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Crimes & Immigration
Newsletter

May, 2015

This Newsletter contains selected recent developments in criminal immigration law occurring during May, 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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Articles

CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYSIS – *ALMANZA ARENAS* VACATED

Almaza Arenas (overruling *Young v. Holder*) was vacated. It's going en banc. Many of you may be aware of this already, but if not--here it is. Now arguably, *Moncrieffe* still trumps *Young v. Holder* on the burden issue (for affirmative applications for relief), but this makes our advisory world much more challenging when advising undocumented clients.

Here is an update sent to criminal defenders in the Ninth Circuit on this case, where the court en banc will consider what is a divisible statute under Descamps, and may consider who has the burden of proving whether a divisible statute is a bar to eligibility for relief.

Below the first section, which is instructions for defenders, is a brief analysis of the issues and possible outcomes.
Thanks to Kathy Brady.

Almanza-Arenas v. Holder, 771 F.3d 1184 (9th Cir. 2014) will be Heard En Banc -- Divisible statutes, Burden of Proof

Bottom line for defenders: This case concerns when a statute is divisible. The advice on the matter has not changed. Where possible, the best practice is to make a record of a plea to specific conduct that would avoid an immigration penalty -- even if it appears that the statute is not truly

divisible, and regardless of whether the person is fighting deportability or applying for relief.

For example, *Almanza-Arenas* addresses whether Cal Veh Code 10851 (taking a vehicle with intent to "temporarily or permanently" deprive the owner) is a crime involving moral turpitude (CIMT). Taking with permanent intent is a CIMT, taking with temporary intent is not.

We ask that whenever possible, the defendant should plead to taking with intent to temporarily deprive the owner. This probably always will be the advice. Even if we get good law, there always is the chance that overworked immigration judges might not have the correct analysis, and this makes it crystal clear.

However, in terms of the actual law, depending on how this case goes, the Ninth Circuit might find that either:

> (a) VC 10851 and statutes like it are not divisible and must be judged solely on the minimum conduct ever prosecuted under the statute. In that case, even a specific plea to permanent taking is not a CIMT, because the minimum conduct is temporary taking; or
>
> (b) VC 10851 is divisible. In that case, the question is burden of proof. If the issue is whether a permanent resident is deportable for moral turpitude, the government has the burden of proving that the person in fact was convicted of permanent intent. The question is, what happens if the immigrant is applying for relief, like cancellation. Does the *Young* rule stand, which would mean that the immigrant must produce a record of conviction that proves temporary intent? Or, as the *Almanza-Arenas* panel held, did the Supreme Court implicitly overrule *Young*, so that an inconclusive record of conviction would mean Mr. Almanza-Arenas would be eligible for relief, even if the statute were divisible?

You can see why we would like to avoid these questions by having the person specifically plead to temporary intent, where possible. But where that is not possible -- or where that was not done in a prior conviction that we must analyze -- *Almanza-Arenas* will help determine the rules.

Analysis. The *Almanza-Arenas* review presents an opportunity to clarify the categorical approach. Here is how I understand the basic issues. A great team, including Jayshri Srikantiah of Stanford Law School and Kara Hartzler of the Fed Defenders, is working on the case -- they can correct this summary as needed.

The *Almanza-Arenas* panel decision (*Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014)) addressed two questions about divisible statutes and the categorical approach.

> Question 1: Is vehicle taking, Cal Veh Code 10851, "truly divisible" between alternative elements, under the test set out by the U.S. Supreme Court in 2013 in *Descamps* and *Moncrieffe*? (If a criminal statute is truly divisible, an immigration (or federal criminal court) judge may look at the individual's record of a conviction to see which of the statutory offenses the person was convicted of.)
>
> Question 2: If a statute is truly divisible for purposes of eligibility for some relief -- here, cancellation of removal -- then who has the burden of proof and document production? Currently under *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), the immigrant (read, the often indigent, detained, and unrepresented immigrant) has the burden of obtaining the record of conviction from the prior criminal case, and that record must prove that he or she was convicted of an offense that does not bar the relief. Earlier, better law had provided that due to the nature of the categorical approach, if an inconclusive record of conviction under a divisible statute is before the immigration judge, the immigrant has met his or her burden of showing eligibility for relief.

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For Mr. Tooby's biography click here.

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Almanza-Arenas found that:

> Q 1: Cal Veh Code 10851 is not truly divisible as a crime involving moral turpitude, because a jury is not required to unanimously agree that the intent was to deprive the vehicle's owner permanently as opposed to temporarily; and
>
> Q 2: Even if the statute had been divisible, the BIA was wrong to apply the *Young* rule because in *Moncrieffe* the Supreme Court effectively overturned *Young*. Therefore, where a statute is divisible, a noncitizen meets his or her burden of proving eligibility for relief if an inconclusive record of conviction is before the immigration judge.

Now the Ninth Circuit en banc will hear *Almanza-Arenas.* The bad news is that at this point the panel decision is vacated and the *Young* burden of proof rule applies. This is bad, but not a surprise -- it was expected that the court en banc would review the question.

The ambivalent news is that a likely, although not guaranteed, outcome of the *Almanza-Arenas en banc* review is that the court will find that Veh Code 10851 is not divisible - yay - and therefore that the *Young* issue is not before the court - boo. Again, *Young* only addresses who carries the burden when a statute *is* divisible.

The significant upside of this result would be that it could cement the Ninth Circuit's ruling in cases like *Rendon v. Holder,* 764 F.3d 1077, 1084-85 (9th Cir. 2014), that divisibility requires jury unanimity on statutory alternatives. There the Ninth Circuit held that under *Descamps* a statute is not divisible unless (a) the statute literally sets out the different elements, phrased in the alternative ; (b) at least one, but not all, of the alternatives would trigger the removal ground at issue; and (c) (the great requirement) in order for these alternative statutory phrases to be "elements" rather than mere means to commit the offense, there must be law requiring a jury to unanimously decide between the alternatives in order to find the defendant guilty. The *sua sponte* request for rehearing *en banc* was rejected in *Rendon*, but with dissents, including one by Judge Kozinski on the mysterious footnote 2 in *Descamps* (782 F.3d 466).

If the Ninth Circuit *en banc* were to use *Almanza-Arenas* to upheld the *Rendon* jury unanimity interpretation, that would further nail down the victory for our side. The *Almanza-Arenas* statute, Veh Code 10851, presents a clear example for the court to address.

The downside would be that the court *en banc* well might rule that because the statute is not divisible it should not reach the *Young* issue, which would leave *Young* standing until it can be litigated another day. Or possibly the anti-*Rendon* faction would have enough votes to find that Veh Code 10851 is divisible, in which case it could get to the *Young* issue.

Young is a very harmful decision. Still, a good reading of *Descamps/Moncrieffe/Rendon,* etc. would mean that fewer and fewer statutes are held divisible, and therefore the amount of cases where *Young* even comes into play decreases commensurately.

For more discussion of these decisions and questions, see ILRC advisory "How to Use the Categorical Approach Now" at http://www.ilrc.org/resources/how-to-use-the-categorical-approach-now ; CD4:16.3;AF:4.2;CMT3:6.2

Practice Advisories

CAL CRIM DEF – AGGRAVATED FELONY – FRAUD – MATERIALITY REQUIREMENT – PRACTICE ADVISORY

Based on the Supreme Court's definition of fraud and deceit in *Kawashima v. Holder,* 132 S.Ct. 1166 (Feb. 21, 2012), there is a reasonably good argument that conviction of any false statement offense that lacks materiality of a false statement as an essential element does not constitute a fraud or deceit aggravated felony, under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). Kawashima, supra, at ___ (“We conclude that Mrs. Kawashima's conviction establishes that, by knowingly and willfully assisting her husband's

Publication Announcement

California Criminal Defense of Immigrants Newsletter (CEB 2014)
By Norton Tooby

We are happy to announce a new newsletter, the *California Criminal Defense of Immigrants E-Newsletter*. Continuing Education of the Bar is kind enough to publish this new online newsletter, beginning with the October 2014 issue. This newsletter will cover 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 will be 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 from the research cutoff date for the printed volume of 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 will continue 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 the particular practice manual, and section number, that is relevant to your work, to ensure you are aware of the most recent legal authorities on each topic.

While this office is discontinuing its 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 new newsletter will cover 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 most of the most common California convictions, which can be very useful in establishing claims of ineffective assistance of counsel. Subscribers to our California post-conviction relief newsletter are urged to consider subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*.

filing of a materially false tax return, Mrs. Kawashima also committed a felony that involved "deceit.""")(emphasis added). California Penal Code § 550(a) (false financial statements on an insurance claim) does not have an express statutory materiality requirement, but simply requires a false or fraudulent claim. Thanks to Dan Kesselbrenner. Cal Crim Def 13.1, CD4:19.74;AF:5.56;SH:7.82

BIA

RELIEF – VISA-FRAUD WAIVER – ADJUSTMENT OF STATUS CONSTITUTES AN "ADMISSION"

Matter of Agour, 26 I&N Dec. 566 (BIA 2015) (adjustment of status constitutes an "admission" for purposes of determining an alien's eligibility to apply for a visa-fraud waiver under INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) (2012)); distinguishing *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984).
CD4:24.30;AF:2.46;CMT3:3.45

RELIEF – WAIVERS – INA § 212(h) WAIVER – AGGRAVATED FELONY BAR

Matter of J-H-J-, 26 I&N Dec. 563 (BIA 2015) (noncitizen who adjusted status in the United States, and who has not entered as a lawful permanent resident, is not barred from establishing eligibility for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h) (2012), as a result of an aggravated felony conviction); withdrawing *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010).
CD4:24.29;AF:2.45;CMT3:3.44

Fourth Circuit

SENTENCE – FELONY – MAXIMUM SENTENCE

United States v. Bercian-Flores, ___ F.3d ___, 2015 WL 2239325 (4th Cir. May 14, 2015) (rejecting an argument that the top sentence of six months in pre-*Booker* Guidelines range controls over statutory maximum sentence in determining maximum sentence of prior felony for illegal re-entry sentencing purposes).
CD4:10.63;AF:2.62;AF:7.25;PCN:7.3

Fifth Circuit

RELIEF – LPR CANCELLATION OF REMOVAL – "ADMITTED IN ANY STATUS"

Tula-Rubio v. Lynch, ___ F.3d ___ (5th Cir. May 21, 2015) (noncitizen admitted at a port of entry by immigration officials by a wave-through has been "admitted in any status" for purposes of cancellation of removal eligibility under INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2)).
CD4:24.4;AF:2.4;CMT3:3.4

CITIZENSHIP – DERIVATIVE – JOINT CUSTODY

Kamara v. Lynch, __ F.3d __ (5th Cir. May 18, 2015) ("sole legal custody" requirement for purposes of derivative citizenship only applies where divorced parents entered in to a child custody arrangement; where no custody arrangement exists, the test is whether naturalized parent had *actual* uncontested custody over child).
CD4:3.17

Seventh Circuit

SENTENCE – CREDIT FOR TIME SERVED – DELAY IN CHARGING DENIED DEFENDANT CHANCE TO GET CREDIT FOR TIME SERVED IN PART IN IMMIGRATION DETENTION

United States v. Estrada-Mederos, ___ F.3d ___, ___, 2015 WL 1926371 (7th Cir. Apr. 29, 2015) ("The sentencing judge could view the time spent under ICE's custody as the basis for granting a convicted migrant a downward departure from the sentencing range for illegal reentry.").
CD4:10.63;AF:2.62;AF:7.25;PCN:7.3

Ninth Circuit

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – CHILD MOLESTATION

United States v. Martinez, ___ F.3d ___, ___, 2015 WL 3406178 (9th Cir. May 28, 2015) (Washington conviction of third-degree child molestation, in violation of Wash. Rev.Code § 9A.44.089, is categorically not an aggravated felony sexual abuse of a minor offense, under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), since the offense is not divisible and includes touching over clothing; "sexual abuse of a minor" requires skin on

skin contact); see *State v. Soonalole*, 992 P.2d 541, 544 & n.13 (Wash.Ct.App.2000) (holding that "the fondling and thigh rubbing over the victim's clothes" constituted a separate act of third-degree child molestation under state criminal law for double jeopardy purposes); *see also United States v. Castro*, 607 F.3d 566, 570 (9th Cir. 2010), as amended (holding that a California statute prohibiting lewd and lascivious acts on a child, under Penal Code § 288(a), was categorically broader than the generic definition for sexual abuse of a minor because "[l]ewd touching [under the state statute] can occur through a victim's clothing and can involve any part of the victim's body").
CD4:19.89;AF:5.72, A.38, B.73;SH:7.98, 8.77

JUDICIAL REVIEW – PETITION FOR REVIEW – MOOTNESS

Maldonado v. Lynch, ___ F.3d ___, 2015 WL 2343051 (9th Cir. May 18, 2015) (the petition for review was not moot notwithstanding petitioner's removal after filing his petition for review, because there was solid evidence that the petitioner was currently present in the United States, seeking relief from removal to Mexico to avoid being killed, and thus continues to have a stake in the outcome of the petition for review).

The court stated:

> When there are developments in a proceeding that suggest that it may be moot, we have an obligation to inquire whether a case or controversy under Article III of the Constitution continues to exist. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (per curiam). Of concern here is Maldonado's removal to Mexico after he filed his petition for review. After considering the government's response to our concern, we conclude that our review of Maldonado's petition has not been rendered moot by his removal.
>
> "Mootness is a jurisdictional issue." *Blandino–Medina v. Holder*, 712 F.3d 1338, 1341 (9th Cir.2013). It can be described as "the doctrine of standing set in a time frame." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)). For a dispute to remain live without being dismissed as moot, "[t]he parties must continue to have a personal stake in the outcome of the lawsuit." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (internal quotation marks omitted).
>
> (*Id.* at ___ [footnote omitted].)

CD4:15.37;AF:2.19;CMT:3.18

REMOVAL PROCEEDINGS – APPEAL – WAIVER OF APPEAL – NOT CONSIDERED AND INTELLIGENT SINCE IT WAS BASED ON IMMIGRATION JUDGE'S INCORRECT ADVICE

Garcia v. Lynch, ___ F.3d ___, 2015 WL 2385402 (9th Cir. May 20, 2015) (waiver of appeal from removal order was not considered and intelligent because the decision was based upon an Immigration Judge's incorrect advice).
CD4:15.35

POST CON RELIEF – WASHINGTON – SUPREME COURT FINDS *PADILLA* RETROACTIVE

In re Yung Ching Tsai, ___ Wash. ___, __ P.3d __, 2015 WL 2164187 (May 7, 2015) (*Padilla v. Kentucky*, 559 U.S. 356 (2010), applies no matter when the conviction was entered; since *Padilla* was not a new rule of constitutional law it applies retroactively).
http://www.courts.wa.gov/opinions/pdf/887705.pdf
PCN:6.18

CAL POST CON – GROUNDS – INVALID ADMISSION OF TRUTH OF PRIOR CONVICTION SENTENCE ENHANCEMENT ABSENT KNOWING AND INTELLIGENT WAIVER OF PERTINENT TRIAL RIGHTS

People v. Cross, ___ Cal.4th ___, 2015 WL 2343037 (May 18, 2015) (a stipulation to a prior conviction of violating Penal Code § 273.5(a), which increased the maximum prison term for the new conviction from two, three, or four years to

two, four, or five years, was reversed on the ground that the trial court accepted the stipulation without advising the defendant of any trial rights or eliciting his waiver of those rights); following *In re Yurko* (1974) 10 Cal.3d 857, 112 Cal.Rptr. 513, 519 P.2d 561.

PRACTICE ADVISORY – APPLICATION FOR CALIFORNIA DRIVER'S LICENCE

In California, driver's licenses are available for undocumented immigrants beginning January 1, 2015. See AB 60.This leads to several suggestions: Anyone with a criminal conviction (including DUI, but not minor misdemeanors) should be careful in applying, because although the DMV will not proactively alert ICE to immigrants with criminal convictions, ICE does have access to DMV database, and an application for an AB60 license can draw ICE attention. People with criminal records, including DUIs, are an enforcement priority, as are people with recent deportation orders.

Immigration history, such as a previous deportation or current removal proceedings, is not a factor here, and should not stop an immigrant from applying.

Immigrants who plan to apply for LPR status, and immigrants who plan to apply for DACA or DAPA should probably go ahead and apply for an AB60 license, since there is no increased risk from doing so, and because DACA/DAPA status is not yet available and processing those applications will take a long time.

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