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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
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	)	
In removal proceedings	)	

BRIEF OF *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION & THE DEFENDING IMMIGRANTS PARTNERSHIP (IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT)

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PRELIMINARY STATEMENT

The Immigration and Nationality Act, like the federal sentencing statute at issue in *Descamps v. United States*, 133 S.Ct. 2276 (2013), ties adverse consequences to the fact of having been convicted of certain crimes. *See Moncrieffe v. Holder*, -- U.S. --, 133 S.Ct. 1678, 1685 (2013). What the Supreme Court made clear in *Descamps* and *Moncrieffe* is that Congress intended for these adverse consequences to apply only to what an individual has necessarily been convicted of "in the deliberate and considered way the Constitution guarantees." *Descamps*, 133 S.Ct. at 2290; *see also Moncrieffe*, 133 S.Ct. at 1684. When a statute defines more than one offense, such that the fact-finder must make different findings for one offense than for another, that statute may be deemed "divisible" if one such offense triggers adverse consequences but another does not. Only in such cases do *Descamps* and *Moncrieffe* permit review of the record of conviction for the purpose of ascertaining which offense necessarily formed the basis of the conviction. Statutes that merely list alternative *means* for committing the same, unitary set of elements are not divisible.

Before *Descamps* and *Moncrieffe*, the Board relied on its decision in *Matter of Lanferman* to allow immigration judges to look to the record of conviction for facts underlying a conviction that were never proven to a jury beyond a reasonable doubt, an approach squarely at odds with the requirements of *Descamps*. *See Matter of Lanferman*, 25 I&N Dec. 721, 727 (BIA 2012). According to *Matter of Lanferman*, immigration judges were to inquire into the underlying facts in the record of conviction whenever the elements of the statute "could be satisfied by either removable or non-removable conduct." 25 I&N Dec. at 722 (internal quotation and citation omitted). The Supreme Court on the other hand has made clear that adjudicators should rely on the modified categorical approach "only when a statute defines [an offense] not

(as here) overbroadly, but instead alternatively with one statutory phrase corresponding to the generic crime and another not" and only "to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Descamps*, 133 S.Ct. at 2286; *see also Moncrieffe*, 133 S. Ct. at 1684 (applying the modified categorical approach only to "statutes that contain several different crimes, each described separately"). By defining divisible statutes in terms of alternative offenses rather than alternative means for committing the same offense, *Descamps* and *Moncrieffe* thus invalidate the Board's approach in *Matter of Lanferman*.[1] *See, e.g., In re: Ramirez-Moz*, A072-377-892 (BIA Mar. 31, 2014) (unpublished) (finding that *Descamps* abrogates *Lanferman*); *see also In re: Gomez Juardo*, A090-764-104 (BIA Mar. 28, 2014) (unpublished); *In re: Sainz-Rivera*, A091-684-104 (BIA Mar. 10, 2014) (unpublished); *In re: Barrios Rojas*, A090-145-871 (BIA Feb. 7, 2014) (unpublished); *In re: Dieuvu Forvilus,* A071 552 965 (BIA Jan. 28, 2014) (unpublished); *In re: Gonzalez-Manjarrez*, A093-108-092 (BIA May 22, 2013) (unpublished).[2]

In the instant case, the Board has requested amicus briefing on whether, following *Descamps* and *Moncrieffe*, California Health and Safety Code §§ 11378 and 11379(a) are divisible with respect to the identity of the controlled substance, thereby permitting an adjudicator to look to the record of conviction to attempt to identify the controlled substance

[1] *Matter of Lanferman* is not the only Board decision that has been abrogated by *Descamps* and *Moncrieffe*. For example, the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), *overruled by Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014), held that immigration judges in some instances must inquire into "the particularized facts" underlying an offense to determine whether the conviction qualifies as a crime involving moral turpitude. This approach plainly violates the Supreme Court's holdings in both *Descamps* and *Moncrieffe*. *See Descamps*, 133 S.Ct. at 2283; *Moncrieffe*, 133 S.Ct. at 1684 ("[W]e examine what the state conviction necessarily involved, not the facts underlying the case . . . ."); *see also Silva-Trevino*, 742 F.3d at 204–05 (rejecting *Matter of Silva-Trevino* and citing *Moncrieffe*). Other Board precedents that applied contrary formulations of the categorical or modified categorical approach have also clearly been abrogated. *See, e.g., Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012) (drug trafficking aggravated felony); *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010) (antique firearms exception); *Matter of Aruna,* 24 I&N Dec. 452 (BIA 2008) (drug trafficking aggravated felony); *Matter of Sanudo*, 23 I&N Dec. 968, 972-973 (BIA 2006) (crimes involving moral turpitude). As explained below, the Board should clarify that these and other contrary precedents are no longer valid under *Descamps* and *Moncrieffe*.

[2] For copies of the unpublished Board decisions cited herein, *see* Appendix B.

allegedly underlying conviction. As explained below, California Health and Safety Code §§ 11378 and 11379(a) are not divisible with respect to the identity of the controlled substance because no fact finder is required to find the identity of the controlled substance beyond a reasonable doubt in order to convict. Thus, under the proper application of *Descamps* and *Moncrieffe*, the modified categorical approach should not apply.

Recently, however, the Ninth Circuit Court of Appeals issued an opinion in *Coronado v. Holder*, -- F.3d --, No. 11-72121, 2014 WL 983621 (9th Cir. Mar. 14, 2014) that misconstrued *Descamps* and wrongly concluded that a California statute similar to the one at issue in this case was divisible. Although the decision properly concluded that the California controlled substance schedules are broader than their federal counterparts, the panel overlooked the critical fact that the California statute treats the precise identity of a controlled substance as merely a means of satisfying the "controlled substance" element of the offense. Because California law does not require the fact-finder to decide beyond a reasonable doubt which of the prohibited controlled substances was involved in a given offense, *Descamps* compels the conclusion that it is an "overbroad, indivisible statute." 133 S.Ct. at 2290. The Ninth Circuit misunderstood *Descamps* as holding that a list of components set out in the alternative (in a statute or, as here, a definitional provision) is a sufficient, rather than a necessary, condition for divisibility.[3]

The Board should not deem itself bound by *Coronado* because it addressed a different California statute, it failed to consider arguments raised herein, and the mandate has not yet issued. However, even if the Board were to conclude that *Coronado* controls the outcome in the present case, the Board should use this case to provide its own guidance to immigration judges throughout the country faced with these or similar divisibility questions. *See Matter of Anselmo*,

[3] On April 28, 2014, Mr. Coronado petitioned for rehering pursuant to Fed. R. App. P. 35, 40. The Ninth Circuit has since issued another brief opinion applying its holding in *Coronado* without further analysis. *Ragasa v. Holder*, No, 12-72262 (9th Cir. Apr. 28, 2014).

20 I&N Dec. 25, 31 (BIA 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit."). The issue of how immigration judges apply divisibility analysis to state controlled substance statutes is an issue of national importance. And, even when bound to rule otherwise in the particular case before it, the Board may set forth its own analysis to provide guidance in other cases around the country. *See, e.g., Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 388 (BIA 2007) (addressing whether a second possession offense constitutes an aggravated felony "in absence of controlling circuit law" to the contrary).

The centrality of the categorical and modified categorical approaches in immigration adjudications makes it especially important that the Board provide clear guidance to promote uniform adherence to the Supreme Court's decisions in *Descamps* and *Moncrieffe*. *Cf. U.S. v. Donnelly's Estate*, 397 U.S. 286, 294 (1970) (stating that federal law is "to be applied uniformly throughout the country"). Absent such guidance from the Board, immigration judges are left to sort out how to properly analyze the consequences of a wide variety of state criminal statutes. Moreover, the burden of this piecemeal approach falls heavily on detained and pro se respondents, who are ill equipped to challenge Board precedent that compels outcomes contrary to the Supreme Court's recent rulings.[4]

Accordingly, the Board should use the present case to clarify that the approach articulated in *Matter of Lanferman* and similar cases is no longer valid and that immigration courts should look to *Descamps* and *Moncrieffe,* employing the modified categorical approach only when a statute is divisible as that concept is defined in those opinions. When determining whether a state statute is divisible, the Board should hold that immigration judges must assess whether the statute contains multiple offenses, meaning alternative sets of elements that the fact-finder must

[4] The Board should therefore take this opportunity to correct contrary precedent in other contexts beyond controlled substance offenses, including its approaches to convictions for crimes involving moral turpitude, aggravated felonies, and firearm offenses. *See supra* n. 1.

choose between and find beyond a reasonable doubt before a conviction can be secured. Only when the statute contains more than one offense, at least one of which triggers adverse immigration consequences, should immigration judges turn to the modified categorical approach to discover which provision of the divisible statute the noncitizen was convicted of violating.

STATEMENT OF INTEREST

Amici curiae American Immigration Lawyers Association (AILA), Immigrant Defense Project (IDP), Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild (NIP) are nonprofit organizations with myriad members, constituents, clients, and client families who are facing the real-world consequences of detention and deportation. *Amici* have a strong interest in ensuring that the interpretation of immigration laws relating to criminal convictions is fair, consistent, and predictable. Detailed statements of interest are attached at Appendix A.

STATEMENT OF ISSUES

On January 27, 2014, the Board of Immigration Appeals (BIA) issued a request for supplemental briefing (reissued on April 4, 2014) by *amici* in this case on the following issues:

1. Whether to interpret the application of *Descamps v. United States*, 133 S.Ct. 2276 (2013), to California Health and Safety Code §§ 11378 and 11379(a) as proscribing the modified categorical approach to those statutes because the Federal controlled substance schedules are narrower that the state statutes.

2. Whether, in fact, Federal controlled substance schedules are narrower than the State statute (or whether the substances identified in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), as being peculiar to the State statute are federally controlled anabolic steroids or are no longer listed in the state schedule), and, if so, whether there is a "realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition of crime" under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

3. Whether, because the identity of the controlled substance is not necessary to a conviction, it can be considered an "element" of the offense or is a "means" for committing the

offense. *See Moncrieffe v. Holder*, 133 S.Ct. 1688 [sic], 1684 (2013) ("[T]o satisfy the categorical approach, a state drug offense must meet two conditions: It must 'necessarily' prescribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for the conduct.").

In addressing questions 1 and 3 below, *amici* note where their analysis may differ from the Ninth Circuit's recent decision in *Coronado.* Because *amici* agree with one aspect of the Ninth Circuit's analysis—namely that the Federal controlled substance schedules are narrower than the California schedules—*amici* will not address question 2 as it applies to California and instead refer the Board to that portion of the Ninth Circuit's decision. *See Coronado*, 2014 WL 983621 at *3 and app. 1 (comparing the state and federal schedules).

SUMMARY OF THE ARGUMENT

Under the categorical approach, courts must assess indivisibly overbroad controlled substance statutes categorically, without resort to the modified categorical approach. *See infra* Part I.A. Contrary to the Board's decision in *Matter of Lanferman* and similar cases, a statute is divisible only if it proscribes alternative offenses, rather than alternative means of committing the same offense. This is because only the former requires the fact-finder to make a finding unanimously and beyond a reasonable doubt in order to convict a defendant of one offense versus another under the statute; only the former focuses on the conduct of which the noncitizen was convicted "in the deliberate and considered way the Constitution guarantees," *Descamps*, 133 S. Ct. at 2290. *See infra* Part I.B. Applying this analysis to California Health and Safety Code §§ 11378 and 11379(a), the Board should conclude that these statutes are indivisibly overbroad with respect to the type of controlled substance, which functions as an alternative means, rather than designating alternative offenses within each statute. *See infra* Part I.C.

Policy rationales also underscore why the Board must recognize that *Matter of Lanferman* and similarly flawed cases have been invalidated and that the modified categorical approach should only apply to statutes that are truly divisible. Congress has long instructed courts to focus on what the defendant was necessarily convicted of when determining consequences in the immigration and sentencing contexts. *See infra* Part II.A. Misapplying the modified categorical approach to indivisible statutes threatens the accuracy of immigration proceedings as judges could predicate immigration consequences on gratuitous facts that need not have been proven at trial. *See infra* Parts II.B. Particularly in the context of controlled substances convictions, defendants are more likely to take plea bargains, which further necessitates that immigration judges focus only on what the noncitizen was necessarily convicted of rather than investigate facts unproven in a trial. *See infra* Part II.C.

ARGUMENT

I. Courts Must Assess Indivisibly Overbroad Controlled Substance Statutes Under the Longstanding Categorical Approach.

Central to the Supreme Court's decisions in *Descamps* and *Moncrieffe* is the recognition that when Congress chose to tie adverse consequences to prior criminal convictions, it generally limited the range of considerations relevant to deciding when those consequences are triggered. As the Court explained, the requirement of a conviction focuses the adjudicator's attention on "what the state conviction necessarily involved," requiring a presumption that the conviction "rested on nothing more than the least of the acts criminalized." *Moncrieffe*, 133 S.Ct. at 1684 (quotation marks omitted). This is so because Congress did not link consequences to the specific acts a person committed. *Id.* at 1685; *see also Descamps*, 133 S.Ct. at 2287 ("If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so . . ."). Indeed, *Descamps* refers to the focus on the statutory definition, rather than the

facts, of a crime as the "central feature" of the categorical approach. 133 S.Ct. at 2285. Unless a specific factor is essential to secure a conviction under the state statute—meaning it is a fact or circumstance that must be proven beyond a reasonable doubt—it is irrelevant under the categorical approach because it says nothing about what the defendant was necessarily convicted of. *See id.* at 2288–89 (finding that the district court erred in enhancing Descamps' sentence for "his supposed acquiescence to a prosecutorial statement . . . irrelevant to the crime charged").

Under the Immigration and Nationality Act (INA), an individual "convicted of" a controlled substance offense "as defined in section 802 of Title 21" is deportable. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). In turn, 21 U.S.C. § 802 defines the term "controlled substance" as a "drug or other substance . . . included in schedule I, II, III, IV, or V" of the federal controlled substance schedules. § 802(6). Some state statutes, such as California Health and Safety Code §§ 11378 and 11379(a), proscribe possession of a "controlled substance," which is elsewhere defined to include substances that are not included on the federal schedule. *See Coronado*, 2014 WL 983621 at *3 (noting that because the "full range of conduct" specified in California Health and Safety Code § 11055 does not fall within the CSA schedules, "Coronado's conviction was not a categorically removable offense"). The question in this case is whether a person with such a conviction may be deemed to have been "convicted of" a controlled substance offense under INA § 237(a)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i),[5] by resorting to a review of unproven allegations found in the record of conviction.

In *Coronado*, a panel of the Ninth Circuit concluded that a similar statute, California Health and Safety Code § 11377(a), is an overbroad but divisible statue and thus susceptible to

[5] Among the aggravated felonies enumerated in the INA is "illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18)." INA § 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B). Because INA § 101(a)(43)(B) is similarly limited by the federal controlled substance schedules, the following discussion is equally relevant to the question of whether a state drug conviction qualifies as an aggravated felony under that provision.

analysis under the modified categorical approach.[6] Under a proper application of the categorical approach, however, the panel's analysis is wrong. Immigration judges across the country, including those outside of the Ninth Circuit's jurisdiction, are affected by the issues raised in this case. *See, e.g.*, *In re: Meneses de Carvalho,* A026 994 625, 2009 WL 3063813 (BIA Sept. 17, 2009) (unpublished) (assessing California Health and Safety Code § 11364 in removal proceedings arising outside of the Ninth Circuit); *In re: Singh Dhillon*, A037 233 207, 2012 Immig. Rptr. LEXIS 5181 (BIA Aug. 20, 2012) (unpublished) (assessing California Health and Safety Code § 11351 in removal proceedings arising outside of the Ninth Circuit); *In re: Campos Grajeda*, A072 290 879, 2010 Immig. Rptr. LEXIS 4169 (BIA Dec. 15, 2010) (assessing California Health and Safety Code § 11550 in removal proceedings arising outside of the Ninth Circuit). Furthermore, immigration courts nationwide need guidance from the Board regarding the proper application of *Descamps* to other states' controlled substances statutes.

When an indivisible state statute proscribes conduct beyond the scope of the generic federal offense, "a person convicted under that statute is never convicted of the generic crime." *Descamps*, 133 S.Ct. at 2292; *see also Moncrieffe*, 133 S.Ct. at 1684. Some state statutes—referred to as "divisible"—describe several distinct offenses, thereby frustrating application of the categorical approach because an adjudicator cannot identify the defendant's precise offense by looking at the statute alone. When a statute is divisible, an adjudicator may review the record of conviction for the limited purpose of determining which of the distinct offenses defined by the statute the defendant was convicted under. As the *Descamps* Court made clear, the modified categorical approach is "not . . . an *exception*" to categorical analysis that permits examination of

[6] The mandate has not yet issued in the *Coronado* case and Mr. Coronado has filed a petition for rehearing. *See supra* n.3. In any event, as discussed below, the panel's reasoning misconstrues the relevant test for divisibility and, at the very least, should not be followed outside of the Ninth Circuit. *See Carachuri-Rosendo*, 24 I&N Dec. at 388 (articulating a nationwide rule outside of the federal circuit courts of appeal with contrary law).

the conviction record to determine facts that were gratuitous to the conviction. *Descamps*, 133 S.Ct. at 2285 (emphasis added). It is merely a "tool" allowing for the proper employment of the categorical approach: "[a]ll [it] adds . . . is a mechanism" for applying categorical analysis to the true offense of conviction when a statute defines more than one offense. *Id.*

Applying this analysis, state statutes like California Health and Safety Code §§ 11378 and 11379(a) are overbroad but not divisible. As explained below, the modified categorical approach, deployed only when a statute is divisible, has no role to play in cases involving indivisible, overbroad statutes. *See* Point I.A. Contrary to the Board's prior decision in *Matter of Lanferman* (and the Ninth Circuit's reasoning in *Coronado*), a statute is not divisible simply because it contains disjunctive parts. The statute defines separate offenses only if it requires that the jury unanimously agree about a particular alternative included in a disjunctive list; otherwise the alternatives are simply alternative means of violating a single offense. *See* Point I.B. For this reason, the modified categorical approach cannot be applied to state statutes that treat the identity of the controlled substance as means for committed an offense, and thus are indivisible. *See* Point I.C. The Board should formally recognize that *Descamps* and *Moncrieffe* have invalidated *Matter of Lanferman*[7] and similarly flawed cases, and apply the proper standard for assessing a statute's divisibility to the removal grounds at issue in this case.

A. Pursuant to the Longstanding Categorical Approach, Reaffirmed in *Descamps* and *Moncrieffe*, the Modified Categorical Approach is Applicable Only to Divisible Statutes.

In *Descamps* and *Moncrieffe*, the Supreme Court reaffirmed the proper application of the "categorical approach," which is employed to determine whether a prior state criminal conviction triggers certain consequences under federal law. The categorical approach looks at

[7] As noted above, the Board has already done so in at least one unpublished decision. *In re: Ramirez-Moz*, A072-377-892 (BIA Mar. 31, 2014) (unpublished).

what "the state conviction necessarily involved" and then compares that to the federal law at issue. *Moncrieffe*, 133 S.Ct. at 1684; *see also Descamps*, 133 S.Ct. at 2283. This focus on what the state conviction necessarily involved compels the adjudicator to presume that the conviction rested on the "minimum conduct" punishable under the statute. *Moncrieffe*, 133 S.Ct. at 1684. The actual conduct that led to the defendant's prosecution is irrelevant; all that matters is whether the statute of conviction *necessarily* requires a finding of conduct that fits the triggering federal offense. *Descamps*, 133 S.Ct. at 2285; *Moncrieffe*, 133 S.Ct. at 1684. If not, the federal consequence is not triggered. *Id.*

In *Moncrieffe*, the Supreme Court pointed out that its "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense." *Moncrieffe*, 133 S.Ct. at 1684–85 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In other words, there must be a "realistic probability" that a state would apply its statute to non-removable conduct. *Duenas-Alvarez*, 549 U.S. at 193 (noting that the respondent was advancing an implausible theory of accessory liability under state law to argue that there was not a categorical match between the state offense and a theft aggravated felony and characterizing this theory as "legal imagination"). In many cases, however, this "realistic probability" is apparent from a plain reading of the statute. *See United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) ("Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists . . . . The state statute's greater breadth is evident from its text."); *see also Ramos v. U.S. Att'y Gen*, 709 F.3d 1066, 1071–72 (11th Cir. 2013) (finding *Duenas-Alvarez* inapplicable when "the statutory language itself, rather than 'the application of legal imagination' to that language,

creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition").

In both *Descamps* and *Moncrieffe*, the Court also recognized there is a "narrow range of cases" where the categorical approach includes an additional step, often called the "modified categorical approach." *See Descamps*, 133 S.Ct. at 2283–84 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)); *Moncrieffe*, 133 S.Ct. at 1684. When a given criminal statute defines more than one offense, the adjudicator cannot perform the required categorical analysis until it has identified the provision of the statute under which the individual was convicted. *Descamps*, 133 S.Ct. at 2884; *Moncrieffe*, 133 S.Ct. at 1684. For this purpose only, the adjudicator can look beyond the language of the statute to a limited set of official court documents from the defendant's prior case (the "record of conviction"). *Descamps*, 133 S.Ct. at 2884; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that, when the statute is divisible, an adjudicator may consult the plea agreement, plea colloquy transcript, charging document or indictment, and jury instructions to determine the portion of the statute under which the defendant was convicted). The defendant's particular conduct remains irrelevant under this analysis. *Descamps*, 133 S.Ct. at 2886; *see also Moncrieffe*, 133. S.Ct. at 1684 ("Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.))). The only issue is which of the multiple offenses the statute defines underlies the conviction. *Descamps*, 133 S.Ct. at 2285.

The application of the modified categorical approach in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), therefore departs from the Supreme Court's instructions. In *Moncrieffe*, the Supreme Court ends its inquiry once it determined that "possess with intent" under the Georgia statute defines only one offense, the elements of which (possession and the intent to

distribute) can be satisfied by conduct that falls outside the removal ground (distribution without remuneration) as well as conduct falling within it (remunerative distribution). Because the Court holds that only the minimum conduct under the statute may be considered, *Moncrieffe*, 133 S.Ct. at 1684, no further inquiry into the record is warranted. *Matter of Lanferman,* in contrast, permits an inquiry into underlying facts whenever the elements of the statute "could be satisfied by either removable or non-removable conduct." 25 I&N Dec. at 722 (internal quotation and citation omitted). As *Descamps* later pointed out, this approach improperly allows the consideration of facts "unnecessary to the crime of conviction." 133 S.Ct. at 2289.

In light of the dictates of both *Descamps* and *Moncrieffe*, both of which squarely apply to the assessment of whether a person has been necessarily "convicted" of a certain type of offense under a state statute, *Matter of Lanferman* is no longer good law. *See Descamps*, 133 S.Ct. at 2286; *Moncrieffe*, 133 S.Ct. at 1684; *see also infra* Point II (discussing legal and policy reasons that support a limited and focused application of the modified categorical approach to divisible statutes). The Board therefore should formally recognize the abrogation of *Matter of Lanferman* and continue to employ the modified categorical approach as defined in *Descamps* and *Moncrieffe*, which it has done in several unpublished decisions. *See In re: Dieuvu Forvilus,* A071-552-965 (BIA Jan. 28, 2014) (unpublished); *In re: Sainz-Rivera*, A091-684-104 (BIA Mar. 10, 2014) (unpublished); *In re: Gomez Juardo*, A090-764-104 (BIA Mar. 28, 2014).

B. A Statute Is Divisible When It Proscribes Alternative Offenses, Not When It Provides Alternative Means for Committing the Same Offense.

The Supreme Court has repeatedly stated over the years that this modified analysis is only warranted when a statute is "divisible," meaning it sets out multiple offenses in the alternative (e.g. in separate subsections of a disjunctive list) and when one or more of the alternate offenses listed is not a categorical match. *See, e.g., Descamps,* 133 S.Ct. at 2285;

Johnson v. United States, 559 U.S. 133, 144 (2010); *Shepard*, 544 U.S. at 26; *see also Moncrieffe*, 133 S.Ct. at 1684 (explaining that the modified categorical approach is only triggered by "state statutes that contain several different crimes, each described separately"). Contrary to the Board's decision in *Matter of Lanferman*, a statute that can be violated in more than one way thus does not, *ipso facto*, define more than one offense. As the Court explained in *Descamps,* in order for a statute to be divisible, the alternatives it sets out must require jury unanimity (or the requisite quorum in those jurisdictions that do not require unanimity) to secure a conviction under that provision.[8] *See Descamps*, 133 S.Ct. at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

The *Descamps* case itself dealt with a criminal defendant who was convicted under a California burglary statute that did not require unlawful entry. *Descamps*, 133 S.Ct. at 2282. The statute therefore criminalized more conduct than the generic federal definition of burglary, which requires an unlawful entry. *Id.* at 2285. Because the California statute did not define burglary "alternatively, with one statutory phrase corresponding to the generic definition and another not," but rather defined it overly broadly, the Court concluded that the modified categorical approach had no role to play in the case. *Id.* at 2285–86. Significantly, the Court noted, "whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id.* at 2286 (emphasis in original).

The Court in *Descamps* distinguished alternatives that create separate offenses because they require the jury to make a finding unanimously and beyond a reasonable doubt from those

[8] The relevant question is whether the jury was required to find a particular fact beyond a reasonable doubt in order to convict. Some jurisdictions require that a quorum of jurors find each necessary element to secure a criminal conviction, rather than an unanimous jury. For example, in Oregon "ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder." OR. Const. art. I, § 11. Likewise, in Lousiana "[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." LA. Code Crim. Proc. art. 782. In these jurisdictions, a fact is not an element if the jury does not have to agree regarding that fact by the quorum necessary for conviction.

facts that are merely "superfluous" and about which the jury need not agree in order to convict. *Id.* The Court illustrates the distinction by hypothesizing an assault statute that requires use of a weapon. If, for example, a statute criminalizes assault with any of eight specified weapons and if the jury is required to find unanimously and beyond a reasonable doubt the type of weapon involved, then that statute is divisible if some but not all of the weapons fit with the generic federal offense at issue. *Id.* at 2290. On the other hand, a statute that requires only that the jury find that an indeterminate weapon was involved, without having to agree on the particular weapon, is indivisible.[9] *Id.*; *see also United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (finding that a Maryland statute that proscribed "offensive physical contact with, or harm to, the victim" described alternative means because "it is enough that each juror agree only that one of the two occurred, without settling on which"); *In re: Dieuvu Forvilus,* A071 552 965 (BIA Jan. 28, 2014) (unpublished) (holding that a Florida larceny statute requiring an intent to "temporarily or permanently" deprive another of property described alternative means rather than alternative elements); *In re: Sainz-Rivera*, A091-684-104 (BIA Mar. 10, 2014) (unpublished) (holding that an Arizona DUI statute proscribing "driving" or exercising "actual physical control" over a motor vehicle treats those alternatives as means, making the statute indivisibly overbroad). In other words, to determine whether a statute contains several distinct crimes, courts may begin by looking to whether the statute is divided into subsections, alternative phrases, or discrete lists.

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[9] In *Coronado*, the Ninth Circuit refers to this example from *Descamps* but draws the wrong conclusion from it because it fails to grapple with *Descamps'* repeated emphasis (including in its preface to the weapon example itself) on what the prosecutor must prove beyond a reasonable doubt and what the jury must find by the requisite quorum. *See Descamps*, 133 S.Ct. at 2285-86, 2288, 2290. A statute that sets out in the alternative a limited list of weapons and a statute that merely refers to an unspecified weapon are only meaningfully different from a divisibility perspective if the former statute requires the fact-finder to find beyond a reasonable doubt which of the specified weapons was involved in the commission of the crime. *See Descamps*, 133 S.Ct. at 2290. If the jury need not agree unanimously on which of the specified weapons the defendant used, it is as though "the actual statute requires the jury to find only a 'weapon.'" *Id.* By ignoring this requirement and relying solely on the structure of the conviction statute, the panel in *Coronado* misconstrued *Descamps* and its focus on the offense of which a person was *necessarily* convicted.

However, even assuming a statute is so constructed, the word or phrase set off disjunctively must still be a fact that must be found beyond a reasonable doubt by a jury or a fact-finder. *See generally Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality) (concluding that the "assumption that any statutory alternatives are *ipso facto* independent elements defining independent crimes under state law" is "erroneous" because "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.").

C. Under Certain Drug Statutes, Such As California Health and Safety Code §§ 11378 and 11379(a), the Schedule of Controlled Substances Provides Alternative Means for Committing the Offense, but Does Not Create Alternative Offenses, and Thus Such Statutes Are Not Divisible.

Applying this analysis to drug statutes such as the California statutes at issue in this case, California Health and Safety Code §§ 11378 and 11379(a), the Board should conclude that such statutes are indivisibly overbroad with respect to the type of controlled substance, because the type of controlled substances provides alternative means of committing the same offense, rather than designating alternative offenses within each statute. They fall in the same category as the indeterminate weapon offense the Court described in *Descamps* because California law does not require jury unanimity as to the type of controlled substance. The Ninth Circuit's decision in *Coronado* neglected to address this critical issue, leading to the wrong conclusion regarding the divisibility of certain controlled substance statutes. Three California decisions—*Ross v. Municipal Court of Los Angeles*, 49 Cal. App. 3d 575 (1975), *Sallas v. Municipal Court*, 86 Cal. App. 3d 737 (1978), and *People v. Romero*, 55 Cal. App. 4th 147 (1997)—demonstrate the California courts' position on this issue.[10]

[10] Decisions of "every division of the District Court of Appeal are binding on all [trial] courts of [California]." *Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353 (2007).

In *Ross*, the defendants were charged with an offense involving a "controlled substance," with no reference to a specific drug. *Ross*, 49 Cal. App. 3d at 577. The defendant, noting that the statute proscribed over one hundred drugs, contended that the complaint did not afford him adequate notice of the crime with which he was charged. *Id.* The California Court of Appeals rejected this contention and upheld the conviction, holding that the charging document gave the defendant "fair notice" of the crime of which he was accused, even if it "did not tell him *the means by which he committed the crime*." *Id.* at 579 (emphasis added).

Several years later, California courts reaffirmed that the type of controlled substance is a means by which the offense may be committed, rather than defining separate offenses. In *Sallas*, twenty-five defendants filed special demurrers alleging that their complaints failed to give them sufficient notice of the precise crime with which they were charged. *See Sallas*, 86 Cal. App. 3d at 740. The court reiterated that the charge need not "pinpoint one of the many controlled substances" identified in the statute. *Id.* at 744; *see also People v. Romo*, 200 Cal. App. 2d 83, 87 (1962) ("[A] defendant is entitled to be apprised with reasonable certainty of the nature of the crime charged that he may prepare his defense and plead his jeopardy against future prosecutions."). Rather, due process is satisfied by citing "families, or classes, or chemical groupings, of such substances with substantially the same qualities" in the charging document, without proving the specific substance. *Id.* Thus, the *Sallas* opinion further demonstrates that the precise identity of the controlled substance is not an element of the California statute.

This issue came up again in *Romero*, where the court held that mistake as to the *type* of controlled substance was not a defense. *See Romero*, 55 Cal. App. 4th at 157. In its opinion the court discussed *People v. Innes*, 16 Cal. App. 3d 175 (1971), where the defendant advertised that she was selling mescaline when in fact she had sold LSD. *Romero*, 55 Cal. App. 4th at 155. For

that single transaction the defendant was convicted of two offenses, one for selling mescaline and one for selling LSD. *Id.* On appeal, the appellate court held that the evidence in the case established the commission of only one offense. *Id.* The court then upheld the conviction for offering to sell mescaline and reversed the conviction for selling LSD. *Id.* The *Romero* court agreed that in *Innes* there had been only one offense but believed that the offense need only have been characterized as "sale of a controlled substance." *Id.* at 156. The court reasoned that the notice requirement in *Sallas* did not "transmute the offense of possession of a controlled substance into as many different offenses as there are controlled substances," and that the *Innes* court need not have decided whether "the defendant there was guilty of selling mescaline, or guilty of selling LSD." *Id.*

Taken together, these cases demonstrate that, under California law, the precise identity of a controlled substance is not an element of §§ 11378 and 11379(a) because a jury need not agree about the substance involved in order to convict the defendant.[11] Indeed, *Ross* foreshadows the precise language of *Descamps* when it refers to the specific substance as "the *means* by which [the defendant] committed the crime." *Ross*, 49 Cal. App. 3d at 579 (emphasis added). Although the court in *Sallas* imposed a notice requirement that narrows the identity of the controlled substance to a broad class, it declined to require identification of a specific controlled substance. Finally, *Romero* made clear that the exact identity of the controlled substance is irrelevant to the

[11] Because California is not alone among states in treating the identity of controlled substances as a means of violating a state drug statute, the Board's resolution of the issues raised in this case will provide immigration judges with necessary guidance. For example, New York law treats the precise identity of controlled substances as a means of violating the state's drug statutes, rather than an element. *See People v. Martin*, 153 A.D.2d 807, 808 (1st Dep't 1989), *leave denied*, 74 N.Y.2d 950 (1989). In *Martin*, the defendant was convicted of two counts of possession of a controlled substance in the third degree under New York Penal Law § 220.16. The separate counts were based on the defendant having been found in possession of cocaine and heroin at the time of his arrest. The court dismissed one count on appeal because the statute "does not distinguish between the types of narcotics possessed . . . . Thus, there is no basis for multiple counts . . . based on the fact that the narcotics happen to be of different types." *Id.* In other cases, New York courts have found that a charging document that aggregates all drugs in a defendant's possession is not duplicitous (i.e. does not charge more than one offense), confirming that New York treats the identity of a controlled substance as an interchangeable means of violating an element of the statute. *See, e.g., See, e.g., People v. Maldonado*, 271 A.D.2d 328 (1st Dep't 2000); *People v. Rivera*, 257 A.D.2d 425 (1st Dep't 1999).

fact of conviction; all that matters is that the substance be included in the relevant schedules. Rather than describing alternative elements, the controlled substance schedules are merely alternative means of satisfying an element of the offense listed in the California statutes. Consequently, the California statutes at issue in this case do not describe "as many different offenses as there are controlled substances," *Romero*, 55 Cal. App. 4th at 156, and so the modified approach "has no role to play." *Descamps,* 133 S.Ct. at 2285.[12]

What is more, state controlled substance statutes, including the California statutes at issue here, generally do not require any "legal imagination" to reach the conclusion that they criminalize conduct not covered by the ground of deportability at 8 U.S.C. § 1227(a)(2)(B)(i).[13] For example, the conclusion that the California statutes punish conduct not covered by the federal law requires nothing more than a comparison of the state and federal controlled substance schedules. *See Coronado*, at *3 (noting that because the "full range of conduct" specified in California Health and Safety Code § 11055 does not fall within the CSA schedules, "Coronado's conviction was not a categorically removable offense"); *cf. Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) ("We note that California law regulates the possession and sale of numerous substances that are not similarly regulated by the [Controlled Substances Act]."). The

[12] In *Coronado*, the Ninth Circuit cites to two cases where the Ninth Circuit previously found statutes similar to § 11377(a) as "'sufficiently divisible' for purposes of applying the modified categorical approach." *Coronado*, at *4 n. 3. However, these two cases do not consider the impact of *Descamps* in their analysis. *See Cheuk Fung S-Yong*, 600 F.3d 1028, 1034 n.5 (9th Cir. 2009) ("[I]t is not entirely clear from our current precedents when the modified categorical approach may be employed if the particular statute is broader than the generic offense..."); *see also Cabantac v. Holder*, 736 F.3d 787, 789 n.2 (9th Cir. 2013) (Murguia, J., dissenting) ("I note, however, that our court has not yet considered the impact of *Descamps* on our prior analysis of § 11377(a).").

[13] In any event, case law shows that the California statutes in question have been applied to conduct beyond the scope of the federal statute. For example, California Health and Safety Code sections 11379 (a) and (b) and 11378 have been applied to prosecute persons in California for controlled substance violations for khat and chorionic gonadotropin. *People v. Ahmod Ismail,* 2014 WL 115754 (Cal.App. 4 Dist., January 13, 2014) (unpublished) (prosecuted for Cal. Health and Safety Code §§ 11379(a), 11377(b)(3) for khat); *People v. Jaime Gomez*, Super. Ct. of Cal., Cnty. of Monterey case #SS122397A, filed December 18, 2012 (charged under Cal. Health and Safety Code §§ 11379(b), 11378 for khat); *People v. Hidetada Yamagishi*, Super Ct. of Cal., Cnty. of L.A., Case # SA066228, complaint filed December 08, 2007 (prosecution for possession for sale of chronic gonadotropin).

California statutes at issue in this case are plainly broader than the corresponding federal offenses, and thus clearly satisfy the *Duenas-Alvarez* "realistic probability" test. *See supra* Part I.A. This would remain true for any straightforward comparison of state and federal schedules.

In these instances where the state drug statutes are overbroad and do not require the jury to find unanimously and beyond a reasonable doubt the specific type of controlled substance, there is no place for the modified categorical approach. Moreover, even if a modified categorical approach were to apply, it would reveal nothing about the offense of which a person *necessarily* was convicted, since the type of controlled substances is a means of committing the offense and does not create as many distinct offenses as there are controlled substances.

II. Strong Legal and Policy Reasons Support the Proper Application of the Categorical Approach in the Immigration Context

The categorical approach and the limited circumstances for applying the modified categorical approach described above have had a long history in the immigration context, and for good reason. Since 1891, Congress has consistently tied adverse immigration consequences to convictions for crimes involving moral turpitude. *Compare* Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084 (making excludable "any persons who have been *convicted* of a . . . misdemeanor involving moral turpitude" (emphasis added)) *with* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (making inadmissible noncitizens "*convicted* of . . . a crime involving moral turpitude" (emphasis added)) *and* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (making deportable certain noncitizens "*convicted* of a crime involving moral turpitude" (emphasis added)). A similarly lengthy history exists for controlled substance offenses. *Compare* Act of February 18, 1931, as amended, 46 Stat. 1171; 54 Stat. 673 (making deportable certain noncitizens "who . . . shall be *convicted* of" various controlled substance-related offenses) *with* 8 U.S.C. § 1227(a)(2)(B) (making deportable noncitizens who have "been convicted of a violation of . . . any law or regulation . . . relating to a

controlled substance"). Congress chose the "convicted of" language because it did not want immigration adjudicators to go beyond the minimum conduct that was necessarily established by the conviction. *See Moncrieffe,* 133 S.Ct. at 1690.

As explained above, the modified categorical approach is a tool for the application of categorical analysis rather than an exception to this analysis. Properly applied, it helps adjudicators assess overbroad, divisible statutes—statutes that define multiple offenses, some of which are a categorical fit with grounds of deportability or inadmissibility and some that are not. Using the modified categorical approach with regard to statutes that are not divisible, however, "turns an elements-based inquiry into an evidence-based one" and "conflict[s] with each of the rationales supporting the categorical approach and threaten[s] to undo all its benefits." *Descamps*, 133 S.Ct. at 2287. When applied to indivisible statutes, it becomes more akin to a "modified factual approach," *id.* (citations omitted), which has no place in the immigration assessment of criminal convictions.

This section describes why the Board should recognize that *Matter of Lanferman* and similar cases in tension with *Descamps* and *Moncrieffe* are no longer valid law and that it is impermissible to change the modified categorical approach into a modified factual approach by applying it to indivisible statutes. *Id.* First, the Board is bound to apply *Descamps*'s admonition since Congress used the same "convicted of" language in both the immigration and sentencing contexts and intended a uniform approach. *See* Point II.A. Second, departing from the correct view of the modified categorical approach in immigration law threatens to undo the benefits of the categorical approach in the immigration and criminal justice systems. *See* Point II.B. Third, expanding the intended reach of the modified categorical approach in the controlled substances context prevents the fair and proper administration of the criminal justice system. *See* Point I.C.

A. Congress Instructs Courts to Focus on What the Noncitizen is "Convicted of" in Both the Immigration and Sentencing Contexts.

Federal courts, including the Supreme Court, have long recognized that the categorical approach stems from Congress's longstanding choice to predicate immigration and sentencing consequences on what a person has been "convicted of." In *Descamps*, the Supreme Court explicitly linked its method of analysis to the fact that the relevant sentencing provision looks at what the defendant was "convicted of," identifying the same Congressional intent that federal courts long ago recognized in the immigration context. The Court pointed out that it has long recognized that the language of the sentencing statute focuses on "previous convictions" rather than on a given defendant's prior actions. *See Descamps*, 133 S.Ct. at 2287 ("If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so . . ."). And as *Descamps* explains, Congress's focus on convictions requires adjudicators "to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'" *Descamps*, 133 S.Ct. at 2287 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). From this it follows that any application of the modified categorical approach that seeks to make removal consequences hinge on facts not essential to the predicate conviction violates Congressional intent. *Id.* at 2287.

The Board has long endorsed the categorical approach in the immigration context, *see, e.g.*, *Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 335 (BIA 1996) (stating that the BIA has been consistent in applying categorical analysis). Nonetheless, in *Matter of Lanferman* and similar cases, the Board has adopted rules allowing adjudicators to apply a modified categorical analysis to a much broader array of statutes that would be permissible under *Descamps*. 25 I&N Dec. at 721. However, several factors demonstrate why the Board must recognize that *Descamps* and *Moncrieffe* have invalidated those rules.

As an initial matter, the Supreme Court's opinion in *Moncrieffe,* which was decided just before *Descamps*, forecloses any debate over whether a more flexible approach to divisibility analysis should apply to immigration cases.[14] In *Moncrieffe*, the Court observed that the INA also "asks what offense the noncitizen was 'convicted' of . . . not what acts he committed." 133 S.Ct. at 1685. Consistent with *Descamps*, the Court described the modified categorical approach as applying to "statutes that contain several different crimes, each described separately." *Moncrieffe*, 133 S.Ct. at 1684. Because the Georgia statute at issue *did* describe several crimes separately, the Court applied the modified categorical approach. *Id.* at 1685. Under the statute it was a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." *Id.* The Court consulted part of the record of conviction (the plea agreement) and found that Mr. Moncrieffe was convicted under the "possess with intent to distribute" prong. *Id.*

Turning to the "possess with intent" prong, the Court found that, under Georgia law, it could include both remunerative transfer (an aggravated felony) and non-remunerative transfer of a small amount (not at aggravated felony). *Id.* at 1686. At that point, rather than examine the record of conviction to determine whether Mr. Moncrieffe's conviction rested on a remunerative transfer, or transfer of more than a small amount, the Court concluded that "the conviction did not 'necessarily' involve facts that correspond to" the federal drug trafficking removal ground. *Id.* at 1687. In other words, the Court did not treat the indivisible "possess with intent" prong as allowing a modified categorical inquiry, but instead examined the one offense it defined categorically and determined that it was broader than the relevant removal ground. Read

[14] Binding precedent of the Ninth Circuit holds that *Descamps* applies to immigration proceedings. *Aguilar-Turcios v. Holder*, 740 F.3d 1294 (9th Cir. 2014) (applying the framework set forth in *Descamps* in the removal context). For the reasons discussed above, amici submit that the Board is equally bound to do so in cases arising in other circuits and should issue precedent authority to that effect.

together, *Moncrieffe* and *Descamps* shows that the Court applies the same divisibility analysis in both the immigration and criminal sentencing contexts.

The notion that *Descamps* applies with equal force in the immigration context is unremarkable. The Supreme Court frequently draws on its decisions in the sentencing context to inform its application of the categorical approach in the immigration context, and vice versa. *See, e.g.*, *Descamps*, 133 S.Ct. at 2284, 2288 (citing immigration cases to support categorical analysis in the sentencing context); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684, 1690, 1693 n.11 (2013) (citing sentencing decisions to support categorical analysis in the immigration context); *Kawashima v. Holder*, 132 S.Ct. 1166, 1172 (2012) (same); *Johnson v. United States*, 559 U.S. 133, 144 (2010) (citing immigration cases to support categorical analysis in the sentencing context); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–87 (2007) (citing immigration cases to support categorical analysis in the sentencing context). This Board recently has recognized *Descamps* as "the current understanding of the 'modified categorical approach'" in the removal context. *Matter of Abdelghany*, 26 I&N Dec. 254, 271 n.16 (BIA 2014). *See also Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 281 n.3 (BIA 2014); *Matter of Tavarez-Peralta*, 26 I&N Dec. 171, 178 (BIA 2014). Several federal courts of appeal have similarly acknowledged the applicability of *Descamps* in immigration cases. *See, e.g.*, *Sarmientos v. Holder*, 742 F.3d 624, 628-631 (5th Cir. 2014); *Rojas v. Att'y Gen. of U.S.*, 728 F.3d 203, 215–16 (3rd Cir. 2013); *Mellouli v. Holder*, 719 F.3d 995, 999 (8th Cir. 2013); *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1280–82 (11th Cir. 2013); *Aguilar-Turcios*, 740 F.3d at 1300.

In addition, the term "convicted" in the INA must be given a uniform definition in criminal and immigration contexts as the INA predicates immigration consequences on sentencing provisions and what the defendant was "convicted of." Title II of the INA defines

numerous federal crimes, including illegal re-entry. INA § 276(a). Under INA § 276(b), a defendant's maximum sentence for this offense increases from two years to twenty years if he has re-entered following "conviction" for an aggravated felony. The Sixth Amendment clearly limits judicial fact finding regarding whether or not such prior convictions fall within the "aggravated felony" label. *See, e.g., United States v. Gomez*, 690 F.3d 194, 198–99 (4th Cir. 2012). As such, *Descamps* prohibits courts from using a modified categorical approach to base an illegal re-entry sentencing enhancement on alleged conduct underlying a defendant's conviction under an indivisible statute. Suggesting that federal courts should apply the modified categorical approach to indivisible criminal statutes for purposes of determining whether noncitizens are removable under INA §§ 212(a)(2) and 237(a)(2) for having been "convicted" of certain offenses, or are barred from relief from removal under various other provisions of Title II relating to disqualifying convictions, such as §§ 240A(a)(3) and 240A(b)(1)(C), would violate the basic maxim of statutory construction that words in a given statute should be given a consistent construction when they appear in multiple provisions. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning.") (internal citation and quotation omitted); *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give the [ ] same words a different meaning for [different] categor[ies of noncitizens] would be to invent a statute rather than interpret one.").

While there are exceptions to this interpretive rule, the Supreme Court has already made clear that the meaning of "conviction" and "convicted" in the INA is not one of them. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court held that because the "crime of violence" aggravated felony definition it was interpreting under the categorical approach was incorporated, word for

word, from criminal law, it was *required* to give the term the same construction in both contexts: "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." 543 U.S. at 12 n.8. Because the term "conviction" has criminal applications under the INA itself, it too must be interpreted the same way. For all of these reasons, the Board must recognize that *Matter of Lanferman* and similarly flawed cases have been abrogated and must instead align its precedent on the modified categorical approach with the Supreme Court's analysis in *Descamps* and *Moncrieffe*.

B. Departing in the Immigration Context From What is Established by the Conviction and Instead Allowing Reliance on Unproven Alleged Facts Leads to Adverse Consequences for the Immigration and Criminal Justice Systems.

Delving into the facts of a conviction under an indivisible statute blurs the agency's role by calling for an impermissible inquiry that undermines the very purpose of the categorical approach. Immigration adjudicators—including not only immigration court judges in adversarial proceedings but also immigration officers making enforcement-related decisions or decisions on applications for immigration benefits[15]—need to ensure accurate and uniform results in their assessment of the immigration consequences of criminal convictions under similarly defined statutes. Abandoning the appropriate scope of the modified categorical approach in the context of controlled substance statutes prevents immigration adjudicators from accomplishing these goals.

First, requiring an inquiry into the type of controlled substance involved in the conviction under indivisible statutes like Cal. Penal Code §§ 11378 and 11379(a) jeopardizes the accuracy of immigration proceedings, as many of the documents that the immigration court would

[15] Naturalization and adjustment officers, asylum officers, and detention officers all are called upon to determine the immigration effects of prior convictions. Departing from a categorical approach in these settings provides noncitizens with "little ability to anticipate what types of evidence they should submit to support their applications, and no practical opportunity to contest the government's later submissions." *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1729-31 (2011).

consider are accusatory documents of uncertain validity. In *Descamps*, the Court rejected this type of fact-based inquiry because it would require immigration officials to attempt to "evaluate the facts the judge or jury found" and determine whether the "prosecutor's case realistically lead the adjudicator to make that determination." 133 S.Ct. at 2286. For example, departing from the categorical approach would allow an adjudicator to predicate serious consequences on putative facts that were "irrelevant to the crime charged," *Id.* at 2289. Precisely because these putative facts were irrelevant to the issues before the criminal court, the parties lack any incentive to challenge them and any stray references to them in the criminal records are inherently unreliable. *See id.* ("The meaning of those [record] documents [referring to facts unnecessary to the conviction] will often be uncertain. And the statements of fact in them may be downright wrong."). The determination made on the basis of putative facts cannot be described as accurately reflecting the decision made by the criminal court. The categorical approach promotes accuracy by only allowing the immigration adjudicators to consider what was necessarily proven during the criminal adjudication.

Second, inquiry to discover the particular controlled substance under an indivisible statute disrupts the strong interest the agency has in uniformly applying the nation's immigration laws. *See, e.g., Matter of F—*, 8 I&N Dec. 469, 472 (BIA 1959) ("The immigration laws must be uniformly administered . . . ."); *Matter of R—*, 6 I&N at 448 n.3. Such an inquiry would amplify discrepancies because those convicted of the same crime would receive different immigration consequences based on a gratuitous fact that need not have been proven at trial. *See Moncrieffe*, 133 S.Ct. at 1690 (noting that departing from the categorical approach will lead to different results for the same conviction "depending on what evidence remains available or how it is perceived by an individual immigration judge"). The categorical approach avoids this type of

arbitrariness by focusing attention on the fixed statutory definition of §§ 11378 and 11379(a), which include controlled substances not in the federal controlled substance schedules.

Finally, proper use of the modified categorical approach to focus only on convicted conduct protects a defendant's right to effective assistance of counsel and right to enter into a plea knowingly. *See Padilla v. Kentucky*, 599 U.S. 356, 364 (2010) ("Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" (quoting *McMann v. Richardson,* 397 U.S. 759, 771(1970))). Allowing the immigration judge to look beyond the elements of a statute to gratuitous details that were not necessarily admitted would not only frustrate the defense attorney's ability to advise her client about the immigration consequences of a given plea, but would also deprive the defendant of the benefit of the bargain struck with the prosecution. In *Moncrieffe,* the Court squarely rejected the government's argument that defense counsel would routinely be able to construct a record of conviction, for immigration purposes, reflecting facts gratuitous to the conviction. *Moncrieffe*, 133 S.Ct. at 1691-1692 (acknowledging that there is no "reason to believe that state courts will regularly or uniformly admit evidence going to facts"...when the evidence is "irrelevant to the offense charged"). These harms are prevented by limiting the use of the modified categorical approach to only those statutes that list offenses in the alternative. This ensures that only the findings necessarily adjudicated and required for a conviction under statutes like §§ 11378 and 11379(a) become the basis for immigration consequences stemming from that conviction.

C. The Board Should Take Extra Care to Correctly Apply the Categorical and Modified Categorical Approach in Regard to Controlled Substance Convictions Where Defendants are More Likely to Take Plea Bargains.

Low-level drug convictions are typically processed quickly with little opportunity to challenge facts unnecessary to the conviction. Various factors put pressure on all actors within

the criminal justice system to secure convictions quickly. For the defendant, many difficulties and costs associated with pursing trial in low-level adjudications (such as pretrial detention, bail payment, multiple court appearances, and lost wages) seem to outweigh the possible sanctions for the misdemeanor plea. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1776 (2013). Moreover, in light of the large numbers of defendants going through the court system on these types of charges, prosecutors, defenders, and judges all have an interest to quickly process low-level offenses, which leads to "meet and plead" situations where the defendant gets a few minutes of "legal advice" before his or her case is called and a guilty plea is entered. *See* Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 11 (2009), *available at* http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808. In controlled substance cases defendants often hastily take plea deals, making it all the more important to end the categorical inquiry when the statute of conviction is not a categorical match. Pursuing the inquiry until the particular alleged controlled substance is identified would rely on documents of uncertain validity since the fact of the particular substance need not have been established for the plea. *See Descamps*, 133 S.Ct. at 2289.

Notably, applying the categorical approach correctly would not result in a null set of removable controlled substance convictions. In California, as in many other states, there are controlled substance statutes that treat the underlying controlled substance as an element. These particular statues proscribe controlled substances that are also federally scheduled and therefore are a categorical match to the federal schedule. *See e.g.* California Health and Safety Code § 11351.5 (possession of cocaine base for sale); California Health and Safety Code § 11379.2 (possession for sale of sale of ketamine); California Health and Safety Code § 11378.5

(possession for sale of designated substances including phencyclidine). Because these statutes require proof of the particular controlled substance during the criminal trial phase, they comport with the purpose of the categorical approach, which seeks to link immigration consequences to criminal convictions. By contrast, allowing the application of the modified categorical approach to an overbroad, indivisible statute such as the California Health and Safety Code §§ 11378 and 11379(a), undermines this congressional purpose.

CONCLUSION

For the reasons stated above, *amici* urge the Board to reaffirm the proper application of the modified categorical approach, and conclude that state statutes are indivisibly overbroad with respect to the type of controlled substance when the type of controlled substances provides alternative means of committing the same offense, rather than designating alternative offenses within each statute. In doing so, the Board should formally recognize that *Matter of Lanferman* and similar cases have been invalidated by *Descamps* and *Moncrieffe*, and provide immigration judges with guidance on determining divisibility.

Dated: May 2, 2014

Respectfully submitted,

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APPENDIX A

American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

The National Immigration Project (NIP) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP has provided legal training to the bar and bench on the immigration consequences of criminal conduct since 1970, and has authored the treatise *Immigration Law and Crimes*, which was first published in 1984.

The Immigrant Legal Resource Center (ILRC) is a nonprofit national resource center that provides technical assistance in advocacy to low- income immigrants and their advocates. ILRC is known nationally as a leading authority on issues at the intersection of immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (formerly *California Criminal Law and Immigration*), which was first published in 1990. Since its founding in 1979, ILRC has provided daily assistance to criminal defense and immigration counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. A

leading national expert on issues that arise from the interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and immigration court judges, and noncitizens with expert legal advice, training, and publications on such issues since 1997. IDP's publications include *Representing Immigrant Defendants in New York*, which was first published in 1998.

NIP, ILRC and IDP collaborate as partner organizations in the Defending Immigrants Partnership to provide materials, training and technical assistance to criminal defense lawyers and other actors in the criminal justice system in order to improve the quality of justice for immigrants accused or convicted of crimes. As such, the Partnership has a keen interest in this case and the fair and just administration of the nation's criminal and immigration laws.

Federal courts and the Board have accepted and relied on *amici curiae* briefs submitted by *amici* in several important cases involving the application of criminal and immigration law. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 599 U.S. 356 (2010); *Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010); Matter *of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).

APPENDIX B

File: A090 145 871 – Seattle, WA

Date: FEB - 7 2014

In re: JOSE MANUEL BARRIOS ROJAS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Bernice Funk, Esquire

ON BEHALF OF DHS: Ryan Kahler
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude (Withdrawn)

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation (Withdrawn)

APPLICATION: Reopening

The respondent moves the Board pursuant to section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7), and 8 C.F.R. § 1003.2 to reopen his removal proceedings to apply for adjustment of status. In our decision dated July 31, 2013, we dismissed his appeal from the Immigration Judge's February 16, 2012, decision which found him removable as charged above, denied his motion for a continuance, but granted him voluntary departure. We also granted him 30 days voluntary departure. The Department of Homeland Security opposes the motion. The motion will be granted.

The respondent's motion to reopen proceedings filed on October 29, 2013, is timely.[1] He alleges ineffective assistance of former counsels (Larry W. Smith and Brenda C. Diaz). In

[1] Because the respondent filed a motion to reconsider on August 29, 2013, which was prior to the expiration of the 30-day voluntary departure period we granted in our July 31, 2013, decision [Aug. 30, 2013], the grant of voluntary departure was automatically terminated, and the penalties for failure to depart under section 240B(d) of the Act, 8 U.S.C. § 1229c(d), shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

Matter of Compean, Bangaly, & J-E-C-, 25 I&N Dec. 1 (A.G. 2009) ("*Compean II*"), *vacating* 24 I&N Dec. 710 (A.G. 2009), the Attorney General directed the Board to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel (pending the outcome of a rulemaking process).

The respondent meets the requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), to allege ineffective assistance of Ms. Diaz. He presents his affidavit and a copy of the complaint filed against Ms. Diaz (in which counsel states that she notified Ms. Diaz of the complaint) [Motion Exhs. B, E]. We have no authority to consider the ineffective assistance of counsel claim against Mr. Smith, whose actions allegedly led to the issuance of the Notice to Appear (Form I-862) against the respondent. *Cf. Matter of Compean II, supra*, at 3 (concluding that the Board's discretion to reopen removal proceedings includes the power to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred *after* a final order of removal had been entered).

The respondent shows prejudice. *See generally Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (prejudice will be found when the performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings). The respondent was found removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), based on two convictions. Section 237(a)(2)(B)(i) of the Act provides, in pertinent part, that any alien who at any time after admission has been convicted of a violation of any law of a State relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

The first removability conviction is a March 4, 1991, conviction in a California criminal court for using or being under the influence of any specified controlled substance (Exh. 2). Ms. Diaz did not challenge removability based on this conviction (Tr. at 18-19). However, the record of conviction does not identify the controlled substance involved. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076-77 (9th Cir. 2007) (holding that conviction under the California possession statute was not a categorical controlled substance offense because California regulates the possession and sale of many substances not covered by the Controlled Substances Act). Removability has not been shown on the present record.

The respondent's second removability conviction is an October 28, 1993, conviction in a California criminal court for possession of marijuana more than 28.5 grams (Exh. 2). However, the record of conviction does not establish whether the amount involved was for 30 grams or less, or for more than 30 grams. *See Rodriguez v. Holder*, 619 F.3d 1077, 1079 (9th Cir. 2010); *see also Medina v. Ashcroft*, 393 F.3d 1063, 1065 n.5 (9th Cir. 2005) (the government bears the burden of establishing that an alien's conviction does not fall within the exception for possession of 30 grams or less of marijuana). Removability has not been shown on the present record.[2] We conclude that the respondent shows prejudice.

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[2] If upon remand the respondent is found to have two or more controlled substance offenses, he will not be eligible for the personal use exception. *See Rodriguez v. Holder, supra* (the personal use exception does not apply to an alien with more than one drug conviction).

In sum, the respondent meets the requirements in *Matter of Lozada, supra*, and shows prejudice. Because his motion to reopen is timely filed, due diligence is not an issue. We will grant the motion to reopen and remand the record to the Immigration Judge for new determinations on removability under section 237(a)(2)(B)(i) of the Act and eligibility for adjustment of status.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted, and the proceedings are reopened.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

2010 Immig. Rptr. LEXIS 4169

Board of Immigration Appeals
Date: DEC 15, 2010; Date: DEC 15, 2010
File: A072-290-879 - El Paso, TX

BIA & AAU Non-Precedent Decisions

Reporter: 2010 Immig. Rptr. LEXIS 4169

In re: JUAN RAMON CAMPOS GRAJEDA

Core Terms

mandatory, detain, alien, controlled substance, bond, conviction, violation, appeal, removability, document, unlikely, plea, commission, immigrate, decision, custody, record, factual basis, jurisdiction, redetermine, provision, convince, schedule, hearing, prevail, proceed, reviews, charge, law

Counsel

ON BEHALF OF RESPONDENT:
Arthur C. Evangelista, Esquire

ON BEHALF OF DHS:
Lorely Ramirez Mravetz
Assistant Chief Counsel

Opinion

IN BOND PROCEEDINGS

APPEAL

APPLICATION: Redetermination of custody status

The respondent has appealed from the Immigration Judge's decision dated September 27, 2010. The Immigration Judge issued a bond memorandum setting forth the reasons for his bond decision on November 4, 2010. The Immigration Judge found the respondent subject to mandatory detention under *section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)*, based upon his conviction for Under the Influence of a Controlled Substance in violation of *California Health and Safety Code § 11550(a)*. On appeal, the respondent argues that the Department of Homeland Security ("DHS") is substantially unlikely to prevail in establishing his removability for a controlled substance violation, since the California controlled substance schedule is broader than the federal schedule and the record of conviction does not specifically [*2] identify the controlled substance involved in the respondent's conviction. The respondent's appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *8 C.F.R. § 1003.1(d)(3)(i)*. The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo.8 C.F.R. § 1003.1(d)(3)(h); Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008).*

The Act prescribes mandatory detention for certain aliens, including those who, like the respondent, may be removable for commission of a controlled substance violation. *See8 U.S.C. § 1226(c)(1)(A)*. The regulations generally do not confer jurisdiction on an Immigration Judge over custody or bond determinations governing those aliens who are subject to mandatory detention. *See8 C.F.R. § 1003.19(h)(2)(i)(D)*. However, an alien may seek a determination by an Immigration Judge that the alien is "not [*3] properly included within" certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue

in this matter. See 8 C.F.R. § 1003.19(h)(2)(h); *Matter of Joseph*, 22I&NDec. 799, 802 (BIA 1999). An alien will not be considered "properly included" within a mandatory detention category only when an Immigration Judge is convinced that the DHS is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention. *See Id.*

Based upon the documentation contained in the record, we are not convinced that it is substantially unlikely that the DHS will establish that the respondent was convicted of a controlled substance violation. *See Matter of Joseph, supra.* In bond proceedings, the alien bears the burden of proof to establish that he is eligible for release on bond. *See id.* Although we recognize that the respondent is correct that the conviction documents contained in the bond record are inconclusive with regard to whether the respondent is removable for commission of a controlled [*4] substance violation, the respondent has not provided a copy of the transcript of the plea hearing, a plea colloquy, or other documentation providing the factual basis for his guilty plea. *See Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1078 (9th Cir.2007)* . In the absence of this critical documentation that would demonstrate the factual basis for the respondent's plea, we find that the respondent has not established that the DHS is "substantially unlikely" to prevail in establishing the respondent's removability for commission of a law relating to a controlled substance. Consequently, we find that the respondent is properly included in the classes of aliens subject to mandatory detention.

Inasmuch as the respondent is subject to mandatory detention under section 236(c)(1) of the Act, we find no error in the Immigration Judge's conclusion that she was without authority to redetermine the conditions of the respondent's custody. *See8 C.F.R. § 1003.19(h)(2)(i)(D).* Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.
Panel Members: King, Jean C.

File: A071 552 965 – Miami, FL

Date: JAN 2 8 2014

In re: DIEUVU FORVILUS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patricia Elizee, Esquire

ON BEHALF OF DHS: Margarita I. Cimadevilla
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination

The respondent appeals from an Immigration Judge's October 3, 2013, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

The respondent is a native and citizen of Haiti and a lawful permanent resident ("LPR") of the United States. In 2010 the respondent was convicted in Florida of third-degree grand theft in violation of Fla. Stat. § 812.014. In 2013, after traveling abroad, the respondent presented himself for DHS inspection at the Miami International Airport port of entry, where he requested permission to reenter the United States as a returning LPR. Upon discovering the respondent's 2010 conviction, however, the DHS denied his request to reenter the United States and initiated the present removal proceedings. In a notice to appear filed in August 2013, the DHS charged the respondent with inadmissibility to the United States as an arriving alien convicted of a crime involving moral turpitude ("CIMT"). Sections 101(a)(13)(C)(v) and 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(C)(v), 1182(a)(2)(A)(i)(I).[1] The Immigration Judge sustained the charge and ordered the respondent removed. This timely appeal followed, in which the respondent argues that the offense defined by Fla. Stat. § 812.014 is not a CIMT. We review that legal question de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

At all relevant times, Fla. Stat. § 812.014(1) has stated in relevant part that "[a] person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property [or] (b) Appropriate the property

[1] As the respondent is a returning LPR, the DHS bears the burden of proving by clear and convincing evidence that he has committed an offense which renders him amenable to a charge of inadmissibility. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

to his or her own use or to the use of any person not entitled to the use of the property." The statute also provides: "It is grand theft in the third degree and a felony of the third degree . . . if the property stolen is . . . [v]alued at $300 or more, but less than $5,000 . . . ." Fla. Stat. § 812.014(2)(c).

The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, has held that an offense is a CIMT if it "involves '[a]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" *Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013) (quoting *United States v. Gloria*, 494 F.2d 477, 481 (5th Cir. 1974)). To determine whether a crime qualifies as a CIMT in cases arising within the Eleventh Circuit, we apply the traditional "categorical approach," under which we focus upon the statutory definition of the crime rather than the facts underlying the particular offense. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011). The categorical approach requires that "we analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude." *Cano v. U.S. Att'y Gen., supra*, at 1053 n. 3 (quoting *Keungne v. U.S. Att'y Gen.*, 561 F.3d 1281, 1284 n. 3 (11th Cir. 2009)).

It is undisputed that Fla. Stat. § 812.014 does not define a categorical CIMT because the statute, by its terms, encompasses offenses in which only a temporary taking or appropriation of property is intended. Under this Board's precedents, temporary takings of property are not CIMTs. *E.g., Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). As the "least culpable conduct" necessary to support a conviction for third-degree grand theft under Fla. Stat. § 812.014 does not involve moral turpitude, the DHS can carry its burden only if the statute is "divisible" vis-à-vis the CIMT concept, such that the Immigration Judge may consult the respondent's conviction record under the "modified categorical" approach with a view to determining whether his particular offense of conviction involved moral turpitude.

The Immigration Judge found that Fla. Stat. § 812.014 is divisible because it encompasses some turpitudinous offenses in which a permanent taking or appropriation of property is intended, as well as some non-turpitudinous offenses involving temporary takings or appropriations. Thus, he found it proper to consider the respondent's plea agreement and charging document which, taken together, show that he was convicted of unlawfully obtaining food stamps and cash assistance from the State of Florida (I.J. at 2-3). Based on that evidence, the Immigration Judge concluded that the DHS had carried its burden of proving that the respondent was convicted of third-degree grand theft involving the intent to permanently take or appropriate the victim's property, a CIMT.

On appeal, the respondent maintains that the Immigration Judge's divisibility analysis was erroneous in light of the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013). We agree with the respondent.

In *Descamps*, the Supreme Court explained that the modified categorical approach operates narrowly, and applies only if: (1) the statute of conviction is divisible in the sense that it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to

disjunctive sets of "elements,"[2] more than one combination of which could support a conviction, and (2) some (but not all) of those listed offenses or combinations of disjunctive elements are a categorical match to the relevant generic standard. *Id.* at 2281, 2283. Thus, after *Descamps* the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to conduct that fits the generic federal standard; according to the *Descamps* Court, such crimes are "overbroad" but not "divisible." *Id.* at 2285-86, 2290-92.[3]

The Immigration Judge found that Fla. Stat. § 812.014 was divisible vis-à-vis the CIMT concept because it covers either "permanent" or "temporary" takings. In light of *Descamps*, however, this disjunctive phrasing does not render the statute divisible so as to warrant a modified categorical inquiry. Permanent and temporary takings are alternative *means* of committing grand theft in Florida; however, the DHS—which bears the burden of proof—has identified no authority to suggest that they are alternative *elements* of grand theft about which Florida jurors must agree in order to convict. *See Descamps v. United States, supra*, at 2285 n. 2; *accord Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.").[4]

As the offense defined by Fla. Stat. § 812.014 is neither a categorical CIMT nor divisible vis-à-vis the CIMT concept under *Descamps*, we conclude that the removal charge must be dismissed. No other charges are pending against the respondent, moreover, and therefore the removal proceedings will be terminated.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the removal proceedings are terminated.

FOR THE BOARD

[2] By "elements," we understand the *Descamps* Court to mean those facts about a crime which must be proved to a jury beyond a reasonable doubt *and* about which the jury must agree by whatever margin is required to convict in the relevant jurisdiction. *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

[3] The Eleventh Circuit has held that the requirements of the categorical and modified categorical approaches may not be relaxed in CIMT cases. *Fajardo v. U.S. Atty. Gen., supra.*

[4] In its appellate brief, the DHS argues that "*Descamps* is of no applicability to the instant inquiry," largely because this Board has previously found statutes resembling Fla. Stat. § 812.014 to be divisible. On the contrary, we view *Descamps* as authoritative intervening precedent as to the scope of the "divisibility" concept; thus, after *Descamps* a theft statute can be divisible in CIMT cases on the basis of the permanent-versus-temporary-taking dichotomy only if permanent and temporary takings are set forth by the convicting statute as alternative elements. Prior Board decisions embracing a more expansive understanding of divisibility are necessarily superseded to the extent they are inconsistent with *Descamps*.

File: A090 764 102 – Atlanta, GA Date: MAR 28 2014

In re: EDUARDO GOMEZJURADO a.k.a. Eduardo Gomez Jurado

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jama A. Ibrahim, Esquire

ON BEHALF OF DHS: Gene Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C.§ 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -
Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's March 4, 2013, decision terminating proceedings. The respondent has filed a brief in opposition to the appeal. For the reasons that follow, the appeal will be dismissed.

At issue on appeal is whether the DHS met its burden of proving that the respondent's August 2010 conviction for assault on a female in violation of North Carolina law is a crime involving moral turpitude, which would combine with a 1996 conviction for felony theft under Florida law to satisfy the charge of removal arising under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act. In addition, the DHS argues on appeal that the assault on a female conviction under section 14-33(c)(2) of the North Carolina statute is also a crime of domestic violence, satisfying the removal charge under section 237(a)(2)(E)(i) of the Act.[1] We

[1] In its Notice of Appeal, the DHS also raised the question whether the Immigration Judge erred in finding that it had failed to prove that the respondent's March 2012 conviction for cyberstalking in violation of section 14-196.3 constituted a crime involving moral turpitude. However, in its appeal brief, the DHS does not elaborate on this argument, nor support it with pertinent legal authority. We therefore deem this argument abandoned. Nevertheless, to the extent that the DHS challenges the Immigration Judge's findings with regard to whether the cyberstalking conviction can go towards satisfying the charge of removal under section 237(a)(2)(A)(ii) of the Act, we affirm the Immigration Judge's finding in this regard (Tr. at 85-86). *See Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1053 n. 3 (11th Cir. 2013) (analysis must

(Continued . . . .)

review these legal questions de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). We also note that there are no contested questions of fact arising in this appeal that would trigger clear error review. *See* 8 C.F.R. § 1003.1(d)(3)(i).

The question whether the assault conviction under the above-referenced section of North Carolina law constitutes a crime involving moral turpitude is informed by the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), which was issued after the Immigration Judge rendered his decision in this case. In *Descamps*, the Supreme Court explained that the modified categorical approach operates narrowly, and applies only if: (1) the statute of conviction is divisible in the sense that it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements,"[2] more than one combination of which could support a conviction, and (2) some (but not all) of those listed offenses or combinations of disjunctive elements are a categorical match to the relevant generic standard. *Id.* at 2281, 2283. Thus, after *Descamps* the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to conduct that fits a generic federal standard; according to the *Descamps* Court, such crimes are "overbroad" but not "divisible." *Id.* at 2285-86, 2290-92.[3]

The state statute under which the respondent was convicted for misdemeanor assault provides in relevant part that ". . . any person who commits any assault, assault and battery, or affray, is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she. . . (2) [a]ssaults a female, he being a male person at least 18 years of age." *See* N.C. Gen. Stat. 14-33(c)(2). The Immigration Judge found that this statute did not categorically define a crime involving moral turpitude, but pursuant to the parties' agreement, conducted a modified categorical analysis of the conviction record, to determine if the conviction would support the charge under section 237(a)(2)(A)(ii) of the Act (I.J. at 2-3).

We disagree that under *Descamps v. United States*, *supra*, the statute lends itself to a modified categorical inquiry into whether the respondent's conviction thereunder is for a crime involving moral turpitude. While the language referencing the commission of "any assault,

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determine if least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude). The cyberstalking conviction was not alleged as a factual predicate for the charge under section 237(a)(2)(E)(i) of the Act, and the DHS does not allege on appeal that this conviction would support removal under section 237(a)(2)(E)(i) of the Act. *See* DHS's Brief at 3, n. 2 and Exh. 5.

[2] By "elements," we understand the *Descamps* Court to mean those facts about a crime which must be proved to a jury beyond a reasonable doubt *and* about which the jury must agree by whatever margin is required to convict in the relevant jurisdiction. *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

[3] The Eleventh Circuit has held that the requirements of the categorical and modified categorical approaches may not be relaxed in CIMT cases. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

assault and battery, or affray," describes alternative means of committing the crime, we do not read the Supreme Court's opinion to support a conclusion that these are disparate "elements" of the crime, supporting a modified categorical approach. Moreover, the balance of the statute relating to the perpetrator being "a male person at least 18 years of age" who "assaults a female" suggests no alternative *elements* of assault—certainly no question about a domestic relationship—about which North Carolina jurors must agree in order to convict. *See Descamps v. United States, supra*, at 2285 n. 2. We therefore find the modified categorical approach undertaken here to be unwarranted under intervening precedent.[4]

Even if the modified categorical approach was appropriate here, we affirm the Immigration Judge's determination that under noticeable documents, the DHS did not meet its burden to prove that the respondent's assault on a female conviction involved moral turpitude. *Fajardo v. U.S. Att'y Gen., supra.* As the Immigration Judge found, the documents indicate that the respondent was convicted after trial by the district court acting as the trier of fact (I.J. at 2-3). The record of conviction, which included the warrant of arrest and the judgment (Exh. 3), does not reflect the factual basis for the finding of guilty, insofar as the warrant, even assuming that it is equivalent to an indictment, was not shown on this record to be the basis for a plea or finding of guilty (I.J. at 3; Tr. at 52-57). Accordingly, assuming that a modified categorical approach was appropriate, we find that the Immigration Judge properly found that the DHS did not prove that this record reflected the type of "willful" "infliction of bodily harm upon a person with whom one has . . . a familial relationship" that would indicate that the respondent's assault conviction involves moral turpitude. *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996).

Furthermore, we affirm the Immigration Judge's finding that the record does not support a finding that the conviction for assault on a female was for a crime of domestic violence. First, the North Carolina statute at issue does not set forth a categorical crime of violence as described under 18 U.S.C. § 16(a),[5] which would be necessary to a finding of a "domestic violence" crime. *See Matter of Velasquez*, 25 I&N Dec. 278, 279-80 (BIA 2010). That is because an "assault" for purposes of this statute is defined according to common law to include a battery, which requires a showing of *any* level of force, either direct or indirect, to the person of another. *See United States v. Kelly*, 917 F.Supp.2d 553, 559 (W.D.N.C. 2013) (*citing State v. Britt*, 154 S.E.2d 519 (N.C. 1967)). Battery under North Carolina law does not require the application of violent force or force capable of causing injury, and indeed has been described as requiring only "offensive touching." *See City of Greenville v. Haywood*, 502 S.E.2d 430, 433 (N.C. Ct. App. 1998). We

[4] We note that the parties conceded that the respondent's 1996 conviction for grand theft under section 812.014 of the Florida statutes was categorically a crime involving moral turpitude (Tr. at 82). However, *Descamps v. United States, supra*, may undermine any such finding, since we read the Florida theft statute to permit conviction for temporary or permanent takings, raising the question whether these would constitute alternative elements to the offense, so as to invite a modified categorical approach under relevant precedent.

[5] Because the respondent's conviction under section 14-33(c)(2) of the North Carolina statute was for a misdemeanor, it can only constitute a crime of violence if it is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See Matter of Velasquez*, 25 I&N Dec. 278, 280 (BIA 2010).

have held that this conduct does not equate to an element of "physical force" that is required to qualify an offense as a crime of violence under 18 U.S.C. § 16(a). *See Matter of Velasquez, supra*, at 281-82; *Johnson v. United States*, 559 U.S.133 (2010). Even if we assume that the underlying assault conviction would not include a battery, it does not appear that violent force is always a requisite element of the crime of assault under North Carolina, since common law does not consistently require the showing of "force and violence" to convict under the statute. *See United States v. Kelly, supra*, at 557-58 (noting cases wherein conviction for assault predicated on showing of "force *or* violence" or a show of force).

We do not find that a modified categorical inquiry into the crime of violence question is viable in light of *Descamps v. United States, supra*. Furthermore, even if it were, the record does not contain the requisite judicially noticeable documents to reveal the manner in which the "assault" conviction occurred, since the record does not reflect that the facts in the "warrant" were considered and found by the trier of fact. These findings make unnecessary our consideration of evidence outside of the record of conviction to determine that the victim and the respondent were in a requisite "domestic" relationship, as urged by the DHS on appeal. *See Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010); DHS's Brief at 12-13.

Accordingly, we find no cause to disturb the Immigration Judge's decision to terminate proceedings. The following order will therefore be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

File: A093 108 092 – Tulsa, OK[1] Date: MAY 22 2013

In re: SERGIO GONZALEZ-MANJARREZ a.k.a. Sergio Majarrez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven F. Langer, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(B))

APPLICATION: Remand

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge dated January 30, 2013, finding him removable as charged and ordering his removal to Mexico. The decision of the Immigration Judge will be vacated and the decision will be remanded for further consideration.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge concluded that the respondent's conviction of unlawful possession of a controlled dangerous substance with the intent to distribute under 63 Okl. St. Ann. § 2-401 is categorically a drug trafficking aggravated felony pursuant to section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), rendering him removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

Subsequent to the Immigration Judge's decision in this matter, the United States Supreme Court issued *Moncrieffe v. Holder*, 133 S.Ct. 1678 (U.S. 2013), in which the Court held that, "[i]f a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA." *Id.* at 1693-94. The record here discloses that the controlled substance at issue is marijuana, but does not disclose either that the offense involved

[1] The proceedings before the Immigration Judge in this matter were completed in Tulsa, Oklahoma through video conference pursuant to section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

remuneration or more than a small amount of marijuana (Exh. 2).[2] Accordingly, in light of *Moncrieffe v. Holder*, *supra*, we will vacate the decision of the Immigration Judge and remand for further proceedings to determine the respondent's removability under the sole lodged charge.[3] Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's order dated January 30, 2013, is vacated.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[2] The term "distribution" under Oklahoma law includes exchanges without remuneration. *See Goodner v. State*, 546 P.2d 653, 57-58 (Okl.Cr.1976) (holding that the plain meaning of the word "distribute" includes not only selling or dealing, but also dividing, sharing, or delivering, with or without compensation and with or without the existence of an agency relationship).

[3] Though not so charged by the Department of Homeland Security, the respondent's conviction renders him subject to removal under section 237(a)(2)(B)(i) of the Act. *Moncrieffe v. Holder*, *supra*, at 1692.

2009 WL 3063813 (BIA)

** THIS IS AN UNPUBLISHED DECISION - NOT INTENDED FOR CITATION AS PRECEDENT **

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: ALFREDO MENESES DE CARVALHO

File: A026 994 625 - Houston, TX
September 17, 2009

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Joy Al-Jazrawi, Esquire

ON BEHALF OF DHS:

Victor P. Lehman
Assistant Chief Counsel

APPLICATION: Termination

*1 The respondent, a native and citizen of Brazil, has appealed from the Immigration Judge's decision dated April 9, 2009. The appeal will be dismissed.

As found by the Immigration Judge, the respondent was convicted on April 5, 2005, for possession of controlled substance paraphernalia in violation of section 11364 of the California Health and Safety Code (I.J. at 3). The respondent was also convicted on that date of being under the influence of a controlled substance in violation of section 11550(a) of the Cal. Health and Safety Code. The Immigration Judge ruled that the evidence did not support the other convictions alleged in the Notice To Appear (I.J. at 3).

We affirm the Immigration Judge's determination that the respondent is subject to removal under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an individual convicted of violating a law relating to a controlled substance. The respondent argues on appeal that the Immigration Judge erred in finding that his drug paraphernalia conviction was for a controlled substance offense because the "controlled substance" involved in his drug paraphernalia conviction is not identified in the record of conviction.

While the circumstances presented in this case have not yet been addressed in the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this matter arises, we may look for guidance to a decision of the United States Court of Appeals for the Ninth Circuit that involved an Arizona drug paraphernalia statute that is substantially similar to the California statute at issue in this case. In *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000), the Ninth Circuit held that a conviction for possession of drug paraphernalia under Arizona Revised Statutes § 13-3415 constitutes a conviction "relating to a controlled substance" for immigration purposes, even though Arizona's definition of "drug" does not map perfectly with the definition of "controlled substance" in the Act. *See Luu-Le v. INS, supra,* at 915. See also Estrada v. Holder, 560 F.3d 1039 (9th Cir. 2009), at 1042.

The Arizona and California statutes are alike in that the definition of the term "drug paraphernalia" referenced in both statutes makes abundantly clear that an object is not drug paraphernalia unless it is in some way linked to drugs. In addition, both statutes contain similar definitions of the term "drug," and both statutes list factors to be considered in determining whether an object is drug paraphernalia. *Compare* Cal. Health and Safety Code §§ 11364 and 11364.5 with Ariz. Rev. Stat. § 13-3415. Therefore, notwithstanding the absence of information identifying a particular controlled substance, we agree with the Immigration Judge that the respondent's drug paraphernalia conviction is a controlled substance offense that renders him inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. Inasmuch as the respondent's conviction for possession of drug paraphernalia is sufficient to support the charge of inadmissibility, we need not address whether there is sufficient evidence to sustain the charge based on the respondent's conviction under Cal. Health and Safety Code § 11550(a).

*2 Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Molly Kendall Clark
FOR THE BOARD

2009 WL 3063813 (BIA)

End of Document

File: A072 377 892 - Arlington, VA

Date: MAR 31 2014

In re: LUIS MIGUEL RAMIREZ-MOZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ivan Yacub, Esquire

ON BEHALF OF DHS: Stacie L. Chapman
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F)) (withdrawn)

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(G)) (sustained)

APPLICATION: Termination

The respondent, a native and citizen of El Salvador, appeals the June 27, 2012, denial of his motion to terminate these removal proceedings. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On August 12, 2008, the respondent was convicted of grand larceny in violation of Va. Code Ann. § 18.2-95, and sentenced to 2 years of imprisonment (I.J. at 1). In determining whether a conviction qualifies as an aggravated felony for removal purposes, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, follows the analytical model set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005). Under this "categorical" approach, we focus on the statutory definition of the crime rather than the facts underlying the respondent's particular violation. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).

The respondent argues that he was not convicted of an aggravated felony involving theft pursuant to the categorical approach because Va. Code Ann. § 18.2-95 can also apply to fraud offenses, which do not come within section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G). *See Soliman, supra*, at 283; *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (2008). The Immigration Judge found that the controlling distinction

between a theft and fraud offense is that theft occurs without the owner's consent, whereas fraud occurs with consent that has been unlawfully obtained (I.J. at 2). *Soliman, supra*, at 282; *Matter of Garcia-Madruga, supra*, at 440-41. Grand larceny under Va. Code Ann. § 18.2-95 includes all the elements of common law larceny, which are: (1) the wrongful or fraudulent taking; (2) of property; (3) of another; (4) without his permission; (5) with the intent to permanently deprive the owner of that property (I.J. at 2). *Britt v. Commonwealth*, 667 S.E.2d 763, 765 (Va. 2008). Focusing on the element "without his permission," the Immigration Judge concluded that because Va. Code Ann. § 18.2-95 requires an owner's lack of consent, Va. Code Ann. § 18.2-95 cannot apply to fraud offenses, as defined in *Soliman* (I.J. at 2). *See Soliman, supra*, at 281. He further determined that the elements of Va. Code Ann. § 18.2-95 match the elements of section 101(a)(43)(G) of the Act, to wit: (1) the taking; (2) of property; (3) of another; (4) without consent; (5) with intent to deprive the owner of the rights and benefits of ownership (I.J. at 2-3). *Soliman, supra*, at 282; *Matter of Garcia-Madruga, supra*, at 441. Since a conviction under Va. Code Ann. § 18.2-95 is also punishable by "imprisonment [for] at least one year," the Immigration Judge held that the respondent has been convicted of an aggravated felony under the categorical approach (I.J. at 3). Section 101(a)(43)(G) of the Act.

The respondent observes that Virginia courts have interpreted the grand larceny statute at Va. Code Ann. § 18.2-95 to include when the accused takes property without the consent of the owner (i.e., a "classic theft" offense), as well as when the victim voluntarily surrenders his or her property (i.e., a "fraudulent taking"). *See Britt, supra*, at 765; *see also Salem v. Holder*, 647 F.3d 111, 113-14 (4th Cir. 2011) (stating that Va. Code Ann. § 18.2-96 (petit larceny) is divisible, as it criminalizes both wrongful and fraudulent takings of property, with the latter offense not constituting an aggravated felony under the Act). As such, Va. Code Ann. § 18.2-95 criminalizes both conduct that does and conduct that does not qualify as an aggravated felony. The Immigration Judge thus erred in holding that a conviction under this statute categorically qualifies as an aggravated felony "theft" offense, as described in section 101(a)(43)(G) of the Act.

Since the Department of Homeland Security ("DHS") has not demonstrated that the respondent was convicted of a categorical crime of violence, we must next decide whether any basis exists to conduct a "modified categorical" inquiry of the sort contemplated in *Shepard v. United States*, 544 U.S. 13 (2005). As the United States Supreme Court recently explained, the modified categorical approach is a tool that helps courts implement the categorical approach by supplying them with a mechanism to identify the "elements" of offenses arising under "divisible" criminal statutes. *See Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). Under *Descamps*, the modified categorical approach applies only if: (1) the statute of conviction is "divisible" in the sense that it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of elements, more than one combination of which could support a conviction; and (2) some (but not all) of those listed offenses or combinations of disjunctive elements are a categorical match to the relevant generic standard. *Id.* at 2281, 2283. The modified categorical approach does *not* apply merely because the elements of the crime can sometimes be proved by reference to *conduct* that fits the generic federal standard; in the view of the *Descamps* Court, such crimes are "overbroad," but not "divisible." *Id.* at 2285-86, 2290-92 (emphasis added). Thus, the Supreme Court has overruled *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), in which the Board held that a criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but

not all violations of the statute give rise to grounds for removal or ineligibility for relief. As the Supreme Court explained, the modified categorical approach:

> 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 categorical approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." . . . 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 categorical approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.

Descamps, *supra*, at 2285 (internal citation omitted).

The statute at issue provides:

> Any person who (i) commits larceny from the person of another of money or other thing of value of $5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value of $200 or more, or (iii) commits simple larceny not from the person of another of any firearm, regardless of the firearm's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $2,500, either or both.

Va. Code Ann. § 18.2-95. Three potential forms of grand larceny, each with specific elements, are listed in the alternative: (1) larceny from another's person of something worth $5 or more; (2) larceny not from another's person of goods and chattels worth $200 or more; and (3) larceny not from another's person of a firearm regardless of the firearm's worth. Also, as discussed previously, Virginia courts have defined "larceny" as a "classic theft" offense *or* a "fraudulent taking." *See Britt*, *supra*, at 765 (emphasis added); *Salem*, *supra*, at 113-14 (emphasis added). Va Code Ann. § 18.2-95 thus lists discrete offenses as enumerated alternatives, some (but not all) of which have the elements of a theft offense, so as to categorically match section 101(a)(43)(G) of the Act. *See Descamps*, *supra*, at 2281, 2283. Therefore, Va. Code Ann. § 18.2-95 is divisible in relation to section 101(a)(43)(G) so as to warrant a modified categorical inquiry. This modified categorical inquiry is *not* being applied to examine the respondent's conduct; it further is not being applied to supply a missing element contained in section 101(a)(43)(G) of the Act, but not in Va. Code Ann. § 18.2-95. *Cf. Matter of Lanferman*, *supra*. Rather, it is being used as a tool that helps us implement the categorical approach to a statute that lists multiple, alternative elements, effectively creating several different crimes, where at least one, but not all of those crimes matches the generic version set forth in section 101(a)(43)(G) of the Act. *See Descamps*, *supra*, at 2285.

Evidence that may be considered in applying the modified categorical approach includes "'the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information.'" *Matter of Sanudo*, 23 I&N Dec. 968, 974-75 (BIA 2006) (*quoting Shepard, supra*, at 26). The record contains an Indictment, dated July 21, 2008, charging that on March 23, 2008, the respondent "did feloniously take, steal and carry away property of [a named victim], valued in excess of $200.00." Furthermore, a Warrant of Arrest provides that on March 23, 2008, the respondent did "steal GPS valued at two hundred dollars or more and belonging to [the named victim]." The record also includes a sentencing order showing that on August 12, 2008, the respondent was found guilty of the grand larceny offense committed on March 23, 2008. The record of conviction thus indicates that the respondent was convicted of a "classic theft" and not a "fraudulent taking," for which the term of imprisonment is at least 1 year. *See* section 101(a)(43)(G) of the Act. Therefore, applying the modified categorical approach per our de novo review, we affirm the Immigration Judge's ultimate holding that the DHS has established removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a).

The respondent has not applied for relief from removal and indicated that he did not wish to do so (I.J. at 3; Tr. at 13).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

File: A091 684 104 – Florence, AZ Date: MAR 10 2014

In re: RAUL SAINZ-RIVERA a.k.a. Jesus Urbieta a.k.a. Manuel Sainz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (withdrawn)

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

APPLICATION: Termination

The respondent appeals from an Immigration Judge's October 7, 2013, decision finding him removable from the United States as an alien convicted of two crimes involving moral turpitude not arising from a single scheme of criminal misconduct. Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The appeal will be sustained and the record will be remanded.

The respondent, a native and citizen of Mexico, has twice been convicted of violating Ariz. Rev. Stat. § 28-1383(A)(1), which prohibits any person from "driving" or exercising "actual physical control" over a motor vehicle while under the influence of intoxicating liquor or drugs if the person knows that his driver license or privilege to drive is suspended, canceled, revoked, refused or restricted. The issue on appeal is whether the Department of Homeland Security ("DHS") has proven by clear and convincing evidence that these offenses qualify as crimes involving moral turpitude ("CIMT") for removal purposes. Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that the DHS has not carried that burden.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter arises, has concluded that Ariz. Rev. Stat. § 28-1383(A)(1) encompasses some conduct that is morally turpitudinous and other conduct that is not. *Compare Marmolejo-Campos v. Holder*, 558 F.3d 903, 914-17 (9th Cir. 2009) (en banc) (deferring to *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), in which this Board found that moral turpitude inheres in the act of "driving" under the influence of alcohol or drugs with knowledge that one's driving privileges have been revoked), *with Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118-1119 (9th Cir. 2003) (holding that moral turpitude does *not* inhere in the act of exercising "actual physical control" over a vehicle while intoxicated, even if the accused knew his driving privileges had been suspended).

As Ariz. Rev. Stat. § 28-1383(A)(1) encompasses both turpitudinous and non-turpitudinous conduct, the Ninth Circuit has treated it as a "divisible" statute vis-à-vis the CIMT concept, authorizing Immigration Judges to consult aliens' conviction records under the "modified categorical approach" to determine whether the particular alien before the court was convicted of "driving" rather than merely exercising "actual physical control." *See Marmolejo-Campos v. Holder, supra*, at 913 & n. 12. The Immigration Judge conducted such a modified categorical inquiry here and found that the respondent's guilty pleas were to "driving" while intoxicated (I.J. at 2-4).

During the pendency of these removal proceedings, however, the Supreme Court decided *Descamps v. United States*, 133 S. Ct. 2276 (2013), which embraced a conception of "divisibility" that appears substantially narrower than that embodied in *Marmolejo-Campos*. The *Descamps* Court held that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Id.* at 2281, 2283. In other words, the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to *conduct* that fits the generic federal standard; under *Descamps*, such crimes are merely "overbroad," they are not "divisible." *Id.* at 2285-86, 2290-92.

The Ninth Circuit has determined that the categorical approach applies in removal cases involving CIMT convictions, *see Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), and has also concluded that the approach to divisibility announced in *Descamps* applies in the immigration context. *See Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1301-02 (9th Cir. 2014). Accordingly, our present task is to decide whether Ariz. Rev. Stat. § 28-1383(A)(1) remains "divisible" for CIMT purposes within the meaning of *Descamps*.

In light of *Descamps*, Ariz. Rev. Stat. § 28-1383(A)(1) can be considered "divisible" into discrete offenses requiring "driving" and "actual physical control" only if Arizona law defines "driving" and "actual physical control" as alternative "elements" of the offense. Under *Descamps*, the term "element" means a fact about a crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find ..., unanimously and beyond a reasonable doubt." *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Thus, if Arizona law does not require both proof beyond a reasonable doubt and jury unanimity as to whether a defendant charged under Ariz. Rev. Stat. § 28-1383(A)(1) was "driving" or exercising "actual physical control" over the vehicle, it necessarily follows that "driving" and "actual physical control" are not alternative "elements" for divisibility purposes, but rather mere alternative "means" by which a defendant can commit aggravated DUI. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.").

The Arizona Supreme Court has held that the State's constitutional requirement of jury unanimity, *see* Ariz. Const., Art. II, § 23, does not entitle a defendant "to a unanimous verdict on the precise manner in which the [criminal] act was committed"). *See State v. Encinas*, 647 P.2d 624, 627 (Ariz. 1982) (citation omitted). Applying that principle to Arizona's DUI statutes, the

Arizona Court of Appeals has squarely determined that a jury need not be unanimous as to whether a defendant was "driving" under the influence or merely in "actual physical control" of a vehicle while under the influence. *State v. Rivera*, 83 P.3d 69, 72-73 (Ariz. Ct. App. 2004). According to the *Rivera* court, "driving" and being in "actual physical control" are merely "two ways of committing a single offense" rather than "two offenses." *Id.* at 73 (citing *Schad v. Arizona, supra*).

State v. Rivera establishes that "driving" and "actual physical control" are not alternative "elements" of the offense defined by Ariz. Rev. Stat. § 28-1383(A)(1) within the meaning of *Descamps*. Accordingly, the distinction between "driving" and "actual physical control" does not render that statute divisible. As the offense defined by Ariz. Rev. Stat. § 28-1383(A)(1) is neither a categorical CIMT nor divisible vis-à-vis the CIMT concept, it follows that the respondent's convictions do not render him removable under section 237(a)(2)(A)(ii) of the Act. Therefore, that removal charge will be dismissed and the record will be remanded to the Immigration Court for further proceedings—including the lodging of substituted removal charges, if appropriate—and for the entry of such further orders as the Immigration Judge deems proper.

ORDER: The respondent's appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD

2012 Immig. Rptr. LEXIS 5181

Board of Immigration Appeals
Date: August 30, 2012; Date: August 30, 2012
File: A037 233 207--El Paso, TX

BIA & AAU Non-Precedent Decisions

Reporter: 2012 Immig. Rptr. LEXIS 5181

In re: JASWINDER SINGH DHILLON

Core Terms

conviction, appeal, immigrate, decision, certified, removable, submitted, terminate, document, proceed, nolo contendere plea, controlled substance, removal proceedings, aggravated felony, conviction record, possession, charged, nolo contendere, constitute, violation, cocaine, defined, holder, nature, record, arise, order, plea, pled, sale

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ON BEHALF OF DHS:
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Opinion

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act *[8 U.S.C. § 1227*(a)(2)(A)(iii)]--
Convicted of aggravated felony (as defined under section 101(a)(43)(B))

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's March 13, 2012, decision terminating removal proceedings against the respondent. [1] The proceedings will be remanded.

The respondent, a native and citizen of the United Kingdom and a lawful permanent resident of the United States, pled nolo contendere in the California Superior Court on October 31, 2011, to one count of possession for sale of a controlled substance, in violation of California Health and Safety Code ("CHSC") section 11351. See Exhs. 2 & 3. In the March 13, 2012, decision, the Immigration Judge found that the DHS failed to submit certified [*2] record of conviction documents for the respondent and thus had not established the existence of a conviction for removability purposes. Moreover, the Immigration Judge concluded that even if the record of conviction documents were properly certified, the DHS did not establish that the respondent was removable as charged in light of the respondent's plea of nolo contendere pursuant to *People v. West, 477 P.2d 409 (Cal. 1970)* . Therefore, the Immigration Judge terminated removal proceedings against the respondent. The DHS appeals.

On appeal, the DHS argues that the Immigration Judge erred in terminating proceedings. Specifically, the DHS contends that it submitted certified record of conviction documents establishing that the respondent is removable as

[1] Footnote 1. On March 27, 2012, the Immigration Judge [*5] issued a decision denying the DHS's motion to reconsider, but the DHS did not file an appeal from that decision.

an alien convicted of an aggravated felony. *Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S. C. § 1227(a)(2)(A)(iii)*. Moreover, the DHS argues that the respondent's plea pursuant to People v. West, supra , does not alter the nature of his conviction.

We agree with the DHS that the Immigration Judge erred in terminating [*3] proceedings. The DHS submitted a minute order, which reveals that the respondent entered a plea of nolo contendere to a violation of Section 11351 of the CHSC in Count I of the Information (Exh. 3). Moreover, Count I of the Information identifies the controlled substance involved in the offense as cocaine (Exh. 3). A conviction for possession of cocaine for the purpose of sale constitutes an aggravated felony, as defined by section 237(a)(2)(A)(iii) of the Act. Furthermore, as argued by the DHS on appeal, a plea of nolo contendere is a conviction for immigration purposes. *See* section 101(a)(48)(A) of the Act; *Singh v. Holder, 568 F.3d 525 (5th Cir. 2009)* (holding that a plea of nolo contendere constitutes a conviction for immigration purposes). Although the respondent pled nolo contendere to possession of a controlled substance pursuant to People v. West, supra , we disagree with the Immigration Judge's conclusion that this plea impacted the nature of the respondent's conviction, especially since this case does not arise in the United States Court of Appeals for the Ninth Circuit. *See Matter of Anselmo, 20 I&N Dec. 25, 31 (BIA 1989)* (explaining that [*4] the Board historically follows a court's precedent in cases arising in that circuit). *See also* Cabantac v. Holder, 2012 WL 3608532 (9th Cir. 2012) .

We find, however, that remand of proceedings is warranted based on the certification issue. The DHS contends on appeal that it submitted certified copies of the respondent's record of conviction documents. Upon remand, the Immigration Judge should determine whether these documents are properly certified and thus establish that the respondent is removable as charged. [2]

Accordingly, the following order shall be issued.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Panel Members: Greer, Anne J.

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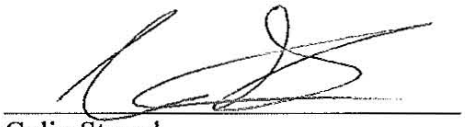
[2] Footnote 2. We note that subsequent to the Immigration Judge's March 13, 2012, decision, the DHS submitted a Form I-261 before the Immigration Judge seeking to charge the respondent as removable under section 237(a)(2)(B)(i) of the Act.

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I served a copy of the Brief of *Amicus Curiae* by Certified First Class Mail on DHS/ICE Office of Chief Counsel – EAZ, addressed to P.O. Box 25158, Phoenix, AZ 85002, and by UPS on Kuyomars Q. Golparvar, Chief of the Immigration Law Practice Division, addressed to Office of the Principal Legal Advisor, ICE Headquarters, Potomac Center North, 500 12th Street, S.W., MS 5900, Washington, D.C. 20536. Please also note that the Respondent's copy of this Brief is being served on the Board, as the Respondent's information has been redacted from the briefing request.



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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
	)	A [Redacted]
J–C–C	)	
	)	
In removal proceedings	)	

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
AMERICAN IMMIGRATION LAWYERS ASSOCIATION & THE DEFENDING IMMIGRANTS PARTNERSHIP (IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT)

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PRELIMINARY STATEMENT

Amicus curiae American Immigration Lawyers Association (AILA) and the Defending Immigrants Partnership submit this supplemental brief pursuant to Board of Immigration Appeals Practice Manual Rule 4.6(g)(ii). In response to the Board's request for *amicus curiae* briefing, *amici* previously submitted a brief to the Board addressing several issues in the case. The Department of Homeland Security ("DHS") then filed a supplemental brief with the Board. Because DHS invited additional materials from *amici* regarding prosecution of a specific controlled substances covered under California law, raised new arguments contrary to the Ninth Circuit's conclusions with respect to these substances, and raised arguments beyond those specified in the Board's request for supplemental briefing, *amici* respectfully submit this supplemental brief to address these issues.

First, the Department of Homeland Security (DHS) has invited *amici* to submit court documents from the case of *People v. Hidetada Yamagishi,* from the Superior Court of California, County of Los Angeles. *See* DHS Suppl. Br. at 14, n. 7. *Amici* referenced this case in our brief to show that California does prosecute persons for controlled substance violations involving chorionic gonadotropin. *See Amicus Curiae* AILA et al Br. at 19, n. 13. We have attached a copy of the complaint in that case showing that Mr. Yamagishi was in fact prosecuted for offenses involving chorionic gonadotropin. *See* Point I(A), *infra,* and Appendix A. *Amici* note, though, that whether Mr. Yamagishi was actually prosecuted for this substance is beside the point because California law clearly proscribes the possession of this and other substances not found in the federal schedules, and DHS can point to no authority stating that California has granted a blanket amnesty to those substances. *See* Point I(D), *infra.*

Second, *amici* were surprised that DHS would challenge recent governing Ninth Circuit precedent (*Coronado v. Holder*, 747 F.3d 662 (9th Cir. 2014)) that concluded that the California controlled substance schedules are broader than the federal schedules. *See Amicus Curiae* AILA et al Br. at 6 (stating, based on the Ninth Circuit's recent conclusion that the federal controlled substance schedules are narrower than the California schedules, that *amici* would not address this issue). In that March 14 decision, the Ninth Circuit specifically identified khat and chorionic gonadotropin as two California state controlled substances not listed on the federal schedules. *Coronado*, 747 F.3d at 667. DHS admits that at least chorionic gonadotropin was listed only on the California state schedules, not on the federal schedules, but argues that the California list of schedules is not "meaningfully broader" than the federal list. *See* DHS Br. at 6. And although DHS admits that khat is not listed in the federal schedules, DHS argues that because the psychoactive ingredients of khat are listed in the federal schedules, that the plant, khat, even after it is harvested, can be deemed listed on the federal schedules. As explained below, there is a mismatch between the state and federal controlled schedules, which supports *amici*'s previous arguments the California statutes at issue are indivisibly overbroad. *See* Point I, *infra* Indeed, in light of DHS's concession that the state and federal controlled substance schedules do not match, the "realistic probability" test is met, contrary to DHS's arguments. *See* Point I(D), *infra.*

Finally, DHS makes a new argument beyond the scope of the issues that the Board requested that the parties and *amicus curiae* brief, in that they argue that the Board should revisit its precedent interpreting the "relating to" clause in INA § 237 (a)(2)(B)(i) and find that this statutory language does not require an exact match between state and federal controlled substance schedules. DHS Br.at 26-29. As we explain below, this new argument conflicts with

the statute, governing Ninth Circuit precedent, and the longstanding approach the Board has applied to controlled substance offenses. *See* Point II, *infra*.

ARGUMENT

I. DHS Does Not Dispute That CHSC §§ 11378 and 11379(a) are Broader Than the Federal Controlled Substance Schedules, but Instead Advances an Erroneous "Meaningfully Broader" Standard

DHS admits that there is not an exact match between the federal and California state controlled substances schedules. *See* CHSC §§ 11378 and 11379(a). DHS Br. at 8, 14. Despite the differences, DHS argues that the California state schedules are not "meaningfully broader" than the federal controlled substance schedules—which is wrong—and does not explain why this should be the standard or what constitutes "meaningfully broader." DHS Brief at 6. In fact, DHS makes up the "meaningfully broader" standard out of whole cloth.

The correct test under the categorical analysis is not whether the California list of controlled substances punished by CHSC §§ 11378 and 11379(a) is "meaningfully broader" than the federal Controlled Substance Act (CSA) list, but whether the "full range of conduct" covered by the California statutes falls within the CSA schedules. Such a match is required before the BIA can find that the respondent's convictions are categorically removable offenses. *Coronado v. Holder*, 747 F.3d 662, 666 (9th Cir. 2014). A statute either is or is not a categorical match to a removable offense. The DHS's proposed standard would unnecessarily and inappropriately inject uncertainty into the analytical approach and result in disparate treatment of noncitizens convicted of the same offense.

In *Coronado*, the court identified the plant khat as a controlled substance in California which is not on the federal list, and the Ninth Circuit held that "[t]his one difference is sufficient because the 'full range of conduct' covered by California Health & Safety Code § 11377(a)

does not fall within the CSA schedules, and as such, Coronado's conviction is not a categorically removable offense." *Id.* at 667. The Court noted in a footnote that chorionic gonadotropin was also a mismatch with the federal CSA. *Id.* at 667, n. 2. As the court in *Coronado* correctly stated, "the government had the burden of proving that Coronado's criminal conviction was for possession of a substance that is listed under California law *and* the CSA schedules." *Id.* at 666. After all, if the government seeks to *categorically* find that a noncitizen convicted of a particular code section is removable under a ground of deportation or inadmissibility, there has to be an exact match with a drug listed in the federal CSA because INA §237(a)(2)(A)(iii) specifically includes the parenthetical "(as defined is section 102 of the Controlled Substances Act (21 U.S.C. 802))." *Id.* at 666. Although other mismatches can be identified,[1] this brief will mostly focus on the DHS discussion of the two substances identified by the Ninth Circuit in *Coronado* as more than sufficient to show that the California state schedules are broader than the federal schedules – khat and chorionic gonadotropin.

A. Chorionic Gonadotropin

The Ninth Circuit in *Coronado* identified chorionic gonadotropin as a controlled substance under CHSC §11056(F), but not under federal law, and the DHS does not dispute this. DHS Brief at 14-16. Even though there is no dispute that this substance is on the California controlled substances list, and thus there is no need to establish a "realistic probability" of prosecution of offenses involving this substance (*see* Point II(D), *infra*), *amici* provided a case name and case number of a Los Angeles case where the defendant was prosecuted for possession for sale and transportation of chorionic gonadotropin. *People v. Hidetada Yamagishi*, Super. Ct. of Cal., Cnty. of L.A., Case # SA066228, cited in *Amicus Curiae* Brief at 19, n. 12. Attached as

[1] See Point I(C). *infra.*

Appendix "A" is a true and correct copy of the complaint, which specifically lists "chorionic gonadotropin" as one of the drugs prosecuted in this case (*see* Counts 3 and 6, Complaint filed December 8, 2007).[2]

Chorionic gonadotropin (commonly known as "hCG"[3]), is also not some esoteric drug, as DHS claims. *See* DHS Br. at 15 (describing "[t]he state's inclusion of one or two comparatively esoteric substances" in its list of controlled substances)[4]. A person who unlawfully possesses or dispenses hCG to another may be found criminally liable under California law but not under federal law. *See, e.g., People v. Yamagishi, supra*; *see also People v. Berkowitz*, 68 Cal.App.3d Supp. 9, 137 Cal. Rptr. 313, 316 (1977) (describing facts in which prosecutors brought charges against a doctor for dispensing a dangerous drug without a good faith examination at a weight-control clinic for dispensing hCG.). Given that California has actually prosecuted persons for this drug and given the proliferation of steroid use in both professional and amateur athletics, this drug is much less "esoteric" than DHS paints it to be, and certainly meets the "realistic probability" test that DHS asserts—incorrectly—as requiring proof that there has been an actual prosecution under a particular statute which falls outside the generic definition. *See* Point I(D), *infra*.

B. Khat

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[2] Although Mr. Yamagishi was prosecuted under code sections (CHSC §§ 11351 and 11352(a)), rather than those at issue in this case (CHSC §§ 11378 and 11379(a)), this does not matter. What matters is that chorionic gonadotropin is a California Schedule III controlled substance. prosecuted by the State of California, and which is listed in CHSC § 11056(f) and 11056(f)(32), and thus expressly prosecutable under CHSC §§ 11378 and 11379(a), which cover "[t]he substances classified in schedule III, IV, or V and is not a narcotic drug". Chorionic gonadotrophin is not a "narcotic drug." (CHSC §11019) (defining narcotic drugs).

[3] DHS in its brief (DHS Br. at 14) and CHSC §11056(f)(32) incorrectly refers to this drug as "HGC."

[4] Chorionic gonadotropin is frequently "used to treat the short-term adverse effects of anabolic steroid abuse" (http://www.deadiversion.usdoj.gov/pubs/brochures/steroids/public/), to stimulate the testes to produce male hormones such as testosterone and to lose weight. *See* The Mayo Clinic, Chorionic-Gonadotropin, *at* http://www.mayoclinic.org/drugs-supplements/chorionic-gonadotropin-subcutaneous-route-intramuscular-route-injection-route/description/drg-20062846; Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1233 n.368, n.370 (2010). (describing the uses of chorionic gonadotropin)

DHS argues that "[b]ecause khat is covered under the federal CSA provisions for cathinone and cathine, there is a categorical match between the state and federal schedules with regard to khat." DHS Brief at 13. However, several federal circuit courts have found that there is no scientific evidence that after it is harvested, khat, the plant, contains any cathinone or cathine.

In the recent case of *U.S. v. Mire*, 725 F.3d 665 (7th Cir. 2013), the Court noted that cathinone is a federally controlled substance under Schedule I, and cathine is a controlled substance under Schedule IV. But, the Court, after reviewing the evidence at trial stated that "[n]ot all khat leaves contain the same or similar amounts of either substance, however; *some contain none*. The regulation of khat then is dependent upon the particular chemical composition of each leaf, which may vary depending on the size of the plant and when the plant was harvested." *Id.* at 668. (emphasis added).

> Because cathinone and cathine break down soon after harvesting, "*at some point, khat leaves might not have any trace of the controlled substances and ingesting them would have the same effect as chewing leaves off an oak tree.*"

Id. at 668 (emphasis added). In fact, the government's expert witness, a DEA forensic chemist, testified at the trial that his chemical tests found that some of the khat seized from the defendant had no trace of either cathinone or cathine. *Id.* at 675

In *Argaw v. Aschcroft*, 395 F.3d 521 (4th Cir. 2005), a petition for review in an immigration case, the court held that "none of the sources cited by the BIA supports the proposition that khat always contains cathinone. If anything, these sources suggest that cathinone quickly disappears from khat, perhaps as soon as seventy-two hours after the leaf is harvested." *Id.* at 525. The Attorney General provided supplementary information arguing that because Khat contains cathine, a Schedule IV controlled substance, that khat is a controlled substance, but the court held that "the Attorney General fails to cite any authority to establish that cathine never

disappears from khat. The few published cases discussing khat indicate that without scientific testing on a case-by case basis, it cannot be determined when cathine or cathinone appears in khat. *Id.* at 526.

For the same reasons stated in the *Argaw* case, other Circuits are in agreement that the plant khat is not a controlled substance. In *U.S. v. Hussein*, 351 F.3d 9, 17 (1st Cir. 2003), the court stated that "khat, unlike cocaine, is not a controlled substance per se, and the government concedes that it is not enough to show that the appellant knowingly possessed khat." In *U.S. v. Hassan*, 578 F.3d 108, 114 (2d Cir. 2008) the court after surveying the available studies and court cases concluded that "[k]hat itself is not a controlled substance under United States law." Additionally, in *United States v. Caseer*, 339 F.3d 828, 833 (6th Cir.2005), the court stated that "neither the U.S. Code nor the Code of Federal Regulations controlled substances schedules refers to the plant from which cathinone is derived, *Catha edulis,* commonly known as 'khat.'"

DHS cites *United States v. Ali*, 735 F.3d 176 (4th Cir.2013) (DHS Brief at 12), but although that decision said that "it is illegal to possess, distribute, buy, or sell khat," *id.* at 183, it did not discuss, much less refute, the fact that khat is not included in the CSA by name and did not reach the issue of whether khat always contains cathinone or cathine as did the other cases cited above. Because it was not an issue that was raised or discussed in the case, it is *dicta. See U.S. v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) (Kozinski, J.) (*dicta* is a statement "made casually and without analysis where the statement is uttered in passing without due consideration of the alternatives").

Because there is no scientific evidence that cathinone and cathine remain in harvested khat plants more than 72 hours after the plants are harvested, DHS's argument that khat is identical to cathinone and cathine fails.

C. Other Mismatches

In addition to chorionic gonadotropin and khat, there also appear to be other mismatches between the California and federal controlled substance schedules. While we do not concede that these are the only mismatches between the two schedules, we note there appear to be other California substances that are not on the federal schedule (some of which DHS even concedes).

First, DHS admits, as it must, that *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) was correct in noting that CHSC § 11033 punishes the possession of optical and geometrical isomers of controlled substances; the CSA, in contrast generally punishes the possession of optical isomers alone." *Ruiz-Vidal*, 473 F.3d at 1078 (citing 21 C.F.R. § 13000.01(b)(21)). DHS Brief at 8.

Second, one of the substances listed in *Ruiz-Vidal*, 437 F 3d. at 1078, *n.* 6, androisoxazole, (listed in CHSC § 11056(f)(1)) is different than any substance listed in the CSA and is not listed under another name.[5] This compound is very similar to stanozolol,[6] except that it substitutes an oxygen instead of a nitrogen on the molecule. As such, it is a *different* compound from the one on the federal list.[7]

The federal definition of the term anabolic steroid "includes" a list of exactly 59 substances and "any salt, ester or ether of a drug or substance described in this paragraph."(21 U.S.C. § 802(41)(A).) It is a finite list. The Act even goes further to say that "[t]he substances

[5] DHS noted they did not "have enough information regarding the chemical composition of androisoxazole to determine whether it is expressly enumerated in the regulation under a different name...." (DHS Brief at 10.)

[6] The molecular formula for stanozolol is $C_{21}H_{32}N_2O$ (https://www.rsc.org/Merck-Index/monograph/mono1500008921/stanozolol?q=unauthorize), whereas the molecular formula for androisoxazole is C21H31NO2 (https://www.rsc.org/Merck-Index/monograph/mono1400000634/androisoxazole?q=unauthorize). Stanozolol is listed in the CSA, while androisoxazole is not.

[7] Dihydromesterone is another anabolic steroid that is listed on the California schedules but not the Federal CSA (Compare CHSC § 11056(F)(8) with 21 U.S.C. § 802(41)(A).) There may be other substances that are different. The point is, California names substances not listed in the Federal CSA for anabolic steroids.

excluded under this subparagraph may at any time be scheduled by the Attorney General in accordance with the authority and requirements of subsections (a) through (c) of section 811 of this title. 21 U.S.C. § 802(41)(A). The notion that any steroid compound which any random chemist might opine is an "anabolic steroid" automatically falls under the Act without any action whatsoever by the Attorney General is a misinterpretation of the Act. When the Attorney General has desired to add new substances to the list of anabolic steroids, a notice of proposed rule-making was provided in the Federal Register, after exhaustive scientific studies of the substances in question. (Federal Register, Vol. 73, No. 81 / Friday, April 25, 2008). Accordingly, any substance that is not specifically enumerated in the Act and is not a salt, ester or ether of a substance in the Act does not fall under the Act. By contrast, CHSC § 11056 states that any anabolic steroid "including, but not limited to, the following" is a controlled substance with an exception not relevant. Thus, an anabolic steroid not listed in the federal CSA, and even not listed specifically in CHSC § 11056, could be charged as a California controlled substance violation under CHSC §§ 11378 and 11379(a) which includes schedule III controlled substances which are non-narcotics listed in CHSC § 11056.

Third, the CSA has an exemption for certain grandfathered combination drugs where the ratio of the controlled drug component vs. the non-controlled ingredient is such that it is considered exempt.[8] However, California has not adopted the same exemptions. Examples of products exempt under federal law but not exempt under California law are the following: Fioricet (CA-CIII), HSC 11056(c)(3) (butalbital product with barbaturic acid or any salt thereof); Donnatal (CA-CIV), HSC 11057(d)(26), (phenobarbital); Librax (CA-CIV), HSC 11057(d)(5) (clordiazepoxide). If the drug is a combination product that has ingredients like clordiazepoxide, phenobarbital, butalbital, pentobarbital, etc., which are on the federal exempt list, they remain as

[8] 2014 Fed Exempted list: http://www.deadiversion.usdoj.gov/schedules/exempt/exempt_rx_list.pdf

controlled drugs in California since there is no corresponding exempt language in the California Health & Safety Code to render them exempt under California law.[9]

D. Because the California Drug Statute is Broader than the Federal Schedule on Its Face, the "Realistic Probability" Test Is Met

DHS acknowledges that the Ninth Circuit's *Ruiz-Vidal v. Gonzales* and *Coronado* decisions recognize that the California drug schedule contains substances that are not contained on the federal drug schedule. DHS Brief at 7. And yet DHS maintains that the California drug schedule is not "meaningfully broader" than the federal schedule, because the substances discussed in those cases "have no realistic probability of being prosecuted in California." DHS Brief at 6. Indeed, it offers little or no defense regarding certain overbroad substances – particularly chorionic gonadotropin, Brief at 14 – apart from DHS's claim that there is no realistic probability that California will prosecute individuals for selling those substances, despite the fact that *amici* has referenced, *Amicus Curiae* AILA et al Br. at 19, n. 12, and submits proof that California has prosecuted a person for this drug. *See* Appendix A.

DHS attributes the Ninth Circuit's failure to consider the "realistic probability" test to ignorance or to the lack of the parties' – that is, its own – advocacy on this point in that Court. *See* DHS Brief at 15-16. But it is DHS, not the Ninth Circuit, who fails to grapple with controlling law. The Ninth Circuit has long held that if a statute is overbroad by its own terms, either on its face or as authoritatively construed, it satisfies any "realistic probability" concerns. Sitting *en banc*, the Ninth Circuit stated:

> Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no "legal imagination" [under *Duenas-Alvarez*] is

[9] The drugs listed in the code sections above are non-narcotic drugs and are included within Health & Safety Code section 11378 and 11379(a), which includes any controlled substance "classified in Schedule III, IV, or V and which is not a narcotic drug" with certain exceptions not relevant. CHSC §§ 11378 and 11379(a).

> required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text.

United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (citation omitted). It requires no "legal imagination," then, to reach the conclusion that chorionic gonadotropin or khat or geometrical isomers or any other substance on the state list but not on the federal list can be charged under California law; the text of the statute itself provides California prosecutors with that option.[10]

Grisel is not alone in so concluding. The Third, Fourth, and Eleventh Circuit have reached the same, hardly controversial, conclusion that *Duenas-Alvarez*'s concern about "legal imagination" is not present where the statute itself – either on its face or as authoritatively construed – supplies the prosecutor with the option of prosecuting a defendant for given conduct. *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) ("Here, by contrast, no application of "legal imagination" to the Pennsylvania simple assault statute is necessary. The elements of 2701 are clear, and the ability of DHS to prosecute a defendant under subpart 2701(b)(2) – even where the defendant is unaware of the victim's age – is not disputed."); *Accardo v. Attorney General*, 634 F.3d 1333, 1336-37 (11th Cir. 2011) ("Section 891(6) provides that one engages in the extortionate extension of credit if there is an understanding between both parties 'that delay in making repayment or failure to make repayment could result in the use of . . . other criminal means to cause harm to the . . . reputation . . . of any person.' 18

[10] Since *Grisel* is controlling law in the Ninth Circuit and this case arises in the Ninth Circuit, the BIA must apply *Grisel* to this case. *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989); *Matter of K-S-*, 20 I&N Dec. 715, 719-720 (BIA 1993). In 2012, the Ninth Circuit directly addressed the assertion that a lesser categorical approach applies in immigration proceedings, and held that it is required to apply the protections of the criminal categorical approach in immigration hearings. *Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc) (rejecting argument that categorical approach should apply differently in immigration than in federal criminal proceedings).

U.S.C. § 891(6) (emphasis added). The potential that a debtor could suffer harm to her reputation as a result of failing to repay an extortionate loan is, therefore, a "realistic probability, not a theoretical possibility."); *Ramos v. Attorney General*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (rejecting contention respondent must show state would prosecute overbroadly, stating "*Duenas–Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition. Here, the statute expressly requires alternate intents."); *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) ("We do not need to hypothesize about whether there is a "realistic probability" that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so."); *see also Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564. 572 (6th Cir. 2007) (recognizing same principle as *Grisel*, albeit in an unpublished decision).

The rationale behind *Duenas-Alvarez* demonstrates the correctness of this rule. *Duenas-Alvarez* was not concerned with whether cases falling outside a generic definition represented some significant portion of prosecutions under the state statute. Instead, the Court was looking for some indication that a state would even conclude that hypothetical conduct imagined by a litigant violated its statute. In *Duenas-Alvarez*, "the hypothetical conduct asserted by the alien was not clearly a violation of [state] law. In fact, the parties vigorously disputed whether [the state] court would permit application of the statute to a defendant who committed acts [that were claimed to fall outside the generic definition]." *Jean-Louis*, 582 F.3d at 481. From this flowed *Duenas-Alvarez*'s concern whether or not "the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U.S. at 193. No such questions

arise, however, where *the plain language of the statute* covers conduct that falls outside the generic definition. That is, there is no question that California "would apply its statute" to chorionic gonadotropin or khat. For this reason, DHS cannot win by arguing that there is no realistic probability that the drugs discussed in *Ruiz-Vidal* and *Coronado* will be prosecuted in California. The language of the California statute itself is sufficient to satisfy *Duenas-Alvarez*.

II. The Board Must Apply the Controlling Ninth Circuit Law Holding That, Under the "Plain Language" of INA §237(a)(2)(B)(i), DHS Must Prove That the Substance Underlying a Noncitizen's State Controlled Substance Conviction Is One That is Covered by Section 102 of the CSA

The DHS argues that the "relating to" language of INA §237(a)(2)(B)(i) "does not require an identical match between state and federal schedules in order for a state conviction to categorically constitute a removable offense." DHS Br. at 26-17.[11] DHS thus asks the Board to ignore the plain language of the statute and revisit and abandon its longstanding precedent decision in *Matter of Paulus* 11 I&N Dec. 274 (BIA 1965). However, not only should the Board stand by its long-followed precedent, but as this case arises in the Ninth Circuit, the Board must follow the law of the Circuit. *Ruiz-Vidal*, 473 F.3d at 1076 (O'Scannlain, J.) ("The plain language of this statute [INA §237(a)(2)(B)(i)] requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the CSA."); *see also Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989) (holding that the Board must follow the law of the Circuit); *Matter of K-S-*, 20 I&N Dec. 715, 719-720 (BIA 1993) (same). In meeting its burden, the DHS is required to comply with the

[11] DHS's argument that *Paulus* should be revisited exceeds the scope of the issues the Board invited the parties and amicus curiae to address, and for this reason DHS's argument should not be considered. But, since DHS made this argument, *amici* would be remiss not to respond.

categorical and modified categorical approaches as set forth by the Supreme Court in *Moncrieffe* and *Descamps*.

The Board has no discretion to disregard a circuit court decision based on the plain language of a statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 849, n.9 (1984)("*Chevron*"). DHS admits that "[i]n *Ruiz-Vidal*, the Ninth circuit found the language of the INA provision to be 'plain.'" DHS Br. at 27, n. 11. Under *Chevron, supra*, once the agency determines that the judiciary has made a "plain language" ruling on the statute, the agency has no discretion to disregard it, so this should be the end of the argument. 467 U.S. at 849. However, DHS argues that the court relied for its interpretation upon the Board's prior decision in *Paulus*, acknowledged that "many" of the court's own decisions had construed the "relating to language differently and more broadly, and that because the issue was not raised to the court as an issue it cannot properly be considered part of its holding. DHS Br. at 27, n. 11. But, this analysis misinterprets *Ruiz-Vidal*, as well as the Board's own adherence to the categorical and modified categorical approaches. Certainly, the opinion correctly noted that the requirement that the drug be covered by Section 102 of the CSA had been both explicitly and implicitly acknowledged by both the BIA and the Court. *Ruiz-Vidal*, 473 F.3d at 1076.

Although there was a concession by DHS in *Ruiz-Vidal* that DHS was required to prove that the conviction was for possession of a substance "not only listed in the California statute under which he was convicted, but also contained in section 102 of the Controlled Substances Act", the court stated *"[a]lthough we need not accept the government's concession on a matter of law, [citation omitted], as we explain below, we agree with its formulation of the issue."* *Ruiz-Vidal*, 473 F.3d at 1077, n. 3 (emphasis added). While the court acknowledged that many of its decisions have broadly construed the "relating to" language, the court made it clear that

"[n]onetheless, we believe, that where a conviction for possession of a particular substance is at issue, 8 U.S.C. §1227(a)(2)(B)(i) requires that at a minimum the substance be listed on the federal schedules." *Id.* at 1077, n. 5. Importantly, the court explained the basis for its plain language analysis: *[t]o hold otherwise would be to read out of the statute the explicit reference to Section 102 of the CSA.*" *Id.* at 1077, n. 5 [Italics added for emphasis]. In short, to portray the *Ruiz-Vidal* decision as anything other than a "plain language" analysis is just plain wrong.

Subsequent Ninth Circuit decisions have emphasized that *Ruiz-Vidal* was based on a plain language analysis: "[w]e have repeatedly held that the *plain language* of this statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the CSA."*Cheuk Fung S-Young v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (emphasis added)(addressing conviction for transporting and attempting to transport controlled substances);"[T]he *text* of the immigration statute states that the "controlled substance" must be one that is "defined in section 802 of Title 21, which is the CSA." *U.S. v. Leal-Vega*, 680 F.3d 1160, 1165 (9th Cir. 2012) (emphasis added); "The *plain language* of the statute establishes a logical connection between the law and certain controlled substances because the offense must involve one of the listed controlled substances." *Mielewczyk v. Holder*, 575 F.3d 992, 994-995 (9th Cir. 2009) (emphasis added) (addressing conviction for crime of offering to transport drugs).

Other circuits also require that the state statute of conviction must match the federal CSA before a conviction for possession of a controlled substance can categorically be deemed a deportable offense under INA §237(a)(2)(B)(i). *See Rojas v. Attorney General*, 728 F.3d 203 (3rd Cir. 2013) (en banc); *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008). The Third Circuit sitting *en banc* in *Rojas*, 728 F. 3d at 209, held that the "as defined" parenthetical in INA

§237(a)(2)(B)(i) requires the government to prove that a state conviction for a controlled substance offense must involve a federally controlled substance. This decision based its analysis on the "rule of the last antecedent" which is that "a limiting clause or phrase...should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id.* at 209 (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The court in *Rojas* stated that "[r]eading the statute as written, it is clear that the parenthetical "'(as defined in section 802 of Title 21)' is a restrictive modifier that affects only its immediate antecedent term, 'a controlled substance.'" *Id* at 209. The Third Circuit found support for its plain language analysis from *Ruiz-Vidal* since "to hold otherwise would 'read out of the statute the explicit reference' to Section 802 of Title 21." *Id.* (citing and quoting *Ruiz-Vidal v. Gonzales*, 473 F.3d at 1077 n. 5). The court stated that "we do not cripple statues by rendering words therein superfluous, as the Department's reading would have us do to the "as defined" parenthetical." *Id.* at 209-210 (citing and quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.")). The *Rojas* Court rejected the argument by DHS that all that was required is the substance or a particular state's statute be related "in kind" or "close to" the federal substances if the match is not "exact." *Id.* at 212. The court stated: "We reject this artificial redraft-we will not construe "relating to" to modify more than one clause and we will not arbitrarily insert into the text the words "close to" or "in kind." *Id.* at 212; *cf. Lopez*, 549 U.S. at 56, 127 S.Ct. 625 (rejecting a convoluted rewriting of a statute from "a felony punishable under the CSA "to "a felony punishable under CSA whether or not as a felony")."

The Seventh Circuit is in agreement with this plain language reading of the statute. *Desai*, 520 F.3d at 766. (The parenthetical "can only be read to modify 'controlled substance,' its immediate antecedent," and thus "bridges the state law crimes with federal definitions of what

counts as a controlled substance" and that because of the parenthetical, states do not have "free rein to define their criminal laws in a manner that would allow them to...determine who is permitted to enter and live in the country." *Id.* at 766. The court noted that the "as defined" parenthetical means that if "a state decides to outlaw the distribution of jelly beans, then it would have no effect on one's immigration status to deal jelly beans because it is not related to a controlled substance listed in the federal CSA."[12] *Id.* at 766.

These Circuit Court decisions from the Third, Seventh, and Ninth Circuits appear to be the only Circuits which have directly spoken on this issue. The Board should be reluctant to issue an opinion abrogating its own long-standing precedent, *Matter of Paulus*, which goes back to 1965, especially in view of the fact that three Circuits have a plain language analysis which supports the *Paulus* decision, and no Circuit has come out with a contrary reading of the statute.

Additionally, DHS mischaracterizes *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000) as supporting the proposition that a state statute of conviction can categorically be a ground of deportation under INA §237(a)(2)(B)(i) even if there is not an identical match between the state and federal statutes because of the "related to" language. DHS Br. at 27. This case has been distinguished by the Ninth Circuit as a case relating to state law violations of drug paraphernalia laws. *Ruiz-Vidal v. Gonzales*, 473 F.3d at 1077 n. 5 (distinguishing *Luu-Le* to cases involving paraphernalia, not possession of drugs); *Mielewczyk v. Holder*, 575 F.3d at 995 (distinguishing

[12] It should be noted that DHS in its Supplemental Brief mischaracterizes *Desai* by citing it as a case which supports the proposition that INA §237(a)(2)(B)(i) requires only that the statute of conviction "relat[e] to" one or more federally controlled substances, and does not require an identical match between state and federal schedules in order for a state conviction to categorically constitute a removable offense." DHS Br. at 27. While this case did hold that a law prohibiting the sale of a fake, look-alike drug, represented to be peyote, rendered a noncitizen deportable under the controlled substance offense deportability ground, it did so only because peyote (psilocybin) is listed in the CSA: "Thus, this is a state law that is related to a federal controlled substance, in the sense that violating it in the way that *Desai* did – by distributing something that would lead one to believe it contained Psilocybin – brings it into association with a federal controlled substance." *Id.* at 765.

and limiting *Luu-Le* to "offenses that do not require personal contact with the drug" but not applying to offenses that require "use, possession, transportation, or sale of controlled substances.")[13]

The Board should be reluctant to overturn its *Paulus* precedent on the basis that the "relating to" language allows there to be a broad interpretation of the statute, especially since three Circuits have found that the parenthetical "(as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" cannot be read out of the statute based on the plain language of the statute. Moreover, important fairness concerns would be implicated if *Paulus* is overruled since noncitizens have based plea decisions in reliance on this settled law for over 49 years. Furthermore, even a *prospective* decision would create a crazy patchwork with one law for decisions in the Third, Seventh and Ninth Circuits and one law for the rest of the Circuits, pending resolution of this issue in the remaining Circuits.

Finally, DHS argues that "[a] broad interpretation of the 'relating to' clause would be consistent with Congress's intent to remove drug offenders." DHS Brief at 29. DHS's argument provides no support for the specific question at issue, particularly in light of Congress's choice to specify the federal definition explicitly in the statute. Moreover legislative intent is a statutory interpretation tool of last resort, not first. *Logan v. U.S. Bank Nat'l Assoc.*, 722 F.3d 1163, 1171 (9th Cir.2013). The more amorphous the claimed legislative intent, the less value it has as an interpretative tool. How can DHS claim to divine that Congress has intended lawful permanent residents should be deported even if they violate a law or regulation of a state or foreign country prohibiting the use, possession, or distribution of a substance not on the federal list of controlled substances? As the *en banc* panel of the Third Circuit stated in *Rojas*:

[13] Notably, the *en banc* Third Circuit held in *Rojas* held that not only possessory offenses for drug convictions require a match, but that even a conviction for possession of paraphernalia requires such a showing. *Id.* at 211-212.

> [T]he Department's reading would result in a patchwork of removability rules dependent on the whims of the legislatures of the fifty states-effectively permitting them to control who may remain in the country via their controlled-substances schedules not to mention the law of all foreign nations, which may ban substances that are commonplace in the United States, such as poppy seeds. Although Congress has, on occasion, allowed non-uniformity by tying immigration consequences to state law, here the explicit reference to section 802 of Title 21 shows that Congress has "pegged the immigration statues to the classifications Congress itself chose....[I]t is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of...offenses to which its immigration law expressly reefers." *Lopez*, 549 U.S. at 58-59, 127 S.Ct. 625; *see also Desai*, 520 F.3d at 766 (reasoning that because of the parenthetical, states do not have "free rein to define their criminal laws in a manner that would allow them to ...determine who is permitted to enter and live in the country").

728 F.3d at 2. The plain language of the statute and precedent controls this question, and the Board should reject DHS's arguments on this point.

CONCLUSION

For all the reasons set forth above and in its initial brief, *amici* urge the Board to find (1) the California state list of controlled substances is broader than the federal controlled substance schedules, (2) because the California drug schedule is expressly broader than the federal schedule on its face, the "reasonable probability" test is met, and (3) the Board should hold that, under the "plain language" of INA §237(a)(2)(B)(i), DHS must prove that the substance underlying an alien's state law conviction for violation of a controlled substance law is one that is covered by Section 102 of the CSA.

Dated June 17, 2014

Respectfully submitted,

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Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. **01 HIDETADA YAMAGISHI (06/30/1973)** Defendant(s).	**CASE NO. SA066228** ***FELONY COMPLAINT***

FILED
LOS ANGELES SUPERIOR COURT
DEC 10 2007
JOHN A. CLARKE, CLERK
BY S. Reed DEPUTY

The undersigned is informed and believes that:

COUNT 1

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11351, a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully possess for sale and purchase for sale a controlled substance, to wit, TRENBOLONE.

"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 2

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11351, a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully possess for sale and purchase for sale a controlled substance, to wit, TESTOSTERONE.

"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 3

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11351, a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully possess for sale and purchase for sale a controlled substance, to wit, CHORIONIC GONADOTROPIN.
"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 4

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11351, a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully possess for sale and purchase for sale a controlled substance, to wit, MESTEROLONE.
"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 5

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION FOR SALE OF A CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11351, a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully possess for sale and purchase for sale a controlled substance, to wit, OXANDROLONE.
"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 6

On or about December 8, 2007, in the County of Los Angeles, the crime of SALE/TRANSPORTATION/OFFER TO SELL CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11352(a), a Felony, was committed by HIDETADA YAMAGISHI, who did unlawfully transport, import into the State of California, sell, furnish, administer, and give away, and offer to transport, import into the State of California, sell, furnish, administer, and give away, and attempt to import into the State of California and transport a controlled substance, to wit, TRENBOLONE, CHORIONIC GONADOTROPIN, TESTOSTERONE, MESTEROLONE, OXANDROLONE and STANOZOLOL.

"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

* * * * *

COUNT 7

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION OF A CONTROLLED SUBSTANCE, in violation of BUSINESS & PROFESSIONS CODE SECTION 4060, a Misdemeanor, was committed by HIDETADA YAMAGISHI, who did knowingly and unlawfully possess VIAGRA, a controlled substance without a prescription.

* * * * *

COUNT 8

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION OF A CONTROLLED SUBSTANCE, in violation of BUSINESS & PROFESSIONS CODE SECTION 4060, a Misdemeanor, was committed by HIDETADA YAMAGISHI, who did knowingly and unlawfully possess CIALIS, a controlled substance without a prescription.

* * * * *

COUNT 9

On or about December 8, 2007, in the County of Los Angeles, the crime of POSSESSION OF A CONTROLLED SUBSTANCE, in violation of BUSINESS & PROFESSIONS CODE SECTION 4060, a Misdemeanor, was committed by HIDETADA YAMAGISHI, who did knowingly and unlawfully possess TAMOXIFEN, a controlled substance without a prescription.

* * * * *

NOTICE: Conviction of this offense will require the defendant to provide DNA samples and print impressions pursuant to Penal Code sections 296 and 296.1. Willful refusal to provide the samples and impressions is a crime.

NOTICE: The People of the State of California intend to present evidence and seek jury findings regarding all applicable circumstances in aggravation, pursuant to Penal Code section 1170(b) and *Cunningham v. California* 2007 U.S. LEXIS 1324.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER SA066228, CONSISTS OF 9 COUNT(S).

Executed at LOS ANGELES, County of Los Angeles, on December 10, 2007.

VARDAN GRIGORYAN
DECLARANT AND COMPLAINANT

STEVE COOLEY, DISTRICT ATTORNEY

BY: _____
DANETTE E. MEYERS, DEPUTY

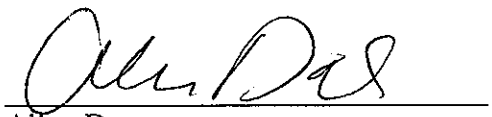
AGENCY:	OTHER LOCAL/OTHER COUNTY AGENCY	I/O: VARDAN GRIGORYAN	ID NO.: 5853	PHONE:	(310) 215-2200 EXT: 232
DR NO.:	LX13JR08LX0003	OPERATOR: EG	PRELIM. TIME EST.:	90 MINUTE(S)	

DEFENDANT	CII NO.	DOB	BOOKING NO.	BAIL RECOM'D	CUSTODY R'TN DATE
YAMAGISHI, HIDETADA	028917516	6/30/1973	1089220	$180,000	12/11/2007

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2014, I served a copy of the Supplemental Brief of *Amicus Curiae* by Certified First Class Mail on DHS/ICE Office of Chief Counsel – EAZ, addressed to P.O. Box 25158, Phoenix, AZ 85002, and by UPS on Kuyomars Q. Golparvar, Chief of the Immigration Law Practice Division, addressed to Office of the Principal Legal Advisor, ICE Headquarters, Potomac Center North, 500 12th Street, S.W., MS 5900, Washington, D.C. 20536. I also served a copy by UPS on *amicus* Michael M. Hethmon, Esq., Immigration Reform Law Institute, 25 Massachusetts Avenue, NW, Suite 335, Washington, D.C. 20001. Please also note that the Respondent's copy is being served on the Board, as the Respondent's information has been redacted from the briefing request.



Alina Das