



## COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION

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## INTRODUCTION

- A Criminal Conviction is the Negative Defining Moment in most of our Client's Lives;
- Traditionally, We Have Focused on the "Pilot Theory" to Criminal Defense – "Any Landing Our Client Can Walk Away from was a Good Result;"
- The Law is Changing:
  - *Padilla v Kentucky*;
  - SORA;



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## SCOPE OF TODAY'S DISCUSSIONS

- Duty to Give Advice on Collateral Consequences
- Collateral consequences and pleas;
- Illusive Concept of What Constitutes a "Conviction;"
- Firearm Rights;
- Driver's License Rights;
- Sex Offender Registry;
- Investigation 101;
- Professional License Issues;
- Canada



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## COLLATERAL CONSEQUENCES?

- Conditions which flow from the sentence beyond the actual fine and sentence such as :
  - Loss of civil rights;
  - Loss of immigration status;
  - Bars from certain types of professional licenses;
  - Sex offender registry;
- Term is difficult to define but the impact can be very real

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## MICHIGAN SUPREME COURT DEFINITION OF "DIRECT CONSEQUENCE:"

- Modern distinction between a direct and collateral consequences:

"turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

People v. Cofo, 491 Mich. 325, 333-34, 817 N.W.2d 497, 501 (2012).



Retired Justice Cavanaugh

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## PADILLA V. KENTUCKY (2010)



JOSE PADILLA WITH ONE OF HIS ATTORNEYS (YOLANDA VASQUEZ).

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### **PADILLA FACTS**

- Lawful permanent resident for 40 years
- Vietnam War veteran
- Charged with marijuana possession and trafficking for having marijuana in his commercial truck
- Pled guilty (plea agreement) for marijuana trafficking after defense attorney told him he did not have to worry about deportation because he had lived in US for so long

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### **PADILLA REMARKS**

- Court could have adopted an intermediate approach, but didn't do so. Padilla was given erroneous advice. The Court could have said that erroneous advice was different than no advice;
- Different sovereigns didn't matter. It was a Kentucky conviction, but a federal collateral consequence;
- Burden is actually on the counsel (it is an IAC case) but as a practical matter it is on the system as well;
- Date of the Decision is March 30, 2010. *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

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### **PADILLA HOLDING**

- Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea
- Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.
- Non-advice (silence) is insufficient(ineffective). Affirmative advice is required.

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## COLLATERAL V DIRECT CONSEQUENCES: AN ELUSIVE DEMARKATION

Direct consequences are those that have a "definite, immediate, and largely automatic effect on the range of punishment." Collateral consequences, on the other hand, are those that are not direct consequences—they are not definite, immediate, and automatic. Consequences are collateral, rather than direct, when they have "no effect whatsoever upon the length or nature" of the actual criminal sentence. If a judge can impose a penalty for a guilty plea but doing so is discretionary, the penalty is collateral. Similarly, a consequence is generally collateral if its imposition is contingent upon action by a governmental agency or another actor outside the control of the sentencing judge.

*Walker, "NO LOGICAL STOPPING POINT": THE CONSEQUENCES OF PADILLA V. KENLUCKE, 154 NW U.L. REV. 351 (2012)*

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## DUTY TO BARGAIN CREATIVELY TO AVOID IMPORTANT CONSEQUENCES

Defense counsel should "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation."



*Justice Stevens in Padilla (majority opinion).*

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## US DEPARTMENT OF JUSTICE STANDARD

A defense attorney has a duty to "disclose to the defendant at the earliest feasible opportunity any . . . other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation."

*US Department of Justice Compendium of Standards (as quoted in Padilla at 130 S. Ct. at 1482).*

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## GENERIC ONE-SIZE FITS ALL WARNINGS ARE NOT PADILLA COMPLIANT

This option was available to the Court in Padilla, which could have decided the case under the rubric of due process instead of assistance of counsel.



See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1496 & n.1 (2010) (Scalia, J., dissenting).

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## DANGER OF OVERLY GENERIC WARNINGS

1. "Do you understand that by pleading guilty your medical license, if any, will be suspended?"
2. Do you understand that your ability to work as a nuclear engineer will be suspended as a result of your plea?"



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## PEOPLE V FONVILLE

- Extended *Padilla* to Sex Offender Registration Consequences;
- *Fonville* is a 6.500 petition case and his underlying conviction is from September of 2006;
- Prosecutor's have challenged *Fonville* in a case currently before the Appellate Courts;
- Court of Appeals in an unpublished ruling said that *Fonville* isn't retroactive.

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## OTHER POSSIBLE EXTENSIONS OF PADILLA

- Civil Confinement;
- Disenfranchisement;
- Federal prosecution, e.g. admitting facts in state court plea that would lead to a serious federal prosecution;
- Loss of a Driver's or Professional License.

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## COMMON (SIMPLE) QUESTIONS

- Former offenders don't lose the right to vote in Michigan;
- Former offenders can have passports. The United States doesn't restrict foreign travel by convicted felons but the other country might;
  - Exception: International Megan's List?
- Former felony offenders cannot sit on a jury absent set aside;
- Former felony offenders cannot have CPL permits absent restoration;
- Former felony offenders cannot be police officers absent a pardon. (Espungement is not good enough per AG Op)

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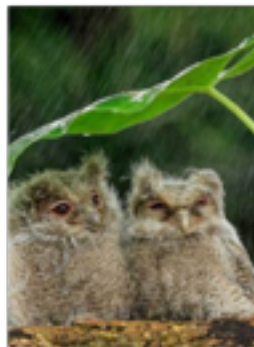
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## WHAT CONSTITUTES A CONVICTION?

"HAVE YOU EVER BEEN CONVICTED OF A CRIMINAL OFFENSE" IS AN INCREDIBLY DIFFICULT QUESTION WITH A SET-ASIDE.



Any shelter from a "storm."

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## DEFINITION OF WHAT CONSTITUTES A CONVICTION NEEDS TO BE REEXAMINED IN MOST CONTEXTS

- "Pregnancy test" doesn't work;
- Example: Expungement statute tells a defendant that they can answer no in a variety of contexts, but an expunged conviction is a conviction for purposes of being a police officer, lawyer, or any other profession licensed by judiciary;
- Answering the question incorrectly is evidence of bad moral character
- Recommendation: never tell a client that a sheltered adjudication "doesn't exist."

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## FIREARM ISSUES

- State law and federal law aren't the same;
- You can't get a state court restoration if you aren't allowed to federally possess a firearm;
- Exception: Antique firearms and black powder weapons;
- High court misdemeanors aren't felony convictions under federal law;

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## PROBLEMS WITH A FEDERAL RESTORATION ARGUMENT

- Jury trial right isn't normally restored. Michigan doesn't allow former felons to regain right to sit on a jury;
- *Caron v United States*, 524 US 308; 118 S Ct 2007; 141 L Ed 2d 303 (1998), partial restoration of right to own gun not good enough (long gun only in Mass. for former offenders);
- Sixth Circuit overruled favorable rulings. *United States v Flores*, 118 Fed Appx 49 (CA 6 2004), overruled by *United States v Sanford*, 707 F3d 594 (CA 6, 2012);



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## NO ATF RESTORATION DESPITE STATUTE!

- ATF restoration has not been funded since 1992;
- Upheld in *Bean v US*, 37 U.S. 71, (2002).
  - Per Justice Thomas, failure to process applications is not a "denial" which can be appealed.
- Attempts to restore funding have come close, but ultimately failed.



## DRIVER'S LICENSES

- Many offenses carry driver's licenses sanctions which are imposed by the SOS;
- Suspension (definite/indefinite);
  - Sample definite: From Oct. 10, 2014 through Oct. 10, 2015. Pay reinstatement fee at SOS and good to go;
  - Indefinite. Until certain conditions fulfilled;
- Revocation (5 years);
- Denial. A denial happens at branch (e.g. can't pass road test, health problems etc.). Not a collateral consequence.



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## COMMON CRIMES REQUIRING SUSPENSION

- Impaired/Under the influence;
- Joyriding (90 days - 1st offense within 7 years/1 year if more);
- UDAA (1 year);
- Drugs including marijuana;
- Leaving the scene of an injury accident (90 days);
- Felony in which motor vehicle was used;
- Fleeing and Eluding;
- Fraudulent use of ID under 21 (90 days);
- Theft of gasoline (180 days/1 year);
- False bomb threat (90 days);

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## COMMON DRIVER'S LICENSE REVOCATION

- 2 Reckless Driving within last 7 years;
- Neg Homicides, Manslaughter, Murder With Motor Vehicle within the last 7 years;
- 3 OUI\*s within the last 10 years;
  - \*\* means OUILs and/or OUIDs.
- Source: Page 18 of DLAD Handbook

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## BACKGROUND

- Created in 1994 by Michigan Legislature;
- Maintained by the State Police;
- Propelled by Congress (Jacobs-Wetterling Crime Against Children and Sex Offender Act of 1994);
- Requires all sex offenders to register.

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## SEX OFFENDER REGISTRY CONSEQUENCES

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## REGISTRATION OBLIGATIONS

- Required to register 15, 25, or life depending on their Tiers (1,2,3) and update their registration;
  - Registration annual (Tier 1);
  - Twice a year (Tier 2);
  - Four times a year (Tier 3);
- Backup by criminal sanctions for non-compliance

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## MALPRACTICE/IAC TRAP: FONVILLE AND SORA RECAPTURE

- A Defendant previously convicted of a listed offense for which he or she was not required to register, but who is convicted of any other felony on or after July 1, 2011, must now register under the new recapture provision of MCL 28.724(5).
- This includes individuals assigned to youthful trainee status prior to October 1, 2004, if the person is convicted of any other felony on or after July 1, 2011.

MCL 28.722(b)(ii)(b).



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## THERE IS ALSO A PRIVATE REGISTRY

- MOST OFFENSES APPEAR ON PUBLIC REGISTRY, BUT SOME ONLY APPEAR ON THE PRIVATE REGISTRY:
  - MOST JUVENILE OFFENSES;
  - JUVENILES CHARGED AS AN ADULT ARE INCLUDED;
  - SOME TIER 1 OFFENSES WHERE VICTIM IS NOT A MINOR;
  - DEFENDANT WHO MOVES OUT OF STATE IN SOME CASES;

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## ELECTRONIC MONITORING

Lifetime monitoring is required for:

- CSC-II against a person under age 13 when the defendant was 17 or older must be sentenced to lifetime electronic monitoring and prescribe penalties for violations of the monitoring program.
- All CSC Is (except life sentences) are subject to lifetime monitoring. *People v. Comer*, No. 152713, 2017 WL 2743354, at \*7 (Mich. June 23, 2017);
- Lifetime electronic monitoring is part of a criminal defendant's sentence and he must be informed of it. *People v. Cole*, 491 Mich 325; 817 NW2d 497 (2012).



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## DOES V SYDER - SIXTH CIRCUIT

- 2011 amendments to SORA, which extended many registrants' obligations from 25 years to life, cannot be applied retroactively;
- School zone does not apply to offenses committed before January 1, 2006 and who want to work or live within 1,000 feet of a school, or who want to attend their children's school events;
- Vagueness challenge not resolved but lower court ruling adopted in *Solis*;
- State has appealed.



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## SORA MAY BE PUNISHMENT!!!

A growing body of courts in states that have SORA statutes similar to ours, have recently concluded, despite earlier rulings to the contrary, that SORA constitutes a punitive rather than regulatory action. See, e.g., *Doe v New Hampshire*, 167 NH 322, 489 A.2d 111 A.2d 1077 (2015) (holding that the sex offender "statute has changed dramatically . . . to the point where the punitive effects are no longer de minimis"); *Doe v. State*, 109 P.3d 999, 1018 (Ariz., 2006) ("we conclude that ASORA's effects are punitive, and convincingly outweigh the state's non-punitive purposes and effects."); *Starkley v. Oklahoma Dep't of Corrections*, 265 P.3d 1004, 1030 (Okla., 2011) ("SORA's obligations have become increasingly broad and onerous. We find there is clear proof that the effect of the retroactive application of SORA's registration is punitive and outweighs its non-punitive purpose."); *Wallace v Indiana*, 965 N.E.2d 371, 382 (Ind., 2014) ("the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping"); *Kentucky v Baker*, 295 SW 3d 437, 447 (Ky., 2009) ("Although the General Assembly did not intend [the SORA statute] to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil").

*People v Hess*, No. 327890 (Shapiro, J.)

## REMOVAL STRATEGIES NON-CONSTITUTIONAL (TIER 1 OFFENDER)

The court may grant a petition properly filed by an individual under subdivision (1) if all of the following apply:

- (a) Ten or more years have elapsed since the date of his or her conviction for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.
- (b) The petitioner has not been convicted of any felony since the date described in subdivision (a).
- (c) The petitioner has not been convicted of any listed offense since the date described in subdivision (a).
- (d) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.
- (e) The petitioner successfully completed a [certified] sex offender treatment program under 42 USC 14915(b)(1), or another appropriate sex offender treatment program. The court may make the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole.

*Mich Comp L. Ann § 28.728c.*

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## TIER 3 REMOVAL AFTER 25 YEARS

(13) The court may grant a petition properly filed by an individual under subdivision (2) if all of the following apply:

- (a) The petitioner is required to register based on an order of eligibility entered under section 18 of chapter 208 of the probate code of 1929, 1929 PA 288, MCL 7126.18, that is open to the general public under section 28 of chapter 80A of the probate code of 1929, 1929 PA 288, MCL 7126.28.
- (b) **Twenty-five or more years have elapsed since the date of his or her adjudication for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.**
- (c) The petitioner has not been convicted of any felony since the date described in subdivision (b).
- (d) The petitioner has not been convicted of any listed offense since the date described in subdivision (b).
- (e) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.
- (f) The court determines that the petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 14915(b)(1), or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole.

## REMOVAL ALL TIERS - ROMEO/ JULIET

(14) The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:

(a) All of the following:

- (i) The victim was 15 years of age or older but less than 16 years of age at the time of the offense.
- (ii) The petitioner is not more than 4 years older than the victim.

(b) All of the following:

(i) The individual was convicted of a violation of section 110, 310, 330a, or 330b of the Michigan penal code, 1921 PA 320, MCL 750.110, 750.310, 750.330a, and 750.330b.

(ii) The victim was 15 years of age or older but less than 16 years of age at the time of the violation.

(iii) The individual is not more than 4 years older than the victim.

(c) All of the following:

(i) The individual was convicted of a violation of section 110, 310, 330a, 330b, or 320a(1)(j) of the Michigan penal code, 1921 PA 320, MCL 750.110, 750.310, 750.330a, 750.330b, and 750.320a.

## REMOVAL STRATEGY ALL LEVELS UNDER 14 AT THE TIME OF THE OFFENSE

(15) The court shall grant a petition properly filed by an individual under subsection (3) if either of the following applies:

(a) Both of the following:

(i) The petitioner was adjudicated as a juvenile.

(ii) The petitioner was less than **14 years of age** at the time of the offense.

(b) The individual was registered under this act before July 1, 2011 for an offense that required registration but for which registration is not required on or after July 1, 2011.

## CRUEL OR UNUSUAL PUNISHMENT

- Currently Before the Supreme Court in *People v Temeloski*;
- One good case - *People v DiPiazza*;
- Court of Appeals Opinion in *Temelkoski* narrows *DiPiazza*.

Immigration/Removal



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### GENERAL SESSIONS IS THE CHIEF IMMIGRATION JUDGE!!

- The Attorney General can overrule the Board of Immigration Appeals and can change enforcement priorities;
- The President can also change enforcement priorities.



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### PROBE WHETHER YOUR CLIENT IS A CITIZEN!

- Ask where they were born;
- Get a copy of their citizenship papers if they were born outside the United States;
- Many clients believe that a green card make them a citizen.

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## PROOF OF CITIZENSHIP

- Naturalization papers;
- Consular Registration papers;
- US Passport;
- **Not voter's registration card!!!**

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## THE IMMIGRATION AND NATIONALITY ACT

- Aggravated felonies;
- Crimes Involving Moral Turpitude;
- Drug Trafficking;
- Limitations on Waivers;
- Domestic Violence;

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## WHAT IS A CONVICTION?

- A conviction includes any judicial proceeding where a disposition is imposed on an adult defendant either admits guilt or there is a judicial finding (which can be implicit) of guilt;
- Two convictions arising out of the same transaction and occurrence may be one conviction for immigration purposes (differing from Michigan law).

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### EXAMPLES OF SOME COUNTER-INTUITIVE "CONVICTIONS" UNDER INA

- No contests pleas;
- HYTA, 769.4A;
- Most Diversion Programs;
- Expungements;
- Orders Granting New Trial Based on Rehabilitation or to Avoid Deportation

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### UNLAWFULLY PRESENT ISN'T ALWAYS THE KISS OF DEATH

- I-601A; TPS ("Temporary Protected Status"), Deferred Action ("Dreamers"), etc.
- Unlawful presence is waivable in many circumstances, but waivers will not be granted if USCIS determines that there is **reason to believe** that the alien may be inadmissible to the United States at the time of his or her immigrant visa interview based on another ground of inadmissibility other than unlawful presence, USCIS will deny the request for the provisional unlawful presence waiver."

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### ELEMENTS OF A IMMIGRANT FRIENDLY DIVERSION PROGRAM

- No admission or finding of guilt;
- A conviction does not automatically flow if the Defendant violates the terms of it;
- Best Handled in the Prosecutor's Office.

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## A WORD ON PARDONS

- A governor or the president's pardon undoes a "conviction" if it doesn't expressly exclude deportation consequences;
- If it ain't from the Governor or the President, it doesn't count. *Widersperg v INS*, 896 F2d 1179 (CA 9, 1990);
- Debate about whether a presidential pardon can remove inadmissibility beyond the statute <http://www.usdoj.gov/olc/pardon3.19.htm>. Argument wouldn't apply to a Michigan pardon; and,
- Foreign pardons don't count;

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## AGGRAVATED FELONIES

- A noncitizen is deportable if convicted of an aggravated felony any time after admission. INA § 237(a)(2)(A)(iii);
- "Aggravated felony" is an immigration law term that includes an expanding list of offenses defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43);
- Term is a euphemism. Offense doesn't have to be aggravated or even a felony. Some misdemeanors are "felonies;"
- Suspended sentences count where there is a one year threshold.

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## OTHER IMMIGRATION CONSEQUENCES FROM CONVICTION

- Inability to return to the U.S.
- "Good moral character" bar to naturalization (INA §101(f)) Denial of LPR ("green card") status;
- Bar to asylum/withholding of removal
- Inability to renew green card or travel
- Mandatory detention

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## AGGRAVATED FELONIES REGARDLESS OF SENTENCE

- Murder/Rape/Extortion/Drug Trafficking;
- Sexual abuse of a minor/Child Pornography;
- Drug trafficking
- Firearm trafficking;
- Sex Trafficking, slavery or involuntary servitude;
- Some bond jumping offenses;
- Pure Fed Offenses Omitted

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## AGGRAVATED FELONIES IF ONE OR MORE YEARS IS IMPOSED

- Crimes of violence;
- Theft or burglary offenses (including possession or receiving of stolen property);
- Passport or document fraud offenses
- Counterfeiting
- Forgery
- Commercial bribery
- Trafficking in vehicles with altered identification numbers
- Obstruction of justice
- Perjury or subornation of perjury
- Witness Bribery

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## MORE ON CRIMES OF VIOLENCE

An offense requiring only proof of accidental or negligent conduct, even when involving serious physical injury or death, is not an aggravated felony "crime of violence," as defined in 18 U.S.C. § 16.

Source: *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (DWI and causing serious bodily injury, which does not have a mens rea component or requires only a showing of negligence in the operation of a vehicle, is not crime of violence under 18 U.S.C. § 16)

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## \$10,000 THRESHOLD

- Aggravated Felonies Triggered by More than a \$10,000 Loss;
- Offenses involving fraud or deceit with a loss to the victim of more than \$10,000;
- Money laundering offenses involving more than \$10,000;
- Tax evasion with a loss to the government of more than \$10,000;

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## CRIMES INVOLVING MORAL TURPITUDE ARE DIFFICULT TO DEFINE

- Defined vaguely by the courts. If it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006). ;
- Can change over time, (e.g. homosexuality);
- Intent almost always required;

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## EXAMPLES OF CIMTS

- offenses in which either an intent to steal or defraud is an element (such as theft and forgery offenses)
- many aggravated assaults (depending on whether infliction of bodily injury is an element)
- most sex offenses

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## CONSEQUENCES OF A CIMT

- A sanctioner is deportable if convicted of one CIMT committed within five years of admission to the U.S. and punishable by at least one year in prison (INA § 237(a)(2)(A)(i)).
  - US Attorney's office takes the position that any reentry into the US resets this clock.  
[http://www.justice.gov/usa/eoasa/foia\\_reading\\_rooms/usaen/titr/ore01924.htm](http://www.justice.gov/usa/eoasa/foia_reading_rooms/usaen/titr/ore01924.htm)
- One decision says you can aggregate penalties to get to the one year threshold. See *U.S. v. Hoop*, 406 F.3d 242 (4th Cir. 2005).
- A sanctioner is also deportable if convicted of two or more CIMTs, not arising out of a single scheme of criminal misconduct, committed at any time after admission and regardless of the actual or potential sentence. See INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

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## OTHER CONDUCT BASED REMOVALS

- Is or has been a drug addict or abuser (often not pursued);
- Has engaged in the business of prostitution;
- Has committed certain crimes that involve immigration status such as alien smuggling, false documents, or making a false claim to U.S. citizenship; or
- Has been found by a court to violate a protection orders relating to domestic violence.
- Drug Trafficking (see next slide).

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## DRUG TRAFFICKING

- **Reason to Believe** Drug Trafficking. A person is inadmissible if government has "reason to believe" that she is or has been a drug trafficker;
- While legally a juvenile is not "capable" of committing a crime, the government will argue that the drug trafficking in the statute refers to activity and not "crime".
- Juvenile warning. Pleading guilty to sale or possession for sale offenses in juvenile court causes far greater risk to an immigrant youth than pleading guilty to simple possession, which in most cases has no effect.

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## A WORD ON ASSAULTS

- Old cases say that a general assault is not a CMT;
- New cases are finding an assault to be a CMT may be a CMT if there is an intent to injure element;
- The BIA has held, however, that an assault or battery may be a CMT where the crime "necessarily involves some aggravating factor that indicates the perpetrator's moral depravity, such as the use of a deadly weapon or the infliction of serious injury on a person whom society views as deserving of special protection, such as children, domestic partners, or peace officers." *Matter of Ahortakyo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011).



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## MONCRIEFFE V. HOLDER: THE MODIFIED CATEGORICAL APPROACH

- A Jamaican citizen/LPR was charged with possessing 1.3 grams of marijuana. Pled guilty to possession of marijuana with intent to distribute. Gov't placed him in removal for being convicted of an aggravated felony;
- Georgia's intent to distribute law was broad enough to include conduct would fall within an exception for small amounts of marijuana. In addition to the under 30 grams exception in the INA, the Federal Controlled Substance Act had an exception for possession of marijuana without a remunerative purpose;
- Court held that where a state law can be violated in a way which makes the offense an aggravated felony or a not an aggregated felony and the statute isn't divisible, the Immigration Court cannot hold a mini-trial to determine which fact pattern applies to turn the case into a categorical offense;

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## MODIFIED CATEGORICAL AND UNDER 30 GRAMS EXCEPTION.

- 8 U.S.C. § 1227(a)(2)(B)(i) (2012) has a second exception to deportation – a person can be waived from deportation consequences for possessing under 30 grams of marijuana for personal use;
- LPR was convicted in 2013 of possessing more than 1 ounce of marijuana under generic Nevada law. DHS started removal proceedings.
- DHS tried to prove the case involved more than 30 grams. IJ dismissed based on *Moncrieffe*. Categorical approach barred this. BIA reversed;
- BIA said *Moncrieffe* didn't overrule in the *Matter of Davey* which called for a circumstances specific holding and reversed.
  - *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014)

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## DRUG OFFENSES

- Most drug offense is subject to mandatory deportation;
- Minor marijuana offenses not involving sale are the exception (discussed infra);
- Drug trafficker trap. Conviction is not required:
  - *Example.* Defendant makes a detailed admission to the police of drug trafficking, is offered a plea to a safe offense, but US-CIS learns of the statement.

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## DRUG OFFENSE EXCEPTIONS

- Alcohol is not a drug for purposes of the Immigration Act; and,
- Under 30 grams of marijuana for personal possession (single offense). INA §237(a)(2)(B)(i): "a single offense involving possession for one's own use of 30 grams or less of marijuana." In such a case, a waiver is permitted (but not required);

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## REMOVABILITY V. ADMISSIBILITY

- Different standards from what keeps you out at the border v. what gets you deported;
- INA exemptions for LPRs don't apply, but broader waivers are permitted (particularly for defendants who take a voluntary departure);
- Due process rights don't apply anywhere near as much at a POE or at deferred processing (paroled in subject to further hearings).



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**A DEFENDANT WITH CERTAIN CRIMINAL CONVICTIONS CAN BE NON-REMOVABLE/ AND INADMISSIBLE AT THE SAME TIME**

- Different standards for removal and admission means offender may avoid deportation but be denied readmission following foreign travel;
- Solution: Advanced Parole (Advanced Permission to Travel Abroad);
- Most common case – Prosecutorial Discretion.



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**VOLUNTARY DEPARTURE V. DEPORTATION**

- Deportation is a term of art and applies only when the US Government physically sends the defendant home.
- A non-citizen who has been ordered removed is not admissible to the United States for five, ten, or 20 years, or even permanently. As a last ditch measure, most immigration lawyers will encourage a client to take voluntary departure even when all else fails;
- In most cases, if there is a new basis for a visa, the individual can seek a 212(h) waiver to come back to the US if they take a voluntary departure;
- Applies primarily to clients who were lawfully in the US when they committed offense.

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**SOME MAY WANT DEPORTATION**

Effective March 31, 2011, inmates with a final removal order may be paroled after serving one-half of the sentence, although this provision is not available to those serving sentences for first- or second-degree murder, first-, second- or third-degree CSC and those sentenced as an habitual offender.

Source: MCL 791.234b.

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## HELPFUL RESOURCES

- Kesselbrenner and Rosenberg, Immigration Law and Crimes (West)
- North Carolina Indigent Criminal Defense System (<http://www.ncids.org/>);
- Norton Tooby ([nortontooby.com](http://nortontooby.com))
- US Attorney's Manual - Chapter 9; ([http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/title9.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm))



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## PROFESSIONAL LICENSES



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## PROFESSIONAL LICENSURE ISSUES

- Summary. The law with respect to professional licenses is a complete mess.
- Organic document is the Occupational Licensing for Former Offenders Act of 1974;
- Provides definition of good moral character and turpitude;
- Some acts specifically exclude criminal convictions. Such a bar is not read in conjunction with OLFA

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## ELIGIBILITY FOR A LICENSE???

- Eligibility in the abstract doesn't mean licensure;
- Schools may not admit you to grad program despite eligibility. E.g. Thomas Cooley won't take former offenders;
- Can still face bonding problems

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Eligible	Not Eligible	Ten Year Gap	Nexus
Attorney	Insurance Salesperson (But Can Keep With a Suspension)	Notary	Teachers
Doctor	Nurse	Caregiver	
EMT			Eligible, but have completely
Construction			...

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## REPORTING DUTIES

- 14 Days for Lawyers;
- 30 Days for Healthcare Professionals;
- Conviction means found or pled guilty, **not sentencing**;
- No contest pleas don't apply to licensing sanctions (e.g. they still treat it as a "conviction")

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## TEACHER'S WITH FELONY RECORDS

- Eligible for reinstatement, but public hearing has to be held by District hiring teacher;
- Some of absolute disqualifiers:
  - CSC;
  - Drug trafficking involving minors;
  - Some child abuse offenses.

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## CANADA ISSUES



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## US CONVICTION CAN BAR ADMISSION TO CANADA

- Criminality: A person is inadmissible into Canada if convicted of a US offense which would carry more than one year if prosecuted under its Canadian counterpart statute;
- Example:
  - Drunk driving;
  - Simple assault;
- Doesn't apply to Canadian citizen;
- Waivers available and single offenses time out after ten years ("deemed rehabilitated")

Source: Canada IRPA Sec. 36(2)

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## CBSA SEES US CRIMINAL RECORDS

- Information sharing agreement gives US and Canadian Border Services Agencies provide full access to each other's criminal records;
- 06 Millisecond access;
- They see newer expunged convictions



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## US DRUNK DRIVING WITH CANADIAN DRIVER'S LICENSE

- One year suspension under Canadian law followed by interlock;
- MTO says that Michigan OWIs are not eligible to participate in reduced suspension programs ("Stream Aa" and "Stream Bb");
- We think they are wrong, but this is their position.
- Basis on our belief: Mich/Ontario agreement says that Michigan convictions will be converted to Ontario penalties per schedule. Provision Ministry relies on only applies catch-call offenses.



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