-immigration-law>

ICE Detainers are Illegal—So What Does that Really Mean?: <https://www.ilrc.org/ice-detainers-are-illegal-so-what-does-really-mean>

## **National Immigrant Women's Advocacy Project at American University, Washington College of Law, Vera Institute of Justice and Legal Momentum**

U Visa Toolkit for Law Enforcement Agencies and Prosecutors:

<https://humantraffickinghotline.org/sites/default/files/U-visa%20Toolkit%20for%20LE%20-%20LM%20and%20VERA.pdf>


## **Ingham County Prosecutor's Office**

Ingham County Prosecutor Office's policy: <https://michiganimmigrant.org/sites/default/files/Ingham-County-Guide.pdf>

# Appendices

Appendix A: Orleans Parish Sheriff's Office ICE Detainer Policy

Appendix B: Seattle Welcoming City Resolution

	<b>ORLEANS PARISH SHERIFF'S OFFICE</b>	INDEX#: 501.15	PAGE: 1 of 1
		UPDATED: 6/21/13	REVIEWED: 6/21/13
	<b>CHAPTER: Inmate Acceptance, Booking, Release and Records</b>		
<b>SUBJECT: Immigration and Customs Enforcement (ICE) Procedures</b>			

### **POLICY:**

It is the policy of the Orleans Parish Sheriff's Office to cooperate with the United States Immigration and Customs Enforcement (ICE) in accordance with the following procedures:

1. For purposes of this section, a voluntary Immigrations and Customs Enforcement ("ICE") detainer request shall be defined as any request, including but not limited to Form 1-247 (also known as a "48 hour hold"), which seeks continued detention of an inmate beyond expiration of municipal, state, or federal charges, or a finding of no probable cause, or a posting of bail or parole, or a completion of a sentence, or lifting of another jurisdiction or agency's detainer, or a court ordered release. ICE criminal warrants, or any court order for continued detention shall not be considered voluntary ICE detainer requests for purposes of this section.
2. The Orleans Parish Sheriff's Office shall decline all voluntary ICE detainer requests unless the individual's charge is for one or more of the following offenses: First Degree Murder (La. R.S. 14:30); Second Degree Murder (La. R.S. 14:30.1); Aggravated Rape (La. R.S. 14:42); Aggravated Kidnapping (La. R.S. 14:44); Treason (La. R.S. 14:113); or Armed Robbery with Use of a Firearm (La. R.S. 14:64.3). If a court later dismisses or reduces the individual's charge such that the individual is no longer charged with one of the above offenses or the court recommends declining the ICE hold request, OPSO will decline the ICE hold request on that individual.
3. OPSO officials shall not initiate any immigration status investigation into individuals in OPSO custody or affirmatively provide information on an inmate's release date or address to ICE.
4. Prior to any interview pertaining to an ICE criminal investigation, ICE must notify the subject inmate's attorney, provide a reasonable opportunity for counsel to be present during the interview, and certify to OPSO that this notice and opportunity has occurred. Absent a criminal warrant or court order transferring custody, no ICE agent shall be permitted into the secure area of the Intake and Processing Center. Absent a court order, OPSO shall not allow ICE to conduct civil immigration status investigations at OPSO or otherwise interview an inmate before the detainee's first appearance.
5. Any individual who alleges a violation of the policy set forth herein may file a written complaint for investigation with the Orleans Parish Sheriff's Director of Intake and Processing.



**CITY OF SEATTLE**

**RESOLUTION 31730**

..title

A RESOLUTION affirming the City of Seattle as a Welcoming City that promotes policies and programs to foster inclusion for all, and serves its residents regardless of their immigration or refugee status, race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, disability, homelessness, low-income or veteran status, and reaffirming the City's continuing commitment to advocate and support the wellbeing of all residents.

..body

WHEREAS, Seattle fosters a culture and environment that makes it a vibrant, global city where our immigrant and refugee residents can fully participate in and be integrated into the social, civic, and economic fabric of Seattle; and

WHEREAS, nearly one in five Seattle residents is foreign born and 129 languages are spoken in our public schools; and

WHEREAS, Washington is the country's 8th largest refugee-receiving state and a majority of the estimated 3,000 new arrivals each year are re-settled in Seattle-King County; and

WHEREAS, an estimated 100,000 Muslim residents are proud to call Washington their home and live peacefully as our neighbors, colleagues and friends; and

WHEREAS, more than 28,000 undocumented youth in Washington are the recipients of the Deferred Action for Childhood Arrivals (DACA) program and they deserve an opportunity to have a bright future and to contribute their time and talent to make Seattle a city of innovation and growth; and

WHEREAS, City employees serve all residents and make city services accessible to all, regardless of immigration status, and City agencies and law enforcement cannot withhold services based on ancestry, race, ethnicity, national origin, color, age, sex, sexual

1 orientation, gender identity, marital status, physical or mental disability, immigration  
2 status or religion; and

3 WHEREAS, in 2014, to recognize and uphold the 4th Amendment constitutional rights of  
4 immigrants to be protected against unreasonable seizures, the Metropolitan King County  
5 Council adopted Ordinance 17886 to clarify that the County will only honor U.S.  
6 Immigration and Customs Enforcement (ICE) detainer requests that are accompanied by  
7 a criminal warrant issued by a federal judge or magistrate; and

8 WHEREAS, the City of Seattle adopted Ordinance 121063 in 2003 to establish policies of the  
9 Seattle Police Department to protect immigrants' access to police protection and public  
10 services regardless of immigration status, subsequently re-affirmed by Resolution 30672  
11 in 2004; and

12 WHEREAS, the City of Seattle adopted Resolution 30851 in 2006, Resolution 31193 in 2010,  
13 and Resolution 31490 in 2013 supporting Federal Comprehensive Immigration Reform  
14 and fostering family unity with a pathway to citizenship for the undocumented, including  
15 students who arrived in the U.S. as children (DREAMers); and

16 WHEREAS, the City of Seattle has previously adopted Resolution 30355 in 2001, honoring  
17 Seattle's immigrant community, and Resolution 30796 in 2005, relating to development  
18 of an action plan to identify and address issues facing Seattle's immigrant communities;  
19 and

20 WHEREAS, the City of Seattle enacted Ordinance 123822 in 2012 to create an Office of  
21 Immigrant and Refugee Affairs and renaming the Immigrant and Refugee Advisory  
22 Board to the Immigrant and Refugee Commission; and

1 WHEREAS, the City of Seattle adopted Resolution 31724 in 2016 reaffirming Seattle's values of  
2 inclusion, respect, and justice, and the City's commitment toward actions to reinforce  
3 these values; and calling on President Donald Trump to condemn recent attacks and hate  
4 speech that perpetuate religious persecution, racism, sexism, homophobia, transphobia  
5 and xenophobia; and

6 WHEREAS, Seattle benefits tremendously from the large number of diverse immigrants and  
7 refugees who contribute to the development of a culturally and economically diverse and  
8 enriched community; and

9 WHEREAS, the level of anti-immigrant and anti-refugee rhetoric during the 2016 Presidential  
10 campaign, racist hate speech toward immigrant and refugee communities, and anti-  
11 immigrant and anti-refugee policies proposed by the current Presidential Administration  
12 is alarming; and

13 WHEREAS, the City of Seattle is committed to recognizing the dignity of all its residents,  
14 including the right of all Seattle residents to live in a City that does not subject them to  
15 prejudicial treatment or discrimination; and

16 WHEREAS, Seattle is committed to continue building a welcoming, safe, and hate-free  
17 environment in communities, where all immigrants and refugees are welcomed, accepted,  
18 and integrated; and to encourage business leaders, civic groups, community institutions,  
19 and residents to join in a community-wide effort to adopt policies and practices that  
20 promote integration, inclusion, and equity; and

21 WHEREAS, on November 24, 2016, the Mayor signed Executive Order 2016-08 reaffirming  
22 Seattle as a welcoming city and establishing an Inclusive and Equitable City Cabinet and

1 confirming the City's intent to protect the civil liberties and civil rights of all Seattle  
2 residents; and

3 WHEREAS, Ordinance 121819 authorizes the Chief of Police or designee to "execute for and on  
4 behalf of the City of Seattle an interlocal agreement with other police agencies in King  
5 County to provide mutual aid to attempt to enhance the safety and protection of the  
6 public in Seattle and King County," consistent with chapter 10.93 RCW; and

7 WHEREAS, on January 25, 2017, by *Executive Order: Border Security and Immigration*  
8 *Enforcement Improvements*, President Trump declared the policy of the executive branch  
9 to secure the southern border of the United States through the immediate construction of  
10 a physical wall; to detain individuals apprehended on suspicion of violating Federal or  
11 State law, including Federal immigration law, pending further proceedings regarding  
12 those violations; to expedite determinations of apprehended individuals' claims of  
13 eligibility to remain in the United States; to promptly remove individuals whose legal  
14 claims to remain in the United States are rejected; to cooperate fully with States and  
15 local law enforcement in enacting Federal-State partnerships to enforce Federal  
16 immigration priorities, as well as State monitoring and detention programs that are  
17 consistent with Federal law and do not undermine Federal immigration priorities; and to  
18 hire an additional 5000 Border Patrol Agents; and

19 WHEREAS, on January 25, 2017, by *Executive Order: Enhancing Public Safety in the Interior*  
20 *of the United States*, President Trump declared the policy of the executive branch to  
21 ensure faithful execution of United States immigration laws against all removable aliens  
22 consistent with Article II, Section 3 of the United States Constitution and 5 U.S.C. 3331;  
23 to make use of all available systems and resources to ensure the efficient and faithful

1 execution of the immigration laws of the United States; to ensure that jurisdictions that  
2 fail to comply with applicable Federal law do not receive Federal funds, except as  
3 mandated by law; to ensure that aliens ordered removed from the United States are  
4 promptly removed; to support victims of crimes committed by removable aliens; to hire  
5 an additional 10,000 immigration officers; to empower State and local law enforcement  
6 agencies to perform the functions of immigration officers; to provide the Secretary of  
7 Homeland Security with the authority to designate, in his discretion and to the extent  
8 consistent with law, a jurisdiction as a sanctuary jurisdiction; to ensure that jurisdictions  
9 that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not  
10 eligible to receive Federal grants, except as deemed necessary for law enforcement  
11 purposes by the Attorney General or the Secretary of Homeland Security; and

12 WHEREAS, *Executive Order: Enhancing Public Safety in the Interior of the United States*

13 directs the U.S. Attorney General to take appropriate enforcement action against any  
14 entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that  
15 prevents or hinders the enforcement of Federal law, and further directs the Secretary of  
16 Homeland Security to, on a weekly basis, make public a comprehensive list of criminal  
17 actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor  
18 any detainers with respect to such aliens; and

19 WHEREAS, The City of Seattle recommits its policy to be a Welcoming City to all its residents  
20 and to continue building a city of inclusion and participation by all; NOW,

21 THEREFORE,

22 **BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SEATTLE, THE**  
23 **MAYOR CONCURRING, THAT:**

Section 1.

A. Seattle will celebrate its diversity by welcoming and supporting immigrants and refugees from all nationalities, religions, and backgrounds with policies and programs that foster inclusion for all. Seattle elected officials and employees shall support the efforts of elected officials and staff in local jurisdictions throughout Washington in developing policies protecting immigrants, refugees, LGBTQ people, women, and other populations whose rights may be abrogated and interests harmed by those hostile to maintaining or expanding protections to these communities and who would unconstitutionally and illegally misuse the power of the federal government to do so.

B. The City of Seattle believes that the Seattle Police Department (SPD) should be focused on the safety and security of all our residents regardless of immigration status and refuses to allow its police officers to be compelled into service as de facto immigration officers. As such, the City will reject any offer from the federal government to enter into a Section 287(g) agreement per the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

C. The City of Seattle commits to exercising its rights under the Tenth Amendment to the U.S. Constitution to refrain from performing the duties of the Department of Homeland Security for purposes of enforcing the Immigration and Nationality Act. Accordingly, SPD, in consultation with the Law Department, shall, by no later than February 28, 2017, file a report with the Office of the City Clerk with a copy to the Chair of the Gender Equity, Safe Communities and New Americans Committee (GESCNA), for subsequent presentation in GESCNA, that includes the following:

1. A copy of all mutual aid agreements between The City of Seattle and other jurisdictions; provided, that where agreements with more than one jurisdiction contain identical

1 terms, only one copy need be provided along with a list of the jurisdictions that have that  
2 identical language;

3               2. For all jurisdictions with whom The City of Seattle has mutual aid agreements,  
4 identification of those jurisdictions that: (1) have entered into a Section 287(g) agreement with  
5 the federal government; (2) have explicitly declared their intent to not enter into a Section 287(g)  
6 agreement; (3) have neither entered into a Section 287(g) agreement nor declared their intent to  
7 not enter into a Section 287(g) agreement; and (4) fall into none of these categories; and

8               3. Proposed amendments to the City’s mutual aid agreements with jurisdictions  
9 that have not explicitly rejected offers to enter into a Section 287(g) agreement to be consistent  
10 with the SPD and The City of Seattle’s position related to focusing its limited law enforcement  
11 resources on criminal investigations rather than civil immigration law violations, including an  
12 analysis of the impact of the proposed amendments.

13           D. In recognition that immigrants and refugees of all immigration statuses are a  
14 contributing and integral part of Seattle, all instances of the word *citizen* will be replaced with  
15 the word *resident* in the My.Seattle.Gov Mission Statement. This shall include revising the  
16 mission statement to reflect a commitment to provide a 24-hour City Hall for the *residents* of  
17 Seattle.

18           E. The City of Seattle will use all legal avenues at its disposal to resist any efforts to  
19 impose on the City any immigration, spending or funding policy that violates the U.S.  
20 Constitution and the Laws of the United States.

21           F. The City of Seattle will continue to protect the rights guaranteed to the City and its  
22 people by the United States Constitution and will challenge any unconstitutional policies that  
23 threaten the security of its communities.

1           G. The City of Seattle will not cooperate or assist with any unconstitutional or illegal  
2 registration or surveillance programs or any other unconstitutional or illegal laws, rules, or  
3 policies targeted at those of the Muslim faith and/or of Middle Eastern descent and rejects any  
4 attempts to characterize family, friends, neighbors, and colleagues as enemies of the state.

5           H. Seattle does not tolerate hate speech towards any Seattle resident or visitor. The Office  
6 for Civil Rights will conduct an outreach campaign on, develop a hotline for, and continue to  
7 work to enforce federal and local laws against illegal discrimination and harassment based on  
8 age, religion, national origin, race, sex, sexual orientation, and other protected groups in housing,  
9 employment, public accommodations and contracting. The Seattle Police Department and the  
10 Office for Civil Rights will work with the community to ensure that the people of Seattle are  
11 protected under state and local malicious harassment laws and understand these protections.

12           I. Seattle rejects any effort to criminalize or attack the Black Lives Matter social justice  
13 movement or any other social justice movement that seeks to address inequalities, inequities and  
14 disparities present in Seattle.

15           J. City employees will defer detainer requests from the U.S. Department of Homeland  
16 Security's Immigration and Customs Enforcement (ICE) to King County. Because jails are in  
17 King County's jurisdiction and enforcing civil federal immigration violations are in the purview  
18 of the U.S. Department of Homeland Security, City department directors are hereby directed to  
19 comply with the City's practice to defer to King County on all ICE detainer requests. King  
20 County Ordinance 17886 passed in 2014 clarifies that the County will only honor ICE detainer  
21 requests that are accompanied by a criminal warrant issued by a federal judge or magistrate.  
22 Because City employees do not have legal authority to arrest or detain individuals for civil  
23 immigration violations, nor to execute administrative warrants related to civil immigration law



1 violations, City of Seattle employees are hereby directed, unless provided with a criminal  
2 warrant issued by a federal judge or magistrate, to not detain or arrest any individual based upon  
3 an administrative or civil immigration warrant for a violation of federal civil immigration law,  
4 including administrative and civil immigration warrants entered in the National Crime  
5 Information Center database.

6 K. City of Seattle employees will continue to serve all residents and make City services  
7 accessible to all residents, regardless of immigration status. The City will not withhold services  
8 on the basis of ancestry, race, ethnicity, national origin, color, age, sex, sexual orientation,  
9 gender identity, marital status, physical or mental disability, religion, or immigration status.

10 L. City employees will seek to maintain, refine or develop City policies that advocate for  
11 and provide support for all immigrants, refugees, Muslims, LGBTQ people, women, and anyone  
12 else who may face severe adverse effects of newly adopted federal laws or policies.

13 M. City employees will not require any person seeking or accessing City programs or  
14 services to disclose their immigration status. City employees will make no record of any  
15 immigration status information that is inadvertently disclosed and will treat such immigration  
16 status information as confidential and sensitive information pursuant to the City of Seattle's  
17 privacy principles as adopted by Resolution 31570 in 2015.

18 N. The City of Seattle: unequivocally supports full reproductive health care for women,  
19 including immigrants and refugees; stands against attacks on the right to organize or labor  
20 unions; and supports living wages, expanded benefits like paid sick days and paid parental leave  
21 for all, and the push for an end to the fossil fuel economy.

22 Section 2. The Office of Immigrant and Refugee Affairs in coordination with the  
23 Department of Education and Early Learning and the Human Services Department shall develop

1 a proposal for assisting children and families associated with Seattle Public Schools affected by  
2 federal policies directed at immigrants and refugees.

3 Section 3. City department directors will use tools at their disposal, including meetings  
4 and trainings, to direct their staff to comply with the City's and County's policies described  
5 above. A communication will be issued by City departments to their staff by February 28, 2017.

6 Section 4. City departments will annually issue and file with the City Clerk a letter to all  
7 contractors receiving General Fund dollars to clarify and inform about the policies described  
8 above. A communication will be issued and filed with the City Clerk by City departments to  
9 their contractors by February 28, 2017. Additionally, language will be added to Requests for  
10 Proposals (RFPs) to reflect the commitment to the policies described above.

11 Section 5. An Inclusive and Equitable City Cabinet is hereby established. A Deputy  
12 Mayor shall lead and coordinate efforts across City departments and provide oversight and  
13 evaluation of outcomes. The City Attorney's Office shall act as legal advisor to the Cabinet.

14 A. The following Departments shall be primary members of the Inclusive and Equitable  
15 City Cabinet:

16 \* City Budget Office

17 \* Department of Neighborhoods

18 \* Department of Education and Early Learning

19 \* Human Services Department

20 \* Office for Civil Rights

21 \* Office of Economic Development

22 \* Office of Immigrant and Refugee Affairs

23 \* Office of Intergovernmental Relations

\* Office of Labor Standards

\* Office of the Mayor

\* Seattle Police Department

B. The goal of the Inclusive and Equitable City Cabinet will be to advise the Mayor and/or City on how to best coordinate City efforts to protect the civil liberties and civil rights of all Seattle residents and provide supportive services and information as necessary to communities of color, people with disabilities, women, LGBTQ residents, people who are low-income, immigrants and refugees in light of potential changes in Federal Government policy and operations.

Section 6. The Inclusive and Equitable City Cabinet shall advise on how the City may:

A. Develop a programmatic investment strategy for \$250,000 in funding included in the 4th Quarter Supplemental Budget of 2016 to directly address the needs of children and family members within the Seattle Public Schools system affected by federal policies directed at immigrants and refugees.

B. Prioritize investments to partner with community-based organizations to develop sustainable resources, such as online training and tools, to educate and build the capacity of city staff, educators, and administrators to work with immigrant and refugee children and families.

C. Institute a Rapid Response Policy Coalition that will bring together City staff, private sector attorneys, non-profit staff, and other policy experts to serve on sub-committees based on issue areas. These teams will offer analyses and action items on federal executive orders and legislation. These analyses will be distributed to the larger coalition and be made available to the general public.

D. Develop a comprehensive public awareness effort around anti-hate speech and hate crimes.

E. Conduct a comprehensive review of potential implications on City departments – policy or financial – given direction and available information about any new initiatives and intent of the current Presidential administration.

F. Collaborate with immigrant and refugee community stakeholders and community based organizations to expand and develop partnership efforts with the City, specifically the Office of Immigrant and Refugee Affairs, to identify community needs and priorities.

G. Develop a forum for regional coordination with other cities in King County as well as Pierce and Snohomish Counties to share knowledge and information about the City's efforts.

H. Develop a strategy for the creation and funding of a Legal Defense Fund to assist immigrant and refugee individuals and families.

1           Adopted by the City Council the \_\_\_\_\_ day of \_\_\_\_\_, 2017,  
2 and signed by me in open session in authentication of its adoption this \_\_\_\_\_ day of  
3 \_\_\_\_\_, 2017.

4 \_\_\_\_\_  
5 President \_\_\_\_\_ of the City Council

6           The Mayor concurred the \_\_\_\_\_ day of \_\_\_\_\_, 2017.

7 \_\_\_\_\_  
8 Edward B. Murray, Mayor

9           Filed by me this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

10 \_\_\_\_\_  
11 Monica Martinez Simmons, City Clerk

12 (Seal)