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PRACTICE ADVISORY*

June 26, 2013

DESCAMPS V. UNITED STATES AND THE MODIFIED CATEGORICAL APPROACH

INTRODUCTION

> "[A]n inferior court had best respect what the [Supreme Court] says rather than read between the lines. . . .[W]e take its assurances seriously. If the Justices are just pulling our leg, let them say so."
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> *Sherman v. Community Consol. School Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 448 (7th Cir. 1992) (Easterbrook, J.).

In a June 20 decision, *Descamps. v. United States*, No. 11-9540, 570 U.S. ___ (2013), the Supreme Court makes clear that it was not just pulling our leg in its prior rulings concerning proper application of the "categorical approach" employed to determine whether a prior state or federal criminal conviction triggers certain consequences under federal law, including consequences under the Armed Career Criminal Act (ACCA) and the Immigration and Nationality Act (INA). The categorical approach compares the language of the criminal statute, taken at its minimum, to the INA removal ground or other federal law at issue. Under this approach, the actual conduct that led to the defendant's prosecution is irrelevant; all that matters is whether the statute of conviction *necessarily*, in every case, requires a finding of conduct that triggers the later federal consequence. If not, the federal consequence is not triggered. The approach includes an additional step in some cases, often called the "modified categorical approach." When a given criminal statute defines *more than one* offense, the federal sentencing judge or immigration judge cannot perform the required categorical analysis until it has been determined *which* of these offenses the individual was convicted of. 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"). The defendant's particular conduct remains irrelevant under this analysis; the only issue is which of the multiple offenses the statute defines formed the basis of the conviction.

The Supreme Court has repeatedly indicated over the years that this modified analysis is only warranted when a statute is "divisible"—that is, when it sets out multiple elements in the alternative, e.g. in separate subsections or a disjunctive list—and when one or more of the

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* This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. This Advisory was written by Dan Kesselbrenner, Isaac Wheeler, and Sejal Zota. The authors gratefully acknowledge the helpful contributions of Trina Realmuto and Manny Vargas.

alternate offenses listed is not a categorical match. But the Board of Immigration Appeals[1] and several circuits, most notably the Ninth,[2] had nonetheless adopted rules allowing adjudicators to apply a modified categorical analysis to a much broader array of statutes, finding that the Court's contrary statements were mere dicta. In *Descamps*, the Court forcefully reiterated that it meant what it had said all along: . In *Descamps v. United States*, it held that the modified categorical approach can be used *only* when a statute is divisible.

This practice advisory covers: (1) the holding in *Descamps*; (2) why this criminal case is equally applicable to the categorical approach used in immigration proceedings; and (3) the decision's potential implications for specific removal grounds. This advisory, prepared shortly after *Descamps* was handed down, is intended to provide early guidance to advocates analyzing the decision and does not purport to be an exhaustive analysis of all of its implications.

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[1] *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012)
[2] *United States v. Aguila-Montes de Oca*, 655 F. 3d 915 (2011) (en banc); *see also United States v. Armistead*, 467 F.3d 943 (6th Cir. 2006).

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Different Approaches to Modified Categorical Analysis: Examples

Advocates not already familiar with the divergent approaches courts have taken to the modified categorical approach may find the following examples helpful to illustrate the difference in these approaches. Suppose the INA provides that individuals are removable if they have been convicted of "an offense relating to possession or use of a firearm." Respondent X was previously convicted under a state law that punishes "possession of a firearm." Assuming that the state's definition of "firearm" is no broader than the federal law's definition, this conviction categorically satisfies the federal law and X is removable; no modified categorical inquiry is necessary. If, instead, the state law X had been convicted under punished "possession of (a) a firearm or (b) a knife," then the offense may be deemed divisible with respect to this removal ground, because it has two alternative sets of elements, one of which does not trigger removal under that ground. Removability would only be triggered if X's record of conviction showed that he was convicted under subparagraph (a) of the state law. Next suppose that the state statute punished "possession of a weapon" but did not further define that term. The statute defines only one offense and is not divisible, so this statute would not trigger removal under the *Descamps* rule that limits modified categorical analysis to divisible statutes. But possession of a firearm would be *sufficient* for conviction under the statute (as would possession of any other deadly weapon). On that basis, prior to *Descamps* the BIA's *Lanferman* decision and the Ninth Circuit's *Aguila-Montes de Oca* case would have allowed a modified categorical approach to determine if the record of conviction revealed what kind of weapon formed the basis for the conviction. Finally, suppose that the state law had punished aggravated assault, defined as "harmful contact resulting in serious physical injury." Although this statute, too, defines only one offense, and although it is altogether missing any element of use of a weapon, prior to *Descamps* the Ninth Circuit's rule would have permitted the judge to consult the record of conviction to determine whether X caused the required harmful contact with a firearm. (It is not altogether clear whether the BIA's rule would also have gone that far, but in *Lanferman* the BIA cited *Aguila-Montes de Oca* with approval.)

I. THE SUPREME COURT'S HOLDING IN *DESCAMPS*

Michael Descamps was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on Descamps' three prior state convictions, including one for burglary under California Penal Code Ann. § 459, which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." The ACCA increases the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." To determine whether a given conviction is a "violent felony" as defined by ACCA, courts use what has become known as the categorical approach – comparing the statute of conviction, taken at its minimum, with the definition of the identified "generic" crime. *See Moncrieffe v. Holder,* 569

U.S. __, 133 S. Ct. 1678, 1684 (2013) (applying *Taylor* v. *United States*, 495 U.S. 575 (1990) and *Shepard* v. *United States*, 544 U.S. 13 (2005) in the immigration context).

Descamps argued that his California burglary conviction did not qualify as an ACCA predicate under the categorical approach because the state burglary statute does not require "unlawful entry" and is thus broader than the generic definition of burglary. The District Court rejected Descamps' argument and imposed an enhanced sentence of 262 months in prison—more than twice the term he would otherwise have received. The court employed what has been called the modified categorical approach and examined underlying court records, finding that Descamps had admitted the elements of a generic burglary when entering his plea. The Court of Appeals for the Ninth Circuit affirmed relying on its decision in *United States* v. *Aguila-Montes de Oca*, 655 F. 3d 915 (9th Cir. 2011) (en banc), which had held that when a factfinder considers a conviction under any statute that is "categorically broader than the generic offense," the court may apply the modified categorical approach and scrutinize certain court documents to determine the factual basis of the conviction. The U.S. Supreme Court granted certiorari to resolve a growing circuit split on the question of whether the modified categorical approach applies to statutes like California burglary that contain a single, "indivisible" set of elements sweeping more broadly than the corresponding generic offense.

In an 8-1 decision, the Supreme Court reversed. It strongly reaffirmed that a federal sentencing judge (and presumably also an immigration judge ruling on whether a state crime fits into one of the criminal removal grounds – *see, infra*, section II of this advisory) may not apply the modified categorical approach and look to the underlying court record when the statute of conviction has a single, indivisible set of elements, such as California burglary. Op. at 2.[3] It also held that a conviction for that offense is never for generic burglary because it does not contain an element of unlawful entry. Op. at 10. In doing so, the Court clarified that the modified categorical approach "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute"—one that sets out multiple, alternative elements, thus defining more than one crime—for example, stating that burglary involves entry into a building *or* an automobile." Op. at 8. It "acts not as an exception, but instead as a tool" to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id*. The Court emphasized that an adjudicator applying the modified approach may not examine underlying court records to determine the facts or conduct, but only to determine of which statutory offense or section the person was convicted.

The Court began its analysis by observing that its prior caselaw explaining the categorical approach "all but resolves this case." Op. at 5. The Court explained that in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), it approved the use of a modified categorical approach in a "narrow range of cases" in which a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. Op. at 6-7. Because a sentencing court cannot tell, simply by looking at a divisible statute, under which alternative elements a defendant was convicted, the court is permitted to consult a limited class of extra-statutory documents. *See Shepard,* 544 U.S.

[3] The citations to *Descamps* used throughout this practice advisory ("Op. at __") refer to the slip opinion, available at http://www.supremecourt.gov/opinions/12pdf/11-9540_8m58.pdf.

at 26 (holding that an adjudicator may consult the plea agreement, plea colloquy transcript, charging document or indictment, and jury instructions to determine the offense of conviction when statute is divisible). But it may do so only to assess whether the defendant was convicted of the particular statutory offense that corresponds to the generic offense, not to determine the factual basis of the prior plea. Op. at 7. The Court also cited to *Nijhawan* v. *Holder*, 557 U.S. 29 (2009), and *Johnson* v. *United States,* 559 U.S. 133 (2010), as further emphasizing this elements-based rationale for the modified categorical approach. Op. at 7‑8.

Turning to this case, the Court concluded that the modified approach does not apply because the California burglary statute defines burglary over broadly (by not requiring unlawful entry and by covering shoplifting). It does not, however, define burglary "alternatively, with one statutory phrase corresponding to the generic definition and another not." Op. at 9. 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.* Because California burglary does not correspond to the generic definition, Mr. Descamps' conviction does not qualify as an ACCA predicate conviction.

Importantly, the Court flatly rejected the Ninth Circuit's approach in *Aguila-Montes,* noting that "it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents…. *Aguila-Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits." Op. at 11‑12. The Court upheld those rationales, showing that the elements-centric "formal categorical approach" (1) "comports with ACCA's text and history," (2) "avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries," and (3) "averts 'the practical difficulties and potential unfairness of a factual approach.'" Op. at 12 (citing *Taylor*, 495 U.S. at 601).

The Court also rebuffed the government's attempt to distinguish overbroad statutes (which is how the government characterized the statute at issue) from statutes missing an element of the generic offense (which the government conceded may not be appropriately analyzed using a modified approach). The Court reasoned that this is a distinction without a difference, as "most overbroad statutes can also be characterized as missing an element; and most statutes missing an element can also be labeled overbroad." Op. at 21. The Court explained that "whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime." *Id.*

Lastly, it is worth noting that the government argued that the sentencing court should consider not only the statute defining an offense but also any judicial interpretations of it, and that here the state judicial rulings interpreting California burglary supplied the otherwise missing element of unlawful entry (though the government conceded that even under its theory the state statute was broader than the generic definition). Op. at 19. In responding to the government's argument, the Court specifically reserved "the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it." Op. at 20. It is unclear how the Court will ultimately resolve this issue, but should adjudicators be precluded from considering judicially-defined elements or

judicial rulings interpreting an element when determining whether a criminal statute is divisible, there may be both positive and negative implications for practitioners depending on the specific state statute. For example, such a rule should benefit noncitizens convicted of common law offenses that are judicially defined such as many states' assault offenses. Because such statutes are clearly indivisible based on the language of the statute (but not necessarily based on caselaw), practitioners can argue that a conviction under a common law assault statute is broader than a crime of violence as defined in 18 U.S.C. § 16 and thereby not an aggravated felony. It may have negative implications, however, for other offenses where caselaw may help show the indivisible over-broadness of a criminal statute. For example, for conviction of a controlled substance offense in a state like California, the caselaw clarifies that the specific controlled substance is not an element of the offense, but simply an alternative means for commission of the offense that need not be specifically proven by the prosecution.[4] Thus, without pointing to the caselaw, it may be harder for practitioners to argue that certain drug offenses are indivisible.

II. *DESCAMPS'* APPLICABILITY TO IMMIGRATION CASES

The *Descamps* Court reiterated its earlier holdings that ACCA's focus on "previous convictions" shows that "'Congress intended the sentencing court to look only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions,'" Op. at 12 (quoting *Taylor*, 495 U.S. at 600). The Court found that the Ninth Circuit's broad application of the modified categorical approach violated the statutory requirement of a "conviction." Op. at 13. Because the categorical approach in immigration proceedings similarly relates to removal grounds and bars to relief that require the respondent to have been "convicted" of specified types of crimes, s*ee, e.g.*, INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), use of the modified categorical approach should be similarly limited in the immigration context.

However, in *Matter of Lanferman*, 25 I& N Dec. 721 (BIA 2012), the BIA asserted that it can apply the modified categorical approach broadly, even in situations where doing so would be impermissible under ACCA, 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. *Lanferman* itself did not spell out the Board's reasons for this claim, but it cited other cases reasoning that an immigration judge could constitutionally order removal on the basis of "facts" about a prior conviction that were never proven to a jury beyond a reasonable doubt, whereas a federal criminal court imposing a sentence under ACCA or another federal law could not do so without violating a defendant's right under the Sixth Amendment to have a jury, rather than a judge, determine any fact that increases the maximum criminal penalty she faces. *Lanferman*, 25 I&N

[4] *See* additional discussion of California controlled substance offenses in Section II.B.5. *See also* discussion of the elements/means distinction in Alito dissenting opinion at 6 ("'[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes'") (*quoting Schad v. Arizona*, 501 U.S. 624, 636 (1991)) and *compare with* majority opinion, Op at 9, n.2 (". . . if the dissent's real point is that distinguishing between 'alternative elements' and 'alternative means' is difficult, we can see no real-world reason to worry. Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard* . . . would reflect the crime's elements").

Dec. at 728 (citing *Conteh v. Gonzales*, 461 F.3d 45, 55‑56 (1st Cir. 2006); *Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008)).

The Board determined it would apply a modified categorical approach to "all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." *Lanferman*, 25 I&N Dec. at 727.[5] This rule clearly transgresses the rule later announced in *Descamps*, because it allows a modified categorical analysis even when a statute defines only one crime, and even when the removable conduct is *sufficient* (but not *necessary*) for conviction. In essence, the BIA's position in *Lanferman* was that it was free to conclude that Congress meant something different by using the term "convicted" in the INA than it did in using similar language in ACCA, and could therefore disregard criminal precedents based (in part) on Sixth Amendment concerns. The government included a similar claim in its brief to the Supreme Court in *Descamps*, asserting in a footnote that "*Taylor* . . . is not necessarily controlling on the BIA because the BIA is entitled to deference on its interpretation of an immigration statute, as long as it is reasonable." (Br. of Resp. 16 n.3). DHS may therefore attempt to argue that IJs and the BIA should continue to follow *Lanferman* and employ a modified categorical approach to statutes that are "indivisible" in *Descamps*' terms. This argument is mistaken for at least four reasons.

A. The term "convicted" in the INA must be given a uniform definition in criminal and immigration contexts.

Even supposing that Sixth Amendment concerns were a critical factor underlying the categorical approach in the ACCA context (see below), it is simply untrue that these concerns do not apply to the interpretation of what it means to be "convicted" under the INA. Title II of the INA defines numerous federal crimes, including illegal re-entry. INA § 276(a), 8 U.S.C. § 1326(a)). Under INA § 276(b), a defendant's maximum sentence for this offense increases from two years to twenty years if s/he has re-entered following "conviction" for an aggravated felony. The Sixth Amendment clearly limits judicial factfinding 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), so *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.

Under the BIA's suggested approach in *Lanferman*, however, "conviction" means something different for other sections of Title II of the INA. The BIA suggests that federal courts should defer to its interpretation and 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 aggravated felonies,

[5] In dicta, the BIA suggested it would have the authority to disregard federal caselaw even from the immigration context under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *Lanferman*, 25 I&N Dec. at 729 n.7. *But see, e.g.*, *James v. Mukasey*, 522 F.3d 250, 256 (2d Cir. 2008) (noting that circuit courts owe the BIA no deference on the analysis of criminal statutes, including the issue of when to employ a modified categorical approach to do so).

crimes involving moral turpitude, etc., or are barred from relief under various other provisions of Title II relating to disqualifying convictions, such as §§ 240A(a)(3) and 240A(b)(1)(C). *Lanferman*, 25 I&N Dec. at 729 n.7. This violates the basic maxim of statutory construction that the 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."); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (holding that because the "crime of violence" definition under 18 U.S.C. § 16(b) "contains the same formulation" regarding active use of force as § 16(a), "we must give the language in § 16(b) an identical construction").

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*, it 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 (and therefore to apply the same interpretive tools—in that instance, the criminal rule of lenity): "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.[6]

B. *Moncrieffe* has already applied a divisibility rule inconsistent with *Lanferman* in the immigration context

The Court's recent *Moncrieffe* decision forecloses any debate over whether a more flexible approach to divisibility analysis should apply to the INA, because in that immigration case the Court applied the modified categorical approach in a narrow way that cannot be reconciled with the BIA's *Lanferman* rule. Consistent with *Descamps*, the Court described the modified categorical approach as applying to "statutes that contain several different crimes, *each described separately*." *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684 (2013) (emphasis added). The Court applied a modified categorical analysis to the Georgia statute at issue because it *did* describe several crimes separately: it was a crime under that law to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." The Court therefore consulted the record of conviction (the plea agreement) and found that Mr. Moncrieffe was convicted under the "possess with intent" prong. *Id.* at 1685.

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[6] Consistent with this understanding, the Supreme Court has repeatedly drawn on ACCA precedents in its discussions of how to apply the approach in immigration cases. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 1690, 1693 n.11 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012); *Gonzales v. Duenas-Alvarez*, 549 US 187□87, 190 (2007). In *Descamps* itself, both the majority and dissent discussed Justice Alito's dissent in *Moncrieffe* as fully relevant to the ACCA issue before the Court. Op. at 11 n.3; *id.* at 5 (Alito, J., dissenting).

Turning to the "possess with intent to distribute" prong itself, the *Moncrieffe* Court found that under Georgia law it could include both remunerative transfer of marijuana (an aggravated felony) and non-remunerative transfer of a small amount (not an aggravated felony). 133 S. Ct. at 1686. On this basis alone, the Court concluded that "the conviction did not 'necessarily' involve facts that correspond to" the federal drug trafficking removal ground and "[u]nder the categorical approach, then, Moncrieffe was not convicted of an aggravated felony." *Id.* at 1687. The Court did not examine the plea agreement or other record of conviction documents to determine whether Mr. Moncrieffe's particular conviction rested on a remunerative transfer or transfer of more than a small amount. In other words, the Court did not regard the "possess with intent" prong as further divisible into separate offenses, but instead examined the one offense it defines *categorically* and determined that it was broader than the relevant removal ground. Note that *Matter of Lanferman* would require the opposite result: because the relevant Georgia provision "contain[s] an element" (distribution) "that could be *satisfied* by either removable or non-removable conduct" (i.e., by remunerative transfer of any amount, or non-remunerative transfer of a small amount), *Lanferman*, 25 I&N Dec. at 727 (emphasis added), the Board's rule would have required the Supreme Court to determine the "facts" on which Mr. Moncrieffe's conviction was based. *Moncrieffe* is therefore consistent with *Descamps* in rejecting the BIA rule, and proves that the Supreme Court will not tolerate application of the *Lanferman* rule in immigration cases any more than in criminal ones.

C. Lower court authority supports applying *Descamps* to Immigration Cases

Taken together, *Moncrieffe* and *Descamps* should clinch the argument that *Lanferman* has been abrogated. However, advocates may also find it useful to point to lower-court decisions that have rejected distinctions in the categorical analysis between ACCA and INA cases. 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). Still other courts have not addressed the issue as explicitly but have confirmed that the categorical approach applies at least as forcefully in immigration cases by applying criminal precedents to immigration petitions for review, or vice versa. *See, e.g.*, *United States v. Beardsley*, 691 F.3d 252, 263–67, 275 (2d Cir. 2012); *Evanson v. Att'y Gen.*, 550 F.3d 284, 290–92 (3d Cir. 2008); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); *Olmstead v. Holder*, 588 F.3d 556, 559 (8th Cir. 2009); *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011); *Jaggernauth v. Att'y Gen.*, 432 F.3d 1346, 1353 (11th Cir. 2005).

The discussion above indicates why the few lower courts that have suggested that the categorical approach may be less protective in immigration cases are mistaken. *See Conteh v.* 461 F.3d 45, 55–56 (1st Cir. 2006); *Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008);

Godoy-Bobadilla v. Holder, 679 F.3d 1052, 1056–68 & n.3 (8th Cir. 2012). *Conteh*'s broad suggestion that the modified categorical approach may be more relaxed in INA cases (which the BIA cited in *Lanferman*) was explicitly renounced as incorrect *dictum* by the First Circuit when it later considered the divisibility issue. *See Campbell*, 698 F.3d at 33–35. And *Ali* and *Godoy-Bobadilla* may be limited to the narrow and unrelated issue they addressed. These cases permit courts in the Seventh and Eighth Circuits to abandon categorical analysis altogether under certain circumstances to determine whether an offense is a "crime involving moral turpitude," but that holding, even assuming it is correct,[7] should not alter the limits on modified categorical analysis where the categorical approach *does* apply. *Cf. Campbell*, 698 F.3d at 34 ("[F]act-specific provisions aside . . . the categorical approach operates similarly in the INA context as in the criminal context.").[8]

D. Sixth Amendment considerations were only one of several factors in *Descamps* and the others fully justify applying the *Descamps* rule to immigration cases

The *Descamps* Court notes that Sixth Amendment concerns are only one of three rationales the Court has given for requiring categorical analysis of prior convictions under ACCA. Op. at 12. Indeed, *Taylor*, the first case in which the Court held that this approach was required under ACCA, was decided a full decade before the Court recognized that judicial fact-finding at sentencing violates the Sixth Amendment. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). But even if it were permissible to apply the categorical approach differently to removal proceedings merely because of the lack of Sixth Amendment concerns, neither *Descamps* nor earlier cases offer any justification for doing so. Instead, the rationales they advance for narrow application of the MCA apply with at least as much force to immigration proceedings.

The first consideration *Descamps* offers is the text of ACCA itself, which as noted above requires a "conviction." Slip op. 12. "If Congress had wanted to increase a sentence based on the facts of a prior offense," the Court reasoned, "it presumably would have said so . . . ." *Id.* (citing *Taylor*, 495 U.S. at 600; *Shepard*, 544 U.S. at 19). This reasoning is fully applicable to the INA; as the Court found in *Moncrieffe,* when *"*the relevant INA provisions ask what the noncitizen was 'convicted of,' not what he did, . . . the inquiry in immigration proceedings is limited accordingly." *Moncrieffe*, 133 S.Ct. at 1690.[9] The *Moncrieffe* Court cited judicial

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[7] *But see Olivas-Motta v. Holder*, ___ F.3d ___, No. 10-72459, 2013 WL 2128318 (9th Cir. May 17, 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Sanchez-Fajardo v. Holder*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 478–80 (3d Cir. 2009).

[8] The Second Circuit has also occasionally countenanced divergent outcomes of categorical analysis in criminal and immigration cases, but in the opposite direction: it has only done so in the context of adopting a rule more favorable to immigrants than its own sentencing precedent. *See Martinez v. Mukasey*, 551 F.3d 113, 118 (2d Cir. 2008); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). It has never suggested or held that the categorical approach can be *less* protective in immigration cases than it is in criminal ones. *Cf. Beardsley*, 691 F.3d at 263–67 (adopting *Descamps*' approach to divisibility and drawing no distinction between ACCA and INA precedents).

[9] The *Descamps* Court contrasted ACCA with other statutes that *do* show a congressional intent to focus on underlying conduct, and cited as an example "an immigration statute" considered in

decisions dating back to 1914 applying this limitation, *id.* at 1684, 1685, noting that the "reason" for the longstanding categorical approach in immigration law (since long before *Taylor*) was that "'[c]onviction is the relevant statutory hook.'" *Id.* at 1685 (citing *Carachuri–Rosendo v. Holder,* 130 S.Ct. 2577, 2588 (2010)).[10]

The Court also noted ACCA's legislative history, pointing out that in the debate leading up to ACCA it was clear that "Congress meant . . . a prior crime [to]. . . qualify as a predicate offense in all cases or in none," rather than making such consequences turn on the underlying

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Nijhawan v. Holder, 557 U.S. 29 (2009), which the Court found to require a "circumstance-specific" rather than a categorical inquiry. *Descamps*, Op. at 12. The government would be foolish to attempt to argue that this vague reference to "an immigration statute" means that *Descamps* distinguished conviction-based INA provisions in general from ACCA and does not require the same divisibility analysis for them. Such an interpretation would deliberately misread both cases. The issue in *Nijhawan* was much narrower: considering the "fraud or deceit" aggravated felony ground, INA § 101(a)(43)(M)(i), *Nijhawan* held that the isolated phrase "in which the loss to the victim . . . exceeds $10,000" permitted an immigration judge to consult some sources of extra-record evidence to determine the loss amount related to a conviction that *categorically* involves fraud or deceit. 557 U.S. at 40. That is, *Nijhawan* broadly reaffirmed the applicability of categorical analysis to conviction-based removal grounds, including § 101(a)(43)(M)(i), but held that in certain specific instances, language in the statute limits the application of certain particular removal grounds to offenses that categorically meet the definition by specifying *further* conditions and limitations that are not established categorically. *See Moncreiffe*, 133 S. Ct. at 1684 (holding that the categorical approach is "generally employ[ed]" for aggravated felony determinations under the INA, citing *Nijhawan*); *id.* at 1691 ("The monetary threshold [of § (M)(i)] is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words 'in which,' which calls for a circumstance-specific examination of "the conduct involved ' *in* ' the commission of the offense of conviction."). These "circumstance-specific" limits on particular removal grounds have no bearing on how the categorical and modified categorical approaches are to be applied to the generically defined components of those grounds. *See Campbell*, 698 F.3d at 34 ("[T]he Supreme Court's decision in *Nijhawan* . . . requires the *Taylor–Shepard* analysis in INA cases—save where the matching INA offense is phrased so as to require a fact-specific determination."); *accord Lanferman*, 25 I&N Dec. at 726 (observing that circumstance-specific INA provisions "do not . . . involve[] a divisibility analysis"). For a full discussion of why *Nijhawan* does not permit courts to relax or abandon the categorical analysis of conviction-based removal grounds in general, see *Practice Advisory*: *The Impact of* Nijhawan v. Holder *on Application of the Categorical Approach to Aggravated Felony Determinations* (June 24, 2009), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_pa_Nijhawan%20and%20the%20Categorical%20Approach%20-%20NIPNLG%20and%20IDP%20-%202009.pdf.

[10] The Court also cited with approval a scholarly article demonstrating that courts had applied the categorical approach for decades before *Taylor*, based on the understanding of congressional intent manifested in the conviction requirement. *Moncrieffe*, 133 S. Ct. at 1685 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L.Rev. 1669, 1688–1702, 1749–1752 (2011)).

facts in each individual case. *Descamps*, slip op. at 12-13. The debate over the INA reveals precisely the same congressional intent. The Senate version of the bill that would become the modern INA initially proposed to authorize deportation for anyone convicted of a crime "if the Attorney General in his discretion concludes that the alien is an undesirable resident of the United States." *See* S. 2550, 82d Cong. § 241(a)(4). Senators objected to this language, asserting that it would permit the immigration agency to deport a person based on a discretionary view of the desirability of the immigrant rather than the conviction at issue. 98 Cong. Rec. 5420, 5421 (1952). As Senator Douglas explained:

> The phrase is "in his discretion"—that is, in the discretion of the Attorney General. In other words, frequently the test is not the fact, but whether the Attorney General might with some reason conclude that deportation was proper. The Senator (Mr. Welker) has quite properly pointed out that this leaves only a very narrow question for the courts to decide on review, and the alien has almost no protection. A lawsuit is no protection if the matter to be received is as vague and variable and arbitrary as the Attorney General's conclusion about a person's undesirability.

Id. Thereafter, amendments to the Senate bill eliminated this problematic portion of the bill and left only the conviction-based ground of deportability for crimes involving moral turpitude, demonstrating Congress's desire to limit the immigration agency's review of underlying facts where removability is predicated on convictions. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 241(a)(4), 66 Stat. 163, 204.

Finally, the *Descamps* Court focuses on the "daunting difficulties and inequities" that result from improper use of the modified categorical approach to examine alleged facts that were gratuitous to the conviction. Op. at 15-16. These include "expend[ing] resources" of courts and prosecutors in relitigating past criminal conduct; consulting inherently unreliable documents regarding issues that the parties had no incentive to dispute, and, most seriously in the Court's view, "depriv[ing] some defendants of the benefits of their negotiated plea deals" by treating them in the later proceeding as though they had been convicted of something other than the actual offense to which they pled guilty. *Id.* The Court in *Moncrieffe* raised the same concerns in rejecting the government's invitation to relax the categorical analysis of drug trafficking aggravated felonies: it pointed to the difficulties such an approach would create for "overburdened immigration courts," raised doubts about the reliability of the available evidence long after the fact, and noted the unfairness of treating two defendants convicted of the same offense differently "depending on what evidence remains available or how it is perceived by an individual immigration judge," 133 S. Ct. at 1690. *Moncrieffe* pointed out that these fairness and practical concerns are *more* serious in the removal context because unlike federal criminal defendants, "noncitizens are not guaranteed legal representation and are often subject to mandatory detention where they have little ability to collect [relevant] evidence." *Id.* Therefore, all of the factors discussed in *Descamps* confirming the wisdom of the categorical approach are equally or more applicable to conviction-related provisions of the INA.

III. IMPLICATIONS OF *DESCAMPS*

In addition to Descamps' impact on *Matter of Lanferman,* discussed *supra*, the holding in *Descamps* calls into question the ongoing validity of numerous administrative and circuit decisions involving application of the categorical approach in both civil and criminal proceedings. This advisory does not attempt to identify all possible arguments that a criminal defense or immigration practitioner might raise based on *Descamps*. Rather, this advisory addresses select issues that illustrate the framework for arguments a practitioner could make based on *Descamps* to argue that a statute is not divisible.

A. Illustrations of the Implications for Specific Offenses

1. Sexual Abuse of a Minor Aggravated Felony Deportability: Minority

The definition of aggravated felony includes "sexual abuse of a minor." INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A). In *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009), the Supreme Court catalogued which aggravated felony grounds are subject to the categorical approach and which are "circumstance-specific." In its analysis, the Court treated the sexual abuse of a minor definition as subject to the categorical approach. *Id.* at 37.

The generic definition of "sexual abuse of a minor" requires that the victim be a minor. *Matter of Rodriguez–Rodriguez*, 22 I&N Dec. 991, 993–94 (BIA 1999). Under *Decamps,* unless the statute of conviction also requires that the victim was a minor, it is not a "sexual abuse of a minor" aggravated felony. Prior decisions holding that a court could look to the record of conviction to determine the age of the victim—including where the statute of conviction does not require that the victim be a minor—are inconsistent with *Decamps.* For example, the Seventh Circuit previously held that a factfinder could examine the record of conviction in an age-neutral statute to determine the age of the victim. *See Lara-Ruiz v. I.N.S.,* 241 F.3d 934, 941 (7th Cir. 2001). The court deemed the statute was *divisible* as to age because some victims could be minors. *Id.* at 941. Under *Decamps*, such age neutral sexual assault statutes are *indivisible* in that the none of the elements require that the victim is a minor.

2. Firearm Deportability: Lists of Weapons

Under INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C), an individual convicted of certain firearms offenses is deportable. The Court's divisibility analysis in *Descamps* cannot be reconciled with the BIA's approach to determining divisibility in firearm deportability cases, which no longer should apply.

Notably, the Supreme Court discussed when a weapons statute is divisible in its analysis in *Decamps.* According to the Court, if a statute requires only an unspecified "weapon" for a conviction, then

> [w]hatever the underlying facts or the evidence presented, the defendant still would not have been convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the supposed generic crime (assault with a gun).

Op. at 18. Thus, under *Decamps*, where the statute of conviction does *not* specify the type of weapon, then the statute of conviction is *not* divisible and, therefore, *not* a deportable firearm offense.

Accordingly, the BIA's rule—which treats unspecified weapons statutes as divisible—should no longer apply. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992). Given the *Decamps* Court's detailed discussion regarding the divisibility of a statute that mentions that an unspecified weapon, the BIA's test fails.

In addition, *Matter of Lanferman* also dealt with the firearms removal ground. In that case, the Board adopted a broad rule that would allow immigration judges to examine the record of conviction, even for unspecified weapons statutes. *Lanferman*, 25 I&N Dec. at 731–32. However, the statutory scheme actually at issue in *Lanferman* presented a narrower question: what happens when a criminal statute uses a term that state's criminal code defines in another section of the criminal code. Specifically, the statute at issue provided that a person was guilty of menacing if "[h]e or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon…." New York Penal Law § 120.14(1). Importantly, even though a different section of the New York Penal Code defined the term "weapon" to include a series of weapons, including a firearm, *the menacing statute itself did not specifically reference a definition for the term "deadly weapon*" and the Board assumed that it applied.[11] *See Matter of Lanferman*, 25 I&N Dec. at 732 (citing New York Penal Law § 10.00(12)).

The Court in *Descamps* recognizes that a statute listing weapons would create distinct crimes whereas a statute that merely says "weapon" would not. *Compare Descamps*, Op. at 18 *with id.* at 17. Importantly, however, the Court did not address whether or not a statute is divisible where the statute itself does *not* reference a definition of a term that is defined elsewhere in the criminal code. Therefore, a person convicted under a statute that does not specifically define the term weapon in the statute itself, but the term is defined elsewhere in the criminal code, could argue that such a statute is indivisible because: (1) such a statute does not plainly fit under the Court's divisibility definition and, therefore, the government cannot meet its burden of proving deportability; and (2) because the rule of lenity should resolve the ambiguity in the noncitizen's favor.[12]

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[11] Under New York law, the term, "deadly weapon" means: "Any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, or metal knuckles." N.Y. Penal Law § 10.00(12).

[12] *See* discussion of lenity at Section II.A, *supra*.

3. Child Abuse Deportability: Age of Victim

Under INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E), an individual convicted of certain child abuse offenses is deportable. The generic offense of child abuse requires that a person be convicted of an offense against a child. *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

The BIA has assumed that an assault statute that lacks an element regarding the age of the victim is a divisible offense because some of the victims will be children. *Velasquez-Herrera*, 24 I&N Dec. at 514. This view is at odds with the Supreme Court's requirement that a statute must define more than one offense before it is divisible. Thus, the BIA's analysis that a factfinder can look at the record of conviction to determine whether the victim was an adult or a child is irreconcilable with the Court's approach in *Descamps*, which permits recourse to the record of conviction only to determine of which offense a person has been convicted. Where the statute is indivisible, the factfinder must compare the statute as a whole with the generic definition. An age-neutral statute taken at its minimum, like that in *Velasquez-Herrera*, does not match the generic offense of child abuse, which requires that a person be convicted of an offense against a child.

4. Crime of Violence Aggravated Felony Deportability: Common Law Assault Statutes

As discussed above, the Court expressly reserved the issue of whether case law expanding the text of a statute can make a statute divisible. Op. at 20. For example, in Massachusetts, the assault and battery statute does not define what constitutes an "assault and battery."[13] Before *Descamps*, circuit courts generally looked to the state case law to discern the judicially created elements for the offense, and applied the modified categorical approach to the statute, which did not define battery.[14]

However, post-*Descamps*, a practitioner may argue that since the text defines only one offense the inquiry should end without a factfinder reviewing the record of conviction. In addition, the state cases arguably set out means to commit the offense and not elements. *See* Op. at 9-10. Finally, since the Court reserved the issue of whether it is permissible to consult caselaw, one may argue that it is improper to go beyond the statutory text in determining the elements of the offense. *See* Op. at 20 (reserving issue of impact of case law on elements of offense for purposes of the categorical approach).

5. Controlled Substances Deportability: Schedules or Lists of Controlled Substances

[13] M.G.L.A. § 265-13A.
[14] *See*, *e.g.*, *U.S. v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011).

Under INA 8 U.S.C. § 1227(a)(2)(B)(i), an individual convicted of a controlled substance offenses as defined in the Controlled Substances Act (CSA), 21 U.S.C. § 802, is deportable. That Congress incorporated the list of offenses in the CSA into the generic federal definition of a controlled substance offense is significant. Where a person is convicted of a state controlled substance offense and the state's list of controlled substances is broader than the federal list in the CSA, the conviction is not a deportable offense unless the statute is divisible and the record of conviction identifies the substance. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

In its analysis in *Descamps*, the Court offered at least two examples of divisible statutes: (1) a Massachusetts burglary statute that lists a "building, ship vessel or vehicle"; and (2) a weapons statute that includes a gun and other weapons. Op. at 7, 18‑20. Significantly, however, those statutes only are divisible *if* they actually define elements for which as jury has made an unanimous finding. Op at 14, citing *Richardson v. United States*, 526 U.S. 813, 817 (1999) (defining elements of an offense as facts requiring unanimity in a jury).

In addition to federal law, state laws create schedules of controlled substances. *See*, *e.g.*, 21 U.S.C. § 812; Cal. Health & Safety Code §§ 11054‑58. Most state criminal codes define drug crimes with reference to such schedules.

For example, California's list of controlled substances is broader than the federal list in the CSA (which, again, Congress incorporated into the generic definition of a controlled substance offense).[15] In California, a jury does not have to be unanimous about which drug is involved to sustain a conviction for using or being under the influence of a controlled substance.[16] California caselaw treats each controlled substance on the schedule as a "means" to commit the offense, not as an essential element necessary for a conviction.[17] As a result, one can argue that, for example, California's using or being under the influence statute[18] is indivisible for the identity of the particular substance. Under *Descamps*, this means that the factfinder cannot examine the record of conviction to determine the identity of the substance. Accordingly, arguably no California conviction for using or being under the influence of a controlled substance is a deportable offense.

B. Retroactivity (Post-Conviction Relief)

When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is

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[15] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1077 (9th Cir. 2007), *abrogation on other grounds recognized by Cardozo-Arias v. Holder*, 495 F. App'x 790, 792 (9th Cir. 2012).

[16] *See Sallas v. Municipal Ct.*, 86 Cal. App. 3d 737, 740□44 (Ct. App. 1978) (holding that a state defendant is entitled to know the nature of the controlled substance at issue not because it is an element of a controlled substance offense, but because due process requires it).

[17] *Ross v. Municipal Ct.*, 49 Cal. App. 3d 575, 579 (Ct. App. 1975) (explaining that the specific type of controlled substance is a "means by which" a defendant commits a controlled substance offense).

[18] California Health and Safety Code §11550.

deciding whether the decision was unfair when initially rendered.[19] If a Supreme Court case creates a new criminal rule after a petitioner's case became final, post-conviction relief petitioners generally cannot benefit from the new rule because it was not the law when the decision became final.

Not all new Supreme Court decisions that expand legal rights of a criminal defendant create new rules, however. For federal habeas purposes, if a new Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.[20] According to the Supreme Court, an old rule applies to post-conviction review and cases on direct appeal.[21]

The language of the *Descamps* decision strongly suggests that it is not a new rule for retroactivity purposes.[22] Near the beginning of its analysis, the Court stated: "Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case." Op. at 5. Later in the opinion, the Court reiterated that the outcome in *Descamps* is an application of a long-standing approach as opposed to a new rule of criminal procedure. *See* Op. at 8 ("Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute.").

[19] *Teague v. Lane*, 489 U.S. 288 (1989).
[20] *Williams v. Taylor*, 529 U.S. 362, 390□91(2000).
[21] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).
[22] The Court's test requires the result to be "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997). That Justice Alito dissented does not necessarily mean that *Descamps*' result was not "apparent." *See Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004).