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Crimes & Immigration Newsletter

November, 2016

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

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RECENT DEVELOPMENTS

Articles

DETENTION – IMMIGRATION DETENTION – BOND

Hernandez v. Lynch, __ F.Supp.3d __ (C.D. Cal. Nov. 11, 2016) (preliminary injunction issued requiring ICE to reform system for setting bail bonds).

https://www.aclu.org/cases/hernandez-v-lynch

CD4:6.44, CCDOI4.17

Practice Advisories

RELIEF – CANCELLATION OF REMOVAL FOR NON-LPRS – CONDUCT-BASED GROUNDS – PRACTICE ADVISORY

A respondent is ineligible for cancellation of removal for non-lawful permanent residents if he has been "convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)." INA § 240A(b)(1)(C). Every word in a statute is to be given meaning, and should not be rendered superfluous. *Corley v. United States*, 556 U.S. 303, 314 (2009); *TRW*

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Consultations

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Inc. v. Andrews, 534 U.S. 19, 31 (2001). Therefore, by the plain language of the statute, a respondent who is deportable or inadmissible based on a *non-conviction* based ground of removal would *not* be barred from relief. See, e.g., INA § 212(a)(2)(D) (prostitution ground); INA § 212(a)(2)(I) (money laundering).

A civil court violation of a domestic violence restraining order is not a conviction. The TRO ground of removal does not require a conviction. INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii). The TRO ground only requires a determination by a court that a TRO was violated. Such a determination is not the same as a conviction, and nowhere in the language of INA § 237(a)(2)(E)(ii) is the term "conviction" found.

The TRO ground of removal, at INA § 237(a)(2)(E)(ii), as a non-conviction based ground of deportation, therefore cannot trigger the conviction bar to non-LPR cancellation of removal, at INA § 240A(b)(1)(C), 8 U.S.C. § 1229A(b)(2)(E)(ii), because that ground of deportation does not require a conviction. (This assumes that the removal ground was not proven by the existence of a conviction with the same elements. In that event, it is the conviction, not the removal ground, that triggers the bar.)

Note: This argument has wide application. For a complete list of conduct-based grounds of deportation, which likewise do not bar non-LPR cancellation of removal, see N. Tooby & J. Rollin, Criminal Defense of Immigrants (2012 Update), Deportation Grounds Checklist, Appendix D (32 grounds: [4], [7], [8], [12-15], [19-20], [22-33], [35], [38-41], [43-47], [50], [52]. For a complete list of conduct-based grounds of inadmissibility, see N. Tooby & J. Rollin, Criminal Defense of Immigrants (2012 Update), Checklist of Crime-Related Grounds of Inadmissibility, Appendix E (31 conduct-based grounds: [4]-[34]).

The CMT inadmissibility ground is a hybrid ground of removal. Part of it is triggered by a conviction, and this part would therefore trigger the cancellation bar. But it is also triggered by an "admission" of the elements of a crime of moral turpitude. This part of the removal ground, INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i), is a ground that includes non-conviction based inadmissibility, but still falls under INA § 240A(b)(1)(C). This particular removal ground is "divisible" with different elements, and so the "conviction"-based CMT ground fits, but the "admission"-based CMT ground does not.

CD4:24.5;AF:2.5;CMT3:3.5

BIA

CONVICTION – NATURE OF CONVICTION – DIVISIBLE STATUTES

Matter of Chairez-Castrejon, 26 I&N Dec 819 (BIA 2016) (Utah conviction for discharge of a firearm, in violation of Utah Code § 76-10-508.1, is not an aggravated felony crime of violence because, applying the analysis set forth in *Mathis*, the statute is overbroad and indivisible).

Note: This is the third time this categorical approach case has been before the Board. The decision clarifies that the understanding of "divisibility" which was laid out in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016), applies in immigration proceedings.

Generally, the categorical approach is used to determine whether a particular state criminal conviction matches the federal criminal grounds of deportability or inadmissibility. In *Descamps*, the Supreme Court clearly reasserted that under the categorical approach, the court is not concerned with what the defendant actually did, but only with the "elements," those facts that must be found beyond a reasonable doubt by a unanimous jury, of the statutory offense. Under this approach, courts look to the minimum conduct necessary to satisfy the elements of state offense and if those elements do not match the federal removal ground, the noncitizen is not subject to removal – so long as there is a "realistic probability" that a person would be prosecuted for that minimum conduct. Only when a statute is considered "divisible" – i.e. only when a statute includes two or more different crimes - may courts look beyond the statute to the record of conviction (a limited class of documents, such as a complaint or indictment, docket sheet, and plea colloquy, but not the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

After *Descamps* there was debate between the circuits about how to determine whether a statute was divisible. Some courts concluded that a statute was divisible only if it included different crimes with different "elements", whereas other courts concluded that so long as the statute described an offense with different means of committing the offense listed in the alternative (even if the jury would not have to decide unanimously and beyond a reasonable doubt with respect to those particular means) such an offense would be considered divisible. In *Mathis*, the Supreme Court held that disjunctive language alone does not make a statute divisible unless each statutory alternative defines and independent element of the offense. The Court defined "elements" as the "constituent parts of a crime's legal definition—the things the prosecution must prove…beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2248. Means are those parts of an offense that do not need to be found by a jury. *Id*.

The respondent in this case was a lawful permanent resident who had been convicted of discharge of a firearm under Utah law and sentenced to five years. The immigration judge had found him removable based on a conviction for an aggravated felony, specifically, a crime of violence with a sentence of a year or more. However, using the analysis set forth in *Mathis*, the Board determined that the Utah statute was overbroad, but not divisible and therefore the offense could not be an aggravated felony.

Practice Tip. The ongoing debate over how to apply the categorical approach in immigration court has largely been settled by this decision. The Board holds that they will follow the practice set forth in *Descamps* and *Mathis*.

Thanks to the Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services.

CD4:16.14, 19.40;AF:4.13, 5.22, A.14, B.51;CMT3:7.6;SH:7.49, 8.54

AGGRAVATED FELONY – THEFT OFFENSES – DEFINITION OF THEFT INCLUDES TAKINGS BY CONSENT INDUCED BY FORCE, FEAR, OR THREATS

Matter of Ibarra, 26 I&N Dec. 809 (2016) (California conviction of robbery, under Penal Code § 211, constituted an aggravated felony theft offense, under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), even though it had been accomplished with consent, since there is no meaningful difference between a taking of property accomplished against the victim's will and one where his 'consent' to parting with his property is coerced through force, fear, or threats).

CD4:19.94;AF:5.78, A.42, B.43;SH:7.103

First Circuit

POST CON RELIEF – GROUNDS – PREJUDICE – MOOTNESS – NONCITIZEN WHO WANTS TO TRAVEL OUTSIDE THE US SUFFERS DAMAGE FROM ERRONEOUS CONVICTION

Commonwealth v. Valdez, 475 Mass. 178 (2016) (stating, "it is virtually inevitable that an individual who is ineligible for admission based on a criminal conviction ... will be deemed inadmissible upon arrival.]," the Court held that a defendant satisfies his burden to show more than a 'hypothetical risk' of exclusion by showing that '(1) he has a bona fide desire to leave the country and reenter, and (2) that, if the defendant were to do so, there would be a substantial risk that he or she would be excluded…because of his or her conviction.'") (some internal quotation marks omitted).

PCN:6.57

AGGRAVATED FELONY – FRAUD OFFENSES – LOSS TO THE VICTIM

Nanje v. Chaves, 836 F.3d 131 (1st Cir 2016) (immigration courts can properly rely on any admissible evidence to establish loss exceeding $10,000, for purposes of showing a fraud aggravated felony, under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), and are not bound by postconviction alterations in the record of conviction; the revised docket sheets allocating a portion of the entire restitution amount to the conviction at issue had clearly been manipulated for the sole purpose of influencing immigration consequences and therefore could not be considered as controlling).

Practice Tip. This case is a good reminder to try at plea or sentence to limit the amount of restitution placed on fraud offenses by the criminal court. When it is not possible to keep the total amount under $10,000, the

defendant is more likely to get the benefit of the doubt if the initial plea divides up the amount of loss rather than revising the amount in post-conviction motions. Defense counsel should from the beginning try to minimize the amount of loss or structure the plea in a safer manner.

Thanks to the Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services.

CD4:19.74, 16.7;AF:5.56, 4.7

CRIMES OF MORAL TURPITUDE – CATEGORICAL APPROACH – REALISTIC PROBABILITY

Matter of Silva-Trevino, 26 I&N Dec. 826, ___ (BIA 2016) (the categorical approach must be applied in determining whether a conviction constitutes a crime of moral turpitude, since a uniform national standard should be used and the statute requires a "conviction," assuming "the minimum conduct . . . has a realistic probability of being prosecuted under the statute of conviction."); but see *Whyte v. Lynch*, 807 F.3d 463, 469–70 (1st Cir. 2016) (the court used "common sense" to conclude that under the plain terms of a Connecticut statute, there is a realistic probability the offense covered conduct that does not match the relevant federal removal ground, even though the noncitizen could not point to an actual prosecution: "The absence of such a case, says the government, means that violent force is required. The problem with this argument is that while finding a case on point can be telling, not finding a case on point is much less so. This logic applies with particular force because prosecutions in Connecticut for assault have apparently not generated available records or other evidence that might allow us to infer from mere observation or survey the elements of the offense in practice."); citing Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005) (discussing the "extensive problem" of state criminal record databases lacking information regarding disposition).

CD4:16.7;CMT3:6.2

Third Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(b) – RECKLESS AGGRAVATED ASSAULT

Baptiste v. Attorney General, ___ F.3d ___, 2016 WL 6595943 (3d Cir. Nov. 8, 2016) (New Jersey conviction for reckless second-degree aggravated assault, under N.J. Stat. Ann. § 2C:12–1b(1), meets the definition of aggravated felony crime of violence in 18 U.S.C. § 16(b); however, 18 U.S.C. § 16(b) is void for vagueness under the Due Process Clause of the Fifth Amendment, so the noncitizen is not deportable under this ground); see *Johnson v. United States*, ___ U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (invalidating the so-called "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), definition of violent felony, which is highly analogous to the crime of violence definition in 18 U.S.C. § 16(b), as unconstitutionally vague).

Note: The Court noted the difference between normal "recklessness" and the specific recklessness addressed in this case: "we have recognized that some recklessness crimes 'raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime' and so are crimes of violence under § 16(b). *Aguilar*, 663 F.3d at 699. In *Aguilar v. Attorney General*, we held that the Pennsylvania crime of reckless sexual assault is a crime of violence under § 16(b). *Id.* at 700–02. Although a defendant may act with a reckless state of mind in committing the offense, we observed that the defendant's actions create a 'substantial risk ... that ... the offender will intentionally use force to overcome the victim's natural resistance against participating in unwanted intercourse.' *Id.* at 702."

CD4:19.40;AF:5.22, A.14, B.9;SH:7.49

CRIMES OF MORAL TURPITUDE – RECKLESS AGGRAVATED ASSAULT

Baptiste v. Attorney General, ___ F.3d ___, 2016 WL 6595943 (3d Cir. Nov. 8, 2016) (New Jersey conviction for reckless second-degree aggravated assault [intentionally uses force against victim and is reckless as to whether that force will cause serious bodily injury], under N.J. Stat. Ann. § 2C:12–1b(1), is a crime of moral turpitude for immigration purposes); following the reasoning of *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) ("BIA could reasonably conclude that the elements of depravity, recklessness and grave risk of death, when considered together, implicate accepted rules of morality and the duties owed to society.").

Sixth Circuit

POST-CONVICTION RELIEF – TRIAL COURT ADVISAL IN DIVERSION PROCEEDINGS

State v. Kona, __ N.E.3d ___ (Ohio Nov. 21, 2016) ("when in accordance with the requirements of a pretrial diversion program a noncitizen defendant admits sufficient facts to warrant a finding of guilt, the trial court must provide to the defendant the advisement contained in R.C. 2943.031(A) that the admission of guilt may affect his or her immigration status, i.e., that it 'may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'").

Note: Counsel can seek this right in California cases by analogy to Penal Code § 1016.5.

PCN:6.57, CCDOI20.47

Seventh Circuit

OVERVIEW – REMOVAL PROCEEDING – EVIDENCE – MARRIAGE FRAUD –HEARSAY

Vidinski v. Lynch, ___ F.3d ___, (7th Cir. Nov. 1, 2016) (hearsay evidence regarding out-of-court statements which alien's purported wife made to immigration agent regarding the sham nature of their marriage possessed sufficient indicia of reliability to be admissible;

immigration judge's finding, as affirmed by the BIA, that alien was removable, with lifetime ban on his reentry, for having

Publication Announcement

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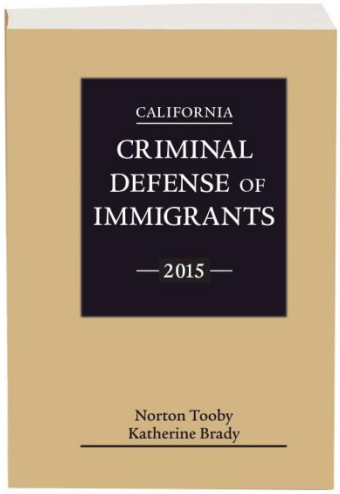

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Details

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

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

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

entered into sham marriage was supported by requisite clear and convincing evidence).

CD4:15.26

Eighth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – TERRORISTIC THREATS

United States v. McFee, 842 F.3d 572 (8th Cir. Nov. 17, 2016) (Minnesota conviction for terroristic threats, under Minn. Stat. § 609.713, is not a violent felony under the ACCA, since force is not categorically required; modified categorical analysis is inapplicable to the statute, since the statute lists means, not elements).

CD4:19.39;AF:5.20, A.14, B.17;SH:7.47, 8.15

CATEGORICAL ANALYSIS – DIVISIBLE STATUTE – ELEMENTS – JURY UNANIMITY – TERMS DEFINED IN OTHER STATUTES

United States v. McFee, 842 F.3d 572 (8th Cir. Nov. 17, 2016) (where a state statute references a [divisible] definition in another part of the statute, the terms of that definition are not elements of the crime of conviction unless a jury would specifically be required to find which part of the referenced definition applied).

CD4:16.14;AF:4.13;CMT3:7.6

Ninth Circuit

RELIEF – ADMISSIBILITY – VISA WAIVER PROGRAM

Riera Riera v. Lynch, __ F.3d __ (9th Cir. Nov. 28, 2016) (noncitizen who fraudulently enters the U.S. on the visa waiver program is still bound by waiver of challenge to deportation, other than asylum).

CD4:18.3

JUDICIAL REVIEW – RETROACTIVITY OF COURT DECISIONS

Lemus v. Lynch, 842 F.3d 641 (9th Cir. Nov. 16, 2016) (where court of appeal does not expressly adopt a new rule, but simply defers to the BIA, *Chevron's* retroactivity criteria are inapplicable and the decision is retroactively applicable); see *Garfias–Rodriguez v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012) (en banc) (court did not announce a new rule on its own authority, as in *Nuñez-Reyes*, but rather deferred to a rule previously announced by the BIA, so the proper approach to the issue of retroactivity is set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982)).

CD4:15.37;AF:2.19;CMT3:3.18

CONVICTION – NATURE OF CONVICTION – ELEMENTS – SENTENCE ENHANCEMEMENT

Vinh Tan Nguyen v. Holder, 763 F.3d 1022, 1028 (9th Cir. 2014) (sentence enhancement increasing penalty for an offense constitutes an element of the offense for purposes of the categorical analysis of whether the offense triggers immigration consequences).

The court reasoned:

The BIA did not err in identifying the elements of Nguyen's § 1544 conviction. Though Nguyen argues otherwise, the intent to facilitate an act of international terrorism is an element of his offense. "Any fact that, by law, increases the penalty for a crime is an 'element'...." *Alleyne v. United States*, ––– U.S. ––––, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because Nguyen pled guilty "as charged in Count 1 of the Single–Count Indictment," he pled guilty to misuse of a passport "to facilitate an act of international terrorism, as defined in Title 18, United States Code, Section 2331(1)." See *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir.2007) (en banc). This intent to facilitate an act of international terrorism, in turn, increased the maximum criminal penalty to which Nguyen was exposed: § 1544 prescribes a maximum fifteen-year prison term in most cases, but a maximum twenty-five year prison term "if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)." Because the intent to facilitate an act of international terrorism increased the criminal penalty to which Nguyen was exposed, the BIA was correct that the intent to facilitate an act of international terrorism is an element of Nguyen's conviction.

(*Id*. at 1028.)

Thanks to Kara Hartzler.

CD4:10.56;SH:5.63;AF:3.55

CONTROLLED SUBSTANCES – IMMIGRATION CONSEQUENCES – MARIJUANA POSSESSION – CALIFORNIA

In California, the voters passed Proposition 64, which decriminalizes possession of up to one ounce of marijuana and up to 6 marijuana plants per household out of public view and some other offenses for those 21 and older and makes other offenses infractions or misdemeanors. It does not, however, allow noncitizens to use or smoke marijuana without immigration consequences.

Decriminalization of certain marijuana offenses is good, but under federal immigration law, a noncitizen can be held inadmissible for *admitting* commission of a drug offense, even without a *conviction*, and federal law controls. So, noncitizens can be asked when they seek a visa, adjustment, consular processing, or upon return from a trip abroad, "Now that it's legal to use marijuana in California, have you had occasion to try it?" Noncitizens who admit the essential elements of an offense of possession, use, transportation for personal purposes, or cultivation of six plants of marijuana, are inadmissible. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

U.S. Customs and Immigration Services (and probably ICE and CBP) take the position that a conviction of a California marijuana infraction can be used as a controlled substances conviction for immigration purposes of both inadmissibility and

deportability. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2) (A)(i)(II) (controlled substance conviction or admission ground of inadmissibility); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)(controlled substance conviction ground of deportation). There is no binding legal precedent on California infractions being a conviction for immigration purposes, but there is a negative unpublished Ninth Circuit opinion. The problem is that California convictions of infractions require proof beyond a reasonable doubt and that is a factor that tends to show they are criminal convictions. See *Matter of Eslamizar,* 23 I. & N. Dec. 684 (BIA Oct. 19, 2004). So, an infraction is not definitely safe for noncitizens. We have to assume that an infraction is a "conviction" for immigration purposes.

Even use or possession of marijuana with a prescription for medical marijuana or a license to sell marijuana, can still have serious negative immigration consequences under federal immigration law, even through those offenses have been legalized under California state law. Federal immigration law controls for federal immigration purposes.

Withdrawing a plea for "legal invalidity" under new Health & Safety Code §§ 11361.8(e)-(h), might eliminate a conviction, but only where the court vacates or dismisses the conviction. If the court merely resentences the defendant, or reduces a felony to an infraction, that does not eliminate the controlled substances misdemeanor or infraction conviction which is a still "conviction" for immigration purposes.

Thanks to an excellent presentation at the 2016 AILA California annual conference by superstars Katherine Brady, Matt Adams, and Zachary Nightingale. Michael Mehr and Norton Tooby summarized their advice with a little editorial comment added.

CD4:21.5, CCDOI8.4, 8.5, 20.37B