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Crimes & Immigration
Newsletter

May, 2016

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

Andrew J. Phillips, Esq.
Editor

INSIDE

RECENT DEVELOPMENTS

Practice Advisories

PRACTICE ADVISORY – STATUTORY INTERPRETATION – *CHEVRON* DEFERENCE – RULE OF LENITY

Where an aggravated felony definition is ambiguous or unclear, federal courts should not defer to the agency under the statutory interpretation framework of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984). Because this definition has important criminal-law implications, see 8 U.S.C. § 1326, aggravating the sentence for illegal reentry after deportation, the rule of lenity should be applied instead. In *Torres v. Lynch*, ___ U.S. ___, 2016 WL 2903424 (May 19, 2016), the Supreme Court rejected the government's argument to defer to the BIA under the *Chevron* analysis. *See* Point B in Brief for the Respondent in *Torres v. Lynch*, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1096_resp.authcheckdam.pdf. This is important because there is a good argument that, when the reach of an aggravated felony is ambiguous, the adjudicator must apply the criminal rule of lenity to resolve the ambiguity in favor of the immigrant and not defer to the agency under *Chevron* given the criminal law implications of the aggravated

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Consultations

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felony definition. *See* Point I in Brief of National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Defense Project et al. as Amici in Support of Petitioner in *Torres v. Lynch*, available at http://immdefense.org/wp-content/uploads/2016/05/Amicus-Brief-of-NACDL-et-al-Torres-v.-Lynch.pdf. For support for this argument, see *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (finding that, if a statute has both criminal and noncriminal applications, the presence of ambiguity triggers the criminal rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context"); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023 (6th Cir. 2016) ("An increasingly emergent view asserts that the rule of lenity ought to apply in civil cases involving statutes that have both civil and criminal applications."); and 1027 (Sutton, J., dissenting) (calling for application of the criminal rule of lenity and rejecting deference to immigration agency interpretation of the ambiguous sexual abuse of a minor aggravated felony ground, INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), stating that "*Chevron* has no role to play in construing criminal statutes."). But see *e.g., Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015) (deferring to the agency in cases involving aggravated felony charges based on ambiguous or unclear provisions in the aggravated felony definition, such as the sexual abuse of a minor ground). Practitioners and immigrants should argue that an immigration adjudicator must apply the criminal rule of lenity, not *Chevron* deference, in such cases.

Thanks to Manny Vargas, Dan Kesselbrenner, and Andrew Wachtenheim, National Immigration Project of the National Lawyers Guild and the Immigrant Defense Project, CD4:15.37, 19.2;AF:3.2, 2.19;CMT3:3.18

STATISTICS – REMOVAL CASES

In April, 2016, the Justice Department's Executive Office for Immigration Review, the agency that oversees the nation's immigration courts, released its important annual compilation of statistical data. The report is a valuable glimpse into the front-line adjudication of migrants' attempts to remain in the United States. The fiscal year 2015 report, released in April 2016, reveals an immigration court system that continues to process hundreds of thousands of removal cases with glaring procedural faults.

As it has in recent years, the immigration courts completed well over 250,000 matters last year. The 262,293 cases completed in FY 2015 were up from the previous year's 248,689 and FY 2013's 265,341. Courts in the nation's largest cities—Los Angeles (18,105) and New York City (17,666)—topped the list. Sitting far above its population size, the immigration court in tiny Pearsall, Texas, population 9,852, completed 10,075 matters. That is, the judges at the Pearsall immigration court closed more cases than there are people in Pearsall—a testament to the important role that Pearsall's South Texas Detention Facility currently occupies in the federal government's immigration policing efforts. Almost all of Pearsall's work resulted from new removal cases or requests for bond by imprisoned migrants. Nationally there were many more removal cases initiated than requests for bond.

Continuing a troubling trend, many people whose fates were determined in FY 15 had to undergo the immigration court process

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without the benefit of legal representation. Only 58 percent of migrants (105,619 cases) whose cases were completed in FY 15 were represented, meaning that fully 42 percent (75,956 cases) had to navigate the labyrinthine immigration law regime alone. Lest anyone believe that representation is irrelevant, the best available evidence suggests otherwise. A recent study by Ingrid V. Eagly and Steven Shafer found that migrants who obtained representation were substantially more likely to obtain relief from removal or convince an immigration judge to terminate removal proceedings. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Courts,* 164 University of Pennsylvania Law Review 1, 50 fig.14 (2015). Though the Justice Department's report doesn't venture into the utility of legal counsel, it does point out that ending up in immigration court proceedings doesn't necessarily mean ending up with a removal order. Almost 20,000 migrants (19,626) obtained relief from removal. Another 28,370 had their cases terminated for one reason or another. In other words, almost 50,000 people managed to win their removal cases.

With 457,106 cases pending at the start of the FY 16, this is likely to be another busy year for the immigration courts.

CONVICTION – NATURE OF CONVICTION – RECORD OF CONVICTION – REPORTER'S TRANSCRIPT GOVERNS WHEN CLERK'S MINUTES CONFLICT

"When there is a conflict between the clerk's docket and the court reporter's transcript, the transcript will be determinative of the issue." Continuing Education of the Bar, CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 26.12 (last paragraph), p. 749 (2015), citing *In re Burch* (1973) 10 Cal. 3d 314, 320.
CD4:16.28;AF:4.27;CMT3:7.11

PRACTICE ADVISORY – FIREARMS – ANTIQUE EXCEPTION – CALIFORNIA OFFENSES

A state conviction for being a felon in possession of a firearm is an aggravated felony as an analogue to the federal offenses, 18 USC § 922(g) (1)-(5), but only if the state definition of "firearm" matches the federal. The Ninth Circuit held that no conviction of Pen C § 12021(a)(1) is an aggravated felony, because the applicable state definition of firearm at Penal C § 16520(a) does not match the federal definition due to the "antique firearms" exception. See *U.S. v Aguilera-Rios* (9th Cir 2014) 754 F3d 1105, amended and superseded by 769 F3d 626, and *U.S. v Hernandez* (9th Cir 2014) 769 F3d 1059, 1063 (per curiam) and see §11.17. It is not a deportable firearms offense for the same reason.

However, conviction for being a felon in possession of ammunition, Pen C § 30305, may qualify as an aggravated felony. *Matter of Oppedisano* (BIA 2013) 26 I&N Dec 202. The California definition of ammunition appears to align with the federal definition. A far better plea for immigration purposes would be to Pen C § 12021(a)(1). If that is not possible, arguably a plea to "owning" rather than "possessing" ammunition would prevent the Pen C §30305 from being an aggravated felony, because owning falls outside the federal definition in 18 USC §922(g)(1). See *U.S. v Pargas-Gonzalez* (SD Cal, Feb. 8, 2012, No. 11cr03120 BTM) 2012 US Dist Lexis 16013. Immigration counsel may argue that § 30305 is not divisible between owning and possessing, and therefore no conviction of this offense can

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qualify because a portion of the indivisible statute falls outside this ground of deportation.

A conviction for being a misdemeanant in possession of ammunition (or a federally-defined firearm) is not an aggravated felony, because that offense is not listed at 18 USC § 921(g)(1)-(5).

Most other more common California firearms offenses do not appear to have an exact federal analogue. Some less common California offenses, such as possession a machine gun, may have a federal analogue. Counsel should carefully compare the California offense with the listed federal offenses, and consider the definition of "firearm" used in the California statute, to identify whether the state offense necessarily contains all of the elements of the federal offense. See §§ 11.15, 11.17; see also further discussion of individual offenses at ILRC Chart & Notes available at http://www.ilrc.org/chart.

Penal Code §16590 lists the following firearms as "generally prohibited weapons". This list identically tracks the firearms that had been listed in the old PC 12020(a). Below is the list with corresponding new Penal Code sections that deal with each specific firearm:

Cane Gun	24410
Wallet Gun	24710
Undetectable Firearm	24610
Firearm not recognizable as one	24510
Camouflaging Firearm Container	24310
Short-Barreled Shotgun	33215
Short-barreled Rifle	33215
Zip Gun	33600
Unconventional Pistol	31500

Penal Code § 17700 states that the above prohibitions do *not* apply to antique firearms. The unaltered definition of an antique firearm is found at Penal Code § 16170, which uses the 1898 date. The notes for Penal Code § 17700 indicate that 17700 continues the first sentence of former Penal Code § 12020(b)(5) without substantive change.

Before 2012, CALJIC instructions demonstrate that the jury had to agree unanimously on the weapon in question. In fact, the weapon alleged determined which CALJIC instruction applied. CALJIC 12.40 applied to firearms and weapons, while CALJIC 12.41 applied specifically to dirks and daggers. Therefore, it would be difficult argue that jury unanimity was required as between a dirk/dagger or a firearm. Thanks to Albert Camacho.
CCDOI1.7, 11.16, 11.17

US Supreme Court

CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYSIS – JURISDICTIONAL ELEMENT

Torres v. Lynch, 136 S. Ct. 1619 (May 19, 2016) (an alien's state crime, which does not contain a solely jurisdictional interstate commerce element which does not substantively narrow the reach of the federal offense, but otherwise corresponds to an offense specified in the aggravated felony definition, counts as an aggravated felony under the Immigration and Nationality Act, where the individual did not argue that the interstate commerce element narrowed the reach of the federal arson statute, thus abandoning the argument), distinguishing *Bautista v. Attorney General*, 744 F.3d 54 (3d Cir. Feb. 28, 2014)(holding state arson

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conviction is not an offense "described in" a federal arson offense listed in the aggravated felony definition, where the interstate commerce element missing from the state offense substantively narrows the reach of the federal arson offense by restricting it to arson of commercial buildings, and excluding arson of residential structures).

Note. The holding of *Torres* applies where the federal jurisdictional element is solely jurisdictional, but the result may be different if that element is a part of the substantive definition of the crime defined by the statute: "We do not deny that some tough questions may lurk on the margins—where an element that makes evident Congress's regulatory power also might play a role in defining the behavior Congress thought harmful." *Torres*, slip op. at 18. Practitioners and immigrants should research federal law to determine whether there is any argument that the cross-referenced federal crime commerce element at issue in a particular case has such a substantive component. For example, as the *Torres*, dissent pointed out, dissenting opinion at 14, the Supreme Court has held that the commerce element in the federal arson statute at issue in the *Torres* case itself, 21 U.S.C. §844(i), has a substantive component in reaching only destruction of commercial property and not destruction of an owner-occupied residential house. *See Jones v. United States*, 529 U.S. 848, 855 (2000). But, according to the majority, Mr. Torres did not argue that the commerce element of the federal arson statute was not solely of the jurisdictional kind. *Torres*, slip op. at 21. Perhaps the result would be different where an immigrant affirmatively highlights any substantive nature – "defining the behavior Congress thought harmful" – of the commerce element of the cross-referenced federal statute at issue in his or her case. *Torres*, slip op. at 18. For example, in the *Bautista* case, the Third Circuit found that the commerce element in 18 U.S.C. § 844(i) does have a substantive component – excluding arson of residences and limiting the reach of the federal statute to commercial structures, and thus that Court determined that there was a substantive element mismatch. *See Bautista v. Attorney General*, 744 F.3d 54, 66-67 (3d Cir. 2014) (interstate commerce element in § 844(i) "does more than provide a jurisdictional hook for Congress . . . . Under § 844(i), the jurisdictional element has a meaningful narrowing effect on the range of arson criminalized."). Thus, if *Bautista* had reached the Supreme Court, and the argument had been made that the interstate commerce element had a substantive effect, the result would have been different.
CD4:16.519.8;AF:4.4, 4.35;CMT3:6.4

BIA

CONVICTION -- NATURE OF CONVICTION – DOMESTIC VIOLENCE – PROTECTED RELATIONSHIP IS A CIRCUMSTANCE-SPECIFIC FACTOR

Matter of H. Estrada, 26 I&N Dec. 749 (BIA 2016) (Georgia conviction of simple battery, involving intentional infliction of physical injury, triggers deportation as a domestic violence offense, even though statute does not require proof of a domestic relationship; domestic relationship is circumstance-specific factor that may be proven by evidence outside the record of conviction and beyond the elements of the statute).
CD4:16.7, 22.26;SH:7.154

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AGGRAVATED FELONY – FAILURE TO APPEAR FOR SENTENCE –UNDERLYING OFFENSE WAS PUNISHABLE BY FIVE YEARS OR MORE

Matter of Adeniye, 26 I&N Dec. 726 (BIA 2016) (as amended on May 2, 2016) (an "offense relating to a failure to appear by a defendant for service of sentence" is an aggravated felony under INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q), if the underlying offense was "punishable by" imprisonment for a term of 5 years or more, regardless of the penalty actually ordered or imposed).
CD4:19.67;AF:5.49, A.20, B.31

First Circuit

JUDICIAL REVIEW – PETITION FOR REVIEW – BIA DECISION DID NOT ADEQUATELY EXPLAIN ITS CONCLUSION
Tillery v. Lynch, ___ F.3d ___, 2016 WL 2731994 (1st Cir. May 11, 2016) (BIA's written decision did not adequately explain BIA's conclusion that alien had to show good-faith marriage before alien was eligible for special rule cancellation of removal, and thus remand was warranted).
CD4:15.37;AF:2.19;CMT3:3.18

Second Circuit

RELIEF – LPR CANCELLATION OF REMOVAL – AGGRAVATED FELONY BAR *Nuñez Peña v. Lynch*, __ F.3d ___, 2016 WL 2942931 (2d Cir. May 20, 2016) (pre-1996 aggravated felony conviction barred noncitizen from cancellation of removal for lawful permanent residents, under INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3), even though a waiver of deportation had been granted under former INA § 212(c), since the waived aggravated felony convictions still existed); following *Peralta-Taveras v. Attorney General*, 488 F.3d 580 (2d Cir. 2007).
CD4:24.4, 24.28;AF:2.4, 2.44;CMT3:3.4, 3.43

Fifth Circuit

RELIEF – INA §212(c) WAIVER – AGGRAVATED FELONY BAR

Lucas v. Lynch, ___ F.3d ___, 2016 WL 3027351 (5th Cir. May 24, 2016) (per curiam) (waiver under former INA § 212(c), 8 U.S.C. § 1182(c), unavailable to waive December, 1996 aggravated felony conviction, since AEDPA barred aggravated felony offenses).
CD4:24.28;AF:2.44;CMT3:3.43
POST CON RELIEF – FEDERAL – DIRECT APPEAL – DEPORTATION DID NOT RENDER DEFENDANT'S APPEAL MOOT
United States v. Heredia-Holguin, ___ F.3d ___, 2016 WL 2957853 (5th Cir. May 20, 2016) (en banc) (defendant's deportation did not render moot his appeal of remaining supervised release term); abrogating *United States v. Rosenbaum–Alanis*, 483 F.3d 381 (5th Cir. Mar. 29, 2007).
PCN:5.20, 5.66

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

United States v. Batamula, ___ F.3d ___, 2016 WL 2342943 (5th Cir. May 3, 2016) (en banc) (defendant made an insufficient showing of prejudice in his ineffective assistance of counsel claim to survive summary judgment, because he did not show he had a realistic

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probability of prevailing at trial); citing *Hill v. Lockhart*, 474 U.S. 52 (1985).
PCN:6.19

NATURE OF CONVICTION – CRIMES OF MORAL TURPITUDE – REALISTIC PROBABILITY

Mercado v. Lynch, ___ F.3d ___ (5th Cir. May 4, 2016) (per curiam) (BIA erred in applying "realistic probability" test, rather than "minimum conduct" test in holding that Texas conviction of indecent exposure in violation of Texas Penal Code § 21.08 and of making terroristic threats in violation of Texas Penal Code § 22.07, were crimes of moral turpitude).

NOTE: The holding of this case is somewhat confusing. The court cites *Cisneros–Guerrerro v. Holder*, 774 F.3d 1056, 1058–59, 1059 n. 2 (5th Cir.2014); *Nino v. Holder*, 690 F.3d 691, 694 (5th Cir. 2012), in support of finding that the Fifth Circuit does not apply the "realistic probability" test from *Duenas* in the context of crimes of moral turpitude. However, both of those cases instead were rejecting the fact-based analysis of *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008). Generally, the "realistic probability" test is considered to be *part of* the minimum conduct analysis, rather than a separate test entirely. Nevertheless, the Fifth Circuit's holding may be cited as supporting a pre-*Duenas* minimum conduct test in the CMT context, without the "realistic probability" limitation imposed by *Duenas*.

The point the Court is trying to make may be further elucidated by *Hernandez v. Lynch,*___ F.3d ___, 2016 WL 2586184 (5th Cir. May 4, 2016), reversing *Matter of Hernandez*, 26 I. & N. Dec. 464 (BIA 2015). In *Matter of Hernandez,* the BIA did not look beyond the record of conviction to make its holding. However, it still applied a "realistic probability" test *prior to* looking at the "minimum conduct" punishable by the offense.

This may be what the Fifth Circuit is actually objecting to – the fact that the BIA (applying a different part of the *Silva Trevino* analysis) applied a "realistic probability" test at the *first* stage of analysis ("Under the first step of that framework, we conduct a categorical inquiry to examine the statute of conviction and determine whether moral turpitude is intrinsic to all offenses that have a "realistic probability" of being prosecuted thereunder." *Matter of Hernandez*, 26 I&N Dec. at 465), rather than as part of the minimum conduct test.
CD4:16.7;CMT3:6.6

Seventh Circuit

CRIMES OF MORAL TURPITUDE – POSSESSION OF COUNTERFEIT PRESCRIPTION BLANKS

Guzman-Rivadeneira v. Lynch, ___ F.3d ___, ___, 2016 WL 2798678 (7th Cir. May 13, 2016) (while not reaching this issue, the court recognized an argument that a California conviction for possessing counterfeit prescription blanks, in violation of Health & Safety Code § 11162.5(a) (West 1993), was arguably not a crime involving moral turpitude, since the crime does not require proof or admission of any element of intent to defraud or mislead); citing *Matter of Serna*, 20 I & N. Dec. 579 (BIA 1992) (conviction for possession of altered immigration document without actual use or intent to use it unlawfully was not crime involving moral turpitude).
CD4:20.6;CMT3:8.6;SH:7.121

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CD4:20.23;CMT3:8.23, 9.51, CHART;SH:7.120

CRIMES OF MORAL TURPITUDE – BURGLARY OF VEHICLE

Dominguez-Pulido v. Lynch, ___ F.3d ___, 2016 WL 2641841 (7th Cir. May 5, 2016) (Illinois conviction of burglary, in violation of 720 Ill. Comp. Stat. 5/19–1 (without authority knowingly enters or remains within a vehicle with intent to commit therein a felony or theft), constituted a crime of moral turpitude, because burglary with the intent to commit theft has long been held to be a crime involving moral turpitude); citing *Matter of De La Nues,* 18 I. & N. Dec. 140, 145 (BIA 1981).

Note. In the Ninth Circuit, the nearly identical California burglary statute would not have been held to be divisible, because in California, the jury in a criminal trial is not required unanimously to agree on the identity of the target offense intended to be committed at the time of the entry. *Rendon v Holder*, 782 F3d 466 (9th Cir 2015) (California conviction of burglary (entry with intent to commit larceny or any felony) is not a divisible statute); see also *Ramirez v Lynch*, 810 F3d 1127 (9th Cir 2016); *Almanza-Arenas v Lynch*, 809 F3d 515 (9th Cir 2015) (en banc); *Matter of Chairez-Castrejon*, 26 I&N Dec 349, 354 (BIA 2014) (for statute to be divisible, immigration authorities must produce clear legal authority showing requirement of jury unanimity as to which offense was offense of conviction). Because it includes non-moral turpitude offenses, as well as moral turpitude ones, it is not a categorical match with the definition of a crime of moral turpitude. Therefore, no California conviction of violation of this statute can be a moral turpitude conviction under the prevailing federal categorical analysis, since the intended offense is not an element of the offense of conviction.

Eighth Circuit

IMMIGRATION OFFENSES – FAILURE TO COOPERATE IN DEPORTATION

United States v. Yan Naing, ___ F.3d ___, 2016 WL 1729530 (8th Cir. May 2, 2016) (federal conviction of willful failure or refusal to make timely application in good faith for travel or other documents necessary for his departure after the Board of Immigration Appeals (BIA) held that he was removable, in violation of 8 U.S.C. § 1253(a)(1)(B), affirmed, holding IJ did not violate defendant's due process rights, in underlying deportation proceedings, when IJ proceeded without obtaining an affirmative waiver of counsel from defendant; failure of IJ and BIA to advise defendant of his right to judicial review, in deportation proceedings, did not violate defendant's due process rights; defendant's due process rights were not violated in deportation proceeding by the failure to provide him with translated copy of State Department report on human rights in Burma; and defendant was properly prevented from asserting coercion defense). CD4:CHAPT13

Ninth Circuit

RESOURCES – POST CON RELIEF – CALIFORNIA – Penal Code § 1170.18 -- PROP 47 – PRACTICE ADVISORY

Appellate Defenders, Inc., Proposition 47: Modifications to Felony, Wobbler, Misdemeanor Law, http://www.adi-sandiego.com/pdf_forms/PROPOSITION_47_%20PRACTICE_ARTICLE.pdf

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CCDOI 20.64

AGGRAVATED FELONY – THEFT OFFENSES – CALIFORNIA – PRACTICE ADVISORY

In 1927, the Legislature consolidated the offenses of larceny, false pretenses, and embezzlement into a single crime, called "theft." Pen C § 484(a) (1872), amended by Stats.1927, ch. 619, § 1, p. 1046. It did so to remove technicalities in pleading and proof of these crimes. "Indictments and informations charging the crime of 'theft' can now simply allege an 'unlawful taking.' [Citations.] Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved [Citations.]." *People v Williams* (2013) 57 C4th 776, 785-86. These three theories of theft – larceny, false pretenses, and embezzlement – are therefore not separate offenses, because the jury need not unanimously agree on the elements of one of them, *Williams*, *supra*, and because the prosecution need not plead every theory or means of committing the offense of "theft." *Almendarez-Torres v US* (1998) 523 US 224, 228; *United States v. Cook* (1872) 17 Wall. 168, 174, 21 L.Ed. 538.

The Ninth Circuit has held that no conviction of "theft" as defined in Pen C § 484, or 487 (grand theft), or 666 (petty theft with a prior) can be aggravated felony theft even if a one-year sentence is imposed, because 484 is not divisible between theft and fraud. *Lopez-Valencia v Lynch* (9th Cir 2015) 798 F3d 863 (Pen C § 484 is not divisible between theft and fraud because the jury is not required to decide unanimously between them; therefore, minimum conduct to commit offense is not a theft aggravated felony). The rule may, however, be different outside the Ninth Circuit. See also *United States v Rivera* (9th Cir 2011) 658 F3d 1073, 1077 (noting that Pen C §§ 484(a) and 666 (petty theft with a prior) are not categorically theft aggravated felonies because they cover offenses that do not come within generic theft definition, such as theft of labor, false credit reporting, and theft by false pretenses); *Garcia v Lynch* (9th Cir 2015) 786 F3 789, 794-795 (if specific theory of theft under Pen C §§ 484, 487, is not identified, a sentence of one year or more does not make the offense a theft aggravated felony; court did not reach question whether the statute is divisible between different theories of theft).

Thanks to Dan Kesselbrenner.
AF5.78;19.94;CCDOI13.5, 13.15

SENTENCE – PROP 47 DID NOT GRANT JURISDICTION TO VACATE OR OTHERWISE CHANGE COMPLETED SENTENCE
POST CON RELIEF – PENAL CODE § 1170.18 (PROP 47) DID NOT GRANT JURISDICTION TO VACATE OR OTHERWISE CHANGE COMPLETED SENTENCE

People v. Vasquez, ___ Cal. App. 4th ___, 2016 WL 2888736 (2d Dist. May 17, 2016) (affirming grant of Pen C § 1170.18 petition to redesignate 1995 felony conviction of petty theft with a prior conviction, under Penal Code § 666, as a misdemeanor, but denying request to vacate resulting 16-month sentence, since the defendant had long ago completed serving the sentence: "Penal Code section 1170.18 [footnote omitted] allows resentencing only for petitioners currently serving a sentence for a qualifying felony [so] 1170.18 did not give the trial court jurisdiction to vacate or otherwise change Vasquez's completed sentence.").
CCDOI22.52

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RELIEF -- GOOD MORAL CHARACTER – FALSE REPRESENTATIONS NOT UNDER OATH -- MATERIALITY

Hussein v. Barrett, ___ F.3d ___, 2016 WL 1719326 (9th Cir. Apr. 29, 2016) (reversing USCIS decision to deny naturalization, for lack of good moral character, since false representations to law enforcement officers were not made under oath or penalty of perjury, and thus were not perjury; the legal standard for materiality of an allegedly perjurious false statement under California law is whether the false statement, at the time it was made, had the tendency to probably influence the outcome of the proceedings, not whether, as a matter of historical fact, the false statement probably did influence the outcome of the proceedings), citing Penal Code § 118. CD4:15.6;AF:3.14;CMT3:2.14

RELIEF -- GOOD MORAL CHARACTER – FALSE REPRESENTATIONS NOT UNDER OATH -- MATERIALITY

Hussein v. Barrett, ___ F.3d ___, 2016 WL 1719326 (9th Cir. Apr. 29, 2016) (reversing USCIS decision to deny naturalization, for lack of good moral character, since false representations to law enforcement officers were not made under oath or penalty of perjury, and thus were not perjury; the legal standard for materiality of an allegedly perjurious false statement under California law is whether the false statement, at the time it was made, had the tendency to probably influence the outcome of the proceedings, not whether, as a matter of historical fact, the false statement probably did influence the outcome of the proceedings), citing Penal Code § 118. CD4:15.6;AF:3.14;CMT3:2.14

PRACTICE ADVISORY – DOMESTIC VIOLENCE – VIOLATION OF COURT PROTECTIVE ORDER – NOT A CATEGORICAL MATCH WITH THE DOMESTIC VIOLENCE PROTECTION ORDER VIOLATION GROUND OF DEPORTATION
CAL CRIM DEF -- – DOMESTIC VIOLENCE – VIOLATION OF COURT PROTECTIVE ORDER – NOT A CATEGORICAL MATCH WITH THE DOMESTIC VIOLENCE PROTECTION ORDER VIOLATION GROUND OF DEPORTATION

In *Alanis-Alvarado v. Holder*, 558 F.3d 833, 836-837 (9th Cir. 2009), amended opinion and denial of rehearing and rehearing *en banc*, 541 F.3d 966 (9th Cir. 2008), the court held that California Penal Code § 273.6, proscribing the violation of a protective order issued pursuant to Family Code §§ 6320 and 6389, was not a categorical match with the domestic violence protection order violation ground of deportation, INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii), because the "full range of conduct" proscribed by § 273.6 was not a categorical match with the deportation ground: "For instance, some orders issued under the civil procedure code or welfare code have nothing to do with domestic violence. See, e.g., Civ. Proc. Code 527.6(c) (authorizing a court to issue a temporary restraining order against any person, without regard to the existence or nature of a relationship between the assailant and the victim)." Nonetheless, the panel held that a conviction for violating § 273.6 *pursuant to* Calif. Family Code §§ 6320 and 6389 *is* a categorical match with the deportation ground. It reasoned that because such orders uniformly restrict the subject from owning a firearm, and are issued based only on evidence of *past* abuse, such orders uniformly are made *for the purpose of* preventing future violence. *Id.* at 839-840. Any judicial finding of violating a stay-away order, or an order not to commit

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any offense that is described in Family Code §§ 6320 or 6389, is a basis for deportability. *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009).

Finding that the deportation ground definition places the focus on the purpose of the order which was violated rather than individual conduct underlying the violation, the panel held that the conviction would cause deportability even if the conduct that constituted the violation of the order was innocuous and did not in itself threaten "violence, repeated harassment or bodily injury."

We acknowledge that the protective order may have enjoined Petitioner from making even a single telephone call to his partner, and Petitioner may have placed a non-threatening and non-harassing telephone call. (Footnote 1 omitted.) If the INA provision required the state court to find that Petitioner *actually had engaged* in violent, threatening, or harassing behavior, we would conclude that Petitioner's convictions do not qualify categorically. But the INA provision requires something different: that the state court conclude that Petitioner violated "the portion of a protection order that *involves protection against*" violence, threats, or harassment. 8 USC § 1227(a)(2)(E)(ii) (emphasis added). As discussed above, an injunction against making a telephone call (and all the other enumerated acts in section 6320) "involves protection against" violence, threats, or harassment, even if it is possible that Petitioner's violative conduct did not independently constitute violence, threats, or harassment.

The panel noted in footnote 4 that it hesitated to assume that such a minor action as placing a non-threatening phone call in violation of an order prohibiting all contact realistically would result in a conviction, under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), but "[b]ecause our conclusion is unaffected by Petitioner's example of benign behavior, we need not determine whether a conviction for such behavior is a "realistic probability."" *Id.* at 839 n.4. On the other hand, the statute clearly criminalizes placing a harmless phone call in violation of a no-contact order. Penal Code § 273.6. It requires no legal imagination to conclude that there is a realistic probability of prosecution of a clear violation of the express language of the statute defining the offense. *United States v. Grisel*, 488 F.3d 844, 851-52 & n.8 (9th Cir. 2007) (en banc).

The majority of the panel declined to consider Petitioner's argument that the record only established that he pled guilty to Penal Code § 273.6, and not to Penal Code 273.6 "pursuant to" Family Code §§ 6320 and 6389. He made this argument based on the fact that the documents in the record lacked the key phrase "as charged in the Complaint," required under *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (*en banc*). The majority stated that it would not address the argument because it was not sufficiently raised on appeal: his brief to the BIA acknowledged that "the ROC [record of conviction] shows that [Petitioner] violated a court order pursuant to California Family Code §§ 6320 or 6389," and in his opening brief before the court, he represented that he "was convicted of Disobeying a Court Order in violation of [California Penal Code] § 273.6 pursuant to Section[s] 6320 and 6389 of the [California] Family Code." *Alanis-Alvarado*, 558 F.3d at 837, n.2.

Judge Rawlinson disagreed with this, based on his analysis that the argument was raised sufficiently to be considered, and that under *Vidal* the record only establishes that Petitioner pleaded to P.C. § 273.6:

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The majority has amended its opinion to now represent that Alanis-Alvarado "belatedly argues that his convictions were not necessarily for violating an order issued pursuant to sections 6320 and 6389 of the California Family Code, citing *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (*en banc*)." However, the majority's representation somewhat mischaracterizes Alanis-Alvarado's position. Alanis-Alvarado has consistently maintained that the statute of conviction is overbroad and the judicially noticeable documents do not establish a removable offense. Indeed, that is the very point for which he cited *Vidal*. In any event, we review the BIA's determination that "all of the actions proscribed by section 6320 of the California Family Code necessarily involve protection against credible threats of violence, repeated harassment of, or bodily injury to, the person for whom the protection order was issued." That is precisely the issue on which I part company with the majority.

Id. at 840-41 (Rawlinson, J., dissenting).

Immigration practitioners should carefully check whether according to the *Vidal* requirement, and any other requirements applicable under the modified categorical analysis, the reviewable record actually establishes that the plea was to § 273.6 *pursuant to* Family Code §§ 6320 and 6389. If not, *Alanis-Alvarado* is not controlling. Counsel should carefully raise the precise issue at every step in the appeal.

Criminal defense counsel should avoid a conviction to § 273.6 altogether and opt for a plea to Penal Code § 166(a) (4) with a vague record of conviction that does not establish whether the order was issued pursuant to Family Code §§ 6320 and 6389 (deportable), or Civ. Proc. Code § 527.6(c) (not deportable because not necessarily to protect against family violence)." *Id.* at 836-837. If this is not possible, counsel should attempt not to plead to a conviction pursuant to these Family Code sections, but bargain to simply plead to Penal Code § 273.6, keep the record vague, or if nothing else is possible, refuse to plead to the count "as charged in the Complaint" but instead to a violation of § 273.6 in general, without reference to any charge in the charging document.

Where a statute is divisible – i.e., it prohibits violation of some court orders or provisions that do and some that don't cause deportability under this ground -- the fact-finder will employ the modified categorical approach to determine which order or provision is the subject of the conviction. *Matter of Strydom,* 25 I&N Dec. 507 (BIA 2011) (similar holding for Kansas statute).

In *Szalai*, *supra,* the Ninth Circuit considered a finding by an Oregon court that the defendant had violated a 100-yard stay-away order (walking a child up the driveway instead of dropping him off at the curb, after visitation). The court held that the case was controlled by *Alanis-Alvarado*, *supra*. *Alanis-Alvarado* had found that "every portion" of a protective order issued under Family Code § 6320 "involves protection against credible threats of violence, repeated harassment, or bodily injury." Using California law as the standard, the *Szalai* court concluded that because Family Code § 6320 includes stay-away orders, a violation of the Oregon stay-away order also is a deportable offense.

Section 6320(a) covers a wide range of behavior. It permits a judge in a domestic violence situation to enjoin a party from "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not

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limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members."

In *Matter of Strydom*, the BIA cited these Ninth Circuit cases and followed their analysis. The Board considered a conviction under a Kansas statute, where the violation consisted of a single phone call. Finding that the Kansas statute included violations of court orders that would not be covered by the DV deportation ground, the Board applied the modified categorical approach. In this case the record of conviction contained a "Temporary Order of Protection from Abuse" which indicated that it was issued pursuant to section "60-3101 *et seq."* of the Kansas Statutes Annotated, which included a no-contact provision. The Board determined that the purpose of issuing no-contact orders under Kansas law was to prevent threats of violence or repeat harassment. Finding that the record of conviction established that the respondent violated a no-contact provision in a domestic violence order, and that the purpose of this provision was to prevent threats of violence or repeat harassment, the Board found the respondent deportable.

The Board and the Ninth Circuit recognize that some provisions or domestic violence orders do not trigger deportation under this ground, for example "provisions requiring attendance at and payment for a counseling program or requiring the payment of costs for supervision during parenting time." *Matter of Strydom*, 25 I&N at 511, quoting *Szalai v. Holder,* 572 F.3d at 980.

Thanks to Kathy Brady.
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