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Crimes & Immigration
Newsletter

October, 2014

This Newsletter contains selected recent developments in criminal immigration law occurring during October, 2014.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2007), with monthly updates online at NortonTooby.com.

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RECENT DEVELOPMENTS

Articles

PRACTICE TIP – FALSE CLAIM TO US CITIZENSHIP – CLAIM OF BIRTH IN US IS INSUFFICIENT TO SUPPORT FALSE CLAIM TO US CITIZENSHIP SINCE SOME PERSONS BORN IN THE US ARE NOT US CITIZENS

There is a small, but legally significant, subset of persons born in the U.S. who are not U.S. citizens. Therefore, a claim of birth in the U.S. is insufficient to establish an allegation of making a false claim to U.S. citizenship, unless DHS can allege and prove that in the particular case, the same benefits could not have been obtained by someone born in the U.S. but who was nevertheless not a U.S. citizen. Thanks to David Link.
CD4:18.10

BIA

DETENTION – IMMIGRATION DETENTION

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). The requisite "reason to believe" that allows the INS to claim a respondent is subject to the mandatory detention for purposes of the automatic stay is not sufficient for the merits of the bond appeal. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified. For purposes of

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*.

determining the custody conditions of a lawful permanent resident under section 236(c) of the Act, a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the BIA finds it is substantially unlikely that the INS will prevail on a charge of removability specified under section 236(c)(1) of Act.
CD4:6.37

First Circuit

DETENTION – MANDATORY ICE DETENTION – "WHEN RELEASED"
Castaneda v. Souza, ___ F.3d ___, ___ (1st Cir.

Oct. 30, 2014) ("Because INA § 236(c), 8 U.S.C. § 1226(c) only applies to aliens detained "when . . . released" from criminal custody, and because the petitioners were not timely detained under any reasonable interpretation of the statute [they were each arrested by ICE over four years after release], we conclude that the petitioners are not subject to mandatory detention under § 1226(c) and are entitled to an individualized bail hearing under § 1226(a). We therefore affirm the district court's grant of habeas corpus relief in each case."); see Casas-Castrillon v. Dept. of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008); Ly v. Hansen, 351 F.3d 263, 272 (6th Cir. 2003); Sylvain,714 F.3d at 157 (collecting cases); Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999); Ortiz v. Holder, No. 2:11-cv-1146 DAK, 2012 WL 893154, at *3-4 (D. Utah Mar. 14 2012); Harris v. Lucero, Civil Action No. 1:11-cv-692, 2012 WL 603949, at *3 (E.D. Va. Feb 23, 2012); Parfait v. Holder, Civil No. 11-4877 (DMC), 2011 WL 4829391, at *4-9 (D.N.J. Oct. 11, 2011); Rianto v. Holder, No. CV-11-0137-PHX-FJM, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011).
CD4:6.39

Fourth Circuit

INADMISSIBILITY – VISA FRAUD – SUFFICIENCY OF THE EVIDENCE

Yang v. Holder, 770 F.3d 294 (4th Cir. Oct. 29, 2014) (BIA erred in finding that petitioner was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i), since the record lacked substantial evidence to support a determination that noncitizen made deliberate and voluntary misrepresentations to procure an immigration benefit, even though Immigration Judge found noncitizen's testimony regarding asylum claim was not credible).
CD4:18.10, 24.18;AF:2.28;CMT3:2.29

CRIMES OF MORAL TURPIUTDE – SEX OFFENDER REGISTRATION

Mohamed v. Holder, 769 F.3d 885 (4th Cir. Oct. 17, 2014) (Virgina conviction for violation of VaCodeAnn. § 18.2-472.1, failure to register as a sex offender, is not a crime involving moral turpitude for immigration purposes, since it is merely a regulatory offense), disagreeing with Matter of Tobar-Lobo, 24 I&N Dec. 143 (BIA 2007).
CD4:20.22;SH:7.108, 8.32;CMT3:9.44, CHART

Eighth Circuit

AGGRAVATED FELONIES – ATTEMPT – MERE PREPARATORY CONDUCT HELD INSUFFICIENT

United States v Warnell Reid, ___ F.3d ___, 2014 WL 5314563 (8th Cir. Oct 20, 2014) (Missouri conviction for attempted burglary is not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2), because Missouri's statute can be violated by mere preparatory conduct; commentary to the Missouri attempt statute says that "reconnoitering the place contemplated for the commission of the offense" or "possession of

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materials to be employed in the commission of the offense, which are specially designed for such unlawful use" can be a substantial step sufficient for conviction of attempted burglary); see James v. United States, 550 U.S. 192 (2007) (Florida state courts stated attempt required "an overt act directed toward the entry of a structure" to qualify as attempted burglary, so the court here found it unnecessary to address whether "more attenuated conduct" -- such as the "casing" of a building or neighborhood -- would suffice, but suggested that a statute requiring only "preparatory conduct" might well not qualify).
CD4:19.27;SH:7.34, 8.66;AF:5.7, A.7, B.63

Ninth Circuit

CAL CRIM DEF – THEFT OFFENSES

Theft: Penal Code § 484 is a divisible statute, which includes both theft offenses and fraud offenses. If the record of conviction does not establish which form of theft resulted in the conviction, the minimum conduct would be fraud, where the defendant sought to avoid a theft aggravated felony because the sentence imposed was one year or more. In addition, if the loss to the victim(s) was in excess of $10,000, the minimum conduct would be theft, so there would be no theft aggravated felony where the sentence imposed was less than one year. Therefore, immigration counsel can argue that a conviction under Penal Code § 484 or 487 can never be a theft or fraud aggravated felony unless both a one-year sentence was imposed, and the loss to the victim(s) exceeded $10,000. This is because the minimum conduct includes theft and fraud. See Nugent v. Ashcroft, 367 F.3d 162 (3d Cir. May 7, 2004). Criminal defenders should strive to create a good record of conviction: designate theft and obtain a sentence of less than one year, or designate fraud where the loss is $10,000 or less.
Burglary: Commercial burglary is never an aggravated felony theft offense, even if a one-year sentence is imposed. Rendon v. Holder, ___ F.3d ___, ___, 2014 WL 4115930 (9th Cir. August 22, 2014). Residential burglary is always an aggravated felony crime of violence if a one-year sentence is imposed. There is a very strong argument that no burglary is a crime of moral turpitude, regardless of the intended offense, and regardless whether it is residential or commercial. See Rendon, supra. To be conservative, however, we recommend that defense counsel try to identify a specific non-moral turpitude target offense, such as receiving stolen property, Pen C §496 (specifying intent to take temporarily), unauthorized driving a vehicle, Veh C §10851 (same), or false imprisonment, Pen C §236 (using menace as the means), as the intended offense.
Vehicle taking: Unauthorized driving a vehicle, under Veh C §10851, is not a divisible statute, under the Descamps analysis. Even though the statute is phrased in the alternative, it is not divisible, because the jury need not be unanimous as to whether the intent was permanent or temporary. Therefore no conviction under this statute should be held a moral turpitude offense. It is safer, however, to plead specifically to intent only temporarily to deprive the owner of the property. See Almanza-Arenas v Holder, ___ F3d ___ (9th Cir 2014).

CAL CRIM DEF – CONSPIRACY – OBJECT OF A CONSPIRACY IS NOT AN ELEMENT
AGGRAVATED FELONY – CONSPIRACY

People v. Vargas, 110 Cal. Rptr. 2d 210, 247 (2001) (the object of a conspiracy is not an element of a California conspiracy offense: "[T]he specific crimes that constitute the object of the conspiracy are not elements of the conspiracy. Rather, they are the means by which the purpose of the conspiracy was to be achieved."); id. at 245 ("So long as there is unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else.").

Note: As long as Rendon v. Holder, ___ F.3d ___, ___, 2014 WL 4115930 (9th Cir. August 22, 2014), remains the law of the Ninth Circuit, the target offense of the conspiracy does not constitute part of the elements of the offense of conviction. Under the same reasoning, a conspiracy offense is not divisible in terms of the elements, so the immigration authorities cannot use the modified categorical analysis to consult the record of conviction documents to determine the nature of the conviction for immigration purposes. Thanks to Dan Kesselbrenner
CD4:19.32;SH:7.39, 8.67;AF:5.12, A.12, B.64

SAFE HAVEN – CARRYING A CONCEALED FIREARM
CRIM DEF – FIREARMS OFFENSES – DEFINITION OF FIREARM

A plea to carrying a concealed firearm on the person, in violation of Pen C 25400(a)(2), should not be considered a crime of moral turpitude, a firearms conviction, or an aggravated felony, as a ground of deportation, inadmissibility, or even for relief purposes such as cancellation of removal. United States v. Aguilera–Rios, 754 F.3d 1105, 1112 (9th Cir. 2014); Matter of Chairez, 26 I&N Dec. 349, 355−58 (BIA 2014).
SH:9.22,CD23.14

FIREARMS OFFENSES – CARRYING A FIREARM IN THE COURSE OF A FELONY

Medina-Lara v. Holder, 771 F.3d 1106, 1116 (9th Cir. Oct. 10, 2014), withdrawing prior opinion at 767 F.3d 801 (9th Cir. Sept. 19, 2014) (California conviction of possession for sale of a controlled substance, in violation of Health & Safety Code § 11351, with a sentence enhancement for carrying a firearm during that offense, in violation of Penal Code § 12022(c), did not constitute a deportable firearms offense, under INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C), since former Penal Code § 12001(b), which defined "firearm" at the time of petitioner's conviction, was overbroad with respect to the federal firearms definition, which includes an exception for antique firearms that the California definition does not: "We hold that Aguilera–Rios applies to any California statute based on the definition of "firearm" formerly appearing at § 12001(b). Although the underlying conviction in Aguilera–Rios was obtained under former California Penal Code § 12021(c)(1), that statute incorporates by reference the same definition of "firearm" as does § 12022(c), the statute of Medina's conviction. This is sufficient to bind us to Aguilera–Rios's holding."); following United States v. Aguilera–Rios, 754 F.3d 1105, 1112 (9th Cir. 2014) (California conviction for possession of a firearm under former California Penal Code § 12021(c)(1), which used the state firearms definition provided under former California Penal Code § 12021(c)(1), did not categorically match the federal firearms definition, because it did not incorporate the same antique firearms exception as the federal statute).
Cross-References: Cal Crim Def Immig §16.12.
CD4:23.14;SH:7.173

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