PEREIDA V. WILKINSON AND CALIFORNIA OFFENSES

By Kathy Brady

Pereida v. Wilkinson, 141 S.Ct. 754 (March 4, 2021), overruling *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc).

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I. Overview

In *Pereida v. Wilkinson,* the Supreme Court addressed how certain criminal convictions are evaluated in immigration proceedings, under the "modified categorical approach."

Pereida is a damaging opinion that will affect defense strategies in criminal and immigration proceedings, especially relating to drug offenses. In technical terms, the bottom line is:

- An "inconclusive" record of conviction under a divisible statute will *not* protect an applicant for immigration relief. See Part II.A, and see criminal defense goals at p. 12, below.
- Further, based on remarks by the majority, an inconclusive record of conviction might not be a truly secure defense for a lawful permanent resident trying to avoid deportability, at least if the conviction occurred on or after March 4, 2021. See Part II.B, below.

This advisory will not discuss the flawed reasoning of the majority opinion, which misconstrued and rewrote the modified categorical approach and characterized it as a factual rather than legal question. For that discussion, see the dissent and national practice advisories.[1]

The purpose of this advisory is to identify which parts of the categorical approach *Pereida* did and did not change, and discuss how this affects defense strategy using California offenses as a model. This Overview is followed by a Discussion section, which will (a) walk through the categorical approach under *Pereida*, as applied to California possession of a controlled substance, (b) discuss the majority's statement in *Pereida* that an applicant for relief can use a wider range of evidence in the modified categorical approach, and (c) discuss how *Pereida* changes defense strategies for selected California offenses.

The categorical approach is the analysis authorities use to decide whether a criminal conviction triggers certain grounds of removal.[2] In this analysis, a single criminal statute is deemed "divisible" if it sets out multiple, legally separate offenses, where at least one offense triggers an immigration penalty and one does not. If a noncitizen was convicted under a divisible statute, the question is, *which* sub-offense was the person convicted of? One that triggers the immigration penalty, or one that does not? The modified categorical approach supplies the analysis and rules for how an adjudicator determines this. We will refer to the offense that the person actually was convicted of as their "offense of conviction."

> **Example:** Mr. Pereida was convicted under a divisible Nebraska statute that set out four separate offenses. At least one of these offenses was a crime involving

[1] See, e.g., IDP, NIPNLG, *Practice Alert: Pereida v. Wilkinson* (March 10, 2021) at https://nipnlg.org/practice.html and Kahn, *I'll Never Be Your Beast of Burden (Unless You're a Noncitizen): Pereida v. Wilkinson* (March 7, 2021) at https://topoftheninth.com/

[2] See, e.g., ILRC, *How to Use the Categorical Approach Now* (Dec. 2019, update forthcoming) at https://www.ilrc.org/chart

moral turpitude (CIMT) that would be a bar to his application for non-LPR cancellation, and at least one was not a CIMT and would not be a bar. The few documents that Mr. Pereida submitted from his "reviewable record of conviction" did not identify the offense of conviction; they just said that he was convicted under the statute. That is an "inconclusive" record of conviction.

Some circuits, including the Ninth Circuit in *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc), had held that because the categorical approach is a legal, not factual, inquiry and because it requires certainty, an inconclusive record of conviction under a divisible statute is sufficient for the immigrant to prove eligibility for relief. They would have found Mr. Pereida eligible for relief. Other circuits disagreed, and the issue went to the Supreme Court.

In *Pereida* the majority held that the modified categorical approach is a factual, not legal, inquiry. An applicant for relief convicted under a divisible statute has the burden of producing evidence to prove that their offense of conviction is *not* one that is a bar to the relief. If the applicant's evidence is inconclusive, their conviction is deemed a bar and they are ineligible for the relief. Because Mr. Pereida's record of conviction was inconclusive, his conviction was a bar to non-LPR cancellation. *Pereida* overruled cases such as *Marinelarena v. Barr*, *supra.*

The majority also made a surprising statement, which arguably is dicta, about evidence. It stated that under the modified categorical approach, an applicant for immigration relief is *not* restricted to submitting documents from "reviewable record of conviction," as prescribed by *Shepard v. United States*,[3] to prove their offense of conviction. *Shepard* does not necessarily apply in immigration proceedings, but only in criminal proceedings. Thus an applicant for relief can use a range of evidence, perhaps including testimony, to meet their burden of proof.

The majority's statement contradicts consistent federal precedent that has applied *Shepard* and the modified categorical approach equally in immigration and federal criminal proceedings. It also appears to be dicta. Neither party in *Pereida* had raised or briefed the issue. But because the majority of the Supreme Court signed off on it, it is conceivable that some federal courts will withdraw from their precedent and allow applicants for relief to use the wider range of evidence to prove that their conviction under a divisible statute is not a bar. This could present a risk, however, in that ICE might assert that it also can use a range of evidence to prove that a permanent resident convicted under a divisible statute is *deportable*. See further discussion of the evidentiary rule in Part II.B, below.

It is important to understand what *Pereida* does and does not change about the categorical approach. See discussion in Part II.A, below.

[3] *Shepard v. United States*, 544 U.S. 13, 26 (2005).

- *Pereida* does not change the analysis of a criminal offense: whether a particular statute is a categorical match to some removal ground, or is overbroad, or is divisible.
- Only after a statute is found to be truly divisible do we go to the "modified categorical approach," where *Pereida* comes into play. Then:
    - An applicant for relief has the burden of producing evidence to prove that their conviction is not a bar. If evidence is inconclusive or unavailable, the applicant loses.
    - The majority stated that an applicant for relief may be able to use a range of evidence, beyond the "reviewable record of conviction." to prove the offense of conviction. (ICE might assert that it also can use a range of evidence to prove that a permanent resident convicted under a divisible statute is deportable.)

The first step in dealing with *Pereida* is to ascertain whether the particular criminal statute is divisible. Criminal defense counsel and immigration advocates can access such analyses of over 100 California offenses in the free *California Quick Reference Chart.*[4] See additional free resources at www.ilrc.org.

Consider Post-Conviction Relief. If your client has a prior California conviction that will bar them from relief under *Pereida*, consider the possibility of eliminating the conviction by getting post-conviction relief. See Part II.C, below, for more on this and other defense strategies.

II. Discussion

A. The Categorical Approach and *Pereida*: Possession of a Controlled Substance

This is a brief discussion of how the categorical approach applies to the offense of possession of a controlled substance, California Health & Safety Code § 11377, and the effect of *Pereida*. For more background on the categorical approach, consult resources such as ILRC, *How to Use the Categorical Approach Now* (Dec. 2019, update forthcoming).[5]

Every criminal law term that appears in removal grounds (e.g., controlled substance, crime involving moral turpitude, burglary) has a technical, federal definition, referred to as the "generic" definition. The categorical approach determines whether the offense that the noncitizen was convicted of sufficiently matches that generic definition, such that it makes the person removable.

[4] Advocates can access the California Chart by registering at https://calchart.ilrc.org/registration/
[5] Available at https://www.ilrc.org/chart

1. Step One: The Categorical Approach (*Pereida* does not affect this)

Here we compare the elements of the generic definition of the term in the removal ground, to the elements of the criminal statute under which our client was convicted. We do not look at what our client actually did or pled guilty to. Instead, we consider *all possible conduct* that has a realistic probability of being prosecuted under that criminal statute, and compare *that* to the generic definition. We hope to find that the criminal statute is "overbroad," meaning that it reaches some conduct that is not covered by the generic definition.

Let's compare the generic definition of a controlled substance, as used in immigration law, with the definition in California H&S C § 11377, possession of a controlled substance.

- *Generic definition of "controlled substance."* The removal grounds define a controlled substance according to federal drug schedules at 21 USC § 802. These include substances like ecstasy and morphine, but do not include chorionic gonadotropin or khat (although khat has a complex analysis[6]).
- *Substances reached by H&S C § 11377.* This includes substances like ecstasy and morphine, and also includes chorionic gonadotropin and khat.
- *Result:* California H&S C § 11377 is "overbroad" because it reaches conduct (possession of chorionic gonadotropin or khat) not reached by the generic definition.

If, like here, the state statute is overbroad, that's good. We have passed the Step One test and will go on to Step Two.

If instead there is no conduct covered by the state statute that is not also covered by the generic definition, the two are a "categorical match." That's bad: it means that every noncitizen convicted of that offense will come within the removal ground at issue. The inquiry ends.

2. Step Two: The Divisibility Analysis (*Pereida* does not affect this)

As always, here we determine whether our client's overbroad criminal statute also is "divisible." In a divisible statute, "a single criminal statute will list multiple, stand-alone offenses, some of which trigger consequences under federal law, and others of which do not." *Pereida* at 763.

For a statute to be truly divisible, it must be phrased in the alternative (using "or"). Further, these alternative phrases must set out "elements" (describing different offenses) rather than just "means" (describing different ways to commit a single offense). Determining whether these

[6] The khat plant itself is not listed in federal drug schedules, but certain chemicals that are present in some but not all khat plants, and that come into being upon ingestion, are listed in federal schedules. Whether possession of khat itself is possession of a federal substance has been handled differently in various criminal and immigration cases. See, e.g., *Argaw v. Ashcroft*, 395 F.3d 521, 526 (4th Cir. 2005). The Ninth Circuit has not ruled on this issue.

statutory phrases set out "elements" versus "means" can require a complex analysis[7] that we won't review here.

> *Is California H&S C § 11377 divisible as to the substance?* Section 11377 incorporates state drug schedules that are phrased in the alternative (e.g., "morphine, ecstasy, *or* chorionic gonadotropin"), where at least one alternative comes within the removal ground and another does not. The Ninth Circuit held that the listed substances are elements, not means.[8] In other words, it found that § 11377 contains dozens of separate offenses, including possession of ecstasy, possession of morphine, and possession of chorionic gonadotropin. Section 11377 is divisible for purposes of the controlled substance removal grounds.

If, as here, the statute is divisible, we go on to Step Three, the modified categorical approach. This is where *Pereida* comes in.

If a statute is *not* divisible ("indivisible"), the immigrant wins big: *no* conviction under that statute triggers the removal ground at issue. For example, California Vehicle Code § 23152(f), driving under the influence of a "drug," should be held overbroad because "drug" includes both controlled and non-controlled substances.[9] It should be held indivisible because the statute is not phrased in the alternative: "drug" is a single term, and it is not further defined by some other statute that is phrased in the alternative. Because the statute is overbroad and indivisible, no one convicted of VC § 23152(f) should come within a controlled substance removal ground. This is true regardless of the underlying facts or what the person pled guilty to. (Note that this still is not an ideal plea; see *California Chart.*)

Fortunately, most California statutes are *not* divisible. Unfortunately, many California drug statutes, as well as a few other commonly charged offenses, are divisible.

3. Step Three: The Modified Categorical Approach and *Pereida*

If the statute is truly divisible, the adjudicator is permitted to examine evidence about the noncitizen's own conviction to see if it conclusively shows of *which* offense listed in the divisible statute that person was convicted. This is called the modified categorical approach.

For H&S C § 11377, the adjudicator can look at the evidence to try to determine whether the conviction was for, e.g., possession of ecstasy (which triggers the controlled substance removal grounds) or possession of chorionic gonadotropin (which does not).

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[7] See, e.g., *Mathis v. United States*, 136 S.Ct. 2243, 2256-58 (2016).
[8] *United States v Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (en banc).
[9] See, e.g., *People v. Olive* (2001) 92 Cal. App. 4th Supp. 21, 26,and see definition of "drug" at VC § 312.

Sometimes the record is clear. For example, if at plea the defendant said, "I possessed ecstasy" or "I possessed chorionic gonadotropin," that is clear.

What happens if the record is *inconclusive* (unclear)? For our example, what happens if the record only proves that the person was convicted of possessing "a controlled substance" in violation of H&S C § 11377, without ever naming the substance? Or, what if the record of conviction is unavailable: the criminal court destroyed or lost it? This is where *Pereida* applies.

- ✓ If the issue is whether a noncitizen is eligible for relief, *Pereida* holds that the noncitizen must produce evidence to prove that their conviction is *not* a bar to relief. If the evidence is inconclusive (vague or unavailable), they are not eligible for relief. This is what happened to Mr. Pereida.
- ✓ If the issue is whether an LPR is deportable, the rule remains that inconclusive evidence means that the immigrant is *not* deportable. ICE must prove with clear and convincing evidence that the conviction *is* of a deportable offense.
- ✓ What evidence can the parties use under the modified categorical approach, to prove the offense of conviction? Courts consistently have held that only the *Shepard* "reviewable record of conviction" documents can be used. However, the majority in *Pereida* suggested that applicants for relief can use a range of evidence beyond that, perhaps including testimony. ICE might also try to claim this right. See Part B, below.

Pereida and Noncitizens Who Apply for Relief. In the context of California controlled substance offenses, *Pereida* creates real difficulties for noncitizens who must apply for relief. Say that your client must apply for non-LPR cancellation, and an inadmissible or deportable conviction of a controlled substance will destroy their eligibility. Under *Pereida,* if the reviewable record of conviction for H&S C § 11377 is inconclusive as to the substance ("I possessed a controlled substance"), the conviction is a bar to relief. To be eligible for relief, your client would have to prove that they were convicted of possessing chorionic gonadotropin, khat, or some other specific, non-federally defined substance. See Part B, below.

Pereida involved relief from removal (non-LPR cancellation), but DHS will assert that the rule applies any time a noncitizen has the burden of showing admissibility or eligibility for status, for example at admission, adjustment, or applications such as naturalization. Advocates may be able to push back, considering that *Pereida* relied heavily on language in 8 USC § 1229a(c)(4), "Applications for Relief from Removal." But while making this argument, at the same time advocates should investigate the possibility of obtaining post-conviction relief.

Pereida and Permanent Residents Who Are Contesting Deportability. *Pereida* did not change the burden of proof for a lawful permanent resident (LPR) contesting deportability. If the only basis for deportability is a conviction under a divisible statute, the government has the burden to prove that the conviction was for a deportable offense.

However, ICE may argue that because the majority stated that an applicant for relief can use evidence beyond the *Shepard* documents, ICE also should be able to use that in order to prove deportability. See next section.

B. *Pereida, Shepard*, and Evidence in the Modified Categorical Approach

(*Pereida* only affects noncitizens convicted under "divisible" statutes. See Part A, above.)

The holding of *Pereida* is that immigrants applying for relief from removal have the burden to produce evidence that proves that their conviction under a divisible statute is not a bar to that relief, according to rules of the modified categorical approach.

What evidence can the applicant use to show this? Courts uniformly have held that the only permissible evidence in the modified categorical approach is documents from the "reviewable record of conviction" in the person's criminal case. In *Shepard v. United States*, 544 U.S. 13, 26 (2005), the Court held that in considering a conviction by plea, the reviewable record "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." While *Shepard* was a criminal case, this rule has been applied equally in criminal and immigration proceedings.

Who must produce the reviewable record of conviction? In *Pereida,* advocates submitted briefs documenting the fact that most immigrants applying for relief are unrepresented and many also are detained, which makes it extremely difficult for them -- as opposed to the government attorneys -- to obtain these records. See *Pereida,* dissent, at 775-76. However, the majority swept aside objections based on unfairness. It held that even if the record of conviction was destroyed, the immigrant bears the burden of production. See *Pereida,* majority, at 766-67.

In response to these concerns, however, the majority stated that applicants for immigration relief may not be limited to the reviewable record of conviction under *Shepard.* An applicant may be able to submit a range of evidence beyond the reviewable record.

> It seems, too, that Mr. Pereida may have overlooked some of the tools Congress afforded aliens faced with record-keeping challenges. In the criminal context, this Court has said that judges seeking to ascertain the defendant's crime of conviction should refer only to a "limited" set of judicial records. *Shepard*, 544 U.S., at 20–23, 125 S.Ct. 1254. In part, the Court has circumscribed the proof a judge may consult out of concern for the defendant's Sixth Amendment right to a trial by jury … But Sixth Amendment concerns are not present in the immigration context. And in the INA, Congress has expressly authorized parties to introduce a much broader array of proof when it comes to prior convictions—indicating, for example, that a variety of records and attestations

> "shall" be taken as proof of a prior conviction. 8 U.S.C. § 1229a(c)(3)(B). Nor is it even clear whether these many listed forms of proof are meant to be the only permissible ways of proving a conviction, or whether they are simply assured of special treatment when produced. Cf. n. 5, *supra*. Mr. Pereida acknowledges none of this, again perhaps understandably if further evidence could not have helped his cause. Still, it is notable that Congress took significant steps in the INA to ameliorate some of the record-keeping problems Mr. Pereida discusses by allowing aliens considerably more latitude in carrying their burden of proof than he seems to suppose.
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> *Pereida,* 141 S.Ct. at 76

Note that the majority cites documents listed at 8 USC § 1229a(c)(3)(B). That section sets out documents that the government can use to prove deportability by showing that a conviction under a particular statute *occurred.* And, stating that there might be other permissible evidence beyond that list, the majority referenced n.5 of the opinion, which discusses the use of *testimony* to prove eligibility for relief.[10]

The majority raised this idea in response to concerns about the disadvantages faced by applicants for relief, who are not able to obtain *Shepard* documents. The idea could help some applicants, but it has limits.

Evidence submitted by applicants for relief. Some applicants for relief could benefit from lifting the *Shepard* requirements, because if they could not obtain those documents, or the documents were inconclusive, they could prove their offense of conviction by, e.g., offering testimony or a declaration from a defender, prosecutor, or court reporter, or other document. However, many applicants, especially unrepresented and/or detained people, have very few resources. They will face the same or greater obstacles to obtaining declarations or testimony from court personnel as they did in obtaining the *Shepard* documents.

If no other evidence is available, could the applicant themselves, and/or a friend or family member who was present at the time of the conviction, testify as to what offense the applicant was convicted of? Absent evidence to the contrary, could that meet their burden of proof?

ICE evidence to prove deportability. ICE may argue that it too can use evidence beyond the *Shepard* documents to meet its burden to prove that an LPR convicted under a divisible statute

[10] The referenced n. 5, discussing evidence used to establish eligibility for relief in general, states in part: "The INA authorizes an immigration judge to make 'credibility determination[s]' based on an alien's proof, § 1229a(c)(4)(C); it says the immigration judge must determine whether 'testimony is credible, is persuasive, and refers to specific facts sufficient to [discharge] the applicant's burden of proof,' § 1229a(c)(4)(B); and the law requires the alien to comply with regulations requiring him to 'submit information or documentation' supporting his application for relief, *ibid*."

is *deportable*. It may argue that if the *Shepard* restrictions generally are not required in immigration proceedings, or applied to applicants, they should not apply to the government.

If this happened, it could damage an important defense for permanent residents. Say that a permanent resident was charged with § 11377, possession of a controlled substance. Their counsel created an inconclusive record of conviction under *Shepard:* the charge pled to, plea, and judgment all referred only to "a controlled substance," and the defendant did not stipulate to a factual basis or the basis referred only to "a controlled substance." This has been a long-established, secure defense against a charge of deportability.[11] Under *Pereida,* will ICE argue that it can bring in a police officer, prosecutor, or other to testify as to the specific substance? ICE has the resources to obtain such testimony. Would it argue that documents that are not acceptable under *Shepard*, such as the original charging document, police or probation reports, etc., also could be considered cumulatively as evidence of the substance?

Advocates should push back against such an ICE argument. We should argue that the majority's *Shepard* discussion, to the extent courts take it up at all, applies only to applicants for relief, exactly as the Court raised it. Arguments we can investigate include:

First, the *Shepard* discussion in *Pereida* appears to be dicta. Factors indicating that a court's statement is dicta include that the statement addresses a question that was not presented in the case or required to resolve the case; the question was not fully argued by the parties; the court used "hedged" language; and/or the court made the statement as a rebuttal to a counterargument rather than as part of the holding.[12] All of these factors occurred in *Pereida*:

- The Court majority and dissent, and all parties, agreed that the *Shepard* question was not presented and was not required to resolve Mr. Pereida's case.[13]
- Neither party to the case raised, briefed, or argued the *Shepard* question.[14] No court below discussed or ruled on the question (because it was not at issue).

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[11] See, e.g., *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (citing *Shepard*, finding that the noncitizen is not deportable because the record of conviction is inconclusive as to the substance). Long before *Shepard*, the BIA adopted this principal. See, e.g., *Matter of Paulus*, 112 I&N 274 (BIA 1965) (the noncitizen is not deportable because the record of conviction is inconclusive as to the substance).

[12] See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.,* 568 U.S. 519, 548 (2013).

[13] See the majority at pp. 766, 767, "Notably, though, neither Mr. Pereida nor the dissent suggests that record-keeping problems attend this case … Still, even accepting that graver record-keeping problems will arise in other cases, it is not clear what that might tell us." See the dissent at p. 775, "At a minimum, I would not hold, in this case, that the categorical approach's limitation on the documents a judge can consult is inapplicable in immigration proceedings. That argument was neither raised nor briefed by the parties. The Government confirmed several times at oral argument that it had not argued that a judge should be allowed to look at a broader array of evidentiary materials because, in its view, that issue was not implicated since no other documents exist."

[14] See dissent at p. 775, quoted above.

- The majority made their statement only in rebuttal to a counterargument (that their interpretation of the statute would result in unfairness to immigrants). It uses "hedged" language (e.g., "It is not clear what that might tell us …" "It seems Mr. Pereida may have overlooked …." "Nor is it even clear ….")[15]

Second, the majority in *Pereida* did not discuss or acknowledge any of the Supreme Court and other federal precedent decisions that uniformly and directly contradict its suggestion that *Shepard* does not apply in immigration proceedings. At the least, this failure should show that the majority's discussion did not rise to the level of a holding.

The dissent points out that the majority's assertion contradicts Supreme Court precedent providing that *Shepard* applies in immigration proceedings. *Pereida,* dissent at p. 775. It notes that the Sixth Amendment issues relied on by the majority have not been the Court's "only, or even primary, reason for adopting the limitation. Rather, we limited the documents that a judge can review in order 'to implement the object of the statute and avoid evidentiary disputes.'" *Id.* at p. 774. The dissent voiced concern that without *Shepard*, the immigration proceedings "will result in precisely the practical difficulties and potential unfairness that Congress intended to avoid by adopting a categorical approach." *Id.* at p. 775-76.

Without exception, past Supreme Court decisions have provided that *Shepard* applies in immigration proceedings. See dissent at *Pereida*, p. 775, and see *Moncrieffe v. Holder*, 569 U.S. 184 (2013), discussing *Shepard* at pp. 190-91 and applying *Shepard* at 193; *Esquivel Quintana v. Sessions,* 137 S. Ct. 1562, 1568 n.1 (2017) ("Under [the modified categorical] approach . . . the court may review the charging documents, jury instructions, plea agreement, plea colloquy, and similar sources to determine the actual crime of which the alien was convicted."); and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (describing the modified categorical approach and the *Shepard* documents and stating, "The case before us concerns the application of the framework just set forth.") In addition, the Ninth Circuit and other federal courts of appeals have published dozens of precedent decisions on deportability, where the holdings are squarely based on the application of *Shepard.*[16]

However, whether dictum or not, any statement by the Supreme Court carries great weight. Some federal courts might decide that they should withdraw from applying *Shepard* to immigration cases, and extend this to ICE's burden to prove deportability.

To combat this, in ***removal proceedings*** immigration advocates can argue:

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[15] See majority at p. 766, 767.

[16] All Ninth Circuit immigration decisions that get to the modified categorical approach abide by the *Shepard* standard. See, e.g., decisions applying *Shepard* to determine whether the individual can be found deportable, cited in *Ninth Circuit Immigration Outline,* Part D. Criminal and Immigration Law, at Sub-Part III.C. Modified Categorical Approach, at https://www.ca9.uscourts.gov/guides/immigration_outline.php

1) As discussed above, the majority's statements in *Pereida* are not a basis to overrule unanimous precedent of many years by the Supreme Court, governing circuit courts of appeals, and the BIA, which require *Shepard* documents to prove deportability. This precedent cannot be overruled *sub silentio*, in dicta, where the issue was not presented by, or briefed or argued in, the case. The BIA is governed by courts of appeals precedent on the categorical and modified categorical approach.

2) If courts were to adopt a new rule that released ICE from *Shepard* requirements, the rule only could apply prospectively. An adverse change to clearly settled jurisprudence should not be applied retroactively to convictions that occurred before the court announced its new rule (or at the least, to convictions from before *Pereida* was published on March 4, 2021). Permanent residents who faced criminal charges reasonably relied on the uniform, longstanding case law of the Supreme Court and all circuit courts of appeals (and the very long history of this concept at the BIA). See, e.g., discussion of factors for prospective application of a new ruling in *Nunez-Reyes v. Holder*, 646 F.3d 684, 690-94 (9th Cir. 2011) (en banc).

In ***criminal proceedings***, if an immigrant is charged under a damaging divisible statute:

1) An "inconclusive" record of conviction (e.g., "I possessed a controlled substance") *does not help an immigrant who must apply for relief.* If the defendant is undocumented, or has lawful status but already has become deportable or disqualified, so that their only way to remain here is to qualify for relief, there is no harm to an inconclusive record but it does not solve the immigration problem. See Part C for other possible options.

   Exception: If the person was admitted at some point, they are subject to mandatory ICE detention based on certain deportable convictions (8 USC § 1226(c)(1)). An inconclusive record might help them avoid mandatory detention.

2) For a permanent resident in good standing, whose criminal defense goal is to avoid becoming deportable, creating an inconclusive record is far better than nothing, but it may no longer be a guaranteed defense. Until *Pereida* was published, creating an inconclusive record of conviction was a secure defense against being found deportable based on conviction under a divisible statute. Now we must warn defendants that this is not completely secure, because it is possible that some federal courts might change their rule going forward based on *Pereida.*

   By far the best resolution is to plead to a non-drug offense, get pre-trial diversion, etc. See Part C, below. But for people who need to avoid becoming deportable, *if there are no other options, it still is very worthwhile to create an inconclusive record*. Courts may decide *not* to change their rules, and/or ICE may not be motivated or competent enough

to obtain more evidence. (However, if the permanent resident ever becomes deportable for some other reason, the inconclusive record will not preserve eligibility for relief.)

C. Strategies for Some Divisible or Potentially Divisible California Offenses

See further discussion of these and over 100 other California offenses at the ILRC *California Quick Reference Chart*. Criminal defenders and immigration advocates can register for this free resource at https://calchart.ilrc.org/registration/.

Check: Is the statute really divisible? *Pereida* only applies if the statute is divisible! If the statute is not divisible, you may already have won. To research this, start with the *California Chart* and other resources, which should indicate whether a statute has been held divisible or is likely to be. Do additional research as needed. If an offense *might* be divisible, criminal defenders should try hard to plead either to a different offense, or to specific elements under the divisible statute that are immigration-neutral. (In controlled substance cases, the latter may be difficult.)

In removal proceedings, advocates should consider contesting divisibility if necessary. As always, at the same time investigate other defense strategies, including post-conviction relief.

Always investigate post-conviction relief. California has some excellent post-conviction relief laws that may permit the person to return to criminal court to vacate a conviction due to legal error. For example:

- If the conviction record was destroyed, consider PC § 1016.5, alone or with PC § 1473.7.
- If the person is no longer on probation or parole, consider PC § 1473.7.
- If the person was convicted of simple possession of a controlled substance, or possession of paraphernalia, before July 14, 2011, it is possible that any "expungement," e.g., PC § 1203.4, will eliminate the conviction. This defense only applies in immigration proceedings within the Ninth Circuit.[17]
- If the person completed or could complete the former deferred entry of judgment (DEJ) under former PC § 1000 (1997-2017), consider PC §§ 1203.43 and/or 1473.7.
- If six months have not passed since probation was imposed, consider withdrawing the plea pursuant to PC § 1018, based on error.

[17] See ILRC, *Lujan and Nunez* (2011) at https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011

See free online ILRC resources on California post-conviction relief, including a questionnaire to determine possible eligibility for PCR,[18] at www.ilrc.org/immigrant-post-conviction-relief

1. Non-Drug Offenses that May be Divisible Statutes

- ✓ See further discussion at the ILRC *California Quick Reference Chart* and other resources.
- ✓ Some of the below offenses need to get a sentence imposed of 364 days or less, in order to avoid being an aggravated felony. Defenders may be able to craft a "sentence" of less than a year for immigration purposes, even if the person serves more time.[19] *Note: Time added to the original count due to a probation violation counts toward the one year.*
- ✓ Advise any noncitizen client who has had contact with the criminal law system that they should not leave the United States, or even leave Ninth Circuit states, without first consulting with an expert in crim/imm (crimes and immigration) to make sure that it is safe.

a. Penal Code § 32, Accessory After the Fact

Accessory after the fact is very valuable as a substitute plea, because it is not a removable controlled substance, domestic violence, firearms, crime of violence, etc. offense.[20] For example, it is a great substitute for a plea to a drug offense, if one can negotiate it. This is true in all jurisdictions, not just in the Ninth Circuit.

Within the Ninth Circuit, PC § 32 is not a crime involving moral turpitude (CIMT), and is not an aggravated felony even if a sentence of a year or more is imposed.

However, if the person ends up in immigration proceedings *outside* the Ninth Circuit, PC § 32 could be held a CIMT or an aggravated felony if certain factors are present, under Board of Immigration Appeals (BIA) rulings.[21] Therefore, consider the following for all clients, just in case your client is detained and transported outside the Ninth Circuit.

- ✓ Have PC § 32 charged as a new count.
- ✓ Section 32 is not a CIMT in the Ninth Circuit. [22]

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[18] See https://www.ilrc.org/12-questions-spot-california-post-conviction-relief

[19] See ILRC, *California Sentences and Immigration* (November 2020) at https://www.ilrc.org/sites/default/files/resources/immigration_and_sentence_11.2020.pdf

[20] See, e.g., *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (not a drug offense even if the principal's offense involved trafficking); *Matter of Carrillo*, 16 I&N Dec. 625, 626 (BIA 1978) (not a drug or firearms offense); *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993) (not a crime of violence).

[21] Generally, the BIA rule governs unless the federal court of appeals with jurisdiction has ruled otherwise.

[22] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*).

- ***But to further protect the person*** in case they are detained and transferred outside the Ninth Circuit, try to identify on the record a specific non-CIMT that the principal committed. For example, felony burglary, vandalism, possession of a weapon, receipt of stolen property, false personation under PC § 530.5(a), and (probably) false imprisonment are not CIMTs; see other suggestions in the *California Chart*. With this, PC § 32 is not a CIMT even under the BIA's rule. [23]

✓ Section 32 is not an aggravated felony in the Ninth Circuit, even if a year is imposed.[24]

- ***But to further protect the person*** in case they are detained and transferred outside the Ninth Circuit (and as a general practice), try to obtain 364 days or less on each count. Outside the Ninth Circuit, the BIA will find PC § 32 to be an aggravated felony if a year or more is imposed.[25]

b. Penal Code § 118, Perjury

The BIA held that PC § 118 always is a CIMT. The Ninth Circuit held that § 118 is a divisible statute and that written (as opposed to oral) perjury under it is not a CIMT. However, the Ninth Circuit could defer to the BIA in future.

All authorities agree that PC § 118 is an aggravated felony as perjury, if a year or more sentence is imposed. Therefore consider:

✓ A plea to *written* perjury under PC § 118 is not a CIMT in the Ninth Circuit at this time, but that could change. [26] It may be held a CIMT in jurisdictions outside the Ninth Circuit. [27] Therefore, an immigrant who must avoid a CIMT should try hard not to plead to perjury.

- Consider PC §§ 459, 496, 529(a)(3), 530.5(a), or other non-CIMT suggestions in the *California Chart.* If PC § 118 cannot be avoided, plead to written perjury.

✓ To prevent an aggravated felony, obtain 364 days or less imposed on each count.

c. VC § 2800.2, Flight from Police with Wanton Disregard

The Ninth Circuit held that Vehicle Code § 2800.2 never is a CIMT. Under this reasoning, it also never will be a crime of violence, even if the Supreme Court expands that definition. Still,

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[23] *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) (accessory is divisible as a CIMT: it is a CIMT if the principal's offense is one.)

[24] *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056-58 (9th Cir. 2020) *petition for rehearing denied*.

[25] *Matter of Valenzuela Gallardo* 27 I&N Dec. 449 (BIA 2018).

[26] *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir 2016) (*written* perjury under PC § 118 is not a CIMT). However, the Ninth Circuit only declined to defer to the BIA in *Martinez-Recinos, supra,* on the grounds that the BIA did not state its reasoning in that decision. The BIA could come back with a better-presented decision.

[27] *Matter of Martinez-Recinos,* 23 I&N Dec. 175 (BIA 2001) (PC § 118 is categorically (always) a CIMT).

defenders should try to plead specifically to "three traffic offenses" and get a sentence of less than a year, to further protect their clients in case the statute (wrongly) is held to be divisible.

Section 2800.2(a) prohibits flight from police in a vehicle "driven in a willful or wanton disregard for the safety of persons or property." Under § 2800.2(b), this disregard "includes, but is not limited to" committing three or more traffic offenses. The Ninth Circuit held that while evading police with "willful and wanton disregard" may be a CIMT, evading police while violating three traffic laws is not. The court held (1) that the minimum conduct to commit § 2800.2 (involving three traffic offenses) is not a CIMT, and (2) that § 2800.2 is not divisible between violation of three traffic laws and other recklessness. Because § 2800.2 is overbroad and indivisible, *no* conviction is a CIMT for any purpose, even if the record identifies recklessness. *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9th Cir 2017). This divisibility ruling appears likely to be upheld nationally.[28] (Still, for extra protection, the preferred plea is to three traffic offenses.)

The same analysis would apply to crimes of violence (COV). A COV is an aggravated felony if a year or more is imposed. In 2021, the Supreme Court might expand the COV definition to include recklessness.[29] The fact that § 2800.2 is not divisible between traffic violations and recklessness means that *no* conviction would be a COV, even under an expanded definition.

While § 2800.2 ought to have no consequences, to be conservative the best practice is:

- ✓ Defenders should try to negotiate a plea specifically involving the three traffic offenses (although this is not required.)

  They also should try to get a sentence of 364 days or less on any single count. *However,* if a sentence of a year or more is needed on some offense, § 2800.2 is a very good choice for that if one can plead to the traffic offenses, and a pretty good choice even if one cannot.

  The above is not legally necessary to avoid immigration consequences under Ninth Circuit law. But it will help protect the defendant in case a local adjudicator gets the law wrong, or the defendant is transferred to another jurisdiction that has a different analysis.

- ✓ Immigration advocates can cite *Ramirez-Contreras, supra,* to show that no conviction under § 2800.2 is a CIMT, and that it also is not a COV, even if the Supreme Court expands the COV definition to include recklessness.

d. Vehicle Code § 10851, Vehicle Taking

The Ninth Circuit held that § 10851 never is a CIMT, because a temporary taking (joyriding) is not a CIMT, and § 10851 is not divisible between a permanent and temporary taking. This very

[28] This appears straightforward based on the phrase "includes, but is not limited to" in § 2800.2(b), indicating it is an example or means, not an element. See *Mathis v. United States*, 136 S. Ct. 2243, 2255-57 (2016).
[29] See *Borden v. United States* (19-5410), pending.

likely will be the holding in other jurisdictions as well. Still, best practice is to plead to intent to deprive temporarily for extra protection, if that is possible.

The more complex issue is whether § 10851 is an aggravated felony. A conviction of "theft" or "obstruction of justice" is an aggravated felony if a sentence of a year or more is imposed. Section 10851 includes auto theft, which does meet the generic definition of "theft," but it also includes accessory after the fact. The Ninth Circuit held that accessory after the fact under PC § 32 is not an obstruction of justice aggravated felony even if a year is imposed. Outside the Ninth Circuit, the BIA holds the opposite. See discussion at PC § 32, above. The same should apply to accessory under § 10851. The result of all this is:

- ✓ Section 10851 is not a CIMT in the Ninth Circuit, or probably in any jurisdiction.[30]
- ✓ To surely avoid an aggravated felony in every jurisdiction, obtain a sentence of 364 days or less on each count of § 10851.
- ✓ But if a year or more is or later might be imposed, *plead specifically to accessory after the fact under § 10851*. This should prevent it from being an aggravated felony even with a year or more, *within the Ninth Circuit*.[31]
    - Outside the Ninth Circuit, assume that the BIA will prevail and § 10851 with a year imposed will be an aggravated felony, even if the plea was to accessory.[32]
- ✓ Even if a year or more was imposed *and* the person pled to theft, or created a vague record and must apply for relief, there are immigration defenses within the Ninth Circuit:
    - Assert that § 10851 is indivisible between theft and accessory after the fact. Because it is overbroad (accessory is not an aggravated felony) and indivisible, no conviction of § 10851 is an aggravated felony. (See Part A on the categorical approach, above.)

    While this assertion is correct, it may not resolve the case. In 2017 a Ninth Circuit panel found that § 10851 is not divisible between theft and accessory under current Supreme Court standards, but noted that it had been held divisible under older precedent. The three-judge panel found that they lacked authority to overrule that precedent. Instead, a new decision by the Ninth Circuit *en banc* or the Supreme Court is required to find that past precedent is overruled and § 10851 is indivisible.[33] This likely means that you will

[30] *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (*en banc*). It includes joyriding, and thus is not a CIMT as a "substantial deprivation." See *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 853-54 (BIA 2016).
[31] See *United States v Arriaga-Pinon*, 852 F.3d 1195 (9th Cir 2017), and discussion at PC § 32, above.
[32] The BIA likely will hold that both theft and accessory after the fact are aggravated felonies if a year or more is imposed, unless there is contrary federal court rulings. See discussion at PC § 32, above.
[33] *United States v Arriaga-Pinon*, 852 F.3d at 1199-1200.

have to appeal the issue to the BIA and up, until such a decision is published (or until you are able to vacate the § 10851 conviction or sentence for cause).

Pending some new case, if § 10851 is considered divisible and the evidence is inconclusive between theft and accessory, we are left with the rules under *Pereida.* An applicant for relief should seek other evidence beyond the reviewable record to show that the plea was actually to accessory. An LPR who contests deportability under § 10851 based on an inconclusive record ought to win, but *Pereida* has created some doubt about that defense. See Part II.B, above.

e. VC §§ 20001, 20002, Hit and Run

This has been held to be divisible as a CIMT. Any failure to stop is a CIMT, but stopping and then failing to give registration information is not a CIMT.[34]

✓ To avoid a CIMT, always delete the "failed to stop and" language from the complaint, and make it clear that the person does not plead to that conduct. Plead only to 'failing to provide registration,' or better, to "stopping but failing to provide registration."

2. Divisible Controlled Substance Offenses

CRIMINAL DEFENDERS: Even a minor drug conviction with no jail time can be life-destroying for a noncitizen defendant. These cases may require a far more aggressive criminal defense than for a citizen. The defendant may be fighting for their only chance to remain in the U.S. with their spouse or children, or to avoid deadly risks in the home country. The stakes may be high and require an equivalent level of defense. Get expert help if needed.

a. Avoid Conviction of a Removable "Controlled Substance Offense"

Most controlled substance statutes that reference a specific schedule are "divisible" as to the substance. These include H&S C § 11350-52, 11377-79, 11364, and 11550. Conviction can make the person deportable and inadmissible, and some offenses are aggravated felonies.

✓ Defense strategies in criminal court are:

1) Plead to a non-drug offense

- Can the person plead to a different misdemeanor or felony such as PC §§ 32, 415, 459, 594, or any other non-drug offense that is not as harmful to the immigration case? Is it worth offering a strike? The person can safely take

[34] *See Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (VC § 20001(a) is not categorically a crime involving moral turpitude). Assume this is divisible because a jury must unanimously decide which duty defendant failed to perform. CALCRIM 2140, 2141, 2150, 2151. This should also apply to § 20002.

drug counseling or other probation conditions on these offenses, without them becoming a controlled substance offense. Get expert help on these cases.

2) Get pre-trial diversion (diversion after a not-guilty plea), which is not a "conviction" for immigration purposes. See, e.g., PC § 1000 (minor drug offenses), § 1001.36 (mental health issues), and perhaps § 1001.95 (other misdemeanors).

3) Bargain for *informal* pre-trial diversion. Ask to put off the plea hearing so that a motivated client can complete drug counseling, restitution, etc., to support a request for an immigration-neutral plea or dropped charge if they succeed.

4) Plead to a specific non-federal substance, e.g., chorionic gonadotropin or (probably) khat in H&S §§ 11377-79. Some defenders have been able to negotiate this plea.

5) Plead to a drug offense that is not divisible as a controlled substance, because it just uses the term "drug" (or drug or alcohol). See, e.g., B&P C §§ 4141, 4324, VC §§ 23152(e), (f), PC §§ 4573.5, 4573.7, 4573.8. Note that while these are not federal controlled substance convictions, they may lead to difficult questions if the person must apply for admission or relief. Get expert advice.

✓ Create an inconclusive record for a lawful permanent resident? An LPR who is not yet deportable (e.g., does not have a deportable prior conviction), whose needs to avoid a deportable conviction, and who has no other options, may be able to avoid deportability if you create an "inconclusive" record (only refer to "a controlled substance") in all *Shepard* documents (the (new, sanitized) charge pled to, plea colloquy or written agreement, judgment, any factual basis for the plea). Warn the defendant that this defense is less than secure now, because the law is somewhat unsettled and ICE may assert that it can use a range of evidence to prove the substance*. But if there is no other choice, this is far better than nothing*. ICE might not gather additional evidence or testimony in the case, or the immigration judge might not admit it or be persuaded by it.

Note that even if courts were to adopt a new rule about *Shepard* as proof of deportability, arguably it cannot be applied retroactively to convictions from before at least March 4, 2021. For these convictions, an inconclusive record of conviction surely should prevent deportability. Plus, if the conviction is old, ICE may not be able to locate more evidence. Consider this as you analyze the effect of prior convictions that have an inconclusive reviewable record of conviction.

b. At Least Avoid a Drug Trafficking *Aggravated Felony*

Some immigrants can legally survive a removable drug conviction, but almost no immigrant can survive conviction of a drug "aggravated felony." California sale statutes (H&S C §§ 11352, 11360, 11379) are divisible as aggravated felonies according to the verb. To sell, distribute, or

transport a federally-defined substance is an aggravated felony, but (in the Ninth Circuit only) *offering to* sell, distribute, or transport is not.[35]

A conviction for H&S C §§ 11352, 11360, or 11379 is *not* an aggravated felony if:

- ✓ The conviction is for "offering to" sell, transport, or (best) distribute, and immigration proceedings are within the Ninth Circuit. ***Always plead specifically to "offering"*** in any case in which you are forced to plead to a trafficking statute. It will avoid an aggravated felony in the Ninth Circuit, although not elsewhere.
- ✓ The person pled specifically to giving away a small amount of marijuana to an adult under § 11360 (e.g., from before Proposition 64). Giving away less than 28.5 grams is most secure, but giving away more than 28.5 grams also should work.[36] This is true nationally.
- ✓ Convictions for "transporting" that occurred before January 1, 2014 (for §§ 11352, 11379) or January 1, 2016 (for § 11360) are not aggravated felonies, because that included transportation for personal use. This is true nationally, not just in the Ninth Circuit.

If you can bargain for a plea to a specific non-federal substance (e.g., chorionic gonadotropin or probably khat, for § 11379), the conviction will not be a removable controlled substance offense *or* a drug trafficking aggravated felony. It still will be a crime involving moral turpitude.

c. Do Not Plead to Possession for Sale

If the defendant is a noncitizen, *never* plead to possession for sale, H&S C §§ 11351, 11378, or 11359. Along with § 11358, those statutes are automatic aggravated felonies.

- ✓ Try to plead to a non-drug offense, plead down to possession or diversion, or if needed plead *up* to "offering" under §§ 11352, 11379, 11360. Failure to advise the client of the option of pleading up in this way has been held to be ineffective assistance of counsel.[37]
- ✓ A plea to a specific non-federal substance (e.g., for § 11378, chorionic gonadotropin or probably khat), the conviction will not be a drug offense or drug aggravated felony -- although it still will be a CIMT. It still would be best to plead up to 11379 and "offering."

[35] See *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc).

[36] See *California Chart* and see *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013).

[37] See *People v. Bautista*, (2004) 115 Cal.App.4th 229, *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005) (if defendant is a noncitizen, failure to advise and consider pleading up from § 11378 to § 11379 is ineffective assistance of counsel).