Ninth Circuit Panel Reverses Itself in *Pagayon II* -- Testimony Before an IJ May *Not* Be Used to Characterize an Offense, Or to Link Two Documents from the Record of Conviction

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A Ninth Circuit panel has withdrawn a very bad opinion on the modified categorical approach and substituted a substantially better one. See *Pagayon v. Holder*, --F.3d-- (9th Cir. December 8, 2011) (en banc) ("*Pagayon II"),* withdrawing *Pagayon v. Holder*, 642 F.3d 1246 (9th Cir. June 24, 2011) (*"Pagayon I"*). *Pagayon II* follows and interprets *Perez-Mejia v. Holder*, --F.3d-- (9th Cir. November 23, 2011), amending *Perez-Mejia*, 641 F.3d 1143 (9th Cir. April 21, 2011). These cases refer to 8 CFR 1240.10(c), (d), which describe the plea stage and evidentiary stage of removal proceedings.

The Rule. Whether a respondent's statement to the IJ may serve to characterize an offense of conviction depends upon the "stage" that the removal proceedings are in. *Pagayon* and *Perez-Mejia* reaffirm that in general, admitting and conceding allegations in the NTA in the "plea stage" has legal effect to define the offense of conviction. In contrast, testimony during the "evidentiary stage" may not be used to define the offense, under the rules of the categorical approach. See *Pagayon II,* Slip Op. at 20842-43, citing *Perez-Mejia*, Slip Op. at 20411.

A court "may set aside a determination by the IJ that rests on an alien's *erroneous* concession, at least in some circumstances." *Perez-Mejia,* Slip Op. at 20415 (emphasis added). If the defendant makes a concession that is wrong as a matter of law, for example that an offense meets the definition of aggravated felony when it does not, or is a felony when it is a misdemeanor, the concession is not binding.[1] In *Pagayon* and *Perez-Mejia,* however, the respondents argued that the government did not meet its burden of proof, not that the admission had been wrong as a matter of law.

The Case. A key issue in Mr. Pagayon's case was whether the IJ could find that his conviction was for possession of *methamphetamine* under Calif. H&S § 11377, as opposed to merely possession of an unspecified "controlled substance." Section 11377 is divisible as a deportable drug offense: possession of a "controlled substance" is not a deportable offense, but possession of a federally recognized substance like methamphetamine is. The record before the IJ contained an Abstract of Judgment that showed only that he was convicted under § 11377. The record also contained an Information charging him with § 11377 for possession of methamphetamine. There was nothing written linking the conviction noted in the Abstract to the Information with the more specific charge. What statements by Mr. Pagayon could the IJ consider to find that the conviction was for methamphetamine?

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[1] *Perez-Mejia* provides the following examples, at Slip Op. at 20415-16; see also n. 11. "*See Mandujano-Real v. Mukasey, 526 F.3d 585, 588 (9th Cir. 2008)* ("The Government does not argue, nor could it, that the U's reliance on [the alien's] concession would suffice as a basis for removal if the BIA or the court were to determine that his conviction does not, as a matter of law, constitute an aggravated felony."); *Garcia-Lopez v. Ashcroft, 334 F.3d 840, 844 n.4 (9th Cir. 2003)* (holding that an alien was not bound by his characterization, in an application for suspension of deportation, of his prior conviction as a "felony," because the characterization was "patently inaccurate," and, more importantly, because an alien's "belief about the nature of his offense is irrelevant to the purely legal question of how the offense was categorized or what the maximum penalty was"); *Huerta-Guevara, 321 F.3d at 886* ("[W]e may consider an issue regardless of waiver if the issue is purely one of law and the opposing party will suffer no prejudice.")."

Citing *Perez-Mejia*, in *Pagayon II* the court found that in the "plea stage," the respondent's admission of the allegations in the NTA will serve to characterize the offense of conviction under a divisible statute.

> **Example:** In Mr. Pagayon's case, an NTA allegation stated that he had been convicted of possession of methamphetamine under Calif. H&S 11377. When the IJ asked if he admitted the allegations in the NTA, the unrepresented Mr. Pagayon said, "Yes."
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> Because this admission was at the NTA "plea stage," it established that the conviction was for possession of methamphetamine, a deportable offense.

A different rule applies when the proceeding moves into the "evidentiary stage," where an IJ is seeking evidence to resolve material issues in dispute (for example if the respondent did not admit and concede, or if the IJ was not satisfied with the admission/concession). Then testimony from the respondent cannot be used to identify the offense of conviction under a divisible statute. The IJ may use only the strictly limited criminal court documents that are permitted under the modified categorical approach.

> **Example:** In Mr. Pagayon's case the IJ stated that the Information in the record included a charge of possession of methamphetamine under § 11377 and asked "Are these your convictions?" Mr. Pagayon said, "Yes, Your Honor."

In *Pagayon I* the panel had held that this statement could be used to define the offense of conviction. The panel held that while testimony can't provide facts independently, it can link together two documents from the reviewable record of conviction.

In *Pagayon II* the panel reversed itself and held that this statement does *not* prove that the substance was methamphetamine. See Slip Op. at 20843.

> Pagayon's admission of the allegation that his drug offense involved methamphetamine was a "pleading stage" admission. By contrast, his admission that he was convicted of the crimes charged in the informations offered by the government was an "evidentiary stage" admission. Under *Perez-Mejia*, the IJ could properly consider the former, but not the latter, in determining whether Pagayon was removable, because it is testimony made during the fact-finding "evidentiary stage."

In Mr. Pagayon's case, the IJ asked the evidentiary question about the Information in the middle of taking the plea to the NTA. The timing of the question did not change the fact that the question was actually part of the evidentiary stage. See *Pagayon II,* Slip Op. at 20844:

> As Perez-Mejia recognized, removal proceedings are "not always neatly divided into pleading and evidentiary stages." Slip op. at 20413 n.10. That is certainly the case here. After asking Pagayon to admit or deny the government's allegations, the initial IJ detoured into the evidentiary phase of the proceedings by asking Pagayon to confirm that his convictions were for the crimes charged in the informations he entered into evidence. Further muddying the waters, the successor IJ returned to the pleadings phase to allow Pagayon to withdraw his concession of removability and pursue his claim of citizenship.