THE LAW OFFICES OF
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Crimes & Immigration
Newsletter

April, 2016

This Newsletter contains selected recent developments in criminal immigration law occurring during April, 2016. The full version , which includes *all* monthly updates, is available here.

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 NortonTooby.com.

Andrew J. Phillips, Esq.
Editor

INSIDE

RECENT DEVELOPMENTS

Articles

CRIMES OF MORAL TURPITUDE – THEFT – DE MINIMIS CONDUCT DOES NOT QUALIFY AS MORAL TURPITUDE

Jordan v. De George, 341 U.S. 223, 231-32, 71 S. Ct. 703, 708 (1951) ("We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. We have recently stated that doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness."); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1069 (9th Cir. 2007) (Judge Pregerson, concurring) ("Take the example of a welfare mother who falsely endorses and then cashes a social security check mistakenly issued to her deceased father. The woman knows that she does not have the right to the money. She forges her father's signature. But, she needs money to feed her hungry children. Although such conduct is illegal, it is not base, vile, or depraved."); overruled by *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir.

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Since 1989, the Law Offices of Norton Tooby have offered expert advice and highly successful services to immigration attorneys, criminal attorneys, and clients. Our nationwide law practice assists foreign nationals in avoiding adverse immigration consequences of crimes anywhere in the country.

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2011); *Matter of T,* 2 I&N Dec 22 ((BIA, A.G. 1944) (Boardmember Jack Wasserman's dissent) ("It should be noted that if the alien's crime were stretched, without legal warrant, into a petty larceny, the view has been forcefully expressed that not all petty larcenies involve moral turpitude. Lord Bacon said that it is not even larceny to steal viands to satisfy hunger (Bacon, Law Tracts, 2d Ed. (1741) Reg. 5, p. 55). Yet this would generally be considered a crime although the act itself would not indicate moral turpitude. Judge Thomas in *U.S. ex rel. Rizzio v. Kenny*, 50 F.(2d) 418, 419 (D.C. Conn., 1931) recognized that larceny in some circumstances did not involve moral turpitude. In *Tillinghast v. Edmead*, 31 F.(2d) 81, 84 (C.C.A.1st, 1929), Judge Anderson said in a dissenting opinion: `It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude.' In the lower court opinion, Judge Morton said (27 F.(2d) 438, at 439): `While there is authority that all larceny involves moral turpitude * * * I am not prepared to agree that a boy who steals an apple from an orchard is guilty of `inherently base, vile, or depraved conduct.' Where the larceny is petty, I think that the circumstances must be inquired into.' In a discussion with reference to petty offenses and moral turpitude, Mr. Prichard, special assistant to the Attorney General, said in a memorandum dated Apr. 5, 1941, in the case of Re G, 56040/601: `* * * in connection with some offenses at least, doubt should be resolved against exclusion of deportation upon this ground. Certainly it would seem harsh and oppressive to hold that a crime for which only a fine or a suspended jail sentence was involved is the proper basis for excluding from the United States one who seeks admission.' *id*, n.10); *Castillo v. Holder,* 776 F.3d 262, 266 (4th Cir. 2015) ("The BIA thus construed the term "theft offense" to encompass the taking of property when "there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." Id. at 1346. Notably, however, in articulating this construction of the statute, the BIA emphasized that "[n]ot all takings of property ... will meet this standard[,] because some takings entail a de minimis deprivation of ownership interests" and constitute only a "glorified borrowing" of property. Id."); *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929) (Anderson, Circuit Judge, dissenting) ("It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude. But such is the logical result of the majority opinion."); *Marciano v. Immigration & Naturalization Serv.*, 450 F.2d 1022, 1028 (8th Cir. 1971) (District Judge Garnett, dissenting) ("There are the cases cited by Judge Anderson in his dissent in *Tillinghast v. Edmead,* 31 F.2d 81 (1st Cir. 1929), of a mother stealing milk for her hungry child, of a "foolish college student" stealing a sign, and of a boy stealing an apple from an orchard; and there is the situation posed by Judge Learned Hand of a boy's forcing his way into a vacant building, *United States ex rel. Guarino v. Uhl*, supra. There are, of course, literally hundreds of other examples that could be given. All of these hypothetical situations are crimes, involving criminal intent and criminal culpability. All of them could result in deportation under the rule of *Pino v. Nicolls*, and of the majority here, because such crimes as larceny, burglary, and breaking and entering "usually", "commonly" and "generally" involve moral turpitude. None of them can be said to involve moral turpitude, however;

not, at least, without further examination into the factual context. It might be that today some crimes would be held to involve moral turpitude which judges writing in past years did not think contravened the moral standards of that time. The converse might be true with regard to other types of offenses. The point is that I do not believe Congress intended for all aliens in these, and many other hypothetical situations, be deported. The statute says deportation shall follow when the crime committed involves moral turpitude, not when that type of crime "commonly" or "usually" does."); *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956) ("Whether there is a possible exception in an extreme case such as that instanced by troubled judges where a man takes the property of another to provide for his starving family is not a problem we need to worry about here."); see K. Brady, et al., *Defending Immigrants in the Ninth Circuit* (2008) ("Theft. Despite case law to the contrary, immigration counsel at least can argue that conviction for theft under Calif. Penal Code §§ 484 or 487 should be held a divisible statute for moral turpitude purposes, because the offense of larceny, noted in the statute as "steal[ing], tak[ing], carry[ing], lead[ing], or driv[ing] away the personal property of another" does not require in every case the intent to carry away or to deprive the owner of the property permanently. . . . . In fact, it is possible to be convicted of this section where the intent is to deprive only temporarily. The California Jury Instructions, CALJIC 14.02 states that theft by larceny under PC § 487 is committed by "every person who steals, takes, carries" . . . " with the specific intent to deprive the owner permanently of property." However, CALJIC 14.03 says the specific intent is satisfied "by either an intent to deprive an owner permanently of his or her property, or to deprive an owner temporarily, but for an unreasonable time, so as to deprive him or her of a major portion of its value or enjoyment." Advocates can therefore argue that theft under these statutes should not categorically be crimes of moral turpitude, similar to a "joyriding" statute, such as California Vehicle Code § 10851(a), which is divisible for moral turpitude purposes because it involves the taking of a vehicle "with intent either to permanently or temporarily deprive the owner" of title or possession. See, e.g., *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007)(Calif. PC § 487 involves moral turpitude); *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999); see *Matter of T*, 2 I&N Dec. 22 (BIA 1944); *Matter of M*, 2 I&N Dec. 686 (BIA 1946)." Thanks to Jonathan Moore.
CD4:20.5;CMT3:8.5;SH:7.121

Resources

RESOURCES – FEDERAL CONVICTIONS – CHART OF FELONY AND MISDEMEANOR OFFENSES
Felony and Misdemeanor Federal Chart as prepared by Federal Defender office:
http://ms.fd.org/maxpenalties/maxpenalties.pdf
CD4:10.86;SH:7.24;AF:3.57;CMT3:7.19

RESOURCES – ILLEGAL REENTRY – COMMENTS TO FEDERAL SENTENCING COMMISSION
Federal Defender's Public Comment to the Federal Sentencing Commission regarding proposed Amendments for 2016 re Illegal Re-entry, etc.
https://www.fd.org/docs/select-topics/sentencing-resources/defender-public-comment-of-3-21-16-regarding-proposed-amendments-for-2016.pdf?sfvrsn=4

CD4:CHAPT13

RESOURCES – CITIZENSHIP – DERIVATIVE CITIZENSHIP – CHART
chart
at http://www.ilrc.org/files/documents/natz_chart-c-2016-3-29.pdf
CD4:3.13;AF:3.3;CMT3:3.4;SH:4.4;PCN:3.6

Practice Advisories

PRACTICE ADVISORY – CAL CRIM DEF – PROSECUTION POLICIES – SANTA CLARA COUNTY – DEFERRED ENTRY OF JUDGMENT NOW ACCOMODATES PLEAS TO ACCESSORY AFTER FACT IN LIEU OF CONTROLLED SUBSTANCES OFFENSES
The Santa Clara County District Attorney's Office and judges, in California, are now accepting a plea to accessory after the fact, under Penal Code § 32, instead of insisting on a controlled substances conviction, for each DEJ qualifying offense. The court then grants Deferred Entry of Judgment under Penal Code § 1000, for offenses qualifying for DEJ (now including accessory after the fact). This protects immigrants from (a) the risk of deportation or inadmissibility for a controlled substances conviction if they flunk DEJ, or (b) before they completed DEJ and obtain the DEJ dismissal that qualifies for *Lujan* treatment. The accessory conviction is not dismissed when DEJ is completed, although the defendant can seek a Penal Code § 1203.4(a) expungement after probation has been completed. Thanks to Beth Chance.
CCDOI 14.4; 20.68

CAL CRIM DEF – JUVENILE – PRACTICE ADVISORY – CONFIDENTIALITY OF JUVENILE RECORDS IN CALIFORNIA
The Immigrant Legal Resource Center has published a comprehensive new resource. California has strict confidentiality laws that govern when and to whom records from dependency and delinquency proceedings may be released. Immigration advocates need to be aware of these laws and ensure they are complied with when representing individuals with California juvenile records. This new resource provides an overview of the law and practical guidance for how to handle issues of juvenile confidentiality before USCIS and the immigration courts.
http://www.ilrc.org/files/documents/confidentiality_of_juvenile_records_advisory_ilrc_4.21.16_final.pdf
CCDOI 17.1

PRATICE ADVISORY – CONVICTION – PLEA OF NO CONTEST CREATES CONVICTION FOR IMMIGRATION PURPOSES, EVEN THOUGH THERE IS NO EXPRESS ADMISSION OF GUILT
A plea of "no contest," or nolo contendere, is when "a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *North Carolina v. Alford*, 400 U.S. 25, 35 (1970). A plea of no contest followed by any limitation on the client's freedom is a conviction for immigration purposes. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

The BIA initially addressed the issue in *Matter of C* (1953), see: https://casetext.com/case/in-the-matter-of-c-47. In its analysis the Board reasoned that "Technically, a plea of nolo contendere does not admit the allegations of the charge, but merely says that defendant does not choose to defend." The Board continued:

For instance, it is best not to enter a plea of guilty but rather to enter a plea of nolo contendere if a client is likely to be sued in a civil action or a civil action is pending as a result of his/her alleged criminal conduct. In such instances, it may be advisable that client enter a plea of no contest rather than a plea of guilty.

In others, the discovery or the State's case may be very weak or the record of conviction is sloppy, or in other proceedings, such as probation revocation proceedings, it may be advisable not to enter a plea of guilty, but rather proceed with a plea of Nolo Contendere.

In *United States v. Nguyen*, 465 F.3d 1128 (9th Cir. Oct. 18, 2006), the court held:

[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.). Thus, some may argue that in the context of determining whether a noncitizen on supervised release from immigration detention had violated the term of the release requiring that he not "commit any crimes," the Ninth Circuit has held that a plea of no contest in criminal proceedings is insufficient evidence to show that the noncitizen has committed a crime, since a nolo contendere plea is not an admission of guilt to the underlying crime. Applied in this context, counsel could argue that a no contest plea cannot be used to establish that a noncitizen has "committed" a crime, because even though there is a conviction, a no contest plea gives no proof that the offense of conviction was "committed" by the defendant. Granted, other evidence, however, could be used to prove the conduct.

Thanks to Ray Borloutchi.
CD4:8.58;SH:6.29

US Supreme Court

IMMIGRATION OFFENSES – ILLEGAL REENTRY – SENTENCE –
Molina–Martinez v. United States, 136 S.Ct. 1338 (Apr. 20, 2016) (where there is an unpreserved error in calculating a Sentencing Guidelines range, a defendant is not required to provide additional evidence to show the error affected his or her substantial rights).
CD4:CHAPT13

POST CON RELIEF – UNCONSTITUTIONAL STATUTE – RETROACTIVITY
AGGRAVATED FELONY – CRIME OF VIOLENCE – § 16(b)
Welch v. United States, ___ U.S. ___, No. 15-6418 (Apr. 18, 2016) (*Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to invalidate 16(b), no matter when the conviction occurred, because it is a "substantive rule" of criminal procedure, because it "changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'") (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Note: This decision has substantial implications for anyone involved in immigration work for clients with criminal histories. The ACCA residual clause, involved in *Johnson*, uses language that tracks the 16(b) definition of a "crime of violence," a type of aggravated felony that frequently results in detention and removal of migrants through the nation's immigration court system. Since *Johnson* was decided, the Fifth, Seventh, and Ninth Circuits have held that

the reasoning of *Johnson* holding unconstitutional the residual clause of the ACCA requires them to invalidate 18 U.S.C. § 16(b), for the same reasons.
CD4:19.41;AF:5.23;SH:7.51;PCN:6.56

BIA

POST CON – MOTION TO REOPEN SUA SPONTE AFTER VACATED CONVICTION
The Board has frequently granted motions to reopen, *sua sponte*, after a conviction has been vacated. E.g., *In Re: Jose Noel Meza-Perez A.K.A. Jose Noel Perez*, 2011 Wl 899604 (BIA 2011) (unpublished) ("The sole conviction underlying the respondent's removability under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (crime of domestic violence), has been vacated due to a defect in the criminal proceedings. The Board, therefore, will grant the respondent's motion sua sponte and terminate the proceedings."); *In Re: Cesar Gomez-Rivas A.K.A. Cesar Gomez A.K.A. Cesar Rivas Gomez*, : A041 830 317 - IMP, 2011 WL 4730892, at *1 (BIA 2011) (unpublished) (reopening an untimely motion to reopen after the respondent was deported because the conviction that formed the basis for the deportation was vacated on a legally invalidity); *In Re: Francisco Antonio Jimenez Dilone A.K.A. Francisco Jimenez A.K.A. Franciso Jimenez A.K.A. Franciso Antonio Jimenez-Dilone*, : A039 093 312 - BOS, 2009 WL 422063, at *1-2 (BIA 2009) (unpublished) (" Given this new evidence [regarding the vacatur of a conviction], we find that *sua sponte* reopening is appropriate despite the time bar, and will reopen proceedings and remand the record to the Immigration Judge."); *In Re: Ignacio Javier Perez-Hernandez A.K.A. Javier Ignacio Perez, Jr. A.K.A. Ignacio Hernandez*, : A092 259 726 - LOS, 2013 WL 3899855, at *1 (BIA July 18, 2013) (unpublished) ("The evidence offered with the motion reveals that on Apr. 6, 2011, the criminal court granted the respondent's motion, pursuant to California Penal Code section 1016.5, to vacate the conviction underlying his removability, and permitted him to plead to a lesser offence. *See* Motion Tab F. California Penal Code section 1016.5 requires that a criminal defendant must be advised of the potential immigration consequences of entering a plea of guilty prior to entering the plea. Inasmuch as the conviction underlying the sole basis of the respondent's removability has been vacated due to a substantive defect in the criminal proceedings, reopening is warranted. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).")(emphasis supplied). See also *Mendiola v. Holder*, 576 F. App'x 828, 835-36 (10th Cir. 2014) (unpublished); *Zambrano-Reyes v. Holder*, 725 F.3d 744, 751 (7th Cir. 2013); *Anaya–Aguilar v. Holder*, 697 F.3d 1189 (7th Cir.2012); *Pllumi v. Attorney Gen. of U.S.*, 642 F.3d 155, 160 (3d Cir. 2011); *Mahmood v. Holder*, 570 F.3d 466, 470 (2d Cir. 2009).

Thanks to Stacy Tolchin.
CD4:15.34;AF:6.30;CMT3:10.31

First Circuit

DOMESTIC VIOLENCE – ASSAULT ON SPOUSE
Sauceda v. Lynch, ___ F.3d ___, 2016 WL 1612848 (1st Cir. Apr. 22, 2016) (on rehearing) (Maine conviction for assault on spouse, in violation of Me. Rev. Stat. Ann. tit. 17–A, § 207(1)(A) ("intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another

person."), is not necessarily a crime of domestic violence, since the statute is divisible between "bodily injury" (domestic violence) and "offensive physical contact" (non-domestic violence)).
CD4:22.25;SH:7.153

NATURE OF CONVICTION – CATEGORICAL ANALYSIS – MINIMUM CONDUCT – BURDEN
Sauceda v. Lynch, ___ F.3d ___ (1st Cir. Apr. 22, 2016) (a non-citizen can qualify for cancellation of removal without having to prove affirmatively that a conviction wasn't for a disqualifying conviction: "We hold that since all the Shepard documents have been produced and the modified categorical approach using such documents cannot identify the prong of the divisible Maine statute under which Peralta Sauceda was convicted, the unrebutted Moncrieffe presumption applies, and, as a matter of law, Peralta Sauceda was not convicted of a "crime of domestic violence.").

NOTE: This case addresses the issue of who wins a "divisible statute" argument when the record of conviction is unclear which part of the statute the noncitizen was convicted under. The Ninth Circuit went back and forth on this issue for several years. See *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007); *Young v. Holder*, 697 F.3d 976, 988–90 (9th Cir.2012) (en banc). Ultimately, however, the Ninth Circuit left this question open following *Moncrieffe*. See *Almanza Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). This appears to be the first Circuit Court decision to definitively apply *Moncrieffe* to find that the categorical (and modified categorical) analysis is a question of law, and does not depend upon whether the Government or the Respondent bears the burden of proof.
CD4:16.7, 15.26, 24.1;AF:4.6, 2.1;CMT3:6.2, 3.1

Second Circuit

DETENTION – IMMIGRATION DETENTION – ARRIVING ALIENS – NO ENTITLEMENT TO AN INDIVIDUALIZED BOND HEARING AFTER SIX MONTHS
Cardona v. Nalls-Castillo, ___ F.Supp.3d ___, 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016) (8 U.S.C. §1225(b) authorizes detention of certain "arriving aliens," including those who have been convicted of enumerated offenses, during the pendency of their removal proceedings, but does not provide for a bond hearing before an immigration judge).
CD4:6.41

Fourth Circuit

AGGRAVATED FELONY – THEFT OFFENSE – RECEIVING STOLEN OR EMBEZZLED PROPERTY
Mena v. Lynch, ____ F.3d ____, 2016 WL 1660166 (4th Cir. Apr. 27, 2016) (federal conviction of violating 18 U.S.C. § 659, second paragraph (purchase, receipt, or possession of property that has moved in interstate or foreign commerce "knowing the same to have been embezzled or stolen"), was not categorically an aggravated felony theft offense, under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), for immigration purposes, because the crime of embezzlement necessarily involves a taking of property *with* the owner's consent, and "a taking of property 'without consent' is an essential element" of aggravated felony theft); see *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005) ("[w]hen a theft offense has occurred, property has been obtained from its owner 'without consent;' " but "in a fraud scheme, the owner has voluntarily 'surrendered' his property, because of an 'intentional perversion of truth,' or otherwise 'act [ed] upon' a false representation to his injury. . . . [The] "key and controlling distinction between

these two crimes is ... the 'consent' element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained."); accord, *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014).
CD4:19.94, A.42, B.43;AF:5.78;SH:7.103, 8.46

Fifth Circuit

AGGRAVATED FELONY – SENTENCE IMPOSED

United States v. Narez-Garcia, ___ F.3d ___, 2016 WL 1274034 (5th Cir. March 31, 2016) (Arkansas conviction of third-degree domestic battery, with a sentence to confinement of "___ months" and "Suspended Imposition of Sentence: 72 months," did not warrant reversal as the basis for imposing an 8-level enhancement in the federal sentence for illegal reentry after deportation, since the defendant did not sufficiently raise the insufficient sentence argument in the trial court, and the significance of the "suspended imposition of sentence" in Arkansas law, was not sufficiently clear).

NOTE: While the noncitizen in this case was limited in his ability to argue the point because he had failed to raise it earlier, the dissenting opinion lays out a good argument on the difference between directly "suspending" a sentence, versus imposing *and then* suspending a sentence. Apparently there is room to argue that there is a distinction between these two judicial acts that may mean that a straight "suspended" sentence is more similar to "execution of sentence suspended" under California law, which does not count as a sentence for immigration purposes.
CD4:19.10;AF:3.55;SH:7.18

Sixth Circuit

EXTRADITION – BOSNIA

Basic v. Steck, ___ F.3d ___, 2016 WL 1460549 (6th Cir. Apr. 14, 2016) (Secretary of State was empowered to extradite United States citizens to Bosnia, provided that other requirements of treaty between United States and Bosnia were met, and decision from Bosnian Court that included what appeared to be finding of probable cause and order for detention of naturalized citizen of United States, which constituted valid arrest warrant under Bosnian law, satisfied requirement of "duly authenticated copy of the warrant of arrest" under extradition treaty).
CD4:6.48;PCN:9.15

Eighth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – THIRD DEGREE ASSAULT ON AN OFFICER
AGGRAVATED FELONY – CRIME OF VIOLENCE – RECKLESS INTENT
CATEGORICAL ANALYSIS – RECORD OF CONVICTION – PRESENTENCE REPORT

United States. v. Garcia-Longoria, ___ F.3d ___, 2016 WL 1658120 (8th Cir. Apr. 27, 2016) (Nebraska conviction for third-degree assaulting a police officer, in violation of Neb.Rev.St. § 28–931(1) (intentionally, knowingly, or recklessly cause bodily injury to a police officer), was a "crime of violence" for purposes of the ACCA, because the presentence report, to which the defendant did not object, reflected a *mens rea* of intent); *see United States v. Ossana,* 638 F.3d 895, 900–03 & n. 6 (8th Cir. 2011) (at least in some circumstances, a crime involving a *mens rea* of mere recklessness does not qualify as a crime of violence); *compare United States v. Boose,* 739 F.3d 1185, 1187

(8th Cir.2014), *and United States v. Dawn,* 685 F.3d 790, 795 (8th Cir. 2012) (following *Ossana*), *with United States v. Kosmes,* 792 F.3d 973, 977 (8th Cir. 2015) (distinguishing *Ossana*), *cert. denied,* __ S.Ct. __ (2016).
CD4:16.28, 19.40, A.14, B.9;AF:4.27, 5.22;SH:8.10

IMMIGRATION OFFENSES – MARRIAGE FRAUD – CONSPIRACY TO COMMIT MARRIAGE FRAUD – DATE OFFENSE WAS COMPLETE
Ashraf v. Lynch, ___ F.3d ___, 2016 WL 1612766 (8th Cir. Apr. 22, 2016) (federal crime of conspiracy to commit marriage fraud was complete, in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1325(c), and thus five-year statute of limitations began to run, on date that alien submitted petition to remove conditions on residence, as the last overt act in furtherance of the conspiracy); *United States v. Stewart*, 744 F.3d 17, 18, 23 (1st Cir. 2014; *United States v. Bennett,* 765 F.3d, 887, 895 (8th Cir. 2014) (conspiracy is a continuing offense that continues through the last overt act committed in furtherance of the conspiracy); *United States v. Farmer,* 73 F.3d 836, 841 (8th Cir. 1996); *United States v. Garfinkel,* 29 F.3d 1253, 1259–60 (8th Cir. 1994); distinguishing *United States v. Rojas*, 718 F.3d 1317, 1320 (11th Cir. 2013) (the crime of marriage fraud, under 8 U.S.C. § 1325(c), is completed on the date the parties enter into the marriage).
CD4:CHAPT13

NATURE OF CONVICTION – CATEGORICAL ANALYSIS – MODIFIED CATEGORICAL ANALYSIS
*Alonzo v. Lynch,*___ F.3d ___, 2016 WL 1612772 (8th Cir. Apr. 22, 2016) (Iowa convictions for domestic abuse assault, third or subsequent offense, in violation of Iowa Code Annotated § 708.1, a divisible statute, did not categorically constitute crimes of moral turpitude, since a single conviction of that offense is not necessarily a crime of moral turpitude). See *Cisneros–Guerrerro v. Holder,* 774 F.3d 1056, 1061 (5th Cir. 2014).

Note: The court noted, but made no decision on, the issue of whether conviction of multiple non-CMT offenses can arise to the level of a CMT. The court merely held that the statute was divisible, and the BIA therefore should have applied the modified categorical analysis.
CD4:16.12;CMT3:7.4;AF:4.11

Ninth Circuit

CONTROLLED SUBSTANCES – ARIZONA – *PAULUS* DEFENSE
Practice Advisory – Arizona – *Paulus* Unidentified Controlled Substance Defense
Two drugs on the Arizona controlled substances schedules are not on the federal list, so the unidentified substance defense and the unlisted substance defenses apply. They are Benzylfentanyl and Thenylfentanyl. Thanks to Maris J. Liss.
CD4:21.34;SH:7.143

CAL POST CON – STATE REHABILITATIVE RELIEF – EXPUNGEMENTS – *LUJAN* – DEFERRED ENTRY OF JUDGMENT (DEJ) – PROP 36 – DIVERSION
DRUG PROGRAM RELAPSE STATISTICS
Approximately 70-80% of participants in controlled substances dependency programs fail to stay clean for a year after starting a program.
http://ideas.time.com/2013/04/03/we-need-to-rethink-rehab/;
https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-

edition/frequently-asked-questions/how-effective-drug-addiction-treatment
CCDOI 20.68

IMMIGRATION OFFENSES – ILLEGAL RENTRY ATTEMPT – ELEMENTS – MENTAL STATE
United States v. Argueta-Rosales, ___ F.3d ___, 2016 WL 1425881 (9th Cir. Apr. 12, 2016) (government failed to prove noncitizen crossed into the United States with specific intent to enter into country free from official restraint where the defendant presented evidence that he crossed into the United States in a delusional state, believing he was being chased by Mexican gangs, and with the specific intent solely to place himself into the protective custody of United States officials).
CD4:CHAPT13; CCDOI 19.8

D.C. Circuit

EXTRADITION – MEXICO
Zhenli Ye Gon v. Lynch, ___ F.Supp.3d ___, 2016 WL 1384774 (D. Columbia Apr. 7, 2016) (where a magistrate judge issued a certificate of extraditability approving the proposed extradition of Zhenli Ye Gon from the United States to Mexico, the court dismissed the "Petition for Writ of Error Coram Nobis," because there is no authority to suggest that coram nobis relief is available under these circumstances).
CD4:6.48;PCN:9.15