UPDATE: Using the California Chart and Notes After *Moncrieffe v. Holder* and *Olivas-Motta v. Holder*

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Two important cases have changed the immigration consequences of convictions – for the better. Please keep these principles in mind when considering dispositions in criminal cases. This update sets out a brief description of the two holdings and a preliminary updated chart of offenses. For further discussion, see an ILRC Practice Advisory written for immigration attorneys, "*Moncrieffe and Olivas-Motta:* Fourteen Crim/Imm Defenses in the Ninth Circuit" at www.ilrc.org/crimes.

Moncrieffe v. Holder, 133 S.Ct. 1678 (April 23, 2013). The categorical approach governs how an immigration authority will determine whether an immigrant's prior conviction will cause an immigration consequence. The categorical approach compares the immigrant's prior conviction to the federal, "generic" definition of a crime that is listed in the immigration statute, e.g. the generic definition of "burglary" as an aggravated felony, or of a deportable "crime of domestic violence." In *Moncrieffe v. Holder* the Supreme Court clarified the categorical approach in immigration proceedings, in a very good way. It held that where a criminal statute identifies a single offense, the "minimum conduct criminalized by the statute" must come within the generic definition. If it does not, i.e., if there is a way to commit the offense that does not come within the generic definition, then the immigrant wins. This is true regardless of whether the issue is deportability or proving eligibility for relief. There must be some proof that this proposed "minimum conduct" actually would be prosecuted under the statute, e.g., the conduct should be specifically described in the statutory language, or published or unpublished decisions or other authority should demonstrate that this has been prosecuted at least once under the statute. See *Moncrieffe* slip op. at 5-6.[1]

In *Moncrieffe* the Court addressed the generic definition of a drug trafficking aggravated felony, which includes distribution without remuneration of a controlled substance *other than* a "small amount" of marijuana. The Georgia statute at issue prohibited distribution of

marijuana, with no reference to remuneration or quantity. Georgia cases showed that in fact distribution without remuneration of a small amount of marijuana would be prosecuted under the statute. The Court held that because the minimum conduct required to violate the statute did not meet the generic definition, *no* conviction under the statute could be held a drug trafficking aggravated felony, either as a ground of deportability or a bar to eligibility for relief.

There is a slightly different treatment if, rather than setting out one offense, a statute lists "several different crimes, each described separately." This process is the "modified categorical approach." In that case, the immigration authority may look to certain documents in the immigrant's record of conviction, solely to determine which of the separately described crimes was the subject of the conviction. Then the authority will determine whether the minimum conduct to commit that offense comes within the generic definition. Identifying which of multiple offenses set out in the statute was the offense of conviction is the only permitted use of information in the record of conviction. *Ibid.* Note that a statute that prohibits, e.g., "use of a weapon" sets out only one offense, and the modified categorical approach cannot be used – despite the fact that the offense could be *committed* in multiple ways, such as by use of a gun, a knife, etc. To qualify for the modified categorical approach, the statute actually must describe separate offenses, e.g., "use of a gun or a knife."

Olivas-Motta v. Holder, —F.3d— (9th Cir. May 17, 2013). In *Matter of Silva-Trevino* the Attorney General held that to determine whether a conviction is of a crime involving moral turpitude (CIMT), in some cases an immigration judge may depart from the categorical approach and conduct a fact-based inquiry into the defendant's underlying conduct. In *Olivas-Motta v. Holder* the Ninth Circuit rejected *Matter of Silva-Trevino,* and held that the categorical approach (which now is defined by *Moncrieffe*) fully applies to determinations of CIMTs. This will significantly reduce, although not eliminate, the confusion about when a particular conviction is likely to be held a CIMT.

How does this change the law? Many offenses that used to be considered "divisible" (so that an immigrant would escape the immigration consequence only with a particular record of conviction) now are not divisible and do not carry the immigration consequence as a matter of law, regardless of whether the issue is deportability or eligibility for relief, or what information appears in the record of conviction.

What is the "best" course of action, and what is "good enough"? The preliminary chart below shows examples of offenses that can be treated differently under these new cases. The question is, how long will it take the immigration system to accept and incorporate these cases? Will ICE contest everything and leave immigrants detained while courts sort out the new rules? Or will ICE and immigration judges accept the inevitable relatively quickly? Because we are not sure what will happen, the very best course of action remains to get a disposition with a good record of conviction, so that the immigrant can rely on existing precedent and clearly win. If that is not possible, a "good enough" plea is one that should win under these new cases. Hopefully the immigrant will not be detained pending litigation, but even if he or she is, the outcome appears relatively secure.

Plea Examples in Light of *Moncrieffe* and *Olivas-Motta*

OFFENSE	**BEST PLEA** – Good even under current law, no questions asked	**GOOD ENOUGH –** Ultimately shd be held safe under *Moncrieffe, Olivas-Motta*, but might require litigation
PC § 69	Not a crime of violence (COV) or crime involving moral turpitude (CIMT) if record shows mere offensive touching (deportability, eligibility for relief or admission) or is vague (deportability only)[2]	Never a COV or CIMT for any purpose, because minimum criminalized conduct is not
PC § 236, misdemeanor	Not a CIMT, unless the ROC shows some kind of bad facts; keep the record vague or identify innocuous conduct[3]	Never a CIMT for any purpose, because minimum criminalized conduct is not
PC §§ 243(a), (e)	A crime of violence (COV) is an aggravated felony if a sentence of a year is imposed, and regardless of sentence is a deportable "crime of domestic violence" if victim and defendant had domestic relationship. Offensive touching or other de minimus violence is not a "crime of violence," which requires violent force. 243(a), (e) is not a COV or DV if the ROC identifies offensive touching (deportability, eligibility for relief) or if ROC is vague (deportability only). 243(e) is not a CIMT under the same standard.[4]	Never a COV, DV or a CIMT for any purpose, because minimum criminalized conduct (offensive touching) is not

PC § 243(d)	Should be treated the same as 243(a), *supra*, because it can be committed with mere offensive touching.[5] However this is counter-intuitive and there is the danger that some immigration judges won't follow.	Never a COV or a CIMT for any purpose, because minimum criminalized conduct (offensive touching) is not.
PC § 261.5(c), (d)	In the Ninth Circuit, not the aggravated felony sexual abuse of a minor (SAM) if the ROC shows that the victim was age 15, or conceivably age 14 (deportability, eligibility for admission or relief) or if the ROC is vague as to the age of the victim (deportability only).[6]	Not SAM for any purpose, because minimum criminalized conduct is not. Also should not be held a CIMT for any purpose.
PC § 273.5	Always a CIMT, unless there was an attenuated past relationship (short affair years ago) and minor injury.[7] NOTE: PC 273.5 is always a crime of violence and a deportable crime of domestic violence, including after *Moncrieffe.*	Divisible as CIMT. Spousal abuse is CIMT, but abuse of cohabitants or former cohabitants should never be CIMT.[8] If the ROC is vague as which part of the statute the conviction was under, PC 273.5 is not a CIMT for deportability purposes. Note: the court may go outside the record to identify to victim for purposes of the DV deportability ground.
PC § 647.6	Not sexual abuse of a minor or a CIMT if the ROC lists non-explicit, non-egregious conduct (deportability, ineligibility for admission or relief) or if the ROC is vague as to conduct (deportable).[9]	Never SAM or a CIMT for any purpose, because minimum criminalized conduct is not.

PC §§ 25400(a), 27500, 29800, 33215	Deportable firearms offense, because it includes a federally defined firearm. The fact that the federal definition excludes an antique firearm is not relevant, or only is relevant if the defendant proves that his or her own case involved an antique firearm. Also a bar to applying for non-LPR cancellation.	Never should be a deportable firearms offense because these statutes include antique firearms, and antique firearms have been prosecuted under these statutes (pre-2012 versions).[10] Note that immigration judges in particular will not like this argument, even despite the fact that the Supreme Court specifically affirmed the antique firearms defense in *Moncrieffe*. Therefore it still is best to try to plead to a non-firearms offense or if you must plead to one of these statutes, leave the ROC vague regarding the type of firearm involved.
PC § 17500	Not deportable firearms offense if ROC identifies non-firearm weapon or is vague. Not a bar to non-LPR cancellation if ROC identifies non-firearm weapon.	Never deportable firearms offense because minimum criminalized conduct (weapon) is not.

Endnotes

[1] See slip opinion at http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.
[2] See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012).
[3] *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).
[4] See, e.g., discussion at *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).
[5] *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, www.usdoj.gov/eoir/vll/intdec/indexnet.html (P.C. § 243(d) is not a CIMT if committed with offensive touching); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (similar Canadian statute).
[6] See Note: Sex Crimes, and see *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009), holding that 261.5(d) is not categorically (automatically) sexual abuse of a minor (SAM) because consensual sex with a 15-year-old ("just under age 16") is not necessarily abusive or harmful.

[7] *Morales-Garcia v. Holder*, 567 F.3d 1058, 1064-1065 (9th Cir. 2009) ("Section 273.5(a) includes in its list of covered victims a 'former cohabitant.' This factor alone makes the offense virtually indistinguishable from the run-of-the-mill assault. Few would argue that former cohabitants -- however transitory that cohabitation -- are in a special relationship of trust such as to make an assault by one on the other a CIMT. Our past decisions make clear that assault and battery, without more, do not qualify as CIMTs.")

[8] Compare *Morales-Garcia, supra* (holding that PC § 273.5 is not a CIMT if it involved a cohabitant or former cohabitant) with *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (holding that spousal abuse under PC § 273.5 is a CIMT).

[9] See *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th 2004). The court noted that mild conduct held to violate § 647.6 that is not SAM includes urinating in public, offering minor females a ride home, driving in the opposite direction; repeatedly driving past a young girl, looking at her, and making hand and facial gestures at her (in that case, "although the conduct was not particularly lewd," the "behavior would place a normal person in a state of being unhesitatingly irritated, if not also fearful") and unsuccessfully soliciting a sex act. In another case the Ninth Circuit detailed mild behavior that violates § 647.6 that is not a CIMT, which also could provide plea guidance: brief touching of a child's shoulder, photographing children in public with no focus on sexual parts of the body so long as the manner of photographing is objectively "annoying"; hand and facial gestures or words alone*;* words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen; it is not necessary that the act[s or conduct] actually disturb or irritate the child (see *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9th Cir. 2008).

[10] California firearms offenses that cover antique firearms include but are not limited to former (prior to January 1, 2012) Calif. P.C. §§ 12020, 12021(a) & (b), 12022(a)(1), 12025(a)(1), 12031(a)(1), and current Calif. P.C. §§ 25400(a), 27500, 29800, 33215. Some other sections specifically exclude antique firearms, such as current Calif. P.C. § 26350 (possession of unloaded firearm), 30600 (assault weapons). Antique firearms offenses have been prosecuted for former Cal. P.C. § 12022 (armed with antique weapon while committing felony) and former P.C. § 12021 (possession by felon). See, e.g., *People v. Gossman*, 2003 WL 22866712 (2003) (conviction for felon in possession of a firearm; opinion suggests that it was antique firearm because there was motion to return the seized item (the antique firearm) to family members); *People v. McGraw*, 2004 WL 928379 (2004) (upheld firearms enhancement under former P.C. § 12022(a) based on admission that defendant has access to an antique firearm). While California Penal Code sections relating to firearms were reorganized as of January 1, 2012, the legislature provided that the new code makes no substantive changes from the old. P.C. § 16005. Thanks to Su Yon Yi for this analysis.