CRIMES, THE IMMIGRATION PRACTITIONER

AND THE CRIMINAL DEFENSE PRACTITIONER

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NEW YORK STATE BAR ASSOCIATION
Crimes, The Immigration Practitioner and the Criminal Defense Practitioner
Wednesday, May 7, 2014

Brief Overview of the Relevant Immigration Laws for both Immigration and Criminal Defense Practitioners

Manny Vargas, Senior Counsel, Immigrant Defense Project

1. **Introduction – Coordination between the Immigration Practitioner and the Criminal Defense Practitioner**

    a. On the immigration side, trajectory over recent years of immigration law and practice relating to immigrants convicted of crimes –
        i. Bad news – criminal convictions have increasingly led to mandatory deportation
        ii. Good news -- Recent Supreme Court decisions make clear that, where a negative immigration law requires a conviction, a noncitizen should only be subject to negative immigration consequences based on what was necessarily established by the criminal conviction
    b. On the criminal defense side, gradual development of professional standards for criminal defense lawyers representing immigrants & constitutional duty to provide effective counsel regarding immigration consequences recognized in Supreme Court *Padilla v. Kentucky* decision
    c. Need for coordination between the immigration practitioner and the criminal defense practitioner

2. **Brief Overview of the Relevant Immigration Laws – see attached Immigration Consequences of Crimes Summary Checklist**

    a. Immigration consequences depend on immigration status of noncitizen defendant and past criminal history – no across-the-board rules
    b. Inadmissibility, deportability & ineligibility for citizenship – general applicability of so-called categorical approach to evaluating the immigration consequences of criminal convictions
    c. Criminal bars to relief from removal due to inadmissibility/deportability

3. **Written Resources included in Materials**

    a. Immigration Consequences of Crimes Summary Checklist
    b. Practice Advisory – *Moncrieffe v. Holder*: Implications for Drug Charges and Other Issues Involving the Categorical Approach
    c. Practice Advisory -- *Descamps v. United States* and the Modified Categorical Approach
    d. Practice Advisory – Why *United States v. Castleman* Does Not Hurt Your Immigration Case and May Help It

e. Practice Advisory – *Matter of Abdelghany*: Implications for LPRs Seeking § 212(c) Relief
f. Practice Advisory – Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*

4. Other Criminal/Immigration Law Resources

a. *Representing Immigrant Defendants in New York* (Fifth Ed. 2011) – Order copies at www.immigrantdefenseproject.org.
b. IDP criminal/immigration issues hotline – (212) 725-6422
c. Immigrant Defense Project – www.immigrantdefenseproject.org
d. National Immigration Project – www.nationalimmigrationproject.org
e. Defending Immigrants Partnership – www.defendingimmigrants.org

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at **www.immigrantdefenseproject.org** or call **212-725-6422** for individual case support.

CRIMINAL INADMISSIBILITY GROUNDS

Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude** (CIMT), which category includes a broad range of crimes, including:

- ➤ Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- ➤ Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- ➤ Most sex offenses
- ➤ *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs**.

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY

based on extreme hardship to USC or LPR spouse, parent, son or daughter

- ➤ Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- ➤ Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- ➤ In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:

- ➤ **Aggravated Felony** [see Criminal Deportability Gds]
  - ♦ All aggravated felonies will bar asylum
  - ♦ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- ➤ **Violent or dangerous crime** will presumptively bar asylum
- ➤ **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- ➤ DHS reason to believe that the individual is a **drug trafficker**
- ➤ **Violent or dangerous crime** is a presumptive bar

CRIMINAL BARS ON NON-LPR CANCELLATION OF REMOVAL based on continuous physical presence in U.S. for 10+ years; and "exceptional and extremely unusual" hardship to USC or LPR spouse, parent or child

- ➤ Conviction of type of offense listed in criminal inadmissibility or deportability grounds, maybe whether or not the ground applies to the person, e.g., one CIMT with a potential sentence of 1 year or longer [see Criminal Deportability Gds] even if the offense was not w/n five years of an admission to the US
- ➤ Conviction or admission of crimes barring required finding of good moral character during 10 year period [see Criminal Bars on Obtaining U.S. Citizenship]

CRIMINAL DEPORTABILITY GROUNDS

Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]

- ➤ One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- ➤ Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**

- ➤ *Consequences*, in addition to deportability:
  - ♦ Ineligibility for most waivers of removal
  - ♦ Permanent inadmissibility after removal
  - ♦ Enhanced prison sentence for illegal reentry
- ➤ *Crimes included*, probably even if not a felony:
  - ♦ **Murder**
  - ♦ **Rape**
  - ♦ **Sexual Abuse of a Minor**
  - ♦ **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - ♦ **Firearm Trafficking**
  - ♦ **Crime of Violence + at least 1 year prison sentence***
  - ♦ **Theft or Burglary + at least 1 year prison sentence***
  - ♦ **Fraud or tax evasion + loss to victim(s) >10, 000**
  - ♦ **Prostitution business offenses**
  - ♦ **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - ♦ **Obstruction of justice or perjury + at least 1 year prison sentence***
  - ♦ **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - ♦ **Other offenses listed at 8 USC 1101(a)(43)**
  - ♦ **Attempt or conspiracy** to commit any of the above

* The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- ➤ Conviction of an **Aggravated Felony**
- ➤ **Offense** triggering removability referred to in **Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- ➤ **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- ➤ **Crime Involving Moral Turpitude** (unless single CIMT and the offense in not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years
- ➤ 2 gambling offenses
- ➤ **Confinement** to a jail for an aggregate period of 180 days

Conviction of an **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) permanently bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:

(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contedere* 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 noncitizen's liberty to be imposed

THUS:

- ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- ➤ A deferred adjudication without a guilty plea **IS NOT** a conviction
- ➤ **NOTE:** A youthful offender adjudication **IS NOT** a conviction if analogous to a federal juvenile delinquency adjudication

IDP IMMIGRANT DEFENSE PROJECT

HYPOTHETICAL AND ANSWERS

FULFILLING YOUR OBLIGATION UNDER *PADILLA:*
Plea Bargaining for Immigrant Clients in Criminal Court

Written by Labe M. Richman

The answers are in italics under each example.

HYPOTHETICAL ONE

Client is charged with a boiler-room operation selling fraudulently over-valued coins with a demonstrated loss to the victims of 300,000 dollars. A few of the workers (not your client) were also involved in a cocaine delivery operation from the same location. The place is raided and the police find evidence of the fraud and also find one-half ounce of cocaine. All four defendants are charged with numerous larceny, fraud and cocaine charges. The cocaine charges involve weight offenses and offenses of sale and possession with intent to sell.

You have been given the information from the prosecutor that they want to work something out and that you could plead to a felony drug crime or a felony larceny/fraud crime – the details to be worked out.

1. Your client has been in the United States for 7.5 years and entered the United States with a green card. Should you seek a drug plea or a fraud plea in this case.

ANSWER: *1. You should probably seek a drug weight plea. It's not an aggravated felony because it's not trafficking (make sure not to plead to intent to sell or sale).* See, In re L-G-, BIA, 1995 cited in 171 F.3d 142; Aguirre v. INS, 79 F.3d 315 (2d Cir. 1994). *It makes him deportable and inadmissible but he has a remedy from deportation. Defendant has been here for over 7 years with a green card so he's eligible for Cancellation of Removal for Legal Permanent Residents. INA § 240A(a).*

Defendant cannot take the fraud plea because ICE can probably prove from the court file that the fraud involved a loss of over 10K and then he will not be eligible

for cancellation of removal because it will be an aggravated felony (fraud offense involving a loss of more than 10K, See 8 U.S.C. §§ 1101(a)(43)(M)(i) (classifying frauds involving a loss of more than 10,000 dollars as an "aggravated felony"), 1227(a)(2)(A)(iii)(stating alien "shall" be deported for conviction of aggravated felony), 1229b(a)(3)(aliens convicted of aggravated felonies ineligible for cancellation of removal)).

2. Your client has been in the United States for 7.5 years but never got a green card. He could apply for a green card now because he just got married to a United States citizen and entered on a tourist visa legally and overstayed. Should you seek a drug plea or a fraud plea?

ANSWER: *2. Defendant should take the fraud plea. He's deportable because he has no status. It's very important that he try to adjust his status to green card holder. The drug weight plea will bar him from a green card for life because it makes him inadmissible. He cannot take the drug plea.*

The fraud case is both an aggravated felony as a fraud involving a loss of over 10K, and as a crime of moral turpitude. Aggravated felonies have no effect on his adjustment to green card holder because aggravated felonies do not make you inadmissible to the US. He can get a 212(h) waiver on this crime to get a green card because it is a crime of moral turpitude. Important: 212(h) is not applicable to any drug case other than less than 30 grams of marijuana. He must show extreme hardship to eligible relatives to obtain a 212(h) waiver.

3. Same scenario as Example 2, but the People appear to have a problem with the case and offer attempted possession of a crack pipe with residue found in a drawer, P.L. § 110/220.03 and a one hundred dollar fine to drop whole case. Do you take it?

ANSWER: *3. Unless they involve a single possession of 30 grams or less of marijuana, controlled substance pleas bar a green card however minor the sentence. And, since the provision involves any offense "related" to a controlled substance, attempts count. If he takes the 100 dollar fine, as described here, he is deportable with no remedy and has a lifetime bar to a green card.*

4. Your client entered 10 years ago by sneaking across the border undetected, and

married a U.S. citizen last year. What disposition can he take?

ANSWER: *4. This defendant is deportable because he entered illegally. His only hope is to apply for Cancellation of Removal for Non-Legal Permanent Residents (INA §240A(b)) which requires him to show exceptional and unusual hardship to an eligible relative. He has the 10 years of physical presence required by that law but this new case could sabotage his chances because he needs a finding of good moral character during that time in the U.S. The client might be able to get this waiver with a non-drug B misdemeanor plea, but there is a risk that good moral character might not be found in that circumstance. This is a situation where full cooperation with the hope of a full dismissal should be explored or the client should go to trial. Of course, the advisability of that approach depends on the evidence.*

HYPOTHETICAL TWO: THE WARRANT CASE

Police execute a warrant in the client's apartment where others are living in 1988 and find drugs, a loaded gun, and a stolen stereo. It appears client was not indicted for bail jumping. He gets picked up on the warrant now. Client is offered either an A misdemeanor gun conviction, an A misdemeanor drug conviction, or an A misdemeanor possession of stolen property case and three years probation. Bail jumping prosecution is threatened if he does not take the plea.

1. Defendant is a green card holder for decades, having come to the U.S. with his green card in 1984. Does it matter which plea he takes? If so, which should he take?

ANSWER: 1. *The defendant should can take the gun or the possession of stolen property case. All three crimes are deportable. [The possession of stolen property case is a crime of moral turpitude within five years of entry where the maximum sentence one could receive is a year or more; the gun is a firearms offense; the drug case is an offense relating to a controlled substance].*

Since all of the crimes are deportable, one must hope to get Cancellation of

Removal for Legal Permanent Residents. [1] *Cancellation requires seven years residency in the US. However, if one commits an inadmissible offense that cuts off the time of residency required. You do not look at the plea date but you look at the crime date. Therefore, this person will not have the seven years if he pleads to either the drug case. The gun case and the crime of moral turpitude (stolen property case) does not cut off the time because it does not effect his admissibility to the United States.* [2] *(This is a little confusing because crimes of moral turpitude do make you inadmissible but in this case there is a petty offense exception as to inadmissibility for crimes where the actual sentence is less than six months and the crime has a statutory maximum of a year or less. In this case, if a defendant violated a CD on the stolen property case and was re-sentenced six months, he would then be ineligible for Cancellation of Removal for Legal Permanent Residents).*

2. Same scenario but defendant came to the US in 1982? Which plea should he take?

ANSWER: *2. This client should take the stolen property case. If he pleads to the drugs, he's deportable with no remedy as shown above in one. If he pleads to the gun he's deportable, but can get cancellation of removal because a gun does not cut off the time. The stolen property misdemeanor conviction did not occur within five years of entry so he can't be deported at all and does not need Cancellation of Removal at all.*

[KEY NOTE: If a defendant with a green card pleads to possession of stolen property, what can occur in the future which makes him deportable with no remedy?] See, footnote for answer. [3]

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[1] A 212(c) waiver is not available because that was abolished in 1996 and to apply that statute one looks at the date of the plea and not the date of the crime. Furthermore, 212(c) is never available for a gun case, even if the conviction happened before the remedy was abolished in 1996.

[2] Cancellation also requires five years with a green card but that is counted from the time one receives the green card until one has to move to get the waiver. A crime does not cut off the time like the residency requirement.

[3] If he gets violated on probation or on his CD, he can get one year which would make this misdemeanor an aggravated felony under immigration law as a possession of stolen property

3. Same scenario as Number 2 above but defendant has a possession of cocaine case from another state from 2001. What should he do?

ANSWER: *3. In this case the defendant is already deportable for the 2001 cocaine case he has out of state. So he will really need to get Cancellation of Removal for Legal Permanent Residents. He's eligible for cancellation of removal because he had seven years of residency before that crime and he has his green card for five years. So you don't want to destroy the seven years by taking a plea that reverts back to cut off the seven years. Therefore, avoid the drug case. The gun case if probably the best bet because it will never cut off his time for the seven years. The possession of stolen property case would be fine as a petty offense case unless he gets violated and gets a sentence of six months or more.*

4. Defendant arrived on a visitors visa in 1982, never got a green card, but is eligible to get one now because his children need him and they are over 21 years old. What is a good disposition for this person?

ANSWER: *4. Can either take the gun or the possession of stolen property. The gun is deportable but will not bar a green card at all. The possession of stolen property case is not deportable and does not makes him inadmissible because of the petit offense exception. Remember, the stolen property case has problems if the sentence changes and goes above six months. Try to avoid a CD or probation and then the sentence cannot change. The drugs are out because they bar a green card and make him deportable with no remedy. If no green card, avoid drugs like the plague except one single possession of 30 grams or less of marijuana.*

5. If the offered convictions were for a felony, would this change the analysis under Number 4?

ANSWER: *5. As to the drugs it would not change the analysis because a misdemeanor controlled substance case is just as bad as a felony, it makes him inadmissible and bars a green card for life. As to the gun case it does not because it's a firearms case whether or not its misdemeanor or felony. [Of course, if there*

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offense with a sentence of a year or more. This also applies to crimes of violence, larcenies, or burglaries. Any offense in these areas, even a misdemeanor, with a sentence of a year or more, is an aggravated felony.

is an intent to use element and the sentence is a year or more than its an aggravated felony as a crime of violence with a sentence of a year or more]. As to the stolen property it makes a huge difference because it would then not satisfy the petit offense exception because the maximum sentence would be more than a year. That would mean that a crime of moral turpitude would make the defendant inadmissible and would cut off the 10 years residency time needed for Cancellation of Removal for Non-Legal Permanent Residents. Therefore, in these examples, the gun case would be a better plea.

6. What is the legal advice one should consider giving if the defendant wants to adjust his status through a new U.S. citizen wife, but entered illegally by sneaking across the border under Number 4?

ANSWER: 6. *This is similar to Number 4 in Hypo One. His only hope is to apply for Cancellation of Removal for Non-Legal Permanent Residents which requires him to show exceptional and unusual hardship to an eligible relative. He would need the 10 years of physical presence with good moral character. This case could ruin that even with an A misdemeanor plea of guilty. This case is very old and it is unlikely that the People can sustain their burden of proof. He should probably demand a trial to make it easier to get Non-LPR Cancellation.*

The prosecutors usually threaten a bail jumping charge to leverage a plea of guilty. However, bail jumping is not a continuing crime (as many people think). Therefore, the statute of limitations begins to run 30 days after the person does not appear in court. The statute of limitations is five years but can be extended up to five more years for time living out of state. Therefore, the defendant must be charged with bail jumping within 10 years at the most. Do not let these threats force pleas that should not be taken. Ask the People to conduct viability investigations to see if they can really prove their case. Also investigate speedy trial issues because of the People's failure to exercise due diligence to find the defendant.

HYPOTHETICAL THREE

Russian client is a secretary in a doctor's office. She is charged in a Medicaid and insurance fraud scheme with very large loss amounts and a gun charge for a pistol found in a drawer. She is a minor player and could try the case

on the grounds that she did not know what the office was doing criminally and was unaware of the weapon. She is very scared of trial. The offer is grand larceny, probation and restitution of 500K which they will allow her to satisfy with a confession of judgment. They know she can't pay it.

1. Client came to the United States three years ago on a tourist visa and applied for asylum which she won. Two years later she gets her green card. She marries a United States citizen after getting her green card. If she takes the plea, what are her immigration consequences? Does she have to try this case and win to avoid deportation?

ANSWER: *1. She will be guilty of an aggravated felony for a fraud offense with a loss of more than 10 K. However, she might be able to get a new green card through her husband by getting a 212(h) waiver under Hanif v. Atty General (3d Cir. April 11, 2012).*

To give her another option, attempt to make the confession of judgment not part of the criminal case. Have her plead guilty with a stipulation that the loss on the particular count she is pleading to is 10k or less. The confession of judgment does not negate this because it could be money owed for some other reason, such as negligence or failure to perform some service. [4] *Therefore, the confession of judgment could be for a non-criminal act. The critical issue is to make the count of conviction not involve a loss of more than 10K. Then the conviction will be deportable as a crime of moral turpitude within five years of entry, she will not be cancellation eligible because the crime occurred before she could get seven years residence or five years with her green card, but she is 212(h) eligible for the new green card with her husband.*

2. Same as above but client is offered a gun charge with 1 year sentence. This would be a deportable offense and defendant would not be able to get cancellation of removal because she would be put in proceedings before the 7 years residency is up and before she has her green card for five years. Is there an immigration option for her if she takes this charge?

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[4] Another approach is to pay restitution up front and not have it be part of the criminal case. Make sure restitution is not mentioned in the plea agreement.

ANSWER: *2. She could get a green card through her husband because the gun does not make her inadmissible. She would be deportable though on her old green card. Make sure there is no intent to use element on the gun case. Such would be a crime of violence with a sentence of a year or more. Then you would have to rely on Hanif above which might not work. (In general, when pleading to felony gun cases, always avoid intent to use unlawfully).*

3. Same as Number 1, but the crime occurred six years after her entry into the United States. What disposition should she seek?

ANSWER: 3. *If the client can avoid this being an aggravated felony, this conviction will not be deportable because it is not a crime of moral turpitude within five years of entry. Therefore, it is critical that this case not turn into a one-year sentence (to be a larceny offense with a sentence of a year or more) or a fraud offense with a loss of more than 10K. The suggestions listed in the Answer to No. 1, under this hypothetical, are critical. Otherwise, she should plead to the gun charge and try to adjust her status with her husband.*

4. Prosecutor believes that cocaine addiction fueled the criminal conduct here. She offers a drug diversion program. Client will plead to a fraud offense with stipulation of $100,000 loss amount and a count of disorderly conduct. After completion of the program, the felony conviction and restitution agreement will be annulled and she will be sentenced to time served on the disorderly conduct conviction. What are the immigration consequences of this conviction if she completes the program and gets the deal as proposed?

ANSWER: *4. This will an aggravated felony involving deportation with no remedy even if the program is completed. Immigration authorities do not recognize vacaturs based on rehabilitation or cooperation. In re Pickering, 23 I & N Dec. 621 (BIA 2003). To be recognized in Immigration Court the vacatur must be based on the fact that the conviction was illegal on the day it was entered. Even though the defendant was never sentenced on the fraud offense, it is considered a conviction because there was a finding of guilt or an admission of guilt and the defendant was punished (i.e., the drug program). Counsel in all such cases must figure out a way to obtain the program without entering a plea of guilty to deportable offenses, especially aggravated felonies.*

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

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IDP IMMIGRANT DEFENSE PROJECT

PRACTICE ADVISORY[1]
May 2, 2013

MONCRIEFFE V. HOLDER: IMPLICATIONS FOR DRUG CHARGES AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH

INTRODUCTION

Under the immigration laws as long interpreted by the courts, a noncitizen generally is not subject to removal or other negative immigration consequences based on a criminal conviction unless the conviction fits categorically within one of the criminal removal grounds. The "categorical approach" requires adjudicators to determine whether *all* of the conduct covered under the statute of conviction (or, under the "modified categorical approach," the conduct covered under a divisible sub-portion of the statute) fits within the alleged criminal removal classification. If it does not, the person does not fit within the removal classification. Importantly, adjudicators may not consider the particular conduct underlying the defendant's conviction. Application of the categorical approach follows upon Congress' choice to require a conviction and thus to rely on the criminal process to determine immigration consequences of criminal conduct.

In recent years, however, in response to federal government efforts to cut back on the categorical approach, the Board of Immigration Appeals (BIA), the Attorney General and some federal courts have issued rulings that have chipped away at it. Examples include the following:

- The BIA and some federal courts decided that a noncitizen convicted under a state statute that covers non-deportable conduct may nevertheless be deemed deportable as long as the statute's "elements" match up with those of the federal statute cross-referenced in the relevant deportation provision. *See, e.g.*, *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008); *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011).
- The BIA and some federal courts found that a noncitizen seeking relief from removal may be deemed convicted of a relief-barring offense if the record of conviction is inconclusive, based on the noncitizen's statutory burden of proof in the relief eligibility context. *See, e.g.*, *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc).
- The BIA held that a criminal statute may be deemed divisible allowing application of a modified categorical approach (where the adjudicator reviews the record of

[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

The authors of this Practice Advisory are Manny Vargas, Dan Kesselbrenner, Sejal Zota, Isaac Wheeler, and Beth Werlin.

conviction to determine under which portion of the statute a person was convicted) even where the different means of committing a violation are not enumerated in the statute as separate alternatives. *See Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

- Former Attorney General Mukasey ruled that the government may, in some cases, go beyond the categorical and modified categorical approach to look at evidence outside the record of conviction in order to determine removability under the crime involving moral turpitude ground. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

On April 23, in *Moncrieffe v. Holder*, the Supreme Court, in unequivocal language, reaffirmed the traditional categorical approach for determining whether a conviction falls within a removal classification. Specifically, the Court held that a Georgia marijuana possession with intent to distribute conviction may not be deemed a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) falling outside the aggravated felony drug trafficking definition at issue. The Court thus explicitly rejected *Matter of Aruna*'s deviation from the traditional categorical approach. The Court's analysis also significantly undermined the reasoning behind the other above-listed retreats from the categorical approach. *See Moncrieffe v. Holder*, No. 11-702, 569 U.S. ___, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013).

This practice advisory covers: (1) the holding in *Moncrieffe*; (2) the decision's potential broader implications; (3) strategies for noncitizen criminal defendants; and (4) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings affected by *Moncrieffe*.

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I. THE SUPREME COURT'S SPECIFIC HOLDING IN *MONCRIEFFE* AND IMPLICATIONS FOR OTHER STATES' MARIJUANA STATUTES.

A. The *Moncrieffe* Holding

Adrian Moncrieffe, a long time permanent resident, pleaded guilty in 2007 to the Georgia offense of possession of marijuana with intent to distribute. The case arose when the police found 1.3 grams of marijuana in his car. The federal government sought to deport him for the conviction, arguing that it was punishable as a felony under the Controlled Substances Act (CSA) and thereby automatically an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Adopting the government's argument, the immigration judge ordered Mr. Moncrieffe removed. Both the BIA and the Court of Appeals for the Fifth Circuit affirmed, rejecting Mr. Moncrieffe's reliance upon 21 U.S.C. § 841(b)(4), which makes distribution of a small amount of marijuana without remuneration punishable only as a misdemeanor. The Fifth Circuit's decision accorded with prior decisions from the Sixth and First Circuits, but conflicted with decisions from the Second and Third Circuits.[2] The U.S. Supreme Court granted certiorari to resolve the circuit split.

In a 7-2 decision, the Court reversed the Fifth Circuit. It held that when mere social sharing of marijuana is punishable under a state statute as "possession with intent to distribute," no convictions under such a statute would constitute an aggravated felony. Op. at 1.[3] In doing so, the Court unequivocally endorsed the categorical approach, reaffirmed that any exceptions to the approach are limited, and then found no such exceptions applicable here.

The Court began its analysis by affirming the strict application of the categorical approach to aggravated felony determinations:

> Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. [*Gonzales v. Duenas-Alvarez*, 549 U.S.183, 186 (2007)] (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). . . . [A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) . . . .

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[2] Compare 662 F.3d 387 (5th Cir. 2011) (case below), *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011) (is an aggravated felony), and *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (same), with *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (is not an aggravated felony), and *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003) (same).

[3] The citations to *Moncrieffe* used throughout this practice advisory (Op. at __) refer to the slip opinion, available at http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

> Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Johnson v. United States*, 559 U.S. 133, 137 (2010). . . .
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> The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]." *Nijhawan*, 557 U.S., at 37. So the categorical approach applies. *Ibid.*

Op. at 5-6.

Citing to *Lopez v. Gonzalez*, 549 U.S. 47 (2006), the Court explained that to qualify as an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), a state drug conviction "must meet two conditions. First, it must 'necessarily' proscribe conduct that is an offense under the CSA; and second, the CSA must 'necessarily' prescribe felony punishment for that conduct." Op. at 6. The Court found that the Georgia offense satisfied the first condition, but not the second. Specifically, the Court observed that while the federal crime of possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a)(1) may be punished as a felony, it also may be also be punished as a misdemeanor under § 841(b)(4) if only a small amount of marijuana is distributed for no remuneration. The Court concluded that because the conviction did not establish that it involved either remuneration or more than a small amount of marijuana, it did not qualify as an aggravated felony:

> In Georgia, the statute of conviction does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, *see, e.g.*, *Taylor v. State*, 260 Ga. App. 890, 581 S.E.2d 386, 388 (2003) (6.6 grams), and that "distribution" does not require remuneration, *see, e.g., Hadden v. State*, 181 Ga. App. 628, 628–629, 353 S.E.2d 532, 533–534 (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

Op. at 9.

Significantly, the Court flatly rejected the Board and Fifth Circuit's conclusion that any marijuana distribution conviction is presumptively a felony because, *in practice*, "that is how federal criminal prosecutions for marijuana distribution operate." Op. at 11-12. Rather, the Court reversed the presumption, reasoning "that ambiguity in criminal statutes referenced by the immigration statute must be construed in the noncitizen's favor," even if the result is that some offenders avoid aggravated felony status. Op. at 20-21. The Court also rebuffed the government's reliance on *Nijhawan v. Holder*, 557 U.S. 29 (2009), in suggesting "the § 841(b)(4) factors are like the monetary threshold" at issue in that case and "thus similarly

amenable to the circumstance-specific inquiry" employed there. Op. at 17. The Court unequivocally clarified that drug trafficking is a generic removal ground to which the categorical approach applies, not a circumstance-specific one, so that there is no place for the government-proposed (and Board-endorsed) "minitrials," in which noncitizens must demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana.

The Court overruled the contrary precedent in the Fifth, First, and Sixth Circuits, *see, e.g.*, *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), as well as the Board's decisions in *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012) and *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).

B. Implications for Other States' Marijuana Statutes

The Court's holding in *Moncrieffe* means that many convictions for distribution of marijuana will no longer constitute an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). (Note, however, that such convictions will continue to qualify as controlled substance offenses, which render a person removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) and/or inadmissible under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).) Specific implications include:

- In states similar to Georgia, where the statute does not require remuneration or any minimum quantity of marijuana and where there is no separate offense for social sharing of marijuana, a conviction for marijuana distribution should not constitute an aggravated felony (though it may be necessary or at least helpful to point to state case law that makes clear that the statute would cover small amounts of marijuana and the exchange of drugs without remuneration). *See* op. at 6 (explaining "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'") (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). This is the case even for noncitizens whose underlying conduct may have consisted of transfer for remuneration, or a large amount of marijuana. Roughly half the states employ broad statutes that do not require remuneration or any minimum quantity of marijuana. Op. at 19.

- In other states, there may be a series of separate offenses, only one of which specifically covers social sharing of marijuana. *See, e.g.*, N.Y. Penal Law Ann. § 221.35 (West 2008) ("A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, [marihuana] of an aggregate weight of two grams or less; or one cigarette containing marihuana."). A conviction under such a statute would not constitute an aggravated felony. Thirteen states have similar statutes. Op. at 18 n.10. Whether a conviction under *another* marijuana distribution statute in one of these states is an aggravated felony would depend on whether or not the other statute also may cover distribution of a small amount of marijuana without remuneration. *See, e.g.*, N.Y. Penal Law Ann. § 221.40 (West 2008) (which covers distribution without remuneration of 2 to 25 grams of marijuana).

- Convictions under statutes that include an element of "selling" would seem to establish remuneration (unless case law specified otherwise) and would thus constitute an aggravated felony.

- Convictions under statutes that proscribe the distribution of more than a small amount of marijuana also would qualify as an aggravated felony. Neither the CSA nor *Moncrieffe* defines "small amount," but the Court noted the Board's suggestion of 30 grams as a "useful guidepost," based on the exception in INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Op. at 8 n.7 (citing *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (2012)).

Section III provides additional discussion of arguments that certain distribution offenses may not qualify as aggravated felonies.

II. THE DECISION'S POTENTIAL BROADER IMPLICATIONS.

The Supreme Court's decision in *Moncrieffe* also has important broader implications for various challenges to government deviations from the categorical approach. This section presents a preliminary analysis of some of the potential implications and arguments.

A. Burden of Proof for Relief

***Moncrieffe* supports the argument that the immigrant's burden of proof in the relief eligibility context does not affect the legal determination of whether a particular conviction does or does not fall within a criminal bar category** – *use in challenges to Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)

When a noncitizen applies for relief from removal, he or she has the burden of proof to demonstrate eligibility for that relief. *See* INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For many forms of relief, a person is not eligible if he or she has been convicted of specified crimes. For example, lawful permanent residents are ineligible for cancellation of removal if they have been convicted of an aggravated felony. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). Likewise, individuals convicted of aggravated felonies are ineligible for asylum and naturalization.[4] The BIA and several courts have interpreted the burden of proof provision to

[4] *See* INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (making a particularly serious crime a bar to asylum eligibility); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (deeming an aggravated felony conviction to be a particularly serious crime); INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (requiring good moral character for naturalization); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (deeming individuals convicted of an aggravated felony as not having good moral character). The good moral character bar to naturalization applies to murder convictions at any time and to other aggravated felony convictions on or after November 29, 1990. *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994).

mean that a noncitizen with a past conviction is ineligible for relief when the record of conviction is inconclusive as to whether the conviction falls within the criminal bar category. *See, e.g., Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). *But see Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134 (3d Cir. 2010) (holding that inconclusive record is sufficient to establish that aggravated felony bar does not apply); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)(same). *See also Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

The *Moncrieffe* Court's analysis rejects the notion that a criminal bar classification, such as the aggravated felony inquiry at issue in the case, may be treated as a factual question to which a burden of proof provision would be relevant.[5] Throughout the decision, the Court treats the adjudication of whether a past conviction falls within the aggravated felony definition not as a factual question, but instead as a legal determination that looks at the language of the statute of conviction and then determines from the statutory language what the conviction "necessarily" involved. Thus, the Court states: "Under this approach we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." Op. at 5.

The Court then explains: "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must *presume* that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, ..." Op. at 5 (emphasis added). Nothing in the Court's discussion suggests that this legal determination/presumption would change based on a burden of proof provision. In fact, the government's regulations provide that the immigrant's "preponderance of the evidence" burden with respect to an application for relief from removal is not even triggered unless the evidence indicates that a ground for denial may apply. *See* 8 C.F.R. § 1240.8(d). In any event, such a "preponderance of the evidence" burden is relevant to questions of a factual nature (e.g., other relief eligibility questions such as length of residence in the United States)[6] and not to the strict categorical approach legal inquiry the Supreme Court applies to a criminal classification question.

The following portions of the Court's decision in *Moncrieffe* provide further support for challenging the government's reliance on the noncitizen's burden of proof in the relief eligibility context:

- The Supreme Court expressly states that the analysis of whether a noncitizen is "convicted" of an aggravated felony in the relief eligibility context – the context of its

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In addition, DHS can terminate asylum status if the person is convicted of an aggravated felony. INA § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 1208.24.

[5] In fact, on April 30, 2013, the Ninth Circuit ordered the parties in *Almanza-Arenas v. Holder*, No. 09-71415, to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

[6] *See* 2 McCormick on Evidence § 339, at 484 (a "preponderance of the evidence" standard applies to factual questions).

earlier decision in *Carachuri-Rosendo v. Holder*, 560 U.S. __ (2010) (concerning eligibility for cancellation of removal) – is "the same" as the analysis in the deportability context in which the issue arises in *Moncrieffe*. Op. at 6 n.4.

- The Court confirms this by pointedly observing that once an individual's conviction is found not to be an aggravated felony for deportability purposes, the person will be eligible for relief: "At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria." Op. at 19.[7]

- The Court rejects an approach that would require the submission of evidence at a post hoc minitrial in immigration court to determine whether a conviction fits within a criminal offense category, op. at 15-16, as would presumably be required if the crime classification question is treated as a case-specific factual question subject to a burden of proof provision.

- Further, the Court notes that the post hoc minitrial can result in different determinations relating to convictions of the same offense. As the Court explains, "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." Op. at 16. The categorical approach was designed to avoid the potential unfairness of such an outcome. *Id.* These kinds of disparities are an inevitable result of a rule that an inconclusive record of conviction cannot show relief eligibility, because noncitizens convicted of the same offense will be found eligible, or not, depending on what facts happen to appear in the record of conviction, or what the government happens to introduce in the case of a detained immigrant who cannot access criminal records herself. *See Young*, 697 F.3d at 992 (Fletcher, J., dissenting in part). The Court also observes that it is no answer to say that defense counsel in the criminal case could build an appropriate record when the facts are fresh because "there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged." Op. at 18.

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[7] The conclusory fashion in which the Court finds that there is no bar to relief echoes the Second Circuit's incredulity in *Martinez v. Mukasey* that the government even made the argument that the noncitizen had to prove that he or she was not convicted of an aggravated felony. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (Calabresi, J.) ("The Government makes one additional and rather startling argument … This argument flies in the face of the categorical approach insofar as it requires any alien seeking cancellation of removal to prove the facts of his crime to the BIA.").

B. What Constitutes a Divisible Statute

***Moncrieffe* supports the understanding that a statute may only be deemed divisible and subject to the modified categorical approach when it describes different crimes separately** – *use in challenges to Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).

The courts have stated that, when a statute of conviction is "divisible," i.e., has at least one portion of the statute covering only conduct falling within the criminal classification at issue, the adjudicator may go beyond the statutory text to look at the record of conviction in order to determine if an individual's conviction falls within that portion of the statute. There is a dispute, however, about what constitutes a divisible statute. Arguably, the alternative means of committing a violation must be separately described in the statute, such as by use of subsections, in order for the statute to be deemed divisible. The BIA has taken a broader view, finding divisibility in "all statutes of conviction, regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

Moncrieffe implicitly rejects the BIA's broader view of divisibility. In describing when it has allowed a court to look beyond the language of the statute to the record of conviction, the Court speaks of "state statutes that contain several different crimes, each described separately . . . ." Op. at 5. Then, in analyzing the Georgia statute of conviction at issue in *Moncrieffe*, the Court applies such a view of divisibility to determine which of the following crimes, listed in the statute in the disjunctive, Mr. Moncrieffe was convicted of – "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." After looking to the record of conviction (the plea agreement) to find that Mr. Moncrieffe was convicted of the crime of possession with intent to distribute marijuana, op. at 7, the Court then goes on to consider whether this offense was "necessarily" an aggravated felony. Significantly, in doing so, the Court looked only at the statute of conviction without looking again at the record of conviction. Op. at 9. Thus, the Court indicated it did not consider the "possession with intent" prong further divisible as to the critical factors of amount of marijuana or the presence of remuneration – even though there is a broad range of conduct that may result in this conviction – given that the statute does not describe different crimes based on such factors. Op. at 9.

Practitioners should be aware that the Court has pending a criminal sentencing case that squarely raises the question of when a criminal statute may be deemed divisible. *Descamps v. U.S.*, No. 11-9540, argued on January 7, 2013. The Court's upcoming decision in *Descamps* may provide further and more detailed guidance on when a criminal statute may be deemed divisible for immigration purposes.[8]

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[8] For further guidance on the possible significance of *Descamps* to immigration cases, see K. Brady & I. Wheeler, *Waiting for* Descamps: *How the Supreme Court Might Save Your Crim-Imm Case* (Feb. 2013), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2013/02/Descamps-advisory-final.pdf.

C. Challenging *Matter of Silva-Trevino*

***Moncrieffe* reaffirms the principle that the categorical approach looks only to the statute of conviction (and, where the statute is divisible, the record of conviction) and not extrinsic evidence –** *use in challenges to Matter of Silva-Trevino,* 24 I&N Dec. 687 (AG 2008)

In *Matter of Silva-Trevino,* former Attorney General Mukasey ruled that the government may go beyond the categorical and modified categorical approach to look at facts and extrinsic evidence outside the record of conviction to determine removability under the crime involving moral turpitude ("CIMT") ground. 24 I&N Dec. 687 (AG 2008).

Moncrieffe provides many arguments to challenge *Silva-Trevino*. First, the decision refutes one of the government's main arguments in defense of *Silva-Trevino*. The government argued in *Moncrieffe*, as it has in CIMT context, that the statute at issue requires a "circumstance-specific approach," as was applied in *Nijhawan v. Holder*, 557 U.S. 29 (2009). In *Nijhawan*, the Court considered INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) -- "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" – and determined that the $10,000 loss requirement was a case-specific circumstance to which the categorical approach does not apply.

But the Supreme Court in *Moncrieffe* found that applicability of the *Nijhawan* circumstance-specific approach was a rare exception to the general applicability of the categorical approach. It found that the circumstance-specific approach applies only when the "circumstance" itself is written into the immigration statute by a qualifying phrase, such as "in which," describing a subset of offenses to which the removal ground applies. Op. at 17 (noting that the monetary threshold language at issue in *Nijhawan* triggered the circumstance-specific examination). By contrast, the provision at issue in *Moncrieffe* was a generic offense to which the categorical approach applies because the immigration statute prescribes no circumstantial limitations. Op. at 17; *see also id.* at 15 ("[N]o statutory authority for . . . case-specific factfinding in immigration court . . . is apparent in the INA."). *Moncrieffe* thus supports the conclusion reached by several courts that the CIMT removal grounds do not permit "circumstance-specific" treatment under *Nijhawan* because they include no express directive to examine underlying conduct. *See Prudencio v. Holder*, 669 F.3d 472, 483 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1310 n.7 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009).

Further, *Moncrieffe* provides the following additional support for challenging *Matter of Silva-Trevino*:

- *Moncrieffe* cites with approval the long history of applying the categorical approach in immigration cases specifically addressing the CIMT removal grounds. The Court observes that the categorical approach "has a long pedigree in our Nation's immigration law," citing a scholarly article examining cases applying that approach as early as 1913 to the exclusion ground for CIMTs. Op. at 6 (citing Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669 (2011)). The Court repeatedly cites those

early CIMT cases for the proposition that the immigration statute generally requires an analysis of the conduct necessary to offend the criminal statute, rather than the underlying facts of a particular case. Op. at 5, 6, 16.

- *Moncrieffe* holds that, "*post hoc* investigation into the facts of predicate offenses" conducted in "minitrials conducted long after the fact" yields arbitrary and unfair results, especially where respondents in removal proceedings are detained and/or unrepresented and lack meaningful access to evidence. Op. at 15, 16. The Court thus rejected a rule under which removal determinations hinge on the fortuity of "what evidence remains available" years later or "how it is perceived by an individual immigration judge." Op. at 16. Further, the categorical approach ensures "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." Op. at 20 n.11.

- *Moncrieffe* observes that the minitrials that the government proposed in that case "would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention . . . where they have little ability to collect evidence." Op. at 16. This starkly contradicts claims that the government sometimes makes in defense of *Silva-Trevino*, namely, that it, rather than a detained noncitizen, is the only party prejudiced by re-trying long-past criminal conduct in a civil removal proceeding because it (sometimes) bears the burden of proof.

- Although *Moncrieffe* acknowledges that Sixth Amendment concerns about judicial fact-finding "do not apply in th[e] context" of removal proceedings, op. at 13, the Court reaffirms that the analytical limits imposed by Court decisions in the criminal context, such as in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Shepard v. U.S.*, 544 U.S. 13 (2005), still apply with full force in the immigration context. Op. at 5, 7, 16, 22. This undermines *Silva-Trevino*'s contention that the lack of Sixth Amendment concerns in removal proceedings justify the abandonment of the categorical approach. *See Silva-Trevino*, 24 I&N Dec. at 700-01.

D. Minimum Conduct Approach

***Moncrieffe* reaffirms the general principle that one must look to the minimum conduct covered under the statute of conviction** – *use in challenges to agency decisions that disregard or overlook non-removable conduct covered by the statute of conviction*

Moncrieffe reaffirms the general principle that, under the categorical approach, the adjudicator must look to the minimum conduct covered under the statute of conviction. The Court states: "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." Op. at 5.

The Court dismissed government concerns that application of such a minimum conduct test would lead to noncitizens escaping aggravated felony treatment. The Court stated: "[Some] offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive result is little more than an attack on the categorical approach itself. We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions." Op. at 20.

The Court's strong reaffirmation of the minimum conduct test will provide additional support for challenges to agency decisions that disregard or overlook that a statute of conviction covers conduct falling outside the removal ground. *See*, *e.g.*, agency decisions at issue in *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013), *petition for rehearing pending* (agency found New York drug "sale" conviction to be drug trafficking aggravated felony even though the offense covers offer to sell conduct not covered under the federal "drug trafficking crime" definition referenced in the aggravated felony definition); *Rojas v. Attorney General*, No. 12-1227 (3d Cir.), *sua sponte rehearing en banc pending* (agency found Pennsylvania drug paraphernalia conviction to be controlled substance offense even though Pennsylvania defines "drug" more broadly than federal definition of "controlled substance"); *Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255-56 (BIA 2010) (BIA treated a conviction under a firearm statute that included antique firearms as presumptively deportable even though the federal firearm statute referenced in the deportation statute excludes antique guns as an affirmative defense).

The Court, however, does identify two limitations on the minimum conduct test. First, the Court describes what has been called the modified categorical approach. It indicates that where the statute of conviction is divisible (such that it identifies at least one sub-crime whose minimal conduct does fall within the removal ground), the adjudicator may look to the record of conviction to "determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record of the factual basis for the plea.'" Op. at 5 (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard*, 544 U.S. at 26)).

Second, the Court states: "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Op. at 5-6 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Later, the Court addresses the aggravated felony conviction under INA § 101(a)(43)(C), which refers to a federal firearms statute with an exception for antique firearms. *See* INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C) (referencing 18 U.S.C. § 921, which includes the exception at § 921(a)(3)). The Court states in dictum that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, the "realistic probability" standard must be met, i.e., "a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." Op. at 21.

One way a person may show that the state actually prosecutes the relevant offense is to is to cite state case law. Op. at 9 (citing Georgia court cases to show that Georgia does prosecute

the marijuana offense at issue in *Moncrieffe*). The realistic probability standard also may be satisfied, however, where the criminal statute expressly covers the conduct falling outside the removal category. *See Ramos v. U.S. Atty Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (finding that "realistic probability" is created where the statute's language expressly demonstrates "that it will punish crimes that do qualify as theft offenses and crimes that do not."); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (finding that because Oregon burglary statute explicitly covers vehicles and boats "that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of" burglary). *See also Kawashima v. Holder*, 132 S. Ct. 1166, 1175 (2012) (Court accepted the government's argument that a federal tax evasion conviction was not categorically a "fraud or deceit" aggravated felony because the tax evasion provision covered certain non-deceitful conduct without citing a case that actually involved prosecution for such conduct and despite government concession at oral argument that such cases would be rare).

- Practice Tip

A practitioner should examine closely the notice to appear to determine if the statute of conviction necessarily satisfies the generic ground of deportability charged in the notice to appear. As discussed above, *Moncrieffe* highlighted the firearm aggravated felony definition as one such situation where a conviction may not satisfy the generic ground because the federal criminal statute (18 U.S.C. § 921) contains an exception for antique firearms. Op. at 21. This means that a person cannot be convicted for a federal firearm offense for having an antique gun or a gun that used antique ammunition.

The California Penal Code, unlike 18 U.S.C. § 921(a)(3), makes it crime to possess an antique firearm. P.C. § 25400(a); *see Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (holding that conviction under predecessor California statute met federal gun definition even though former statute included conviction for an antique firearm). Despite the fact that convictions under the California statute would seem to necessarily fail the categorical inquiry, the noncitizen convicted under this provision still must show a realistic probability that California would prosecute a defendant for having an antique weapon. *See* op. at 21 and discussion above regarding ways to meet the "reasonable probability" standard.

E. Rule of Lenity

***Moncrieffe* reaffirms the applicability of the criminal rule of lenity in immigration cases involving interpretation of terms also used in criminal statutes** – *use in challenges to government interpretations of terms such as "drug trafficking crime," "crime of violence," "aggravated felony," and "conviction."*

In *Moncrieffe*, the Supreme Court reaffirms the applicability of the criminal rule of lenity in immigration cases that involve interpretation of terms contained in criminal statutes. The Court states: "[We] err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens' favor." Op. at 20-21 (citing *Carachuri-Rosendo v. Holder*, 560 U.S. __, __ (slip op. at 17) (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004)). Thus, practitioners should cite the criminal rule of lenity in support of

arguments relating to interpretation of criminal statutes cross-referenced in the Immigration and Nationality Act. *See, e.g.*, federal criminal code "drug trafficking crime" and "crime of violence" definitions referenced in INA §§ 101(a)(43)(B)&(F); 8 U.S.C. §§ 1101(a)(43)(B)&(F). Practitioners also should consider citing the criminal rule of lenity in support of arguments relating to the reach of terms in the immigration statute itself that have criminal law applications. *See, e.g.*, "aggravated felony" and "conviction" terms referenced in INA § 276(b), 8 U.S.C. § 1326(b) (INA criminal illegal reentry statute where these terms are used as defined in INA §§ 101(a)(43) and 101(a)(48)(A)).

F. No Deference to the Agency

> ***Moncrieffe* represents yet another criminal removal case where the Court does not discuss or even mention *Chevron* deference to the agency when determining how the categorical approach is applied** – *use in any challenges where the government seeks* Chevron *deference to its interpretation of how the categorical approach is applied*

Moncrieffe represents yet another criminal removal case where the Court rejects the immigration agency's deviation from the categorical approach without considering or even mentioning deference to the agency under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This supports the notion that the categorical approach has been effectively incorporated into the statute as a result of its "long pedigree in our Nation's immigration laws," as recognized by the Court in *Moncrieffe*. Op. at 6 (citing Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669, 1668-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913)). Practitioners should point to the Supreme Court's history of not applying *Chevron* when the government seeks deference to its decisions cutting back on the categorical approach in immigration cases.

III. ANALYZING CRIMINAL STATUTES AND STRATEGIES FOR CRIMINAL DEFENDANTS.

For criminal defendants, the *Moncrieffe* decision provides a possible roadmap for avoiding adverse immigration consequences. It is true that the prosecuting authorities control the scope and extent of charge bargaining and that no defendant has the right to any specific plea bargain. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). Nevertheless, 94% of state criminal convictions are the result of plea bargains. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Moreover, effective plea bargaining is one approach to avoid adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

* * *

A. State Court Strategies

1. Controlled Substances

The Court recognized fourteen states that had statutes which specifically proscribe § 841(b) conduct (i.e., distribution of a small amount of marijuana for no remuneration).[9] Thus, in at least every one of those states, criminal defense counsel can plead a client to a charge that would not be an aggravated felony. In some states, like Georgia, the statute defines a range of crimes. Op. at 7, 9. In others, like New York, the only crime defined under the statutory subsection involves distribution without remuneration. Op. at 14 (discussing N. Y. Penal Law Ann. §221.35(West 2008)). In Texas, there is a specific crime for distributing a quarter ounce or less of marijuana for no remuneration. V.T.C.A., Health & Safety Code § 481.120(b)(1). It is important to note, however, that § 841(b) only applies to marijuana and does not include other federally controlled substances. 21 U.S.C. § 841(b)(4). Distribution of other federally controlled substances is a felony regardless of whether there was remuneration. *See* 21 U.S.C. §§ 841-843 (providing that distribution of virtually any controlled substance other than marijuana is a felony under federal law without exception).

Furthermore, as the Court noted, with the exception of a single offense for simple possession for personal use of 30 grams or less of marijuana, a person with a conviction under one of these fourteen state statutes still will be deportable under the controlled substance ground of deportability. Op. at 19; INA § 237(a)(2)(B)(i), 8 U.S.C. §1227(a)(2)(B)(i).

- Practice Tip

Moncrieffe may preclude the government from establishing that certain controlled substance distribution offenses are convictions for an aggravated felony even when a noncitizen has a conviction that does not specifically fall under a state's counterpart to 21 U.S.C. § 841(b)(4). Florida's controlled substance law presents one such situation.

The Controlled Substances Act (CSA) definition of the term "marihuana" includes "the resin extracted from any part of the plant." 21 U.S.C. § 802(16)(d) (governing § 841(b)(4), the CSA misdemeanor marijuana distribution provision at issue in *Moncrieffe*). Unlike federal law, the Florida drug offense that is specific to non-remunerative transfer of marijuana does "not include the resin extracted from the plants of the genus Cannabis." *Compare* Fla. Stat. § 893.13(2)(b)(3) (2010) *with* 21 U.S.C. § 802(d)(16). This means that a person with a Florida

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[9] *See* Cal. Health & Safety Code Ann. §11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. §18–18–406(5)(2012); Fla. Stat. §893.13(2)(b)(3) (2010); Ill. Comp. Stat., ch. 20, §§550/3,550/4, 550/6 (West 2010); Iowa Code §124.410 (2009); Minn. Stat.§152.027(4)(a) (2010); N.M. Stat. Ann. §30–31–22(E) (Supp. 2011); N.Y. Penal Law Ann. §221.35(West 2008) Ohio Rev. Code Ann. §2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. §475.860(3) (2011); Pa. Stat. Ann., Tit. 35, §780–113(a)(31)(Purdon Supp. 2012); S.D. Codified Laws §22–42–7 (Supp. 2012); Tex.Health & Safety Code Ann. §481.120(b)(1) (West 2010); W. Va. CodeAnn. §60A–4–402(c) (Lexis 2010).

conviction for distributing cannabis resin, commonly known as "hashish," could have been guilty of giving away a small amount of hashish, but the lack of remuneration would be legally irrelevant because the Florida statute does not require proof of remuneration.

Under the Court's test in *Moncrieffe*, "not only must the state offense of conviction meet the 'elements'" of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony." Op. at 5. Applying the *Moncrieffe* test to a Florida conviction for distribution of hashish reveals that the offense taken at its minimum includes the federal misdemeanor offense of giving away a small quantity of marijuana, including the resin (hashish). That Florida treats hashish distribution more seriously than the United States Code does not change the applicability of the categorical approach. As a result, anyone with a Florida conviction for distributing hashish should not have an aggravated felony conviction under the Court's test because DHS will not be able to prove that the conviction was not for an offense punishable as a misdemeanor under federal law. The defendant's alleged actual conduct is not part of the calculation because *Moncrieffe's* central holding is that a factfinder must focus on the statute of conviction rather than the defendant's conduct. *See* op. at 5-6.

Similarly, a conviction for distribution of a small amount of any unnamed controlled substance under Florida law should not be deemed an aggravated felony because the conviction could have been for distribution of a small amount of cannabis resin.

The Florida structure may exist in many other states. Practitioners should examine carefully any controlled substance aggravated felony charge to determine whether the statute of conviction taken at a minimum would necessarily result in a felony conviction under the federal controlled substance laws.

- Practice Tip

If a defendant is charged under a statute that covers marijuana and other controlled substances and the charging document is silent about the identity of the controlled substance, a defendant, if possible should not allocute to any other drug. *See Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (holding that the government fails to meet its burden where the record of conviction fails to identify the substance). A plea of nolo contendere to a charging document that does not identify the controlled substance should protect the defendant from the harsh consequences of an aggravated felony charge because the Department of Homeland Security will not have evidence to prove conclusively that the offense would be punishable as a felony under federal law.

B. Federal Court Strategies

1. Reentry Prosecutions

A noncitizen charged with violating INA § 276, 8 U.S.C. § 1326, for illegally reentering the United States after having been deported faces both statutory and Guideline sentencing enhancements. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (interpreted by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that § 1326(b)(2) created an enhancement));

U.S.S.G §2L1.2(b)(1)(C). For example, a noncitizen convicted for illegal reentry can get an eight-level increase under the United States Sentencing Guidelines for having an aggravated felony conviction. *Id.* Federal criminal defense practitioners in pending cases should ensure that a defendant's sentence does not include an enhancement for a conviction that is not an aggravated felony under *Moncrieffe.*

A federal criminal defendant can raise a collateral challenge to the lawfulness of a prior removal order in certain circumstances. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987) (holding due process requires judicial review of underlying deportation proceedings); INA § 276(d), 8 U.S.C. § 1326(d) (setting out requirements for raising collateral challenges).

2. Controlled Substances

The Court noted that any federal marijuana distribution conviction will be a deportable offense under the controlled substance ground of deportability. Op. at 19. Nevertheless, it may be possible that a noncitizen defendant pleading guilty to an offense under 21 U.S.C. § 841(b)(4) could be eligible to expunge the offense so that she or he would not have any conviction for immigration purposes. This seemingly counterintuitive scenario is possible because the language in 21 U.S.C. § 841(b)(4) provides that a person be treated in accordance with 21 U.S.C. § 844 and 18 U.S.C. § 3607. Section 3607 of Title 18, in turn, provides a mechanism for a defendant to receive a disposition that is not a conviction for any purpose whatsoever.[10]

Although there may be some tension between the language in 18 U.S.C. § 3607 unequivocally stating that ameliorative treatment under the statute "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime" and INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), which defines a conviction for immigration purposes, the explicit command of 18 U.S.C. § 3607 would arguably include the consequence of having a conviction for immigration purposes. There is not a single published case since the law changed in 1996 interpreting whether a disposition expunged under 18 U.S.C. § 3607 is a conviction under 8 U.S.C. § 1101(a)(48). Nevertheless, the holding in *Moncrieffe* and the statutory text of 18 U.S.C. § 3607 suggest that any defendant with some leverage with the prosecutors might consider seeking to come under its ameliorative terms.[11]

IV. SUGGESTED STRATEGIES FOR NONCITIZENS WITH REMOVAL CASES AFFECTED BY *MONCRIEFFE*.

This section offers strategies to consider for noncitizens whose removal cases are affected by *Moncrieffe*. Keep in mind, most individuals directly affected by *Moncrieffe* still are removable from the United States under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for a

[10] A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. 18 U.S.C. § 3607(a) & (c).

[11] A defendant who is providing substantial assistance to a federal prosecution might be an example of someone who might have sufficient leverage to obtain such a favorable plea bargain.

controlled substance offense and, thus, likely only will pursue these strategies if they are eligible for a form of relief from removal.

For sample motions and other documents to help implement these strategies, please see *Sample* Carachuri-Rosendo *Motions* (June 21, 2010), at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/CARACHURI-ROSENDO.pdf and Vartelas v. Holder: *Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts* (April 5, 2012) (beginning on page 15) at http://www.legalactioncenter.org/sites/default/files/vartelas_practice_advisory_fin.pdf. Although these samples address different substantive law, they nonetheless may provide helpful guidance.

A. Noncitizens with Pending Removal Cases

Individuals who are in removal proceedings before the immigration court or on appeal at the BIA should bring *Moncrieffe* to the attention of the IJ or the BIA. If the aggravated felony charge was the only ground of removability on the Notice to Appear (NTA), he or she may file a motion to terminate. In this situation, DHS likely will seek to amend the charges on the NTA. *See* 8 C.F.R. § 1240.10(e); *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). If the case is on appeal at the BIA, the individual may file a motion to terminate and/or remand to the Immigration Court for a hearing on relief from removal. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

Individuals who are in administrative removal proceedings under INA § 238(b) should bring *Moncrieffe* to the attention of DHS. DHS has discretion to initiate administrative removal proceedings only against non-LPRs and individuals with conditional permanent residency who are convicted of an aggravated felony. Individuals in § 238(b) proceedings have the opportunity to rebut the charges of removability, INA § 238(b)(4)(C), 8 C.F.R. § 238.1, and should argue that DHS improperly initiated § 238(b) proceedings because they were not convicted of an aggravated felony. If the noncitizen has not been convicted of an aggravated felony, DHS must terminate proceedings. At this point, DHS may initiate removal proceedings under INA § 240 by issuing an NTA. 8 C.F.R. § 238.1(e).

B. Noncitizens with Final Orders

A person who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Moncrieffe*; the motion should explain the impact of *Moncrieffe* on removability and the person's prospects for relief. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Moncrieffe*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Moncrieffe* and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Moncrieffe* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Moncrieffe*.

Administrative Motion to Reconsider or Reopen. Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case) or with DHS if the person was in administrative removal proceedings under INA § 238(b).[12] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).[13] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Moncrieffe*, i.e., by May 23, 2013 or by July 22, 2013, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Moncrieffe* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.[14]

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[12] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

[13] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

[14] Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

C. Noncitizens Who Are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner's return to the United States.[15]

Noncitizens outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuit, which have not decided the issue) have invalidated the bar. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012). If filing a motion to reconsider or reopen in the First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute or impermissibly contracts the BIA's jurisdiction. Thus, it advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g., Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[16]

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[15] For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at http://www.legalactioncenter.org/sites/default/files/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf.

[16] For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues*

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

(March 14, 2012) at http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf.

national IMMIGRATION project of the National Lawyers Guild

IDP IMMIGRANT DEFENSE PROJECT

PRACTICE ADVISORY*

July 17, 2013

DESCAMPS V. UNITED STATES AND THE MODIFIED CATEGORICAL APPROACH

INTRODUCTION

> "[A]n inferior court had best respect what the [Supreme Court] says rather than read between the lines. . . .[W]e take its assurances seriously. If the Justices are just pulling our leg, let them say so."
>
> *Sherman v. Community Consol. School Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 448 (7th Cir. 1992) (Easterbrook, J.).

In a June 20 decision, *Descamps. v. United States*, No. 11-9540, 570 U.S. ___ (2013), the Supreme Court makes clear that it was not just pulling our leg in its prior rulings concerning proper application of the "categorical approach" employed to determine whether a prior state or federal criminal conviction triggers certain consequences under federal law, including consequences under the Armed Career Criminal Act (ACCA) and the Immigration and Nationality Act (INA). The categorical approach compares the language of the criminal statute, taken at its minimum, to the INA removal ground or other federal law at issue. Under this approach, the actual conduct that led to the defendant's prosecution is irrelevant; all that matters is whether the statute of conviction *necessarily*, in every case, requires a finding of conduct that triggers the later federal consequence. If not, the federal consequence is not triggered. The approach includes an additional step in some cases, often called the "modified categorical approach." When a given criminal statute defines *more than one* offense, the federal sentencing judge or immigration judge cannot perform the required categorical analysis until it has been determined *which* of these offenses the individual was convicted of. For this purpose only, the adjudicator can look beyond the language of the statute to a limited set of official court documents from the defendant's prior case (the "record of conviction"). The defendant's particular conduct remains irrelevant under this analysis; the only issue is which of the multiple offenses the statute defines formed the basis of the conviction.

The Supreme Court has repeatedly indicated over the years that this modified analysis is only warranted when a statute is "divisible"—that is, when it sets out multiple elements in the alternative, e.g. in separate subsections or a disjunctive list—and when one or more of the

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* This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. This Advisory was written by Dan Kesselbrenner, Isaac Wheeler, and Sejal Zota. The authors gratefully acknowledge the helpful contributions of Trina Realmuto and Manny Vargas. This version is substantively identical to the June 26, 2013 version, but corrects several typographical errors.

alternate offenses listed is not a categorical match. But the Board of Immigration Appeals[1] and several circuits, most notably the Ninth,[2] had nonetheless adopted rules allowing adjudicators to apply a modified categorical analysis to a much broader array of statutes, finding that the Court's contrary statements were mere dicta. In *Descamps*, the Court forcefully reiterated that it meant what it had said all along: the modified categorical approach can be used *only* when a statute is divisible.

This practice advisory covers: (1) the holding in *Descamps*; (2) why this criminal case is equally applicable to the categorical approach used in immigration proceedings; and (3) the decision's potential implications for specific removal grounds. This advisory, prepared shortly after *Descamps* was handed down, is intended to provide early guidance to advocates analyzing the decision and does not purport to be an exhaustive analysis of all of its implications.

* * *

[1] *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012)
[2] *United States v. Aguila-Montes de Oca*, 655 F. 3d 915 (2011) (en banc); *see also United States v. Armistead*, 467 F.3d 943 (6th Cir. 2006).

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Different Approaches to Modified Categorical Analysis: Examples

Advocates not already familiar with the divergent approaches courts have taken to the modified categorical approach may find the following examples helpful to illustrate the difference in these approaches. Suppose the INA provides that individuals are removable if they have been convicted of "an offense relating to possession or use of a firearm." Respondent X was previously convicted under a state law that punishes "possession of a firearm." Assuming that the state's definition of "firearm" is no broader than the federal law's definition, this conviction categorically satisfies the federal law and X is removable; no modified categorical inquiry is necessary. If, instead, the state law X had been convicted under punished "possession of (a) a firearm or (b) a knife," then the offense may be deemed divisible with respect to this removal ground, because it has two alternative sets of elements, one of which does not trigger removal under that ground. Removability would only be triggered if X's record of conviction showed that he was convicted under subparagraph (a) of the state law. Next suppose that the state statute punished "possession of a weapon" but did not further define that term. The statute defines only one offense and is not divisible, so this statute would not trigger removal under the *Descamps* rule that limits modified categorical analysis to divisible statutes. But possession of a firearm would be *sufficient* for conviction under the statute (as would possession of any other deadly weapon). On that basis, prior to *Descamps* the BIA's *Lanferman* decision and the Ninth Circuit's *Aguila-Montes de Oca* case would have allowed a modified categorical approach to determine if the record of conviction revealed what kind of weapon formed the basis for the conviction. Finally, suppose that the state law had punished aggravated assault, defined as "harmful contact resulting in serious physical injury." Although this statute, too, defines only one offense, and although it is altogether missing any element of use of a weapon, prior to *Descamps* the Ninth Circuit's rule would have permitted the judge to consult the record of conviction to determine whether X caused the required harmful contact with a firearm. (It is not altogether clear whether the BIA's rule would also have gone that far, but in *Lanferman* the BIA cited *Aguila-Montes de Oca* with approval.)

I. THE SUPREME COURT'S HOLDING IN *DESCAMPS*

Michael Descamps was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on Descamps' three prior state convictions, including one for burglary under California Penal Code Ann. § 459, which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." The ACCA increases the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." To determine whether a given conviction is a "violent felony" as defined by ACCA, courts use what has become known as the categorical approach – comparing the statute of conviction, taken at its minimum, with the definition of the identified "generic" crime. *See Moncrieffe v. Holder,* 569 U.S. __, 133 S. Ct. 1678, 1684 (2013) (applying *Taylor* v. *United States*, 495 U.S. 575 (1990) and *Shepard* v. *United States*, 544 U.S. 13 (2005) in the immigration context).

Descamps argued that his California burglary conviction did not qualify as an ACCA predicate under the categorical approach because the state burglary statute does not require "unlawful entry" and is thus broader than the generic definition of burglary. The District Court rejected Descamps' argument and imposed an enhanced sentence of 262 months in prison—more than twice the term he would otherwise have received. The court employed what has been called the modified categorical approach and examined underlying court records, finding that Descamps had admitted the elements of a generic burglary when entering his plea. The Court of Appeals for the Ninth Circuit affirmed relying on its decision in *United States* v. *Aguila-Montes de Oca*, 655 F. 3d 915 (9th Cir. 2011) (en banc), which had held that when a factfinder considers a conviction under any statute that is "categorically broader than the generic offense," the court may apply the modified categorical approach and scrutinize certain court documents to determine the factual basis of the conviction. The U.S. Supreme Court granted certiorari to resolve a growing circuit split on the question of whether the modified categorical approach applies to statutes like California burglary that contain a single, "indivisible" set of elements sweeping more broadly than the corresponding generic offense.

In an 8-1 decision, the Supreme Court reversed. It strongly reaffirmed that a federal sentencing judge (and presumably also an immigration judge ruling on whether a state crime fits into one of the criminal removal grounds – *see, infra*, section II of this advisory) may not apply the modified categorical approach and look to the underlying court record when the statute of conviction has a single, indivisible set of elements, such as California burglary. Op. at 2.[3] It also held that a conviction for that offense is never for generic burglary because it does not contain an element of unlawful entry. Op. at 10. In doing so, the Court clarified that the modified categorical approach "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute"—one that sets out multiple, alternative elements, thus defining more than one crime—for example, stating that burglary involves entry into a building *or* an automobile." Op. at 8. It "acts not as an exception, but instead as a tool" to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id*. The Court emphasized that an adjudicator applying the modified approach may not examine underlying court records to determine the facts or conduct, but only to determine of which statutory offense or section the person was convicted.

The Court began its analysis by observing that its prior caselaw explaining the categorical approach "all but resolves this case." Op. at 5. The Court explained that in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), it approved the use of a modified categorical approach in a "narrow range of cases" in which a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. Op. at 6–7. Because a sentencing court cannot tell, simply by looking at a divisible statute, under which alternative elements a defendant was convicted, the court is permitted to consult a limited class of extra-statutory documents. *See Shepard,* 544 U.S. at 26 (holding that an adjudicator may consult the plea agreement, plea colloquy transcript, charging document or indictment, and jury instructions to determine the offense of conviction when statute is divisible). But it may do so only to assess whether the defendant was convicted

[3] The citations to *Descamps* used throughout this practice advisory ("Op. at __") refer to the slip opinion, available at http://www.supremecourt.gov/opinions/12pdf/11-9540_8m58.pdf.

of the particular statutory offense that corresponds to the generic offense, not to determine the factual basis of the prior plea. Op. at 7. The Court also cited to *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), and *Johnson* v. *United States,* 559 U.S. 133 (2010), as further emphasizing this elements-based rationale for the modified categorical approach. Op. at 7–8.

Turning to this case, the Court concluded that the modified approach does not apply because the California burglary statute defines burglary over broadly (by not requiring unlawful entry and by covering shoplifting). It does not, however, define burglary "alternatively, with one statutory phrase corresponding to the generic definition and another not." Op. at 9. Significantly, the Court noted "whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id.* Because California burglary does not correspond to the generic definition, Mr. Descamps' conviction does not qualify as an ACCA predicate conviction.

Importantly, the Court flatly rejected the Ninth Circuit's approach in *Aguila-Montes,* noting that "it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents…. *Aguila-Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits." Op. at 11–12. The Court upheld those rationales, showing that the elements-centric "formal categorical approach" (1) "comports with ACCA's text and history," (2) "avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries," and (3) "averts 'the practical difficulties and potential unfairness of a factual approach.'" Op. at 12 (citing *Taylor*, 495 U.S. at 601).

The Court also rebuffed the government's attempt to distinguish overbroad statutes (which is how the government characterized the statute at issue) from statutes missing an element of the generic offense (which the government conceded may not be appropriately analyzed using a modified approach). The Court reasoned that this is a distinction without a difference, as "most overbroad statutes can also be characterized as missing an element; and most statutes missing an element can also be labeled overbroad." Op. at 21. The Court explained that "whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime." *Id.*

Lastly, it is worth noting that the government argued that the sentencing court should consider not only the statute defining an offense but also any judicial interpretations of it, and that here the state judicial rulings interpreting California burglary supplied the otherwise missing element of unlawful entry (though the government conceded that even under its theory the state statute was broader than the generic definition). Op. at 19. In responding to the government's argument, the Court specifically reserved "the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." Op. at 20. It is unclear how the Court will ultimately resolve this issue, but should adjudicators be precluded from considering judicially-defined elements or judicial rulings interpreting an element when determining whether a criminal statute is divisible, there may be both positive and negative implications for practitioners depending on the specific state statute. For example, such a rule should benefit noncitizens convicted of common law

offenses that are judicially defined such as many states' assault offenses. Because such statutes are clearly indivisible based on the language of the statute (but not necessarily based on caselaw), practitioners can argue that a conviction under a common law assault statute is broader than a crime of violence as defined in 18 U.S.C. § 16 and thereby not an aggravated felony. It may have negative implications, however, for other offenses where caselaw may help show the indivisible over-broadness of a criminal statute. For example, for conviction of a controlled substance offense in a state like California, the caselaw clarifies that the specific controlled substance is not an element of the offense, but simply an alternative means for commission of the offense that need not be specifically proven by the prosecution.[4] Thus, without pointing to the caselaw, it may be harder for practitioners to argue that certain drug offenses are indivisible.

II. *DESCAMPS'* APPLICABILITY TO IMMIGRATION CASES

The *Descamps* Court reiterated its earlier holdings that ACCA's focus on "previous convictions" shows that "'Congress intended the sentencing court to look only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" Op. at 12 (quoting *Taylor*, 495 U.S. at 600). The Court found that the Ninth Circuit's broad application of the modified categorical approach violated the statutory requirement of a "conviction." Op. at 13. Because the categorical approach in immigration proceedings similarly relates to removal grounds and bars to relief that require the respondent to have been "convicted" of specified types of crimes, s*ee, e.g.*, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), use of the modified categorical approach should be similarly limited in the immigration context.

However, in *Matter of Lanferman*, 25 I& N Dec. 721 (BIA 2012), the BIA had asserted that it could apply the modified categorical approach broadly, even in situations where doing so would be impermissible under ACCA, because "the categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena," *id.* at 728. *Lanferman* itself did not spell out the Board's reasons for this claim, but it cited other cases reasoning that an immigration judge could constitutionally order removal on the basis of "facts" about a prior conviction that were never proven to a jury beyond a reasonable doubt, whereas a federal criminal court imposing a sentence under ACCA or another federal law could not do so without violating a defendant's right under the Sixth Amendment to have a jury, rather than a judge, determine any fact that increases the maximum criminal penalty she faces. *Lanferman*, 25 I&N Dec. at 728 (citing *Conteh v. Gonzales*, 461 F.3d 45, 55–56 (1st Cir. 2006); *Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008)).

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[4] *See* additional discussion of California controlled substance offenses in Section II.B.5, *infra*. *See also* discussion of the elements/means distinction in Alito dissenting opinion at 6 ("'[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes'") (*quoting Schad v. Arizona*, 501 U.S. 624, 636 (1991)) and *compare with* majority opinion, Op at 9, n.2 ("[I]f the dissent's real point is that distinguishing between 'alternative elements' and 'alternative means' is difficult, we can see no real-world reason to worry. Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard* . . . would reflect the crime's elements").

The Board determined it would apply a modified categorical approach to "all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." *Lanferman*, 25 I&N Dec. at 727.[5] This rule clearly transgresses the rule later announced in *Descamps*, because it allows a modified categorical analysis even when a statute defines only one crime, and even when the removable conduct is *sufficient* (but not *necessary*) for conviction. In essence, the BIA's position in *Lanferman* was that it was free to conclude that Congress meant something different by using the term "convicted" in the INA than it did in using similar language in ACCA, and could therefore disregard criminal precedents based (in part) on Sixth Amendment concerns. The government included a similar claim in its brief to the Supreme Court in *Descamps*, asserting in a footnote that "*Taylor* . . . is not necessarily controlling on the BIA because the BIA is entitled to deference on its interpretation of an immigration statute, as long as it is reasonable." (Br. of Resp. 16 n.3). DHS may therefore attempt to argue that IJs and the BIA should continue to follow *Lanferman* and employ a modified categorical approach to statutes that are "indivisible," in *Descamps*' terms. This argument is mistaken for at least four reasons.

A. The term "convicted" in the INA must be given a uniform definition in criminal and immigration contexts.

Even supposing that Sixth Amendment concerns were a critical factor underlying the categorical approach in the ACCA context (but see below), it is simply untrue that these concerns do not apply to the interpretation of what it means to be "convicted" under the INA. Title II of the INA defines numerous federal crimes, including illegal re-entry. INA § 276(a), 8 U.S.C. § 1326(a)). Under INA § 276(b), a defendant's maximum sentence for this offense increases from two years to twenty years if s/he has re-entered following "conviction" for an aggravated felony. The Sixth Amendment clearly limits judicial factfinding regarding whether or not such prior convictions fall within the "aggravated felony" label, *see, e.g.*, *United States v. Gomez*, 690 F.3d 194, 198–99 (4th Cir. 2012), so *Descamps* prohibits courts from using a modified categorical approach to base an illegal re-entry sentencing enhancement on alleged conduct underlying a defendant's conviction under an indivisible statute.

Under the BIA's suggested approach in *Lanferman*, however, "conviction" means something different for other sections of Title II of the INA. The BIA suggests that federal courts should defer to its interpretation and apply the modified categorical approach to indivisible criminal statutes for purposes of determining whether noncitizens are removable under INA §§ 212(a)(2) and 237(a)(2) for having been "convicted" of aggravated felonies, crimes involving moral turpitude, etc., or are barred from relief under various other provisions of Title II relating to disqualifying convictions, such as §§ 240A(a)(3) and 240A(b)(1)(C). *Lanferman*, 25 I&N Dec. at 729 n.7. This violates the basic maxim of statutory construction that

[5] In dicta, the BIA suggested it would have the authority to disregard even federal caselaw from the immigration context under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Lanferman*, 25 I&N Dec. at 729 n.7. *But see, e.g.*, *James v. Mukasey*, 522 F.3d 250, 256 (2d Cir. 2008) (noting that circuit courts owe the BIA no deference on the analysis of criminal statutes, including the issue of when to employ a modified categorical approach to do so).

the words in a given statute should be given a consistent construction when they appear in multiple provisions. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, identical words used in different parts of the same statute are ... presumed to have the same meaning.") (internal citation and quotation omitted); *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give the[] same words a different meaning for [different] categor[ies of noncitizens] would be to invent a statute rather than interpret one."); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (holding that because the "crime of violence" definition under 18 U.S.C. § 16(b) "contains the same formulation" regarding active use of force as § 16(a), "we must give the language in § 16(b) an identical construction").

While there are exceptions to this interpretive rule, the Supreme Court has already made clear that the meaning of "conviction" and "convicted" in the INA is not one of them. In *Leocal*, it held that because the "crime of violence" aggravated felony definition it was interpreting under the categorical approach was incorporated, word for word, from criminal law, it was *required* to give the term the same construction in both contexts (and therefore to apply the same interpretive tools—in that instance, the criminal rule of lenity): "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." 543 U.S. at 12 n.8. Because the term "conviction" has criminal applications under the INA itself, it too must be interpreted the same way notwithstanding the lack of Sixth Amendment concerns under certain sections of Title II.[6]

B. *Moncrieffe* has already applied a divisibility rule inconsistent with *Lanferman* in the immigration context

The Court's recent *Moncrieffe* decision forecloses any debate over whether a more flexible approach to divisibility analysis should apply to the INA, because in that immigration case the Court applied the modified categorical approach in a narrow way that cannot be reconciled with the BIA's *Lanferman* rule. Consistent with *Descamps*, the Court described the modified categorical approach as applying to "statutes that contain several different crimes, *each described separately.*" *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684 (2013) (emphasis added). The Court applied a modified categorical analysis to the Georgia statute at issue because it *did* describe several crimes separately: it was a crime under that law to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." The Court therefore consulted the record of conviction (the plea agreement) and found that Mr. Moncrieffe was convicted under the "possess with intent" prong. *Id.* at 1685.

Turning to the "possess with intent to distribute" prong itself, the *Moncrieffe* Court found that under Georgia law it could include both remunerative transfer of marijuana (an aggravated

[6] Consistent with this understanding, the Supreme Court has repeatedly drawn on ACCA precedents in its discussions of how to apply the approach in immigration cases. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 1690, 1693 n.11 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012); *Gonzales v. Duenas-Alvarez*, 549 US 187-87, 190 (2007). In *Descamps* itself, both the majority and dissent discussed Justice Alito's dissent in *Moncrieffe* as fully relevant to the ACCA issue before the Court. Op. at 11 n.3; *id.* at 5 (Alito, J., dissenting).

felony) and non-remunerative transfer of a small amount (not an aggravated felony). 133 S. Ct. at 1686. On this basis alone, the Court concluded that "the conviction did not 'necessarily' involve facts that correspond to" the federal drug trafficking removal ground and "[u]nder the categorical approach, then, Moncrieffe was not convicted of an aggravated felony." *Id.* at 1687. The Court did not examine the plea agreement or other record of conviction documents to determine whether Mr. Moncrieffe's particular conviction rested on a remunerative transfer or transfer of more than a small amount. In other words, the Court did not regard the "possess with intent" prong as further divisible into separate offenses, but instead examined the one offense it defines *categorically* and determined that it was broader than the relevant removal ground. Note that *Matter of Lanferman* would require the opposite result: because the relevant Georgia provision "contain[s] an element" (distribution) "that could be *satisfied* by either removable or non-removable conduct" (i.e., by remunerative transfer of any amount, or non-remunerative transfer of a small amount), *Lanferman*, 25 I&N Dec. at 727 (emphasis added), the Board's rule would have required the Supreme Court to determine the "facts" on which Mr. Moncrieffe's conviction was based. *Moncrieffe* is therefore consistent with *Descamps* in rejecting the BIA rule, and proves that the Supreme Court will not tolerate application of the *Lanferman* rule in immigration cases any more than in criminal ones.

C. Lower court authority supports applying *Descamps* to Immigration Cases

Taken together, *Moncrieffe* and *Descamps* should clinch the argument that *Lanferman* has been abrogated. However, advocates may also find it useful to point to lower-court decisions that have rejected distinctions in the categorical analysis between ACCA and INA cases. For instance, in *Campbell v. Holder*, 698 F.3d 29, 33–35 (1st Cir. 2012), the First Circuit expressly disapproved the BIA's *Lanferman* rule in reliance on the Supreme Court's ACCA jurisprudence. In *Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc), the Ninth Circuit applied its (mistaken) criminal divisibility approach from *Aguila-Montes de Oca* in an immigration case, so its reversal should carry over as well. Other courts have held more broadly that the immigration and criminal categorical approaches are equivalent. *See, e.g.*, *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 478–80 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *cf. Perez-Gonzalez v. Holder*, 667 F.3d 622, 625 (5th Cir. 2012) (rejecting without comment dissent's argument that categorical approach should apply with less rigor in immigration cases). Still other courts have not addressed the issue as explicitly but have confirmed that the categorical approach applies at least as forcefully in immigration cases by applying criminal precedents to immigration petitions for review, or vice versa. *See, e.g.*, *United States v. Beardsley*, 691 F.3d 252, 263–67, 275 (2d Cir. 2012); *Evanson v. Att'y Gen.*, 550 F.3d 284, 290–92 (3d Cir. 2008); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); *Olmstead v. Holder*, 588 F.3d 556, 559 (8th Cir. 2009); *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011); *Jaggernauth v. Att'y Gen.*, 432 F.3d 1346, 1353 (11th Cir. 2005).

The discussion above indicates why the few lower courts that have suggested that the categorical approach may be less protective in immigration cases are mistaken. *See Conteh v.* 461 F.3d 45, 55–56 (1st Cir. 2006); *Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008); *Godoy-Bobadilla v. Holder*, 679 F.3d 1052, 1056–68 & n.3 (8th Cir. 2012). *Conteh*'s broad suggestion that the modified categorical approach may be more relaxed in INA cases (which the BIA cited in *Lanferman*) was explicitly renounced as incorrect *dictum* by the First Circuit when

it later considered the divisibility issue. *See Campbell*, 698 F.3d at 33–35. And *Ali* and *Godoy-Bobadilla* may be limited to the narrow and unrelated issue they addressed. These cases permit courts in the Seventh and Eighth Circuits to abandon categorical analysis altogether under certain circumstances to determine whether an offense is a "crime involving moral turpitude," but that holding, even assuming it is correct,[7] should not alter the limits on modified categorical analysis where the categorical approach *does* apply. *Cf. Campbell*, 698 F.3d at 34 ("[F]act-specific provisions aside . . . the categorical approach operates similarly in the INA context as in the criminal context.").[8]

D. Sixth Amendment considerations were only one of several factors in *Descamps* and the others fully justify applying the *Descamps* rule to immigration cases

The *Descamps* Court notes that Sixth Amendment concerns are only one of three rationales the Court has given for requiring categorical analysis of prior convictions under ACCA. Op. at 12. Indeed, *Taylor*, the first case in which the Court held that this approach was required under ACCA, was decided a full decade before the Court recognized that judicial fact-finding at sentencing violates the Sixth Amendment. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). But even if it were permissible to apply the categorical approach differently to removal proceedings merely because of the lack of Sixth Amendment concerns, neither *Descamps* nor earlier cases offer any justification for doing so. Instead, the rationales they advance for narrow application of the MCA apply with at least as much force to immigration proceedings.

The first consideration *Descamps* offers is the text of ACCA itself, which as noted above requires a "conviction." Slip op. 12. "If Congress had wanted to increase a sentence based on the facts of a prior offense," the Court reasoned, "it presumably would have said so . . . ." *Id.* (citing *Taylor*, 495 U.S. at 600; *Shepard*, 544 U.S. at 19). This reasoning is fully applicable to the INA; as the Court found in *Moncrieffe,* when "the relevant INA provisions ask what the noncitizen was 'convicted of,' not what he did, . . . the inquiry in immigration proceedings is limited accordingly." *Moncrieffe*, 133 S.Ct. at 1690.[9] The *Moncrieffe* Court cited judicial

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[7] *But see Olivas-Motta v. Holder*, ___ F.3d ___, No. 10-72459, 2013 WL 2128318 (9th Cir. May 17, 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Sanchez-Fajardo v. Holder*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 478–80 (3d Cir. 2009).

[8] The Second Circuit has also occasionally countenanced divergent outcomes of categorical analysis in criminal and immigration cases, but in the opposite direction: it has only done so in the context of adopting a rule more favorable to immigrants than its own sentencing precedent. *See Martinez v. Mukasey*, 551 F.3d 113, 118 (2d Cir. 2008); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). It has never suggested or held that the categorical approach can be *less* protective in immigration cases than it is in criminal ones. *Cf. Beardsley*, 691 F.3d at 263–67 (adopting *Descamps*' approach to divisibility and drawing no distinction between ACCA and INA precedents).

[9] The *Descamps* Court contrasted ACCA with other statutes that *do* show a congressional intent to focus on underlying conduct, and cited as an example "an immigration statute" considered in *Nijhawan v. Holder*, 557 U.S. 29 (2009), which the Court found to require a "circumstance-specific" rather than a categorical inquiry. *Descamps*, Op. at 12. The government would be foolish to attempt to argue that this vague reference to "an immigration statute" means that

decisions dating back to 1914 applying this limitation, *id.* at 1684, 1685, noting that the "reason" for the longstanding categorical approach in immigration law (since long before *Taylor*) was that "'[c]onviction is the relevant statutory hook.'" *Id.* at 1685 (quoting *Carachuri–Rosendo v. Holder,* 130 S.Ct. 2577, 2588 (2010)).[10]

The Court also noted ACCA's legislative history, pointing out that in the debate leading up to ACCA it was clear that "Congress meant . . . a prior crime [to]. . . qualify as a predicate offense in all cases or in none," rather than making such consequences turn on the underlying facts in each individual case. *Descamps*, slip op. at 12–13. The debate over the INA reveals precisely the same congressional intent. The Senate version of the bill that would become the modern INA initially proposed to authorize deportation for anyone convicted of a crime "if the

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Descamps distinguished conviction-based INA provisions in general from ACCA and does not require the same divisibility analysis for them. Such an interpretation would deliberately misread both cases. The issue in *Nijhawan* was much narrower: considering the "fraud or deceit" aggravated felony ground, INA § 101(a)(43)(M)(i), *Nijhawan* held that the isolated phrase "in which the loss to the victim . . . exceeds $10,000" permitted an immigration judge to consult some sources of extra-record evidence to determine the loss amount related to a conviction that *categorically* involves fraud or deceit. 557 U.S. at 40. That is, *Nijhawan* broadly reaffirmed the applicability of categorical analysis to conviction-based removal grounds, including § 101(a)(43)(M)(i), but held that in certain specific instances, language in the statute limits the application of certain particular removal grounds to offenses that categorically meet the definition by specifying *further* conditions and limitations that are not established categorically. *See Moncreiffe*, 133 S. Ct. at 1684 (holding that the categorical approach is "generally employ[ed]" for aggravated felony determinations under the INA, citing *Nijhawan*); *id.* at 1691 ("The monetary threshold [of § (M)(i)] is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words 'in which,' which calls for a circumstance-specific examination of "the conduct involved '*in*' the commission of the offense of conviction."). These "circumstance-specific" limits on particular removal grounds have no bearing on how the categorical and modified categorical approaches are to be applied to the generically defined components of those grounds. *See Campbell*, 698 F.3d at 34 ("[T]he Supreme Court's decision in *Nijhawan* . . . requires the *Taylor–Shepard* analysis in INA cases—save where the matching INA offense is phrased so as to require a fact-specific determination."); *accord Lanferman*, 25 I&N Dec. at 726 (observing that circumstance-specific INA provisions "do not . . . involve[] a divisibility analysis"). For a full discussion of why *Nijhawan* does not permit courts to relax or abandon the categorical analysis of conviction-based removal grounds in general, see *Practice Advisory*: *The Impact of* Nijhawan v. Holder *on Application of the Categorical Approach to Aggravated Felony Determinations* (June 24, 2009), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_pa_Nijhawan%20and%20the%20Categorical%20Approach%20-%20NIPNLG%20and%20IDP%20-%202009.pdf.

[10] The Court also cited with approval a scholarly article demonstrating that courts had applied the categorical approach for decades before *Taylor*, based on the understanding of congressional intent manifested in the conviction requirement. *Moncrieffe*, 133 S. Ct. at 1685 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688–1702, 1749–1752 (2011)).

Attorney General in his discretion concludes that the alien is an undesirable resident of the United States." *See* S. 2550, 82d Cong. § 241(a)(4). Senators objected to this language, asserting that it would permit the immigration agency to deport a person based on a discretionary view of the desirability of the immigrant rather than the conviction at issue. 98 Cong. Rec. 5420, 5421 (1952). As Senator Douglas explained:

> The phrase is "in his discretion"—that is, in the discretion of the Attorney General. In other words, frequently the test is not the fact, but whether the Attorney General might with some reason conclude that deportation was proper. The Senator (Mr. Welker) has quite properly pointed out that this leaves only a very narrow question for the courts to decide on review, and the alien has almost no protection. A lawsuit is no protection if the matter to be received is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undesirability.

Id. Thereafter, amendments to the Senate bill eliminated this problematic portion of the bill and left only the conviction-based ground of deportability for crimes involving moral turpitude, demonstrating Congress's desire to limit the immigration agency's review of underlying facts where removability is predicated on convictions. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 241(a)(4), 66 Stat. 163, 204.

Finally, the *Descamps* Court focuses on the "daunting difficulties and inequities" that result from improper use of the modified categorical approach to examine alleged facts that were gratuitous to the conviction. Op. at 15‑16. These include "expend[ing] resources" of courts and prosecutors in relitigating past criminal conduct; consulting inherently unreliable documents regarding issues that the parties had no incentive to dispute, and, most seriously in the Court's view, "depriv[ing] some defendants of the benefits of their negotiated plea deals" by treating them in the later proceeding as though they had been convicted of something other than the actual offense to which they pled guilty. *Id.* The Court in *Moncrieffe* raised the same concerns in rejecting the government's invitation to relax the categorical analysis of drug trafficking aggravated felonies: it pointed to the difficulties such an approach would create for "overburdened immigration courts," raised doubts about the reliability of the available evidence long after the fact, and noted the unfairness of treating two defendants convicted of the same offense differently "depending on what evidence remains available or how it is perceived by an individual immigration judge," 133 S. Ct. at 1690. *Moncrieffe* pointed out that these fairness and practical concerns are *more* serious in the removal context because unlike federal criminal defendants, "noncitizens are not guaranteed legal representation and are often subject to mandatory detention where they have little ability to collect [relevant] evidence." *Id.* Therefore, all of the factors discussed in *Descamps* confirming the wisdom of the categorical approach are equally or more applicable to conviction-related provisions of the INA.

III. IMPLICATIONS OF *DESCAMPS*

In addition to Descamps' impact on *Matter of Lanferman,* discussed *supra*, the holding in *Descamps* calls into question the ongoing validity of numerous administrative and circuit decisions involving application of the categorical approach in both civil and criminal proceedings. This advisory does not attempt to identify all possible arguments that a criminal defense or immigration practitioner might raise based on *Descamps*. Rather, this advisory addresses select issues that illustrate the framework for arguments a practitioner could make based on *Descamps* to argue that a statute is not divisible.

A. Illustrations of the Implications for Specific Offenses

1. Sexual Abuse of a Minor Aggravated Felony Deportability: Minority

The definition of aggravated felony includes "sexual abuse of a minor." INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A). In *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009), the Supreme Court catalogued which aggravated felony grounds are subject to the categorical approach and which are "circumstance-specific." In its analysis, the Court treated the sexual abuse of a minor definition as subject to the categorical approach. *Id.* at 37.

The generic definition of "sexual abuse of a minor" requires that the victim be a minor. *Matter of Rodriguez–Rodriguez*, 22 I&N Dec. 991, 993–94 (BIA 1999). Under *Decamps,* unless the statute of conviction also requires that the victim was a minor, it is not a "sexual abuse of a minor" aggravated felony. Prior decisions holding that a court could look to the record of conviction to determine the age of the victim—including where the statute of conviction does not require that the victim be a minor—are inconsistent with *Decamps.* For example, the Seventh Circuit previously held that a factfinder could examine the record of conviction in an age-neutral statute to determine the age of the victim. *See Lara-Ruiz v. I.N.S.,* 241 F.3d 934, 941 (7th Cir. 2001). The court deemed the statute was *divisible* as to age because some victims could be minors. *Id.* at 941. Under *Decamps*, such age neutral sexual assault statutes are *indivisible* in that the none of the elements require that the victim is a minor.

2. Firearm Deportability: Lists of Weapons

Under INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C), an individual convicted of certain firearms offenses is deportable. The Court's divisibility analysis in *Descamps* cannot be reconciled with the BIA's approach to determining divisibility in firearm deportability cases, which no longer should apply.

Notably, the Supreme Court discussed when a weapons statute is divisible in its analysis in *Decamps.* According to the Court, if a statute requires only an unspecified "weapon" for a conviction, then

> [w]hatever the underlying facts or the evidence presented, the defendant still would not have been convicted, in the deliberate and considered way the Constitution guarantees, of an offense with

> the same (or narrower) elements as the supposed generic crime (assault with a gun).

Op. at 18. Thus, under *Decamps*, where the statute of conviction does *not* specify the type of weapon, then the statute of conviction is *not* divisible and, therefore, *not* a deportable firearm offense.

Accordingly, the BIA's rule—which treats unspecified weapons statutes as divisible—should no longer apply. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992). Given the *Decamps* Court's detailed discussion regarding the divisibility of a statute that mentions that an unspecified weapon, the BIA's test fails.

In addition, *Matter of Lanferman* also dealt with the firearms removal ground. In that case, the Board adopted a broad rule that would allow immigration judges to examine the record of conviction, even for unspecified weapons statutes. *Lanferman*, 25 I&N Dec. at 731–32. However, the statutory scheme actually at issue in *Lanferman* presented a narrower question: what happens when a criminal statute uses a term that state's criminal code defines in another section of the criminal code. Specifically, the statute at issue provided that a person was guilty of menacing if "[h]e or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon…." New York Penal Law § 120.14(1). Importantly, even though a different section of the New York Penal Code defined the term "weapon" to include a series of weapons, including a firearm, *the menacing statute itself did not specifically reference a definition for the term "deadly weapon*" and the Board assumed that it applied.[11] *See Matter of Lanferman*, 25 I&N Dec. at 732 (citing New York Penal Law § 10.00(12)).

The Court in *Descamps* recognizes that a statute listing weapons would create distinct crimes whereas a statute that merely says "weapon" would not. *Compare Descamps*, Op. at 18 *with id.* at 17. Importantly, however, the Court did not address whether or not a statute is divisible where the statute itself does *not* reference a definition of a term that is defined elsewhere in the criminal code. Therefore, a person convicted under a statute that does not specifically define the term weapon in the statute itself, but the term is defined elsewhere in the criminal code, could argue that such a statute is indivisible because: (1) such a statute does not plainly fit under the Court's divisibility definition and, therefore, the government cannot meet its burden of proving deportability; and (2) because the rule of lenity should resolve the ambiguity in the noncitizen's favor.[12]

[11] Under New York law, the term, "deadly weapon" means: "Any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, or metal knuckles." N.Y. Penal Law § 10.00(12).

[12] *See* discussion of lenity at Section II.A, *supra*.

3. Child Abuse Deportability: Age of Victim

Under INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E), an individual convicted of certain child abuse offenses is deportable. The generic offense of child abuse requires that a person be convicted of an offense against a child. *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

The BIA has assumed that an assault statute that lacks an element regarding the age of the victim is a divisible offense because some of the victims will be children. *Velasquez-Herrera*, 24 I&N Dec. at 514. This view is at odds with the Supreme Court's requirement that a statute must define more than one offense before it is divisible. Thus, the BIA's analysis that a factfinder can look at the record of conviction to determine whether the victim was an adult or a child is irreconcilable with the Court's approach in *Descamps*, which permits recourse to the record of conviction only to determine of which offense a person has been convicted. Where the statute is indivisible, the factfinder must compare the statute as a whole with the generic definition. An age-neutral statute taken at its minimum, like that in *Velasquez-Herrera*, does not match the generic offense of child abuse, which requires that a person be convicted of an offense against a child.

4. Crime of Violence Aggravated Felony Deportability: Common Law Assault Statutes

As discussed above, the Court expressly reserved the issue of whether case law expanding the text of a statute can make a statute divisible. Op. at 20. For example, in Massachusetts, the assault and battery statute does not define what constitutes an "assault and battery."[13] Before *Descamps*, circuit courts generally looked to the state case law to discern the judicially created elements for the offense, and applied the modified categorical approach to the statute, which did not define battery.[14]

However, post-*Descamps*, a practitioner may argue that since the text defines only one offense the inquiry should end without a factfinder reviewing the record of conviction. In addition, the state cases arguably set out means to commit the offense and not elements. *See* Op. at 9-10. Finally, since the Court reserved the issue of whether it is permissible to consult caselaw, one may argue that it is improper to go beyond the statutory text in determining the elements of the offense. *See* Op. at 20 (reserving issue of impact of case law on elements of offense for purposes of the categorical approach).

5. Controlled Substances Deportability: Schedules or Lists of Controlled Substances

Under INA 8 U.S.C. § 1227(a)(2)(B)(i), an individual convicted of a controlled substance offenses as defined in the Controlled Substances Act (CSA), 21 U.S.C. § 802, is deportable. That Congress incorporated the list of offenses in the CSA into the generic federal definition of a

[13] M.G.L.A. § 265-13A.
[14] *See*, *e.g.*, *U.S. v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011).

controlled substance offense is significant. Where a person is convicted of a state controlled substance offense and the state's list of controlled substances is broader than the federal list in the CSA, the conviction is not a deportable offense unless the statute is divisible and the record of conviction identifies the substance. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

In its analysis in *Descamps*, the Court offered at least two examples of divisible statutes: (1) a Massachusetts burglary statute that lists a "building, ship vessel or vehicle"; and (2) a weapons statute that includes a gun and other weapons. Op. at 7, 18‑20. Significantly, however, those statutes only are divisible *if* they actually define elements for which as jury has made an unanimous finding. Op. at 14 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999) (defining elements of an offense as facts requiring unanimity in a jury)).

In addition to federal law, state laws create schedules of controlled substances. *See*, *e.g.*, 21 U.S.C. § 812; Cal. Health & Safety Code §§ 11054‑58. Most state criminal codes define drug crimes with reference to such schedules.

For example, California's list of controlled substances is broader than the federal list in the CSA (which, again, Congress incorporated into the generic definition of a controlled substance offense).[15] In California, a jury does not have to be unanimous about which drug is involved to sustain a conviction for using or being under the influence of a controlled substance.[16] California caselaw treats each controlled substance on the schedule as a "means" to commit the offense, not as an essential element necessary for a conviction.[17] As a result, one can argue that, for example, California's using or being under the influence statute[18] is indivisible for the identity of the particular substance. Under *Descamps*, this means that the factfinder cannot examine the record of conviction to determine the identity of the substance. Accordingly, arguably no California conviction for using or being under the influence of a controlled substance is a deportable offense.

B. Retroactivity (Post-Conviction Relief)

When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is deciding whether the decision was unfair when initially rendered.[19] If a Supreme Court case creates a new criminal rule after a petitioner's case became final, post-conviction relief

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[15] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1077 (9th Cir. 2007), *abrogation on other grounds recognized by Cardozo-Arias v. Holder*, 495 F. App'x 790, 792 (9th Cir. 2012).
[16] *See Sallas v. Municipal Ct.*, 86 Cal. App. 3d 737, 740-44 (Ct. App. 1978) (holding that a state defendant is entitled to know the nature of the controlled substance at issue not because it is an element of a controlled substance offense, but because due process requires it).
[17] *Ross v. Municipal Ct.*, 49 Cal. App. 3d 575, 579 (Ct. App. 1975) (explaining that the specific type of controlled substance is a "means by which" a defendant commits a controlled substance offense).
[18] California Health and Safety Code §11550.
[19] *Teague v. Lane*, 489 U.S. 288 (1989).

petitioners generally cannot benefit from the new rule because it was not the law when the decision became final.

Not all new Supreme Court decisions that expand legal rights of a criminal defendant create new rules, however. For federal habeas purposes, if a new Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.[20] According to the Supreme Court, an old rule applies to post-conviction review and cases on direct appeal.[21]

The language of the *Descamps* decision strongly suggests that it is not a new rule for retroactivity purposes.[22] Near the beginning of its analysis, the Court stated: "Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case." Op. at 5. Later in the opinion, the Court reiterated that the outcome in *Descamps* is an application of a long-standing approach as opposed to a new rule of criminal procedure. *See* Op. at 8 ("Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute.").

[20] *Williams v. Taylor*, 529 U.S. 362, 390–91(2000).
[21] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).
[22] The Court's test requires the result to be "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997). That Justice Alito dissented does not necessarily mean that *Descamps*' result was not "apparent." *See Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004).

national IMMIGRATION project of the National Lawyers Guild

IDP IMMIGRANT DEFENSE PROJECT

PRACTICE ADVISORY[*]
April 7, 2014

WHY *UNITED STATES v. CASTLEMAN* DOES NOT HURT YOUR IMMIGRATION CASE AND MAY HELP IT

INTRODUCTION

On March 26, in *United States v. Castleman*,[1] the Supreme Court settled a circuit split over the meaning of a federal criminal law that prohibits people who have been convicted of misdemeanor domestic violence crimes from possessing guns or ammunition. *Castleman* is a problematic decision for criminal defendants that may also embolden the Department of Homeland Security (DHS) to try to expand the reach of the "domestic violence" and "crime of violence" removal grounds. However, because of strong language in the opinion limiting its reasoning to the criminal context, it should have no negative impact on immigration law. This advisory covers (1) the holding of *Castleman* as to federal criminal law; (2) the reasons *Castleman* does not affect existing court and agency decisions holding that an offense must require the intentional employment of strong, violent force to trigger immigration consequences as a "crime of violence" aggravated felony or as a "crime of domestic violence"; and (3) how *Castleman* may help support arguments to narrow the "domestic violence" and "aggravated felony" removal grounds.

I. The Holding of *Castleman*

James Castleman pled guilty in 2001 to misdemeanor assault against the mother of his child under Tenn. Code Ann. § 39-13-111(b). In 2008, federal authorities charged him with violating 18 U.S.C. § 922(g)(9), which prohibits anyone who has previously been "convicted . . . of a misdemeanor crime of domestic violence" from possessing firearms or ammunition. A "misdemeanor crime of domestic violence" for purposes of this law is defined as a misdemeanor offense that

> has, as an element, the *use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is

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 This Advisory was written by Dan Kesselbrenner, Isaac Wheeler, and Sejal Zota.

This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[1] No. 12-1371 (U.S. Mar. 26, 2014). Citations to pages in *Castleman* refer to the slip opinion (available at http://www.supremecourt.gov/opinions/13pdf/12-1371_6b35.pdf).

> cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[2]

18 U.S.C. § 921(a)(33)(A) (emphasis added). Castleman moved to dismiss his indictment on the ground that his prior Tennessee conviction, which punished "intentionally or knowingly caus[ing] bodily injury" to the victim,[3] did not categorically involve "the use . . . of physical force." The district court agreed, and the Sixth Circuit affirmed. The Sixth Circuit relied on the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010), which interpreted nearly identical language in a different federal firearm statute, the Armed Career Criminal Act ("ACCA"). ACCA imposes heightened sentences for firearm possession by people with three or more prior convictions for a "violent felony," which includes an offense that "has as an element the use . . . of physical force against the person of another."[4] In *Johnson*, the Court had held that this language did *not* include offenses that amounted to battery at common law—that is, offenses that punished mere offensive touching—because the term "physical force" meant "violent force . . . capable of causing pain or injury to another person."[5]

The Supreme Court granted certiorari in *Castleman* to resolve a circuit split over whether *Johnson*'s definition of "use . . . of physical force" for the ACCA also applied to the same phrase used in the definition of a "misdemeanor crime of domestic violence" in § 922(g)(9).[6] Justice Sotomayor, writing for a seven-member majority of the Court, reversed the Sixth Circuit and held that "physical force" for purposes of the "misdemeanor crime of violence" definition means common-law battery—i.e., any offensive physical contact, not just strong or violent force. The Court also held that this offensive touching includes the use of *any* physical mechanism, even an indirect one, that causes some kind of injury—for example, inducing the victim to ingest poison.

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[2] With some critical differences discussed *infra*, this definition is similar to the definition of a "crime of domestic violence" that triggers deportability under INA § 237(a)(2)(E)(i): "any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government." In turn, 18 U.S.C. § 16 defines a "crime of violence" (in part) as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[3] Tenn. Code Ann. § 39-13-111(b) (incorporating definition of "assault" at § 39-13-101).

[4] 18 U.S.C. § 924(e)(2)(B)(i).

[5] 559 U.S. at 140.

[6] The Fourth, Sixth, Ninth and Tenth Circuits held that "physical force" meant violent force. *United States v. White*, 606 F.3d 144 (4th Cir. 2010); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). The First, Eighth and Eleventh Circuits held that 922(g)(9) applied to prior convictions involving any application of force, however slight. *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006).

In finding that "physical force" under § 921(a)(33)(A) includes all offensive contact, the Court reasoned that *Johnson*'s central point – that it would be a "comical misfit" to give the term "physical force" within the term "violent felony" under ACCA a meaning that originated from the use of the term "physical force" in *misdemeanor* battery offenses—pointed in the opposite direction here, where the term being defined is "misdemeanor crime of domestic violence." Op. at 5-6. Also, the Court reasoned that "domestic violence" was a broader concept than "violence" and encompassed many kinds of assaultive behavior that would not be characterized as "violent" in ordinary speech. Op. at 6-7.

Using the categorical and modified categorical approaches applicable to immigration and many federal criminal statutes,[7] the Court then applied this expansive definition of "force" to Castleman's prior conviction and concluded that it categorically required the use of physical force.

II. Implications of *Castleman* for Immigration Law

A. The definition of "use . . . of physical force" for immigration law is unchanged

The single biggest takeaway from *Castleman* for immigration practitioners is that the Court at footnote 4 made explicit that the decision does not affect the existing case law interpreting the "aggravated felony" "crime of violence" definition[8] or the "crime of domestic violence" ground of deportability.[9] The Court said:

> The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in *Johnson* that it could not constitute the "physical force" necessary to a "violent felony"…. The Board of Immigration Appeals has similarly extended *Johnson's* requirement of violent force to the context of a "crime of violence" under §16. *Matter of Velasquez*, 25 I. & N. Dec. 278, 282 (2010). Nothing in today's opinion casts doubt on these holdings, because—as we explain—"domestic violence" encompasses a range of force broader than that which constitutes "violence" simpliciter.[10]

Castleman, Op. at 7 n.4 (citations omitted). Footnote 4 adds that the Immigration and Nationality Act (INA) defines "crimes of domestic violence" in reference to 18 U.S.C. § 16, and in so doing, does not have the expansive meaning that the Court held applies to Castleman's misdemeanor crime of domestic violence conviction under 18 U.S.C. § 922(g)(9). The footnote concludes by saying:

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7 *See generally Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Shepard v. United States*, 544 U.S. 13 (2005).

8 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F).

9 8 U.S.C. § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

10 "Simpliciter" means "simply" or "without any condition."

> Our view that "domestic violence" encompasses acts that might not constitute "violence" in a nondomestic context does not extend to a provision like this, which specifically defines "domestic violence" by reference to a generic "crime of violence."

Castleman, Op. at 7 n.4.

In order to understand the holdings on which the *Castleman* decision does not "cast doubt," a very brief review of the case law is necessary. The Supreme Court has held that the term "force" in 18 U.S.C. § 16 means active, violent force. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The Supreme Court again interpreted the meaning of "physical force" in *Johnson v. United States*, 59 U.S. 133 (2010), which involved the ACCA. In *Johnson*, the Court held that to qualify as a "violent felony" the level of "physical force" required for a conviction must be "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id*. at 140. In *Johnson*, the Court found that the crime of battery by offensive touching does not require violent force. *Id*. at 140-41. Because the ACCA's definition of a "violent felony" is almost identical to 18 U.S.C. § 16(a),[11] the BIA in *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010), treated the rule in in *Johnson* as controlling authority in interpreting whether an offense is a "crime of violence" under § 16(a).[12]

Under *Johnson* and *United States v. Descamps*, 133 S. Ct. 2276, 2283-85 (2013),[13] a battery statute for which the minimum conduct includes a non-violent, offensive touching should not be a crime of violence because it does require violent force.[14] It is not a crime of violence even if the offender's actual conduct involved violent force because the fact finder looks to the elements, not the particular facts relating to the crime. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

By affirming the authority of *Matter of Velasquez*, 25 I&N Dec. at 282-83, and the holdings on which it relies, the Court is drawing a clear line of demarcation between a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) on the one hand, and a crime of violence under 18 U.S.C. § 16(a) and the crime of domestic violence ground of

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[11] *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" in relevant part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another.").

[12] The statute at issue in *Velasquez* was the Virginia offense for assault and battery of a family member under Virginia Code Annotated § 8.2-57.2(A), which is a common law offense. *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005).

[13] *Castleman* cites *Descamps* as supplying the test of whether a statute is divisible, but the issue of the Tennessee statute's divisibility was not squarely before the Court in *Castleman* because both parties agreed it was divisible. Op. at 12.

[14] At issue in *Johnson* was a conviction under Fla. Stat. § 784.03, which includes as battery "any intentional touching, no matter how slight." *State v. Hearns*, 961 So. 2d 211, 218 (Fla 2007).

deportability on the other hand.[15] The Court's disclaimer that its expansive holding regarding "misdemeanor crime of domestic violence" does not apply to the aggravated felony crime of violence definition and the crime of domestic violation definition is so explicit that it should prevent DHS attorneys from even arguing that a common law battery is a crime of violence or a crime of domestic violence. Should DHS attorneys attempt to import the special meaning that attaches to "misdemeanor crime of domestic violence" into removal charges, a practitioner should quote the language in footnote 4 to disabuse the immigration judge of that notion.

B. *Castleman*'s holding regarding "indirect force" does not apply to the Domestic Violence and Aggravated Felony removal grounds

In *Castleman*, the Court found that even an indirect application of force, if knowing or intentional, qualifies as a use of physical force under common law, and thus under 18 U.S.C. § 922(g)(9). Op. at 12-13. Though the district court had reasoned that one can cause bodily injury under the Tennessee law "without the use of physical force," for example, by "deceiving [the victim] into drinking a poisoned beverage, without making contact of any kind," Op. at 12, the Court disagreed, clarifying the meanings of both "force" and "use" for the purposes of 18 U.S.C. § 922(g)(9).

First, the Court noted with regards to "force," that under common law, the force used in battery "need not be applied directly to the body of the victim," and may encompass "administering a poison or infecting with a disease." Op. at 12-13 (citing 2 W. LaFave, Substantive Criminal Law § 16.2(b) (2d ed. 2003)). The Court concluded that "it is impossible to cause bodily injury without applying force in the common-law sense." Op. at 13.

Second, the Court explained that as long as the application of force (as defined by common law) is intentional or knowing, it qualifies as a "use" of force. In doing so, the Court looked to the analysis in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), an immigration case interpreting 18 U.S.C. § 16. Op. at 13 ("*Leocal* held that the 'use' of force must entail a higher degree of intent than negligent or merely accidental conduct; it did not hold that the word 'use' somehow alters the meaning of 'force.'") (internal citations omitted).

Because of *Castleman's* discussion of *Leocal*, DHS may argue that an application of indirect force, such as causing injury by drugging someone, qualifies as a use of force even for the purposes of 18 U.S.C. § 16 and the INA in Circuits that have held otherwise.[16] In response, a practitioner can point out that the analysis in *Castleman* is expressly limited to the common law

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[15] The Supreme Court has held that a factfinder must construe § 16(a) and § 16(b) identically. *Leocal*, 543 U.S. at 11. *See* section II.D.

[16] *See, e.g., U.S. v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) (finding that the offense of injury to a child does not meet the definition of a crime of violence because it can be committed by an intentional act without the use of physical force such as by putting poison or another harmful substance in the child's food or drink); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (finding that the offense of intentionally causing injury to another does not satisfy § 16(a) where use of force is not a formal element and rejecting reasoning in *Matter of Martin*, 23 I&N Dec. 491, 498 (BIA 2002)).

concept of "force," which applies only to a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), and not to 18 U.S.C. § 16. Op. at 5-10 (attributing the common-law meaning of "force" to §921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence," after declining to read the common-law meaning of "force" into ACCA's definition of a "violent felony," and 18 U.S.C. § 16's crime of violence). The Court throughout the opinion makes clear that this common law definition was correctly rejected in *Johnson* "because it was a 'comical misfit.'" Op. at 5 (internal citations omitted).

C. *Castleman* strengthens arguments that the categorical approach applies to determining whether an offense was committed against a qualifying victim for "Domestic Violence" deportability

The Court in *United States v. Hayes*, 555 U.S. 415, 418 (2009) held that the predicate "misdemeanor crime of domestic violence" in a prosecution under 18 U.S.C. § 922(g)(9) need not have a domestic relationship element. This means that the categorical approach does not apply to proving that the defendant's predicate misdemeanor was committed against a family member; the federal prosecutor charging a § 922(g)(9) offense can introduce evidence from outside the record of conviction to show that a general assault or battery offense was committed (in fact) against a person who has the requisite relationship to the defendant. *Id*. at 421-23. The *Hayes* Court reasoned that it would be under-inclusive to require the domestic relationship be an element of the predicate "misdemeanor crime of domestic violence," because at the time Congress passed § 922(g)(9), many states prosecuted domestic violence under generally applicable assault/battery statutes that did not have any element of a domestic relationship. *Id* at 427.

Many advocates had assumed that *Hayes*' holding that a "misdemeanor crime of domestic violence" does not require the factfinder to apply the categorical approach to determine the requisite domestic relationship would also apply to determining deportability for a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E). The BIA said as much in *dicta* (but did not decide this point) in *Matter of Velasquez*, 25 I&N Dec. 278, 281 (BIA 2010).[17] Arguably, under *Castleman* a different calculus for determining underinclusiveness should apply to a "crime of domestic violence" under the INA, which, per footnote 4 in *Castleman*, has a less expansive meaning than the term "misdemeanor crime of domestic violence." According to footnote 4, the term "misdemeanor crime of domestic violence" conveys the broad common law meaning of force, while the term "crime of domestic violence" means "active and violent force" as the BIA said in *Velasquez*, 25 I&N Dec. at 282. That Congress intended for the terms to have a different scope suggests that it might not be under-inclusive to require that the domestic nature of the relationship be an element of the offense of conviction for the "crime of domestic violence" ground of deportability, which Congress never intended to have as expansive a meaning as the term "misdemeanor crime of domestic violence."

[17] *See also Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010) (holding that, in light of *Hayes*, a crime of domestic violence under the INA "need not have as an element the domestic relation of the victim to the defendant").

D. *Castleman* strengthens arguments that a reckless use of force is not an aggravated felony or deportable domestic violence offense

In discussing the various subsections of the Tennessee assault statute, the Court explained that "the merely reckless causation of bodily injury under § 39–13–101(1) may not be a 'use' of force," and thus may not satisfy 18 U.S.C. § 922(g)(9). Op. at 11. The Court noted that while "*Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force" under 18 U.S.C. § 16, "the Courts of Appeals have almost uniformly held that recklessness is not sufficient." *Id*. at 11, n. 8 (citing cases holding that reckless crimes are not crimes of violence under either 18 U.S.C. § 16(a) or (b)).[18] While the specific issue was not presented in *Castleman*, the Court's discussion in footnote 8 suggests that reckless offenses do not satisfy either § 16(a) or § 16(b), and undermines contrary Board law, which suggests that reckless conduct may satisfy § 16(b).[19]

Should DHS charge a noncitizen as removable or ineligible for relief based on an asserted "crime of violence" aggravated felony for conviction for a crime with a reckless mental state, practitioners should point to *Castleman* as additional support for the proposition that reckless conduct is not sufficiently purposeful to constitute a crime of violence under 18 U.S.C. § 16.

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[18] In *Leocal*, the Court interpreted 18 U.S.C. § 16 and held that it must identically construe both § 16(a) and § 16(b). *Leocal*, 543 U.S. at 11 (because "[16(b)] contains the same formulation we found to be determinative in § 16(a) … we must give the language in §16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct").

[19] *See Matter of Singh*, 25 I&N Dec. 670, 676 (BIA 2012) ("the critical inquiry [under 16(b)] is not the mens rea required for conviction of a crime, but rather whether the offense, by its nature, involves a substantial risk that the perpetrator will [intentionally] use force in completing its commission"). *See also Aguilar v. Attorney General of U.S.*, 663 F.3d 692, 699 (3d Cir. 2011) ("crimes carrying a mens rea of recklessness may qualify as crimes of violence under § 16(b) if they raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime").

PRACTICE ADVISORY[*]
March 14, 2014

MATTER OF ABDELGHANY: IMPLICATIONS FOR LPRs SEEKING § 212(c) RELIEF

INTRODUCTION

In a long-awaited precedent decision issued on February 28, the Board of Immigration Appeals (Board or BIA) has withdrawn from its "comparable grounds" rule and the distinction between convictions based on pleas and trials for the purposes of eligibility for § 212(c) relief. *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Although issued after many immigrants were improperly denied § 212(c) relief, this favorable decision brings Board precedent in line with the Supreme Court's decisions in *Judulang v. Holder*, *Vartelas v. Holder*, and *INS v. St. Cyr*. The decision broadens the availability of § 212(c) relief for lawful permanent residents (LPR) currently in removal proceedings with plea agreements and convictions preceding the enactment of Antiterrorism and Effective Death Penalty Act of 1996 **(**AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and provides grounds for seeking reopening of past removal orders involving such individuals.

This practice advisory describes: (1) the Board's holding in *Matter of Abdelghany*; (2) its impact on various LPRs seeking § 212(c) relief; and (3) steps that lawyers (or immigrants themselves) should take immediately to take advantage of its benefits, including in already concluded proceedings. Accompanying this advisory is a sample Motion to Reconsider to the BIA in light of *Matter of Abdelghany*. The motion is available as a separate, downloadable document in Word format to allow attorneys to modify it, as necessary.

* * *

 This Advisory was written by Sejal Zota and Manny Vargas. The authors gratefully acknowledge the helpful contributions of Dan Kesselbrenner and Trina Realmuto.

This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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I. THE BOARD'S HOLDING IN *MATTER OF ABDELGHANY*

A. Background

Until repealed in 1996, § 212(c) of the Immigration and Nationality Act (INA) permitted the Attorney General to grant discretionary relief to an excludable/inadmissible[1] immigrant, if the immigrant had a lawful unrelinquished domicile in the United States for at least seven years before temporarily leaving the country and if the immigrant was not inadmissible on one of two specified grounds. *See* INA § 212(c) (1994 ed.). By its terms, § 212(c) applied only in exclusion proceedings, but the BIA extended it decades ago to deportation proceedings as well. *See Matter of Silva*, 16 I& N Dec. 26 (1976).

Although Congress first restricted and then eliminated § 212(c) relief in 1996,[2] the Supreme Court in *INS v. St. Cyr* determined that § 212(c) relief remains available to an immigrant whose removal is based on a guilty plea agreement before the waiver's repeal. 533 U.S. 289, 326 (2001). In implementing *St. Cyr*, the Executive Office for Immigration Review

[1] With the passage of IIRIRA, the former grounds of "exclusion" came to be identified as grounds of "inadmissibility."

[2] In 1996, AEDPA eliminated § 212(c) relief for LPRs who were *deportable* based on convictions for a broad set of offenses. *See* Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (effective Apr. 24, 1996). Less than 1 year after AEDPA went into effect, Congress repealed section 212(c) in its entirety. *See* IIRIRA, Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective Apr. 1, 1997).

(EOIR) in 2004 issued regulations making § 212(c) relief unavailable to immigrants convicted after trial, on the theory that such individuals cannot demonstrate detrimental reliance on the potential availability of section 212(c) relief.[3] In *Vartelas v. Holder*, however, in ruling on the retroactive impact of another IIRIRA amendment, the Supreme Court held that reliance on prior law is not required to find that a new law has impermissible retroactive effect. 132 S. Ct. 1479, 1491 (2012).

A separate restriction on available § 212(c) relief came in 2005, with the Board's announcement of the "comparable grounds" test, holding that LPRs charged with deportability do not have a right to seek § 212(c) relief unless the charged ground of deportation is "substantially equivalent" to a ground of inadmissibility. *Matter of Blake*, 23 I&N Dec. 722, 729 (BIA 2005); *Matter of Brieva*, 23 I&N Dec. 766, 773 (BIA 2005). In both cases, the LPR had been charged under an aggravated felony ground, as "sexual abuse of a minor" (Blake) and "crime of violence" (Brieva). The Board concluded that neither of these aggravated felony deportation categories had a comparable ground of inadmissibility so as to permit the LPR to apply for § 212(c) relief under the statutory counterpart rule set forth in 8 C.F.R. § 1212.3(f)(5). *Id*.

In 2011, in *Judulang v. Holder*, the Supreme Court unanimously rejected as "arbitrary and capricious" the Board's "comparable grounds" approach. 132 S. Ct. 476, 485 (2011). The Court explained that "by hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner." *Id*. at 484. The Court remanded to the Board to bring its interpretation of § 212(c) relief in line with the Court's decision. *Id*. at 490.

Two years later, the Board answered the Court's mandate in *Matter of Abdelghany*, which had been pending at the time of the *Judulang* decision. It presented a case in which the immigration judge found the respondent removable for a conviction of an aggravated felony under INA § 101(a)(43)(E)(i) & (U), based on a 1995 arson conviction. The immigration judge denied § 212(c) relief because the aggravated felony ground did not have a comparable ground of inadmissibility, as required by 8 C.F.R. § 1212.3(f)(5) and as applied in *Matter of Blake* and *Matter of Brieva*. On February 28, 2014, however, the Board reversed.

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[3] *See* 69 Fed. Reg. at 57,828, 57,835 (codified at 8 C.F.R. § 1212.3(h)). In *St. Cyr*, the Supreme Court reasoned that "IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations" and was thereby impermissible. *INS v. St. Cyr*, 533 U.S. at 321. Based on the *St. Cyr* Court's focus on the contractual nature of plea agreements, some courts had concluded that the AEDPA and IIRIRA amendments have no impermissible retroactive effect on individuals who were convicted of deportable offenses *after trial*. *See Matter of Abdelghany*, 26 I&N Dec. at 267 (citing cases).

B. Holding of *Abdelghany*

The Board used this decision as a vehicle to adopt a uniform nationwide rule for § 212(c) relief eligibility consistent with the Supreme Court's decisions in *Judulang v. Holder*, *Vartelas v. Holder*, and *INS v. St. Cyr*.

- First, the Board overruled both *Matter of Blake* and *Matter of Brieva* and 8 C.F.R. § 1212.3(f)(5). It also overruled those cases excluding from 212(c) relief LPRs whose convictions did not trigger inadmissibility, such as firearm convictions.[4] The Board reasoned that consistent with *Judulang*, this rule "places inadmissible and deportable lawful permanent residents on a truly level playing field while disregarding mechanical distinctions that arise from the statutory structure and that bear no relation either to deportable aliens' fitness to remain in this country or to the overall purposes of the immigration laws." *Matter of Abdelghany*, 26 I&N Dec. at 265. Under *Abdelghany*, a noncitizen may apply for § 212(c) relief in removal proceedings to waive a ground of deportability, including firearm convictions, even if there is no substantially equivalent ground of inadmissibility.

- Second, although Mr. Abdelghany had been convicted by guilty plea, the decision eliminated the distinction between convictions based on pleas and trials for the purposes of § 212(c) eligibility, and thereby abrogated the regulatory prohibition in 8 C.F.R. § 1212.3(h) against granting § 212(c) relief to immigrants convicted after trial. In doing so, the Board pointed to the Supreme Court's decisions in *INS v. St. Cyr*, 533 U.S. at 326, prohibiting retroactive application of AEDPA and IIRIRA's amendments to § 212(c), and *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012), clarifying that the presumption against retroactive application of statutes does not require a showing of detrimental reliance:

  > Moreover, we conclude that a lawful permanent resident convicted after trial need not demonstrate that he acted or could have acted … in reliance on the availability of section 212(c) relief when structuring his conduct. All that is required under *St. Cyr* and *Vartelas* is a showing that the AEDPA or IIRIRA amendments attached a "new disability" to pleas or convictions occurring before their effective dates.

  Matter of Abdelghany, 26 I&N Dec. at 268-69. Under *Abdelghany*, an LPR may apply for § 212(c) relief in removal or deportation proceedings without regard to whether the relevant conviction resulted from a plea agreement or a trial.

- Third, the Board held that an LPR who is presently deportable or removable based on a pre-IIRIRA plea or conviction is eligible for § 212(c) relief, even if the individual was not deportable under the law in effect at the time of the conviction. *Matter of Abdelghany*, 26 I&N Dec. at 271-72. Under *Abdelghany*, an LPR may apply for § 212(c) relief in removal or

[4] *See, e.g., Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979) (finding § 212(c) ineligibility for a firearm possession offense because the offense did not come within the grounds of excludability as a crime involving moral turpitude), *aff'd*, 624 F.2d 191 (9th Cir. 1980); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991).

deportation proceedings without regard to whether he or she was removable or deportable under the law in effect when the conviction was entered.

The Board found that Mr. Abdelghany satisfied the test and remanded his case for an adjudication on the merits of the § 212(c) application. *Matter of Abdelghany*, 26 I&N Dec. at 273.

II. LPRS NOW ELIGIBLE TO SEEK § 212(C) RELIEF

This section outlines the law, after *Matter of Abdelghany*, for when a lawful permanent resident may seek § 212(c) relief from removal or deportation based on a pre-April 1, 1997 plea agreement or trial conviction, depending on the date of the plea agreement/conviction.[5]

A. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *before November 29, 1990*

Prior to November 29, 1990, the effective date of the Immigration Act of 1990 (IMMACT), the INA provided that a lawful permanent resident immigrant could seek § 212(c) relief if the immigrant had accrued 7 consecutive years of lawful unrelinquished domicile in the United States. The only substantive limitation was that such an immigrant could *not* waive certain grounds of excludability relating to national security or to former persecutors in Nazi Europe.[6] But, then, under IMMACT, § 212(c) relief was made inapplicable to an immigrant convicted of one or more aggravated felonies for which the immigrant had served a term of imprisonment of at least 5 years.[7]

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[5] In cases where an applicant for relief was convicted by plea, it is the date of the plea agreement that governs. The date of the plea agreement is the date that the plea agreement was agreed to by the parties. *See* 8 C.F.R. § 1212.3(h). In addition, although not acknowledged in *Matter of Abdelghany*, an immigrant whose plea agreement/conviction occurred after the relevant amendment restricting § 212(c) relief, but whose underlying conduct preceded the amendment, may be able to argue that the law on the date of the conduct governs. *See Vartelas v. Holder*, 132 S. Ct. at 1490 (describing as "doubly flawed" the reasoning of courts that had rejected, based on a lack of reliance, arguments against retroactive application of new immigration laws enacted after the date of the criminal conduct at issue); *see also* Practice Advisory -- *Vartelas v. Holder*: Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts (April 5, 2012), posted at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Vartelas_Practice_Advisory.pdf.

[6] *See* former INA section 212(c) (1990) (omitting these grounds when listing INA section 212(a) excludability grounds waivable under the provision).

[7] *See* section 511 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Sta. 4978, as amended by section 306(a)(10) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

Even before *Matter of Abdelghany*, however, the federal government had recognized that this IMMACT aggravated felony five-years-served prohibition should not apply to any aggravated felony conviction resulting from a plea agreement made before November 29, 1990.[8] *Matter of Abdelghany* now rules that this prohibition should also not apply to any aggravated felony conviction resulting from a trial where the conviction was entered before November 29, 1990. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility. Thus, the only restriction that should apply to immigrants with pre-November 29, 1990 plea agreements/convictions are the original limited bars for waiving certain grounds of inadmissibility relating to national security or former persecutors in Nazi Europe.

B. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *on or after November 29, 1990 but before April 24, 1996*

Under AEDPA, enacted on April 24, 1996, § 212(c) relief was made further inapplicable to an immigrant deportable by reason of having committed any aggravated felony (regardless of time served), a controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer.[9]

Even before *Matter of Abdelghany*, however, the federal government had recognized that the AEDPA criminal bars should not apply to any conviction resulting from a plea agreement made before April 24, 1996.[10] *Matter of Abdelghany* now rules that this prohibition should also not apply to any aggravated felony conviction resulting from a trial where the conviction was entered before April 24, 1996. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility.

But to a plea agreement/conviction on or after November 29, 1990, the government will apply the pre-existing IMMACT bar on § 212(c) relief of one or more aggravated felonies for which the immigrant has served a term of imprisonment of at least 5 years.[11] The government will also apply the already existing bars for immigrants subject to certain

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[8] *See* 8 C.F.R. § 1212.3(f)(4)(ii); *see also Toia v. Fasano,* 334 F.3d 917, 919-21 (9th Cir. 2003).

[9] *See* section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[10] *See* 8 C.F.R. § 1212.3(h)(1); *see also INS v. St. Cyr,* 533 U.S. 289 (2001).

[11] If the immigrant did not serve the five years in a single term of imprisonment, there is support for arguing that the IMMACT five-years-served bar does not apply. *See, e.g., Paulino-Jimenez v. INS,* 279 F.Supp.2d 313 (S.D.N.Y. 2003); *Toledo-Hernandez v. Ashcroft,* 280 F.Supp.2d 112 (S.D.N.Y. 2003).

grounds of excludability/inadmissibility relating to national security and former persecutors in Nazi Europe, as well as a new bar for international child abductors added in 1991.[12]

C. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *on or after April 24, 1996 but before April 1, 1997*

As explained earlier, under IIRIRA, which became generally effective on April 1, 1997, the former § 212(c) waiver provision was repealed entirely.

Even before *Matter of Abdelghany*, however, the federal government had recognized that the IIRIRA repeal should not apply to any conviction resulting from a plea agreement made on or between April 24, 1996 and April 1, 1997.[13] *Matter of Abdelghany* now rules that the repeal should also not apply to any conviction resulting from a trial where the conviction was entered before April 1, 1997. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility.

But the government will apply the pre-existing AEDPA criminal bars on § 212(c) relief to a plea agreement/conviction on or after April 24, 1996 making an immigrant deportable for any aggravated felony, controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer.[14] The government will also apply the previously existing bars for immigrants subject to certain grounds of inadmissibility relating to national security, former persecutors in Nazi Europe, and international child abductors.[15]

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[12] *See* 8 C.F.R. § 1212.3(f)(3); *see also* former INA section 212(c) (1994) (prohibiting relief for those excludable under then INA sections 212(a)(3) and (9)(C)). The new § 212(c) bar for international child abductors was added, and made effective as if included in IMMACT, by sections 307(b) and 310 of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

[13] *See* 8 C.F.R. § 1212.3(h)(2); *see also INS v. St. Cyr*, 533 U.S. 289.

[14] *See* 8 C.F.R. § 1212.3(h)(2). Note, however, that the AEDPA bars do not apply to immigrants who are in exclusion proceedings initiated before April 1, 1997, *see Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997), and arguably, by extension, to those who are in removal proceedings initiated after April 1, 1997 where the removal proceedings are based on inadmissibility charges relating to a pre-April 1, 1997 conviction. The AEDPA bars also do not apply to those who are in deportation proceedings initiated before April 24, 1996. *See* 8 C.F.R. § 1212.3(g).

[15] *See* 8 C.F.R. § 1212.3(f)(3).

III. SUGGESTED STRATEGIES FOR LPRS IN PROCEEDINGS OR WHO WERE PREVIOUSLY DENIED § 212(C) RELIEF

This section offers strategies to consider for LPRs whose cases are affected by *Matter of Abdelghany*. Accompanying this advisory (as a separate document) is a sample Motion to Reconsider that provides additional guidance in implementing the strategies discussed below.

A. LPRs in pending removal cases

Individuals who are in removal proceedings (either before the immigration court or on appeal at the BIA) may request § 212(c) relief under *Matter of Abdelghany*. If the case is on appeal at the BIA, the LPR may want to file a motion to remand to the immigration court for a § 212(c) hearing. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

B. LPRs with final orders pending

Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand to the Board under *Matter of Abdelghany*. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Matter of Abdelghany*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Matter of Abdelghany* and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Matter of Abdelghany* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Matter of Abdelghany*.

Administrative Motion to Reconsider. Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the Board or the immigration court (whichever entity last had jurisdiction over the case).[16] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and

[16] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

240(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).[17] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Matter of Abdelghany*, i.e., by March 30, 2014 or by May 29, 2014, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Matter of Abdelghany* and argue that the filing deadline was equitably tolled until the Board issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.[18]

C. LPRs who are outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner's return to the United States.[19]

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.[20] If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA

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[17] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

[18] Note, however, that courts of appeals have held that they lack jurisdiction to review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

[19] For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Return_to_US_After_Successful_Petition_for_Review_or_%20Motion%20(12-21-2012).pdf.

[20] Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the Eighth Circuit,

or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua sponte*) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence (i.e., based on the agency's malfeasance in misconstruing the law) or ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g.*, *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, as stated above (see n.18, *supra*), most courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[21]

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nipnlg.org or Beth Werlin at bwerlin@immcouncil.org.

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which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

[21] For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (Nov. 30, 2013) at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Departure%20Bar%20PA%2011-20-13.pdf

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A *Defending Immigrants Partnership* Practice Advisory*
DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY*
April 6, 2010 (revised April 9, 2010)

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). The Court held that, in light of the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

- **The Court found that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer's silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

A. Summary

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long." Mr. Padilla stated that he relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court's Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.[1]

The U.S. Supreme Court's Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, slip op. at 2. The Court observed that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years." *Id*. at 2. The Court stated:

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that "accurate legal advice for noncitizens accused of crimes has never been more important" and that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 6.

In Mr. Padilla's case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an "objective standard of reasonableness."[2]

The Supreme Court's Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.* at 17.

B. Key Points For Defense Lawyers

1. The Court found that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the

scope of the constitutionally "reasonable professional assistance" required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a "particularly severe penalty" that is "intimately related" to the criminal process. *Id*. The Court stated:

> Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.

Id. (citations omitted).

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.

In assessing whether the counsel's representation in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness," the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

> We long have recognized that that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.

Padilla at 9-10 (citations omitted).

3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).

Finding that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation," *id.* at 9, the Court concluded that counsel's misadvice in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness." The Court further noted that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that "there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

> A holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.

Id. (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 11-12. But the Court then went on to say that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel's representation "fell below an objective standard of reasonableness," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id*. at 14 (citation omitted).

4. The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that "informed consideration" of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

> [I]nformed consideration of possible deportation can only benefit both the State and the noncitizen defendants during the plea bargaining process. . . . By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation . . . . At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty . . . .

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel's failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, "NLADA Guidelines"), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, "ABA Pleas of Guilty Standards").

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of *every* client at the *initial* interview. *See* NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. *See State v. Paredez*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id*. cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id*. cmt. at 126-27.

The fact that many states[3] require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

> The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called "collateral" consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to "see that justice is accomplished." National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, "the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted") (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

Duty to investigate and advise about immigration consequences of sentencing alternatives:

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be "familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation"; and *id*. 8.3(a) requires the client be informed of "the likely and possible consequences of sentencing alternatives." For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered. *See, e.g.*, 8 U.S.C. 1101(a)(43) (prison sentence of one year for theft offense results in "aggravated felony" mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation).

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

[*] This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association's Immigration Project.

[1] Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the "collateral consequences" rule. *See, e.g., People v. Ford,* 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. *See, e.g., State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) ("[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.").

[2] The Court remanded Mr. Padilla's case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*'s second prong—prejudice as a result of his constitutionally deficient counsel.

[3] Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Appendix A

Immigrant Defense Project
Immigration Consequences of Convictions Summary Checklist*

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)

Aggravated Felony Conviction

➢ *Consequences* (in addition to deportability):
- Ineligibility for most waivers of removal
- Ineligibility for voluntary departure
- Permanent inadmissibility after removal
- Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal

➢ *Crimes covered* (possibly even if not a felony):
- Murder
- Rape
- Sexual Abuse of a Minor
- Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)
- Firearm Trafficking
- Crime of Violence + 1 year sentence**
- Theft or Burglary + 1 year sentence**
- Fraud or tax evasion + loss to victim(s) > $10,000
- Prostitution business offenses
- Commercial bribery, counterfeiting, or forgery + 1 year sentence**
- Obstruction of justice or perjury + 1 year sentence**
- Certain bail-jumping offenses
- Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
- Attempt or conspiracy to commit any of the above

Controlled Substance Conviction

➢ EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CIMT) Conviction

➢ For crimes included, see Grounds of Inadmissibility
➢ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)
➢ Two CIMTs committed at any time "not arising out of a single scheme"

Firearm or Destructive Device Conviction

Domestic Violence Conviction or other domestic offenses, including:

➢ Crime of Domestic Violence
➢ Stalking
➢ Child abuse, neglect or abandonment
➢ Violation of order of protection (criminal or civil)

GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)

Conviction or *admitted commission* of a **Controlled Substance Offense**, or DHS has reason to believe individual is a drug trafficker

➢ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)

Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** (CIMT)

➢ Crimes in this category cover a broad range of crimes, including:
- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses

➢ *Petty Offense Exception*—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months

Prostitution and Commercialized Vice

Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

INELIGIBILITY FOR US CITIZENSHIP

Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:

➢ **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
➢ **Crime Involving Moral Turpitude** (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
➢ **2 or more offenses** of any type + **aggregate prison sentence of 5 years**
➢ **2 gambling offenses**
➢ **Confinement** to a jail for an aggregate period of 180 days

Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) *permanently* bars a finding of moral character and thus citizenship eligibility

CONVICTION DEFINED

A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:

(i) a judge or jury has found the noncitizen guilty or the noncitizen 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 noncitizen's liberty to be imposed.

THUS:

➢ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
➢ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction
➢ A youthful offender adjudication (e.g., NY YO) is NOT a conviction

INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL

➢ Aggravated felony conviction
➢ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States

INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL

"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:

➢ Aggravated felonies
- All will bar asylum
- Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
- Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding

➢ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)

*For the most up-to-date version of this checklist, please visit us at **http://www.immigrantdefenseproject.org**.

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

See reverse ➤

[12/06]

Immigrant Defense Project
Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- Drug offense (§5.4)
- Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- Property offense, including theft, burglary or fraud offense (§5.6)
- Firearm offense (§5.7)

1. If your client is a LAWFUL PERMANENT RESIDENT:

➢ First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)

➢ Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).

➢ If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).

➢ If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a REFUGEE or PERSON GRANTED ASYLUM:

➢ First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).

➢ If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is ANY OTHER NONCITIZEN who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

➢ First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).

➢ If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).

➢ If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (**TPS**) of not removing individuals based on conditions in that country:

➢ First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).

➢ If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).

➢ In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

See reverse ➤

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

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1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City's five boroughs, has an immigration unit that counsels attorneys in the organization's criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at http://www.immigrantdefenseproject.org/webPages/crimJustice.htm*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** *(www.defendingimmigrants.org)*, which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, *see* Defending Immigrants Partnership, *Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: www.defendingimmigrants.org.**

- DIP partner **Immigrant Defense Project** (IDP) is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: www.immigrantdefenseproject.org**.
- DIP partner **Immigrant Legal Resource Center** (ILRC) is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: www.ilrc.org**.

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org**.

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled "Federal System, Regional, or State-Specific Resources."

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at http://defendingimmigrationlaw.com.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at http://criminalandimmigrationlaw.com.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***The Criminal Lawyer's Guide to immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at http://www.abanet.org.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at http://www.ailapubs.org.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at http://www.jurispub.com.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: http://west.thompson.com.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at http://www.immigrantdefenseproject.org/webPages/practiceTips.htm.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at http://www.immigrantdefenseproject.org/webPages/crimJustice.htm.
- ***Tooby's Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at http://www.criminalandimmigrationlaw.com.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (*formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (*formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserve, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (*formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at http://www.criminalandimmigrationlaw.com.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@pubdef.lacounty.gov.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at http://www.in.gov/ipdc/general/manuals.html.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at http://www.michiganlegalaid.org.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at http://www.ailaoregon.com.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and http://www.defensenet.org/immigration-project/immigration-resources.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at http://www.defensenet.org/immigration-project/immigration-resources.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (*formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.