The Ninth Circuit *En Banc* Decides Key Issues About the Categorical Approach; overturns *Sandoval-Lua*

Young v. Holder __F.3d__ (9th Cir. Sept. 17, 2012) (*en banc*) at
http://www.ca9.uscourts.gov/datastore/opinions/2012/09/17/07-70949.pdf

This quick Advisory provides the headlines from an important Ninth Circuit case published today. Further advisories may provide a more in-depth analysis.

Cases discussed here include *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc), *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1082 n.3 (9th Cir. 2007) (and/or issue) and *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007) and *Rosas-Castaneda v. Holder*, 655 F.3d 875, 883-84 (9th Cir. 2011) (burden of proof issue); see also *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), *Shepard v. United States*, 544 U.S. 13, 26 (2005).

In highly divided opinions, the Ninth Circuit held the following in *Young v. Holder*:

1. "Under the modified categorical approach, a guilty plea to a conjunctively phrased charging document establishes only the minimal facts necessary to sustain a defendant's conviction. In other words, when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes a conviction under at least one, but not necessarily all, of those theories."

2. "An alien cannot carry the burden of demonstrating eligibility for cancellation of removal by merely establishing that the relevant record of conviction is inconclusive as to whether the conviction is for an aggravated felony."

3. "The evidentiary limitations articulated in Shepard v. United States, 544 U.S. 13, 26 (2005), apply when determining, under the modified categorical approach, whether a prior conviction renders an alien ineligible for cancellation of removal."

The good news: "and" versus "or." Where the statute is phrased in the disjunctive ("or") but the complaint was phrased in the conjunctive ("and"), a plea to the complaint means that the defendant committed one, but not necessarily all, of the listed offenses. *Snellenberger* partially overturned, *Malta-Espinoza* affirmed.

> **Example:** Mr Young was convicted under Cal. H&S C § 11352(a), a statute listing many offenses that states in the disjunctive that it is a crime to, e.g., sell, offer to sell, *or* transport a controlled substance. Some of the listed offenses are aggravated felonies (e.g. sale), and some are not (e.g., transport for personal use, offer to sell). Mr. Young pled guilty to a complaint that listed all these offenses in the conjunctive, e.g. sell *and* transport. The government argued that in so doing he pled guilty to *all* the offenses.
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> Held: The court disagreed with the government and found that the record shows that Mr. Young is guilty of at least one of these offenses but not all of them, and not which one. Partially overturned *Snellenberger*, upheld *Malta-Espinoza*, on the issue.

The bad news: The immigrant must prove, using only Shepard documents, that a conviction under a divisible statute is not a bar to relief such as cancellation; if the record is vague, the government wins. The court overturned the *Sandoval-Lua/Rosas-Castaneda* rule, and held that an immigrant who is applying for relief from removal has the burden of presenting evidence that proves that a conviction under a divisible statute is not for an offense that would bar relief. A vague record will not suffice. Further, the immigrant must prove this using only documents from the reviewable record of conviction, i.e. documents that meet the regular rules of the modified categorical approach under *Shepard* and *Taylor*. The dissenting judges pointed out that this may create insurmountable barriers for permanent resident who cannot obtain this evidence, but they did not prevail.

> **Example:** Assume that Young was convicted under Cal. H&S C § 11352(a) of an offense involving cocaine base, and therefore is deportable under the controlled substance ground. The question is whether he is barred from applying for LPR cancellation because his conviction also is an aggravated felony. As discussed above, it is established that despite the fact that he pled to "sale *and* transportation for personal use," courts must read that as "sale *or* transportation." If the conviction was for sale it is an aggravated felony, if it is transportation it is not. The REAL ID statute and regulations provide that the immigrant generally has the burden of proving eligibility for relief from removal, but how does this work when the potential bar to relief is a conviction under a divisible statute?
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> Under *Sandoval-Lua* and cases following, the Ninth Circuit had held that because of the particular nature of the categorical approach, an immigrant in Young's position would meet the burden by producing an inconclusive record of conviction. The current record – showing he pled to "transportation *or* sale" – would be enough to establish eligibility for relief such as cancellation.
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> Today's *en banc* decision in *Young* overturned that rule. Under this decision *Young* must prove by a preponderance of the evidence that the conviction was for transportation rather than sale. To prove it he is limited to the regular *Shepard* documents acceptable under the modified categorical approach, e.g., a plea transcript, written plea agreement, charging paper with proof that he pled to a particular charge, or other evidence from the reviewable record of conviction.

If the question is whether the immigrant is deportable, the burden is reversed. A vague record of conviction under a divisible statute does mean that the immigrant wins, because the government has the burden of proving deportability.

Possible good news. The BIA currently is asserting that the categorical approach does not fully apply in immigration proceedings; rather, some "categorical approach lite" will apply. *See, e.g., Matter of Lanferman, supra.* While further analysis is required, this decision might provide yet more evidence that the Ninth Circuit disagrees with this premise. It is possible that this issue would be addressed in *Deschamps v. United States*, currently pending at the U.S. Supreme Court.