Moncrieffe and *Olivas-Motta*: Fourteen Crim/Imm Defenses in the Ninth Circuit[1]

In *Moncrieffe v. Holder,* 133 S.Ct. 1678 (April 23, 2013)[2] the U.S. Supreme Court reaffirmed that the full categorical approach applies in immigration proceedings. A result is that where the criminal statute defines the offense more broadly than the immigration definition at issue, the conviction will not trigger the immigration penalty -- regardless of information that may appear in the individual's record of conviction, or of who has the burden of proof.

For an excellent Practice Advisory that covers several aspects of the *Moncrieffe* opinion and includes links to sample briefs, see "*Moncrieffe v. Holder*: Implications for Drug Charges and Other Issues Involving the Categorical Approach" (May 2, 2013) by the American Immigration Council, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild (hereafter "May 2 Practice Advisory").[3] We strongly recommend that advocates carefully read that Advisory to get both a theoretical understanding of the case and important practice tips.

In contrast, this Advisory (a) provides a basic statement of the rule under *Moncrieffe* and (b) suggests defenses pertaining to specific crimes, especially as they may be interpreted under Ninth Circuit law. This includes new defenses in moral turpitude determinations that are made

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[1] Katherine Brady of the Immigrant Legal Resource Center wrote this advisory, updated as of May 24, 2013. Thanks to the authors of the *Moncrieffe* Practice Advisory cited above, and especially to Dan Kesselbrenner, Norton Tooby, Isaac Wheeler, and Su Yon Yi. Mistakes belong to the author.

[2] Slip opinion at http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

[3] See http://immigrantdefenseproject.org/wp-content/uploads/2013/05/Moncrieffe-PA-5-1-13-FINAL.pdf.

available by *Moncrieffe* coupled with the Ninth Circuit's decision to reject *Matter of Silva-Trevino* in *Olivas-Motta v. Holder,* --F3d-- (9th Cir. May 17, 2013).[4] See Part C.10, below.

This Advisory will discuss *Moncrieffe* using California law as a model. For discussion of other Ninth Circuit state laws and extensive discussion of crim/imm issues from a defense perspective, see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit* (Updated 2013, www.ilrc.org). Other state resources are available online.[5] See link for more extensive online materials discussing the categorical approach and Ninth Circuit law.[6]

A. The Categorical Approach Under *Moncrieffe*

Moncrieffe addressed a conflict among the Circuit Courts of Appeals in the application of the categorical approach. With some exceptions,[7] immigration judges and officers must use the categorical approach to determine whether an immigrant's prior criminal conviction triggers the immigration consequence at issue, e.g., whether it is a basis for removal or a bar to eligibility for relief. A federal criminal court judge uses the same analysis to determine whether a defendant's prior conviction triggers a sentence enhancement in the current prosecution. This section will summarize this analysis, review the Supreme Court's definition of the terms generic offense, categorical approach, and modified categorical approach, and provide a summary of the holding in *Moncrieffe*. For further discussion, see the May 2 Practice Advisory cited above.

In sum, under the categorical approach a decision-maker must identify the generic definition of the term at issue, e.g., burglary, and compare this to the immigrant's criminal conviction to see if it matches. The categorical approach governs the comparison of the generic definition to the criminal statute alone. If the criminal statute enumerates multiple offenses, one or more of which match the generic definition, the decision-maker also may consult designated documents in the individual's record of conviction, to identify which of these offenses was the subject of the conviction. The Supreme Court labels this limited review of the individual's record the modified categorical approach.

The Generic Definition. First the decision-maker must identify the technical federal generic

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[4] See opinion at http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/17/10-72459.pdf.
[5] See the *California Quick Reference Chart* and *California Notes* at www.ilrc.org/crimes, the *Arizona Quick Reference Chart* at http://www.firrp.org/resources/criminaldefense/ (scroll down), and materials on Washington state law at http://www.defensenet.org/immigration-project.
[6] For a more in-depth discussion of Ninth Circuit and Supreme Court cases on this topic, see Brady, Yi, "The Categorical Approach in the Ninth Circuit and *U.S. v. Aguila-Montes de Oca, Young v. Holder*" (2012) and Brady, Wheeler, "Waiting for *Descamps*" (2013), at www.ilrc.org/crimes.
[7] The categorical approach does not apply to "circumstance specific" factors; see *Nijhawan v. Holder*, 557 U.S. 29 (2009). It does not fully apply under *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) (but this case is severely undercut by *Moncrieffe*; see Part C.10, below), which currently controls moral turpitude determinations in some Circuit Courts of Appeal, not including the Ninth Circuit; see Part C.10, below. It does not fully apply to some bars to relief, e.g., "particularly serious crime" for asylum/withholding purposes or a "dangerous or violent" offense for asylum and § 212(h) purposes. It does not apply to conduct-based removal grounds or bars that are not dependent upon convictions (unless a conviction is the only evidence of the conduct; see *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)).

definition of the immigration term at issue, e.g., the definition of a deportable "crime of child abuse" or of the aggravated felonies "drug trafficking" or "burglary." For example, the Supreme Court held that the definition of generic "burglary" is "an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a crime."[8]

Usually a generic definition consists of elements that describe criminal conduct, such as the definition of "burglary" above, or the Ninth Circuit definitions of "sexual abuse of a minor" discussed at Part C.6, below.

The Court in *Moncrieffe* reaffirmed, however, that "when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too." Slip at 10. *Moncrieffe* addressed one definition of a "drug trafficking" aggravated felony, which includes a state drug offense only if it would be punishable *as a felony* under the federal Controlled Substances Act if the case were in federal court.[9] That an offense is a felony rather than a misdemeanor in federal court becomes part of this generic definition. See *Lopez v. Gonzales,* 549 U.S. 47, 60 (U.S. 2006) ("a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law"); *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2589 (2010) (because generally a possession offense is a felony under federal law only when the government prosecutes it as a recidivist offense, "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' under § 1229b(a)(3) [a bar to cancellation] of a 'felony punishable' as such 'under the Controlled Substances Act'); *Moncrieffe v. Holder*, *supra* (where the Controlled Substance Act treats distribution of a small amount of marijuana without remuneration as a misdemeanor rather than a felony, that offense is not part of the generic definition of a drug trafficking aggravated felony). In other cases, the generic definition may include a requirement that the individual's conviction is classed as a felony (or has a potential sentence of over a year) under the law of the convicting jurisdiction.[10]

In *dictum*, the Court in *Moncrieffe* stated that where a federal statute serves as the generic definition, an exception to the statutory definition of the crime also applies to the generic definition. Thus where the federal statutory definition of a firearm excludes antique firearms, the generic definition of a deportable firearms offense also excludes antique firearms. This is true even if in practice the defendant in a federal criminal hearing must prove that the exception applies, as an affirmative defense. See discussion at Part C.9, below.

The Moncrieffe Decision. *Moncrieffe* reaffirmed that the categorical and modified categorical approach applies fully in immigration proceedings.[11] It reaffirmed and clarified the

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[8] *Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143 (1990).
[9] See INA § 101(a)(43)(B).
[10] See, e.g., the definition of a "crime of violence" aggravated felony at 8 USC § 1101(a)(43)(F), citing to 18 USC § 16, where § 16(a) requires an "offense" while § 16(b) requires an "offense that is a felony".
[11] *Moncrieffe,* slip at 4, 6 ("When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a 'categorical approach' to determine whether the state offense is comparable

Court's established, strict application of the categorical and modified categorical approach.

> When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. See, e.g., *Nijhawan v. Holder,* 557 U. S. 29, 33-38 (2009); *Gonzales v. Duenas-Alvarez*, 549 U. S. 183, 185-187, (2007). 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. Id., at 186 (citing *Taylor v. United States,* 495 U. S. 575, 599-600 (1990)). 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. 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]." *Shepard v. United States*, 544 U. S. 13, 24, (2005) (plurality opinion). Whether the noncitizen's actual conduct involved such facts "is quite irrelevant." *United States ex rel. Guarino v. Uhl*, 107 F. 2d 399, 400 (CA2 1939) (L. Hand, J.).
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> 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. *Johnson v. United States,* 559 U. S. 133, 137 (2010); see *Guarino,* 107 F. 2d, at 400. But this rule is not without qualification. First, our cases have addressed state statutes that contain several different crimes, each described separately, and we have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or "'some comparable judicial record' of the factual basis for the plea." *Nijhawan,* 557 U. S., at 35, (quoting *Shepard*, 544 U. S., at 26). Second, our 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." *Duenas-Alvarez*, 549 U. S., at 193.

Moncrieffe slip op. at 5-6 (citations abbreviated).

The Court applied its interpretation of the categorical approach both to the aggravated felony removal ground and to the bar to eligibility for relief.[12] See Part C.13, below.

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to an offense listed in the INA… The reason is that the INA asks what offense the noncitizen was 'convicted' of, 8 U. S. C. §1227(a)(2)(A)(iii), not what acts he committed").

[12] Noting that while Mr. Moncrieffe's conviction was not a deportable aggravated felony it still was a deportable controlled substance offense, the Court stated: "At that point, having been found not to be an aggravated felon, the

Specifically, the Court held that because the Controlled Substance Act treats distribution without remuneration of a small amount of marijuana as a misdemeanor rather than a felony, the generic definition of a drug trafficking aggravated felony likewise excludes this offense. A state criminal statute that generally prohibits distribution of marijuana is overbroad, and no conviction under it will qualify as the aggravated felony. Note that the Court rejected the government's argument that, because a defendant in a federal criminal case must affirmatively prove that a marijuana conviction qualifies as a misdemeanor (i.e., that it involved distribution without remuneration of only a small amount), similarly an immigrant in removal proceedings must make this showing. See Part C.1, below.

Step One: The Categorical Approach. The first step in the inquiry, the categorical approach, compares the generic definition of the offense to the offense as defined by statute, without reference to the immigrant's individual offense. The decision-maker 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." Slip at 5. Thus the decision-maker may not use facts from the individual's record of conviction, e.g., admissions in a guilty plea that go beyond the bare elements of the criminal statute, to match the generic definition. Instead the "minimum conduct criminalized by the state statute" must meet the generic definition. *Id.* at 6.

The Court also reaffirmed its mandate that counsel may not use mere "legal imagination" to establish that specific conduct that falls outside the generic definition in fact would be prosecuted under the statute. There must be "a realistic probability" that is the government would prosecute such conduct. *Ibid.* See discussion of this issue at Part C.14, below.

Step Two: The Modified Categorical Approach. *Moncrieffe* reaffirmed that where a criminal statute contains "several different crimes, each described separately," at least one of which matches the generic definition, a decision-maker may look to the individual's reviewable record of conviction for the sole purpose of determining *which* of these statutorily enumerated crimes was the subject of the conviction. *Ibid.*

If instead the statute does not describe separate offenses, at least one of which is wholly encompassed by the generic definition, the decision-maker may not look to the individual's record to further describe the offense of conviction. The Court rejected the government's argument that rather than rely on the minimum conduct criminalized by the statute, an immigration judge should be able to consult information from within or outside of the reviewable record of conviction, to determine whether Mr. Moncrieffe's conviction was for conduct beyond giving away a small amount of marijuana. Slip at 15-19. Therefore *Moncrieffe* held that conviction under a statute that prohibits distribution of marijuana without regard to amount or remuneration, never constitutes a conviction for giving away "more than a small amount" of marijuana, regardless of what appears in the record (as long as there is a "reasonable probability"

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noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria." Slip at 6.

that that offense actually would be prosecuted under the statute).

Another way to state the *Moncrieffe* standard is that, unless the criminal statute is a categorical match with the applicable generic definition, the inquiry stops and the immigrant wins. The exception is that if the criminal statute sets out multiple discrete offenses separated by the word "or," and at least one of those offenses is a categorical match, then the decision-maker may look to the individual's reviewable record of conviction *only* to determine the statutorily described offense of which the defendant was convicted. No other use of information in the record of conviction is permitted. If the record of conviction is inconclusive on this point, it is clear that the immigrant is not deportable. See Part C.14, below, regarding the effect of an inconclusive record on a bar to eligibility for relief.

B. *Moncrieffe* and Ninth Circuit and BIA Cases: *Navarro-Lopez, Estrada-Espinoza, Aguila-Montes de Oca, Lanferman, Descamps*

The Supreme Court's decision in *Moncrieffe* will be read to overturn some Ninth Circuit precedent decisions and re-animate others. *Moncrieffe* caps a long process in which the Supreme Court has been consistent in its interpretation of the categorical approach, but some federal court and recent BIA decisions have adopted more lax interpretations.

In *Taylor v. United States,* 495 U.S. 575, 602 (1990) the Supreme Court set out the strict categorical approach, i.e., the requirement that the criminal statute must specifically set out all elements contained in the generic definition. Over time several Circuit Courts of Appeals, including the Ninth Circuit, applied a looser standard that permitted some use of facts from the record of conviction. Beginning in 2007, the Ninth Circuit *en banc* recognized that it had strayed from *Taylor*, and adopted a strict categorical analysis (sometimes called the "missing element" rule). See, e.g., *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007)(en banc) and *Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. 2008) (en banc). At around this time the Supreme Court published several opinions that clarified that it had meant what it said in *Taylor:* the categorical approach must be strictly applied. See, e.g., *Shepard v. United States*, 125 S. Ct. 1254 (U.S. 2005); *James v. United States*, 127 S.Ct. 1586 (2007); *Nijhawan v. Holder,* 557 U.S. 29 (2009); *Johnson v. United States,* 559 U.S. 133, 137 (2010).[13]

In light of these cases, especially *Nijhawan* and *Johnson,* most if not all Circuit Courts of Appeals reaffirmed or adopted a stricter interpretation of the categorical approach, in order to conform to the Supreme Court's standard. But in a surprise move, in 2011 the Ninth Circuit reversed itself and asserted that the Court actually did not require the strict application. See *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*), reversing *Navarro-Lopez* and its progeny. In 2012 a three-judge panel of the Board of Immigration Appeals took the same tack, citing *Aguila-Montes de Oca*. See *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). The BIA panel also asserted that a less strict categorical approach applies in immigration proceedings than in federal criminal proceedings, and asserted that federal courts must defer to

[13] For an excellent discussion of these developments, see Judge Berzon's concurrence in *U.S. v. Aguila-Montes de Oca*, *supra.*

the BIA's opinion in this matter. (In contrast, *Aguila-Montes de Oca* had assumed that immigration and federal criminal proceedings use the same categorical approach.)

The Supreme Court accepted certiorari on the *Aguila-Montes de Oca* question in the criminal case, *Descamps v. United States*, No. 11-9540 (argued on January 7, 2013), while considering some of the same issues in the immigration case *Moncrieffe.* The Court should issue an opinion in *Descamps* shortly.

Meanwhile, in *Moncrieffe* the Supreme Court already has answered two key questions. First, *Moncrieffe* re-affirmed that under the categorical approach an immigration judge may look only to the criminal offense as defined by the statute, and not to underlying facts in the record that go beyond the statute. In this way, at least in immigration proceedings *Moncrieffe* has answered the basic question in *Descamps* by overturning the looser standard set out in *U.S. v. Aguila-Montes de Oca* (although *Moncrieffe*, an immigration case, did not discuss these federal criminal cases). Counsel should assert that Ninth Circuit immigration decisions such as *Navarro-Lopez* and *Estrada-Espinoza*, which were overturned by *Aguila-Montes*, should be followed. *Matter of Lanferman* is effectively overruled.

Second, *Moncrieffe* made clear that the strict categorical approach applies fully in immigration proceedings. In fact the Court cited a law review article showing that use of the categorical approach in immigration proceedings (to evaluate crimes involving moral turpitude) pre-dates *Taylor* by several decades.[14] Significantly the Supreme Court neither deferred to the BIA on the categorical approach nor discussed deference.[15]

C. Defense Arguments Created by *Moncrieffe*

The following are some potential defense arguments under *Moncrieffe*. Advocates undoubtedly will develop further arguments as we work with this opinion.

1. Marijuana Statutes

Giving away (distribution without remuneration of) a small amount of marijuana. Please see the discussion of marijuana exceptions and state and federal laws in the May 2 Practice Advisory cited above.

Moncrieffe directly addressed the question of when a conviction for distribution of marijuana is an aggravated felony. In short, while a state conviction for distribution without remuneration

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[14] Op. at 6 (citing Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669 (2011)).

[15] Without discussing *Matter of Lanferman*, the Court simply overruled the BIA and Circuit Court of Appeals that addressed the marijuana question at issue, such as *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008) and *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012). For discussion of deference issues, see May 2 *Moncrieffe* Practice Advisory cited above, at p. 15. The reasoning in *Lanferman* would seem completely inconsistent with the holding in *Moncrieffe* because the BIA defined divisibility in a manner that the Court rejected in *Moncrieffe*.

of a controlled substance generally is an aggravated felony (because the offense is punishable as a felony under federal law), distribution without remuneration of a small amount of marijuana is not (because that offense is punishable as a misdemeanor under federal law; see 21 USC § 841(b)(4)). Mr. Moncrieffe was a long-time permanent resident who was convicted under a Georgia statute that prohibited distributing marijuana, with no requirement as to amount or remuneration. He had been arrested while possessing a few grams of marijuana. The BIA and Fifth Circuit held that the conviction was an aggravated felony and therefore not only a removal ground, but also a bar to LPR cancellation. Circuit Courts of Appeals were split on this issue.

The Supreme Court held that Mr. Moncrieffe was not and could not have been convicted of an aggravated felony, because the minimum conduct criminalized by the statute did not contain all the elements of the generic definition. The criminal statute failed to contain as an element that the amount of marijuana was not "small," or that remuneration was involved.

Under *Moncrieffe*, conviction for giving away marijuana under a statute that does not designate any amount of marijuana, or that specifically designates a "small" amount, is not an aggravated felony. The Court declined to reach the issue of the definition of "small," although it noted that the BIA indicates that 30 grams, a marijuana cut-off amount used in other parts of the INA, is a useful guidepost. *Moncrieffe,* slip at n. 7. Under this test, giving away up to 28.5 grams of marijuana under Cal. H&S C § 11360(b) is categorically not an aggravated felony. Counsel may argue that conviction under a statute that prohibits distribution of more than 28.5 grams of marijuana also is not an aggravated felony, since the statute does not require a sufficiently large amount even if the BIA's suggested cut-off of 30 grams of marijuana is used.

In all cases, evidence from the record of conviction cannot be used to determine whether a conviction for distribution of marijuana is an aggravated felony; the determination must be based solely on the statutory language. However, there must be a "reasonable probability" that the identified conduct that falls outside the generic definition (here, giving away up to 30 grams, or other definition of a small amount, of marijuana) actually would be prosecuted under the statute. See Part C.14, below.

Giving Away a Small Amount Of Marijuana: Eliminate a Past Conviction Under Lujan-Armendariz. Note that in immigration proceedings arising within the Ninth Circuit, a plea from before July 15, 2011 to giving away a small amount of marijuana may qualify for treatment under the *Lujan-Armendariz* rule.[16] In that case withdrawing the plea pursuant to expungement, deferred adjudication, or other state "rehabilitative relief" may eliminate the conviction for all immigration purposes.[17]

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[16] See 21 USC § 841(b)(4), which provides that "distributing a small amount of marijuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18." Section 3607 is the Federal First Offender Act (FFOA). *Lujan-Armendariz* reaches state convictions of offenses that would be amenable to treatment under the FFOA. See discussion in *Defending Immigrants in the Ninth Circuit*, § 3.6.

[17] For more information see Practice Advisory and discussion of *Nunez-Reyes v. Holder,* 646 F.3d 684, 690 (9th Cir. 2011) at http://www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011.

2. Possession of Paraphernalia, Unspecified Substance

Immigration law defines a "controlled substance" as a substance listed in federal drug schedules.[18] Many state drug statutes, e.g., Cal. H&S Code §§ 11350-52 and 11377-79, include some substances that are and some that are not on the federal schedules. The BIA and the Ninth Circuit repeatedly have held that such state statutes are divisible and subject to the modified categorical approach.[19] If the record of conviction reveals only that the person was convicted of an unspecified "controlled substance" (as opposed to, e.g., cocaine), the government cannot prove that the conviction is a deportable controlled substance offense or aggravated felony.

The Ninth Circuit repeatedly has held that this requirement does not apply to a conviction for possession of drug paraphernalia. It has held a paraphernalia conviction to be of a deportable controlled substance offense even when the record of conviction does not establish that the paraphernalia related to a federally defined controlled substance.[20] The BIA stated that along with possession of paraphernalia, conviction of maintaining a place where drugs are sold will cause inadmissibility as an offense relating to a controlled substance, even if no specific controlled substance is specified in the record.[21]

Moncrieffe presents an opportunity for counsel to raise this issue again. The Ninth Circuit has not provided a persuasive rationale as to why it should depart from the categorical approach in paraphernalia cases, or should define "relating to a controlled substance" so differently there than in other cases. See also *Rojas v. Attorney General*, No. 12-1227 (3rd Cir. Jan. 23, 2013) where the Court sua sponte decided to rehear *en banc* an agency decision (Pennsylvania drug paraphernalia conviction is a controlled substance offense even though Pennsylvania defines "drug" more broadly than federal definition of "controlled substance").

3. Transportation for Personal Use

California law prohibits transportation of a controlled substance for personal use. See Calif. H&S C §§ 11352(a), 11360, 11379(a) prohibiting "transportation," an offense that can be committed by moving the smallest "usable quantity" of a controlled substance just a "minimal

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[18] See, e.g., INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B) (controlled substance aggravated felony); INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II) (inadmissibility ground); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (deportability ground); providing that controlled substance is defined at 21 USC § 802.
[19] See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). The Ninth Circuit upheld this defense for Calif. H&S C §§ 11377-79 (*Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007)) and for H&S C §§ 11350-52 (*Esquivel-Garcia v. Holder*, 593 F.3d 1025 (2010) (11350) and *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) (§ 11351 is divisible, but a review of the record identified tar heroin which is on the federal list).
[20] *Luu Le v. INS*, 224 F.3d 911 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009), *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009), *Bermudez v. Holder*, 586 F.3d 1167 (9thCir. 2009), and *U.S. v. Oseguera-Madrigal*, 700 F.3d 1196 (9th Cir. Wash. 2012), discussing Cal. Health & Safety Code § 11364, Ariz. Rev. Stat. § 13-3415(A), Hawaii Rev. Stat. § 329-43.5(a), and Wash. Rev. Code § 69.50.412(1).
[21] *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

distance," e.g., twenty feet.[22] Transportation for sale of a controlled substance is set out separately in §§ 11352(b) and 11379(b).

Transportation of a controlled substance for personal use does not meet either definition of a controlled substance aggravated felony: it does not fit the general definition of trafficking, and it is not analogous to a federal drug felony.[23] There was some concern, however, that under a loose interpretation of the categorical approach an applicant for relief might have to present evidence from the record of conviction to prove that a conviction under §§ 11352(a) or 11379(a) was for personal use rather than trafficking. *Moncrieffe* removes this issue by clarifying that the minimum conduct criminalized by the statute must match the generic definition. Because the minimum conduct to violate these sections is transportation for personal use, the sections may not be considered an aggravated felony under any circumstances, regardless of allocation of burden of proof or of information in the record.

4. Battery, Offensive Touching

Under *Moncrieffe*, a battery or other offense that can be committed by offensive touching never should be held to be a crime of violence or a deportable crime of domestic violence in immigration proceedings, regardless of evidence in the record or allocation of burden of proof.

A battery that consists of an offensive touching is not a crime of violence under 18 USC § 16.[24] Therefore the offense cannot qualify as a crime of violence aggravated felony, or a deportable crime of domestic violence.[25] (The same division applies to moral turpitude determinations in the case of spousal battery; see Part C.10, below.)

Many state statutes define battery or spousal battery to reach conduct that may range from mere offensive touching to actual violence, without designating offensive touching and actual violence as separately described statutory offenses. See, e.g., Cal. P.C. §§ 242 ("A battery is any willful and unlawful use of force or violence upon the person of another"), 243(e) (battery against a spouse). To date the rule in the BIA and Ninth Circuit has been that in that situation a court may look to the record of a conviction to determine whether the conviction was for actual violence or offensive touching, and so determine whether the conviction is a crime of violence.[26]

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[22] See e.g., *People v. Emmal,* 68 Cal. App. 4th 1313, 1315-1316 (Cal. App. 4th Dist. 1998); *People v. Ormiston,* 105 Cal. App. 4th 676 (Cal. App. 1st Dist. 2003); and see 2-2300 CALCRIM 2300 (a person transports a controlled substance who "carries or moves it from one location to another, even if the distance is short.").

[23] See INA § 101(a)(43)(B), and see, e.g., *U.S. v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) (transportation under Cal. H&S C § 11360 includes transportation for personal use with no trafficking intent, and in fact no requirement of possession).

[24] See, e.g., *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010), *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*).

[25] If a sentence of a year or more is imposed for a conviction of a crime of violence, the offense is an aggravated felony under INA § 101(a)(43)(F). Regardless of sentence, if there is sufficient showing that the victim and defendant shared a designated domestic relationship, a crime of violence conviction is a deportable "crime of domestic violence" under INA § 237(a)(2)(E)(i).

[26] See, e.g., *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1062 (9th Cir. 2006) (simple battery divisible for moral turpitude purposes based on whether actual violence is involved); *Matter of Sanudo, supra*; *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

Counsel should assert that *Moncrieffe* overturned these cases. *Moncrieffe* provides that under the categorical approach, the minimum conduct criminalized by the statute must be encompassed by the federal generic offense. Slip op. at 5. If a battery offense can be committed by offensive touching or other *de minimus* violence, the minimum conduct is not a crime of violence and therefore no conviction of the offense is a crime of violence.

Example: Roberto wants to apply for non-LPR cancellation. He was convicted of spousal battery under Cal. P.C. § 243(e). He pled guilty to an allegation that he used violent force. Section 243(e) is an offense that can be committed by an offensive touching. Under *Moncrieffe*, an IJ should find that as a matter of law § 243(e) is not a crime of violence (or a crime of domestic violence), because the minimum conduct required to violate the statute does not meet the definition of a crime of violence.

5. An Age-Neutral Statute as a Crime of Child Abuse

The BIA held that it must follow the categorical approach in deciding whether a conviction comes within the domestic violence deportation ground at INA § 237(a)(2)(E)(i), at least in cases arising within the Ninth Circuit. See *Matter of Velazquez-Herrera*, 24 I&N Dec. 504, 512-516 (BIA 2008), a case that defines a deportable crime of child abuse. Now that the Supreme Court has clarified how the categorical approach must be used in immigration cases, the BIA must adopt this method.

In *Velazquez-Herrera* the BIA interpreted the categorical approach to mean that a conviction under a statute that *contains no element pertaining to minor age of the victim* still can be a deportable crime of child abuse, as long as the reviewable record of conviction conclusively establishes that the victim was under age 18. *Ibid.* Counsel should assert that *Moncrieffe* invalidates this ruling, because *Moncrieffe* requires the statutory definition of the offense to contain all of the elements of the generic definition. At a minimum, the statute must require the victim to be under 18 years of age.

6. Sexual Abuse of a Minor: Consensual Sex with a Minor

The Supreme Court has stated that the aggravated felony "sexual abuse of minor" is a generic crime subject to the categorical approach.[27] The Ninth Circuit currently employs two generic definitions of the aggravated felony "sexual abuse of a minor." An offense is sexual abuse of a minor ("SAM") if the criminal statute prohibits either:

1) Knowingly engaging in sexual conduct, with a minor who is under the age of 16 and at least four years younger than the defendant (the elements of 18 USC § 2243)[28] and/or

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[27] *Nijhawan v. Holder*, 557 U. S. 29, 37 (2009).
[28] See *Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. 2008) (en banc) (sexual abuse of a minor is defined by the elements of 18 USC § 2243); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009) (Cal. P.C. 261.5(d) lacks the element of "knowingly" engaging in sex).

2) Engaging in consensual sex with a minor who is so young that the conduct is *per se* abusive. The Ninth Circuit has found that such conduct is not *per se* abusive if the minor is at least age 15 and is *per se* abusive if the minor is age 13 or younger. Counsel should assume it will be held *per se* abusive if the minor is age 14.[29]

Under the *Moncrieffe* standard, to constitute sexual abuse of a minor a criminal statute must contain all of the elements of at least one of these definitions. This should lead to the following results:

- Conviction under a statute that prohibits sex with a minor under the age of 17 or 18 never is the aggravated felony sexual abuse of a minor (SAM) in immigration proceedings arising within the Ninth Circuit, because consensual sex with a 16- or 17-year-old – the minimum conduct required to violate the statute - does not meet either definition of SAM. The conviction is not SAM even if the individual's reviewable record of conviction contains evidence that the minor was under age 15, because the IJ must evaluate the conviction according to the minimum conduct criminalized by the statute.

  This was the holding in *Estrada-Espinoza v. Mukasey,* 546 F.3d 1147 (9th Cir. 2008) (en banc) (**Cal. P.C. § 261.5(c)** is categorically not SAM). See also *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010) (same holding for **Arizona Rev. Stat. § 13-1405**). While *Estrada-Espinoza* was reversed by *Aguila-Montes de Oca, supra,* it should be considered revived by *Moncrieffe.* See Part B. The Supreme Court previously has specifically cited *Estrada-Espinoza* with approval.[30]

- Conviction under a statute that prohibits sex with a person under the age of 16, but does not require the perpetrator to be at least four years older, never should be held to be SAM. It does not meet the first test because it lacks the element of age difference. It does not meet the second test because the minimum conduct required to violate the statute is that the minor is age 15.

- Conviction under **Cal. P.C. § 261.5(d),** which requires the defendant to be age 21 or older and the victim to be under age 16, never is SAM. Section 261.5(d) does not meet the first test because, while it contains the required elements pertaining to the ages of the victim and perpetrator, the Ninth Circuit found that it does not contain the element of "knowingly" engaging in sexual conduct. *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009).

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[29] See *Pelayo-Garcia*, supra (consensual sex with a minor just shy of his or her 16th birthday is not *per se* abusive). While counsel should assume that sexual conduct with a 14-year-old is sexual abuse of a minor, the Ninth Circuit may not have held this. See *U.S. v. Pereira-Salmeron,* 337 F.3d 1148, 1154-1155 (9th Cir. Ariz. 2003) (court pointed out that the minor was age 13, but the statute also included minor age 14).

[30] See *Nijhawan,* 557 U.S. at 37. "The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes. Subparagraph (A), for example, lists 'murder, rape, or sexual abuse of a minor.' See, e.g., *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (CA9 2008) (en banc) (applying the categorical approach to 'sexual abuse')..."

The statute does not meet the second test because the minimum conduct required to violate the statute is that the other party is age 15, which is not *per se* abuse. *Id.* at 1017.

Note that *Pelayo-Garcia* should be considered partially overturned, to the extent that it provides that an IJ may look to the record of conviction to determine the age of the minor, rather than evaluating the offense based on the minimum conduct, i.e., a minor who is a day less than age 16. *Id.* at 1016. *Moncrieffe* requires the minimum conduct standard.

Warning: While the categorical approach is now settled, the definition of "sexual abuse of a minor" is not. Circuit Courts of Appeals have widely differing definitions of SAM, many of which are broader than the Ninth Circuit's. If your client is transferred outside of the Ninth Circuit, or if the Supreme Court decides to resolve the Circuit split by creating a new definition of SAM, your client may be held to have an aggravated felony. Qualifying clients should consider applying for naturalization within the Ninth Circuit. See also discussion of these offenses as crimes involving moral turpitude at Part C.10, below.

7. Sexual Abuse Of A Minor: Broadly Defined Offenses

The Ninth Circuit has held that some broadly defined statutes that prohibit non-explicit conduct with minors reach some conduct that is and some that is not sexual abuse of a minor (SAM), depending upon the type of conduct and age of the victim. The court has indicated that the modified categorical approach may apply to these statutes, so that a judge may review the record of conviction to see how egregious the conduct was in the particular case. See, e.g., *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (**Cal. P.C. § 647.6(a),** annoying or molesting a child, is divisible as SAM because the statute can be violated in a way that does not necessarily cause harm), and *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005) (same holding for immoral communication with a minor under **Rev. Wash. Code § 9.68A.090**).

Counsel should assert that under the *Moncrieffe* standard, no conviction under these statutes can constitute SAM, because the minimum conduct criminalized by the statute does not. See the decisions cited above for published cases showing that conduct that is not harmful enough to be SAM is prosecuted under these statutes. The conviction is not SAM for any purpose, regardless of the allocation of burden of proof or of information in the record. See also discussion of these offenses as crimes involving moral turpitude at C.10, below.

Cal. P.C. § 288(c) prohibits actions with lewd intent toward "a child of 14 or 15 years" by a person who is at least ten years older. The Ninth Circuit found that this offense is not *per se* abusive and thus not categorically SAM, but indicated that the modified categorical approach might be permissible.[31] Given the wording of the statute, an IJ might be permitted to review the

[31] *U.S. v. Castro*, 607 F.3d 566, 569 (9th Cir. 2010) ("Section 288(c)(1) does not expressly include physical or psychological abuse as an element of the crime. Moreover, unlike section 288(a), which applies only where the minor is younger than 14, section 288(c)(1) does not address conduct that is per se abusive. See Pelayo-Garcia, 589 F.3d at 1015-16 (concluding that sexual conduct with a 15-year-old child is not per se abusive). Section 288(c)(1) is therefore broader than the first generic definition of sexual abuse of a minor.").

record to see if the victim was age 14 versus age 15, but counsel can argue that the minimum conduct to violate the statute is not *per se* abusive even when committed against a 14-year-old. Acting with lewd intent toward a victim under age 14, P.C. § 288(a), has been held to be categorically SAM.

8. Firearms: "Deadly Weapons"

Under *Moncrieffe* an immigration judge may look to the record of conviction only if the criminal statute identifies multiple "different crimes, each described separately," one or more of which categorically satisfies the generic definition, and then only to identify which crime was the offense of conviction. Slip at 5-6. A single offense that is defined only as involving a "weapon" or a "deadly weapon" does not meet this test, even if a firearm is identified in the record of conviction. See, e.g., Cal. P.C. § 17500, intent to assault while possessing a deadly weapon. (Note that the forthcoming decision in *Descamps, supra,* might discuss this language, because *Aguila-Montes de Oca, supra,* used the weapons/firearms dichotomy to illustrate its rule.)

If instead the statute lists specific weapons, e.g., "a firearm or a knife," including at least one weapon that meets the applicable federal definition of firearm, or if it refers specifically to a statutory definition of weapon that is itself a disjunctive list that includes a qualifying firearm, the statute may be held divisible and the IJ may consult the record of conviction to see if conduct involving that firearm was the offense of conviction.

9. Affirmative Defenses: Antique Firearms and Others

Exceptions in federal statutes. In some cases a federal criminal statute serves as a generic definition. For example, the drug trafficking aggravated felony discussed in *Moncrieffe* is defined in part as offenses punishable *as felonies* under the federal Controlled Substances Act (CSA). See INA § 101(a)(43)(B). *Moncrieffe* held that because the CSA provides that a conviction for giving away a small amount of marijuana may be a misdemeanor, that the Georgia statute of conviction was not a categorical match. This is true even though in federal criminal court, a defendant would have to prove that the offense was a misdemeanor rather than a felony. As discussed below, in *dictum Moncrieffe* discussed the antique firearm exception to the definition of firearms, which is an affirmative defense in federal criminal court. Counsel should be on the lookout for other beneficial exceptions or defenses in federal criminal statutes that serve as generic definitions.

Antique firearms. The deportation ground and aggravated felonies that pertain to firearms define that term according to 18 USC § 921(a). This definition explicitly excludes antique firearms. See §§ 921(a)(3), (16). In *Moncrieffe* the Court stated in *dictum* that the antique firearms exclusion must be treated as part of the generic definition of firearms that applies in immigration proceedings.

> Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like §1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U. S. C.

> §921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas-Alvarez* requires that there 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." 549 U. S., at 193, 127 S. Ct. 815, 166 L. Ed. 2d 683. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.

Moncrieffe, slip at 21.

Thus a broadly defined state firearms statute that *does* reach antique firearms has the potential never to describe a firearms offense for immigration purposes. For example, in California, some but not all criminal statutes include antique firearms.[32] Significantly, cases show that California does prosecute antique firearms under qualifying statutes.[33] This ought to enable counsel to make the "realistic probability" showing to establish that under *Moncrieffe*, no conviction under these statutes is a deportable firearms offense or firearms aggravated felony.

Based on *Moncrieffe,* cases such as the following should be considered overruled: *Matter of Mendez-Orellana,* 25 I&N Dec. 254 (BIA 2010) (to take advantage of the antique firearms affirmative defense and avoid a deportable firearms offense, an immigrant must prove that his or her own conviction actually involved an antique firearm) and *Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (conviction under former Cal. P.C. § 12025(a) is categorically a deportable firearms offense, because as an affirmative defense in federal proceedings, the antique firearm exception is not relevant to the categorical analysis).

10. Crimes Involving Moral Turpitude

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), the Attorney General found that the categorical approach does not fully apply in determining whether a conviction is of a crime involving moral turpitude (CIMT). Instead, if the categorical and modified categorical approach are applied and do not resolve whether an offense is a CIMT, in some cases an immigration

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[32] California firearms offenses that cover antique firearms include but are not limited to former (prior to January 1, 2012) Calif. P.C. §§ 12020, 12021(a) & (b), 12022(a)(1), 12025(a)(1), 12031(a)(1), and current Calif. P.C. §§ 25400(a), 27500, 29800, 33215. Some other sections specifically exclude antique firearms, such as current Calif. P.C. § 26350 (possession of unloaded firearm), 30600 (assault weapons).

[33] The Ninth Circuit has held that a single unpublished case can satisfy the showing of a "reasonable probability" that conduct will be prosecuted. See Part C.14, below. Antique firearms offenses have been prosecuted for former Cal. P.C. § 12022 (armed with antique weapon while committing felony) and former P.C. § 12021 (possession by felon). See, e.g., *People v. Gossman*, 2003 WL 22866712 (2003) (conviction for felon in possession of a firearm; opinion suggests that it was antique firearm because there was motion to return the seized item (the antique firearm) to family members); *People v. McGraw*, 2004 WL 928379 (2004) (upheld firearms enhancement under former P.C. § 12022(a) based on admission that defendant has access to an antique firearm). While California Penal Code sections relating to firearms were reorganized as of January 1, 2012, the legislature provided that the new code makes no substantive changes from the old. Thanks to Su Yon Yi for this discussion.

judge may look at evidence outside the record to resolve the matter. (In *Silva-Trevino* itself, this was done even where the evidence did not go to prove an element of the offense.[34])

On May 17, 2013 the Ninth Circuit rejected the *Silva-Trevino* approach and held that a "crime involving moral turpitude" is a generic crime, and a conviction is subject to the categorical approach. *Olivas-Motta v. Holder,* --F3d-- (9th Cir. May 17, 2013).[35] While *Olivas-Motta* did not rely on *Moncrieffe*, the decisions are consistent. The *Moncrieffe* opinion fundamentally undercuts the reasoning of *Silva-Trevino*, and hopefully will provide a basis for other Circuit Courts of Appeals to reject it. See May 2 Practice Advisory, pp. 11-12.

A final layer of uncertainty in moral turpitude determinations remains, however, because the Ninth Circuit has held that it will defer to the BIA's on-point published precedent that defines particular criminal conduct as a CIMT, if the opinion is reasonable.[36]

Here are some examples of areas where the law may change based upon *Moncrieffe* and/or *Olivas-Motta.* Advocates will undoubtedly identify more defenses.

Spousal battery. Counsel should assert that a conviction for spousal battery that can be committed by an offensive touching is categorically not a CIMT, regardless of evidence in the record of conviction or the allocation of the burden of proof. Even before *Silva-Trevino*, the BIA and the Ninth Circuit have treated battery as being divisible for moral turpitude purposes, depending upon whether the record of conviction indicated that the offense involved actual violence. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968, 972-973 (BIA 2006) (conviction under P.C. § 243(e) is a CIMT if the record shows actual rather than *de minimus* violence). This should be held overturned. *Moncrieffe* has clarified that where the minimum conduct to commit a battery is not a CIMT, e.g., where the term "battery" includes an offensive touching, then no conviction under the statute is a CIMT. See similar discussion regarding spousal battery as a crime of violence at Part C.4, *supra.*

Consensual sex with a minor. In the substantive holding in *Silva-Trevino,* the Attorney General ruled that a conviction for sexual conduct with a minor is a CIMT if the defendant knew or should have known that the person was underage, *even where such knowledge was not an element of the offense*.[37] Following this, the BIA held that where a respondent had been

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[34] See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705-707 (AG 2008), *Matter of Alfaro*, 25 I&N Dec. 417, 420 (BIA 2011) (where the conviction is for consensual sex with a minor, an IJ may hold a hearing to determine whether the perpetrator believed or had reason to believe that the minor was under-age, even if the offense has no element relating to such belief).

[35] See opinion at http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/17/10-72459.pdf. The court held "that the relevant provisions of the INA are not ambiguous and that we do not owe Chevron deference to the Attorney General's opinion in Silva-Trevino. A 'crime involving moral turpitude' is a generic crime whose description is complete unto itself, such that 'involving moral turpitude' is an element of the crime. Because it is an element of the generic crime, an IJ is limited to the record of conviction in determining whether an alien has been 'convicted of' a CIMT. We conclude that Silva-Trevino was wrongly decided…" Slip op. at 24-25.

[36] *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908-909 (9th Cir. 2009) (*en banc*).

[37] *See Matter of Silva-Trevino,* 24 I&N Dec. at 705-707; *Matter of Alfaro,* 25 I&N Dec. at 420.

convicted of sexual conduct with a minor under Cal. P.C. § 261.5(d), which has no element relating to reason to know the other party's age, an immigration judge could hold a fact-finding hearing to determine whether the immigrant knew or should have known that the person was under age 16.[38]

The Ninth Circuit in *Olivas-Motta* overturned *Silva-Trevino's* holding regarding the categorical approach, but did not address or overturn the Attorney General's substantive test for when sexual conduct with a minor is a CIMT. Now that *Moncrieffe* has clarified that the minimum conduct to violate the criminal statute must match the generic definition, counsel should assert that to be a CIMT under the *Silva-Trevino* definition, a statute that prohibits consensual sex with a minor must have *as an element* that the defendant knew or should have known that the other party was underage.

Note that before *Silva-Trevino*, the Ninth Circuit defined sexual conduct with a minor as a CIMT based upon whether the conduct would harm the minor. See *Quintero-Salazar v. Gonzales*, 506 F.3d 688 (9th Cir. 2007), holding that consensual sex between a 15 year old and a 21 year old, the minimum conduct required to violate Cal. P.C. § 261.5(d), is not categorically a CIMT. The BIA declined to adopt the *Quintero-Salazar* definition even in the Ninth Circuit, stating that the Ninth Circuit must defer to the *Silva-Trevino* definition.[39] The Ninth Circuit has not yet ruled on whether the *Silva-Trevino* definition deserves deference.

The *Quintero-Salazar* decision should be considered modified to the extent that the Ninth Circuit indicated that a judge could review the record of conviction, if one were submitted, to determine if the conduct in that case was harmful to the minor. *Quintero-Salazar*, 506 F.3d at 694. Instead, § 261.5(d) should be held categorically not to be a CIMT under the *Quintero-Salazar* standard, because the minimum conduct required to violate the statute is not a CIMT. This is true regardless of evidence in the reviewable record or the allocation of burden of proof. See also discussion of this offense as the aggravated felony "sexual abuse of a minor" at Part C.6, above.

Broadly Defined Misconduct Relating to a Minor. The Ninth Circuit has held that some statutes that prohibit relatively mild misconduct toward a minor, such as Cal. P.C. § 647.6(a), are divisible for CIMT purposes because the statute reaches both conduct that is and that is not harmful or abusive. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008) (section 647.6(a) is divisible as a crime involving moral turpitude) (partially overruled by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) for its statement that the BIA is not due deference in defining whether particular conduct is turpitudinous). But see the questionable opinion *Morales v. Gonzales,* 478 F.3d 972, 978 (9th Cir. 2007) (because it involves "immoral" purpose, immoral communication with a child under Wash. Rev. Code § 9.68A.090 is categorically a CIMT).

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[38] *Matter of Alfaro, supra.*
[39] *Ibid.*

Moncrieffe dictates that because § 647.6(a) reaches conduct that does not involve moral turpitude, no conviction of the offense is a CIMT. See *Nicanor-Romero, supra,* for published cases showing prosecutions of non-turpitudinous conduct. See discussion of §§ 647.6(a) and 9.68A.090 as the aggravated felony "sexual abuse of a minor" at Part C.7, above.

Misdemeanor false imprisonment. Under Cal. P.C. §§ 236, 237, felony false imprisonment requires use of violence, menace, fraud or deceit. The Ninth Circuit held that misdemeanor false imprisonment, which lacks these elements, is not a CIMT. The court left open the possibility that adverse facts in the record of conviction would change this outcome, however.[40] Under *Moncrieffe*, the minimum conduct required to violate the statute is determinative, and so misdemeanor false imprisonment should be held categorically not a CIMT. This is true regardless of evidence in the reviewable record, and regardless of allocation of the burden of proof.

Accessory after the fact. This offense often is defined as assisting a principal who committed a felony to avoid arrest, prosecution or punishment. See, e.g., Cal. P.C. § 32. The BIA held that accessory after the fact is a CIMT depending upon whether the offense committed by the principal is a CIMT. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

The minimum conduct criminalized by an accessory statute such as Cal. P.C. § 32 is not a CIMT, because the statute reaches assisting a principal who committed a felony that is not a CIMT. Counsel may assert that § 32 is not a divisible statute because it does not specify a list of felonies in the disjunctive from which to choose. The California Penal Code defines felony only as "a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." If a court did hold that the offense is divisible for this purpose and the record indicated a specific felony, that felony would be evaluated based on the minimum conduct criminalized under that statute.

The Ninth Circuit held differently from *Rivens.* Before *Rivens* the Ninth Circuit held in *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007) (*en banc*) that accessory after the fact under Cal. P.C. § 32 never is a crime involving moral turpitude, because it is missing the element of depravity. The Ninth Circuit never has decided whether it will defer to the BIA's rule in *Rivens* and abandon the holding in *Navarro-Lopez.* (In *Rivens* the BIA specifically declined to rule on the applicability of *Navarro-Lopez*, because the case did not arise in the Ninth Circuit. *Rivens*, 25 I&N Dec. at 629). Note that the Ninth Circuit has held that federal misprision of felony, which lacks the element of intention to conceal the perpetrator, is not a CIMT and that the BIA opinion holding the opposite was too unreasonable to warrant deference. *Robles-Urrea v. Holder,* 678 F.3d 702 (9th Cir. 2012).

Just to make things more complex: in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011)*(en banc),* the Ninth Circuit overturned *Navarro-Lopez,* to the extent *Navarro-Lopez* applied the strict categorical approach. However, in *Moncrieffe* the Supreme Court made clear

[40] See *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 628 (9th Cir. 2010).

that the strict application of the categorical approach is correct, and applies fully in immigration proceedings. This should be held to resuscitate *Navarro-Lopez*. It appears likely that the Court will overturn *Aguila-Montes de Oca* itself this term, when it decides the criminal case *Descamps v. U.S.* (No. 11-9540).

11. Burglary as an Attempt to Commit the Intended Offense

A conviction for burglary, attempted theft, or a crime of violence is an aggravated felony if a sentence of a year or more is imposed. INA §§ 101(a)(43)(F), (G). A state burglary conviction has the potential to come within any of these categories. Note that conviction of ***residential burglary*** is a categorical "crime of violence," and always will be an aggravated felony if a year or more is imposed. This section and the next discuss some defenses for a conviction of burglary that is not proved to be residential.

Counsel should argue that at least for some burglary statutes, *Moncrieffe* overturns Ninth Circuit precedent holding that a conviction for burglary with intent to commit theft will constitute the aggravated felony ***attempted theft***, if the reviewable record shows that the defendant took a "substantial step" toward committing the theft. See *Ngaeth v. Mukasey*, 545 F.3d 796, 800-801 (9th Cir. 2008), *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011). For purposes of burglary the Ninth Circuit held that an unlicensed, non-permissive entry constitutes a "substantial step" toward a theft. *Ibid.* An overt act such as walking out with unpaid-for goods also is likely to.

Moncrieffe holds that the minimum conduct criminalized by the statute must meet the generic definition. Slip op. at 5. Therefore, unless the conduct that constitutes a "substantial step" toward commission of the offense is *an element of the statutorily defined burglary offense*, the conviction will not meet the generic definition of attempt.

A statute such as Cal. P.C. § 459 does not have the required "substantial step" as an element. It prohibits "entry" with intent to commit a crime, with no statutory language referring to an unlicensed or non-permissive entry. The Supreme Court will address this specific language very soon in *Descamps v. United States*. Until that decision is published counsel should argue that based upon the rule set out in *Moncrieffe*, for immigration purposes § 459 does not contain an unlicensed or non-permissive entry as an element, and an IJ may not go to the record to determine whether the entry was unlicensed or not. Neither does § 459 have as an element other conduct that would constitute a substantial step required for attempted theft. Therefore no conviction under P.C. § 459 may be held to be an attempted theft, regardless of the allocation of burden of proof or of evidence in the individual's record.

The government may argue that a burglary statute that does have an unlawful entry as an element does meets the definition of attempt, because that is a substantial step toward committing the intended offense. Among possible arguments against this, counsel may investigate whether the definition of "unlawful" entry in the state statute differs from the generic definition of an unlicensed or non-permissive entry that would constitute a substantial step toward a crime. See, e.g., *Aguila-Montes de Oca,* 655 F.3d 915, 941-944 (9th Cir. 2011)*(en*

banc) (an "unlawful" entry under California law includes licensed or permitted entries where the perpetrator entered with intent to commit a crime).

12. California Burglary Pending Descamps

Because the generic definition of burglary requires an unlicensed or non-permissive entry, and burglary defined under Cal. P.C. § 459 requires only an "entry," advocates argue that a California burglary conviction never amounts to the aggravated felony "burglary." The Ninth Circuit rejected this argument in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*). The Supreme Court accepted certiorari on this precise question in *Descamps v. United States*, No. 11-9540 (argued on Jan. 7, 2013), which should be decided very shortly. The Court's decision in *Moncrieffe* would appear to signal that it will overturn *Aguila-Montes de Oca*.

13. Young and Applications for Relief

In *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*) the Ninth Circuit held that the REAL ID Act requires that where the modified categorical approach can be employed, an applicant for relief must prove under that approach that a conviction is *not* a bar to eligibility for relief. The applicant may use only evidence from the reviewable record of conviction to do this. *Young* reversed cases such as *Sandoval-Lua v. Gonzales*,[41] which had held that due to the nature of the categorical approach, an inconclusive record of conviction is sufficient to meet the applicant's burden to prove eligibility for relief. See also *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), holding that an applicant for relief must prove that an offense is not a crime involving moral turpitude. Advocates will argue that *Moncrieffe* overturned this rule.

Overbroad criminal statutes. An overbroad statute is one that entirely lacks specific elements from the generic definition, although it may describe an offense more generally. *Moncrieffe* held that a conviction under a statute that is "overbroad" in relation to the generic definition never matches the generic definition. The decision-maker may not proceed to the modified categorical approach to try to supply the missing elements from the reviewable record. The Court held that this is true for purposes of deportability as well as relief from removal such as cancellation of removal. See *Moncrieffe* slip op. at 19. (Note that both *Young* and *Almanza-Arenas* concerned divisible statutes, not overbroad statutes.)

Divisible criminal statutes. *Moncrieffe* strongly supports a finding that an applicant for relief does not have the burden of proving that a conviction is not a bar to eligibility for relief where a statute is divisible, in that it sets out discrete offenses at least one of which is not a bar to eligibility. *Moncrieffe* supports the holding in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007), and discredits the rationale for overruling it in *Young v. Holder*, 697 F.3d 976, 982-85 (9th Cir. 2012) (*en banc*).

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[41] See, e.g., *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007), *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9th Cir. 2011).

See discussion of this argument in the May 2 Practice Advisory, pp. 7-9. Further, on April 30, 2013 the Ninth Circuit ordered the parties in *Almanza-Arenas v. Holder*, No. 09-71415, to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young v. Holder.* See Petitioner's brief on the issue at this link.[42]

Example: Mr. Young was convicted of an offense involving cocaine base, under Cal. H&S C § 11352(a), which prohibits several distinct offenses including sale (an aggravated felony) as well as transportation for personal use and offering to sell (not an aggravated felony). His record of conviction did not identify which of these offenses was the subject of the conviction. ICE could prove that he was convicted of a deportable controlled substance offense, but not of an aggravated felony. He needed to apply for LPR cancellation, which is barred by conviction of an aggravated felony. The Ninth Circuit held that although ICE must prove that the conviction is a deportable offense, Mr. Young must prove that the conviction is *not* a bar to eligibility for relief, using only evidence permitted under the modified categorical approach. Mr. Young could not meet this burden.

Moncrieffe supports reversing *Young* and returning to the standard set out in *Sandoval-Lua, supra*, which would mean that the inconclusive record would prevent the conviction from serving as a bar.

14. Establishing the Minimum Criminalized Conduct; *Duenas-Alvarez*

Moncrieffe reaffirms the importance of determining the minimum conduct, or the variety of conduct, that is criminalized by a state statute. The Court held that a judge "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." Slip at 5. Thus iff counsel identifies conduct that is prosecutable as the statutorily defined offense and is not wholly encompassed by the generic definition, the conviction under that statute is categorically not a match, and the immigrant wins.

Moncrieffe reaffirmed, however, that "our 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.'" Slip at 6, citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Example: Mr. Moncrieffe was convicted under a Georgia statute that prohibited distribution of marijuana. While generally distribution of marijuana is an aggravated felony, distribution without remuneration of a small amount of marijuana is not. If there is a "reasonable probability" that distribution without remuneration of a small amount of marijuana actually would be prosecuted under the statute, that means that minimum conduct criminalized by the

[42] Go to www.ilrc.org/crimes and scroll down to *Almanza-Arenas/Moncrieffe* brief. Thanks to Michael Codner, who wrote the brief in consultation with the Stanford Immigrant Rights Clinic and Immigrant Defense Project.

statute does not meet the generic definition, and that no conviction under the statute is an aggravated felony.

How does one establish a "reasonable probability" that conduct would be prosecuted under a criminal statute? One way is to provide evidence that the state in fact has prosecuted the conduct. This could consist of published or unpublished opinions or case documents, or documents from the client's own case. In *Moncrieffe* the Supreme Court cited to published Georgia criminal court decisions. Slip at 9. The Ninth Circuit has held that a single unpublished decision is sufficient.[43] Some advocates have presented affidavits from criminal defense counsel stating that particular conduct has been prosecuted under a statute.

Another way to show "reasonable probability" is if the criminal statute explicitly includes the conduct at issue. The Ninth Circuit held that where "a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' … is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *United States v. Grisel,* 488 F.3d 844, 450 (9th Cir. 2007) (en banc) (finding that the Oregon statute at issue is not a categorical match for the generic definition of "burglary," since on its face it includes burglary of vehicles and other non-structures). The same reasoning ought to permit use of other official descriptions of conduct reached by the statute, such as jury instructions, which can be a valuable source of information as to the minimum conduct required to commit an offense. *Grisel* is established law in the Ninth Circuit.[44] See also *Ramos v. U.S. Atty Gen.,* 709 F.3d 1066, 1072 (11th Cir. 2013) (similar finding) and further discussion at May 2 Practice Advisory, pp. 12-14.

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[43] See *Osequeda-Nunez v. Holder*, 594 F.3d 1124, 1129, fn 2 (9th Cir. 2010), citing with approval *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1005 (9th Cir. 2008) (partially overruled on other grounds by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*)).

[44] See, e.g., *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1190 (9th Cir. 2011), *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).