New Jersey Crimmigration Law

The Immigration Consequences of NJ Criminal and Municipal Court Activity

Ronald P. Mondello, Esq.

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DISCLAIMER:

This publication is intended to be informational for judges, prosecutors, and defense attorneys. No legal advice is being given to defendants, and no attorney-client relationship is intended to be created by reading this material. If you are a defendant facing legal issues, whether criminal or civil, seek professional legal counsel to get your questions answered.

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New Jersey Crimmigration Law

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Dedication

This book is dedicated to all of my "crimmigration" colleagues and other immigration attorneys who have helped me over these many, many years. I consider them to be my dear friends. These attorneys continue to fight the good fight to guarantee that foreign nationals are advised of the immigration consequences of New Jersey criminal conduct and municipal court violations BEFORE they enter into a plea agreement or choose to take their case to trial. Praying that I do not miss a single friend: Derek DeCosmo (My Main Man from the day we met—we still kiss every time we see each other; it's an Italian thing), Jerry Gonzalez, Larry LeRoy, Ed Shulman, Michael Noriega (thank you for the slides), Raquiba Huq, Anne Picker, Eric Mark, John Leschak, Michele Alcalde, Susan Roy (thank you for the slides), Alan Pollack, Jayson DiMaria, Lloyd Bennett, Ray D'Uva, Jason Scott Camilo, Jeff Steinfeld, and Brian D. O'Neill—THANK YOU!

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Foreword

Ron Mondello is one of the most knowledgeable, responsive, and creative lawyers I know. He is very knowledgeable in the complex area of criminal/immigration law. Since 2006, Ron and I have worked on some very complex criminal deportation cases. Ron has continued to amaze me with the innovative solutions he finds to very complex criminal/immigration law problems.

– **Derek DeCosmo, Esq., Immigration Attorney in Camden, New Jersey**

Ron Mondello is a passionate, caring, and ultra-professional attorney. I have worked on both sides of cases with Mr. Mondello. There is no greater fighter for a client in the field of crimmigration than Ron Mondello. He is experienced, knowledgeable, and creative and will not rest until everything that can be done is done. I endorse Ron Mondello.

– Carl Spector, Attorney in New Jersey and New York

I endorse this lawyer in the field of crimmigration. When an individual who is not a US citizen is charged with a crime or even less, a criminal attorney alone is not enough. Mr. Mondello has a terrific guide on his website that I refer to for my own cases.

– **Yolanda Navarrete, Lawyer in Morristown, New Jersey**

I endorse this lawyer. Ron is a highly effective advocate, whether appearing before boards, judges, or juries. Always putting the interests of his clients first, he is a tenacious, thorough, and skilled practitioner, especially in the area referred to as crimmigration.

– William Soukas, Attorney in Hackensack, New Jersey

Preface

This book explains in a presentation-like format the extremely complex area of law referred to as crimmigration. The term "crimmigration," coined by legal scholar Julie Stumpf in 2006, refers to the complex nexus of immigration and crimes that emerged in the United States after 1980. The book contains PowerPoint slides and an explanation of each slide. The final content offers opinions on crimmigration. They will assist with the mechanics of applying the principles taught in the slides. Although the emphasis is on the New Jersey Criminal 2C Code, the concepts are applicable to all states. The book is *not* a legal, scholarly cited exploration of the consequences of the rise of this Frankenstein-like system of criminal and immigration law. This is a practical, step-by-step approach to solving the foreign national's dilemma: Can I plead to that offense and not get deported? Please note that there are many other negative immigration consequences other than deportation that a foreign national may be subject to, such as becoming ineligible to obtain a green card or being unable to become a US citizen. This book only addresses permanent banishment from the United States and permanent exile to a country that the defendant may not even recognize anymore. Many of the examples and conclusions are stated in general terms due to the complexity of this area of law. A statement that the defendant's deportation will be terminated assumes other factors that simply cannot be incorporated into the hypothetical. Constant legal research is required to properly assess foreign nationals' immigration consequences caused by their New Jersey charges.

Introduction

Crimmigration has become very important. Why? The possibility of deportation has become more certain. The 1996 amendments to immigration law are severe for criminal offenses, and federal enforcement of these laws has increased. The United States Supreme Court has directed attorneys to inform their foreign national clients of the immigration consequences when entering a guilty plea to criminal charges. The 6th Amendment's Right to Counsel has been expanded to include this nondelegable duty. The Supreme Court has directed courts to warn foreign national defendants that they have the right to seek immigration (really, crimmigration) advice before they enter a guilty plea. There has been a dramatic increase in the number of postconviction relief petitions (PCRs) and motions to withdraw (MTW) guilty pleas filed in superior courts and municipal courts. The main goal of this book is to educate judges, prosecutors, and defense attorneys and give them a complete and thorough understanding of the immigration deportation consequences of foreign nationals' pleas. Foreign nationals will then understand the immigration deportation consequences of their guilty pleas. The number of PCRs and MTW will decrease over time as the level of education increases.

New Jersey Crimmigration

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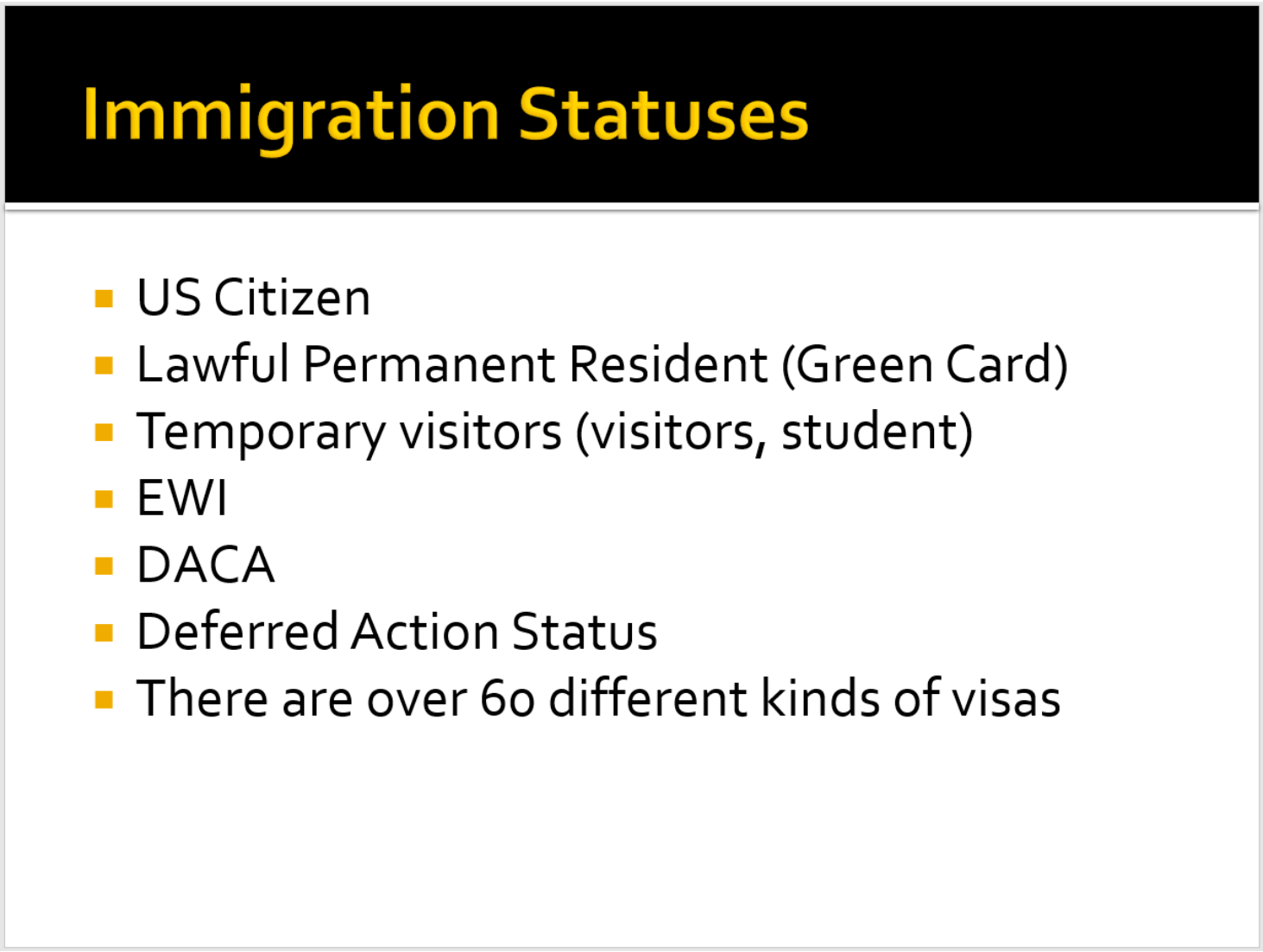
Crimmigration

The field of crimmigration encompasses several areas of law. There is the interplay of criminal law, municipal court law, immigration, and postconviction relief. This is a dynamic, complex, and ever-changing area of law that requires constant legal research because what was considered an aggravated felony (AF) yesterday may not be considered an AF for immigration purposes today, or vice versa.



Immigration Statuses

This is not an immigration book. This is a crimmigration book. However, you need to be somewhat familiar with basic immigration statuses. Do not overlook United States citizen (USC) status. The defendant may not know that he or she is a USC. Generally, if such defendants were not born in the United States, they are most likely a foreign national. However, a foreign national can become a USC by "operation of law." The details of that subject are too complex for this book, but if the defendant was under 18 years old and his or her parents were naturalized (became USCs), then the defendant might be a USC. A lawful permanent resident is a foreign national who has a green card. These residents have the same rights as a USC, but they cannot vote. They are subject to immigration laws, unlike a USC. Temporary visitors are those who are here for pleasure or business. Another temporary visitor is a student. A business or pleasure visitor visa typically has a finite period within which the foreign national must depart or fall "out of status." A student must

remain in school or fall "out of status." A foreign national who has fallen out of status can be deported on that basis alone without any criminal activity. An EWI (entry without inspection) is a foreign national who has entered the country illegally. He or she does not have a visa and, unlike the other mentioned categories, was not inspected by authorized immigration personnel (e.g., Customs Border Patrol [CBP] at the airport). DACA status refers to Deferred Action for Childhood Arrivals. A foreign national who entered the United States under the age of 16, like an EWI or temporary visitor who has fallen out of status, can apply for DACA and receive work authorization and a guarantee that he or she will not be deported for a certain time period. These are the general guidelines:

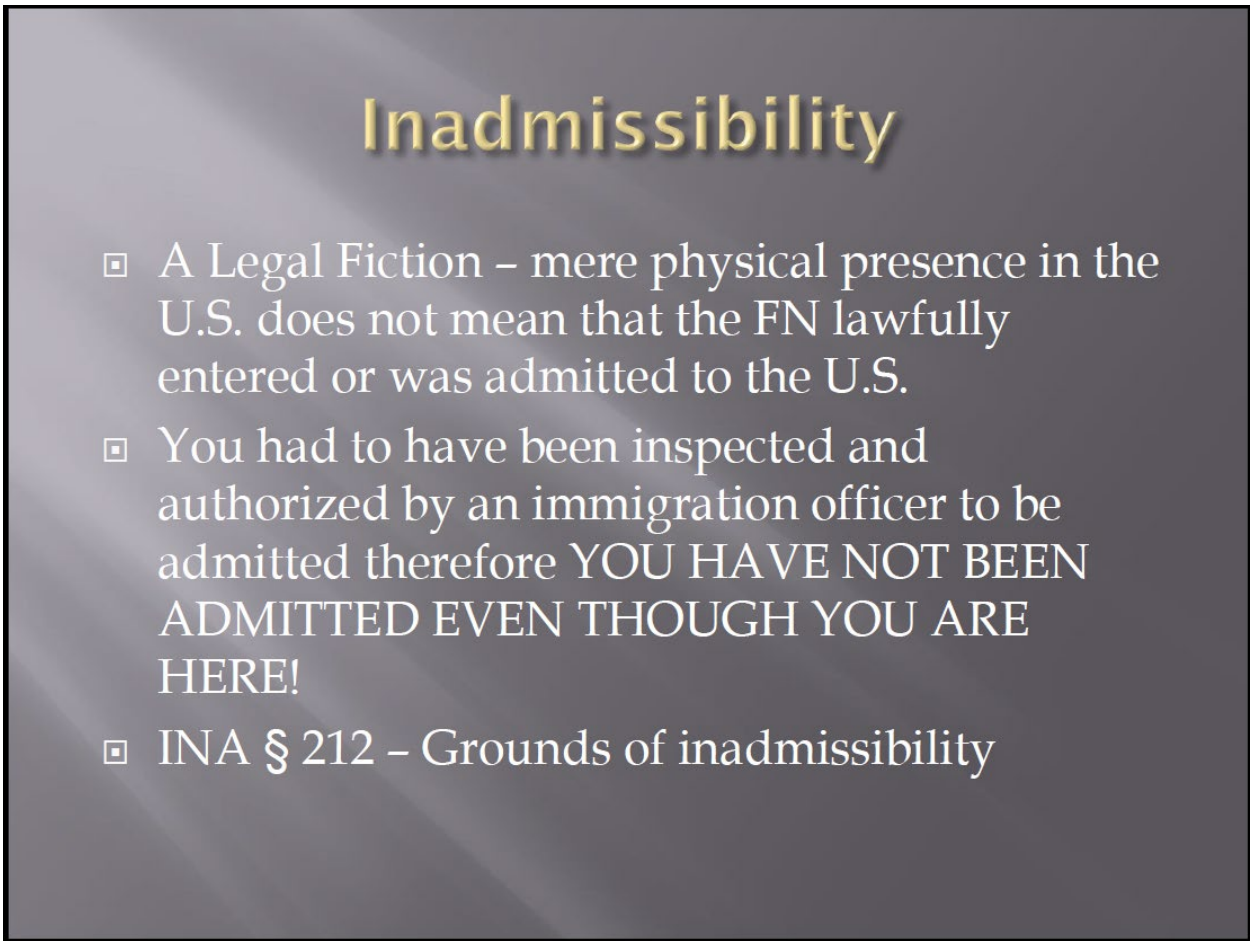
- Under the age of 31 on June 15, 2012; arrived in the United States before 16th birthday
- Can prove they have continuously resided in the United States from June 15, 2007, to the present
- Can prove that they were physically present in the United States on June 15, 2012 (and at the time of requesting deferred action)
- Entered without inspection or had their lawful immigration status expire before June 15, 2012 (does not include pending applications/petitions)
- Satisfy the education requirement
- No felony convictions; do not have three or more misdemeanors

DACA does not confer a lawful immigration status upon an applicant, does not alter existing immigration status, and does not provide a pathway to citizenship. This is another category where several pages could be spent explaining the requirements and barriers to obtaining DACA.

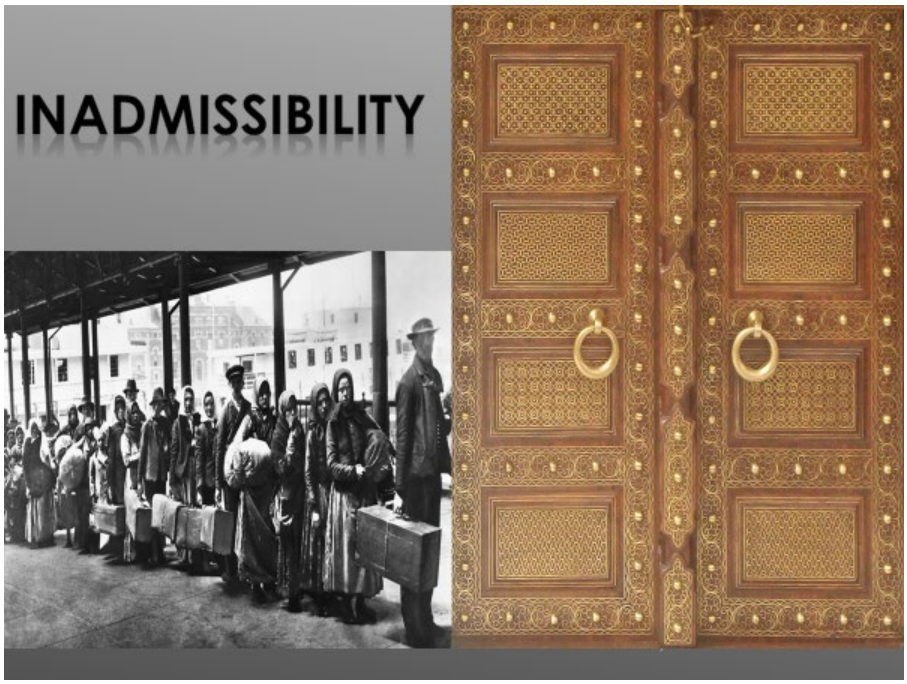
Deferred Action status, much like DACA, is really no status at all but a "guarantee" that removal proceedings will not be initiated or will be closed for a brief period with a possibility of renewal. For example, say a foreign national drug dealer has assisted the US government in bringing other, bigger drug dealers to justice. In exchange for that cooperation, the individual is given a "do not deport" classification.

Inadmissibility v. Deportability

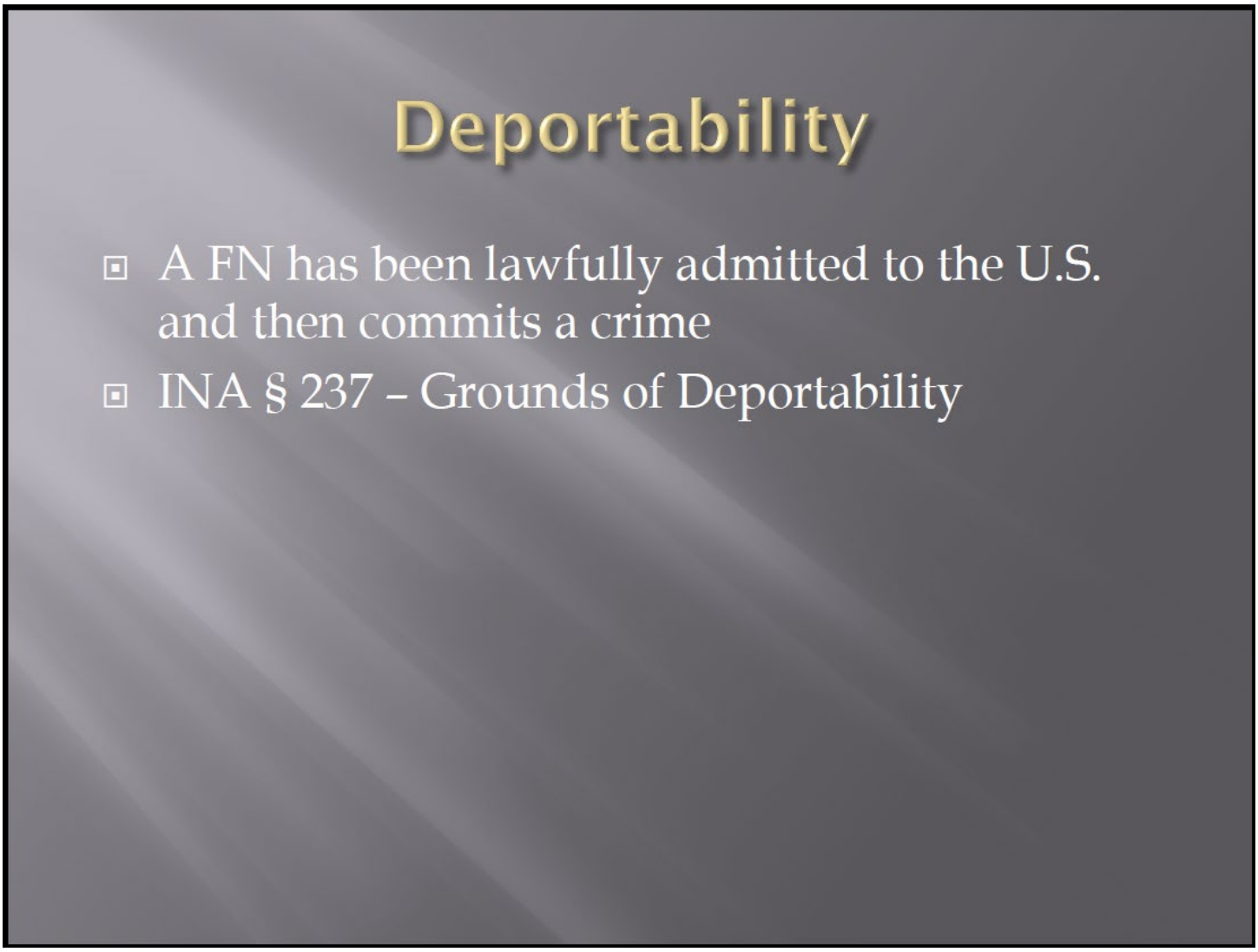
To answer the $64,000 question regarding the defendant's immigration consequences, one must determine whether the defendant is subject to the grounds of inadmissibility or deportability. To determine status or classification in this context (grounds of inadmissibility or deportability), one must focus on whether the defendant was inspected by an authorized immigration official (left side of the above slide) or entered the United States without inspection by an authorized immigration official (right side of the slide).



Generally, the immigration term "inadmissibility" means that the defendant is physically present in the United States but did not lawfully enter and was not admitted to the United States. The defendant was not inspected and was not authorized to enter the United States. Therefore, the defendant has not been admitted even though he or she is already here. The defendant is subject to the "grounds of inadmissibility" at INA §212. This is important because immigration uses different criminal grounds to deport defendants depending on their status. For example, did they illegally cross the border, or were they inspected and authorized to be here? Are they an EWI, or do they have a visa, such as a student or visitor's visa? The next several slides will clarify this important distinction. The distinction can almost be viewed as a caste system divided into two categories: illegal entries v. legal entries. Those defendants who entered illegally are subject to more strict criminal grounds than those who entered legally.



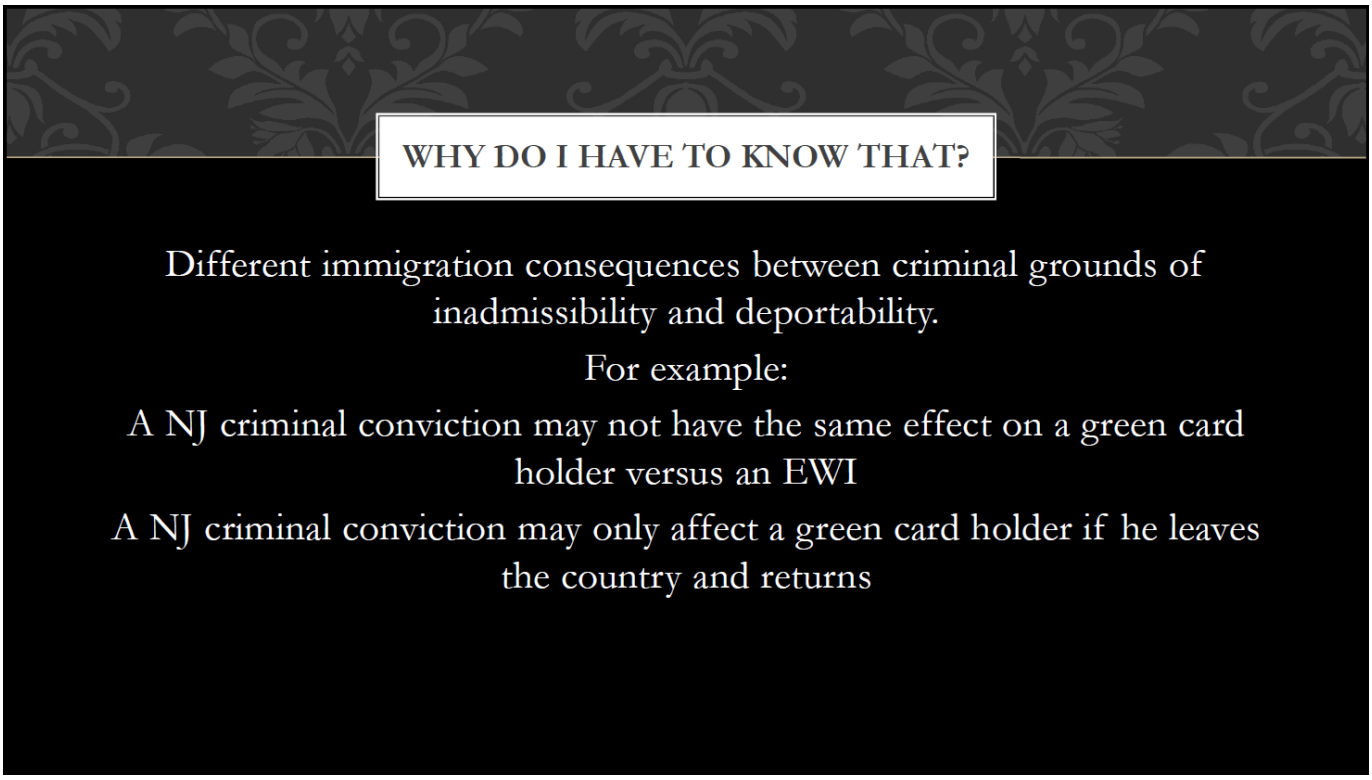
Foreign national defendants who have been convicted in the United States of certain crimes and who then depart the country may find themselves subject to the criminal grounds of inadmissibility when they return. The CBP may take the defendant into custody and initiate removal proceedings. This same defendant may not have been subject to removal had they never departed the United States.



The foreign national (FN) defendant has been inspected and admitted to the United States. The defendant is therefore subject to the criminal grounds of deportability found at INA §237. These criminal grounds, compared to the grounds of inadmissibility, are somewhat more lenient and forgiving.

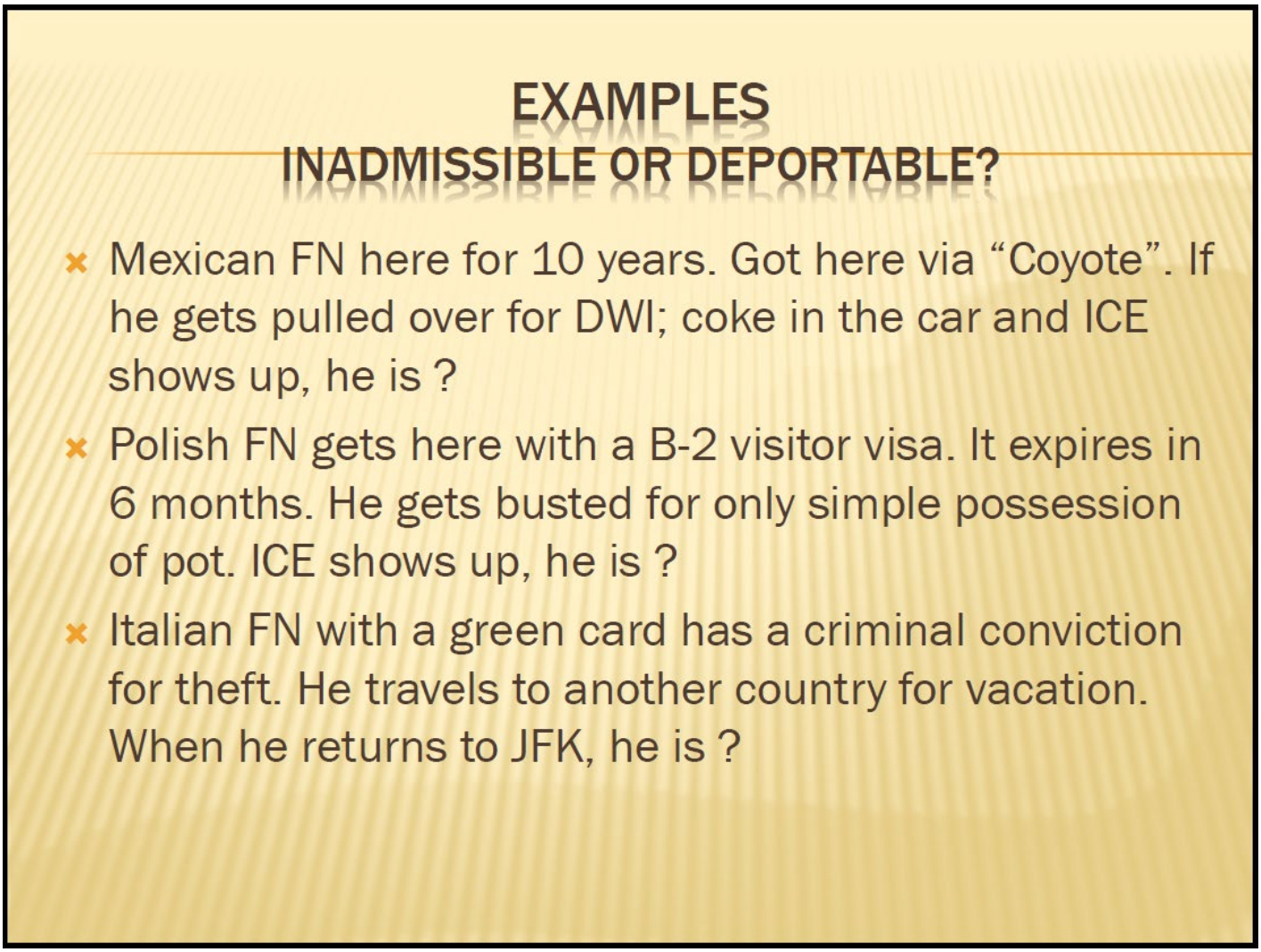
Lawful Permanent Resident

Green Card/Inspected



The question of whether the defendant is subject to the criminal grounds of inadmissibility or the criminal grounds of deportability is crucial to determine whether the defendant will be deported. Why? Simply stated, there are different immigration consequences between the criminal grounds of inadmissibility and the criminal grounds of deportability. For example,

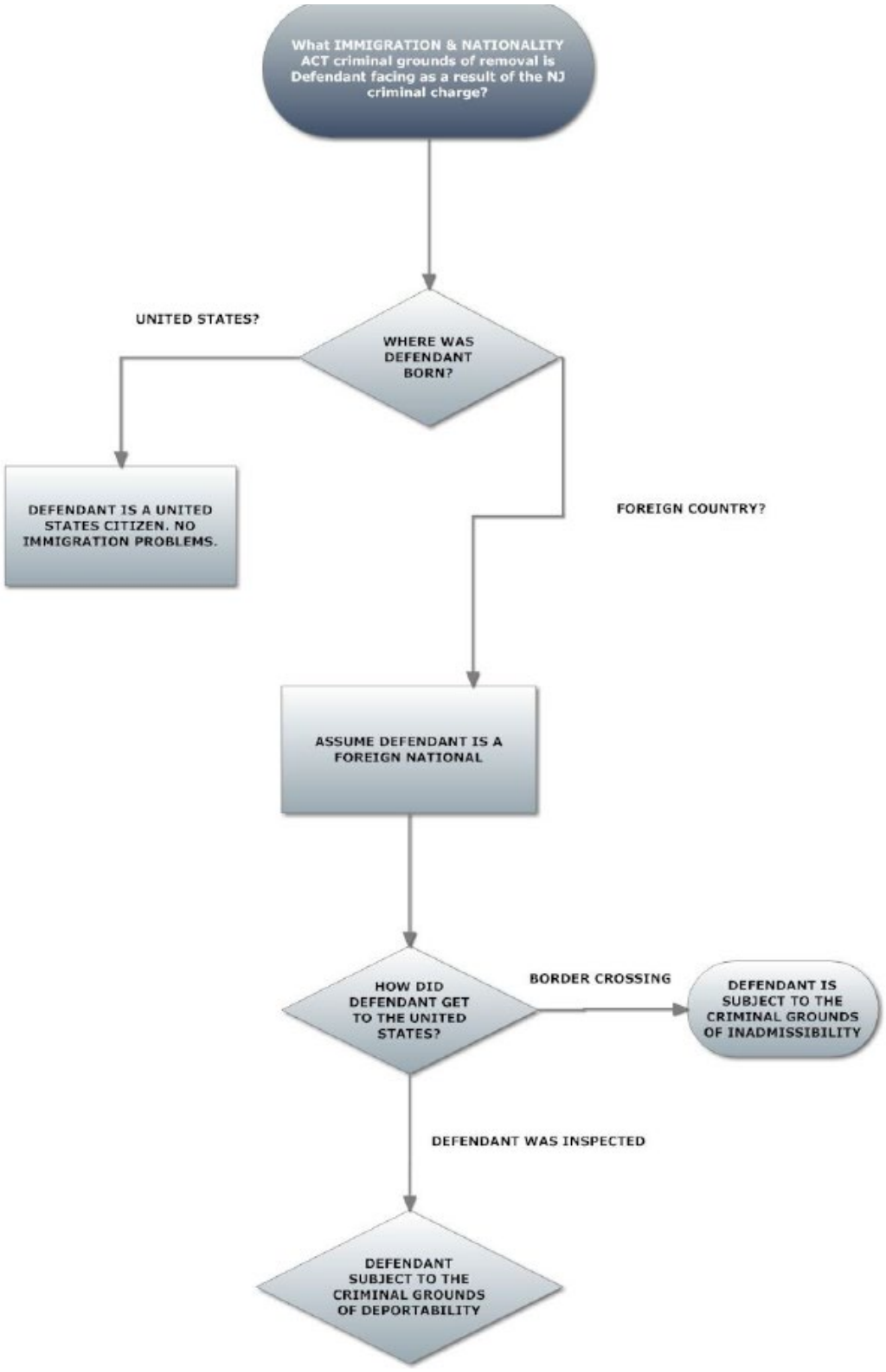
- A green card holder has been inspected and lawfully admitted to the United States for five years.
- He pleads to a non-aggravated felony regarding NJSA 2C: 20-3 Theft. Third degree.
- This crime is considered a crime involving moral turpitude (CIMT; most theft-related offenses are—more on that to come). He has no priors. He will not be deported. SAFE!
- The same exact offense and same time frame for an EWI defendant has a different effect. He is subject to the criminal grounds of inadmissibility and will be placed in removal proceedings by ICE (Immigration Customs Enforcement).
- The same green card holder (above) goes to Italy and returns via JFK to be inspected by CBP. This green card holder is now subject to the grounds of inadmissibility and will be put in removal proceedings.



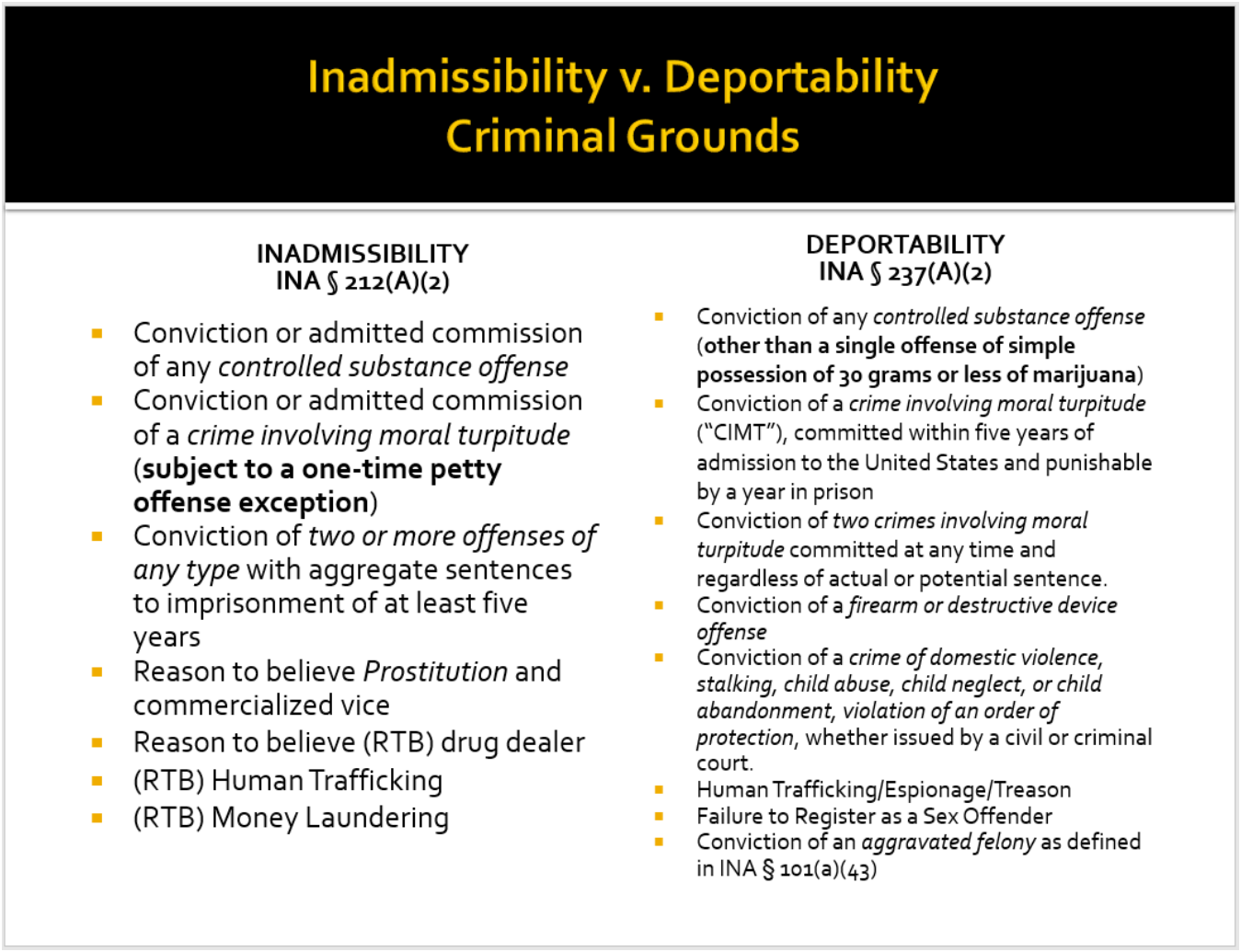
Is a Mexican foreign national inadmissible or deportable? Inadmissible. Why? He was not inspected and was not legally admitted to the United States and is therefore subject to the criminal grounds of inadmissibility.

Is a Polish foreign national inadmissible or deportable? Deportable. Why? He obtained a B-2 visitor visa. He was inspected and admitted to the United States and is therefore subject to the criminal grounds of deportability.

Is the Italian foreign national inadmissible or deportable? Inadmissible. Why? Despite the fact that he was inspected and lawfully admitted to the United States, he is subject to the grounds of inadmissibility because he committed a CIMT crime in the United States and then departed. He would not be subject to the criminal grounds of inadmissibility if he had never committed such an offense, departed, and then returned to the United States.



This flowchart provides some guidance to determine whether a defendant is subject to the criminal grounds of inadmissibility or deportability/removal.



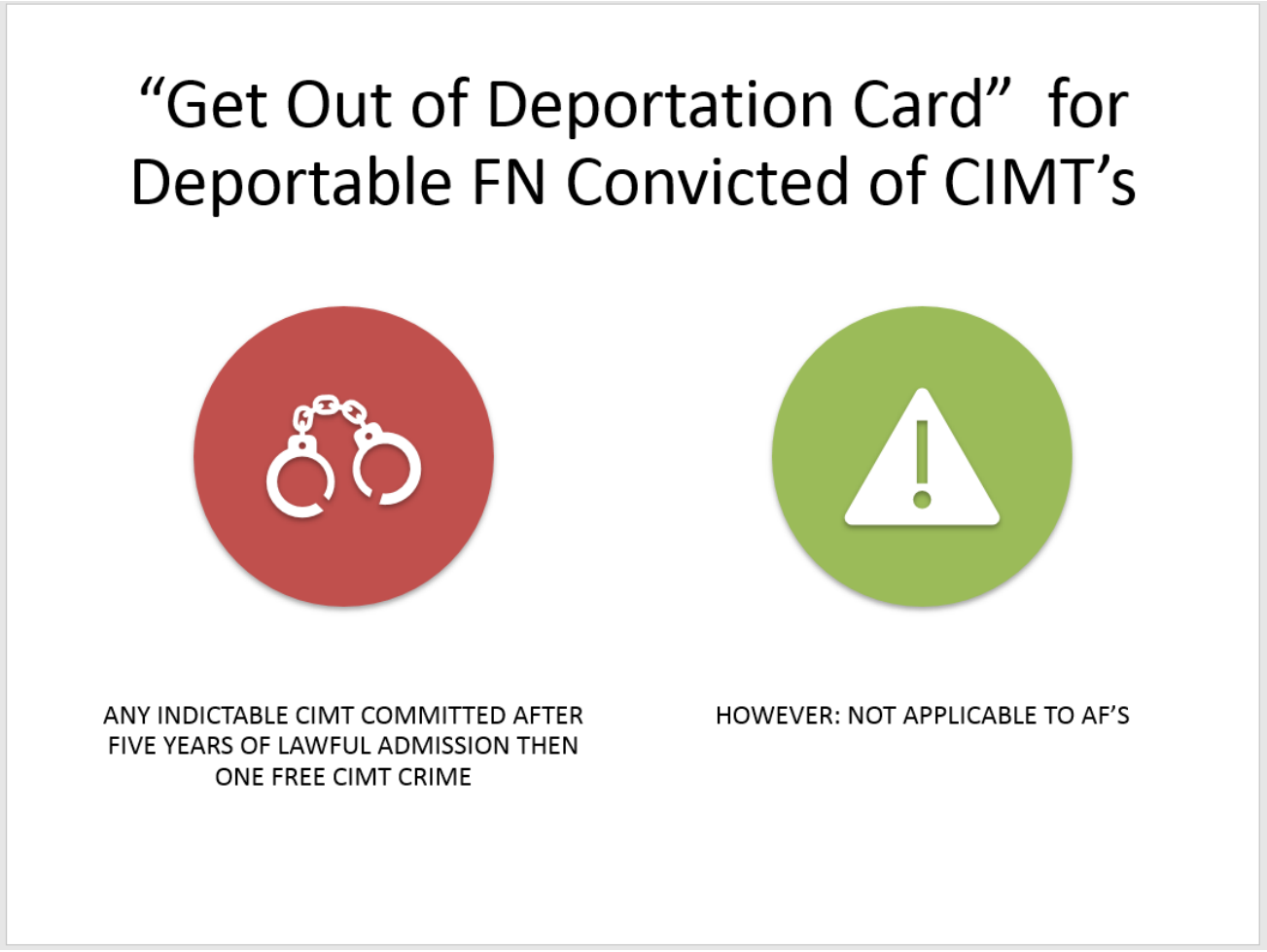
In the examples above, the Mexican foreign national defendant was subject to the criminal grounds of inadmissibility. The left side of the chart lists the offenses that would place a defendant subject on the criminal grounds of inadmissibility into removal proceedings. If an EWI is convicted for possession of a marijuana cigarette, then the EWI will be placed into removal proceedings. The Polish foreign national defendant was subject to the criminal grounds of deportability. The right side of the chart lists the offenses that would place a defendant subject on the criminal grounds of deportability into removal proceedings. If this Polish foreign national is convicted for possession of a marijuana cigarette (less than 30 grams), he will *not* be placed into removal proceedings. What would happen to him if he is convicted of two or more shoplifting offenses? He would be placed in removal proceedings.

The Italian foreign national defendant was subject to the criminal grounds of inadmissibility. The left side of the chart lists the offenses that will place a defendant subject on the criminal grounds of inadmissibility into removal proceedings.

Exceptions to Removability

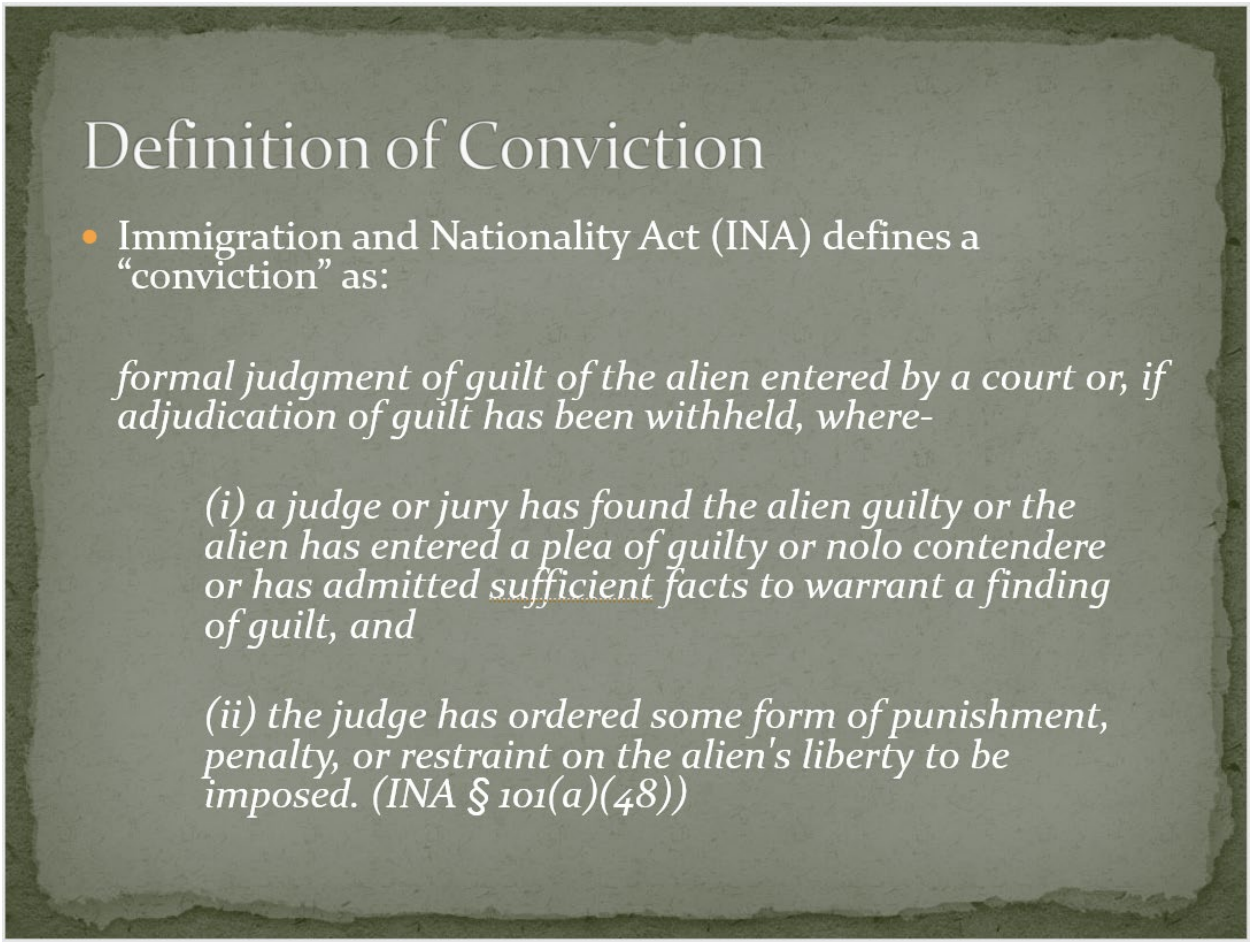
Defendants subject to the criminal grounds of inadmissibility are entitled to the petty offense exception (POE). This exception is found in the above Inadmissibility v. Deportability Criminal Grounds chart under the CIMT section (second paragraph—left side: §INA 212(A)(2)). The defendant subject to the criminal grounds of inadmissibility is given one free pass. Disorderly person (DP) offenses like shoplifting and theft fit into the POE.

Defendants subject to the criminal grounds of deportability are entitled to what I refer to as the "Get Out of Deportation Card." This exception is found in the above Inadmissibility v. Deportability Criminal Grounds chart under the CIMT section (second paragraph—right side: §INA 237(A)(2)). The defendant subject to the criminal grounds of deportability is given one free pass. The key component to the exception is that the criminal conviction had to occur after five years from the date that the defendant was inspected and lawfully admitted to the United States. The exception does not apply to immigration AFs, which will be discussed in detail later.

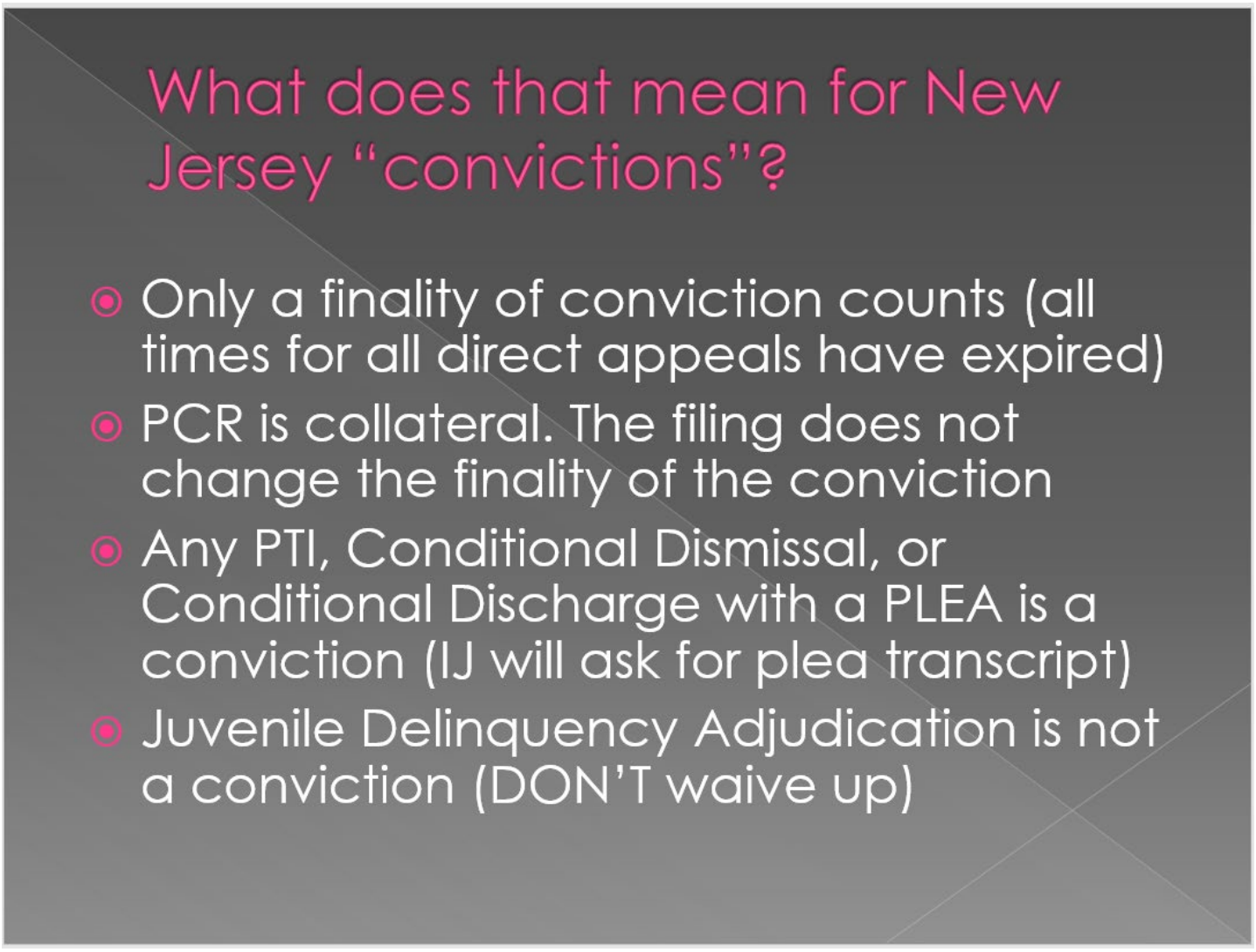


Definition of Conviction

The definition of a conviction in immigration is different than our New Jersey definition of a conviction. Any guilty plea is a conviction for immigration purposes, even if the conviction has been dismissed because of some form of a diversionary program or drug court program. Any guilty plea followed by an expungement remains a guilty plea for immigration purposes. No guilty plea but an allocution to the essential elements of the crime or offense plus any form of punishment is a conviction for immigration purposes. Any form of punishment means a fine, probation, and/or jail. A conditional dismissal is a conviction for immigration purposes because the defendant enters a guilty plea. A conditional discharge is not a conviction for immigration purposes because there is no guilty plea. However, a conditional discharge wherein the defendant admits that the drugs were his and not his girlfriend's counts as a conviction for immigration purposes. The fact that the charge is dismissed because of the defendant's successful completion in that diversionary program is of no moment. How about the example of simple possession of cocaine downgraded to loitering where the prosecutor asks, "And you actually obtained and possessed the cocaine?" For immigration purposes, the defendant has a conviction for simple possession of cocaine.



There is no conviction for immigration purposes until the time for direct appeals has expired. In other words, if the defendant is in removal proceedings for a conviction and a timely appeal is filed, there is no conviction until the appeal is concluded. In contrast, the filing of a petition for postconviction relief does not change the finality of a conviction. Immigration views the filing of the petition for postconviction relief as collateral. A successful petition for postconviction relief may or may not vacate the conviction for immigration purposes, depending on the reason for the vacatur. Any diversionary treatment program or drug court with a guilty plea is a conviction for immigration purposes, regardless of the dismissal of the conviction. A juvenile delinquency adjudication is not a conviction; therefore, the defendant cannot be placed in removal proceedings based on a juvenile delinquency adjudication.

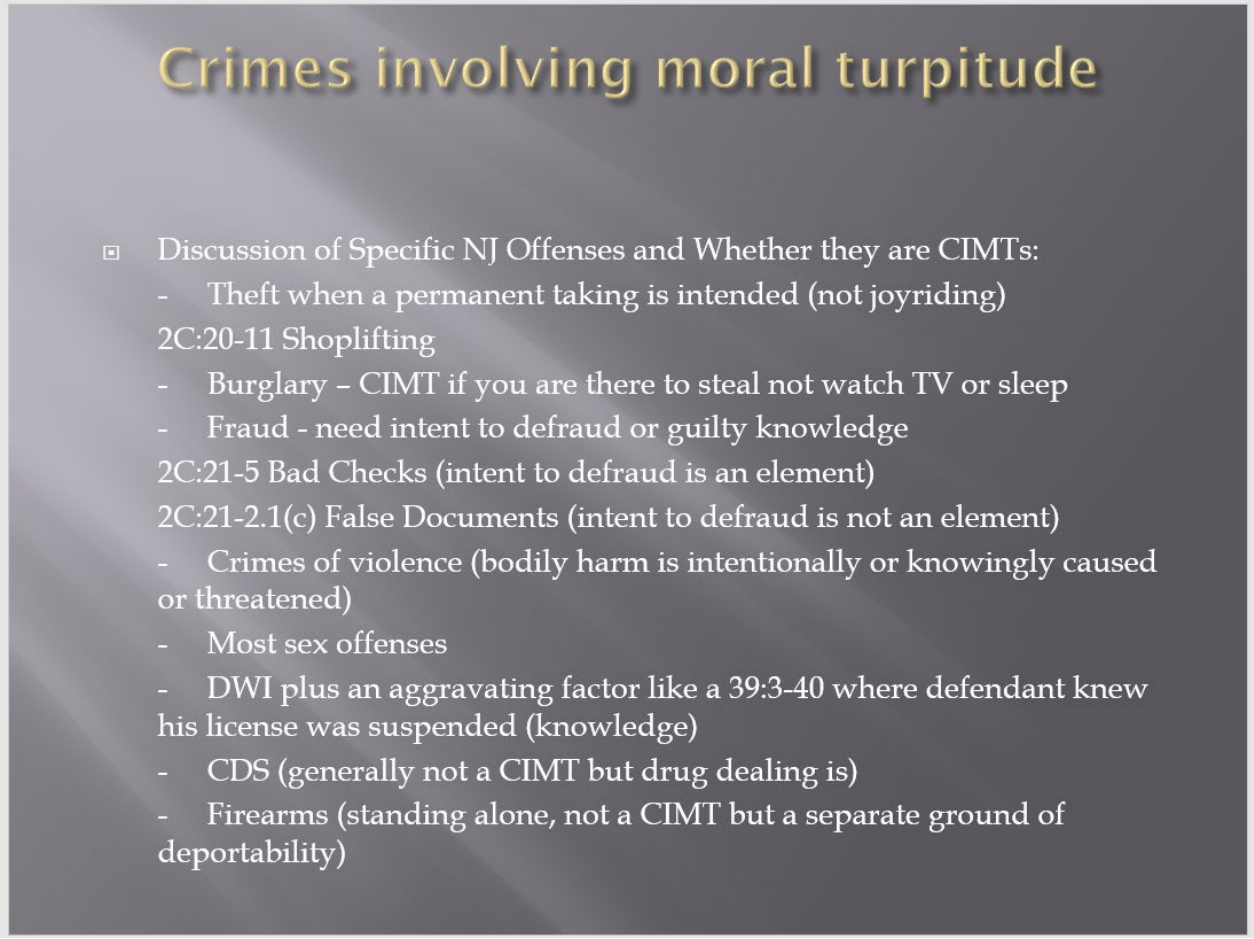


CIMT

The phrase "crimes involving moral turpitude" is an ambiguous one, and court decisions related to it are often inconsistent. For an offense to be a CIMT, there must be some type of guilty knowledge required on the part of the defendant. This *mens rea* must be an element in the statute. Criminal negligence is not a CIMT. The severity or degree of the crime is irrelevant. Stealing a piece of bubble gum is considered to be a CIMT. Look to the elements of the New Jersey statute, not the facts of the case, to determine whether the offense is a CIMT.

CRIMES INVOLVING MORAL TURPITUDE

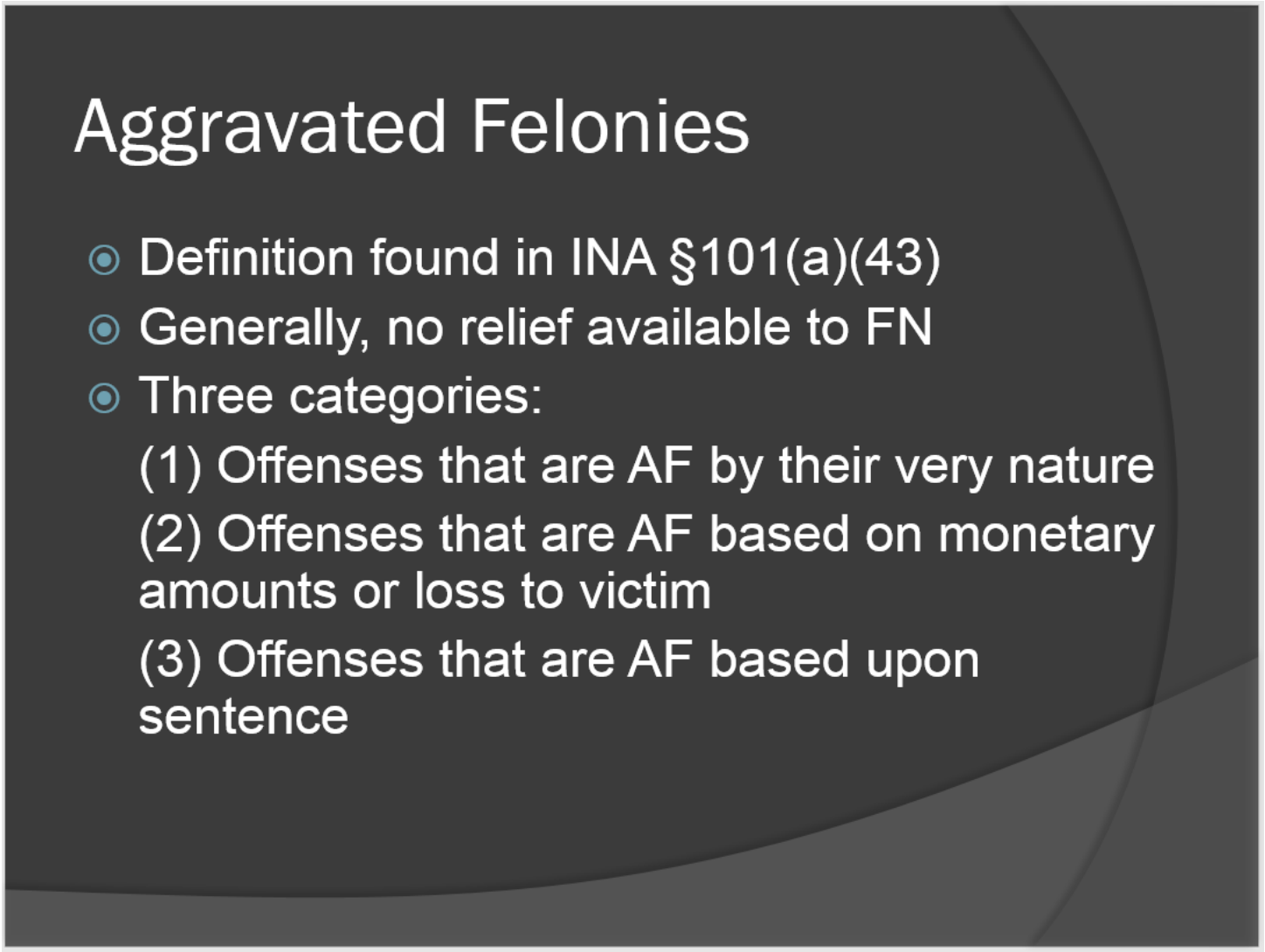
- The phrase "moral turpitude" is one of the most ambiguous in the long list of ambiguous legal phrases and the cases are far from consistent.
- Moral turpitude refers to conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, 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 the defendant's 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**.



The above chart discusses some specific NJ crimes and whether they are CIMTs. Generally, almost all theft offenses are CIMTs. A theft that involves a "temporary" taking may not be CIMT. For example, joyriding is not a CIMT. Burglary is generally a CIMT if you have unlawfully entered the structure to steal. However, using the "categorical approach," NJ immigration judges have found that the NJ burglary statute is not a CIMT. In NJ, a defendant can be convicted of burglary because he or she unlawfully entered and committed a DP offense of disorderly conduct. No intention to steal is required by the NJ burglary statute. Additionally, federal courts have found that if the definition of structure is broader than the state definition of structure, then the statute is not a categorical match and not a CIMT. The NJ structure definition includes a car, a vehicle, and a plane. The federal generic definition does not. Therefore, the NJ statute is broader than the federal generic definition of burglary. (The "categorical approach" will be discussed later.) NJ statutes that require that the defendant intend to defraud refer to CIMTs. Certain crimes of violence are CIMTs where bodily harm is intentional or knowingly caused. Most if not all sex-related crimes are CIMTs. The simple possession of a controlled dangerous substances (CDSs) is not a CIMT, but drug trafficking is a CIMT (and in most cases an AF). The possession of a gun is not a CIMT, but threatening someone with one is.

AFs

A defendant convicted of an AF has little to no immigration relief and will, in general, be removed from the United States. The three categories of AFs are (1) offenses that by their very nature are considered to be AFs, (2) offenses based on monetary amounts or a specific loss to the victim, and (3) offenses based on the jail sentence imposed. The actual time spent in jail is irrelevant. The inquiry is the specific jail sentence imposed by the judge.



Aggravated Felonies

Nature of the Offense

- Murder, rape, or sexual abuse of a minor
- Drug trafficking
- Firearms trafficking (including destructive devices)
- Prostitution business
- Human trafficking
- Kidnapping
- Child Pornography (Salmoran 3rd Circuit just said nope but it is Child Abuse)

Child pornography was previously categorized as an AF, but the Third Circuit in the *Salmoran* case ruled that child pornography is *not* an AF. The court found that child pornography is child abuse because the pictures or videos of these young children remain "published" forever.

The immigration judge will look to the record of conviction to determine this monetary amount. If the above amounts are $10,001 or greater, then the defendant is facing an AF and the mandatory deportation that results from the same.

The above offenses will become AFs if the sentence the judge imposes is greater than 364 days. The focus is on the exact sentence, not the time spent in jail. A suspended sentence is still a sentence for immigration purposes. Almost all theft-related offenses are CIMTs, as previously discussed, and if there is a jail sentence of more than 364 days, then the conviction is an AF. NJ immigration judges have found that the NJ burglary statute is not a CIMT because a defendant can be convicted of burglary by unlawfully entering and committing the DP offense of "disorderly conduct." Further, our definition of structure encompasses more than the federal generic definition (e.g., vehicle). Therefore, the NJ statute is broader than the federal generic definition of burglary. If the NJ burglary statute is not a CIMT, it is not an AF. Possession of stolen property is an AF if the jail sentence is more than 364 days. This discussion on burglary highlights how dynamic this area of law is. Recent legal research is required to obtain data on the most accurate immigration consequences of the defendant's plea. Immigration consequences can and do change with case law from immigration judges, Board of Immigration Appeals (BIA), the United States Attorney General, the Circuit Courts of Appeals, and the United States Supreme Court. The words "generally speaking" cannot be overemphasized.

The AF crime of violence requires additional explanation. The federal definition of the term "crime of violence" used in immigration is found in 18 USC §16. Until recently, sections §16(a) and §16(b) were used to define a crime of violence. The Third Circuit Court of Appeals and the United States Supreme Court have found that §16(b) is void for vagueness. Prior to this ruling by the courts, a defendant convicted of NJSA 2C:29-2a(3)(b) Resisting Arrest; Eluding Officer who was sentenced to more than 364 days in jail could have been classified as having committed an AF. The abolition of §16(b) has eliminated that AF classification for the above NJ statute and others.

Crime of Violence at 18 USC § 16

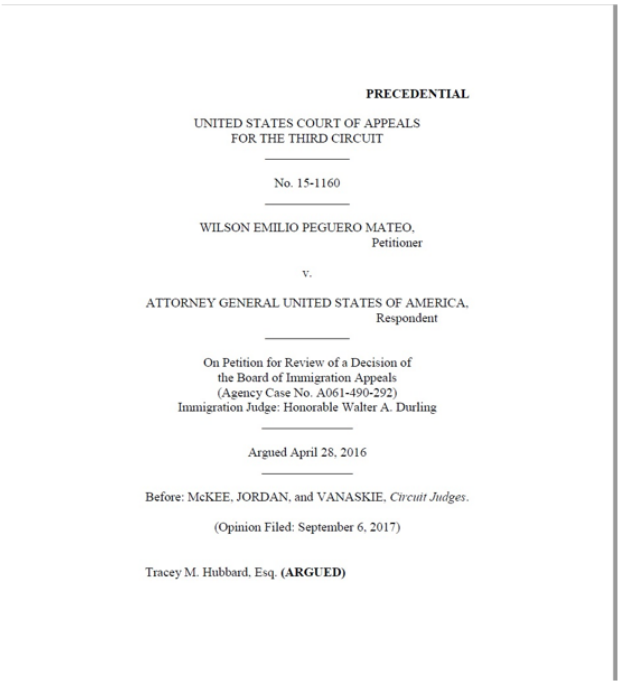
WILSON EMILIO PEGUERO MATEO - VOID FOR VAGUENESS!

- 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. More than 364-day jail sentenced required.

Aggravated assault with a firearm (and a jail sentence of more than 364 days) would be a crime of violence. Look at the NJ statute and determine what the *mens rea* is. There must be an element involving the use, attempted use, or threatened use of physical force against a person or property.

The United States Court of Appeals for the Third Circuit ruled that 18 U.S.C.A. § 16(b) is unconstitutional. Additionally, US Supreme Court Justice Kagan held that the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's (INA) definition of AF, was impermissibly vague in violation of due process. *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549, 86 USLW 4189, 18 Cal. Daily Op. Serv. 3446, 2018 Daily Journal D.A.R. 3331, 27 Fla. L. Weekly Fed. S 161, 2018 WL 1800371 (2018).

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

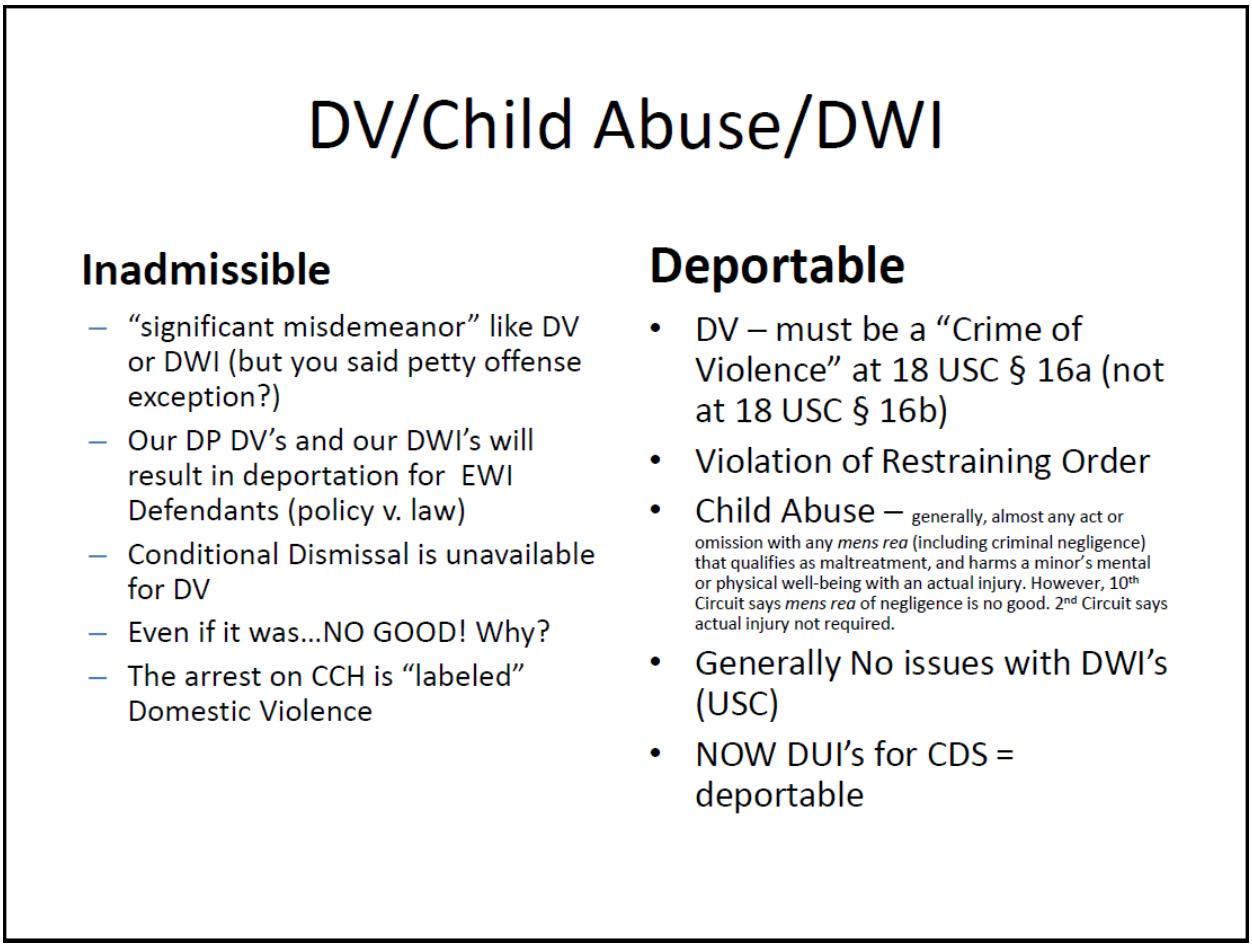
Argued April 28, 2016

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

(Opinion Filed: September 6, 2017)

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

DV/Child Abuse/DWI



Under Inadmissible

Immigration classifies an act of domestic violence or a driving while intoxicated traffic ticket to be a "significant misdemeanor." The defendant who is subject to the criminal grounds of inadmissibility and is convicted of some form of domestic violence has committed a "significant misdemeanor." For example, harassment in a domestic violence context in municipal court would be a "significant misdemeanor." The defendant who is subject to the criminal grounds of inadmissibility and is convicted of NJSA 39:4-50 Driving While Intoxicated has committed a "significant misdemeanor." The defendant who has been convicted of either offense will be placed into removal proceedings. The POE applies only to CIMTs like shoplifting. None of the abovementioned violations are listed in the Inadmissibility v. Deportability chart, so why would the defendant be removed? Recall that foreign nationals who are here illegally (no inspection, no admission) can be removed on that basis alone. The government does not need a conviction to remove these foreign nationals. The field of immigration consists of laws and policy. The current immigration policy/priority is to seek out and remove those foreign nationals who have been convicted of domestic violence or of driving while intoxicated. A priority policy for deportation exists under every administration. Conditional dismissals are not available to defendants charged with disorderly or petty DP offenses in the domestic violence context. Even if domestic violence

was not an exception to conditional dismissal, conditional dismissal is of no value to a foreign national defendant because an applicant to this diversionary program MUST enter a guilty plea. Immigration views the guilty plea as a conviction even though the conviction is dismissed after successful completion of the diversionary program. ICE is able to determine whether the DP offense was in the context of domestic violence by looking to the criminal case history (CCH). Above the arrest line on the CCH will be a series of "*" (asterisks) with the letters "DV" in the center of the line.

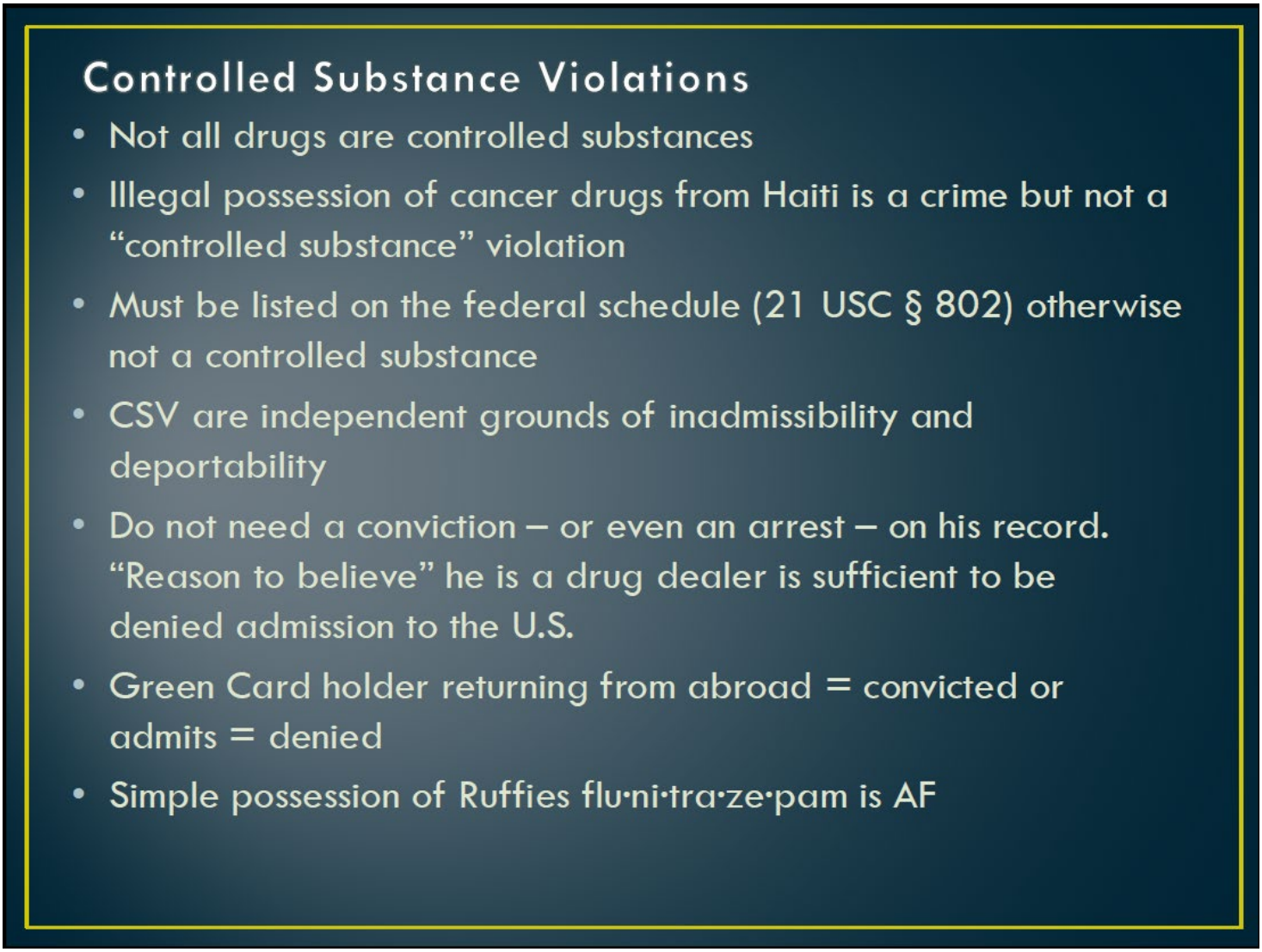
Under Deportable

Defendants subject to the criminal grounds of deportability can be removed for a domestic violence offense that is a crime of violence as defined by 18 USCA 16(a). Defendants can be removed for a violation of a temporary or final restraining order. Generally, the violation must involve protection against credible threats of violence, repeated harassment, or bodily injury to the person for whom the protection order was issued. In other words, if a former girlfriend who has a restraining order against her boyfriend calls him and he answers the phone and politely tells her not to call him, chances are that would not be viewed as a violation that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person for whom the protection order was issued. The case law on child abuse is far from consistent. Some jurisdictions require that there be some form of injury, which may be defined broadly, while others do not. Although a DWI will not result in the removal of a defendant subject to the criminal grounds of deportability, driving under the influence of drugs could. The Third Circuit has found that a conviction for driving under the influence of marijuana is not entitled to the 30-grams-or-less-of-marijuana exception. The court's position appears to be that the combination of smoking marijuana and driving is worse than simply possessing a small amount of marijuana.

"Therefore, Sambare's conviction under the Pennsylvania DUI Statute for driving under the influence of marijuana, to which he pleaded guilty, is a more serious crime than simple possession of a small amount of marijuana, and we decline to interpret the word 'involving' in such a broad way so as to construe a conviction under the Pennsylvania DUI Statute as a 'a single offense involving possession for one's own use of 30 grams or less of marijuana' under 8 U.S.C. § 1227(a)(2)(B)(i). See *Moncada-Servellon*, 24 I. & N. Dec. at 65 ('The personal-use exception is not intended or understood by Congress to apply to offenses that are significantly more serious than simple possession by virtue of other statutory elements that greatly increase their severity.')." *Sambare v. Attorney Gen. of the United States*, 925 F.3d 124, 129, 2019 WL 2262705 (3d Cir. 2019).

This is very serious for defendants who are convicted of driving under the influence of a CDS.

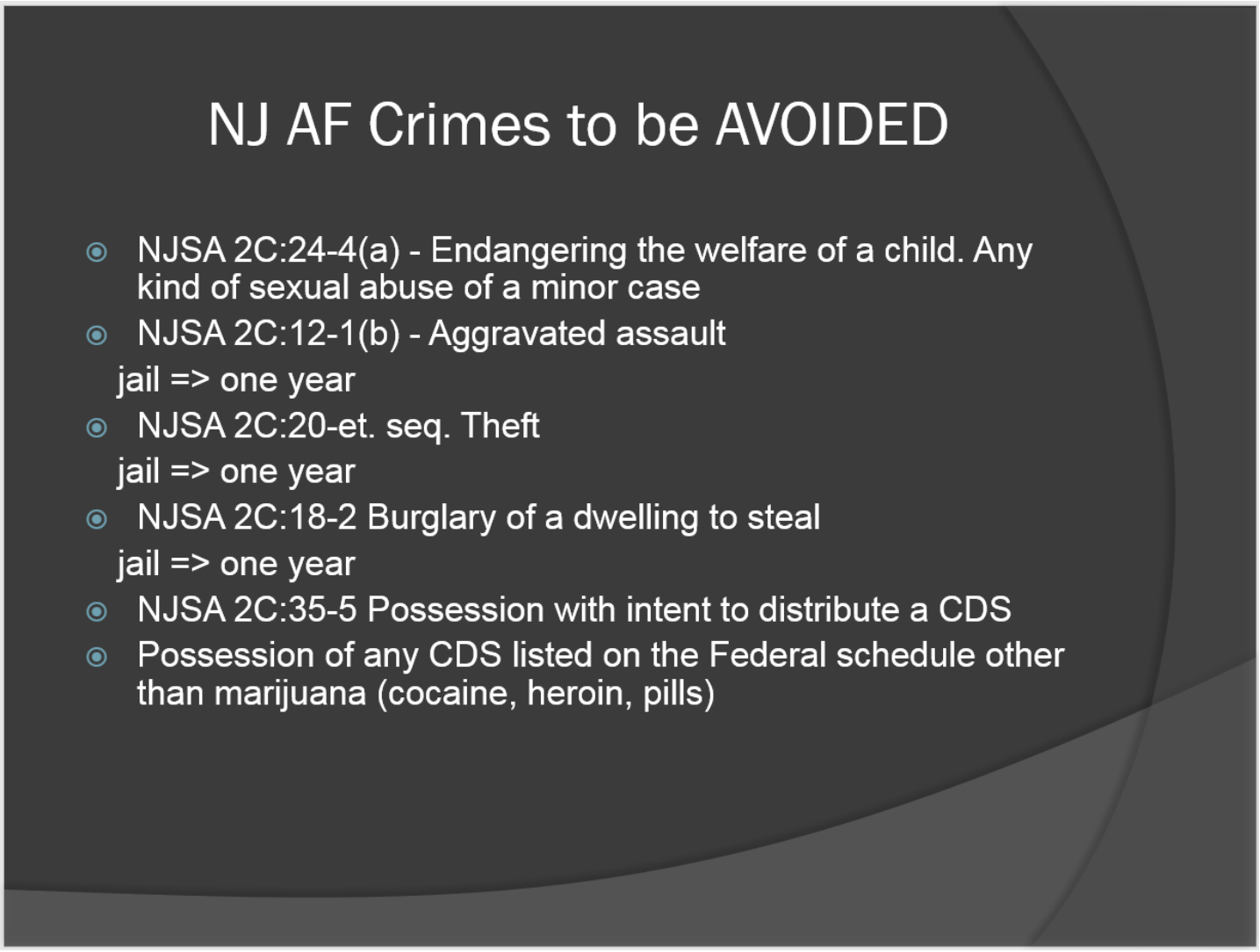
CDS Violations



Defendants facing charges related to CDS are looking at an uphill battle to avoid removal proceedings. Defendants should seek crimmigration advice at the earliest possible stage of the criminal proceedings. They should take steps immediately prior to or shortly after the arraignment. Waiting days before entering a plea or days before trial is a mistake. Some consequences are easily discernible, whereas others require comprehensive research (immigration judges' decisions, BIA, Third Circuit case law, etc.). The Inadmissibility v. Deportability chart *supra* illustrates that CDS offenses are independent criminal grounds for being removed from the United States. Not all drugs are CDS, and the CDS must be on the federal schedule for a conviction to trigger removal proceedings. For example, Drug A is not on the federal schedule, but it is on the NJ schedule. A guilty plea to possession of Drug A will not trigger removal proceedings for the defendant. Defendants who have drug convictions and leave the country with intentions of returning face the grounds of inadmissibility. For example, a defendant who entered PTI with a plea to dealing drugs

might be taken into custody by CBP and questioned about the offense. If the defendant admits to having dealt drugs or if a copy of the police report is in the hands of CBP, then CBP will have "reason to believe" the defendant is a drug dealer and deny admission to the United States. The simple possession of "roofies" is considered to be an AF. No other simple possession of a CDS is considered to be an AF. Simple possession of crack cocaine was considered an AF in the past but is not now.

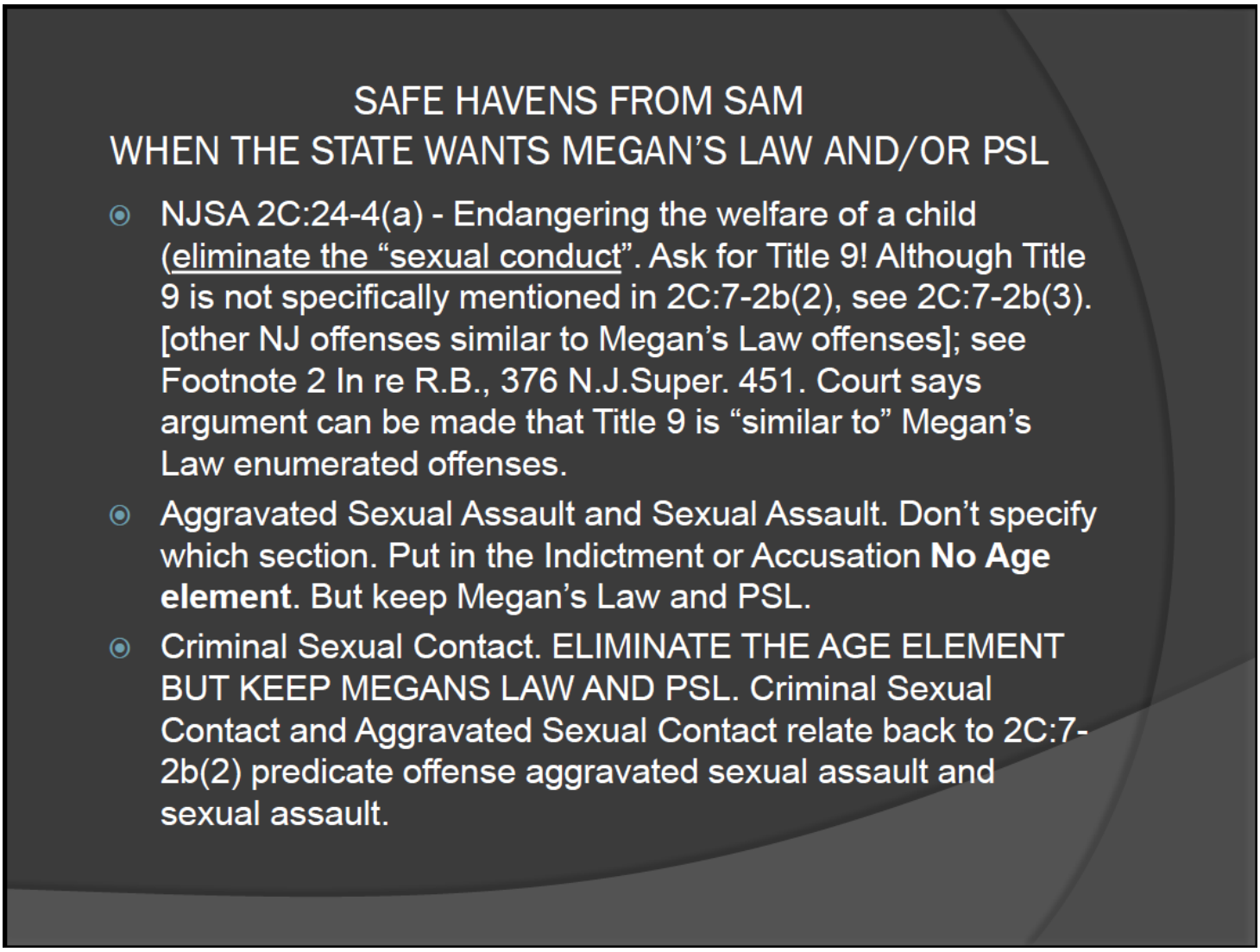
NJ AF Crimes to be Avoided and Safe Havens



The defendant charged with any type of sexual abuse of a minor faces a difficult, if not impossible, battle to remain in the United States. Such a defendant not only has extremely unforgiving criminal grounds of removal, but the act itself is considered taboo by society and therefore the courts. The courts tend to ignore the rulebook with these types of offenses. Given the fairly recent changes to crimes of violence, the defendant facing aggravated assault charges may or may not have conducted an AF. The aggravated assault must have as an element the use, attempted use, or threatened use of physical force against a person or property. Most theft offenses with a jail sentence of 365 days or more will result in an AF and the removal of the defendant. As previously discussed, NJ statute for burglary is not a CIMT and not an AF. Our NJ statute for burglary (third degree) can be considered a "safe haven" and be removed from this slide. Why? The NJ statute has a broader range of places that a defendant may enter (e.g., a car) compared to the federal generic definition of burglary (the federal courts use the common law definition of burglary, which requires a dwelling). NJSA 2C:18-2 does not require that a defendant commit a CIMT crime while in the dwelling (i.e., stealing). A defendant could break into a car with the purpose of joyriding

and be convicted of NJSA 2C:18-2. A defendant could break into a house to commit simple assault, criminal mischief, or any number of non-CIMT offenses. This encompasses criminal activity that the federal generic definition does not, so NJ burglary does not trigger the criminal grounds of removal.

The distribution of drugs other than marijuana is a major immigration problem. There is an exception for marijuana in the federal law. A defendant who shares a small amount (less than 30 grams) of marijuana for no remuneration is guilty of NJSA 2C:35-5b(11) or (12). However, there is a federal exception for sharing a small amount (less than 30 grams) of marijuana for no remuneration [21 USC § 841(b)(4)]. This criminal act does not trigger the criminal grounds of drug trafficking. NJSA 2C:35-5b(11) or (12) are not considered drug trafficking due to the federal exception. The exception is *only* for marijuana. The larger quantities found in NJSA 2C:35-5b(10) would not fit into the exception. The distribution of any other drug is drug trafficking no matter the quantity, thus triggering the criminal grounds of removal for drug dealing. The possession of any other drug is problematic for any defendant. A very small amount of cocaine will result in deportation proceedings for a longtime green card holder. The defendant must be made aware of these dangerous pitfalls.



This is a complex slide involving sexual abuse of a minor and requires a step-by-step explanation. The end result is a plea that completely removes the age element anywhere in the record of conviction (indictment or accusation, plea forms, plea colloquy, etc.) but still permits the state to impose Megan's Law and parole supervision for life conditions. If the state and defendant reach such a plea agreement, the defendant has just dodged a bullet.

The facts assume that the defendant had a sexual incident with a minor. Criminal defense attorneys representing such a foreign national defendant will seek to avoid the AF classification of sexual abuse of a minor. Prosecutors will seek to impose Megan's Law and parole supervision for life. The above slide attempts to legally reach these two competing goals.

A defendant pleading to NJSA 2C:24-4a(2) or NJSA 9:6-1 (child abuse statutes) will avoid being classified as an AF in immigration. However, the defendant will most likely be subject to the separate grounds of removal under Child Abuse [INA §237(a)(2)(E)(i)]. New Jersey's child endangerment statutes (both NJSA 9:6-1 and NJSA 2C:24-4) prohibit a broad range of conduct. The least culpable conduct punishable under the above citations is not morally turpitudinous, so

charges for "child endangerment" do not constitute a CIMT. Using harsh language, failing to use a child seat in an automobile, or leaving the child unattended for five minutes in the car would violate the above NJ statutes.

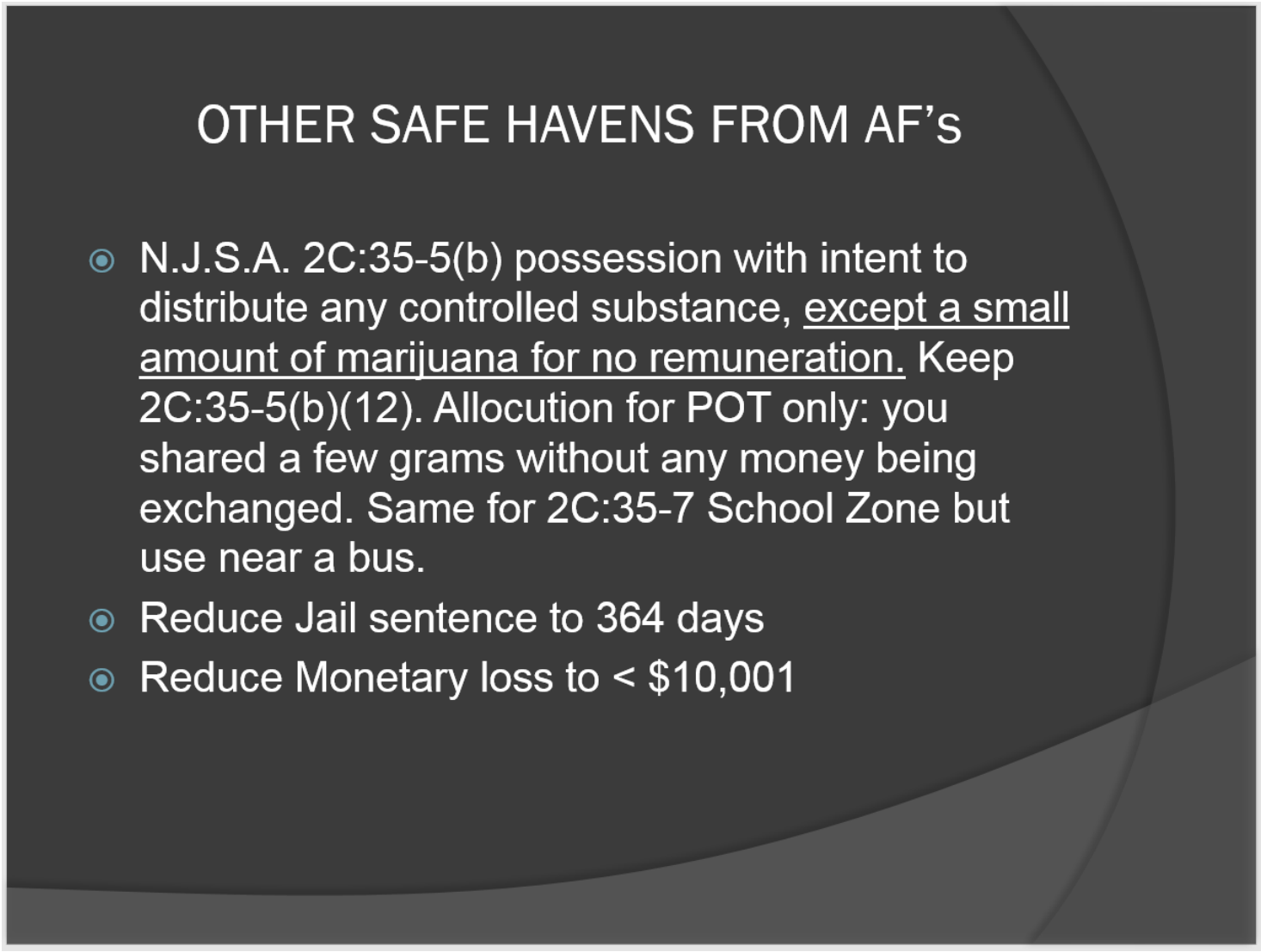
Although Megan's Law NJSA 2C:7-2b(2) does not make mention of our Title 9 violation, NJSA 2C:7-2b(3) includes other NJ offenses similar to Megan's Law offenses and footnote 2 *In re R.B*, 376 N.J. Super. 451's comments that Title 9 is "similar to" Megan's Law enumerated offenses.

Megan's Law section NJSA 2C:7-2b(2) lists those sex offenses that would require registration. The aggravated sexual assault crimes found in NJSA 2C:14-2a(3), (4), (5), (6), and (7) do not require an age element. Further, the sexual assault crimes found in NJSA 2C:14-2c(1) and (2) do not require an age element. The use of these sections of the statute will not result in an immigration classification of aggravated assault. However, the offenses are considered CIMTs and will also be classified as child abuse, a separate grounds of removal.

The Megan's Law section NJSA 2C:7-2b(2) also lists child pornography-type sex offenses that would require registration, namely NJSA 2C:24-4b(3), (4), and (5). The Third Circuit Court of Appeals in *Salmoran* found that child pornography is not an AF, but it is child abuse, a separate ground for removal. The goal is to avoid the immigration classification of AF. The defendant may still find himself in removal proceedings, but the absence of an AF classification might afford the defendant one or more forms of immigration relief.

Finally, Megan's Law section NJSA 2C:7-2b(2) lists criminal sexual contact pursuant to NJSA 2C:14-3b if the victim is a minor. However, criminal sexual contact refers to NJSA 2C:14-2a (aggravated sexual assault), which is found in NJSA 2C:7-2b(2). Further, criminal sexual contact refers to NJSA 2C:14-2c (sexual assault), which is found in NJSA 2C:7-2b(2).

Theoretically (and more importantly with the State's consent and the judge's approval), the defendant could plead to NJSA 2C:14-3a under NJSA 2C:14-2a(3), (4), (5), (6), or (7), and the absence of an age element would prevent the immigration classification of an AF. The same applies to NJSA 2C:14-3b under NJSA 2C:14-2c(1) and (2). Megan's Law would apply to the defendant. The severity of the defendant's conduct may render such a plea agreement impossible from the State's perspective.



The above crimes might still be CIMTs, but the AF classification is eliminated. There is an exception to the AF classification for drug trafficking. The distribution of a small amount of marijuana (marijuana only and less than 30 grams) for no remuneration is not considered drug trafficking or a CIMT.

The Third Circuit has ruled that NJSA 2C:35-7 distribution in a school zone is not an AF. "The Court of Appeals, Krause, Circuit Judge, held that New Jersey narcotics offense of which alien had previously been convicted swept more broadly than the generic federal offense, in that New Jersey offense could be committed by means either of distribution or dispensing of controlled substance, and thus did not qualify as AF, the alien's conviction of which would render him statutorily ineligible for cancellation of removal." *Chang-Cruz v. Attorney Gen. United States of Am*., 659 Fed. Appx. 114, 2016 WL 4446063 (3d Cir. 2016).

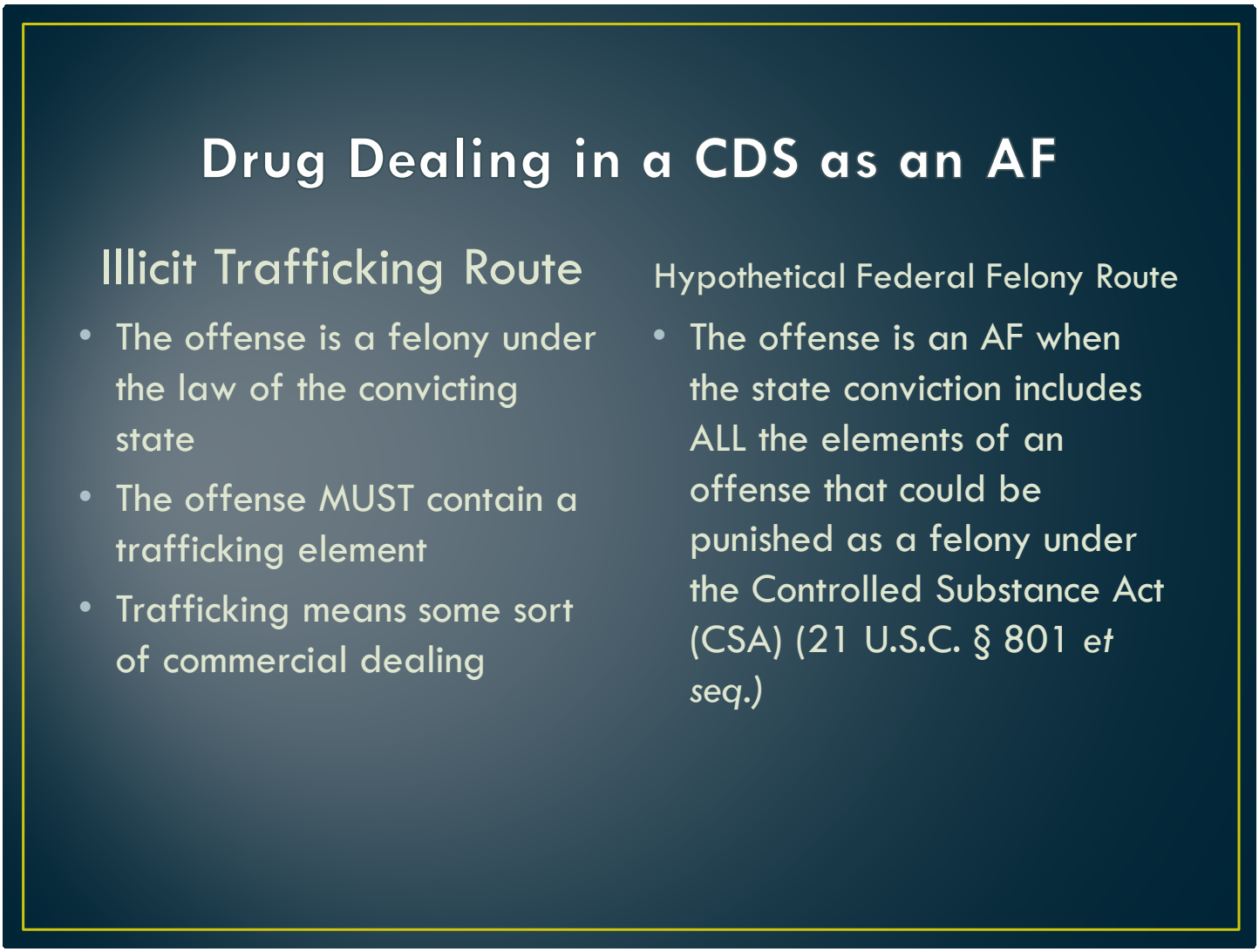
The BIA came to the opposite conclusion using a different analysis: "In deciding whether a State offense is punishable as a felony under the Federal Controlled Substances Act and is therefore an

AF drug trafficking crime under section 101(a)(43)(B) of the INA, 8 U.S.C. § 1101(a)(43)(B) (2012), adjudicators need not look solely to the provision of the Controlled Substances Act that is most similar to the State statute of conviction. The respondent's conviction under section 2C:35-7 of the New Jersey Statutes for possession with intent to distribute cocaine within 1,000 feet of school property is for an AF drug trafficking crime because his State offense satisfies all of the elements of 21 U.S.C. § 841(a)(1) (2012) and would be punishable as a felony under that provision." *Matter of Rosa*, 27 I. & N. Dec. 228, 228, Interim Decision 3919, 2018 WL 1365569, at 1 (BIA 2018).

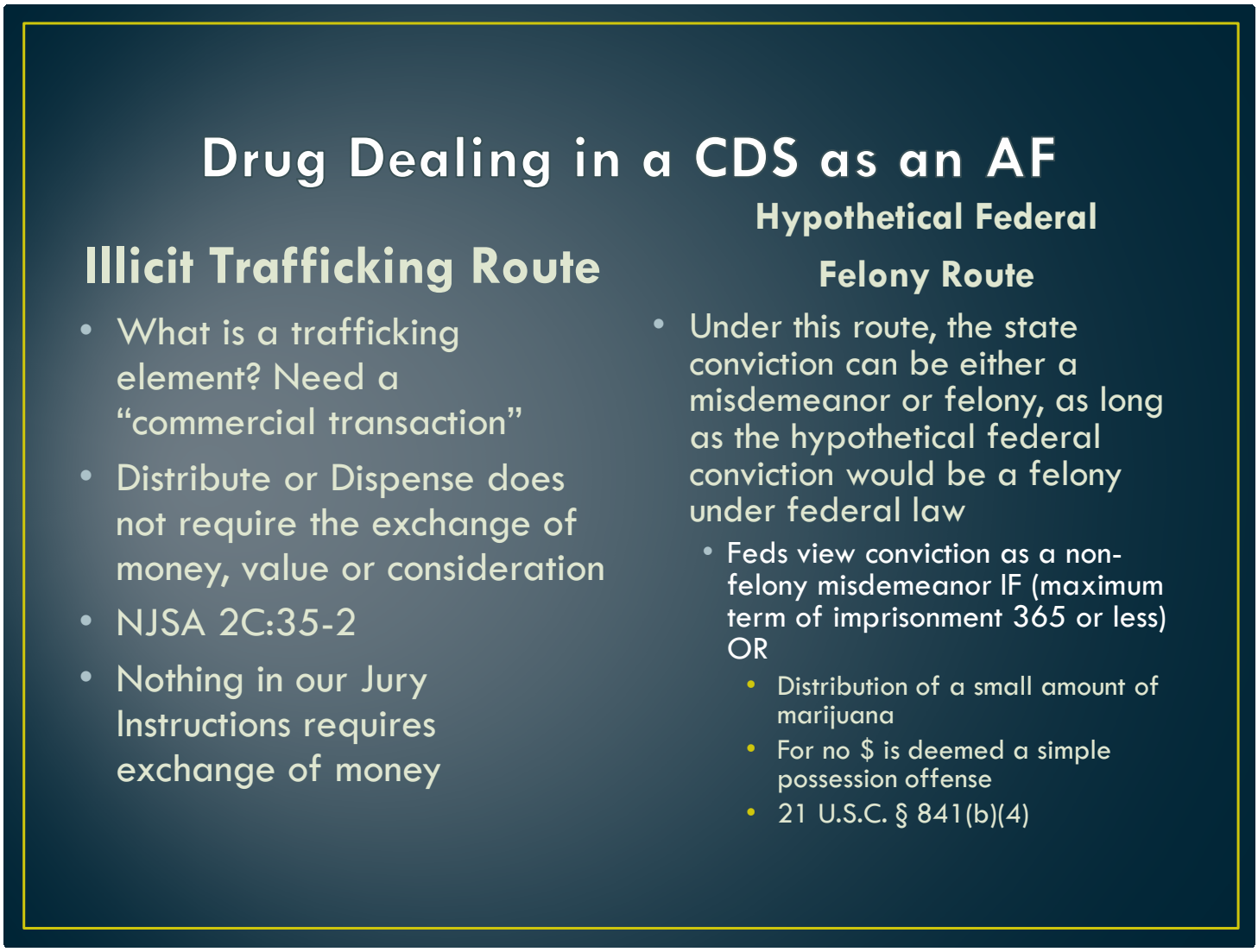
A defendant charged with NJSA 2C:35-7 should provide a factual basis that a small amount of marijuana was distributed for no remuneration near or on a bus. For those crimes that become classified as AFs based on a jail sentence of at least one year, reduce the jail sentence to 364 days. For those crimes that become classified as AFs based on monetary amounts, reduce the dollar amount to less than $10,001.

The following slides will detail exactly how our Court of Appeals for the Third Circuit concluded that NJSA 2C:35-7 is not an AF.

Drug Trafficking – AF or Not?

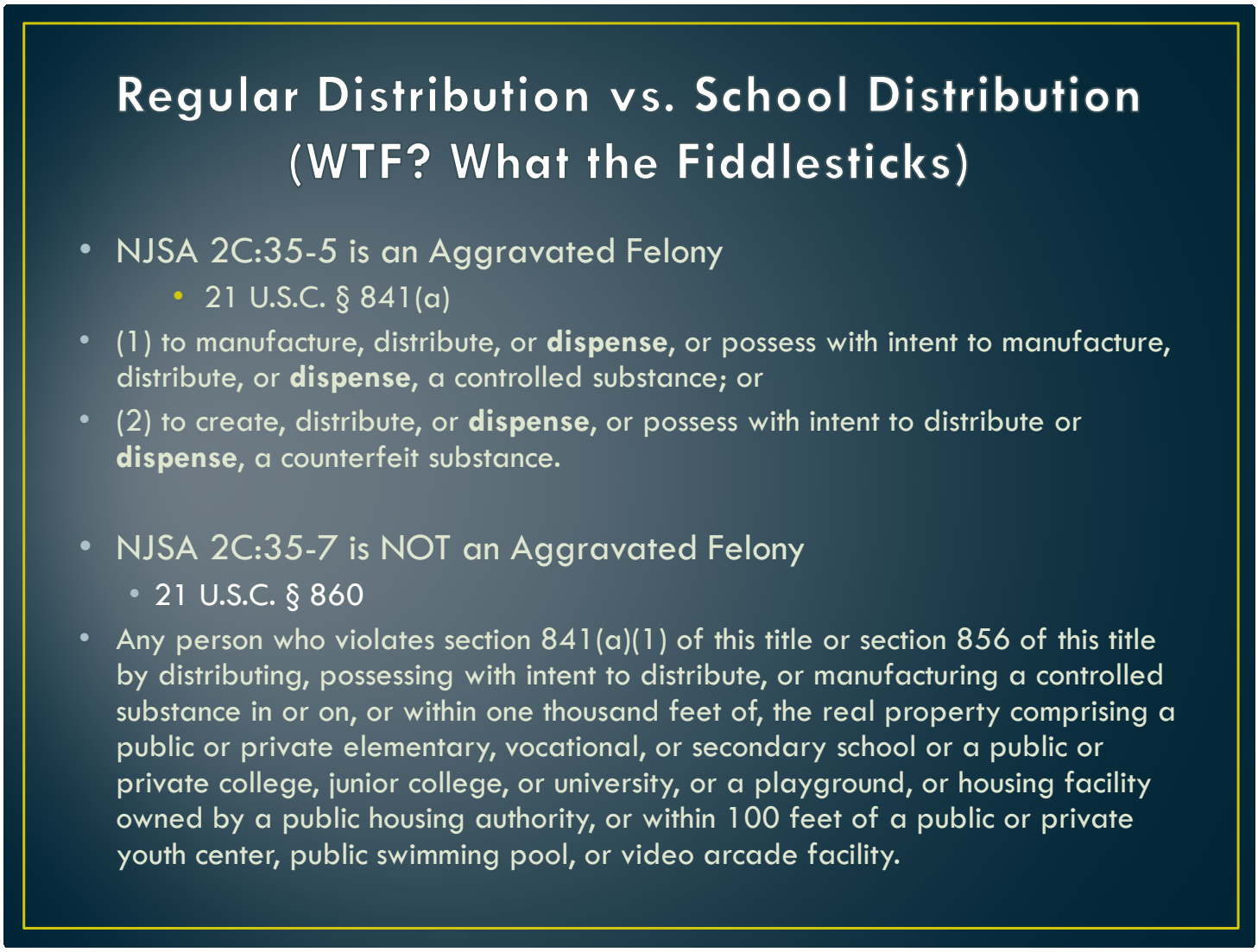


There are two drug trafficking grounds of removal: The Illicit Trafficking Route grounds of removal and the Hypothetical Federal Felony Route grounds of removal. In New Jersey, a defendant could be convicted of drug dealing even if no money is exchanged (e.g., commercial dealing). Therefore, when the immigration court analyses whether the New Jersey statute of drug dealing "triggers" the Illicit Trafficking Route grounds of removal, the analysis fails because no commercial dealing is required for a conviction under the New Jersey drug dealing statute of conviction. The immigration court proceeds to the Hypothetical Federal Felony Route grounds of removal analysis. If the exception under 21 USC § 841(b)(4) applies, then the analysis stops, and the conclusion is that the offense is not an AF; otherwise, the analysis continues.



Using the Illicit Trafficking Route analysis and comparing our New Jersey drug distribution statutes and definitions, we can conclude that our New Jersey drug distribution statutes will not trigger this grounds of removal. Our drug distribution statutes permit a conviction without the need for a commercial transaction (i.e., no money need be exchanged).

Using the Hypothetical Federal Felony Route analysis and comparing our New Jersey drug distribution statutes and definitions, we can conclude that our New Jersey drug distribution statutes will trigger this grounds of removal, except for the exception found in 21 USC §841(b)(4). Generally, a conviction under NJSA 2C:35-5b(11) or (12) wherein the quantity of marijuana is one ounce or less for no exchange of money will fall into the 21 USC §841(b)(4) exception.



The Third Circuit has ruled that NJSA 2C:35-7 distribution in a school zone is not an AF: "The Court of Appeals, Krause, Circuit Judge, held that New Jersey narcotics offense of which alien had previously been convicted swept more broadly than the generic federal offense, in that New Jersey offense could be committed by means either of distribution or dispensing of controlled substance, and thus did not qualify as AF, the alien's conviction of which would render him statutorily ineligible for cancellation of removal." *Chang-Cruz v. Attorney Gen. United States of Am.*, 659 Fed. Appx. 114, 2016 WL 4446063 (3d Cir. 2016).

The BIA, however, has come to the opposite conclusion using a different analysis: "In deciding whether a State offense is punishable as a felony under the Federal Controlled Substances Act and is therefore an AF drug trafficking crime under section 101(a)(43)(B) of the INA, 8 U.S.C. § 1101(a)(43)(B) (2012), adjudicators need not look solely to the provision of the Controlled Substances Act that is most similar to the State statute of conviction. The respondent's conviction under section 2C:35-7 of the New Jersey Statutes for possession with intent to distribute cocaine within 1,000 feet of school property is for an AF drug trafficking crime because his State offense satisfies all of the elements of 21 U.S.C. § 841(a)(1) (2012) and would be punishable as a felony

under that provision." *Matter of Rosa*, 27 I. & N. Dec. 228, 228, Interim Decision 3919, 2018 WL 1365569, at 1 (BIA 2018).

In concluding that violation of NJSA 2C:35-7 is not an AF, the Third Circuit engaged in the categorical approach and focused on elements in a statute versus alternative means of committing a crime. The existence of alternative means to commit a crime does not mean that the statute is divisible, and thus the trier of fact may not look to the record of conviction. An example of a divisible statute is NJSA 2C:24-4 Endangering Welfare of Children. Section a refers to engaging in sexual conduct with the minor. Section b refers to causing harm that results in an abused or neglected minor. The immigration judge must determine what section of NJSA 2C:24-4 the foreign national was convicted of by consulting the record of conviction. An example of a non-divisible statute is NJSA 2C:35-5b(12). For immigration purposes, the least culpable conduct under NJSA 2C:35-5b(12) is the sharing of less than one ounce of marijuana for no remuneration. No need to look to the record of conviction.

The existence of different elements in conjunction with a different way to commit the crime suggests that the statute is divisible, and the trier of fact may peek at the record of conviction. Immigration attorneys do not want the trier of fact looking at the record of conviction. Why? There

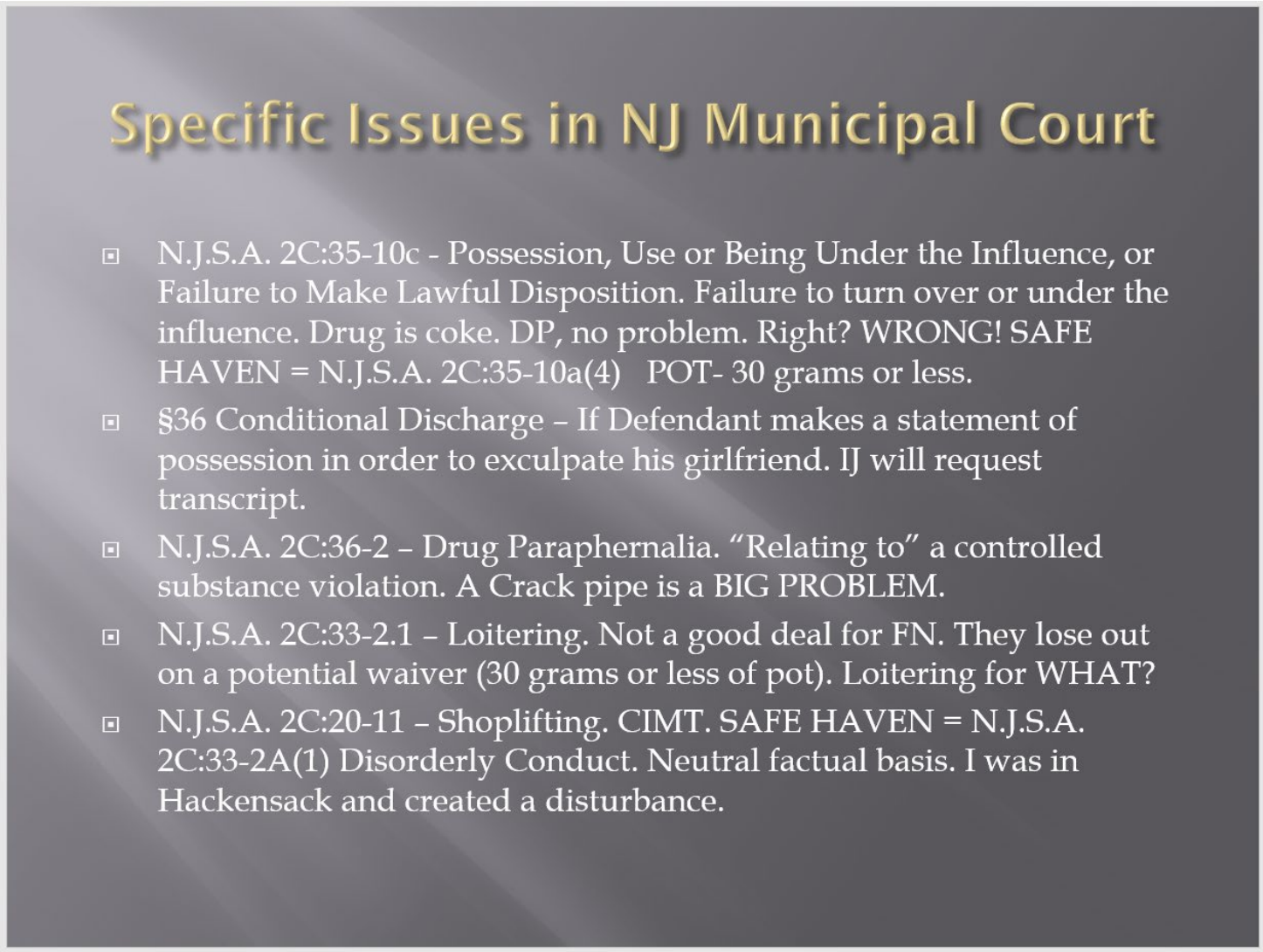
are many reasons for this, such as the potential for the judge to find that the drug is more than an ounce, in which case the exception under 21 USC §841(b)(4) would not apply. A peek at the record of conviction may trigger the grounds of removal as opposed to the strict categorical approach. The categorical approach permits only a comparison of the New Jersey statute of conviction to the grounds of removal.

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 elements, we may apply the Modified Categorical Approach to determine the elements of his conviction
- 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!

Bottom line: The Third Circuit has found that violation of NJSA 2C:35-7 is not an AF, but the BIA has found that it is an AF. The above BIA decision is on appeal before the Third Circuit to answer the question of whether the government can choose a grounds of removal such as "regular" distribution instead of a more accurate or similar grounds of removal to the statute of conviction such as "school zone" distribution when the state statute of conviction is "school zone." In other words, can the government pick and choose a different federal ground of removal when another federal ground of removal is available that more readily compares to the New Jersey statute of conviction? Additional guidance is forthcoming. The BIA wants to ignore the federal grounds of removal for drug distribution in a school zone (21 USC § 860) and use the "regular" federal grounds of removal for drug distribution [21 U.S.C. § 841(a)(1)].

Specific Issues in Municipal Court

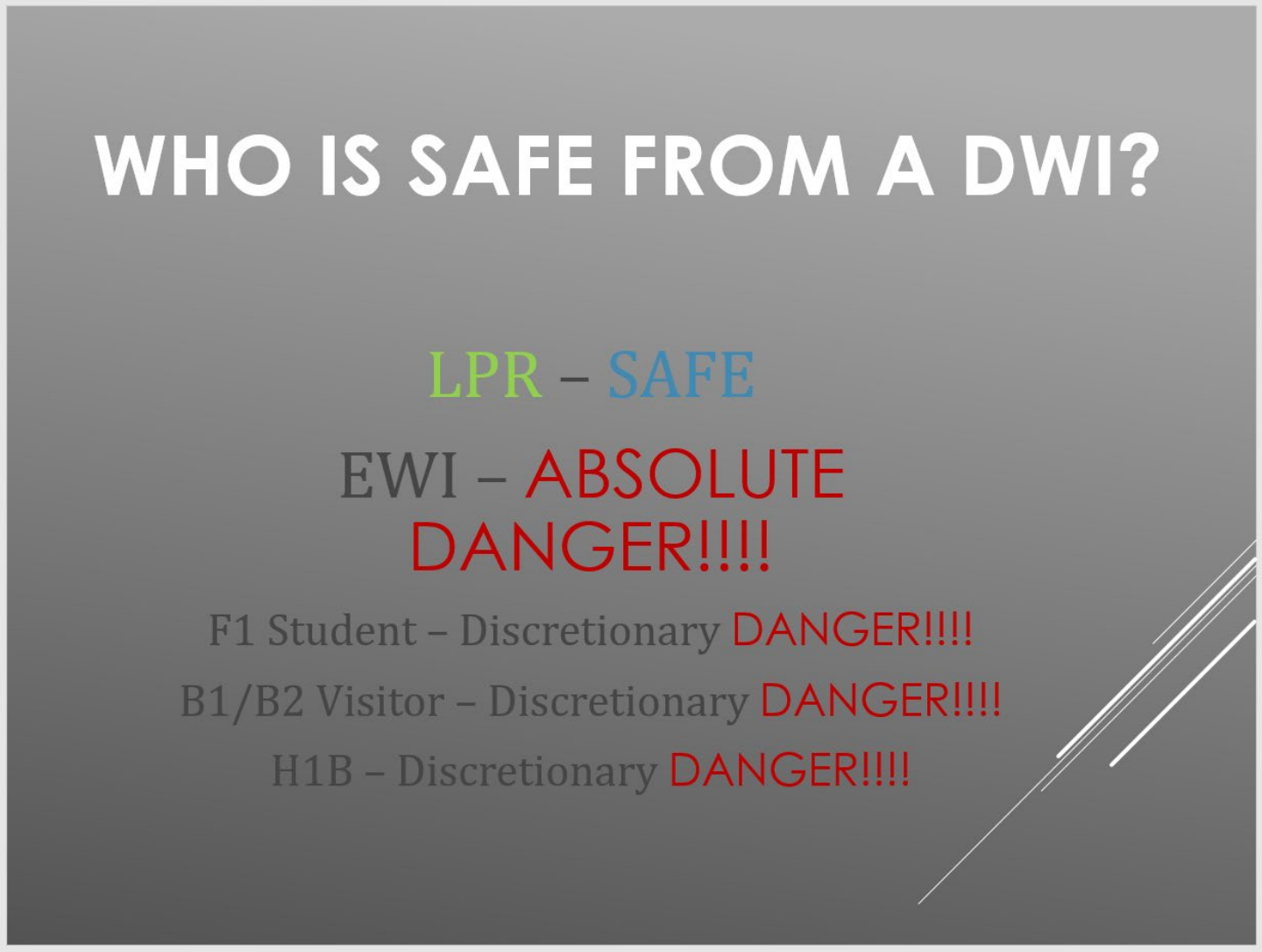


A common mistake is equating the severity (or lack thereof) of the NJ crime with the severity of the immigration consequences. A conviction for the DP offense of NJSA 2C:35-10c where the drug is anything other than marijuana could result in the defendant being placed in deportation and mandatory detention (ICE jail).

In the context of a conditional discharge, the defendant who makes a statement that the drugs were his to exculpate a co-defendant now has a conviction for immigration purposes. Defendants in removal proceedings could be required to provide a copy of the conditional discharge transcript to the immigration judge to prove there was no plea or no such allocution.

A defendant convicted of drug paraphernalia NJSA 2C:36-2 or loitering for the purpose of obtaining drugs will have immigration issues, especially if the drug is anything other than marijuana. Possessing a crack pipe or wandering to obtain heroin are going to be very problematic for the foreign national defendant.

Shoplifting is a CIMT. The green card holder who has two or more convictions for shoplifting will be placed in mandatory ICE detention (jail) and in removal proceedings. A typical "safe haven" is an amendment to disorderly conduct. The defendant charged with a shoplifting offense who has no prior criminal history and is unable to secure an amendment to a town ordinance would be well served by **amending** the shoplifting offense to disorderly conduct (NJSA 2C:33-2a(1)) and entering conditional dismissal.



Immigration policy differs from immigration law. The government's immigration policies change with administration turnover. The law is more consistent. The seeking out and swift removal of EWIs (undocumented) who have been charged with violations of NJSA 39:4-50 are currently a high immigration policy priority. The green card holder who is convicted of NJSA 39:4-50 is not subject to deportation or refusal of admission to the United States should he or she depart the United States. There may be other immigration consequences that are beyond the scope of this book, such as the ineligibility to become a USC for a period or the inability to remove the conditions from a conditional green card. A conviction of NJSA 39:4-50 for the remaining categories is discretionary on the part of the government. The defendant who has a student visa and was convicted of NJSA 39:4-50 might find the government unwilling to renew his visa; worse, the government might revoke it.

On May 28, 2019, the United States Court of Appeals, Third Circuit, ruled that Sambare's (a long-time green card holder with a prior criminal record of credit card theft and forgery) conviction under the Pennsylvania DUI Statute for driving under the influence of marijuana, to which he pleaded guilty, is a more serious crime than simple possession of a small amount of marijuana, and he was therefore not entitled to the 30 grams or less of marijuana exception and was deported. *Sambare v. Attorney Gen. of the United States*, 925 F.3d 124, 129, 2019 WL 2262705 (3d Cir. 2019).

The above is a very serious (and scary) ruling that has the potential to disrupt many lives. Driving while intoxicated due to alcohol will not result in the removal of a green card holder, but driving under the influence of any CDS can result in removal proceedings for that same individual.

Expungements

EXPUNGEMENTS =

EXPUNGEMENTS =

Expungements are typically a poor choice for foreign nationals. The federal immigration system does not give comity to expungements. The defendant must list all arrests and convictions on immigration applications, even if the defendant has obtained an expungement. Defendants who apply for immigration benefits or relief must provide copies of police reports, summonses, judgments, and, in some instances, transcripts of the plea and sentence. Defendants who have had their records expunged must go through the process of temporarily unsealing their records. The defendant who has obtained ALL the records associated with the criminal conviction, including transcripts, and requires a sealing of the entire record to obtain employment is a candidate for expungement. The defendant who has obtained a full and complete criminal file can then supply immigration with the records when applying for relief (i.e., green card, naturalization). The expungement will not affect his ability to obtain the criminal records because he already has the entire file.

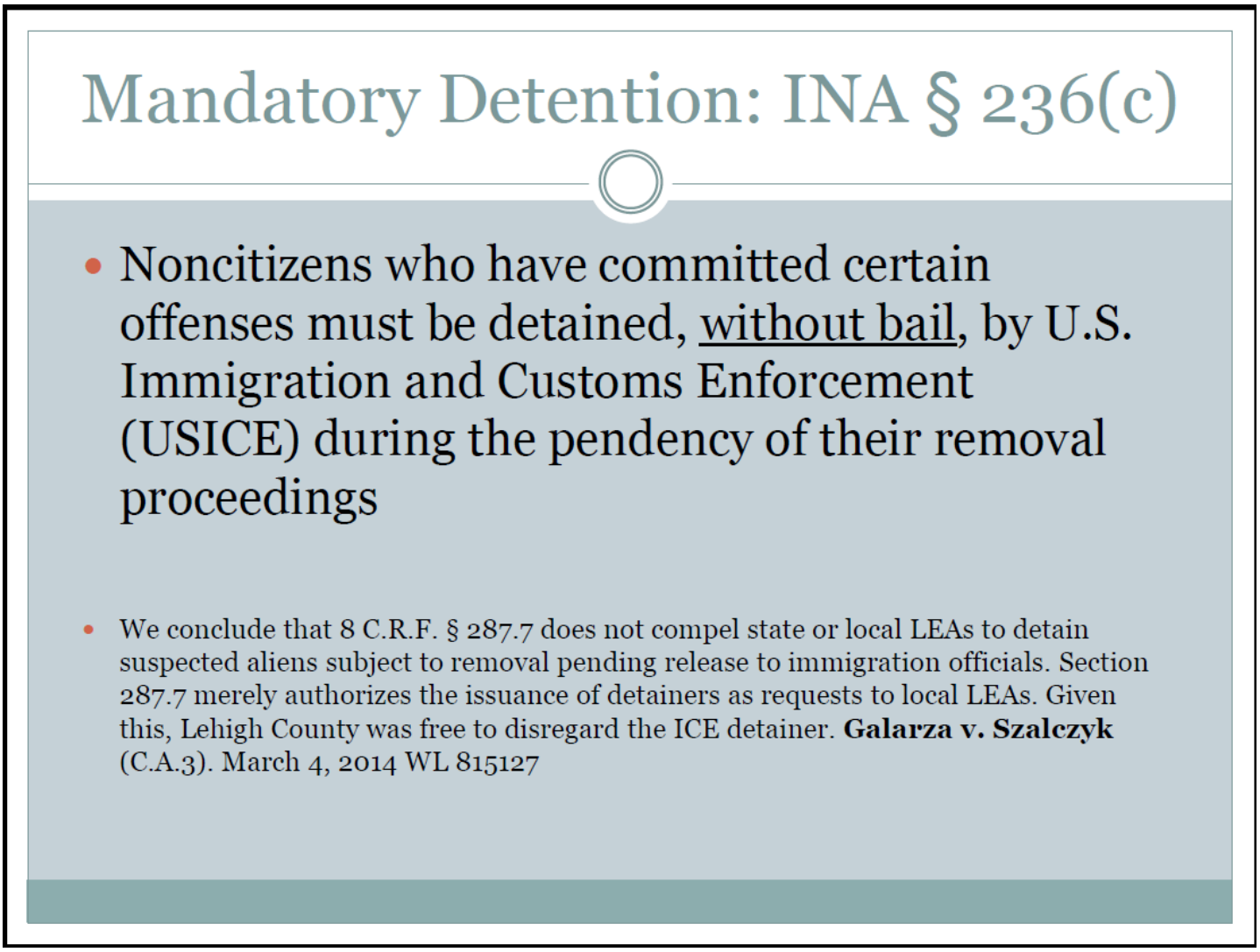
ICE Detainers and Mandatory Detention

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)

The detention (incarceration in a jail) of foreign nationals by ICE is another area of law within the field of crimmigration that is changing based on our state's administration and the policies within the administration. The NJ Attorney General in November 2018 issued a directive prohibiting law enforcement from assisting ICE with detaining and apprehending immigrants except in criminal cases.

An ICE detainer is nothing more than a request to the sheriff or other prison official to detain the defendant until ICE can decide whether to take him into custody. There are time restrictions, as stated above. The request includes notifying ICE if the NJ prison intends to release the defendant. Generally, criminal defendants are held in the Essex County jail, and immigrants without convictions (or very minor infractions) are held in the Elizabeth Detention Center. ICE has the option of moving and transferring defendants at will based on its needs. A defendant could be housed at the Essex County jail one day and transferred to Louisiana the next day.



A very serious concern for defendants is mandatory detention (ICE jail without the possibility of bond). A number of generic crimes (grounds for removal) can subject defendants to being jailed indefinitely until they are deported or their deportation proceedings are terminated. Federal district courts have ruled that incarceration past a certain period is unreasonable and have ordered immigration judges to conduct a bond hearing. The period seems to be at least six months or more. The defendant would have to apply to the Federal District Court for habeas corpus relief.

Mandatory Detention INA § 236(c)

INADMISSIBLE	DEPORTABLE
• CIMT (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	• CIMT w/i 5 years of admission AND sentenced to at least 1 year of 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

This list of federal generic crimes or grounds of removal is the same as the Inadmissibility v. Deportability chart. This list of crimes will subject the defendant to mandatory detention without the possibility of bond. For example, an EWI who is convicted of simple possession of a marijuana joint or who admits to having possessed a marijuana joint will not be eligible for bond. He or she will remain in jail until the deportation proceeding concludes. The green card holder who has been convicted of two or more shoplifting offenses will be subject to mandatory detention without the possibility of bond. He or she will remain in jail until the deportation proceedings have been concluded.

Executive Branch Immigration Policy

The following slides detail immigration policy set by the executive branch. Immigration laws are passed by Congress, but the president has the authority to set immigration policy and priorities.

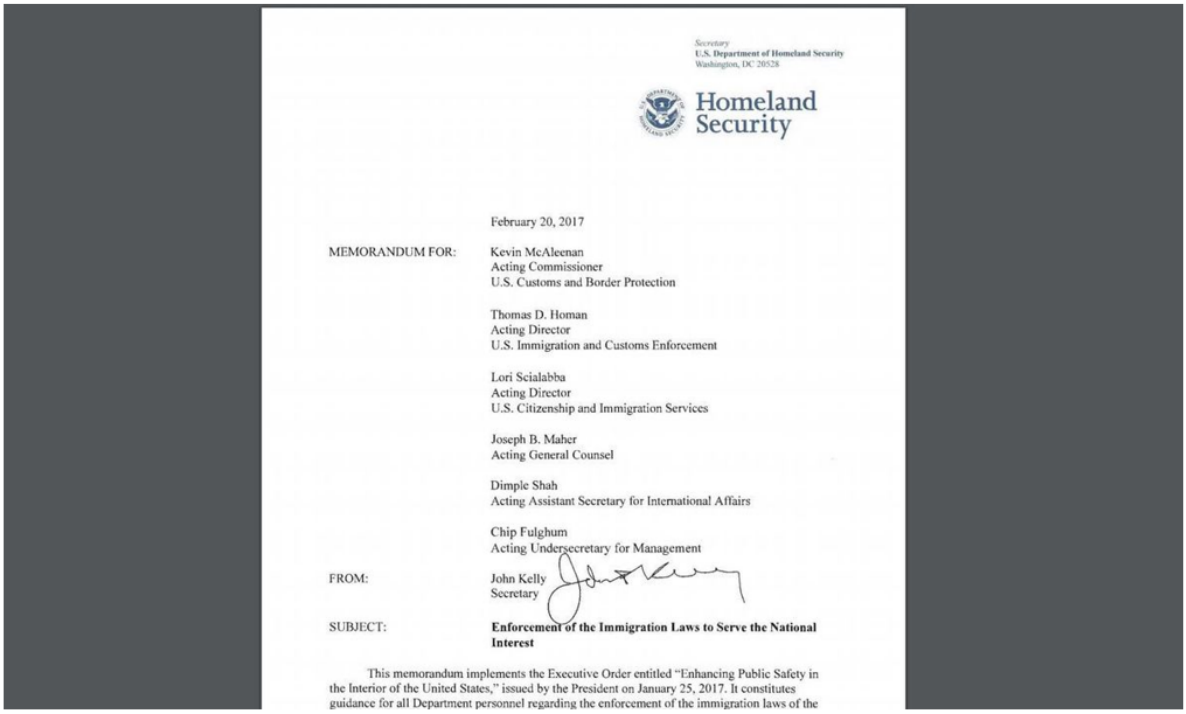
The immigration policies under President Obama differed from the immigration polices being implemented under President Trump.

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

Homeland Security

Although John Kelly is no longer Secretary of the US Department of Homeland Security (DHS), on February 20, 2017, as Secretary of DHS, he issued the "Enforcement of Immigration Laws to Serve the National Interest" memorandum.

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

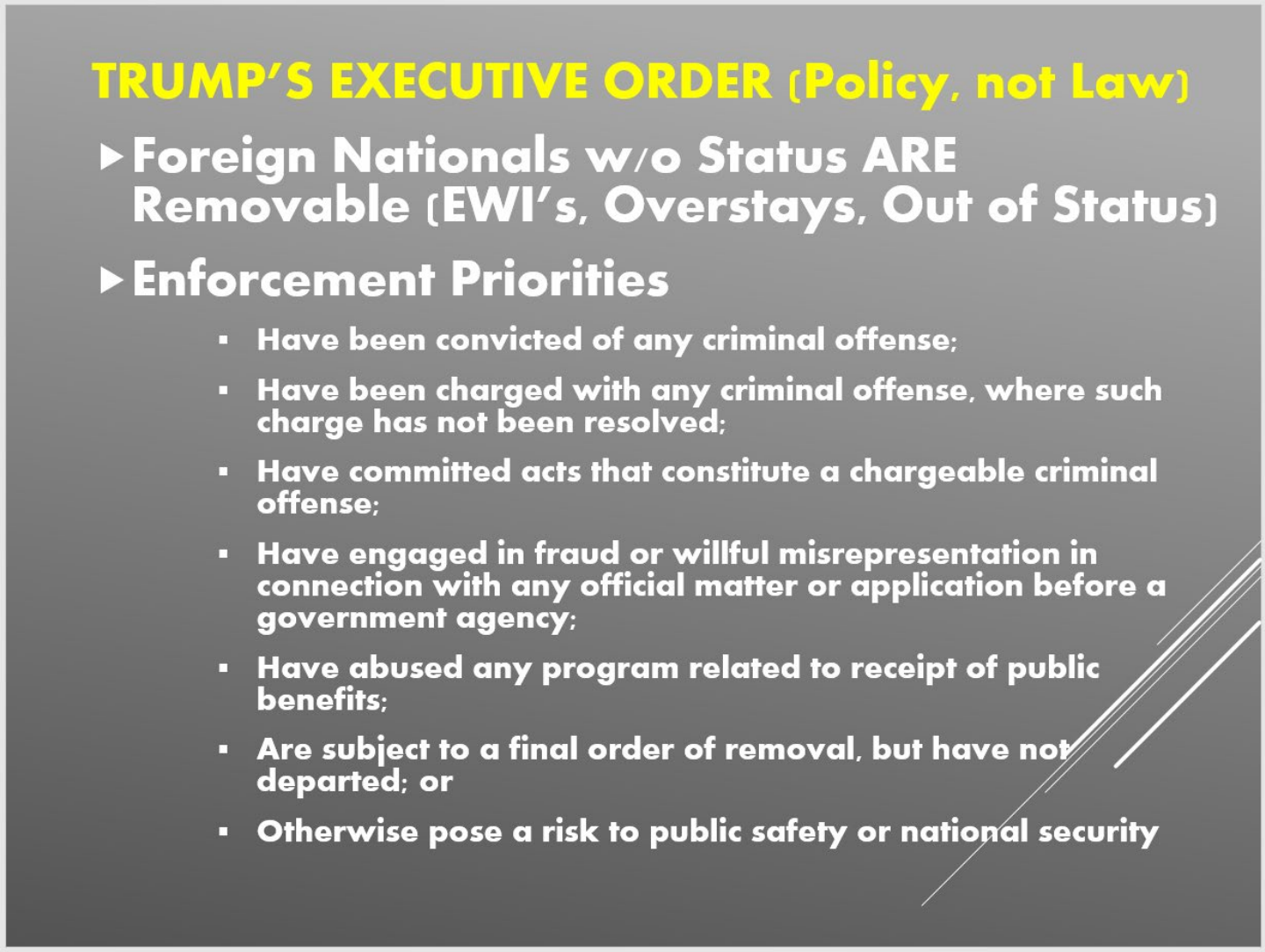
Chip Fulghum
Acting Undersecretary for Management

FROM:
John Kelly
Secretary

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

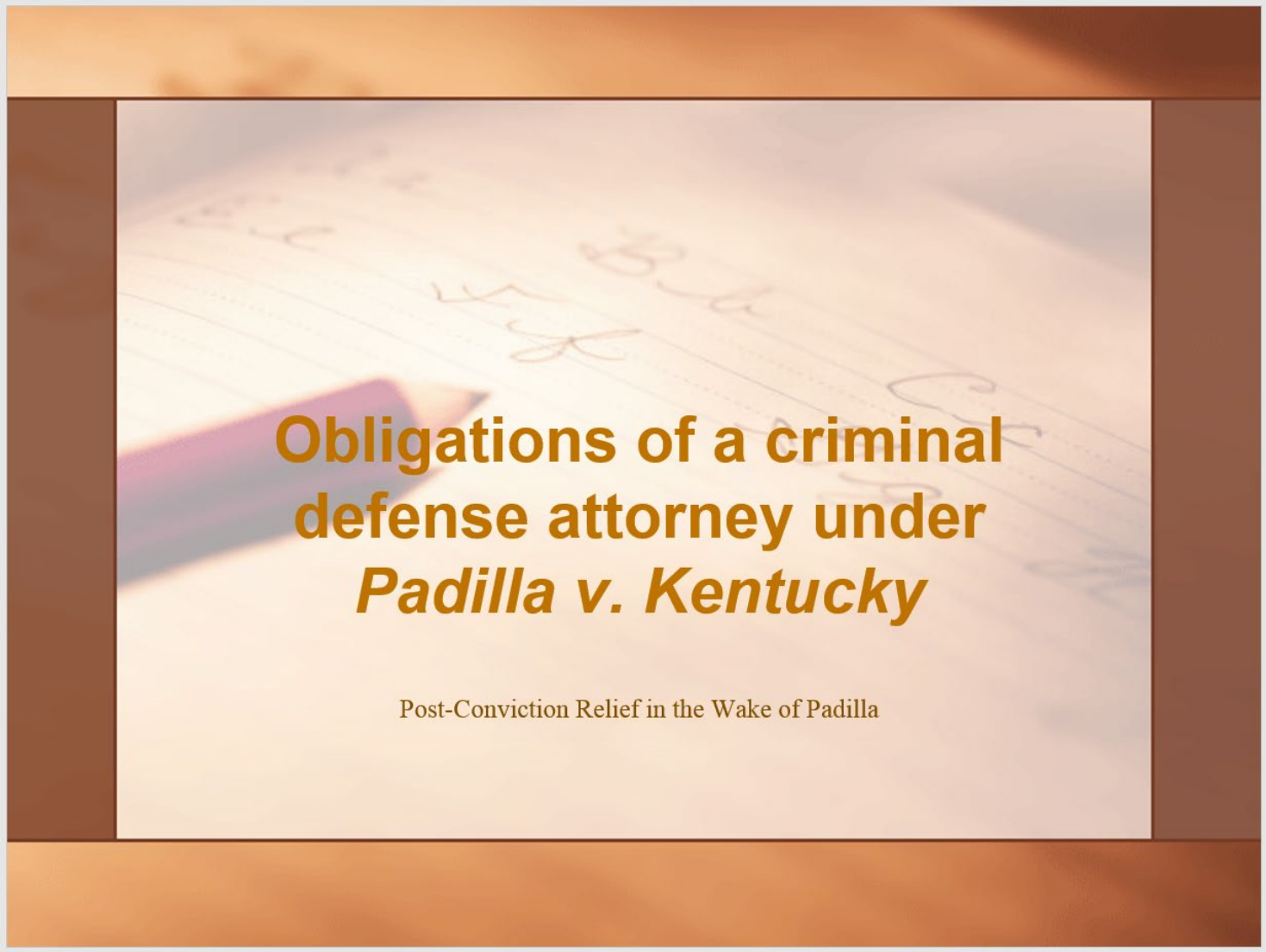
The memorandum implements the executive order entitled "Enhancing Public Safety in the Interior of the United States," issued by the President on January 25, 2017. The memo provides guidance to all DHS personnel on how to enforce immigration laws.



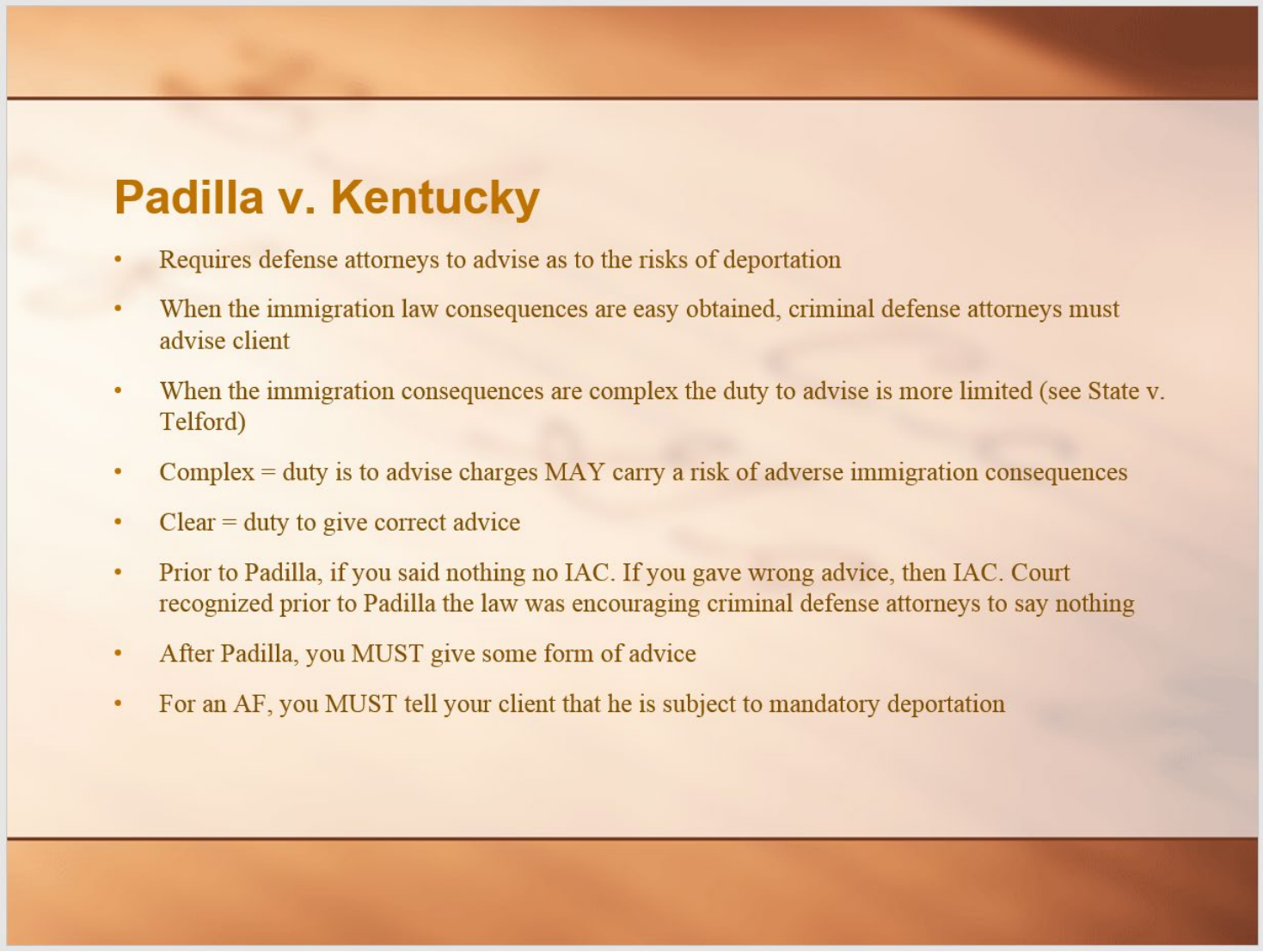
The above summary of the executive order referred to in the previous slide applies to those foreign nationals who are "removable," meaning the foreign national could be deported on the basis of being an EWI, having overstayed his or her visa, or being "out of status." An example of "out of status" is a student who has an F-1 visa to attend school but no longer attends it.

These extremely broad enforcement (deportation) priorities are applied to foreign nationals without status. The priorities range from convictions to having committed acts that constitute a chargeable criminal offense to posing a risk to public safety.

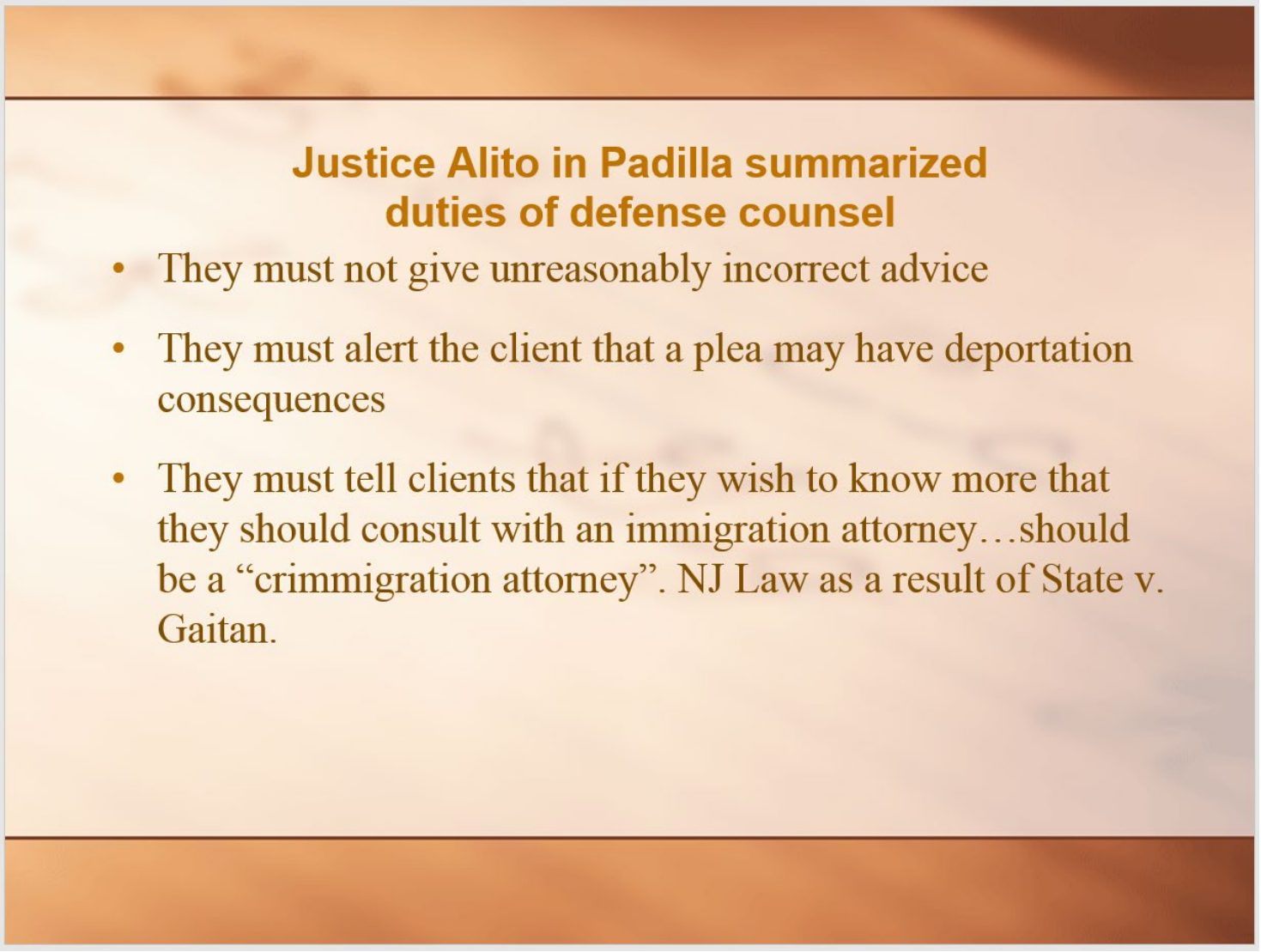
Obligations in the Wake of Padilla



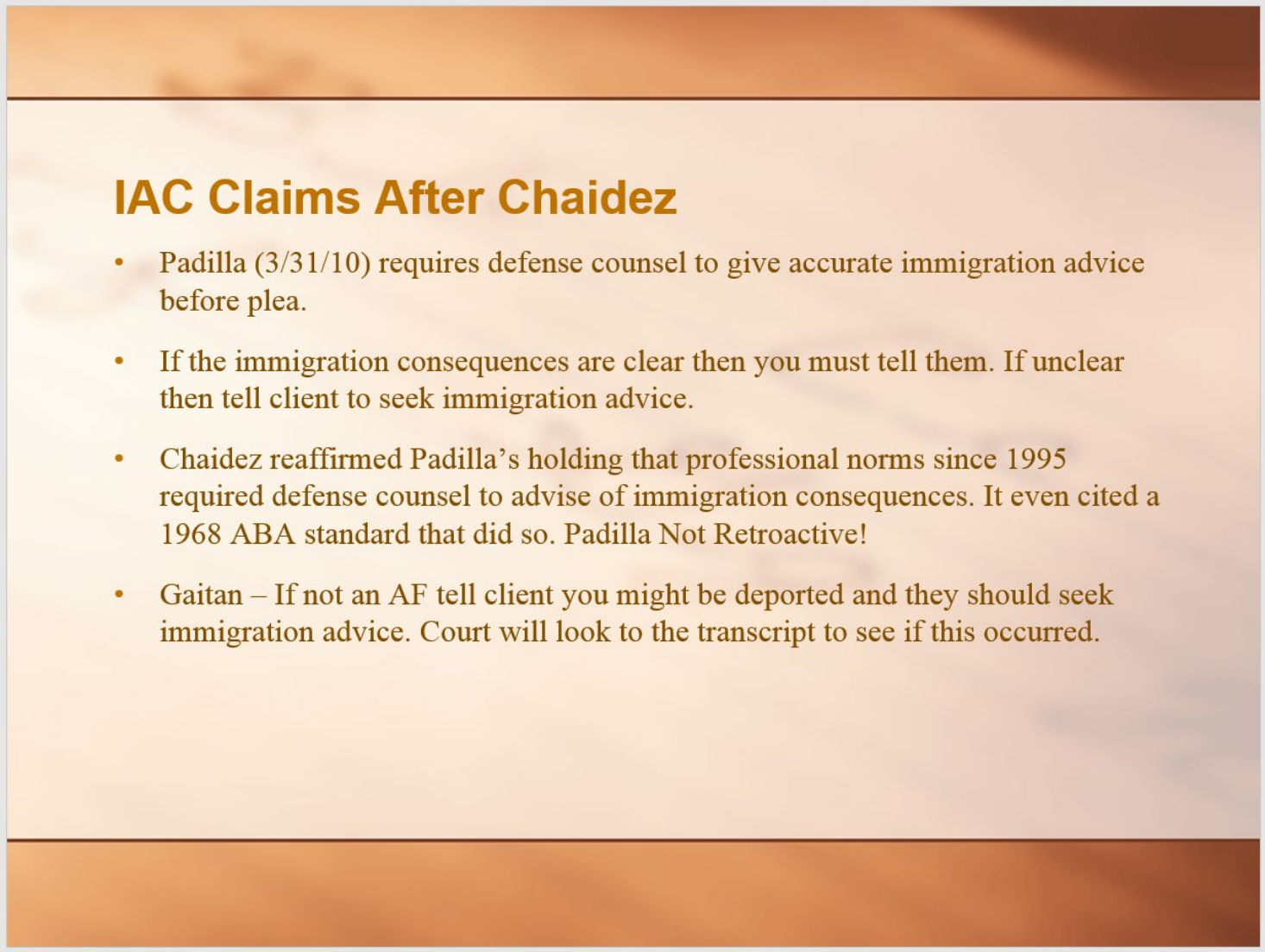
The next several slides discuss the obligations a criminal defense attorney has when representing foreign nationals. The obligations were imposed upon counsel in *Padilla v. Kentucky*, a United States Supreme Court case. Those obligations are now part of the 6th Amendment Right to Counsel, specifically concerning how a criminal defense attorney must advise his or her client as to the immigration consequences of the New Jersey charges. The last pages will discuss the prosecutor's and the judge's *Padilla* obligations in New Jersey.



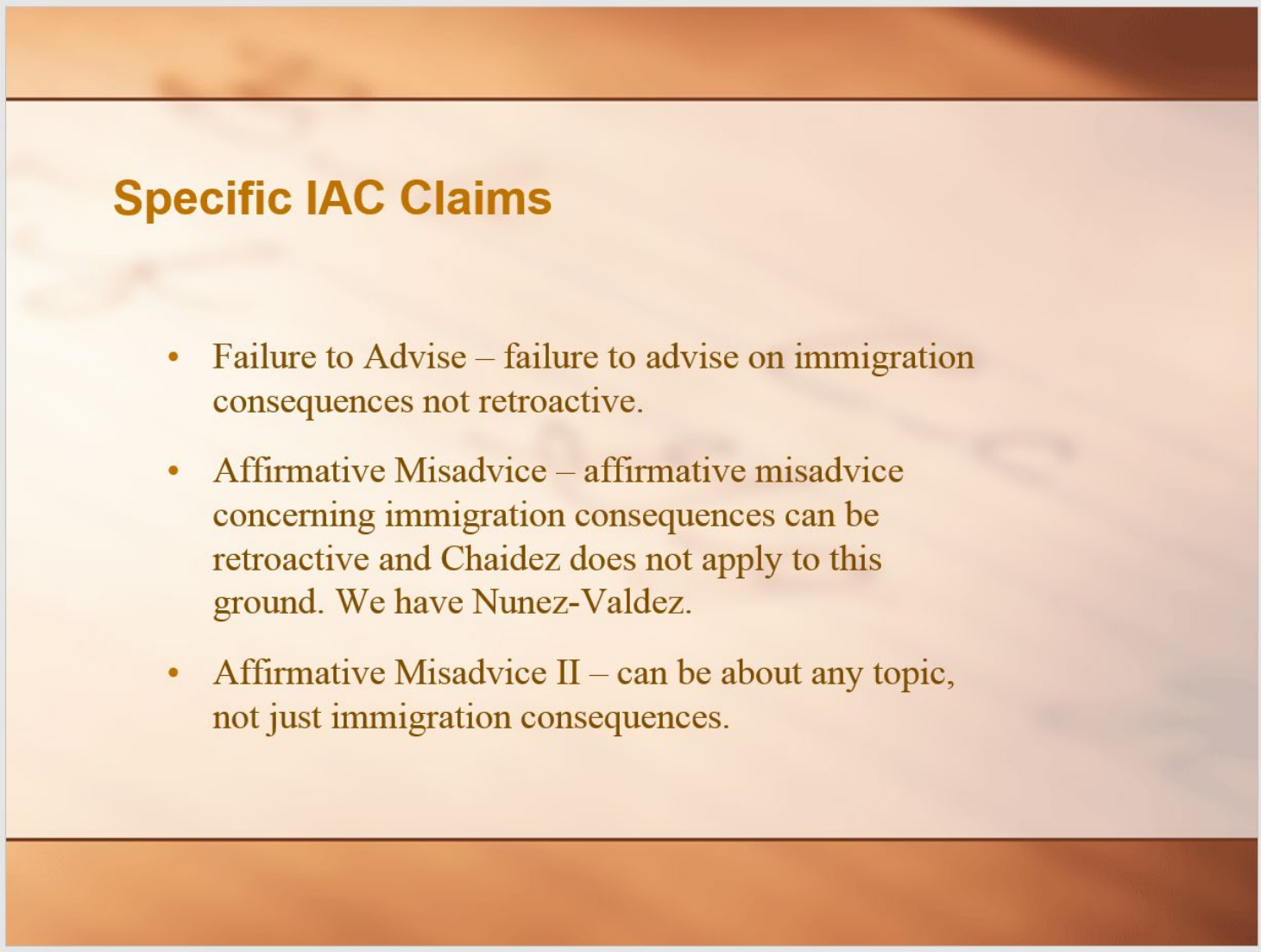
Criminal defense counsel representing foreign nationals have yet another obligation imposed upon them in addition to all the other work that must be performed in a criminal case (pretrial motions, plea negotiations, etc.). Simply stated, when the immigration consequences of the New Jersey charge are clear, certain, and easily discernable, counsel must give correct advice. For example, if the defendant is charged with the distribution of a very large amount of heroin, the advice that defense counsel is required to provide is something along the lines of "pack your bag and make arrangements to live the rest of your days in your home country." The words to be used are as varied as defense counsels' personalities, but the message/advice should be that clear. If the immigration consequences of the New Jersey charge are complex, not certain, and not easily discernable, the duty is only to advise that the defendant may be deported. When criminal defense counsel represents a foreign national, he or she must provide some form of crimmigration advice. Remaining silent is no longer an option and can be viewed as ineffective assistance of counsel under the 6th Amendment.



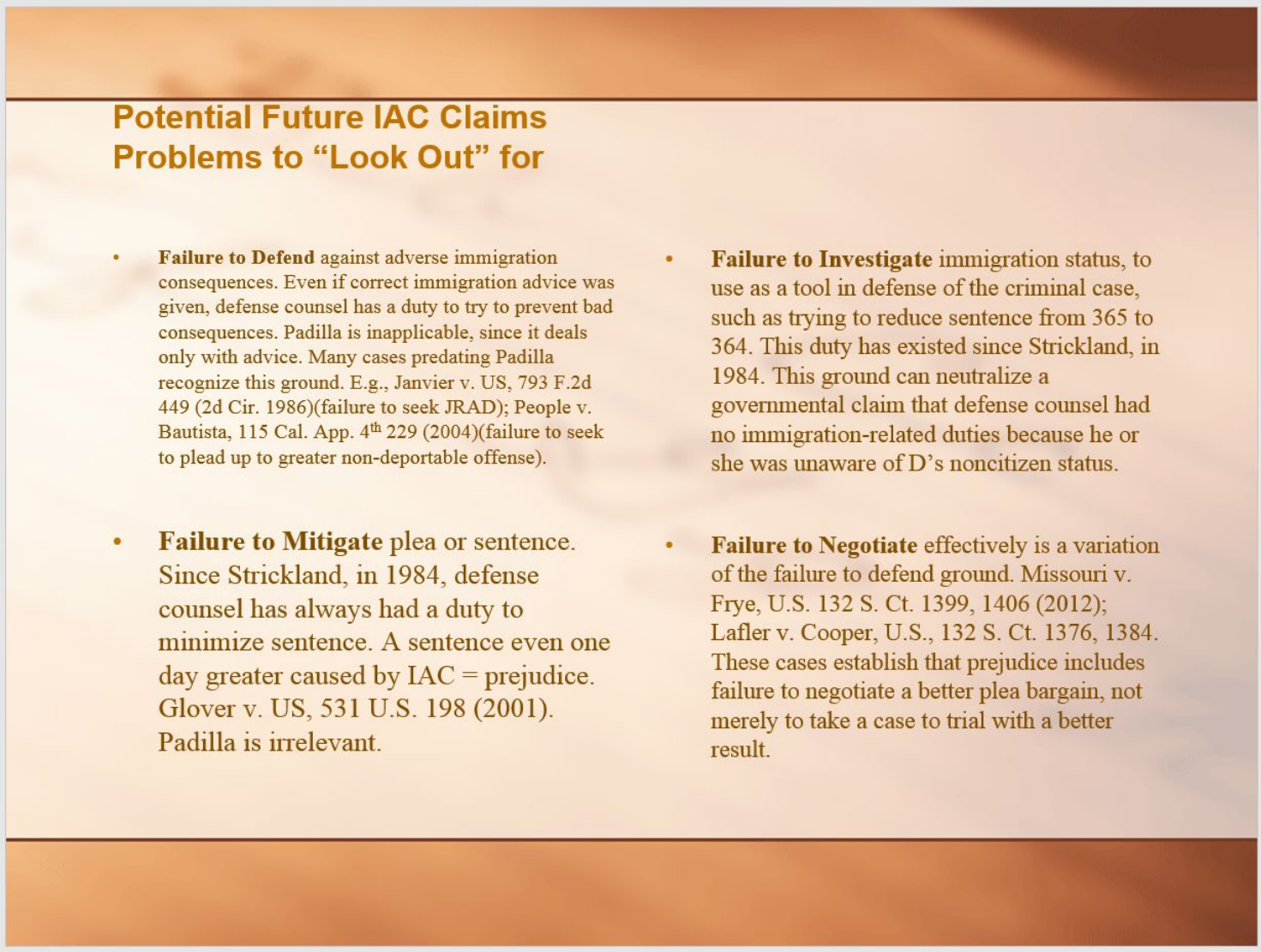
Our New Jersey Supreme Court in *State v. Gaitan* said that numerous resources are available to assist criminal defense counsel and that the courts will look to the transcript to see whether advice was given.



The obligation has existed since March 31, 2010. If the matter occurred before *Padilla*, then criminal defense counsel had no obligation to provide crimmigration advice. The *Padilla* obligation is not retroactive.



If criminal defense counsel said nothing about the immigration consequences in a case occurring pre-*Padilla* (March 31, 2010), there can be no ineffective assistance of counsel. If criminal defense counsel gave misadvice as to the immigration consequences pre-*Padilla*, there may be ineffective assistance of counsel under *State v. Nunez-Valdez*.



The above slide mentions potential future ineffective assistance of counsel claims in the crimmigration context. The concept of "Failure to Defend" is where criminal defense counsel is aware that an axe is about to come down on his or her client but does nothing to prevent it. This assumes something could have been done. For example, the defendant is given a 365-day jail sentence on a theft offense, which equates to an AF. The criminal defense counsel has a duty to ask for 364 days to prevent the axe from falling. "Failure to Investigate" means the criminal defense counsel has an obligation to determine whether the defendant is a foreign national. The remaining potential Ineffective Assistance of Counsel (IAC) claims are just different variations of the same concepts.

Padilla Obligations for County Prosecutors?

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DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
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TRENTON, NJ 08625-0085
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SHEILA Y. OLIVER
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GURBIR S. GREWAL
Attorney General

VERONICA ALLENDE
Director

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2018-6

TO: All Law Enforcement Chief Executives

FROM: Gurbir S. Grewal, Attorney General

DATE: November 29, 2018

SUBJECT: **Directive Strengthening Trust Between Law Enforcement and Immigrant Communities**

V. Considerations for Prosecutors

- A. ***Initial court appearances***. At a defendant's initial court appearance before a judge, the prosecutor **shall** confirm that the defendant has been advised **on the record** that:
    1. Potential charges and convictions may carry immigration consequences, *see Padilla v. Kentucky*, 559 U.S. 356 (2010)

- D. ***Charging, resolving, and sentencing cases***. As in all cases, the prosecutor should be mindful of potential collateral consequences and consider such consequences in attempting to reach a just resolution of the case. Nothing in this Directive shall be construed to require any particular charge or sentence, to limit prosecutorial discretion in reaching a just resolution of the case, or to prevent the prosecutor from making any argument at sentencing.

The New Jersey Attorney General has mandated that prosecutors shall confirm that the defendant has been advised on the record that the New Jersey charges may carry immigration consequences. Are we going to have IAP (ineffective assistance of prosecutors)? How will this be carried out? Currently, our New Jersey judges perform this function by either going over Question 17 of the Plea Form with the defendant or by giving immigration warnings to the defendant.

The second paragraph requires prosecutors to consider or be mindful of the immigration consequences during plea bargaining.

Padilla Obligations for Judges?

Municipal Court Judges

Presumably because there are no plea forms comparable to the plea forms (Question 17) in superior criminal court, our municipal court judges are guided by Directive #09-11 (*Padilla* obligations).

Directive #09-11 reads in part as follows:

B. First Appearance
At the first appearance proceeding, any defendant charged with the following offenses shall be advised of the immigration consequences of a guilty plea:

(1) all disorderly or petty disorderly persons offenses;
(2) driving while intoxicated (N.J.S.A. 39:4-50; N.J.S.A. 39:4-50.14; N.J.S.A. 39:3-10.13; N.J.S.A. 12:7-46);
(3) operating motor vehicle while in possession of a CDS (N.J.S.A. 39:4-49.1).

The municipal court judge shall engage in the following colloquy with defendants charged with the above-listed offenses at first appearance proceeding:

If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, it may prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. Do you understand?

You have a right to seek advice from a private attorney about the effect a guilty plea or conviction will have on your immigration status. If you qualify for a court-appointed attorney, you can speak to the public defender about the immigration consequences of your plea. Do you understand?

The municipal court judge shall engage in this colloquy during the first appearance of all defendants charged with any of the above-listed offenses, regardless of the defendants' name, appearance, or English proficiency.

Superior Court Judges

The Plea Forms in the Superior Criminal Court, specifically Question 17, address the immigration consequences of the New Jersey charges.

The following is a history of how plea forms changed in the wake of *Padilla*:

The AOC Directives

The following is being included to note the series of amendments to Question 17 in the Main Plea Form concerning the immigration consequences of a guilty plea in Directive #14-08, Directive #08-09, and Directive #05-11.

Specifically, Question 17 in Directive #14-08 consisted of two questions asking whether the defendant is a USC. If the defendant answered no, the defendant was to be advised of the consequence that, by virtue of a guilty plea, he or she could be deported.

Directive #08-09, which supplemented Directive #14-08, added two inquiries in Question 17 pursuant to the Supreme Court's direction in *State v. Nunez-Valdez*, 200 N.J. 129, 144 (2009). The Supreme Court advised that the plea form should inform a noncitizen defendant that "if your plea of guilty is to a crime considered an AF under federal law you will be subject to deportation/removal." The court also determined "that the form should instruct defendants of their right to seek legal advice regarding their immigration status."

Directive #05-11, which supplemented Directive #08-09, promulgated further revisions adopted by the Supreme Court at its July 12, 2011, Administrative Conference based upon the recommendation of the Supreme Court Committee on Criminal Practice in its "Report on Revisions to the Plea Form to Address Immigration Consequences of a Guilty Plea" during its 2009–2011 term. Directive #05-11 explained that "**Question 17 is designed to ensure that defendants understand that they have an opportunity to seek consultation with an attorney about the immigration consequences of a plea, should they choose to do so. However, there is no obligation to provide defendant with separate counsel for this purpose. Judges should be guided accordingly when addressing these matters**."

The above direction and guidance from the New Jersey Supreme Court requires that judges "be guided accordingly when **addressing these matters**."

Therefore New Jersey judges must warn a foreign national on these points:

- by virtue of the guilty plea, he or she could be deported
- if his or her plea of guilty is to a crime considered an AF under federal law, he or she will be subject to deportation/removal
- defendants have an opportunity to seek consultation with an attorney about the immigration consequences of a plea, should they choose to do so.

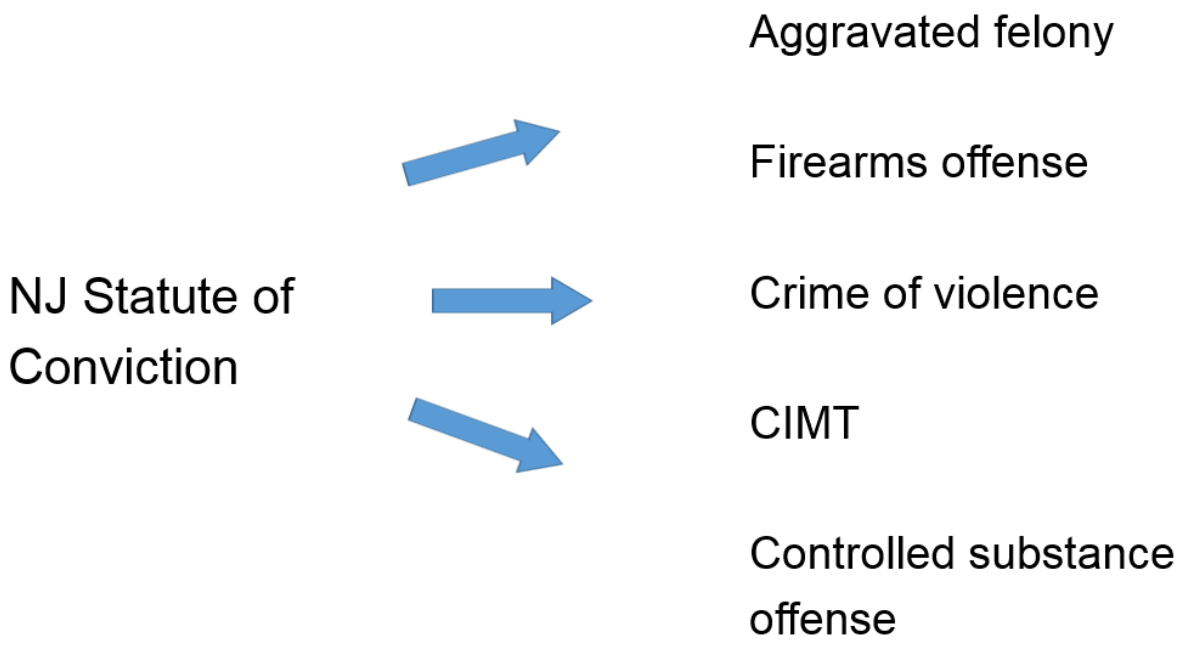
The directives indicate that judges should be guided when **ADDRESSING** these matters. The directives require that judges in some shape or form address the defendant and provide warnings

so that the defendant's due process rights are protected and so that the judge has some level of comfort about the fact that the plea was given voluntarily and was given with an understanding of the nature of the charge and the consequences of the plea.

ANALYZING CRIMINAL STATUTES
Record of Conviction & Record of Proceedings

A defendant is in deportation proceedings because of a New Jersey crime conviction. ICE has alleged that the New Jersey crime has triggered a criminal grounds of removal. The defendant's immigration attorney denies that this New Jersey conviction is the same as the immigration grounds of removal. The immigration judge is not permitted to conduct a mini trial of what occurred in New Jersey and equate the facts to the immigration grounds of removal for two reasons. First, this is impractical given the large immigration caseload. Second, the US Supreme Court ruled that it cannot. Instead, the immigration judges use a methodology created by the Supreme Court called the "categorical approach." Simply stated, the immigration judge compares the elements of the New Jersey Statute of Conviction to the Federal Generic Crime or Grounds of Removal. This is stated very simply, but its actual application is complicated and everchanging.

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



We have discussed how certain New Jersey offenses and criminal convictions can result in the defendant being placed into removal proceedings. The above slide lists a few that we have explained in detail. INA refers to the Immigration and Nationality Act.

What is this Categorical Approach?

- Taylor v. US (1990) and the Armed Career Criminal Act of 1984
- Felon w/3 priors for robbery or burglary followed by a gun conviction = 15 years mandatory vs. up to 10 years
- How does the sentencing Judge figure out whether the state conviction is the same as the federal general accepted definition?

The categorical approach was discussed and developed in the United States Supreme Court case *Taylor v. United States* in the context of the Armed Career Criminal Act (ACCA) of 1984. ACCA was passed to deter violent criminals from committing additional crimes using a gun. A defendant with three prior convictions for robbery or burglary who was then convicted of a federal gun charge received a mandatory 15 years instead of up to 10 years imprisonment. The problem for the court was this: How does the federal judge determine whether the prior state convictions are the same as the federal general accepted definition of robbery and burglary? For example, say the defendant has two New Jersey robbery convictions and one New Jersey burglary conviction and then gets convicted of a federal gun charge. The federal sentencing judge must determine whether the New Jersey robbery statute is the same as the federal generic definition for robbery. The same analysis holds for the New Jersey burglary statute versus the federal generic definition of burglary. The categorical approach first used in this purely criminal context was adopted by the immigration courts for defendants facing criminal grounds or removal.

What is this Categorical Approach?

- A certain category of crimes having specified elements…not by crimes that happen to be labeled burglary or robbery
- Crimes that have common characteristics
- The focus is on the elements of the statute NOT the actual conduct of the Defendant
- This has been applied in the immigration context

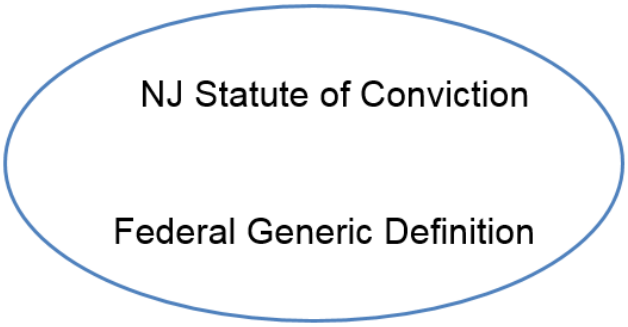
Every state has its own way of titling and labeling crimes. Their elected officials choose the title. The titles can vary as much as the elected officials do. Robbery in one state may be called something completely different in another state. The categorical approach ignores titles and labels. The categorical approach focuses on the elements of the statute, not the actual conduct of the defendant (i.e., the facts).

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) in the statute
- Identify the elements and nature of the statute of conviction *Id.*

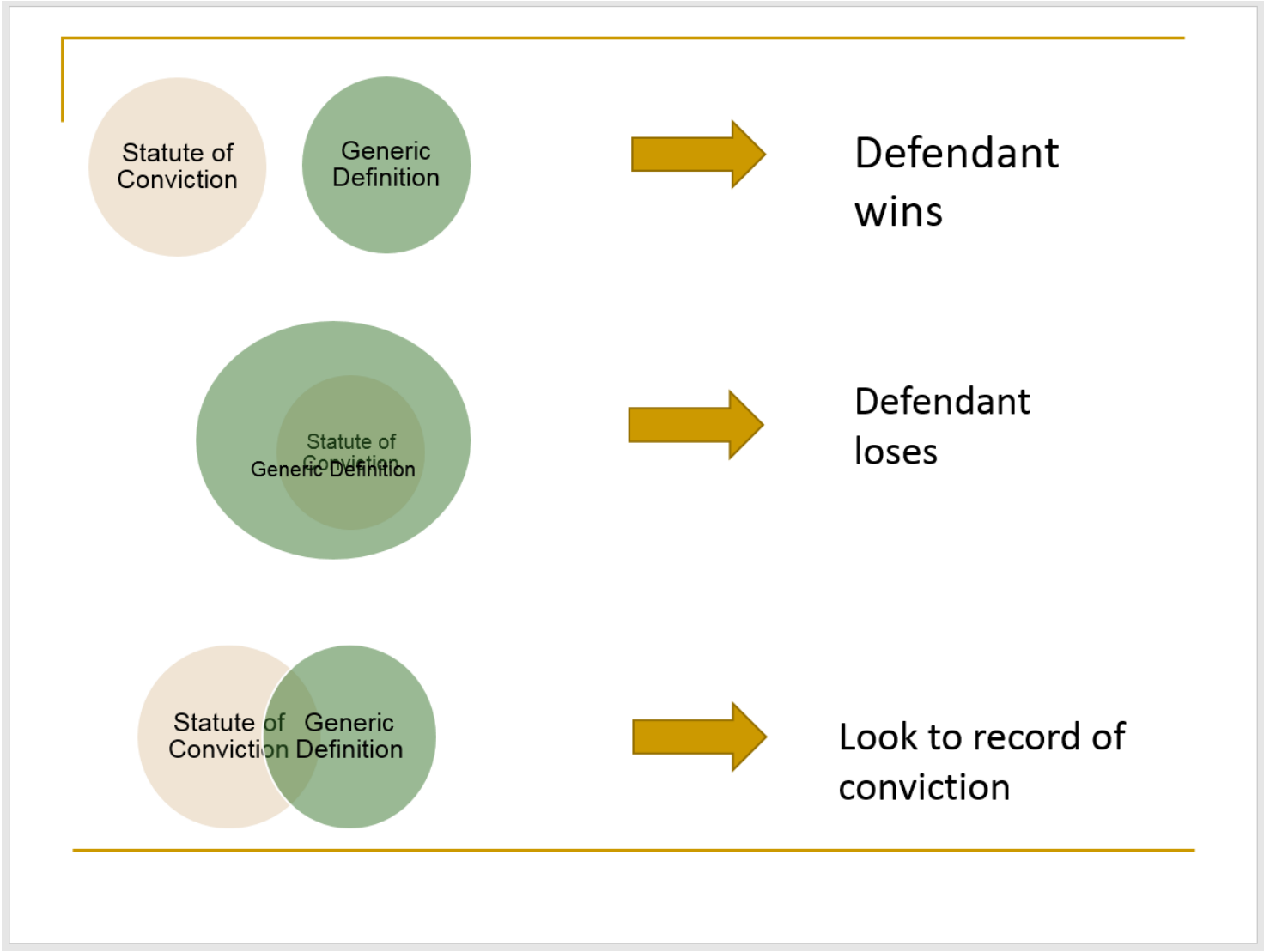
There is no retrial of a criminal charge in immigration court. The immigration judge compares the federal generic statutory definition of the grounds of removal to the elements of the New Jersey statute of conviction.

A Categorical Match



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

There is a categorical match in the above hypothetical New Jersey statute and the federal generic definition of the grounds of removal. The conduct in the New Jersey statute is a match to the federal generic definition, and that will trigger removal.



There is no categorical match above where the slide indicates "Defendant wins." The New Jersey statute of conviction is different than the generic definition of the criminal grounds of removal. The defendant wins, and the deportation is terminated.

The conduct under the New Jersey statute of conviction is a match for the federal generic definition of the grounds of removal. The defendant loses and will be deported.

Some conduct of the New Jersey statute falls within the federal generic definition (where the circles overlap), and some conduct does not fall within the federal generic definition. The immigration judge applies the modified categorical approach.

For example, consider the federal firearms definition v. the New Jersey firearms definition. New Jersey's definition is much broader and includes things like slingshots and BB guns. NJSA 2C:35-7 regarding distribution in a school zone includes being on or near a bus. This is broader than the federal generic definition, which does not include a bus.

The analysis becomes more complex and is referred to as the **modified categorical approach**. If the New Jersey statute is divisible (i.e., the statute lists separate crimes, not just variations on committing the same crime), the immigration judge reviews the defendant's record of conviction to determine whether the federal generic definition is triggered by what the record of conviction reveals.

Modified Categorical Approach:

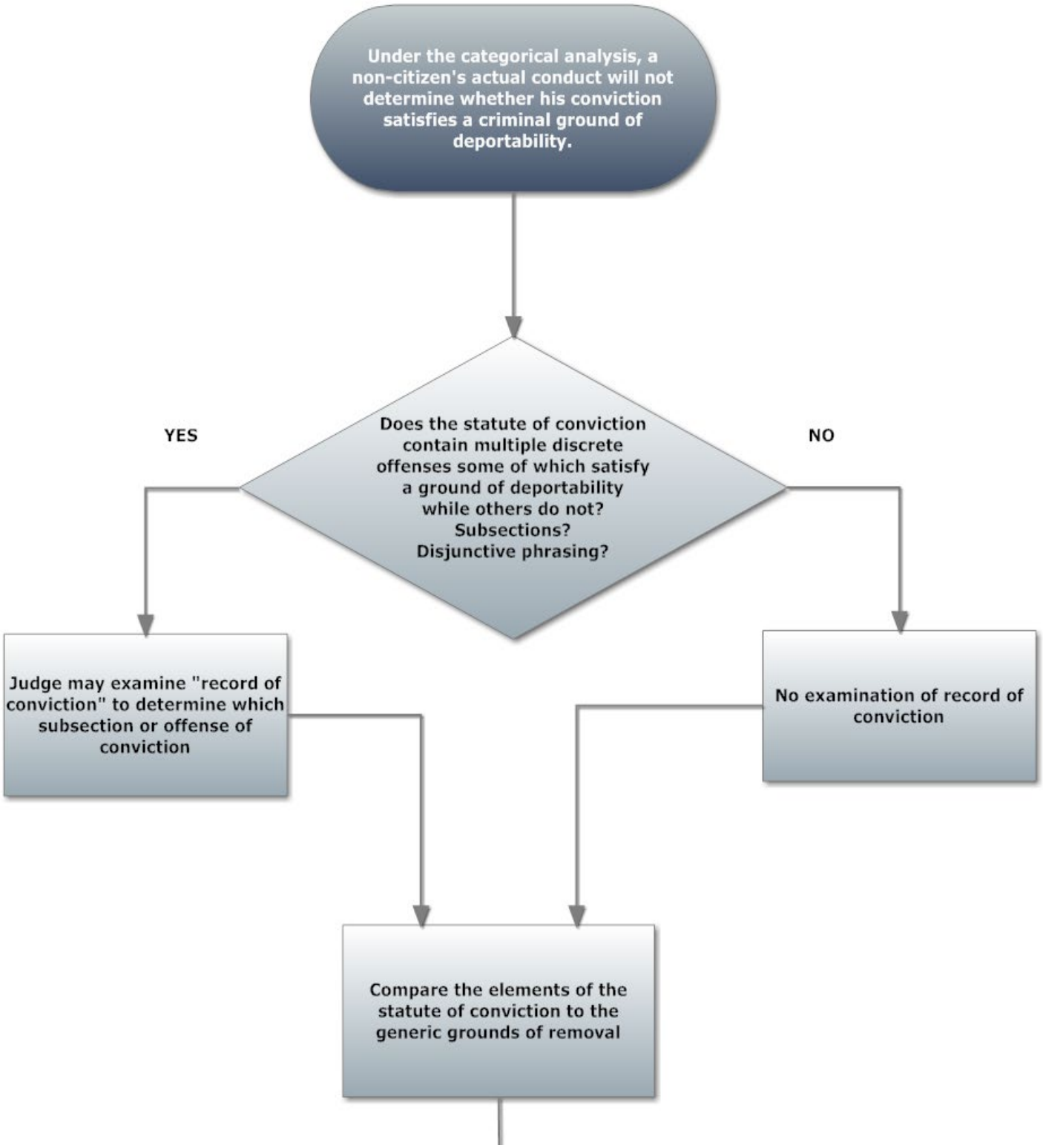
- WHAT IS IT?
  - Because we have this "overlap" issue as depicted in the previous slides, the immigration judge can look (beyond the statutory elements) at the **"record of conviction"** to identify the version of the New Jersey state statute resulted in a conviction.
    - The immigration judge is not to engage in the MCA to see what defendant "actually did". The facts are irrelevant.
  - The immigration judge then compares the NJ statute **elements** to the federal generic offense to see if the defendant was convicted of the generic crime.

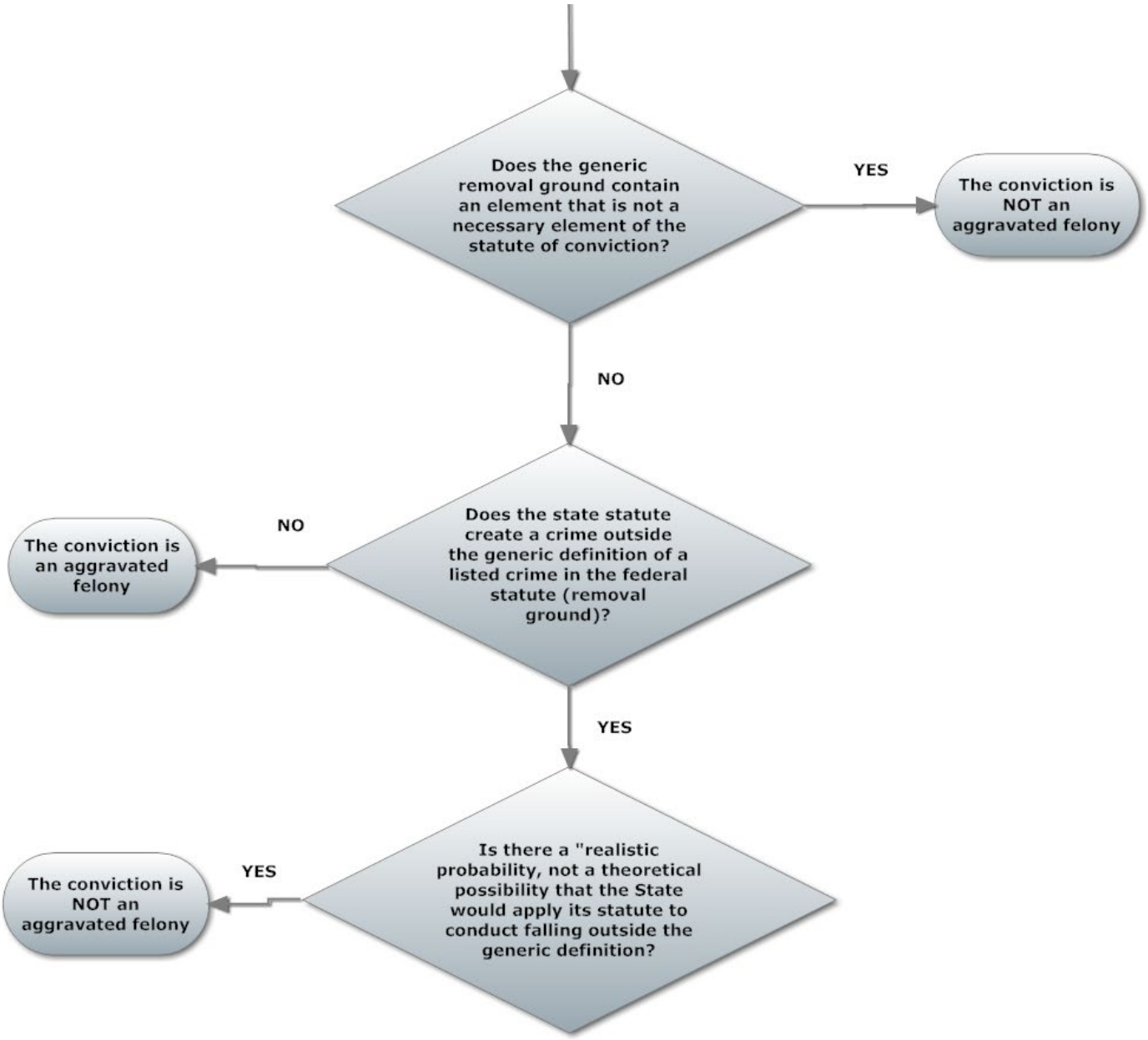
The immigration judge can peek at the record of conviction to determine what section of the divisible New Jersey statute the defendant was convicted of. Visually, where in the two circles that overlap was the defendant convicted?

MODIFIED CATEGORICAL APPROACH:

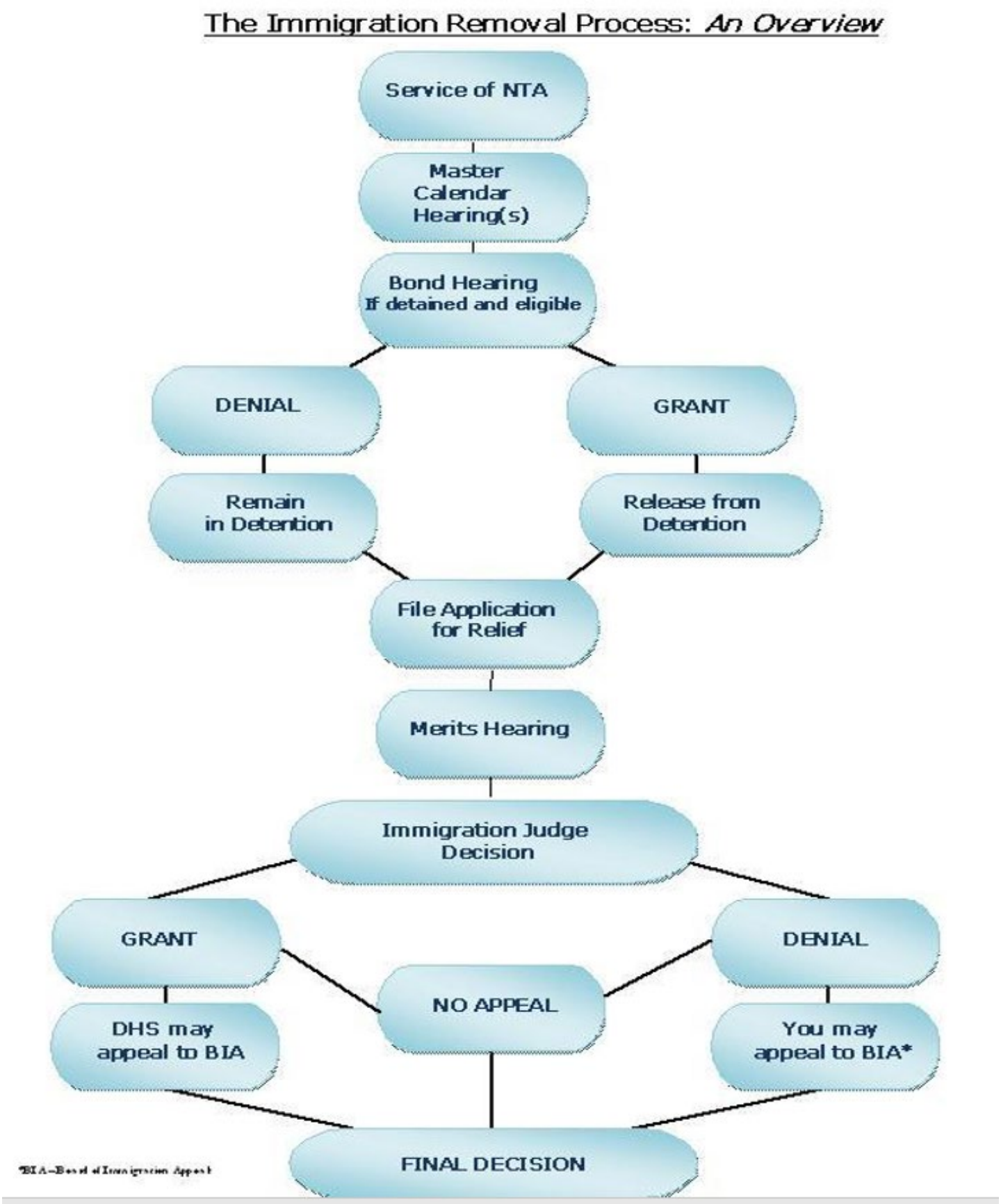
- WHAT IS A RECORD OF CONVICTION?
  - Charging document: summons, indictment or accusation
  - Plea forms and/or plea colloquy transcript
  - Judgement of Conviction or court disposition
  - Lab Certificate
- **Note**: Police reports are generally NOT part of ROC unless incorporated into the guilty plea or were admitted by the alien. *Matter of Milian-Dubon*, 25 I&N Dec. 197 (BIA 2010).

The modified categorical approach is not an opportunity for the immigration judge to conduct a criminal trial in immigration court. The courts have placed restrictions on how far and deep the immigration judge can delve into the criminal case. The courts refer to the immigration judge, "taking a peek" at the record of conviction and not retrying the criminal case in immigration court. Practically, the defendant's conduct or the facts of the criminal case could trigger the grounds of removability, but that is *not* the methodology dictated by the courts. The focus is on the elements of the statute. The facts are irrelevant.

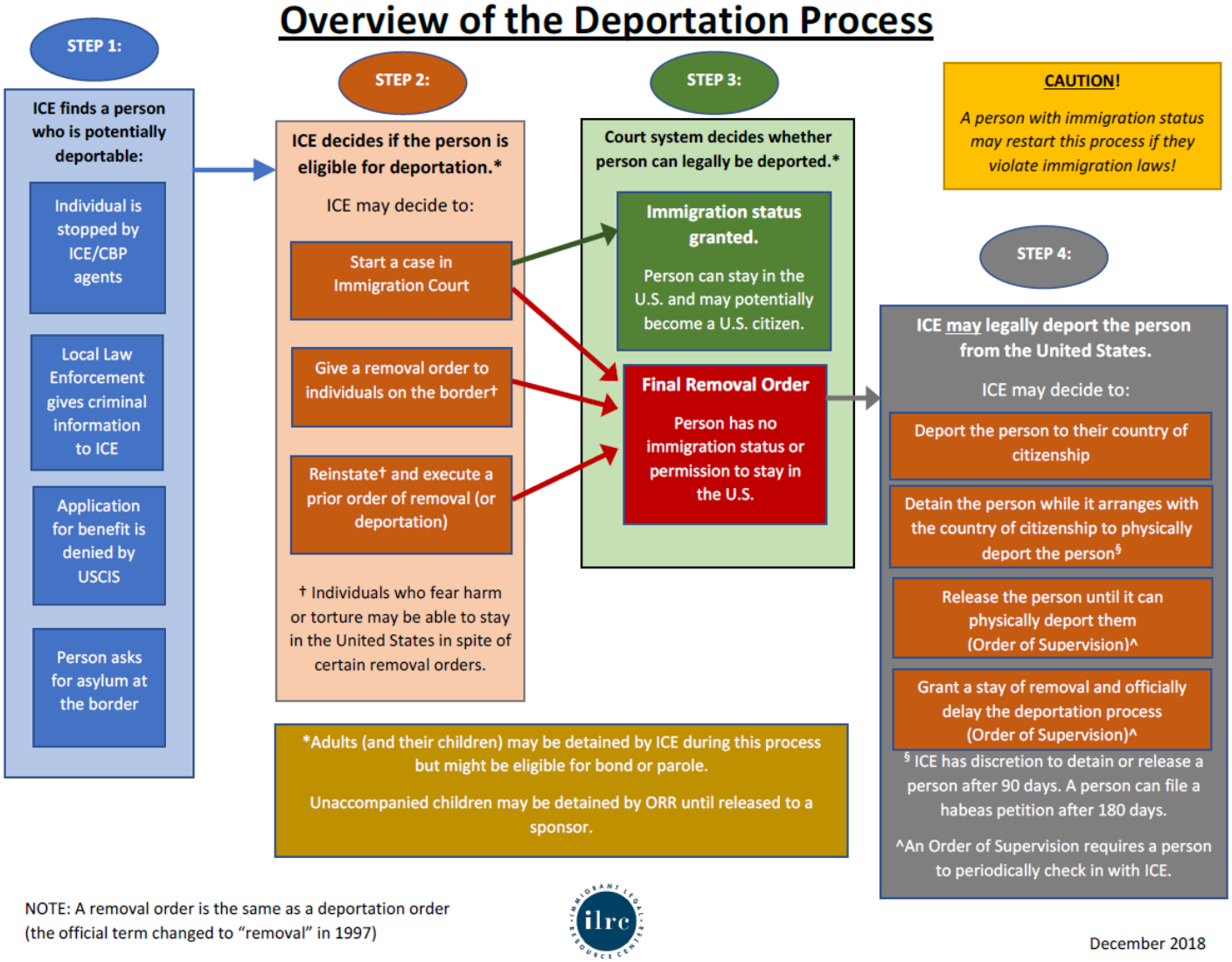

Under the categorical analysis, a non-citizen's actual conduct will not determine whether his conviction satisfies a criminal ground of deportability.
Does the statute of conviction contain multiple discrete offenses some of which satisfy a ground of deportability while others do not? Subsections? Disjunctive phrasing?
YES
NO
Judge may examine "record of conviction" to determine which subsection or offense of conviction
No examination of record of conviction
Compare the elements of the statute of conviction to the generic grounds of removal



This flowchart presents the steps and questions to be answered to determine whether violation of the New Jersey statute is an AF in the categorical analysis context.


The Immigration Removal Process: An Overview
Service of NTA
Master Calendar Hearing(s)
Bond Hearing If detained and eligible
DENIAL
GRANT
Remain in Detention
Release from Detention
File Application for Relief
Merits Hearing
Immigration Judge Decision
GRANT
DENIAL
NO APPEAL
DHS may appeal to BIA
You may appeal to BIA*
FINAL DECISION

Overview of the Deportation Process



NOTE: A removal order is the same as a deportation order (the official term changed to "removal" in 1997)

December 2018

Crimmigration Opinions

The following crimmigration opinions are provided as a guide ONLY. This area of law is complex and dynamic. Opinions that are valid today may not be valid tomorrow or next year. Readers are cautioned to conduct their own legal research or to speak to an attorney who has specialized knowledge in this area.

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MEMBER
NJ, NY & FL BARS

January 18, 2018

Ron Bar-Nadav, Esq.
161 South River Street
Hackensack, NJ 07601

I am of the opinion that Mr. [redacted] WILL BE subject to removal (deportation) if his prior New York conviction is a crime involving moral turpitude. I need to review the NY record of conviction.

In addition, Mr. [redacted] will be placed in removal proceedings should he depart the United States and return. Please advise him not to do so.

Re: [redacted]

Dear Mr. Bar-Nadav:

Thank you for referring Mr. [redacted] to my office with respect to the immigration consequences of his pending New Jersey criminal violations, namely NJSA 2C:21-6c(5) and NJSA 2C:21-1A(1).

A violation of either of these statutes involves fraud or deceit. Furthermore, **IF** there is a loss to the victim or victims exceeding $10,000, the violation is an aggravated felony under section 101(a)(43)(M)(i) of the INA and Mr. [redacted] will be deported. Each of the above statutes are crimes involving moral turpitude.

Let us now discuss Mr. [redacted]'s prior criminal history:

NYPL §140.35 Possession of Burglar's tools

On February 16, 2010, Mr. [redacted] pled guilty to NYPL §140.35 Possession of Burglar's tools. Although he received a conditional discharge, he pled guilty. I do not have enough information to accurately form an opinion on this charge. However, it appears that Mr. [redacted] pled guilty to a class A misdemeanor. Upon conviction of a Class "A" misdemeanor, a court may sentence an individual to a maximum of one year in jail. This offense can be characterized as a crime involving moral turpitude or as a crime that does not involve moral turpitude.

> The Immigration Judge concluded, inter alia, that the respondent's 1992 conviction for possession of burglar's tools in violation of section 140.35 of the New York Penal Law (NYPL) was not a conviction for a "crime involving moral turpitude" within the meaning of section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on the conviction documents contained within the record of proceedings. The only document in the record of proceedings relating to the respondent's conviction for possession of burglary tools is the trial court's judgment and order imposing sentence. The record does not contain a copy of an indictment or information for this offense or a plea agreement. Because the record of conviction does not specify that the respondent possessed burglar's tools with the intent to commit or abet a larceny or theft offense, we are obliged to conclude that his offense is not one in which moral turpitude necessarily inheres. Accordingly, the Immigration Judge correctly dismissed the crime involving moral turpitude charge to the extent that it was based upon his conviction under NYPL § 140.35. *In Re: Fabian Dario Rojas-Montoya A.K.A. Jose Ventura*, : A38 956 026 - YORK, 2003 WL 23508501, at *1 (DCBABR Nov. 28, 2003).

Therefore, without obtaining the NY record of conviction (charging document, JOC, transcript), I cannot opine as to whether Mr. [redacted] was convicted of a crime involving moral turpitude.

Virginia § 18.2-195. Credit card fraud

On January 5, 2015, Mr. [redacted] was found guilty of Credit Card Fraud (Felony). All the documents that you provided do not specify the exact statute, it appears to be as I have listed above. This statute is a crime involving moral turpitude as it begins with the following language:

(1) A person is guilty of credit card fraud when, with **intent to defraud** any person; or
(2) A person who is authorized by an issuer to furnish money, goods, services or anything else of value upon presentation of a credit card or credit card number by the cardholder, or any agent or employee of such person, is guilty of a credit card fraud when, **with intent to defraud** the issuer or the cardholder

Although the record that has been provided to you does not indicate the exact Virginia statute or even the exact subsection of the above statute, I am of the opinion that this statute is crime involving moral turpitude. The element of fraud is clearly present. It appears that Mr. [redacted]

was convicted of a Class 6 felony. For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

Assuming the above two offenses are crimes involving moral turpitude results in Mr. [redacted] falling in the category of being an alien subject to removal. If the New York is not a crime involving moral turpitude then Mr. [redacted] is NOT subject to removal.

Here are the relevant Federal Statutes regarding the deportation of foreign nationals:

(2) Criminal offenses
(A) General crimes

(i) Crimes of moral turpitude
Any alien who--
(I) is convicted of a crime involving moral turpitude committed within five years after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,
is deportable.

(ii) **Multiple criminal convictions**
Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.

The current pending New Jersey violations are crimes involving moral turpitude and a guilty plea or guilty finding would result in Mr. [redacted] being subject to removal. You indicated that the State might be willing to amend the above charge(s) to disorderly persons offenses. Recall that the severity of the offense does not necessarily mean that the offense is NOT a crime involving moral turpitude. Stealing a single piece of bubble gum is a crime involving moral turpitude.

I would like to bring your attention to the New Jersey statute 2C:21-2.1(c) which appears to fit Mr. [redacted]'s factual basis.

In the unpublished BIA decision In re: Juan Pinto-Diaz (2008)[case attached], the Board provides "non-precedential" guidance and instructs us:

> We agree with the respondent's argument that intent to defraud is not an element of N.J.S.A. 2C:21-2.1(c), the offense for which he was convicted, and that he was not charged with intent to defraud. We further conclude that the statute covers conduct which both does and does not constitute a crime involving moral turpitude. See Smriko v. Ashcroft, 387 F.3d 279, 283 (3d Cir. 2004). To determine whether the respondent was convicted of a turpitudinous offense, we

> apply a modified categorical approach, examining the respondent's conviction record including the indictment, the Judgment of Conviction, and the plea agreement. See Alaka v. Att'y Gen., 456 F.3d 88, 106 (3d Cir. 2006).
>
> These documents of conviction do not conclusively establish whether the respondent pled guilty to turpitudinous conduct covered within the statute, or to a non-turpitudinous act under the statute. Consequently, it was error to find that the respondent's conviction under N.J.S.A. 2C:21-2.1c was for a crime involving moral turpitude.

Just like in Pinto-Diaz (non-precedential), which is squarely and exactly on point, Defendant [redacted] MUST not plead to any intent to defraud. The statute, N.J.S.A. 2C:21-2.1c, is divisible because a defendant could be charged with turpitudinous conduct and non-turpitudinous conduct. The record of conviction in [redacted]'s case MUST not establish that he plead guilty to turpitudinous conduct.

This case arises under the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has adopted the traditional categorical approach to determine whether a crime constitutes a CIMT. See Jean-Louis v. Holder, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the "realistic probability approach" put forth by the Attorney General in Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense ... to ascertain that least culpable conduct necessary to sustain a conviction under the statute." Id. at 465-66.The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." Id. at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other which are not ... [The Immigration Judge] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." Id. at 466.This is true even where clear sectional divisions do not delineate the statutory variations. Id. In so doing, the Immigration Judge may only look at the formal record of conviction. Id. Mr. [redacted]'s record of conviction MUST NOT reveal that he engaged in "evil" or "corrupt mind" conduct.

> New Jersey Statute 2C:21-2.1c states:
> c. A person who knowingly exhibits, displays or utters a document or other writing which falsely purports to be a driver's license, birth certificate or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age or any other personal identifying information is guilty of a crime of the third degree. A violation of N.J.S.2C:28-7, constituting a disorderly persons offense, section 1 of P.L.1979, c. 264 (C.2C:33-15), R.S.33:1-81 or section 6 of P.L.1968, c. 313 (C.33:1-81.7) in a case where the person uses the personal identifying information of another to illegally purchase an alcoholic beverage or for using the personal identifying information of another to misrepresent his age for the purpose of obtaining tobacco or other consumer product denied to persons under 18 years of age shall not constitute an

offense under this subsection if the actor received only that benefit or service and did not perpetrate or attempt to perpetrate any additional injury or fraud on another. N.J. Stat. Ann. § 2C:21-2.1 (West).

According to the New Jersey Practice Series:

New Jersey Practice Series
Database updated November 2011

Motor Vehicle Law and Practice
Robert Ramsey

Chapter
2. License and Registration
M. Criminal Offenses Related to False Driver's License—N.J.S.A. 2C:21-2.1

§ 2:62. Exhibit, display or utterance: Crime of the fourth degree, N.J.S.A. 2C:21-2.1(c)

The knowing exhibition of a false license or false governmental document used for verifying age or identification is a crime of the fourth degree. So, too, is the act of displaying or uttering such a false document. There is no limitation on the purpose for which the false document is exhibited or to whom. **Indeed, there need not be any purposeful conduct associated with the display, uttering or exhibition, and certainly no intent to defraud, deceive or injure anyone**. [emphasis added] Thus, any display, uttering or exhibition of the false document to any person for any purpose will satisfy the elements of the offense, so long as the display or exhibition of the false document was done knowing that the license or identification falsely purported to be a government issued document. On the other hand, mere possession of the false license or identification document is insufficient to constitute a violation of this statute. There must be an affirmative act that constitutes more than mere possession. The defendant must not only possess the false document, but must exhibit, utter or display it.

The particular goal of this section was to prevent the sale of identification cards to be used by underage purchasers of alcoholic beverages. (See N.J.S.A. 2C-21-2.1 comment to Title 2C, New Jersey Criminal Code Annotated by John M. Cannel, Gann Law Books). Under the Third Circuit's minimum conduct test, pursuant to the elements of N.J.S.A. 2C:21-2.1c, Respondent could have displayed a fake I.D. to anyone for no purpose at all and been convicted under this statute.

An examination of the plain language of this statute clearly indicates that fraud is not an element necessary to be convicted, and I am not aware of any federal case which has determined that “Offenses involving false government documents” without a fraud element under this or another similarly worded statute has been categorized as a CIMT. In fact, there is an abundance of case law categorizing such conduct as non-turpitudinous.

In addition to Pinto-Diaz, Blanco v. Mukasey, 518 F.3d 714 (9th Cir. 2008), is informative in this matter, as it relates to the use of a false I.D. without fraudulent intent. In Blanco, the Court reasoned that when a crime involved a mere attempt to impede enforcement of the law, such as presenting a fake I.D. to a police officer, and no intent to induce another to act to his or her detriment, there is no element of fraud and it does not constitute a CIMT. See also Tall v. Mukasey, 517 F.3d 1115 (9th Cir. 2008) (reasoning that to be inherently fraudulent a crime must involve knowingly false representations made in order to gain something of value);

One must look to the nature of the Defendant [redacted]'s crime in order to determine if it involves evil intent or corruption of the mind.

> Our review of crimes relating to possession reveals that some are considered to involve moral turpitude while others are not. We have stated that criminal possession is a crime involving moral turpitude when accompanied by the intent to commit a crime involving moral turpitude. Matter of Jimenez, 14 I & N Dec. 442 (BIA 1973) (holding that possession of forgery devices with the intent to use them for forgery involves moral turpitude). Thus, carrying or possessing a concealed weapon has been held to involve moral turpitude only when the intent to use it against another person has been established. United States ex rel. Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926); Ex parte Saraceno, 182 F. 955 (S.D.N.Y. 1910); Matter of Granados, 16 I & N Dec. 726 (BIA 1979); Matter of S-, 8 I & N Dec. 344 (BIA 1959). Similarly, possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to commit a turpitudinous offense such as larceny. United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Matter of S-, 6 I & N Dec. 769 (BIA 1955). Matter of Serna, 20 I. & N. Dec. 579, 584 (BIA 1992).
>
> Circumstances may exist under which the respondent might not have had the intent to use the altered immigration document in his possession unlawfully. Therefore, we do not consider it appropriate to hold that the offense of which he was convicted is one involving moral turpitude. See United States ex rel.Guarino v. Uhl, supra (holding that possession of burglary tool with intent to use it to commit some crime which might not involve moral turpitude is not a crime involving moral turpitude); Kaye v. United States, 177 F. 147 (7th Cir. 1910) (stating that there are many circumstances under which a person might possess counterfeit molds without intent to use them fraudulently or unlawfully); Matter of K-, 2 I & N Dec. 90 (BIA 1944) (finding that receipt of stolen goods without knowledge they are stolen or without intent to deprive owner of his possession is not a crime involving moral turpitude). Accordingly, we find that the crime of possession of an altered immigration document with the knowledge that it was altered, but without its fraudulent use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude. Matter of Serna, 20 I. & N. Dec. 579, 586 (BIA 1992).

It is well established that an offense must necessarily involve moral turpitude in order for a conviction for that crime to support an order of deportation. See United States ex rel. Zaffarano

v. Corsi, 63 F.2d 757 (2d Cir. 1933); United States ex rel. Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931); United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914); United States ex rel. Valenti v. Karnuth, 1 F. Supp. 370 (N.D.N.Y. 1932). It is equally clear that any doubts in deciding such questions must be resolved in the alien's favor. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); United States ex rel. Giglio v. Neelly, 208 F.2d 337 (7th Cir. 1953); Matter of Hou, Interim Decision 3178 (BIA 1992).

There must be absolutely no evidence in the record of conviction that he had (or more importantly, was convicted of) any fraudulent intent or that he unlawfully used this Florida I.D. therefore his ultimate conviction cannot be considered a CIMT.

In addition, there is a recent Third Circuit decision that calls into question agency issued documents that are fake or forged as "relating to forgery". If possible, please try to establish that the Florida I.D. was a REAL ID and not a fake or a forgery. **I do remain VERY concerned that any period of incarceration will result in ICE placing a detainer on him.** I simply do NOT have enough information to evaluate Mr. [redacted]'s New York conviction. Please contact me immediately to discuss the various plea options available to Mr. [redacted].

Very truly yours,

_____

Ronald P. Mondello, Esq.

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February 11, 2019

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Re: State v. [redacted]
Immigration Consequences of NJSA 2C:20-11B(1)

I am of the opinion that Mr. [redacted] did commit a crime involving moral turpitude but he is NOT inadmissible because the crime falls within the petty offense exception.

Dear Ms. Zimovak:

Thank you for referring the above defendant to my office. As always, let us examine Mr. [redacted]'s conviction.

NJSA 2C:20-11B(1)

b. Shoplifting. Shoplifting shall consist of any one or more of the following acts:
(1) For any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof.

As the Middle Township Police report indicates, Mr. [redacted] was arrested for shoplifting various items of clothing valued at $106 from a Walmart store.

In order to determine the degree of the offense, one need only look to the section "Grading". Under N.J. Stat. Ann. § 2C:2–11(c), there are 4 gradations of shoplifting offenses. Three are crimes and one is a disorderly persons offense. Castillo v. Attorney Gen. U.S., 729 F.3d 296, 299, 2013 WL 4712753 (3d Cir. 2013).

c. Gradation.
(4) Shoplifting is a disorderly persons offense under subsection b. of this section if the full retail value of the merchandise is less than $200.

Mr. [redacted] pled guilty and was convicted of shoplifting and the gradation was a disorderly persons offense because the value was under $200. A person convicted of a "disorderly persons offense" faces up to six months in jail and a fine of $1,000. N.J. Stat. Ann. § 2C:1–4. Hussein v. Attorney Gen. of U.S., 413 Fed. Appx. 431, 432, 2010 WL 5173837, at *1 (3d Cir. 2010). The matter was disposed of in the Middle Township Municipal Court.

New Jersey municipal courts are statutory courts and can exercise only the jurisdiction conveyed by statute. State v. Casalino, 262 N.J. Super. 166, 168, 620 A.2d 449, 450–51, 1993 WL 69486 (App. Div. 1993).

A municipal court has jurisdiction over the following cases within the territorial jurisdiction of the court:

a. Violations of county or municipal ordinances;
b. Violations of the motor vehicle and traffic laws;
c. Disorderly persons offenses, petty disorderly persons offenses and other non-indictable offenses except where exclusive jurisdiction is given to the Superior Court;
d. Violations of the fish and game laws;
e. Proceedings to collect a penalty where jurisdiction is granted by statute;
f. Violations of laws regulating boating; and
g. Any other proceedings where jurisdiction is granted by statute.
N.J.S.A. 2B:12-17

A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense. N.J.S.A. 2C:43-8.

Based on the above, the defendant is entitled to the petty offense exception.

(ii) Exception
Clause (i)(I) shall not apply to an alien who committed only one crime if--
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed

constituted the essential elements) **did not exceed imprisonment for one year** and, if the alien was convicted of such crime, the alien **was not sentenced to a term of imprisonment in excess of 6 months** (regardless of the extent to which the sentence was ultimately executed). 8 U.S.C.A. § 1182 (West). Defendant [redacted] could have ONLY been sentenced to a maximum of 6 months because he was charged with a disorderly persons offense. He received no period of incarceration but rather paid monetary fines.

A New Jersey municipal court does not have jurisdiction over any other offenses wherein the sentence can result in more than 6 months of incarceration. Their jurisdiction is very limited. Only the New Jersey Superior Courts have jurisdiction over higher gradations of shoplifting.

Thank you again for referring Mr. [redacted] to my office. Please contact me at the above number should you wish to discuss this case further.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

RPM:cab
Cc: [redacted]

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January 4, 2018

Jimmy J. Song, Esq.
Kim & Bae, P.C.
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Suite 303
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Re: State vs. [redacted]

Dear Mr. Song,

You have taken the liberty of contacting me and informing me that Mr. [redacted] has a pending theft offense (NJSA 2C:20-3a) in the Palisades Park Municipal Court. Mr. [redacted] is currently an F-1 visa holder (student). Mr. [redacted] has unfortunately risked the loss of this student visa as a result of this crime involving moral turpitude. Mr. [redacted] is subject to the immigration **grounds of inadmissibility** when he returns to the United States.

The larceny and theft related offenses have been long considered crimes involving moral turpitude.

> It is well settled that theft or larceny offenses involve moral turpitude. *See, e.g.*, *Giammario v. Hurney*, 311 F.2d 285, 286 (3d Cir. 1962); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *Matter of Westman*, 17 I&N Dec. 50, 51 (BIA 1979). In determining whether there was an intention to permanently deprive the owner of his property, we have found it appropriate to consider the nature and circumstances surrounding a theft offense. *See, e.g.*, *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of S-*, 5 I&N Dec. 552, 555 (BIA 1953); *Matter of M-*, 2 I&N Dec. 686, 688 (C.O., BIA 1953); *Matter of F-*, 2 I&N Dec. 517, 520 (C.O., BIA 1946); *Matter of G-*, 2 I&N Dec. 235, 238 (BIA 1945). We have also found that similar offenses involving theft of goods from a retail establishment are crimes involving moral turpitude. *See, e.g.*, *Matter of Neely and Whylie*, 11 I&N Dec. 864 (BIA 1966); *Matter of P-*, 4 I&N Dec. 252 (Acting A.G., BIA 1951);

Matter of W-, 2 I&N Dec. 795 (C.O., BIA 1947). In Re Jurado-Delgado, 24 I. & N. Dec. 29, 33, Interim Decision 3543, 2006 WL 3337626, at 4 (BIA 2006).

(2) **Criminal and related grounds**

(A) Conviction of certain crimes

(i) **In general**

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) 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, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses

involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. 8 U.S.C.A. § 1182 (West).

Mr. [redacted] runs the risk of having his F-1 status revoked if he is forced to plead guilty to a "theft" related offense. Although Mr. [redacted] would have the "petty offense exception" available for one "CIMT" disorderly persons offense under exception (II) above, he could experience grave difficulty returning to the United States from abroad. The F-1 is discretionary and simply might not be renewed or it could be revoked.

My understanding is that there might be an amendment to NJSA 54:40A-25 *Possessing cigarettes not bearing required revenue stamps*:

> Any wholesale dealer or retail dealer who violates the provisions of section four hundred six of this act, **and any consumer who fails to report and remit the tax due as provided by section two hundred five of this act**, shall be liable to a penalty of not more than $1,000 for each individual carton of unstamped or illegally stamped cigarettes in the dealer's possession, which penalty shall be sued for and recovered in the same manner as provided for the penalties imposed by section six hundred one of this act. N.J. Stat. Ann. § 54:40A-25
>
> **Every licensed consumer who has acquired cigarettes for use, storage or consumption subject to the tax shall, on or before the twentieth day of the month following receipt of such cigarettes, complete and file with the director, in such form as the director shall prescribe, a report showing the amount of cigarettes so received. Said report shall be accompanied by a remittance for the full amount of the tax due.** N.J. Stat. Ann. § 54:40A-7

Although I can find NO Board of Immigration decisions regarding the above offense, it appears to be a regulatory offense. Meaning, there is no criminal *mens rea* therefore it cannot be a crime involving moral turpitude. Mr. [redacted] may have simply forgotten to report and remit the tax as further described above. I am of the opinion that a guilty plea to such an offense would not affect Mr. [redacted]'s F-1 visa status. However, having said that and having previously mentioned that there is an element of discretionary decision making on the parts of the USCIS (United States Citizenship and Immigration Services) and CBP (Customs and Border Patrol), may I suggest that you pled guilty BUT enter Conditional Dismissal. The allocution should be that "Mr. [redacted] forgot to report and remit the tax unintentionally and mistakenly".

Thank you for allowing me to be of service to you and your client. Please do not hesitate to contact me, should you have ANY questions.

/s/ Ronald P. Mondello, Esq.
Ronald P. Mondello, Esq.

RPM:cab

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February 20, 2019

Thomas Carroll Blauvelt, Esq.
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I am of the opinion that Mrs. [redacted] will be prevented from returning to the United States if she is required to plead guilty to shoplifting. A guilty plea to possession of the antishoplifting device could have the same result. She is NOT inadmissible because the crime falls within the petty offense exception however the H-4 visa is discretionary and will, in my opinion, be denied given today's political climate. A plea to a borough ordinance or disorderly conduct with a "neutral factual basis" would be a major "homerun" for this Defendant.

Re: [redacted]
Summons S-2018-[redacted]
Immigration Consequences of NJSA 2c:20-11b(2) AND NJSA 2C:20-11F

Dear Mr. Blauvelt:

I have been contacted by Mr. [redacted] with regards to the above pending charges wherein you represent the Defendant Mrs. [redacted]. Mrs. [redacted] was denied an H-4 visa based on these charges. The Department of State has WIDE discretion when it comes to the issuance of visas. In my opinion, given today's political environment, should the Defendant plead guilty to either the shoplifting offense or the possession of antishoplifting devices, the Defendant will be denied a visa to return to the United States.

As to the Shoplifting Offense

Shoplifting has always been a crime involving moral turpitude.

What is Moral Turpitude in the Immigration Context?

The INA does not define the term "moral turpitude." However, both the Board of Immigration Appeals and the Third Circuit (our Court) have defined morally turpitudinous conduct as "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." *Knapik,* 384 F.3d at 89. It is well-settled that "the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation." *Partyka v. Att'y Gen.,* 417 F.3d 408, 414 (3d Cir.2005). Additionally, it "is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Totimeh v. Att'y Gen.,* 666 F.3d 109, 114 (3d Cir.2012) (internal quotation marks omitted). Hernandez-Cruz v. Attorney Gen. of U.S., 764 F.3d 281, 284–85, 2014 WL 4358469 (3d Cir. 2014).
The larceny and theft related offenses have been long considered crimes involving moral turpitude.

It is well settled that theft or larceny offenses involve moral turpitude. *See, e.g.*, *Giammario v. Hurney*, 311 F.2d 285, 286 (3d Cir. 1962); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *Matter of Westman*, 17 I&N Dec. 50, 51 (BIA 1979). In determining whether there was an intention to permanently deprive the owner of his property, we have found it appropriate to consider the nature and circumstances surrounding a theft offense. *See, e.g.*, *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of S-*, 5 I&N Dec. 552, 555 (BIA 1953); *Matter of M-*, 2 I&N Dec. 686, 688 (C.O., BIA 1953); *Matter of F-*, 2 I&N Dec. 517, 520 (C.O., BIA 1946); *Matter of G-*, 2 I&N Dec. 235, 238 (BIA 1945). We have also found that similar offenses involving theft of goods from a retail establishment are crimes involving moral turpitude. *See, e.g.*, *Matter of Neely and Whylie*, 11 I&N Dec. 864 (BIA 1966); *Matter of P-*, 4 I&N Dec. 252 (Acting A.G., BIA 1951); *Matter of W-*, 2 I&N Dec. 795 (C.O., BIA 1947). In Re Jurado-Delgado, 24 I. & N. Dec. 29, 33, Interim Decision 3543, 2006 WL 3337626, at 4 (BIA 2006).

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(II) (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) 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, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. 8 U.S.C.A. § 1182 (West).

Mrs. [redacted] runs the risk of having her H-4 denied if she is forced to plead guilty to a "theft" related offense. Although Mrs. [redacted] would have the "petty offense exception" available for one "CIMT" disorderly persons offense under exception (II) above, she could experience grave difficulty returning to the United States from abroad. The H-4 is discretionary and simply might not be issued.

<u>As to the Antishoplifting Device</u>

Whether this crime is a CIMT is less clear. There are no cases on anti-shoplifting devices that I was able to find. A comparison to burglary tools must be made.

The Immigration Judge concluded, inter alia, that the respondent's 1992 conviction for possession of burglar's tools in violation of section 140.35 of the New York Penal Law (NYPL) was not a conviction for a "crime involving moral turpitude" within the meaning of section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on the conviction documents contained within the record of proceedings. The only document in the record of proceedings relating to the respondent's conviction for possession of burglary tools

is the trial court's judgment and order imposing sentence. The record does not contain a copy of an indictment or information for this offense or a plea agreement. **Because the record of conviction does not specify that the respondent possessed burglar's tools with the intent to commit or abet a larceny or theft offense, we are obliged to conclude that his offense is not one in which moral turpitude necessarily inheres.** Accordingly, the Immigration Judge correctly dismissed the crime involving moral turpitude charge to the extent that it was based upon his conviction under NYPL § 140.35. In Re: Fabian Dario Rojas-Montoya A.K.A. Jose Ventura, : A38 956 026 - YORK, 2003 WL 23508501, at *1 (DCBABR Nov. 28, 2003).

For this offense to be considered a CIMT, the record would have to contain some indicia that Mrs. [redacted] possessed this device for the purposes of stealing. Therefore, the offense may or may not be considered a CIMT. I informed Mr. [redacted] that neither you nor I are miracle workers and that this could turn out to be a most difficult case. I would suggest, IF POSSIBLE, that the matter be amended to a Borough ordinance or downgraded to disorderly conduct. I informed Mr. [redacted] that this may be impossible but that he should discuss the matter with you. Please feel free to contact me with any questions that you may have.

Finally, I am sure that you are aware of the Attorney General's Memorandum of Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting Marijuana and Other Criminal Offenses, dated August 29, 2018 and the Attorney General's Immigrant Trust Directive dated November 29, 2018. Perhaps these two directives might assist you in resolving the matter.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

RPM/cab
cc: Mr. [redacted]

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MEMBER
NJ, NY & FL BARS
NJ ATTORNEY ID #031461992
EOIR #TA16105

February 9, 2018

Joseph M. Horn, Esq.
167 Main Street
Hackensack, NJ 07601

Re: [redacted]

Dear Joe,

You asked me to evaluate your client's current immigration status in light of her criminal charges.

The following is my analysis.

The plea to TWO disorderly persons offenses for simple possession of Marijuana, namely NJSA 2C:35-10a(4) possession of 50 grams or less of marijuana would render [redacted] **inadmissible and deportable**.

As a B-2 visitor, [redacted] is subject to the **grounds of deportability**. The immigration laws concerning any drug offense are quite clear. Specifically, §237(a)(2)(B)(I) of the Immigration and Nationality Act, states that at any time after admission (i.e., your legal entry into the United States), if one is convicted of a violation of any law relating to a controlled substance, **other than a single offense involving possession for one's own use of 30 grams or less of marijuana**, you are subject to removal (deportation) proceedings. If you are able to reduce the convictions to one single offense involving possession for one's own use of 30 grams or less of marijuana, [redacted] WILL NOT BE SUBJECT TO DEPORTATION.

HOWEVER, AND DISPITE THAT, Once [redacted] files for her green card, she is THEN subject to the **grounds of inadmissibility**. There is no "automatic free pass" for a **single offense** involving possession for one's own use of 30 grams or less of marijuana. If you are able to reduce the convictions to one single offense involving possession for one's own use of 30 grams

or less of marijuana, she would still have to file a 212(h) waiver in order to obtain a green card based on her marriage to a United State Citizen.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello, Esq

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MEMBER
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February 12, 2019

David K. S. Kim, Esq.
Law Office of David K. S. Kim, P.C.
193-08 Northern Boulevard
Flushing, NY 11358

Re: State v. [redacted]
Accusation No.: [redacted]
Immigration Consequences of NJSA 2C:21-25c

I am of the opinion that Mrs. [redacted] WILL NOT be subject to deportation/removal as a result of a guilty plea to the above offense. However, she CAN be placed in removal proceeding should she leave the United States.

Dear Mr. Kim:

Thank you for speaking with me on the telephone recently regarding Mrs. [redacted] and her criminal conviction. The purpose of this memo is to provide an opinion as to the conviction and the immigration consequences of this unfortunate incident.

The State Statute of Conviction

Money Laundering - N.J. Stat. Ann. § 2C:21-25c

A person is guilty of a crime if the person:
c. directs, organizes, finances, plans, manages, supervises, or controls the transportation of or transactions in property known or which a reasonable person would believe to be derived from criminal activity.

The Federal Generic Offense
Laundering of monetary instruments – 18 U.S.C.A. § 1956

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States-

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

The Federal Generic Offense
Engaging in monetary transactions in property derived from specified unlawful activity – 18 U.S.C.A. § 1957

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States;

The Immigration Aggravated Offense Removal Grounds
Money Laundering and Monetary Transactions from Unlawful Activity - 8 U.S.C.A. § 1101

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000.

The plea transcript makes it abundantly clear that the dollar amount involved is less than $10,000.

> Ms. [redacted], I'm going to direct your attention to the period between May 7, 2015 and November 9, 2015. At that -- at that time, did you handle transporting money from the massage spa in excess of $500 but less than $75,000 -- actually, even **less than $10,000** -- knowing that it was from an illegal activity?

I am therefore of the opinion that Mrs. [redacted] did not commit an aggravated felony for immigration purposes of deportation/removal.

Elements of the Statute of conviction	Elements of the Federal Generic Offense § 1956	Elements of the Federal Generic Offense § 1957
A person is guilty of a crime if the person		
Knowingly directs, organizes, finances, plans, manages, supervises, or controls	knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity	knowingly engages or attempts to engage in a monetary transaction
the transportation of or transactions in property	conducts or attempts to conduct such a financial transaction	
The Defendant knew		
or a reasonable person would have believed		
That the property was derived from criminal activity.	involves the proceeds of specified unlawful activity	in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity (see section 1956 for definition of that activity)

The FIRST Immigration Grounds of Inadmissibility

(I) Money laundering
Any alien--
(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or
(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible. 8 U.S.C.A. § 1182.

PLEASE Note how there is no dollar amount in the ground of inadmissibility versus the ground of deportability as an aggravated felony. **Mrs. [redacted]'s conviction would render her inadmissible under § 212(a)(2)(I)(i) and (ii) [Money laundering] if she left the United States**.

The SECOND Immigration Grounds of Inadmissibility

(2) Criminal and related grounds
(A) Conviction of certain crimes
(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--
(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. 8 U.S.C.A. § 1182 (West)

The conviction appears to be a *Crime Involving Moral Turpitude* (CIMT).

What is Moral Turpitude in the Immigration Context?

The INA does not define the term "moral turpitude." However, both the Board of Immigration Appeals and the Third Circuit (our Court) have defined morally turpitudinous conduct as "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." *Knapik,* 384 F.3d at 89. It is well-settled that "the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation." *Partyka v. Att'y Gen.,* 417 F.3d 408, 414 (3d Cir.2005). Additionally, it "is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Totimeh v. Att'y Gen.,* 666 F.3d 109, 114 (3d Cir.2012) (internal quotation marks omitted). Hernandez-Cruz v. Attorney Gen. of U.S., 764 F.3d 281, 284–85, 2014 WL 4358469 (3d Cir. 2014).

Mrs. [redacted] was involved in money transactions derived from criminal activity (prostitution). The crime to which Mrs. [redacted] was convicted includes an element of fraud or deception. The crime inherently involves deceptive conduct and thus in my opinion involves moral turpitude. We would always argue that the conviction is not a crime involving moral turpitude and we might or might not win. In any event, **IF Mrs. [redacted] DECIDES TO LEAVE THE COUNTRY THEN SHE COULD BE SUBJECT TO THE GROUNDS OF INADMISSIBILTY FOUND AT INA § 212(a)(2)(A)(i)(I) [moral turpitude] and § 212(a)(2)(I)(i) and (ii) [Money laundering] AND PLACED IN REMOVAL PROCEEDINGS.**

I am therefore of the opinion that if Mrs. [redacted] leaves the United States then she will be placed in removal proceedings based on the above grounds of inadmissibility.

Please do not hesitate to contact me should you have any questions or wish to discuss Mrs. [redacted]'s case further. Thank you for the referral.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

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MEMBER
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February 13, 2019

AMENDED THIRD LETTER
David K. S. Kim, Esq.
Law Office of David K. S. Kim, P.C.
193-08 Northern Boulevard
Flushing, NY 11358

Re: State v. [redacted]
Accusation No.: [redacted]
Immigration Consequences of Financial Facilitation of Criminal Activity
NJSA 2C:21-25c

I am of the opinion that the probability of a PCR being granted in this matter is remote at best. The prior criminal defense counsel avoided an aggravated felony conviction and mandatory detention. I am of the opinion that the NJ conviction is not the same as the Federal Money Laundering Ground of Inadmissibility for the reason stated herein.

Dear Mr. Kim:

Thank you for speaking with me on the telephone recently regarding Mrs. [redacted] and her criminal conviction. The purpose of this memo is to provide an alternative to the filing of a PCR. I am of the opinion that the probability of a PCR being granted on ineffective assistance of counsel grounds is remote at best. I am of the opinion that the New Jersey statute Financial Facilitation of Criminal Activity NJSA 2C:21-25c is not the same as the Federal Money Laundering Ground of Inadmissibility.

In this case, the applicable section is INA §212(a)(2)(I)(i):

(I) Money laundering
Any alien—
(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible. 8 U.S.C.A. § 1182.

Under the legal framework of Batista v. Attorney General, 744 F.3d 54 (3d Cir, 2014), Mrs. Park's conviction is not money laundering. In Batista, the Third Circuit analyzed whether the New York arson statute, (NYPL 150.10), constituted an aggravated felony under INA 101(a)(43)(E). INA 101(a)(43)(E) defines an aggravated felony as "an offense ***described in***... section 842(h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses)." (Emphasis added). Since INA 101(a)(43)(E) uses the phrase, "described in" all of the elements of the state statute must match the enumerated federal statute in order for the state offense to be deemed an aggravated felony. The Third Circuit noted that the New York arson statute was most similar to 18 U.S.C 844(i). A defendant is guilty under 18 U.S.C. 844(i),

if he maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property ***used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce*** shall be imprisoned for not less than 5 years and not more than 20 years […]" (Emphasis added).

The Third Circuit concluded that "*Used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce*" is the key federal jurisdiction element that was missing from the New York arson statute. For this reason, the Third Circuit held that the New York arson offense was not an aggravated felony.

By analogy, a conviction of Financial Facilitation of Criminal Activity under New Jersey state law is not an the same as the Federal inadmissibility ground money laundering. Mrs. Park was convicted of NJSA 2C:21-25(c) Financial Facilitation of Criminal Activity. A person is guilty of 2C:21-25(c) when he "directs, organizes, finances, plans, manages, supervises, or controls the transportation of or transactions in property known or which a reasonable person would believe to be derived from criminal activity."

By contrast, the most similar federal statute is 18 USC 1956(a)(2), which provides:

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or
(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both.

The New Jersey statute differs from the federal statute in several ways. First, to be convicted under the New Jersey statute, the defendant only needs to "direct, organize, finance, plan manage, supervise, or control the *transportation of* or *transactions in* **property**".

"Property" means anything of value, as defined in subsection g. of N.J.S. 2C:20-1, and includes any benefit or interest without reduction for expenses incurred for acquisition, maintenance or any other purpose. N.J.S.A. 2C:21-24.

"Property" means anything of value, including real estate, tangible and intangible personal property, trade secrets, contract rights, choses in action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric, gas, steam or other power, financial instruments, information, data, and computer software, in either human readable or computer readable form, copies or originals. N.J.S.A. 2C:20-1.

In order to be convicted under the New Jersey statute one need only engage in the "transportation of property" or "transactions in property,". This property could be stolen airline tickets, animals, food and drink, electric, gas, steam or other power, financial instruments, information, data, and computer software or these items could be purchased using the proceeds of criminal activity. The federal statute specifically requires a "monetary instrument" or "funds."

Second, the New Jersey statute makes it a crime to transport property in which a "**reasonable person** would believe derived from criminal activity." (Emphasis added). In New Jersey, the defendant does not necessarily need to personally know that the property in question derived from criminal activity. The federal ground, however, requires that the defendant **intend** to promote criminal activity or "**know** that the monetary instrument or funds were the proceeds of unlawful activity.

Finally, sections of the federal statute require that the monetary instrument or funds be transferred either from the United States to a foreign country, or from a foreign country to the United States. The New Jersey statute does not. Therefore, as in Batista, the New Jersey statute lacks the federal jurisdictional element. For all of the above reasons, Mrs. [redacted]'s conviction of NJSA 2C:21-25(c) Financial Facilitation of Criminal Activity is not the same as the federal inadmissibility grounds of money laundering.

It should be noted that INA §212(a)(2)(A)(I) is not applicable to Mrs. [redacted] because the offense in question occurred more than five years after she legally entered the United States.

Please do not hesitate to contact me should you have any questions or wish to discuss Mrs. [redacted]'s case further. Thank you for the referral.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

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MEMBER
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October 4, 2019

Via email address – afflittolaw@gmail.com
Joseph T. Afflitto, Jr., Esq.
502 Valley Road
Suite 103
Wayne, NJ 07470

Re: State v. [redacted]
Immigration Consequences of NJSA 2C:20-11B(1)

I am of the opinion that Ms. [redacted] did commit a crime involving moral turpitude but she is NOT inadmissible because the crime falls within the "petty offense" exception and she is not deportable as a result of the charge. HOWEVER, Ms. [redacted] has overstayed her B-2 visa. She could be deported on that basis alone until she marries a United States citizen.

Dear Mr. Afflitto:

Thank you for referring the above defendant to my office. As always, let us examine the charge.

NJSA 2C:20-11B(1)

b. Shoplifting. Shoplifting shall consist of any one or more of the following acts:
(1) For any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof.

My understanding is that the defendant was charged in the Township of Wayne. I do not have a copy of the charge or the police report but I was informed that the charge was downgraded to a disorderly persons offense.

In order to determine the degree of the offense, one need only look to the section "Grading". Under N.J. Stat. Ann. § 2C:2–11(c), there are 4 gradations of shoplifting offenses. Three are crimes and one is a disorderly persons offense. Castillo v. Attorney Gen. U.S., 729 F.3d 296, 299, 2013 WL 4712753 (3d Cir. 2013).

c. Gradation.
(4) Shoplifting is a disorderly persons offense under subsection b. of this section if the full retail value of the merchandise is less than $200.

Ms. [redacted] is charged with shoplifting and the gradation is now a disorderly persons offense because of the "downgrade". A person convicted of a "disorderly persons offense" faces up to six months in jail and a fine of $1,000. N.J. Stat. Ann. § 2C:1–4. Hussein v. Attorney Gen. of U.S., 413 Fed. Appx. 431, 432, 2010 WL 5173837, at 1 (3d Cir. 2010).

New Jersey municipal courts are statutory courts and can exercise only the jurisdiction conveyed by statute. State v. Casalino, 262 N.J. Super. 166, 168, 620 A.2d 449, 450–51, 1993 WL 69486 (App. Div. 1993).

A municipal court has jurisdiction over the following cases within the territorial jurisdiction of the court:

a. Violations of county or municipal ordinances;
b. Violations of the motor vehicle and traffic laws;
c. Disorderly persons offenses, petty disorderly persons offenses and other non-indictable offenses except where exclusive jurisdiction is given to the Superior Court;
d. Violations of the fish and game laws;
e. Proceedings to collect a penalty where jurisdiction is granted by statute;
f. Violations of laws regulating boating; and
g. Any other proceedings where jurisdiction is granted by statute.
N.J.S.A. 2B:12-17

A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense. N.J.S.A. 2C:43-8.

Based on the above, the defendant is entitled to the "petty offense" exception. (see chart).

(ii) Exception
Clause (i)(I) shall not apply to an alien who committed only one crime if--
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed

constituted the essential elements) **did not exceed imprisonment for one year** and, if the alien was convicted of such crime, the alien **was not sentenced to a term of imprisonment in excess of 6 months** (regardless of the extent to which the sentence was ultimately executed). 8 U.S.C.A. § 1182 (West). Defendant [redacted] could ONLY be sentenced to a maximum of 6 months because she was charged with a disorderly persons offense.

A New Jersey municipal court does not have jurisdiction over any other offenses wherein the sentence can result in more than 6 months of incarceration. Their jurisdiction is very limited. Only the New Jersey Superior Courts have jurisdiction over higher gradations of shoplifting.

Ms. [redacted] is engaged to a United States citizen and hopes to obtain a green card someday. This shoplifting offense will not interfere with her obtaining a green card and will not subject her to deportation. HOWEVER, should she be charged and convicted of another theft related offense, she will be placed in removal proceedings. **In addition, Ms. [redacted] has overstayed her B-2 visa. She could be deported on that basis alone until she marries a United States citizen**. (see chart).

Perhaps the State would be willing to amend the charge to an ordinance or to "disorderly conduct" followed by admission into the conditional dismissal program. The factual basis should be neutral. For example, "I was in the township of Wayne and created a disturbance".

FINALLY, MS. [redacted] MUST NOT LEAVE THE UNITED STATES OR SHE WILL BE SUBJECT TO A 10 YEAR BAR TO RETURNING.

Thank you again for referring Ms. [redacted] to my office. I have attached two charts to better explain Ms. [redacted]'s situation. Please contact me at the above number should you wish to discuss this case further.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

RPM:cab

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NJ ATTORNEY ID #031461992

October 3, 2019

Hon. William A. Daniel, J.S.C.
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

Re: State v. [redacted]
Indictment No. [redacted]-I

Dear Judge Daniel:

I represent Mr. [redacted] in the above matter. Mr. [redacted] has been a long-time green card holder (1984), a licensed physician in the Dominican Republic and is 70 years old. He was convicted of two violations of NJSA 2C:12-1b(1) Aggravated Assault in the second degree and was sentenced to 6 years State prison. Judge Moynihan accepted the plea and you sentenced Mr. [redacted] on October 24, 2014. My understanding is that Judge Moynihan is now in the Appellate Division, Part H.

With respect to immigration, Mr. [redacted] is considered to have been convicted of a crime of violence[1] and is therefore subject to that Federal criminal grounds of mandatory deportation because he attempted to cause serious bodily injury to another, or caused such injury **purposely or knowingly**. This crime of violence (18 USC §16a) with a year or more prison sentence imposed is considered an aggravated felony[2] for immigration purposes with no immigration relief available.

If Mr. [redacted] had been properly advised by prior criminal defense counsel to plead guilty to the section of NJSA 2C:12-1b(1) which contains a *mens rea* of recklessness, namely: Under circumstances manifesting extreme indifference to the value of human life recklessly causes

[1] The term "crime of violence" means—
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. 18 USC § 16a.
[2] (43) The term "aggravated felony" means—
(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year; 8 U.S.C.A. § 1101; INA §101(A)(43)(F).

serious bodily injury, HE WOULD NOT BE SUBJECT TO MANDATORY DEPORTATION AND MANDATORY ICE CUSTODY. I have attached a copy of the September 22, 2014 plea before Judge Moynihan. Judge Moynihan was of the opinion, based on the factual basis, that purposeful "or some other mental state" was appropriate but if this was an attempt than it must be purposeful. The defendant's allocution was initially to "intentional" which is not in 2C. 1T:17-10 to 17.

The Court of Appeals for the Third Circuit in *Popal v. Gonzales* 416 F.3d 249 (3d Cir. **2005**), made plain that, for purposes of 18 USC § 16(a), "crimes with a *mens rea* of recklessness do not constitute crimes of violence." Subsequent case law reaffirms this holding:

> The United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, has held that the use of physical force must be knowing or intentional, and that recklessness or gross negligence are insufficient. See *United States v. Chapman*, 866 F.3d 129, 133-36 (3d Cir. 2017).
>
> *Popal* made plain that, for purposes of § 16(a), "crimes with a *mens rea* of recklessness do not constitute crimes of violence." 416 F.3d 249, 251 (3d Cir. 2005). District courts in our Circuit continue to follow *Popal*. In 2017, the Eastern District of Pennsylvania concluded that a defendant's Pennsylvania aggravated assault conviction, 18 Pa. Cons. Stat. § 2702(a)[3], was not a "crime of violence" under § 4B1.2(a) of the Sentencing Guidelines because the defendant's *mens rea* did not rise above recklessness. *United States v. Haines*, 296 F.Supp.3d 726, 732 (E.D. Pa. 2017); see also *Nelson v. United States*, No. 16-cv-3409, 2017 WL 150242, at 5, 2017 U.S. Dist. LEXIS 5116, at 16 (D.N.J. Jan. 12, 2017) (concluding that New Jersey's assault statute could be satisfied by recklessness alone and "under the elements clauses of the Sentencing Guidelines, § 16(a), and the virtually identical language in the ACCA, a crime requiring only recklessness as to the 'use' of force will not qualify as a crime of violence"). In 2016, this Court declined to presume that a guilty plea that failed to specify mens rea qualified as a crime of violence when the divisible statute was not categorically a crime of violence, even though it was "exceedingly unlikely[ ] that his plea arrangement implicated something other than" one of the qualifying mens rea. *United States v. Dates*, No. 6-cr-83, 2016 WL 5852016, at 3 (W.D. Pa. Oct. 6, 2016).
>
> Thus, the Defendant's underlying conviction cannot as a matter of law qualify as a crime of violence under 18 U.S.C. § 16(a) and is insufficient to support aggravated felon status under 8 U.S.C. § 1101(a)(43)(F). *United States v. Reyes-Romero*, 327 F. Supp. 3d 855, 883–84, 2018 WL 3218658 (W.D. Pa. 2018).

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[3] § 2702. Aggravated assault.
(a) Offense defined.--A person is guilty of aggravated assault if he:
(1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

Therefore, had prior criminal defense counsel advised Mr. [redacted] to plea to the reckless[4] *mens rea* he would not be subject to mandatory ICE custody and mandatory deportation.

I recently spoke to Assistant Prosecutor [redacted] who was previously assigned to this case in 2013. Our discussions focused on resolving this matter in lieu of the defendant filing a post-conviction relief petition[5]. Mr. [redacted] suggested that I reach out to Your Honor for permission to return to court to vacate the prior factual basis (not the actual conviction) and allocute to a factual basis containing the reckless *mens rea*. In addition and in the interest of justice, I will be requesting that the jail sentence be modified to 179 days from 6 six years so that Mr. [redacted] may become a United States Citizen. He is advanced in age and would like to return to the Dominican Republic to visit relatives before he meets his maker. Mr. [redacted] successfully served and completed Your Honor's sentence in its entirety. He was never in trouble before this incident and has never been in trouble since this unfortunate incident. If Your Honor agrees to permit Mr. [redacted] to return to Your Honor's Court then Mr. [redacted] will attempt to obtain approval from his supervisors.

Mr. [redacted] had no objection to me having *ex parte* conversations regarding this matter with Your Honor. Should Your Honor have any questions regarding any aspect of this matter please contact me on my cell phone 201-280-8118. I await Your Honor's decision.

Respectfully submitted,

/s/ Ronald P. Mondello
Ronald P. Mondello

RPM:cab
Cc: [redacted] – Assistant Prosecutor
[redacted]

[4] Discussions with Mr. [redacted] as to how such an incident occurred leads current counsel to the conclusion that the reckless *mens rea* was the best fit for what occurred that unfortunate evening.
[5] Mr. [redacted] **MUST** file before October 24, 2019 in order to avoid the 5-year bar.

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MEMBER
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September 19, 2018

Steven F. Wukovitz, Esq.
Triarsi, Betancourt, Wukovitz & Dugan
186 North Avenue, East
Cranford, NJ 070164

Re: State v. [redacted]
Indictment No.: [redacted]
Immigration Consequences of Proposed Plea to NJSA 2C:5-2, NJSA 2C:20-7.1
Second Degree - Five-year Flat Jail Sentence

I am of the opinion that Mr. [redacted] WILL be subject to mandatory ICE detention (jail) and mandatory deportation should he plead guilty to the above proposed plea agreement because it is considered to be an AGGRAVATED FELONY with virtually no relief from removal from the United States.

Dear Mr. Wukovitz:

Thank you for speaking with me on the telephone today regarding Mr. [redacted] and his criminal case. The purpose of this memo is to provide an opinion as to the current plea offer's immigration consequences and to provide some suggestions and "safe havens" in order to mitigate the immigration consequences of this unfortunate incident. PLEASE understand that I am NOT suggesting that the State would be amenable to ANY of my suggestions or "safe havens". I simply have an obligation to discuss them.

You were kind enough to inform me that the State has offered a plea to NJSA 2C:5-2 Conspiracy to sell stolen cars with a "flat" five-year prison term. You did describe the criminal act of

"selling stolen cars" which would comport with NJSA 2C:20-7.1 Fencing. Please advise if I have the incorrect statute.

First, please let me dispel any immigration misconceptions regarding "conspiracy" and "attempt". Immigration and Customs Enforcement (ICE) equate a conspiracy or an attempt with the actual completion of a crime.

(43) The term "aggravated felony" means--

(U) an attempt or conspiracy to commit an offense described in this paragraph. 8 U.S.C.A. § 1101

Therefore, someone who has pled guilty to an attempt or conspiracy to sell stolen automobiles (fencing) will be subject to deportation. Point being, conspiracy and attempt are viewed the same as the actual commission of the offense.

The crime of selling stolen automobiles falls under the following Immigration and Nationality Act section:

(43) The term "aggravated felony" means--

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year; 8 U.S.C.A. § 1101.

Discussion

Is the Plea an Aggravated Felony?
The proposed plea calls for a sentence of a "flat" five-year period of imprisonment. Should the Judge impose 365 days (at least one year) or more of prison, Mr. [redacted] will have committed an immigration aggravated felony and will be subject to mandatory detention (jail) and mandatory deportation (removal). However, IF THE JUDGE IMPOSES 364 days in jail or NO JAIL SENTENCE THEN THERE IS NO AGGRAVATED FELONY. Please note that should the Judge imposes a jail sentence of at least a year or more BUT suspends the sentence, Mr. [redacted] has still committed an aggravated felony. There MUST be a jail sentence of 364 days or less in order to escape the classification of an aggravated felony. The dollar amount involved in the theft is irrelevant for immigration purposes but New Jersey uses the amount for degree grading purposes. There is a presumption of imprisonment on a second degree crime.

Is the Plea a Crime Involving Moral Turpitude?
Almost ALL theft offenses are Crimes Involving Moral Turpitude (CIMT's). Those theft offenses that involve a temporary taking, as opposed to permanent taking, are generally not CIMT's (e.g. joy riding).

Most certainly, fencing and receiving stolen property ARE CIMT'S. "The foreign national's conviction for receipt of stolen property under New Jersey law N.J.S.A. 2C:20-7 constituted a "crime involving moral turpitude" for removal purposes, since criminal statute's knowledge

requirement necessarily entailed corrupt scienter. Alcaide-Zelaya v. I.N.S., 231 F. App'x 24, 2007 WL 1290230 (2d Cir. 2007).

Here is the section of the INA (Immigration and Nationality Act) that renders a foreign national subject to being deportable as a result of a conviction for a crime involving moral turpitude:

(a) Classes of deportable aliens
Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses
(A) General crimes
(i) Crimes of moral turpitude
Any alien who--
(I) is **convicted** of a crime involving moral turpitude **committed within five years** (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) **after the date of admission**, and
(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable. 8 U.S.C.A. § 1227

My understanding from Mr. [redacted] is that he entered the United States lawfully in January 2010 and received his Conditional Green card in January 2011. He has not been convicted of the above offense to date. Let us assume for the moment that the Judge does NOT sentence Mr. [redacted] to "at least 1 year" of jail then his crime is NOT considered an aggravated felony. He would still be pleading guilty to a CIMT for which a sentence of one year or longer may be imposed. However, because he was not convicted within five years after the date of admission (January 2010 – January 2015), **HE IS NOT DEPORTABLE** and can remain in the United States.

This opinion makes a few assumptions some of which are BIG assumptions:

1. The Judge will not sentence Mr. [redacted] to a year or more of jail.

2. Mr. [redacted] is pleading guilty to conspiracy to commit NJSA 2C:20-7 or a similar **theft** offense.

3. Mr. [redacted] is not pleading guilty to a racketeering offense. Which is an aggravated felony: **(J)** an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed.

4. Mr. [redacted] is not pleading guilty to an offense that involves fraud or deceit where the loss to the victim involves more than $10,000. Which is an aggravated felony: (M) an offense that--(i) involves fraud or deceit in which the loss to the victim or victims exceeds

$10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

5. Mr. [redacted] has accurately recalled when he was admitted to the United States.

To summarize, should Mr. [redacted] plead guilty to the aforementioned charge and be sentenced to a year or more of jail then he most certainly will have been convicted of an aggravated felony. He will be subject to mandatory detention and mandatory deportation. HOWEVER, should the Judge sentence him to 364 days in the county jail or probation then he will not be subject to deportation.

Please do not hesitate to contact me should you have any questions or wish to discuss Mr. [redacted]'s case further.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

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MEMBER
NJ, NY & FL BARS

January 28, 2019

Via email address – tom@thomaskingesq.com
Thomas R. King, Esq.
11 Kiel Avenue
Suite C-3
Kinnelon, NJ 07405

Re: State v. [redacted]
Immigration Consequences of NJSA 39:4-50

I am of the opinion that Ms. [redacted] will NOT be subject to deportation should she plead guilty to NJSA 39:4-50. However, she will have difficulties becoming a United States Citizen due to the fact that she must prove that she is a person of Good Moral Character.

Dear Mr. King:

Thank you for referring the above defendant with respect to the immigration consequences of her pending New Jersey traffic violation. I appreciate the time that you and Ms. [redacted] have spent with me. My opinion is based on information supplied to me by Ms. [redacted] and that she is pleading guilty to DWI and REFUSAL, along with Failure to Report an Accident in Clifton.

Clifton

There are no deportation or removal grounds for drinking and driving (DWI). The stand-alone NJSA 39:4-50 is not considered a crime involving moral turpitude (CIMT). However, when a DWI is also associated with another violation that requires a *mens rea* of purposefully or knowingly, the classification could change. For example, someone who was also driving with a suspended license. The information that I have reviewed indicates that Ms. [redacted] has no other

violations that would rise to such a classification. The failure to report an accident ticket will have no immigration consequences.

Ms. [redacted] will NOT be subject to deportation or removal. However, should Ms. [redacted] leave the county and return to the United States, she may be subject to I&N §212(a)(1) Excludable Alien – Health Related Grounds. The immigration officers might determine that Ms. [redacted] is an alcoholic whose behavior may pose or has posed a threat to property, safety, or welfare to himself or others. I raise this as a **VERY, VERY REMOTE** possibility but one nonetheless.

Ms. [redacted] is in the process of Naturalizing (becoming a United States Citizen). I am of the opinion that she not eligible to become a USC now because of this DWI and Refusal offense. Naturalization requires that a person be of "good moral character". She fails this as a result of the DWI. However, there is a 5 year "look back" period. She will be eligible then but for now she must wait. If USCIS applies the policy that it is an arrest within the five year statutory time frame, it is irrelevant that this offense is non-criminal, the government can still deny your application to naturalize. Prior to the current administration, USCIS would normally approve naturalization with a first time DWI.

Thank you again for referring Ms. [redacted] to my office. Please contact me at the above number should you wish to discuss Ms. [redacted]'s case further.

Very truly yours,

/s/ Ronald P. Mondello
Ronald P. Mondello

RPM:cab
Cc: [redacted]