Immigration and Crimes:
What Have We Learned from the Last Term of the U.S. Supreme Court

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I. Introduction

It is not an exaggeration to say that the last term of the U.S. Supreme Court was historic from the Immigration Law perspective in several different aspects. It addressed many important issues, ranging from decisions affecting the rights of the same-sex couples to marry and dismissal of the federal Defense of Marriage Act (DOMA), in *United States v. Windsor* (No. 12–307) and *Hollingsworth v. Perry* (No. 12–144); to dismissing Arizona law that required voter-registration officials to reject any application that was not accompanied by documentary evidence of citizenship, in *Arizona v. Inter Tribal Council of Arizona, Inc.* (No. 12-71). These decisions are important and will play a major role in changing immigration law landscape for years to come.

However, with this said, the present article will concentrate on three other cases that came down from the U.S. Supreme Court last year, that specifically affect immigrants who are facing removal from the United States due to criminal conviction(s) on their records. Decisions that might provide some ray of hope for those aliens who might not have had any possibility of relief prior to opinions handed down by the Supreme Court Justices during their last term: *Descamps v. United States* (No. 11-9540); *Moncrieffe v. Holder* (11-702); and *Chaidez v. United States* (11-820).

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II. *Descamps* and *Moncrieffe*: Categorical Approach is Here to Stay!

Generally speaking, a noncitizen is subject to negative immigration consequences, which include removal, based on a criminal conviction when the conviction categorically fits within one of the criminal grounds for removal.

With this as a backdrop, the SCOTUS decided two landmark cases during the October 2012 Term that took up and explained this principle in *Moncrieffe v. Holder*, No. 11-702, 569 U.S. ___, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013), 133 S. Ct. 1678, 569 US __, 185 L. Ed. 2d 727 (in an opinion delivered by Justice Sotomayor), and; *Descamps* v. United States (No. 11-9540) 570 US __, 186 L. Ed. 2d 438 (June 20 2013); 133 S. Ct. 2276 (opinion by Justice Kagan).

In *Moncrieffe,* the Supreme Court restated the traditional categorical approach for determining whether a conviction falls within a removal classification. Here the Court held that a conviction for marijuana possession with intent to distribute may not be deemed a drug trafficking aggravated felony for removability purposes when the pertinent statute covers some conduct falling outside the aggravated felony drug trafficking definition at issue. The conduct in this case was social sharing of marijuana, an alternative part of the same criminal statute.

In doing so, the Court specifically rejected the Government's contention that "any marijuana distribution conviction is "presumptively" a felony," mainly because of its belief that the felony provision serves as the default position because "...in practice, that is how federal criminal prosecutions for marijuana distribution operate." *Moncrieffe,* at 1688. The Court categorically stated that if an offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not to be considered an aggravated felony under the INA.

By doing this, the Court undermined the retreats from the categorical approach as previously and restated the established by beginning its analysis in with the following:

> When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. See, e.g., Nijhawan v. Holder, 557 U.S. 29, 33-38, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185-187, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. Id., at 186, 127 S.Ct. 815 (citing Taylor v. United States, 495 U.S. 575, 599-600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "`necessarily' involved... facts equating to [the] generic [federal offense]." Shepard v. United States, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion). Whether the noncitizen's actual conduct involved such facts "is quite irrelevant." United States ex rel. Guarino v. Uhl, 107 F.2d 399, 400 (C.A.2 1939) (L. Hand, J.).

Under the categorical approach, the Court must compare the elements of the criminal statute of conviction to the generic definition and decide whether the conduct proscribed fits within the alleged criminal removal classification. The SCOTUS in *Moncrieffe* resoundingly stated that all of the elements must fit within the removal classification in the specific case of a noncitizen's conviction for a marijuana distribution, if the offense fails to establish that it involved either remuneration or more than a small amount of marijuana.

Then along came *Descamps*. In *Descamps. v. United States*, No. 11-9540, 570 U.S. ___ (June 2013), 133 S.Ct. 2276 (2013) the SCOTUS answers the question of whether sentencing courts may also consult additional documents when a defendant was convicted under an "indivisible" statute — i.e., one not containing alternative elements — that criminalize a broader swath of conduct than the relevant generic offense. The Court holds that in the negative, stating that:

> Because that result would contravene our prior decisions and the principles underlying them, we hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.

In *Descamps v. United States,* it held that the modified categorical approach can be used only when a statute is divisible. The Court specifically stated:

> Descamps may (or may not) have broken and entered, and so committed generic burglary. But § 459 — the crime of which he was convicted — does not require the fact finder (whether jury or judge) to make that determination. Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. And that decides this case in Descamps favor; the District Court should not have enhanced his sentence under ACCA. That court and the Ninth Circuit erred in invoking the modified categorical approach to look behind Descamps conviction in search of record evidence that he actually committed the generic offense. 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. Accordingly, we reverse the judgment of the Court of Appeals. [Emphasis added]

- *Descamps*, 133 S.Ct. 2276, 2293.

How does *Descamps* affect immigration cases? The court restated that Congress intended the sentencing court to look only to the fact of the conviction falling under a certain category and not to the underlying facts of the conviction. Op. at 12 (citing *Taylor*, 495 U.S. at 600). As such, the court found the 9th Circuit violated the statutory requirement of a conviction by applying the modified categorical approach. Because the categorical approach in immigration also relates to removal grounds and bars to forms of relief that require respondent to have been convicted of specific offenses, the use of the categorical approach should also be limited in the immigration context.

Nonetheless, in *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), the BIA found that the modified categorical approach can be applied to almost anything because the categorical approach itself need not be applied with the same rigor in the immigration

context as in the criminal arena. Id, at 728. It appears that the BIA somehow reasoned that the BIA could order someone deported based on facts about a prior conviction that were never proven to a jury, or not required under the conviction statute. There the BIA stated that it would apply a modified categorical approach to all statutes of conviction regardless of their structure as long as they contain an element or elements that could be satisfied either by removable or non removable conduct. Id. at 727. This goes against the rule of *Descamps*, because it allows a modified categorical analysis in situations where the statute defines only one crime, even in situations where the removable conduct is enough but not necessary for a conviction. This argument is a mistake. The term conviction in the INA must be given a uniform definition in both immigration and the criminal context. The Supreme Court has already found that conviction and convicted in the INA is not an exception to the rule of interpretation. In *Leocal*, the court found that because the "crime of violence" aggravated felony definition it was interpreting under the categorical approach was incorporated verbatim from criminal law, it was required to give the term the same construction in both contexts (and apply the same interpretive tools in that instance: the criminal rule of lenity) and stated that "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 notwithstanding the lack of Sixth Amendment concerns under certain sections of Title II.

Moreover, *Moncrieffe* has applied a divisibility rule inconsistent with *Lanferman* in the immigration context as it forecloses any debate over whether a more flexible approach to divisibility analysis should apply to the INA, because in that case the Court applied the modified categorical approach narrowly and cannot be reconciled with *Lanferman*. In *Moncrieffe,* and consistent with the rule of *Descamps,* the Court described the modified categorical approach as applying to statutes containing several crimes, each described separately. *Moncrieffe,* at 1684.

Also, there are court cases supporting *Descamps'* applicability to immigration cases and supporting that *Lanferman* has been limited. For instance, in *Campbell v.*

Holder, 698 F.3d 29, 33–35 (1st Cir. 2012), the First Circuit expressly disapproved the BIA's *Lanferman* rule in reliance on the Supreme Court's ACCA jurisprudence. In *Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc), the Ninth Circuit applied its (mistaken) criminal divisibility approach from *Aguila-Montes de Oca* in an immigration case, so its reversal should carry over as well. Other courts have held more broadly that the immigration and criminal categorical approaches are equivalent. See, e.g., *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 478–80 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); cf. *Perez- Gonzalez v. Holder*, 667 F.3d 622, 625 (5th Cir. 2012) (rejecting without comment dissent's argument that categorical approach should apply with less rigor in immigration cases).

In addition, the *Descamps* court found that the 6th amendment concerns are only one of the many rationales the court gave for requiring categorical analysis of prior convictions under the ACCA. Op. at 12. The Supreme Court first found that the approach was required under ACCA 10 years before the Court recognized that judicial fact finding at sentencing violated the 6th amendment. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Even if we could apply the categorical approach in a different way in immigration proceedings because there would be no 6th amendment concerns, neither *Descamps* nor cases before it justify doing so. All rationales then and now advance for a narrow application of the modified categorical approach in immigration proceedings.
Descamps says that the ACCA requires a "conviction." Slip op. 12. It does not say facts. This reasoning is fully applicable to the INA as the court found in *Moncrieffe* that when the INA asks what the noncitizen was convicted of, not what he did, limiting the inquiry accordingly. *Moncrieffe*, 133 S.Ct. at 1690.

Finally the *Descamps* court focused on the difficulties and inequities that result from improper use of the modified categorical approach to examine alleged facts that were not proven in the criminal case. These would include "expending resources of courts and prosecutors in relitigating past criminal conduct; consulting inherently unreliable documents regarding issues that the parties had no incentives to dispute, and depriving defendants of negotiated pleas by treating them in later proceedings as though

they had been convicted of something other than the actual offense to which they pleaded guilty. Op. at 15-16.

III. *Chaidez*: Is *Padilla v. Kentucky* Really Not Retroactive?

When the U.S. Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010), where Justices expressly found that the Sixth Amendment of the U.S. Constitution imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea; it seems to have opened a "Pandora's Box" of *habeas* and *coram nobis* filings throughout the Nation's Federal and State Courts seeking collateral attacks on convictions of aliens who were now facing removal from the United States, as a result of such convictions.

In many cases aliens claimed, often correctly, that their criminal attorneys either never told them of potential immigration consequences of their pleas or that they never even bothered to ask if the client was an immigrant at all and just assumed that there will be no other penalties, following a quick and easy plea-bargain before a Criminal Court.

The main argument that was advanced by the attorneys representing Federal or State Governments against mass writ filings by the aliens in criminal courts, was based on their legal reasoning that the ruling in *Padilla* announced a "new" rule. Therefore, it should not apply retroactively, i.e., no *Padilla* based *habeas* petition should be granted in cases where the criminal conviction was final before the ruling in *Padilla* was handed down by the U.S. Supreme Court on March 31, 2010.

The main precedent cited by the Government attorneys in support of their argument was a decision in *Teague v. Lane*, 489 U.S. 288 (1989), the case that established analysis of the retroactivity framework. Specifically, in *Teague* the Supreme Court held that new constitutional rules of criminal procedure generally are inapplicable to convictions that become final before the rule was announced. *Id.*

It was this issue that eventually made it all the way to the U.S. Supreme Court from the 7th Circuit, in *Chaidez v. United States* (11-820). At the time of the decision three other Circuit Courts, besides the 7th, held that indeed *Padilla* announced a "new" rule and therefore is not retroactive: *United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011); *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011); and *United States v. Amer*, 681 F. 3d 211 (5th Cir. 2012).

Unfortunately, the U.S. Supreme Court in *Chaidez* agreed with the 7th Circuit and ruled that *Padilla* does not apply retroactively to cases already final on direct review. Justice Kagan, who delivered the opinion of the Court, reasoned that *Padilla* "did something more" than just applied standard set in *Strickland* v. *Washington*, 466 U. S. 668 (1984), as it relates to claims of ineffective assistance of counsel, because it asked first *whether* the *Strickland* test applied, before asking *how* it applied.

In other words, because *Padilla* for the first time found that wrongful advice about removal is within the scope of the Sixth Amendment right to counsel, despite the fact that removal is a "collateral consequence" of a conviction, rather than a component of the criminal sentence, it indeed announced a new rule and therefore is not retroactive! However, despite this decision there is still some slim ray of hope for those immigrants wishing to contest their convictions that took place prior to March 31, 2010, i.e. the day the decision in *Padilla* was handed down. Notwithstanding the U.S. Supreme Court's holding in *Chaidez*, State Courts are still able to accord a retroactive effect to the decision in *Padilla*, as a matter of state habeas law.

Specifically, in the *Danforth v. Minnesota*, 552 U.S. 264 (2008), the U.S. Supreme Court held that the decision in *Teague* does not constrain "the authority of state courts to give *broader* effect to *new* rules of criminal procedure than is required by that opinion." *Id.* (emphasis added).

Some State Courts have already utilized this exception found in *Danforth* on the issue of retroactivity of *Padilla*, and arrived at a different conclusion than the U.S. Supreme Court in *Chaidez*; see decisions from Maryland and Massachusetts in *Denisyuk v. State*, 30 A.3d 914, 924-925 (Md. 2011); and *Commonwealth v. Sylvan*, SJC-11400 (Mass. 2013), respectively. Unfortunately, Texas chose to follow the *Teague* analysis. *See Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. App.—El Paso 2011), joining about 30 other States.

It also should be noted that other States recognized the right of the defendant to proper advice as it relates to immigration consequences long before *Padilla* was decided. Therefore, collateral attacks on those convictions will be successful even pre-*Padilla*, *Chaidez* notwithstanding; see decisions from Colorado, New Mexico, and California in *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *State v. Paredez*, 136 N.M. 533 (2004); and *People v. Soriano*, 194 Cal.App.3d 1470 (1987).

Furthermore, the decision in *Danforth* also found that *Teague* analysis must be followed by Federal Courts considering *habeas* type petitions specifically "challenging state-court criminal convictions." *See Danforth*, at 279. Therefore, there is clearly room to argue here that Federal Courts do not necessarily need to follow *Teague*, if the *habeas* request arises out of the conviction that was handed down by the Federal Court.

Finally, if all else fails, please keep in mind that an attorney who is trying to challenge an alien's conviction through a *habeas* or *coram nobis* filing can still use the *Strickland* v. *Washington* standard that existed since 1984. While the fact that person who was convicted was an alien is not a factor in *Strickland* challenge, there is a possibility that if a criminal attorney ignored or misadvised an immigrant about immigration consequences of their conviction, they have also made errors or mistakes along the way, pertaining to person's defense in Criminal Court.

As per *Strickland*, if "counsel's performance fell below an objective standard of reasonableness, and that counsel's performance gives rise to a reasonable probability that,

if counsel had performed adequately, the result of the proceeding—the trial, the sentencing hearing, the appeal—would have been different," such counsel was ineffective. Therefore, such counsel's client deserves a favorable adjudication of the writ requesting the Court to overturn conviction resulting from such ineffective assistance.

IV. Conclusion

The full impact of *Descamps*, *Moncrieffe*, and *Chaidez* is now being felt by the immigration practitioners and their clients throughout the country. While the U.S. Supreme Court decisions in these cases help answer important questions and guide immigration attorneys to successful resolution of many previously hopeless cases before U.S. Immigration Courts, there is still much work to be done.

The immigration law remains an enigma to many lawyers who are not familiar with that specialized area of legal practice. It falls on immigration attorneys to educate their fellow lawyers that practice in criminal law, appellate law, and other practice areas where these practitioners come across a client who may be legal or an undocumented alien.

Victory for clients of immigration attorneys starts way before that client was ever served with the dreaded Notice to Appear and the only way to secure such a victory is to continue not only being familiar with the ever-changing state of the United States' immigration law, but also spreading the word about these changes to others!