Criminal & Immigration

eNewsletter

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This eNewsletter contains selected recent developments in criminal immigration law occurring during February, 2009. For a complete report, see the February Report sent to Premium Members of www.NortonTooby.com.

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 (2008), with monthly updates online at www.NortonTooby.com.

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RECENT CIRCUIT DECISIONS:

First Circuit

REMOVAL PROCEEDINGS – EVIDENCE – NO ERROR IN ADMISSION OF UNTRANSLATED FOREIGN DOCUMENTS– DUE PROCESS CONSIDERATIONS OF FAIRNESS AND RELIABILITY GOVERN AND WERE NOT OFFENDER HERE

Nadal-Ginard v. Holder, 558 F.3d 61 (1st Cir. Feb. 25, 2009 (no error in admitting untranslated foreign documents in removal proceedings); citing *United States v. Diaz,* 519 F.3d 56, 64 (1st Cir. 2008) (no plain error in a criminal case where untranslated foreign language documents, including a passport, were admitted under the Federal Rules of Evidence because the "evidentiary significance was facially apparent"); *Toure v. Ashcroft,* 400 F.3d 44, 48 (1st Cir. 2005) ("[T]he Federal Rules of Evidence do not apply in INS proceedings," rather, " 'the less rigid constraints of due process impose outer limits based on considerations of fairness and reliability.' "), quoting *Yongo v. INS,* 355 F.3d 27, 30 (1st Cir. 2004)).

CD4:15.26 ♦

Second Circuit

AGGRAVATED FELONY – DRUG TRAFFICKING – SECOND POSSESSION CONVICTION HELD NOT TO BE AN AGGRAVATED FELONY

United States v. Ayon-Robles, 557 F.3d 110 (2d Cir. Feb. 24, 2009) (per curiam) (California second conviction of simple possession of a controlled substance did not constitute an aggravated felony, under INA § 101(a)(43)(B), for illegal re-entry sentencing purposes), following *Alsol v. Mukasey,* 548 F.3d 207 (2d Cir. 2008) (second felony conviction for simple drug possession was not an aggravated felony for purposes of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1101(a)(43)(B), where the noncitizen did not admit the prior in being convicted a second time).

CD4:19.58;SH:7.66, 8.3;AF:5.40, A.18, B.3 ♦

Third Circuit

JUDICIAL REVIEW – PETITION FOR REVIEW – FULL JUDICIAL REVIEW IS AVAILABLE FOR REINSTATEMENT OF REMOVAL ORDERS

Ponta-Garcia v. Attorney General of U.S., 557 F.3d 158 (3d Cir. Feb. 20, 2009) (holding full judicial review is available to a noncitizen adjudged removable following reinstatement of removal procedures, so they do not violate due process on this basis); see *United States v. Charleswell,* 456 F.3d 347, 353 (3d Cir. 2006); *Ponta-Garc[i]a v. Ashcroft,* 386 F.3d 341, 342 (1st Cir. 2004) ("An order reinstating an earlier order of deportation is subject to review...."); 8 U.S.C. § 1252 (providing for judicial review of final orders of removal); *Duran-Hernandez v. Ashcroft,* 348 F.3d 1158, 1162 n. 3 (10th Cir. 2003) (finding that 8 U.S.C. § 1252 covers review of reinstatement orders).

CD4:15.37, 15.40;AF:2.35, 2.19;CMT3:3.18, 3.34 ♦ *(Cont'd p.4)*

ARTICLE:

SUPREME COURT'S CRIMINAL DECISION IN *UNITED STATES V. HAYES* BROADENS RANGE OF CONVICTIONS THAT CAN TRIGGER DOMESTIC VIOLENCE GROUND OF DEPORTATION

In *United States v. Hayes*, ___ U.S. ___, 129 S.Ct. 1079 (Feb. 24, 2009), the Supreme Court held "that the domestic relationship, although it must be established beyond a reasonable doubt in a[n 18 U.S.C.] § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." Justice Ginsberg authored the opinion. Justice Thomas join in all but Part III, in which the court found practical considerations supported its reading to avoid frustrating Congress' manifest purpose. Chief Justice Roberts authored a persuasive dissent, and was joined by Justice Scalia, in his argument that the domestic relationship as well must be found within the elements of the predicate offense, and his defense of the virtues of the categorical analysis.

While this decision arose in the criminal context, it has a number of important implications for the domestic violence deportation ground. (INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).) First, the language of the illegal firearm offense at issue in *Hayes* is largely indistinguishable from the language of the DV deportation ground. Compare 18 U.S.C. § 922(g)(9) (firearm prohibition applies to persons convicted of "a misdemeanor crime of domestic violence."), with INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (deportation ground covers a noncitizen "convicted of a crime of domestic violence . . . ."). The fact that each statute defines the required domestic relationship slightly differently has no impact on the question whether or not the offense of conviction must have the domestic relationship as an element.

There is a real risk that the immigration laws will be interpreted to reach the same conclusion. In that event, as in *Hayes*, a conviction of a generic crime of violence that has no domestic element, but is committed against a person meeting the deportation ground's definition of a protected relationship, will trigger deportation where it can be proven by other evidence. For example, a conviction of simple assault or battery may be trigger the DV deportation ground if the government can prove a listed domestic relationship at the removal hearing, so long as the elements of the offense of conviction meet the immigration definition of "crime of violence." (See INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), citing 18 U.S.C. § 16.) This would mean the overruling of decisions, such as *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. June 10, 2004), that hold the government may not resort to evidence extrinsic to the elements of the offense of conviction to establish the domestic relationship required to trigger this ground of deportation.

The Supreme Court in Hayes also declined to use the "rule of lenity" to push the decision in the defendant's favor. The court stated:

> "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco v. United States,* 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) (internal quotation marks omitted). We apply the rule "only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani,* 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). Section 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence," we acknowledge, is not a model of the careful drafter's art. See *Barnes,* 295 F.3d, at 1356. But neither is it "grievous[ly] ambigu[ous]." *Huddleston v. United States,* 415 U.S. 814, 831, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974). The text, context, purpose, and what little there is of drafting history all point in the same direction: Congress defined "misdemeanor crime of domestic violence" to include an offense "committed by" a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.

(*United States v. Hayes*, ___ U.S. ___, 129 S.Ct. 1079 (Feb. 24, 2009).)

Aside from these immigration issues, the *Hayes* decision should not have any other direct negative impact on criminal immigration law. It should have no application to the categorical analysis in general, other than Chief Justice Roberts' spirited dissent in favor of the administrative benefits of the categorical analytical approach:

> The majority's approach will entail significant problems in application. Under the interpretation adopted by the court below, it is easy to determine whether an individual is covered by the gun ban: Simply look to the record of the prior conviction. Under the majority's approach, on the other hand, it will often be necessary to go beyond the fact of conviction and "engage in an elaborate factfinding process regarding the defendant's prior offens[e]," *Taylor v. United States,* 495 U.S. 575, 601, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), to determine whether it happened to involve domestic violence.
>
> That is one reason we adopted a categorical approach to predicate offenses under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor, supra,* at 600, 110 S.Ct. 2143; see *Shepard v. United States,* 544 U.S. 13, 19, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Court considered "predicate offens[e] in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes")… *(cont'd on p. 3)*

UPCOMING EVENTS:

PRE-AILA LAS VEGAS CRIMES & IMMIGRATION SEMINAR

UNLV WILLIAM S. BOYD SCHOOL OF LAW
4505 S. MARYLAND PARKWAY, LAS VEGAS, NV 89154
JUNE 2, 2009 TIME: 9AM – 5PM

Come to Las Vegas one day early to join us for a day-long CLE training on defending non-citizens for immigration and criminal attorneys! Dan Kesselbrenner and Norton Tooby will present on the following topics:

I. Recent Developments Concerning Categorical Analysis
Categorical analysis, extra-element analysis and its limits: Wherethe government is limited to the elements of the offense of conviction, and the record of conviction, and where it is not. Different rules depend on the criminal removal ground and the circuit.

II. Attorney General's New Moral Turpitude Analysis
The new /Matter of Silva-Trevino/ (AG November 8, 2008) analysis of whether a conviction is a crime of moral turpitude, how to resist this new rule, and how to practice under it.

III. Preserving Issues in the Lower Court
Tips on how not to waiver important issues: What counsel must do before the IJ to preserve an issue for appeal to the BIA, and before the BIA to preserve an issue for a petition for review. Analogies to similar rules in criminal appeals.

IV. Evidentiary Issues in Criminal Removal Cases
How to establish a reasonable probability that a non-deportable offense within a divisible statute is actually prosecuted, under the /Duenas /rule. Differences between proof of the existence of a conviction, and proof of the nature of the conviction. Attacks on government evidence, including right to cross-examination, reliability, hearsay, and weight v. admissibility for different types of evidence.

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FUTURE SEMINAR:

SEPTEMBER, 2009

NEW YORK CRIMES AND IMMIGRATION SEMINAR

NYU SCHOOL OF LAW

ARTICLE (CONT'D.)

> As we warned in *Taylor* and reaffirmed in *Shepard,* "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor, supra,* at 601, 110 S.Ct. 2143; see *Shepard, supra,* at 20, 125 S.Ct. 1254. Those same concerns are implicated here, given that the majority would require juries and courts to look at the particular facts of a prior conviction to determine whether it happened to involve domestic violence, rather than simply looking to the elements of the predicate offense. See *ante,* at ---- - ----.

(*United States v. Hayes*, ___ U.S. ___, 129 S.Ct. 1079 (Feb. 24, 2009).) The reasoning of this decision is thus limited to taking the "extra element" approach to the DV deportation ground alone, and the reasoning does not support extending this approach to any other removal ground.

If *Hayes* is followed in the DV deportation context, it will transform the domestic relationship element of the deportation ground in effect into a conduct-based ground of deportation. The domestic relationship may become subject to proof by any evidence, like any other fact on which removal depends. Percipient witnesses, including the respondent, can testify. Character evidence can be submitted to buttress the credibility of any witness, including the respondent, and evidence of respondent's character for a pertinent trait, e.g., honesty, can be submitted for the purpose of proving conduct in conformity with that trait on the occasion in question. Evidence of the bias of any witness can be offered. For example, if the ex-spouse testifies, s/he can be impeached with any evidence of bias or lack of credibility. Objections can be offered to any evidence, on grounds of unreliability or fundamental unfairness. Counsel can also argue for the application of the Federal Rules of Evidence; while not currently binding, an Immigration Judge is certainly free to follow them in any given instance where it is necessary to reliable and fair decisionmaking. If the inquiry becomes too burdensome, the Immigration Judge or the DHS could decide not to pursue this ground of removal. What the court cannot do is listen only to the evidence of one side, and exclude pertinent evidence offered by the other. See *Wardius v. Oregon*, 412 U.S. 470 (1973) (due process requires procedural rules to be even-handed in their application, striking down a state law requiring the defendant to produce discovery for the prosecution, but not vice versa). Due process also prohibits a tribunal from allowing one party to offer evidence on an issue, but precluding the other party from doing so. *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam) (reversing sentence because trial court excluded testimony offered by the defense under Georgia's hearsay rules, but allowed the prosecution to introduce the same evidence in a codefendant's trial); *Gray v. Klauser*, 282 F.3d 633, 644 (9th Cir. 2002) (Idaho deprived petitioner of right to present a defense under Sixth Amendment when trial court used different standard for determining admissibility of hearsay statements from two dead victims. "A state rule or state judge may not without justification impose stricter evidentiary standards on a defendant . . . than it does on the prosecution.").
CD4:22.26;SH:7.154 ♦

CIRCUIT DECISIONS (CONT'D.)

Fifth Circuit

RECORD OF CONVICTION – PROBATION REPORT – PRIVACY OBJECTION TO PRESENTENCE REPORT – SEEK ORDER FROM U.S. DISTRICT COURT TO PROTECT PRIVACY OF REPORT

Arguelles-Olivares v. Mukasey, 526 F.3d 171, 180 (5th Cir. April 22, 2008), *revised opinion,* (5th Cir. Feb. 2009) (rejecting privacy objection to use of federal presentence report to establish loss to victim over $10,000 for fraud offense aggravated felony, under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i): "[noncitizen] additionally asserts that the PSR is confidential and cannot be accessed without leave of court. Arguelles-Olivares made no attempt during the immigration proceedings to seek an injunction or order from the district court to maintain the confidentiality of the PSR. He did not identify any provisions of the PSR that would jeopardize his own privacy or the government's interest in maintaining the trust of third-party witnesses by keeping the PSR confidential. There was no abuse of discretion in admitting the PSR.").
CD4:16.32;AF:4.31 ♦

Ninth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – AGGRAVATED ASSAULT

United States v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. Feb. 25, 2009) (per curiam) (Arizona conviction for aggravated assault under Arizona Revised Statutes § 13-1204(A)(11) ("[i]ntentionally, knowingly or recklessly causing any physical injury to another person") was not a conviction for a "crime of violence" under USSG § 2L1.2(b)(1)(A)(ii), as an "offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another," under U.S.S.G. § 2L1.2 n. 1(b)(iii), because "Under the categorical approach, aggravated assault requires a mens rea of at least recklessness "under circumstances manifesting extreme indifference to the value of human life." Esparza-Herrera's statute of conviction, A.R.S. § 13-1204(A)(11), encompassed ordinary recklessness, and therefore his conviction was not a conviction for generic aggravated assault or a crime of violence.").
CD4:19.40;AF:5.22, A.14, B.9;SH:7.49, 8.10 ♦

JUDICIAL REVIEW – PETITION FOR REVIEW – FUGITIVE DISENTITLEMENT DOCTRINE NOT APPLICABLE WHERE PETITIONER'S WHEREABOUTS KNOWN DURING PETITION FOR REVIEW

Wenqin Sun v. Mukasey, 555 F.3d 802 (9th Cir. Feb. 9, 2009) (fugitive disentitlement doctrine, which developed in the criminal context to limit a person's ability to appeal as long as s/he remained a "fugitive," has also been applied in the immigration context, but could not preclude the court's consideration of a petition for review on the grounds that the petitioner did not report for removal, as ordered by the government, several years prior to filing a petition for review: "the critical question" is "whether the appellant is a fugitive at the time the appeal is pending." Because the petitioner's whereabouts were known to her counsel, DHS, and the court while the petition for review was pending, it would be inappropriate to dismiss the case). *(Cont'd next column)*

See generally AILF's practice advisory at http://www.ailf.org/lac/pa/lac_pa_fugdis.pdf; AILF Legal Action Center Litigation Clearinghouse Newsletter, Vol. 4, No. 3 (Feb. 24, 2009). CD4:15.37;AF:2.19;CMT3:3.18 ♦

ASYLUM – PARTICULARLY SERIOUS CRIME – DUI

Anaya-Ortiz v. Mukasey, 553 F.3d 1266 (9th Cir. Jan. 27, 2009) ("The BIA determined that Anaya's testimony 'establishes that the respondent, after drinking alcohol to the point where he was intoxicated, began driving a motor vehicle in reckless disregard for persons or property whereupon he drove his car into the home of his victim causing property damage and bodily injury.' The BIA also noted that Anaya 'was confined for his criminal actions.' We therefore conclude that the BIA properly considered 'the nature of the conviction, the circumstances and underlying facts of the conviction, [and] the type of sentence imposed' when reaching its conclusion that Anaya's drunk driving constituted a 'particularly serious crime.').
CD4:24.19;AF:2.31;CMT3:3.30 ♦

AGGRAVATED FELONY – FIREARMS OFFENSES – FELON IN POSSESSION OF FIREARM – ARGUMENT THAT STATE OFFENSE LACKS INTERSTATE COMMERCE ELEMENT NECESSARY TO CORRESPOND TO FEDERAL OFFENSE

In *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), the Ninth Circuit has already determined that the interstate commerce element under §922 should not be a requisite of the criminal state statute at issue when conducting the categorical matching process. The Ninth Circuit stated that the wording of INA § 101(a)(43) makes evident that Congress clearly intended state crimes to serve as predicate offenses for the purpose of defining what constitutes an aggravated felony. *Ibid*. The Court noted that INA § 101(a)(43)(E) defines aggravated felony as "an offense described in" several federal statutory provisions, including 18 U.S.C. § 922(g)(1). *Ibid*. The Court reasoned:

> [I]nterpreting the jurisdictional element of § 922(g) to be necessary in order for a state firearms conviction to constitute an aggravated felony under § 1101(a)(43)(E)(ii) would reduce the number of state firearms offenses that qualify to no more than a negligible number. Rarely, if ever, would a state firearms conviction specify whether a commerce nexus exists. If we were to construe the jurisdictional nexus of the federal felon in possession provision to be a necessary element for a state crime to qualify as an aggravated felony, we would undermine the language of the aggravated felony statute and the evident intent of Congress. *Ibid*.

However, *Castillo-Rivera* has arguably been overruled by *Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. October 20, 2008) (en banc), in which the Ninth Circuit sitting en banc visited the same quandary and came to the opposite conclusion. *(Cont'd on p. 5)*

(Cont'd from page 4)
This principle was reiterated in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) (finding California accessory after the fact missing an entire element of the generic definition of a crime involving moral turpitude), and *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008) (finding the state fraud statute missing an entire element – the $10,000 loss to the victim – of aggravated felony fraud offenses).

Because the Ninth Circuit has now clarified en banc in two cases that there must be a categorical match to each element of the state statute to the federal immigration statute or generic definition, *Castillo-Rivera* has arguably been overruled and the case circumvents this requirement. Because the California felony in possession of a firearm statute has no interstate commerce element, it is a categorical mismatch to the federal definition and the noncitizen cannot be considered an aggravated felon. Thanks to Holly S. Cooper.

Counsel can also argue that the Ninth Circuit did not fully consider the issue of the federal element in that case. The original BIA opinion in *Matter of Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA Dec. 1, 2000), ruled for the immigrant, noting that Congress knows how to say "no federal jurisdictional element is required" when it wants to, and citing other legislation in which Congress did just that. *Castillo-Rivera* did not discuss that argument.
CD4:19.8, 19.70;AF:4.35, 5.52 ♦

Tenth Circuit
AGGRAVATED FELONY – CRIME OF VIOLENCE – SEXUAL ASSAULT
United States v. Yanez-Rodriguez, 555 F.3d 931 (10th Cir. Feb. 10, 2009) (Kansas conviction for violation of Kan. Stat. Ann. § 21-3517 (1988) ("unlawful, intentional touching of the person of another who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another") is a "forcible sex offense" for illegal re-entry sentencing purposes, even though the statute does not require that the actor used force), disagreeing with *United States v. Meraz-Enriquez*, 442 F.3d 331 (5th Cir.2006).
CD4:19.22, 19.38;AF:4.40, 5.20, A.14, B.77 ♦

Other
SAFE HAVEN – TRAVEL ACT
18 U.S.C. § 1952 ("travels . . . or uses the mail or any facility in interstate or foreign commerce, within intent do (1) distribute the proceeds of any unlawful activity."), by it minimum conduct is arguably not controlled substances offense or a crime involving moral turpitude (the funds may have been obtained through non-CMT activity and be distributed for non-CMT purposes).
Thanks to Jonathan Moore.
SH:9.47 ♦

Supreme Court
POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – AFFIRMATIVE MISADVICE OF IMMIGRATION CONSEQUENCES – SUPREME COURT GRANTS CERTIORARI
Padilla v. Kentucky, ___ U.S. ___, 129 S.Ct. 1317 (Feb. 23, 2009) (mem) (United States Supreme Court granted cert in Padilla v. Kentucky, in which the Kentucky Supreme Court affirmed the denial of post-conviction relief on a claim of ineffective assistance of counsel for affirmatively misadvising the defendant concerning the immigration consequences of his conviction during plea bargaining). Oral argument will be heard in the fall.
PCN:6.18 ♦

DOMESTIC VIOLENCE – DOMESTIC RELATIONSHIP ELEMENT OF THE FEDERAL CRIMINAL FIREARMS POSSESSION OFFENSE NEED NOT BE IN THE ELEMENTS OF THE PREDICATE OFFENSE OF CONVICTION, BUT CAN BE PROVEN BY OTHER EVIDENCE
United States v. Hayes, ___ U.S. ___, 129 S.Ct. 1079 (Feb. 24, 2009) (West Virginia conviction of misdemeanor battery, in violation of W. Va. Code Ann. § 61-2-9(c) ("[A]ny person [who] unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, ... shall be guilty of a misdemeanor."), constituted a conviction of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A), for purposes of a conviction of illegal possession of a firearm, in violation of 18 U.S.C. § 922(g)(9), where evidence outside the elements of the predicate offense established the required domestic relationship.)
CD4:22.26;SH:7.154 ♦

ARTICLE:

NATURE OF CONVICTION – RECORD OF CONVICTION – ABSTRACTS OF JUDGMENT – ARGUMENT THAT ABSTRACTS ARE INSUFFICIENTLY RELIABLE TO FORM PART OF RECORD OF CONVICTION

Abstracts of judgment cannot be relied upon in the modified categorical approach because they are insufficiently reliable non-judicial summaries of other documents. Under both *Duenas-Alvarez* and *Shepard* documents must be judicial in nature to be *Shepard*-type documents considered under the modified categorical approach. 'Judicial' does not mean prepared by a judge- as *Snellenberger* noted they can be prepared by a clerk of court. *Snellenberger*, 548 F.3d at 702. But it does not follow that *anything* prepared by a clerk of court is thereby judicial in nature. Abstracts of judgment are one such document, that though prepared by a clerk are not judicial in nature and therefore cannot be considered in the modified categorical approach. Furthermore, abstracts of judgment are so often flawed that they fail to meet the high *Shepard* standard for document reliability.

Abstracts of judgment are insufficiently judicial in nature to be *Shepard*-type documents. In *Duenas-Alvarez*, the Supreme Court reiterated its position from *Shepard* that in addition to "'the terms of a plea agreement,' [and] the 'transcript of a colloquy between the judge and the defendant,' [] 'some comparable *judicial* record' of information about the 'factual basis for the plea'" may be considered in the modified categorical approach. *Duenas-Alvarez*, 549 U.S. at 187 (*citing to Shepard* at 26) (emphasis added). As to abstracts, this Court had already noted that, "preparation of the abstract of criminal judgment in California is a clerical, not a judicial function." *United States v*. *Navidad-Marcos*, 367 F.3d 903, 909 (9th Cir. 2004).

While the court in *Navidad-Marcos* characterized this distinction in terms of a clerical/judicial dichotomy, its analysis is undisturbed by *Snellenberger's* favorable characterization of documents prepared by clerks of court. *See Snellenberger*, 548 F.3d at 702. Indeed, in *People v*. *Rodriguez*, the California case regarding abstracts of judgment to which this Court in *Navidad-Marcos* was citing for that proposition, no action by a clerk of court was even at issue. *People v*. *Rodriguez*, 152 Cal.App.3d 289, 299 (Cal.2nd 1984). There the clerical/judicial distinction was being drawn with regard to a judge's own actions. *Id*. (discussing why a judge could not use a provision permitting changes to abstracts of judgment in light of clerical errors for the purpose of substantively altering it). An abstract of judgment is then "clerical" and not "judicial" in the sense that it does not require nor immediately record the action of a judge acting in that capacity. See A.R. at 130-31 (Mr. Garcia's abstract of judgment, as an example of Judicial Council form CR-290, nowhere requires the signature of a judge). For this reason, a court "may not rely on an abstract of judgment to determine the *nature* of a prior conviction for purposes of analysis under *Taylor v*. *United States*." *United States v*. *Sandoval-Sandoval*, 487 F.3d 1278 (9th Cir. 2007).

As secondary sources, abstracts of judgment are insufficiently reliable for removal purposes. Abstracts of judgment have been consistently found unreliable for the purpose of identifying the nature of a conviction. California courts have frequently noted abstracts of judgment contain erroneous information and as such are not reliable. *See, e.g., People v. Morelos*, 168 Cal. App. 4th 758, 763 (Cal. Ct. App. 2008) (abstract incorrectly labeled the conviction as a felony instead of a misdemeanor); *People v. Bradley*, 47 Cal. Rptr. 3d 741, 762 (Cal. Ct. App. 2006) (abstract incorrectly labeled the offense, identifying "misappropriation" and "unauthorized loan" as "embezzlement"); *People v. Martinez*, 31 Cal. 4th 673, 704 (Cal. 2003) (abstract incorrectly labeled sentence as life *without* the possibility of parole instead of with the possibility of parole); *People v. Prieto*, 30 Cal. 4th 226, 277 (Cal. 2003) (same); *People v. Grayson*, 83 Cal. App. 4th 479, 481 (Cal. Ct. App. 2000) (abstract erroneously denominated false imprisonment conviction as a conviction for dissuading a witness); *People v. Avila*, 75 Cal. App. 4th 416 (1999) (abstract incorrectly noted the sentence imposed); *People v. Thongvilay*, 62 Cal. App. 4th 71, 77 (Cal. Ct. App. 1998) (abstract incorrectly labeled a second degree murder conviction as first degree murder); *People v. Murillo*, 47 Cal. App. 4th 1104, (Cal. Ct. App. 1996) (abstract incorrectly stated that the conviction was by plea instead of jury verdict); *People v. Esquivel*, 28 Cal. App. 4th 1386 (1994) (abstract incorrectly listed the applicable sentence term); *People v. High*, 119 Cal. App. 4th 1192 (2004) (abstract incorrectly identified statute of conviction); *People v. Jackson*, 128 Cal. App. 4th 1326, 1327 (2005) ("The parties have pointed out several clerical errors in the abstract of judgment, which we order corrected."); *People v. Leung*, 5 Cal. App. 4th 482 (1992) (abstract incorrectly stated the degree of conviction, showing first degree robbery instead of second-degree); *People v. Olmsted*, 84 Cal. App. 4th 270, 272 (2000) (abstract incorrectly identified consecutive sentences as concurrent); *People v. Williams*, 40 Cal. App. 4th 446 (1995) (abstract incorrectly calculated custody credits); *People v. Rowland*, 206 Cal. App. 3d 119 (1989) (abstract incorrectly ordered restitution); *Rios v. Garcia*, 390 F.3d 1082, 1083 (C.D. Cal. 2004) (abstract erroneously stated the offense as burglary instead of robbery). In the words of one California court, "The frequency with which records on appeal have come to us with [erroneous] abstracts of judgments … indicates that trial courts would be well advised to remind their personnel that printed abstract of judgment forms must be used with caution." *People v. Waters*, 30 Cal.App.3d 354, 362 (Cal.3rd 1973). More recently, the Fifth Circuit went so far as to hold that "considering the low level of reliability associated with abstracts of judgment in California, we are satisfied they should not be added to the list of documents *Shepard* authorizes …." *United States v*. *Gutierrez-Ramirez*, 405 F.3d 352, 359 (5th Cir. 2005).

Abstracts of judgment may establish the mere fact of a conviction, or the length of a sentence. *See* 8 U.S.C. § 1229a(c)(3)(B), *United States v*. *Valle-Montalbo*, 474 F.3d 1197, 1199 (2007); *see also Sandoval-Sandoval*, 487 F.3d at 1278. However, they lack sufficient judicial imprimatur and are too prone to error to satisfy *Shepard's* rigorous standard. For a person to be deportable the government must satisfy a high burden. Since *Woodby v*. *INS*, the Government must prove removability by "clear, unequivocal, and convincing evidence." *Woodby v*. *INS*, 385 U.S. 276, 286 (1966). Abstracts are simply too unreliable to be "unequivocal." Thanks to Holly Cooper. ♦