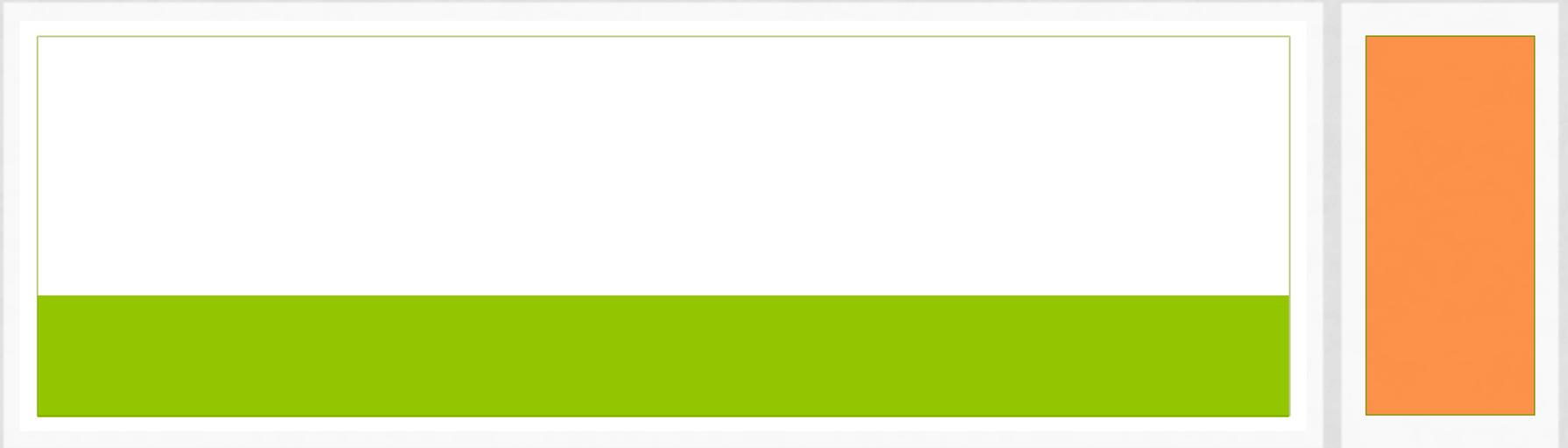


REPRESENTING NONCITIZEN CLIENTS: AN OVERVIEW



A CRIMINAL CHARGE POSES A TRIPLE THREAT TO SOME NONCITIZEN CLIENTS

Two

A criminal conviction could bar eligibility for a future immigration benefit

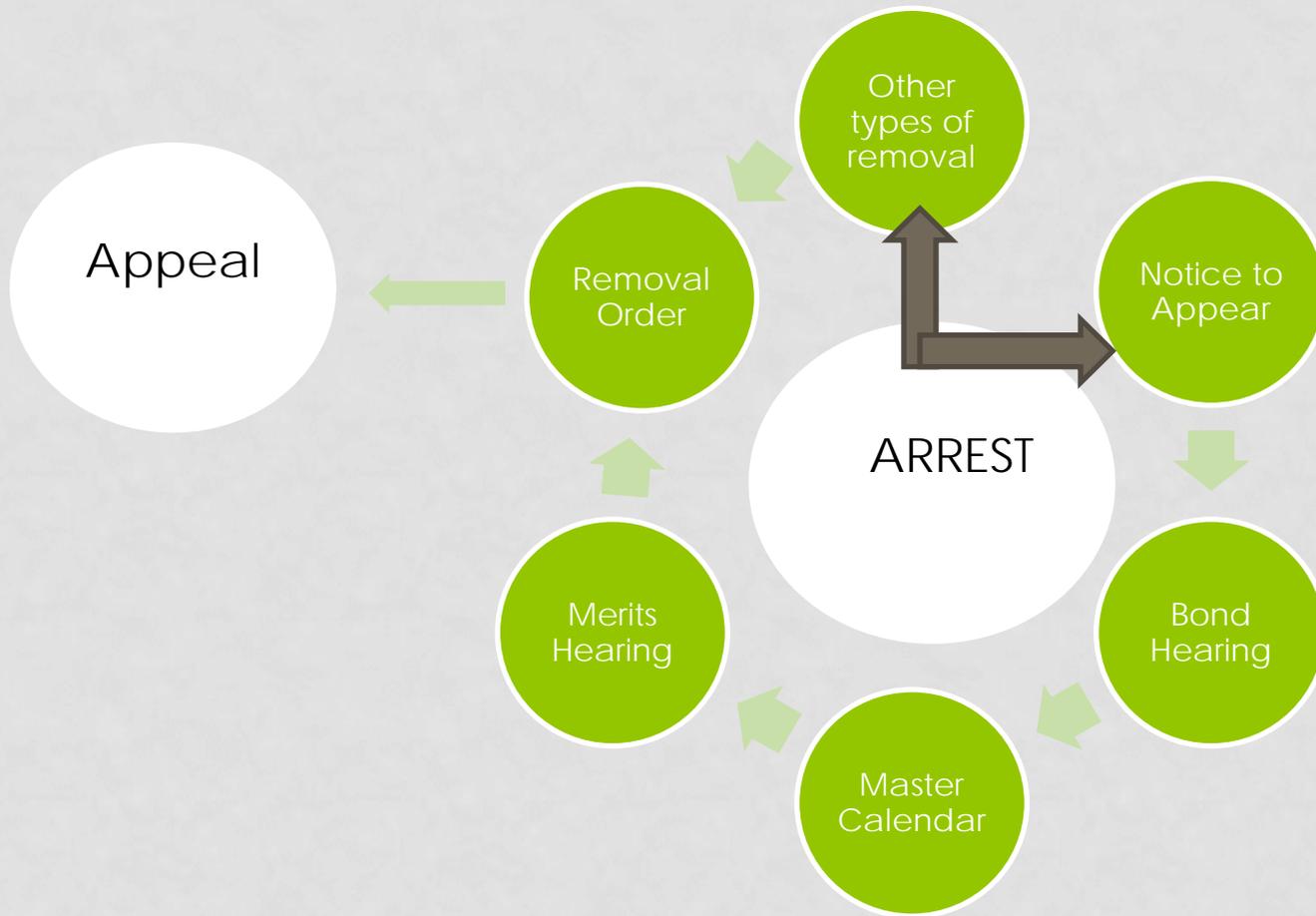
Three

Contact with the criminal justice system can create grounds for removal

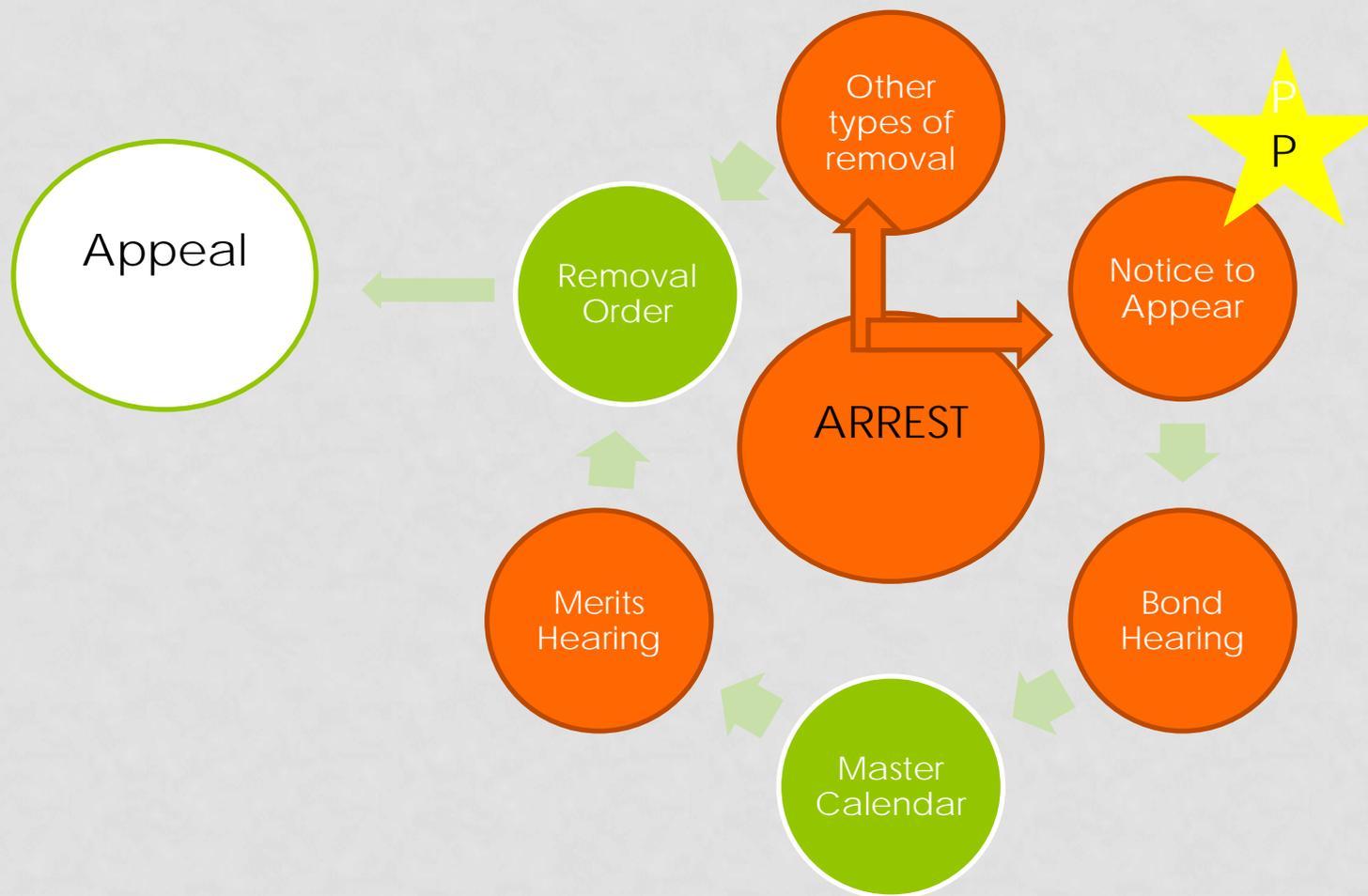
Contact with the criminal justice system could lead to discovery of irregular status

One

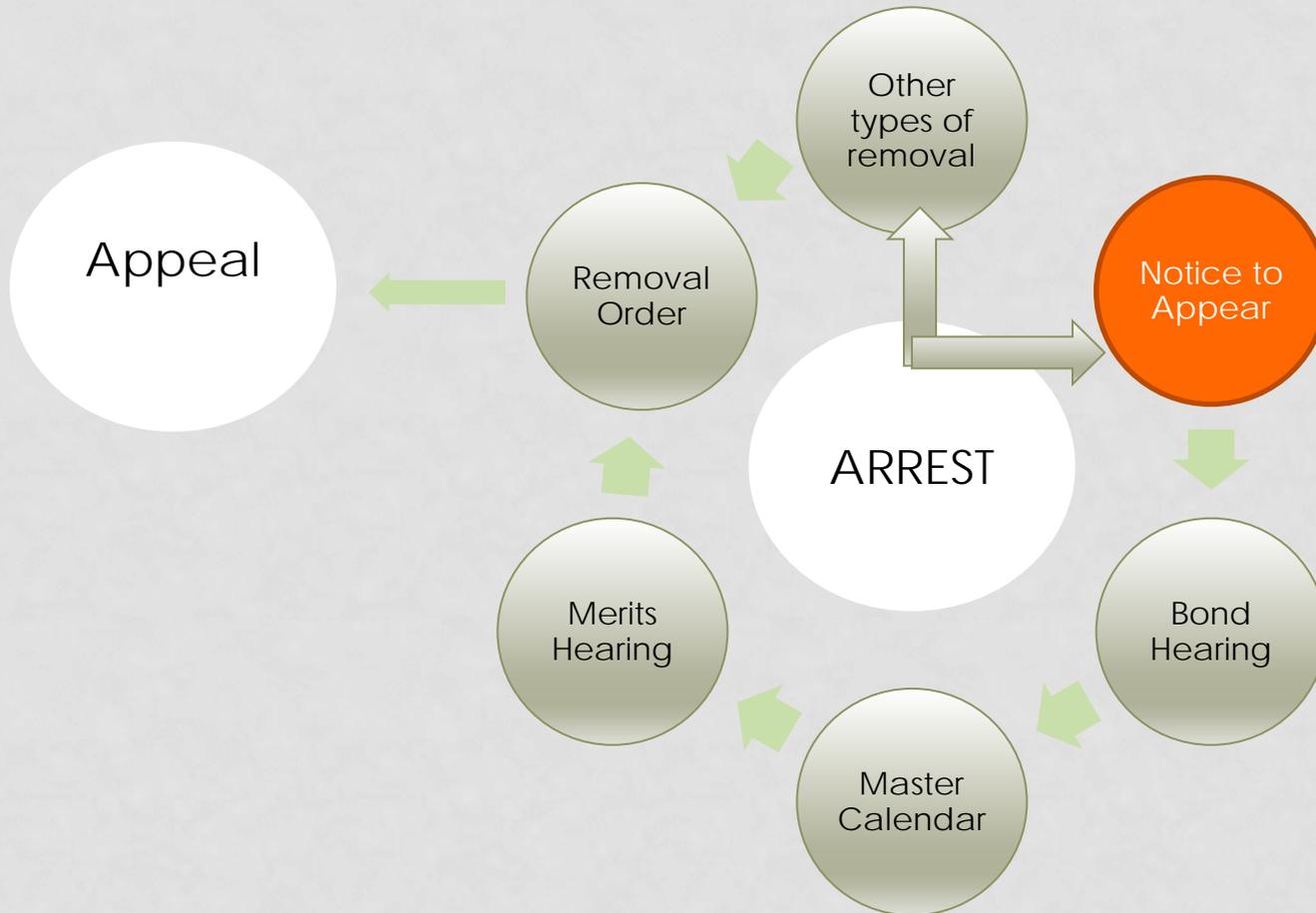
ABBREVIATED REMOVAL MAP



CRIMINAL CONVICTION COULD AFFECT IMMIGRATION PROCEEDINGS



CRIMINAL CONVICTION CAN AFFECT GROUNDS FOR REMOVAL



REQUIREMENTS OF DEFENSE COUNSEL

- Effective plea bargaining
- *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)
- *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895 (abrogated by *State v. Shata*)
- *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93
- *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717
- Know your DA and judge

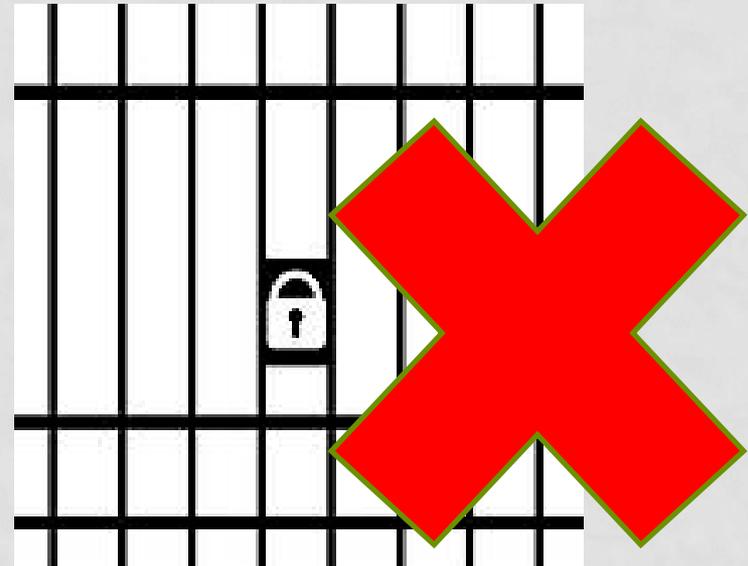


6TH AMENDMENT RIGHT TO COUNSEL = RIGHT TO EFFECTIVE REPRESENTATION

Deficient Performance



Prejudice



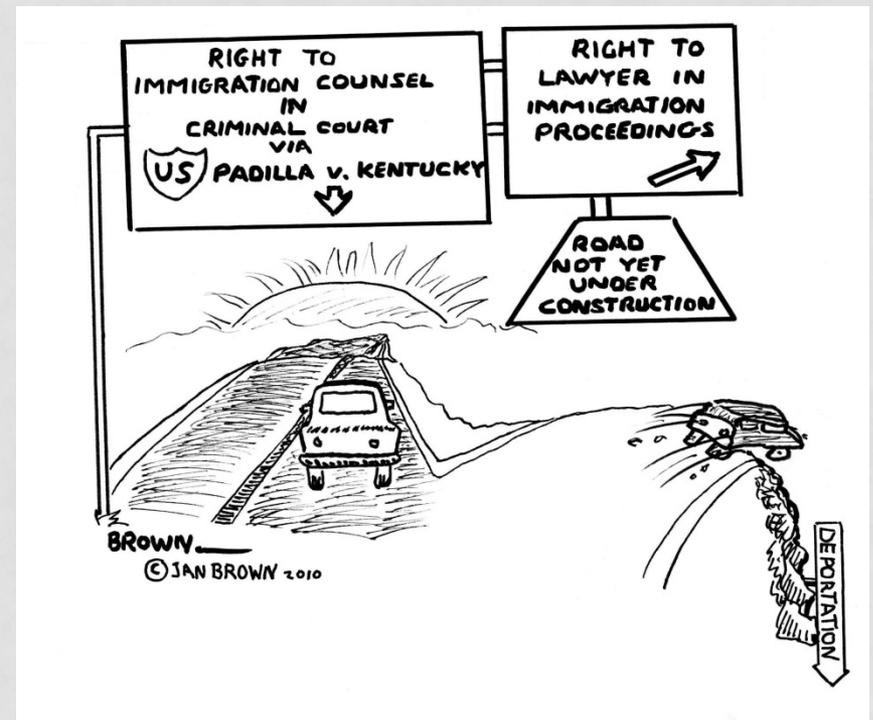
- *Strickland v. Washington*, 466 U.S. 668 (1984)

INCLUDES RIGHT TO EFFECTIVE PLEA BARGAIN

- According to 2005 Bureau of Justice Statistics 90-95% of criminal cases in federal and state courts resolve themselves through plea bargain
- **Missouri v. Frye**, 566 U.S. 133, 143-44 (2012) “The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stage . . . [i]t is not some adjunct to the criminal justice system; it is the criminal justice system”
- **Lafler v. Cooper**, 566 U.S. 155, 170 (2012) “the right to adequate assistance of counsel cannot be defined or enforced without taking into account the central role that plea bargaining plays in securing convictions and determining sentences”

PADILLA V. KENTUCKY

- Defense counsel assures Padilla that conviction will not result in removal, when in fact it would
- Counsel's failure to advise a defendant concerning clear deportation consequences of his plea bargain is prejudicial if the defendant shows that a decision to reject the plea bargain would have been rational under the circumstances. 559 U.S. 356, 372 (2010)



WOULD RATIONAL DEFENDANT REJECT PLEA B/C OF IMMIGRATION CONSEQUENCES?

- *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895 (abrogated by *State v. Shata*)
- Bad immigration advice satisfies deficient performance prong of IAC claim, but was there prejudice?
- Although counsel may have performed deficiently by failing to advise of clear immigration consequences, court required to analyze whether a decision to reject the plea bargain would have been rational under the circumstances

HOW SPECIFIC DOES THE ADVICE NEED TO BE?

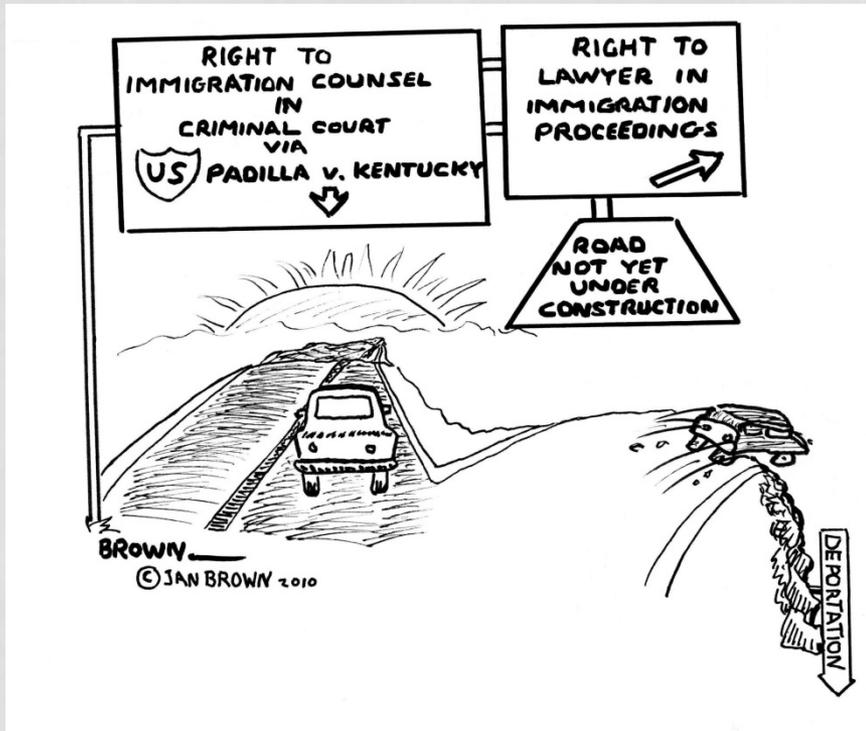
- *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93: Shata's attorney advised client that plea would result in a "strong chance" of deportation, when in fact the plea would absolutely result in deportation because involved more than 30 grams of marijuana
- Not deficient performance even though "strong chance" language misstated consequence
- Withdrew language in *Mendez* that suggests that an attorney advise a FN client that a conviction for a deportable offense will necessarily result in deportation

HOW SPECIFIC DOES THE ADVICE NEED TO BE?

- ***State v. Ortiz-Mondragon***, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717: parties disagreed whether conviction for substantial battery, as an act of domestic violence, would clearly render Ortiz-Mondragon removable
- The attorney's equivocal advice (that the conviction could result in removal) satisfied the attorney's obligations to neither overstate nor understate the potential immigration consequences

REALITY CHECK

Padilla in theory



Padilla in practice in Wisconsin



- Deficient performance (Required to provide specifics?)
- Prejudice (Affect decision to plea? Removal certain?)

SO, YOU'RE ALL SET TO GIVE THE BEST PADILLA ADVICE POSSIBLE



- Start with screening
- Use immigration practice coordinators
- Do your own research
- Keep in mind a conviction might have more than one ramification

SCREENING FOR NONCITIZEN CLIENTS

Revised 5/11 **Wisconsin State Public Defender Applicant Case Information Form**

Applicant Name (First M.I. Last)		Applicant Date of Birth	
Permanent Address		Applicant Telephone Number	
City, State, ZIP		Applicant Social Security Number	
Ethnicity/ancestry: (Mark one or more) <input type="checkbox"/> Arab <input type="checkbox"/> Hispanic/Latino <input type="checkbox"/>			
Race: (Mark one or more) <input type="checkbox"/> American Indian/Alaska Native <input type="checkbox"/> African American/African Descent <input type="checkbox"/> <input type="checkbox"/> Asian <input type="checkbox"/> Native Hawaiian/Pacific Islander <input type="checkbox"/>			
Place of birth _____ U.S. Citizen? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown		Check if interpreter needed <input type="checkbox"/>	
Currently Detained/Incarcerated At _____		Language _____	
Attorney Name _____		Today's Date _____	
Reason for Private Bar Appointment <input type="checkbox"/> Conflict of Interest <input type="checkbox"/> Prior Pending <input type="checkbox"/> Other		Transferred from _____	
Other Names? _____		Date Appointed _____	
Alternative Means of Contact: _____		SPD Nu _____	
Family: _____		Date/Time Arrested: _____	
		Pending Charges: _____	
		Length of Time in Area/State: _____	

IMMIGRATION PRACTICE COORDINATORS/ OTHER RESOURCES

- Resources
 - Practice Coordinators
 - <http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice/questionnaire>
 - Finding an Immigration Attorney
 - National Immigrant Law Center
 - <https://www.nilc.org/>
 - Immigrant Defense Project
 - <https://www.immigrantdefenseproject.org/>

SUGGESTED ROAD MAP

1. Determine whether 212 or 234 grounds would apply
2. Determine whether the resolution in your criminal case would count as a conviction in immigration court
3. If your client faces a conviction, determine whether the conviction offense will give rise to inadmissibility or deportability
4. When all else fails, avoid an aggravated felony





REMOVAL GROUNDS

Grounds of
Inadmissibility
INA 212

Grounds of
Deportability
INA 237

STEP 2

CONVICTION

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

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48)(A)

CONVICTION?



Expungement



MOST DPA



Hold open without an admission



Ordinance violation



Juvenile adjudications: generally not convictions, but if more than one, can be inadmissible and can be a negative discretionary factor for applications like citizenship, LPR, DACA, etc.

STEP
3

IDENTIFY CONSEQUENCES OF CONVICTION



CRIMINAL GROUNDS OF REMOVAL

INA 212(a)(2)

- CIMTs
- Controlled substance violations
- Controlled substance trafficking
- Multiple convictions with an aggregate sentence of 5 years or more
- Prostitution and commercialized vice

237(a)(2)

- CIMTs
- Controlled substance convictions
- Aggravated felonies, as defined in INA 101(a)(43)
- Firearm offenses
- Crimes of domestic violence, stalking and child abuse

CRIME INVOLVING MORAL TURPITUDE

- A CIMT involves “both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1 and 706 n. 5 (AG 2008).

AGGRAVATED FELONY

Some common Ag fels:

- Murder, rape, or sexual abuse of a minor
- Drug trafficking
- Crimes of violence (sentence of 1 year or more)
- Theft offense (sentence of 1 year or more)
- Fraud offenses involving more than \$10,000
- Obstruction of Justice (1 year or more)

HOW DO YOU FIGURE OUT IF A CRIME IS CIMT OR AGGRAVATED FELONY

- Courts mostly focus on the elements of the offense rather than the underlying conduct.
- Two steps for both Ag fels and CIMTs:
 - Categorical approach: look to statute of conviction to see if ag fel or CIMT by virtue of the elements of the offense.
 - Modified categorical approach: if the statute is “divisible,” look to the record of conviction to clarify which provision convicted under.
- In *Matter of Silva Trevino*, the Board added a third step for assessing whether a crime is a *CIMT* (not for ag fels):
 - If the record of conviction doesn’t resolve the question of whether a crime is a *CIMT*, look to other evidence of the conduct at issue.
 - AG certified case to himself in 10/2016 and vacated *Silva Trevino* – what now?

WHEN COULD A JUDGE LOOK BEYOND THE ELEMENTS?

- With divisible criminal statutes ("or") AND at least one but not all of the offenses created by the alternative is a categorical match of a generic definition
- Then, permitted to examine the record of the conviction (information, complaint, plea colloquy) to determine whether there is an immigration consequence

EXCEPTIONS



- Certain offenses, judges can use “circumstance specific approach” to determine whether the offense is a removable one
 - Determining the amount of loss in fraud or deceit offense
- Some inconsistent decisions, AND law could change at any moment

4

AVOID AGGRAVATED FELONIES TIPS

Avoid a one-year sentence for crimes that trigger the agg fel ground based on the sentence (e.g. theft, burglary, violent crimes, counterfeiting/forgery, obstruction of justice, commercial bribery, perjury)

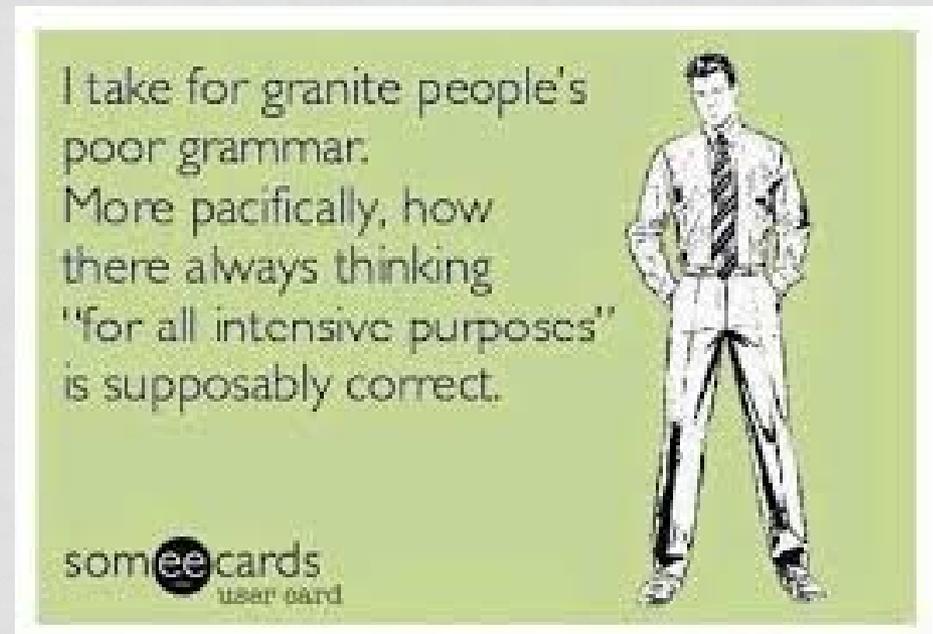
- Stack counts to run consecutively.
- Waive presentence credits.
- Waive future conduct credits.

Prevent the record from revealing a loss of more than \$10,000 for fraud, money laundering, or tax evasion offenses.

- Keep restitution under \$10,000.
- During plea allocution contest any allegation in complaint involving \$10,000 or more.
- Have client pay a portion of the loss voluntarily pre-sentence to reduce restitution under \$10,000.
- Make written plea agreement or oral stipulation that the loss to the victim is \$10,000 or less.
- Make sure that the fine is labeled as "Restitution" not "Reparation."

AVOID IMPOSED & STAYED SENTENCES

- Remember, "a sentence" includes imposed and stayed sentences
- "Include[s] the period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part."
 - 8 U.S.C. § 1101(a)(48)(A).



IS PADILLA COMPLIANCE ENOUGH?

Arrest

Bar to benefits

Triggers removal

Appeal

