

Immigration Issues Facing Non- Immigration Courts

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Topics Covered

1. WHY IMMIGRATION MATTERS TO NON-IMMIGRATION COURTS?
2. IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS
3. THE SUPREME COURT'S DECISION IN *PADILLA V. KENTUCKY*
4. IMMIGRATION ISSUES BEFORE JUVENILE COURTS
5. ADMINISTRATIVE RELIEF UPDATES
6. QUESTIONS

I. Why This Matters

Impact of State, Local, or Federal Court Proceedings

- Non-immigration court decisions can have a conclusive and serious impact on immigration status and immigration outcomes.
- Non-immigration court decisions can have a powerful impact on entire families, not just individuals; including on both citizen and noncitizen family members.
- Immigration status of parties involved in a state court action can interfere with the state court's process, objectives, and obligations.

Immigration Law 101

Sources of Immigration Law

Immigration and Nationality Act (Title 8 of the United States Code)

Code of Federal Regulations (Title 8)

Case Law

- U.S. Supreme Court
- U.S. Court of Appeals
- Board of Immigration Appeals

Other

- ICE/USCIS Memos (Example: DACA)

Department of Homeland Security

USCIS - Citizenship and Immigration Services

- Adjudicates affirmative applications

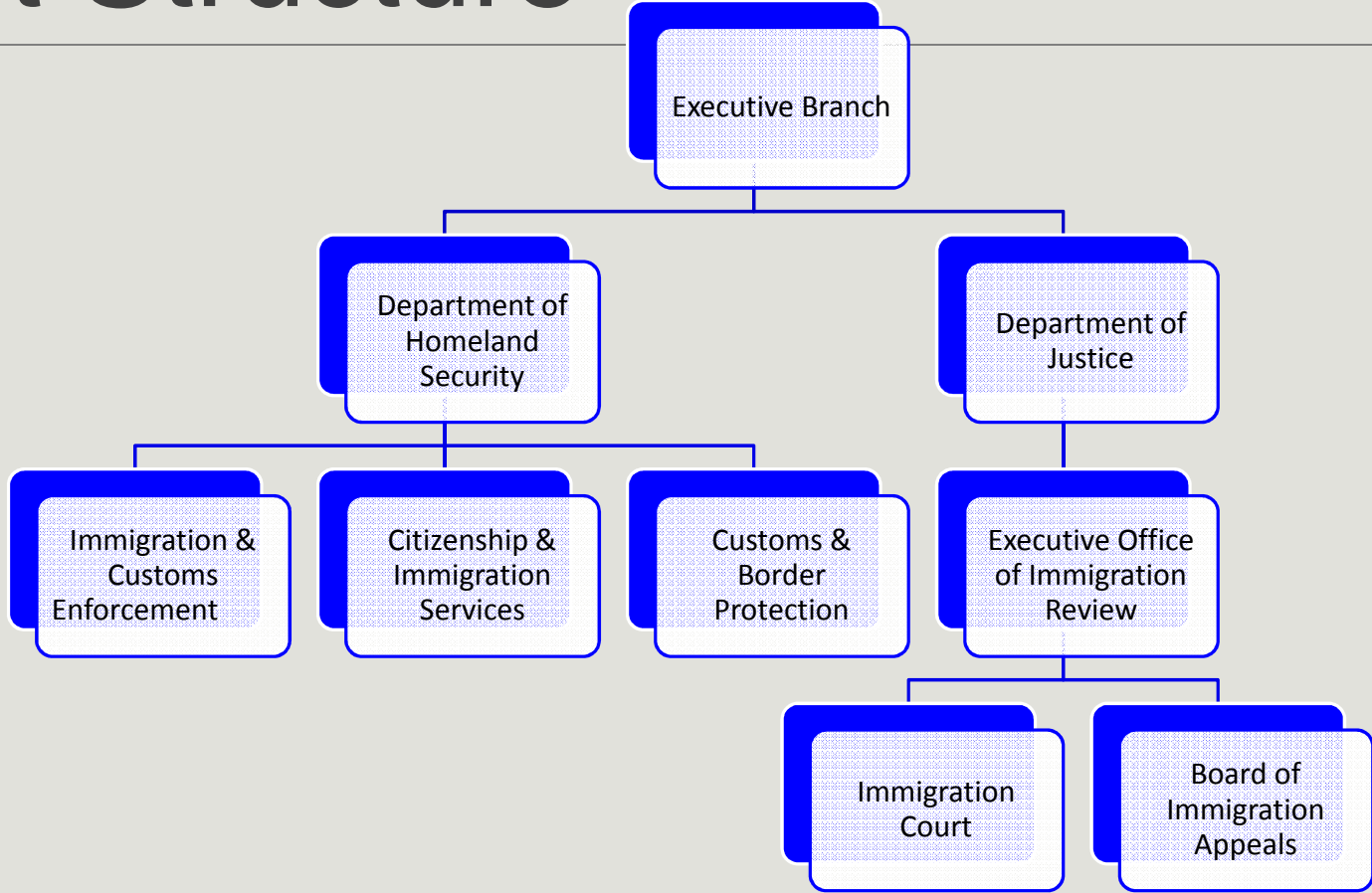
ICE - Immigration and Customs Enforcement

- Apprehends and detains aliens for removal
- Represents government in removal proceedings before Executive Office of Immigration Review

CBP - Customs and Border Protection

- Conducts border inspections
- Can order expedited removal without hearing for certain individuals, usually at the port of entry

Court Structure



Detention & Deportation Figures

- In Fiscal Year 2014, ICE conducted 315,943 removals.
- In 1996, the number of individuals detained by the Department of Homeland Security on any given day was approximately 10,000.
- Today, in compliance with a “detention bed mandate,” the Department of Homeland Security detains at least 34,000 individuals in custody on any given day.

Who Can Be Removed from U.S.?

Only **Non-Citizens** can be placed in removal proceedings and/or ordered removed.

A criminal conviction suffered after an individual becomes a U.S. Citizen cannot cause that individual to lose citizenship.

Non-Citizen Status Includes:

Green Card (Lawful Permanent Resident)

Non-Immigrant Visas, including:

- Tourist Visa (B-1)
- Student Visa (F-1)
- S (informants), U (victims), T (human trafficking) Visas

Undocumented

- Entered without inspection
- Legally admitted then status expired

Granted Asylum or Refugee Status

Temporary Protected Status (select countries)

U.S. Citizenship

Born in the U.S.

- Includes Puerto Rico, Guam, & U.S. Virgin Islands
- Individuals born in American Samoa & the Swains Islands are not USCs but they are “nationals” and cannot be deported.

Derivative Citizenship

- If one parent has naturalized before a Lawful Permanent Resident turns 18, may be a US Citizen.

Acquired Citizenship

- If parent is a U.S. Citizen *at time of birth abroad*, may be a U.S. Citizen if additional conditions are met.

U.S. Citizenship

Naturalization

- 18 years of Age, LPR for 5 years, Good Moral Character
- Must go through application process.
- Cannot apply while on **probation** for **any** offense.

Acquired and Derived Citizenship are *automatically* conferred when certain conditions are met. No discretion. Criminal history cannot constitute a bar.

Naturalization is a discretionary process. All criminal history will be taken into account.

Who can be detained?

- ICE can detain ANY NONCITIZEN who is in violation of U.S. Immigration laws under either “discretionary” or “mandatory” detention.
- Discretionary Detention means Judge has the authority to grant or deny bond.
- Mandatory Detention means a Judge’s hands are tied and no bond can be set.
- Mandatory Detention is *usually* triggered by specific types of convictions, including non-violent, first-time misdemeanors, and nearly all convictions related to controlled substances.

Immigration Detention

Civil Detention

Not legally classified as “punishment”

No fixed “sentence” so detention can feel indefinite

Held in federal detention center or one of 300 or so jails or private prisons (Corrections Corporation of America, etc.)

Removal Proceedings Lacking in Numerous Procedural Safeguards

- Adversarial proceedings
- No Discovery
- No Speedy Trial
- Detention without the possibility of bail
- No Statute of Limitations (can use a decades old conviction as a basis for removal proceedings)
- **No right to appointed counsel if indigent**

Removal Proceedings

Question of Removability:

1. Is individual subject to U.S. Immigration Laws?
2. Is individual in violation of U.S. Immigration Laws and thereby removable?

Question of Relief:

1. If removable, is individual eligible for any relief against removal?
2. If eligible, whether relief should be granted? Does the case merit a grant of relief or favorable exercise of discretion?

Coming into contact with ICE

Traveling abroad (example: Returning Lawful Permanent Resident apprehended at airport)

Apprehended crossing border without inspection

Renewing Green card

Applying for Naturalization

Referred to ICE after coming into contact with the state system – usually this is the criminal justice system or juvenile justice system

Priority Enforcement Program

- Notification Requests:

In many cases, ICE will request notification of when an individual who falls within the PEP priorities is to be released – rather than issue a request for detention beyond that point.

- ICE Holds or Detainers:

Under PEP, detainers may only be issued in limited circumstances and ICE must indicate on the detainer for that the individual is both a PEP enforcement priority and there is probable cause to believe they are removable. A detainer is a request that a LEA hold an individual for 48 hours beyond the time when they would otherwise be released to allow ICE to assume custody.

3 Common Misunderstandings

Does being “removable” mean that an individual will necessarily be removed?
No. An individual may be erroneously charged by ICE as removable. Even if an individual is removable, they may be eligible to apply for relief against removal.

Does a request for ICE notification or issuance of an ICE hold mean that an individual will necessarily be removed? No.

Does ICE only request notification or holds for individuals who are “illegally” in the United States? No. ICE notification or holds are regularly issued for Lawful Permanent Residents who have been convicted of a broad range of offenses.

Length of Civil Detention

- To get a decision from an Immigration Court: approximately 1- 6 months (in some places, much longer).
- If individual appeals to the Board of Immigration Appeals: approximately another 4-6 months.
- If individual petitions for review before a U.S. Circuit Court: approximately another 1-2 years.

Where Do Immigration Issues Come Up?

State Courts

I. Criminal Courts

Pre-Conviction - Noncitizens facing criminal charges will often not only be concerned about direct criminal consequences of a criminal conviction but also of the immigration consequences of a conviction by plea or a conviction by trial.

Post-Conviction – Noncitizen may seek to vacate a prior conviction where her defense attorney did not properly advise her of immigration consequences. A noncitizen may also seek other forms of post-conviction relief in state court, including a sentence modification that will help her avoid an immigration consequence.

II. Juvenile and Family Courts

“A court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles” has jurisdiction to make certain predicate findings that can then be considered by DHS or an Immigration Court in determining whether a juvenile is eligible for Special Immigrant Juvenile Status. 8 C.F.R. 204.11(a).

Where Do Immigration Issues Come Up?

Federal Courts

I. U.S. District Courts

- a. **Criminal** – Criminal prosecutions for immigration related offenses (8 U.S.C. 1326 – illegal reentry prosecutions) require a Court to engage in legal analysis regarding an individual’s immigration status and immigration history.
- b. **Civil** – U.S. District Courts may hear challenges to unlawful immigration detention by the Department of Homeland Security brought through the Federal Habeas Corpus petitions.

II. U.S. Courts of Appeal

U.S. Courts of Appeal have exclusive jurisdiction over challenges to removal orders issued by the Executive Office of Immigration Review. This includes adjudicating citizenship claims, asylum cases, and determining immigration consequences of criminal convictions.

II. *Padilla v. Kentucky*

130 S. CT. 1473 (2010)

Padilla : Lower Court Decision

The Kentucky Supreme Court decided that deportation is a collateral consequence and therefore is outside the scope of the Sixth Amendment. Defense counsel's misadvice does not rise to the level of a Constitutional deprivation of right to counsel.

U.S. Supreme Court Response in *Padilla*

- Overturned the lower court's ruling.
- The Court observed increasing harshness of immigration laws over past 90 years and concluded: "Accurate legal advice for noncitizens accused of crimes has never been more important."
- The Court recognized that these changes have "dramatically raised the stakes of a noncitizen's criminal conviction."
- The Court found that constitutionally competent counsel would have advised Mr. Padilla that his conviction for drug distribution made him subject to automatic deportation.

Padilla v. Kentucky (2010)

Supreme Court held:

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

Padilla v. Kentucky: Key Point 1

Deportation is a “particularly severe penalty” that is “intimately related” to the criminal process. Advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

Padilla v. Kentucky: Key Point 2

“Informed consideration” of possible deportation can only **benefit** both the State and the noncitizen during plea bargaining.

State and defense may be able to reach agreements that **better satisfy the interests of both parties**.

It is appropriate for defense counsel to “plea bargain creatively with the prosecutor in order to **craft** a conviction and sentence that reduce the likelihood of deportation...”

Padilla v. Kentucky: Key Point 3

The Supreme Court:

- Described deportation as a serious and severe consequence.
- Affirmed its previous description of deportation as “the equivalent of banishment or exile.”
- Recognized the seriousness of the family separation caused by deportation.

Under *Padilla*, Defense Counsel Must:

Inquire as to where each defendant was born and whether or not s/he is a U.S. Citizen.

Investigate the immigration consequences of the disposition that Defendant is facing.

Advise the Defendant about the immigration consequences of a particular conviction.

Defend the Defendant by advocating for alternative pleas or modified sentences that may mitigate or avoid immigration consequences.

Relevance of *Padilla* for Judges

Pre-Conviction:

- Court should provide defense counsel with an opportunity to request a continuance specifically in order to comply with obligations in *Padilla*.
- Court can inform defendant that his or her defense attorney has a constitutional obligation to advise regarding Immigration Consequences.
- Judges can create an atmosphere that promotes creative plea bargaining.
- Court's own immigration advisal does not obviate defense counsel's duty under *Padilla*.

Relevance of *Padilla* for Judges

Post-Conviction:

- Judges will be asked to adjudicate Ineffective Assistance of Counsel claims based on *Padilla*.
- The Supreme Court has held that its decision in *Padilla v. Kentucky*, requiring defense counsel to advise defendant about the risk of deportation, does not apply retroactively to convictions that became final on or before *Padilla's* issuance on March 31, 2010. *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

Ethical Obligations of Judges

Judges should refrain from soliciting information about a defendant's citizenship or immigration status. Asking about a defendant's citizenship/immigration status can trigger immigration consequences for defendant.

It is up to defense counsel to determine whether it is appropriate and potentially beneficial to defendant to bring up his/her immigration status in court.

Manual for Judges

MANUAL AVAILABLE ONLINE AT:

<http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf>



JUDICIAL OBLIGATIONS AFTER *PADILLA v. KENTUCKY*

**THE ROLE OF JUDGES IN
UPHOLDING DEFENDANTS' RIGHTS TO ADVICE
ABOUT THE IMMIGRATION CONSEQUENCES
OF CRIMINAL CONVICTIONS**

by
**Immigrant Defense Project
and
New York University School of Law
Immigrant Rights Clinic**

October 2011

III. Immigration Consequences of Criminal Convictions

Grounds of Removability

- **Inadmissibility - 8 U.S.C. 1182**

- Grounds of Inadmissibility apply to an individual who is seeking entry or admission to the United States.
- Criminal Grounds of Inadmissibility found at 8 USC 1182(a)(2).

- **Deportability - 8 U.S.C. 1227**

- Grounds of Deportability apply to an individual who has been lawfully admitted to the U.S. (LPR, Visa, etc.).
- Criminal Grounds of Deportability found at 8 USC 1227(a)(2).

Undocumented v. LPR

Undocumented person who entered without inspection is subject to the grounds of inadmissibility.

Undocumented person who was lawfully admitted but fell out of status is subject to the grounds of deportability.

Lawful Permanent Resident (LPR) convicted of certain crimes can become deportable. *Exception: LPR returning from trip abroad is subject to grounds of inadmissibility.*

Undocumented persons will be most concerned with remaining eligible to apply for status whereas LPRs will be most concerned with how to maintain their current status.

Immigration Consequences Analysis

Analysis of whether a criminal statute triggers a ground of removability is individualized analysis and therefore requires taking into account:

- (1) Defendant's prior criminal history.
- (2) Defendant's prior immigration history.

Selected Grounds of Removability

Aggravated Felonies

Crimes Involving Moral Turpitude

Controlled Substances

Domestic Violence Offenses

Firearms Offenses

Child Abuse

Violation of a DV Protection Order (conviction is not required – a judicial finding is enough)

Immigration Definition of a Criminal Category Is Different Than the State Definition

The immigration statute does not define “Crimes of Moral Turpitude.” The definition appears in cases and is constantly shifting.

What constitutes a “firearms” offense under a state definition is not necessarily analogous to what constitutes a “firearms” offense for immigration purposes.

Immigration definitions are very often different than state definitions so the determination of whether a particular state conviction has a particular federal immigration consequences requires exploration of a complex and nuanced area of law.

Aggravated Felony

- Bars eligibility to most forms of relief from removal and immigration benefits
- An aggravated felony conviction after November 29, 1990 permanently bars an individual from establish good moral character for naturalization.
- Severe due process restrictions (mandatory detention and deportation – Judge loses ability to exercise discretion)
- Severe sentence enhancements for illegal reentry prosecutions under 8 U.S.C. 1326
- Can Result in Permanent Bar from Returning to U.S.

Aggravated Felonies

- Defined in 8 U.S.C. 1101(a)(43)
- Aggravated Felony for immigration purposes:
 - Doesn't have to be "aggravated"
 - Doesn't have to be "felony"

Selected Aggravated Felony Provisions

- Murder, rape, sexual abuse of a minor (regardless of sentence)
- Drug trafficking (regardless of sentence)
- Crimes of violence with 1 year or more sentence imposed
- Theft, possession of stolen property, burglary with 1 year or more sentence imposed
- Crimes of fraud or deceit where loss to the victim exceeded \$10,000 (regardless of sentence)
- Forgery with 1 year or more sentence imposed
- Illicit trafficking in firearms (regardless of sentence)

Violation of Protection Order

- Noncitizens found in **civil** or criminal court to have violated certain kinds of protection orders – related to domestic violence – are deportable. No conviction is necessary.
- Must violate a court order designed to protect someone against “credible threats of violence, repeated harassment, or bodily injury.” 8 U.S.C. 1227(a)(2)(E)(ii).

Convictions that can make a Lawful Permanent Resident deportable include:

One Misdemeanor possession of a controlled substance

One Misdemeanor drug paraphernalia

Two petty theft convictions

One Misdemeanor forgery with 3 years probation and a suspended sentence of 365 days county jail

One Misdemeanor domestic violence

One Misdemeanor possession of a firearm

What is a “Conviction” Under Immigration Law?

Statutory definition:

Formal judgment of guilt by court OR

Deferred adjudication = conviction if there is a finding or admission of guilty AND judge orders punishment, penalty, or restraint on liberty (example, post-plea diversion)

- Expunged convictions are still convictions under immigration law.

“Sentence” for Immigration Purposes

“Term of Imprisonment” OR “Sentence” MEANS...

Period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that sentence.*

Does not include period of probation (unless confinement part of probation conditions – see next slide).

8 U.S.C. 1101(a)(48)(B)

Probation ≠ Sentence, unless...

Probation time doesn't count towards sentence but *sentence of confinement on probation violation* counts towards sentence for the underlying conviction.

- If Defendant is convicted of theft and sentenced to 3 years probation and 8 months in the county jail, his sentence for immigration purposes is 8 months.
- If the same Defendant violates probation and is sentenced to 5 months in the county jail *as a result of that violation*, his sentence for immigration purposes is 13 months.

Juvenile Dispositions Are Not Convictions

Juvenile Delinquency Dispositions are not considered “convictions” for immigration purposes.

Convictions obtained in adult criminal proceedings are “convictions” for immigration purposes, even if they involved defendants under 18 years of age.

Although a juvenile dispo is not a “conviction,” some grounds of removability only require evidence of certain conduct and no conviction.

Drug trafficking, sex offenses, and gang activity can have the most serious consequences for juveniles.

Counterintuitive & Disproportionate Consequences

Even minor criminal convictions can have devastating immigration consequences.

A misdemeanor receiving stolen property with a 365 day sentence makes any noncitizen, including a Lawful Permanent Resident, subject to near certain deportation.

Immigration Law treats an individual convicted of selling \$5 worth of marijuana the same as a leader of a drug trafficking operation. By statute, both are “drug traffickers” for immigration purposes.

KEY POINT

Minor modifications to a charge, a factual basis for a plea, or a sentence can *sometimes* mean the difference between automatic removal or an opportunity to have a case considered by an Immigration Judge. Very often, a noncitizen is asking for a disposition that keeps the door open for consideration of status or relief from removal.

IV. Juvenile Courts

Special Immigrant Juvenile Status

Form of status aimed at protecting youth who are victims of abuse, abandonment, neglect, or another similar basis under state law. Requires that a juvenile court make certain findings.

Federal law recognizes expertise of juvenile courts in making certain factual findings and determining the best interest of the child. Federal law asks state courts to make certain predicate factual findings before the Department of Homeland Security can adjudicate a petition for Special Immigrant Juvenile Status (SIJS).

Statutory Authority: 8 U.S.C. 1101(a)(27)(J)

Expanded by 2008 Trafficking Victims Protection Reauthorization Act (“TVPRA”)

Federal Regulations: 8 C.F.R. 204.11 (still not updated since changes in the law in 2008!)

Special Immigrant Juvenile Status

SIJS Requirements:

- Must be unmarried pending final adjudication.
- Must be under the age of 21 at the time of filing.
- Must be a *dependent* of the [juvenile court](#) or the court must have legally committed the child or placed him under the custody of an agency or department of a State or individual appointed by a state or court.

How is Juvenile Court” defined?

Immigration Law defines “Juvenile Court” as any court in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles. 8 C.F.R. 204.11(a).

This includes dependency and [delinquency](#) courts in the United States.

Must *remain* a ward of the Juvenile Court

Jurisdiction of the Juvenile Court over the minor must be continued until *permanent residency* is granted.

If the Court terminates juvenile probation while the immigration application is still pending, the Department of Homeland Security is divested from jurisdiction over the child's application for immigration status pursuant to SIJS.

A termination "due to age" (as opposed to due to completion of probation) should maintain applicant's eligibility for SIJS.

What Must The Juvenile Court Do?

When requested to do so, the Juvenile Court must determine three things:

- (1) Whether the Juvenile has been found to be a ward or dependent of the Juvenile Court?
- (2) Whether reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or similar basis found under state law.
- (3) Whether it is in the child's best interests to be returned to the child's or parent's country of nationality.

SIJS continued...

Finding for SIJS **does not require:**

1. A formal charge of abuse or neglect against one or both parents;
2. Formal termination of parental rights; OR
3. Determination that reunification will never be possible.
4. Determination that the juvenile was abandoned, abused, or neglected by BOTH parents. *See In Re Israel O*, 233 Cal.App.4th 279 (California Court of Appeal, First District, January 16, 2015); *see also Eddie E. v. Superior Court*, 234 Cal.App.4th 319 (California Court of Appeal, Fourth District, February 11, 2015).

SIJS Recipient Can't Petition For Parent

An child who gains immigration status through Special Immigrant Juvenile Status cannot petition for his or her parent(s) to be lawfully admitted to the U.S. – even if the child is applying for his or her non-abusive parent.

Immigration Status is in the Child's Best Interest

- Access to Education
- Access to Employment
- Access to Healthcare
- Greater Emotional and Psychological Health
- Greater sense of accountability towards one's community, state, country
- Greater long-term security and incentives to invest in the future

HYPOTHESIS

Sandra is 14 years old and was arrested for receiving stolen property. She is taken to juvenile hall and the case is heard before a local county juvenile delinquency court. Sandra's mother appears at every court appearance but her father never appears. The probation reports disclose that according to Sandra and her mother, Sandra's father has been out of the picture for most of her life and has never financially or emotionally supported her. Sandra admits to a violation for receiving stolen property and is placed in a 6 week girls camp run by the county. When she finishes camp, she will go back to residing with her non-abusive mother. Sandra is undocumented. What can the Court do?

Finding a Detained Person

Online Detainee Locator – Department of Homeland Security

<https://locator.ice.gov/odls/homePage.do>

Must have either Detainee's A# ("Alien Number" or immigration case number) and Country of Birth

OR

First & Last Name, Country of Birth, and Date of Birth.

Tatiana's Story

One woman impacted by three legal systems:

Criminal Justice System

- Arrested & Convicted of Child Abuse
- ICE Hold goes into effect while in Criminal Custody

Child Welfare System

- Child taken by CPS & placed in temporary foster care
- Judge begins reunification process

Immigration System

- Detained on the basis of conviction
- Deportable on the basis of Conviction

V. Administrative Relief

Deterred Action for Childhood Arrivals (DACA)

On June 15, 2012, President Obama announced that DHS will not remove certain youth brought into the U.S. as minors and who meet certain requirements.

Applicants may be granted “deferred action” status for two years, with an option to renew.

Those granted “deferred action” are eligible to receive a work permit, social security card, and in some states a driver’s license.

DACA is not legislative change or a pathway to legal residency or citizenship.

Eligibility for DACA

- Last entered the U.S. before 16th birthday
- Are 15 years or older when you apply
- You were under 31 years old on June 15, 2012
- Have continuously lived in the U.S. since June 15, 2007 (“brief, casual, innocent” trips outside U.S. between 6/15/07 and 8/15/12 are okay)
- Were present in the U.S. on June 15, 2012
- Must be currently enrolled in high school, or have high school diploma, or GED or other equivalent OR be an honorably discharged veteran of Coast Guard or Armed Forces.
- AND not be convicted of any Felony, “Significant Misdemeanor,” or any 3 Non-Significant Misdemeanors OR otherwise pose threat to public safety or national security.

What is a Significant Misdemeanor?

Federal, State, or local offense which is punishable by imprisonment of greater than five days but not greater than one year; **and**

Is one of the following offenses (regardless of sentence):

- Domestic violence
- Sexual abuse or exploitation
- Burglary
- Unlawful possession or use of a firearm
- Drug distribution or trafficking
- DUI

Or is **any** *misdemeanor* with a sentence over 90 days.

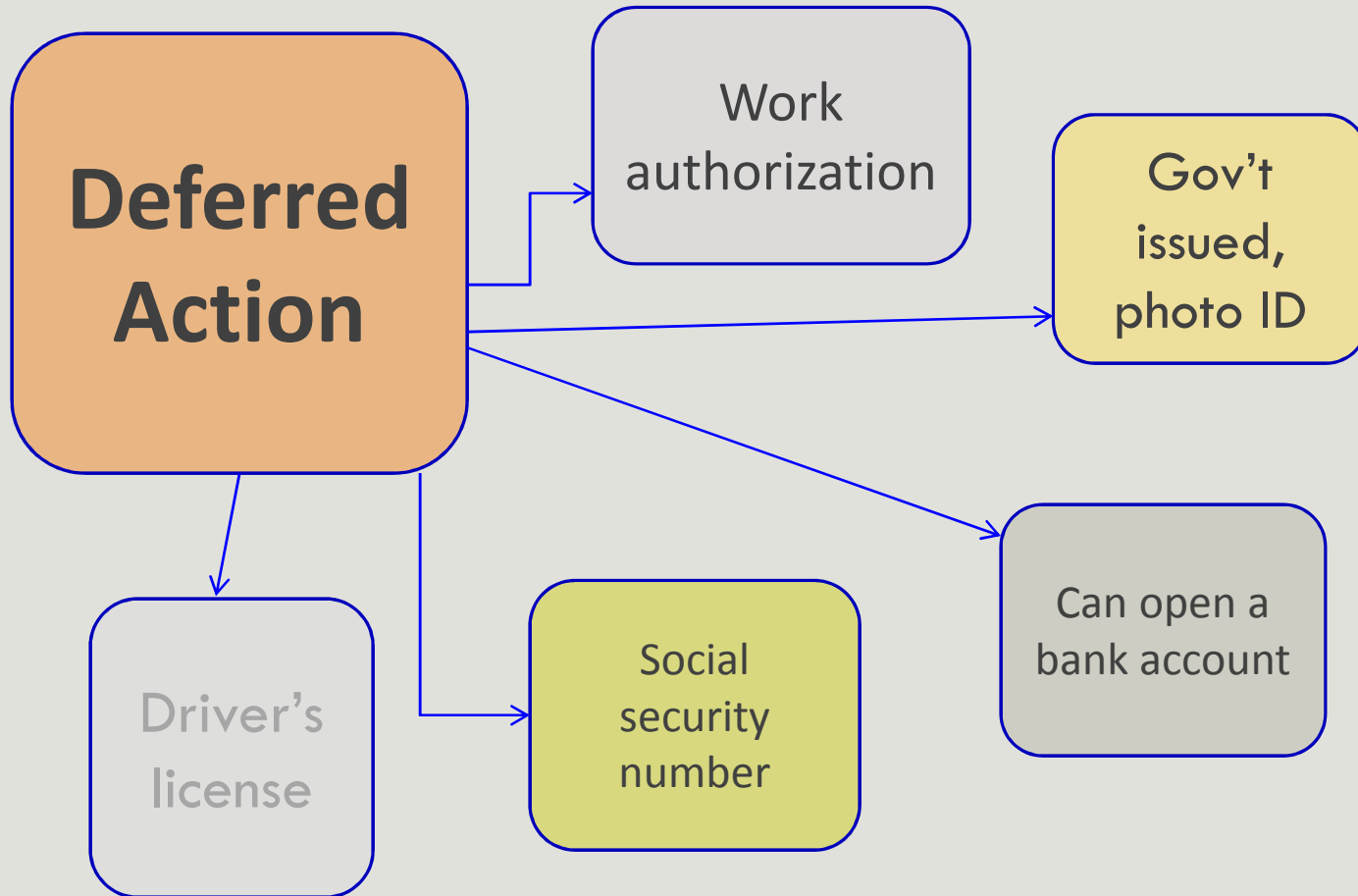
DACA & Crimes Continued

Juvenile Delinquency Dispositions will not automatically disqualify an individual from DACA eligibility but can be considered on discretion.

Expungement of an otherwise disqualifying conviction eliminates the impact of the original conviction for purposes of DACA. **This is one of the only instances where expungements work.**

Individuals who have already been ordered removed may still be eligible for DACA.

DACA



DACA is **NOT**...

Legislative Change

Dream Act

A pathway to lawful permanent residency

A permanent fixture

Amnesty or legalization

Deferred Action for Parental Accountability (DAPA) [not implemented]

Form of administrative status announced by Executive Branch on November 20, 2014.

Main Eligibility Criteria:

- Physically present since January 1, 2010
- Have a U.S. Citizen or LPR Child born on or before November 20, 2014.
- Not be an “enforcement priority” as laid out in DHS’s November 20, 2014 Memo: *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum*.
- Get Work Authorization, Social Security, & CA Drivers License.
- 3 year status (cannot be deported during this time)

DACA expanded on November 20, 2014

DACA was expanded to no longer require individuals to show that they were a particular age at the time that DACA was first introduced.

Also expanded DACA by requiring that individuals only need to show continuous physical presence since January 1, 2010 instead of June 15, 2007.

However this “New DACA” and “DAPA” have not yet been implemented as a result of a temporary injunction issued in *Texas v. United States*, currently pending before the U.S. Court of Appeals for the Fifth Circuit.

VI. Questions

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