

### 3.3 Determining Whether a State Offense Triggers Removal

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### 3.3 Determining Whether a State Offense Triggers Removal

#### A. Categorical Approach and Variations

**Minimum culpable conduct.** To determine whether a state conviction qualifies as an offense that triggers removal, the immigration court employs the “categorical approach.” Under this approach, the factfinder compares the elements of the statute of conviction to the federal removal ground. *See Moncrieffe v. Holder*, 569 U.S. 184, 133 S. Ct. 1678 (2013). The actual conduct that led to the defendant’s prosecution is irrelevant. What matters is whether the “least of the acts” criminalized by the statute necessarily comes within the ground of removal. *Id.*, 133 S. Ct. at 1684. For example, in *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015), the Fourth Circuit considered whether the defendant’s conviction for unauthorized use of a vehicle under Virginia law was an aggravated felony theft offense. The aggravated felony theft ground of removal requires that an element of the offense be a non-consensual taking. In *Castillo*, the Court found that the minimum culpable conduct criminalized under the Virginia statute is where the car is entrusted to the defendant but is used in a manner not specifically authorized by the owner. The Court found that the statute was not a categorical match because the minimum culpable conduct under the statute did not involve a taking without the owner’s consent and thus did not come within the aggravated felony theft ground. Thus, no convictions under the Virginia unauthorized-use statute qualify as an aggravated felony theft offense. It does not matter that the noncitizen may in fact have taken the car without the owner’s consent because the immigration court is required to presume that the conviction rested on the least of the acts under the statute.

As part of this analysis, the immigration court must consider whether a “realistic probability” exists that the convicting jurisdiction actually prosecutes the minimum culpable conduct. *Moncrieffe*, 133 S. Ct. at 1684–85. If there is a “realistic probability” that the state would apply the statute of conviction to conduct falling outside the federal removal ground, the immigration consequence is not triggered.

How have courts determined whether a realistic probability of prosecution exists? The Supreme Court has explained that a noncitizen can satisfy this standard by pointing to a case in which the state courts applied the statute to conduct falling outside the removal ground. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Eleventh Circuit has held that where the statute on its face expressly reaches conduct that falls outside the generic ground of removability, the statute satisfies the standard. *Ramos v. Attorney General*, 709 F.3d 1066, 1071–72 (11th Cir. 2013) (concluding that where a Georgia

theft statute expressly covered alternative intents, one of which did not satisfy the elements of an aggravated felony theft crime, the statute's language created the realistic probability that it would punish crimes beyond generic theft). The BIA, however, does not apply this express language rule. *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). The Fourth Circuit has held that even where the language of the statute does not expressly include the minimum conduct, but the case law interpreting the statutory language does, the realistic probability standard is satisfied. *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc).

**Modified categorical approach.** The above approach includes an additional step, called the “modified categorical approach,” if the statute of conviction is *divisible*—that is, it defines more than one offense, at least one of which comes within the removal ground and one of which does not. *Descamps v. U.S.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2276 (2013). In these cases, the immigration judge cannot perform the required categorical analysis until it has been determined which offense the individual was convicted of. For this limited purpose, the immigration judge can look beyond the language of the statute to a limited set of official court documents from the defendant's criminal case, called the “record of conviction.” The defendant's particular conduct remains irrelevant under this analysis; the only issue is which of the multiple offenses defined by the statute was the basis of the conviction. *Id.* The specific documents that comprise the record of conviction are listed below.

Until recently, it was unclear when the immigration court could look to the record of conviction in applying the modified categorical approach. Some statutes contain a disjunctive list of acts, which are considered alternative ways of committing a single crime. In other statutes, the acts are considered elements, which are part of separate crimes. In identifying the offense committed by the defendant, can the immigration court look at the record of conviction in both instances or only when the statute creates separate crimes?

For example, suppose a statute defines burglary as unlawfully breaking and entering into a *building, car, or boat* with the intent to commit a felony. For immigration purposes, burglary of a car or boat is not an aggravated felony burglary offense. Can the immigration court look to the record of conviction to determine whether the defendant was guilty of burglary of a building (which is an aggravated felony burglary) or burglary of a car (which is not an aggravated felony burglary). The U.S. Supreme Court recently held that this question turns on whether the items in the list (building, car, or boat) are “elements” of the offense, which must be found unanimously and beyond a reasonable doubt, or are alternative means of committing a single offense. *See United States v. Mathis*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2243 (2016). If the former, then the immigration court may look to the record of conviction. If the latter, the immigration court cannot because the statute creates only one offense. This is an important distinction because if “building, car, or boat” are alternative means of committing one offense, then the minimum conduct punished under the statute does not come within the burglary aggravated felony ground and does not trigger removal on that basis.

Assume instead that “building, car, or boat” are three different elements, defining three different crimes. In that case, because the statute defines more than one offense, the immigration judge would be permitted to consult the record of conviction to determine for which offense the defendant was convicted. If the record indicates that he was convicted of entering a building, the client would be deportable. If the record of conviction is silent, then the immigration court should conclude that the noncitizen is not deportable because the burden of proof lies with the government. *See infra* § 3.3B, Burden of Proof on ICE in Establishing Deportability. Similarly, if the defendant takes an *Alford* plea, there is an argument that the government cannot meet its burden of establishing under which prong of a divisible statute the defendant was convicted. *See infra* § 6.1C, Categorical Approach and Record of Conviction.

A practitioner would generally look to state law to make this determination. Researching state case law and examining the state criminal statute’s text is therefore an essential and critical first step to ascertaining whether a criminal statute is divisible and permits review of the record of conviction. For a discussion of this issue in the context of pleading requirements, see 1 North Carolina Defender Manual § 8.5G, Disjunctive Pleadings (2d ed. 2013); Robert L. Farb, [The “Or” Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity of Jury Verdict](#) (Feb. 1, 2010).

**Record of Conviction.** The Board of Immigration Appeals and U.S. Supreme Court have determined that the following documents make up the record of conviction:

- statute of conviction,
- charging document (such as the indictment or information),
- written plea agreement,
- transcript of plea colloquy,
- any factual findings by the judge to which the defendant agreed
- stipulations to the factual basis for the offense, and
- jury instructions if the defendant is convicted after a jury trial.

The following documents are beyond the record of conviction and ordinarily may not be considered by the immigration court:

- police reports,
- probation or pre-sentence reports, and
- statements by the noncitizen outside the judgment and sentence transcript.

The record of conviction can be affected by counsel’s handling of the case, discussed *infra* in § 6.1C, Categorical Approach and Record of Conviction.

**Non-categorical exceptions.** In a few limited contexts, the immigration court may take a non-categorical, “circumstance-specific” approach, which permits an inquiry into the facts of a conviction without regard to the elements of the statute of conviction. In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the U.S. Supreme Court held that some aggravated felony definitions are made up of two parts: one or more “generic” offenses

that are subject to the categorical approach, and one or more “circumstance-specific” factors that are not. *Nijhawan* concerned the aggravated felony of a crime of fraud or deceit in which the loss to the victim exceeds \$10,000. INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M). The Court found that the amount of loss is circumstance-specific and need not be proved under the categorical approach, while fraud and deceit are generic offenses that are subject to the categorical approach. Thus, in determining whether the loss was greater than \$10,000, the immigration court is permitted to look at documents beyond the record of conviction, such as presentence reports. Other areas in which this approach applies include the exception to deportability for an offense involving possession of thirty grams or less of marijuana (*see Matter of Davey*, 26 I&N 37 Dec. (BIA 2012); *see also infra* § 3.4D, Conviction of any Controlled Substance Offense) and proof of a domestic relationship for purposes of the domestic violence ground of deportability. *See Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015); *see infra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order

### **B. Burden of Proof on ICE in Establishing Deportability**

In removal proceedings, ICE has the burden of establishing that the noncitizen is deportable. *See* INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a). Thus, ICE must demonstrate that the offense of conviction falls into a ground of removal. If the statute of conviction defines multiple offenses (some of which come within the immigration ground and some of which do not), and there is insufficient information in the record of conviction to determine the offense of conviction, the government would be unable to demonstrate that the noncitizen is deportable. *See Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *see also infra* § 6.1C, Categorical Approach and Record of Conviction (discussing *Alford* pleas).

### **C. Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility**

If ICE establishes that a noncitizen is deportable, the noncitizen may be able to apply for some form of relief from removal. In general, the noncitizen has the burden of proving that he or she is eligible for a form of relief from removal. *See* 8 C.F.R. § 1240.8(d); *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). Also, noncitizens subject to grounds of inadmissibility generally bear the burden of demonstrating that they are admissible. *See* INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2). Thus, in some instances, the noncitizen has the burden of documenting necessary information in the record of conviction. For example, an individual convicted of Class 1 misdemeanor marijuana possession in North Carolina is inadmissible on controlled substance grounds. But, the individual may qualify for relief from removal for such an offense by demonstrating that the conviction involved 30 grams or less of marijuana. Because Class 1 misdemeanor possession of marijuana covers quantities of more and less than 30 grams, the noncitizen must ensure that the record of conviction indicates that the amount of possession was 30 grams or less. Counsel may be able to take steps to safeguard the record. *See infra* § 6.1C, Categorical Approach and Record of Conviction.