How to Use the Categorical Approach Now[1]

Katherine Brady, ILRC

With a few exceptions, immigration authorities must use the "categorical approach" to determine whether a criminal conviction triggers a ground of removal. Expert use of the categorical approach may be the most important defense strategy available to immigrants convicted of crimes.

This is especially true now that the Supreme Court again has addressed how the analysis must be applied, in *Moncrieffe v. Holder,* 133 S. Ct. 1678 (2013) and *Descamps v. United States*, 133 S. Ct. 2276 (2013). These decisions effectively overrule a lot of past precedent, to the benefit of immigrants. In 2014 the Board of Immigration Appeals (BIA) adopted the Supreme Court's analysis and withdrew its own conflicting precedent. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014), withdrawing *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

If you represent an immigrant convicted of a crime and do *not* understand how to use the categorical approach in light of recent decisions, you may be doing your client a terrible disservice. Relying on older precedent, you may think that the conviction has adverse immigration consequences, when under recent precedent it should have no consequences, or at least less serious ones. Likewise, immigration judges who do not correctly apply the categorical approach commit reversible error. See *Matter of Chairez-Castrejon*, *supra* at 358.

The purpose of this article is to provide a step-by-step guide on how to use the categorical approach under current law. Part I provides a concise outline of the analysis, in five steps. Part II discusses these steps in more detail and with examples. Part III provides more examples of formerly removable offenses that now should be held immigration-neutral. Part IV discusses in what contexts the full categorical approach does and does not apply. In particular, at this writing the full categorical approach applies to moral turpitude determinations in some circuits but not others, and applies to determining whether a crime is an aggravated felony except for a few cases where the circumstance-specific inquiry applies. See Part IV.

This article is more of a how-to guide than an analysis of the reasoning of the key cases and their implications. For a more in-depth discussion of *Moncrieffe v. Holder, Descamps v. United States,* and *Matter of Chairez-Castrejon*, see Practice Advisories available online.[2]

As always, how much and whether to rely upon new arguments depends on context. Advocates representing noncitizens in removal proceedings can advance these arguments. Advocates considering whether to file an affirmative application, in cases where this would expose a potentially removable person to authorities, should consider the chances that the argument might be rejected while the application is pending. Criminal defenders always should try to take the most conservative option of pleading specifically to a "good" offense, even if the statute really should be considered not divisible.

PART I. Overview of the Five Steps

The categorical approach can be expressed in five steps. This Part will briefly outline the steps, and Part II will provide more information about how to conduct each step.

Step 1: Identify the generic definition of the crime listed in the removal ground.[3]

Using secondary sources and other materials, identify the federal, "generic" definition of the criminal law term that is listed in the removal ground, for example the definition of a "crime of domestic violence," a "controlled substance," or "burglary."

Step 2: Identify the minimum prosecuted conduct that violates the criminal statute.[4]

Using jury instructions and other materials, identify the minimum conduct required to violate the criminal statute of which the person was convicted. The person must show a "realistic probability" that this conduct is prosecuted under the statute, by showing that it was prosecuted in published or unpublished decisions or the person's own case, or by other means.

Step 3: Does this minimum conduct necessarily come within the generic definition?[5]

If the minimum conduct to commit the offense (Step 2) necessarily comes within the generic definition (Step 1), there is a categorical match. Another way of putting this test is, has anyone ever been convicted of the criminal statute who could not have been convicted of the generic definition? If not, there is *not* a categorical match.

If there is no categorical match, go to Step 4 to determine whether the statute is divisible. If there is a categorical match, the person loses on this issue and the analysis stops.

Step 4: Is the criminal statute divisible? [6]

Under recent Supreme Court precedent, to be "truly" divisible a statute must meet all three of the following criteria:

1. It sets out multiple discrete alternatives for conduct, separated by "or."

2. At least one, but not all, of these alternatives is a categorical match to the generic definition. See Step 3 to define "categorical match."

3. A jury must decide unanimously between these alternatives, in order to find the defendant guilty. (This is required for the alternative to be an "element.")

   If the law is unclear as to whether jury unanimity is required, the adjudicator must assume that unanimity is not required, and the statute is *not* divisible.

If the statute is not divisible because it does not meet all of these criteria, the person wins. An indivisible statute is evaluated under the minimum conduct test. At Step 3, we already found that the minimum conduct is not a categorical match. Therefore as a matter of law, the conviction

does not come within the removal ground for purposes of deportability, admissibility, or eligibility for relief. Information in the record of conviction, and facts underlying the case, are irrelevant.

If the statute is divisible because it meets all of the above criteria, go on to Step 5.

Note: Judicial precedent and divisibility. The Supreme Court left open the question of whether a statute is divisible if judicial precedent, rather than statutory language, establishes alternative ways to violate the statute and requires a jury to unanimously choose between them.[7] Check jury instructions and caselaw to see if such precedent exists.

Step 5: <u>If the statute is divisible, do documents in the reviewable record of conviction establish which crime the defendant was convicted of, under the "modified categorical approach"</u>?[8]

If and only if a statute is divisible according to the criteria in Step 4, the modified categorical approach applies. Here the adjudicator (immigration judge or officer) is permitted to review certain documents from the person's record of conviction,[9] with the sole purpose of identifying *which* offense (meaning, which elements set out in the statute) the person was convicted of.

1. If the record conclusively identifies the offense (statutory elements) of which the person was convicted, then the adjudicator must evaluate that offense based on the minimum prosecuted conduct required to commit it, as described in Steps 2 and 3.

2. If instead the record is inconclusive, the case outcome may depend upon whether the question is deportability versus eligibility for relief. DHS always must prove that a conviction under a divisible statute causes deportability. Therefore if the record is inconclusive, the person is not deportable. Regarding relief, the BIA and some federal courts hold that an inconclusive record of conviction will not meet an immigrant's burden of proving eligibility for relief, while other federal courts have held that it will. See discussion in Part II.

Note on the "record of conviction." Nowhere in the first Four Steps do we look to the person's conviction record or the facts underlying the conviction. What the person actually did to violate the statute, or the facts that the person actually pled guilty to, is irrelevant under the "regular" categorical approach.[10] In the Fifth Step, the facts from the record are relevant only to identify which statutory elements the person was convicted of.

PART II. The Five Steps: Questions and Examples

Step 1: Identify the "Generic" Definition at Issue

The Law: "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*, 133 S. Ct. at 1684 (citations omitted).

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, in which case the immigrant will win.

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 of child abuse," "crime involving moral turpitude," etc.[11] Conviction of an aggravated felony is a deportation ground as well as a bar to many forms of relief, and its definition includes dozens of criminal law terms such as "burglary," "theft," "fraud," "crime of violence," "sexual abuse of a minor," etc.[12]

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 statute. For example, the firearms deportation ground provides that "firearm" is defined at 18 USC § 921(a). In other cases the INA simply lists a general term, for example, "theft" or a "crime of child abuse." Where the statute does not specifically define a criminal law term, federal courts and/or the BIA will decide upon the definition. Some generic definitions are well established, for example the Supreme Court's definition of generic burglary, which is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[13] In other cases different circuits, or a federal court and the BIA, may create competing generic definitions or may disagree on how to interpret terms in the same definition. 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 litigate the issue.

How to find a generic definition. 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, and the books are kept updated online. 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 Appeal publish outlines on the topic on their websites. Some states have state-specific books, online charts, and articles. Once you have consulted secondary sources, do further research to see if there are new developments by the BIA or the federal courts. Because Circuit Courts of Appeals may disagree on a generic definition, try to identify the definition that applies in your circuit.

Deference: Federal courts and the BIA both may create generic definitions. If these definitions conflict, the law is unsettled as to if or when a federal court must give *Chevron*[14] deference to the BIA's generic definition.

Step 2: <u>Identify the Minimum Conduct that has a Realistic Probability of Prosecution</u>

The Law: "To determine whether the respondent's offense qualifies as an aggravated felony, we employ the 'categorical approach,' which requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under [the criminal statute], rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Chairez-Castrejon,* 26 I&N Dec. at 351, applying *Moncrieffe v. Holder*, 133 S.Ct. at 1684-85.

"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*, 133 S. Ct. at 1684 (citations omitted).

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

What is "minimum conduct 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.[15] Depending on the offense, the required elements might be that the defendant engaged in certain conduct (e.g., trespass), 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.

What is a "realistic probability of prosecution" and how do you 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:

- The person's own conviction was for this conduct.[16]
- Published or unpublished decisions (in the Ninth Circuit, a single unpublished decision) describe a conviction under the statute based on this conduct.[17]
- Language in the criminal statute sets out the specific minimum conduct. This is accepted in some but not all circuits; see below.

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

Specific statutory language. The Third, Ninth, and Eleventh Circuits (and at least the Sixth Circuit in an unpublished opinion) have held that if the criminal statute itself describes the *specific* minimum conduct, no case evidence is needed to meet the realistic probability test.[18]

> **Example: Specific Statutory Language for Burglary, Firearms.** 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.[19] But if a statute prohibits conduct with a "firearm," that does not establish a realistic probability that *antique* firearms are prosecuted under the statute; case evidence showing such prosecution is required.[20] To qualify under this category, the statute would have to prohibit conduct with an "antique firearm."

The BIA disagrees with this rule. It held that case evidence always must be submitted to show a realistic probability of prosecution. *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014).[21]

> **Example: Unspecified Controlled Substance Defense.** The generic definition of a "controlled substance" includes only substances listed on *federal* drug schedules. A Connecticut drug statute, CGSA § 21a-277(a), includes some substances not on the federal list. Cases such as *Matter of Paulus*[22] have long held that in this situation, because the state penalizes some drugs not in the generic definition, the state statute is not categorically a deportable or inadmissible controlled substance offense or aggravated felony. However, in *Matter of Ferreira* the BIA held that despite the fact that the specific non-federally defined drugs are named in the state statute, Mr. Ferreira must produce cases showing prosecutions involving these drugs, to show a "realistic probability" that they actually were prosecuted under the statute.

Within the Third, Ninth and Eleventh Circuits, practitioners should assert that the BIA must defer to the federal court's interpretation,[23] but of course also should attempt to locate case evidence. Outside of these circuits, the BIA's rule may apply. The Supreme Court might resolve this issue this term, in *Mellouli v. Holder.*

How to identify the minimum prosecuted conduct for a particular crime. State jury instructions are an excellent starting point. They may set out the minimum conduct required for guilt under state statutes, and also may provide supporting case citations that can be used to show a realistic probability of prosecution. Some 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. However, California jury instructions make clear that "force" and "violence" in § 242 mean the same thing and that they include "the slightest touching," causing no pain or injury of any kind. The instructions cite cases showing that P.C. §§ 242, 243 have been used to prosecute this

kind of conduct. See 1-1800 CALCRIM 841. We can use this to show that the minimum prosecuted conduct for this statute involves a mere touching.

Some aspects of jury instructions can be hard for us immigration attorneys to understand. In case of doubt, consult with criminal defense counsel. We also must do additional research in case subsequent cases that affect the minimum conduct have not yet been incorporated into the instructions.

If your state does not publish jury instructions, you must research criminal cases. This also is an opportunity to get some help from the criminal defense attorneys you have been advising (or the one who now is asking you the question). Note that defense attorneys might use other terms for minimum conduct, such as "least act" or "least adjudicable elements."

Check jury instructions for possible hidden "divisible" statutes. In almost all cases, to be divisible a criminal statute must literally set out alternatives separated by "or," or incorporate a statutory definition that contains "or." But even if it does not, check the jury instructions to see if a jury is required to unanimously agree between different alternatives. See further discussion of divisible statutes at Step 4.

PRACTICE TIP: Most prior precedent holding that an "overbroad" statute is divisible should be held overturned, and no conviction of the statute should have the adverse consequence! Examine prior decisions that held that a single, broadly defined offense is divisible for some purpose. Most or all of these statutes should no longer be held divisible, under the test set out in *Descamps, supra* (the Step 4 test). If a statute is not divisible, it is subject to the minimum conduct test, and the person should win the issue.

> **Example: Spousal Battery as a Divisible Statute and a Crime of Violence.** The generic definition of a misdemeanor "crime of violence" does not include an offensive "touching."[24] California cases (listed in the jury instructions described in the above example) show that Cal. P.C. § 243(e), spousal battery, has been used to prosecute different kinds of conduct ranging from an offensive touching to actual violent attack. Based on this, *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) and federal court decisions have held that the minimum prosecuted conduct under P.C. § 243(e) is not a crime of violence.
>
> However, *Matter of Sanudo* and other cases decided before *Descamps v. United States* held that P.C. § 243(e) is "divisible" as a crime of violence. They permitted an immigration judge to review an individual's record of conviction for § 243(e) to see if in the particular case, the conduct was an offensive touching versus actual violence. But *Descamps* provides that a statute is not truly divisible unless it sets out multiple elements in the alternative, at least one of which is a categorical match to the generic definition. Section 243(e) is not a divisible statute under this test. Therefore, *Descamps* should be held to have overruled *Matter of Sanudo* on the issue of divisibility for § 243(e).[25] See similar discussion by the Ninth Circuit concerning resisting arrest, in the next example.

> Because § 243(e) is an indivisible statute, it is evaluated solely by the minimum prosecuted conduct required to violate the statute. As discussed above, *Matter of Sanudo* and other cases already held that the minimum prosecuted conduct to commit § 243(e) is not a crime of violence. Therefore, *no* conviction of § 243(e) ever is a crime of violence, for purposes deportability, inadmissibility, *and* eligibility for relief.[26] Again, the Supreme Court has held that information in the person's record of conviction, and the facts underlying the case, are irrelevant to this determination.[27]

The Ninth Circuit dealt with this change in the law when it held that misdemeanor resisting arrest, Arizona Revised Statute § 13-2508(A)(1), which can be committed by an offensive touching, is no longer divisible as a crime of violence. (California resisting arrest, P.C. § 69, should be treated the same.)

> **Example: Resisting Arrest as a Crime of Violence. "**Under our law prior to the Supreme Court's recent decision in *Descamps v. United States*, [the conclusion that the statute could be violated by offensive touching] would not end our inquiry. We would have to remand for the district court to determine whether the prior conviction was a crime of violence by looking to judicially noticeable documents under the modified categorical approach. The Supreme Court, however, has now decided *Descamps* and has held that the modified categorical approach should not be applied when the statute of prior conviction is indivisible. Use of the modified categorical approach is appropriate only when the state statute lists multiple, alternative elements, and the federal court is attempting to determine the elements implicated in a particular defendant's violation of the statute…." *U.S. v. Flores-Cordero*, 723 F.3d 1085, 1088-1089 (9th Cir. 2013) (citations omitted) (finding that no conviction of the offense is a crime of violence).

See also the discussion of other examples in Part III.

Burden of proof. The person must show that the minimum conduct has a realistic probability of prosecution.[28] The minimum conduct to commit an offense is a question of state law; information from the person's record of conviction is not relevant. (The exception is if the person is offering his or her own case as proof of a realistic probability of prosecution, in which case his or her own record is useful evidence.) The same characterization of the offense applies to deportability *and* eligibility for relief – for example, if the offense is not held to be a deportable aggravated felony based on the minimum conduct test, it also is not an aggravated felony as a bar to relief. (Compare this with the sometimes-changing burden of proof with a divisible statute, discussed at Step 5 below.)

Deference. Federal courts should not owe *Chevron* deference to the BIA on questions of state law, such as the minimum conduct required to commit a state offense.[29]

Step 3: <u>Does The Minimum Conduct Necessarily Match The Generic Definition</u>?

The Law: **"**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*, 133 S. Ct. at 1684 (citations omitted).

"Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant.... We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over." *Descamps v. United States*, 133 S.Ct. at 2286.

What is the defense goal? We want to show that the minimum prosecuted conduct to commit the offense (Step 2) does not necessarily come within the generic definition (Step 1). If so, there is not a categorical match.

If there is no categorical match, the next step will be to examine the statute to see if it is divisible (see Step 4). If it is divisible, we must complete that analysis. But if there is no categorical match and the statute is *not* divisible, then the immigrant wins big. As the Supreme Court said above, "the inquiry is over." As a matter of law, the conviction does not come within the removal ground for purposes of deportability, admissibility, or as a bar to eligibility for relief. Information in the record of conviction, and facts underlying the case, are irrelevant to this determination.[30]

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

How do we make the comparison? 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 matches the generic definition.

Another way of putting this is, has anyone ever been convicted under the criminal statute who could not have been convicted under the generic definition?

> **Example: Burglary as 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, requires only an "entry" with intent to commit a crime, and cases show that persons have been convicted of § 459 based on both lawful and unlawful entries.
>
> This is categorically *not* a match: the minimum conduct to commit § 459 is a lawful entry, which lacks the element in the generic definition of an unlawful or unprivileged entry. In other words, persons who made a lawful entry have been convicted of § 459, but could not be convicted of generic burglary. See *Descamps v. United States*, *supra*.
>
> **Example**: **Distributing Marijuana as an Aggravated Felony.** The generic definition of a drug trafficking aggravated felony excludes giving away a small amount of marijuana. 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 distributions ranging from giving away a small amount of marijuana, to selling large amounts of it.

> This is categorically *not* a match: 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. See *Moncrieffe v. Holder, supra*.

Burden of proof. Whether the minimum conduct matches the generic definition is a question of law. The same analysis applies to deportability and eligibility for relief. The immigrant does not need to produce the record of conviction to prove eligibility for relief, because the record of conviction is irrelevant. Compare this to the holdings in *Matter of Almanza-Arenas* and *Young v. Holder, infra,* which apply only to divisible statutes; see Step 5.

Deference. Federal courts do not need to give *Chevron* deference to the BIA, since this involves comparing a state criminal offense to a federal generic definition.[31]

Step 4. <u>Is the Criminal Statute Divisible?</u>

What is the defense goal? An "indivisible" statute is any statute that is not divisible. We want to establish that a statute is indivisible, because then the conviction will be evaluated solely on the most minimal conduct that has a realistic probability of being prosecuted under the statute. Further, the record of conviction is irrelevant: the adjudicator may not consult it, and the person does not need to produce a good record to show eligibility for relief. See Step 3.

In contrast, if the statute is "divisible," the adjudicator can review the record of conviction, and the person might need to produce a "good" record to qualify for relief. See Step 5.

Recently the law on divisibility has changed significantly, and in a way that benefits immigrants. Many statutes that previously were held to be divisible now should be held indivisible, under *Descamps.* Advocates must clearly explain to adjudicators how the law has changed, and why prior precedent finding a particular statute to be divisible must be considered overruled by the Supreme Court. Adjudicators must use the correct standard for divisibility, to avoid committing reversible error. See *Matter of Chairez-Castrejon,* below.

Law: "The Supreme Court explained there that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard … The Court further explained that for purposes of the modified categorical approach, an offense's "elements" are those facts about the crime which "[t]he Sixth Amendment contemplates that a jury— not a sentencing court—will find . . . unanimously and beyond a reasonable doubt." *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353, applying *Descamps v. U.S.,* 133 S.Ct. at 2281, 2283, 2288.

Three-Part Test: Thus a criminal statute is divisible only if it meets all three of these criteria:

1. It sets out multiple discrete alternatives for conduct, separated by "or."

2. At least one, but not all, of these alternatives is a categorical match to the generic definition. See Step 3 to define "categorical match."

3. A jury must decide unanimously between these alternatives, in order to find the defendant guilty. This is required for the alternative to be an "element."

If the statute does not meet all of these criteria, it is "indivisible" (not divisible). In that case, the minimum conduct test described in Step 3 resolves the issue: as long as the statute as a whole is not a categorical match, the person wins.

Example: Matter of Chairez-Castrejon. *Matter of Chairez-Castrejon* concerns a statute that might look divisible, and in the past could have been held to be divisible, but actually is indivisible under the standard set out in *Descamps v. United States* and *Moncrieffe v. Holder.*

Mr. Chairez-Castrejon was convicted of Utah Code §§ 76-10-508.1(1)(a), which prohibits discharging a firearm in the direction of a person while "knowing or having reason to believe" the person could be injured. The *mens rea* (mental state) of "knowing or having reason to believe" has its own statutory definition at Utah Code § 76-2-102, which is with "intent, knowledge, or recklessness." Incorporating that definition, § 76-10-508.1(1)(a) prohibits discharging a firearm in the direction of a person, with "intent, knowledge, or recklessness" as to the fact that the person could be injured. The issue was, is this offense a crime of violence under the categorical approach, as articulated by the Supreme Court?

The BIA found that the minimum conduct with a realistic probability of being prosecuted under the statute is recklessness, which is not a crime of violence. (This is Step Three, above.) Therefore, unless the statute is divisible, it is not a crime of violence.

To determine whether the statute is divisible, the BIA looked at the three criteria described above. It found that the statute meets the first requirement because it sets out conduct in the alternative ("intent, knowledge, *or* recklessness"). It found the statute meets the second requirement because the minimum conduct to commit the offense intentionally is categorically a crime of violence, while the minimum conduct to commit it recklessly is not.

The BIA found that the statute does not meet the third requirement, because DHS failed to meet its burden to produce legal authority showing that a jury must decide *unanimously* between "intent, knowledge, or recklessness." In other words, DHS failed to show that under Utah law, if some persons on a jury find that a defendant fired the gun recklessly, but others on the jury find that he or she fired it intentionally, the jury cannot find the defendant guilty. This meant that the statute is not divisible. The BIA explained:

> Under *Descamps*, section 76-10-508.1(1)(a) of the Utah Code can be "divisible" into three separate offenses with distinct mens rea only if Utah law requires jury unanimity regarding the mental state with which the accused discharged the firearm. If Utah does

> not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative "means" by which a defendant can discharge a firearm, not alternative "elements" of the discharge offense.

Matter of Chairez-Castrejon, at 354. The BIA found that Utah law was at least "unclear" as to whether jury unanimity was required. *Id.* at 355. (See section below for further discussion of proof of jury unanimity.) Without proof of jury unanimity, the statutory alternatives were not "elements." Without multiple, alternative "elements," the statute was not divisible.

Because the Utah statute was not divisible, the BIA evaluated it based on the minimum prosecuted conduct, which was recklessness, which is not a crime of violence. The BIA held that Mr. Chairez-Castrejon was not convicted of a crime of violence aggravated felony for any purpose, including as a bar to eligibility for relief. It remanded the case so that he could apply for LPR cancellation. *Id.* at 354-355, 358.

What do multiple discreet alternatives in a statute look like? The statutory alternatives could be set out in different ways. Different conduct within a statute, such as "firearm *or* knife," can be the alternatives. See, e.g., *Matter of Chairez-Castrejo, supra,* evaluating whether Utah Code 76-10-508.1(1)(a) is divisible between "intent, knowledge, or recklessness." (The BIA found that it was not divisible, because jury unanimity between the alternatives was not required.)

Formal subsections, such as Penal Code § 245(a), (b), or (c), can be the alternatives. See, e.g., *Matter of Chairez-Castrejon, supra,* evaluating whether Utah Code 76-10-508.1(1) is divisible between parts (a), (b), and (c). (The BIA found that it was divisible.)

A single word may have its own statutory definition that sets out alternatives. For example, Conn. Gen. Stat. Ann 53a-103 defines burglary as an unlawful entry into a "building." "Building" is a single term. However, "building" is defined at CGSA 53a-100(a)(1) for this purpose in the alternative; it includes, among other things, a "structure or vehicle or any building." Thus § 53a-103, incorporating the definition at 53a-100(a)(1), meets the first prong of the three-part test: it sets out alternatives separated by "or." (In an unpublished opinion discussed at Part III.B below, the BIA found that it was not a divisible statute, because jury unanimity between the alternatives was not required.)

(But see *Franco-Casasola v. Holder*, --F.3d-- (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 excellent dissent by Judge Graves.)

PRACTICE TIP: Some prior precedent ruling that statutes that contain an "or" are divisible should be held overturned, and no conviction of the statute should have the adverse consequence! Examine prior decisions holding that a statute that set out different criminal conduct in the alternative, separated by "or," is divisible. Unless there is legal authority clearly stating that a jury must unanimously decide between these alternatives, the statute is not divisible under the test set out in *Descamps v. United States, supra* (the Step 4 test). If a statute is not divisible, it is subject to the minimum conduct test. In that case the person should win, because

the precedent that held the statute divisible necessarily held that some qualifying minimum conduct did not trigger the immigration consequence. Therefore, *no* conviction under the statute should carry the consequence.

Practitioners may have to explain this change in the law to the adjudicator. See below and see sample explanation in Part III.

> **Vehicle Taking as a CIMT.** Assume that the case occurs in a circuit where the full categorical approach applies to moral turpitude determinations (see Part IV). A theft offense is a crime involving moral turpitude if it requires an intent to deprive the owner of the property permanently, but not temporarily.[32] Section 10851 of the California Vehicle Code defines vehicle taking to require "intent either to permanently or temporarily deprive the owner."
>
> Precedent decisions have held that Veh. C. § 10851(a) is divisible for moral turpitude purposes, because it prohibits intent to deprive temporarily (not moral turpitude) or permanently (moral turpitude). See, e.g., *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009).
>
> The finding of divisibility should be held overturned by *Descamps*. Although § 10851 sets out permanent and temporary intent in the alternative, these are not distinct "elements" because California law does not require a jury to unanimously decide between the two. In fact, California jury instructions provide that to find the defendant guilty, a jury need only find that the defendant "intended to deprive the owner of possession or ownership of the vehicle *for any period of time*." 1-1800 CALCRIM 1820 (emphasis added). When jury unanimity between statutory elements is not required, a statute is not divisible under *Descamps*; instead, the statute must be evaluated according to the minimum conduct with a realistic probability of prosecution. *Matter of Chairez-Castrejon*, 26 I&N Dec. at 354-55.
>
> The BIA and courts have found that the minimum prosecuted conduct required to commit § 10851 is not a crime involving moral turpitude. See *Matter of V-Z-S, Castillo-Cruz v. Holder, supra.* Therefore *no* conviction of § 10851 is a crime involving moral turpitude under the categorical approach. This is true for purposes of deportability, inadmissibility, and eligibility for relief,[33] and regardless of information in the record of conviction or the conduct underlying the offense.[34] See *Almanza-Arenas v. Holder,* --F.3d-- (9th Cir. Nov. 10, 2014).

Divisible "for the purpose of" a specific removal ground. To be divisible, a statute must include at least one element that does, and one that does not, meet a particular generic definition. The very same statute might be divisible for purposes of more than one removal ground, or be divisible for one ground but not another.

> **Example: Divisible for Crime of Violence But Not Firearms.** In *Matter of Chairez-Castrejon*, Utah Code §§ 76-10-508.1(1) prohibited discharging a firearm under various circumstances described in subsections (a), (b), and (c). The BIA found that § 76-10-

> 508.1(1) was not divisible as a deportable firearms offense, because all three of subsections were deportable under that ground.
>
> The BIA found that § 76-10-508.1(1) was divisible as a crime of violence. Subsections (b) and (c) were categorically crimes of violence. The BIA analyzed subsection (a) to see if it was internally divisible, and found that it was not, because a jury was not required to decide unanimously between "intent, knowledge, and recklessness." Therefore subsection (a) was indivisible and not a crime of violence. Because (a) was not a crime of violence but (b) and (c) were, § 76-10-508.1(1) as a whole was divisible.

Requirement of Jury Unanimity. Whether an offense is divisible is a question of law. In *Chairez-Castrejon* the BIA held that unless legal authority clearly shows that jury unanimity is required with respect to statutory alternatives, the adjudicator must find that jury unanimity is not required and the statute is not divisible between those alternatives.

Discussing deportability, the BIA held:

> The lack of Utah authority expressly requiring jury unanimity with respect to the mens rea underlying a violation of section 76-10-508.1, coupled with the Utah Supreme Court's suggestive determination that such unanimity is not required in second-degree murder cases, indicates that section 76-10-508.1 ***may not*** be divisible into three offenses with distinct mens rea, or at least that ***the law is unclear*** on this point. Because the issue before us involves removability, an issue on which the DHS bears the burden of proof, and the DHS has not come forward with any authority to establish the statute's divisibility, we conclude that the Immigration Judge was not authorized to consult the respondent's conviction record in order to determine which mental state he possessed.

Matter of Chairez-Castrejon, 26 I&N Dec. at 355 (emphasis added).

Next, the BIA held that the conviction also was not divisible as an aggravated felony for purposes of eligibility for relief, noting that "the record does not establish that the respondent was convicted of an aggravated felony. We will therefore remand for the Immigration Judge to consider whether the respondent is statutorily eligible for cancellation of removal, and if so, whether he merits a grant of relief in the exercise of discretion. *See* 8 C.F.R. § 1240.8(d)." *Id.* at 358. Significantly, the BIA did not switch the burden of proof to demand that the respondent prove that jury unanimity is not required.

Thus the BIA held that absent clear authority requiring jury unanimity, the adjudicator must find that unanimity is *not* required. The BIA's rule conforms with basic criminal law precepts. The Board cited *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.") 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."). *Chairez-Castrejon supra* at 354-55. 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). Many states have adopted the so-called *Sullivan*[35] rule, which provides that "where a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed so long as all the members of the jury are agreed that the defendant has committed the offense as it is defined by the statute..."[36] 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) (holding that burglary under Cal. P.C. § 459, with intent to commit "grand or petit larceny or any felony," is not divisible as to the intended offense).

Despite this, practitioners report that some immigration judges are insisting that the immigrant prove that jury unanimity is *not* required. Practitioners should reiterate that this directly contradicts the BIA's ruling in *Chairez-Castrejon,* and be prepared to preserve the issue for appeal. But despite the fact that it is not properly their burden, practitioners also may want to locate legal authority showing that unanimity is not required. In some cases, we can identify state law holding that jury unanimity in choosing between alternative conduct is not required, citing jury instructions or decisions. In many cases, however, there simply is no case law on unanimity requirements for a particular statute, because no one has appealed a conviction under the statute on that basis. This is why it is so important that *Chairez-Castrejon* held that if the law is "unclear," the statute is not divisible.

Finally, the Board noted that some states may not require a unanimous jury for a finding of guilt. While federal defendants must be found guilty by unanimous verdict, "no such jury unanimity requirement applies to the States unless they impose it upon themselves. Thus, where a defendant was lawfully convicted by a nonunanimous jury, we deem the 'elements' of the offense to be those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction." *Chairez-Castrejon, supra* at 353, n. 2.

Deference. In *Matter of Chairez-Castrejon, supra* at 354, the BIA acknowledged that "Federal courts have not accorded deference to our application of divisibility, particularly given that *Descamps* itself makes no distinction between the criminal and immigration contexts…. 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*." The BIA withdrew from *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), which conflicted with *Descamps*.

Step 5. <u>If the Statute is Divisible, Apply the Modified Categorical Approach</u>

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 facts in the record of conviction, and where the immigrant might be required to produce his or her record.

The law. "[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."

Descamps v. United States, 136 S.Ct. at 2281, 2285, applied in *Matter of Chairez-Castrejon*, *supra* at 353.

What are the defense goals? If a statute is divisible, the adjudicator (immigration judge or officer) may review strictly limited documents from the individual's record of 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[37] (see Step 4);

- Consults only the permitted documents from the record (see below);

- Uses facts from the record only to identify the statutory elements that make up the offense of conviction (see citations 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.

Which documents may the judge 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 stated 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."[38] 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.[39] Counsel should research BIA and Circuit-specific decisions, as there is a lot of litigation on which documents, and which content from the documents, are included in the reviewable record of conviction.

The judge may use facts from the record only to identify the offense of conviction. Facts in the record are significant only to the extent that they indicate which elements made up the offense of conviction. "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*, 136. S.Ct. at 2281.

Review: When is the individual's record completely irrelevant? Many judges and practitioners remain confused about how and when the record of conviction is used. Again, the record is relevant only if a statute is truly "divisible"; it does not apply at all if a statute is indivisible. *Matter of Chairez-Castrejon*, *supra* at 354-55. With an indivisible statute, what the person actually did to violate the statute, or what damaging facts the person may have pled guilty to, is "irrelevant." Once the adjudicator has determined that the minimum prosecuted conduct does not necessarily come within the generic definition, the "inquiry is over" and the person wins. *Descamps*, 136 S.Ct. at 2286. The immigration judge may not consult the record, so the person cannot be required to produce it. The characterization of the offense – e.g., whether it is an aggravated felony or not – is a question of law and is the same regardless of whether the question is deportability, inadmissibility, or eligibility for relief. See, e.g., *Matter of Chairez-Castrejon, supra* (because as a matter of law the minimum conduct to commit the offense is not an aggravated felony, the respondent may apply for LPR cancellation); *Moncrieffe v. Holder, supra* (same holding).

If DHS has proved that a statute is truly *divisible* (see Step 4), the adjudicator may consult the reviewable record of conviction to identify which of the alternative offenses was the subject of the conviction in the particular case. Then the adjudicator will apply the minimum conduct test (Step 3) to that offense. See *Matter of Chairez-Castrejon*, 26 I&N Dec. at 354-55.

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 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. Here authorities are split as to what happens if the record is inconclusive. The First, Second, Fifth, and, most recently, Ninth Circuit Courts of Appeals have held that an inconclusive record *is* sufficient to meet the immigrant's burden of proving that a conviction under a divisible statute does not bar eligibility for relief.[40] (A petition for rehearing might be filed in the Ninth Circuit.) In contrast, the BIA and the Fourth, and Tenth Circuits have held that an inconclusive record does not meet the immigrant's burden,[41] and the Third and Seventh Circuits have agreed with this reasoning (although in cases that did not

employ the full categorical approach).[42] Advocates are contesting some of those negative decisions, based on *Moncrieffe v. Holder, supra*.[43]

PART III: Additional Case Examples

A. California Burglary Never is "Attempted Theft"

This Part will discuss the analysis in *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014).

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.[44]

2. *What is the minimum conduct with a realistic probability of prosecution?* California burglary, P.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.

4. *Is the statute divisible?* No. The Ninth Circuit found that 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 P.C. § 459 ever is attempted theft, for any purpose.

Holding. Because the statute is indivisible, the minimum conduct standard applies. Because the minimum prosecuted conduct to commit the offense is not attempted theft, the offense is not an attempted theft aggravated felony for purposes of deportability or eligibility for relief, and Mr. Rendon may apply for LPR cancellation. See *Rendon v. Holder, supra.* This should overturn cases such as *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) that had held that P.C. § 459 is divisible as attempted theft.

B. Examples of Offenses That Arguably Are Not Divisible

Advocates may argue that *Descamps* and *Moncrieffe* have partially overturned prior precedent that held that statutes like the below are divisible. The result should be that no conviction under these statutes triggers the immigration consequence, regardless of information in the record of conviction, and regardless of whether the issue is deportability, admissibility, or eligibility for relief.

Note that some of these examples involve moral turpitude determinations. At this writing the full categorical approach is applied to these determinations only in the Third, Fourth, Fifth, Ninth, and Eleventh Circuit Courts of Appeals. See Part IV.

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

A theft offense is a crime involving moral turpitude if it requires an intent to deprive the owner of the property permanently, but not if it requires intent to deprive temporarily.[45] California receipt of stolen property, Cal. P.C. § 496, prohibits possessing property knowing that it was stolen. The Ninth Circuit found that the minimum conduct with a reasonable probability of being prosecuted under § 496 involves intent to deprive temporarily. "There is no requirement of an intent on the part of the recipient to deprive the owner of possession permanently. Indeed, California courts have upheld convictions under § 496 in the context of joyriding, where there was indisputably no such intent." *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161(9th Cir.2009).

In *Castillo-Cruz* the Ninth Circuit left open the possibility that § 496 was divisible for moral turpitude purposes, because it was defined broadly enough to reach intent to permanently or temporarily deprive the owner. *Id.* at 1161. Subsequently, however, the Supreme Court held that a statute is not divisible unless it sets out elements in the alternative, where a jury must unanimously choose between the elements. See *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353-55, applying *Descamps v. U.S.,* 133 S.Ct. at 2281, 2283, 2288. Because § 496 does not meet this standard, the Supreme Court decisions effectively overrule any finding that P.C. § 496 is divisible. As a non-divisible statute, P.C. § 496(a) must be evaluated solely based on the minimum prosecuted conduct. *Ibid.* Because this conduct (intent to deprive temporarily) is not a crime involving moral turpitude, *no* conviction of § 496(a) is a crime involving moral turpitude, for any purpose. *Ibid.*

2. Argument: California Burglary, P.C. § 459, Never is a Crime Involving Moral Turpitude

A burglary offense can qualify as a crime involving moral turpitude under either of two standards. First, a burglary offense involves moral turpitude if it is an entry with intent to commit a crime involving moral turpitude. See, e.g., *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Second, a burglary offense involves moral turpitude if it is an unlawful entry into a dwelling with intent to commit a crime. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009).

Section 459 of the California Penal Code provides that a person who "enters" various areas with intent to commit "grand or petit larceny or any felony" is guilty of burglary. This offense is categorically not a crime involving moral turpitude, for purposes of deportability, inadmissibility, or eligibility for relief.

Under the categorical approach, a conviction is evaluated based "on the minimum conduct that has a realistic probability of being prosecuted under [the criminal statute], rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Chairez-Castrejon,* 26 I&N Dec. at 351, applying *Moncrieffe v. Holder*, 133 S.Ct. at 1684-85. The minimum

prosecuted conduct required for guilt under P.C. § 459 is not a crime involving moral turpitude under either of the two applicable standards.

First, § 459 falls outside of the "entry with intent to commit a crime involving moral turpitude" definition, because § 459 has been used to prosecute entry with intent to commit offenses that do not involve moral turpitude. The Ninth Circuit has held that the minimum conduct to commit California felony false imprisonment, P.C. §§ 236, 237, is not a crime involving moral turpitude. *Turijan v. Holder,* 744 F.3d 617, 621-622 (9th Cir. 2014). Section 459 has been used to prosecuted burglary with intent to commit P.C. § 236, 237. See, e.g., *People v. Islas,* 210 Cal. App. 4th 116, 117 (2001) (burglary with intent to commit false imprisonment by menace); *People v. Griffin*, 90 Cal. App. 4th 741 (2001) (burglary with intent to commit false imprisonment, theft, or assault). The Ninth Circuit specifically cited *People v. Islas, supra,* as a basis for holding that felony false imprisonment is not a categorical crime involving moral turpitude. *Ibid.*[46]

The Ninth Circuit has found that minimum conduct to commit receipt of stolen property, P.C. § 496, does not involve moral turpitude. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009). While this offense may have been held divisible in the past, under recent Supreme Court and BIA precedent, *no* conviction for § 496 should be held a crime involving moral turpitude.[47] Section 459 has been used to prosecute entry with intent to commit P.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).

Second, § 459 falls outside the "unlawful entry of a dwelling" definition, because § 459 has been used to prosecute lawful entries. See *Descamps v. United States,* 133 S.Ct at 2285-86. Because the minimum prosecuted conduct falls outside the generic definition, no conviction of § 459 is a CIMT under this test.

The minimum conduct test resolves whether an issue triggers a removal ground so that "the inquiry is ended," *unless* the statute is a divisible statute for purposes of the ground. *Descamps*. Under the modified categorical approach, if and only if a statute is "truly" divisible, then an immigration judge may consult the record of conviction, to determine which of the statutory alternatives was the subject of the conviction in that case. Section 459 is not divisible as a crime involving moral turpitude under the Supreme Court's test. See *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353, applying *Descamps v. U.S.,* 133 S.Ct. at 2281, 2283, 2288. Under that test, a statute is divisible only if it meets all three of the following criteria: the statute sets out separate subsections, or separate types of conduct, in the alternative; at least one, but not all, of the alternatives is a categorical match to the relevant generic definition; and a jury is required to decide unanimously between the alternatives in order to find the defendant guilty. *Ibid.*

Courts have found that P.C. § 459 is not divisible under the standard. First, § 459 is not divisible for purposes of the "entry with intent to commit a CIMT" definition, because it is not divisible for purposes of the intended offense. The Ninth Circuit found that the phrase describing the intended offense in P.C. § 459, "grand or petit larceny or any felony," is not divisible because a jury is not required to unanimously decide between theft or any felony, or agree upon the

specific "felony." *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014). Second, § 459 is not divisible for purposes of the "unlawful entry into a dwelling" definition. The Supreme Court found that the term "entry" in P.C. § 459 is not divisible between a lawful or unlawful entry, because the statute does not set out those terms in the alternative and require a jury to decide between them unanimously.

Because P.C. § 459 is indivisible for moral turpitude purposes, the minimum conduct test governs the inquiry. Because the minimum prosecuted conduct falls outside both of the possible definitional standards, no conviction of the offense is a CIMT, as a matter of law.

3. Argument: California Theft, P.C. § 484, Never is a Theft or Fraud Aggravated Felony, Unless It Has *Both* a One Year Sentence Imposed and a Loss to the Victim/s Exceeding $10,000

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).[48]

Theft and fraud have separate and generally mutually exclusive definitions. 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[49] 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)).

Section 484 of the California Penal Code defines "theft" to include several discrete offenses in the alternative, including both theft (taking of property without consent, by stealth), and fraud (taking of property with consent, by deceit) offenses.[50] In practice, P.C. § 484 has been viewed as a divisible statute. For example, a plea to an offense involving theft (rather than fraud or deceit) where the victim's loss exceeded $10,000 is not an aggravated felony.

However, the statute appears not to be divisible under the test set out in *Descamps v. United States, supra* and *Matter of Chairez-Castrejon, supra*. California jury instructions provide that a jury may reach a finding of guilt without unanimously agreeing upon the theory of the theft, i.e., which of the offenses listed in § 484 the defendant committed. See instructions for P.C. §§ 484, 487 at 1-1800 CALCRIM 1861 ("Each theory of theft has different requirements, and I have instructed you on (both/all). You may not find the defendant guilty of theft unless all of you

agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory.")

If P.C. § 484 is not divisible, it must be evaluated based upon the minimum conduct to commit the offense. In that case, arguably no conviction for California theft ever is an aggravated felony under INA §§ 101(a)(43)(G) or (M), regardless of the specific plea or whether the issue is deportability, admissibility, or eligibility for relief. First, § 484(a) never is an aggravated felony as theft even if a sentence of a year is imposed, because the minimum conduct to commit § 484 includes fraud, which is not theft. Second, § 484 never is an aggravated felony as fraud or deceit despite a loss exceeding $10,000, because the minimum conduct to commit § 484 includes theft, which is not fraud. If a person convicted of theft as defined in § 484 received a sentence of a year *and* was found to have caused a loss to the victim/s exceeding $10,000, then the conviction might be an aggravated felony, under both categories. See, e.g., discussion in *Nugent v. Ashcroft*, 367 F.3d 162, 174-175 (3d Cir. 2004), requiring both a loss exceeding $10,000 and a sentence imposed of a year or more, to find an aggravated felony.

4. Connecticut Commercial Burglary (with *Unlawful* Entry) is Never "Burglary"

In an unpublished decision available online,[51] the BIA held that no conviction for commercial burglary under Connecticut law meets the generic definition of "burglary." It found that DHS did not prove that the state statute is divisible between "building" and "vehicle." Let's examine this case using the five steps.

Generic definition: The generic definition of burglary is an unlawful remaining or entry into a "building or structure" with intent to commit a crime.

Minimum prosecuted conduct. Many state statutes define commercial burglary to include things *beyond* buildings or structures. In this case, Conn. Gen. Stat. Ann 53a-103 defines burglary as an unlawful entry into a "building," but a separate section defines "building" to include, among other things, a building, vehicle, watercraft, or aircraft. See CGSA 53a-100(a)(1). The immigrant met his burden of producing cases showing that burglary of a vehicle (which is not a "building or structure") has been prosecuted under the statute.

Categorical match? The minimum conduct with a realistic probability of prosecution under the statute includes burglary of a vehicle. This falls outside the generic definition of "burglary," which is burglary of a building or structure. Under the minimum conduct test, the statute is categorically not a match.

Divisible statute? The issue was whether the statute was divisible between burglary of a "building" and a "vehicle." Citing *Matter of Chairez-Castrejon* and *Descamps v. United States*, the BIA found that the statute was not divisible, because DHS produced no evidence that a jury was required to decide unanimously between "building" and "vehicle." Because the statute was not divisible, the BIA resolved the question under the minimum conduct test, and found that no conviction of the offense ever is burglary.

5. Additional Examples

See also discussion of these offenses in Examples in Part II, above:

- Reckless/intentional discharge of a firearm toward persons, Utah Code §§ 76-10-508.1(1), 76-2-102, which the BIA found is not divisible as a crime of violence[52]

- Burglary, California Penal Code § 459, which the Supreme Court found is not divisible as the aggravated felony burglary[53]

- Distributing marijuana, Georgia Code Ann. § 16-13-30(j)(1), which the Supreme Court found is not divisible as a drug trafficking aggravated felony[54]

- Misdemeanor resisting arrest, Arizona Revised Statute § 13-2508(A)(1), which the Ninth Circuit found is not divisible as a crime of violence[55]

- Vehicle taking, California Vehicle Code § 10851, which the Ninth Circuit found is not divisible as a crime involving moral turpitude[56]

- Spousal battery, California Penal Code 242, 243(e), which arguably is not divisible as a crime of violence, a crime of domestic violence, or a crime involving moral turpitude.

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. Conviction-Based Grounds of Inadmissibility and Deportability

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 because she was convicted of a deportable offense, or is unable to adjust status based on conviction of an inadmissible offense.

The categorical approach governs whether a conviction involved a federally defined ***"controlled substance,"*** although the BIA recently invited argument as to whether it covers the phrase "relating to a controlled substance."[57] The categorical approach governs definitions of terms such as ***"firearm"*** and ***"destructive devices,"*** a crime of ***"stalking,"*** and (with a few

exceptions discussed below) an ***"aggravated felony."*** It governs other grounds with some qualifications, discussed below.

Crimes Involving Moral Turpitude. In the controversial opinion *Matter of Silva-Trevino,* 24 I&N Dec 687 (AG 2008), the Attorney General held that the categorical approach does not fully apply to determining whether a conviction is of a crime involving moral turpitude. Circuit Courts of Appeals have split as to whether to defer to the decision. At this writing the Third, Fourth, Fifth, Ninth, and Eleventh Circuit Courts of Appeals have declined to defer to *Silva-Trevino* and do apply the full categorical approach to moral turpitude determinations.[58] The Seventh and Eighth Circuit Courts of Appeals apply *Silva-Trevino*, meaning that they do not apply the full categorical approach to these determinations.[59] Where there is no circuit precedent, the BIA will apply *Silva-Trevino.*

Crime of Child Abuse, Neglect or Abandonment. Conviction of a crime of child abuse, neglect or abandonment is a deportation ground. INA § 237(a)(2)(E)(i). The BIA stated that this is subject to the categorical approach, as "there is nothing in the language of the 'crime of child abuse' clause of section 237(a)(2)(E)(i) that invites inquiry into facts unrelated to an alien's 'convicted conduct.'" *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 514-15 (BIA 2008). The BIA noted that it must defer to federal courts on this issue. *Ibid.* However, the manner in which the Board *applied* the categorical approach in *Velazquez-Herrera* should be held overruled by the Supreme Court in *Moncrieffe* and *Descamps.* The BIA correctly held that an age-neutral offense (there, a Washington assault offense) is not categorically a deportable crime of child abuse, but it incorrectly held that the offense can amount to a crime of child abuse as long as the record of conviction conclusively establishes that the victim was under age 18. *Id.* at 513-517. The Supreme Court cases and *Matter of Chairez-Castrejon* hold that a judge may consult the record of conviction only if a statute is divisible. A statute is divisible only if it sets out alternative elements, at least one of which is a categorical match with the generic definition, where a jury is required to decide unanimously between the elements. Under this test, an age-neutral statute is not divisible for purposes of being a crime against a child. Therefore the minimum prosecuted conduct test applies, and under that test no conviction of an age-neutral statute can be a "crime of child abuse." Because the BIA has not yet published an opinion reviewing this issue, practitioners must make the argument to immigration authorities, absent a federal court decision on the matter.

Felony Crime of Violence. An offense that qualifies as a "crime of violence" under 18 USC § 16 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. See INA §§ 101(a)(43)(F), 237(a)(2)(E)(i). A felony conviction can qualify as a "crime of violence" under 18 USC § 16(b) if it involves a substantial risk that violence will be used in committing the offense. Some courts have held that a felony meets this risk-based test if the "ordinary" case[60] would involve such a risk, but have interpreted the "ordinary" case test in a way that conflicts with the minimum conduct test. This is a developing are; counsel should be aware of opinions by the governing circuit court of appeals. Note that in *Matter of Chairez-Castrejon,* 26 I&N Dec. at 351-352, the BIA appeared to reconcile these standards and apply the minimum conduct test. See also Zota, "Crimes of Violence" (May 25, 2012) at www.nipnlg.org.[61]

Circumstance-Specific: Crime of 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.[62] For more information on "circumstance specific" inquiries and *Nijhawan*, see Practice Advisories available online.[63]

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: 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 prosecuted 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.

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 and some federal courts do not require the domestic relationship to be an element of the offense. See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (the domestic relationship need not be an element, but must be proved by conclusive evidence in the reviewable record of conviction); *Matter of Velasquez*, 25 I&N Dec. 278, n.1 (BIA 2010). DHS might argue, based on inconclusive Supreme Court precedent,[64] that the domestic relationship is

a circumstance-specific factor, or that evidence from outside the record may be used to prove the relationship. While the BIA in *Matter of Velasquez*, *supra,* did reaffirm its rule that the domestic relationship need not be an element of the offense, it did not discuss the evidentiary standard for proving the relationship, or the circumstance-specific test. (The offense in *Velasquez* had the domestic relationship as an element.)

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[65] 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.[66]

C. Purely Discretionary Decisions

The categorical approach does not apply in a purely discretionary decision, e.g. whether an applicant 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*, 136 S.Ct. at 1692 (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

The BIA has held that the categorical approach does not wholly apply to some conviction-based bars to eligibility for relief that are not also removal grounds. This includes conviction of a "particularly serious crime" (bar to asylum and withholding),[67] conviction a "violent or dangerous offense" (potential bar to asylum, asylee or refugee adjustment waiver under INA § 209(c), or a waiver under INA § 212(h))[68] and a "significant misdemeanor" (bar to DACA).[69]

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 petitioning for a relative.[70]

ENDNOTES

---

[1] Katherine Brady of the Immigrant Legal Resource Center wrote this advisory. Many thanks to Kara Hartzler, Raha Jorjani, Alison Kamhi, Dan Kesselbrenner, Graciela Martinez, Michael Mehr, and Manny Vargas for their very helpful comments. Mistakes belong to the author. Copyright ILRC 2014.

[2] In "Practice Advisories" at www.nipnlg.org, scroll to see "*Matter Of Chairez-Castrejon:* BIA Applies *Moncrieffe* and *Descamps* to Modify and Clarify Its Views on Proper Application of the Categorical Approach" by the National Immigration Project of the National Lawyers Guild (NIP/NLG) and Immigrant Defense Project (IDP), (July 31, 2014) (hereafter "*Chairez-Castrejon* Advisory"); "*Descamps v. United States* and the Modified Categorical Approach" by NIPNLG and IDP (July 17, 2013) (hereafter "*Descamps* Advisory"); and "*Moncrieffe v. Holder:* Implications for Drug Charges and Other Issues Involving the Categorical Approach" by NIP/NLG, IDP, and the Legal Action Center of the American Immigration Counsel (May 2013) (hereafter *Moncrieffe* Advisory). At www.ilrc.org/crimes scroll to see "Great Ninth Circuit Case On Divisible Statutes; California Burglary Never Is Attempted Theft (*Rendon v. Holder*) August 2014 (hereafter "*Rendon* Advisory"); "*Moncrieffe* and *Olivas-Motta*: Fourteen Crim/Imm Defenses In The Ninth Circuit" by ILRC (May 2013) (hereafter "Fourteen Crim/Imm Defenses").

[3] See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[4] See, e.g., *Matter of Chairez-Castrejon,* 26 I&N Dec. at 351.

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

[6] Quotations are from *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353, applying *Descamps v. United States,* 133 S.Ct. at 2281, 2283, 2288.

[7] The Supreme Court reserved judgment as to "whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." *Descamps,* 133 S.Ct. at 2291.

[8] See *Ibid.*

[9] Although the specifics vary across circuits, generally the reviewable record of conviction by plea consists of "the statutory 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, 20 (2005). The reviewable record of a conviction by jury includes documents such as the charging document and jury instructions. *Taylor v. United States*, 495 U.S. 575, 602 (U.S.1990). See Part II, discussion of Step 5.

[10] See, e.g., *Descamps*, 133 S.Ct. at 2286. The only exception would be if the individual chooses to use the facts from his or her own case to demonstrate that the minimum conduct has a realistic probability of being prosecuted under the statute, as discussed in Step Three.

[11] See INA §§ 212(a)(2), 237(a)(2).

[12] See INA § 101(a)(43).

[13] *Taylor v. United States*, 495 U.S. 575, 598 (1990).

[14] 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 Brady, "Who Decides? *Chevron, Brand X,* and *Mead* Principles" at http://www.ilrc.org/files/documents/overview_of_chevron_mead__brand_x.pdf

[15] See, e.g., *Descamps,* 133 S. Ct. at 2281, 2283, cited in *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353.

[16] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe*, 133 S. Ct. at 1684 and in *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014).

[17] *Ibid.* The Ninth Circuit held that a single unpublished opinion is sufficient to meet the "realistic probability" test. *Osequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010).

[18] *Jean-Louis v. Att'y Gen*., 582 F.3d 462, 481 (3d Cir. 2009); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572-73 (6th Cir. 20092007); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); *Ramos v. Att'y Gen*., 709 F.3d 1066, 1071-72 (11th Cir. 2013). See also 2007).

[19] *Grisel, supra.*

[20] See, e.g., *U.S. v. Aguileras-Rios,* 754 F.3d 1105 (9th Cir. 2014) (holding that conviction for being a felon in possession of a firearm under former Cal. P.C. §12021 (current P.C. §29800) is categorically not a firearms aggravated felony under INA § 101(a)(43)(E), or a deportable firearms offense under INA § 237(a)(2)(C), because unpublished cases establish that the minimum conduct with a realistic probability of being prosecuted under the statute includes an antique firearm).

[21] But note that in *Matter of Chairez-Castrejon, supra,* the BIA held that "recklessness" was the minimum conduct to violate the Utah statute at issue, based on the fact that it appeared in the statutory language, without requiring additional case evidence. 26 I&N Dec. at 352-55.

[22] See, e.g., *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) and cases in next endnote.

[23] In the Ninth Circuit, note that in cases published after *Descamps* – and after *Matter of Ferriera* -- 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 proof of prosecution. See *Coronado v. Holder,* 759 F.3d 977 (9th Cir. 2014) (Cal H&S § 11379); *Medina-Lara v Holder,* --F.3d-- (9th Cir. October 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 18 USC § 16, and see, e.g., *Johnson v. United States,* 130 S.Ct. 1265, 1273 (2010); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

[25] While earlier cases might have (wrongly) held an overbroad statute to be divisible (see, e.g., *Matter of Sanudo, supra*), since *Moncrieffe* and *Descamps* the statute must be evaluated under the minimum conduct standard. See, e.g., *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 354-55 (BIA 2014); *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013).

[26] See, e.g., *Moncrieffe*, 133 S. Ct. at 1684 (holding that because the minimum conduct required to commit the offense was not an aggravated felony, Mr. Moncrieffe was eligible for LPR cancellation; he did not need to produce a record of conviction or prove anything about the underlying conduct); *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014) (same rule); *Matter of Chairez-Castrejon*, *supra* (same rule).

[27] See, e.g., *Descamps*, 133 S.Ct. at 2286. "Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant… We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over."

[28] See, e.g., *Matter of Chairez-Castrejon,* 26 I&N Dec. at 356, citing *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (2007) and *Moncrieffe*, 133 S. Ct. at 1684–85, 1693.

[29] See *Chevron, supra,* holding that federal courts may owe deference to an administrative agency interpretation of

the statute 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*).

[30] See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (holding that because the minimum conduct required to commit the offense was not an aggravated felony, Mr. Moncrieffe did not need to produce a record of conviction, and was eligible for LPR cancellation); *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014) (same rule); *Matter of Chairez-Castrejon*, *supra* (same rule).

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

[32] 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).

[33] See, e.g., *Moncrieffe*, 133 S. Ct. at 1684 (holding that because the minimum conduct required to commit the offense was not an aggravated felony, Mr. Moncrieffe did not need to produce a record of conviction, and was eligible for LPR cancellation); *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014) (same rule); *Matter of Chairez-Castrejon*, *supra* (same rule).

[34] See, e.g., *Descamps v. United States*, 133 S.Ct. at 2286. "Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant....We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over."

[35] Named for *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903).

[36] See *People v. Sutherland*, 17 Cal.App. 4th 602, 21 Cal. Rptr. 2d 752, 758 (Ct. App. 1993), describing the *Sullivan* rule and its evolution.

[37] See *Descamps v. United States*, 136 S.Ct. at 2281.

> 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.

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

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

[40] *Behre v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Omari v. Gonzales,* 419 F.3d 303 (5th Cir. 2005); *Almanza-Arenas v. Holder*, --F.3d-- (9th Cir. Nov. 10, 2014)

[41] *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009).

[42] See *Syblis v. Atty. Gen*., 763 F.3d 348 (3d Cir. 2014) (addressing a moral turpitude determination under *Matter of Silva Trevino* (see discussion of *Silva-Trevino* in Part IV of this article)) (petition for rehearing will be filed), *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014) (addressing "relating to" a controlled substance) (petition for rehearing denied).

[43] See the supplemental and amicus briefs in the pending Ninth Circuit case *Almanza-Arenas v. Holder,* which ask the court to reconsider the rules set out in *Young, supra*, in light of *Moncrieffe, supra*. The briefs are at www.ilrc.org/crimes; search for *Almanza-Arenas*. Note that a petition for rehearing likely will be filed in the Third Circuit case, *Syblis v. Atty. Gen., supra.*

[44] 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).

[45] 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).

[46] The Ninth Circuit noted that *People v. Islas, supra* upheld a conviction for burglary with intent to commit false imprisonment by menace where two gang members hid in a family's apartment for 15 minutes and "did not brandish a weapon, did not act in a hostile manner, did not touch the woman or her family, did not issue any verbal threats, and, in fact, expressly told her that 'they were *not* going to harm her or her children.'" *Turijan v. Holder, supra* at 622.

[47] The Supreme Court held that a statute is not divisible unless it sets out elements in the alternative, where a jury must unanimously choose between the elements. See *Matter of Chairez-Castrejon,* 26 I&N Dec. at 353-55, applying *Descamps v. U.S.,* 133 S.Ct. at 2281, 2283, 2288. Because § 496 does not meet this standard, it is not a divisible statute.

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

[49] See *Matter of Garcia-Madruga*, at 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.

[50] 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….."

[51] See *Matter of Kwei Genego*, A047 376 145 (BIA Oct. 2, 2014), published by the Immigrant & Refugee Appellate Center at https://www.scribd.com/doc/242405237/Kwei-Genego-A047-376-145-BIA-Oct-2-2014

[52] See *Matter of Chairez-Castrejon*, 26 I&N 349 (BIA 2014).

[53] See *Descamps v. United States*, 133 S.Ct. 2276 (2013).

[54] See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[55] See *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013).

[56] *Almanza-Arenas v. Holder, supra.*

[57] See *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408, 412 n. 8 (BIA 2014).

[58] *Jean-Louis v. Atty Gen*., 582 F.3d 462 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Silva-Trevino v. Holder*, 742 F.3d 197(5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Fajardo v. US AG,* 659 F.3d 1303 (11th Cir. 2011)

[59] *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010); *Godoy-Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012), *pet'n for reh'g denied*. *But see Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010)

[60] See *James v. United States*, 550 U.S. 192, 196 (2007).

[61] See "Practice Advisory: Crimes of Violence" at www.nipnlg.org/legalresources/practice_advisories/cd_pa_Crime_of_Violence_revised_May2012.pdf.

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

[63] See NIP/NLG and IDP, "The Impact of Nijhawan v. Holder on the Categorical Approach" (2009) at http://www.nipnlg.org/legalresources/cd_pa_Nijhawan%20and%20the%20Categorical%20Approach%20-%20NIPNLG%20and%20IDP%20-%202009.pdf and see ILRC, "Preliminary Advisory on Nijhawan v. Holder" (2009) at http://www.ilrc.org/files/practice_advisory_nijhawan_ilrc.pdf.

[64] Briefly, in *United States v. Hayes*, 129 S.Ct. 1079 (2009) the Supreme Court considered a federal statute that defines a "misdemeanor domestic violence" offense in language that is very similar to a deportable "crime of domestic violence" at INA § 237(a)(2)(E)(i). *Haye*s held that the domestic relationship need not be an element of a

"misdemeanor domestic violence" offense. It did not use the term "circumstance-specific," which the Court first used in *Nijhawan v. Holder, supra,* published later that year. In *Matter of Velasquez*, 25 I&N Dec. 278, n.1 (BIA 2010) the BIA cited to *Hayes* in reaffirming its rule that an offense does not need to have a domestic relationship as an element in order to be a deportable crime of domestic violence, but the BIA did not discuss the evidentiary standard for proving the relationship or the circumstance-specific test. In *United States v. Castleman*, 134 S.Ct. 1305, n. 4 (2013), the Supreme Court distinguished "misdemeanor domestic violence" and "deportable crime of domestic violence" in certain ways. See further discussion in NIP/NLG and IDP, "Why *United States v. Castleman* Does Not Hurt Your Immigration Case And May Help It" (2014) at http://www.nipnlg.org/legalresources/practice_advisories/cd_pa_Castleman_Practice_Advisory_04-07-2014.pdf.

[65] See discussion of burden of proof at *Kepilino v. Gonzales*, 454 F.3d 1057, 1059-61 (9th Cir. 2006). While the opinion is somewhat hard to follow on this issue, it would appear that the government would have the burden of proving that the conditional resident was not seeking a new admission after return from a trip abroad. See INA § 101(a)(13)(C).

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

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

[68] 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.

[69] The categorical approach is not discussed in DHS materials on DACA, and does not appear to be applied. See materials on http://www.ilrc.org/daca.

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