§ N.3 HOW TO USE THE CATEGORICAL APPROACH NOW (2021)

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Table of Contents

I. **Introduction** 3

II. **Categorical Approach in Three Steps** 5

A. Overview 5

B. Step One: Is there a Categorical Match? 7

C. Step Two: Is the Criminal Statute Divisible? 10

D. Step Three: The Modified Categorical Approach: In a Conviction Under a Divisible Statute, of which Crime was the Defendant Convicted? 13

III. **Further Discussion and Frequently Asked Questions** 15

A. Step One: Is there a Categorical Match? 15

1. Identify the "Generic" Definition of the Criminal Law Term In the Removal Ground 15

2. Identify the Minimum Conduct that is Required for Guilt under the Statute of Conviction and that has a "Realistic Probability of Prosecution" 17

3. Compare the Minimum Conduct and Generic Definition 20

B. Step Two: Is the Criminal Statute Divisible? 23

1. What is the Defense Goal? 23

2. What are the Requirements for a Divisible Statute? 24

3. What do Multiple Discreet Statutory Alternatives Look Like? 24

4. Can a Statute be Divisible for Purposes of One Removal Ground But not for Another? 25
5. What is the Juror Unanimity Requirement? 25
6. How do we Determine Whether a Particular Statute Requires Juror Unanimity? 26
7. Juror Unanimity is Required and a "Peek" at the Record 27
8. Who has the Burden of Proving Whether a Criminal Statute is Divisible? 30
9. Must the BIA Defer to Federal Courts on Divisibility Determinations? 30
10. Which Past Precedent Might be Overturned by *Mathis, Descamps,* and *Matter of Chairez*? 31

C. Step Three: If the Statute is Divisible, Apply the Modified Categorical Approach 33
1. What is the Defense Goal? 34
2. Which Documents from the Record (or Elsewhere) May the Adjudicator Review? 35
3. Can the Adjudicator Use This Information for any Purpose? 37
4. What if the Statute Lists Offenses in the Disjunctive, Using "Or," but the Charging Document Lists them in the Conjunctive, Using "And"? 37
5. What if the Record of Conviction is Inconclusive? *Pereida* and Burden of Proof, Evidence 38

IV. **When the Categorical Approach Does Not Apply** 42

A. Certain Removal Grounds Based on a Conviction 42
1. Circumstance-Specific: Fraud or Deceit where Loss Exceeds $10,000 43
2. Circumstance-Specific: 30 Grams or Less of Marijuana 44
3. Circumstance-Specific: Family Exception to the Alien Smuggling Aggravated Felony 45
4. Circumstance-Specific: Transportation for Prostitution for Commercial Gain 45
5. Circumstance-Specific: Crime of Domestic Violence 45
6. Deportable for being the Subject of a Criminal or Civil Court Finding of a Violation of Designated Sections of a Domestic Violence Protective Order 46

B. Conduct-Based Removal Grounds 46

C. Purely Discretionary Decisions 46

D. Bars to Eligibility for Relief that are not Removal Grounds 47

I. Introduction

With a few exceptions, immigration authorities must use the "categorical approach" to determine whether a criminal conviction triggers a ground of removal. The general rule is that the categorical approach is required where the Immigration and Nationality Act (INA) uses the statutory term "conviction." Some state courts also have adopted the categorical approach. See, e.g., *People v Gallardo* (2017) 4 Cal 5th 120.

Competent use of the federal categorical approach may be the single most important defense strategy available to immigrants convicted of crimes. This is especially true now that the Supreme Court has clarified how the categorical analysis functions, in four recent decisions: *Pereida v. Wilkinson*, 141 S.Ct. 754 (2021); *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013), and *Moncrieffe v. Holder,* 569 U.S. 184 (2013). Following *Mathis*, the BIA expressly acknowledged that it is bound by this Supreme Court precedent regarding the application of the categorical approach in immigration cases. See *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016) ("*Chairez III*"[1]).

Mathis, Descamps and *Moncrieffe* overrule a lot of past precedent on immigration consequences of convictions in very helpful ways, while *Pereida* affects the modified categorical approach in damaging ways. If you represent an immigrant charged with or convicted of a crime and do *not* understand how to use the categorical approach in light of these decisions, you will be doing your client a terrible disservice. Relying on older precedent, you may incorrectly analyze the offense.

This article provides a current step-by-step guide on how to use the categorical approach. Part I outlines the three steps in the analysis. This section can stand alone as a summary of the approach. Part II addresses frequently asked questions about the steps. Part III discusses the contexts in which the categorical approach does not apply.

[1] The BIA's 2016 *Chairez* decision adopts the Supreme Court's reasoning in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013) and clarifies the earlier BIA decisions *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) and *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015). The Attorney General had stayed the earlier *Chairez* opinions while awaiting the Supreme Court's decision in *Mathis*. After *Mathis* was published, the Attorney General lifted the stay and remanded *Chairez* to the Board to decide in accord with *Mathis*. See *Matter of Chairez* and *Sama*, 26 I&N Dec. 796 (AG 2016), lifting the stay imposed at 26 I&N Dec. 686 (AG 2015). The Board then published the current decision, which is cited in the text, *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). It further published *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) *(Chairez IV),* where it denied the government's motion to reverse its earlier decisions and discussed the "peeking" strategy set out in *Mathis.*

This article[2] is more of a how-to guide than an analysis of the reasoning and full implications of the key cases. For an in-depth discussion of *Pereida*, *Moncrieffe, Descamps*, and *Mathis*, as well as related opinions such as *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), see Practice Advisories on these opinions that are available online.[3]

As always, how one uses new arguments depends on where one is in proceedings. Advocates representing people in removal proceedings can advance any good argument. Advocates considering whether to file an affirmative application that would expose a potentially removable person to authorities must be more conservative and should consider the chances that the argument might be rejected and the person placed in removal proceedings. Criminal defenders should always try to act conservatively by pleading specifically to one of the "good" immigration offenses within a criminal statute, even if this ought not to be necessary under the categorical approach.

II. Categorical Approach in Three Steps

A. Overview

Let's say that a client comes in who has an Iowa conviction for burglary for which she was sentenced to 16 months. You know that a burglary conviction with a sentence of a year or more is an aggravated felony for immigration purposes. How do you know whether *her* conviction is an aggravated felony? Is every offense that a state labels "burglary" an aggravated felony if a year or more is imposed?

No, it isn't, and this is the core of the categorical approach. The title of the offense – burglary, theft, assault – does not control. Instead, we undertake a detailed legal analysis, based on the elements of the offense the client was convicted of and the minimum conduct necessary to

[2] Many thanks to Kara Hartzler, Raha Jorjani, Alison Kamhi, Dan Kesselbrenner, Graciela Martinez, Michael Mehr, Manny Vargas, and Andrew Wachtenheim for their very helpful comments, and especially to Avantika Shastri for her work on this update to the advisory.

[3] See, e.g., ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at https://www.ilrc.org/pereida-v-wilkinson-and-california-offenses; 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/. In addition, at http://www.nipnlg.org/practice.html scroll to see practice advisories by IDP and NNIPNLG, including: *Practice Alert: In Mathis v. United States, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach* (July 1, 2016); *Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability under Drug Deportation and Other Conviction-Based Removal Grounds* (June 8, 2015) and advisories on opinions such as *Esquivel, Mellouli,* and *Dimaya.*

commit it, and the definition used in the removal ground. This approach can take up to three steps.

In Step 1 of the categorical approach, we compare the "generic" definition of the removal ground with the elements of the criminal statute. Every criminal law term that appears in removal grounds[4] (e.g., burglary, crime involving moral turpitude) has a technical federal definition, referred to as the "generic" definition or the "generically defined offense." Federal courts or the Board of Immigration Appeals (BIA) may publish precedent that sets out the generic definition of the term in the removal ground, or the removal ground might define it by reference to a federal statute. We will compare this generic definition to the elements of the state (or federal or other) statute our client was convicted of. Here we do not look at what the client actually did, or even what they pled guilty to doing. Instead, we identify the minimum possible conduct that ever has a realistic probability of being prosecuted under the criminal statute and compare *that* conduct to the generic definition. For example, in this case we would compare the federal, generic definition of "burglary" as used in the removal ground, with the minimum conduct required to commit burglary under the Iowa statute.

If this definition of the state offense is narrower than the definition of the removal ground – so that there is no way to commit the offense that does not also trigger the removal ground – then there is a "categorical match." In that case, every noncitizen who is convicted of that offense will come within the removal ground. But if the state offense covers a broader range of conduct than the generic definition, so that one could commit the state offense in a way that does not trigger the removal ground, then the offense is "overbroad" compared to that removal ground. There is no categorical match.

- If there is a categorical match, the client loses and the inquiry ends.
- If there is no categorical match, we breathe a sigh of relief. We will move to Step 2 to determine whether the statute is "divisible" because it sets out multiple discrete offenses, as opposed to just one offense. If a statute is overbroad and indivisible (not divisible), the immigrant wins.

Regarding Step 2, in *Descamps* and *Mathis* the Supreme Court affirmed that a statute must meet a strict standard to be "truly" divisible. The statute must be phrased in the alternative, and the statutory alternatives must describe "elements" (multiple distinct offenses, where a jury must unanimously choose between the statutory alternatives) rather than mere "means" (multiple ways to commit a single offense). In prior decisions, federal courts and the BIA used an incorrect

[4] Note that the categorical approach does not necessarily apply to other immigration terms that are not removal grounds, for example, particularly serious crime. See Part IV, below.

standard and in many cases wrongly held that a statute was divisible, when it was not. Therefore, ***a lot of published precedent on specific offenses must be considered overruled by the Supreme Court, in favor of the immigrant.*** This is one reason that it is important to have a basic understanding of the categorical approach: we can't rely on (bad) past precedent on divisibility.

- If the statute is overbroad (not a categorical match per Step One) and indivisible (not a divisible statute per Step 2), the client wins big. No conviction under the statute ever triggers the removal ground, for any purpose: deportability, inadmissibility, or eligibility for relief. It does not matter to what facts the person pled guilty, because the adjudicator is not permitted to rely on individual facts of the case if the statute is not divisible. Instead, *no one* convicted under the statute, under any circumstances, comes within the particular removal ground

- If instead the statute is divisible into different offenses, we go on to Step 3, the "modified" categorical approach.

In Step 3, the modified categorical approach, an immigration judge or officer may rely on facts from a limited set of documents from the client's criminal case, called the reviewable "record of conviction", which traditionally has consisted of the *Shepard*[5] documents, to see if this conclusively shows of which offense the person was convicted.

If the record is "inconclusive," meaning it does not identify which offense was the subject of the conviction, the outcome depends on who bears the burden of proof. If the issue is deportability, ICE has the burden to show that the record conclusively proves the noncitizen was convicted of a deportable offense under a divisible statute. An inconclusive record means that ICE cannot prove deportability based on this offense. In contrast, if the issue is eligibility for relief, the Supreme Court held in *Pereida* that an applicant for relief has the burden of producing evidence to prove that they were *not* convicted of an offense that is a bar to the relief. ***Thus, an inconclusive record of conviction under a divisible statute will held insufficient to prove that an applicant is eligible for relief.***[6]

[5] See discussion of *Shepard v. United States,* 544 U.S. 13 (2005) in the next section. But note that the Supreme Court majority in *Pereida* questioned whether *Shepard* applies in removal proceedings, despite long precedent finding that it does.

[6] *Pereida* overruled *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Thomas v. Att'y Gen*., 625 F.3d 134 (3d Cir. 2010); *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc). *Pereida* affirmed decisions and reasoning on this issue in the Fourth, Sixth, Eighth, and Tenth Circuits: *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017).

Further, in what arguably is dicta, the *Pereida* majority stated that the *applicant* may be able to use evidence from outside the reviewable record of conviction to meet their burden, because *Shepard* does not necessarily apply in immigration, as opposed to criminal, proceedings.[7] The *Shepard* issue was not briefed, argued, or presented in *Pereida* and the statement shocked legal observers. However, courts may decide to withdraw their precedent and follow it. Most worrisomely, while *Pereida* discussed the ***applicant's*** ability to use evidence from outside *Shepard* documents, ICE will assert that it too may use that evidence. If this is upheld, an inconclusive record of conviction under a divisible statute may no longer be a guaranteed defense against deportability, because ICE might try to meet its burden of proof with evidence from outside the reviewable record.

Now that we've described the whole process once, we will discuss the three steps again in a more thorough manner. The steps are: First, is there a categorical match between the generic definition and the criminal statute? Second, if not, is the statute divisible between different offenses? Third, if the statute is divisible, does the evidence identify which offense the person was convicted of?

B. Step 1: Is there a Categorical Match?

Here we ask: (a) What are the elements of the offense described in the removal ground at issue (the "generic" definition); (b) What are the elements of the client's offense under the statute of conviction (the minimum conduct required to violate that statute); and (c) Do the elements of the statute of conviction fall entirely within the generic definition, or do they reach a broader swath of conduct than the generic definition? As the Supreme Court summarized in *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016):

> To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.

1. Identify the "Generic" Definition of the Removal Ground

The grounds of inadmissibility and deportability (which include the definition of an aggravated felony) contain dozens of terms describing crimes, e.g., "crime involving moral turpitude," "crime of child abuse," "law…relating to a controlled substance," "crime of violence," "burglary," etc. Each of these terms must have a technical, federal definition, referred to as the "generic" definition. Our first research task is to identify the generic definition of the term that appears in the removal ground with which we are concerned. Federal court or Board of Immigration Appeals

[7] See *Pereida*, 141 S.Ct. at 767.

case law may define a general term; checking secondary sources can save research time. Some removal grounds reference a federal statute as the definition, in which case we look to federal cases interpreting that statute.

> **Example:** The definition of aggravated felony includes conviction of "burglary" if a sentence of a year or more is imposed. INA § 101(a)(43)(G). What is generically defined "burglary?"

The Supreme Court reviewed possible sources for definitions, including the Model Penal Code, common law, and the law of several states, and finally decided that generic burglary contains these elements: "an unlawful or unprivileged entry into, or remaining in, a ***building or other structure***, with intent to commit a crime." The Court found that the term "building or other structure" does not include a vehicle. *Taylor v. United States*, 495 U.S. 575, 598 (1990) (emphasis added).

Note on subsequent expansion of the definition of burglary. Almost thirty years after *Taylor*, the Supreme Court revisited this generic definition and held that it includes burglary of a vehicle that is "adapted or customarily used for lodging." *United States v. Stitt,* 139 S.Ct. 399 (2018). The Court reviewed its prior decisions on burglary, in *Taylor, Mathis*, etc., and found that that particular issue had not been presented, and the prior decisions did not conflict with it. Because the new definition does not affect those prior decisions, we will not discuss it further as part of this example.

2. Identify the minimum conduct prosecuted that violates the statute of conviction

Using the text of the statute of conviction, state case law, or other materials, we identify the *minimum conduct* required to violate the statute of which our client was convicted. Court decisions may refer to this as the "minimum conduct," "least acts criminalized," or "least adjudicated elements." Remember that we are focusing solely on the minimum conduct that can be or has been prosecuted under the statute, and "ignoring the particular facts of the case." *Mathis,* 136 S.Ct. at 2248.

The Supreme Court has cautioned that an immigrant may not simply imagine some theoretical, possible minimum conduct for an offense, but must demonstrate a "realistic probability" that this minimum conduct actually would be prosecuted under the statute.[8] One may prove this by producing one or more cases where someone was found guilty under the statute for committing the particular minimum conduct. One can cite to published or unpublished decisions, their own

[8] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe v. Holder*, 569 U.S. 184, 205-06 (2013).

case, or arguably other materials such as documents from criminal prosecutions or press releases or newspaper articles, that document conviction for non-generic conduct. For further discussion of the realistic probability of prosecution, see Part II, below, and see online practice advisories.[9]

One excellent source of information about a state statute's minimum conduct is the relevant state jury instruction for the offense. Do an internet search, or work with a criminal defense attorney, to find the instructions. The instructions also may cite to state precedential cases, which are the best authority.

In addition to cases, many circuit courts of appeals have held that an immigrant can demonstrate that a statute is overbroad if the *express language* of the statute includes conduct that is outside of the generic federal definition. In circuits that have adopted this rule, sometimes referred to as the "express language rule," no cases or other realistic probability proof is necessary.

> **Example:** Iowa Code § 702.12 prohibits in part a burglary of "building and structures, [or] land, water, or air ***vehicle***…." (emphasis added). The language of the statute as well as Iowa cases demonstrate that the statute is used to prosecute burglary of vehicles,[10] not just burglary of buildings. Thus, the minimum prosecuted conduct includes burglary of a vehicle.

The BIA and just a few circuit courts of appeals have declined to adopt the express language rule. See Part II, below. In those jurisdictions, even if the statute describes a specific minimum conduct, the immigrant may need to provide a further showing of realistic probability of prosecution.

3. Is the crime of conviction defined more broadly than the generic definition?

Here is where we compare the elements of the generic definition with the elements of the client's conviction. If the generic definition contains all of the elements of the criminal statute, there is a categorical match. Another way to state the test is to say that if there is some way to commit the state offense that would *not* also commit the generic definition, then there is *no* categorical match.

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[9] See, e.g., IDP/NIPNLG, *Practice Advisory: Realistic Probability in Immigration Categorical Approach Cases* (June 3, 2021), available at https://nipnlg.org/practice.html.

[10] See *Mathis*, 136 S.Ct. at 2250. The Supreme Court subsequently held that generic burglary also can include burglary of vehicles that are adapted or customarily used for lodging, but found that does not apply to the Iowa statute. See discussion of *United States v. Stitt,* 139 S.Ct. 399, 405-407 (2018) at Subpart 1, above.

Example: A person can be convicted of Iowa burglary for illegally entering any vehicle with intent to commit a crime. Could that person also be convicted of generic burglary?

No, they could not. At that time, generic burglary was held to include entry into a building or structure, but to exclude entry into a vehicle. Because of this discrepancy, there was no categorical match. (The definition later was expanded to include certain vehicles serving as dwellings.[11])

If there is a categorical match, the removal ground will apply to every conviction under the statute. The client loses and our analysis is over.

If there is no categorical match, then the statute as whole is **overbroad,** meaning it reaches conduct not reached by the generic definition. In that case the immigrant will win everything, *unless* the statute is divisible. We go to Step 2 to determine divisibility.

C. Step 2: Is the Criminal Statute Divisible?

This step may appear complex, but stay with it until the example. In *Mathis*, the Supreme Court affirmed a strict test for when a criminal statute is divisible. The statute must meet all of these criteria:

1. The statutory language must set out multiple discrete statutory phrases in the alternative (i.e., the statute must use the word "or"). But a statute phrased in the alternative is *not always* a divisible statute.

2. At least one, but not all, of the statutory phrases must describe conduct that is a categorical match to the generic definition.

3. Significantly, these statutory phrases must set out different "elements" of different offenses, not just different means of committing one offense. The test is: if in every case, a jury would have to agree unanimously between these statutory alternatives in order to find the defendant guilty, these are alternative "elements" and the statute is divisible. But if a jury could disagree between the statutory alternatives and still convict the defendant, the statutory alternatives are mere "means" and the statute is not divisible.

If the statutory alternatives are means, not elements, then the statute does not set out different offenses. The statute is indivisible (not divisible).

[11] See discussion of *Stitt* in above footnote.

Example: Let's use these three criteria to determine whether the Iowa burglary statute, Iowa Code § 702.12, is divisible between burglary of a building and burglary of a vehicle. Section 702.12 prohibits burglary of "building and structures, [or] land, water, or air vehicle…."

1. Does § 702.12 set out multiple statutory alternatives?

   Yes. It prohibits burglary of a building "or" a vehicle.

2. Is at least one but not all of these alternatives a categorical match to the generic definition?

   Yes. Burglary of a building (assuming that this Iowa definition of building matches the generic definition) does meet the definition of generic burglary, but burglary of a vehicle does not.

3. Must a jury decide unanimously between "building" and "vehicle" in order to convict the defendant? In other words, do these statutory alternatives set out different offenses, with different elements?

   No. In Mathis, the Supreme Court considered whether the Iowa burglary statute was divisible. It found that under Iowa law a jury could convict the defendant even if it split, with some jurors finding that a building was burgled and others finding a vehicle was. Therefore "building" and "vehicle" are not alternative ***elements****, creating multiple offenses, but are mere alternative* ***means*** *(or different ways) of committing the single offense of burglary. Because it does not list elements in the alternative, the Iowa burglary statute is* ***indivisible*** *between a building or vehicle.*

The jury unanimity requirement is a new concept to many immigration advocates, and state law is not always clear as to whether statutory alternatives are means (no juror unanimity requirement) or elements (juror unanimity requirement). In *Mathis,* the Supreme Court provided instructions on how to determine whether these statutory phrases are elements or means. The Court identified the following sources (*see Mathis*, 136 S. Ct. at 2256-2257):

State case law. As was the case in *Mathis*, sometimes there are state cases that rule on whether statutory alternatives have a juror unanimity requirement. You can find these cases through ordinary state law research tools. State model criminal jury instructions, often available on state court system websites, may provide case citations that speak to the juror unanimity question, and thus can be a good place to start research. However, in many instances, state case law

does *not* definitively answer the juror unanimity question, which requires you to continue researching other sources of law.

Statutory language. Sometimes "a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Mathis*, 136 S. Ct. at 2256. Sometimes the statute contains a list of "illustrative examples" preceded by phrases like "including …." or "such as …." This language implies that these alternative ways of violating the statute are means, not elements, and that the statute is not divisible.

Sentencing exposure. "If statutory alternatives carry different punishments, then… they must be elements." *Mathis*, 136 S. Ct. at 2256. Therefore, the statute is divisible. For example, California first degree burglary, Pen C §§ 459/460(a), has an exposure of up to six years, while second degree burglary, §§ 459/460(b), has an exposure of up to three years. Section 460 is a divisible offense.

Indications from the record of conviction. The Court stated in *Mathis* that if the above sources of law are inconclusive on the juror unanimity question, a "peek" at the noncitizen's "record of conviction" may indicate whether the statutory alternatives are means or elements. For example, if a noncitizen's indictment or charging document simply lists the statutory alternatives (e.g., "did burglarize a building, structure, or vehicle"), then that "is as clear an indication as any" that the alternatives are means rather than elements, and the statute is indivisible. The Court carefully distinguished between this "peek" at the record of conviction at Step 2 (which is for "the sole and limited purpose of determining" *whether* the statute is divisible) and the different review of the record of conviction at Step 3 (which is to determine of which offense under a divisible statute the person was convicted). *Mathis*, 136 S.Ct. at 2256-57; *see also* discussion below.

If the statute is indivisible, the immigrant wins. We do not proceed to Step 3, the modified categorical approach. The regular categorical approach at Step 1 governs, and we already found that the statute is overbroad under that test. When a criminal statute is both overbroad and indivisible, no one who is convicted under it comes within the removal ground. This is true for purposes of deportability, admissibility, and eligibility for relief, and regardless of facts in the record.

> **Example:** In *Mathis* the Supreme Court found that the Iowa burglary statute was indivisible (not divisible) between burglary of a building and a vehicle. Since it was indivisible, the Step 1 categorical approach controlled. At Step 1, the court had found that the minimum conduct to commit the offense (burglary of a vehicle) was not a categorical match with the generic definition, and that the statute therefore was overbroad. Because the statute was both overbroad and indivisible, the Court found that no conviction under it *ever* amounts to generic burglary.

> Note that this is true even if a defendant specifically pled guilty to burglary of a building. If the statute is indivisible, the adjudicator cannot rely on facts from the person's record or conviction, or underlying facts; the adjudicator is restricted to the categorical approach, which compares the minimum conduct prosecuted under the statute with the generic definition. In immigration proceedings, the conviction does not trigger the removal ground, regardless of whether the issue is deportability, inadmissibility, or eligibility for relief. See, e.g., the Supreme Court's holding in *Moncrieffe, supra,* which is that because the minimum conduct to commit the offense is not an aggravated felony, and the statute is not divisible, Mr. Moncrieffe automatically is eligible to apply for LPR cancellation.

If the statute is divisible, we go on to Step 3. For example, if Iowa did have a rule that jurors must agree unanimously between burglary of a building and a vehicle in order to convict, the statute would be divisible and we would go to Step 3.

D. Step 3: The Modified Categorical Approach: In a conviction under a divisible statute, of which crime was the defendant convicted?[12] What evidence can be used to prove this?

If and only if a statute is divisible according to the criteria in Step 2, the modified categorical approach applies. Here the immigration judge or officer may review certain documents from the client's record, referred to as the reviewable "record of conviction," for the sole purpose of identifying *which* offense (which of the elements set out in the alternative in the statute) the person was convicted of. For example, if the Iowa burglary statute were properly held to be divisible, a court would be permitted to review Mr. Mathis' record of conviction to see whether it established that he was convicted for burglarizing a building versus a vehicle.

The Supreme Court consistently has held that the reviewable record of a conviction by plea consists of "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States,* 544 U.S. 13, 16 (2005). These also may be referred to as the *Shepard* documents. Courts have agreed that that pre-sentence reports, preliminary hearing transcripts, and police reports are not part of the reviewable record -- unless the defense explicitly stipulated that they contain the factual basis for the plea. The reviewable record of a conviction by jury includes documents such as the charging document and jury instructions.[13] There are several

[12] See, e.g., *Mathis*, 136 S.Ct. at 2248-2249; *Descamps,* 570 U.S. 254, 260-265.

[13] *See, e.g., Taylor v. United States*, 495 U.S. 575, 602 (U.S.1990)

BIA and Circuit-specific decisions as to what is included in the reviewable record of conviction for immigration purposes.

Note, however, that the Supreme Court in 2021 called into question whether the *Shepard* restraints apply in immigration proceedings, as opposed to criminal proceedings. See *Pereida v. Wilkinson*, 141 S.Ct. 754, 767 (2021), discussed below.

If the evidence conclusively identifies of which offense the person was convicted, then the adjudicator will apply the categorical analysis to that offense. But if the evidence is inconclusive, the case outcome depends upon whether the question is deportability versus eligibility for relief.

- DHS must prove that a conviction causes deportability. If the record of conviction under a divisible statute is inconclusive, then the person is not deportable, because DHS cannot meet their burden.

- In *Pereida*, the Supreme Court resolved a circuit split and held that an applicant for relief convicted under a divisible statute has the burden of producing evidence that their offense of conviction under a divisible statute is not one that is a bar to relief. If the applicant's evidence is inconclusive, their conviction is deemed a bar and they are ineligible for that relief. See discussion of *Pereida* at Part II.C, below and in online practice advisories.[14]

In *Pereida*, the Supreme Court also stated that where the record of conviction is inconclusive, an applicant for relief may be able to use a range of evidence beyond the *Shepard* documents to meet their burden. This language may be helpful to certain applicants for relief. However, based on this same reasoning, ICE might 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 is *deportable*. Advocates should push back against that interpretation of *Pereida*. See discussion in Part II.C, below.

[14] See, e.g., NIPNLG/IDP, *Practice Alert: Overview of Pereida v. Wilkinson* (March 2021) at https://nipnlg.org/practice.html and see ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at https://www.ilrc.org/pereida-v-wilkinson-and-california-offenses.

III. Further Discussion and Frequently Asked Questions

A. Step One: Is there a categorical match?

1. First, Identify the "Generic" Definition of the Criminal Law Term in the Removal Ground

"Under [the categorical 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. 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." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citations omitted).

What is the Defense Goal?

The generic definition is the standard to which the criminal statute is compared. We want the generic definition to be narrow and specific so that some conduct prohibited by criminal statute will fall outside of it, because in that case the immigrant will win.

What is a Generic Definition?

The Immigration and Nationality Act (INA) is full of criminal law terms. Removal grounds include terms such as "crime of domestic violence," "firearms," "controlled substance," "crime involving moral turpitude," etc.[15] Conviction of an aggravated felony is a deportation ground as well as a bar to many forms of relief, and the statutory definition of aggravated felony includes dozens of criminal law terms such as "burglary," "theft," "fraud," "crime of violence," "sexual abuse of a minor," etc.[16]

Each of these criminal law terms must have a federal, "generic" definition that applies in immigration proceedings. Sometimes the INA provides the definition by reference to a federal criminal statute. For example, the firearms deportation ground provides that "firearm" is defined at 18 USC § 921(a). A deportable crime of domestic violence requires a "crime of violence" as defined at 18 USC § 16. See INA § 237(a)(2)(C), (E)(i). Here, to find the generic definition we examine the federal statute, as well as federal cases that interpret it.

In other cases, a removal ground will set out a word or phrase, for example, "theft" or a "crime of child abuse." Here federal courts and/or the BIA will consider several factors to decide on the most appropriate definition of the term. (For an example of this process, see how the Supreme

[15] See INA §§ 212(a)(2), 237(a)(2); 8 USC §§ 1182(a)(2), 1227(a)(2).

[16] See INA § 101(a)(43); 8 USC § 1101(a)(43).

Court arrived at the definition of generic burglary in *Taylor v. United States*, 495 U.S. at 592-560.) Some of these generic definitions, like generic burglary, are both specific and universally accepted. In other cases, federal courts, or a federal court and the BIA, may create different, competing definitions, or vague definitions. It is imperative to check the law of your circuit as well as the BIA to ensure that you are aware of the applicable definition, potential conflicts, and recent developments. If a definition is unsettled, advocates can propose a definition (again, see discussion in *Taylor* and other cited cases that describe this process) and can litigate the issue.

How Do I locate the Generic Definition?

Look at the applicable removal ground and check for references to federal statutes or specific information. If it contains general law terms, starting with secondary sources can save time. Norton Tooby's books such as *Aggravated Felonies, Crimes Involving Moral Turpitude,* and *Safe Havens* summarize all decisions on these topics nationally. See www.nortontooby.com. See also national books such as *Immigration Law and Crimes* at www.thomsonreuters.com. Some Circuit Courts of Appeals publish outlines on the topic on their websites; see especially the Ninth Circuit's outline. Some states have state-specific books,[17] online charts,[18] and articles. But secondary sources are the starting, not ending point. Do further research to see if there are new developments.

Must Federal Courts Defer to the BIA on the Definition?

Federal courts and the BIA both create generic definitions. If these definitions conflict, federal courts have gone both ways as to if or when they must give *Chevron*[19] deference to the BIA's generic definition. In particular, because federal criminal courts (as a sentence enhancement) and the BIA (as a removal ground) both apply the definition of aggravated felony, INA § 101(a)(43), arguably federal courts should not need to defer. Federal courts never defer to the BIA's interpretation if the generic definition is a federal statute, such as the definition of a crime of violence at 18 USC § 16(a).

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[17] For example, in California, besides *Defending Immigrants in the Ninth Circuit* (www.ilrc.org), see Tooby, Brady, *California Criminal Defense of Immigrants* (www.ceb.com), and in New York see Vargas, *Representing Immigrant Defendants in New York* (www.immigrantdefenseproject.org).

[18] See, e.g., the California Chart (sign up at www.ilrc.org/chart) and the Arizona chart at www.firrp.org. See several other state charts at www.nipnlg.org. Current immigration non-profit staff can access a library at www.immigrationadvocates.org.

[19] See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), discussing when federal courts must defer to an administrative agency's interpretation of the statute it administers. For a basic overview of deference issues in immigration law see ILRC, *Who Decides? Chevron, Brand X, and Mead Principles* (2011) at http://www.ilrc.org/files/documents/overview_of_chevron_mead__brand_x.pdf

2. Second, Identify the Minimum Conduct that is Required for Guilt Under the Statute of Conviction and that has a "Realistic Probability of Prosecution"

"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. But this rule is not without qualification…. [O]ur 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.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190-191 (2013), citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

What is the defense goal?

The person's conviction is evaluated not by what they did, but by the most minimal, least egregious conduct that has a realistic probability of being prosecuted under the criminal statute. This is a great advantage. The defense goal is (a) to identify some conduct that violates the criminal statute but falls outside the generic definition, and (b) to show that there is a "realistic probability" that this conduct actually is prosecuted under the criminal statute

What is the "Minimum Conduct" Required to Violate the Statute?

For a criminal conviction to occur, the prosecutor must prove, or the defendant must admit, all of the "elements" of the offense. An element is a fact that a jury must unanimously agree upon for a finding of guilt.[20] Depending on the offense, the required elements might be that the defendant engaged in certain conduct (e.g., sold), caused certain results (e.g., injury), had a certain mental state or intent (e.g., malice), or other factors. The least egregious conduct that fulfills all the elements is the minimum conduct required to violate the statute.

What is a "Realistic Probability of Prosecution" and How Can One Prove it?

The person must show that the proposed minimum conduct has a "realistic probability" of actually being prosecuted under the criminal statute. This can be shown by the following:

- Evidence that the person's own conviction was for this conduct.[21]

[20] See, e.g., *Descamps,* 570 U.S. 254, 260 (2013) and see *Mathis,* 136 S. Ct. at 2248-49.

[21] See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe*, 569 U.S. at 205-06 and *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014).

- Published or unpublished decisions (in the Ninth Circuit, a single unpublished decision) describing a conviction under the statute based on this conduct.[22]

- In most but not all circuits: Language in the criminal statute expressly sets out the minimum conduct. See further discussion below.

- If other evidence is not available, affidavits from criminal defense counsel or prosecutors stating that they have seen this conduct prosecuted under the statute might suffice.

Regarding statutory language, multiple circuit courts of appeals, including the First, Second, Third, Ninth, Tenth, and Eleventh Circuits (although the BIA held that the Eleventh Circuit rule has changed) have held that if the criminal statute's text expressly includes minimum conduct that is outside of the generic definition, no further case evidence is needed to meet the realistic probability test.[23]

> **Example: Statutory Language for Burglary.** Under this rule, if a statute prohibits burglary of a "boat, vehicle, or aircraft," that alone establishes a realistic probability that burglary of a "boat" is prosecuted under the statute, even without case examples, because the statute specifically states "boat."[24]

The BIA held that case evidence is required to show a realistic probability of prosecution, *even if* the statute specifically states the minimum conduct at issue. *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). In *Ferreira*, a state drug schedule listed a particular controlled substance that did not appear on federal drug schedules, and so did not meet the generic definition of "controlled substance" for immigration purposes. The BIA said that the statutory language was not sufficient to show a realistic probability of prosecution; the immigrant needed to show evidence of actual prosecutions involving that substance. In 2015, in a nearly identical case, the Supreme Court did not require case evidence. In *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015), the Court simply stated, "At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists." *Ibid.* But the Court did not discuss the realistic probability of prosecution question.

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[22] *Ibid,* and see *Osequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010).

[23] *See, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57, 63-64 (2d Cir. 2018); *Jean-Louis v. Att'y Gen*., 582 F.3d 462, 481 (3d Cir. 2009); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)); *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017);). *See also Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572-73 (6th Cir. 2007) (unpublished). Regarding the Eleventh Circuit, see discussion in *Matter of Guadarrama,* 27 I&N Dec. 560, 562-66 (BIA 2019) making the potentially questionable finding that the court abandoned the rule in *Ramos v. Att'y Gen*., 709 F.3d 1066, 1071-72 (11th Cir. 2013).

[24] See, e.g., *Grisel,* 448 F.3d at 850.

In 2019 the BIA reaffirmed its rule, while acknowledging that several circuit courts of appeals disagree. In a case arising within the Eleventh Circuit, the BIA held that the fact that a Florida statute specifically names parts of the marijuana plant that are outside the generic definition is not sufficient to prove a realistic probability of prosecution of conduct involving those parts of the plant. The Board acknowledged that in *Ramos v. U.S. Att'y Gen*., 709 F.3d 1066 (11th Cir. 2013), the Eleventh Circuit had adopted the rule that express statutory language is sufficient to prove a realistic probability or prosecution, but the Board found that the Eleventh Circuit had abandoned *Ramos* in subsequent cases. See *Matter of Guadarrama*, 27 I&N Dec. 560, 562-566 (BIA 2019).

Most circuit courts of appeals disagree with the BIA. For example, the Eighth Circuit held that the same Florida definition of marijuana considered in *Guadarrama* is overbroad on its face. The court acknowledged that case examples are required to prove a realistic probability of prosecution if a statute is ambiguous or vague. "But when the statute's reach is clear on its face, it takes no 'legal imagination' or 'improbable hypotheticals' to understand how it may be applied and to determine whether it covers conduct an analogous federal statute does not." *Gonzalez v. Wilkinson,* 990 F.3d 654, 660 (8th Cir. 2021). However, the Fifth Circuit has agreed with the BIA's test.[25]

Where a federal court has not ruled on the issue, advocates should cite the reasoning of the many courts that have adopted the plain language text. But the best plan is also to have case evidence if that is available. For more on this topic, see online practice advisories.[26]

How Do I Identify the Minimum Conduct for a Particular Crime?

State jury instructions are an excellent starting point, if a state publishes them. They may set out the minimum conduct required for guilt under state statutes and provide supporting case citations that can be used to show a realistic probability of prosecution. Some jury instructions are available online.

> **Example:** Jury Instructions. California Penal Code § 242 defines a "battery" as an unlawful use of "force or violence" against a person. This statutory language might appear to require actual violence, or to indicate a divisible statute. But California jury instructions make clear that "force" and "violence" in § 242 are synonymous, and that they include "the slightest touching" that causes no pain or injury. The instructions cite cases where the statute has been used to prosecute this kind of conduct. See CALCRIM 841. The cases establish that the minimum prosecuted

[25] See *United States v. Castillo-Rivera*, 853 F.3d 218, 222-24 (5th Cir. 2017) (en banc).

[26] See, e.g., NIP/NLG and IDP Advisories on *Mellouli v. Lynch* (June 8, 2015) and on *Realistic Probability and Duenas-Alvarez* (November 5, 2014) at https://www.nationalimmigrationproject.org/practice.html

conduct to violate the statute is a mere offensive touching. (This same analysis applies to simple battery statutes in several states.)

Some aspects of jury instructions can be hard for immigration attorneys to understand. In case of doubt, consult with criminal defense counsel. Also, do additional research in case subsequent published decisions affect the minimum conduct but have not yet been incorporated into the jury instructions.

If your state does not publish jury instructions, you must research criminal cases. This is an opportunity for immigration advocates to ask for help from the criminal defense attorneys. Note that defense attorneys might use other terms for minimum conduct, such as "least criminalized act" or "least adjudicated elements."

Who Must Prove Realistic Probability of Prosecution?

This is a question of law, and courts have an obligation to get it right. But, in fact, the immigrant is the party who needs to show that a particular minimum conduct has a realistic probability of prosecution, and generally the immigrant will bring the arguments and evidence.

Must Federal Courts Defer to the BIA?

Federal courts do not owe *Chevron* deference to the BIA on questions of state law, such as the minimum conduct required to commit a state offense,[27] or on how the categorical approach is employed, including what constitutes a realistic probability of prosecution.

3. Third, Compare the Minimum Conduct and Generic Definition

"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. … 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].' Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citations omitted).

[27] See *Chevron, Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), holding that federal courts may owe deference to an administrative agency interpretation of the statute that it administers. The BIA does not administer state statutes and thus is not owed deference regarding its interpretation of their construction or comparison to a generic definition. See, e.g., discussion in *Marmolejos-Campos v. Holder*, 558 F.3d 903, 907-908 (9th Cir. 2009) (*en banc*).

What is the Defense Goal?

We want to show that the minimum prosecuted conduct to commit the offense does not necessarily come within the generic definition. If that is true, there is no categorical match, and the statute is "overbroad." (The next step will be to examine the statute to see if it is divisible; see Step 2.)

If instead there is a categorical match, then the person loses the issue and the analysis ends.

How Do We Compare the Generic Definition and Minimum Conduct?

Look at the elements of the generic definition. If there is any minimum prosecuted conduct that does not meet all of the elements of the generic definition, then no conviction under the statute is a categorical match. Another way of putting this is, could a person be convicted under the criminal statute but not under the generic definition?

> **Example:** California Burglary as the Aggravated Felony "Burglary." The generic definition of the aggravated felony "burglary" requires an "unlawful or unprivileged entry" with intent to commit a crime. California burglary, Penal Code § 459, just requires an "entry" with intent to commit a crime. Cases show that persons have been convicted of § 459 based on both lawful and unlawful entries.
>
> The minimum conduct to commit § 459 is a lawful entry with intent to commit a crime. This lacks the element in the generic definition of an unlawful or unprivileged entry. Put another way, persons who committed a burglary involving a lawful entry have been convicted of § 459 but could not be convicted of generic burglary. No conviction of § 459 is a categorical match with "burglary." The statute is overbroad. See *Descamps v. United States*, *supra.*
>
> **Example:** Georgia Distribution of Marijuana as an Aggravated Felony**.** The generic definition of a drug trafficking aggravated felony includes giving away a controlled substance, with one exception: it excludes the offense of giving away a small amount of marijuana.[28] Georgia Code Ann. § 16-13-30(j)(1) prohibits several offenses, including possession with intent to distribute marijuana. The statute has been used to prosecute conduct ranging from giving away a small amount of marijuana, to selling large amounts of it.
>
> The Georgia statute is not a categorical match, because the minimum prosecuted conduct to violate the statute falls outside the generic definition. In other words,

[28] See 21 USC § 841(b)(4), discussed in *Moncrieffe v. Holder*, 569 U.S. at 185.

people who gave away a small amount of marijuana have been convicted under the Georgia statute, but they could not be convicted of the generic offense. No conviction of § 16-13-30(j)(1) is categorically a drug trafficking aggravated felony – even for persons who sold marijuana. The statute is overbroad. See *Moncrieffe v. Holder, supra*.

It may help to create a chart to compare the elements. Here is a chart comparing generic burglary to the California burglary statute described above, which was at issue in *Descamps*. Because conduct that violates the California definition would not violate the generic, there is no match.

Generically Defined Burglary	Minimum Prosecuted Conduct to Commit Burglary under Calif. Penal Code § 459
Unlawful or unprivileged entry into, or remaining in … • ***Requires unlawful entry; excludes lawful entry***	Entry into …. • ***Includes lawful entry – no match***
a building or other structure … • ***Requires building, structure; excludes vehicle (unless adapted for or used as a dwelling)***	a building, vehicle, railroad car, etc. • ***Includes any vehicle – no match***
with intent to commit a crime • ***Requires intent to commit a crime***	With intent to commit larceny or any felony • ***Larceny and felony are crimes - match***

Who Has the Burden of Proof?

Whether the minimum conduct matches the generic definition is a pure question of law. The same legal analysis applies to deportability and eligibility for relief. There is no switching of the burden of proof, and the immigrant does not need to produce the record of conviction to prove eligibility for relief (for one thing, the record of conviction is completely irrelevant to this inquiry; it only comes into play in Step 3, *after* the statute is proved to be divisible). See, e.g., *Moncrieffe v. Holder*, *supra,* where the Supreme Court held that because the minimum conduct to commit GCA § 16-13-30(j)(1) is not categorically an aggravated felony (and the statute was not divisible), Mr. Moncrieffe can apply for cancellation of removal.

Can the Same Offense Come Within Two Removal Grounds, or Within One but Not the Other?

Yes! Each criminal law term in a removal ground will have its own generic definition. One must compare the elements of the offense of conviction to each generic definition. Because each generic definition is different, an offense may come within some generic definitions but not others.

For example, possession of a controlled substance is a removable controlled substance offense (if the substance appears on federal drug schedules), but it is not a crime involving moral turpitude (because that definition does not include simple possession). In contrast, sale of a controlled substance may be a removable controlled substance offense *and* a crime involving moral turpitude.[29]

Must Federal Courts Defer?

Federal courts do not need to give *Chevron* deference to the BIA's finding, since this involves comparing a state criminal offense to a federal generic definition[30] and is not restricted to interpreting the Immigration and Nationality Act.

B. Step Two: Is the criminal statute divisible?

> "To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. Distinguishing between elements and facts is therefore central to [the federal statute's] operation. 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant… Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. A single statute may list elements in the alternative, and thereby define multiple crimes…." *Mathis v. United States*, 136 S.Ct. at 2248-2249 (2016) (citations omitted).

1. What is the Defense Goal?

An "indivisible" statute is any statute that is not divisible. We want to establish that the criminal statute is indivisible. If a statute is both overbroad (Step 1 conclusion) and indivisible (Step 2 conclusion), the analysis stops, and the immigrant wins completely. No conviction under the

[29] See, e.g., *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

[30] See, e.g., discussion in *Marmolejos-Campos v. Holder*, 558 F.3d at 907-908.

statute will trigger the removal ground, for purposes of deportability, inadmissibility, or eligibility for relief. This is true even if the person pled guilty to facts that do happen to match the removal ground; if the statute is indivisible, the individual's guilty plea and other information from the record of conviction may not be considered.

In contrast, if the statute is "divisible," the analysis goes on to Step 3. There the adjudicator will be able to consider facts from the individual's record of conviction.

2. What are the Requirements for a Divisible Statute?

A criminal statute is divisible only if it meets all three of these criteria. These are discussed in more detail below. The criteria are:

- The statutory language must set out multiple discrete statutory phrases in the alternative (i.e., the statute must use the word "or"). But contrary to some prior precedent, now overruled, a statute phrased in the alternative is *not always* a divisible statute.
- At least one, but not all, of the statutory alternatives must describe conduct that is a categorical match to (comes within) the generic definition.
- Significantly, these statutory phrases must set out different "elements" of different offenses, not just different means of committing one offense. The test is: if in every case, a jury would have to agree unanimously between these statutory alternatives in order to find the defendant guilty, these are alternative "elements", and the statute is divisible. But if a jury could not agree between the statutory alternatives and still convict the defendant, the alternatives are mere "means" and the statute is not divisible.

If any of these criteria are not met, the statutory alternatives are not elements and do not create different offenses. The statute is indivisible (not divisible).

3. What Do Multiple Discreet Statutory Alternatives Look Like?

Statutory alternatives can be set out in different ways. Different conduct listed within a statutory phrase or subsection, such as "firearm *or* knife" or "structure *or* vehicle" can be the alternatives. Or, formal subsections such as Utah Code §§ 76-10-508.1(1)(a), (b), and (c) can be the alternatives.

A single term or phrase such as "entry" or "structure" is not phrased in the alternative. It is not divisible *unless* it is defined somewhere else in the code, in text that does set out alternative elements. For example, Iowa Code § 713.1, the burglary statute addressed in *Mathis*, prohibits entry into an "inhabited structure." That is a single term. But the term "inhabited structure" is defined in another section, Iowa Code § 702.12, to include a structure "or" a vehicle. Because

the § 702.12 definition is phrased in the alternative, § 713.1 meets the first requirement for a divisible statute. (As we saw, however, ultimately it was found not to be divisible because the phrases were means, not elements.)

But see *Franco-Casasola v. Holder*, 773 F.3d 33 (5th Cir. 2014), which applied convoluted logic to find that "firearm" is an element of the phrase "contrary to any law or regulation of the United States," and thus held that a conviction for 18 USC § 554(a) is divisible as the aggravated felony firearms trafficking, under INA 101(a)(43)(C). See also the dissent by Judge Graves.

4. Can a Statute Be Divisible for Purposes of One Removal Ground but not for Another?

To be divisible, a statute must include at least one distinct offense that does, and one that does not, meet the generic definition in the removal ground at issue. Because different removal grounds list different crimes, which have may have different generic definitions, the same statute might be divisible for one removal ground but not another. The criminal statute must be separately analyzed under each potential ground.

> **Example:** Divisible for Firearms but not for Moral Turpitude. Say that a state statute prohibits possessing "a firearm or a switchblade" in the passenger section of a car. The state definition of "firearm" meets the generic, federal definition. Assume that the statute actually is divisible between firearm and knife (meaning, a jury can convict the defendant only if all jurors agree as to whether it was a firearm versus a knife).
>
> This statute is divisible for purposes of the firearms ground of deportation, because a conviction involving a firearm triggers the firearms ground, but a conviction involving a knife does not. But the statute is not divisible for purposes of the moral turpitude ground, because neither offense meets the generic definition of moral turpitude. (Simply possessing, as opposed to using, a weapon has been held not to be a crime involving moral turpitude.)

5. What is the Juror Unanimity Requirement?

In *Mathis* the Supreme Court affirmed that to be divisible, a statute must set out *elements* in the alternative. Elements are defined as facts upon which a jury must unanimously agree in order to find guilt. The Court explained the requirement:

> To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. Because that

> kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." And similarly, to bring the discussion back to burglary, a statute might—indeed, as soon discussed, Iowa's burglary law does—itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score….
>
> The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.
>
> *Mathis v. United States*, 136 S. Ct. at 2249, 2256 (citation omitted).

Before *Mathis*, federal courts of appeals were split on this issue. Some courts held that the Supreme Court's 2013 decision in *Descamps, supra*, meant that any statute phrased in the alternative is divisible, regardless of juror unanimity requirements. Other courts held that *Descamps* required a juror unanimity rule. *Mathis* confirmed that *Descamps*, and other Supreme Court precedent stretching back to the 1990 decision in *Taylor, supra*, holds that the categorical approach is determined by the elements of the offense, and that requires juror unanimity.

6. How Do We Determine Whether Juror Unanimity is Required for a Particular Criminal Statute? State Law and Statutory Indications

In *Mathis,* the Supreme Court discussed factors to consider in determining whether a particular statute that is phrased in the alternative has a jury unanimity rule (and thus sets out elements) or does not have such a rule (and thus sets out means). See also discussion in Part I, Step 2, above.

First, the adjudicator must consider whether a state court decision (which might be reflected and cited in state jury instructions) has decided the issue. In many instances, it has not.

Next the adjudicator may look to the wording of the state statute. If the statute lists "illustrative

examples," it is likely not divisible. If it provides different sentencing exposure for the different statutory alternatives, it is.

> When a [state court ruling on whether a statute requires jury unanimity] exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). See, *e.g., Cal. Penal Code Ann. § 952 (West 2008).* Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.
>
> *Mathis v. United States*, 136 S.Ct. at 2256 (citations omitted)

7. How Do We Determine Whether Juror Unanimity is Required for a Particular Criminal Statute? "Peek" at the Record.

If the above inquiry into state law and the phrasing of the statute does not resolve whether there is a jury unanimity rule, *Mathis* suggests looking ("peeking") at certain documents from the individual's record of conviction to see if they shed light on whether the statute is divisible.

A note on this advice, which can seem confusing. Under the "modified categorical approach," an adjudicator may look at the person's record of conviction only *after* a statute has been found divisible, at what we call Step Three. So why does the Court now advise adjudicators to look at the person's record of conviction in order to determine *whether* the statute is divisible, at what we call Step Two? The explanation is that the two reviews of the record have different purposes, and to some extent look at different information. The purpose of the "peek" at certain documents in the record of conviction, discussed here, is to see whether, e.g., the charging document alleges all of the statutory alternatives, which indicates that those alternatives are means rather than elements, and that the statute therefore is not divisible. In contrast, in the modified categorical approach, where we already have determined that the statute is divisible, the adjudicator will look at the record of conviction to see if it establishes of *which* elements the person was convicted. The Court explains:

> And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a "peek at the [record] documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Rendon v.*

> *Holder*, 782 F.3d 466, 473-474 (CA9 2015) (opinion dissenting from denial of reh'g en banc). (Only if the answer is yes can the court make further use of the materials, as previously described, see *supra,* at 12-13.) *Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.* So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps,* 570 U. S., at ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438, 458-459.
>
> *Mathis v. United States*, 136 S.Ct. at 2256-57 (emphasis supplied)

The Court states that if the charging document lists all the alternatives, e.g., "entered a building, structure, or vehicle," or a single umbrella term such as "premises," then that "is as clear an indication as any that each alternative is only a possible means of commission, not an element." *Many charging documents simply track the language of the statute and will set out all the statutory alternatives.* Advocates can assert that this is a clear indication that the statute is indivisible.

> **Example:** In *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016), the BIA considered a Utah statute[31] that prohibited in part discharging a firearm in a way that could cause harm with "intent, knowledge, or recklessness." Under current Tenth Circuit law, intentional conduct under the statute is a crime of violence, but reckless conduct is not. Is the statute divisible between the different mental states?
>
> Applying *Mathis*, the Board found that the statute is not divisible unless a jury is required to decide unanimously between intentional, knowing, and reckless conduct. The Board noted that while there was no case law regarding this offense, a Utah court had considered the same mental state requirement in the context of second degree murder and found that jury unanimity was not required there. This supported a "reasonable inference" that there was no jury unanimity requirement for this offense, either. *Chairez, supra* at 824. The Board also "peeked" at the record and saw that the charging document did not allege a specific mental state. Therefore the "reasonable inference was not refuted by any other source of authoritative state law or by the respondent's record of conviction…" *Ibid.* Because

[31] Utah Code § 76-10-508.1(1)(a), with intent defined at § 76-2-102.

> the statute is not divisible, the minimum conduct test applies.
>
> Under that test, the Board held that for purposes of deportability, as well as eligibility to apply for cancellation of removal, the offense is not an aggravated felony as a crime of violence. *Id.* at 824-25.

But what if the respondent's charging document alleges just one of the statutory alternatives, e.g., "entered a building"?

> Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. *Shepard*, 544 U. S., at 21, 125 S. Ct. 1254, 161 L. Ed. 2d 205. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.
>
> *Mathis v. United States*, 136 S.Ct. at 2257.

With good reason, *Mathis* states that a specifically phrased charging document in the individual's case might or might not show with sufficient certainty that the alternatives are elements. One factor that makes this uncertain is that here, the court is discussing the respondent's records. The jury unanimity rule is a question of law that applies to the statute in every case; the same statute cannot have a jury unanimity rule for one defendant, but not for another. The fact that a charging document in the client's case alleged one alternative is not necessarily proof of the requirement. Advocates should seek out other charging documents that track the whole statute, jury instructions, or other evidence to show that there is no such rule. Creating doubt may be sufficient. If the evidence on jury unanimity is not clear enough to meet "Taylor's demand for certainty," assert that the statute must be deemed indivisible. *Ibid.*

Advocates also can look to a wealth of decisions and basic criminal law precepts cited in *Mathis* and *Descamps*, to support an assertion that many statutes list mere means.[32] In addition, some

[32] See, e.g., *Schad v. Arizona*, 501 U.S. 624, 623 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes."), cited in *Mathis* and *Descamps*; and *Richardson v. United States*, 526 U.S. at 817 ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). See also, e.g., *U.S. v. Lopesierra-Gutierrez*, 708 F.3d 193 (D.C. Cir. 2013); *U.S. v. Felts*, 579 F.3d 1341 (11th Cir. 2009).

states have adopted the so-called *Sullivan*[33] rule, which sets out a kind of presumption that unanimity is not required. The Ninth Circuit noted that because California has adopted the *Sullivan* rule, "we must take great care when considering California state violations as a prior offense because a disjunctively worded California statute may simply be listing alternative means rather than alternative elements." *Rendon v. Holder*, 764 F.3d 1077, 1089 at n. 15 (9th Cir. 2014).

8. Who Has the Burden of Proving Whether a Criminal Statute is Divisible (Has a Jury Unanimity Rule)?

In *Matter of Chairez*, the Board of Immigration Appeals indicated that the government has the burden of proving that a statute is divisible for purposes of deportability, and it extended the same result to eligibility for relief.

> Under the circumstances, we conclude that the respondent's removability under section 237(a)(2)(A)(iii) of the Act has not been proven by clear and convincing evidence.
>
> In conclusion, although the respondent is removable by virtue of his conviction for a firearms offense, the evidence does not establish his removability as an alien convicted of an aggravated felony. For purposes of cancellation of removal, the respondent has carried his burden of proving the absence of any disqualifying aggravated felony conviction because section 76-10-508.1(1) of the Utah Code is overbroad and indivisible relative to the definition of an aggravated felony crime of violence under section 101(a)(43)(F) of the Act.
>
> *Matter of Chairez,* 26 I&N Dec. 819, 825 (BIA 2016) *("Chairez III").*

9. Must the BIA Defer to Federal Courts on Divisibility Determinations?

Yes. The BIA stated that "the understanding of statutory 'divisibility' embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings. Furthermore, we reiterate that Immigration Judges and the Board must follow applicable circuit law to the fullest extent possible when seeking to determine what *Descamps* and *Mathis* require." *Matter of Chairez*, *supra* at 819-820.

[33] See *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903).

10. How Can We Identify Which Past Precedent Might be Overturned by *Mathis, Descamps, and Matter of Chairez*?

The analysis differs slightly depending on whether or not the criminal statute is phrased in the alternative, using "or".

If the Statute Is Not Phrased in the Alternative, it is Not Divisible. The Supreme Court states that in order to be divisible, a statute must set out distinct offenses in the alternative. If the section of the statute you are considering is not phrased in the alternative, that almost surely means that it is indivisible. Any case holding that it is divisible should be held overturned by the Supreme Court. The correct analysis should be that no conviction of the statute triggers the removal ground, for any purpose, and regardless of information in the record. This is because the opinion already held that the statute is "overbroad" and not a categorical match, under the minimum conduct test. If a statute is not divisible, the result under the minimum conduct test controls.

> **Example: Entry.** California burglary statute prohibits "entry" with an intent to commit certain crimes and reaches both permissive and unpermitted entries. The Ninth Circuit had held that the term "entry" was "divisible" between the types of entries, despite the fact that it was a single phrase. The Supreme Court reversed and held that as a single term, "entry" is indivisible. As an overbroad and indivisible term, it must be judged by the minimum prosecuted conduct. Thus, every entry under the statute will be considered a permitted, lawful entry. *Descamps v. United States*, 570 U.S. 254 (2013).
>
> Example: Spousal Battery, Resisting Arrest**.** The generic definition of a misdemeanor "crime of violence" generally does not include an offensive "touching."[34] In many states, resisting arrest, or a simple assault or battery including spousal battery, can be committed by an offensive touching. In the past the BIA held that these statutes were divisible, so that an immigration judge may look to the record to see if the touching in the case actually involved violence. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). These decisions should be overturned, so that no conviction of the simple battery is a crime of violence or a deportable crime of domestic violence.
>
> See, e.g., the discussion in *U.S. v. Flores-Cordero*, 723 F.3d 1085, 1088-1089 (9th Cir. 2013) (court must change its pre-*Descamps* analysis and find that Arizona

[34] See 18 USC § 16(a), and see, e.g., *Johnson v. United States,* 559 U.S. 133, 137-38 (2010); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

> resisting arrest, ARS § 13-2508(A)(1), is not divisible and no conviction of the offense is a crime of violence).
>
> However, see *Stokeling v. United States*, 139 S.Ct. 544 (2019), which held that use of de minimus force *to overcome the will of the victim* (an element in, e.g., some robbery offenses) is a crime of violence.

Warning: Look for hidden statutory definitions of a single term. Sometimes a single term or phrase is defined in the alternative, elsewhere in the criminal statute. This may not be immediately obvious, so research or consulting with an expert criminal attorney is required. See, e.g., Iowa Code § 713.1 prohibiting burglary of an "occupied structure," and Iowa Code § 701.12 further defining occupied structure as a "building, structure … or vehicle." Treat this as a statute that is phrased in the alternative, and determine whether the phrases are means or elements.

A Statute That is Phrased in the Alternative Still May Not Be Divisible. Many, if not most, statutes that are phrased in the alternative also are not divisible, because there is no rule providing that a jury would have to decide unanimously between the phrases in order to convict the defendant. Prior precedent that holds that a statute is divisible without addressing this requirement is binding. The parties will have to investigate the juror unanimity rule issue.

This prior precedent is extremely useful, however, because it establishes that the statute is overbroad. (That is why the court even went to the Step 2, divisibility inquiry.) If you determine that the statute is indivisible, then we have an overbroad and indivisible statute and the immigrant wins.

Some immigration judges or officers may balk at ignoring precedent based on this counter-intuitive standard. Remind authorities that not only the Supreme Court in *Mathis, supra*, but the BIA in *Matter of Chairez,* upheld this rule.

C. Step Two: Is the criminal statute divisible?

If and only if the statute is divisible under the above standard, we proceed to the modified categorical approach. This is the only step in the categorical approach where the adjudicator is permitted to rely upon information found in the record of conviction, and where the immigrant might be required to produce his or her record.

> "[A divisible statute] sets out one or more elements of the offense in the alternative…. [T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the

elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime…

"[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." Nijhawan, 557 U.S. at 41, 129 S.Ct. 2294, 174 L.Ed. 2d 22. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."

Descamps v. United States, 570 U.S. 254, 263-264 (2013).

1. What are the Defense Goals in Using the Modified Categorical Approach?

If a statute is divisible, the adjudicator (immigration judge or officer) may review strictly limited documents (known as the "record of conviction") from the individual's underlying conviction, for the sole purpose of identifying *which* of the statutory elements the person was convicted of. The advocate wants to ensure that the adjudicator:

- Consults the record of conviction only if there is legal authority showing that the statute is truly divisible[35] (see Step 2)

[35] See Descamps v. United States, 570 U.S. at 265.

Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non- generic) formed the basis of the defendant's conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner. We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.

- Consults only the permitted documents from the record (although courts may decide that *Pereida* allows an applicant for relief or even ICE to use an expanded range of evidence; see below)

- Uses information from the record only to identify the statutory elements that make up the offense of conviction (see quotation from *Descamps,* above)

- Applies the minimum prosecuted conduct test to those elements (same) and

- Determines whether the information in the record *conclusively* identifies the offense of conviction. See Burden of Proof, below.

2. Which Documents from the Record May the Adjudicator Review?

Although the specifics vary across circuits, the law has been quite clear that the reviewable record of conviction is limited to documents that reliably show what facts were necessarily adopted by the defendant upon entering a plea or necessarily found at trial. The Supreme Court has held that the reviewable record of conviction by plea consists of "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented", also known as the *Shepherd* documents.[36] Courts have agreed that that pre-sentence reports, preliminary hearing transcripts, and police reports are not part of the reviewable record -- unless the defense explicitly stipulated that they contain the factual basis for the plea. The reviewable record of a conviction by jury includes documents such as the charging document and jury instructions.[37] Counsel should research BIA and Circuit-specific decisions, as there is a lot of litigation regarding which documents, and which content from the documents, are included in the *Shepard* category.

However, counsel should be aware of recent language in *Pereida v. Wilkinson* that appears to expand the range of evidence that may be used in the modified categorical approach. In *Pereida* the majority stated that under the modified categorical approach, an applicant for relief is not restricted to *Shepherd* documents to prove their offense of conviction. The majority suggested that an applicant for relief can use a range of evidence to meet their burden of proof, suggesting that *Shepard* may not apply to immigration proceedings. *Pereida*, 141 S.Ct. at 76. It cited documents listed at 8 USC § 1229a(c)(3)(B), which 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.

[36] *Shepard v. United States,* 544 U.S. 13, 16, 20 (2005).

[37] *See, e.g., Taylor v. United States*, 495 U.S. 575, 602 (U.S.1990)

The majority's suggestion contradicts extensive federal precedent that without exception has applied *Shepard* and the modified categorical approach equally in immigration and federal criminal proceedings.[38] It also appears to be dicta. Neither party in *Pereida* had raised, briefed, or argued the issue, and no lower court had ruled on it, because it was not at issue in the case. But because the majority of the Supreme Court signed off on this statement, some federal courts might 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.[39] They might also extend this to ICE.

Some applicants for relief could benefit from lifting the *Shepard* requirements, because if they could not obtain *Shepard* documents, or the documents were inconclusive, they could prove their offense of conviction by offering other types of evidence, such as testimony or a declaration from a defender, prosecutor, or court reporter, or other document. If no other evidence is available, arguably the applicant themselves, and/or a friend or family member who was present at the time of the conviction, could testify as to what offense the applicant was convicted of. Absent evidence to the contrary, could that meet their burden of proof?

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 to obtaining the *Shepard* documents. The danger is that if federal courts were to decide to withdraw from applying *Shepard* to immigration proceedings, ICE also would claim the right to use other evidence to meet its burden of proving that a conviction under a divisible statute is a deportable offense. In contrast to most immigrants, ICE

[38] 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.* 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.

[39] See the disappointing opinion in *Marinelarena v. Garland*, 6 F.4th 975, 978 (9th Cir. 2021) (finding that under *Pereida*, an applicant can present evidence outside the *Shepard* documents, but declining to remand the case to the BIA on the grounds that the applicant had not attempted to do so before (without noting that such an offer would have been rejected before *Pereida*).

has tremendous resources with which to obtain testimony or other documentation to meet its burden.

3. Can the Adjudicator Use Information from These Documents for any Purpose?

The judge may use facts from the record only to identify the elements of the offense of conviction, i.e., to identify of which statutory alternative the person was convicted. "The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction…" *Descamps v. United States*, 570 U.S. at 278.[40]

4. What if the Statute Lists Offenses in the Disjunctive, Using "Or," but the Charging Document Lists Them in the Conjunctive, Using "And"?

Sometimes prosecutors will take offenses that are listed in the disjunctive ("or") in the statute and phrase them in the conjunctive ("and") in the charging document. For example, California Health & Safety Code § 11379 punishes one who "transports, imports into this state, sells, furnishes, administers, *or* gives away, *or* offers to transport, import into this state …" a controlled substance. But a charging document may allege that the defendant "transported, imported, sold, furnished, administered, *and* gave away, *and* offered to transport, import into this state …" etc. (emphases supplied).

In this case, a plea to a charge phrased in the conjunctive should *not* be held a plea to all listed offenses. The best view is that the plea is inconclusive. See, e.g., *Young v. Holder*, 697 F.3d 976, 988 (9th Cir. 2012) (en banc) ("In sum**,** when either "A" or "B" could support a conviction, a defendant who pleads guilty to a charging document alleging "A and B" admits only "A" or "B." Thus, when the record of conviction consists only of a charging document that includes several theories of the crime, at least one of which would *not* qualify as a predicate conviction, then the record is inconclusive under the modified categorical approach.") When making this argument before a circuit court of appeals that has not resolved this issue, cite on-point law from the convicting jurisdiction (the state, tribal authority, etc., or for federal criminal cases, the circuit). For example, the Fifth Circuit relied on California law to interpret a California indictment phrased in the conjunctive, in *United States v. Moreno-Florean*, 542 F.3d 445, 451-52 (5th Cir. 2008). The court cited *In re Bushman,* 1 Cal. 3d 767, 775 (Cal. 1970) ("Merely because the complaint

[40] In contrast to long-standing Supreme Court precedent, in *Pereida*, the majority referred to this inquiry as a "question of fact." 141 S.Ct. at 764-65. The dissent disputed this characterization as a misunderstanding of the necessary analysis. *Id*. at 772-773.

is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts."), as well as *People v. Turner,* 185 Cal. App. 2d 513 (Cal. Ct. App. 1960)).

Note that criminal defense counsel *always* should try to plead to a specific, immigration-neutral offense under a divisible statute where that is possible, because the law is unsettled, and the immigrant may appear unrepresented before an immigration adjudicator who is not familiar with the correct rules. This may be less necessary for some offenses that immigration judges are very familiar with, e.g., simple battery, but remember that the client's case may be heard anywhere in the United States and some immigration judges have had very little training on these issues.

5. What if the Record of Conviction Under a Divisible Statute is Inconclusive?

Burden of Proof: Deportability: Because ICE must prove deportability, ICE always has the burden of producing a reviewable record that shows that a conviction under a divisible statute was for a deportable offense. If the record is inconclusive as to which offense in a divisible statute was the subject of the conviction, ICE cannot meet its burden and the immigrant is not deportable. An inconclusive record might be, for example, evidence of a plea of guilty to a charge of committing "x *or* y," or no record from the proceeding at all other than proof of a conviction.

Burden of Proof: Eligibility for Relief. What happens if an immigrant who must apply for relief was convicted under a divisible statute, and the record is not conclusive as to whether the offense of conviction is a bar to relief?

The Supreme Court resolved this issue in favor of the government, in *Pereida v. Wilkinson*, 141 S.Ct. 754 (2021). It held that a noncitizen convicted under a divisible statute has the burden to prove that their particular conviction was not a bar to relief. *Pereida* resolved a split between circuits and overturned precedential case law in the First, Second, Third, and Ninth Circuits.[41]

> **Example:** Mr. Pereida was eligible to apply for non-LPR cancellation, but for the fact that he had been convicted of a misdemeanor. The conviction was under a divisible, four-part Nebraska statute that included some offenses that were crimes involving moral turpitude (CIMTs) and some that were not. A CIMT conviction would be a bar to relief. Here the record was inconclusive, because Mr. Pereida did not produce a qualifying record of conviction that proved the specific offense of which he had been convicted.

[41] See note *8.

> The Supreme Court held that because this is a factual question, and an applicant for relief has the burden to prove that they are eligible for that relief, therefore Mr. Pereira had the burden to prove that his conviction was not a bar to relief, meaning that it was *not* for one of the CIMTs in the statute. Because he did not present evidence proving that, the Court found that he was not eligible to apply for non-LPR cancellation.

Pereida is a bad decision that ICE will assert applies to any application for admission, lawful status, or relief. [42] Not only undocumented people, but refugees, permanent residents, and others who need to apply for relief will be affected. However, it is important to remember that it only applies to cases that involve a *truly divisible statute*. *Pereida* did nothing to upset the definition of divisibility, and many, many statutes are not divisible under that definition.

Unfortunately, one type of statute that often, but not always, is found divisible relates to controlled substance offenses. If a state drug schedule that applies to an offense contains any substances that are not contained in the federal drug schedules, the state schedule is overbroad. But if the state schedule also is found divisible, it may be very difficult to be able to plead to one of those non-federal offenses.

> **Example:** California Health and Safety Code § 11379 is overbroad as an immigration drug offense because it reaches some substances that are not on the federal drug schedules, such as chorionic gonadotropin or khat. New York Penal Law § 220.31 also is overbroad as an immigration drug offense because it reaches some substances that are not on the federal drug schedules. Both are overbroad. But are they divisible?
>
> The Ninth Circuit found that the California offense *is* divisible as to the substance.[43] Under *Pereida*, this poses a huge problem for any noncitizen who must apply for relief and cannot have a controlled substance conviction. The person will have to produce court records showing that they were convicted of an offense involving one of the specific non-federal offenses, like chorionic gonadotropin or khat. In criminal court that may be a very hard plea bargain to negotiate. Their only alternative in criminal court may be to get pretrial diversion (diversion that does not require any admission of guilt) or to plead guilty to an alternative offense not

[42] The *Pereida* case specifically concerned an applicant's eligibility for an application for relief within the context of removal proceedings. Advocates may be able to push back on the expansion of *Pereida* to affirmative applications for benefits outside of the relief context by noting 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.

[43] *Ruiz-Vidal v. Gonzales*, 803 F.3d 1049 (9th Cir. 2007).

> relating to drugs. For example, a plea to loitering, vandalism, or accessory after the fact, coupled with an agreement to participate in drug counseling as a condition of probation, is not a drug offense.
>
> The Second Circuit found that the New York offense was *not* divisible.[44] That changes everything. One never gets to the modified categorical approach, *Pereida* does not apply, and the immigration authority is not allowed to rely on information from the record. Because NYPL 220.31 is both overbroad and indivisible, no conviction ever is a controlled substance offense for immigration purposes.

Back to *Pereida,* the Supreme Court majority acknowledged that in some cases the record of conviction under a divisible statute may be difficult to find, or courts may have destroyed the record after a period of time, but it said that this did not make a difference. 141 S.Ct. at 766-67. The Court had received briefing establishing that many immigrants have no counsel, and many are in detention with extremely limited resources. *Id*. at 775-776 (dissent). The majority insisted that it had to follow the general burden of proof, and that the type of conviction under a divisible statute was a factual matter like others.

The dissent was written by Justice Breyer, joined by Justices Sotomayor and Kagan, the authors of the *Mathis, Descamps,* and *Moncrieffe* opinions. The dissent argued that the majority misinterpreted the categorical approach, and that this was a legal, not factual question, in which the standard was that the removal ground is triggered only if the person is *necessarily* convicted of the offense. *Id*. at 772-773.

As discussed in Q. 2, above, the majority also wrote a confusing section that suggested that documents outside of the *Shepard* list can be used in the modified categorical approach, although this issue had not been raised or briefed by either party, and there did not seem to be any support for it. *Id*. at 766-67.

Applications for relief. Thus, following *Pereida*, an applicant for relief must prove that a conviction under a divisible statute was for an offense that does not destroy relief; therefore, an inconclusive record means that the immigrant cannot meet their burden.

> **Example**: LPR Ernesto is deportable, and furthermore he was convicted under a divisible statute where one of the crimes listed in the statute is an aggravated felony. He needs to apply for cancellation of removal for permanent residents, and

[44] *Harbin v. Session*, 860 F.3d 58 (2nd Circ. 2017) (New York Penal Law § 220.31 sale of a controlled substance, indivisible as to controlled substance offense and aggravated felony). See also, e.g., *Villavicencio v. Sessions*, 904 F.3d. 658 (9th Cir. 2018) (N.R.S.§ 454.351, indivisible as to controlled substance).

> conviction of an aggravated felony is a bar to this relief. INA § 240A(a)(1). Ernesto's record of conviction is inconclusive as to the offense of conviction: none of the reviewable documents (the charge pled to, plea colloquy transcript, written plea agreement, factual basis for the plea stipulated to by the defendant, or judgment) identifies which crime he pled to.
>
> Under the burden of proof holding in *Pereida*, if Ernesto cannot prove that he was *not* convicted of an aggravated felony, he will be ineligible for cancellation of removal. He cannot prove this with *Shepard* documents.
>
> Citing the statement in *Pereida* that an applicant for relief may use documents outside of the Shepard record of conviction, Ernesto could seek to produce other evidence to prove the specific offense of his conviction. This might include evidence pertaining to the facts of the case, or even testimony or declarations by the prosecutor, defense attorney, or himself, family, or others.

Defending against deportability: It has long been established that if ICE cannot produce *Shepard* documents to prove that a conviction under a divisible statute makes an LPR (or refugee, or other) deportable, then it has failed to meet its burden and the person is not deportable. However, based on *Pereida*, ICE may argue that it too can use evidence beyond the *Shepard* documents to meet its burden: if the *Shepard* restrictions generally are not required in immigration proceedings, or applied to applicants, they should not apply to the government. Applying *Pereida* in this way would damage important defenses for permanent residents, whose criminal defense counsel may have carefully created an inconclusive record of conviction under *Shepherd*. Advocates should push back against such ICE arguments.

Advice for criminal defense counsel: Creating an inconclusive record of conviction under a divisible statute (e.g., an entire record that refers only to "a controlled substance" rather than "heroin") *is no longer a guaranteed defense for permanent residents*. For a guaranteed defense, the LPR either must plead specifically to a nondeportable offense listed in the divisible statute, or must plead to a different, non-deportable statute. However, if those options are not possible, it still is well worth the effort to create an inconclusive record as a back-up strategy. ICE may not be motivated or able to locate substantial non-*Shepard* evidence in that person's case (a case that might not take place for years), and/or the circuit court of appeals might decide that ICE is not permitted to present such evidence.

Advice for immigration advocates. Removal defense advocates should challenge this application of *Pereida. Pereida* cited the special problems facing immigrants when it noted this possible solution (and arguably the entire discussion was dicta and courts may ignore it). At the least, *Pereida* should not apply to convictions from before the date of that opinion (March 4,

2021) or, more correctly, the date that the courts of appeals with jurisdiction withdrew its precedent that required ICE to use *Shepard* documents and changed its rule per *Pereida*. While it is an uphill battle, there is a governing body of law that governs when a new, adverse interpretation of the law cannot be applied retroactively to criminal defendants who reasonably relied on the prior precedent in conducting their case.

Advocates representing people who want to make affirmative applications must think long and hard about the risks presented by *Pereida.* Unless the person can produce *Shepard* documents showing that a plea to a divisible statute is not a bar to relief, this is very dangerous. If you have strong, non-*Shepard* evidence to make that showing, it may be best to wait and see if the applicable court has ruled that this evidence is acceptable. Better yet would be to vacate the conviction for cause if possible.

Resources. For more information about *Pereida* and defense strategies, see online practice advisories.[45] If you are litigating this issue before the BIA or Circuit Courts, please contact the Immigrant Defense Project at www.immigrantdefense.org.

IV. When the Categorical Approach Does Not Apply

The categorical approach potentially applies any time the phrase "convicted of" is used in a federal statute. As the Supreme Court's interpretation of the phrase "convicted of," it is the default option for how to characterize the type of offense that was the subject of the conviction.

There are several instances, however, where the categorical approach does not apply either wholly or in part. These include convictions in some contexts, and almost all factual and discretionary inquiries.

A. Removal Grounds Based on a Conviction

The categorical approach generally governs whether a *conviction* of a particular type of offense brings a consequence as a ground of inadmissibility or deportability (including as an aggravated felony). This includes when the removal ground functions as a bar to eligibility for relief, or statutory bar to establishing good moral character under INA § 101(f). For example, the categorical approach applies in determining whether a person is ineligible to apply for non-LPR cancellation, INA § 240A(b)(1) because she was convicted of a deportable offense, or is unable to adjust status based on conviction of an inadmissible offense.

[45] See, e.g., ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at https://www.ilrc.org/pereida-v-wilkinson-and-california-offenses; IDP, NIPNLG, *Practice Alert: Pereida v. Wilkinson* (March 10, 2021) at https://nipnlg.org/practice.html

A key exception is the few removal grounds that are subject to the "circumstance specific" test, where one part of the ground is subject to the categorical approach and another part is fact-based. See discussion below.

Previously there was another exception to the categorical approach, in defining a "crime of violence" (COV). A COV is an aggravated felony if a sentence of a year or more is imposed, and is a deportable "crime of domestic violence" regardless of sentence if there is sufficient evidence that the victim and defendant shared a protected domestic relationship.[46] The current definition of a "crime of violence" is found at 18 USC § 16(a). The U.S. Supreme Court struck down a second section, 18 USC § 16(b), after courts had attempted to define this vague statutory definition according to the "ordinary case" test. The Court found that neither the statute nor the "ordinary case" test met the requirements of the categorical approach and held that it was void for vagueness [47]. Precedent decisions that relied upon the 18 USC § 16(b) definition, or the similarly phrased ACCA "residual clause" definition, are overruled. See online practice advisories for more information.[48]

1. Circumstance-Specific: Fraud or Deceit in which Loss to Victim/s Exceeds $10,000

In *Nijhawan v. Holder*, 557 U.S. 29 (2009) the Supreme Court held that some aggravated felony definitions are made up of two parts: one or more "generic" offenses that are subject to the categorical approach, and one or more "circumstance-specific" factors that are not. *Nijhawan* concerned the aggravated felony of a crime of fraud or deceit in which the loss to the victim/s exceeds $10,000. INA § 101(a)(43)(M). The Court found that the amount of loss is circumstance-specific and need not be proved under the categorical approach, while fraud and deceit are

[46] See INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F) (aggravated felony); INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i) (domestic violence deportation ground).

[47] See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which followed *Johnson v. United States*, 135 S.Ct. 2551 (2015), which overruled *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011) on the similarly phrased federal criminal definition.

[48] See Zota, *Sessions v. Dimaya* advisory (April 2018) and sample motions to reopen or terminate proceedings based on *Dimaya* at http://www.nipnlg.org/practice.html . For a discussion of how overruling 18 USC 16(b) affects California offenses, see the California *Chart* (advocates can sign up for this free resource at www.ilrc.org/chart) and see a pre-*Dimaya* advisory, ILRC, Some Felonies Should No Longer Be Crimes of Violence under *Johnson v. United States* at https://www.ilrc.org/some-felonies-should-no-longer-be-%E2%80%9Ccrimes-violence%E2%80%9D-immigration-purposes-under-johnson-v-united.

generic offenses that are subject to the categorical approach.[49] For more information on "circumstance specific" inquiries and *Nijhawan*, see Practice Advisories available online.[50]

2. Circumstance-Specific: 30 Grams or Less of Marijuana.

The deportation ground based on conviction of an offense relating to a controlled substance has an exception for "a single offense involving possession for one's own use of thirty grams or less of marijuana." In *Matter of Davey*, 26 I&N 37 (BIA 2012) the BIA held that the exception calls for a circumstance-specific inquiry into the character of the person's unlawful conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime. Thus a person convicted of more than one statutory crime may be covered by the exception if all the person's crimes were closely related to or connected with a single incident in which the person possessed 30 grams or less of marijuana for his or her own use, provided that none of those crimes was inherently more serious than simple possession. The BIA noted that if the issue is whether a conviction comes within the exception to the deportation ground, ICE bears the burden of proving that the amount of marijuana exceeded 30 grams. If the issue is eligibility for relief, such as a waiver under INA § 212(h), the applicant for relief bears the burden of proving the amount was 30 grams or less. In *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014) the BIA reaffirmed the rule in *Davey* and found it was not implicitly reversed by the Supreme Court in *Moncrieffe v. Holder, supra*. The BIA rejected the respondent's argument that the minimum prosecuted conduct test must apply, and therefore because a statute prohibiting possession of "more than an ounce" (i.e., more than 28.5 grams) of marijuana, had been used to prosecute less than 30 grams, the conviction was not a deportable controlled substance offense. It remanded to the immigration judge so that DHS could "proffer any evidence that is reliable and probative" to prove that the amount was over 30 grams, and the respondent would have a reasonable opportunity to challenge or rebut the evidence. *Id.* at 414. See online Practice Advisory discussing defenses to this rule.[51] The Ninth Circuit deferred to the BIA and held that the circumstance specific test applies.[52]

Note that the categorical approach does apply to another marijuana exception. Generally, giving away a controlled substance (distribution without remuneration) is a drug trafficking aggravated felony under INA 101(a)(43)(C), because it is analogous to a federal drug felony. However, giving away "a small amount" of marijuana is punishable as a misdemeanor under federal law (see 21

[49] See also *Kawashima v. Holder*, 132 S.Ct. 1166 (2012).

[50] See NIP/NLG and IDP, The Impact of Nijhawan v. Holder on the Categorical Approach" (2009), www.nipnlg.org and see ILRC, Note: Theft, Burglary, and Fraud (2019) at www.ilrc.org/chart.

[51] See Zota, *Matter of Davy and the Categorical Approach* (2013) at http://www.nipnlg.org/practice.html

[52] *See Bogle v. Garland*, --F.4th – (9th Cir. June 23, 2021).

USC § 841(b)(4)), and thus it is not an aggravated felony. The Supreme Court held that the categorical approach applies in this context. *Moncrieffe v. Holder*, 569 U.S. 184, 192 (2013).

3. Circumstance-Specific: Family Exception to the Alien Smuggling Aggravated Felony.

A conviction under 8 USC § 1324(a)(1)(A) is an alien smuggling aggravated felony "except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)."[53] The Ninth Circuit held that the family exception is a circumstance specific factor. *United States v. Guzman-Mata*, 579 F.3d 1065, 1070 (9th Cir. Ariz. 2009).

4. Circumstance-Specific: Transportation for Prostitution If Committed for Commercial Gain.

In *Nijhawan, supra*, the Supreme Court stated in dicta that "commercial gain" in the aggravated felony defined at INA § 101(a)(K)(ii) is a circumstance-specific factor. See also *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007).

5. Circumstance-Specific: Crime of Domestic Violence.

A deportable "crime of domestic violence" is a crime of violence as defined in 18 USC § 16(a) committed against a victim with whom the defendant shares or shared a qualifying domestic relationship. INA § 237(a)(2)(E)(i). It is settled that the categorical approach is used to determine whether the conviction is of a crime of violence. The issue is what standard governs proof of the required domestic relationship.

The BIA held that the domestic relationship is a "circumstance specific" factor that can be proved using any reliable evidence, including evidence from outside the record of conviction. *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). In practice, this already was the rule in immigration proceedings in several circuits. The Ninth Circuit has employed a different rule: the domestic relationship does not need to be an element of the offense, but it can be proved only with conclusive evidence found in the reviewable record of conviction. See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004). But advocates in the Ninth Circuit should be prepared for possible change; see Practice Advisory.[54]

[53] INA § 101(a)(43)(N), 8 USC § 1101(a)(43)(N).

[54] See ILRC, *Practice Advisory: Deportable Crime of Domestic Violence and Matter of H. Estrada* (June 2016) at www.ilrc.org/crimes.

6. Deportable for being the subject of a criminal or civil court finding of a violation of designated sections of a domestic violence protective order.

Noncitizens are deportable if a civil or criminal court judge makes a finding that they violated a portion of a domestic violence protective order that "involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." INA 237(a)(2)(E)(ii). The BIA held that, because this ground includes civil court findings, the categorical approach does not apply to either civil findings or criminal convictions. ICE may use any probative and substantial evidence to show the nature of the finding of a violation by a judge. See *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017). See also, e.g., *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019), deferring to the BIA and adopting this rule, and see online practice advisory.[55]

B. Conduct-Based Removal Grounds

The categorical approach generally does not apply to fact-based inquiries, such as whether the person comes within a removal ground based on conduct rather than on a criminal conviction. Examples of conduct-based grounds are being inadmissible for engaging in prostitution or being inadmissible or deportable as an abuser or addict.

The Ninth Circuit has held that the categorical approach does apply if a criminal conviction is the *only* evidence of the conduct. It held that a returning permanent resident was not inadmissible[56] under the prostitution ground where (a) the criminal conviction was the only evidence, and (b) the conviction was for an offense that did not meet the generic definition of prostitution under the categorical approach, because the minimum conduct was a broadly defined "lewd act" for a fee, whereas the generic definition of prostitution is sexual intercourse for a fee.[57]

C. Purely Discretionary Decisions

The categorical approach does not apply in a purely discretionary decision, e.g., whether an applicant who meets statutory requirements, actually merits a grant of asylum, a waiver of inadmissibility, or a finding of good moral character as a matter of discretion. Thus, the strict limits of the categorical approach might apply to a conviction during the "deportability" phase of

[55] See ILRC, *2019 Case Update: Domestic Violence Deportation Ground* (December 2019) at www.ilrc.org/crimes.

[56] See discussion of burden of proof at *Kepilino v. Gonzales*, 454 F.3d 1057, 1059-61 (9th Cir. 2006). It appears that a conditional resident was returning from a trip abroad in this case, so that the government had the burden of proving that she was not seeking a new admission under INA § 101(a)(13)(C).

[57] Kepilino v. Gonzales, supra.

a hearing, but the judge may consider underlying facts of the conviction, as well as any other relevant and probative evidence, in making a purely discretionary decision during the relief phase.

> **Example:** Because his conviction is not an aggravated felony under the categorical approach, Mr. Moncrieffe may apply for LPR cancellation. When it comes to deciding whether to grant the cancellation application, however, the immigration judge may consider the underlying facts. *Moncrieffe v. Holder*, 569 U.S. at 204 (noting that the judge can decide to "deny relief if he finds that the noncitizen is actually a member of one 'of the world's most dangerous drug cartels'" or "if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons.").

D. Bars to Eligibility for Relief that are Not Removal Grounds

A conviction that comes within a removal ground can act as a bar to eligibility for lawful status or relief. For example, a person is not eligible for LPR cancellation of removal if she is convicted of an aggravated felony, and is not eligible for naturalization if she is statutorily barred from establishing good moral character due to conviction of an inadmissible offense within the required period.[58] The categorical approach applies to removal grounds in the context of eligibility for relief. See, e.g., *Moncrieffe v. Holder, supra, Matter of Chairez-Castrejon, supra* (because the minimum prosecuted conduct to commit the offense was not an aggravated felony, the immigrant was permitted to apply for LPR cancellation).

Other statutory or regulatory bars to eligibility for relief are not based on removal grounds. The BIA held that the categorical approach does not wholly apply to some of these. This includes conviction of a "particularly serious crime" (bar to asylum and withholding)[59] or conviction of a violent or dangerous offense (potential bar to asylum, asylee or refugee adjustment waiver under INA § 209(c), a waiver under INA § 212(h), or potentially adjustment under INA § 245),[60] or of a "significant misdemeanor" for DACA.[61] Arguably, however, the conviction must have elements that in some way fit the description. For example, a conviction of trespass, defined as unlawful

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[58] See discussion of eligibility for relief and criminal bars at *Immigration Relief Toolkit at* www.ilrc.org/chart.

[59] *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

[60] See "violent or dangerous" crime in cases such as *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (asylum) and the regulation governing waivers under INA § 212(h), 8 CFR 8 CFR § 1212.7(d). See discussion in *Torres-Valdivias v. Holder*, 766 F.3d 1106 (9th Cir. 2014), declining to apply the categorical approach to determining whether the offense is a violent or dangerous crime. See also ILRC, *Eligibility for Relief: Waivers Under INA § 212(h)* (November 2019) at www.ilrc.org/crimes.

[61] For more on these issues, see materials at www.ilrc.org/daca.

presence on another's property, arguably cannot be held a "particularly serious crime," even if the underlying facts of the conviction involve egregious conduct.

The BIA held that the circumstance-specific test applies in determining whether a visa petitioner was convicted of a specified offense against a minor, which under the Adam Walsh Act can bar a U.S. citizen or permanent resident from immigrating a close relative. *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014).

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