PRACTICE ADVISORY[*]
July 31, 2014

MATTER OF CHAIREZ-CASTREJON: BIA APPLIES *MONCRIEFFE* AND *DESCAMPS* TO MODIFY AND CLARIFY ITS VIEWS ON PROPER APPLICATION OF THE CATEGORICAL APPROACH

INTRODUCTION

On July 24, the Board of Immigration Appeals ("Board" or "BIA") issued a decision in which it applied last year's Supreme Court's decisions in *Moncrieffe v. Holder* and *Descamps v. United States* to modify and/or clarify the Board's views on proper application of the categorical approach for determining whether a conviction fits within a criminal removal ground. *Matter of Chairez-Castrejon,* 26 I&N Dec. 349 (BIA 2014). Most notably, the Board did the following:

(1) in determining whether the conviction at issue was a categorical match with a charged removal ground (aggravated felony crime of violence), **the Board applied *Moncrieffe* to focus on the "minimum conduct" covered under the express terms of the statute of conviction *without* any indication that the noncitizen must show actual prosecutions for such conduct under the "realistic probability" standard**;

(2) in determining whether an adjudicator could go beyond the textual reach of the statute of conviction and examine the record of conviction to determine whether there is a categorical match, **the Board applied *Descamps* to announce a new rule allowing an adjudicator to examine the record of conviction only when the statute is truly "divisible" into separately described crimes at least one of which is a categorical match** (withdrawing from *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012));

(3) in determining whether the conviction at issue was a categorical match with a second charged removal ground (firearm offense), **where the noncitizen argued no match because the statute of conviction did not "exclude" conduct involving antique firearms as does the federal statute, the Board required a showing of actual prosecutions for such conduct** (clarifying *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010)); and

(4) in remanding the case for an Immigration Judge to determine whether the noncitizen is statutorily eligible for cancellation of removal, **the Board indicated that the question of eligibility for relief (cancellation of removal) was resolved by its finding that the record does not establish a conviction of an aggravated felony despite the shift in the burden of proof in the relief eligibility context**.

This Advisory was written by Manny Vargas with input and assistance from Dan Kesselbrenner and Sejal Zota.

This advisory describes the above developments in the BIA's view of proper application of the categorical approach in the sections below relating to (1) minimum conduct test; (2) divisibility; (3) realistic probability standard; and (4) relief eligibility burden of proof. The advisory is meant to supplement and update the discussion of these concepts in last year's advisories on the *Moncrieffe* and *Descamps* decisions. *See Moncrieffe v. Holder*: Implications for Drug Charges and Other Issues Involving the Categorical Approach (May 2, 2013) ("Moncrieffe Advisory") and *Descamps v. United States* and the Modified Categorical Approach (July 17, 2013) ("Descamps Advisory"), which are available along with other relevant legal resources at the following website pages:

http://immigrantdefenseproject.org/resources/legal-resources
http://www.nationalimmigrationproject.org/publications.htm.

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1. MINIMUM CONDUCT TEST

In *Matter of Chairez-Castrejon*, the Board first determined whether or not the respondent's conviction for felony discharge of a firearm under section 76-10-508.1 of the Utah penal code constituted a "crime of violence" for aggravated felony deportability purposes. Applying *Moncrieffe*, the Board stated: "To determine whether the respondent's offense qualifies as an aggravated felony, we employ the 'categorical approach,' which requires us to focus on the *minimum conduct* that has a realistic probability of being prosecuted under section 76-10-508.1 of the Utah Code, rather than on the facts underlying the respondent's particular violation of that statute." 26 I&N Dec. at 351 (emphasis added).

Applying the "minimum conduct" test, the Board looked at the entire range of conduct covered under the Utah statute and found that subsection (a) ("the actor discharges a firearm in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm") covered conduct falling outside the crime of violence definition because it "does not have as an element the deliberate 'use' of violent physical force" but rather "can be proven by reference to reckless conduct." *Id*. It thus found that the respondent's conviction could not categorically be deemed an aggravated felony under 18 U.S.C. § 16(a) or 16(b). It is significant that the Board correctly applied the minimum conduct test to the "risk-based" definition in § 16(b). Prior to *Moncrieffe* and *Descamps*, some courts had looked only to "typical conduct," and not the minimum conduct in assessing the risk under the "ordinary case" analysis in *James v. United States*, 550 U.S. 192, 196 (2007). *See, e.g*., *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2013) (excluding the minimum conduct of privileged entry burglary in determining that California residential burglary is a crime of violence).

Notably, the Board did not review Utah case law to determine - or indicate that the noncitizen was required to show - that Utah has prosecuted persons for violations of the statute involving only reckless conduct. It was sufficient that the terms of the statute expressly covered such conduct to find that the statute was overbroad. *See* 26 I&N Dec. at 351-52.

For further discussion of the helpful potential broader implications of the categorical approach minimum conduct test as enunciated in *Moncrieffe*, *see* Moncrieffe Advisory at 12-14.

2. DIVISIBILITY

After determining that the respondent's conviction under section 76-10-508.1 could not categorically be deemed an aggravated felony, the Board then went on to determine whether the statute of conviction was divisible into separately described crimes at least one of which categorically falls within the crime of violence aggravated felony ground. 26 I&N Dec. at 352-355. If so, this would permit the factfinder to examine the record of conviction to determine removability under what is known as the "modified categorical approach."

The Board found that the Immigration Judge had properly applied a modified categorical inquiry to identify under which separately enumerated subsection of the Utah statute of conviction the respondent was convicted. *Id.* at 352.[1] However, the Board disagreed with the Immigration Judge that such subsection was further divisible because it "disjunctively enumerated intent, knowledge, and recklessness as alternative mental states." *Id.* at 352. The Board said that, while the Immigration Judge's analysis was consistent with the Board's broad view of divisibility in *Matter of Lanferman*, 25 I&N Dec. 721, 727 (statute is divisible whenever its elements "could be satisfied either by removable or non-removable conduct"), this interpretation is not consistent with the stricter approach to divisibility announced by the Supreme Court in *Descamps*. 26 I&N Dec. at 352-353. The Board thus withdrew from its reasoning in *Matter of Lanferman*, and found that, under *Descamps*,[2] a criminal statute is divisible only it if it lists multiple discrete offenses as enumerated alternatives, or lists disjunctive sets of "elements" that in certain combinations can support a conviction, and at least one of those listed offenses or combinations of disjunctive elements is a categorical match to the criminal removal ground. *Id.* at 353.

What is an Element?

Critical to its conclusion that the Utah statute at issue in the *Chairez-Castrejon* case was not divisible under *Descamps* as to its alternative mental states was that the Board adopted and

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[1] Interestingly, the Board did not look to Utah law to see whether the statutory subsections were means or elements of a distinct offense, which the holding of *Chairez-Castrejon* generally requires. *See, infra,* "What is an Element."

[2] The Board, rejecting the argument of the Department of Homeland Security (DHS) that *Descamps* is not applicable because that case arose in the criminal context, stated that "we cannot agree that we have the flexibility to apply *Matter of Lanferman* in this case to the extent that it is inconsistent with our understanding of the Supreme Court's approach to divisibility in *Descamps.*" 26 I&N Dec. at 353. The Board further stated:

> The Federal courts have not accorded deference to our application of divisibility, particularly given that *Descamps* itself makes no distinction between the criminal and immigration contexts and the circuit courts have held that the approach to statutory divisibility announced there applies in removal proceedings in the same manner as in criminal sentencing proceedings. . . . We therefore conclude that we do not have the authority to continue to apply our divisibility analysis in *Matter of Lanferman*, and we withdraw from that decision to the extent that it is inconsistent with *Descamps*.

Id. at 354 (citations omitted).

applied the *Descamps* reasoning that an offense's "elements" are only those facts that a jury must find "'unanimously and beyond a reasonable doubt.'" *Id.* at 353 (quoting *Descamps* at 2288). The Board explained:

> Under *Descamps*, section 76-10-508.1(1)(a) of the Utah Code can be "divisible" into three separate offenses with distinct mens rea only if Utah law requires jury unanimity regarding the mental state with which the accused discharged the firearm. . . . If Utah does not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative "means" by which a defendant can discharge a firearm, not alternative "elements" of the discharge offense. . . . We are not aware of any case directly addressing the issue of jury unanimity in the context of a prosecution under section 76-10-508.1. However, in the context of second-degree murder, the Utah Supreme Court has not required jury unanimity where the single crime can be committed in any of three separate manners, each with a different mens rea. . . . The lack of Utah authority expressly requiring jury unanimity with respect to the mens rea underlying a violation of section 76-10-508.1, coupled with the Utah Supreme Court's suggestive determination that such unanimity is not required in second-degree murder cases, indicates that section 76-10-508.1 may not be divisible into three offenses with distinct mens rea, or at least that the law is unclear on this point. Because the issue before us involves removability, an issue on which the DHS bears the burden of proof, and the DHS has not come forward with any authority to establish the statute's divisibility, we conclude that the Immigration Judge was not authorized to consult the respondent's conviction record in order to determine which mental state he possessed.

Id. at 354-355 (citations omitted).

The Board's focus on the distinction between those alternative statutory factors that are true "elements," which must be specifically proven by juror unanimity,[3] and those factors that merely represent different "means" of committing one offense, is significant. This means that a statute should not be found divisible permitting the adjudicator to look at the record of conviction unless the statute is truly divisible into at least one separately enumerated discrete offense or combination of "elements" set forth disjunctively that can separately support conviction.[4] The practitioner should thus look to case law, jury instructions, and others sources of law in the convicting jurisdiction to determine whether that jurisdiction treats the alternative facts set forth in the statute of conviction as true "elements" or whether they instead represent "means" that need not be specifically proven by juror unanimity.

Burden on the Government

That the BIA required the DHS to make an affirmative showing that a statute is divisible before permitting a factfinder to examine the record of conviction is also significant. This should mean that if the law of the convicting jurisdiction is not clear on the elements v. means distinction, as the Board found with respect to the Utah offense at issue in *Chairez-Castrejon*, the statute should be found to be indivisible and a mismatch with the ground of removal. In addition, DHS is not accustomed to this requirement and may have difficulty complying

[3] The Board noted that, in those jurisdictions that do not require juror unanimity, the "elements" are comprised of those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction. *Id.* at 353, n.2.

[4] Practitioners should be aware that the Board stated: "Since we are not given deference on this [divisibility] issue, going forward we are also bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps*." *Id.* at 354. Therefore, practitioners should look to the law of their circuit to see if it differs in any way from the Board's approach.

immediately. This does not mean that respondent's counsel should not affirmatively research the issue, but rather that practitioners should make it a practice to hold DHS to this requirement.

How to Benefit?

For further discussion of the helpful potential broader implications of the strict divisibility approach set forth in *Descamps* and adopted in *Chairez-Castrejon*, *see* Descamps Advisory at 14-17 (discussing implications for cases involving charges of sexual abuse of a minor aggravated felony deportability, firearm deportability, child abuse deportability, crime of violence aggravated felony deportability and controlled substance deportability).

The length of time it took the BIA to issue a precedent decision applying *Descamps* means that DHS and EOIR have relied on the discredited 2010 *Lanferman* decision in making many removability determinations. For a possible remedy for someone ordered removed in INA § 240 removal proceedings, see discussion in the Practice Tip below. In addition, it may be possible to raise a collateral challenge to a prior deportation in a reinstatement of removal proceeding under INA § 241 (a)(5) or in a criminal proceeding for illegal reentry under 8 U.S.C. § 1326. *See United States v. Aguilera-Rios*, 2014 WL 2723766, *5 (9th Cir. June 17, 2014), available at http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/17/12-50597.pdf; National Immigration Project/NLG practice advisory on reinstatement. http://nationalimmigrationproject.org/legalresources/practice_advisories/2013-4-29%20Reinstatement%20of%20Removal.pdf.

PRACTICE TIP:

Those practitioners representing noncitizens who have already been found removable based on the discredited divisibility approach of *Matter of Lanferman* from which the Board has now withdrawn, should consider moving to reconsider and/or reopen based on *Matter of Chairez-Castrejon*. It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision). If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Chairez-Castrejon*, i.e., **by August 23, 2014 or by October 22, 201**4, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. For further guidance on challenging prior removal orders that were based on *Lanferman*, contact the National Immigration Project or the Immigrant Defense Project.

3. REALISTIC PROBABILITY STANDARD

In *Chairez-Castrejon*, the Board first referenced the requirement of a "realistic probability" that the convicting jurisdiction would apply its statute to conduct falling outside the charged removal ground during its discussion of whether the respondent's conviction under section 76-10-508.1 was a categorical match with the crime of violence aggravated felony ground. 26 I&N Dec. at 351 ("we employ the 'categorical approach,' which requires us to focus on the minimum

conduct that has a realistic probability of being prosecuted . . ."); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (first enunciating "realistic probability" standard). As previously noted (see section 1 above), the Board concluded that the minimum conduct at issue – reckless conduct – precluded a finding of deportability without any discussion of Utah case law or other evidence that Utah prosecutors actually prosecute cases involving only reckless conduct. The strong implication is that no such finding or showing of actual prosecutions is required when the terms of the statute expressly cover the overbroad conduct.

After determining that the respondent's conviction did not establish removability under the aggravated felony deportation ground, however, the Board then went on to determine whether the conviction established deportability under the firearm offense deportation ground. Here, the Board took a different approach. After discussing the respondent's argument that his conviction could not be categorically deemed a firearm offense because the Utah statute does not "exclude" antique firearms as does the federal firearm definition, the Board stated: "The respondent's argument is unavailing because he has offered no support for his contention that section 76-10-508.1 of the Utah Code is actually used to successfully prosecute individuals who unlawfully discharge 'antique firearms.'" *Id.* at 356.[5]

Why the different approach with respect to the antique firearm issue? Based on the Board's discussion, one possible explanation is that the respondent's argument on this issue was based on the fact that the statute of conviction did not "exclude" antique firearms, as opposed to the different situation that the Board faced with respect to the reckless conduct issue as such conduct was included within the statute under its express terms. Supporting that this was the basis for the different treatment, the Board stated: "The fact that the statute's language does not forbid a broader construction [reaching antique firearms] is not determinative." *Id.* at 358. Presumably, the situation would be different when the statute's language instead *expressly requires* a broader construction. Yet another possible explanation consistent with this understanding is that the Board considered the fact that Utah law does exclude antique firearms from other state law provisions, *see id.* at 358 ("such specific 'antique firearm' exclusions do appear in other Utah statutes"), perhaps creating some doubt for the Board that Utah would in fact prosecute persons for antique firearms under section 76-10-508.1. However, no such doubt should exist in other cases where the legislative body has included express language in a criminal statute specifically covering the conduct at issue in those cases -- e.g., knives expressly included in a definition of "weapon" in addition to firearms, reckless conduct expressly covered in addition to intentional conduct, controlled substances not on the federal schedules expressly referenced in a state drug statute -- thereby demonstrating that the legislature affirmatively decided to cover such conduct with no reason to think that the state would not enforce the law as written.

If the Board in the future were nevertheless to require a showing of actual prosecutions even where the terms of a statute of conviction expressly cover conduct outside a removal ground, such a requirement would conflict with federal court case law. *See, e.g., Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("Duenas–Alvarez does not require this showing when

[5] To align this conclusion with prior Board precedent, the Board "clarified" its prior holding in *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010), to make clear that a noncitizen may make such a showing not only by proving that the statute was so applied in his or her own case, but also by showing that the statute has been so applied to others. *Id.* at 356-357.

the statutory language itself . . . creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."); *Jean-Louis v. Att'y Gen*., 582 F.3d 462, 481 (3d Cir. 2009) (finding no "application of 'legal imagination' to the Pennsylvania simple assault statute" necessary because the "elements . . . are clear, and the ability of the government to prosecute a defendant . . . is not disputed."); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, 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 that the state will apply its statute to conduct that falls outside the generic definition of the crime." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572-73 (6th Cir. 2007) (rejecting application of Duenas-Alvarez because the statute's "clear language . . . expressly and unequivocally" included conduct outside the generic definition's scope). Notably, the Board itself in *Chairez-Castrejon* acknowledged that proper application of the categorical approach -- at least in the context of divisibility analysis, which encompasses or is closely related to overbreadth analysis -- is an area in which it must defer to the federal courts. *See* 26 I&N Dec. at 354 ("Since we are not given deference on this [divisibility analysis] issue, going forward we are also bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under *Descamps*.").

For further discussion of arguments related to government assertions of the realistic probability standard, *see* Moncrieffe Advisory at 13-14.

4. RELIEF ELIGIBILITY BURDEN OF PROOF

Finally, the Board in *Chairez-Castrejon* noted that the respondent applied for cancellation of removal, but that the Immigration Judge pretermitted the application "presumably because he believed the respondent's conviction was for a disqualifying aggravated felony." 26 I&N Dec. at 358. The Board went on to state: "However, the record does not establish that the respondent was convicted of an aggravated felony." *Id*. The Board then remanded "for the Immigration Judge to consider whether the respondent is statutorily eligible for cancellation of removal, and if so, whether he merits a grant of relief in the exercise of discretion." *Id*.

What the Board did and said here is significant because, even though the burden of proof to establish relief eligibility shifts to the noncitizen in the relief eligibility context, *see* INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4), the Board nevertheless remanded to the Immigration Judge for reconsideration of the cancellation application with the observation that the record does not establish an aggravated felony conviction. At a minimum, the Board's treatment of the relief eligibility question indicates that the Board considers the question settled where there is no categorical match and the statute of conviction is not divisible.[6]

For further discussion of arguments related to government assertions of the relief eligibility burden of proof, *see* Moncrieffe Advisory at 7-9.

[6] While the Board when remanding cited 8 CFR § 1240.8(d), the relief eligibility burden of proof regulation, this is understandable given that resolution may still be needed of other relief eligibility questions of a more factual nature, e.g., continuous residence requirement for cancellation. *See* INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2).