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Crimes & Immigration Newsletter

October, 2015

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

Andrew J. Phillips, Esq.
Editor

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RECENT DEVELOPMENTS

Articles

CRIMES OF MORAL TURPITUDE – VOID FOR VAGUENESS – SAMPLE BRIEFING
Under *Johnson,* the Term "Crime Involving Moral Turpitude"
Is Void for Vagueness.

Several months ago, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally void for vagueness. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). Because the reasons that led the Supreme Court to strike down that provision are just as present—if not more so—in the CIMT statute, the Court must apply *Johnson* to find that INA [§ 212(a)(2)(A)(i)(I)/§ 237(a)(2)(A)(ii)] is also void for vagueness.

Courts have long divided CIMTs into "two basic types: those involving fraud and those involving grave acts of baseness or depravity." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 910 (9th Cir. 2009) (en banc) (internal quotations and citation omitted). *See also Navarro–Lopez v. Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring for the majority) (stating that some offenses "are so base, vile, and depraved that they qualify as crimes of moral turpitude even though they have no element of fraud") (citation omitted). In *Jordan v. De George*, the Supreme

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Court held that the CIMT statute was not unconstitutionally void for vagueness in regards to fraudulent offenses. 341 U.S. 223, 223-24 (1951). But the Supreme Court was careful to note that its holding *only* extended to offenses involving fraud. *See id*. at 232 ("Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."). Because *Jordan* was limited to fraud offenses, the issue of whether the CIMT statute is unconstitutionally vague in regards to "inherently base, vile, or depraved" offenses remains an open question.

In *Johnson*, the Supreme Court gave two reasons for finding the ACCA residual clause—which reaches conduct that "presents a serious potential risk of physical injury to another"—unconstitutionally vague. First, the Court could find no practical methodology for measuring the inherent risk posed by any given statute, holding that there was "no reliable way to choose between . . . competing accounts" of how much risk a violation of the statute generally entailed. 135 S. Ct. at 2558; *see also id*. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'") (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from the denial of rehearing en banc). Second, even if the Court could discern how much risk a violation of the statute ordinarily entailed, the residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony"—i.e., it lacked a meaningful gauge for determining when the typical conviction under a particular statute reaches the ACCA threshold of posing a "serious potential risk of physical injury." *Id*. at 2558. In other words, *Johnson* found that where both the *methodology* of analyzing a state statute, as well as the *degree of severity* necessary to meet a generic definition, are unclear, this implicated constitutional concerns of vagueness.

Here, the concerns raised in *Johnson* are just as present—if not more so—in the CIMT statute. In *Matter of Silva-Trevino*, then-Attorney General Michael Mukasey defined a CIMT as "reprehensible conduct"—a description substantially more vague than the "serious potential risk of physical injury" found unconstitutional in *Johnson*. *See* 24 I&N Dec. 687, 689 (A.G. 2008). To determine whether an offense is a CIMT, courts thus must look to the conduct falling within a particular state statute and decide in theory whether it is "reprehensible."

But as the Ninth Circuit has noted, the determination of what constitutes a CIMT may well "be unacceptable to one or another segment of society and could well divide residents of red states from residents of blue, the old from the young, neighbor from neighbor, and even males from females." *Nunez v. Holder*, 594 F.3d 1124, 1127 (9th Cir. 2010). Because "[t]here is simply no overall agreement on many issues of morality in contemporary society," courts are equally at a loss to determine whether a conviction under a particular statute renders a noncitizen removable. *Id*. At this point, courts may as well as resort to the same tongue-in-cheek methodology suggested by *Johnson* ("A survey? Expert evidence? Google? Gut instinct?") to decide whether community standards mandate that an offense qualifies as "reprehensible" conduct.

Simply put, courts have no ability to gauge the degree of severity necessary for an offense to constitute a CIMT. Traditionally, non-fraudulent CIMTs crimes have been defined as offenses that are "base, vile, and depraved" and "shock the public conscience." *Navarro–Lopez*, 503 F.3d at 1074–75 (internal quotation marks

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removed). Historically, this means they have been compared to offenses such as murder, rape, and incest. *Id*. at 1074. But in the last ten years, the BIA has found the state offense at issue to be a CIMT in 19 out 21 published decisions—over 90% of the time. This has led the Ninth Circuit to complain that if courts do not "adhere to our precedents limiting the scope of [CIMTs], the category will sooner or later come to mean simply 'crimes,'" which would "not only would dilute our language, it would also contravene Congress's intent." *Navarro-Lopez*, 503 F.3d at 1075.

And like the residual clause, the vagueness problems of CIMTs are evident in courts' ongoing failure to establish a standard for "moral turpitude. *See Johnson*, 135 S. Ct. at 2558 ("This Court has acknowledged that the failure of persistent efforts to establish a standard can provide evidence of vagueness.") (internal quotations and citation omitted). *Johnson* discussed its attempts to adjudicate various applications of the residual clause, finding that "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id*. Similarly, the Ninth Circuit has often expressed frustration over the difficulty of adjudicating CIMT cases. *See Nunez*, 594 F.3d at 1130 (noting "the consistent failure of either the BIA or our own court to establish any coherent criteria for determining which crimes fall within that classification and which crimes do not"); *Marmolejo-Campos*, 558 F.3d at 909 (describing case law defining CIMTs as "a mess of conflicting authority.") (Berzon, J., dissenting); *Nicanor–Romero v. Mukasey*, 523 F.3d 992, 997–99 (9th Cir. 2008) (summarizing Ninth Circuit law on moral turpitude and recognizing that "[w]e have not relied on a consistent or easily applied set of criteria" to identify crimes of moral turpitude). Thus, the perpetual struggle to come up with a workable definition for a CIMT "confirm[s] its hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2558.

For these reasons, the CIMT statute—like the ACCA residual clause—is unconstitutionally void for vagueness.
Thanks to Kara Hartzler.
CD4:20.2;CMT3:8.2;SH:7.110

Resources

POST CON RELIEF – RESOURCES – STATE BY STATE POST-CONVICTION RELIEF STATUTES
This practice advisory and a link discuss state by state post-conviction relief statutes.
http://www.adminrelief.org/resources/item.566101-Post_Conviction_Relief_Resources_by_State
They are also on the www.adminrelief.org website.
CD4:11.1;AF:6.1;CMT3:10.1

Practice Advisories

CAL CRIM DEF – PRACTICE ADVISORY – GROSS NEGLIGENCE IN CALIFORNIA
Penal Code § 191.5(a), gross vehicular manslaughter while intoxicated, arguably involves insufficient intent to qualify as a crime of violence aggravated felony, crime of domestic violence, or crime of moral turpitude. Penal Code §191.5, by its terms, and in CALCRIM 590, requires the prosecution prove the following elements:

The defendant drove under the influence
While driving UI the defendant also committed a misdemeanor, infraction, or otherwise lawful act that might cause death
With gross negligence, and

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The grossly negligent conduct caused the death of another.

Because there is a strong argument that this offense involves conduct that is grossly negligent, as opposed to intentional, this offense may not qualify as a crime of violence aggravated felony, crime of domestic violence, or crime of moral turpitude.

The relevant jury instruction, CALCRIM 590 defines "gross negligence" as follows:

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

He or she acts in a reckless way that creates a high risk of death or great bodily injury; and
A reasonable person *would have known* that acting in that way would create such a risk.

(Emphasis added).

In other words, a person acts with gross negligence when the act creates a high risk of death or GBI, but was unaware of it, even though a reasonable person would have known of the risk. See *People v. Thompson* (2000) 79 Cal. App. 4th 40 (driver's conduct in using drugs and alcohol, speeding and driving unsafely on a mountain road, swerving into an oncoming lane, and failing to have the passenger wear a seatbelt, amounted to gross negligence); *People v. Hansen* (1992) 10 Cal. App. 4th 1065 (gross negligence found where driver ignored requests to slow down and a request by a passenger for help in finding the seatbelt); *People v. Bennett* (1991) 54 Cal.3d 1032 (gross negligence may be based upon the overall circumstances of the driver's intoxication, and the level of intoxication is an integral aspect of the driving conduct).
Thanks to Daniel G. DeGriselles.
CCDOI 6.4, 6.6

BIA

RELIEF – LPR CANCELLATION OF REMOVAL – CONTINUOUS PRESENCE – VOLUNTARY RETURN
Matter of Castrejon-Colino, 26 I. & N. Dec. 667 (BIA 2015) (where an alien has the right to a hearing before an Immigration Judge, a voluntary departure or return does not break the alien's continuous physical presence for purposes of cancellation of removal under INA § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (2012), in the absence of evidence that he or she was informed of and waived the right to such a hearing; although the taking of photographs and fingerprints in conjunction with a voluntary return may be part of a 'formal, documented process,' it is insufficient to meet the requirements of Matter of Avilez without any evidence that it was associated with a legally enforced refusal of admission and return); clarifying *Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005).
CD4:24.6;AF:2.6;CMT3:3.6

First Circuit

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO OFFER ACCURATE IMMIGRATION ADVICE -- *PADILLA* – MASSACHUSETTS
Commonwealth v. Lavrinenko, 473 Mass. 4238 N.E.3d 278 (Oct. 5, 2015) (defense counsel must make a "reasonable inquiry" into the defendant's immigration status, even if defendant does not initially raise the issue; prejudice may be established through a "totality of the circumstances" examination of immigration consequences of conviction, especially if defendant is a refugee or asylee).
PCN:6.18

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RELIEF – NON-LPR CANCELLATION OF REMOVAL – BURDEN OF PROOF
Peralta Sauceda v. Lynch, 804 F.3d 101 (1st Cir. Oct. 14, 2015) (noncitizen had burden of proof by a preponderance of the evidence to establish he had not been convicted of a crime of domestic violence, even though Maine courts do not maintain records sufficient to show whether he was convicted under the "bodily injury" prong of the Maine statute, rather than the general assault prong, which does not involve sufficient violence).

NOTE: This case has been reversed on rehearing by *Peralta Sauceda v. Lynch*, __ F.3d __ (1st Cir. Apr. 22, 2016) (whether a noncitizen is barred from relief is due to a conviction under a divisible statute is a question of law, and therefore not subject to a determination of who bears the burden of proof).
CD4:15.26, 24.5;AF:2.5;CMT3:3.5

Second Circuit

DETENTION – MANDATORY DETENTION – "WHEN RELEASED"
*Lora v. Shanahan***,** 804 F.3d 601 (2d Cir. Oct. 28, 2015) (DHS retains its authority and duty to detain noncitizen subject to mandatory detention even if not taken into custody immediately upon the noncitizen's release)
CD4:6.39

Fifth Circuit

IMMIGRATION OFFENSES – ILLEGAL REENTRY – STIPULATED REMOVAL
*United States v. Cordova-Soto***,** 804 F.3d 714 (5th Cir. Oct. 23, 2015) (rejecting claims that Immigration Judge's failure to make express determination of the voluntariness of pro se alien's waiver of rights and stipulation of removability, and ICE agent's failure to explain to her that there was a possibility that she could become eligible for discretionary relief from removal rendered removal proceedings fundamentally unfair).

Note: The case depends heavily on the particular facts underlying this decision. The Fifth Circuit also relied upon *United States v. Lopez–Ortiz*, 313 F.3d 225, 231 (5th Cir.2002) (eligibility for discretionary relief from removal is not a liberty or property interest deserving of due process protection).
CD4:CHAPT13

CONTROLLED SUBSTANCES – DEPORTATION – EXCEPTION FOR FIRST OFFENSE POSSESSION OF SMALL AMOUNT OF MARIJUANA – BIA CANNOT ADD CONDITIONS
Flores v. Lynch, 803 F.3d 699 (5th Cir. 2015) (conviction for possession of marijuana in a school zone meets the "personal use exception" to deportability for a controlled substances offense; BIA erred in adding to the "personal use" exception a requirement that the offense be *no more* than the "least serious offense").

NOTE: This reasoning should also invalidate the possession in jail disqualification from the marijuana exception to the controlled substance ground of deportation. The Court specifically cited, and disagreed with, *Matter of Moncada–Servellon*, 24 I. & N. Dec. 62 (BIA 2007). The Court also found that *Moncada-Servellon* was not due *Chevron* deference, as it was contrary to the INA.
CD4:21.35, 21.31, 24.29;SH:7.144, 7.139;AF:2.45;CMT3:3.44

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Ninth Circuit

POST CON RELIEF – CALIFORNIA – DEFERRED ENTRY OF JUDGMENT – AFFIRMATIVE MISADVICE – PRACTICE ADVISORY
New Practice Advisory, K. Brady & M. Mehr, New California Drug Provision Helps Immigrants: Plea Withdrawal After Deferred Entry of Judgment (DEJ) (Immigrant Legal Resource Center, http://www.ilrc.org/resources/New_California_Drug_Law_1203.43
CCDOI 20.37A

CAL CRIM DEF – CONTROLLED SUBSTANCES – POSSESSION OF PARAPHERNALIA HS 11364
Possession of controlled substances paraphernalia, under California Health & Saf. Code § 11364 is not subject to the “unidentified substance” defense. See *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965). This is because advocates have not identified any extra substances covered under the relevant California drug schedules that are not listed in the federal Controlled Substances Act. Safer dispositions include accessory after the fact, under Penal Code § 32, pre-plea diversion, or other suggestions set forth in the last practice advisory on Withdrawal of Plea after DEJ. As last resort do DEJ and then do new Withdrawal of Plea and ask for 18 month diversion period. See the practice advisory at http://www.ilrc.org/resources/New_California_Drug_Law_1203.43

For a *permanent resident who is not already deportable*, a plea -- whether regular or DEJ -- to 11377 with the record sanitized so that it reflects only "a controlled substance prohibited under Health & Saf. Code § 11377(a)" is a reasonable alternative if a non-drug plea simply is not available, because it will not make the person deportable. *Paulus*, *supra*. In that case, DEJ is better than a 'regular' plea. The fact that there is no controlled substance mentioned in the entire record will prevent the person from being found deportable during the 18-month DEJ period, and then the new DEJ Penal Code § 1203.43 withdrawal of the plea as legally invalid will eliminate the "conviction" completely. *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), vacated on other grounds by *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

This "non-specified controlled substance" defense does not work for *an undocumented person or a permanent resident who already is deportable*. They need to apply for some status or relief to avoid being deportable, and the non-specified substance defense does not work there.

Assume that the non-specified substance defense only works for Health & Saf. Code §§ 11377-11379. Although case law currently holds that it works as well for Health & Saf. Code §§ 11350-52, if the government pushed back, counsel might be unable to find a specific controlled substance on those schedules, but not listed under relevant federal law. Thanks to Michael Mehr and Katherine Brady.

Penal Code § 381b, nitrous oxide, might work. It’s not on the federal schedule, and it’s a drug charge. Under Mellouli, based on language in the case, the thinking seems to be that whatever drugs are on the schedule at the time of the plea controls, not whatever drugs might be added at a later date.
Thanks to Daniel G. DeGriselles.

To plead safely to Health & Saf. Code § 11377, under *Coronado v Holder*, 759 F.3d 977 (9th Cir. July 18, 2014), counsel should add a new count, charging possession under 11377, dismiss all other counts, plead to violating this statute, do not stipulate to the police report as a factual basis, and give the court "a factual basis" based on counsel’s independent

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investigation of the case. See *People v Palmer*, 58 Cal.4th 110 (2013).
Thanks to Francisco Ugarte.
CCDOI8.21

DETENTION – MANDATORY DETENTION – SIX MONTH REVIEW
Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. Oct. 28, 2015) (noncitizens subject to mandatory detention entitled to review after six months; DHS must prove by clear and convincing evidence that noncitizen is a flight risk or danger to community).
CD4:6.42
AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(b)
Dimaya v. Lynch, ___ F.3d ___ (9th Cir. Oct. 15 2015) (California conviction for burglary under Penal Code § 459 is not a categorical "crime of violence" as defined by INA 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), because the language in 18 U.S.C. § 16(b), which is incorporated into § 1101(a)(43)(F)'s definition of a crime of violence, is unconstitutionally vague since the 18 U.S.C. § 16(b) language suffers from the same indeterminacy the Supreme Court found void for vagueness in the Armed Career Criminal Act's "residual clause" definition of a violent felony in *Johnson v. United States*, 135 S. Ct. 2551 (2015)).

The *Dimaya* court stated:

The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Alphonsus*, 705 F.3d at 1042 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation. *Jordan v. De George*, 341 U.S. 223, 231 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation."); *see also A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("The defendant attempts to distinguish [prior vagueness] cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.").

(*Id*. at 1113.)
CD4:19.41;AF:5.23;CMT3:7.51,CCDOI 6.4

RELIEF – NON-LPR CANCELLATION OF REMOVAL– CONTINUOUS PRESENCE – SERVICE OF NTA
Mocoso-Castellanos v. Lynch, 803 F.3d 1079 (9th Cir. Oct. 13, 2015) (respondent did not continue to accrue continuous physical presence, for purposes of non-LPR cancellation of removal, after being served with a notice to appear in removal proceedings that did not contain the date and time of appearance); see *Matter of Camarrillo*, 25 I. & N. Dec. 644 (BIA 2011).
CD4:24.6;AF:2.6;CMT3:3.6

Tenth Circuit

JUDICIAL REVIEW – PETITION FOR REVIEW – DEFERENCE
De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. Oct. 20, 2015) (a ruling from the BIA which interprets an ambiguous statute, and which overrules prior circuit court precedent under *Brand X*, should be presumed to act prospectively only).
CD4:15.37;AF:2.19;CMT3:3.18

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