



# Immigration Law Advisor

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## Analysis of the Immigration Consequences of Criminal Convictions after *Descamps v. United States* by Sarah Pixler and Nicole Wells

This article outlines the development of the categorical approach, as it relates to Federal sentencing and immigration law, and the implications of the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), on the analysis of the immigration consequences of criminal convictions. The categorical framework was first outlined by the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 599-600 (1990), and later modified by the Court in *Shepard v. United States*, 544 U.S. 13, 26 (2005). The Supreme Court has noted that this framework applies in criminal sentencing proceedings and in the immigration context. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007); *see also Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc). For decades, adjudicators have relied on the *Taylor/Shepard* framework of the categorical approach to evaluate the immigration consequences of criminal convictions, although something similar to the categorical approach has been used in immigration proceedings for close to a century. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013). *But see Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008) (holding that after an Immigration Judge has applied the categorical approach and determined that the record of conviction is inconclusive, recourse to documents outside the formal conviction record is permitted to discern whether an alien was convicted of removable conduct). However, courts have not uniformly applied the categorical approach—and its variant the "modified categorical approach." *Descamps*, 133 S. Ct. at 2282.

In *Descamps*, the Supreme Court addressed the circuit courts' diverging interpretations and applications of the *Taylor/Shepard* framework. 133 S. Ct. at 2282-83 & n.1 (comparing *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir. 2011) (en banc) (per curiam) (applying the modified categorical approach to a categorically overbroad, indivisible statute), and *United States v. Armstead*, 467 F.3d 943, 947-50 (6th Cir. 2006) (same), with *United States v. Beardsley*, 691 F.3d 252, 268-74 (2d Cir. 2012)

(holding that the modified categorical approach applies only to divisible statutes), and *United States v. Giggey*, 551 F.3d 27, 40 (1st Cir. 2008) (en banc) (same)). The Court ultimately held “that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.” *Id.* at 2282.

It remains to be seen whether the Supreme Court’s holding in *Descamps* is limited to the criminal arena, or whether it applies with equal force to immigration proceedings. See *Matter of Lanferman*, 25 I&N Dec. 721, 727-30 (BIA 2012) (holding 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); see also Brief for Respondent at 16-17 n.3 *Descamps v. United States*, 133 S. Ct. 2276 (2013) (No. 11-9540) (arguing that *Taylor* is not necessarily controlling on the Board of Immigration Appeals, and that the Board is entitled to “select a *Taylor*-like approach or a more flexible approach to analysis of prior convictions”).

However, as of this writing, no circuit court has deferred to the Board’s broader interpretation of the categorical approach in *Matter of Lanferman*. In fact, the Third Circuit has expressly rejected *Matter of Lanferman*’s version of the categorical approach in light of the Supreme Court’s decision in *Descamps*, and the First, Eleventh, and Ninth Circuits have held that the Supreme Court’s decisions do not distinguish between the criminal and immigration application of the categorical approach. See *Donawa v. U.S. Att’y Gen.*, 735 F.3d 1275, 1280 n.3 (11th Cir. 2013); *Rojas v. Att’y Gen. of U.S.*, 728 F.3d 203, 216 n.12 (3d Cir. 2013) (en banc); *Campbell v. Holder*, 698 F.3d 29, 33-34 (1st Cir. 2012); *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1033 (9th Cir. 2012), *withdrawn and superseded by* 740 F.3d 1294 (9th Cir. 2014). Nevertheless, the Supreme Court’s decision in *Descamps*, if applied in the immigration context, may have far-reaching consequences, especially with regard to the administration of the provisions of the Immigration and Nationality Act related to criminal convictions. As a result, it is critical for immigration adjudicators to carefully consider the Court’s decision in *Descamps* and decide how it may impact the immigration consequences of a particular criminal conviction. This is especially true for adjudicators who sit in circuits that have already held that the categorical approach applies in the same manner in immigration and criminal sentencing proceedings.

## Background

In *Taylor*, 495 U.S. 575, the Supreme Court outlined the categorical approach as a mechanism for evaluating whether a prior criminal conviction is within a particular category of convictions. At issue in *Taylor* was a sentencing enhancement under the Armed Career Criminal Act (“ACCA”), which increases the sentences of certain Federal defendants who have three prior convictions for a “violent felony.” Whether a past offense constitutes a violent felony depends on the elements of the statute of conviction. The Court noted that Congress’ intention in creating the ACCA was to impart greater consequences to those convicted of crimes involving certain violent elements, not just for crimes with certain labels. According to the Court, the framework more commonly known as the categorical approach “capture[s] all offenses of a certain level of seriousness that involve violence and an inherent risk thereof, regardless of technical definitions and labels under state law.” *Id.* at 588-90. As a result, the Court applied a categorical analysis to determine whether the defendant’s prior convictions qualified as violent felonies.

The first step in the categorical approach is to look, not to the particular facts underlying the prior conviction, but rather to whether the statute of conviction defining the crime of conviction categorically fits within the “generic” Federal definition of a corresponding offense. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Duenas-Alvarez*, 549 U.S. at 186); *Taylor*, 495 U.S. at 599-600. A generic offense is defined in the abstract, and the purpose of the categorical approach is to determine whether the statute of conviction “shares the same nature” as the generic offense which serves as the point of comparison. *Moncrieffe*, 133 S. Ct. at 1684. A statute of conviction will only be a categorical match for the generic offense if a conviction under the statute “necessarily involved” conduct that fits within the definition of the generic offense. *Id.* (quoting *Shepard*, 544 U.S. at 24). Because the focus is on what conduct the conviction necessarily involved, rather than the facts underlying the conviction, courts must presume that the conviction rested on nothing more than “the least of the acts criminalized” by the statute of conviction and then determine whether such acts are encompassed within the definition of the generic offense. *Id.* (internal quotation marks and alterations omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). However, the focus on the least of the acts criminalized by the statute of conviction is not an invitation to apply “legal imagination.” *Id.* at 1684-85 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Instead, the inquiry is whether there is

a “realistic probability, not a theoretical possibility” that the conduct criminalized by the statute falls outside the definition of the generic offense. *See id.* at 1685 (quoting same).

If there is no realistic probability that the statute of conviction would be applied to nongeneric conduct, determining whether a conviction under the statute fits within the generic Federal definition is straightforward. There is a categorical match “if the elements set out in the . . . statute are the same or narrower than the elements of” the generic offense. *Descamps*, 133 S. Ct. at 2295-96 (Alito, J., dissenting) (citing *Taylor*, 495 U.S. at 599). But “what if the statute is broader?” *Id.* at 2296. In other words, what happens when the statute of conviction criminalizes conduct falling outside the generic definition?

In such an event, courts may find it appropriate to apply the second step of the categorical approach, which is commonly referred to as the “modified categorical approach.” The modified categorical approach may only be used when a prior conviction was for violating a “divisible statute.” *Id.* at 2281 (majority opinion). Such a statute “sets out one or more elements of the offense in the alternative . . . . If one alternative . . . matches an element in the generic offense, but the other . . . does not, the modified categorical approach” permits recourse to the record of conviction to determine whether the defendant was convicted of the statutory alternative matching the generic offense. *Id.* The record of conviction includes the “statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard*, 544 U.S. at 16. In essence, the modified categorical approach allows a court to determine which element(s) the defendant was *convicted of* so that the court can apply the categorical approach to those elements. *Descamps*, 133 S. Ct. at 2281; *see also id.* at 2285 (“[T]he modified approach merely helps implement the categorical approach . . . . It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime.”). However, prior to *Descamps*, circuit courts varied as to when and how they applied the modified categorical approach. *See id.* at 2282-83 & n.1.

## Diverging Interpretations

### Overview

Prior to *Descamps*, the circuit courts applied the categorical approach in different ways, and, as noted, the

Board suggested that the categorical approach “need not be applied with the same rigor in the immigration context as in the criminal arena.” *Matter of Lanferman*, 25 I&N Dec. at 727-28. Before *Descamps*, the First, Fourth, Fifth, Seventh, and Eighth Circuits agreed that only divisible statutes may be examined under the modified categorical approach. *See United States v. Fife*, 624 F.3d 441 (7th Cir. 2010); *United States v. Lipscomb*, 619 F.3d 474, 491-92 (5th Cir. 2010); *United States v. Rivers*, 595 F.3d 558, 562-63 (4th Cir. 2010); *United States v. Boaz*, 558 F.3d 800, 807-08 (8th Cir. 2009); *United States v. Giggey*, 551 F.3d 27, 40 (1st Cir. 2008). The Ninth Circuit, on the other hand, held that the use of the modified categorical approach was appropriate even if the statute of conviction was not necessarily divisible (that is, even where the statute was categorically overbroad because it lacked an element of the generic offense), although it did so in a sharply divided en banc decision. *Aguila-Montes de Oca*, 655 F.3d at 927-40. It is less than clear where the Sixth and Tenth Circuits stood on this issue pre-*Descamps*, but their prior case law suggests that these circuits applied the modified categorical approach to categorically overbroad statutes as well. *United States v. Townley*, 472 F.3d 1267, 1277 (10th Cir. 2007); *Armstead*, 467 F.3d at 947-48. The Second, Third, and Eleventh Circuits were ambiguous about their approaches. *See United States v. Beardsley*, 691 F.3d 252, 264 (2d Cir. 2012); *Jean-Louis v. Att’y Gen. of the U.S.*, 582 F.3d 462, 471-72, 474 (3d Cir. 2009); *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 91-92 (2d Cir. 2009); *Obasohan v. U.S. Att’y Gen.*, 479 F.3d 785, 788 (11th Cir. 2007); *Knapik v. Ashcroft*, 384 F.3d 84, 92 n.8 (3d Cir. 2004). It was the Ninth Circuit’s broad version of the modified categorical approach that was squarely before the Supreme Court in *Descamps*.

### The Aguila-Montes de Oca Approach

In *Aguila-Montes de Oca*, 655 F.3d at 917, the Ninth Circuit overruled its previous decision in *Navarro-Lopez v. Holder*, 503 F.3d 1063 (9th Cir. 2007) (en banc). In *Navarro-Lopez*, the Ninth Circuit distinguished divisible statutes of conviction from those “missing an element of the generic crime altogether,” and determined that, with such statutes, the “crime of conviction can never be narrowed to conform to the generic crime because the jury *is not required*—as *Taylor* mandates—to find all the elements of the generic crime.” 503 F.3d at 1073 (emphasis added). Even a defendant’s admission to committing the elements of the generic crime would not render a conviction under an overbroad statute a match for the generic offense because such admissions “were not



necessary for a conviction.” *Id.* (citing *Shepard*, 544 U.S. at 24 (holding that the Government must show that “a prior conviction ‘necessarily’ involved (and a prior plea necessarily admitted) facts equating to generic burglary”)). In such a case, at least pursuant to *Navarro-Lopez*, “[t]he modified categorical approach . . . cannot be used to conform [an alien’s] conviction to the generic definition” of a removable offense. *Id.*

According to *Aguila-Montes de Oca*, however, a modified categorical approach is appropriate in any case where the statute of conviction is broader than the elements of the generic crime, regardless of whether the statute is considered to be divisible or missing an element. 655 F.3d at 940. In other words, under *Aguila-Montes de Oca*, recourse to the conviction record is always appropriate to determine if the finder of fact “*necessarily found* (for example, through a plea colloquy) a fact or facts that generically satisfy the elements of a . . . ground of removability or inadmissibility.” *Matter of Lanferman*, 25 I&N Dec. at 729.

The en banc panel in *Aguila-Montes de Oca* reasoned that “[t]he modified categorical approach simply asks, in the course of finding that the defendant violated the statute of conviction, was the factfinder *actually required to find the facts satisfying* the elements of the generic offense?” *Aguila-Montes de Oca*, 655 F.3d at 936. Viewed this way, the purpose of the modified categorical approach is to determine “(1) what facts the state conviction *necessarily rested on* and (2) whether these facts satisfy the elements of the generic offense.” *Id.* (emphasis added) (citing *Shepard*, 544 U.S. at 21 (noting that the modified categorical approach indicates “whether the plea had necessarily rested on the *fact identifying* the burglary as generic” (emphasis added) (internal quotation marks omitted))).

For example, according to the panel in *Aguila-Montes de Oca*, if a defendant is convicted under an overbroad aggravated assault statute, requiring (1) harmful contact, and (2) the use of a *gun or axe*, a court can be confident that the defendant was convicted of committing aggravated assault with a gun rather than an axe “if the indictment alleges only that the defendant used a gun, and the only prosecutorial theory of the case (as ascertained exclusively through the relevant *Shepard* documents) is that the defendant used a gun.” *Id.* at 936. Using the *Aguila-Montes de Oca* approach, a court could find that “given the facts put forward by the government, the jury was

‘required’ to find that the defendant used a gun,” even if the statute of conviction itself does not require proof that the defendant used such a weapon. *Id.* at 936. Likewise, in the plea context, “if the only weapon the defendant admitted to using was a gun, then [a court] can be confident that the trier of fact was ‘required’ to find that the defendant used a gun in the course of assaulting the victim.” *Id.* at 936-37.

The Ninth Circuit’s expansive approach allowed an adjudicator to use the conviction record to determine whether particular facts alleged by the prosecution or admitted by the defendant were necessarily found as fact by the jury or judge. Thus, rather than relying on the conviction record merely to determine under which provision of a divisible statute the defendant was convicted, the court could compare the underlying facts necessary for conviction in the specific case to the elements of the generic definition. *Id.* at 936. *See also Matter of Lanferman*, 25 I&N Dec. at 729.<sup>1</sup>

In *Descamps*, the Supreme Court expressly rejected *Aguila-Montes de Oca*’s broad application of the modified categorical approach in favor of an approach that strictly focused on the *elements* of the crime of conviction, rather than its facts.

## **The Supreme Court’s Approach: *Descamps v. United States***

### *Background*

In *Descamps*, the Supreme Court revisited the *Taylor/Shepard* framework in the criminal sentencing context. Like *Taylor*, *Descamps* involved an ACCA sentencing enhancement. *Descamps* was convicted of burglary, in violation of section 459 of the California Penal Code. At sentencing, *Descamps* argued that the section 459 was overly broad and could not serve as an ACCA predicate because the statute does not require an unlawful entry as generic burglary does. For example, a shoplifter can be convicted of burglary under section 459 for entering a store during normal business hours. Thus, section 459 punishes a wider range of conduct than generic burglary. Based on this “asymmetry of offense elements,” *Descamps* argued that his conviction under section 459 could not serve as a predicate for sentencing purposes, “whether or not his own burglary involved an unlawful entry that could have satisfied the requirements of the generic crime.” *Descamps*, 133 S. Ct. at 2282.

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR MAY 2014

by John Guendelsberger

The United States courts of appeals issued 216 decisions in May 2014 in cases appealed from the Board. The courts affirmed the Board in 183 cases and reversed or remanded in 33, for an overall reversal rate of 15.3%, compared to last month's 13.8%. There were no reversals from the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	38	34	4	10.5
Third	6	6	0	0.0
Fourth	5	5	0	0.0
Fifth	13	12	1	7.7
Sixth	4	4	0	0.0
Seventh	2	2	0	0.0
Eighth	9	9	0	0.0
Ninth	117	91	26	22.2
Tenth	3	3	0	0.0
Eleventh	15	13	2	13.3
All	216	183	33	15.3

The 216 decisions included 122 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 44 direct appeals from denials of other forms of relief from removal or from findings of removal; and 50 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	122	101	21	17.2
Other Relief	44	35	9	20.5
Motions	50	47	3	6.0

The 21 reversals or remands in asylum cases involved particular social group (10 cases), credibility (4 cases), nexus (2 cases), level of harm for past persecution (2 cases), disfavored group analysis, the material support

bar, and well-founded fear. Nineteen of the 21 asylum reversals or remands were from the Ninth Circuit.

The nine reversals or remands in the "other relief" category addressed the section 212(c) waiver (two cases), suppression of evidence (two cases), crime involving moral turpitude, aggravated felony, section 212(h) waiver, cancellation of removal, and ineffective assistance of counsel.

The three motions cases involved ineffective assistance of counsel (two cases) and changed country conditions.

The chart below shows the combined numbers for January through May 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	447	348	99	22.1
Third	57	48	9	15.8
Seventh	20	17	3	15.0
Second	185	168	17	9.2
Fifth	80	74	6	7.5
Fourth	55	51	4	7.3
Tenth	19	18	1	5.3
Eleventh	46	44	2	4.3
Sixth	42	41	1	2.4
First	14	14	0	0.0
Eighth	31	31	0	0.0
All	996	854	142	14.3

Last year's reversal rate at this point (January and May 2014) was 13.3%, with 899 total decisions and 120 reversals.

The numbers by type of case on appeal for the first 5 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	529	440	89	16.8
Other Relief	198	161	37	18.7
Motions	269	253	16	5.9

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## RECENT COURT OPINIONS

### **Supreme Court:**

*Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014): The Supreme Court held that the Board's decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), should be accorded *Chevron* deference. In *Wang*, the Board held that the automatic conversion and priority date retention provisions of the Child Status Protection Act only apply to petitions that can be converted from one family preference category to another without the need for a new sponsor. In this case, the respondents were principal beneficiaries of approved visa petitions, but their derivative beneficiary children aged out before their priority date became current and, after obtaining lawful permanent resident ("LPR") status, they filed new petitions on behalf of their aged-out children. USCIS, in deference to *Wang*, did not accord the aged-out children of the principal beneficiary parents the same priority dates as their parents. Instead, USCIS gave the children the date of the new petition their LPR parents filed on their behalf. After the district court granted summary judgment to the Government, the Ninth Circuit reversed, holding that the statutory provision was unambiguous and entitled all aged-out derivative beneficiaries to automatic conversion and priority date retention. The Supreme Court majority did not find the statutory language to be unambiguous. Rather, it concluded that the first and second parts of the statute address the issue in divergent ways, with the first part of section 203(h)(3) of the Act pointing towards "broad-based relief," while its second half (which the court termed its "remedial prescription") applies "only to a narrower class of beneficiaries." The Court determined that the Board's reconciliation was permissible, finding that it "offered a cogent argument," and that its interpretation "has administrative simplicity to recommend it." The majority concluded that "[t]his is the kind of case *Chevron* was built for."

### **Second Circuit:**

*Centurion v. Holder*, No. 11-2997-ag, 2014 WL 2722571 (2d Cir. June 17, 2014): The Second Circuit dismissed a petition for review for lack of jurisdiction in a case challenging the Board's decision affirming an Immigration Judge's order of removal based on the petitioner's conviction for a controlled substance violation. The petitioner was arrested in Texas in 1990 (the year after he obtained LPR status); he was charged with conspiracy to possess in excess of 400 grams of cocaine. He then fled the State and avoided prosecution for 15 years. After being arrested and returned on the outstanding warrant, in 2007,

pursuant to a deferred prosecution agreement, he pled nolo contendere to the charge of conspiracy to possess a controlled substance in violation of section 481.115 of the Texas Health & Safety Code. Soon thereafter, he returned from a trip abroad and the Department of Homeland Security ("DHS") initiated removal proceedings, charging him with inadmissibility under section 212(a)(2)(A)(i)(II) of the Act as an alien convicted of a controlled substance violation. The Immigration Judge sustained the charge and found the petitioner ineligible for a section 212(c) waiver because his plea occurred after the repeal of that relief. The Board affirmed. The petitioner argued before the circuit court that (1) the evidence did not establish that he was convicted of a controlled substance violation, and (2) the Board erred in finding him ineligible for section 212(c) relief. Regarding the first issue, the court noted that it could reverse only upon a finding that "any rational trier of fact would be compelled to conclude that the proof did not rise to the level of clear and convincing evidence." The court concluded that the record clearly established that the conviction was for a controlled substance violation. The petitioner argued that the criminal conviction was undermined by the fact that the Order of Deferred Adjudication referenced the offense as a Class B misdemeanor, a legal impossibility under section 481.115 of the Texas Health & Safety Code (which encompasses only felony offenses). The court held this insufficient to meet the high legal burden stated above, stating that "a single confusing reference to a Class B misdemeanor does not compel a different conclusion." As to section 212(c) eligibility, the court found the Board's decision to be consistent with its own holding in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), that the application of section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to pre-AEDPA conduct was not impermissibly retroactive where the alien's guilty plea postdated AEDPA's effective date. The court held that it was bound by its own precedent and was not persuaded by the petitioner's argument that the holding in *Domond* had been implicitly overruled by the Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012).

### **Sixth Circuit:**

*Mandebvu v. Holder*, No. 11-3969, 2014 WL 2743608 (6th Cir. June 18, 2014): The Sixth Circuit granted a petition for review challenging the Board's decision finding the petitioner's asylum application to be untimely and denying withholding of removal to Zimbabwe. The court analyzed the Immigration Judge's determination (affirmed by the Board) that the petitioners had not established

changed conditions sufficient to excuse their late filing where they conceded that conditions predating the change had been severe enough for them to be eligible for asylum. The Immigration Judge therefore found the incremental change in conditions from bad to worse insufficient to constitute a material change in circumstances. The circuit court disagreed, finding the petitioners eligible for late filing even where they were eligible for asylum prior to the change in circumstances. The court found nothing in the plain language of the statute requiring an asylum applicant to have been ineligible for asylum prior to the change in conditions. The court found persuasive the reasoning in three published decisions of the Ninth Circuit, one of which relied on a statement in the legislative history indicating that obtaining “more information about likely retribution” would satisfy the changed-circumstances exception. The court therefore remanded the record for the Board to reconsider the timeliness issue by applying the correct legal standard. Finding that the evidence of record satisfied the petitioners’ burden of proof for withholding of removal, the court also remanded with instructions to the Board to grant that relief should it determine that the petitioners are not eligible for asylum. The three-judge panel issued both a concurring and a dissenting opinion.

#### ***Eighth Circuit:***

*Cardona v. Holder*, No. 13-2178, 2014 WL 2535292 (8th Cir. June 6, 2014): The Eighth Circuit denied a petition for review of a decision of the Board affirming an Immigration Judge’s removal order. The petitioner, an LPR since 1989, was convicted in 2002 in State court of manslaughter and tampering with evidence. Both crimes were contained on the same charging document, and arose from actions of the petitioner occurring on the same date. In 2003, DHS commenced removal proceedings based on the manslaughter conviction only. Although an Immigration Judge ordered the petitioner removed, the Board vacated and terminated proceedings. In 2011, DHS again commenced removal proceedings, but this time based on the evidence of the tampering conviction. The Immigration Judge did not agree with the petitioner’s argument that the second removal proceedings were barred by res judicata. The Immigration Judge sustained the charge that the petitioner’s conviction constituted an aggravated felony under section 101(a)(43)(S) of the Act as “an offense relating to obstruction of justice,” and ordered him removed. The Board dismissed the petitioner’s appeal, holding that res judicata did not apply since the two removal charges were based on different

criminal convictions, which required different proof. The circuit court noted that it has yet to decide whether res judicata applies in immigration proceedings. However, the court found no need to reach that issue in this case because the petitioner had not satisfied the requirements needed for application of the doctrine. The court found that the two crimes did not arise from the same cause of action, since manslaughter and tampering with evidence “arise out of different facts, require different proof, and redress different wrongs.” Finding that the fact that the two crimes occurred on the same day was also not determinative, the court concluded that the second proceedings were not barred.

#### ***Ninth Circuit:***

*Lianhua Jiang v. Holder*, No. 09-70900, 2014 WL 2609914 (9th Cir. June 12, 2014): The Ninth Circuit denied a petition for review of an Immigration Judge’s decision (affirmed by the Board) denying the petitioner’s application for asylum from China. One of the three panel judges issued a partial concurrence and partial dissent. The Immigration Judge made an adverse credibility finding, and both the petitioner and the dissent focused on whether the phrasing of counsel’s questioning on direct examination demonstrated that the discrepancy cited by the Immigration Judge was, in fact, a misunderstanding as to what the petitioner was being asked. The majority noted that explanation was conceivable, but that under the standard of review for credibility determinations, the evidence need not only support the contrary conclusion, but must compel it. Since the court found that the Immigration Judge’s interpretation was as reasonable as the alternative argued by petitioner, the evidence could not be found to compel the alternative interpretation. The court thus rejected the petitioner’s claim. Regarding the petitioner’s alternative claim for protection under the Convention Against Torture, the court found language in the Department of State Country Reports that religious persecution occurs in China to be insufficient by itself to compel the conclusion that the petitioner would be tortured if returned to that country. The court also found the petitioner’s due process argument unpersuasive. The court concluded that the Immigration Judge’s questions about the relationship between the petitioner and her roommate witness did not reflect a moral judgment that would raise questions of impartiality. Rather, the court determined that the Immigration Judge was properly attempting to understand the nature of the relationship, “whether familial or otherwise,” between the two.



## BIA PRECEDENT DECISIONS

In *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), the Board held that in the ordinary course of removal proceedings, an applicant for asylum or withholding of removal is entitled to a hearing on the merits of the applications, including an opportunity to offer oral testimony and other evidence, without first establishing *prima facie* eligibility for the relief sought.

Following consideration of the respondent's asylum application, two evidentiary exhibits, and prehearing briefs, the Immigration Judge determined that the respondent could not demonstrate that the particular social group proposed in his application was cognizable for purposes of establishing that he was a "refugee" under section 101(a)(42) of the Act. The Immigration Judge concluded that absent *prima facie* eligibility, the respondent was not entitled to a merits hearing, and he denied the applications for asylum and withholding of removal.

On appeal, the Board examined section 240(b)(4)(B) of the Act and observed that the statute requires that a respondent have an opportunity to examine the evidence against him or her, to present evidence, and to cross-examine Government witnesses. Additionally, section 240(c)(4)(B) provides that an Immigration Judge, in deciding whether a respondent has satisfied the burden of proof for an application for relief, should evaluate the credibility of the respondent and any witnesses. Further, the Board noted that the implementing regulations at 8 C.F.R. § 1240.11(c)(3) mandate that applications for relief be decided after an evidentiary hearing where the respondent must be examined under oath and be provided the opportunity to present evidence and witnesses.

The Board pointed out that 8 C.F.R. § 1240.11(c)(3) authorizes an Immigration Judge to control the scope of any evidentiary hearing, including discontinuing the hearing after determining that an asylum or withholding of removal application is subject to mandatory denial. Nevertheless, the Board concluded that the authority to control the scope of the hearing was predicated on the existence of such a hearing, which must include the opportunity for a respondent to present evidence and witnesses. Observing that the Immigration Judge did not find the respondent to be subject to a mandatory bar to asylum or withholding, the Board stated that factual issues regarding his application remained in dispute.

Looking to *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), the Board acknowledged its previous recognition of the importance of oral testimony as a means to establish a respondent's credibility and to provide him an opportunity to explain any variations between his application and testimony. The Board explained that although the regulations in effect when *Matter of Fefe* was decided have been replaced, the current regulations similarly require an Immigration Judge to adjudicate an asylum or withholding application following a hearing where an applicant's testimony must be under oath and the applicant may present evidence and witnesses. Therefore the Board considered its continued reliance on *Matter of Fefe* to be appropriate. Noting that section 240(b)(1) of the Act also requires an Immigration Judge to fully develop the record, the Board concluded that a full evidentiary hearing is ordinarily required prior to a decision on the merits of an application for asylum, withholding of removal under the Act or the Convention Against Torture, or deferral of removal. The record was remanded.

In *Matter of Duarte-Luna and Luna*, 26 I&N Dec. 325 (BIA 2014), the Board held that a parent's continuous physical presence and continuous residence cannot be imputed to an unemancipated minor for purposes of establishing the minor's eligibility for Temporary Protected Status ("TPS"). An Immigration Judge, relying on *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994), found that imputation was permissible and granted the TPS applications of two sisters after imputing their mother's continuous physical presence and continuous residence to them.

On appeal by the Department of Homeland Security ("DHS"), the Board pointed out that while the statute does not provide for "derivative" TPS status, 8 C.F.R. § 1244.2(f)(2)(iv) allows an applicant who is the child of "an alien currently eligible to be a TPS registrant" to receive TPS through late registration. However, a late registrant must satisfy several additional requirements, including continuous physical presence in the United States since March 9, 2001, the effective date of TPS designation for El Salvador, and continuous residence since February 13, 2001, the date designated by the Attorney General.

Since the respondents entered the United States in August 2003, they sought to have their mother's physical presence and residence imputed to them. The Board noted that *Cuevas-Gaspar v. Gonzales* was abrogated by



the Supreme Court in *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), where the Court found reasonable the Board's distinction between "matters involving an alien's state of mind" (such as the parent's domicile or abandonment of lawful permanent resident status, which can be imputed to a child) and "objective conditions or characteristics" (such as the parent's place of residence, which may not be imputed). Therefore the Board concluded that the respondents must independently establish their continuous residence.

Additionally, the Board declined to impute the mother's continuous physical presence to the respondents, explaining that 8 C.F.R. § 1244.1 defines continuous physical presence as "actual physical presence for the entire period" at issue and that physical presence is an objective condition, rather than one involving state of mind. Since the respondents had not continuously resided in the United States since February 13, 2001, and had not been continuously present since March 9, 2001, the Board concluded that they had not established eligibility for TPS. The DHS's appeal was sustained.

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### *Descamps continued*

The district court disagreed, stating that the modified categorical approach permitted it to examine the conviction record "to discover whether Descamps had 'admitted the elements of a generic burglary' when entering his plea." *Id.* (citation omitted). A transcript of Descamps' plea colloquy indicated that his conviction had involved the "breaking and entering" into a grocery store, a statement to which Descamps had not objected. *Id.* Based on this admission, the district court found that Descamps' burglary conviction involved an unlawful entry and applied the ACCA penalty enhancement.

The Ninth Circuit affirmed, relying on its decision in *Aguila-Montes de Oca*, and held that when a sentencing court considers a conviction under "[section] 459—or any other statute that is 'categorically broader than the generic offense'—the court may scrutinize certain documents to determine the factual basis of the conviction." *Id.* at 2282-83 (quoting *Aguila-Montes*, 655 F.3d at 940). Applying that approach, the Ninth Circuit found that Descamps' plea, as revealed in his colloquy, "rested on facts that satisfy the elements of the generic definition of burglary." *Id.* at 2283 (quoting *United States v. Descamps*, 466 F. App'x 563, 565 (9th Cir. 2012)).

The Supreme Court granted certiorari to resolve the split between the circuits, detailed above, regarding whether the modified categorical approach applies to statutes that are overly broad, but not divisible. In an 8 to 1 decision the Court ruled in favor of Descamps and reversed, holding that the modified categorical approach may *not* be applied to a statute containing "a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense." *Id.*

### *The Supreme Court's Reasoning*

The Court began its analysis in *Descamps* by noting that its prior case law explaining the scope and application of the categorical approach "all but resolves this case." *Id.* The Court explained that *Taylor*, 495 U.S. 575, and *Shepard*, 544 U.S. 13, recognized a "narrow range of cases" in which "a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2283-84. Insofar as an adjudicator cannot tell, simply by looking at a divisible statute, under which alternative element a defendant was convicted, the modified categorical approach permitted him or her to consult documents beyond the statutory text. But the Court held that an adjudicator may do so *only* to "discover 'which statutory phrase,' contained within a statute listing 'several different' crimes, 'covered a prior conviction.'" *Id.* at 2285 (citing *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)); *Johnson*, 559 U.S. at 144 (noting that "the 'modified categorical approach' . . . permits a court to determine which statutory phrase was the basis for the conviction").

Turning to the case at hand, the Court concluded that the modified approach was inapplicable because section 459 of the California Penal Code defines burglary more broadly than generic burglary, namely, by not requiring proof of an unlawful entry. *Descamps*, 133 S. Ct. at 2286. The statute, moreover, does not define burglary "alternatively, with one statutory phrase corresponding to the generic definition and another not." *Id.* In other words, the elements of section 459 are "indivisible." *Id.* at 2281 (defining an indivisible statute as "one not containing alternative elements"). Significantly, the Court noted that "whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id.* Because Descamps was convicted of burglary under an overbroad statute composed of indivisible elements, his conviction

did not correspond to the generic definition of burglary and did not qualify as an ACCA predicate.

The Court flatly rejected the Ninth Circuit's approach in *Aguila-Montes de Oca*, observing that "it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents . . . . *Aguila-Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits." *Id.* at 2287. The Court characterized the Ninth Circuit's approach as turning "an elements-based inquiry into an evidence-based one," raising several key concerns. For instance, the Court first noted that Congress intended sentencing courts to look only to the fact that the defendant had been *convicted* of certain crimes falling within certain categories.<sup>2</sup> In contrast, an evidence or facts-based approach would authorize examination of the *facts* underlying the conviction. Accordingly, the Court held that the Ninth Circuit's approach "runs headlong into [a] congressional choice." *Id.*

The Court also held that an elements-based approach is superior to the Ninth Circuit's fact-based approach because it "avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries." *Id.*<sup>3</sup> The Court noted that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2288 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). A finding of a predicate offense under the ACCA increases the maximum penalty of a crime. Thus, "it would raise serious Sixth Amendment concerns" if the Ninth Circuit used the modified categorical approach to make a finding that went "beyond merely finding the prior conviction." *Id.*

Finally, the Court observed that the Ninth Circuit's approach in *Aguila-Montes de Oca* would create several inequities. For example, "[i]n case after case, sentencing courts following *Aguila-Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* at 2289. The Court noted that such documents may often contain inaccurate information because a defendant has little incentive to contest facts that are not elements of the charged offense.

In addition, according to the Court, the Ninth Circuit's approach would deprive some defendants of the benefit of their plea deal, especially if the defendant was arrested for *committing* an ACCA predicate but ultimately *pleaded guilty* to a less serious crime whose elements do not fit the ACCA generic offense. An elements-based approach would avoid these inequities because, as noted, the primary focus of such an approach is the *elements of conviction*, not the facts underlying that conviction.

## Outstanding Issues

### *What is an Element?*

Now that *Descamps* makes the *elements* of a conviction central to determining whether or not a predicate offense categorically matches the generic offense, adjudicators are faced with an important question: what is an "element"?<sup>4</sup> Although not expressly defining the term, the Court's decision suggests that a statutory element for purposes of the categorical approach is any part of the defendant's crime that a finder of fact (either a judge or a jury) would be "*required* to find" to sustain a conviction. *Id.* at 2293 (emphasis added). In the case of a jury, a particular fact must be found "unanimously and beyond a reasonable doubt" for it to constitute a statutory element. *Id.* at 2288, 2290. Put another way, a fact is an element if the jury would be hung as a result of not being able to agree on it. *See id.*; *see also id.* at 2298 (Alito, J., dissenting).

The elements of a crime may not always be readily apparent, particularly when the crime is defined by common law. The *Descamps* Court explicitly "reserve[d]" the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but [also] judicial rulings interpreting it." *Id.* at 2291 (majority opinion). Most of the States with "common law crimes," or crimes with elements wholly defined by the judiciary, are located in the Fourth Circuit (e.g., Virginia and South Carolina). In two post-*Descamps* decisions, the Fourth Circuit has treated common law crimes and statutory crimes as functionally equivalent for purposes of determining divisibility. *United States v. Aparicio-Soria*, 740 F.3d 152, 155 n.2 (4th Cir. 2014) (en banc); *United States v. Montes-Flores*, 736 F.3d 357, 367 (4th Cir. 2013).

### *Statutory Elements versus Alternative Statutory Means*

In his dissent in *Descamps*, Justice Alito distinguishes alternative statutory elements from "alternative means of satisfying an element" and observes that

distinguishing “elements” from “means” is crucial to determining whether the modified categorical approach is permissible. *Descamps*, 133 S. Ct. at 2296-98, 2301 (Alito, J., dissenting). Justice Alito contends that under the majority’s articulation of the categorical approach, an indivisible statute is not susceptible to the modified categorical approach because it is defined by elements that can be satisfied by alternative means, some of which fall outside the definition of the generic offense. A divisible statute, on the other hand, is susceptible to a modified categorical analysis because it is defined by separate or *alternative elements*, some combination of which defines the generic offense. In Justice Alito’s view, “[t]he feature that distinguishes elements and means is the need for juror agreement . . . and therefore in determining whether [certain facts] are elements or means, the critical question is whether *a jury would have to agree on*” facts corresponding to elements of the generic offense. *Id.* at 2298 (emphasis added) (citation omitted). Justice Alito concludes that for some crimes, the only way to distinguish means from elements may be to find cases concerning the correctness of jury instructions, which may be unavailable.

The majority responds to Justice Alito’s concerns by stating that the record of conviction itself “would reflect [a] crime’s elements.” *Id.* at 2285 n.2 (majority opinion). “So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.” *Id.* But Justice Alito counters that an examination of the conviction record may not readily reveal a statute’s elements or distinguish elements from alternative statutory means. “Charging documents must generally include factual allegations that go beyond the bare elements of the crime—specifically, at least enough detail to permit the defendant to mount a defense.” *Id.* at 2301 (Alito, J., dissenting).

The Ninth Circuit confronted the issue of distinguishing alternative elements from alternative means in *Coronado v. Holder*, 747 F.3d 662 (9th Cir. 2014). In *Coronado*, the alien had two prior convictions for possessing methamphetamine in violation of section 11377(a) of the California Health and Safety Code. Based on these convictions, the alien was placed into removal proceedings and found to be inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of an

offense related to a substance controlled by Federal law. A conviction under section 11377(a) did not categorically fit within the generic definition of an offense related to a controlled substance because, although prohibiting almost all of the same substances, the California statute criminalized the possession of one substance not controlled by the Federal Controlled Substances Act (“CSA”). *Id.* at 667 (noting 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”).

Coronado argued that recourse to the conviction record under a modified categorical approach was inappropriate in his case because section 11377(a) lists “alternative means” of satisfying an indivisible set of elements. *Id.* at 668. The Ninth Circuit rejected this argument and held that section 11377(a) was divisible because it “identifies a number of California drug schedules and statutes and organizes them into five separate groups, which are listed in the disjunctive.” *Id.* at 668-69 (citing Cal. Health & Safety Code § 11377(a)). Thus, “by its very terms, § 11377(a) ‘list[s] potential offense *elements* in the alternative,’ . . . some of which are contained in the CSA and some of which are not.” *Id.* at 668 (emphasis added) (quoting *Descamps*, 133 S. Ct. at 2284, 2293). Viewed this way, the Ninth Circuit found that section 11377(a) “effectively creates ‘several different . . . crimes,’ . . . and not separate means of commission.” *Id.* at 669 (quoting *Descamps*, 133 S. Ct. at 2285, 2291).

It is notable, however, that the Ninth Circuit did not discuss whether a jury was required to agree (unanimously or otherwise) on the specific controlled substance underlying Coronado’s conviction. Recall that *Descamps* suggests that unanimous juror agreement is the feature that distinguishes alternative elements from alternative means. *See Descamps*, 133 S. Ct. at 2288, 2290, 2293; *see also id.* at 2296 (Alito, J., dissenting). In fact, the court in *Coronado* buttressed its conclusion that section 11377(a) is divisible by citing to a California criminal jury instruction indicating that a jury need *not* agree on the specific controlled substance at issue. 747 F.3d at 669 n.4 (citing Cal. Jury Instr. - Crim. 2304 (Feb. 2014) (providing that a defendant is guilty of violating section 11377(a) if: (1) the defendant unlawfully possessed a controlled substance; (2) he or she knew of its presence; and (3) he or she “knew of the substance’s nature or



character as a controlled substance”). *But see* Cal. Jury Instr. - Crim. 12.00 (providing a blank space where the controlled substance is to be identified and directing that the State must prove the defendant exercised control over the specified substance).

Thus, it remains less than clear whether *Coronado* is consistent with *Descamps*. Nevertheless, some State controlled substance statutes *do* require a jury to identify the specific substance supporting a controlled substance conviction, and such statutes are divisible pursuant to *Descamps*. See *United States v. Abbott*, 748 F.3d 154, 159 n.5 (3d Cir. 2014) (noting that a fact finder must find the specific substance involved in a violation of section 780-113(a)(30) of the Pennsylvania Statutes Annotated). However, other State statutes may not require a jury to agree on the specific substance at issue, and, in circuits that have yet to decide the issue, it is not clear whether *Descamps* applies. It is important for immigration adjudicators to keep this issue in mind because it may potentially render a State controlled substance statute indivisible and unsusceptible to a modified categorical analysis.

#### *Descamps, Crimes of Violence, and the Ordinary Case Standard*

A number of circuits have also held that the Court’s decisions in *Descamps* and *Moncrieffe* affect its prior holding in *James v. United States*, 550 U.S. 192 (2007). In *James*, the Court held that in determining whether an offense involves a serious potential risk of injury to another under the ACCA, the categorical approach does not require that “every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury.” *Id.* at 208. “Rather, the proper inquiry is whether the *conduct encompassed by the elements of the offense*, in the *ordinary case*, presents a serious potential risk of injury to another.” *Id.* (emphases added).

The circuits and the Board have applied *James*’ “ordinary case” standard in the immigration context to determine whether a conviction categorically fits within the generic definition of a “crime of violence” under 18 U.S.C. § 16(b)—“a felony . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” See section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (providing that an

aggravated felony crime of violence is defined with respect to, inter alia, 18 U.S.C. § 16(b)); *see also, e.g., Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (applying *James* in the § 16(b) context post-*Descamps*); *Van Don Nguyen v. Holder*, 571 F.3d 524, 529-30 (6th Cir. 2009) (applying *James* in the § 16(b) context pre-*Descamps*); *Perez-Munoz v. Keisler*, 507 F.3d 357, 362, 362-64 (5th Cir. 2007) (same); *Matter of U. Singh*, 25 I&N Dec. 670, 674, 677-78 (BIA 2012) (same); *cf. Aguilar v. Att’y Gen. of U.S.*, 663 F.3d 692, 697 (3d Cir. 2011) (applying “an ordinary and obvious sense” standard in discerning whether an offense was a crime of violence under § 16(b)).

Although the *Descamps* Court reserved the issue, 133 S. Ct. at 2293 n.6, defendants in Federal sentencing proceedings may argue that *Descamps*’ and *Moncrieffe*’s strict focus on the elements of an offense and the least of the acts criminalized by those elements undermines *James*’ holding that one look to the “ordinary case” in determining whether the statute creates a “substantial risk” of the use of force. In fact, the First and Fourth Circuits seem to have narrowed the application of the “ordinary case” standard in light of *Descamps*’ emphasis on the elements of a statute rather than the conduct typically encompassed by those elements. See *United States v. Fish*, No. 12-1791, 2014 WL 715785, at \*18 (1st Cir. Feb. 26, 2014) (Dyk, J., dissenting) (stating that “the majority [opinion] suggests that *James* is no longer good law after *Descamps*”); *Aparicio-Soria*, 740 F.3d 155-56 (holding that the defendant’s Maryland conviction of resisting arrest did not qualify as a “crime of violence” under the categorical approach because the statute, at a minimum, required mere offensive touching); *United States v. Carthorne*, 726 F.3d 503, 514 (4th Cir. 2013) (holding that the elements of assault and battery of a police officer in Virginia cannot be viewed as presenting a serious risk of physical injury because the statute’s elements may be satisfied by de minimis touching or without causing physical injury to another).

However, the First Circuit in *Fish* did not wholly discount the “ordinary case” standard in light of *Descamps*. Instead, *Fish* suggests a hybrid approach. Under *Fish*, a sentencing court must first determine whether a statute is divisible pursuant to *Descamps*. If the statute is divisible, a court may then use the modified categorical approach to see under which statutory alternative a defendant was convicted. Once a court determines which alternative

served as the basis of a defendant's conviction, a court may then look to see whether that alternative qualifies as a crime of violence in the "ordinary case." In doing so, however, the First Circuit cautioned that it would be contrary to *Descamps* and *Duenas-Alvarez* to find that a conviction qualified as a crime of violence in the "ordinary case" under either the categorical or modified categorical approach if the statute had been actually applied in the past "to conduct that failed to meet the textual requirements of the [generic offense] at issue." *Fish*, 2014 WL 715785, at \*10. Thus, the court in *Fish* found that a limited version of *James*' "ordinary case" standard continued to apply, but only after *Descamps*' divisibility analysis and *Duenas-Alvarez*'s realistic probability test allowed it scope to do so.

In contrast, the Eighth Circuit in an en banc decision in *United States v. Tucker* used the "ordinary case" standard to determine whether a conviction presented a "serious potential risk of injury to another," even though the statute of conviction was indivisible and overbroad. 740 F.3d 1177, 1182-83 (8th Cir. 2014) (en banc) ("[B]ecause the portion of the Nebraska statute under which Tucker was convicted is textually *indivisible* [under *Descamps*] as between escape from secure custody and escape from nonsecure custody, we now examine whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.'" (emphasis added) (quoting *James*, 550 U.S. at 208).

Under the categorical approach, the Eighth Circuit concluded that the defendant's conviction was not a violent felony under the ACCA because while the generic conduct proscribed by the overly broad statute involved a "significant likelihood of 'confrontation leading to violence,'" such risks "are much less" in relation to the non-generic conduct captured by the statute's overly broad elements. *Id.* at 1183 (noting that "[c]ommon sense thus indicates that the portion of the statute under which Tucker was convicted encompasses both conduct that does and conduct that does not present a serious potential risk of physical injury to another."). Thus, in the Eighth Circuit's eyes, the statute did not qualify as a predicate offense, not on account of its indivisibility, but rather as a consequence of its overbreadth. *Id.* (holding that, due to the statute's overbreadth, the court could not determine whether "a conviction under [the indivisible] portion of the statute could be considered to present a serious potential risk of injury to another in the 'ordinary case'" (quoting *James*, 550 U.S. at 208).

Notwithstanding *Descamps*, the Ninth Circuit has applied the "ordinary case" standard in the immigration context. Although the Ninth Circuit in *Rodriguez-Castellon* only mentioned *Descamps* in passing, the court applied *James*' "ordinary case" standard to determine whether a conviction of lewd and lascivious acts under section 288(c)(1) of the California Penal Code was a crime of violence under § 16(b). In doing so, the court stated that "a state crime may categorically be a crime of violence for purposes of § 16(b) even when a state court has, in some cases, construed the statute as requiring something less than violent force." *Rodriguez-Castellon*, 733 F.3d at 855. According to the court, a State crime of conviction "involves a substantial risk" of the use of force and is therefore a crime of violence under § 16(b) if "the *conduct* covered by that crime raises a substantial risk of physical force 'in the ordinary case,' even though, *at the margin*, some violations of the state statute may not raise such a risk." *Id.* (emphases added). Hence, under *Rodriguez-Castellon*, the "lower limit[s]" or the least of the acts criminalized by the elements of a criminal statute are not relevant to the categorical analysis of a crime of violence. *Id.* at 862.

## Conclusion

Although it remains to be seen whether *Descamps* applies with full force in the immigration context, extending its holding into the immigration sphere would necessarily limit the universe of offenses that carry immigration consequences. In his concurring opinion in *Descamps*, Justice Kennedy recognized that a strict focus on the elements of conviction under the categorical approach would render a "large number" of State statutes "indivisible," and individuals convicted of serious crimes under such statutes would no longer be subject to the ACCA. 133 S. Ct. 2276, 2293-94 (Kennedy, J., concurring). By logical extension, the holding in *Descamps* necessitates that many aliens convicted of violating indivisible statutes will no longer be subject to removal and may now be eligible for relief, irrespective of whether their actual crimes involved facts that would render them removable or disqualify them from applying for relief.

Justice Alito acknowledged the impact of the Court's articulation of the categorical approach in *Descamps* and argued that "while producing very modest benefits at most, the Court's holding will create several serious problems." *Id.* at 2301 (Alito, J., dissenting). According

to Justice Alito, the Court's holding undermined the fundamental objectives of the ACCA: (1) to ensure that violent, dangerous recidivists received enhanced penalties; and (2) that those penalties would be applied uniformly, regardless of the vagaries of State law. Under the majority's holding, Justice Alito asserted, an individual convicted of breaking and entering into a building in California to commit a felony therein would escape ACCA treatment, while an individual convicted of performing the same, dangerous acts in Virginia would not. *Id.* at 2302 (citing Cal. Penal Code § 459 and Va. Code Ann. § 18.2-90).

The Court in *Moncrieffe* similarly recognized that aliens "whose real-world conduct [is] the same" may be treated differently in immigration proceedings depending on the jurisdiction and statute of conviction. 133 S. Ct. at 1693 n. 11. The Court responded to these concerns by stating that such was "the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant 'commit[s],' but rather what facts are necessarily established by a conviction for the state offense. Different state offenses will necessarily establish different facts." *Id.*

Notwithstanding Justice Alito's apprehensions, *Descamps* and the categorical approach remain the law of the land. What's more, as noted above, a number of circuits have applied its holding in the immigration context. In light of the far-ranging implications the Supreme Court's decision may have on assessing the immigration consequences of criminal convictions, it is therefore vital for immigration adjudicators to appreciate the contours of the Court's holding in *Descamps* and to understand how it applies.

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1. As noted, the Board adopted a similarly expansive view of the modified categorical approach in *Matter of Lanferman*, 25 I&N Dec. at 723-30. The Board mentioned the Ninth Circuit's broad version of the modified categorical approach in *Aguila-Montes de Oca*, 655 F.3d 915, but it did not rely on the Ninth Circuit's reasoning. *Matter of Lanferman*, 25 I&N Dec. at 729 n.8.

2. The Supreme Court, the circuits, and the Board have similarly reasoned that when Congress directs immigration adjudicators to determine whether a prior *conviction* carries immigration consequences, Congress intends adjudicators to use the categorical

approach. See, e.g., *Moncrieffe*, 133 S. Ct. at 1684 (citing *Taylor*, 495 U.S. 575); *Ceron v. Holder*, 747 F.3d 773, 780 (9th Cir. 2014) (citing same); *Matter of Introcaso*, 26 I&N Dec. 304, 308 (BIA 2014) (citing same). As previously mentioned, however, it remains to be seen whether an immigration adjudicator's examination of a prior criminal conviction is strictly limited to a statute's text and the record of conviction. See *Matter of Silva-Trevino*, 24 I&N Dec. 687.

3. Sixth Amendment constitutional protections do not apply in immigration proceedings. *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710, 716-17, *vacated on other grounds*, 25 I&N Dec. 1 (A.G. 2009).

4. It should be noted that the Supreme Court has taken the position that generic crimes can be defined by reference to facts *other than* formal elements. For instance, in *Moncrieffe*, 133 S. Ct. at 1687, and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567-68 (2010), the Court held that when Congress chooses to define a generic Federal offense by reference to punishment under Federal law, it may be necessary to take account of a State statute's formal elements *and* relevant Federal sentencing factors.

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