Probation for Illegals?: Whether Texas Judges Should Consider a Defendant's Undocumented Status Before Sentencing

by Justin C. Schneider

I. Introduction

Every day Texas judges face defendants who are citizens of other countries. Many of these defendants have committed minor crimes, eligible for community supervision. However, a conviction of a crime, or even deferred adjudication, can seriously impact a noncitizen's immigration status and could lead to removal and a temporary or permanent bar to reentry.[1] In this instance it is the illegal action that affects the immigration status and potential consequences. This article discusses the mirror image of that situation: What impact does a person's illegal status, resulting from improperly entering into the United States, have on the consequences and punishment resulting from the violation of Texas law.

Before the judge stands a twenty-three year old man. He is dressed nicely, clean-shaven, and obviously very nervous. Behind the bar sits his pregnant wife. She also wears her anxiousness on her face. After a few hours of negotiations, the prosecutor and defense attorney are in the judge's court for a guilty plea and to present the plea agreement to the judge for approval.[2] The defendant is charged with theft of more than $50 and less than $500 for stealing clothes valued at $400 from a store in the

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[1] *See* 8 U.S.C. §§ 1101(a)(48), 1227(a)(2); Madriz-Alvarado v. Ashcroft, 124 Fed. Appx. 296 (5th Cir. 2004); Moosa v. INS, 171, F.3d 994 (5th Cir. 1999).

[2] TEX. CODE CRIM. PRO. art. 26.13(a)(2); *see also* Ortiz v. State, 933 S.W.2d 102, 104 (Tex. Crim. App. 1996) ("[T]he trial judge never accepted the plea agreement. Therefore, the contract of the plea agreement was never binding on the parties.")

mall.[3] As a Class B misdemeanor, the defendant faces up to 180 days in county jail and a $2000 fine.[4] However, due to the negotiations between the prosecutor and the defendant's attorney, an agreement with the State has been reached where the defendant will receive deferred adjudication and will be placed under community supervision for one year. The plea agreement must be accepted in open court for it to be enforceable.[5] Next to the defendant and his attorney stands an interpreter. Early on in the proceedings, the defense attorney recognized his client's difficulty in understanding English, so he filed a motion asking the judge to appoint a licensed interpreter.[6]

As the hearing begins, the judge reads from his script:

"Are you [defendant]?"

Mumbling in another language, then defendant responds, interpreter responds in English, "Yes."

Can you speak, read, and write in the English language?

Again, hushed words, then interpreter answers, "No."

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[3] *See* TEX. PENAL CODE ANN. § 31.03 (Vernon).
[4] *See* TEX. PENAL CODE ANN. § 12.22 (Vernon).
[5] TEX. CODE CRIM. PRO. art. 26.13(a)(2).
[6] *See* TEX. CODE CRIM. PRO. art. 38.30 (Vernon).

"The information charges you with the offense of theft of between $50 and $500. Do you understand the charge contained in the information?"

Mumbling, then interpreter responds, "Yes."

"How do you plead to the charge contained in this information, 'guilty,' 'no contest,' or 'not guilty'?"

Mumbling, then, "Guilty."

"Are you pleading guilty voluntarily and of your own free will?"

"Yes."

"Are you pleading guilty because you are afraid or because you were persuaded to do so or talked into it?"

"No."

"Has anyone promised you anything other than the agreements contained in the plea bargain, if any?"

"No."

"Are you pleading guilty because you are guilty and for no other reason?"

"Yes."

"Let me show you this document titled 'Admonitions to the Defendant.' Have you read over these admonitions with your attorney and interpreter?"

"Yes."

"Do you understand everything contained in the written admonitions?"

"Yes."

The judge continues to touch all of the bases before sentencing.

"You previously entered a plea of guilty. Do you have any further evidence to present regarding punishment or any objections?"

More mumbling, defendant says something, interpreter turns to the judge and answers, "No."

"Does the State have a recommendation?"

The prosecutor answers, "Yes, your honor. The State recommends that the proceedings be deferred without adjudication of guilt and by placing the defendant on community supervision for a period of one year and payment of full restitution to the victim, subject to the conditions specified in the court's order."

Typically the judge pauses here to look over the agreement before him and the charge in order to consider the appropriate conditions for community supervision. However, this time the judge takes more time than usual. He is looking down at the papers and looking up at the defendant with a furrowed brow.

Then, without thinking about it, the judge asks, "Sir, are you a citizen or legal resident of the United States?" Immediately the defense counsel answers before the interpreter finishes speaking to his client. "Your honor, I believe that question is irrelevant to the matter at hand, whether the plea agreement will be accepted by you or not."

The judge looks back at the defense attorney and replies, "The first condition I always set for every individual receiving community supervision is that the defendant 'shall commit no offense against the laws of this State or of any other State or of the United States.'[7] I understand the difficult position this puts you in.

[7] *See* TEX. CODE CRIM. PRO. art. 42.12 § 11(a)(1) (Vernon).

With the possibility that your client is breaking the law as soon as I accept this plea bargain, I cannot in good conscience place him under community supervision."

"In that case, your honor, I will advise my client to 'plead the Fifth.'"

How should the judge proceed? Does the judge have the discretion to base the community supervision decision on the defendant's immigration status? Should the judge base the community supervision decision on the defendant's willingness to follow every law except the law that he can only follow by leaving the country? This is a question judges face every day in Texas courts.

II. Immigration

A. History

Since the Alien Act of 1798, the United States has regulated noncitizens in the United States.[8] The power to regulate immigration stems from the United States Constitution[9] and the inherent power of national sovereignty.[10] While the first one hundred years of our nation was relatively free of restrictions on immigration,

[8] Act of of June 25, 1798, ch. 58, 1 Stat. 570.
[9] U.S. CONST. ART. I § 8[3] & [4].
[10] The Chinese Exclustion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603–04 (1889) ("That the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.").

Congress passed a statute barring convicts and prostitutes in 1875[11] and followed it with the first general immigration statute in 1882.[12]

Beginning in 1917, the policy of immigration restriction became full-fledged. These new immigration laws, along with those passed in 1924 created the need for immigration visas.[13] Those entering without the appropriate visa or in violation of the quota requirements were deportable.[14] Further restrictions resulted from the Alien Registration Act of 1940.[15] The Alien Registration Act expanded exclusion and deportation of criminal and subversive groups and included past subversive acts.[16] The act also put a registration and fingerprinting system into place.[17]

The late 1940s saw a relaxation of some of the immigration laws in response to the end of World War II and the needs that resulted.[18] One such need was in agriculture.[19] In 1942, the Bracero Program was a type of guest worker program,

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[11] Act of March 3, 1875, 18 Stat. 477.
[12] Act of Aug. 3, 1882, 22 Stat. 214.
[13] Immigration Act of 1924, ch. 190, 43 Stat. 153; 1-2 Immigration Law and Procedure § 2.02[3]. (Matthew Bender source)
[14] *Id.*
[15] Alien Registration Act of 1940, ch. 439, 54 Stat. 670.
[16] *Id.*
[17] *Id.*
[18] *Id. See* Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (allowing refugees to become citizens); War Brides Act of Dec. 28, 1945, ch. 591, 59 Stat. 659; Fiancees Act of June 29, 1946, ch. 520, 60 Stat. 339; Act of June 30, 1950, ch. 443, 64 Stat. 316, *as amended by* Act of July 24, 1957, 71 Stat. 311.
[19] MICHAEL C. LEMAY, ILLEGAL IMMIGRATION: A REFERENCE HANDBOOK 4 (ABC-CLIO) (2007).

which allowed U.S. employers to import Mexican workers for nine months of a given year.[20]

In 1952, the immigration system was "recodified" into one act. As amended, the Immigration and Nationality Act of 1952 (INA) provides the basis for United States immigration law today.[21] The INA deemed every person entering the United States as an alien, unless he could show he was a nonimmigrant.[22] Many of the current laws still reflect those from the INA of 1952.

Since 1952, the INA has undergone substantial changes. The changes brought about in 1965 created new issues, but the most significant changes concerning this article took place in 1996, as discussed below.

B. Unauthorized Entry

Since records have been kept, the United States has welcomed approximately 70 million people as authorized immigrants.[23] In addition to those entering legally, millions have followed illegally. Currently, it is estimated that over 11 million individuals reside in the United States without authorization,[24] but that number

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[20] *Id.*
[21] Cite
[22] 8 U.S.C. § 1101(a)(3); *see* 8 U.S.C. § 1101.
[23] LEMAY, *supra* not 19, at 1.
[24] Homeland Security's Office of Immigration Studies new report, "Estimates of the Unauthorized Immigrant Population Residing in the United States, January 2008"

could be as high as 38 million.[25] Unauthorized immigration typically consists of two types: (1) Those who enter illegally without documentation, generally known as "illegal aliens," and (2) those who enter legally with a visa but overstay their visa.[26] This article focuses on the first category. Approximately sixty percent of unauthorized aliens are undocumented aliens who have entered illegally.[27]

As mentioned above, the United States began restricting immigration in earnest in 1875. However, it was not until the 1980s that increased criminal consequences of immigration law violations began in dramatic effect.[28] The Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorized state and local law enforcement officials to arrest and detain certain undocumented aliens.[29] In addition, the IIRIRA changed the burden of proof required at deportability hearings for aliens.[30] Federal prosecutions also began in earnest, and by 2005, immigration-related matters represented the single largest group of federal prosecutions.[31] Numerous articles and sources discuss these issues. Our concern is the impact on Texas courts.

(released February, 2009), *available at* http://www.dhs.gov/ximgtn/statistics (last visited March 14, 2009).

[25] Californians for Population Stabilization, Report by CAPS Disputes Government Figures, *available at* http://www.capsweb.org/content.php?id=57&menu_ id=8 (last visited March 14, 2009).

[26] LEMAY, *supra* not 19, at 1.

[27] *Id.*

[28] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367, 369 (2006).

[29] Pub. L. No. 104-208, 110 Stat. 3009.

[30] *Id.*

[31] Stumpf, *supra* note 28, at 369 (citing TRAC Reports, TRAC/DHS, Immigration Enforcement, New Findings (2005), http://trac.syr.edu/tracins/latest/current).

III. Community Supervision

A. Community Supervision in General

"Community supervision" is the term used in Texas for probation.[32] Article 42.12 of the Texas Code of Criminal Procedure regulates Community Supervision. Community supervision may be granted by a judge or jury.[33] In Texas, two types of community supervision exist: deferred adjudication and post-conviction supervision.[34] They differ in the way a person may receive one or the other at sentencing and in the resulting effect on a defendant's record.[35] Deferred adjudication and post-conviction supervision are discussed below.

1. Deferred Adjudication

Deferred adjudication is only available from a judge, not a jury.[36] For deferred adjudication, a judge hears a plea of guilty or no contest, but delays any finding of guilt and places a defendant on community supervision for a specific length of time

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[32] In 1993, "probation" was changed to "community supervision." The legislature stated that inadvertent reference to the old terms of "probation" and "deferred adjudication" essentially means "community supervision." Acts 1993, 73rd Leg. ch. 900, § 4.04(a).
[33] TEX. CODE CRIM. PRO. art. 42.12 §§ 3 & 4 (Vernon).
[34] *Id.* §§ 3 & 5.
[35] *See id.* § 1.
[36] *See id.* § 5(a).

and with specific conditions of supervision.[37] The main benefit for the defendant is that the finding of guilt is postponed and no sentence is assigned.[38] The state benefits by retaining its ability to seek a finding of guilt and sentence the defendant without a jury trial if the terms of supervision are violated.[39]

Once a defendant pleads guilty or no contest, the state may recommend deferred adjudication for any eligible offense, regardless of the punishment range including enhancements.[40] Except for certain sexual offenses,[41] deferred adjudication can be for any period of time up to the maximum specified by law.[42] The maximum for a felony is ten years; for a misdemeanor, it is two years.[43] At any time, a judge may reduce or terminate a period of deferred adjudication supervision during the period of supervision if the judge finds that it would be in the best interest of society and the defendant.[44]

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[37] *Id*. § 2(2)(A) & 5(a).
[38] *Id.* § 5(c).
[39] JOHN BRADLEY, THE PERFECT PLEA 73 (Texas District & County Attorneys Association 2008).
[40] Wilcox v. State, 18 S.W.3d 636 (Tex. Crim. App. 2000) (Price, J., concurring to PDR?); Cabezas v. State, 848 S.W.2d 693 (Tex. Crim. App. 1993). Certain intoxication offenses, sexual offenses, and drug offenses are not eligible for deferred adjudication. TEX. CODE CRIM. PRO. art. 42.12 § 5(d).
[41] "For a defendant charged with a felony under section 21.11, 22.011, or 22.021, Penal Code, regarless of the age of the victim, and for a defendant charged with a felony described by Section 12B(b) of this article, the period of community supervision may not be less than five years." *Id.* § 5(a).
[42] JOHN BRADLEY, THE PERFECT PLEA 76.
[43] TEX. CODE CRIM. PRO. art. 42.12 § 5(a).
[44] *Id.* § 5(c); State v. Juvrud, 96 S.W.3d 550 (Tex. App.—El Paso 2002), *aff'd* 187 S.W.3d 492 (Tex. Crim. App. 2006). Does not include certain sexual offenses. *See* TEX. CODE CRIM. PRO. art. 42.12 § 5(c).

2. Post-conviction supervision

Post-conviction supervision is the placement of a convicted and sentenced defendant by a judge or jury on community supervision for a specific length of time and under specific conditions.[45] The defendant is adjudicated as guilty; however, the term of confinement, fine, or both confinement and fine is suspended during the term of supervision.[46]

The eligibility requirements for post-conviction community supervision granted by the judge can differ from the requirements when granted by a jury.[47] Eligibility for judge-ordered supervision is limited based on the offense. A judge may not order community supervision if the offense is capital murder, murder (committed after August 31, 1993), aggravated sexual assault, aggravated kidnapping, aggravated robbery, injury to a child punishable as a first degree felony (committed after August 31, 2007), using or exhibiting a deadly weapon, and certain sexual offenses.[48] In addition, certain drug offenses are disqualified from community supervision.[49]

If a defendant is not eligible based on the offense, the defendant may still be able to seek community supervision from a jury. The limitations on jury-ordered

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[45] TEX. CODE CRIM. PRO. art. 42.12 §§ 2(2)(B), 3(a), 4(a).
[46] *Id.* § 2(1-2).
[47] *See id.* § 4.
[48] *See id.* § 3g.
[49] *See id.* §§ 3g(a)(1)(G)(i) & 5(d).

eligibility are fewer than when a judge orders community supervision.[50] A defendant is not eligible for community supervision from a jury for murder (committed after August 31, 2007), murder with a hate crime finding, indecency with a child, aggravated kidnapping (with intent to violate or abuse the victim sexually, aggravated sexual assault if the victim is younger than fourteen, sexual performance of a child (committed after August 31, 2007), a second conviction for a drug offense with a drug-free zone finding, or a second conviction for any offense with a hate crime finding.[51] If the offense is not one of the above, the jury may agree to community supervision if the sentence does not exceed ten years of imprisonment, the defendant has not been convicted of a prior felony, and the jury finds the motion that the defendant has not previously been convicted of a felony is true.[52] A jury may order post-conviction supervision for some violent crimes for which a defendant is not eligible with judge-ordered community post-conviction supervision, and it may also give community supervision regardless of a deadly weapon finding.[53]

3. Impact on a noncitizen

It is safe to say that no individual wants a "record." This is one of the reasons deferred adjudication is appealing to most. For an alien in the U.S., however, the concern goes deeper. While an alien, legally or illegally residing in the U.S., does not

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[50] BRADLEY, *supra* note 44, at 78.
[51] *Id.* § 4(d)(4–7).
[52] *Id.* § 4(d)(1–3) & (e).
[53] BRADLEY, *supra* note 44, at 79.

want a conviction on his or her record, the alien could also face other consequences, such as removal.[54]

For purposes of immigration law, a deferred adjudication is a conviction.[55] Therefore, there is no difference between deferred adjudication and post-conviction supervision concerning immigration consequences. If the immigrant goes before Immigration and Customs Enforcement (ICE), he will be treated the same regardless of the type of community supervision.

Regardless of the offense, removal is possible for all aliens who are not Legal Permanent residents.[56] An undocumented alien's primary concern is avoiding ICE and a subsequent removal. In some cases, the individual may be eligible for voluntary departure rather than removal.[57] However, federal law controls the jurisdiction and removal of aliens, and the responsibility does not fall on Texas judges.

B. The Role of the Judge

An award of community supervision is not a right; it is a contractual privilege.[58] With that in mind, the judge assumes a great deal of discretion through the community supervision process.[59] For both deferred adjudication and post-conviction supervision, only a judge may specify a definite length of time for

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[54] *See* 8 U.S.C. §§ 1101(a)(48), 1227(a)(2); Madriz-Alvarado v. Ashcroft, 124 Fed. Appx. 296 (5th Cir. 2004); Moosa v. INS, 171, F.3d 994 (5th Cir. 1999).
[55] Ghebregziabiher v. Mukasey, 2008 U.S. App. LEXIS 26918 (2008 WL 5352009) (5th Cir. Dec. 23, 2008) (per curiam).
[56] *See* 8 U.S.C. § 1325.
[57] Cite
[58] Speth v. State, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999).
[59] *Id.* at 533.

supervision and written conditions for the defendant to obey.[60] In addition to discretion in these areas, a judge can reduce or terminate community supervision in appropriate situations when he or she believes that it is in the best interest of society and the defendant.[61] The judge has complete discretion as to whether community supervision should be offered to a defendant at all when the jury is not deciding the question.[62]

Once the judge chooses to order community supervision, the judge's options only increase. The judge determines the conditions of community supervision the defendant must adhere to.[63] Section 11 contains twenty-four conditions and explicitly states that the judge is not limited to these conditions.[64] The judge should impose conditions designed to protect or restore the community; protect or restore the victim; or punish, rehabilitate, or reform the defendant.[65] This can include conditions from requiring the defendant to follow the laws of the land[66] all the way to requiring the defendant to wear a sandwich board outside of Wal-Mart warning shoppers against shoplifting.[67] As long as it is a reasonable punishment, the broad discretion of the judge remains intact.[68] The broad discretion lies in the fact that

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[60] TEX. CODE CRIM. PRO. art. 42.12 §§ 3(a), 4(b), 11(a).
[61] *Id.* § 5(c); State v. Juvrud, 96 S.W.3d 550 (Tex. App.—El Palso 2002), *aff'd* 187 S.W.3d 492 (Tex. Crim. App. 2006).
[62] TEX. CODE CRIM. PRO. art. 42.12 §§ 3(a) ("A judge, in the best interest of justice, the public, and the defendant . . . may . . . place the defendant on community supervision . . . .").
[63] *Id.* § 11(a).
[64] *Id.*
[65] *Id.*
[66] *Id.* § 11(a)(1).
[67] Tommy Witherspoon, *Title*, WACO TRIBUNE HERALD, Jan. 16, 2008, at 1C.
[68] Speth v. State, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999).

"the granting of community supervision is a *privilege*, not a right."[69] It is this broad discretion that creates the framework of the issue addressed in this article.

C. When Community Supervision Meets Immigration Issues in State Court

Since 1875, state restrictions of immigration have been unconstitutional as an infringement on the federal power over foreign commerce.[70] However, with the new power authorizing state and local law enforcement officials to arrest and detain certain undocumented aliens,[71] the extent to which states can consider immigration issues in various circumstances is a question once again.

The caselaw and statutes provide little direction in answering our questions. At the time of writing this article, I have found no cases on point to support one side or the other. State statutes and federal statutes have also proven to be without guidance. The INA refers to undocumented aliens who may be on probation, but it is not helpful here. Section 241 states that probation is not a reason to defer removal of the alien.[72] However, the reference does not refer to whether the alien is legally residing in the United States.

1. Caselaw: Gutierrez v. City of Wenatchee[73]

While no cases are on point, a 1987 order out of a United States district court in Washington merits a brief discussion.

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[69] *Id.* at 532 (citations omitted) (emphasis in original).
[70] Henderson v. City of New York, 92 U.S. 259 (1875).
[71] IRCA (find section)
[72] 8 U.S.C. § 1231(a)(4)(A).
[73] 662 F. Supp. 821 (E.D. Wash. 1987).

In *Gutierrez v. City of Wenatchee*, Gutierrez, a Mexican national in the U.S. illegally, was charged with several misdemeanors in a Washington state court. [74] Gutierrez entered into a plea bargain in which he agreed not to break any laws nor return to the county of his crimes.[75] Shortly thereafter, he took a voluntary departure instead of deportation.[76] Within a week, he was back from Mexico. His presence was not discovered for almost nine months until he was detained by INS agents.[77] The newly enacted Immigration Reform and Control Act of 1986 (IRCA) prevented them from holding Gutierrez.[78] In an attempt to circumvent the issues preventing INS from detaining Gutierrez, the agents provided affidavits to the city attorney, alleging that Gutierrez violated the law by returning to the United States illegally.[79] The attorney presented this information to the court. In response, the court ordered revocation.[80] The U.S. district court concluded that the state court had no jurisdictional authority to make a factual determination and reach a legal conclusion that a federal law had been broken.[81] As a federal issue that is squarely under the power of Congress alone, the court held, the state has no power to determine alienage of an individual. [82]

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[74] *Id.* at 822.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 824.
[82] *Id.* at 824–25.

The value in this case is not for the guidance it offers to Texas courts,[83] but rather to frame the issue and show that it is not one unique to today or to Texas.

D. Statutory Guidance

Some guidance can be found in Texas statutes. The Texas Legislature has given the Texas Department of Criminal Justice authority to interpret federal law and make determinations of an immigrant's status in the United States.[84] The Texas Government Code states that the department shall inquire into all individuals held in one of its facilities "for whom the department is unable to reasonably ascertain whether or not the person is an illegal criminal alien.[85] Once the department determines that a person is an illegal criminal alien, it shall promptly notify the Immigration and Naturalization Service (now Immigration and Customs Enforcement).[86] The most interesting aspect of this section, however, is the definition of "illegal criminal alien". An "illegal criminal alien" includes only persons who have been convicted of a felony.[87] The Government Code does not mention aliens who have been convicted of misdemeanors or received deferred adjudication, both considered convictions under the INA.[88] This omission is especially important

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[83] The determination that state courts infringed on federal sovereignty, even when the adjudication arises in a state law proceeding, was incorrect according to the United States Supreme Court. Tafflin v. Levitt, 493 U.S. 455. State courts still have "the jurisdictional authority to make a factual determination and reach a legal conclusion that a federal law has been broken." Gutierrez, 662 F. Supp. at 824.
[84] *See* TEX. GOV'T CODE § 493.015.
[85] *Id.* § 493.015(b).
[86] *Id.* § 493.015(c).
[87] *Id.* § 493.015(a).
[88] *See* 8 U.S.C. §§ 1101(a)(48), 1227(a)(2); Madriz-Alvarado v. Ashcroft, 124 Fed. Appx. 296 (5th Cir. 2004); Moosa v. INS, 171, F.3d 994 (5th Cir. 1999).

to this discussion because Article 2.25 of the Texas Code of Criminal Procedure requires a judge to report to Immigration and Naturalization Service (now Immigration and Customs Enforcement) "a person who has been convicted in the judge's court of a crime or has been placed on deferred adjudication for a felony and is an illegal criminal alien as defined by section 493.015(a), Government Code."[89] This statute leaves out those who have been convicted of misdemeanors. The consequence is that people convicted of misdemeanors face the same immigration consequences while being without the same protections at the state level.

In addition to these two reporting statutes, the Code of Criminal Procedure requires a judge, before accepting a plea in a felony case, to inform the defendant that his or her plea may result in deportation, exclusion from the country, or the denial of naturalization.[90] Once again, persons who committed misdemeanors are excluded.

The statutes do not resolve the main question, especially if the individual is before the judge for a misdemeanor. One thing the statutes make clear, though, is that the Texas legislature anticipated judges accepting pleas from undocumented aliens where the state agreed to deferred adjudication or probation. If the legislature expected judges to have these options for undocumented aliens, then it is likely that a person's status in the United States is contemplated as a consideration at the sentencing stage.

E. Broad Discretion for Texas Judges

[89] TEX. CODE CRIM. PRO. art. 2.25.
[90] *Id.* art. 26.13(a)(4).

1. Sentencing Stage

During the sentencing process, a judge has broad discretion when sentencing the individual. But just how broad is the judge's discretion? The Code of Criminal Procedure limits a judge's discretion in slightly different ways depending on the type of community supervision. In deferred adjudication, the judge's opinion must be based on the best interest of society and the best interest of the defendant.[91] With post-conviction supervision, the judge must consider the best interest of justice, the public, and the defendant.[92] In addition to these separate interests, judges are also limited by offense-based restrictions.[93]

The best interests of society and the defendant and the best interests of justice, the public, and the defendant are not so dissimilar as to warrant a discussion. The issue is whether a defendant's undocumented status affects the best interests of justice, the public, society, or the defendant. In almost every situation, if the judge knows or suspects that the defendant before her is here illegally, she will take that into consideration. Based on the statutory language of the Code of Criminal Procedure and the Government Code, it is clear that the legislature did not intend the defendant's undocumented status to be a significant factor in the best interests of those involved. In addition, almost all of the concerns that would arise due to a person being in the United States illegally can and should be considered as factors on their own. If the person is a flight risk because of no community ties, then this factor should be considered on its own. If the person is unemployed and unable

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[91] *See* TEX. CODE CRIM. PRO. art. 42.12, § 5(a).
[92] *Id.* art. 42.12, § 3(a)
[93] *See id.* §§ 3(g) (judge-ordered post-conviction supervision), 5(d) (deferred adjudication).

to make required payments, then this factor should also be considered on its own. By considering these factors independently, the judge avoids all potential due process conflicts that may arise if she only considers the person's status in the United States.

If the person is here illegally, the undocumented status must be acknowledged when the judge imposes the conditions of supervision.

2. Imposition of Conditions of Supervision

To be clear, sentencing is a separate decision than the imposition of conditions, even if they happen contemporaneously with the conditions immediately following the granting of deferred adjudication or post-conviction supervision. The Code of Criminal Procedure contains twenty-four possible conditions.[94] A judge is not limited to these twenty-four, nor is the judge required to impose any of these conditions.[95] The judge "may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant."[96] It is here that the judge is given the most discretion. The guidelines for imposing conditions encompass those of the sentencing phase for both deferred adjudication and post-conviction supervision. Additional guidelines are also added to ensure that the judge considers each aspect more clearly.

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[94] *See id.* § 11(a).
[95] *See id.* ("Conditions of community supervision may include, but shall not be limited to, the conditions that the defendant shall . . . [twenty-four conditions]").
[96] *Id.*

While a judge has broad discretion on what conditions to impose, it is likely most judges simply pick and choose from the list of twenty-four options. The first condition, requiring the defendant to "commit no offense against the laws of this State or of any other State or of the United States,"[97] is the one that gives judges pause when considering whether to sentence undocumented citizens to community supervision. If the court suspects the defendant is an undocumented alien, then this condition should give pause, because the defendant is breaking the law simply by being in the United States illegally.[98] However, unlike the judge at the beginning of the article, judges should not base the sentence on the person's status in the country, but rather, should adjust the conditions to support the decision granting community supervision.

A judge's broad discretion when imposing conditions allows her to modify the first condition offered in the statute. The condition could be the same, and the judge could simply add an exception for being here illegally. Or the judge could make the condition more specific by excluding a violation of Title 8, sections 1182 and 1325 of the United States Code for purposes of the supervision.[99] Either way, the judge has the discretion to consider the punishment, reformation, and rehabilitation of the defendant without creating an impossible situation for the alien. From the statutes and case law, it appears that this is the intention of the legislature.

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[97] *Id.* § 11(a)(1).
[98] Unlawful presence
[99] Inadmissible aliens and Improper entry by alien.

IV. The Defendant

If the judge considers the information before him based on this article, what happens to the defendant from Section I? If the judge does not consider the defendant's immigrant status as a factor when he decides whether deferred adjudication is appropriate, he will consider first whether the defendant's offense is eligible for deferred adjudication. Theft between $50 and $500 is not barred by the Texas Code of Criminal Procedure,[100] so the defendant passes the first step. Next, the judge considers the guiding factors of the code: in the judge's opinion, is the best interest of society and the defendant served by deferring adjudication?[101] With a clean record, the minor crime, and its nonviolent nature, society has an interest in not paying for the defendant while he is in jail. The defendant's best interest is also not being in jail. His pregnant wife is likely to be better taken care of if the defendant remains with her. In addition, the defendant can avoid some of the negative aspects of a conviction.[102] Based on these factors, the judge will likely conclude that the defendant is a good candidate for deferred adjudication. Once the judge decides that he is eligible for deferred adjudication, she must proceed to the next decision: Imposing the conditions of the community supervision.

If the judge recognizes the likelihood that the defendant is not in the United States legally from the lack of a social security number or license, or other reason that prevents a judge from reasonably ascertaining whether or not the person is an

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[100] *See* driving, flying, boating while intoxicated, sexual assault and sex crimes against children; TEX. CODE CRIM. PRO. art. 42.12, § 5(d).
[101] *Id.* § 5(a).
[102] *Id.* § 5(c), *but see* 8 U.S.C. §§ 1101(a)(48), 1227(a)(2); Madriz-Alvarado v. Ashcroft, 124 Fed. Appx. 296 (5th Cir. 2004); Moosa v. INS, 171, F.3d 994 (5th Cir. 1999).

illegal alien,[103] she must consider the first condition in section 11(a): "The defendant shall commit no offense against the laws of this State or of any other State or of the United States."[104] The judge may then adjust the condition to read: "The defendant shall commit no offense against the laws of this State or any other State or of the United States. The defendant's immigration status shall not be considered an offense against the United States." Once the judge imposes the other conditions, the defendant is able to complete his community supervision.

V. Conclusion

The above decision may leave some judges with an uneasy feeling. It should. As the system stands in its current form, judges have three options: change the condition for an otherwise good candidate, keep the language and put a good candidate for probation in jail, or continue in the lie by giving probation and keeping the condition as it is. The law does not intend for judges to ignore an individual's undocumented status. However, the Texas legislature clearly expects judges to sentence undocumented aliens to community supervision. The intent coupled with the first condition exposes the inconsistencies in the Texas system regarding undocumented individuals.

I recommend that an individual's undocumented status not be considered as a factor in the community supervision decision. The defendant's status should be acknowledged in the construction and imposition of conditions to avoid setting him

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[103] *See* TEX. GOV'T CODE § 493.015(c) (advising the Department of Criminal Justice to identify those "for whom the department is unable to reasonably ascertain whether or not the person is an illegal criminal alien").
[104] TEX. CODE CRIM. PRO. art. 42.12, § 11(a)(1).

up for failure due to an impossible situation. This may give the appearance of making the probation softer or allowing an exception for an undocumented person. The reality, however, is that by adjusting the condition to fit the individual, our system is further strengthened. Rather than ignoring the problem, the courts will hold true to its duty and avoid any appearance of impropriety.[105]

[105] "The legitimacy of the judicial branch ultimately depends on its reputation for impartiality and nonpartisanship." Mistretta v. United States, 488 U.S. 361, 407 (1989). *[Still looking for the appropriate quote]*