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Crimes & Immigration Newsletter

June, 2016

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

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Editor

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RECENT DEVELOPMENTS

Articles

DOMESTIC VIOLENCE – CATEGORICAL ANALYSIS – CIRCUMSTANCE SPECIFIC APPROACH – ARGUMENT TO DISTINGUISH *HAYS* DECISION AND INA § 237(a)(2)(E)

In *United States v. Hayes,* 555 U.S. 415, 129 S. Ct. 1079 (Feb. 24, 2009), the Court found that a 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. Essentially SCOTUS applied a "circumstance specific" approach to determining the nature of the domestic relationship, where no such relationship was required by the statute of conviction.

Jonathan Moore, of the Washington Defender's Immigration Project found a way

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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.

Testimonials:

"If you are an immigration lawyer with a defendant who has criminal issues, you only need to know two words: Norton Tooby." - Dan Kowalski

"Brilliant legal strategies."
-Ann Benson, Directing Attorney, Washington Defender Association's Immigration Project

For Mr. Tooby's biography click here.

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to distinguish the statute at issues in *Hayes* from the DV ground:

1) DV is an element of many state crimes, (or enhancements found BARD) and "crime of domestic violence" is arguably a term of fixed or established meaning, compared to any other thing found to be circumstance-specific so far ('specific loss amount; 'for commercial advantage'; exception to alien smuggling for close family), and so isn't as good a candidate to be circumstance-specific.

2) *Hayes* was a criminal case and while DV didn't have to be an element of the *prior* crime it still had to be proved BARD, under the federal rules of evidence, in a proceeding with a right to counsel, confrontation, to call witnesses & all the constitutional stuff. It just had to meet that that standard in a later proceeding:

"To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way. But that relationship, while it must be established, need not be denominated an element of the predicate offense." *Hayes* at __

3) The DV is therefore *still an 'element'* of 18 USC 922(g)(a)(9). A person convicted of owning a gun in violation of 922(g)(a)(9) based on a prior misdemeanor crime of DV, is deportable for a crime of DV because the DV has been established and proven up as the element of a crime, but only because of that 2nd criminal proceeding proving it as an element of 922(g). (I mean, arguably. I see the slippery slope here)

4) The 9th Circuit has already distinguished a *Hayes*-type finding about a prior conviction from one in immigration court, in *Cisneros-Perez*:

Here, the contexts of the two decisions involve different statutory provisions, as to which the pertinent considerations are quite different: In *Belless*, the government was required to prove a second, distinct crime in the second prosecution. We concluded that the "domestic" aspect of a prior domestic violence conviction can be proven <u>as an element of the second crime</u> whether or not established by the conviction documents in the prior proceeding. *Tokatly*, on the other hand, involved the application of the modified categorical approach in an immigration case, such as this one, in which the inquiry is confined only to determining the nature of the prior crime. As *Tokatly* indicated, citing statutory language in the immigration statutes, "when Congress wants to make conduct the basis for removal [rather than 'conviction'] it does so specifically." Tokatly, 371 F.3d at 622.

We conclude that *Belless* does not apply in the immigration context. Instead, the clear and direct holding of *Tokatly*-that the modified categorical approach applies to prior crimes of domestic violence in the immigration context-is controlling.

Cisneros-Perez v. Gonzales 465 F.3d 386, 392 (9th Cir.2006) (emphasis added)

This is not to say that a criminal defender should rely on *Tokatly* if there is any other possible way to take the conviction out of the crime of violence category. Clearly they should not, since the way things are going, they need to be warned that DV probably will be found to be "circumstance –specific."

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Thanks to Jonathan Moore, of the Washington Defender's Immigration Project. CD4:22.26, 16.7;SH:7.154

Resources

RELIEF – DACA
Utah v. Strieff, 136 S. Ct. 2056 (Jun. 23, 2016) (the Supreme Court refused to lift the injunction and permit DAPA and extended DACA to go forward; the court was evenly split so the below decision remains. http://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf

Here are a variety of materials from ILRC and CIRI:

Summary of SCOTUS Decision and next steps (English, Spanish, and other languages)
http://www.adminrelief.org/resources/item.606940-Supreme_Court_Decision_FAQ_for_the_Community

Summary of other immigration relief (English and other languages)
http://www.adminrelief.org/resources/item.606942-Immigration_Options_without_DAPA_and_Expanded_DACA

Community Education PPT (English, Spanish, and other languages)
http://www.adminrelief.org/resources/item.607056-Supreme_Court_Decision_PPT_for_Community_Forums
CD4:24.25;AF:2.37;CMT3:3.36

Practice Advisories

PRACTICE ADVISORY – NATURE OF CONVICTION – STRICT CATEGORICAL ANALYSIS – JURY UNANIMITY

In the final two weeks of its term, the Supreme Court issued a terrific decision in *Mathis v. United States*, a federal sentencing case in which the Court affirmed a strict, elements-based categorical approach for determining when a prior conviction will trigger adverse sentencing or immigration consequences. IDP and the National Immigration Project of the National Lawyers Guild ("NIP-NLG") have issued a Practice Alert on the *Mathis* decision for immigration lawyers, criminal defense lawyers, and immigrants themselves contending with the possible immigration consequences of criminal convictions. In *Mathis*, IDP and NIP-NLG appeared with allies before the Court to present the robust history of the categorical approach in immigration proceedings, the need for a strict categorical approach to protect constitutional rights in immigration proceedings, and the unique challenges that immigrants who are often detained and unrepresented in deportation proceedings will face if adjudicators are permitted to expand their review of unreliable conviction documents in deciding deportability and eligibility for immigration benefits. The Court's decision makes clear that constitutional and fairness concerns require a strict categorical approach to ensure that immigration consequences and sentencing enhancements are not imposed based on facts that were never necessarily found in an underlying criminal prosecution. https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2016_1July_mathis-alert.pdf
CD4:16.7;AF:4.6;CMT3:6.4

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PRACTICE ADVISORY – RECEIVING STOLEN PROPERTY

A conviction of receiving stolen property, under Penal Code § 496(a), is arguably neither a deportable receiving stolen property aggravated felony, if no one-year sentence was imposed, nor a deportable crime involving moral turpitude, since it is not a divisible statute with respect to the necessary intent, and one of the two intents sufficient for conviction is not a moral turpitude intent.

A receiving stolen property offense that is a crime involving moral turpitude (CIMT) can trigger deportability or inadmissibility depending on the individual defendant's circumstances. For the definition of moral turpitude, and the rules for moral turpitude deportability, see N. Tooby & K. Brady, *California Criminal Defense of Immigrants* §§5.28–5.29, 13.8 (California Continuing Education of the Bar 2015).

A CIMT is defined as a crime that involves "evil intent" or is contrary to contemporary social mores. See, *e.g., Medina v U.S.*, 259 F3d 220, 227 (4th Cir 2001). A conviction is a CIMT when it requires as an element the intent to permanently deprive the owner of property, but not if the intent is to temporarily deprive the owner of possession. See *Castillo-Cruz v Holder*, 581 F3d 1154 (9th Cir 2009); *Matter of Grazely*, 14 I&N Dec 330, 333 (BIA 1973). See also, *Matter of Jurado-Delgado*, 24 I&N Dec 29, 33 (BIA 2006). Any offense that has as an element the intent to defraud will also be held to involve moral turpitude. See, *e.g., Planes v Holder*, 652 F3d 991, 997 (9th Cir 2011).

The Ninth Circuit has held that a conviction for receiving stolen property under Penal Code § 496(a) can be sustained with intent to deprive the owner *temporarily* of the property, which is not sufficient intent to constitute a CIMT. *Castillo-Cruz v Holder*, 581 F3d 1154 (9th Cir 2009). See *Alvarez-Reynaga v Holder*, 596 F3d 534 (9th Cir 2010) (applying Penal Code § 496d(a)). Because the minimum conduct necessary to commit the offense is a temporary taking, no conviction under this statute should be held to be a CIMT regardless of the evidence in the record of conviction. This statute is not divisible in this respect, since it does not state alternative offenses in the disjunctive. See *Mathis v. United States*, ___ U.S. ___ (Jun. 23, 2016) (whether a portion of an offense is an element or not is determined by whether the jurisdiction requires jury unanimity; otherwise, it is a mere means by which the offense may be committed, and alternative means do not make the statute divisible, so no recourse to the record of conviction is permissible for any reason). See also ILRC Chart and Notes, at www.ilrc.org/chart. See also the discussion of the categorical approach and minimum conduct in *California Criminal Defense of Immigrants*, *supra*, § 3.27.

This is contrary to the older BIA decision in *Matter of Balderas*, 20 I & N 389 (BIA 1991), which considered this statute in the context of a prior 212(c) waiver, and found receipt of stolen property was a CIMT. CD4:20.5;CMT3:8.5;SH:7.121

PRACTICE ADVISORY – DETENTION – MANDATORY DETENTION – "WHEN RELEASED" – CALIFORNIA RULE

An immigrant is not subject to mandatory immigration detention under 8 U.S.C. § 1226(c), INA § 236(c), unless the government detains the noncitizen at the time he or she is released from criminal custody, or within a reasonable time thereafter. *Castañeda v Souza* (1st Cir 2014)

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769 F3d 32; see also *Casas-Castrillon v Dep't of Homeland Sec.* (9th Cir 2008) 535 F3d 942, 950. A federal district court judge has so held and granted a preliminary injunction, imposing this rule throughout the state of California. See *Preap v Johnson* (ND Cal, May 15, 2014, No. 13-CV-5754 YGR) 2014 US Dist Lexis 672651.

This case is consistent with decisions such as *Quezada-Bucio v Ridge* (WD Wash 2004) 317 F Supp 2d 1221 and *Velasquez v Reno* (D NJ 1999) 37 F Supp 2d 663, 672. See also *Alikhani v Fasano* (SD Cal 1999) 70 F Supp 2d 1124. The Board of Immigration Appeals (BIA), however, holds that a noncitizen with qualifying convictions is subject to mandatory detention even if he or she is not immediately taken into immigration custody when released from criminal custody, as long as the person was released on or after October 9, 1998. *Matter of Kotliar* (BIA 2007) 24 I&N Dec 124; *Matter of Rojas* (BIA 2001) 23 I&N Dec 117.

WARNING► The California rule is not the law in other states, so a defendant relying on this rule to avoid mandatory immigration detention should not travel outside the state. See CCDOI §20.72.

CD4:6.39;AF:3.11;CMT3:2.11

US Supreme Court

CONVICTION – NATURE OF CONVICTION – MEANS VS ELEMENTS

Mathis v. United States, 136 S. Ct. 2243 (Jun. 23, 2016) (whether a portion of an offense is an element or not is determined by whether the jurisdiction requires jury unanimity on that element of the offense; otherwise, it is a mere means by which the offense may be committed; where alternative means do not make the statute divisible, no recourse to the record of conviction is permissible for any reason).
http://www.supremecourt.gov/opinions/15pdf/15-6092_1an2.pdf
CD4:16.7, 16.8;AF:4.6, 4.17;CMT3:7.9

DETENTION – IMMIGRATION DETENTION – RIGHT TO BOND HEARING

Jennings v. Rodriguez, 136 S. Ct. 2489 (Jun. 20, 2016) (the Supreme Court granted certiorari in a case exploring when immigrants detained solely for immigration violations have the right to be released from jail).

Note: The justices agreed to consider a federal appeals court decision that essentially found detained immigrants were entitled to a bond hearing after six months in custody and every six months thereafter. The high court's announcement comes as immigrant rights advocates are awaiting a Supreme Court decision on the legality of President Barack Obama's executive actions granting quasi-legal status and work permits to millions of immigrants who entered or stayed in the U.S. illegally. In that case, the Obama administration is aligned with most immigrants rights groups. However, in the case the court said Monday that it would take up, the Obama administration is pressing for fewer rights for detained immigrants. In fact, the administration is asking the justices to overturn the 9th Circuit Court of Appeals ruling that found immigrants have the right to regular review of their detention.

The newly-accepted case, *Jennings v. Rodriguez*, could also explore when immigrants accused of ties to terrorism have to be released if authorities are having

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difficulty deporting them. The Supreme Court ruled in 2001 that immigrants awaiting removal from the country should usually be held no more than six months in custody. However, the justices indicated that in special circumstances—such as a national security threat—some detained immigrants could be held longer.
CD4:6.42, 6.44;AF:2.11;CMT3:3.11

CRIME OF VIOLENCE – MENTAL STATE – RECKLESSNESS AND CONSCIOUS DISREGARD OF RISK

Voisine v. United States, 136 S. Ct. 2272 (Jun. 27, 2016) (Maine misdemeanor conviction of assaulting a girlfriend in violation of Maine Criminal Code § 207 ["intentionally, knowingly or recklessly cause[ ] bodily injury" to another"], constituted a crime of violence, for purposes of the Armed Career Criminals Act, even though the minimum conduct sufficient to commit the Maine offense was reckless conduct, since: "Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: It involves a deliberate decision to endanger another.").

Note: In *Voisine*, the Court examined a federal criminal statute that prohibits individuals previously convicted of misdemeanor crimes of domestic violence from possessing firearms. The Court held that under the language of that particular criminal statute, domestic violence offenses committed with a mens rea of recklessness constitute "misdemeanor crimes of domestic violence." IDP and NIP-NLG have issued a Practice Alert that examines the *Voisine* decision and explains that the Court's decision should have no impact on immigration adjudications that involve reckless offenses, most particularly the "crime of violence" aggravated felony and "crime of domestic violence" provisions of the immigration laws.

The existing circuit court decisions interpreting 18 U.S.C. § 16 to exclude reckless conduct remain good law. Moreover, the *Voisine* decision expressly includes only that form of recklessness that penalizes conscious disregard of a known risk, not those forms of recklessness covering gross negligence in failing to recognize the risk. The government may attempt to use *Voisine* in immigration cases to argue that the 18 U.S.C. § 16 "crime of violence" definition referred to in the "aggravated felony"2 and "crime of domestic violence"3 provisions of the Immigration and Nationality Act ("INA") reaches reckless conduct offenses. See INA §§ 101(a)(43)(F) ("crime of violence" aggravated felony); 237(a)(2)(E)(i) ("crime of domestic violence). However, the Supreme Court expressly provided that its ruling in *Voisine*—finding that a differently worded federal criminal law definition reaches reckless behavior—does not resolve whether the 18 U.S.C. § 16 definition includes such conduct. Thus, immigration lawyers should resist any attempt by the government to argue in immigration proceedings that *Voisine* now undermines the nearly universal case law that has found that the 18 U.S.C. § 16 definition does *not* reach reckless conduct. At the same time, however, criminal defense lawyers should take into account that there is now an increased risk that immigration adjudicators will find, based on *Voisine*, that offenses that reach reckless conduct may be deemed "crimes of violence" under the 18 U.S.C. § 16 definition. https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2016_1July_voisine-alert.pdf

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CD4:19.40;AF:5.22, A.14, B.9

BIA

REMOVAL PROCEEDINGS – MENTAL COMPETENCY PROCEDURE

Matter of M-J-K-, 26 I&N Dec. 773 (BIA 2016) (in cases involving issues of mental competency, an Immigration Judge has the discretion to select and implement appropriate safeguards, which the Board of Immigration Appeals reviews *de novo*). CD4:15.25

GOOD MORAL CHARACTER – FALSE SWEARING TO OBTAIN IMMIGRATION BENEFITS

Matter of Gomez-Beltran, 26 I&N Dec. 765 (BIA 2016) (noncitizen cannot establish good moral character under INA § 101(f)(6), 8 U.S.C. § 1101(f)(6), if, during the GMC period, she gives false testimony under oath in proceedings before an Immigration Judge with the subjective intent of obtaining an immigration benefit). CD4:15.6;AF:2.14;CMT3:3.14

First Circuit

POST-CONVICTION – PADILLA – LIFERS

Commonwealth v. Son Nguyen, 89 Mass. App. Ct. 904 (May 17, 2016) (noncitizen from Vietnam, who cannot currently be removed due to no repatriation agreement between the United States and Vietnam, could not show prejudice).

NOTE: The Appeals Court did not address the fact that even though physical removal is not possible, Mr. Nguyen can still be placed in removal proceedings, held in ICE detention throughout those proceedings and can have his green card revoked.

In so ruling, the Appeals Court makes several additional mistakes. First, the Appeals Court suggested that unless a person is subject to presumptively mandatory deportation, the information provided in the waiver of rights form constitutes sufficient advice. *Commonwealth v. Nguyen*, 89 Mass. App. Ct. 904, 904 (2016). However, the SJC has repeatedly made clear that "it is not sufficient for a criminal defense attorney, as a matter of practice, merely to give the same warning that the defendant will receive from the judge during the plea colloquy required by G. L. c. 278, § 29D" no matter what the potential immigration consequence. *Commonwealth v. Lavrinenko*, 473 Mass. 42 (2016) (citing Clarke and DeJesus). In this instance, adequate advice would have entailed an explanation of the repatriation agreement, the possibility of removal proceedings and the possibility of having his green card taken away. Second, in footnote 2 the court asserts that in order to show prejudice, Mr. Nguyen would have to show that he had a substantial ground of defense. However, under Commonwealth v. Clarke, a defendant is not limited to this and can also show prejudice by showing that 1) "there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time", or 2) the presence of "special circumstances" that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether or not to plead guilty." *Commonwealth v. Clarke*, 460 Mass. 30, 47-48 (2011). Finally, the court assumes that because Mr. Nguyen cannot be physically removed, there is no deficient performance.

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They assume that because it would be incorrect to advise that Mr. Nguyen "would be deported" that proper advice was given. However, as discussed above, despite not being physically removed, there are immigration consequences that result from these convictions about which defense counsel should have advised Mr. Nguyen.

Post-conviction counsel should argue, at a minimum, that this is a very narrow decision that only applies when the United States has a written repatriation agreement with another country that prevents the removal of the defendant.
PCN:6.8

Second Circuit

AGGRAVATED FELONY – CHILD PORNOGRAPHY – JURISDICTIONAL ELEMENT UNNECESSARY TO A MATCH

Weiland v. Lynch, ___ F.3d ___, 2016 WL 3548350 (2d Cir. Jun. 29, 2016) (New York conviction for possession of child pornography under New York Penal Law § 263.11, constituted an aggravated felony, under INA 101(a)(43)(J), 8 U.S.C. 1101(a)(43)(J), even though it did not contain a federal jurisdictional element).
CD4:19.31;AF:5.11, A.11, B.74

AGGRAVATED FELONY – JURISDICTIONAL ELEMENT -- UNNECESSARY TO A MATCH

Weiland v. Lynch, ___ F.3d ___, 2016 WL 3548350 (2d Cir. Jun. 29, 2016) (New York conviction for possession of child pornography under New York Penal Law § 263.11, constituted an aggravated felony, under INA 101(a)(43)(J), 8 U.S.C. 1101(a)(43)(J), even though it did not contain a federal jurisdictional element).
CD4:19.8;AF:4.35

CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYSIS – JURISDICTIONAL ELEMENT -- UNNECESSARY TO A MATCH

Weiland v. Lynch, ___ F.3d ___, 2016 WL 3548350 (2d Cir. Jun. 29, 2016) (New York conviction for possession of child pornography under New York Penal Law § 263.11, constituted an aggravated felony, under INA 101(a)(43)(J), 8 U.S.C. 1101(a)(43)(J), even though it did not contain a federal jurisdictional element).

Third Circuit

AGGRAVATED FELONY – DRUG TRAFFICKING OFFENSE – USE OF COMMUNICATION FACILITY

United States v. Martinez-Vidana, ___ F.3d ___, 2016 WL 3212495 (3d Cir Jun. 9, 2016 (rejecting an argument that 21 U.S.C. § 843(b) (aiding and abetting the use of a communication facility to facilitate a felony drug offense) proscribes conduct that falls outside the generic definition of a drug trafficking offense, since the underlying drug offense must be proven beyond a reasonable doubt, there is no question that it is an "element" for purposes of *Descamps*, rendering § 843(b) divisible and allowing the application of the modified categorical approach).
CD4:19.56;AF:5.38, A.18, B.4

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AGGRAVATED FELONY – DRUG TRAFFICKING – POSSESSION WITH INTENT TO DISTRIBUTE

Avila v. Attorney General, ___ F.3d ___, 2016 WL 3443112 (3d Cir. Jun. 23, 2016) (Pennsylvania felony conviction for possession with intent to deliver cocaine, which involved a small amount of cocaine, was an aggravated felony under the INA 101(a)(43)(B), pursuant to the hypothetical felony route).
CD4:19.62;AF:5.44, A.18, B.4

CONVICTION – PUNISHMENT, PENALTY OR RESTRAINT

Frias-Camilo v. Att't Gen., __ F.3d __ (3d Cir. Jun. 23, 2016) ("punishment, penalty, or restraint" requirement of 8 U.S.C. § 1101(a)(48), INA § 101(a)(48), only applies where the adjudication of guilt has been withheld), see *Perez v. Elwood*, 294 F.3d 552, 562 (3d Cir. 2002).
CD4:7.20;AF:3.32;CMT:2.4;SH:4.14

Fourth Circuit

REMOVAL PROCEEDINGS – EXPEDITED REMOVAL PROCEEDINGS FOR NON-LPRS WITH AGGRAVATED FELONY CONVICTIONS – NOTICE OF CHARGES AND RIGHTS

United States v. Lopez –Collazo, ___ F.3d ___, 2016 WL 3080431 (4th Cir. Jun. 1, 2016) (decision granting motion to dismiss indictment for illegal re-entry is reversed; even if DHS had failed to provide the noncitizen with notice of the removal charges against him and his right to contest the charges, the noncitizen could not establish prejudice, since as an aggravated felon, he would have been removed from the United States in any case).
CD4:15.22;AF:2.12;CMT3:3.12

IMMIGRATION CONSEQUENCES – ARIZONA – Arizona Quick Reference Chart on Immigration Consequences
https://firrp.org/resources/criminaldefense/
BIBLOGRAPHY

Fifth Circuit

JUDICIAL REVIEW – BOARD OF IMMIGRATION APPEALS – FAILURE TO CONSIDER ALL RELEVANT EVIDENCE

Hernandez v. Lynch, ___ F.3d ___, 2016 WL 3202492 (5th Cir. Jun. 8, 2016) (granting petition for review from BIA denial of motion to reopen in absentia removal order, where respondent contended that the BIA abused its discretion in determining that his affidavit stating that he did not receive notice of the hearing failed to rebut the presumption that he did receive notice; remanding remand to the BIA so that it may consider all relevant evidence offered by respondent to rebut the presumption of notice).
CD4:15.37;AF:2.19;CMT3:3.18

OVERVIEW – IMMIGRATION PROCEEDINGS – MOTION TO REOPEN

Torres Hernandez v. Lynch, __ F.3d __ (5th Cir. Jun. 8, 2016) (BIA abused its discretion in denying motion to reopen where the BIA failed to consider all relevant evidence).
CD4:15.34;PCN:10.15;AF:6.30;CMT3:3.42

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Sixth Circuit

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – AFFIRMATIVE MISADVICE – PREJUDICE

Lee v. United States, ___ F.3d ___, ___, 2016 WL 3190079 (6th Cir. Jun. 8, 2016) (rejecting claim of IAC during plea negotiations where counsel affirmatively misadvised the defendant that he would not be subject to deportation, since no prejudice was shown because it was irrational to reject the plea and go to trial where the evidence of guilt was overwhelming and the defendant would have been just as deportable after trial as after plea: "Nothing in the record suggests that he would have been acquitted at trial, *cf. Hill,* 474 U.S. at 59–60, or would have been able to obtain a conviction for an offense that did not require deportation, *cf. Missouri v. Frye,* 132 S. Ct. 1399, 1409–10 (2012); *Kovacs*, 744 F.3d at 51–52."); following *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. Feb. 6, 2012) (no rational defendant in Pilla's position -- overwhelming evidence of her guilt , giving no realistic chance of being acquitted at trial and would have faced a longer term of incarceration, and been just as removable as after her plea -- would have proceeded to trial in this situation, so she has not shown that counsel's advice created a "reasonable probability" of prejudice).

NOTE: The court focused on an obsolete, incomplete *Hill v. Lockhart* prejudice standard: To prevail, he must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "The test is objective, not subjective; and thus, 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' " *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). It is true it gave lip service to the possibility of negotiating a non-deportable disposition with the prosecution, but regarded that possibility as mere "speculation" since it found that: "Nothing in the record suggests that he would have been acquitted at trial, *cf. Hill,* 474 U.S. at 59–60, or would have been able to obtain a conviction for an offense that did not require deportation, *cf. Missouri v. Frye,* 132 S. Ct. 1399, 1409–10 (2012); *Kovacs*, 744 F.3d at 51–52." *Id*. at ___. The petitioner, however, did not marshal the facts necessary to make the case for the *Frye* form of prejudice: the chance of negotiating a non-deportable plea, and the court was unwilling or unable to harvest the available facts by itself.
PCN:6.18

Seventh Circuit

IMMIGRATION OFFENSES – ILLEGAL REENTRY – FAILURE TO EXHAUST

*United States v. Gil-Lopez***,** 825 F.3d 819 (7th Cir. Jun. 16, 2016) (defendant could not establish exhaustion of administrative remedies following removal and, therefore, could not collaterally attack removal order).
CD4:CHAPT13

POST CON RELIEF – FEDERAL – RIGHT TO IMPARTIAL COURT – JUDGE'S PARTICIPATION

United States v. Herrera-Valdez, ___ F.3d ___, 2016 WL 3361723 (7th Cir. Jun. 17, 2016) (reversing conviction, where Court of Appeals was permitted to review defendant's appeal of district court's denial of his motion

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to disqualify judge, and judge's participation in prior role as District Counsel for Immigration and Naturalization Service in defendant's original deportation case produced appearance of bias that required judge to recuse himself).
PCN:6.56

Eighth Circuit

CRIMES OF MORAL TURPITUDE – RECKLESS ASSAULT – SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY

Estrada-Rodriguez v. Lynch, ___ F.3d ___, 2016 WL 3148374 (8th Cir. Jun. 6, 2016) (Arkansas conviction of misdemeanor assault in the first degree, under Arkansas Code Annotated § 5-13-205 (recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person), is a crime of moral turpitude).
CD4:20.7;CMT3:8.7, CHART

Ninth Circuit

CAL CRIM DEF – NEGOTIATIONS WITH PROSECUTOR

Some prosecutors are resisting their responsibilities under Penal Code §§ 1016.2 & 1016.3. They will not consider modifying any charge or offer for immigration consequences unless defense counsel provides the following information:

1. When did the defendant enter the country?
2. What is his immigration status and how long has he had that status?
3. Has he previously been removed from the US?
4. Does he have any family here that would negatively be impacted by negative immigration consequences?
5. Can defense counsel provide copies of documents pertaining to his status?

It is unclear how they are going to use this information, as they do not have an immigration specialist. For example, just because the defendant has suffered prior deportations does not mean he or she cannot obtain relief from removal in immigration proceedings. Defense counsel is also being asked to provide confidential information and waiving the client's Fifth Amendment rights, which may expose the defendant to federal prosecution.

Thanks to Bernice Espinoza.

This issue is coming up more in SF.

Penal Code § 1016.3 does not require defense counsel to disclose in-depth immigration status information in order to trigger the DA's obligation to consider immigration consequences. Being a non-citizen is enough—and the DA will nearly always have that information based on field arrest data/rap sheet, prior probation reports, or place of birth information. If the case is more complicated (i.e., a prospective U-Visa applicant for someone with a prior removal order), it should be sufficient for a defense attorney to make a verbal representation to the prosecution concerning the immigration issues (because of the duty of confidentiality) during plea negotiations.

Some San Francisco DAs have asked for verification of immigration status. The San Francisco Public Defender's Office does not, as a matter of course, provide the DA everything (or anything) they ask for relating to details of client's immigration status.

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Sometimes such requests are legitimate attempts to reach a deal. If the case warrants such a disclosure of information, we will provide it. We rarely provide documents or evidence to the DA relating to client's immigration status—and certainly would be very careful to do so absent some type of enforceable confidentiality agreement. Usually, the DA's take the attorneys at their word about immigration issues. For example, if someone is in pending removal proceedings, with a pending asylum application, we would disclose to the DA the existence of those proceedings, and perhaps even the form of relief requested. If it is a particularly sympathetic case, we may provide documentation from the asylum case (showing the client has suffered trauma, etc.) (as long as it corroborates ICE's information). We would need client consent, though.

Generally, providing such information to the DA (as described below)—particularly where there are no guarantees of the confidentiality of the info—seems to be, generally, a bad idea and arguably a violation of the attorney's ethical duties in the absence of informed consent. I am interested in hearing what other offices do, though.

Thanks to Francisco Ugarte

CONTROLLED SUBSTANCES – *PAULUS* DEFENSE – IDENTITY OF THE DRUG
AGGRAVATED FELONY – DRUG TRAFFICKING OFFENSE – *PAULUS* DEFENSE – IDENTITY OF THE DRUG

The question of whether the identity of a controlled substance is an element of a state criminal statute is purely a question of state law, which means that *Coronado v. Holder*, ___ F.3d ___, 2014 WL 983621 (9th Cir. Mar. 14, 2014) (rejecting argument that the modified categorical analysis is inapplicable to Health & Safety Code 11377(a); statutes specific reference to the California controlled substances lists allows conviction), is only bad for people convicted under California law. The Ninth Circuit recently held that an Arizona drug law was indivisible because Arizona Supreme Court did not require the state to prove the identity of the substance so it was not an element of the offense.
See *Vera-Valdovinos v. Lynch*, ___ F.3d ___ (9th Cir. May 11 2016). A case deciding what is required under California law is not authority for what another state requires. Counsel should research what the law of the state of prosecution requires to convict under the state statute. Thanks to Dan Kesselbrenner.
CD4:19.60,21.34;AF:5.42;SH:7.143

CAL CRIM DEF – SENTENCE – LEVEL OF OFFENSE – ORDERS GRANTING SUMMARY PROBATION OR A CONDITIONAL SENTENCE CONVERT FELONIES TO MISDEMEANORS BY OPERATION OF LAW

When court probation is granted in a felony case, that ruling automatically converts the felony to a misdemeanor. Penal Code § 1203(a). When a *conditional sentence* is granted on a wobbler, the wobbler becomes a misdemeanor by operation of law. *People v. Glee* (2000) 82 Cal.App.4th 99, 105-106, *People v. Taylor* (2007) 157 Cal. App. 4th 433, 437. "A grant of informal or summary probation is a "conditional sentence." (Pen. Code, § 1203(a)." (citations omitted). This is because such a disposition is available only in misdemeanor cases (that is, felony probation must be "formal").

Conditional sentences are authorized only in misdemeanor cases. (Pen. Code, §§ 1203, subd. (a) ["It is the intent of the Legislature that both conditional sentence

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and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors"]; 1203, subd. (d) ["If a person is convicted of a misdemeanor, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional sentence"]; 1203b ["All courts shall have power to suspend the imposition or execution of a sentence and grant a conditional sentence in misdemeanor and infraction cases without referring such cases to the probation officer"].)

Examples: sentences of:

[1] 30 days in jail and formal probation does not make a felony a misdemeanor.
[2] 30 days in jail with informal probation makes a felony a misdemeanor.
[3] 30 days in jail with no probation makes a felony a misdemeanor.

Thanks to Dan Mayfield and Paul Upton.

PRACTICE ADVISORY – CONTROLLED SUBSTANCES – IDENTITY OF THE DRUG SHOULD NOT BE AN ELEMENT

This is a potential argument against the holding and reasoning of *Coronado v. Holder*, ___ F.3d ___, 2014 WL 983621 (9th Cir. Mar. 14, 2014) (rejecting argument that the modified categorical analysis is inapplicable to Health & Safety Code 11377(a); statutes specific reference to the California controlled substances lists allows conviction).

If the punishment is exactly the same and the drugs are nestled in the exact same subsection, and the defendant knew it was a controlled substance but it could have been mescaline and could have been LSD, would a jury really have to be unanimous about which, if it could have been either? What if the state's knowledge requirement only requires that you knew it was *a controlled substance*? If you thought it was mescaline but it might have been LSD does the jury have to decide? Since it's the same crime either way, what if there is evidence of both (especially if it's one of those 'circumstantial evidence' cases)?

If you were charged with LSD and at the pleading you piped up and said, "your honor it was really Psilocybin, I swear,"
what difference would it make? So you make them prove it was Psilocybin? The punishment is the same, so why bother?

The requirement of naming the drug to a jury doesn't make it an element, any more than specifying which house you burgled makes the specific address an element of the crime of burglary. The requirement to be adequately "informed of the nature and cause of the accusation" against you in order to enable you to defend yourself goes beyond being informed of "elements."

In a jury trial the prosecution has to tell you more than the bare elements—they have to alleged specific criminal conduct that they say you did – i.e. the prosecution's theory of the case. Even when jury instructions use the term 'element' to mean something that has to be specified in a jury trial those instructions might not be using the term in the same sense as in the categorical approach. Arguably, an element under the categorical approach is something that has to be alleged and proven BARD *in every case prosecuted* under that statute. The categorical approach means analyzing the abstract essence of a criminal statute, not necessarily what has to be proved in a particular criminal proceeding.

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The best way to describe means or ways is that the prosecution has to select a theory of the case, when then becomes an 'element' of the specific case— as something that is alleged in the to-convict jury instruction becomes the 'law of the case.' Of that *specific* case. And that's what alternate means are: alternate theories of the case.

Thanks to Jonathan Moore.
CD4:19.60,21.34;AF:5.42;SH:7.143

Eleventh Circuit

DETENTION – MANDATORY DETENTION – UNREASONABLE DETENTION

*Sopo v. U.S. Att'y Gen,*825 F.3d 1199 (11TH Cir. Jun. 15, 2016) (whether detention has become unreasonable and alien is entitled to individualized bond hearing depends on factual circumstances of the case), following *Reid v. Donelan,___ F.3d ___,* 2016 WL 1458915 (1st Cir. Apr. 13, 2016).
CD4:6.42, 6.44;AF:2.11;CMT3:3.11

AGGRAVATED FELONY – THEFT – THEFT BY TAKING

Vassel v. U.S. Att'y Gen., __ F.3d __ (11th Cir. Jun. 13, 2016) (Georgia conviction for "theft by taking," in violation of Georgia Code § 16-8-2 is not categorically an aggravated felony "theft" offense for immigration purposes, since the offense does not require lack of consent, and can be committed through fraud or deception), following In *Matter of Garcia-Madruga*, 24 I. & N. Dec. 436, 440-41 (BIA 2008).
CD4:19.94;AF:5.78, A.42, B.43

OVERVIEW – BIA REVIEW – INCONSISTENCY

In *Vassel v. U.S. Att'y Gen.*, __ F.3d __ (11th Cir. Jun. 13, 2016), the Court notes:

"There is one more reason to grant Mrs. Vassell's petition. Mrs. Vassell's is not the only case in which the BIA has decided whether a § 16-8-2 conviction is "a theft offense" for the INA. And in every case Mrs. Vassell points us to other than her own, the BIA ruled in the way she asks us to rule here. This includes decisions that are older than the most recent order in Mrs. Vassell's case, see In re Facio-Alba, No. A091-083-853, 2010 WL 5559167, at *3 (BIA Dec. 17, 2010) (unpublished), as well newer decisions, see In re Ajaelu, No. A058-739-058, slip op. at *1-2 (BIA Sept. 3, 2015) (unpublished). Those orders invoke the exact reasoning Mrs. Vassell asks us to apply here. And the government points to no BIA orders deciding the issue the other way. The government has also confirmed that the Ajaelu order (which seems to be the BIA's most recent opinion on this issue) was the final order in that case. The government gives no explanation for why Mrs. Vassell must be deported for her § 16-8-2 conviction but Mr. Ajaelu can't be deported for his. Mrs. Vassell claims that lack of consistency make the BIA's order in her case arbitrary and capricious. We need not decide this question because we agree with Mrs. Vasell that the BIA's reasoning in her case was mistaken. The fact that the BIA adopted Mrs. Vassell's view in apparently every other case simply underscores this."
CD4:15.35

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