Bad Ninth Circuit Decision on the Effect of a Vague Record of Conviction on Immigrant Defendants

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. To see the court's own words, scroll to the bottom of this advisory.

The moral is, if the immigrant defendant will have to apply for status or relief from removal and is pleading to a "divisible" statute, the defendant must plead specifically to the "good" offense, and not just create a vague record of conviction. A vague record of conviction can prevent a green-card holder, refugee or asylee from becoming deportable, but will not otherwise benefit an immigrant defendant.

SUMMARY. The court made two main holdings:

Burden of proof and vague record of conviction. For a conviction under a divisible statute, a vague record of conviction will prevent the offense from serving as a ground of deportability, i.e. from causing a lawful permanent resident to be deported. However the court held that a vague record will *not* prevent the conviction from serving as a bar to eligibility for relief from removal or immigration status. Thus an immigrant who will have to apply for some relief or status – such as an undocumented immigrant, or a permanent resident who has become deportable – needs to make a specific plea to the "good" offense in a divisible statute, and cannot rely on creating a vague record.

And/or. As a little gift, the court did hold that if a criminal statute is phrased in disjunctive ("or") but the charge is phrased in the conjunctive ("and") a plea to the charge does *not* mean that the defendant was convicted of all of the offenses listed in the charge. The court overruled prior case law that had held to the contrary, *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc). While counsel should try to correct a charge and put it in the disjunctive, failure to do this will not hurt the immigrant.

DISCUSSION.

1. Bad news: Vague Record and Eligibility for Relief

A divisible statute is one that reaches some conduct that does, and some that does not, come within an adverse immigration category. It is always best to plead specifically to the "good" offense that does not come within the adverse category, or to locate some other offense that entirely avoids the category.

> **Example:** Sale of heroin is an aggravated felony, while transportation for personal use is not. Calif. H&S C § 11379 prohibits both offenses, so it is divisible for this purpose. Try to plead specifically to transportation rather than

creating a vague record of such as "sale or transportation." This *specific* plea will prevent the offense from being an aggravated felony in every context.

Example: Spousal battery under P.C. § 243(e) is a deportable crime of domestic violence if the conviction was for actual violence, but is not if the conviction was for offensive touching. Try to plead specifically to "offensive touching."

If that is not possible, another option is to create a vague record of conviction, such as a plea to "sale or transportation" or to "battery." In Young v. Holder (9th Cir. Sept. 17, 2012) (*en banc*) the court has clarified the effect of a vague record of conviction – and not in a good way. A vague record is a sure defense where the issue is whether a permanent resident is deportable, but is not a defense where the issue is whether an immigrant can apply for some status or relief.

- ***A vague record of conviction <u>will</u> protect the defendant from being found deportable for the conviction***, because the government has the burden of proving that a conviction is of a *deportable* offense. [1] (The exception is crimes involving moral turpitude; see below.) For the purpose of establishing whether a permanent resident, refugee or asylee is deportable, a vague record provides the same protection as a specific plea to the "good" offense.

  To whom does this apply? A vague record entirely protects a **lawful permanent resident** who is not yet deportable, e.g. who has no prior deportable conviction. The government must prove that the permanent resident is deportable, and a vague record is not sufficient.

  Example: Eduardo is a lawful permanent resident who is convicted under P.C. § 243(e), which is divisible as a deportable "crime of domestic violence." His record of conviction does not state whether the conviction was for offensive touching versus actual violence. Therefore the government cannot meet its burden of proof and he is not deportable under the domestic violence ground.

  Note that a vague record also protects other noncitizens with secure lawful status from being found deportable, for example, **asylees** and **refugees.** However, because the conviction might hurt their status in other ways, an individual analysis is required.

- ***A vague record will <u>not</u> protect the defendant from being found inadmissible or barred from applying for lawful status or relief from removal based on the conviction.*** As we feared that it might, on September 17, 2012 in *Young v. Holder* the Ninth Circuit overturned existing good precedent that held that a vague record also would preserve eligibility for relief. [2] Under *Young*, an immigrant must plead

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[1] INA § 240(c)(3)(A), 8 USC § 1229a(c)(3)(A).

[2] In its pending *en banc* review of *Young v. Holder,* 634 F.3d 1014 (9th Cir. 2011), the Court has asked for briefing about the current rule, which was first set out in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007). See further discussion of this rule in "Victory in Burden of Proof" Practice Advisory at www.ilrc.org/crimes.

specifically to the "good" offense that will preserve eligibility for relief such as cancellation of removal.

Up until now we advised defenders to make every effort to plead specifically to the "good" offense - but if that was not possible, to make a vague record. Now the court has held that a vague record is of no use in avoiding a bar to eligibility to apply for relief.

To whom does this apply, i.e., who needs to apply for relief? This rule is important for an undocumented person who will apply for status, a deportable permanent resident who must apply for some relief from removal, or an asylee or refugee who will apply for permanent residence. They need a specific, good plea.

> ***Example:*** Sofia was convicted under P.C. § 243(e) with a vague record of conviction. However, Sofia is undocumented and wants to apply for non-LPR cancellation as relief from removal. Conviction of a "crime of domestic violence" is a bar to cancellation.
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> Under the new *Young* decision, Sofia's conviction with a vague record is a bar to relief. *She* will have the burden of proving that the conviction was *not* for actual violence, using court documents that make up the reviewable record of conviction. A vague record will not help Sofia – she needs to plea to 243(e) committed by offensive touching.

- ***Exception: Under current law, a vague record will <u>never</u> help prevent a crime involving moral turpitude – regardless of whether the issue is deportability or eligibility for relief.*** A specific plea to an offense that does not involve moral turpitude *will* protect the defendant from a deportable or inadmissible moral turpitude conviction.[3] Under current law a vague record will not.[4]

(However, if a specific plea is not possible, it still is important to get a vague record of conviction, because the Ninth Circuit may decide to reverse this special rule and to treat moral turpitude the same as other immigration categories.)

To whom does this apply? Everyone, in all legal contexts including deportability.

> ***Example:*** A conviction under Calif. Veh. C. § 10851 is a crime involving moral turpitude (CIMT) if the taking was with permanent intent, and is not a CIMT if it was with temporary intent. If a vague record refers to a "temporary *or* permanent" taking, an immigration judge, for moral turpitude purposes only, may decide to take evidence from outside the reviewable record to determine what the person's intent actually was. If the plea is to a temporary taking, however, the judge must accept the specific plea and must find that the offense is not a CIMT.

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[3] *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011), interpreting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

[4] *Matter of Silva-Trevino, supra.*

2. Good News: "And" versus "Or"

In *Young v. Holder* the court held that where the criminal statute is phrased in the disjunctive ("or") but the complaint is phrased in the conjunctive ("and"), a plea to the complaint means that the defendant committed one, but not necessarily all, of the listed offenses.[5] *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.

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The *Young* holdings, in the court's words

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."

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[5] *Young v. Holder, supra*, partially overturning *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc) and reaffirming *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1082 n.3 (9th Cir. 2007).