Great Ninth Circuit Case on Divisible Statutes

California Burglary Never Is "Attempted Theft" (or a Crime Involving Moral Turpitude)

Rendon v. Holder (9th Cir. August 22, 2014)

1. Summary

In *Rendon v. Holder* the Ninth Circuit clarified when a statute is truly "divisible" under the categorical approach, and held that California burglary (Penal Code § 459) never constitutes the aggravated felony "attempted theft." This holding also means that California burglary never is a crime involving moral turpitude, under the categorical approach.

A statute is divisible if it sets out multiple *elements* in the disjunctive (using "or") so that it describes at least one offense that is, and one that is not, an automatic match with the definition at issue, e.g. with "attempted theft." California burglary, Penal Code § 459, prohibits entry with intent to commit "grand or petit larceny or any felony." In *Rendon* the BIA had found that entering a locked vehicle with this intent is divisible as attempted theft, because "larceny" is theft, while "any felony" is not necessarily theft. Because it found that the statute was divisible, the Board found that the immigration judge properly relied on evidence from the record of conviction to find that Mr. Rendon pled guilty to intent to commit "larceny." Therefore his conviction was an aggravated felony as attempted theft, and a bar to LPR cancellation.

The Ninth Circuit overruled the BIA. Citing *Descamps v. United States,* 133 S.Ct. 2276 (2013), the court held that Pen C § 459 is not divisible with regard to the intended offense, because a jury is not required to unanimously decide between "larceny" versus "any felony," or to unanimously agree as to the "felony." The court held that therefore *no* conviction for California burglary is an aggravated felony as "attempted theft." This holding applies to determinations of both deportability and admission/eligibility for relief, and regardless of any information in the record of conviction. See discussion at Part 2.

The result is that California burglary, Pen C § 459, amounts to an aggravated felony *only* if the conviction is for residential burglary with a sentence imposed of a year or more. See Part 3.

While *Rendon* did not address this point, the holding also means that under the categorical approach, no conviction for California burglary is a crime involving moral turpitude, for purposes of both deportability and eligibility for relief, and regardless of information in the record of conviction. Burglary involves moral turpitude if it is (a) an unlawful entry into a residence with intent to commit any crime, or (b) an entry with intent to commit a crime involving moral turpitude. The minimum conduct to commit Pen C § 459 does not necessarily meet either of these definitions. See Part 4.

This advisory will briefly address each of these points. See also the Practice Advisory on *Matter of Chairez*, 26 I & N Dec. 349, 352–54 (BIA 2014), where the BIA adopts the same test for a divisible statute that the Ninth Circuit does in *Rendon*, and advisories on the categorical approach under recent Supreme Court cases.[1] Judge Reinhardt's opinion in *Rendon* is clear and well worth reading.

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[1] See Advisories on *Chairez, supra, Descamps, supra*, and *Moncrieffe v. Holder,* 133 S.Ct. 1678 (2013) at

2. Divisible Statutes and Means v. Elements

A statute is divisible if it sets out multiple elements in the disjunctive (using "or") that describe at least one offense that is and one that is not a categorical match with the definition at issue. *Rendon* reaffirmed that under Supreme Court precedent, a statute that sets out multiple terms separated by "or" is not necessarily divisible. The terms must refer to *elements* of the offense, meaning that a jury must unanimously agree on which alternative the defendant committed.

> *Descamps* addressed the proper method for distinguishing divisible statutes from indivisible statutes. The critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes. *See Descamps*, 133 S. Ct. at 2285 n.2; *United States v. Cabrera-Gutierrez*, No. 12-30233, 2014 WL 998173, at *8 n.16 (9th Cir. Mar. 17, 2014) ("[U]nder *Descamps*, what must be divisible are the elements of the crime, not the mode or means of proving an element.")….
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> While the jury faced with a divisible statute must unanimously agree on the particular offense of which the petitioner has been convicted (and thus, the alternative element), the opposite is true of indivisible statutes; the jury need not so agree. For example, if [California Penal Code § 459] is indivisible, the jury would not need to agree on the particular substantive crime that the defendant intended as long as all jurors find that the defendant intended to commit at least one of "grand or petit larceny or any felony." ….
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> Thus, when a court encounters a statute that is written in the disjunctive (that is, with an "or"), that fact alone cannot end the divisibility inquiry. Only when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative elements and not alternative means.
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> *Rendon* at * 11, 12, 13-14 (emphasis in original)

If jury unanimity is not required, then "grand or petty larceny or any felony" are not different elements, but only different means of committing a single offense. In that case, the conviction is evaluated solely according to the minimum conduct that has a realistic probability of being prosecuted under the statute. Information from the record of conviction is irrelevant. The burden of proof under *Young v. Holder*[2] – by which the immigrant must produce a record showing that a conviction under a *divisible* statute is not a bar to eligibility for relief – simply does not apply here, because the statute is not divisible.

> Thus, after *Descamps* we may apply the modified categorical approach only when the state statute at issue is divisible. If the state statute at issue is overbroad and indivisible, we may not apply the modified categorical approach, and we must hold that petitioner has met his burden for establishing that he was not convicted of an aggravated felony.[6]

In n. 6 above, the court stated that it was not required to reach and did not reach the question of whether the *Young v. Holder* rule governing divisible statutes is incompatible with *Moncrieffe v. Holder,* 133 S.Ct. 1378 (2013). Here, the court remanded to permit Mr. Rendon to apply for LPR cancellation.

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[2] *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc).

The court noted that its conclusion "mirrors the BIA's understanding of *Descamps"* as set out in *Matter of Chairez*, 26 I & N Dec. 349, 352–54 (BIA 2014). *Rendon* at * 17. In *Chairez,* the BIA set out the same analysis pertaining to elements versus means.[3] It also stated that it would follow the interpretation of *Descamps* set out by the Circuit Court of Appeals with jurisdiction over the case. *Id.* at 353.

2. California Burglary as an Aggravated Felony

California burglary is not an aggravated felony as "attempted theft."[4] *Rendon* found that California case law permits a jury to disagree as to whether the defendant was convicted of larceny versus any felony, or as to the specific "felony" in the phrase "any felony." Therefore it held that Penal Code § 459 is not divisible for this purpose, but is a single offense that must be evaluated based on the minimum conduct to complete the offense. Because California cases show that the minimum conduct to entry with intent to commit "grand or petit larceny or any felony" does not necessarily include larceny, the minimum conduct is not attempted theft.

> In sum, we determine whether a disjunctively worded state statute is divisible or not by looking to whether the state treats the parts of the statute on opposite sides of the "or" as alternative elements or alternative means.[13] In this case, California state law is clear: the jury need not be unanimous[14] regarding the particular offense the defendant intended to commit in order to convict under section 459. All the prosecution must prove is that the defendant intended to commit an offense listed in the statute — namely, "grand or petit larceny or any felony." The jury need not agree on which of the substantive offenses the defendant intended to commit — only that he intended to commit an offense listed in the statute. Therefore, the substantive crimes are alternative means of satisfying the intent element of the statute, and the statute is indivisible. As a result, we are unable to conclude that petitioner was convicted of having the intent to commit a theft offense rather than a non-theft felony.
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> *Rendon* at * 19.

Aggravated felony as burglary. [5] The Supreme Court found that because the minimum conduct to commit California burglary of a building or structure includes a *lawful* entry, it does not meet the definition of "burglary" for aggravated felony purposes. *Descamps v. U.S., supra.*

Aggravated felony as a crime of violence.[6] The Ninth Circuit has held that California residential burglary, Pen C §§ 459/460(a), is a "crime of violence" under 18 USC § 16(b) and thus is an aggravated felony if a sentence of a year or more is imposed.[7] Advocates continue to urge that the court reconsider

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[3] See Practice Advisory on *Matter of Chairez* at http://www.nipnlg.org/legalresources/practice_advisories/Chairez-Castrejon%20Advisory.pdf .
[4] An offense that meets the generic definition of attempted theft is an aggravated felony if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(G), (U).
[5] An offense that meets the generic definition of burglary is an aggravated felony if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(G).
[6] An offense that meets the generic definition of "crime of violence" at 18 USC §16 is an aggravated felony if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(F).
[7] See, e.g., *U.S. v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2013) (emphasis added) (quoting *U.S. v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990)).

this issue in light of the fact that the minimum conduct to commit the offense includes a licensed or permissive entry into the residence.[8]

California commercial burglary, Pen C §§ 459/460(b), is not a crime of violence. No conviction of this offense should be held an aggravated felony, even if a sentence of a year or more is imposed.

4. California Burglary as a Crime Involving Moral Turpitude

While *Rendon* did not address this point, the holding also means that under the categorical approach, *no* conviction for California burglary is a crime involving moral turpitude ("CIMT"). Burglary is a CIMT if it is (1) an unlawful entry into a residence with intent to commit a crime,[9] or (2) an entry with intent to commit a crime involving moral turpitude.[10] The minimum conduct to commit California burglary does not meet either of these definitions. First, the minimum conduct to commit California burglary does not necessarily include an *unlawful* entry into a residence. Second, the minimum conduct to commit California burglary does not necessarily include intent to commit a crime involving moral turpitude: it could include attempt to commit an offense that does not involve moral turpitude, such as a taking with intent to deprive the person temporarily.

Not all areas of the country will employ the categorical approach to determine if a conviction is of a crime involving moral turpitude. The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have held that the categorical approach applies to moral turpitude determinations.[11] In other Circuits, the full categorical approach may not apply.

[8] See, e.g., *Dimaya v. Holder,* 11-71307 arguing that *Becker* line of cases is not good law after *Descamps*.
[9] *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009).
[10] *Matter of M*, 9 I&N Dec. 132 (BIA 1960).
[11] See *Jean-Louis v. Atty Gen*., 582 F.3d 462 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Silva-Trevino v. Holder*, --F.3d-- (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Fajardo v. US AG,* 659 F.3d 1303 (11th Cir. 2011).