Law Offices of Norton Tooby

Crimes & Immigration

eNewsletter

April, 2008

Selected Articles - Recent Cases

Contents:

1.Article: The Finality Requirement for a Conviction to Trigger Adverse Immigration Consequences is Under Unwarranted Attack

In general, a criminal conviction may not be considered by the immigration authorities until it is final. Pino v. Landon, 349 U.S. 901 (1955). Although a conviction subject to collateral attack or other modification is final, the United States Courts of Appeals have generally agreed that a conviction is not final until direct appellate review has been either exhausted or waived. White v. INS, 17 F.3d 475 (1st Cir. 1994); Grageda v. INS, 12 F.3d 919 (9th Cir. 1993); Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990); Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981); Marino v. INS, 537 F.2d 686 (2d Cir. 1976). In Matter of Polanco, 20 I. & N. Dec. 894 (BIA 1994), the BIA recognized the distinction between direct appeals as of right and discretionary appeals to the next higher court in a tiered state court system, also commonly referred to procedurally as "direct appeals." Id. at 896. The BIA held that an alien who has exhausted his right to a direct

appeal of his criminal conviction is subject to deportation for that conviction, and that the potential for further discretionary review on direct appeal, such as a discretionary request to file a nunc pro tunc appeal, will not affect the finality of the conviction for the purpose of immigration proceedings. Id. See also Morales-Alvarado v. INS, 655 F.2d 172, 175 (9th Cir. 1981). In three circuits, however, decisions have cast doubt on whether the 1996 statutory definition of conviction abolished this finality requirement by failing to mention it. Puello v. BCIS, 511 F.3d 324, 2007 WL 44409168 (2d Cir. Dec. 20, 2007) ("IIRIRA did, however, eliminate the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute. See Abiodun v. Gonzales, 461 F.3d 1210, 1213 (10th Cir. 2006); Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004); Moosa, 171 F.3d at 1009.") (dictum).

This flies in the face of the rule that Congress is presumed to support existing law when legislating in the area unless it expressly overrules it.

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n. 8, 95 S.Ct. 2362, 2370, n. 8, 45 L.Ed.2d 280 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366, 71 S.Ct. 337, 340, 95 L.Ed. 337 (1951); National Lead Co. v. United States, 252 U.S. 140, 147, 40 S.Ct. 237, 239, 64 L.Ed. 496 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 580-581, 98 S.Ct. 866, 869-871, 55 L.Ed.2d 40 (1978).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379, 102 S.Ct. 1825, 1841 n.66 (1982)(Congress presumed aware of judicial interpretation of a statute and to adopt it when it re-enacts a statute without changing it). "This rule is based on the theory that the legislature is familiar with the contemporaneous interpretation of a statute . . . . Therefore, it impliedly adopts the interpretation upon reenactment. " 2B, N. SINGER, STATUTES AND STATUTORY CONSTRUCTION 108 (6th ed. 2000)(citing National Lead Co. v. United States, 252 U.S. 140, 147 (1920); McCajughn v. Hershey Chocolate Co., 283 U.S. 488, 492 (1931); Helvering v. Griffiths, 318 U.S. 371 (1943); Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); San Huan New Materials High Tech, Inc. v. Int'l Trade Com'n, 161 F.3d 1347 (Fed. Cir. 1998), reh'g denied, in banc suggestion declined (Jan. 28, 1999) and cert. dismissed, 120 S.Ct. 394 (1999). See also Fernandes v. McElroy, 920 F.Supp. 428, 437 (S.D.N.Y. 1996) ("Congress, based on a substantial body of case law, knew exactly what it meant by a "brief, casual, and innocent" absence and this meaning did not encompass prior approval . . . ."); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 102 S.Ct. 1825, 1839 (1982) ("In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted."). "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its

perception of the state of the law was." Brown v. GSA, 425 U.S. 820, 828, 96 S.Ct. 1961, 1965, 48 L.Ed.2d 402 (1976) (footnote omitted); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379, 102 S.Ct. 1825 (1982) ("In Cannon v. University of Chicago, we observed that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." 441 U.S. at 696-697, 99 S.Ct. at 1957-58.").

The finality requirement therefore survives the 1996 amendments, because Congress is presumed to be aware of the rule and to have approved it, since it did not expressly overrule it.

2. Article: Second Drug Possession Convictions Held Not To Be Aggravated Felonies Unless First Conviction Was Admitted By Defendant Or Found By Judge Or Jury

In Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382 (BIA 2007), the BIA found that absent controlling circuit court authority to the contrary, a noncitizen's state conviction for a second or subsequent possession will not be considered an aggravated felony on the basis of recidivism unless the noncitizen's status as a recidivist was either admitted by the noncitizen at plea or determined by a judge or jury in connection with a prosecution for the subsequent simple possession offense. The rule of Matter of Carachuri-Rosendo results in the following circuit court breakdown:

First Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Berhe v. Gonzales, 464 F.3d 74, 85-86 (1st Cir. 2006).

Second Circuit: a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. United States v. Simpson, 319 F.3d 81, 85-86 (2nd Cir. 2002).

Third Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Steel v. Blackman, 236 F.3d 130, 137-38 (3d Cir. 2001).

Fourth Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382 (BIA 2007); Matter of Thomas, 24 I. & N. Dec. 414 (BIA 2007).

Fifth Circuit: a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. United States v. Sanchez-Villalobos, 412 F.3d 572, 576-577 (5th Cir. 2005).

Sixth Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the first conviction was not yet final on the date of the second conviction. United States v. Palacios-Suarez, 418 F.3d 692, 700 (6th Cir. 2005).

Seventh Circuit: a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. United States v. Pacheco-Diaz, 506 F.3d 545-548-549 (7th Cir. 2007).

Eighth Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382 (BIA 2007); Matter of Tomas, 24 I. & N. Dec. 414 (BIA 2007).

Ninth Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Ferreira v. Ashcroft, 382 F.3d 1045, 1050 (9th Cir. 2004).

Tenth Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382 (BIA 2007); Matter of Tomas, 24 I. & N. Dec. 414 (BIA 2007).

Eleventh Circuit: noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Matter of Carachuri-Rosendo, 24 I. & N. Dec. 382 (BIA 2007); Matter of Tomas, 24 I. & N. Dec. 414 (BIA 2007).

3. Article: Using a West or Alford Plea to Create a Non-Deportable Record of Conviction

Entry of a plea under North Carolina v. Alford, does not alter the immigration nature of the conviction, but it might make it easier for the court and prosecution to avoid insisting on making a record of the factual basis for the plea that would expand the nature of the conviction sufficiently to trigger a ground of deportation. Since an Alford plea is entered without any factual admission of guilt, the court and prosecution may allow entry of the plea without establishing any factual basis for the plea. If the court still wishes to establish a factual basis, it might be more inclined to accept defense counsel's specific disclaimer, "We are not admitting the truth of the facts contained in the police report, but simply allowing the court to review it to determine whether the prosecution could present some evidence of every element of the offense." This disclaimer should be sufficient to take the police report factual basis out of the record of conviction, since the defendant is

expressly not admitting the truth of the facts contained therein. In United States v. Vidal, 504 F.3d 1072, 1087-1088 (9th Cir. Oct. 10, 2007), the Ninth Circuit stated: "The California Supreme Court subsequently characterized a People v. West plea as a plea of nolo contendere that does not establish factual guilt. See In re Alvernaz, 2 Cal.4th 924, 8 Cal.Rptr.2d 713, 830 P.2d 747, 752 (1992) (describing a People v. West plea as a "plea of nolo contendere, not admitting a factual basis for the plea."). See also United States v. Nguyen, 465 F.3d 1128, 1130 (9th Cir. 2006) ("[A] plea of nolo contendere ... is, first and foremost, not an admission of factual guilt. It merely allows the defendant so pleading to waive a trial and to authorize the court to treat him as if he were guilty." (citation omitted)). By entering a West plea a defendant "[does] not admit the specific details about his conduct on the ... counts[to which] he pled guilty." Carty v. Nelson, 426 F.3d 1064, 1068 (9th Cir. 2005) (citing In re Alvernaz, 2 Cal.4th 924, 8 Cal.Rptr.2d 713, 830 P.2d 747); see also People v. West, 91 Cal.Rptr. 385, 477 P.2d at 420 (1970) (explaining that by entering a plea agreement a defendant "demonstrates that he ... is prepared to admit each of [the offense]'s elements" but not factual guilt). As a result, unless the record of the plea proceeding reflects that the defendant admitted to facts, a West plea, without more, does not establish the requisite factual predicate to support a sentence enhancement.").

The court, in Vidal, also stated:

Moreover, in the context of a People v. West plea, "[a] court is not limited to accepting a guilty plea only to the offense charged but can accept a guilty plea to any reasonably related lesser offense." People v. Tuggle, 232 Cal.App.3d 147, 283 Cal.Rptr. 422, 426 n. 10 (Ct.App.1991) (rejecting reliance on the fact that the offense was charged in the conjunctive because the prosecutor could have amended the information before the plea) (citing West, 91 Cal.Rptr. 385, 477 P.2d at 419-20), overruled on other grounds by People v. Jenkins, 10 Cal.4th 234, 40 Cal.Rptr.2d 903, 893 P.2d 1224 (1995). The prosecution need not have formally amended the two counts in order for Vidal to have pled guilty to conduct other than that alleged in the Complaint. See People v. Sandoval, 140 Cal.App.4th 111, 43 Cal.Rptr.3d 911, 926 (Ct.App.2006) (explaining that under California's informal amendment doctrine no "talismanic significance [attaches] to the existence of a written information" and that "a defendant's conduct may effect an informal amendment of an information without the People having formally filed a written amendment to the information.

United States v. Vidal, 504 F.3d 1072, 1087-1088 (9th Cir. Oct. 10, 2007).

4. Article: Limitations On New BIA Holding Sentence Enhancements Are Included In Record Of Conviction To Determine The Nature Of The Conviction

In Matter of Martinez-Zapata, 24 I. & N. Dec. 424 (BIA 2007), the BIA held certain sentence enhancements to be equivalent to elements of the offense for purposes of determining the nature of the offense for immigration purposes. This rule, however, does not apply where a sentence enhancement has been found true by a mere preponderance of the evidence, whether it was found by a court or jury. This is because Apprendi v. New

Jersey, 530 U.S. 466 (2000), on which Martinez-Zapata is based, held that a sentencing court's finding by a preponderance of the evidence of the truth of a sentence enhancement that increased maximum penalty of offense was unconstitutional in violation of the jury trial guarantee of the United States Constitution because it constituted an element of the offense under that provision.

This offers a number of favorable arguments counsel can use to argue that a given sentence enhancement does not constitute an element of the offense for purposes of determining the nature of the offense under immigration law. The BIA itself recognized important limitations on its decision.

Importantly, we point out that Apprendi and its progeny do not encompass all sentence enhancements; the Apprendi analysis will not result in all sentence enhancements being the equivalent of "elements" of an offense. Rather, those post-Apprendi enhancements that may still permissibly be found by a preponderance of the evidence by a sentencing judge, including those under the United States Sentencing Guidelines and many State sentencing schemes, will not be the equivalent of an "element" of an offense. See, e.g., Cunningham v. California, 127 S. Ct. 856 (2007); Blakely v. Washington, supra; Ring v. Arizona, 536 U.S. 584 (2002). It is crucial that an examination of the specific statutory sentencing scheme be conducted in order to make the determination. To equate to an element it must be shown that, under the law of the convicting jurisdiction, a sentencing factor had to be proved to a jury beyond a reasonable doubt if it was not admitted by the defendant.

Martinez-Zapata, supra, at 430. In particular, a number of limitations and arguments emerge from this decision:

(1) Martinez-Zapata cannot retroactively convert a sentence enhancement found by a mere preponderance into an element of the offense. Many sentence enhancements imposed prior to June 26, 2000, the date on which Apprendi was decided, were imposed after a sentencing judge found the sentence enhancement true by a preponderance of the evidence. These sentence enhancements cannot constitute elements of the offense under Martinez-Zapata, because it was not in fact admitted by the defendant or found true beyond a reasonable doubt by a jury. Martinez-Zapata expressly states that its rule (like its rationale) applies only with respect to "any post-Apprendi sentencing factor that is shown to have been found in accordance with the criminal law protections of a jury trial and burden of proof afforded a defendant in relation to the elements of an offense." Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 429 n.5 (BIA 2007). "The holding in Matter of Rodriguez-Cortes also continues to apply in pre-Apprendi sentencing determinations." Matter of Martinez-Zapata, supra, at 429 (BIA 2007).

(2) Even after Apprendi, it took some time before courts implemented that decision, so it is important to verify that the sentence enhancement in the case under consideration was in fact admitted by the defendant or found true beyond a reasonable doubt by a jury. If not, the sentence enhancement does not in fact constitute an element of the offense. Even

today, because of the ongoing confusion in this area, many courts are not in fact implementing Apprendi correctly. The courts' learning process is sometimes slow.

(3) Be alert for instances in which the sentence enhancement was found by a preponderance, rather than beyond a reasonable doubt. In jury cases, check the jury instructions relating to the sentence enhancement to verify the burden of proof was in fact beyond a reasonable doubt. The BIA has cautioned that the inquiry in these cases is very much dependent on the exact mechanics of the statutes in the jurisdiction of conviction:

However, not all facts bearing on sentencing are required to be found beyond a reasonable doubt as a result of Apprendi and Blakely. In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court made determinations under the United States Sentencing Guidelines advisory, thereby allowing such findings to continue to be made solely by Federal judges under a preponderance of the evidence standard. Further, the States have responded in various ways to Apprendi and Blakely, such that a careful understanding of specific State law is needed to determine whether a particular sentencing factor, if not admitted during the criminal proceedings, would be required to be found beyond a reasonable doubt by a jury.

Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 428-429 (BIA 2007) [footnote omitted].

(4) Following Apprendi, Martinez-Zapata applies only to sentence enhancements that increase the maximum possible statutory penalty for the offense. Therefore, sentence enhancements are not equivalent to elements of the offense, for immigration purposes, if they do not increase the maximum statutory penalty for the conviction, but merely increase the actual sentence ordered for the conviction within a fixed statutory maximum, as is the case under the United States Sentencing Guidelines and similar state sentence frameworks.

(5) Martinez-Zapata does not apply where a sentence enhancement does not increase the statutory maximum for the offense, but merely the statutory minimum. See Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 429 n.4 (BIA 2007) ("Compare section 481.134(c) of the Texas Health and Safety Code, which is not subject to Apprendi in accordance with Harris v. United States, 536 U.S. 545 (2002), because it merely increases the statutory minimum sentence but does not exceed the statutory maximum sentence. See Williams v. State, 127 S.W.3d 442, 445 (Tex. App. 2004) (finding that section 481.134(c) does not create a separate offense because its only effect is to raise the penalty when an enumerated offense is committed in a designated place); see also Uribe v. State, 573 S.W.2d 819 (Tex. Crim. App. 1978).").

(6) The federal constitutional guarantee of the right to a jury trial does not apply to misdemeanors carrying a maximum sentence of six months or less. Therefore, in such misdemeanor cases, there is no constitutional right to have a jury finding of the true of many sentence enhancements. This gives rise to an argument that Martinez-Zapata does not convert such sentence enhancement findings into elements of the offense for immigration purposes. See Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 428 n.2 (BIA

2007) ("Apprendi v. New Jersey, supra, and its progeny focus on admissions by the defendant or findings by a jury beyond a reasonable doubt. Offenses carrying maximum sentences of 6 months or less, however, are not required to be tried before a jury. See Lewis v. United States, 518 U.S. 322 (1996).") The BIA, however, has expressly left this question open. Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 430 n.6 (BIA 2007) ("We have no occasion here to decide whether we would treat as an element any such factor required by the convicting jurisdiction to be proved beyond a reasonable doubt to a court rather than a jury."), citing Harris v. United States, 536 U.S. 545 (2002), and Matter of Eslamizar, 23 I. & N. Dec. 684 (BIA 2004).

(7) The sentence enhancement in Martinez-Zapata converted a Class B misdemeanor, in violation of Texas Health & Safety Code § 481.121(b)(1) to a Class A misdemeanor, in violation of Texas Health & Safety Code § 481.134(f)(1). Martinez-Zapata, supra, at 425. This can fairly be said to affect the "conviction" directly, since the defendant under this statute is now "convicted" of a Class A misdemeanor, rather than a Class B misdemeanor. On the other hand, a sentence enhancement that merely alters the maximum possible sentence for a conviction cannot be said to affect the conviction in the same way. Counsel can argue that this difference should lead to a distinction, but the chances of a court adopting this distinction seem limited.

(8) Martinez-Zapata expressly applies only with respect to "any post-Apprendi sentencing factor that is shown to have been found in accordance with the criminal law protections of a jury trial and burden of proof afforded a defendant in relation to the elements of an offense." Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 429 (BIA 2007). Therefore, counsel for respondent can argue that a given sentence enhancement was imposed in violation of due process, or another fundamental federal constitutional right, such as the Apprendi right to jury trial, and therefore does not under the facts of this case constitute an element of the offense of conviction. Matter of Martinez-Zapata, 24 I. & N. Dec. 424, 429 n.5 (BIA 2007).

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6. RECENT DEVELOPMENTS

SECOND CIRCUIT -- POST CON RELIEF - EFFECTIVE ORDER - COURT'S ORDER GRANTING MOTION TO WITHDRAW A PLEA ELIMINATES A CONVICTION FOR IMMIGRATION PURPOSES
Puello v. BCIS, ___ F.3d ___, ___, 2007 WL 4440916 (2d Cir. Dec. 20, 2007) (a criminal court's order withdrawing a plea eliminates the conviction for mmigration purposes; an interpretation of the statutory definition [of conviction to the ontrary] appears to lead to the bizarre result that a withdrawn guilty plea would still be a "conviction" for immigration purposes, because the "conviction" would be established on the date of the entry of the plea. We reject this reading because "[a] statute should be interpreted in a way that avoids absurd results."), citing United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000). CD:11.4;AF:6.4;CMT:10.4;PCN:5.52

SECOND CIRCUIT -- CRIME OF MORAL TURPITUDE - BURGLARY - ENTRY WITH INTENT TO COMMIT LARCENY REQUIRED FOR BURGLARY CMT
Wala v. Mukasey, ___ F.3d ___ (2d Cir. Dec. 12, 2007) (Connecticut conviction for third-degree burglary, in violation of Conn. Gen.Stat. section 53a-103, did not constitute a crime involving moral turpitude within the meaning of IONA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for immigration purposes; although the IJ and BIA properly concluded that Wala pled to a burglary with the intent to commit larceny, it was improper for the BIA to have inferred from the plea colloquy that petitioner intended to commit a larceny offense involving a permanent, rather than a temporary, taking of property). CD:20.5; SH:7.121; CMT:8.4

FIFTH CIRCUIT -- AGGRAVATED FELONY - DRUG TRAFFICKING - SECOND POSSESSION CONVICTION CANNOT CONSTITUTE FELONY IN FEDERAL COURT
United States v. Arnold, 467 F.3d 880, 886-87 (5th Cir. 2006) (a federal judge has no authority to impose a felony sentence on a recidivist convicted of a second possession offense under the CSA unless, prior to trial or plea, the prosecutor filed and served an "enhancement information" pursuant to 21 U.S.C. § 851(a) (2000), the purpose of which is to provide the defendant with notice and an opportunity to review allegations of previous convictions for accuracy, to contest the use of such convictions, to create a trial strategy, and to evaluate the consequences of a jury verdict). CD:19.58;SH:7.66;AF:5.40

NINTH CIRCUIT -- NATURE OF CONVICTION - DIVISIBLE STATUTE ANALYSIS - "AS CHARGED"
United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. Oct. 10, 2007) ("We know from the Complaint that Vidal was charged with "willfully and unlawfully driv[ing] and tak[ing] a vehicle ... without the consent of and with intent to deprive the owner of title to and possession of said vehicle, in violation of Vehicle Code Section 10851(a)." He pled guilty, however, only to "Count 1 10851(a) VC Driving a Stolen Vehicle." The plea does not, therefore, establish that Vidal admitted to all, or any, of the factual allegations in the

Complaint. In order to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain "the critical phrase 'as charged in the Information.'"). CD:19.58;SH:7.66;AF:5.40

PRACTICE ADVISORIES

CONTROLLED SUBSTANCES OFFENSES - POSSESSION OF PARAPHERNALIA - DEPORTATION GROUND - EXCEPTION FOR SINGLE OFFENSE OF POSSESSION OF MARIJUANA - WHETHER PARAPHERNALIA POSSESSION CONVICTION QUALIFIES UNDER THE EXCEPTION
Immigration counsel have been successful in persuading immigration judges that a conviction of possession of drug paraphernalia qualified under the exception to controlled substances conviction deportability for a single offense of possession of marijuana, especially prior to Luu-Le v. INS, 224 F.3d 911 (9th Cir. 2000), in two situations: (1) where the Record of Conviction affirmatively showed that the offense involved 30 grams or less of marijuana, and (2) where the Record of Conviction was silent. Since then, some Immigration Judges interpret Luu-Le to mean that a conviction of possession of paraphernalia cannot under any circumstancess fit under the exception. They appear to be incorrect, since Luu-Le does not reach the issue of the exception, finding only that the Arizona paraphernalia offense "relates to a controlled substance." The logic of Luu-Le, and the language of the INA, support the conclusion that if the paraphernalia offense involves "possession for one's own use of 30 grams or less of marijuana," then it falls within the exception. The INA does not require that the exception "be" for possession, but merely that it "involve" possession, of 30 grams or less of marijuana. See also Medina v Ashcroft, 393 F.3d 1063 (9th Cir. Jan. 4, 2005) (holding that a conviction of being under the influence of a controlled substance can fall within the exception to controlled substance conviction deportation for a conviction of a single offense of 30 grams or less of marijuana). This same logic applies to the offense of possession of marijuana paraphernalia. Thanks to Suzannah Maclay. CD:21.35; SH:7.144

BOARD OF IMMIGRATION APPEALS -- RECORD OF CONVICTION - SENTENCE ENHANCEMENT - ELEMENTS
Matter of Martinez-Zapata, 24 I. & N. Dec. 424 (BIA 2007) (any fact, including a fact contained in a sentence enhancement, that serves to increase the maximum penalty for a crime and that is required to be found by a jury beyond a reasonable doubt if not admitted by the defendant, is to be treated as an element of the underlying offense; a conviction involving the application of such an enhancement is a conviction for the enhanced offense), superseding Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992), in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). CD:16.33, 16.18, 10.56; SH:5.63; AF:4.17, 4.32;CMT:7.9, 7.12

PRACTICE ADVISORY -- REMOVAL PROCEEDINGS - EVIDENCE
Where the DHS has not presented any official record of conviction, an inference is warranted that the DHS either has no such record or that the record would not support its case. See Sidhu v. INS, 220 F.3d 1085, 1090-92 (9th Cir. 2000) (drawing an adverse

inference from the failure to present "easily available" evidence); S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R., 695 F.2d 253, 259 (7th Cir. 1982) ("It is elementary that if a party has evidence in its control and fails to produce it, an inference may be warranted that the document would have been unfavorable."), quoting Commercial Ins. Co. Newark v. Gonzalez, 512 F.2d 1307, 1314 (1st Cir. 1975).

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7. Three brand new publications will be available at AILA in Vancouver:

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