THE LAW OFFICES OF
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Crimes & Immigration
Newsletter

January, 2015

This Newsletter contains selected recent developments in criminal immigration law occurring during January, 2015.

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.

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RECENT DEVELOPMENTS

Articles

POST CON RELIEF – EFFECTIVE POST-CONVICTION ORDER – CONVICTION

In an EOIR Newsletter, an article describes the difference in immigration consequences between a conviction vacated on a ground of legal invalidity, and one expunged solely for purposes of rehabilitation or to avoid immigration consequences:

The expungement of a record of conviction is "[t]he removal of a conviction (esp. for a first offense) from a person's criminal record." Black's Law Dictionary 621 (8th ed. 2004). A vacatur is "[t]he act of annulling or setting aside [or a] rule or order by which a proceeding is vacated." Id. at 1546. In the immigration context, the difference between a vacatur and an expungement involves intent. Criminal courts typically expunge convictions in order to rehabilitate offenders or, in the case of noncitizens, to prevent negative immigration consequences. Criminal courts typically vacate convictions because the convictions are substantively defective, for example a due process or the right to counsel violations at trial. Accordingly, this article uses the term "vacatur" to mean removal of a conviction because of substantive defects in the conviction and uses the term "expungement" to mean removal of a conviction to rehabilitate or to prevent immigration consequences. Some courts use the terms "vacatur" and "expungement" differently, however, and some courts use entirely different terms to express these concepts. The Act is silent as to whether a criminal conviction that has been vacated or expunged has

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immigration consequences. The Attorney General, the Board, and, with one exception, the circuit courts of appeals have adopted the following rule: [I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates [or expunges] a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes." Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003) (footnote omitted). Accord Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006); Alim v. Gonzales, 446 F.3d 1239, 1248–49 (11th Cir. 2006); Pinho v. Gonzales, 432 F.3d 193, 215 (3d Cir. 2005); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1129 (10th Cir. 2005); Sandoval v. INS, 240 F.3d 577, 583 (7th Cir. 2001); Matter of Marroquin-Garcia, 23 I&N Dec. 705, 713 (A.G. 2005). The Fifth Circuit, by contrast, has held that convictions vacated for any reason, including substantive defects, retain their immigration consequences. Garcia-Maldonado v. Gonzales, 491 F.3d 284, 291 (5th Cir. 2007).
Josh Adams, Treatment of Criminal Convictions in the Immigration Context, 2 Immigration Law Advisor (October 2008) (emphasis in original), http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%20Vol%202/vol2no10.pdf.
CD4:11.18;PCN:8.3;AF:6.12;CMT3:10.11
CPCR6.8

CAL CRIM DEF – CONTROLLED SUBSTANCES – UNIDENTIFIED SUBSTANCE DEFENSE – PRACTICE ADVISORY
Health & Safety Code §§ 11350-11352. Formerly, these offenses covered certain substances that were not on the federal list, and these statutes were therefore divisible for purposes of removal and eligibility for relief under the strict standards of Moncrieffe and Descamps. For example, the government conceded in Esquivel-Garcia v. Holder, 593 F. 3d 1025 (9th Cir. 2010) that 11350 was divisible, but the conviction in that case occurred in 1989 when schedule II at HS 11055(b) (referenced by 11350) still included apomorphine, which is specifically excluded from the federal CSA. See 21 CFR §1308.12(b)(1). However, apomorphine no longer appears on the California schedules. Likewise, Matter of Paulus relied on the fact that peyote is prohibited under California law, but was not a federal controlled substance at the time. Peyote now is on the federal schedule I. It is not clear whether any other controlled substances are on the California lists for these offenses, but not on the federal lists. Acetafentanyl is also an analogue to a federally controlled substance and there is a catch all in the CSA for analogues.

There is a good argument that the burden is on the government to establish every fact necessary for deportation, and the government must therefore establish that every drug on the 11350 list is also on the federal list before the offense categorically triggers deportation. N. Tooby & K. Brady, California Criminal Defense of Immigrants §21.31 (2014).

There is another problem with this defense against removal. The unspecified drug defense would not be successful in immigration court, if the immigration judge required a showing of "realistic probability" of prosecution in California as to the unlisted drug. Matter of Ferreira, 26 I. & N. Dec. 415 (BIA 2014). There is a strong argument that Ferreira is bad law, and should not be followed, or should be rejected by the Ninth Circuit. Matter of Chairez-Castrejon ,26 I. & N. Dec. 349 (BIA 2014). See also National Immigration Project of the National Lawyers Guild and Immigration Defense Project, Practice Advisory, The Realistic Probability Standard: Fighting Government Efforts To Use It To Undermine The Categorical Approach (Nov. 5, 2014) http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_realistic_probability_11-5-2014.pdf.

If the IJ does require a showing of "realistic probability" of prosecution as to the specific unlisted drug, however, counsel have been unable to come up with a sample prosecution showing offenses involving the drug are in fact prosecuted in California. It is therefore far safer at present to seek a plea to another offense that does not trigger removal, such as accessory after the fact to a drug offense, under Penal Code § 32, which is not considered a drug offense or a drug-trafficking aggravated felony. Matter of Batista-Hernandez, 21

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I. & N. Dec. 955 (BIA 1997). For other possible safer dispositions, see N. Tooby & K. Brady, California Criminal Defense of Immigrants §§8.17-8.31 (2014).

Health & Safety Code §§ 11377-11379. These offenses certain substances that are not on the federal list, and these statutes are therefore divisible for purposes of removal and eligibility for relief under the strict standards of Moncrieffe and Descamps. Coronado v. Holder, 759 F. 3d 977 (9th Cir. 2014). Two federally unlisted drugs, prohibited by Health & Safety Code §§ 11377-11379 for which proof of prosecution exists are khat, prohibited under Health & Safety Code § 11055(d)(2), and chorioinic gonadatropin, prohibited by Health & Safety Code §11056(f). There may be more. Therefore, Ferreira does not prevent these statutes from being considered divisible.
CD4:21.34;AF:19.42;SH:7.67

First Circuit

RELIEF – SPECIAL IMMIGRANT JUVENILE
In re Israel O., ___ Cal.App.5th ___, 2015 WL 227892 (1st Dist. Jan. 16, 2015) (reversing the order of the juvenile court denying defendant's request that the court make factual findings that would qualify him for special immigrant juvenile (SIJ) status, and remanding for a hearing to determine whether it is in defendant's best interest to be returned to Mexico, since the findings are a prerequisite for filing an SIJ status application, to allow defendant an opportunity to pursue regularization of his immigration status in the United States; reunification of defendant with his father in Mexico is not viable due to abandonment; and an eligible minor under the SIJ statute, 8 U.S.C. § 1101(a)(27)(J), includes a juvenile for whom a safe and suitable parental home is available in the United States and reunification with a parent in his or her country of origin is not viable due to abuse, neglect, or abandonment).
CD4:12.7

Second Circuit

RELIEF – WAIVERS – INA § 212(h) WAIVER – LPR AGGRAVATED FELONY BAR
Husic v. Holder, ___ F.3d ___, 2015 WL 106359 (2d Cir. Jan. 8, 2015) (the aggravated felony bar to eligibility for a waiver of inadmissibility under INA § 212(h), applies only to those persons with an aggravated felony conviction who became LPRs at the time that they lawfully entered the United States); but see *Matter of Koljenovic*, 25 I&N Dec. 219 (2010).

Note: With this decision, the Second Circuit joins the seven other Courts of Appeal—an overwhelming majority—to have rejected *Matter of Koljenovic*. To date, the Eighth Circuit stands alone in upholding the BIA's decision. The First and the Tenth Circuits have not yet ruled on the issue.
CD4:24.29;CMT3:3.44;AF:2.45

Fourth Circuit

AGGRAVATED FELONY – THEFT OFFENSES – UNAUTHORIZED USE OF A MOTOR VEHICLE – DEFINITION OF THEFT
Castillo v. Holder, ___ F.3d ___, ___, 2015 WL 161952 (4th Cir. Jan. 14, 2015) (Virginia conviction of unauthorized use of a motor vehicle, in violation of Virginia Code § 18.2–102 ["take, drive or use any ... vehicle ... not his own, without the consent of the owner [ ] and in the absence of the owner, and with intent temporarily to deprive the owner [ ] of his possession [ ], without intent to steal the same, shall be guilty"], did not categorically qualify as an aggravated felony theft offense, under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), because the full range of conduct covered by the Virginia crime of "unauthorized use" … can and do arise based on circumstances in which the defendant's use of property deviates only slightly from the specific scope of consensual use, resulting in an insignificant effect on

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ownership interests. [Footnote omitted] These circumstances stand in stark contrast to crimes involving the intentional, nonconsensual takings that typically involve significant impairment of ownership rights and damage to the property as described by the BIA in its elaboration of the term "theft offense." See VZS, 22 I. & N. Dec. at 1349."); quoting Overstreet v. Commonwealth, 17 Va.App. 234, 435 S.E.2d 906, 908 (Va.Ct.App.1993).
CD4:19.94;SH:7.103, 8.46;AF:5.79, A.42, B.43

Ninth Circuit

AGGRAVATED FELONY – FRAUD OFFENSES – LOSS AMOUNT – CANNOT INCLUDE LOSSES INCURRED PRIOR TO MOMENT DEFENDANT JOINED THE CONSPIRACY
United States v. Rice, ___ F.3d ___, 2015 WL 265459 (9th Cir. Jan. 22, 2015) (reversing sentence for conspiracy to commit money laundering offense, in violation of 18 U.S.C. § 1956(a)(3)(A), since district court improperly based the sentence and restitution order on a loss amount that included money laundered before the defendant joined the conspiracy).
CD4:19.74;SH:7.82;AF:5.56

CAL POST CON – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL –CONFLICT OF INTEREST
People v. Almanza, ___ Cal.App.4th ___, ___, ___ Cal.Rptr.3d ___, 2015 WL 368283 (6th Dist. Jan. 29, 2015) ("Because defense counsel was not representing two or more defendants concurrently, under *Doolin's* bright-line rule we apply the traditional Strickland prejudice standard to his claim. . . . Accordingly, it is possible that the outcome might have differed absent the conflict of interest. But Strickland speaks not of possibilities, but reasonable probabilities. Jane's inculpatory statements are buttressed by defendant's own inculpating statement and behavior. There is no reasonable probability of a different outcome.").
Cal Crim Def §20.39
CPCR7.28

Tenth Circuit

JUDICIAL REVIEW – ABUSE OF DISCRETION STANDARD
Mena-Flores v. Holder, ___ F.3d ___, ___, 2015 WL 294629 (10th Cir. Jan. 23, 2015) ("The agency abused its discretion if it failed to give a rational explanation, inexplicably deviated from past policies, failed to supply any reasoning, or rested on summary or conclusory statements. *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir.2004).").
CD4:15.37;AF:2.19;CMT3:3.18

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