THE LAW OFFICES OF

NORTON TOOBY

Crimes & Immigration
eNewsletter

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This eNewsletter contains selected recent developments in criminal immigration law occurring during August, 2011.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2007), with monthly updates online at www.NortonTooby.com.

INSIDE

ARTICLES

CRIMINAL DEFENSE OF IMMIGRANTS – FEDERAL – SENTENCE – ARGUMENTS FOR INVALIDITY OF EXCLUDING NONCITIZEN BOP INMATES FROM ELIGIBILITY FOR THE RESIDENTIAL DRUG TREATMENT PROGRAM AND ONE-YEAR SENTENCE REDUCTION

There are excellent arguments in favor of granting federal habeas corpus relief to noncitizen inmates of the Bureau of Prisons, for illegally excluding them from eligibility for the Residential Drug Treatment Program and its concomitant one-year sentence reduction:

> [Counsel] can argue that the ineligibility for a sentence reduction based on immigration status should result in a lower sentence. [*United States v. Camejo*, 333 F.3d 669, 677 (6th Cir. 2003); *United States v. Lopez-Salas*, 266 F.3d 842, 850 (8th Cir. 2001); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001); *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997); *United States v. Cubillos*, 91 F.3d 1342, 1344 (9th Cir. 1996).] In habeas corpus, the BOP alien-exclusion rule is arbitrary and capricious under § 706 based on the APA letters and violated § 553(b) because no notice of the effect on aliens was provided, so no comments could be made. Lastly, the recent exclusion of aliens from residential treatment violates the plain language of the statute that makes availability of appropriate treatment mandatory. [18 U.S.C. § 3621(b).] The statute plainly requires that residential treatment be available for all eligible prisoners, [18 U.S.C. § 3621(e)(1)(C)] and "eligible prisoner" means only that the prisoner has a substance abuse problem and is willing to participate, with no other requirement. [18 U.S.C. § 3621(e)(5)(B).]
>
> Excluding all prisoners with immigration detainers from an immensely beneficial and cost-saving

> program based on the misinterpretation of the position of the American Psychological Association deprives the United States and the returning prisoners' home countries the benefits of lowered recidivism and drug-free lifestyles. The cost-savings of allowing over a quarter of the prison population to be potentially eligible for the one year sentence reduction is obvious. The RDAP program should be open to all prisoners who need substance abuse treatment. [*See generally* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 Federal Sentencing Reporter 174 (2009).]

(Stephen R. Sady & Lynn Deffebach, A Defender's Guide To Sentencing And Habeas Advocacy Regarding Bureau Of Prisons Issues 12-13 (Aug. 2011) http://or.fd.org/Case%20Documents/BOP%20Update%202011.pdf.)
CD:6.12

PRACTICE ADVISORY – MODIFIED CATEGORICAL ANALYSIS – FACT IN RECORD OF CONVICTION NECESSARY TO MEET CONVICTION-BASED GROUND OF REMOVAL WAS NOT NECESSARILY REQUIRED FOR CONVICTION OF CRIMINAL OFFENSE – SAMPLE ARGUMENT

On Aug. 11, 2011, the Ninth Circuit issued an *en banc* decision in *United States v. Aguila-Montes De Oca*, ___ F.3d ___, 2011 WL 3506442 (9th Cir. Aug. 11, 2011). In this decision, the Court concluded that the "missing element" rule articulated in *Navarro–Lopez v. Gonzales,* 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc) is not required by the Supreme Court's modified categorical approach as set forth in *Taylor v. United States,* 495 U.S. 575 (1990). *Id.* at *2. Instead, the Court held that the modified categorical approach, "with certain important restrictions," may be employed to rely on established facts in the record of conviction even if those facts do not fall within an element of the statute. *Id.* at *10.

Aguila-Montes held the modified categorical analysis permits a fact from the record of conviction to be used to satisfy the generic definition of a removal ground only if the criminal factfinder was necessarily required to find that fact in order to convict.

In analyzing when facts that appear in the record of conviction may be used under the "modified categorical approach," the *Aguila-Montes* Court first noted that a statute can be "missing an element of the generic crime" in two ways. *Aguila-Montes De Oca*, 2011 WL 3506442 at *8. First, a statute may be "divisible" in that it "contains a list of statutory phrases, at least one of which satisfies an element of a given generic crime." *Id.* Second, a statute may be overbroad in that it "altogether lacks an element of the generic crime." *Id.* at *9. However, the Court held that, for purposes of the modified categorical approach, "there is no way to draw a principled distinction" between the two since "[t]he only conceptual difference…is that the former creates an *explicitly* finite list of possible means of commission, while the latter creates an *implied* list of every means of commission that otherwise fits the definition of a given crime. *Id.* at *9, *11 (emphasis in original).

In order to address this situation, the Court held that the relevant inquiry under the modified categorical approach is whether, in the course of finding that the defendant violated the statute of conviction, the adjudicator was "*actually required to find the facts satisfying* the elements of the generic offense." *Id.* at *17 (emphasis in original). In other words, the court must determine "(1) what facts the state conviction *necessarily* rested on and (2) whether these facts satisfy the elements of the generic offense." *Id.* (emphasis supplied). Under this analysis, the Court is restricted to facts that are discernable from the limited set of documents approved in *Shepard v. United States,* 544 U.S. 13, 16 (2005). *Id.* But importantly, the Court "need not ignore such facts when they are available in those documents." *Id.*

The Court then went on to clarify an "important limitation" on the use of facts that appear in the record of conviction. *Id.* at *18. Specifically, it warned that courts must exercise caution since "[i]t is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant." *Id*. Such a limitation is an "important fairness concern" since its absence would deny defendants "a reasonable opportunity to rebut the charges against them." *Id.* (quoting *Li v. Ashcroft,* 389 F.3d 892, 900 (9th Cir. 2004) (Kozinski, J., concurring). The Court further noted with approval *Li*'s statement that "[w]here a particular fact is not an element of the statute of conviction, the defendant 'had no reason to believe it would be relevant to his conviction, and thus no reason to cast doubt on the government's evidence as to [that fact].'" *Id.* (quoting *Li,* 389 F.3d at 900) (Kozinski, J., concurring).
To illustrate this point, the Court used the example of a generic definition that requires the elements of "harmful contact" and a "gun," while the statute of conviction requires only an element of "harmful contact. *Id.* at *19. If the *Shepard* documents establish that the harmful contact was committed with a gun, "then the factfinder was 'actually required' to find that the defendant used a gun, and the conviction 'necessarily rested' on this fact." *Id*. In such a case, a defendant "certainly has the incentive to contest that fact, even if that fact is not separately listed as a statutory element of the crime," since successful refutation of the fact would defeat "the government's theory of guilt" and result in acquittal. *Id.* Therefore, restricting analysis under the modified categorical approach to facts that are *necessary to convict the defendant* is sufficient to provide the defendant with adequate notice and procedural safeguards in the event that such facts are later used against him.

The present conviction falls squarely within the "important limitation" exception set out in *Aguila-Montes.* In order to use the age of the victim for purposes of satisfying the generic offense of "sexual abuse of a minor," the victim's age must have been "necessary" to convict the defendant of the criminal offense. *Aguila-Montes De Oca*, 2011 WL 3506442 *18. It was not.

First, the statute does not use the word "victim" and does not require a victim in order to secure a conviction. See, e.g., [A conviction under either this section or NRS 201.220 does not require proof of intent to offend an observer or even that the exposure was observed. It is sufficient that the public sexual conduct or exposure was intentional. Young v. State, 109 Nev. 205, 849 P.2d 336, 1993 Nev. LEXIS 35 (1993)].

Second, even if a victim were involved, a defendant may be convicted under NRS § 201.210 regardless of the age off the victim. The statute does not mention the age of the victim, and it appears that no published decision concerning NRS 201.210 involves a minor. The Nevada legislature chose not to make age of the victim a necessary element of the offense of being lewd in public. Compare this offense to several Nevada offenses where the legislature did decide to require proof of minor age of the victim. See, e.g., A NRS § 201.230, "Lewdness with a child under 14 years," which punishes a person who commits any lewd or lascivious act on a child under the age of 14 years, and NRS § 201.195, "Solicitation of minor to engage in acts constituting crime against nature," which contains separate subsections for minors under 14 and those who are 14 or older.

Because of this, the Nevada court was not required to specify the age of the victim in order to convict the defendant under § 201.210. Unlike the *Aguila-Montes* example in which the fact that the defendant shot the victim was *required* to satisfy the element of "harmful contact," the age of the victim is not required and is immaterial to satisfying an element of Open or Gross Lewdness. The government's theory of the case did not "actually require" that the victim in this case be a minor, and the government would have secured a conviction absent the allegation of the age of the victim. Therefore, the conviction in this case did not "necessarily rest" on the age of the victim. *Id.* at *19.

Moreover, the ability to consult the age of the victim under the modified categorical approach raises the "important fairness concern" articulated in *Li.* During criminal proceedings, the defendant did not have any incentive to contest the age of the victim since the victim's age would not have affected his culpability for an act of Open or Gross Lewdness. In other words, since age was not an element of the statute, the defendant "'had no reason to believe it would be relevant to his conviction, and thus no reason to cast doubt on the government's evidence as to [that fact].'" *Li,* 389 F.3d at 900) (Kozinski, J., concurring). Therefore, the age of the victim as it appears in the Information cannot be considered under the modified categorical approach to sustain an aggravated felony for sexual abuse of a minor under 8 U.S.C. § 1227(a)(2)(A)(iii). Thanks to Kara Hartzler and the ILRC.

PRACTICE ADVISORY – CONVICTION – NATURE OF CONVICTION – MODIFIED CATEGORICAL ANALYSIS MAY BE USED MORE OFTEN IN THE NINTH CIRCUIT
Some situations where *Aguila-Montes* may change prior law include:

(1) *Estrada-Espinoza* consensual sex rules. California Penal Code § 261.5(c) shouldn't change because there is only a 3-year age difference, but the result may change for other cases where the record of conviction shows a 4-year age difference between the victim who is under 16 and the perpetrator and there is knowing conduct.

(2) Any sexual abuse offense which is age-neutral. Where the record of conviction shows that the victim is a minor would be an aggravated felony (e.g., California Penal Code § 243.4(a) sexual battery)

(3) Any age-neutral statute involving intentional abusive conduct or negligent abusive conduct used to avoid a crime of child abuse, where the record of conviction shows that the victim is a minor would be a deportable crime of child abuse.

(4) Any firearm-neutral statute where a gun is involved would be a deportable firearms offense if, and but only if, it showed a violation of any law related to the elements of the firearm deportation ground.

(5) Any crime of violence statute without a domestic element where a domestic element is shown is a deportable crime of domestic violence.

(6) Any assaultive crime involving actual violent force where the record of conviction shows a domestic relation may now be considered crime of moral turpitude.
CD:16.7, 16.10;AF:4.6, 4.9;CMT:7.2

RECENT CASE DECISIONS

BIA

REMOVAL PROCEEDINGS – EVIDENCE – *MIRANDA* WARNINGS
Matter of ERMF & ASM, 25 I&N Dec. 580 (BIA 2011) (until a Notice to Appear is filed with the immigration court, immigration officers are not required, 8 C.F.R. § 287.3(c), to advise the noncitizen that she has a right to counsel or that any statements made during interrogation can subsequently be used against her).
http://www.justice.gov/eoir/vll/intdec/vol25/3725.pdf
CD:15.11

THIRD CIRCUIT

PETITION FOR REVIEW – DENIAL OF CONTINUANCE
Simon v. Holder, 654 F.3d 440 (3d Cir. Aug. 17, 2011) (BIA abused its discretion by denying motion to reconsider in that it failed to apply the principles articulated *Matter of Hashmi* to petitioner's case); citing *Matter of Hashimi*, 24 I. & N. Dec. 785, 792 (BIA 2009) (setting forth criteria to be considered in evaluating whether to grant a motion to continue removal proceedings).
CD:15.37;AF:2.19;CMT:3.18

FIFTH CIRCUIT

RELIEF – WAIVERS – 212(H) WAIVER – CONTROLLED SUBSTANCES
Rana v. Holder, 654 F.3d 547 (5th Cir. Aug. 30, 2011) (an individual who previously received a INA § 212(h) waiver of inadmissibility under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for a single conviction of possession of 30 grams or less of

marijuana, cannot receive a second 212(h) waiver for a separate similar offense; rejecting the argument that any new waiver would only "relate[] to a single offense of simple possession").
CD:24.29;AF:2.45;CMT:3.44

SIXTH CIRCUIT

AGGRAVATED FELONY – CRIME OF VIOLENCE – AGGRAVATED ASSAULT
United States v. McMurray, 653 F.3d 367 (6th Cir. Aug 4, 2011) (Tennessee conviction of aggravated assault, in violation of Tenn.Code Ann. § 39–13–102 (1991), was not a "violent felony" under the ACCA's "use of physical force" clause, or under its residual clause, for purposes of the Armed Career Criminal Act, where the offense could be committed recklessly).
CD:19.40;SH:7.49, 8.10;AF:5.22,A.14,B.9

AGGRAVATED FELONY – CRIME OF VIOLENCE – VEHICULAR ASSAULT

United States v. Portela, 469 F.3d 496, 498-99 (6th Cir. 2006) (Tennessee conviction for vehicular assault, Tenn. Code Ann. § 39–13–106, did not qualify as a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii), because it permits a conviction where a person "*recklessly* causes serious bodily injury to another person by the operation of a motor vehicle").

SEVENTH CIRCUIT

AGGRAVATED FELONY – PROSTITUTION BUSINESS – IMPORTING NONCITIZENS FOR PURPOSES OF PROSTITUTION
Rosario v. Holder, 655 F.3d 739 (7th Cir. Aug. 24, 2011) (federal conviction for aiding and abetting a conspiracy to import a noncitizen for the purpose of prostitution, in violation of 8 U.S.C. § 1328, is not categorically an aggravated felony "offense that relates to the owning, controlling, managing or supervising of a prostitution business," INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i), and so does not categorically constitute an aggravated felony under that statute, where a conviction may be had where defendant simply provided condoms to a house of prostitution, or were importation was for personal, rather than business purposes).
CD:19.82;SH:7.91,8.82;AF:5.65,A.33,B.75

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO GIVE ACCURATE IMMIGRATION ADVICE AT PLEA – RETROACTIVITY – *PADILLA* CONTAINED A NEW RULE WHICH DOES NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW
Chaidez v. United States, 655 F.3d 684 (7th Cir. Aug. 23, 2011) (*Padilla v. Kentucky* announced a new rule of criminal procedure which is not applicable retroactively on collateral review); see *United States v. Orocio,* 645 F.3d 630 (3d Cir. June 29, 2011) (*Padilla* simply applied the old *Strickland* rule, such that it is retroactively applicable on collateral review); *United States v. Diaz–Palmerin,* 2011 WL 1337326 (N.D.Ill. April 5, 2011) (*Padilla* did not announce a new rule); *Martin v. United States,* 2010 WL 3463949 (C.D.Ill. Aug.25, 2010) (same); *United States v. Chavarria*, 2011 WL 1336565 (N.D. Ind. April 7, 2011) (same); *United States v. Laguna,* 2011 WL 1357538 (N.D.Ill. April 11, 2011) (*Padilla* announced a new rule); *United States v. Aceves,* 2011 WL 976706, at *3 (D.Hawai'i March 17, 2011) (collecting cases).

PCN:6.18; CPCN:7.16
RELIEF – WAIVERS – 241(f) RELIEF
Torres-Rendon v. Holder, 656 F.3d 456 (7th Cir. Aug. 23, 2011) (a waiver of the fraud under former INA 241(f) applies only to those inadmissible on grounds of

fraud; respondent was inadmissible on grounds of a controlled substance conviction); citing *Matter of Sosa–Hernandez,* 20 I. & N. Dec. 758, 760–61 (BIA 1993) (a waiver under INA § 241(f) waives not only deportability but also the underlying fraud, thereby validating the applicant's lawful permanent resident status and making him theoretically eligible for a § 212(c) waiver).

NOTE: The court's reasoning is arguably faulty. In *Sosa-Hernandez*, the INS never charged the respondent with fraud, only with deportability for having been convicted of a controlled substance offense. In addition to finding deportability as charged for the drug trafficking offense, the IJ found sua sponte that he was excludable for fraud at the time of his entry as a LPR. See *Matter of Sosa-Hernandez*, 20 I&N Dec. 758, 759 (BIA 1993). Thus, the procedural posture of *Sosa-Hernandez* lines up with *Torres*: in both cases, there was commission of fraud at the time of entry as a LPR, the respondent was convicted for drug trafficking, and charged only with deportability for the drug offense, and IJ found an additional ground of deportability.

In *Torres*, the IJ found that he was inadmissible for fraud in 2009 when he returned from a trip abroad; the BIA reversed that part of the IJ's decision and agreed that he was excludable in 1984 at the time of his entry. The BIA's reasoning for avoiding a direct application of *Sosa-Hernandez* was abominable: in *Torres*, the DHS challenged his eligibility for a 241(f) waiver and refused to charge him with an I-261 for the fraud ground. Thus, because DHS never charged him formally with being excludable at the time of entry in 1984 (before he pled guilty to drug trafficking), he does not qualify for a 241(f) waiver even though both the IJ and the BIA agreed that he had committed fraud as noted above. Thanks to Maria Baldini-Potermin.
CD:24.30;AF:2.46;CMT:3.45

EIGHTH CIRCUIT

CONTROLLED SUBSTANCES – NATURE OF CONTROLLED SUBSTANCE – *PAULUS* DEFENSE NATURE OF CONVICTION – RECORD OF CONVICTION – CLERK'S MINUTES OF SENTENCE
United States v. Benitez-De Los Santos, 650 F.3d 1157 (8th Cir. Aug. 18, 2011) (clerk's minutes and abstract of judgment form part of the record of conviction, and are sufficient to establish that defendant pleaded guilty to specific count charged against him, for purposes of showing that controlled substance involved in the conviction was the one identified in the charge); following *United States v. Snellenberger,* 548 F.3d 699, 702 (9th Cir.2008) (en banc).
CD:16.28;AF:4.27;CMT:7.11

NINTH CIRCUIT

CRIMES OF MORAL TURPITUDE – FEDERAL CONVICTION OF FAILURE TO REGISTER AS A SEX OFFENDER – ELEMENTS – NO REQUIREMENT GOVERNMENT PROVE THAT THE DEFENDANT KNEW OF REGISTRATION REQUIREMENT
United States v. Crowder, 656 F.3d 870 (9th Cir. Aug. 30, 2011) (affirming federal conviction for failing to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a), where the government is not required to prove that a defendant knew that SORNA imposed a registration requirement in order to sustain a conviction under the statute).

Note: This strengthens the argument that a federal conviction under 18 U.S.C § 2250(a), is not a crime involving moral turpitude.
CMT:9.96

IMMIGRATION STATUS –LAWFUL PERMANENT RESIDENT – ABANDONMENT
Khoshfahm v. Holder, 655 F.3d 1147 (9th Cir. Aug. 25, 2011) (substantial evidence does not support the BIA's determination that petitioner, who lived for approximately six continuous years with his parents in Iran, abandoned his lawful permanent resident status).
CD:18.5

AGGRAVATED FELONY – BURGLARY – BURGLARY
United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. Aug. 11, 2011) (en banc) (California conviction of burglary, under Penal Code § 459, does not qualify as a generic burglary conviction for illegal re-entry sentencing purposes, even if the defendant pleaded guilty to entering a building "unlawfully" or a jury found the defendant guilty as charged in an indictment reciting that allegation, since the California definition of "unlawful" entry includes a licensed or privileged entry into a building with intent to commit a crime, where the "generic" definition of burglary requires that the entry itself be unlicensed or unprivileged).
CD:19.30;SH:7.37,8.38;AF:5.10,A.10,B.36

TENTH CIRCUIT

AGGRAVATED FELONY – CRIME OF VIOLENCE – MENACING
Damaso-Mendoza v. Holder, 653 F.3d 1245 (10th Cir. Aug. 9, 2011) (Colorado conviction for menacing, under Colo.Rev.Stat. § 18–3–206 ["by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury"], is categorically an aggravated felony crime of violence since it involves a threat of physical force).
CD:19.37;AF:5.19,A.14,B.17

OTHER

PRACTICE ADVISORY – POST CON RELIEF – EFFECTIVE VACATUR – FIFTH CIRCUIT
In *Padilla v. Kentucky*, the Supreme Court implied that a conviction that was vacated on a ground of legal invalidity, such as ineffective assistance of counsel, no longer existed for immigration purposes. This rejects the argument that the 1996 statutory definition of conviction, INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), does not expressly state that post-conviction relief eliminates a conviction for immigration purposes and therefore post-conviction relief does not do so. *Padilla* therefore suggests that the Fifth Circuit decisions in *Discipio v. Ashcroft*, 417 F.3d 448, 450 (5th Cir. 2005) and *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812-13 (5th Cir. 2002) are no longer good law.
Thanks to Dan Kesselbrenner.
CD:11.4;PCN:4.4;AF:6.4;CMT:10.4

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO GIVE ACCURATE IMMIGRATION ADVICE – RETROACTIVITY OF *PADILLA* – TEXAS
Salazar v. State, __ S.W.3d __, 2011 WL 4056283 (Tex.App. Aug. 31, 2011) (*Padilla* applies retroactively to cases that have become final, because it applies the 1984 *Strickland* rule to a new situation).
PCN:6.18; CPCN:7.16

CRIM DEF – EXTRADITION
Extradition cases are listed on the following blog, which can be searched by country for unreported cases.
Thanks to Linda Ramirez.
http://obtainingforeignevidence.blogspot.com/
CD:6.51

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