

Crim-Imm 101

October 2021



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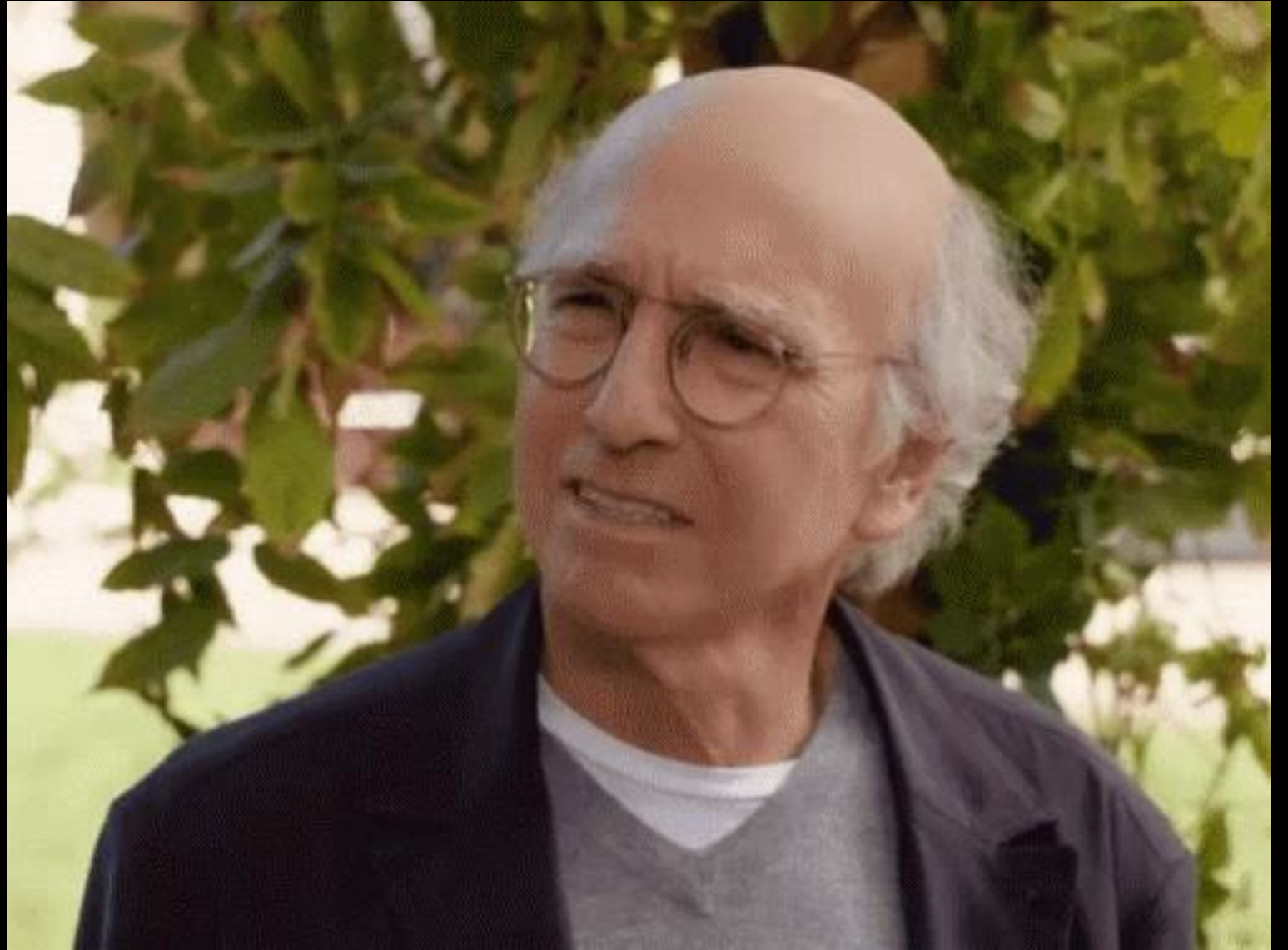
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Why Are We
Here?





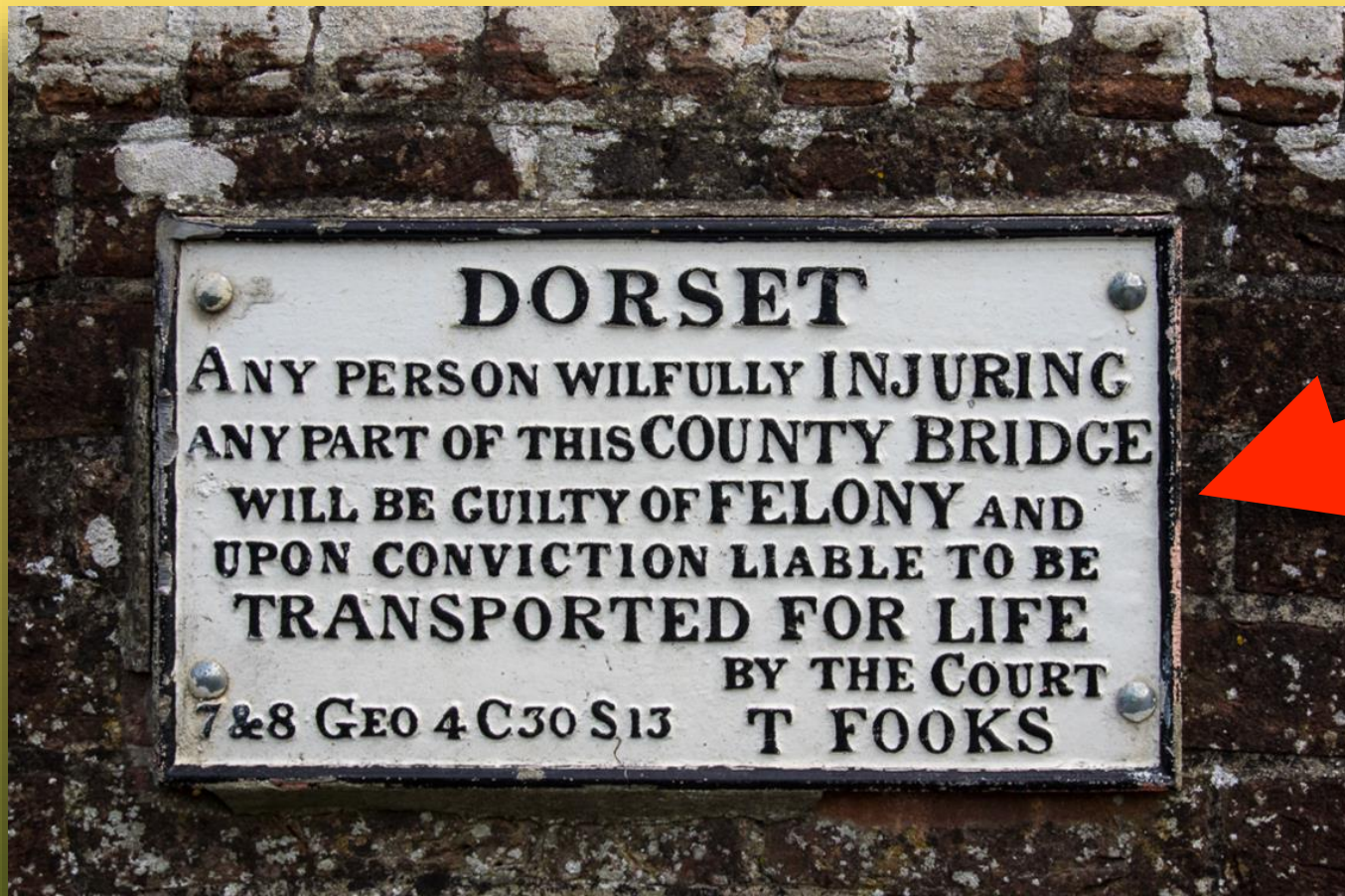
Trent Crimm

The Independent



Trent Crim-imm

“Be independent.”



Dorset, England

privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

Injury to a public Bridge.

XIII. And be it enacted, that if any Person shall unlawfully and maliciously pull down or in anywise destroy any public Bridge, or do any Injury with Intent and so as thereby to render such Bridge or any Part thereof dangerous or impassable, every such Offender shall be guilty of Felony, and, being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for Life, or for any Term not less than Seven Years, or to be imprisoned for any Term not exceeding Four Years; and, if a Male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such Imprisonment.

Destroying a

VII

§ 490. Petty theft; punishment

Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both. (*Enacted in 1872. Amended by Stats. 1927, c. 619, p. 1047, § 6; Stats. 1976, c. 1125, p. 5038, § 19.*)

Cross References

Attempts, punishment, see Penal Code § 664.

Bakery trays, bakery baskets, and merchandise pallets, punishable acts, see Business and Professions Code § 22753.

Prior prison terms, enhancement of terms for new offenses, see Penal Code § 667.5.

The Before Times

Deportation

Criminal case disposition

- Collateral consequences are sanctions and disqualifications that
 - are not intrinsic to the California statutory punishment, so are not part the judgment of the court; instead they result
 - by operation of law; or
 - from the exercise of discretion by a different tribunal

The Before Times: California case law recognized limited duties of counsel representing a non-citizen charged with a crime.

IAC might lie for failing to attempt to mitigate immigration consequences by negotiation.

The provision of incorrect advice about immigration consequences of plea can constitute IAC

Failure to seek a judicial recommendation against deportation ("JRAD," now extinct) constituted IAC

Defense counsel must research and correctly advise about specific immigration consequences *if a client specifically asks*

Soriano

1987

Barocio

1989

Resendiz

2001

Bautista

2004

Padilla v. Kentucky (2010) 559 U.S. 356

- Facts
 - LPR for 40 years
 - Vietnam veteran
 - Plead guilty to transportation of marijuana
 - Mr. Padilla claimed his lawyer told him he did not have to worry about his immigration status “since he had been in the country so long.”
- Holding
 - SCOTUS considers and rejects that immigration consequences are irrelevant as a collateral consequence: “[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” (*Padilla*, p. 364.)
 - Defense counsel must correctly advise about the clear immigration consequences.

Padilla v. Kentucky (2010) 559 U.S. 356

- Facts

“[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” (*Padilla*, p. 364.)

plead guilty to specified crimes.” (*Padilla*, p. 364.)

- Defense counsel must correctly advise about clear immigration consequences.

2016: California Penal Code sections 1016.2 and 1016.3 codify and expand *Padilla*

Prosecution

“The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.” (Pen. Code, § 1016.3, subd. (b).)

Defense

“Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences.” (Pen. Code, § 1016.3, subd. (a).)

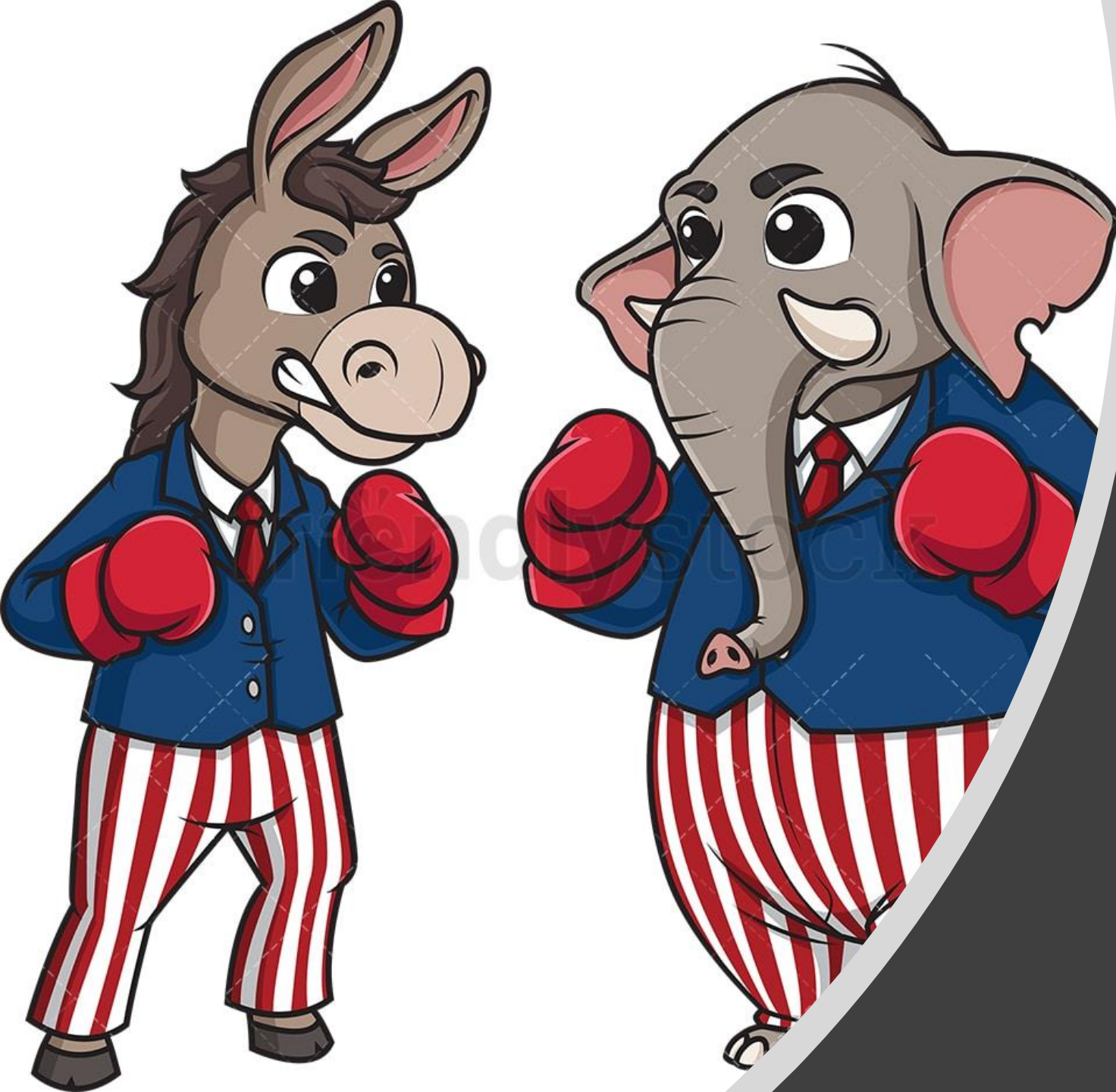
Section 1016.5: the bench officer's duty

- Subdivision (a), advisement : “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”
- The court's advisement is
 - always incomplete because the bench officer never knows the facts and law that determine whether a conviction may have an immigration for a particular defendant
 - independent of defense counsel's duties under *Padilla* and 1016.3

Introduction to the “Imm” of Crim/Imm

Where Does Immigration Law Come From?

- The INA
- Additional Sources
 - BIA opinions
 - The 9th Circuit
 - SCOTUS
 - Code of Federal Regulations
 - Foreign Affairs Manual
 - Administrative Regulations & Executive Orders
- Immigration Law is Very Volatile



The Elephant
(& the Donkey)
in the Room

Who is Enforcing Immigration Policy/Law?

- Consulates
- DHS – Department of Homeland Security
- USCIS – United States Citizen and Immigration Services
- CBP – Customs and Border Protection
- ICE – Immigration and Customs Enforcement
- EOIR – Executive Office for Immigration Review
 - Immigration Judges
 - BIA – Board of Immigration Appeals
- ORR – Office of Refugee Resettlement

What Happens In Immigration Court?

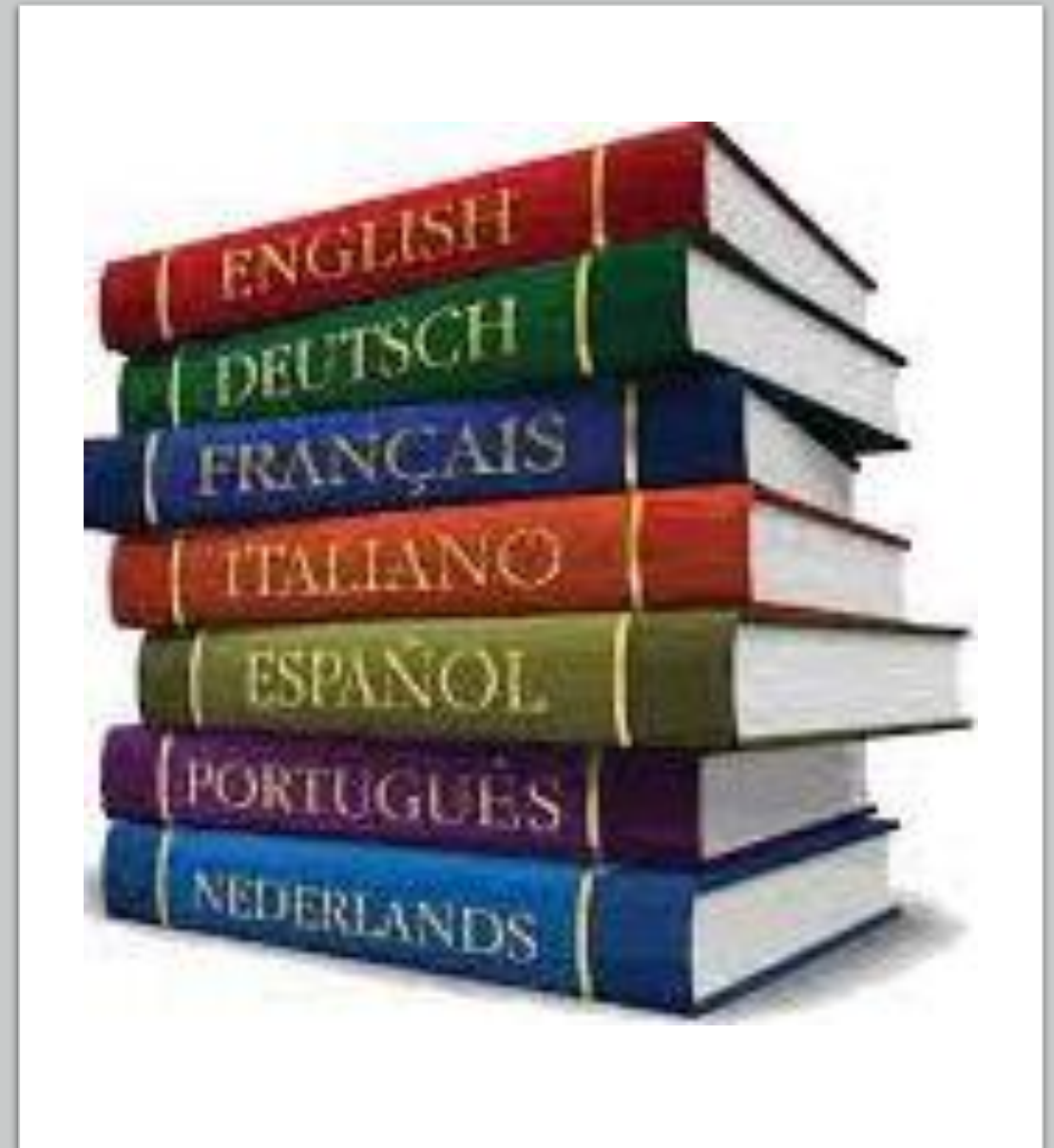
- Notice to Appear (NTA)
- Bond Hearing
- Merits Hearing (Assert a Defense)
 - Success – staying in the US
 - but with what status?
 - Failure – removal from the US
- No Right to Appointed Counsel
 - Very limited exceptions
- Significant Time Delays

What Happens In Immigration Court?
Fun Fact: The FRE are persuasive only!



Immigration Law: A Foreign Language

- Deportable (8 USC 1227(a))
- Inadmissible (8 USC 1182(a))
- Relief/Eligibility for Relief
- Alien Registration Number
- Immigration Status
- Adjustment of Status
- Consular Processing
- Good Moral Character
 - Bars listed at INA 101(f); 8 USC 1101(f) and see 8 CFR 316.10)



Words and Phrases: Immigration Status

Citizen

National (8 USC 1101(a)(29), 1408(1))

Lawful Permanent Resident (LPR, green card holder, resident)

Refugee/ Asylee (INA 208, 8 USC 1158)

DACA holder

TPS – Temporary Protected Status (8 USC 1254a)

Non-Immigrant Visa Holder

SIJS

Undocumented

Pending Application

And more!

Words and Phrases: Terms May Not Mean What You Think

- Aggravated Felony (INA 101(a)(43), 8 USC 1101(a)(43))
- Crime Involving Moral Turpitude (CIMT)
- Particularly Serious Crime for Asylum
- Particularly Serious Crime for Withholding
- Significant Misdemeanor
- Parole (INA 212(d))
- Admission (INA 101(a)(13)(A); 8 USC 1101(a)(13)(A))
- Conviction (INA 101(a)(48)(A); 8 USC 1101(a)(48)(A))
 - Formal judgment of guilt + some form of punishment, penalty, restraint on liberty
 - Infractions count
 - Formal diversion counts
 - Expungements have no effect on a conviction under this definition

2016: California Penal Code sections 1016.2 and 1016.3 codify and expand *Padilla*

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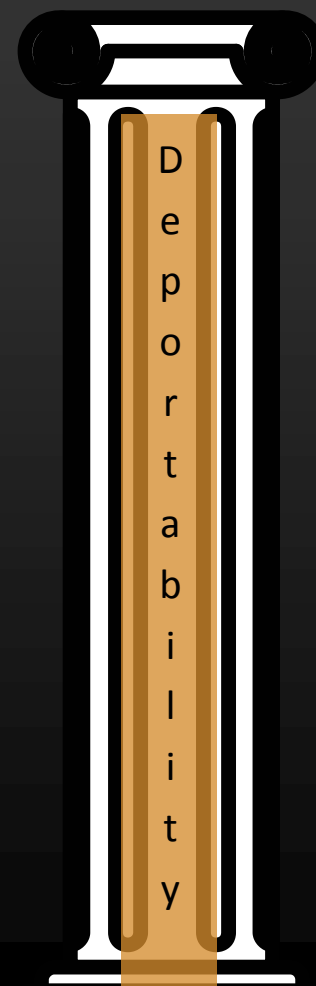
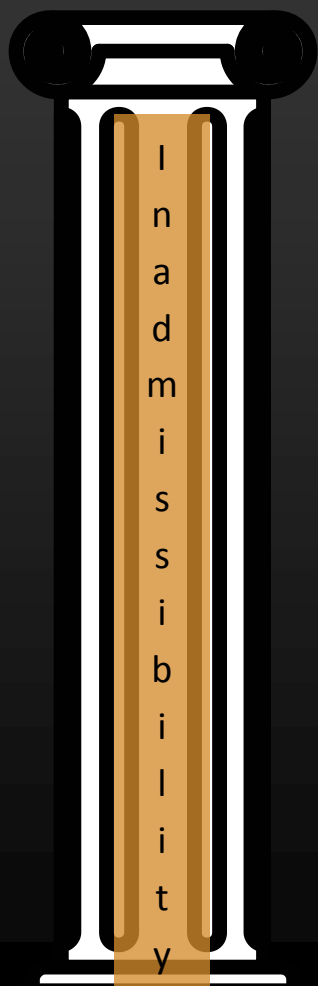
Defense

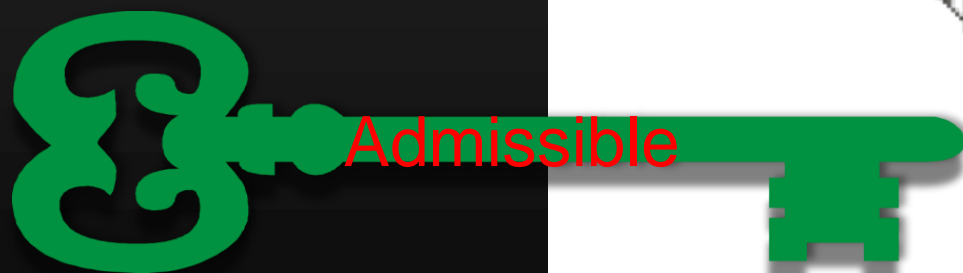
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What are immigration consequences?

- Loss of existing status
- Disqualification from obtaining or upgrading status

The two general causes of immigration consequences





DEPORTABLE



Causes of immigration consequences

Loss of existing status

Disqualification from obtaining or upgrading status

- The two general grounds
 - Inadmissibility (8 USC § 1182(a)(2))
 - Deportability (8 USC § 1227(a)(2))
- Special status-based bars, e.g.,
 - Asylum
 - DACA
- Prejudice to the adjudication of the discretionary component of all forms of immigration benefit and relief

Multiple, independent grounds and their consequences can flow from a single offense, e.g, a violation of Penal Code section 211, robbery

Aggravated felony (with a sentence of \geq one year)

deportability

mandatory detention

whole bunch of bad things

Crime of moral turpitude (CIMT) - irrespective of sentence

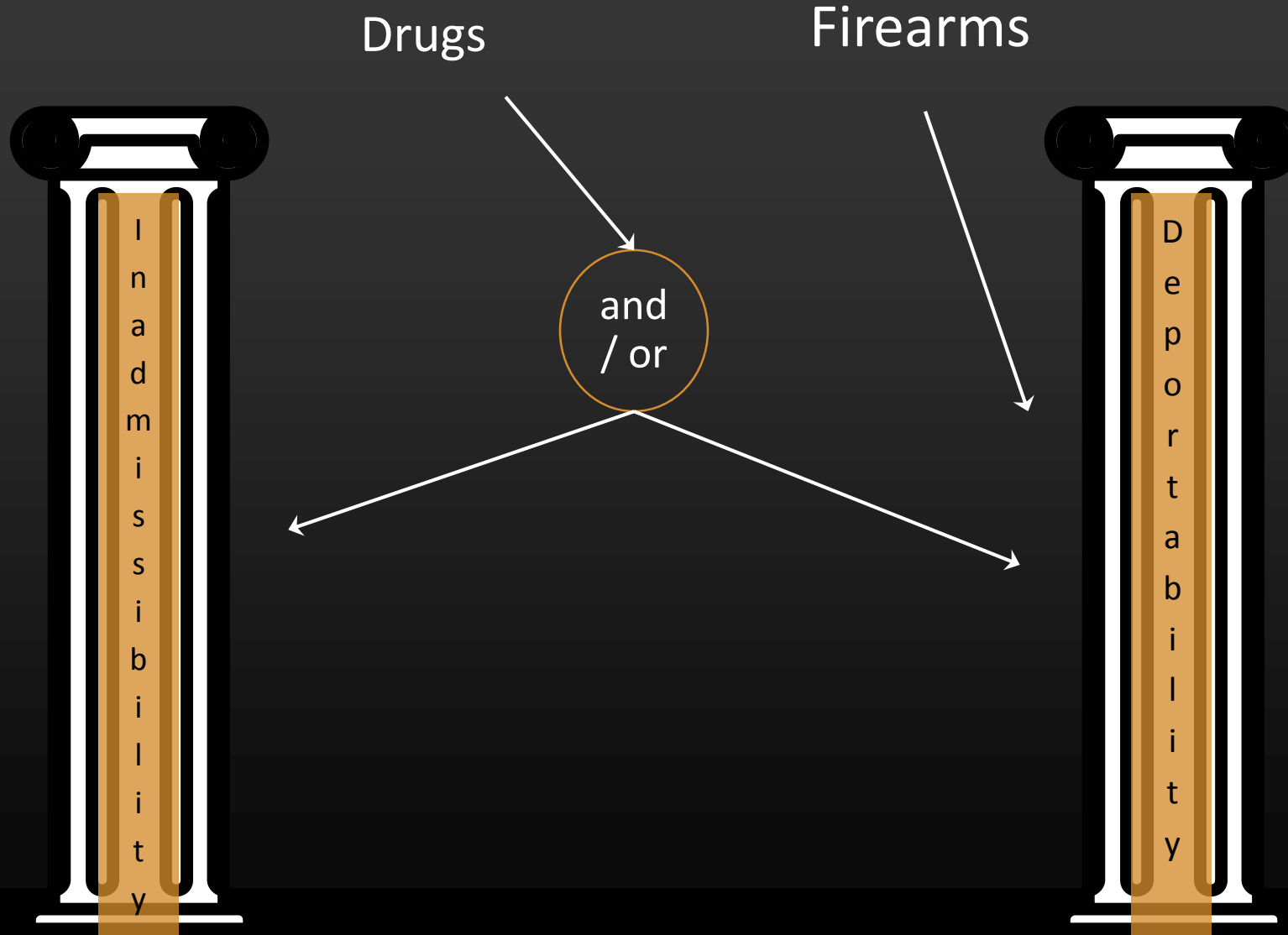
inadmissibility

might cause deportability (irrespective of the sentence)

Might constitute domestic violence

deportability (irrespective of sentence)

Overlapping vs. unique grounds



Deportable

Inadmissible

Crimes of
moral
turpitude

CAN CAUSE EITHER DEPORTABILITY OR INADMISSIBILITY
OR BOTH

Drugs

CAN CAUSE EITHER DEPORTABILITY OR INADMISSIBILITY
OR BOTH

Deportable

Inadmissible

Crimes of moral turpitude

- Single conviction
 - ≥ 1 year max.
 - offense date within 5 years of admission
- Two or more convictions arising from distinct schemes

- Single admission or conviction
 - Petty offense exception
 - single conviction
 - max. possible ≤ 1 yr.
 - imposed ≤ 180
 - Youthful offender
 - under 18 yrs.-old @ commission
 - released from custody > 5 yrs. ago

Drugs

Any conviction except a single offense involving possession for one's own use of 30 grams or less of marijuana

- Any - even < 30 grams, even an infraction
- "Reason to believe" trafficker*
- Abuser / addict *

False claim of U.S. citizenship*

* no admission or conviction is required

Non-overlapping grounds

Deportable

- Aggravated felony
- Domestic violence
- Child abuse
- Stalking
- DV protective order*
- Firearms

Inadmissible

- Prostitution*
- Multiple convictions with ≥ 5 years imposed —even arising from a single case, or a single scheme

* no admission or conviction is required

Aggravated felonies cause the most severe consequences

- Bar eligibility for almost any kind of relief or waiver that might stop a deportation
- Penalty for unlawful re-entry radically increased – up to 20 years
- Bar permanently good moral character if the conviction occurred on or after November 29, 1990
 - Cf. aggregate of 180 days actually served causes a temporary bar to good moral character
- Mandatory detention (except LPRs)
- Fast track procedure – no court hearings except for LPRs



Aggravated Felony 8 U.S.C. 1101(a)(43)

Sentence of at least one year

- bribery
- burglary
- counterfeiting
- crime of violence
- imm. doc. fraud
- obstruction of justice
- perjury
- theft
- altered VIN trafficking
- forgery

Any sentence

- drug trafficking
- ex-felon with a gun
- murder
- rape
- sexual abuse of a minor
- fraud/deceit > \$10K

Note: misdemeanors may be aggravated felonies

Aggravated Felony 8 U.S.C. 1101(a)(43)

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Under which, e.g,

- Burglary is not burglary
- A firearm is not a firearm
- Grand theft *is not* theft but joyriding (Veh. Code, § 10851) *is* theft
- Receiving (§ 496) is not a CIMT but can be an aggravated felony

A categorical approach example: why burglary is not burglary

Generic burglary requires breaking and entry. California burglary includes but does not require breaking and entering, a consensual entry suffices.

SCOTUS: “Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary.” (*Descamps v. U.S.* (2013) 570 U.S. 254.)

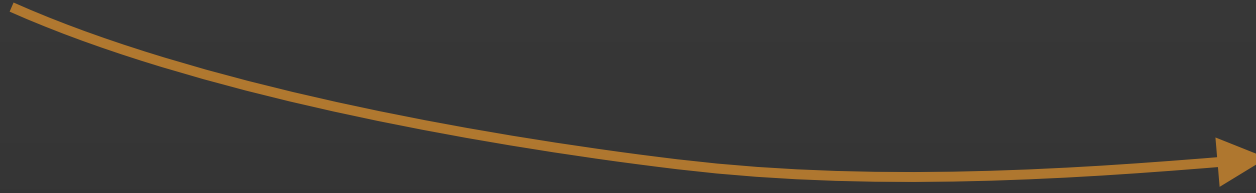
Compare the minimum conduct of the elements



or



If overbroad, is the statute divisible?



Does the statute define more than one crime?

No: the immigrant prevails

Yes: analyze which of the discrete offenses in the statute the non-citizen was convicted of

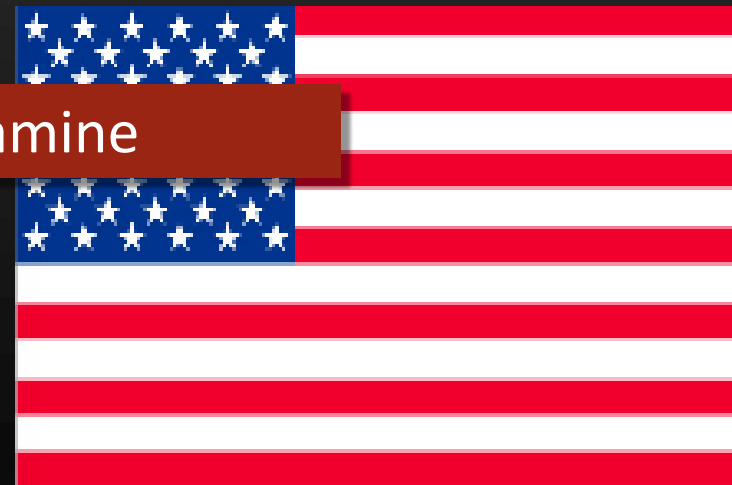
Example of a statute that *is* divisible: Health & Saf. Code, § 11377



bolandiol



methamphetamine



Yes, it is divisible: analyze which of the discrete crimes in the statute the non-citizen was convicted of

Record of conviction

Included

- Statutory definition
- Charging document
- Written plea agreement
- Plea colloquy transcript
- Admissions during the plea
- Factual findings by the court to which the defendant assents

Not included

- Unless the defense stipulates for factual basis
 - Pre-plea reports
 - Preliminary hearing transcript
 - Police reports
 - Dismissed charges

Exceptions to the applicability of the categorical approach

The circumstance specific approach

Instead of elements, look to the specific circumstances surrounding an offender's commission of the defined crime on a specific occasion, e.g.,

- Amount of loss fraud and deceit – the \$10,000 threshold
- Domestic relationship for purposes of the domestic violence ground (but law is unsettled)
- Violation of a domestic protective order

Immigration officials *may* look beyond the record of conviction to any reliable evidence



Maintaining Eligibility for Relief

Relief from Deportation

- Relief is essentially a defense asserted in removal proceeding
 - If Granted: The person gets to stay in the US
 - If Denied: The person will be deported
- But Not All Relief is the Same; Outcomes Vary Widely
 - Become a Citizen
 - Remain an LPR
 - Become an LPR
 - “Defer” Deportation
 - Stay of Removal
- Administrative Closure & Prosecutorial Discretion

Forms of Relief & Defenses from Removal

- Naturalization
- Family Petition (INA 245(a), (i); 8 USC 1255(a), (i))
- Cancellation of Removal
 - For LPRs (INA 240A(a); 8 USC 1229b(a))
 - For Non-LPRs (INA 240(b); 8 USC 1229b(b))
 - VAWA
- Humanitarian Relief:
 - Asylum (INA 208, 8 USC 1154)
 - Withholding of Removal (INA 241(b)(3); 8 USC 1231(b)(3))
 - Convention Against Torture (CAT) (8 CFR 208.16 – 208.17)
- “T”, “U”, “S” Visas
- DACA & TPS (INA 244A; 8 USC 1254a)
- Voluntary Departure (INA 240B(a)(1); 8 USC 1229c(a)(1))



Hypotheticals

What to Expect from an Immigration Focused Negotiation



Case # 1: Justin

- Born in Canada
- Came to the US when he was 2 years old in 2001 with his mother
- Current DACA holder
- No criminal history
- Charged with a first time DUI



Case # 2: Vivienne

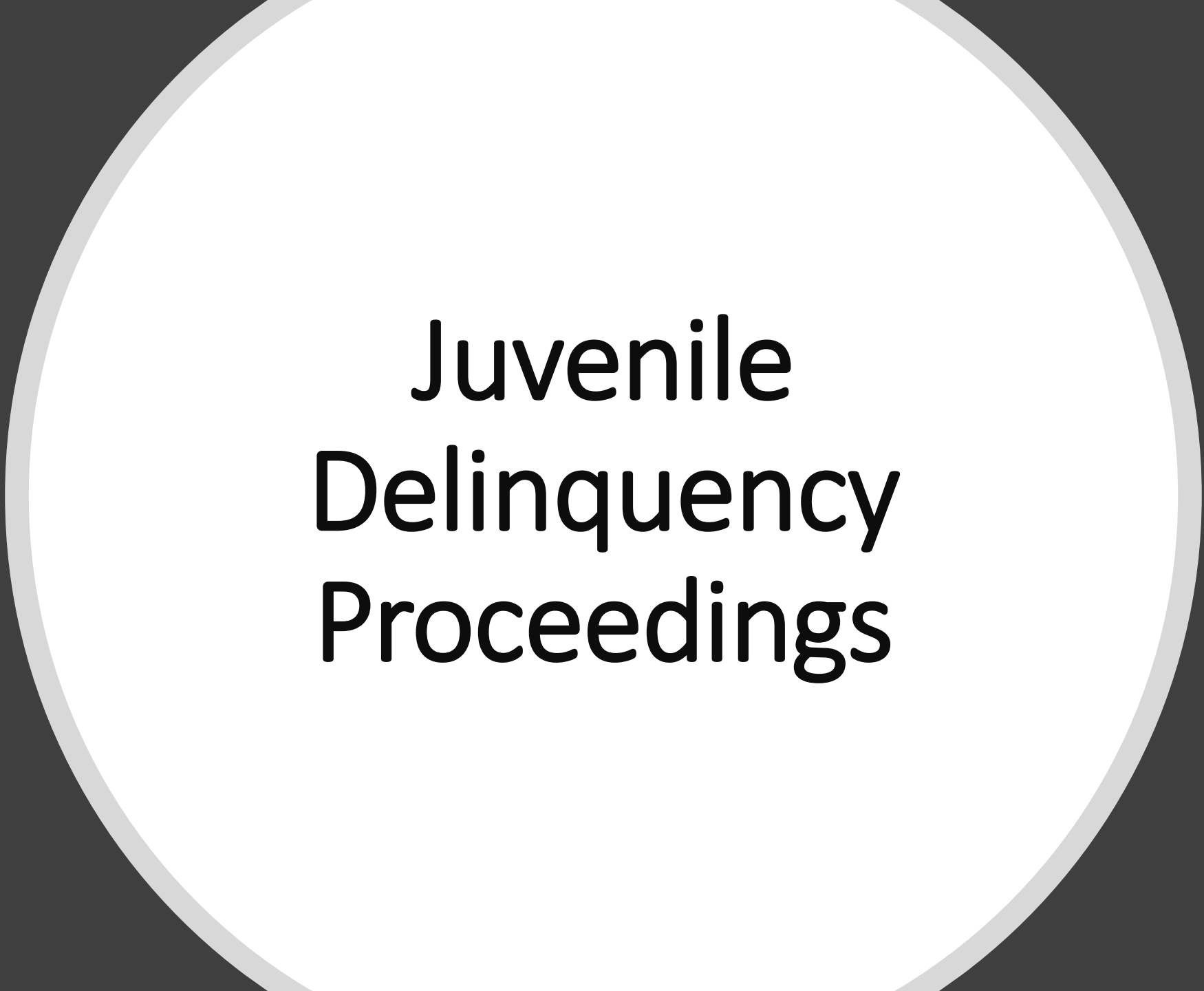
- Born in France
- Came to the US in 2002, currently undocumented
- Married to a US citizen, has 3 children who were born here
- Has one prior conviction for petty theft from 2004
- Charged with petty theft



Case # 3: Allen

- Born in Australia
- Came to the US in 1995, as a minor with his family
- Is an LPR (lawful permanent resident)
- Prior conviction for DUI in 2010, 243(e)(1) in 2010
- 2021: Felony PC 496(a) - 24FP, 180CJ
- PV in lieu filed for an HS 11364(a) arrest





Juvenile Delinquency Proceedings

What About Juvenile Court Adjudications?

- *Padilla*, PC 1016.2 & PC 1016.3 still apply to juvenile proceedings
- A great opportunity for defense counsel to screen for eligibility for derivative citizenship through parents, SIJS, and link to immigration representation services.
- Juvenile adjudication is not a conviction for immigration purposes. (*Matter of Ramirez-Rivero* (BIA 1981) 18 I&N Dec. 135.)
- BUT still can trigger immigration consequences
 - Conduct grounds of deportation and inadmissibility can be triggered by admissions

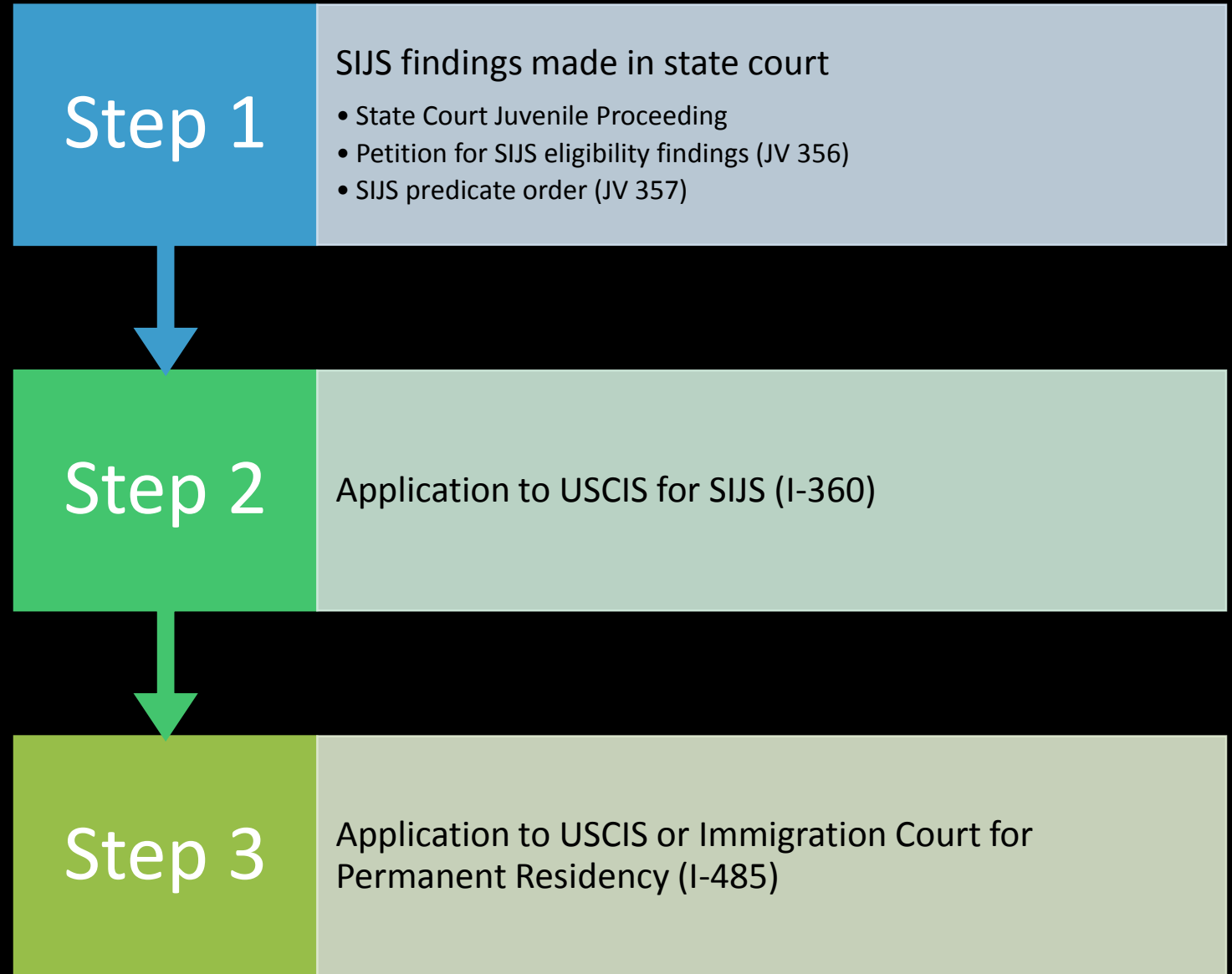
Juvenile Adjudications: Areas of Concern

Delinquency Conduct/Admission	Immigration Penalty Triggered
Drug Trafficking Offenses	Inadmissible
Drug Abuse or Addiction	Inadmissible & Deportable
Behavior showing physical or mental condition that poses current threat to self or others	Inadmissible
Prostitution	Inadmissible
Violation of a Domestic Violence SA/PO	Deportable
False Claim to US Citizenship	Inadmissible & Deportable
Gang Findings	Enforcement Priority for Removal & Negative Discretionary factor
Violent Offenses & Sex Offenses	Severely Negative Discretionary Factor

SIJS – Special Immigrant Juvenile Status

- SIJS provides legal protection for certain undocumented youth who have been abused, abandoned, or neglected, by allowing them to become lawful permanent residents.
 - Codified at INA 101(a)(27)(J); 8 USC 1101(a)(27)(J)
 - Statute implemented by standards set out in federal regulations, see 8 CFR 204.11
- SIJS is a unique hybrid of federal and state law – the federal relief (SIJS) depends upon initial findings made in a state court
- Multi-Step Process
 - State Court Findings
 - USCIS/Immigration Court

The SIJS Multi-Step Process



SIJS Eligibility Requirements

- Under 21
- Unmarried
- Been declared dependent upon a juvenile court in the US, OR the court has legally committed the youth or placed the youth under the custody of an agency or department of the state, OR an individual or entity appointed by a state or juvenile court
 - Juvenile court includes dependency, delinquency, family and probate court (see Cal. CCP 155 and Cal Evid. Code 757)
 - In delinquency court, this specifically means a 602 ward
- Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
- It is not in the youth's best interest to be returned to their country of nationality or last residence

But wait, there's more ... about SIJS

- Public defenders are uniquely situated to identify SIJS eligible youth
- An interview with a juvenile non-citizen client includes SIJS screening, in addition to the complete crim/imm analysis of the charges.
- Resources are limited, but PD & Immigration Unit try to link SIJS eligible youth with a community partner for SIJS representation.
- This is why your PD might:
 - Need more time for a SIJS eligible child's case
 - Request an alternative charge
 - Make a specific record of conviction at the time of the plea
 - Request HOP rather than 654/725/790
 - Keep jurisdiction open longer

Post-conviction relief – the *Pickering* rule

- *Matter of Pickering* (BIA 2003) 23 I&N Dec. 621; *Matter of Thomas & Thompson* (2019) 27 I & N Dec. 674(A.G. 2019)
 - A vacatur of a judgment or a modification of a sentence “will be given effect for immigration purposes only when the orders are based on a procedural or substantive defect in the underlying criminal proceeding.” (*Thomas & Thompson* , p. 674.)
 - Rehabilitation-based vacatur or dismissals, such as DEJ, are not given effect (In response, the Legislature replaced DEJ with pre-plea diversion, enabling non-citizens to earn an immigration effect for successful completion of diversion.)
 - Exceptions
 - DACA
 - In the Ninth Circuit only, DEJ on or before July 14, 2011

Post-conviction relief – vehicles

- Section 1018 – motion to withdraw a guilty plea
- Section 1016.5 – no record that court advised
- Petition for habeas corpus
- Section 1204.43
- 1203.4, 1203.41, 1203.4a
- Proposition 47
- Section (17)(b)
 - but 364 maximum is not retroactive
- Proposition 64



Vacatur under Penal Code § 1473.7, subd. (a)(1)

- Not in actual or constructive custody
- “[P]rejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.”
- “A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.”
- Court must appoint counsel upon a prima facie showing of entitlement to relief if non-citizen is unable to attend hearing (*Fryhaat.*)
- The prejudicial error may arise by any cause

Closing Thoughts

Why is this Defense Attorney Taking So Long?

- Padilla compliance can significantly slow down a disposition
- For defense counsel to properly advise their client, they need to know:
 - Client's status & immigration history
 - Client's complete criminal history
 - Immigration analysis of the charges
 - Research & consult with immigration unit
 - Consult with immigration counsel
 - Convey this all to the client so they can make an informed decision about their case
- Negotiate (mitigation, meetings, etc.)

