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Crimes & Immigration
Newsletter

September, 2014

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

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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).

INSIDE

Recent Case Decisions

RECENT DEVELOPMENTS

Articles

CAL CRIM DEF – CONTROLLED SUBSTANCES – SAFE HAVEN – ACCESSORY AFTER THE FACT TO POSSESSION – PRACTICE ADVISORY
CAL CRIM DEF – AGGRAVATED FELONY – DRUG TRAFFICKING – SAFE HAVEN – ACCESSORY AFTER THE FACT TO POSSESSION – PRACTICE ADVISORY

A plea to accessory after the fact, in violation of Penal Code § 32, to the principal's offense of possession of an unidentified controlled substance, in violation of Health & Safety Code § 11377(a) or 11350(a), the plea would not trigger adverse immigration consequences, even if the substance is on the federal controlled substances schedules, so long as there is no sentence imposed of one year or more. If there is, the accessory plea would become an obstruction of justice aggravated felony. Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997), citing 8 U.S.C. § 1101(a)(43)(S).
This conviction does not trigger any other adverse immigration consequences. It is not considered a deportable controlled substance conviction under Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997), because a conviction of accessory after the fact does not take on the nature of the principal's offense. It does not constitute a crime involving moral turpitude, because the principal's offense is not a crime of moral turpitude. Matter of Rivens, 25

Publication Announcement

California Criminal Defense of Immigrants Newsletter
(CEB 2014)

By Norton Tooby

We are happy to announce the new *California Criminal Defense of Immigrants 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 newsletter, California Post-Conviction Relief for Immigrants, effective with this last issue, interested persons may obtain the same content, and more, by subscribing to the new *California Criminal Defense of Immigrants 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 Newsletter*.

I&N Dec. 623 (BIA 2011). The principal's offense, possession of a controlled substance, under Health & Safety Code § 11350(a) or 11377(a), is not a crime of moral turpitude, because the minimum conduct sufficient for conviction of this offense is possession for personal use. Personal use controlled substances offenses are not considered crimes involving moral turpitude. Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968). Therefore, this accessory after the fact conviction is not considered a crime involving moral turpitude. Rivens, supra; see Navarro-Lopez v. Gonzales, 503 F.3d 1063 (9th Cir. 2007) (California conviction of accessory after the fact, in violation of Penal Code § 32, is not a CMT), overruled on other grounds by United States v. Aguila–Montes de Oca, 655 F.3d 915, 916 (9th Cir. 2011) (en banc), which itself was subsequently abrogated by Descamps v. United States, ___ U.S.___, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). This conviction is not a drug trafficking aggravated felony, Matter of Bautista-Hernandez, supra. Therefore, this conviction does not trigger deportation or inadmissibility, so long as a sentence of one year or more is not imposed.

Marijuana offenses are different, since simple possession of marijuana is only an infraction (28.5 grams or less, Health & Safety Code § 11357(b)), or a misdemeanor (over 28.5 grams, Health & Safety Code § 11357(c)). Accessory after the fact to a misdemeanor is not a violation of Penal Code § 32. Conspiracy to commit a misdemeanor or infraction, however, can constitute a felony. Therefore, marijuana cases, it would be necessary to plead to accessory after the fact to the felony of conspiracy to possess marijuana. The immigration consequences of this disposition are the same as for accessory after the fact to possession of narcotics or restricted dangerous drugs as described above. In the alternative, possession of synthetic THC (the active ingredient in marijuana), constitutes a violation of Health & Safety Code § 11350(a). A plea to accessory after the fact to a violation of Health & Safety Code § 11350(a) would be a safe haven in a marijuana case if the prosecution is willing to accept a plea to this offense.

CCDOI 8.27

RELIEF -- CONSULAR PROCESSING – PROVISIONAL WAIVERS – CRIMES OF MORAL TURPITUDE – INADMISSIBILITY

USCIS memo dated Jan. 24, 2013 instructs officers not to find a "reason to believe" that the applicant may be inadmissible under INA § 212(a)(2)(A)(i) if the offense is not a CMT, or qualifies for the petty offense or for the youthful offender exception.

CD4:15.12;AF:3.7;CMT3:2.7

FIREARMS – ANTIQUE FIREARMS – CALIFORNIA – REASONABLE PROBABILITY

The Immigrant Legal Resource Center has a declaration from a California attorney establishing that in San Bernardino County, the prosecutor prosecuted a felon in possession of two antique/replica civil war era guns, under Penal Code § 12021(a). This is the same definition of "firearm" that is used in a number of California firearms statutes. This declaration establishes not only that there is a reasonable probability that the prosecutors in California prosecute antique firearms under the California definition of firearms, but that they have actually done so. Thanks to Daniel G. Degriselles.

CD4:23.14;SH:7.173; CCDOI 11.17

US Supreme Court

CONVICTION – NATURE OF CONVICTION -- CATEGORICAL ANALYSIS – ELEMENTS – TEST FOR ELEMENTS VERSUS MEANS

Schaud v. Arizona. 501 U.S. 624, 632-33 (1991) (plurality opinion) (when a criminal statute provides alternative routes to a conviction, whether jurors must be unanimous with respect to a particular route depends on the answers to two questions: First, did the legislature intend to create different offenses or

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different means for violating a single offense? Second, if the legislature intended to create different means for violating the same offense, is that statutory definition constitutional under the Due Process Clause?).
Note: The Third Circuit elaborated on the Schaud framework in United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996) (en banc). Thanks to Dan Kesselbrenner.
This helpful distinction is made also by the Fourth Circuit in the Royal decision, not an immigration case, but citing Descamps, 133 S. Ct. at 2285 ("Rather than alternative elements, then, 'offensive physical contact' and 'physical harm' are merely alternative means of satisfying a single element of the Maryland offense. Consequently, because '[t]he dispute here does not concern any list of alternative elements,' the modified approach "has no role to play."). This rule should apply in immigration cases as well.
CD4:16.18;AF:4.17;CMT3:7.9; CCDOI 5.15
REMOVAL PROCEEDINGS – EVIDENCE – MOTION TO SUPPRESS – PRACTICE ADVISORY
Under certain limited circumstances, the immigration judge must grant a motion to suppress evidence of the noncitizen's identity in removal proceedings. See Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1015–16 (9th Cir. Aug. 8, 2008) (the exclusionary rule applies in immigration court only to evidence seized in connection with a Fourth Amendment violation that is an "egregious" one in which a government agent deliberately committed the violation or did so by conduct a reasonable officer should have known would violate the Constitution); Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994) (quoting Benitez-Mendez v. INS, 760 F.2d 907, 909 (9th Cir. 1983) (before taking an individual into custody, an immigration officer must be able to "articulate objective facts providing a reasonable suspicion that the subject of the seizure was an alien illegally in this country.") (internal brackets omitted)); see also 8 C.F.R. § 287.8(c)(2)(i) (2013) (requiring immigration officers to have a "reason to believe that the person to be arrested . . . is an alien illegally in the United States.").
CD4:15.26

BIA

CONVICTION – EXISTENCE OF CONVICTION – CONVICTION VOID ON ITS FACE – CONVICTION FOR VIOLATION OF AN UNCONSTITUTIONAL STATUTE
Matter of Rodriguez-Carrillo, 22 I. & N. Dec. 1031, 1034 (BIA 1999) ("[I]t is clear that an Immigration Judge and the Board cannot entertain a collateral attack on a judgment of conviction, unless that judgment is void on its face, and cannot go behind the judicial record to determine the guilt or innocence of an alien. See Matter of Madrigal, Interim Decision 3274 (BIA 1996).") (emphasis added).
Note: A conviction pursuant to an unconstitutional statute is void on its face.
CD4:7.34;SH:4.30;AF:3.37

First Circuit

DETENTION – PROLONGED DETENTION – BRIGHT LINE RULE THAT DETENTION OVER SIX MONTHS IS PRESUMPTIVELY UNREASONABLE REQUIRING A BOND HEARING
Reid v. Donelan, ___ F.Supp.2d ___, 2014 WL 105026 (D.Mass. Jan 9, 2014) (detention under INA § 236(c) is presumptively unreasonable after six months; detainees entitled to bond hearing after six months has passed).
CD4:6.33;AF:2.11;CMT3:3.

Third Circuit

POST CON RELIEF – VEHICLES – DIRECT APPEAL – PENDING DIRECT APPEAL – FINALITY
Orabi v. Attorney General of the U.S., 738 F.3d 535, 540-541 (3d Cir. Jan. 2, 2014) (New York convictions were pending on direct appeal before the Second Circuit, and were therefore

not sufficiently final to form a basis for removal: "We do not agree that the IIRIRA eliminated a direct appeal from the finality rule in its definition of conviction. Hence, we do not agree with those Courts that have adopted this interpretation. See, e.g., id. (collecting cases). By doing so, they have vitiated, without reason, the BIA's rule formulated and established in In re Ozkok, 19 I. & N. Dec. 546, 552 n. 7 (BIA 1988)."); disagreeing with Planes v. Holder, 686 F.3d 1033 (9th Cir. June 5, 2012) (collecting cases).
PCN:5.71
POST CON RELIEF – REMOVAL PROCEEDINGS – RETURN TO THE UNITED STATES
Orabi v. Attorney General of the U.S., 738 F.3d 535, 528 (3d Cir. Jan. 2, 2014) (even after deportation, the Government was prepared to return noncitizen to the United States under certain circumstances pursuant to ICE regulations); see ICE Policy, § 11061.1(2) ("Absent extraordinary circumstances, if an alien who prevails before the U.S. Supreme Court or a U.S. [C]ourt of [A]ppeals was removed while his or her [petition for review] was pending, ICE will facilitate the alien's return to the United States if either the court's decision restores the alien to lawful permanent resident (LPR) status, or the alien's presence is necessary for continued administrative removal proceedings."); see also 8 U.S.C. § 1229a(b)(2)(A) (requiring an immigrant's presence at a removal hearing absent the parties' consent or a telephonic or video conference).
PCN:10.22;AF:6.30;CMT3:10.31;CD4:11.83
Fourth Circuit
AGGRAVATED FELONY – CRIME OF VIOLENCE – RESISTING ARREST
United States v. Aparicio-Soria, 740 F.3d 152 (4th Cir. Jan. 14, 2014) (en banc) (Maryland conviction of resisting arrest, in violation of Md. Code, Crim. Law § 9–408(b)(1) ["[a] person may not intentionally ... resist a lawful arrest."], does not qualify categorically as a "crime of violence" within the meaning of the residual force clause of U.S.S.G. § 2L1.2(b)(1)(A), because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another).
CD4:19.36;AF:5.18, A.14, B.25;SH:7.45, 8.25

Fifth Circuit

CRIMES OF MORAL TURPITUDE – ANALYIS LIMITED TO TRADITIONAL CATEGORICAL ANLYSIS
Silva-Trevino v. Holder, 742 F.3d 197, 200 (5th Cir. Jan. 30, 2014) (immigration judge cannot consider extrinsic evidence to determine whether an alien was convicted of a crime involving moral turpitude: "We have long held that, in making this determination, judges may consider only "the inherent nature of the crime, as defined in the statute," or, in the case of divisible statutes, "the alien's record of conviction." Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir.2006) (internal quotation marks and citations omitted); U.S. ex rel. McKenzie v. Savoretti, 200 F.2d 546, 548 (1952). We do not permit extrinsic inquiry into the "circumstances surrounding the particular transgression." Amouzadeh, 467 F.3d at 455.); reversing Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. Nov. 7, 2008).
Note: The circuits are in conflict on this issue. Five circuits, now including the Fifth Circuit, agree that the immigration court must apply the categorical analysis to the question whether a conviction is a crime of moral turpitude, and may not go outside the record of conviction, except in the case of a divisible statute. Only the Seventh and Eighth Circuits disagree. As the court in Silva-Trevino summarized:
The Third, Fourth, Ninth, and Eleventh Circuits found the language unambiguous and thus withheld deference. See generally Olivas–Motta v. Holder, 716 F.3d 1199 (9th Cir.2013); Prudencio v. Holder, 669 F.3d 472 (4th Cir.2012); Fajardo v. U.S. Attorney General, 659 F.3d 1303 (11th Cir.2011); Jean–Louis v. Attorney General of U.S., 582 F.3d 462 (3d Cir.2009). The Seventh Circuit, however, has

afforded the decision deference under Chevron, 467 U.S. 837, 104 S.Ct. 2778 (1984). See Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir.2008) ("[A]s the board has done this through formal adjudication[,] the agency is entitled to the respect afforded by the Chevron doctrine."). The Eighth Circuit initially rejected the Silva–Trevino approach, but a later panel held that the opinion warrants deference. Compare Guardado–Garcia v. Holder, 615 F.3d 900, 902 (8th Cir.2010) ("We are bound by our circuit's precedent, and to the extent Silva–Trevino is inconsistent, we adhere to circuit law."), with Bobadilla v. Holder, 679 F.3d 1052, 1057 (8th Cir.2012) ("We conclude that the methodology is a reasonable interpretation of the statute and therefore must be given deference by a reviewing court.").
Id. at 200 n.1.
CD4:16.7;CMT3:6.2

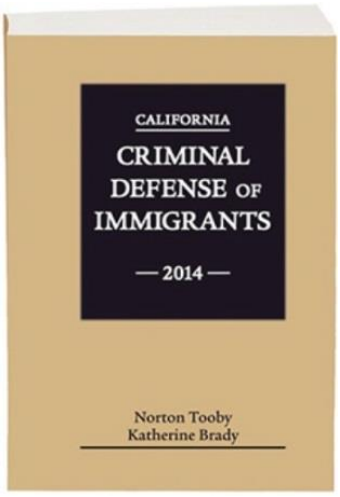
Sixth Circuit

REMOVAL PROCEEDINGS – CONCESSION OF REMOVABILITY – CHALLENGE
Hanna v. Holder, 740 F.3d 379 (6th Cir. Jan. 17, 2014) (noncitizen was qualified to challenge concession of removability by counsel where a change in the law occurred, concerning how that evaluation of deportability is made, that would render removal as charged unjust).
The court explained the conditions under which a noncitizen could challenge counsel's concession of removability as follows:
In a removal proceeding, "petitioners are bound by the concessions of their attorneys to the IJ unless they can show ineffective assistance of counsel or some other egregious circumstances." Gill v. Gonzales, 127 Fed.Appx. 860, 862–63 (6th Cir.2005); see also Magallanes–Damian v. INS, 783 F.2d 931, 934 (9th Cir.1986) ("Petitioners are generally bound by the conduct of their attorneys, including admissions made by them, absent egregious circumstances."); In re Velasquez, 19 I. & N. Dec. 377, 382 (BIA 1986) ("Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission."). This court has yet to clarify those egregious circumstances sufficient to relieve an alien of his counsel's prejudicial admissions. The BIA, however, clarified the meaning of "egregious circumstances" in Velasquez. See 19 I. & N. Dec. at 383. Building on Velasquez, other federal courts of appeals have developed a framework to determine egregious circumstances. See, e.g., Santiago–Rodriguez v. Holder, 657 F.3d 820, 831–36 (9th Cir.2011); Hoodho v. Holder, 558 F.3d 184, 192 (2d Cir.2009).
As a threshold matter, to establish egregious circumstances, an alien must argue "that the factual admissions or concessions of [removability] were untrue or incorrect." Velasquez, 19 I. & N. Dec. at 383; see, e.g., Mai v. Gonzales, 473 F.3d 162, 167 (5th Cir.2006) (reversing BIA's denial of a motion to reopen, where alien's prior attorney had admitted NTA's factual allegations that alien "strongly denied"); cf. Roman v. Mukasey, 553 F.3d 184, 187 (2d Cir.2009) (rejecting that the government must submit evidence of an alien's prior conviction because the alien "does not allege that the admissions were inaccurate"); Torres–Chavez v. Holder, 567 F.3d 1096, 1102 (9th Cir.2009) (refusing to permit alien to withdraw attorney's tactical decision to admit alienage because attorney "simply conceded that [client] was an alien, a fact that [client] has never suggested is untrue"). Further, an alien's argument that his attorney's concessions were incorrect must be supported by record evidence. See, e.g., Hulse v. Holder, 480 Fed.Appx. 23, 26 (2d Cir.2012) (denying petition for review of BIA decision denying withholding of removal because admission of procuring benefit by entering into fraudulent marriage was "not contradicted by the record evidence"); Hoodho, 558 F.3d at 192 (denying petition for review of BIA decision because "[w]here, as here, an IJ accepts a concession of removability from retained counsel and that concession is not

Publication Announcement

California Criminal Defense of Immigrants (CEB 2014)

By Norton Tooby & Katherine Brady



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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.

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contradicted by the record evidence, the circumstances are not ‘egregious' in any respect”).
Where an alien has argued that his or her counsel's admission is incorrect and that argument is supported by the record, two types of egregious circumstances justify relieving the alien of his or her counsel's prejudicial admissions. The first circumstance concerns admissions that “were the result of unreasonable professional judgment.” Velasquez, 19 I. & N. Dec. at 383; see also Santiago–Rodriguez, 657 F.3d at 834–36 (holding that BIA erred in not permitting alien to withdraw attorney's admission where such admission was made without any factual basis and constituted deficient performance); In re Morales–Bribiesca, No. A047 770 293, 2010 WL 4500889, at *2 (BIA Oct. 18, 2010) (“[T]he respondent's prior attorney admitted that she conceded the respondent's removability [for alien smuggling] without first speaking to the respondent or discussing the factual allegations with the respondent ... [and] given the egregiousness of the representation, we do not deem the attorney's admission binding on the respondent.” (citing Velasquez, 19 I. & N. Dec. at 382)); In re Shafiee, No. A24 107 368, 2007 WL 1168488, at *1 (BIA Mar. 2, 2007) (granting motion to reopen and holding that attorney's concession of removability based on alien's “insistence on expediting a case is no excuse for failing to research and advise a client that there is no sound basis for the charges”).
The second circumstance in which an alien should be relieved of an admission of counsel is if binding the alien to that admission would “produce[ ] an unjust result.” Velasquez, I. & N. Dec. at 383. An inadvertent admission would fall into this category. See, e.g., Ali v. Reno, 829 F.Supp. 1415, 1425 (S.D.N.Y.1993) (holding, in habeas corpus proceeding reviewing the rescission of permanent resident status, that alien could not withdraw the prior concessions of counsel because “there has been no showing that counsel's concessions regarding rescission and excludability were inadvertent, unfair or extraordinary”), aff'd, 22 F.3d 442 (2d Cir.1994); cf. Cortez–Pineda v. Holder, 610 F.3d 1118, 1122 n. 2 (9th Cir.2010) (refusing to bind the government to a mistaken factual assertion regarding the alien's entry date). So too would a circumstance “where the propriety of an admission or concession has been undercut by an intervening change in law.” In re Chavez–Mendoza, No. A90 542 948, 2005 WL 649052, at, * 1 n. 3 (BIA Feb. 2, 2005); see, e.g., Santiago–Rodriguez, 657 F.3d at 833 (“Binding [petitioner] to the admission that he smuggled his brother ... even after [an intervening change in the law] would ‘produce[ ] an unjust result,’ if [petitioner] can make a prima facie showing that his actions would not constitute smuggling under the clarified, correct interpretation of the smuggling*389 statute.” (quoting Velasquez, 19 I. & N. Dec. at 383)); Huerta–Guevara v. Ashcroft, 321 F.3d 883, 886 (9th Cir.2003) (permitting alien to challenge removability despite concession because intervening change in law meant alien was not removable).
(Id. at 387-389.)
CD4:15.27

Eighth Circuit

CATEGORICAL ANALYSIS – MODIFIED CATEGORICAL ANALYSIS – DIVISIBLE STATUTE
United States v. Tucker, 740 F.3d 1177 (8th Cir. Jan. 29, 2014) (under the Supreme Court’s decision in Descamps, the court may not apply the modified categorical approach to a statute that is textually indivisible, such as the Missouri statute penalizing a walk-away escape from a half-way house, to hold the offense to be a crime of violence under the residual “otherwise” clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), because there was a guard on duty when the escape occurred); partially overruling United States v. Parks, 620 F.3d 911 (8th Cir. 2010) (holding that a “walk-away” escape from a halfway house was a crime of violence under the Career Offender Guideline,

applying the "modified categorical approach" to determine that Parks's escape offense posed a substantial risk of physical injury to another, because there was a guard on duty at the entrance of the halfway house when Parks walked away, even though the Missouri statute did not make this an element of the offense).
CD4:16.14;AF:4.13;CMT3:7.6

Ninth Circuit

DETENTION – MANDATORY DETENTION – DETENTION CAN BE NO LONGER THAN SIX MONTHS WITHOUT HEARING
Rodriguez v. Robbins, 715 F.3d 1127, 1133 (9th Cir. 2013) (mandatory immigration detention pursuant to INA § 236(c) detention is limited to six months; anything longer without an individualized hearing is presumptively unreasonable); Diop v. ICE/Homeland Security, 656 F.3d 221, 234 (3d Cir. 2011) (individualized hearing required to determine what is reasonable in a given case); Ly v. Hansen, 351 F.3d 263, 272 (6th Cir. 2003); Bourguignon v. MacDonald, 667 F. Supp. 2d 175 (D. Mass. 2009). See also Geoffrey Heeren, Pulling Teeth: The State of Mandatory Immigration Detention, 45 Harvard Civil Rights-Civil Liberties Law Review 601, 603 (2010).
CD4:6.37;AF:2.11;CMT3:3.11

AGGRAVATED FELONY – CRIME OF VIOLENCE – LEWD CONDUCT
United States v. Caceres-Olla, 738 F.3d 1051 (9th Cir. Dec. 23, 2013) (Florida conviction for "lewd and lascivious battery," in violation of Florida Statutes § 800.04(4)(a), ["[e]ngag[ing] in sexual activity with a person 12 years of age or older but less than 16 years of age."], did not categorically constitute a forcible sex offense, and thus cannot be a "crime of violence" as defined under the federal sentencing guidelines).
CD4:19.91;AF:5.74, A.14, B.73; CCDOI 12.7

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