Criminal Grounds of Removability and the Categorical Approach

March 22, 2022

Andrew Lyubarsky, NYIFUP Attorney
Laura Wooley, Padilla Attorney

Brooklyn Defenders (BDS)

Agenda

- Reading Notices to Appear
- Convictions and Sentences
- The Categorical Approach
- Foundations of Categorical Analysis
- Divisibility and the Modified Categorical Approach
- The Realistic Probability Test

Brooklyn Defenders (BDS)

Reading some NTAs!

COPY

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: 356517825

File No: [redacted]

DOB: [redacted]

Event No: CPD1608000075

In the Matter of:

Respondent: [redacted] currently residing at:

[redacted]

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

To be calendared and notice provided by EOIR.

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. *(Date)* at To be set. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

T 4044 J NEVIN SDDO

(Signature and Title of Issuing Officer)

Date: October 3, 2016

Newburgh, NY

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

U.S. Department of Homeland Security

Continuation Page for Form I-862

Alien's Name	File Number	Date
[redacted]	[redacted] Event No: CPD1608000075	10/03/2016

THE SERVICE ALLEGES THAT YOU:

1. You are not a citizen or national of the United States;

2. You are a native of Pakistan and a citizen of Pakistan;

3. You were admitted to the United States at New York, NY on or about June 11, 1973 as a Lawful Permanent Resident;

4. You were convicted of the crime of Criminal Possession of a Forged Instrument in the First degree, in violation of Section 170.30 of the New York State Penal Law, pursuant to a judgment entered on or about June 28, 2016 by the County Court, State of New York, County of Rockland, under Case number 21-2016;

5. For the aforementioned offense, you were sentenced to a term of imprisonment of at least one-year;

6. You were convicted of the crime of Criminal Possession of Stolen Property in the Fifth degree, in violation of Section 165.40 of the New York State Penal Law, pursuant to a judgment entered on or about October 30, 1985 by the Criminal Court of the City of New York, County of New York, under Docket number 1N058870;

7. These crimes did not arise out of a single scheme of criminal misconduct.

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(R) of the Act, a law relating to an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year.

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Signature	Title
T 4044 J NEVIN	SDDO

3 of 3 Pages

Form I-831 Continuation Page (Rev. 08/01/07)

Alien's Name	File Number	Date
[redacted]	[redacted] Event No: CIP1711000014	11/14/2016

ALSO KNOWN AS

[redacted]

THE SERVICE ALLEGES THAT YOU:

1. You are not a citizen or national of the United States;

2. You are a native of TRINIDAD AND TOBAGO and a citizen of TRINIDAD AND TOBAGO;

3. You were admitted to the United States at NEW YORK, NY on or about September 26, 1976 as a Lawful Permanent Resident;

4. You were convicted of the crime of Criminal Possession of a Controlled Substance in the seventh degree, in violation of Section 220.03 of the New York State Penal Law pursuant to a judgment entered on or about March 6, 2003 in the District Court of the County of Suffolk under docket number 2001SU034683;

5. For this offense, the controlled substance in question was "crack";

6. You were convicted of the crime of Criminal Possession of a Controlled Substance in the seventh degree, in violation of Section 220.03 of the New York State Penal Law pursuant to a judgment entered on or about November 22, 2002 in the District Court of the County of Suffolk under docket number 2002SU054345;

7. For this offense, the controlled substance in question was "cocaine";

8. You were convicted of the crime of Promoting Prostitution in the fourth degree in violation of Section 230.20 of the New York State Penal Law pursuant to a judgment entered on or about March 6, 2003 in the District Court of the County of Suffolk under docket number 2001SU026488;

9. You were convicted of the crime of Petit Larceny in violation of Section 155.25 of the New York State Penal Law pursuant to a judgment entered on or about August 21, 1990 in the Criminal Court of the City of New York, County of Kings under docket number 90K049176;

10. You were convicted of the crime of Attempted Petit Larceny in violation of Section 110-155.25 of the New York State Penal Law pursuant to a judgment entered on our about March 27, 2003 in the District Court of the County of Suffolk under docket number 2003SU011185;

11. These crimes did not arise out of a single scheme of criminal misconduct.

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances

Signature	Title
B 1093 BANKS	SDDO

Alien's Name	File Number	Date
[redacted]	[redacted] Event No: CIP1711000014	11/14/2016

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.

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Signature	Title
B 1093 BANKS	SDDO

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: 365737193

File No: [redacted]

DOB: [redacted]

Event No: VRK1906001056

In the Matter of:

Respondent: [redacted] currently residing at:

[redacted]

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;

2. You are a native of DOMINICAN REPUBLIC and a citizen of DOMINICAN REPUBLIC;

3. You were admitted to the United States at New York, NY on October 13, 2010 as FX-2, lawful permanent resident.

4. You were, on December 13, 2016, convicted in the Supreme Court of the State of New York, Bronx County, for the offense of New York State Penal Law section 110-265.03 Sub 03, Attempted Criminal Possession of a Weapon 2nd Degree, to wit: a firearm, under case number 03649-2015.

RECEIVED
DEPARTMENT OF JUSTICE
EOIR
IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NY
2019 JUN 20 AM 8:02

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

EOIR, 201 Varick Street, Room 507, New York, NY 10014.

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. *(Date)* at To be set. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

NENAD VUCKOVIC SDDO

(Signature and Title of Issuing Officer)

Date: June 17, 2019 New York, NY

(City and State)

U.S. Department of Homeland Security

Continuation Page for Form I-862

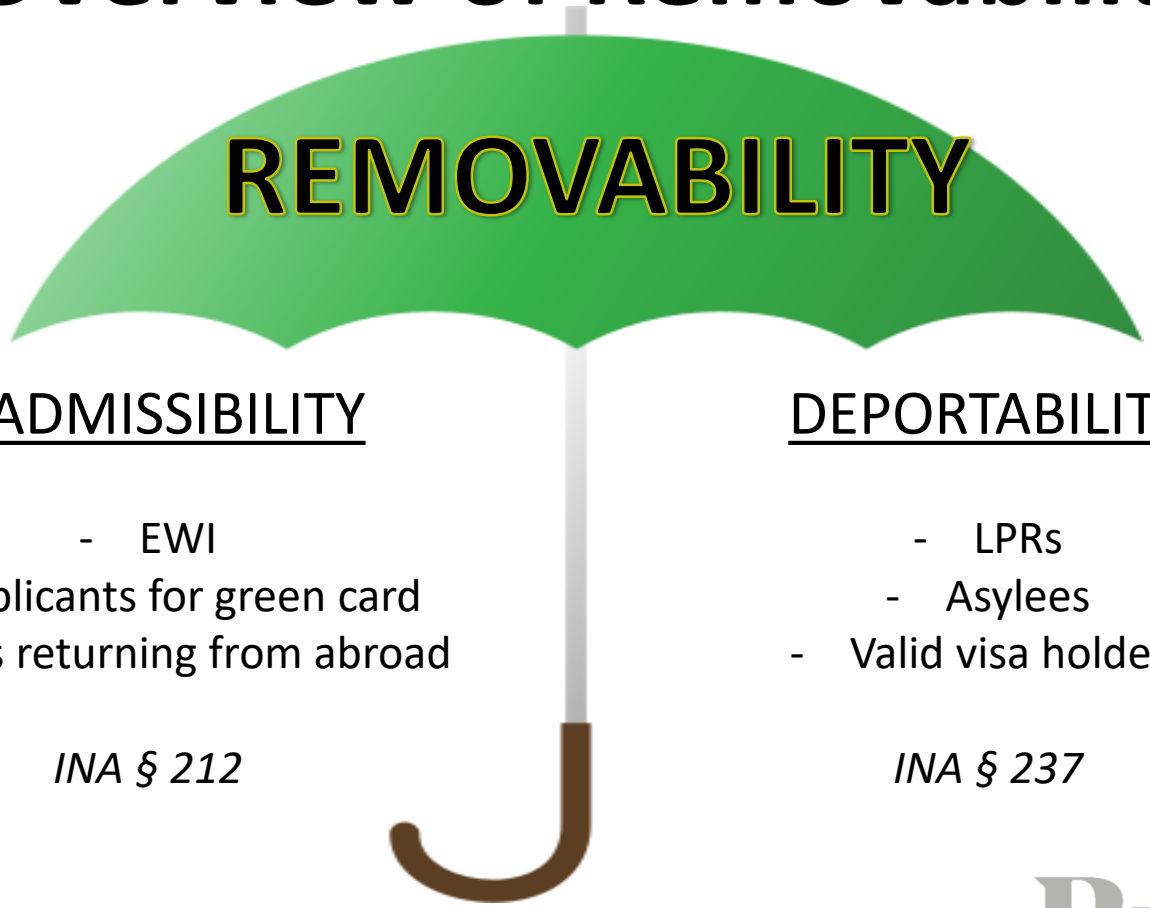
Alien's Name	File Number	Date
[redacted]	[redacted] Event No: VRK1906001056	[redacted]

ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

Section 237(a)(2)(C) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in Section 921(a) of Title 18, United States Code.

Signature	Title
NENAD VUCKOVIC	SDDO

Overview of Removability



INADMISSIBILITY

- EWI
- Applicants for green card
- LPRs returning from abroad

INA § 212

DEPORTABILITY

- LPRs
- Asylees
- Valid visa holders

INA § 237

In practice: it's all relevant for everyone

Brooklyn Defenders (BDS)

Criminal Grounds for Removability

- A conviction can trigger removability under more than one ground.

Inadmissibility triggered by:

- CIMTs
- Controlled substance offenses
- Engaging in prostitution
- Commercialized vice
- Any two offenses + aggregate prison sentence of 5 years or more

Deportability triggered by:

- CIMTs
- Controlled substance offenses
- Aggravated felonies
- Firearm offense
- Crime of domestic violence
- Crime against a child / crime of child abuse
- Violation of a DV protection order

Many grounds of removability are triggered only when there is a "conviction."

(1) Step 0 in the crim-imm analysis -- do you have a conviction at all?
(2) If you do have a conviction – can you get rid of it with post-conviction relief or an appeal?

A "conviction" is defined broadly in INA § 101(a)(48) as:

1. Formal judgment of guilt entered by a court; or
2. If adjudication of guilt has been withheld, where:
   a. A judge or jury has found the [non-citizen] guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and
   b. The judge has ordered some form of punishment, penalty, or restraint on the [non-citizen's] liberty to be imposed.

NOTE: Statute does not clearly state whether the conviction needs to be "final" or whether it counts as final if an appeal is still pending.

What is a “Conviction”?

-- Guilty or *nolo contendere* plea to minor offense with a sentence of no jail time or probation, only diversion, drug treatment or family counseling program?

-- Guilty or *nolo contendere* plea to minor offense with a sentence of conditional discharge (stay out of trouble for a year and your case is dismissed)?

-- Guilty plea to felony charge reduced to misdemeanor or dismissed after successful completion of diversion program?

-- Juvenile court or youthful offender disposition?

-- Conviction with pending post-conviction relief motion based on ineffective assistance of counsel?

-- Conviction vacated on post-conviction relief motion based on ineffective assistance of counsel?

-- Conviction vacated on post-conviction relief motion based on non-citizen’s outstanding equities and efforts at rehabilitation?

BIA on Finality: *Matter of J.M. Acosta*, 27 I. & N. Dec. 420 (BIA 2018)

-- The BIA held that INA § 101(a)(48)(A) was ambiguous as to whether a conviction must be final, but the Board had always held that prior versions of the Act required conviction finality.

-- "A conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived."

-- What about late-filed appeals? If the direct-appeal time has passed, the conviction is presumed final. The presumption can be rebutted with evidence that "an appeal has been filed within the prescribed deadline, including any extensions or permissive filings," and "relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings."

Finality, Continued….

- According to the BIA, what kind of appeals don't count? Those that "do not relate to the underlying merits of the conviction will not be given effect to eliminate the finality of the conviction," for example:
  - Appeals "that relate only to the alien's sentence or that seek to reduce the charges."
  - Appeals "to ameliorate the conviction for rehabilitative purposes, or to alleviate immigration hardships. "
  - "Any other appeals that do not challenge the merits of the conviction."

- Consider the law of your Circuit and state law concerning appeals! The Second Circuit has rejected these extra requirements. Considering NY law and appellate practice, the Court held that meeting the BIA's evidentiary requirements that an appeal was merits-based was "frequently impossible" because of the long delays and timelines in appointing appellate counsel for indigent defendants, among other issues. *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021).
- On the other hand, before *J.M. Acosta*, the Fifth, Seventh, Ninth, and Tenth Circuits had all stated that the INA does not require finality at all. The Tenth Circuit refused to revisit this conclusion after *J.M. Acosta*. *See Solomonov v. Garland*, No. 21-9502, 2021 WL 5895128 (10th Cir. Dec. 14, 2021).

Some grounds of removability do not require a conviction

- **"Admissions"** to CIMTs/CSOs. § 212(a)(2)(C)
  - *But see Matter of K-*
- **"Reason to believe"** the non-citizen engaged in:
  - Drug trafficking. § 212(a)(2)(C)(i) (from a risk-averse POV, this ground will be triggered by a drug sale charges+ *any* conviction, even a Disorderly Conduct)
  - Human trafficking. § 212(a)(2)(H)(i)
  - Money laundering. § 212(a)(2)(I)(i)

- **Violations of DV protection order** § 237(a)(2)(E)(ii)
  - *N.B.* VOPs (Probation) & VOCDs (Conditional Discharge) can trigger immigration consequences even where original plea was safe

- **Drug abuser/addict** § 237(a)(2)(B)(ii)

Sentence Defined – INA § 101(a)(48)(B)

- "a term of imprisonment or sentence* … include[s] any period of incarceration or confinement **ordered by a court"** regardless of suspension of imposition or execution.
  - Beware of "time served." How long has the client actually been in?
  - Suspended sentences are still sentences.

- Where there is an indeterminate sentence, the sentence is the maximum ordered

Brooklyn Defenders (BDS)

1. What is the “categorical approach”?

Most (but not all) criminal grounds of removability are premised on CONVICTIONS, not CONDUCT.

- Categorical - “Any alien who is convicted of an aggravated felony at any time after admission is deportable.”
- Fact based - “Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted…is deportable.”

We need a way to determine what the client was convicted of, not what they actually did.

Brooklyn Defenders (BDS)

Strict categorical analysis

Three Steps:

1. What is the federal immigration category being charged or analyzed (the "generic" removal ground)?
2. What is the **minimum conduct required** under the **elements** of the state or federal statute of conviction?
3. Is there a complete (i.e., "categorical") match?

- **YES** - the conviction triggers the removal ground or bar.
- **NO** – the conviction either does not trigger the bar, or more analysis may be needed (more to come…)

Brooklyn Defenders (BDS)

As SCOTUS Says:

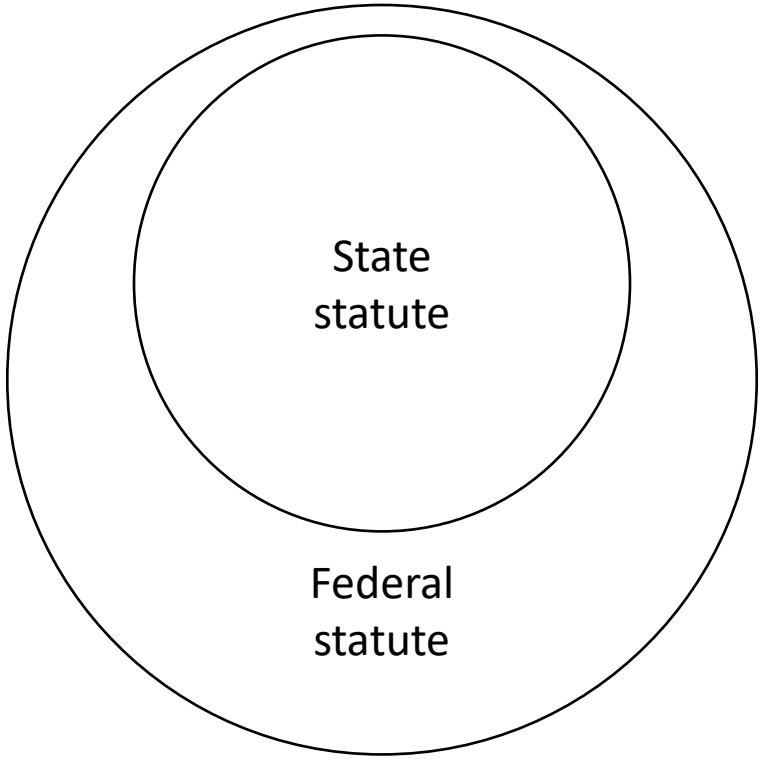
To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: **They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.**

Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)

Brooklyn Defenders (BDS)

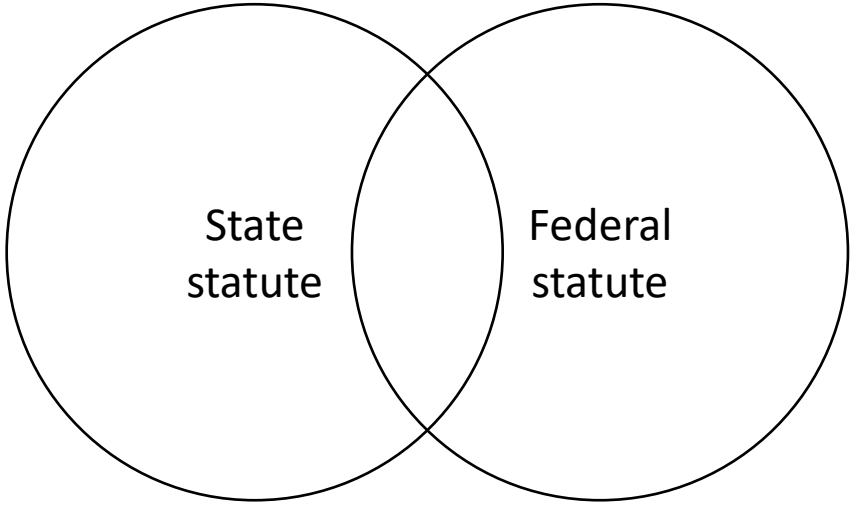
Categorical match

It is not possible to be convicted of the elements of the criminal statute without being also being found guilty of conduct that triggers the immigration penalty.



Not a categorical match

The criminal statute defines the offense more broadly than the immigration definition at issue, the conviction will not trigger the immigration penalty…
EVEN IF the person "actually committed" conduct that seems to fall under the removal ground.



What is the "generic ground" of removal?

Sometimes defined in the INA/Federal law

- INA 237(a)(2)(B)(i): Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (**as defined in *section 802 of title 21***), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.
- 21 USC 802 - **The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.**

Sometimes defined through case law

- "A theft offense is a crime involving moral turpitude if it involves **a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded**." *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016).

2. What is the “minimum conduct”?

- To find the area of “mismatch,” find the conduct in the state statute that falls outside the immigration ground – the “minimum conduct” you can commit and still get convicted of the crime – the “least of the acts” criminalized. *Moncrieffe*, 569 U.S. at 191.

Brooklyn Defenders (BDS)

Small Mismatch = No Match

- A crime counts as "burglary" under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA "burglary"—even if the defendant's actual conduct (*i.e.,* the facts of the crime) fits within the generic offense's boundaries.

  Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)

- Generic burglary required breaking and entering into a building—Iowa statute covered breaking and entering into vehicles. Overbroad.

What's the least you can do?

Brooklyn Defenders (BDS)

The Match Game

Is there a categorical match?

- Generic offense
  - Deportable firearms offense = “owning, carrying, or selling a firearm or destructive device as defined in 18 USC 921(a).”

- Statutes
  - Statute A: Carrying a firearm as defined in 18 USC 921(a)
  - Statute B: Carrying a weapon
  - Statute C: Riding in a car with a firearm as defined in 18 USC 921(a)
  - Statute D: Carrying a firearm as defined in 18 USC 921(a) while under the influence of alcohol.

Burden of proof

Who has to prove that there is/is not a match?

- INA 212 – we have the burden
- INA 237 – DHS has the burden
- Eligibility for relief – we have the burden

What if the exact statute of conviction is inconclusive?

- That is NOT enough to satisfy respondent's burden ☹ *Pereida v. Wilkinson,* 141 S. Ct. 754 (2021).

Brooklyn Defenders (BDS)

3. The Modified Categorical Approach

- When a state statute defines only one crime, and that crime is broader than the generic ground, the categorical analysis ends: the immigration consequence is not triggered.
- But what about statutes that seem to define more than one crime?

It shall be a crime to possess:

a. A gravity knife, or

b. A pistol, or

c. A chuka star

Brooklyn Defenders (BDS)

Divisibility

- A statute that defines more than one crime is “divisible”, and the factfinder may apply the “modified categorical approach.”
- Under the modified categorical approach, the factfinder may consider a limited set of official court documents for the limited purpose of determining which of the several crimes defined under the state law was the basis of conviction.
- Once you figure out which crime the individual was convicted of, you go right back to the strict categorical approach, you still can’t find what the person “actually did.”

Brooklyn Defenders (BDS)

When is a statute divisible?

Divisible	Indivisible
A divisible statute lists **elements** in the alternative or disjunctive, so it lists multiple offenses.	An indivisible statute lists **means** of commission, not different crimes.
• Elements must be elected by the prosecutor or specified from a list of alternatives for an indictment/charging instrument to be sufficiently definite. *Descamps*, 133 S. Ct. at 2290. • Something the jury must be instructed they have to find beyond a reasonable doubt to convict. *Id*. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970) • Something the jury must find unanimously. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356 (1972)	We cannot use means of commission to render a statute divisible because every crime contains: "an infinite number of sub-crimes corresponding to all the possible ways an individual can commit it. (Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?)" *Descamps*, 570 U.S. at 273.

Is this statute divisible as to whether it is a “crime involving moral turpitude”?

New York Penal Law 120.00 **Assault in the third degree.**

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

Brooklyn Defenders (BDS)

Divisibility in Controlled Substance Statutes

Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017)	**Guillen v. U.S. Attorney General, United States Court of Appeals, Eleventh Circuit. 910 F.3d 1174 (11th Cir. 2018)**
NYPL § 220.31: A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance. Criminal sale of a controlled substance in the fifth degree is a class D felony.	FLS § 893.13(6)(a): A person may not be in actual or constructive possession of a controlled substance [unless obtained from a doctor]. A person who violates this provision commits a felony of the third degree, punishable as provided in [statute].
NY controlled substance schedule includes chorionic gonadotropin (hCG)	FL controlled substance schedule includes Thenylfentanyl, 1,4–butanediol, and trenbolone acetate.

	Harbin	Gullien
Text of the statute	Four elements: the defendant must (1) knowingly and (2) unlawfully (3) sell (4) a controlled substance. The statutory scheme goes on to define a "controlled substance" as any substance listed in schedule I, II, III, IV or V of [the NY law]	The plain text doesn't specify whether the drug is an element or means.
State court Decisions	Although a prosecutor must identify the substance in the charging document, this is to protect an individual's fifth and 6th amendment rights.	State courts have found that an individual who possessed both cannabis and a hallucinogen could be charged with two separate crimes. State courts have also declined to issue two separate sentences for possession of marijuana and hashish as they are the same substance.
Jury instructions	Mathis strongly suggested that jury instructions should only be consulted when there is uncertainty, and even then, only jury instructions from case on record should be allowed. This conviction was the result of a guilty plea.	Standard jury instructions: To prove the crime of Possession of a Controlled Substance, the State must prove the following two elements beyond a reasonable doubt: 1. (Defendant) possessed a substance. 2. The substance was (specific substance).
Result	Indivisible	Divisible

Matter of C. Morgan, 28 I&N Dec. 508 (BIA 2022)

March 18, 2022

- Valentine convicted of attempted larceny in the 3rd degree and sentenced to 1 year in prison. Charged with an aggravated felony for a theft offense… for which the term of imprisonment [is] at least one year.
  - **Generic aggravated felony theft offense** – a "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent."
  - **Conn. Gen. Stat. 53a-49/53a-124** - A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to: (1) Embezzlement. . . . (17) Theft of motor fuel. . . .

Matter of C. Morgan, 28 I&N Dec. 508 (BIA 2022)

- **Text of the Statute**: "Section 53a-119 defines larceny in the alternative by listing more than a dozen discrete types of conduct, but the list is plainly 'drafted to offer "illustrative examples"' and not to define alternative elements."
  - Section 53a-119's list is preceded by an introductory clause stating that "[l]arceny includes, but is not limited to"

STATUTE IS OVERBOARD AND INDIVISIBLE

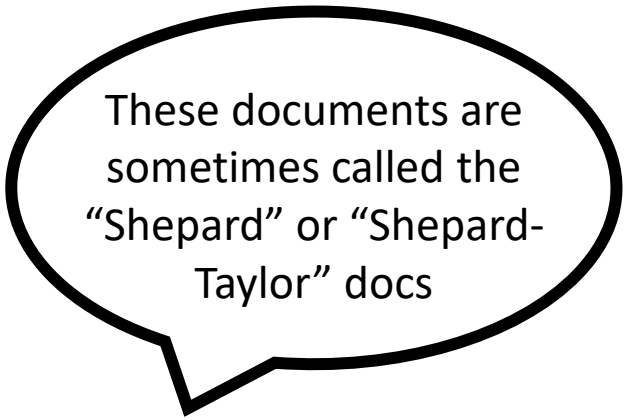
Brooklyn Defenders (BDS)

The Record of Conviction

What happens when you need to look at case documents to determine which offense/subsection your client was convicted of?

- The ROC is used ONLY for the limited purpose of identifying which offense the client was convicted of
  - "The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction…" *Descamps v. United State*s, 136 S. Ct. at 2281, 2285, see also Dickson v. Ashcroft, 347 F.3d 44 (2d Cir. 2003)
- Consult the ROC to determine what was "actually and necessarily pleaded to" *not* dismissed allegations, see *James v. Mukasey*, 511 F.3d 102, "Non-element facts" - *Descamps*)

The ROC includes



- The statutory definition
- Charging document
- Written plea agreement
- Transcript of plea colloquy
- Any explicit factual finding by the trial judge to which the defendant assented (i.e., documents stipulated to as factual basis for plea, certain notations on abstract or minute order), *Shepard v. United States*, 544 U.S. 13, 16 (2005)
- Jury instructions in that case, see *Taylor v. United States*, 495 U.S. 575, 602 (U.S. 1990)

Brooklyn Defenders (BDS)

Not in the ROC

- Statements by the prosecutor, see *Matter of Cassissi*, 120 I&N Dec. 136 (BIA 1963)
- Police reports, probation or "pre-sentence" reports, see *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003)
- Statements by the noncitizen or witnesses outside of the plea (e.g., statements to police, immigration authorities, or the immigration judge). *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)
- Information from a criminal charge absent adequate evidence that the defendant pled to the charge as written
- Information from a dropped charge or Information from a co-defendant's case, *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003), *James v. Mukasey*

Ambiguity in the ROC

- What if the exact statute of conviction is inconclusive?
  - SCOTUS recently ruled that ambiguity in the ROC is not enough to satisfy the Respondent's burden of proof for eligibility for relief. *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)
  - The opinion also refers to the "broader array" of documents listed in 8 U.S.C. § 1229a(c)(3)(B), INA § 240(c)(3)(B), ("Proof of conviction") as documents that a respondent might offer to overcome any unavailability or incompleteness of the Shepard "'limited' set of documents. So, you may need to fight against arguments about looking beyond the ROC (more reason to argue not divisible).

Bottom line

We want our clients to plead guilty to a statute that is:

- Overbroad and indivisible, **OR;**
- Overbroad, divisible, and the modified categorical approach will show that the client pleaded guilty to the non-removable portion of the statue, **OR;**
- Overbroad, divisible, and the modified categorical approach will not be clear to which portion of the statute the client pleaded guilty, but only if the burden is on the government (*Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)).

Brooklyn Defenders (BDS)

Realistic Probability

- In determining what the minimum conduct under a given criminal law is, one
  - May not use pure "legal imagination" to conjure up scenarios – can't just be crazy law school hypotheticals.
  - Must show a "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."

Gonzales v. Duenas-Alvarez, 549 US 183, 193 (2007)

To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense.

Moncrieffe v. Holder, 569 U.S. 184, 206 (2013)

And that's it... SCOTUS has only mentioned realistic probability twice, kind of in passing.

How do we use the "realistic probability" test?

STEP ONE THROUGH TEN: Avoid the "realistic probability" test entirely by relying on statutory language!

- Most circuits – specifically the 1st, 2nd, 3rd, 4th, 8th, 9th, 10th, and 11th Circuits have precedent holding that, where the text of the state statute is broader than the generic federal definition, the test does not apply.
- In other words, in these Circuit, "realistic probability" **only** applies where there is initially a **match** between the state statute and the federal definition.
- This is very useful for those grounds of removability with a precise federal analogue – less so for CIMTs.

- Note: The BIA—and the 5th and 6th Circuits—disagree. *See, e.g., Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019) (CSOs); *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 357 (BIA 2014) (firearms); *Matter of Ferreira*, 26 I&N Dec. 415, 420 (BIA 2014) (CSOs).

Controlled Substance Offenses

- **Swaby v. Yates, 847 F.3d 62 (1st Cir. 2017)** (Rhode Island – thenylfentanyl)
- **Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017)** (New York – chorionic gonadotrophin).
- **Hylton v. Sessions, 897 F.3d 57, 59 (2d Cir. 2018)**
  - NY definition of "sale" had minimum conduct of nonremunerative transfers of 25 grams of marijuana. Federal definition of drug trafficking aggravated felony required more than ounce of marijuana. No need to prove realistic probability of prosecution because facially overbroad.

Brooklyn Defenders (BDS)

Firearms Offenses

- Connecticut (*Williams v. Barr*, 960 F.3d 68 (2d Cir. 2020) and New York (*Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020)) offenses involving firearms are overbroad on their face because the state statutes criminalize loaded antique firearms and the federal generic definition didn't.
- Virginia willful discharging a firearm – same holding. *See Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020).
- *But see Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248 (11th Cir. 2021) – holding Florida firearms statute not to be overbroad (looks at both statutory language *and* a realistic probability analysis).

So When DOES Realistic Probability apply?

- "The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."
- The realistic probability test applies "as a backstop when a statute has indeterminate reach, and where minimum conduct analysis invites improbable hypotheticals."
- "There is no such requirement, however, 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."

Hylton v. Sessions, 897 F.3d 57, 63 (2d Cir. 2018)

Brooklyn Defenders (BDS)

What do we need to prove if we <u>are</u> in realistic probability territory?

- *Moncrieffe* referred to whether a State "actually prosecutes" the relevant offense.
    - So are prosecutions, successful or not, enough? Charging documents?
    - What about trial court decisions about facial sufficiency?
    - Do you need an appellate or state supreme court to opine?
- BIA says: "We are not persuaded that a realistic probability of a successful prosecution may be shown by looking only to a charging document that did not necessarily result in a conviction." *Matter of Mendoza Osorio*, 26 I. & N. Dec.703, 707 n.4 (BIA 2016).

Brooklyn Defenders (BDS)

What do we know is not enough?

- Can't just point to a purely theoretical application.
- ***United States v. Hill*, 890 F.3d 51 (2d Cir. 2018) –** D argued that Hobbs Act robbery was not categorically a crime of violence (which requires use, attempt, or threat of force) because a perpetrator could rob a victim by threatening to use non-forceful means such as "throwing pain on his house, spray painting his car, or pouring chocolate syrup on his passport."
- ***Pierre v. Attorney General*, 879 F.3d 1241 (11th Cir. 2018)** – Petitioner argued that Florida statute prohibiting "knowingly causing a child to come into contact with blood, seminal fluid, or urine or feces by throwing, tossing, projecting, or expelling such fluid or material," could be violated by urinating on a jellyfish sting.

Brooklyn Defenders (BDS)

What do we know <u>is</u> enough?

- An appellate case specifically applying the law to non-generic conduct should be enough.
- ***Lauture v. Attorney General*** (11th Cir.) **–** BIA says burglary of an unoccupied building is a CIMT if the building is at least intermittently occupied. Petitioner pointed to a Florida appellate case upholding a burglary prosecution of an unsold, never-used prefabricated mobile home on a seller's lot.
- ***But see United States v. Castillo-Rivera*****, 853 F.3d 218, 226 (5th Cir. 2017)** – Non-citizen argued that there was a realistic probability that the TX felon-in-possession statute was prosecuted more broadly than the federal equivalent by pointing to a state case involving prosecution for an air-gun. The Fifth Circuit held that that state court case "did not hold as a matter of law" that the Texas statute covered air guns.
- What happens if we don't have an appellate case?

Matthews v. Barr, 927 F.3d 606 (2d Cir. 2019)

Generic Offense Definition	State Offense Definition
"Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable." INA 237(a)(E)(i). "Any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being . . . At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals." *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (B.I.A. 2008). Is not limited to "those [offenses] requiring proof of actual harm or injury to a child," but includes those in which the conduct created "a reasonable probability that the child's life or health will be endangered." *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010).	"A person is guilty of endangering the welfare of a child when: He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health." NYPL 260.10(1). Criminal liability for endangering the welfare of a child is imposed when a defendant engages in conduct knowing it will present a " 'likelihood' of harm to a child (i.e., with an awareness of the potential for harm). In short, "a defendant must simply be *aware* that the conduct may likely result in harm to a child." The People also must establish that the harm was likely to occur, and not merely possible. *People v. Hitchcock,* 98 N.Y.2d 586 (2002). IS THERE A MATCH?

Matthews v. Barr, 927 F.3d 606 (2d Cir. 2019) – The Second Circuit Addresses *Mendoza-Osorio*

- The Second Circuit found that there was a categorical match, so the petitioner actually tried to use the realistic probability test to prove that the minimum conduct was broader.
  - IDP filed an amicus brief with charging documents showing NYPL 260.10(1) charged very broadly. These included:
    - (1) driving with a suspended license while a minor child is in the car;
    - (2) "yell[ing] and swing[ing] a backpack" in a store and knocking objects off shelves, thereby injuring a child;
    - (3) shoplifting while accompanied by children
- IDP also presented numerous trial court decisions finding "home alone" cases to be facially sufficient, including leaving a 4-year-old at home unattended for 15 minutes.
- Lastly, IDP presented statistics that over 99% of convictions under NYPL 260.10(1) were by guilty plea, and very few involved jail time.
- Was this enough to show a realistic probability???

Brooklyn Defenders (BDS)

Matthews v. Barr, Continued

* NO. The majority agreed with *Mendoza Osorio* that there was "**no New York appellate decision"** that has upheld a conviction that sweeps more broadly than the BIA definition.

* Charging documents and arrest reports, on their own, are not reliable in the absence of a conviction demonstrating a successful prosecution. Seems to at a minimum require proof of "specific evidence linking charging documents to guilty pleas."

* **DISSENT:** Doesn't make sense—for a minor misdemeanor offense—to require that someone be convicted at trial and have that conviction upheld on appellate review. "To import into the Court's "realistic probability" test a requirement that the state appellate courts describe the farthest contours of the state law's application strikes me as both unworkable and inappropriate, particularly in the context of a misdemeanor crime, and where (as here) courts are unlikely ever to have the opportunity to do so. An approach that by definition focuses on only the 0.8% of convictions that are secured following a jury trial (and the even smaller percentage that are subsequently upheld on appellate review) will necessarily fail to grasp the elements of the offense in practice.""

Brooklyn (BDS) Defenders

Realistic Probability Cases Using Other Documents from Across the Circuits

***Vetcher v. Barr*, 953 F.3d 361, 367 (5th Cir. 2020) -** Petitioner failed to demonstrate realistic probability where he submitted, inter alia, "anonymous state arrest records" and the state prosecution's brief in a pending appellate case.

***Martinez v. Sessions*, 892 F.3d 655, 662 (4th Cir. 2018)** – In analyzing whether Maryland theft statute was a CIMT, taking into account charging documents showing a defendant was prosecuted for theft "after he borrowed a piece of construction equipment overnight and returned it with no damage other than scratches consistent with normal wear and tear," which would be *de minimis*, temporary takings. Dissent disagrees and says this is a "theoretical possibility" of prosecution.

Law is unsettled, but if published cases not available, can try to present:

-- Charging documents, especially if linked to pleas (need good relations with PD office!)
-- Arrest reports and police docs
-- Attorney declarations
-- News reports?

Brooklyn Defenders (BDS)

Removal Grounds and Bars that are NOT Categorical

- Aspects of certain aggravated felony grounds, e.g.
  - 101(a)(43)(M)(i) [loss amt for fraud or deceit crimes]. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009);
  - *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016) (bail jumping AFs)

Brooklyn Defenders (BDS)

Limits on the Categorical Approach

- "Single scheme" exception to 2 CIMT ground. *Matter of Islam,* 25 I&N Dec. 637 (BIA 2011)
- 30g personal use exception for cannabis. *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012)
- Domestic nature of CODV offense: *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016)
- Particularly Serious Crimes, *Matter of Frentescu*
- Any non-conviction based removal or inadmissibility ground, i.e., Reason to Believe Drug Trafficker

Brooklyn Defenders (BDS)

Closing Exercise

Is NYPL 265.03(3) a firearm offense?

Brooklyn Defenders (BDS)

Step 1: What is the generic removal ground?

INA 237(a)(2)(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

Definitional provision under 18 USC 921(3)

The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. **Such term does not include an antique firearm.**

Step 2: What is the minimum conduct of 265.03 (3)?

A person is guilty of criminal possession of a weapon in the second degree when…(3) such person possesses any loaded firearm. …

265.00, definitional provision

- 3. "**Firearm**" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. **Firearm does not include an antique firearm**.
- 14. "**Antique firearm**" means: Any **unloaded** muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

Is the statute overbroad?

- Yes! New York criminalizes possession/sale of a loaded antique firearm, and the federal statute does not
- Is realistic probability required? No!
  - Even though you have to wade through the definitions rather than the statute specifically stating that loaded antique firearms are covered, still clear “on the face” of the statute

Brooklyn Defenders (BDS)

Individual Case Consultations for SAFE & NYIFUP

- safecitiesconsult@bds.org

- nyifupconsult@bds.org

Brooklyn Defenders (BDS)