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Crimes & Immigration Newsletter

June, 2015

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

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RECENT DEVELOPMENTS

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CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYSIS – ANALYSIS IS INDEPENDENT OF BURDEN OF PROOF AND APPLIES IN INADMISSIBILITY AND BARS TO RELIEF CONTEXTS

As potential further support for the argument that the issue of who has the burden of proof is irrelevant in applying the categorical analysis, the Supreme Court granted cert in another case, just one week after Mellouli, that rose the same drug paraphernalia issue, but in the relief eligibility context. The Supreme Court vacated and remanded the case for further consideration in light of Mellouli. Madrigal-Barcenas v. Lynch, Dkt. No. 13-697 (Jun. 8, 2015). For further discussion, see Section II(D) of the NIP/IDP Mellouli practice advisory, posted at http://immigrantdefenseproject.org/wp-content/uploads/2015/06/Mellouli-Advisory-6-8-15-FINAL.pdf

Thanks to Manny Vargas.
CD4:15.26, 24.1;AF:2.1;CMT3:3.1

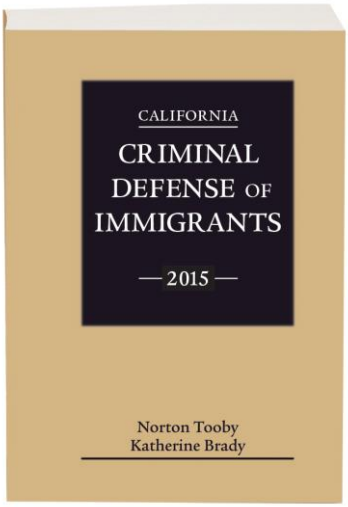
CONTROLLED SUBSTANCES – UNIDENTIFIED SUBSTANCE DEFENSE

For an excellent new discussion of Mellouli v. Holder see Practice Advisory by the NIPNLG and IDP:

Publication Announcement

California Criminal Defense of Immigrants (CEB 2015)

By Norton Tooby & Katherine Brady



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Details

We are happy to announce the publication of the new 2015 edition of our 600-page CEB book, California Crimes and Immigration, written by Norton Tooby and Katherine Brady.

This new practice manual was written specifically for California criminal defense attorneys, to assist them in representing foreign national defendants by (1) preventing the criminal disposition from triggering an immigration disaster, and (2) preventing the immigration status, and an immigration hold, from sabotaging all criminal dispositions that depend on the client actually emerging into freedom.

The heart of the book consists of nine chapters outlining "safe haven" pleas and sentences in general, and in specific areas such as Assault and Battery Offenses and Burglary Offenses. These chapters describe the specific immigration threats and their antidotes, making it easier for counsel to comply with the *Padilla* requirement of giving accurate immigration advice at plea, for a wide range of California offenses. In addition, safer alternate pleas are offered, that give equivalent convictions and sentences, but avoid damaging immigration consequences.

www.nipnlg.org/legalresources/practice_advisories/Mellouli_Advisory_6-8-15.pdf

CD4:19.60, 21.34;SH:7.143, 7.67;AF:5.42

CRIMES OF MORAL TURPITUDE – CRIMINAL INTENT WHEN NOT LISTED

Elonis v. United States, __ F.3d __ (Jun. 1, 2015) (a guilty mind is "a necessary element in the indictment and proof of every crime"; statutes that do not explicitly contain an element of intent, the Court must read into the statute, "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'").
NOTE: It may be possible to argue that this case be used to attack A.G. Ashcroft's CMT definition, requiring "some form of scienter," since all criminal offenses have some form of scienter according to Elonis, but not every crime is a CMT.

CD4:20.9;CMT3:8.9;SH:7.111

CONTROLLED SUBSTANCES – DRUG OF CONVICTION MUST BE ON FEDERAL LIST AT TIME OF CONVICTION

In determining whether Mr. Mellouli's paraphernalia conviction was related to a federally controlled substance, the Supreme Court ruled that the relevant inquiry is whether the State drug schedules were broader than the federal schedules at the time of his conviction. *Mellouli v. Lynch*, ___ U.S. ___ (Jun. 1, 2015), at *6 ("At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists"); id. at *11 (same). *Mellouli* therefore abrogates cases like *Gousse v. Ashcroft*, 339 F.3d 91, 99 (2d Cir. 2003), that held that changes to the federal schedules subsequent to the date of conviction for the noncitizen are to be applied retroactively to eliminate those substances as a basis for mismatch.

CD4:19.60, 21.34;SH:7.143, 7.67;AF:5.42

PRACTICE ADVISORY – CRIMES OF MORAL TURPITUDE – DEPORTATION – MAXIMUM SENTENCE FOR CALIFORNIA MISDEMEANOR IS NO LONGER 365 DAYS

California law has recently changed the maximum possible sentence for a misdemeanor conviction. Penal Code § 18.5 (effective Jan. 1, 2015). The purpose of the bill was to "reduce the maximum possible misdemeanor sentence from one year to 364 days, so that deportation eligibility will not be triggered for a legal immigrant who commits a misdemeanor punishable by imprisonment for one year." Hearing on SB 1310, Californian Senate Committee on Public Safety (Apr. 1, 2014). "Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days." Penal Code § 18.5. This definition applies to all misdemeanor convictions. Because the maximum possible sentence that can be imposed for a misdemeanor conviction is 364 days, a misdemeanor no longer qualifies as a deportable moral turpitude conviction under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

This applies even to convictions that pre-date the legislative change to the statute. In assessing the potential sentence for a misdemeanor, immigration authorities must look to Penal Code § 18.5 to determine whether a noncitizen "… is convicted of a crime for which a sentence of one year or longer *may* be imposed." INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).

For convictions under statutes such as Penal Code § 487 (grand theft), which are "wobblers" in that they may be punished by either a felony

or misdemeanor offense. California Penal Code § 489(c). The penalty provision states that the offense may be punished "by imprisonment in a county jail *not exceeding one year." Ibid.* (emphasis added). Californian Penal Code § 18.5 now applies because any reference to "imprisonment in a county jail up to or *not exceeding one year* shall be punishable by imprisonment in a county jail for a period not to exceed 364 days." Cal. Penal Code § 18.5 (emphasis added). "One year," as defined in INA § 237(a)(2)(A)(i), is a reference to 365 days. *See Matsuk v. INS*, 247 F.3d 999, 1001 (9th Cir. 2001), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011); *Matter of Ramirez*, 25 I. & N. Dec. 203, 208 n.1 (BIA 2010).

Penal Code § 18.5 applies to "[e]very offense which is prescribed by any law of the state" to be punishable by "imprisonment in a county jail up to or not exceeding one year." *Ibid.* Notably, the statute does not state that it only applies prospectively to convictions entered after the date of enactment. *Compare* Cal. Penal Code § 1170(h)(6) ("The sentencing changes made by the act that added this subdivision shall be applied *prospectively to any person sentenced on or after October 1, 2011*.") (emphasis added). The state legislature's failure to include expressly prospective language in § 18.5, when it clearly knew how to do so in § 1170(h)(6), indicates its intent to apply the statute retroactively. *See generally Khatib v. Cnty. of Orange*, 639 F.3d 898, 902 (9th Cir. 2011) *citing Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992 ("We presume that Congress 'says in a statute what it means and means in a statute what it says there.'"). Further, the legislature's application of Californian Penal Code § 18.5 to "every offense" indicates an intent to apply the current definition of the statute retroactively. *Khatib v. Cnty. of Orange*, 639 F.3d 898, 902 (9th Cir. 2011) ("the plain meaning of a statute controls where that meaning is unambiguous.")

Additionally, the statute must be read to include the legislature's intent. *Younger v. Superior Court*, 21 Cal. 3d 102, 113, 577 P.2d 1014 (1978) (state law); *United States v. Sagg*, 125 F.3d 1294, 1295 (9th Cir. 1997) (federal law). The intent of SB 1310 was to ameliorate the immigration consequences of misdemeanor sentences so that noncitizens are not removed for misdemeanor offenses which were not intended for removal under federal law, which defines a misdemeanor as a period of less than one year. Hence, the intent of SB 1310 was to maintain uniformity with the federal definition of a misdemeanor and to ameliorate the immigration consequences of misdemeanor offenses. Since Cal. Penal Code § 18.5 applies to "every offense," the Board must look to the current definition of a misdemeanor in determining the potential sentence imposed, which expresses the intent of the state legislature.

If the Board finds that the statute is ambiguous regarding retroactivity, California law states that "[i]n the absence of an express declaration, a statute may apply retroactively if there is "'a clear and compelling implication'" that the Legislature intended such a result." *In re Chavez*, 114 Cal. App. 4th 989, 993, 8 Cal. Rptr. 3d 395, 399 (2004). In *In re Chavez*, the California courts reviewed a legislative change to sentencing for the crime of filing false tax returns. *Id.* at 994. At the time of the defendant's conviction, the penalties required only indeterminate sentences, but three years later the state legislature changed the statute to require fixed sentences. The defendant filed a petition for writ of habeas corpus based on the change, arguing that the change in law required a lesser sentence. The court held that "when the Legislature amends a statute for the purpose of lessening the punishment, in the absence of clear legislative intent to the contrary, a criminal defendant should be accorded the

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Consultations

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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We investigate criminal and immigration histories nationwide and offer strategies for obtaining (a) immigration-safe dispositions, and (b) post-conviction relief to eliminate immigration damage.

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We investigate your situation to (a) advise your criminal lawyer what plea will avoid deportation, (b) advise your immigration lawyer on new immigration-court arguments to avoid removal, and (c) erase convictions in criminal court to avoid immigration damage.

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For Mr. Tooby's biography click here.

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benefit of a mitigation of punishment adopted before his criminal conviction became final." *Id*. at 999. Hence, to the extent that the statute is ambiguous, *In re Chavez* controls, because California Senate Bill 1310 was an ameliorative measure intended to mitigate the effects of punishment. 114 Cal. App. 4th at 999.

Therefore, due to this change in the maximum possible sentence for a California misdemeanor, the maximum sentence for a misdemeanor is 364 days, and INA § 240A(b)(1)(C) does not apply to bar eligibility for cancellation of removal.
Thanks to Stacy Tolchin.
CD4:20.34;SH:7.127;CMT3:5.8

US Supreme Court

JUDICIAL REVIEW – PETITION FOR REVIEW – MOTIONS TO REOPEN
Mata v. Lynch, ___ U.S. ___ (Jun. 15, 2015) (federal courts have authority to review immigration decisions denying motions to reopen removal orders, since a motion to reopen is a procedural protection meant to ensure a proper and lawful outcome in an immigration proceeding).

SAFE HAVENS – CONTROLLED SUBSTANCES – ALALOUGE CONTROLLED SUBSTANCE – KNOWLEDGE ELEMENT
McFadden v. United States, __ F.3d __ (2015) (Federal conviction under 21 U.S.C. § 802(a)(1) for analogue controlled substance requires proof that defendant knew he was dealing with a substance regulated under the Controlled Substances Act or Analogue Act).
SH:9.12

AGGRAVATED FELONY – CRIME OF VIOLENCE – VOID FOR VAGUENESS – ORDINARY CASE
Johnson v. United States, __ U.S. __, 135 S.Ct. 2551 (Jun. 26, 2015) (Armed Career Criminal Act residual clause, at 18 U.S.C. § 924(e)(2)(B), asking whether the defendant's conviction "otherwise involves conduct that presents a serious potential risk" is unconstitutionally void for vagueness; the "ordinary case" analysis announced in *James v. United States*, 550 U. S. 192 (2009), violates due process; tying judicial assessment of risk to a judicially imagined "ordinary case" of a crime rather than to real-world facts or statutory elements leaves grave uncertainty about how to estimate the risk posed by a crime).

Note: In addition to the effect this case will likely have on the "ordinary case" analysis applied to 18 U.S.C. § 16(b), it will be interesting to see what effect the reasoning of this case has on other aspects of immigration law, such as the "violent or dangerous crime" test under *Matter of Jean*, the *Duenas* "reasonable probability" test, or even crimes of moral turpitude.
CD4:19.44, 16.7;AF:4.6, 5.26, A.14, B.9

CONTROLLED SUBSTANCES – POSSESSION OF PARAPHERNALIA
CONTROLLED SUBSTANCES – UNIDENTIFIED SUBSTANCE
AGGRAVATED FELONY – UNIDENTIFIED SUBSTANCE
CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYSIS

Mellouli v. Lynch, ___ U.S. ___ (Jun. 1, 2015) (Kansas misdemeanor conviction of possession of drug paraphernalia "to . . . store [or] conceal . . . a controlled substance," under Kan. Stat. Ann. §21–5709(b)(2), did not categorically constitute a controlled substances offense under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), since at the time of conviction,

the Kansas controlled substances schedules were not confined to federally controlled substances, and the State did not charge, or seek to prove, that the defendant's offense involved a substance on the federal schedules).

In *Mellouli*, the court held that a Kansas conviction for possession of drug paraphernalia did not trigger removal as a conviction relating to a controlled substance listed under 21 U.S.C. § 802, where the Kansas drug schedules were not limited to drugs listed under federal law, and the State did not charge or prove that the defendant's offense involved a substance listed on the federal schedules. Under the normal categorical analysis applied to determine whether a conviction, including a controlled substances conviction, triggered removal, Mellouli's conviction does not trigger removal as a controlled substances offense, INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), because the Kansas list includes substances that are not on the federal list, and the record of conviction does not establish that the particular substance involved in this case was on the federal list. See *Matter of Paulus*, 11 I. & N. Dec. 274, 275–276 (BIA 1965) (California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance, such as peyote, controlled only under California law); *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014) (reaffirming Paulus analysis); *Matter of Fong*, 10 I. & N. Dec. 616, 619 (BIA 1964) (a Pennsylvania conviction for unlawful use of a drug rendered alien removable because "every drug enumerated in the Pennsylvania law [was] found to be a narcotic drug or marijuana within the meaning of [the federal removal statute]"), overruled in part on other grounds, *Matter of Sum*, 13 I. & N. Dec. 569 (1970).

The court summarized the BIA's position in this case as follows:

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (2009). There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general." *Id.*, at 121. The BIA rejected the argument that a paraphernalia conviction should not count at all because it targeted implements, not controlled substances. *Id*., at 120. It then reasoned that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id*., at 121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802.

(*Id*. at ___.)

The court, however, declined to give Chevron deference to this reasoning. It stated:

The disparate approach to state drug convictions, devised by the BIA and applied by the Eighth Circuit, finds no home in the text of §1227(a)(2)(B)(i). The approach, moreover, "leads to consequences Congress could not have intended." *Moncrieffe*, 569 U. S., at ___ (slip op., at 15).

(*Id*. at ___.)

The BIA's position distinguishing drug possession and distribution offenses from offenses involving the drug trade in general, with the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses. Drug possession and distribution convictions trigger removal only if they necessarily involve a federally controlled substance, see *Paulus*, 11 I. & N. Dec. 274, while convictions for paraphernalia possession, an offense less grave than drug possession and

California Criminal Defense of Immigrants Newsletter

(CEB 2015)
By Norton Tooby

Continuing Education of the Bar began publishing our *California Criminal Defense of Immigrants E-Newsletter*. This newsletter covers the relevant national immigration law that affects criminal defense of immigrants in California, as well as the California law on the subject. The case summaries and other developments are cross-referenced to the relevant sections of the new CEB practice manual, *California Criminal Defense of Immigrants*, so the newsletter will serve as a cumulative indexed update for the current edition to the present on an ongoing basis. You may subscribe to this newsletter from Continuing Education of the Bar.

The Law Offices of Norton Tooby continues to publish monthly online updates to the 3000-page, three-volume Criminal Defense of Immigrants, along with all of our other practice manuals, through our Premium Web Updates. These updates are keyed to our practice manuals, making it easy for you to check each month to see if a new development has occurred concerning your particular issue, ensuring you are aware of the most recent legal authorities on each topic.

While this office no longer publishes the *California Post-Conviction Relief for Immigrants* newsletter, those interested may obtain the same content, and more, by subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*. In addition to the California developments on post-conviction relief for immigrants, this newsletter covers other topics of great importance to immigrants, including safe havens that can be used as replacement convictions when a problematic conviction is vacated, and the actual immigration consequences of the most common California convictions, which are especially useful in establishing ineffective assistance of counsel grounds for relief.

distribution, trigger removal whether or not they necessarily implicate a federally controlled substance, see *Martinez Espinoza*, 25 I. & N. Dec. 118. The incongruous upshot is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U. S. 837, 843 (1984).

(*Id*. at ___.)

Finally, the court rejected an argument that the broad phrase "relating to" justified doing away entirely with the requirement that the elements of a drug offense must involve a specific substance listed in the federal schedules:

In sum, construction of §1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under §802. We therefore reject the argument that any drug offense renders an alien removable, without regard to the appearance of the drug on a §802 schedule. Instead, to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§802]."

(*Id*. at ___.)

The reasoning of *Mellouli* applies across the board to all immigration statutes attaching consequences to convictions of offenses relating to controlled substances as defined in 21 U.S.C. § 802. The decision also suggests that no *Chevron* deference is due where an argument would result in removal for a less serious offense, such as possession of drug paraphernalia, where a more serious offense would not do so. (*Id*. at ___.)

On the other hand, it raises the question whether this analysis applies to immigration uses of the term "controlled substances" unaccompanied by the qualification as "defined in [§802]." (*Id*. at ___.) The court referred to

other provisions of the immigration statute tying immigration consequences to controlled-substance offenses [that] contain no reference to §802. See 8 U. S. C. §1357(d) (allowing detainer of any alien who has been "arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances"); §1184(d)(3)(B)(iii) (allowing Secretary of Homeland Security to deny certain visa applications when applicant has at least three convictions of crimes "relating to a controlled substance or alcohol not arising from a single act"). These provisions demonstrate that when Congress seeks to capture conduct involving a "controlled substance," it says just that, not "a controlled substance (as defined in [§802])."

(*Id*. at ___, n.11.)

This argument in support of the court's decision is relatively weak, and leads to the position that an arrest for any controlled substances offense, even one involving a state but not federal substance, triggers immigration detention. 8 U. S. C. §1357(d). This provision, however, has been largely ignored as a limitation on the immigration power to detain for only controlled substances arrests, and so does not appear to be very significant. The other statute mentioned by Justice Ginsberg, relating to an application for a fiancée visa, requires only that the visa application contain information concerning any conviction of the petitioner for a controlled substances offense. This adverse immigration consequence, likewise, does not appear very significant. A

thorough computer search of the INA for uses of the phrase "controlled substance" to see whether there are other uses unaccompanied by a reference to 21 U.S.C. § 802 would be useful to help determine whether to attempt to persuade Justice Ginsberg to delete this footnote argument from the opinion.

The court did not rule on whether the Kansas drug statute was divisible. It also did not require cases showing a realistic probability of prosecution, i.e., that the non-federal offenses actually had been prosecuted, and so it would seem to support the finding that listing substances in the statute is sufficient to prove a "realistic probability of prosecution." It also stated, however, that it did not address the BIA case that held that the immigrant must show a realistic probability of prosecution of the unlisted substance. The court's main point was that the BIA had to act consistently on this point in paraphernalia cases, possession cases, and drug-trafficking cases.
CD4:19.60, 21.34;SH:7.143, 7.67;AF:5.42, A.18, B.3

BIA

RELIEF – OTHER WAIVERS – 237(a)(1)(H)
Matter of Pena, 26 I&N Dec. 613 (BIA 2015) (a returning lawful permanent resident cannot be regarded as seeking an admission into the United States, and may not be charged with inadmissibility under INA § 212(a), 8 U.S.C. § 1182(a), if he or she does not fall within any of the exceptions in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C)); distinguishing *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003).
NOTE: This means that the government cannot consider individuals as arriving aliens if they are eligible for a fraud waiver under INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H), even though they may have obtained LPR status by fraud (e.g., they claimed to be single when they were married).
Thanks to Lisa Brodyaga.
CD4:24.30;AF:2.46;CMT3:3.45

RELIEF – INA § 212(c) WAIVER

Deborah Ann Romero, A017 176 264 (BIA Jun. 10, 2014) (unpublished) (charge of deportability under INA 237(a)(2)(A)(ii) cannot be sustained if a waiver under former section 212(c) is granted with respect to one of the convictions), distinguishing *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991) (INA § 212(c) waiver does not immunize a respondent who subsequently reoffends from the initiation of new removal proceedings based on the prior conviction).

First Circuit

OVERVIEW – JURIDICAL REVIEW – MOTION TO REOPEN
Mazariegos v. Lynch, 790 F.3d 280 (1st Cir. Jun. 24, 2015) (court has jurisdiction to review denial of motion to reopen even when underlying decision denying relief was as a matter of discretion).
CD4:15.34;PCN:10.15;AF:6.30;CMT3:10.31

Fourth Circuit

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – CAUSING ABUSE TO A CHILD
Amos v. Lynch, 790 F.3d 512 (4th Cir. Jun. 10, 2015) (Maryland conviction of causing abuse to a child, in violation of former Maryland Code, Article 27 § 35A (1988), did not constitute aggravated felony sexual abuse of a minor, under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), since the minimum conduct of failure to act to prevent sexual abuse is not

"sexual abuse of a minor"; even if applying the 18 U.S.C. § 3509(a)(8) as a guide, the Maryland statute is broader since 3509 does not punish failure to act).

Note: The court pointed out that the BIA did not adopt the federal statutory definition of sexual abuse of a minor in a federal statute providing procedural protections for child victims and witnesses, 18 U.S.C. § 3509(a)(8), but only uses the statute as a "guide." Three other circuits have found that the BIA did adopt this statute as the definition of sexual abuse of a minor for aggravated felony purposes. *See Mugalli v. Ashcroft,* 258 F.3d 52, 58–59 (2d Cir. 2001); *Restropo v. Attorney General*, 617 F.3d 787, 792, 795–96 (3d Cir.2010) (deferring under *Chevron* to the BIA's "definition" in *Rodriguez–Rodriguez* by reference to § 3509(a)); *Velasco-Giron v. Holder,* 773 F.3d 774, 776 (7th Cir.2014), *cert. denied sub nom. Velasco-Giron v. Holder*,__ U.S. __, 135 S.Ct. 2072 (2015).
CD4:19.89;AF:5.72, A.38, B.73;SH:7.98, 8.77

Fifth Circuit

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO ADVISE
United States v. Batamula, ___ F.3d ___ (5th Cir. Jun. 4, 2015) (court advisal of likely deportation during plea colloquy pursuant to Rule 11 does not bar a claim of ineffective assistance of counsel, since counsel's duty to advise is different from the court's), see also *United States v. Urias–Marrufo,* 744 F.3d 361, 369 (5th Cir.2014).
PCN:6.18

Seventh Circuit

POST-CONVICTION – GROUNDS – INEFFECTIVE ASSISTANCE – PADILLA
DeBartolo v. United States, __ F.3d __ (7th Cir. Jun. 26, 2015) (defendant, upon belated discovery of deportation threat, may choose to withdraw guilty plea and seek trial, even where chances of success at trial were slim).
CD4:6.18

Ninth Circuit

CRIMES OF MORAL TURPITUDE – UNLAWFUL LASER ACTIVITY
Coquico v. Lynch, ___ F.3d ___, 2015 WL 3756470 (9th Cir. Jun. 17, 2015) (California conviction for unlawfully pointing a laser scope or pointer at an officer, in violation of Penal Code § 417.26, is not a categorical crime involving moral turpitude since this offense can be committed by conduct which resembles non-turpitudinous simple assault and has little similarity to turpitudinous terrorizing threats).
CD4:20.7;CMT3:8.7, 9.72, CHART

SAFE HAVEN – AGGRAVATED IDENTITY THEFT
United States v. Alvarez, __ F.3d __ (9th Cir. 2015) (federal conviction of aggravated identity theft, under 18 U.S.C. § 1029A, does not require 'theft' as an element of the offense; illegal use of means of identification sufficient; affirming conviction where defendant used brother's passport with brother's permission).
SH:9.37

Eleventh Circuit

SENTENCE – FEDERAL STANDARD
United States v. Rosales-Bruno, ___ F.3d ___, 2015 WL 3825109 (11th Cir. Jun. 19, 2015) ("The district court's task is to impose a sentence that will adequately (1) 'reflect the seriousness of the offense,' (2) 'promote respect for the law,' (3) 'provide just punishment,' (4) 'afford adequate deterrence,' (5) 'protect the public from further crimes of the defendant,' and (6) provide the defendant with any needed training and treatment in the most effective manner. 18 U.S.C. § 3553(a)(2). The task is a holistic endeavor that requires the district court to consider a variety of factors: (1) the nature

and circumstances of the offense, (2) the defendant's history and characteristics, (3) the kinds of sentences available, (4) the applicable sentencing guidelines range, (5) pertinent policy statements of the Sentencing Commission, (5) the need to provide restitution to any victims, and (6) the need to avoid unwarranted sentencing disparities. *Id*. § 3553(a).”; “A district court abuses its considerable discretion and imposes a substantively unreasonable sentence only when it ‘(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.’ *Irey*, 612 F.3d at 1189 (quotation marks omitted). Because that rarely happens, ‘it is only the rare sentence that will be substantively unreasonable.’ *United States v. McQueen,* 727 F.3d 1144, 1156 (11th Cir.2013). The party challenging a sentence has the burden of showing that the sentence is unreasonable in light of the entire record, the § 3553(a) factors, and the substantial deference afforded sentencing courts. *United States v. Langston*, 590 F.3d 1226, 1236 (11th Cir.2009).”).
CD4:10.31

POST CON RELIEF – GROUNDS – BREACH OF PLEA AGREEMENT
Amin v. Superior Court, ___ Cal.App.4th ___, 2015 WL 3866903 (4th Dist. Jun. 23, 2015) (writ granted, requiring dismissal of complaint filed in breach of plea agreement, where prosecutor was required to bear risk of mistake of fact in plea bargain; defense counsel's failure to volunteer defendant had been a suspect in a child molestation incident was not a misrepresentation which rendered plea agreement unenforceable; and term “police report” in plea agreement clearly referred to all police reports included within officer's report).
PCN:6.41