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U.S. Department of Justice  
Executive Office for Immigration Review  
*Board of Immigration Appeals*

P.O. Box 8530  
5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

April 4, 2014

American Immigration Lawyers Association  
1331 G Street, NW, Suite 300  
Washington, DC 20005

Federation for American Immigration Reform  
25 Massachusetts Avenue, NW, Suite 330  
Washington, DC 20001

Re: Matter of J C -C  
A [REDACTED]

Dear Parties:

The Board resets its supplemental briefing request for the subject case. Both parties are granted until May 5, 2014 to submit a supplemental brief to the Board of Immigration Appeals. The briefs or extension request must be RECEIVED at the Board on or before this date. Please note: The supplemental brief is limited to 30 double-spaced pages. Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records. Amicus Curiae AILA & FAIR are also permitted to submit a supplemental brief by May 5, 2014. Please address the following:

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 than 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, 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.").

A fee is not required for the filing of a brief. Your brief must be RECEIVED at the Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at [www.justice.gov/eoir](http://www.justice.gov/eoir).

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals—including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

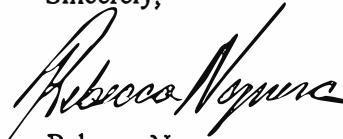
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Board of Immigration Appeals  
Clerk's Office  
5107 Leesburg Pike, Suite 2000  
Falls Church, VA 20530

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

Sincerely,



Rebecca Noguera  
Legal Assistant  
Information Management Team

Enclosure

cc:

Kuyomars Q. Golparvar w/o encl.  
Chief  
Immigration Law and Practice Division  
Office of the Principal Legal Advisor  
ICE Headquarters  
Potomac Center North  
500 12th Street, S.W.  
MS 5900  
Washington, DC 20536

DHS/ICE Office of Chief Counsel - EAZ  
P.O. Box 25158  
Phoenix, AZ 85002

Respondent



Sejal Zota, Esq.  
National Immigration Project of the  
National Lawyers Guild  
14 Beacon Street, Suite 602  
Boston, MA 02108

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)
)
)
)
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A [Redacted]

**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*.<sup>1</sup> *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: Dieu Vu Forvilus*, A071 552 965 (BIA Jan. 28, 2014) (unpublished); *In re: Gonzalez-Manjarrez*, A093-108-092 (BIA May 22, 2013) (unpublished).<sup>2</sup>

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

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<sup>1</sup> *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*.

<sup>2</sup> 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.<sup>3</sup>

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*,

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<sup>3</sup> On April 28, 2014, Mr. Coronado petitioned for rehearing 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.<sup>4</sup>

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

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<sup>4</sup> 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 than 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),<sup>5</sup> 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 statute and thus susceptible to

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<sup>5</sup> 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.<sup>6</sup> 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

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<sup>6</sup> 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*<sup>7</sup> 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

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<sup>7</sup> 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: Dieu Vu Forvilus*, A071-552-965 (BIA Jan. 28, 2014) (unpublished); *In re: Sainz-Rivera*, A091-684-104 (BIA Mar. 10, 2014) (unpublished); *In re: Gomez Juado*, 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.<sup>8</sup> *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

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<sup>8</sup> 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 Louisiana “[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. CodeCrim. 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.<sup>9</sup> *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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<sup>9</sup> 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.<sup>10</sup>

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<sup>10</sup> 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.<sup>11</sup> 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

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<sup>11</sup> 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.<sup>12</sup>

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).<sup>13</sup> 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

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<sup>12</sup> 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).”).

<sup>13</sup> 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.<sup>14</sup> 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

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<sup>14</sup> 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 Tavaréz-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<sup>15</sup>—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

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<sup>15</sup> 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: Resurrecting 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 pursuing 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 statutes 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,

By:   
Alina Das, Esq.

Russell R. Abrutyn, Esq.  
AILA Amicus Committee Member  
Marshal E. Hyman & Associates  
3250 West Big Beaver Road, Suite 529  
Troy, MI 48084

Alina Das, Esq.  
Jehan Laner, Legal Intern  
Colin Stroud, Legal Intern  
Washington Square Legal Services  
245 Sullivan Street, 5<sup>th</sup> Floor  
New York, NY 10012

Manuel D. Vargas, Esq.  
Isaac Wheeler, Esq.  
Immigrant Defense Project  
28 West 39<sup>th</sup> Street, Suite 501  
New York, NY 10018

Sejal Zota, Esq.  
National Immigration Project of the  
National Lawyers Guild  
14 Beacon Street, Suite 602  
Boston, MA 02108

Counsel for *Amici Curiae*



## 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**

**B-1**

Falls Church, Virginia 20530

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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.<sup>1</sup> He alleges ineffective assistance of former counsels (Larry W. Smith and Brenda C. Diaz). In

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<sup>1</sup> 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).

Cite as: Jose Manuel Barrios Rojas, A090 145 871 (BIA Feb. 7, 2014)

*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.<sup>2</sup> We conclude that the respondent shows prejudice.

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<sup>2</sup> 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.

  
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FOR THE BOARD

Immigrant & Refugee Appellate Center | [www.irac.net](http://www.irac.net)

## 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. See 8 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. See 8 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. See 8 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.

BIA & AAU Non-Precedent Decisions

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Falls Church, Virginia 20530

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File: A071 552 965 – Miami, FL

Date: JAN 28 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).<sup>1</sup> 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

<sup>1</sup> 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,”<sup>2</sup> 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.<sup>3</sup>

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.”).<sup>4</sup>

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

<sup>2</sup> 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)).

<sup>3</sup> 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*.

<sup>4</sup> 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*.

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A090 764 102 -- Atlanta, GA

Date: MAR 28 2014

In re: EDUARDO GOMEZ JURADO 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.<sup>1</sup> We

<sup>1</sup> 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. Atty Gen.*, 709 F.3d 1052, 1053 n. 3 (11th Cir. 2013) (analysis must  
(Continued . . . )

Cite as: Eduardo Gomez Juado, A090 764 102 (BIA Mar. 28, 2014)

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,"<sup>2</sup> 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.<sup>3</sup>

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,

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.

<sup>2</sup> 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)).

<sup>3</sup> 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.<sup>4</sup>

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),<sup>5</sup> 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

<sup>4</sup> 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.

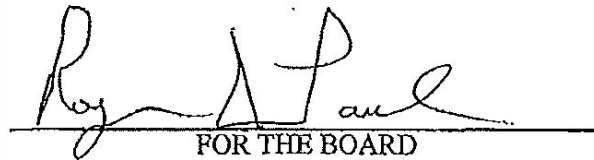
<sup>5</sup> Because the respondent’s conviction under section 14-33(c)(2) of the North Carolina statute was for a misdemeanor, it can only constitute a crime of violence if it is “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property 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

Immigrant & Refugee Appellate Center | www.irac.net

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

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File: A093 108 092 – Tulsa, OK<sup>1</sup>

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

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<sup>1</sup> 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).<sup>2</sup> 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.<sup>3</sup> 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

Immigrant & Refugee Appellate Center | www.irac.net

<sup>2</sup> The term "distribution" under Oklahoma law includes exchanges without remuneration. See *Goodner v. State*, 546 P.2d 653, 57-58 (Okla.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).

<sup>3</sup> 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 (9<sup>th</sup> 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)

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

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

Cite as: Luis Miguel Ramirez-Moz, A072 377 892 (BIA Mar. 31, 2014)

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). *Sollman, 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 *Sollman* (I.J. at 2). *See Sollman, 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). *Sollman, 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

A072 377 892.

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 Samdo*, 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

Immigrant & Refugee Appellate Center | www.irac.net

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

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File: A091 684 104 – Florence, AZ

Date: MAR 10 2014

In re: RAUL SAINZ-RIVERA a.k.a. Jesus Urbieto 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).

Cite as: Raul Sainz-Rivera, A091 684 104 (BIA Mar. 10, 2014)



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*.

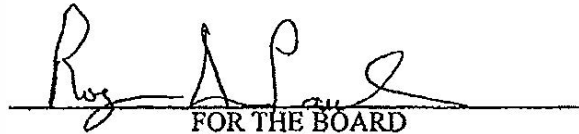
In light of *Descamps*, Ariz. Rev. Stat. § 28-1383(A)(1) can be considered “divisible” into discrete offenses requiring “driving” and “actual physical control” only if Arizona law defines “driving” and “actual physical control” as alternative “elements” of the offense. Under *Descamps*, the term “element” 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

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## 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

### Counsel

ON BEHALF OF RESPONDENT:  
Gloria Martinez-Senftner, Esquire

ON BEHALF OF DHS:  
Brenda J. Thomas  
Assistant Chief Counsel

### 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. <sup>1</sup> 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

<sup>1</sup> 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.<sup>2</sup>

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.

Return to Text

BIA & AAU Non-Precedent Decisions

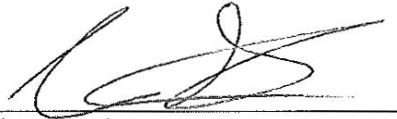
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<sup>2</sup> Footnote 2. We note that subsequent to the Immigration Judge's March 13, 2012, decision, the DHS submitted a Form I-261 before the Immigration Judge seeking to charge the respondent as removable under section 237(a)(2)(B)(i) of the Act.

### **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 12<sup>th</sup> 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.

A handwritten signature in black ink, appearing to read 'Colin Stroud', written over a horizontal line.

Colin Stroud