



Seminar on

"Crimmigration" 101 for Defense Lawyers

Ronald P. Mondello, Esq.
Immigration and Criminal Attorney

0-100 27th Street
Fair Lawn, N.J. 07410
(201) 703-9400

www.njcrimmigration.com

In the News

Trump v. Hawaii

- Plaintiffs State of Hawaii (operates the University of Hawaii system which recruits students and faculty from the designated countries), 3 individuals who have family from Iran, Syria, and Yemen; the Muslim Association of Hawaii.
 - DHS identified 16 countries as having deficient information-sharing practices and presenting national security concerns.
 - Plaintiffs claim the President's Proclamation violates the Establishment Clause of the First Amendment because it was motivated not by concerns pertaining to national security but by animus toward Islam.
 - 8 USC § 1182(f) entrusts to the President the decisions whether and when to suspend entry whenever he finds that the entry of aliens would be detrimental to the national interest.
 - President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information – both to protect national security and public safety, and to induce improvement by their home countries.
 - The Proclamation crafted country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances while securing the Nation until such time as improvements occur.
 - One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall.
-

In the News

Trump v. Hawaii

- The text says nothing about religion. 5 out of the 7 nations included have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.
 - Iraq is exempted from the Proclamation and it is one of the largest predominantly Muslim countries in the region. Exempted because of the close cooperative relationship between the U.S. and Iraqi Governments and the country's key role in combating terrorism in the region.
 - Sudan and Chad, also Muslim-majority countries have been removed from the list of covered countries. Libya is being considered for removal given their steps to improve its practices.
-

In the News

Trump v. Hawaii

- 8 Countries initially on the list: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, Somalia
 - Range of Restrictions depending on the country
 - North Korea and Syria – suspends ALL nationals.
 - Iran – ok for nonimmigrant student and exchange-visitor visas (significant b/c majority of visa in last 3 years were nonimmigrant from this region especially Iran which is now exempted).
 - Chad, Libya and Yemen – no immigrant visa, no nonimmigrant business or tourist visas.
 - Chad had sufficiently improved its practices and the President lifted ALL restrictions on its nationals
 - Somalia – no immigrant visas and more scrutiny of nonimmigrant visas.
 - Venezuela – only certain government officials and their family members can come on nonimmigrant business or tourist visa.
 - Proclamation exempts green card holders and FN who have been granted asylum
 - Also provides for case-by-case waivers
 - Undue hardship
 - Entry is in the national interest
 - Would not pose a threat to public safety
 - FN seeks to reside with a close family member
 - Obtain urgent medical care
 - Pursue significant business obligations
 - The Proclamation is facially neutral towards religion. Standard of Review is Rational Basis. We will only strike down if the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group.
-

Citi Field
09:03 PM

LIVE



Breaking News

Dead Head Detainees
Taken from their parents

mematic.net

In the News

Border Concerns

- **What is now going on at the border?** Zero tolerance will not be applied to persons traveling with children. Instead, all coming will be expediently removed. If they claim fear, they will be detained by DHS-CBP until (1) it is determined that if more than one parent/adult is traveling with a family unit, at least one of the adults will be released on their own recognize along with the children. Any remaining parent/adult may still be detained. At DHS-CBP's discretion that remaining adult may be bonded out or ROR'd too. However, since the private detention centers need to fill beds to make money, the likelihood is that the remaining adult will be detained. Even after passing a credible fear interview while in detention, the person will probably remain detained; or (2) If neither parent/adult is eligible for ROR with the kids, then the kids will be processed by the Office of Refugee Resettlement (ORR) for safekeeping or making contact with a potential caregiver (extended family member, etc.).
 - **What can I tell my clients about their families at the border?** The following site may be helpful: <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>
 - **How can I help my clients help their families?** If you know of persons traveling with kids, perhaps be accessible, available and willing, so that the ORR can release the kids to your client's care, if the parent/adult is not eligible for bond or ROR.
 - **How can I make contact on behalf of my clients who have loved ones at the border?** The aforementioned site may be helpful: <https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification>
 - **Is there a way I can expedite the process for them?** - Other than the noted website above, I doubt there is much more that can be done.
-

In the News

Border Concerns

- Executive Order 13841 of June 20, 2018
 - Zero Tolerance for illegal entry remains but NOT if you are traveling with children
 - Temporary Detention Policy for Families Entering this Country Illegally
 - Keep families together during the criminal improper entry or immigration proceedings
 - Use existing facilities for housing and care of alien families
 - Construct new facilities if needed
 - All Heads of executive departments shall make available any facilities that are appropriate for such use
 - Prioritization of Immigration Proceedings Involving Alien Families
-



CRIMINAL

IMMIGRATION

MUNICIPAL

**POST CONVICTION
RELIEF**

Immigration Statuses

- US Citizen
- Lawful Permanent Resident (Green Card)
- Temporary visitors (visitors, student)
- EWI
- DACA
- Deferred Action Status
- There are over 60 different kinds of visas

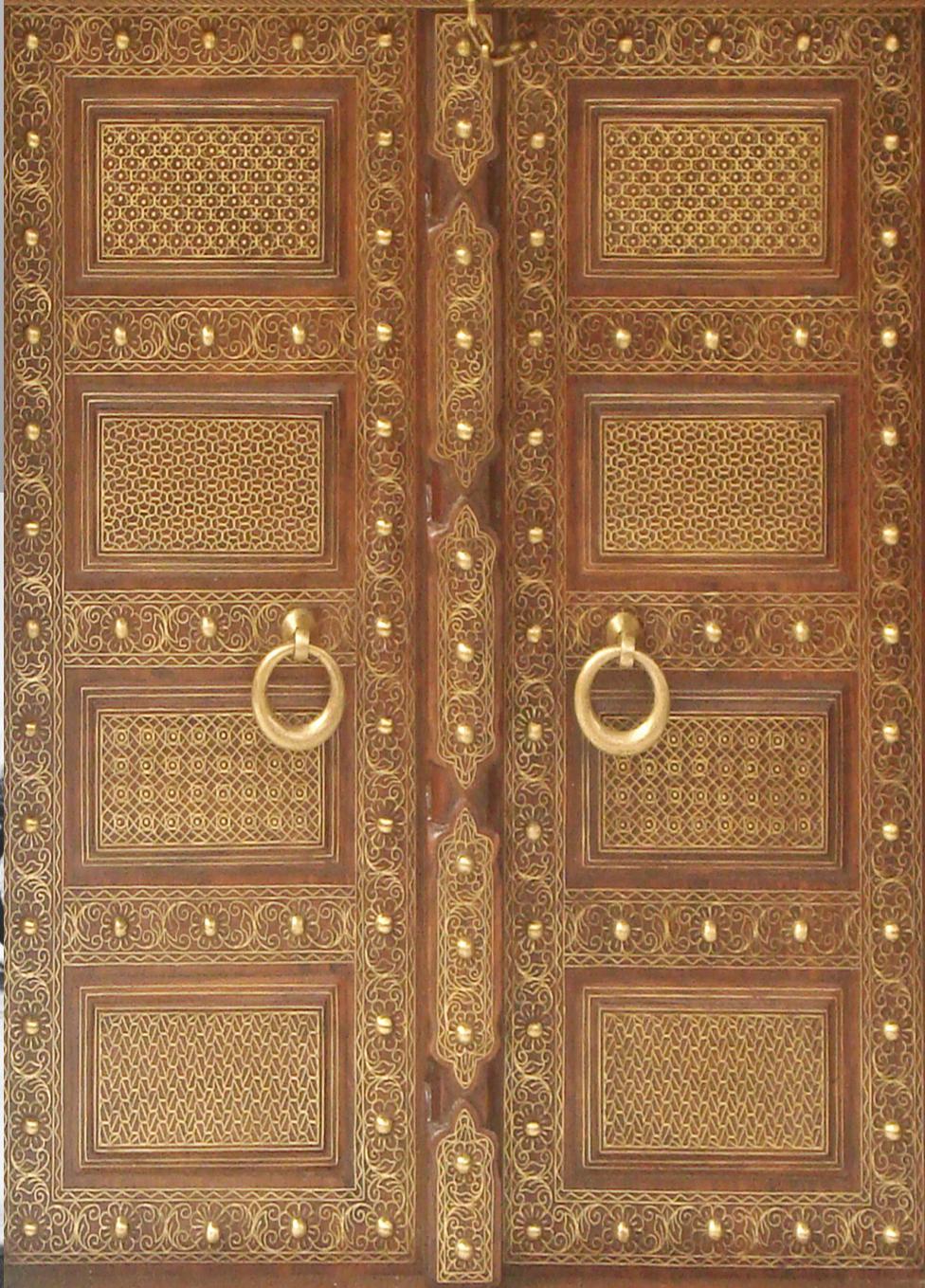
Determining Status



VS



INADMISSIBILITY



Entry without Inspection

EWI/No Inspection



Inadmissibility

- ▣ A Legal Fiction – mere physical presence in the U.S. does not mean that the FN lawfully entered or was admitted to the U.S.
- ▣ You had to have been inspected and authorized by an immigration officer to be admitted therefore **YOU HAVE NOT BEEN ADMITTED EVEN THOUGH YOU ARE HERE!**
- ▣ INA § 212 – Grounds of inadmissibility

Deportability

- ▣ A FN has been lawfully admitted to the U.S. and then commits a crime
- ▣ INA § 237 – Grounds of Deportability

Lawful Permanent Resident

Green Card/Inspected



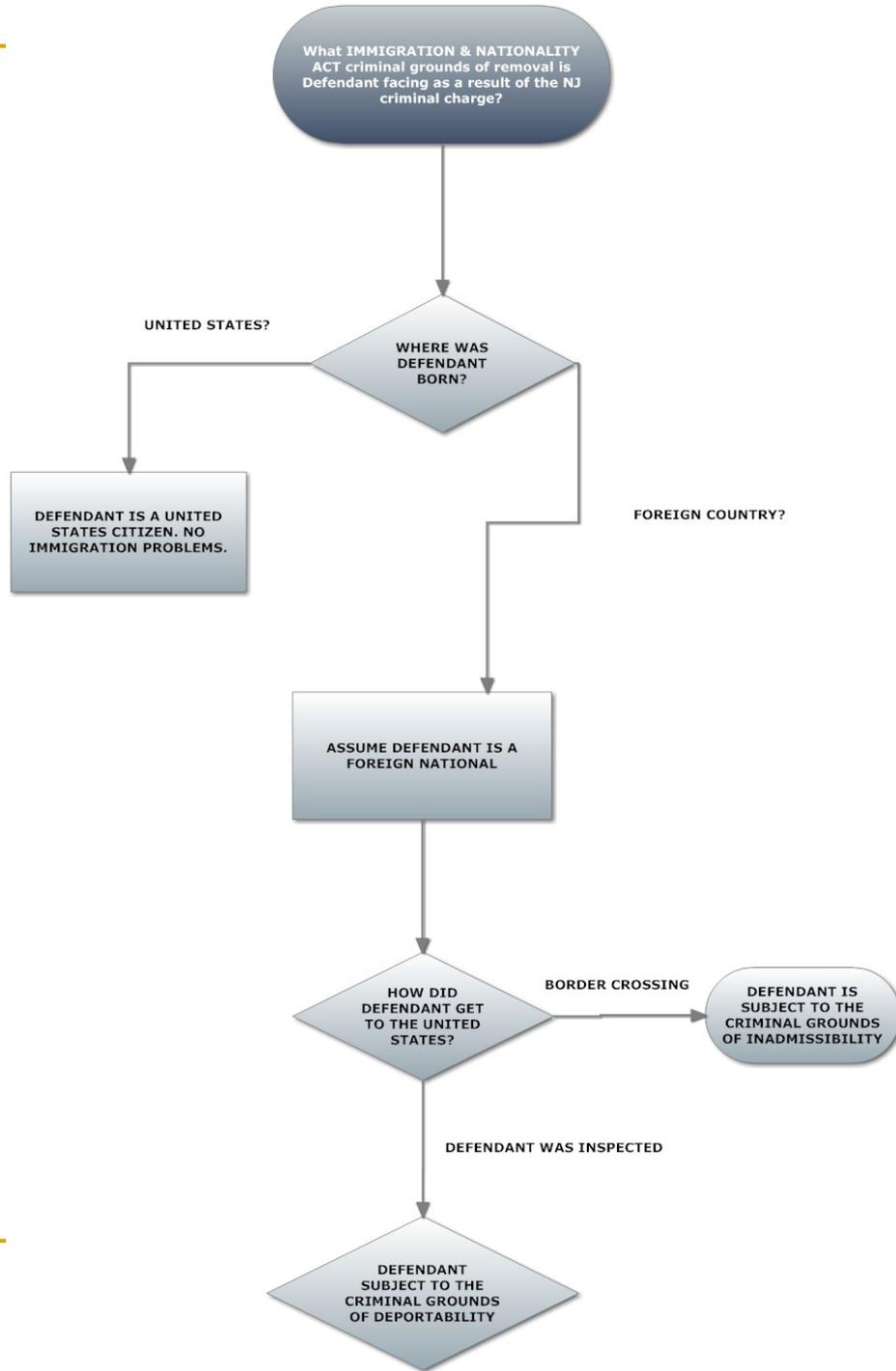
**WHY DOES A NJ CRIMINAL
DEFENSE HAVE TO KNOW THAT?**

Different immigration consequences between criminal grounds of inadmissibility and deportability.

For example:

A NJ criminal conviction may not have the same effect on a green card holder versus an EWI

A NJ criminal conviction may only effect a green card holder if he leaves the country and returns



EXAMPLES

INADMISSIBLE OR DEPORTABLE?

- ✘ Mexican FN here for 10 years. Got here via “Coyote”. If he gets pulled over for DWI; coke in the car and ICE shows up, he is ?
- ✘ Polish FN gets here with a B-2 visitor visa. It expires in 6 months. He gets busted for only simple possession of pot. ICE shows up, he is ?
- ✘ Italian FN with a green card has a criminal conviction for theft. He travels to another country for vacation. When he returns to JFK, he is ?

Inadmissibility v. Deportability

Criminal Grounds

Inadmissibility

INA § 212(a)(2)

- Conviction or admitted commission of any *controlled substance offense*
- Conviction or admitted commission of a *crime involving moral turpitude (subject to a one-time petty offense exception)*
- Conviction of *two or more offenses of any type* with aggregate sentences to imprisonment of at least five years
- Reason to believe *Prostitution* and commercialized vice
- Reason to believe (RTB) drug dealer
- (RTB) Human Trafficking
- (RTB) Money Laundering

Deportability

INA § 237(a)(2)

- Conviction of any *controlled substance offense (other than a single offense of simple possession of 30 grams or less of marijuana)*
- Conviction of a *crime involving moral turpitude* (“CIMT”), committed within five years of admission to the United States and punishable by a year in prison
- Conviction of *two crimes involving moral turpitude* committed at any time and regardless of actual or potential sentence.
- Conviction of a *firearm or destructive device offense*
- Conviction of a *crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, violation of an order of protection*, whether issued by a civil or criminal court.
- Conviction of an *aggravated felony* as defined in INA § 101(a)(43)

Definition of Conviction

- Immigration and Nationality Act (INA) defines a “conviction” as:

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

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (INA § 101(a)(48))

What does that mean for New Jersey “convictions”?

- Only a finality of conviction counts (all times for all direct appeals have expired)
- PCR is collateral. The filing does not change the finality of the conviction
- Any PTI, Conditional Dismissal, or Conditional Discharge with a PLEA is a conviction (IJ will ask for plea transcript)
- Juvenile Delinquency Adjudication is not a conviction (DON'T waive up)

CRIMES INVOLVING MORAL TURPITUDE

- The phrase “moral turpitude” is one of the most ambiguous in the long list of ambiguous legal phrases and the cases are far from consistent.
- Moral turpitude refers to conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general.
- In determining whether an offense involves moral turpitude, it is a common mistake to consider whether the crime is a DP or a “degree” crime. Intentional theft of a piece of bubble gum is theft and involves moral turpitude.
- The facts of your clients case does not determine whether an offense involves moral turpitude. If they did, immigration judges would be charged with retrying the criminal case in immigration court.
- The focus is on whether the elements necessary to obtain a conviction under a particular NJ Criminal Statute render the offense a crime involving moral turpitude.
- **Generally need a specific intent to do harm, or knowledge of the act’s illegality. Recklessness might be enough. Negligence is not moral turpitude.**

Crimes involving moral turpitude



- Discussion of Specific NJ Offenses and Whether they are CIMTs:
 - Theft when a permanent taking is intended (not joyriding)
2C:20-11 Shoplifting
 - Burglary – CIMT if you are there to steal not watch TV or sleep
 - Fraud - need intent to defraud or guilty knowledge
2C:21-5 Bad Checks (intent to defraud is an element)
2C:21-2.1(c) False Documents (intent to defraud is not an element)
 - Crimes of violence (bodily harm is intentionally or knowingly caused or threatened)
 - Most sex offenses
 - DWI plus an aggravating factor like a 39:3-40 where defendant knew his license was suspended (knowledge)
 - CDS (generally not a CIMT but drug dealing is)
 - Firearms (standing alone, not a CIMT but a separate ground of deportability)

“Juvie” & Petty Offense Exceptions for Inadmissible FN Convicted of CIMT’s

“Juvie”

- Crime was committed when FN under 18 years of age and “waived” up to Adult Court; AND
- The FN released from prison
- More than 5 years before the date of application for a visa or other documentation
- And the date of application for admission to the United States

Petty Offense Exception

- Maximum sentence possible does NOT exceed one year; AND
- You are NOT sentenced in excess of six months
- Regardless of actual time spent in jail
- Suspended sentence = Sentence

“Get Out of Deportation Cards” for Deportable FN Convicted of CIMT’s

- CARD 1 - Maximum sentence possible is less than one year (our DP’s). Can occur at anytime.
- CARD 2 - Any Indictable Offense CIMT committed after five years of green card status then one free CIMT crime
- Two or more CIMT’s NOT arising out of a single scheme of criminal conduct regardless of jail or possible sentence and regardless of when occurred = DEPORTABLE
- Not applicable to AF’s

DV/Child Abuse/DWI

Inadmissible

- “significant misdemeanor” like DV or DWI
- Our DP DV’s and our DWI’s will result in deportation for EWI Defendants
- Conditional Dismissal is unavailable for DV
- Even if it was...NO GOOD! Why?
- The arrest on CCH is “labeled” Domestic Violence

Deportable

- DV – must be a “Crime of Violence” at 18 USC § 16
- Violation of Restraining Order
- Child Abuse – generally, almost any act or omission with any *mens rea* (including criminal negligence) that qualifies as maltreatment, and harms a minor’s mental or physical well-being with an actual injury. However, 10th Circuit says *mens rea* of negligence is no good. 2nd Circuit says actual injury not required.
- Generally No issues with DWI’s (DWS)(USC)

Aggravated Felonies

- Definition found in INA §101(a)(43)
- Generally, no relief available to FN
- Three categories:
 - (1) Offenses that are AF by their very nature
 - (2) Offenses that are AF based on monetary amounts or loss to victim
 - (3) Offenses that are AF based upon sentence

Aggravated Felonies

Nature of the Offense

- ⦿ Murder, rape, or sexual abuse of a minor
- ⦿ Drug trafficking (not school zone – wow)
- ⦿ Firearms trafficking (including destructive devices)
- ⦿ Prostitution business
- ⦿ Human trafficking
- ⦿ Kidnapping
- ⦿ Child Pornography

Aggravated Felonies

Monetary Amounts

- Money laundering involving funds in excess of \$10,000
- Fraud or deceit where loss to the victim exceeds \$10,000
- Tax evasion where loss to the Government exceeds \$10,000

Aggravated Felonies

Sentence imposed exceeds one year

- Theft
- Burglary
- Crime of violence (Mateo?)
- Possession of stolen property
- U.S. Passport Fraud
- Commercial bribery, counterfeiting, forgery, or trafficking in vehicles
- Obstruction of justice, perjury or subornation of perjury, or bribery of a witness
- Bail Jumping (2C:29-7 – third degree only)

Crime of Violence at 18 USC § 16

WILSON EMILIO PEGUERO MATEO - VOID FOR VAGUENESS!

- 18 USC § 16a – An offense that has as an element the use, attempted use, or threatened use of physical force against a person or property.
- ~~18 USC § 16b – Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another maybe used in the course of committing the offense.~~ **Resisting Arrest; Eluding Officer: NJSA 2C: 29-2a(3)(b)** uses any other means to create a substantial risk of causing physical injury to the public servant or another.
- Look to the *mens rea* – Purposeful v. Negligence
- Specific Intent to Harm v. Thoughtless or Careless Action. One year jail sentenced required.

The Court concluded that “[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1160

WILSON EMILIO PEGUERO MATEO,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,
Respondent

On Petition for Review of a Decision of
the Board of Immigration Appeals
(Agency Case No. A061-490-292)
Immigration Judge: Honorable Walter A. Durling

Argued April 28, 2016

Before: McKEE, JORDAN, and VANASKIE, *Circuit Judges*.

(Opinion Filed: September 6, 2017)

Tracey M. Hubbard, Esq. (**ARGUED**)

Controlled Substance Violations

- Not all drugs are controlled substances
- Illegal possession of cancer drugs from Haiti is a crime but not a “controlled substance” violation
- Must be listed on the federal schedule (21 USC § 802) otherwise not a controlled substance
- CSV are independent grounds of inadmissibility and deportability (1 simple pot possession 30 grams or less OK for deportable aliens...not for inadmissible aliens)
- Do not need a conviction – or even an arrest – on his record. “Reason to believe” he is a drug dealer is sufficient to be denied admission to the U.S.
- Green Card holder returning from abroad = convicted or admits = denied
- Simple possession of either Crack or Ruffies flu·ni·tra·ze·pam is AF

Illicit Trafficking in a CDS as an AF

Illicit Trafficking Route

- The offense is a felony under the law of the convicting state
- The offense **MUST** contain a trafficking element
- Trafficking means some sort of commercial dealing

Hypothetical Federal Felony Route

- The offense is an AF when the state conviction includes **ALL** the elements of an offense that could be punished as a felony under the Controlled Substance Act (CSA) (21 U.S.C. § 801 *et seq.*)

Illicit Trafficking in a CDS as an AF

Hypothetical Federal

Illicit Trafficking Route

- What is a trafficking element? Need a “commercial transaction”
- Distribute or Dispense does not require the exchange of money, value or consideration
- NJSA 2C:35-2
- Nothing in our Jury Instructions requires exchange of money

Felony Route

- Under this route, the state conviction can be either a misdemeanor or felony, as long as the hypothetical federal conviction would be a felony under federal law
 - Feds view conviction as a non-felony misdemeanor IF (maximum term of imprisonment 365 or less)
OR
 - Distribution of a small amount of marijuana
 - For no \$ is deemed a simple possession offense
 - 21 U.S.C. § 841(b)(4)

Regular Distribution vs. School Distribution (WTF? What the Fiddlesticks)

- NJSA 2C:35-5 is an Aggravated Felony
 - 21 U.S.C. § 841(a)
- (1) to manufacture, distribute, or **dispense**, or possess with intent to manufacture, distribute, or **dispense**, a controlled substance; or
- (2) to create, distribute, or **dispense**, or possess with intent to distribute or **dispense**, a counterfeit substance.

- NJSA 2C:35-7 is NOT an Aggravated Felony
 - 21 U.S.C. § 860
- Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility.

Alternative Elements of the Statute or Alternative Means of Committing the Crime?

Elements

- Must be unanimously found by a Jury beyond a reasonable doubt
- Might contain different minimum or maximum punishments

Means

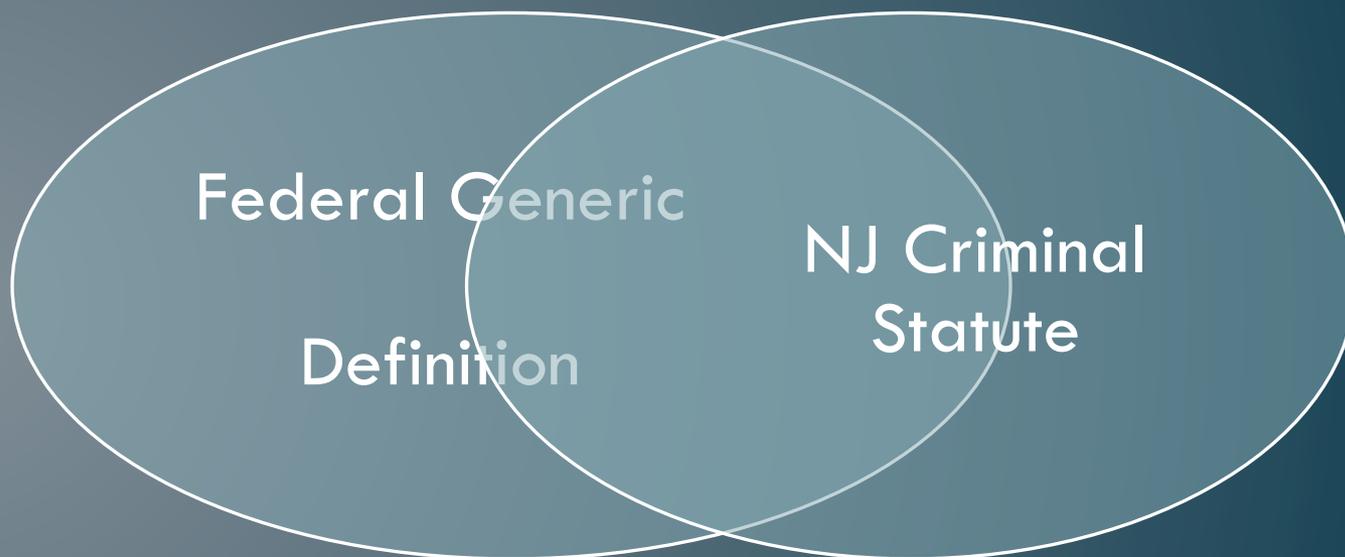
- Jury need not unanimously find
- Only alternative means of fulfilling an element of the statute
- Possible means of commission, not an element that a prosecutor must prove to a jury

Chang-Cruz v. Attorney General USA

659 Fed.Appx. 114 (2016)

- The Third Circuit found that there is uncertainty as to whether “distribution” and “dispensing” in NJSA 2C:35-7 constitute alternative elements or alternative means
- Uncertainty means the Foreign National wins
- If they are both means, there is one element satisfied by either distribution or dispensing, in which case 2C:35-7 sweeps more broadly than 21 U.S.C. § 860
- School Zone distribution is NOT an Aggravated Felony but plain vanilla distribution is!

Not a Categorical Match



Where the NJ criminal statute defines the offense more broadly than the immigration grounds of removal at issue, the conviction will not trigger the immigration penalty regardless of the information that may appear in the individual's record of conviction

NJ AF Crimes that Defense Attorneys should Avoid

- ⦿ NJSA 2C:24-4(a) - Endangering the welfare of a child
(but see Safe Havens)
- ⦿ NJSA 2C:12-1(b) - Aggravated assault
jail => one year (but Mateo?)
- ⦿ NJSA 2C:20-et. seq. Theft
jail => one year
- ⦿ NJSA 2C:18-2 Burglary of a dwelling to steal
jail => one year
- ⦿ NJSA 2C:35-5 Possession with intent to distribute a
CDS
(but see Safe Havens)

SAFE HAVENS IN ORDER TO AVOID AF CLASSIFICATION

- ⦿ NJSA 2C:24-4(a) - Endangering the welfare of a child (eliminate the “sexual conduct”). Defense Counsel should ask for Title 9. Still grounds for Removal.
- ⦿ N.J.S.A. 2C:35-5(b) possession with intent to distribute any controlled substance, except a small amount of marijuana for no remuneration
- ⦿ Criminal sexual contact in which age of the victim is not an element (e.g. N.J.S.A. 2C:14-3(a) and 2C:14-2(a)(7) – aggravated criminal contact in which the victim is helpless)
- ⦿ Reduce Jail sentence to 364 days
- ⦿ Reduce Monetary loss to < \$10,000

Specific Issues in NJ Municipal Court

- ❑ N.J.S.A. 2C:35-10c - Possession, Use or Being Under the Influence, or Failure to Make Lawful Disposition. Failure to turn over or under the influence. Drug is coke. DP, no problem. Right? WRONG! SAFE HAVEN = N.J.S.A. 2C:35-10a(4) POT- 30 grams or less.
- ❑ §36 Conditional Discharge – If Defendant makes a statement of possession in order to exculpate his girlfriend. IJ will request transcript.
- ❑ N.J.S.A. 2C:36-2 – Drug Paraphernalia. “Relating to” a controlled substance violation. A Crack pipe is a BIG PROBLEM.
- ❑ N.J.S.A. 2C:33-2.1 – Loitering. Not a good deal for FN. They lose out on a potential waiver (30 grams or less of pot). Loitering for WHAT?
- ❑ N.J.S.A. 2C:20-11 – Shoplifting. CIMT. SAFE HAVEN = N.J.S.A. 2C:33-2A(1) Disorderly Conduct. Neutral factual basis. I was in Hackensack and created a disturbance.

WHO IS SAFE FROM A DWI?

U.S.C. - SAFE

LPR – SAFE

EWI – ABSOLUTE DANGER!!!!

F1 Student – Discretionary DANGER!!!!

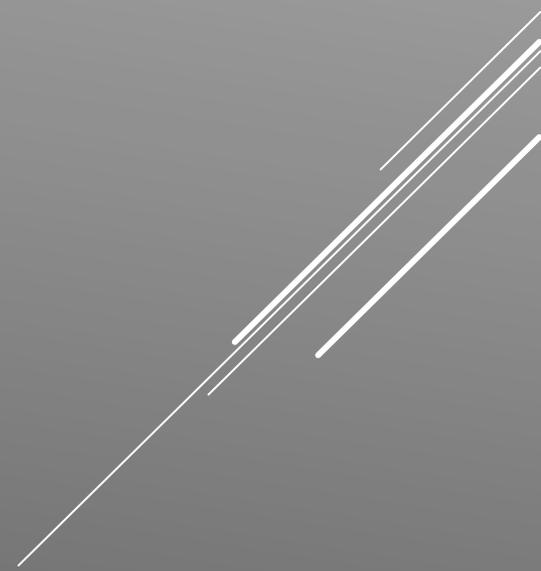
B1/B2 Visitor – Discretionary DANGER!!!!

H1B – Discretionary DANGER!!!!

EXPUNGEMENTS =



EXPUNGEMENTS =



FN Defendant is in the Candem County Jail with an ICE Detainer



ICE DETAINER



- After an alien is taken into state custody, DHS places a notice with state prison officials requesting the Bureau of Prisons or state equivalent to notify DHS if they intend to release the detained alien or hold the alien for DHS.
- Pursuant to 8 CFR 236.1, 287.7, 1236.1, state officials can only hold aliens for 48 hours based on DHS detainer request
- **Immigration Bonds**
 - DHS and EOIR (Executive Office of Immigration Review) typically refer to “bail” as “bond”
 - Immigration Bonds cannot be paid with cash or by personal check and the usual 10% rule that is common in the criminal context is generally not applicable
- **Decision to Detain**
 - Immigration must make a decision within 48 hours of arrest, or in the case of an emergency, a reasonable period of time. See 8 CFR 287.3(d)

Mandatory Detention: INA § 236(c)



- Noncitizens who have committed certain offenses must be detained, without bail, by U.S. Immigration and Customs Enforcement (USICE) during the pendency of their removal proceedings
- We conclude that 8 C.R.F. § 287.7 does not compel state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to local LEAs. Given this, Lehigh County was free to disregard the ICE detainer. **Galarza v. Szalczyk** (C.A.3). March 4, 2014 WL 815127

Mandatory Detention INA § 236(c)



INADMISSIBLE

- CIMT (Juvie and POE)
- Conviction or admitted commission of *any controlled substance offense*
- 2 or more convictions (non-CIMT or CIMT) for which aggregate prison sentences 5 years or more
- Reason to believe (RTB) drug dealer
- (RTB) Prostitution
- (RTB) Human Trafficking
- (RTB) Money Laundering

DEPORTABLE

- CIMT w/i 5 years of admission AND sentenced to at least 1 year jail
- 2 or more CIMT not arising out of single scheme
- Aggravated Felony
- Controlled Substances (except 30 grams or less of pot)
- Firearms Offenses
- Miscellaneous Crimes like espionage, sabotage, treason

ANALYZING CRIMINAL STATUTES
Record of Conviction & Record
of Proceedings

A STATUTE OF CONVICTION MAY TRIGGER A REMOVABLE OFFENSE IN THE INA

NJ Statute of Conviction



Aggravated felony



Firearms offense

Crime of violence



CIMT

Controlled substance offense



BURDENS OF PROOF:

- **Removability**

- DHS/ICE bears the **burden** of proving by **clear and convincing evidence** that the non-citizen is removable. INA § 240(c)(3).
 - DHS must prove that the non-citizen's conviction falls within the federal definition of a removable offense.

- **Relief**

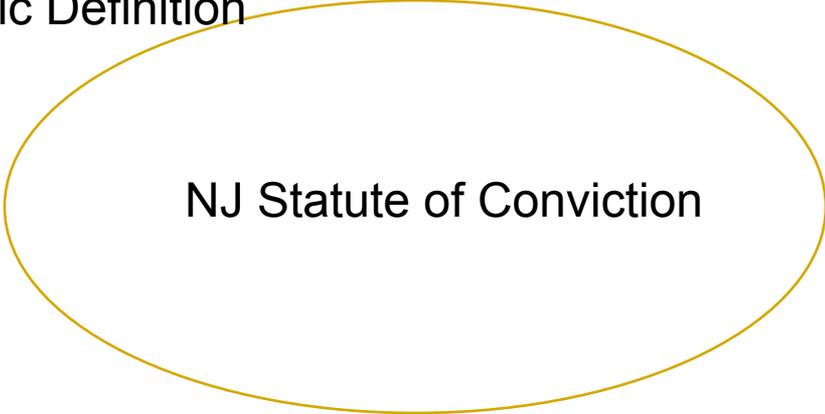
- Once DHS has met its burden of proving removability, the **burden** shifts to the non-citizen to demonstrate statutory eligibility by a **preponderance of the evidence**. INA § 240(c)(2), (4).
-

CATEGORICAL APPROACH:

- Look at the statutory definition, not facts
 - Actual conduct is irrelevant. *Mellouli v. Lynch*, S. Ct. 1980, 1986. (2015).
 - Use the least culpable conduct (for a conviction)
 - Identify the elements and nature of the statute of conviction *Id.*
-

A Categorical Match

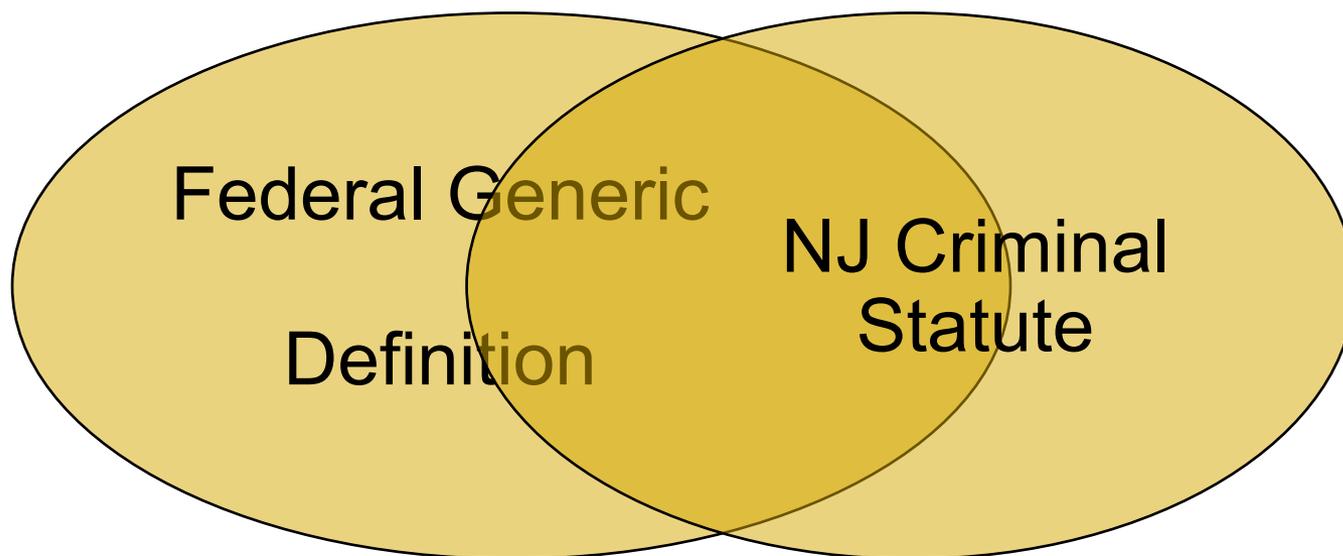
Federal Generic Definition



NJ Statute of Conviction

The NJ criminal statute is a categorical match with the applicable generic definition.

Not a Categorical Match



Where the NJ criminal statute defines the offense more broadly than the immigration grounds of removal at issue, the conviction will not trigger the immigration penalty regardless of the information that may appear in the individual's record of conviction

Modified Categorical Approach:

- WHEN DO WE GO THERE?

- **ONLY** when a state criminal statute is “**divisible**”:

(1) “list[s] potential offense elements in the alternative”

AND

(2) “at least one, but not all” of the alternative versions of the offense is, by its elements, a predicate offense. (a categorical match to federal analog)

Descamps v. U.S., 133 S. Ct. 2276, 2285 (2013); see also *United States v. Brown*, 765 F.3d 185 (3d Cir. 2014).

Modified Categorical Approach:

- WHAT IS IT?
 - MCA permits adjudicators to look (beyond the statutory elements) at the “**record of conviction**” to identify the version of the state offense that resulted in a conviction.
 - **NOT** to see what defendant “actually did”
 - Then compare the **elements** to the generic offense to see if non-citizen was convicted of generic crime listed in the INA.
-

MODIFIED CATEGORICAL APPROACH:

❑ WHAT IS A RECORD OF CONVICTION?

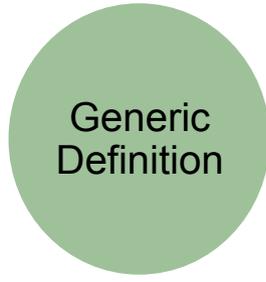
■ **Trial:**

- ❑ charging document (i.e. indictment or the accusation).OR
- ❑ jury instructions

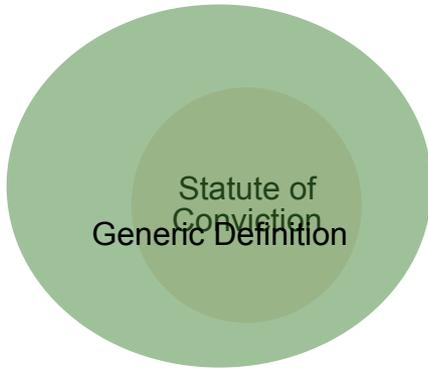
■ **Guilty Plea:**

- ❑ plea agreement or plea colloquy

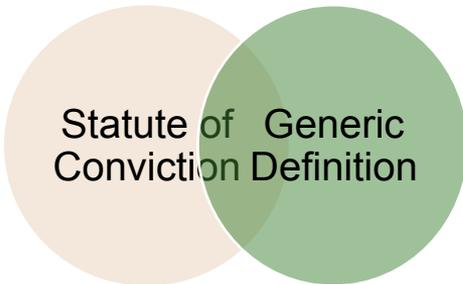
- **Note:** Police reports are generally NOT part of ROC unless incorporated into the guilty plea or were admitted by the alien. *Matter of Milian-Dubon*, 25 I&N Dec. 197 (BIA 2010).
-



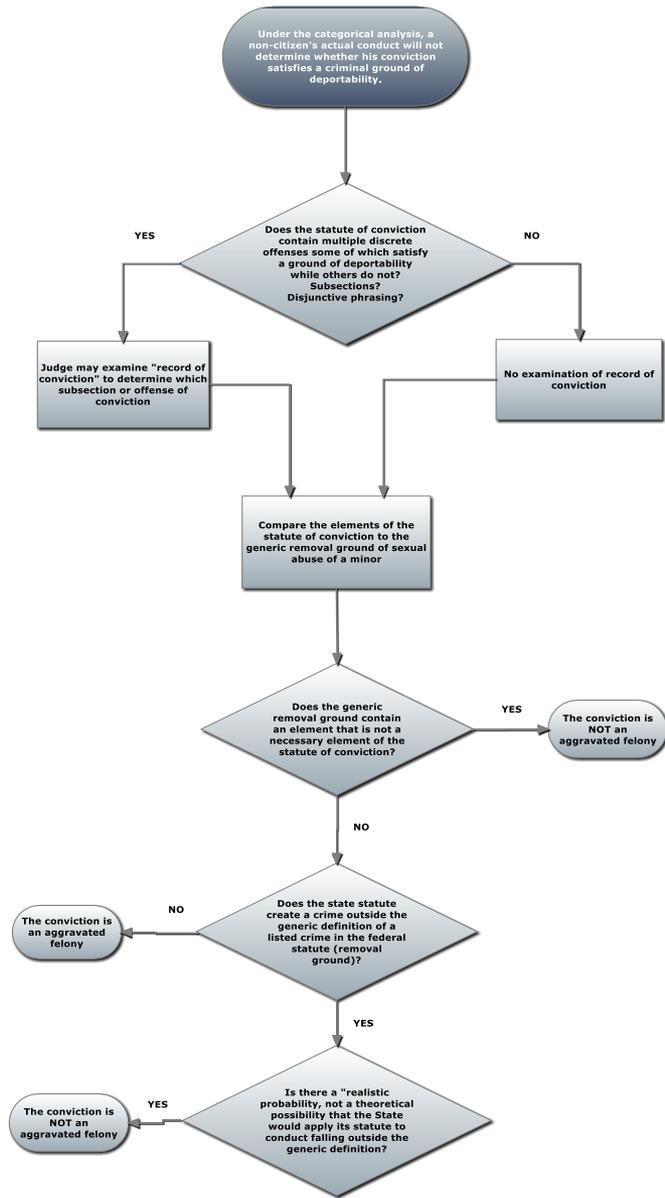
Respondent wins



Respondent loses



Look to record of conviction



First Executive Order



Under Obama DEPORTATION

- ▣ New program – Priority Enforcement (changing priorities)
 - Priority One – Terrorists, street gang related crimes, felonies and Aggravated Felonies
 - Priority Two – 3 or more misdemeanors, one “significant misdemeanor like DWI/DV, or any offense Jail = 90 days, FN entering illegally AFTER 1/1/2014
 - Priority Three – FN with a deportation order issued AFTER 1/1/2014
 - Many if not Most FN NOT on the priority list to deport
- ▣ Secure Communities Program eliminated and replaced with – Priority Enforcement Program
- ▣ In general, NO MORE DETAINERS if FN not on the priority list!

Enforcement - Deportation

How has immigration enforcement changed?
Law versus Policy



Secretary
U.S. Department of Homeland Security
Washington, DC 20528



Homeland Security



MEMO FROM KELLY IMPLEMENTING EXECUTIVE ORDER

Secretary
U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

February 20, 2017

MEMORANDUM FOR: Kevin McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Lori Scialabba
Acting Director
U.S. Citizenship and Immigration Services

Joseph B. Maher
Acting General Counsel

Dimple Shah
Acting Assistant Secretary for International Affairs

Chip Fulghum
Acting Undersecretary for Management

FROM:

John Kelly
Secretary

A handwritten signature in black ink, appearing to read "John Kelly", written over the printed name and title.

SUBJECT:

**Enforcement of the Immigration Laws to Serve the National
Interest**

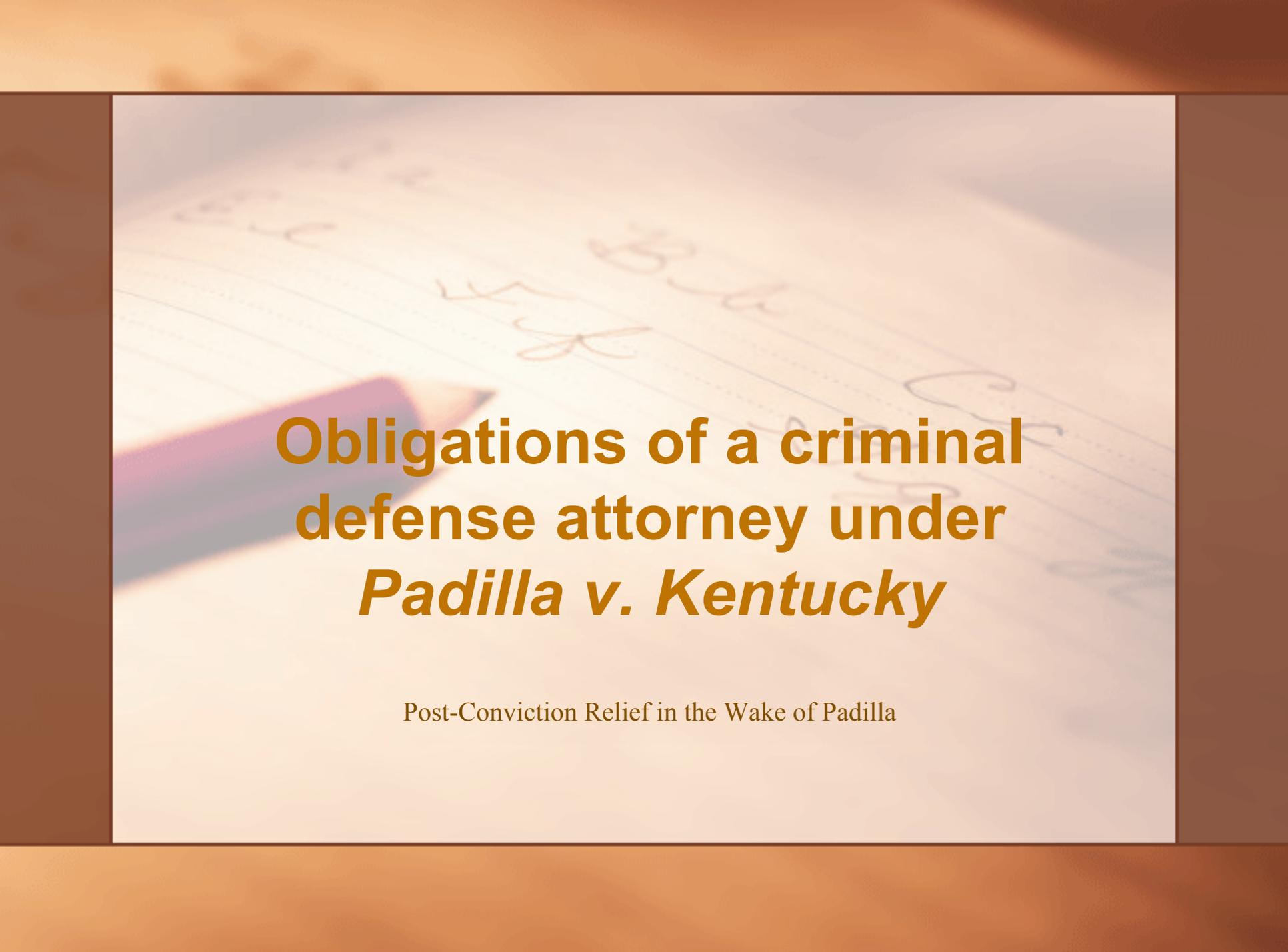
This memorandum implements the Executive Order entitled "Enhancing Public Safety in the Interior of the United States," issued by the President on January 25, 2017. It constitutes guidance for all Department personnel regarding the enforcement of the immigration laws of the

TRUMP'S EXECUTIVE ORDER

Foreign Nationals w/o Status ARE Removable (EWI's, Overstays, Out of Status)

► Enforcement Priorities

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense, where such charge has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;
- Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but have not departed; or
- Otherwise pose a risk to public safety or national security



**Obligations of a criminal
defense attorney under
*Padilla v. Kentucky***

Post-Conviction Relief in the Wake of Padilla

Padilla v. Kentucky

- Requires defense attorneys to advise as to the risks of deportation
- When the immigration law consequences are easy obtained, criminal defense attorneys must advise client
- When the immigration consequences are complex the duty to advise is more limited (see State v. Telford)
- Complex = duty is to advise charges MAY carry a risk of adverse immigration consequences
- Clear = duty to give correct advice
- Prior to Padilla, if you said nothing no IAC. If you gave wrong advice, then IAC. Court recognized prior to Padilla the law was encouraging criminal defense attorneys to say nothing
- After Padilla, you MUST give some form of advice
- For an AF, you MUST tell your client that he is subject to mandatory deportation

Justice Alito in Padilla summarized duties of defense counsel

- They must not give unreasonably incorrect advise
- They must alert the client that a plea may have deportation consequences
- They must tell clients that if they wish to know more that they should consult with an immigration attorney...should be a “cimmigration attorney”. NJ Law as a result of State v. Gaitan.

IAC Claims After Chaidez

- Padilla (3/31/10) requires defense counsel to give accurate immigration advice before plea.
- If the immigration consequences are clear then you must tell them. If unclear then tell client to seek immigration advice.
- Chaidez reaffirmed Padilla's holding that professional norms since 1995 required defense counsel to advise of immigration consequences. It even cited a 1968 ABA standard that did so. Padilla Not Retroactive!
- Gaitan – If not an AF tell client you might be deported and they should seek immigration advice. Court will look to the transcript to see if this occurred.

Specific IAC Claims

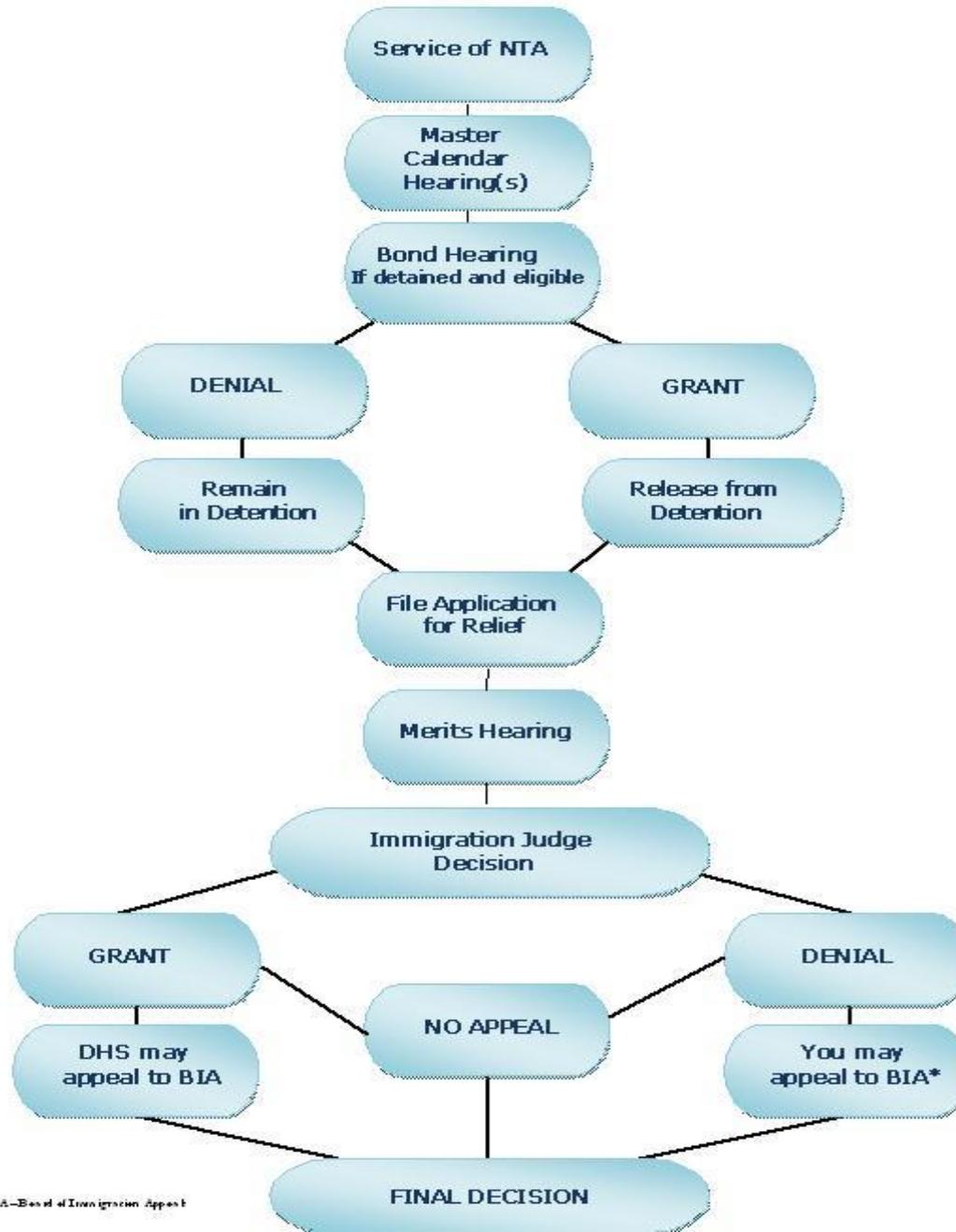
- Failure to Advise – failure to advise on immigration consequences not retroactive.
- Affirmative Misadvice – affirmative misadvice concerning immigration consequences can be retroactive and Chaidez does not apply to this ground. We have Nunez-Valdez.
- Affirmative Misadvice II – can be about any topic, not just immigration consequences.

Potential Future IAC Claims

Problems to “Look Out” for

- **Failure to Defend** against adverse immigration consequences. Even if correct immigration advice was given, defense counsel has a duty to try to prevent bad consequences. Padilla is inapplicable, since it deals only with advice. Many cases predating Padilla recognize this ground. E.g., *Janvier v. US*, 793 F.2d 449 (2d Cir. 1986)(failure to seek JRAD); *People v. Bautista*, 115 Cal.App. 4th 229 (2004)(failure to seek to plead up to greater non-deportable offense).
- **Failure to Mitigate** plea or sentence. Since *Strickland*, in 1984, defense counsel has always had a duty to minimize sentence. A sentence even one day greater caused by IAC = prejudice. *Glover v. US*, 531 U.S. 198 (2001). Padilla is irrelevant.
- **Failure to Investigate** immigration status, to use as a tool in defense of the criminal case, such as trying to reduce sentence from 365 to 364. This duty has existed since *Strickland*, in 1984. This ground can neutralize a governmental claim that defense counsel had no immigration-related duties because he or she was unaware of D’s noncitizen status.
- **Failure to Negotiate** effectively is a variation of the failure to defend ground. *Missouri v. Frye*, U.S. 132 S. Ct. 1399, 1406 (2012); *Lafler v. Cooper*, U.S., 132 S. Ct. 1376, 1384. These cases establish that prejudice includes failure to negotiate a better plea bargain, not merely to take a case to trial with a better result.

The Immigration Removal Process: *An Overview*



Questions and Answers



When?

Who?

How?

What?