§ N. 3 How to Use the Categorical Approach Now[1]

December 2019

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With a few exceptions, immigration authorities must use the "categorical approach" to determine whether a criminal conviction triggers a ground of removal. The general rule is that the categorical approach is required where the INA uses the statutory term "conviction." (Some state courts also have adopted the categorical approach. See, e.g., *People v Gallardo* (2017) 4 Cal 5th 120.)

Competent use of the categorical approach may be the single most important defense strategy available to immigrants convicted of crimes. This is especially true now that the Supreme Court has clarified how the categorical analysis functions, in three recent decisions: *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013), and *Moncrieffe v. Holder,* 569 U.S. 184 (2013). Following *Mathis*, the BIA expressly acknowledged that it is bound by these Supreme Court precedents on how the categorical approach applies in immigration cases. See *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016) ("*Chairez III*"[3]).

Mathis, Descamps and *Moncrieffe* overrule a lot of past precedent on immigration consequences of convictions, much to the benefit of immigrants. In fact, if you represent an immigrant convicted of a crime and do *not* understand how to use the categorical approach in light of these decisions, you may be doing your client a terrible disservice. Relying on older precedent, you may incorrectly believe that the conviction has adverse immigration consequences, when in fact it should have no consequences or at least less serious ones.

This article provides a current step-by-step guide on how to use the categorical approach. Part I outlines the three steps in the analysis. This five-page section can stand alone as a summary of the approach. Part II addresses frequently asked questions about the steps. Part III provides some examples of offenses previously found to be removable that now should be held immigration-neutral under the Supreme Court's precedents. Part IV discusses in what contexts the categorical approach does not apply.

This article is more of a how-to guide than an analysis of the reasoning and full implications of the key cases. For an in-depth discussion of *Moncrieffe, Descamps*, and *Mathis*, as well as related opinions such as *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), see Practice Advisories on these opinions that are available online.[4]

As always, how one uses new arguments depends on where one is in proceedings. Advocates representing people in removal proceedings can advance any good argument. Advocates considering whether to file an affirmative application that would expose a potentially removable person to authorities must be somewhat more conservative, and should consider the chances that the argument might be rejected and the person placed in removal proceedings. Criminal defenders always try to act conservatively by pleading specifically to one of the "good" immigration offenses within a criminal statute, even if this ought not to be necessary under the categorical approach.

PART I. CATEGORICAL APPROACH IN THREE STEPS

Overview

Let's say that a client comes in who has an Iowa conviction for burglary for which she was sentenced to 16 months. You know that a burglary conviction with a sentence of a year or more is an aggravated felony for immigration purposes. How do you know whether *her* conviction is an aggravated felony? Is every offense that a state labels "burglary" an aggravated felony if a year or more is imposed?

No, it isn't, and this is the core of the categorical approach. The title of the offense – burglary, theft, assault – does not control. Instead, we undertake a detailed legal analysis, based on the elements of the offense the client was convicted of and the minimum conduct necessary to commit it, and the definition used in the removal ground. This approach can take up to three steps.

In Step 1 of the categorical approach, we compare the "generic" definition of the removal ground with the elements of the criminal statute. Every criminal law term that appears in removal grounds[5] (e.g., burglary, crime involving moral turpitude) has a technical, federal definition, referred to as the "generic" definition or the "generically defined offense." Federal courts or the Board of Immigration Appeals (BIA) may publish precedent that sets out the generic definition of the term in the removal ground, or the removal ground might define it by reference to a federal statute. We will compare this generic definition to the elements of the state (or federal or other) statute our client was convicted of. Here we do not look at what the client actually did, or even what they pled guilty to doing. Instead, we identify the minimum possible conduct that *ever* has a realistic probability of being prosecuted under the criminal statute, and compare *that* conduct to the generic definition. For example, in this case we would compare the federal, generic definition of "burglary" as used in the removal ground, with the minimum conduct required to commit burglary under the Iowa statute.

If this definition of the state offense is narrower than the definition of the removal ground – so that there is no way to commit the offense that does not also trigger the removal ground – then there is a "categorical match." In that case, every noncitizen who is convicted of that offense will come within the removal ground. But if the state offense covers a broader range of conduct than the generic definition, so that one could commit the state offense in a way that does not trigger the removal ground, then the offense is "overbroad" compared to that removal ground. There is no categorical match.

If there is a categorical match, the client loses and the inquiry ends.

If there is no categorical match, we breathe a sigh of relief. We will move to Step 2 to determine whether the statute is "divisible" because it sets out multiple discrete offenses, as opposed to just one offense. If a statute is overbroad and indivisible (not divisible), the immigrant wins.

Regarding Step 2, in *Descamps* and *Mathis* the Supreme Court affirmed that a statute must meet a strict standard to be "truly" divisible. In prior decisions, federal courts and the Board of Immigration Appeals used an incorrect standard and in many cases they wrongly held that a statute was divisible, when it was not. Therefore, ***a lot of published precedent on specific offenses must be considered overruled by the Supreme Court, in favor of the immigrant.*** This is one reason that it is important to have a basic understanding of the categorical approach: we can't rely on (bad) past precedent.

If the statute is overbroad (not a categorical match per Step One) and indivisible (not a divisible statute per Step 2) the client wins big. No conviction under the statute ever triggers the removal ground, for any purpose: deportability, inadmissibility, or eligibility for relief. It does not matter to what facts the person pled guilty, because the adjudicator is not permitted to rely on individual facts of the case if the statute is not divisible. Instead, *no one* convicted under the statute, under any circumstances, comes within the particular removal ground.

If instead the statute is divisible into different offenses, we go on to Step 3, the "modified" categorical approach. Here an immigration judge or officer may rely on facts from a limited set of documents from the client's criminal case, called the reviewable "record of conviction" or the *Shepard*[6] documents, to see if this conclusively shows of which offense the person was convicted.

Now that we've described the whole process once, we will go over it again in a more formal manner discussing the three questions: First, is there a categorical match between the generic definition and the criminal statute? Second, if not, is the statute divisible between different offenses? Third, if the statute is divisible, does the record of conviction identify which offense the person was convicted of?

Step 1: Is there a categorical match?

Here we ask: (a) What are the elements of the conviction-based removal ground at issue (the "generic" definition); (b) What are the elements of the client's offense/statute of conviction (the minimum conduct required to violate that statute); and (c) Do the elements of the statute of conviction fall entirely within the generic definition, or do they reach a broader swath of conduct than the generic definition? As the Supreme Court summarized in *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

> To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic

burglary, while ignoring the particular facts of the case.

a. Identify the "generic" definition of the removal ground.

The grounds of inadmissibility and deportability (which include the definition of an aggravated felony) contain dozens of terms describing crimes, e.g., "crime involving moral turpitude," "crime of child abuse," "law…relating to a controlled substance," "crime of violence," "burglary," etc. Each of these terms must have a technical, federal definition, referred to as the "generic" definition. Our first research task is to identify the generic definition of the term that appears in the removal ground with which we are concerned.

> **Example:** The definition of aggravated felony includes conviction of "burglary" if a sentence of a year or more is imposed. INA § 101(a)(43)(G). What is generically-defined "burglary?"
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> The Supreme Court reviewed possible sources for definitions, including the Model Penal Code, common law, and the law of several states, and finally decided that generic burglary contains these elements: "an unlawful or unprivileged entry into, or remaining in, a ***building or other structure,*** with intent to commit a crime." The Court found that the term "building or other structure" does not include a vehicle. *Taylor v. United States*, 495 U.S. 575, 598 (1990) (emphasis added).

b. Identify the minimum conduct prosecuted that violates the statute of conviction.

Next, using the text of the statute of conviction, state case law, or other materials, we identify the *minimum conduct* required to violate the statute of which our client was convicted. Federal court decisions governing the categorical approach refer to this as the "minimum conduct" or "least acts criminalized." Remember that we are focusing solely on the minimum conduct that can be or has been prosecuted under the statute, and "ignoring the particular facts of the case." *Mathis, supra.*

The Supreme Court has cautioned that an immigrant may not simply imagine some theoretical, possible minimum conduct for an offense, but must demonstrate a "realistic probability" that this minimum conduct actually would be prosecuted under the statute.[7] A common way of proving this is to produce cases where someone was found guilty under the statute for committing the particular minimum conduct. Immigrants can cite to published or unpublished decisions that show prosecution for such conduct; to their own case where that conduct actually was prosecuted, or to other materials such as documents from criminal prosecutions or press releases or newspaper articles documenting prosecutions for non-generic conduct. For further discussion of the realistic probability of prosecution, see Part II, below, and see online practice advisories.[8]

One excellent source of information about a state statute's minimum conduct is the relevant state jury instruction for the offense. Do an internet search, or work with a criminal defense attorney, to find the instructions.

In addition, many Circuits, including the Ninth Circuit, have held that an immigrant can demonstrate that a statute is overbroad if the *express language* of the statute includes conduct that

is outside of the generic federal definition. In Circuits that have adopted this rule, sometimes referred to as the "express language rule," no further realistic probability inquiry is necessary.

> **Example:** Iowa Code § 702.12 prohibits in part a burglary of "building and structures, [or] land, water, or air ***vehicle***…." (emphasis added). The language of the statute as well as Iowa cases demonstrate that the statute is used to prosecute burglary of vehicles, not just burglary of buildings. Thus, the minimum prosecuted conduct includes burglary of a vehicle.

The BIA and some other circuit courts of appeals have declined to adopt the express language rule. See Part II, below. In those jurisdictions, even if the statute describes a specific minimum conduct, the immigrant may need to provide a further showing of realistic probability of prosecution.

c. Are the elements of the crime of conviction (the minimum conduct required for guilt) broader or narrower than the elements of the generic definition?[9]

Here is where we compare the elements of the generic definition with the elements of the client's conviction. If the generic definition contains all of the elements of the criminal statute, there is a categorical match. Another way to state the test is to say that if there is some way to violate the statute that would *not* also come within the generic definition, then there is *no* categorical match.

> **Example:** A person can be convicted of Iowa burglary for illegally entering a vehicle with intent to commit a crime. Could that person also be convicted of generic burglary?
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> No, they could not. Generic burglary includes entry into a building or structure, but it excludes entry into a vehicle. Because of this discrepancy, there is no categorical match.

If there is a categorical match, the removal ground will apply to every conviction under the statute. The client loses and our analysis is over.

If there is no categorical match, then the statute as whole is **overbroad,** meaning it reaches conduct not reached by the generic definition. In that case the immigrant will win everything, *unless* the statute is divisible. We go to Step 2 to determine divisibility.

Step 2: Is the criminal statute divisible?[10]

This step may appear complex, but stay with it until the example. In *Mathis v. United States*, the Supreme Court affirmed a strict test for when a criminal statute is divisible. The statute must meet all of these criteria:

1. The statutory language must set out multiple discrete statutory phrases in the alternative (i.e., the statute must use the word "or"). But contrary to some prior precedent, now overruled, a statute phrased in the alternative is *not always* a divisible statute.

2. At least one, but not all, of the statutory alternatives must describe conduct that is a categorical match to (comes within) the generic definition.

3. Significantly, these statutory phrases must set out different "elements" of different offenses, not just different means of committing one offense. The test is: if in every case, a jury would have to agree unanimously between these statutory alternatives in order to find the defendant guilty, these are alternative "elements" and the statute is divisible. But if a jury could disagree between the statutory alternatives and still convict the defendant, the statutory alternatives are "means" and the statute is not divisible.

If any of these criteria are not met, the statutory alternatives are means, not elements, and the statute does not set out different offenses. The statute is indivisible (not divisible).

Example: Let's use these three criteria to determine whether the Iowa burglary statute, Iowa Code § 702.12, is divisible between burglary of a building and burglary of a vehicle. Section 702.12 prohibits burglary of "building and structures, [or] land, water, or air vehicle…."

1. Does § 702.12 set out multiple statutory alternatives?

   Yes. It prohibits burglary of a building "or" a vehicle.

2. Is at least one but not all of these alternatives a categorical match to the generic definition?

   Yes. Burglary of a building (assuming that this Iowa definition of building matches the generic definition) does meet the definition of generic burglary, but burglary of a vehicle does not.

3. Must a jury decide unanimously between "building" and "vehicle" in order to convict the defendant? In other words, do these statutory alternatives set out different offenses, with different elements?

   No. In Mathis, supra, the Supreme Court considered whether the Iowa burglary statute met this requirement. It found that under Iowa law a jury could convict the defendant even if it split, with some jurors finding that a building was burgled and others finding a vehicle was. Therefore "building" and "vehicle" are not alternative ***elements****, creating multiple offenses, but are mere alternative* ***means*** *(or different ways) of committing the single offense of burglary. Because it does not list elements in the alternative, the Iowa burglary statute is* ***indivisible*** *between a building or vehicle.*

The jury unanimity requirement is a new concept to many immigration advocates, and state law is not always clear as to whether statutory alternatives are means (no juror unanimity requirement) or elements (juror unanimity requirement). In *Mathis* the Supreme Court provided instructions on how to determine whether these statutory phrases are elements or means. The Court identified the following sources (*see Mathis*, 136 S. Ct. at 2256-2257).

State case law. As was the case in *Mathis*, sometimes there are state cases that rule on whether statutory alternatives have a juror unanimity requirement. You can find these cases through ordinary state law research tools. State model criminal jury instructions, often available on state court system websites, may provide case citations that speak to the juror unanimity question, and

thus can be a good place to start research. However, in many instances, state case law does *not* definitively answer the juror unanimity question, which requires you to continue researching other sources of law.

Statutory language. Sometimes "a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Mathis*, 136 S. Ct. at 2256. Sometimes the statute contains a list of "illustrative examples" preceded by phrases like "including ...." or "such as ...." This language implies that these alternative ways of violating the statute are means, not elements, and that the statute is not divisible.

Sentencing exposure. "If statutory alternatives carry different punishments, then… they must be elements." *Mathis*, 136 S. Ct. at 2256. Therefore the statute is divisible. For example, California first degree burglary, Pen C §§ 459/460(a), has an exposure of up to six years, while second degree burglary, §§ 459/460(b), has an exposure of up to three years. Section 460 is a divisible offense.

Indications from the record of conviction. The Court stated in *Mathis* that if the above sources of law are inconclusive on the juror unanimity question, a "peek" at the noncitizen's "record of conviction" may indicate whether the statutory alternatives are means or elements. For example, if a noncitizen's indictment or charging document simply lists the statutory alternatives (e.g., "did burglarize a building, structure, or vehicle"), then that "is as clear an indication as any" that the alternatives are means rather than elements, and the statute is indivisible. The Court carefully distinguished between this "peek" at the record of conviction at Step 2 (which is for "the sole and limited purpose of determining" *whether* the statute is divisible) and the different review of the record of conviction at Step 3 (which is to determine of which offense under a divisible statute the person was convicted). *Mathis*, 136 S.Ct. at 2256-57; *see also* discussion below.

If the statute is indivisible, the immigrant wins. We do not proceed to Step 3, the modified categorical approach. The regular categorical approach at Step 1 governs, and we already found that the statute is overbroad under that test. When a criminal statute is both overbroad and indivisible, no one who is convicted under it comes within the removal ground. This is true for purposes of deportability, admissibility, and eligibility for relief, and regardless of facts in the record.

> **Example:** In *Mathis* the Supreme Court found that the Iowa burglary statute was indivisible (not divisible) between burglary of a building and a vehicle. Since it was indivisible, the Step 1 categorical approach controlled. The court already had found that the minimum conduct to commit the offense (burglary of a vehicle) was not a categorical match with the generic definition, and that the statute therefore was overbroad. Because the statute was both overbroad and indivisible, the Court found that no conviction under it *ever* amounts to generic burglary.
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> Note that this is true even if a defendant specifically pled guilty to burglary of a building. If the statute is indivisible, the adjudicator cannot rely on facts from the person's record or conviction; the adjudicator is restricted to the categorical approach, which compares the minimum conduct prosecuted under the statute with the generic definition. In immigration proceedings, the conviction does not trigger the removal ground, regardless of whether the issue is deportability, inadmissibility, or eligibility for relief. See, e.g., the Supreme Court's

holding in *Moncrieffe, supra,* which is that because the minimum conduct to commit the offense is not an aggravated felony, and the statute is not divisible, Mr. Moncrieffe automatically is eligible to apply for LPR cancellation.

If the statute is divisible, we go on to Step 3. For example, if Iowa did have a rule that jurors must agree unanimously between burglary of a building and a vehicle in order to convict, the statute would be divisible and we would go to Step 3.

Step 3: The modified categorical approach: In a conviction under a divisible statute, do documents in the record of conviction establish of which crime the defendant was convicted?[11]

If and only if a statute is divisible according to the criteria in Step 2, the modified categorical approach applies. Here the immigration judge or officer may review certain documents from the client's record, referred to as the reviewable "record of conviction," for the sole purpose of identifying *which* offense (which of the elements set out in the alternative in the statute) the person was convicted of. For example, if the Iowa burglary statute were properly held to be divisible, a court would be permitted to review Mr. Mathis' record of conviction to see whether it established that he was convicted for burglarizing a building, versus a vehicle.

The Supreme Court held that the reviewable record of a conviction by plea consists of "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States,* 544 U.S. 13, 16 (2005). These also may be referred to as the *Shepard* documents. Courts have agreed that that pre-sentence reports, preliminary hearing transcripts, and police reports are not part of the reviewable record -- unless the defense explicitly stipulated that they contain the factual basis for the plea. The reviewable record of a conviction by jury includes documents such as the charging document and jury instructions.[12] Counsel should research BIA and Circuit-specific decisions, as there is a lot of litigation regarding which documents, and which content from the documents, are included in the reviewable record of conviction.

If the record conclusively identifies of which offense the person was convicted, then the adjudicator will apply the categorical analysis to that offense.

If the record is inconclusive, the case outcome might depend upon whether the question is deportability versus eligibility for relief.

- DHS always must prove that a conviction causes deportability. If the record of conviction under a divisible statute is inconclusive, then the person is not deportable, because DHS cannot meet their burden.
- The BIA and some federal courts hold that an inconclusive record of conviction does not meet an immigrant's burden of proving eligibility for relief. Other federal courts have held that it does. The Supreme Court will decide this issue at least by June 2020, in *Pereida v. Barr*, No. 19-438 (2019). See discussion in Part II.

PART II. FURTHER DISCUSSION AND FREQUENTLY ASKED QUESTIONS

Step One: Is There a Categorical Match?

A. "Generic" Definition of the Criminal Law Term in the Removal Ground

> "Under [the categorical approach] we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony. By 'generic,' we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citations omitted).

1. What is the defense goal? The generic definition is the standard to which the criminal statute is compared. We want the generic definition to be narrow and specific so that some conduct prohibited by criminal statute will fall outside of it, because in that case the immigrant will win.

2. What is a generic definition? The Immigration and Nationality Act (INA) is full of criminal law terms. Removal grounds include terms such as "crime of domestic violence," "firearms," "controlled substance," "crime involving moral turpitude," etc.[13] Conviction of an aggravated felony is a deportation ground as well as a bar to many forms of relief, and the statutory definition of aggravated felony includes dozens of criminal law terms such as "burglary," "theft," "fraud," "crime of violence," "sexual abuse of a minor," etc.[14]

Each of these criminal law terms must have a federal, "generic" definition that applies in immigration proceedings. Sometimes the INA provides the definition by reference to a federal criminal statute. For example, the firearms deportation ground provides that "firearm" is defined at 18 USC § 921(a). A deportable crime of domestic violence requires a "crime of violence" as defined at 18 USC § 16. See INA § 237(a)(2)(C), (E)(i). Here, to find the generic definition we examine the federal statute, as well as federal cases that interpret it.

In other cases a removal ground will set out a word or phrase, for example, "theft" or a "crime of child abuse." Here federal courts and/or the Board of Immigration Appeals (BIA) will consider several factors to decide on the most appropriate definition of the term. (For an example of this process, see how the Supreme Court arrived at the definition of generic burglary in *Taylor v. United States*, 495 U.S. at 592-560.) Some of these generic definitions, like generic burglary, are both specific and universally accepted. In other cases federal courts, or a federal court and the BIA, may create different, competing definitions, or vague definitions. It is imperative to check the law of your circuit as well as the BIA to ensure that you are aware of the applicable definition, potential conflicts, and recent developments. If a definition is unsettled, advocates can propose a definition (again, see discussion in *Taylor* and other cited cases that describe this process) and can litigate the issue.

3. How do I locate the generic definition? Look at the applicable removal ground and check for references to federal statutes or specific information. If it contains general law terms, starting with secondary sources can save time. Norton Tooby's books such as *Aggravated Felonies, Crimes*

Involving Moral Turpitude, and *Safe Havens* summarize all decisions on these topics nationally. See www.nortontooby.com. See also national books such as *Immigration Law and Crimes* at www.thomsonreuters.com. Circuit-wide books, such as *Defending Immigrants in the Ninth Circuit* (www.ilrc.org), go into great detail, and some Circuit Courts of Appeals publish outlines on the topic on their websites; see especially the Ninth Circuit's outline. Some states have state-specific books,[15] online charts,[16] and articles. But secondary sources are the starting, not ending point. Do further research to see if there are new developments.

4. Must federal courts defer to the BIA on the definition? Federal courts and the BIA both create generic definitions. If these definitions conflict, federal courts have gone both ways as to if or when they must give *Chevron*[17] deference to the BIA's generic definition. In particular, because federal criminal courts (as a sentence enhancement) and the BIA (as a removal ground) both apply the definition of aggravated felony, INA § 101(a)(43), arguably federal courts should not need to defer. Federal courts never defer to the BIA's interpretation if the generic definition is a federal statute, such as the definition of a crime of violence at 18 USC § 16(a).

B. Minimum Conduct with a Realistic Probability of Prosecution

> "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense. But this rule is not without qualification…. [O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013), citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

1. What is the defense goal? The person's conviction is evaluated not by what they did, but by the most minimal, least egregious conduct that has a realistic probability of being prosecuted under the criminal statute. This is a great advantage. The defense goal is (a) to identify some conduct that violates the criminal statute but falls outside the generic definition, and (b) to show that there is a "realistic probability" that this conduct actually is prosecuted under the criminal statute.

2. What is the "minimum conduct" required to violate the statute? For a criminal conviction to occur, the prosecutor must prove, or the defendant must admit, all of the "elements" of the offense. An element is a fact that a jury must unanimously agree upon for a finding of guilt.[18] Depending on the offense, the required elements might be that the defendant engaged in certain conduct (e.g., sold), caused certain results (e.g., injury), had a certain mental state or intent (e.g. malice), or other factors. The least egregious conduct that fulfills all the elements is the minimum conduct required to violate the statute.

3. What is a "realistic probability of prosecution" and how can one prove it? The person must show that the proposed minimum conduct has a "realistic probability" of actually being prosecuted under the criminal statute. This can be shown by the following:

- Evidence that the person's own conviction was for this conduct.[19]

- Published or unpublished decisions (in the Ninth Circuit, a single unpublished decision) describing a conviction under the statute based on this conduct.[20]

- At least in some circuits: Language in the criminal statute expressly sets out the minimum conduct. See further discussion below.

- If other evidence is not available, affidavits from criminal defense counsel or prosecutors stating that they have seen this conduct prosecuted under the statute might suffice.

Regarding statutory language, multiple Circuit Courts, including the First, Second, Third, Ninth, Tenth, and Eleventh Circuits (although the BIA held that the Eleventh Circuit rule has changed) have held that if the criminal statute's text expressly includes minimum conduct that is outside of the generic definition, no further case evidence is needed to meet the realistic probability test.[21]

> **Example: Statutory Language for Burglary.** Under this rule, if a statute prohibits burglary of a "boat, vehicle, or aircraft," that alone establishes a realistic probability that burglary of a "boat" is prosecuted under the statute, even without case examples, because the statute specifically states "boat."[22]

The BIA held that case evidence is required to show a realistic probability of prosecution, *even if* the statute specifically sets out the minimum conduct at issue. *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). In *Ferreira*, a state drug schedule listed a particular controlled substance that did not appear on federal drug schedules, and so did not meet the definition of "controlled substance" for immigration purposes. The BIA said that the statutory language was not sufficient to show a realistic probability of prosecution; the immigrant needed to show evidence of actual prosecutions involving that substance. In 2015, in a nearly identical case, the Supreme Court did not require case evidence. In *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015), the Court simply stated, "At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists." *Ibid.* But the Court did not discuss the realistic probability of prosecution question.

In 2019 the BIA reaffirmed its rule, while acknowledging that several circuit courts of appeals disagree. In a case arising within the Eleventh Circuit, the BIA held that the fact that a Florida statute specifically names parts of the marijuana plant that are outside the generic definition is not sufficient to prove a realistic probability of prosecution of conduct involving those parts of the plant. The Board acknowledged that in *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066 (11th Cir. 2013), the Eleventh Circuit had adopted the rule that express statutory language is sufficient to prove a realistic probability or prosecution, but the Board found that the Eleventh Circuit had abandoned *Ramos* in subsequent cases. See *Matter of Guadarrama*, 27 I&N Dec. 560, 562-566 (BIA 2019).

In sum, in areas where a federal court has not ruled on the issue, advocates should assert that *Mellouli* overruled *Ferrerira*, but also should try hard to obtain case evidence. Within the First, Second, Third, Ninth, Tenth, and arguably Eleventh Circuits, advocates should cite the controlling federal decisions holding that a specific statutory description is sufficient to prove realistic

probability[23] -- but also should make every effort to supply case examples. For more on this topic, see online practice advisories.[24]

4. How do I identify the minimum prosecuted conduct for a particular crime? State jury instructions are an excellent starting point, if a state publishes them. They may set out the minimum conduct required for guilt under state statutes, and provide supporting case citations that can be used to show a realistic probability of prosecution. Some jury instructions are available online.

> **Example: Jury Instructions.** California Penal Code § 242 defines a "battery" as an unlawful use of "force or violence" against a person. This statutory language might appear to require actual violence, or to indicate a divisible statute. But California jury instructions make clear that "force" and "violence" in § 242 are synonymous, and that they include "the slightest touching" that causes no pain or injury. The instructions cite cases where the statute has been used to prosecute this kind of conduct. See CALCRIM 841. The cases establish that the minimum prosecuted conduct to violate the statute is a mere offensive touching. (This same analysis applies to simple battery statutes in several states.)

Some aspects of jury instructions can be hard for immigration attorneys to understand. In case of doubt, consult with criminal defense counsel. Also, do additional research in case subsequent published decisions affect the minimum conduct but have not yet been incorporated into the jury instructions.

If your state does not publish jury instructions, you must research criminal cases. This is an opportunity for immigration advocates to ask for help from the criminal defense attorneys. Note that defense attorneys might use other terms for minimum conduct, such as "least criminalized act" or "least adjudicated elements."

5. Who must prove realistic probability of prosecution? This is a question of law, and courts have an obligation to get it right. But, in fact, the immigrant is the party who needs to show that a particular minimum conduct has a realistic probability of prosecution, and generally the immigrant will bring the arguments and evidence.

6. Must federal courts defer to the BIA? Federal courts do not owe *Chevron* deference to the BIA on questions of state law, such as the minimum conduct required to commit a state offense,[25] or on how the categorical approach is employed, including what constitutes a realistic probability of prosecution.

C. Categorical Match: Comparing the Minimum Conduct and Generic Definition

> "Under this approach we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony. … Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense ''necessarily' involved . . . facts equating to [the] generic [federal offense].' Whether the

noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citations omitted).

1. What is the defense goal? We want to show that the minimum prosecuted conduct to commit the offense does not necessarily come within the generic definition. If that is true, there is no categorical match and the statute is "overbroad." (The next step will be to examine the statute to see if it is divisible; see Step 2.)

If instead there is a categorical match, then the person loses the issue and the analysis ends.

2. How do we compare the generic definition and minimum conduct? Look at the elements of the generic definition. If there is any minimum prosecuted conduct that does not meet all of the elements of the generic definition, then no conviction under the statute is a categorical match. Another way of putting this is, could a person be convicted under the criminal statute but not under the generic definition?

> **Example: California Burglary as the Aggravated Felony "Burglary."** The generic definition of the aggravated felony "burglary" requires an "unlawful or unprivileged entry" with intent to commit a crime. California burglary, Penal Code § 459, just requires an "entry" with intent to commit a crime. Cases show that persons have been convicted of § 459 based on both lawful and unlawful entries.
>
> The minimum conduct to commit § 459 is a lawful entry with intent to commit a crime. This lacks the element in the generic definition of an unlawful or unprivileged entry. Put another way, persons who committed a burglary involving a lawful entry have been convicted of § 459, but could not be convicted of generic burglary. No conviction of § 459 is a categorical match with "burglary." The statute is overbroad. See *Descamps v. United States*, *supra.*
>
> **Example: Georgia Distribution of Marijuana as an Aggravated Felony.** The generic definition of a drug trafficking aggravated felony includes giving away a controlled substance, with one exception: it excludes the offense of giving away a small amount of marijuana.[26] Georgia Code Ann. § 16-13-30(j)(1) prohibits several offenses, including possession with intent to distribute marijuana. The statute has been used to prosecute conduct ranging from giving away a small amount of marijuana, to selling large amounts of it.
>
> The Georgia statute is not a categorical match, because the minimum prosecuted conduct to violate the statute falls outside the generic definition. In other words, people who gave away a small amount of marijuana have been convicted under the Georgia statute, but they could not be convicted of the generic offense. No conviction of § 16-13-30(j)(1) is categorically a drug trafficking aggravated felony – even for persons who sold marijuana. The statute is overbroad. See *Moncrieffe v. Holder, supra*.

It may help to create a chart to compare the elements. Here is a chart comparing generic burglary to the California burglary statute described above, which was at issue in *Descamps*. Because conduct that violates the California definition would not violate the generic, there is no match.

Generically Defined Burglary	**Minimum Prosecuted Conduct to Commit Burglary under Calif. Penal Code § 459**
Unlawful or unprivileged entry into, or remaining in … • ***Requires unlawful entry; excludes lawful entry***	Entry into …. • ***Includes lawful entry – no match***
a building or other structure … • ***Requires building, structure; excludes vehicle***	a building, vehicle, railroad car, etc. • ***Includes vehicle – no match***
with intent to commit a crime • ***Requires intent to commit a crime***	With intent to commit larceny or any felony • ***Larceny and felony are crimes - match***

3. Who has the burden of proof? Whether the minimum conduct matches the generic definition is a pure question of law. The same legal analysis applies to deportability and eligibility for relief. There is no switching of the burden of proof, and the immigrant does not need to produce the record of conviction to prove eligibility for relief (for one thing, the record of conviction is completely irrelevant to this inquiry; it only comes into play in Step 3, *after* the statute is proved to be divisible). See, e.g., *Moncrieffe v. Holder*, supra, where the Supreme Court held that because the minimum conduct to commit GCA § 16-13-30(j)(1) is not categorically an aggravated felony (and the statute was not divisible), Mr. Moncrieffe can apply for cancellation of removal.

4. Can the same offense come within two removal grounds, or within one but not the other. Yes! Each criminal law term in a removal ground will have its own generic definition. One must compare the elements of the offense of conviction to each generic definition: the elements may meet some generic definitions, but not others.

For example, the generic definition of a crime involving moral turpitude (CIMT) includes a theft with intent to take permanently or substantially, but not temporarily; it also includes fraud. In contrast, the generic definition of "theft" as an aggravated felony (if a year or more is imposed) is a wrongful taking of *property* by theft, but *not by fraud*, and *regardless of intent to deprive temporarily versus permanently*. Thus California theft as defined by Pen C § 484 (and see § 487) is a CIMT: it includes fraud, but that's all right; and it does not include an intent to deprive temporarily. But it is not "theft" as an aggravated felony, because it is not limited to theft of property, and it includes fraud.

5. Must federal courts defer? Federal courts do not need to give *Chevron* deference to the BIA's finding, since this involves comparing a state criminal offense to a federal generic definition[27] and is not restricted to interpreting the Immigration and Nationality Act.

Step Two. Is the Criminal Statute Divisible?

> "To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. Distinguishing between elements and facts is therefore central to [the federal statute's] operation. 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant… Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. A single statute may list elements in the alternative, and thereby define multiple crimes…." *Mathis v. United States*, 136 S.Ct. at 2248-2249 (2016) (citations omitted).

1. What is the defense goal? An "indivisible" statute is any statute that is not divisible. We want to establish that the criminal statute is indivisible. If a statute is both overbroad (Step 1 conclusion) and indivisible (Step 2 conclusion), the analysis stops and the immigrant wins completely. No conviction under the statute will trigger the removal ground, for purposes of deportability, inadmissibility, or eligibility for relief. This is true even if the person pled guilty to facts that do happen to match the removal ground; if the statute is indivisible, the individual's guilty plea and other information from the record of conviction may not be considered.

In contrast, if the statute is "divisible," the analysis goes on to Step 3. There the adjudicator will be able to consider facts from the individual's record of conviction.

2. What are the requirements for a divisible statute? A criminal statute is divisible only if it meets all three of these criteria. These are discussed in more detail below. The criteria are:

a. The statutory language must set out multiple discrete statutory phrases in the alternative (i.e., the statute must use the word "or"). But contrary to some prior precedent, now overruled, a statute phrased in the alternative is *not always* a divisible statute.

b. At least one, but not all, of the statutory alternatives must describe conduct that is a categorical match to (comes within) the generic definition.

c. Significantly, these statutory phrases must set out different "elements" of different offenses, not just different means of committing one offense. The test is: if in every case, a jury would have to agree unanimously between these statutory alternatives in order to find the defendant guilty, these are alternative "elements" and the statute is divisible. But if a jury could not agree between the statutory alternatives and still convict the defendant, the alternatives are mere "means" and the statute is not divisible.

If any of these criteria are not met, the statutory alternatives are not elements and do not create different offenses. The statute is indivisible (not divisible).

3. What do multiple discreet statutory alternatives look like? Statutory alternatives can be set out in different ways. Different conduct listed within a statutory phrase or subsection, such as "firearm *or* knife" or "structure *or* vehicle" can be the alternatives. Or, formal subsections such as Utah Code §§ 76-10-508.1(1)(a), (b), and (c) can be the alternatives.

A single term or phrase such as "entry" or "structure" is not phrased in the alternative. It is not divisible *unless* it is defined somewhere else in the code, in text that does set out alternative elements. For example, Iowa Code § 713.1, the burglary statute addressed in *Mathis*, prohibits entry into an "inhabited structure." That is a single term. But the term "inhabited structure" is defined in another section, Iowa Code § 702.12, to include a structure "or" a vehicle. Because the § 702.12 definition is phrased in the alternative, § 713.1 meets the first requirement for a divisible statute. (As we saw, however, ultimately it was found not to be divisible because the phrases were means, not elements.)

But see *Franco-Casasola v. Holder*, 773 F.3d 33 (5th Cir. 2014), which applied convoluted logic to find that "firearm" is an element of the phrase "contrary to any law or regulation of the United States," and thus held that a conviction for 18 USC § 554(a) is divisible as the aggravated felony firearms trafficking, under INA 101(a)(43)(C). See also the dissent by Judge Graves.

4. Can a statute be divisible for purposes of one removal ground but not for another? To be divisible, a statute must include at least one distinct offense that does, and one that does not, meet the generic definition in the removal ground at issue. Because different removal grounds list different crimes, which have may have different generic definitions, the same statute might be divisible for one removal ground but not another. The criminal statute must be separately analyzed under each potential ground.

> **Example: Divisible for Firearms but not for Moral Turpitude.** Say that a state statute prohibits possessing "a firearm or a switchblade" in the passenger section of a car. The state definition of "firearm" meets the generic, federal definition. Assume that the statute actually is divisible between firearm and knife (meaning, a jury can convict the defendant only if all jurors agree as to whether it was a firearm versus a knife).
>
> This statute is divisible for purposes of the firearms ground of deportation, because a conviction involving a firearm triggers the firearms ground, but a conviction involving a knife does not. But the statute is not divisible for purposes of the moral turpitude ground, because neither offense meets the generic definition of moral turpitude. (Simply possessing, as opposed to using, a weapon has been held not to be a crime involving moral turpitude.)

5. What is the juror unanimity requirement? In *Mathis* the Supreme Court affirmed that to be divisible, a statute must set out *elements* in the alternative. Elements are defined as facts upon which a jury must unanimously agree in order to find guilt. The Court explained the requirement:

> To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. Because that kind of list merely

> specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." And similarly, to bring the discussion back to burglary, a statute might—indeed, as soon discussed, Iowa's burglary law does—itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score….
>
> The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.
>
> *Mathis v. United States*, 136 S. Ct. at 2249, 2256 (citation omitted).

Before *Mathis*, federal courts of appeals were split on this issue. Some courts held that the Supreme Court's 2013 decision in *Descamps, supra*, meant that any statute phrased in the alternative is divisible, regardless of juror unanimity requirements. Other courts held that *Descamps* required a juror unanimity rule. *Mathis* confirmed that *Descamps*, and other Supreme Court precedent stretching back to the 1990 decision in *Taylor, supra*, holds that the categorical approach is determined by the elements of the offense, and that requires juror unanimity.

6. How do we determine whether juror unanimity is required for a particular criminal statute? State law and statutory indications.

In *Mathis* the Supreme Court discussed factors to consider in determining whether a particular statute that is phrased in the alternative has a jury unanimity rule (and thus sets out elements) or does not have such a rule (and thus sets out means). See also discussion in Part I, Step 2, above.

First, the adjudicator must consider whether a state court decision (which might be reflected and cited in state jury instructions) has decided the issue. In many instances, it has not.

Next the adjudicator may look to the wording of the state statute. If the statute lists "illustrative examples," it is likely not divisible. If it provides different sentencing exposure for the different statutory alternatives, it is.

> When a [state court ruling on whether a statute requires jury unanimity] exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. And a statute may itself identify which things

> must be charged (and so are elements) and which need not be (and so are means). See, *e.g., Cal. Penal Code Ann. § 952 (West 2008).* Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.
>
> *Mathis v. United States*, 136 S.Ct. at 2256 (citations omitted)

7. How do we determine whether juror unanimity is required for a particular criminal statute? "Peek" at the record.

If the above inquiry into state law and the phrasing of the statute does not resolve whether there is a jury unanimity rule, *Mathis* suggests looking ("peeking") at certain documents from the individual's record of conviction to see if they shed light on whether the statute is divisible.

A note on this advice, which can seem confusing. Under the "modified categorical approach," an adjudicator may look at the person's record of conviction only *after* a statute has been found divisible, at what we call Step Three. So why does the Court now advise adjudicators to look at the person's record of conviction in order to determine *whether* the statute is divisible, at what we call Step Two? The explanation is that the two reviews of the record have different purposes, and to some extent look at different information. The purpose of the "peek" at certain documents in the record of conviction, discussed here, is to see whether, e.g., the charging document alleges all of the statutory alternatives, which indicates that those alternatives are means rather than elements, and that the statute therefore is not divisible. In contrast, in the modified categorical approach, where we already have determined that the statute is divisible, the adjudicator will look at the record of conviction to see if it establishes of *which* elements the person was convicted. The Court explains:

> And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a "peek at the [record] documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Rendon v. Holder*, 782 F.3d 466, 473-474 (CA9 2015) (opinion dissenting from denial of reh'g en banc). (Only if the answer is yes can the court make further use of the materials, as previously described, see *supra,* at 12-13.) *Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.* So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps, 570 U. S., at ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438, 458-459*.
>
> *Mathis v. United States*, 136 S.Ct. at 2256-57 (emphasis supplied)

The Court states that if the charging document lists all the alternatives, e.g., "entered a building, structure, or vehicle," or a single umbrella term such as "premises," then that "is as clear an indication as any that each alternative is only a possible means of commission, not an element."

Many charging documents simply track the language of the statute, and will set out all the statutory alternatives. Advocates can assert that this is a clear indication that the statute is indivisible.

> **Example:** In *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016) the BIA considered a Utah statute[28] that prohibited in part discharging a firearm in a way that could cause harm with "intent, knowledge, or recklessness." Under current Tenth Circuit law, intentional conduct under the statute is a crime of violence, but reckless conduct is not. Is the statute divisible between the different mental states?
>
> Applying *Mathis*, the Board found that the statute is not divisible unless a jury is required to decide unanimously between intentional, knowing, and reckless conduct. The Board noted that while there was no case law regarding this offense, a Utah court had considered the same mental state requirement in the context of second degree murder, and found that jury unanimity was not required there. This supported a "reasonable inference" that there was no jury unanimity requirement for this offense, either. *Chairez, supra* at 824. The Board also "peeked" at the record and saw that the charging document did not allege a specific mental state. Therefore the "reasonable inference was not refuted by any other source of authoritative state law or by the respondent's record of conviction…" *Ibid.* Because the statute is not divisible, the minimum conduct test applies. Under that test, the Board held that for purposes of deportability, as well as eligibility to apply for cancellation of removal, the offense is not an aggravated felony as a crime of violence. *Id.* at 824-25.

But what if the respondent's charging document alleges just one of the statutory alternatives, e.g., "entered a building"?

> Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. *Shepard*, 544 U. S., at 21, 125 S. Ct. 1254, 161 L. Ed. 2d 205. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.
>
> *Mathis v. United State*s, 136 S.Ct. at 2257.

With good reason, *Mathis* states that a specifically phrased charging document in the individual's case might or might not show with sufficient certainty that the alternatives are elements. One factor that makes this uncertain is that here, the court is discussing the respondent's records. The jury unanimity rule is a question of law that applies to the statute in every case; the same statute cannot have a jury unanimity rule for one defendant, but not for another. The fact that a charging document in the client's case alleged one alternative is not necessarily proof of the requirement. Advocates should seek out other charging documents that track the whole statute, jury instructions, or other evidence to show that there is no such rule. Creating doubt may be sufficient. If the evidence on jury unanimity is not clear enough to meet "Taylor's demand for certainty," assert that the statute

must be deemed indivisible. *Ibid.*

Advocates also can look to a wealth of decisions and basic criminal law precepts cited in *Mathis* and *Descamps*, to support an assertion that many statutes list mere means.[29] In addition, some states have adopted the so-called *Sullivan*[30] rule, which sets out a kind of presumption that unanimity is not required. The Ninth Circuit noted that because California has adopted the *Sullivan* rule, "we must take great care when considering California state violations as a prior offense because a disjunctively worded California statute may simply be listing alternative means rather than alternative elements." *Rendon v. Holder*, 764 F.3d 1077, at n. 15 (9th Cir. 2014).

8. Who has the burden of proving whether a criminal statute has a jury unanimity rule? In *Matter of Chairez*, the Board of Immigration Appeals indicated that the government has the burden of proving that a statute is divisible for purposes of deportability, and it extended the same result to eligibility for relief.

> Under the circumstances, we conclude that the respondent's removability under section 237(a)(2)(A)(iii) of the Act has not been proven by clear and convincing evidence.
>
> In conclusion, although the respondent is removable by virtue of his conviction for a firearms offense, the evidence does not establish his removability as an alien convicted of an aggravated felony. For purposes of cancellation of removal, the respondent has carried his burden of proving the absence of any disqualifying aggravated felony conviction because section 76-10-508.1(1) of the Utah Code is overbroad and indivisible relative to the definition of an aggravated felony crime of violence under section 101(a)(43)(F) of the Act.
>
> *Matter of Chairez,* 26 I&N Dec. 819, 825 (BIA 2016) *("Chairez III").*

9. Must the BIA defer to federal courts on divisibility determinations? Yes. The BIA stated that "the understanding of statutory 'divisibility' embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings. Furthermore, we reiterate that Immigration Judges and the Board must follow applicable circuit law to the fullest extent possible when seeking to determine what *Descamps* and *Mathis* require." *Matter of Chairez*, *supra* at 819-820.

10. How can we identify which past precedent might be overturned by Mathis, Descamps, and Matter of Chairez?

The analysis differs slightly depending on whether or not the criminal statute is phrased in the alternative, using "or".

A. If the Statute Is Not Phrased in the Alternative, It is Not Divisible

The Supreme Court states that in order to be divisible, a statute must set out distinct offenses in the alternative. If the section of the statute you are considering is not phrased in the alternative, that almost surely means that it is indivisible. Any case holding that it is divisible should be held

overturned by the Supreme Court. The correct analysis should be that no conviction of the statute triggers the removal ground, for any purpose, and regardless of information in the record. This is because the opinion already held that the statute is "overbroad" and not a categorical match, under the minimum conduct test. If a statute is not divisible, the result under the minimum conduct test controls.

> **Example: Entry.** California burglary statute prohibits "entry" with an intent to commit certain crimes, and reaches both permissive and unpermitted entries. The Ninth Circuit had held that the term "entry" was "divisible" between the types of entries, despite the fact that it was a single phrase. The Supreme Court reversed and held that as a single term, "entry" is indivisible. As an overbroad and indivisible term, it must be judged by the minimum prosecuted conduct. Thus every entry under the statute will be considered a permitted, lawful entry. *Descamps v. United States*, 570 U.S. 254 (2013).
>
> **Example: Spousal Battery, Resisting Arrest.** The generic definition of a misdemeanor "crime of violence" generally does not include an offensive "touching."[31] In many states, resisting arrest, or a simple assault or battery including spousal battery, can be committed by an offensive touching. In the past the BIA held that these statutes were divisible, so that an immigration judge may look to the record to see if the touching in the case actually involved violence. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). These decisions should be overturned, so that no conviction of the simple battery is a crime of violence or a deportable crime of domestic violence.
>
> See, e.g., the discussion in *U.S. v. Flores-Cordero*, 723 F.3d 1085, 1088-1089 (9th Cir. 2013) (court must change its pre-*Descamps* analysis and find that Arizona resisting arrest, ARS § 13-2508(A)(1), is not divisible and no conviction of the offense is a crime of violence).
>
> However, see *Stokeling v. United States*, 139 S.Ct. 544 (2019), which held that use of de minimus force *to overcome the will of the victim* (an element in, e.g., some robbery offenses) is a crime of violence.

Warning: Look for hidden statutory definitions of a single term. Sometimes a single term or phrase is defined in the alternative, elsewhere in the criminal statute. This may not be immediately obvious, so research or consulting with an expert criminal attorney is required. See, e.g., Iowa Code § 713.1 prohibiting burglary of an "occupied structure," and Iowa Code § 701.12 further defining occupied structure as a "building, structure … or vehicle." Treat this as a statute that is phrased in the alternative, and determine whether the phrases are means or elements.

B. A Statute That is Phrased in the Alternative Still May Not Be Divisible

Many, if not most, statutes that are phrased in the alternative also are not divisible, because there is no rule providing that a jury would have to decide unanimously between the phrases in order to convict the defendant. Prior precedent that holds that a statute is divisible without addressing this requirement is binding. The parties will have to investigate the juror unanimity rule issue.

This prior precedent is extremely useful, however, because it establishes that the statute is overbroad. (That is why the court even went to the Step 2, divisibility inquiry.) If you determine that the statute is indivisible, then we have an overbroad and indivisible statute and the immigrant wins.

Some immigration judges or officers may balk at ignoring precedent based on this counter-intuitive standard. Remind authorities that not only the Supreme Court in *Mathis, supra*, but the Board of Immigration Appeals in *Matter of Chairez,* upheld this rule.

Step 3. If the Statute is Divisible, Apply the Modified Categorical Approach

If and only if the statute is divisible under the above standard, we proceed to the modified categorical approach. This is the only step in the categorical approach where the adjudicator is permitted to rely upon information found in the record of conviction, and where the immigrant might be required to produce his or her record.

> "[A divisible statute] sets out one or more elements of the offense in the alternative.... [T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime...
>
> "[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." Nijhawan, 557 U.S. at 41, 129 S.Ct. 2294, 174 L.Ed. 2d 22. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."
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> *Descamps v. United States*, 570 U.S. 254, 263-264 (2013).

1. What are the defense goals in using the modified categorical approach?

If a statute is divisible, the adjudicator (immigration judge or officer) may review strictly limited documents (known as the "record of conviction") from the individual's underlying conviction, for the sole purpose of identifying *which* of the statutory elements the person was convicted of. The advocate wants to ensure that the adjudicator:

- Consults the record of conviction only if there is legal authority showing that the statute is truly divisible[32] (see Step 2);

- Consults only the permitted documents from the record (see below);
- Uses information from the record only to identify the statutory elements that make up the offense of conviction (see quotation from *Descamps,* above); and
- Applies the minimum prosecuted conduct test to those elements (same).

Depending on the context, the advocate also may want to litigate whether or not the information in the record *conclusively* identifies the offense of conviction. See Burden of Proof, below.

2. ***Which documents from the record may the adjudicator review?***

Although the specifics vary across circuits, the law is clear that the record of conviction is limited to documents that reliably show what facts were necessarily adopted by the defendant upon entering a plea or necessarily found at trial. Generally, the Supreme Court has held that the reviewable record of conviction by plea consists of "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[33] Courts have agreed that that pre-sentence reports, preliminary hearing transcripts, and police reports are not part of the reviewable record -- unless the defense explicitly stipulated that they contain the factual basis for the plea. The reviewable record of a conviction by jury includes documents such as the charging document and jury instructions.[34] Counsel should research BIA and Circuit-specific decisions, as there is a lot of litigation regarding which documents, and which content from the documents, are included in the reviewable record of conviction.

3. ***Can the adjudicator use information from these documents for any purpose*?**

The judge may use facts from the record only to identify the elements of the offense of conviction, i.e. to identify of which statutory alternative the person was convicted. "The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction…" *Descamps v. United States*, 570 U.S. at 278.

4. ***What if the statute lists offenses in the disjunctive, using "or," but the charging document lists them in the conjunctive, using "and"?***

Sometimes a charging document will take offenses that are listed in the statute in the disjunctive ("or") and phrase them in the conjunctive ("and"). For example, California Health & Safety Code § 11379 punishes one who "transports, imports into this state, sells, furnishes, administers, *or* gives away, *or* offers to transport, import into this state …" a controlled substance. But a charging document may allege that the defendant "transported, imported, sold, furnished, administered, *and* gave away, *and* offered to transport, import into this state …" etc. (above emphases supplied).

In this case, a plea to a charge phrased in the conjunctive should *not* be held a plea to all listed offenses. The best view is that the plea is inconclusive. See, e.g., *Young v. Holder*, 697 F.3d 976, 988 (9th Cir. 2012) (en banc) ("In sum**,** when either "A" or "B" could support a conviction, a defendant who pleads guilty to a charging document alleging "A and B" admits only "A" or "B." Thus,

when the record of conviction consists only of a charging document that includes several theories of the crime, at least one of which would *not* qualify as a predicate conviction, then the record is inconclusive under the modified categorical approach.") When making this argument before a circuit court of appeals that has not resolved this issue, cite on-point law from the convicting jurisdiction (the state, or for federal criminal cases, the circuit). See *ibid.* For example, the Fifth Circuit relied on California law to interpret a California indictment phrased in the conjunctive, in *United States v. Moreno-Florean*, 542 F.3d 445, 451-52 (5th Cir. 2008). The court cited *In re Bushman,* 1 Cal. 3d 767, 775 (Cal. 1970) ("Merely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts."), as well as *People v. Turner,* 185 Cal. App. 2d 513 (Cal. Ct. App. 1960)).

Note that criminal defense counsel *always* should try to plead to a *specific*, immigration-neutral offense under a divisible statute where that is possible, because the law is unsettled, and the immigrant may appear unrepresented before an immigration adjudicator who is not familiar with the correct rules.

5. What if the record of conviction under a divisible statute is inconclusive?

Burden of Proof: Deportability: Because ICE must prove deportability, ICE always has the burden of producing a reviewable record that shows that a conviction under a divisible statute was for a deportable offense. If the record is inconclusive as to which offense in a divisible statute was the subject of the conviction, ICE cannot meet its burden and the immigrant is not deportable. An inconclusive record might be, for example, evidence of a plea of guilty to a charge of committing "x *or* y," or no record from the proceeding at all other than proof of a conviction.

Burden of Proof: Eligibility for Relief. What happens if an immigrant who must apply for relief was convicted under a divisible statute, and the record is not conclusive as to whether the offense of conviction is a bar to relief? Federal courts are split on this question, and the Supreme Court will address the issue by the end of June 2020, in *Pereida v. Barr*, No. 19-438 (2019).

An example of the better view in the split is *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc). There the court held, "Under *Moncrieffe*, ambiguity in the record as to a petitioner's offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief." *Marinelarena* at 1047 (emphasis in original). It overruled its prior precedent in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), finding it "incompatible with the Supreme Court's subsequent decision in *Moncrieffe*." *Id.*

An example of the worse view is *Pereida v. Barr*, 916 F.3d 1128 (8th Cir. 2019), the opinion taken up by the Supreme Court. The Eighth Circuit held that the applicant for relief must prove that a conviction under a divisible statute was for an offense that does not destroy relief; therefore an inconclusive record means that the immigrant cannot meet their burden.

> Example 1: LPR Ernesto is deportable, and furthermore he was convicted under a divisible statute where one of the crimes listed in the statute is an aggravated felony. He needs to apply for cancellation of removal for permanent residents, and conviction of an aggravated felony is a bar to this relief. INA § 240A(a)(1). Ernesto's record of conviction is inconclusive

as to the offense of conviction: none of the reviewable documents (the charge pled to, plea colloquy transcript, written plea agreement, factual basis for the plea stipulated to by the defendant, or judgment) identifies which crime he pled to.

As of December 2019, if his case arises within the Ninth Circuit Ernesto will be eligible for relief, but if it arises within the Eighth Circuit he will not. See below for discussion of other circuits. However, by no later than June 2020, the Supreme Court will rule on this issue.

Note that even where an inconclusive record does not create a *conviction* that bars relief, if the issue is inadmissibility, the client might face another challenge. Formally admitting to having committed an inadmissible controlled substance offense or crime involving moral turpitude is itself a ground of inadmissibility, even without a conviction. Such an admission could be a bar to, e.g., family immigration, or could prevent the good moral character required for cancellation of removal for non-permanent residents, INA § 240A(b)(1). If the applicant is protected by an inconclusive record of conviction, DHS may try another strategy: to get them to make an admission about the same incident.

Example: Claire is applying for adjustment of status (affirmatively or as a defense to removal) in a circuit where the rule is that an inconclusive record is enough to prevent a conviction from being a bar to relief. She was convicted of possessing a controlled substance, under a divisible statute that includes possession of some substances that do, and others that do not, meet the federal definition of a controlled substance. She has an inconclusive record of conviction: while she was originally charged with possessing ecstasy (which is a federally-defined substance), her entire reviewable record of conviction was sanitized to refer only to "a controlled substance."

Say that the USCIS officer or ICE attorney tries to get her to formally admit that she possessed ecstasy, with the goal of charging her with being inadmissible. In response, the advocate can direct Claire not to answer that particular question, while also providing the decision-maker with other information about the offense. The advocate can argue that Claire's refusal to answer this question should not result in a denial of relief, because the decision-maker still has sufficient information to make a discretionary ruling.[35] (Or if the question is posed casually and Claire does answer it, the advocate later can argue that this exchange did not meet the requirements for an admission that causes inadmissibility.[36]) The advocate also can argue that the question is improper: because Claire's case was heard in criminal court, the court record and categorical approach must control, and she cannot be found inadmissible or barred from relief for admitting to the very same conduct[37] . However, there does not appear to be an established rule on this issue, and these questions are a risk. In the alternative, Claire can try to have her conviction vacated, which should prevent any admission of the same from being used.[38]

Pending a Supreme Court ruling in *Pereida*, there is a split among federal courts as to whether an inconclusive record prevents a conviction under a divisible statute from being a bar to relief. The Ninth Circuit discussed the split in *Marinelarena*, 930 F.3d at 1047 n.6. The First and Second Circuit Courts of Appeals, like the Ninth in *Marinelarena*, have held that a noncitizen *is* eligible for

relief on an inconclusive record under a divisible statute.[39] The Third Circuit, in cases predating *Moncrieffe*, has also found noncitizens eligible for relief on an inconclusive record. *See, e.g.*, *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010). The government sometimes invokes the Third Circuit's decision in *Syblis v. Att'y Gen.*, 763 F.3d 348 (3d Cir. 2014), as adopting a rule where noncitizens are *ineligible* for relief in these circumstances, but this argument is incorrect, as the *Syblis* case involved application of a version of the categorical approach that the Supreme Court subsequently rejected in *Mellouli*. Moreover, in a recent unpublished opinion, a panel of the Third Circuit rejected the government's argument and adopted the Ninth Circuit's reasoning from *Marinelarena*. *See Harve v. Att'y Gen.*, No. 18-2935, __ F. App'x __, 2019WL5260723 at *2 & n.3 (3d Cir. 2019) (unpublished). The Seventh Circuit found noncitizens ineligible for relief in these circumstances, but in a case that did not involve the categorical approach.[40] The Fourth, Sixth, Eighth, and Tenth Circuits, as well as the BIA, find noncitizens ineligible for relief on an inconclusive record of conviction, though the Fourth Circuit has not decided the issue in a published decision in light of *Moncrieffe*.[41] If you are litigating this issue before the BIA or Circuit Courts, please contact the Immigrant Defense Project at www.immigrantdefense.org.

PART III: Additional Case Examples, California Law

A. California Burglary Never is "Attempted Theft"

A conviction for attempted theft is an aggravated felony if a sentence of a year or more is imposed. INA § 101(a)(43)(G), (U).

1. ***What is the generic definition?*** The generic definition of "attempted theft" requires intent to commit "theft" plus taking a substantial step toward committing the theft.[42]

2. ***What is the minimum conduct with a realistic probability of prosecution?*** California burglary, Pen C § 459, prohibits entry into a building, vehicle, etc. with intent to commit "grand or petit larceny or any felony." Cases show that that § 459 has been used to prosecute burglaries with intent to commit "any felony" where the felony did not involve theft.

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. It can be committed with intent to commit an offense other than theft. The statute is overbroad with relation to the removal ground.

4. ***Is the statute divisible?*** No. The Ninth Circuit found that under California law a jury can find a defendant guilty without having to decide unanimously (a) whether the intended offense was larceny versus "any felony," or (b) in the case of "any felony," the specific felony that was intended. Therefore, the statute is not divisible under *Descamps*.

   Because it is indivisible, the minimum prosecuted conduct standard applies and no conviction of Pen C § 459 ever is attempted theft, for any purpose including deportability, inadmissibility, or eligibility for relief. This is true even if in a particular case the defendant pled guilty to entry with intent to commit theft, because the record of conviction is irrelevant and may not be consulted.

This was the holding in *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014). *Rendon* should partially overturn cases such as *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011), *Ngaeth v. Mukasey*, 545 F.3d 796 (9th Cir. 2008), which held that Pen C § 459 is divisible as attempted theft.

B. Argument: California Burglary Never is a Crime Involving Moral Turpitude

A burglary offense can qualify as a crime involving moral turpitude ("CIMT") under either of two standards. This section argues that California burglary should not meet either definition.

The first definition requires entry with intent to commit a CIMT.

1. ***What is the generic definition?*** A burglary offense involves moral turpitude if it is entry with intent to commit a CIMT. *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

2. ***What is the minimum conduct with a realistic probability of prosecution?*** California burglary, Pen C § 459, prohibits entry with intent to commit "grand or petit larceny or any felony." While larceny may be a CIMT, California cases show that that § 459 has been used to prosecute burglaries with intent to commit "any felony" where the felony is not a CIMT.[43]

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. It can be committed with intent to commit a non-CIMT. The statute is overbroad in relation to the removal ground.

4. ***Is the statute divisible?*** No. As discussed in the example above, in *Rendon* the Ninth Circuit found that under California law a jury can find a defendant guilty without having to decide unanimously (a) whether the intended offense was larceny versus "any felony," or (b) in the case of "any felony," the specific felony that was intended. Therefore, the statute is indivisible as to the intended offense. Because the statute is overbroad (Step 1) and indivisible (Step 2), no conviction of Pen C § 459 ever is attempted theft, for any purpose.

The second definition requires an unlawful entry into a dwelling with intent to commit a crime.

1. ***What is the generic definition?*** A burglary consisting of an *unlawful* entry into a dwelling with intent to commit a crime is a CIMT, regardless of whether the intended crime is not a CIMT. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009).

2. ***What is the minimum conduct with a realistic probability of prosecution?*** California cases show that the residential burglary statute, Pen C §§ 459, 460(a) has been used to prosecute both lawful and unlawful entries. See *Descamps v. United States,* 570 U.S. at 259.

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. The generic definition requires an unlawful entry, while the California statute includes a lawful entry. The statute is overbroad in relation to the removal ground.

4. ***Is the statute divisible?*** No. "Entry" is a single, indivisible term. Because the statute is not phrased in the alternative, it is indivisible between lawful and unlawful entry. *Descamps,*

supra. Because the statute is overbroad (Step One) and indivisible (Step Two), no conviction of Pen C § 459 ever should be held a CIMT under this definition, for any purpose.

C. Held: California Vehicle Taking, Veh. C. § 10851, Never is a Crime Involving Moral Turpitude

1. ***What is the generic definition?*** Theft is a CIMT if it has intent to deprive permanently or substantially, but not temporarily, as an element. *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016).

2. ***What is the minimum conduct with a realistic probability of prosecution?*** The statute prohibits taking with intent to "permanently or temporarily" deprive the owner. It has been used to prosecute "joyriding," where the intent was to use the car for a short time. See *Castillo-Cruz v. Holder,* 581 F.3d 1154, 1160-61 (9th Cir. 2009)*, Matter of Jurado-Delgado,* 24 I&N Dec. 29, 33 (BIA 2006).

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. See cases above.

4. ***Is the statute divisible?*** No, because it does not require juror unanimity. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 481-82 (9th Cir. 2016) (en banc).

D. Argument: California Receipt of Stolen Property, Pen C § 496, Never is a Crime Involving Moral Turpitude

1. ***What is the generic definition?*** A theft offense is a crime involving moral turpitude if it requires an intent to deprive the owner of the property permanently or substantially, but not if it requires intent to deprive temporarily.[44]

2. ***What is the minimum conduct with a realistic probability of prosecution?*** The Ninth Circuit found that the minimum conduct with a realistic probability of being prosecuted under Penal Code § 496 involves intent to deprive temporarily. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009).

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. A person who receives property with intent to deny the owner temporarily can be convicted a § 496, but not of the generic definition. The statute is overbroad.

4. ***Is the statute divisible?*** No, because it is not phrased in the alternative (it does not say "temporarily or permanently") and thus does not meet the first requirement for divisibility. Because it is overbroad and indivisible, no conviction should be held to involve moral turpitude.

E. Held: California Theft, Pen C § 484/487, Is Not a Theft Aggravated Felony Even if a Sentence of Over a Year Was Imposed (or a Fraud Aggravated Felony Even if the Loss Exceeded $10,000)

Note: This offense still is likely a crime involving moral turpitude. Whether theft is a CIMT is governed by a different generic definition (which is that a CIMT requires fraud, or theft with intent to take permanently or substantially, but not temporarily) than the definition at issue here, for generic "theft" as an aggravated felony (which is that "theft" is a wrongful taking of property by theft, but not by fraud, and regardless of intent to deprive temporarily versus permanently).

A conviction for generic theft is an aggravated felony only if a sentence of a year or more is imposed. INA § 101(a)(43)(G). A conviction for a crime of generic fraud or deceit is an aggravated felony only if the loss to the victim/s exceeds $10,000. INA § 101(a)(43)(M). The categorical approach applies to determining whether an offense constitutes generic theft, fraud, or deceit (although it does not apply to determining a loss exceeding $10,000).[45]

1. ***Generic definition: Theft and fraud.*** Theft and fraud have separate and generally mutually exclusive definitions, for aggravated felony purposes. As the Fourth Circuit stated, "The key and controlling distinction between these two crimes is therefore the "consent" element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained." *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005). The BIA substantially[46] adopted this analysis in *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008). It held that "the offenses described in sections 101(a)(43)(G) and (M)(i) of the Act ordinarily involve distinct crimes. Whereas the taking of property without consent is required for a section 101(a)(43)(G) "theft offense," a section 101(a)(43)(M)(i) "offense that involves fraud or deceit" ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained." The Ninth Circuit adopted this as well, when it held that one offense may be fraud but not theft (*Carrillo-Jaime v. Holder*, 572 F.3d 747, 752 (9th Cir. 2009)), while another may be theft but not fraud (*Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010)).

2. ***Minimum conduct:*** California Pen C § 484/487 defines "theft" to include several discrete offenses listed in the alternative, including both theft (taking of property without consent, by stealth), and fraud (taking of property with consent, by deceit) offenses.[47] Case law shows the statute has been used to prosecute both theft and fraud offenses. Thus, the minimum conduct involves fraud.

3. ***Does the minimum prosecuted conduct necessarily come within the generic definition?*** No. A person who commits fraud can be guilty of Pen C § 484/487 but not be guilty of generic theft, because fraud involves taking property with consent, by deceit.

4. ***Is the statute divisible?*** No, because there is no jury unanimity rule. In fact, *Mathis* noted a California statute that specifically provides that a jury need not rule unanimously on the "theory of the theft" for Pen C § 484. See Cal Pen C § 952, cited in *Mathis v. United States*, 136 S.Ct. at 2256.

This is an example of reversed precedent. Previously § 484/487 was considered divisible between its theft and fraud offenses. [48] Now the Ninth Circuit has held that under *Descamps,* § 484 is

overbroad and indivisible, and the adjudicator may not look to the record to see whether fraud or theft was involved. *Lopez-Valencia v. Lynch,* 798 F.3d 863 (9th Cir. 2015).

Under *Lopez-Valencia,* a conviction of § 487 likewise should not be held an aggravated felony as a fraud or deceit offense under INA § 101(a)(43)(M), even where loss to the victim exceeds $10,000, because the statute is not divisible between theft and fraud. But what if a person convicted of § 487 received a sentence of a year *and* was found to have caused a loss to the victim/s exceeding $10,000? See *Nugent v. Ashcroft*, 367 F.3d 162, 174-175 (3d Cir. 2004). The Attorney General is expected to rule on this question; see *Matter of Reyes*, 27 I&N Dec. 708 (AG 2019).

PART IV. When the Categorical Approach Does and Does Not Apply

The categorical approach potentially applies any time the phrase "convicted of" is used in a federal statute. As the Supreme Court's interpretation of the phrase "convicted of," it is the default option for how to characterize the type of offense that was the subject of the conviction.

There are several instances, however, where the categorical approach does not apply either wholly or in part. These include convictions in some contexts, and almost all factual and discretionary inquiries.

A. Removal Grounds Based on a Conviction

The categorical approach generally governs whether a *conviction* of a particular type of offense brings a consequence as a ground of inadmissibility or deportability (including as an aggravated felony). This includes when the removal ground functions as a bar to eligibility for relief, or statutory bar to establishing good moral character under INA § 101(f). For example, the categorical approach applies in determining whether a person is ineligible to apply for non-LPR cancellation, INA § 240A(b)(1) because she was convicted of a deportable offense, or is unable to adjust status based on conviction of an inadmissible offense.

A key exception is the few removal grounds that are subject to the "circumstance specific" test, where one part of the ground is subject to the categorical approach and another part is fact-based.

Note: 18 USC § 16(b) and the "ordinary case" test have been struck down. Another exception to the categorical approach used to exist, in defining a "crime of violence" (COV). A COV is an aggravated felony if a sentence of a year or more is imposed, and is a deportable "crime of domestic violence" regardless of sentence if there is sufficient evidence that the victim and defendant shared a protected domestic relationship.[49] The current definition of a "crime of violence" is found at 18 USC § 16(a). The U.S. Supreme Court struck down a second section, 18 USC § 16(b), as being unconstitutionally void. It provided that a felony conviction is a "crime of violence" if it involves a substantial risk that violence will be used in committing the offense. Some courts held that an offense met this test if that risk would be present in the "ordinary" case. The Supreme Court found that neither the statute nor the "ordinary case test" met the requirements of the categorical approach, and held that it was void for vagueness See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which followed *Johnson v. United States*, 135 S.Ct. 2551 (2015), which overruled *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011). Advocates

should note that precedent decisions that relied upon the 18 USC § 16(b) definition, or the similarly phrased ACCA "residual clause" definition, are overruled. See online practice advisories for more information. [50]

Circumstance-Specific: Fraud or Deceit in which Loss to Victim/s Exceeds $10,000. In *Nijhawan v. Holder*, 557 U.S. 29 (2009) the Supreme Court held that some aggravated felony definitions are made up of two parts: one or more "generic" offenses that are subject to the categorical approach, and one or more "circumstance-specific" factors that are not. *Nijhawan* concerned the aggravated felony of a crime of fraud or deceit in which the loss to the victim/s exceeds $10,000. INA § 101(a)(43)(M). The Court found that the amount of loss is circumstance-specific and need not be proved under the categorical approach, while fraud and deceit are generic offenses that are subject to the categorical approach.[51] For more information on "circumstance specific" inquiries and *Nijhawan*, see Practice Advisories available online.[52]

Circumstance-Specific: 30 Grams or Less of Marijuana. The deportation ground based on conviction of an offense relating to a controlled substance has an exception for "a single offense involving possession for one's own use of thirty grams or less of marijuana." In *Matter of Davey*, 26 I&N 37 (BIA 2012) the BIA held that the exception calls for a circumstance-specific inquiry into the character of the person's unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime. Thus a person convicted of more than one statutory crime may be covered by the exception if all the person's crimes were closely related to or connected with a single incident in which the person possessed 30 grams or less of marijuana for his or her own use, provided that none of those crimes was inherently more serious than simple possession. In *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014) the BIA reaffirmed the rule in *Davey* and found it was not implicitly reversed by the Supreme Court in *Moncrieffe v. Holder, supra*. The BIA rejected the respondent's argument that the minimum prosecuted conduct test must apply, and therefore because a statute prohibiting possession of "more than an ounce" (i.e., more than 28.5 grams) of marijuana, had been used to prosecute less than 30 grams, the conviction was not a deportable controlled substance offense. Instead the BIA reaffirmed that the circumstance-specific test applies to the amount of marijuana. It remanded to the immigration judge so that DHS could "proffer any evidence that is reliable and probative" to prove that the amount was over 30 grams, and the respondent would have a reasonable opportunity to challenge or rebut the evidence. *Dominguez-Rodriguez, supra* at 414. See online Practice Advisory discussing defenses to this rule.[53]

Circumstance-Specific: Family Exception to the Alien Smuggling Aggravated Felony. A conviction under 8 USC § 1324(a)(1)(A) is an alien smuggling aggravated felony "except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)."[54] The Ninth Circuit held that the family exception is a circumstance specific factor. *United States v. Guzman-Mata*, 579 F.3d 1065, 1070 (9th Cir. Ariz. 2009).

Circumstance-Specific: Transportation for Prostitution If Committed for Commercial Gain. In *Nijhawan, supra*, the Supreme Court stated in dicta that "commercial gain" in the aggravated felony defined at INA § 101(a)(K)(ii) is a circumstance-specific factor. See also *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007).

Circumstance-Specific: Crime of Domestic Violence. A deportable "crime of domestic violence" is a crime of violence as defined in 18 USC § 16 committed against a victim with whom the defendant shares or shared a qualifying domestic relationship. INA § 237(a)(2)(E)(i). It is settled that the categorical approach is used to determine whether the conviction is of a crime of violence. The issue is what standard governs proof of the required domestic relationship.

The BIA held that the domestic relationship is a "circumstance specific" factor that can be proved using any reliable evidence, including evidence from outside the record of conviction. *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). In practice, this already was the rule in immigration proceedings in several circuits. The Ninth Circuit has employed a different rule: the domestic relationship does not need to be an element of the offense, but it can be proved only with conclusive evidence found in the reviewable record of conviction. See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004). But advocates in the Ninth Circuit should be prepared for possible change; see Practice Advisory.[55]

Deportable for being the subject of a criminal or civil court finding of a violation of designated sections of a domestic violence protective order. Noncitizens are deportable if a civil or criminal court judge makes a finding that they violated a portion of a domestic violence protective order that "involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." INA 237(a)(2)(E)(ii). The BIA held that, because this ground includes civil court findings, the categorical approach does not apply to either civil findings or criminal convictions. ICE may use any probative and substantial evidence to show the nature of the finding of a violation by a judge. See *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017). See also, e.g., *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019), deferring to the BIA and adopting this rule, and see online practice advisory.[56]

B. Conduct-Based Removal Grounds

The categorical approach generally does not apply to fact-based inquiries, such as whether the person comes within a removal ground based on conduct rather than on a criminal conviction. Examples of conduct-based grounds are being inadmissible for engaging in prostitution, or being inadmissible or deportable as an abuser or addict.

The Ninth Circuit has held that the categorical approach does apply if a criminal conviction is the *only* evidence of the conduct. It held that a returning permanent resident was not inadmissible[57] under the prostitution ground where (a) the criminal conviction was the only evidence, and (b) the conviction was for an offense that did not meet the generic definition of prostitution under the categorical approach, because the minimum conduct was a broadly defined "lewd act" for a fee, whereas the generic definition of prostitution is sexual intercourse for a fee.[58]

C. Purely Discretionary Decisions

The categorical approach does not apply in a purely discretionary decision, e.g. whether an applicant who meets statutory requirements, actually merits a grant of asylum, a waiver of inadmissibility, or a finding of good moral character as a matter of discretion. Thus the strict limits of

the categorical approach might apply to a conviction during the "deportability" phase of a hearing, but the judge may consider underlying facts of the conviction, as well as any other relevant and probative evidence, in making a purely discretionary decision during the relief phase.

> **Example:** Because his conviction is not an aggravated felony under the categorical approach, Mr. Moncrieffe may apply for LPR cancellation. When it comes to deciding whether to grant the cancellation application, however, the immigration judge may consider the underlying facts. *Moncrieffe v. Holder*, 569 U.S. at 204 (noting that the judge can decide to "deny relief if he finds that the noncitizen is actually a member of one 'of the world's most dangerous drug cartels'" or "if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons.").

D. Bars to Eligibility for Relief that are Not Removal Grounds

A conviction that comes within a removal ground can act as a bar to eligibility for lawful status or relief. For example, a person is not eligible for LPR cancellation of removal if she is convicted of an aggravated felony, and is not eligible for naturalization if she is statutorily barred from establishing good moral character due to conviction of an inadmissible offense within the required period.[59] The categorical approach applies to removal grounds in the context of eligibility for relief. See, e.g., *Moncrieffe v. Holder, supra, Matter of Chairez-Castrejon, supra* (because the minimum prosecuted conduct to commit the offense was not an aggravated felony, the immigrant was permitted to apply for LPR cancellation).

Other statutory or regulatory bars to eligibility for relief are based on removal grounds. The BIA held that the categorical approach does not wholly apply to some of these. This includes conviction of a **particularly serious crime**" (bar to asylum and withholding)[60] or conviction a **violent or dangerous offense** (potential bar to asylum, asylee or refugee adjustment waiver under INA § 209(c), a waiver under INA § 212(h), or potentially adjustment under INA § 245).[61] Recently DHS indicated that the categorical approach would apply to the definition of at least one **significant misdemeanor** -- a crime of domestic violence -- in the context of enforcement priorities. [62] Besides making the person an enforcement priority, conviction of a significant misdemeanor acts as a bar to DACA, and the categorical approach has not been applied to crime of domestic violence in the DACA context.[63] Arguably, however, the conviction must have elements that in some way fit the description. For example, a conviction of trespass, defined as unlawful presence on another's property, arguably cannot be held a "particularly serious crime," even if the underlying facts of the conviction involve egregious conduct.

The BIA held that the circumstance-specific test applies in determining whether a visa petitioner was convicted of a **specified offense against a minor**, which under the Adam Walsh Act can bar a U.S. citizen or permanent resident from immigrating a close relative.[64]

ENDNOTES

[1] The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, please contact Katherine Brady at kbrady@ilrc.org.

[2] Many thanks to Kara Hartzler, Raha Jorjani, Alison Kamhi, Dan Kesselbrenner, Graciela Martinez, Michael Mehr, Manny Vargas, and Andrew Wachtenheim for their very helpful comments.

[3] The BIA's 2016 *Chairez* decision adopts the Supreme Court's reasoning in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013) and clarifies the earlier BIA decisions *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) and *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015). The Attorney General had stayed the earlier *Chairez* opinions while awaiting the Supreme Court's decision in *Mathis*. After *Mathis* was published, the Attorney General lifted the stay and remanded *Chairez* to the Board to decide in accord with *Mathis*. See *Matter of Chairez* and *Sama*, 26 I&N Dec. 796 (AG 2016), lifting the stay imposed at 26 I&N Dec. 686 (AG 2015). The Board then published the current decision, which is cited in the text, *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). It further published *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) *(Chairez IV),* where it denied the government's motion to reverse its earlier decisions, and discussed the "peeking" strategy set out in *Mathis.*

[4] At http://www.nipnlg.org/practice.html scroll to see practice advisories by IDP and NNIPNLG, including: *Practice Alert: In Mathis v. United States, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach* (July 1, 2016); *Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability under Drug Deportation and Other Conviction-Based Removal Grounds* (June 8, 2015) and advisories on opinions such as *Esquivel, Mellouli,* and *Dimaya.*

[5] Note that the categorical approach does not necessarily apply to other immigration terms that are not removal grounds, for example, particularly serious crime. See Part IV, below.

[6] See discussion of *Shepard v. United States,* 544 U.S. 13, 16, 20 (2005) in the next section.

[7] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe v. Holder*, 569 U.S. 184, 205-06 (2013).

[8] A practice advisory on the realistic probability standard, *The Realistic Probability Standard: Fight Government Efforts to Use It to Undermine the Categorical Approach* (IDP/NIPNLG Nov. 5, 2014) is available at https://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf.

[9] See, e.g., *Moncrieffe, supra*.

[10] See, e.g., *Mathis*, 136 S.Ct. at 2248-2249; *Descamps,* 570 U.S. 254, 260-265.

[11] See *Ibid.*

[12] *See, e.g., Taylor v. United States*, 495 U.S. 575, 602 (U.S.1990)

[13] See INA §§ 212(a)(2), 237(a)(2); 8 USC §§ 1182(a)(2), 1227(a)(2).

[14] See INA § 101(a)(43); 8 USC § 1101(a)(43).

[15] For example, in California, besides *Defending Immigrants in the Ninth Circuit* (www.ilrc.org), see Tooby, Brady, *California Criminal Defense of Immigrants* (www.ceb.com), and in New York see Vargas, *Representing Immigrant Defendants in New York* (www.immigrantdefenseproject.org).

[16] See, e.g., the California Chart (sign up at www.ilrc.org/chart) and the Arizona chart at www.firrp.org. See several other state charts at www.nipnlg.org. Current immigration non-profit staff can access a library at www.immigrationadvocates.org.

[17] See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), discussing when federal courts must defer to an administrative agency's interpretation of the statute it administers. For a basic overview of deference issues in immigration law see ILRC, *Who Decides? Chevron, Brand X, and Mead Principles* (2011) at http://www.ilrc.org/files/documents/overview_of_chevron_mead__brand_x.pdf

[18] See, e.g., *Descamps,* 570 U.S. 254, 260 (2013) and see *Mathis,* 136 S. Ct. at 2248-49.

[19] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe*, 569 U.S. at 205-06 and *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014).

[20] *Ibid,* and see *Osequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010).

[21] *See, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57, 63-64 (2d Cir. 2018); *Jean-Louis v. Att'y Gen*., 582 F.3d 462, 481 (3d Cir. 2009); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)); *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017); *Ramos v. Att'y Gen*., 709 F.3d 1066, 1071-72 (11th Cir. 2013). *See also Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572-73 (6th Cir. 2007) (unpublished).

But in the Ninth Circuit see *United States v. Perez*, 932 F.3d 782 (9th Cir. 2019), and regarding the Eleventh Circuit, see discussion in *Matter of Guadarrama,* 27 I&N Dec. 560, 562-66 (BIA 2019) finding that the *Ramos* rule has been abandoned. *And see United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

[22] *Grisel, Chavez-Solis, supra.*

[23] In the Ninth Circuit, note that in cases published after *Descamps* – and after *Matter of Ferreira* -- the Ninth Circuit has reaffirmed that certain California drug statutes are not categorical matches to federal drug schedules based on the state statute, without requiring cases as evidence to prove a realistic probability of prosecution. See *Coronado v. Holder,* 759 F.3d 977 (9th Cir. 2014) (Cal H&S § 11379); *Medina-Lara v Holder*, 771 F.3d 1106 (9th Cir. 2014)(H&S § 11351). In addition, see amicus brief in *Matter of J-J-C-,* posted at www.ilrc.org/crimes, for case showing prosecution of non-federally defined substances under H&S § 11377-79 and arguments.

In general, federal courts owe deference to an administrative agency (here, the BIA) only when the agency interprets certain sections of the statute over which it has jurisdiction (here, the INA). *Chevron, supra.* In *Matter of Ferreira, supra*, the BIA interpreted Supreme Court rulings, not the INA. See discussion of *Moncrieffe* and *Gonzales v. Duenas-Alvarez*, 549 U.S. at 186, in *Ferreira, supra* at 420-21. Further, generally the BIA is not owed deference in its interpretation of the categorical approach. See, e.g., *Matter of Chairez-Castrejon,* 26 I&N Dec. at 354, where the BIA acknowledged that the same categorical approach applies in immigration and federal criminal cases and that it is not owed deference in its interpretation of the approach (in terms of divisibility); it therefore must follow the governing circuit law ("Since we are not given deference on this issue, going forward we are also bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps*.").

[24] See, e.g., NIP/NLG and IDP Advisories on *Mellouli v. Lynch* (June 8, 2015) and on *Realistic Probability and Duenas-Alvarez* (November 5, 2014) at https://www.nationalimmigrationproject.org/practice.html

[25] See *Chevron, supra,* holding that federal courts may owe deference to an administrative agency interpretation of the statute that it administers. The BIA does not administer state statutes and thus is not owed deference regarding its interpretation of their construction or comparison to a generic definition. See, e.g., discussion in *Marmolejos-Campos v. Holder*, 558 F.3d 903, 907-908 (9th Cir. 2009) (*en banc*).

[26] See 21 USC § 841(b)(4), discussed in *Moncrieffe v. Holder*, 569 U.S. at 185.

[27] See, e.g., discussion in *Marmolejos-Campos v. Holder*, 558 F.3d at 907-908.

[28] Utah Code § 76-10-508.1(1)(a), with intent defined at § 76-2-102.

[29] See, e.g., *Schad v. Arizona*, 501 U.S. 624, 623 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes."), cited in *Mathis* and *Descamps*; and *Richardson v. United States*, 526 U.S. at 817 ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). See also, e.g., *U.S. v. Lopesierra-Gutierrez*, 708 F.3d 193 (D.C. Cir. 2013); *U.S. v. Felts*, 579 F.3d 1341 (11th Cir. 2009).

[30] See *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903).

[31] See 18 USC § 16(a), and see, e.g., *Johnson v. United States,* 559 U.S. 133, 137-38 (2010); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

[32] See *Descamps v. United States*, 570 U.S. at 265.

> Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non- generic) formed the basis of the defendant's conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner. We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.

[33] *Shepard v. United States,* 544 U.S. 13, 16, 20 (2005).

[34] *See, e.g., Taylor v. United States*, 495 U.S. 575, 602 (U.S.1990)

[35] Advocates may want to advise a client in the position of Claire in the example to not answer questions about the identity of the controlled substance. Often, an applicant for relief who refuses to answer a government question will be penalized by being denied the relief, for "failure to prosecute" the relief. A rationale for this is that without key information, the decisionmaker is "thereby prevented from reaching a conclusion about the respondent's entitlement to the discretionary relief he seeks." *Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977) (upholding immigration judge's decision to deny adjustment when the applicant refused to disclose why he had $54,000 in cash when he was stopped by the police). But in this case, the decisionmaker does not need additional information to make a discretionary decision. Claire can supply all information about the event other than the identity of the substance. In fact, the immigration judge could review the police report to get that information, without Claire having to formally admit it – and then Claire would not be inadmissible, because she would have neither a qualifying admission nor conviction. See below footnotes as well.

[36] For example, the officer first must state all of the elements of the offense, in an understandable manner. *Matter of K-*, 9 I&N Dec. 715 (BIA 1962).

[37] Advocates can argue that the client is not required to answer the government's questions, which are asked in order to circumvent the protections of the categorical approach. In addition, the BIA has long held that if conduct was brought before a criminal court and the result was less than a conviction, no admission of the same conduct can be a basis of inadmissibility. See, e.g., *Matter of E—V--,* 3 I&N Dec. 623 (BIA 1953). Advocates could assert that the principle also should apply when there is a conviction; the inquiry should be limited to the conviction, not to an additional admission.

[38] If the conviction is vacated, she would not be subject to inadmissibility based on admitting the same conduct. See *Matter of E—V--, supra.* See further discussion of drug convictions at ILRC, *Note: Controlled Substances* (March 2019) at www.ilrc.org/chart.

[39] *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2017); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008).

[40] *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014).

[41]*Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Gutierrez v. Sessions*, 887 F.3d 770, 776 (6th Cir. 2018); *Pereida v. Barr*, 916 F.3d 1128, 1132-33 (8th Cir. 2019); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 582 (10th Cir. 2017); *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

[42] See INA § 101(43)(G), (U), 8 USC § 1101(a)(43)(G), (U). For discussion of substantial step see *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011), which effectively is overruled by *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014).

[43] Section 459 has been used to prosecute entry with intent to commit offenses that do not involve moral turpitude. For example, the minimum conduct to commit California felony false imprisonment, Pen C §§ 236, 237, is not a crime involving moral turpitude. *Turijan v. Holder,* 744 F.3d 617, 621-622 (9th Cir. 2014), citing *People v. Islas,* 210 Cal. App. 4th 116, 117 (2001) (burglary with intent to commit false imprisonment by menace is not a CIMT when the entrants did not harm or threaten residents and assured them that they would not harm them). Section 459 has been used to prosecuted burglary with intent to commit Pen C § 236/237. See, e.g., *People v. Islas, supra*; *People v. Griffin*, 90 Cal. App. 4th 741 (2001) (burglary with intent to commit false imprisonment, theft, or assault). In addition, the minimum conduct to commit receipt of stolen property, Pen C § 496, does not involve moral turpitude. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009). Section 459 has been used to prosecute entry with intent to commit Pen C § 496. See, e.g., *People v. Thomas*, 74 Cal. App. 3d 320 (1977) (defendant was convicted of burglary with intent to commit larceny or receive stolen property, although conviction was overturned on other grounds).

[44] See, e.g., *Matter of Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

[45] See *Nijhawan v. Holder,* 557 U.S. 29 (2009).

[46] See *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440, n.5. The decision did not reach whether *Soliman*'s definition of fraud offense was "sufficiently inclusive." It left open the precise meaning of "consent," and did not discount that certain offenses such as "theft by deception" might fit into both categories.

[47] Section 484 provides in part: "(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft....."

[48] *See, e.g., Garcia v. Lynch,* 786 F.3d 789, 794-795 (9th Cir. 2015) (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 an aggravated felony; court did not reach the issue of divisibility.)

[49] See INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F) (aggravated felony); INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i) (domestic violence deportation ground).

[50] See Zota, *Sessions v. Dimaya* advisory (April 2018) and sample motions to reopen or terminate proceedings based on *Dimaya* at http://www.nipnlg.org/practice.html . For a discussion of how overruling 18 USC 16(b) affects California offenses, see the California *Chart* (advocates can sign up for this free resource at

www.ilrc.org/chart) and see a pre-*Dimaya* advisory, ILRC, "Some Felonies Should No Longer Be Crimes of Violence under *Johnson v. United States*" at www.ilrc.org/resources/some-felonies-should-no-longer-be-crimes-of-violence-for-immigration-purposes-under-johnso .

[51] See also *Kawashima v. Holder*, 132 S.Ct. 1166 (2012).

[52] See NIP/NLG and IDP, "The Impact of Nijhawan v. Holder on the Categorical Approach" (2009) at www.nipnlg.org and see ILRC, "Preliminary Advisory on Nijhawan v. Holder" (2009) at www.ilrc.org/crimes.

[53] See Zota, *Matter of Davy and the Categorical Approach* (January 15, 2013) at http://www.nipnlg.org/practice.html

[54] INA § 101(a)(43)(N), 8 USC § 1101(a)(43)(N).

[55] See ILRC, *Practice Advisory: Deportable Crime of Domestic Violence and Matter of H. Estrada* (June 2016) at www.ilrc.org/crimes.

[56] See ILRC, *2019 Case Update: Domestic Violence Deportation Ground* (December 2019) at www.ilrc.org/crimes.

[57] See discussion of burden of proof at *Kepilino v. Gonzales*, 454 F.3d 1057, 1059-61 (9th Cir. 2006). It appears that a conditional resident was returning from a trip abroad in this case, so that the government had the burden of proving that she was not seeking a new admission under INA § 101(a)(13)(C).

[58] *Kepilino v. Gonzales*, *supra.*

[59] See discussion of eligibility for relief and criminal bars at *Immigration Relief Toolkit at* www.ilrc.org/chart.

[60] *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

[61] See "violent or dangerous" crime in cases such as *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (asylum) and the regulation governing waivers under INA § 212(h), 8 CFR 8 CFR § 1212.7(d). See discussion in *Torres-Valdivias v. Holder*, 766 F.3d 1106 (9th Cir. 2014), declining to apply the categorical approach to determining whether the offense is a violent or dangerous crime. See also ILRC, *Eligibility for Relief: Waivers Under INA § 212(h)* (November 2019) at www.ilrc.org/crimes.

[62] See USCIS, *Frequently Asked Questions Relating to Executive Action on Immigration at* https://www.ice.gov/immigrationAction/faqs, providing that the significant misdemeanor relating to domestic violence is defined by a "crime of domestic violence" in the domestic violence deportation ground.

[63] For more on these issues, see materials at www.ilrc.org/daca.

[64] *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014).