Ann Benson, Directing Attorney
abenson@defensenet.org (360) 385-2538
Enoka Herat, Staff Attorney
enoka@defensenet.org (206) 623-4321, x105
Jonathan Moore, Immigration Specialist
jonathan@defensenet.org (206) 623-4321, x104

Washington Defender Association's Immigration Project
110 Prefontaine Place S., Suite 610, Seattle, Washington 98104
www.defensenet.org/immigration-project

Analyzing Selected Washington Property Crimes After *Moncrieffe* and *Descamps*

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NOTE TO IMMIGRATION COUNSEL:

This analysis is intended to complement the extensive summary on these decisions provided in the practice advisories published jointly by the National Immigration Project, the Immigrant Defense Project, and the Immigrant Legal Resource Center. This overview presumes immigration counsel is familiar with these advisories which are available at:

- *Moncrieffe v. Holder* Advisory: http://www.ilrc.org/files/documents/moncrieffe_ninth_cir_defenses_final_5.28.pdf

- *Descamps v. United States* Advisory: http://immigrantdefenseproject.org/wp-content/uploads/2013/06/Descamps-advisory-7-17-FINAL.pdf

I. Challenging Removal & Relief Ineligibility Due to Convictions: The New and Improved Landscape

PRACTICE HIGHLIGHT: The Supreme Court and 9th Circuit decisions outlined here significantly expand the basis to vigorously contest removal and relief bars in many cases and immigration counsel should be doing so whenever possible.

A. The Categorical Approach Re-Calibrated to its Original, Traditional Principles

1. Minimum Conduct Test Lives Again!

The categorical and modified categorical approach constitute the legal framework used by immigration judges (IJs) to determine whether a state conviction triggers a conviction-related ground of removability, inadmissibility, or bars relief from removal. In recent years both BIA and Ninth Circuit decisions had significantly compromised the integrity of this framework and eroded its core principles, causing countless unwarranted removals. See, *e.g., United States v. Aguila-Montes De Oca,* 655 F.3d 915 (9th Circuit 2011) (*en banc)* and *Matter of Lanferman,* 25 I&N Dec. 721 (BIA 2012). In *Moncrieffe v. Holder,* 133 S.Ct. 1678 (2013), and in *Descamps v. United States*, 133 S.Ct. 2276 (2013), the U.S. Supreme Court overruled these decisions, and re-established the strict limitations that govern the categorical approach.

These decisions make clear that the categorical approach is an elements-based test, not an evidence (facts)-based test. In other words, it doesn't matter what happened that dark & stormy night; it only matters what happened that day in criminal court. Under this approach, the relevant inquiry is whether the statute of conviction *necessarily*, in every case, requires that the State prove elements that match the elements of the generic immigration offense. **Traditionally, this was known as the "minimum conduct" test: does the minimum conduct necessary to violate the statute match the generic immigration definition at issue?** If there is no match, that is the end of the inquiry – period – and the conviction cannot trigger the conviction-based removal ground at issue.

EXAMPLE – Assault 4th Degree: Because the minimum conduct necessary for a conviction under RCW §9A.36.041 includes placing someone in apprehension of harm which does not even include touching, a conviction for this offense can never match the elements of the generic definitions relating to crimes of violence, crimes involving moral turpitude or crimes against children and can, thus, categorically never trigger these grounds. No resort to the documents in the record of conviction is necessary or permitted – it does not matter what the actual conduct of conviction was. *See* discussion, *infra,* §II.A.

2. Significant Limitations Re-Imposed on Using the Modified Categorical Approach

While the BIA and Ninth Circuit had sanctioned continuing on to the modified categorical ("mod-cat") approach in almost all cases (*see*, *Lanferman*, *supra*), the *Moncrieffe* and *Descamps* Courts made clear that the mod-cat approach (which permits the examination of a limited number of specific documents from the record of

conviction (ROC[1])) was reserved only for statutes which set forth multiple, separately defined offenses, one of which would trigger the generic immigration definition. *Descamps*, 133 S.Ct. at 2286. "[A]pproved extra-statutory documents [can be reviewed] only when a statute defines burglary not (as here) over broadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." Moreover, even where it is used, consultation of the ROC under the mod-cat approach is strictly limited to narrowing the record to identify the specific statutory provision related to the crime of conviction; the defendant's particular conduct or the underlying facts remain irrelevant.

EXAMPLE Assault 3rd Degree: Like, Descamps, Washington's Assault in the 3rd degree, RCW § 9A.36.031, sets forth 10 separately defined offenses, some of which can match generic immigration definitions and some which do not. The Immigration Judge is permitted to consult the ROC for the exclusive purpose of identifying which of the 10 provisions is the subject of respondent's conviction

Missing Element Statutes. Where the statute of conviction is missing an element of the generic immigration definition it can never be a match. The Immigration Judge is not permitted to consult the ROC to determine whether specific facts and/or conduct could supply it.

EXAMPLE: Since none of Washington's general assault statutes (RCW §§ 9A.36.011-41) require that the victim be a minor child, a conviction for any of these offenses will no longer risk triggering INA 237(a)(2)(E)(i). Regardless of whether the ROC indicates that the victim was, in fact, a minor, a general assault conviction is categorically missing an essential element of the BIA's generic definition of what constitutes a crime of child abuse set forth in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).[2] *See*, discussion, *infra*, II.A.

3. Underlying Rationale: Upholding the Defendant's Benefit of the Bargain

Moncreiffe and *Descamps* go a long way to righting the categorical approach "ship" (which had been dangerously listing). However, ensuring their full implementation by immigration courts will take strong, vigilant advocacy from immigration counsel. A foundational argument for pushing forward in the application of these cases is the primary rationale that *Descamps* cited in overturning *Aguila-Montes de Oca*, namely the benefit of the bargain.[3]

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[1] Under the modified categorical approach, the Immigration Judge can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. U.S.*, 544 U.S. 13, 20-21 (2005).

[2] Note, however, that a conviction for Assault of a child under RCW 9A.36.120-140 do have the victim's minor status as an element will sufficiently match the generic definition of a crime of child abuse and trigger this ground of deportation.

[3] The *Descamps* Court stated:

> Still worse, the *Aguila–Montes* approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary.495 U.S., at 601–602, 110 S.Ct. 2143. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.
>
> *Descamps v. U.S.* 133 S.Ct. 2276, 2289 (2013)

Ninety-four percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Plea bargaining is not an act of grace by the State, but a contractual agreement where both sides obtain a benefit. *See, e.g., United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir.2002) ("Plea agreements are contractual by nature and are measured by contract law standards."). Just as the defendant chooses rationally to avoid the risk of conviction at trial, the prosecution avoids testing its evidence before a jury. As the U.S. Supreme Court has explained, "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Frye*, 132 S. Ct. at 1407.

The courts have long recognized that honoring a plea bargain is a core concern in the application of the two-step categorical approach. In its seminal decision, *Taylor v. United States*, 495 U.S. 575 (1990), outlining this analytical framework, the Supreme Court stated, "in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* at 602.

The Ninth Circuit has also made clear that protecting a defendant's benefit from the plea bargain is a critical rationale underpinning the use of the modified categorical approach in determining whether immigration consequences attach to a conviction. In *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012), the court found that the respondent's conviction for sexual battery was not an aggravated felony sexual abuse of a minor, despite the fact that it was committed against a victim who was thirteen at the time of the offense. The circuit explained that it could not consider the victim's date of birth, which was stated in the information, because "limitations on the reach of modified categorical analysis are necessary to protect defendants from procedural unfairness." *Id.* at 1018. The circuit explained

> "Sanchez pled guilty to the sexual battery charge in exchange for the dismissal of all of the child- and minor-specific charges against him. He may have expected that this deal would spare him from the consequences of conviction for a child sex crime. To conclude that we may nevertheless penalize him based on the date of birth allegation would risk undoing the bargain he struck with the state prosecutor." *Id.*

This Board has also recognized the importance of preserving the benefit of the bargain for plea agreements when applying the modified categorical approach in *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 465 (BIA 2011).[4]

In cases involving noncitizen defendants, the benefit of a plea bargain also includes avoiding the immigration consequences of convictions. The Supreme Court has explained that, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (2010). Moreover, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 1483 (citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. To prevent against deportation, the Supreme Court recognized that "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 130 S.Ct. at 1486.

[4] "[T]he hierarchical approach serves the important function of recognizing and preserving the results of a plea bargain, where the parties, with the consent of a trial judge, agree to allow the defendant to plead to a less serious crime. By recognizing that the evaluation of a crime involving moral turpitude is not an invitation to relitigate a conviction, *Matter of Silva-Trevino* indicates that it does not intend to allow Immigration Judges to undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.

4. CIMT Analysis: *Matter of Silva-Trevino* Overruled & Categorical Approach Controls

Although *Moncreiffe* and *Descamps* did not directly involve analysis of whether a conviction constitutes a crime involving moral turpitude (CIMT), the reinvigorated categorical analysis framework they set out also controls whether state convictions meet the relevant generic CIMT definition.[5] In its recent decision in *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), the Ninth Circuit rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Thus, in the Ninth Circuit, IJ's are no longer permitted to conduct an additional third step of analysis under *Silva-Trevino*, which let Immigration Judges look at "any additional evidence deemed necessary" *outside* of the record of conviction, to determine if a conviction was for a CIMT, when the traditional categorical and modified categorical steps were "inconclusive." Consequently, CIMT determinations are now again subject to the strict limitations set forth in *Moncrieffe* & *Descamps*.

EXAMPLE: both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). Since intent to permanently deprive is NOT an element of Washington theft offenses (*State v. Komok*, 133 Wash 810 (Wash. 1989)), a theft conviction under any degree (RCW §§ 9A.56.030-050) is categorically not a CIMT - period. The analysis ends here and the Immigration Judge is not permitted to consult the ROC or any other documents since the facts or conduct involved in respondent's conviction is not relevant to the analysis since the statute does not set forth multiple, separately defined offenses.

B. How Do I Apply this Reinvigorated Categorical Approach to My Case? The Four Key Questions.

To determine whether a Washington (or other state) conviction triggers a conviction-based ground of deportation or inadmissibility, or bars relief from removal, immigration counsel should apply the categorical and modified categorical approach by using the following four questions.

NOTE: The categorical approach only applies to conviction-based inadmissibility and deportation grounds. The categorical approach **does not apply to conduct-based grounds** (e.g., INA § 212(a)(2)(C)'s 'reason to believe" involvement in drug trafficking). The categorical approach **also does not apply to** the limited universe of crime-related immigration provisions that are deemed to be "**circumstance specific**" under *Nijhawan v. Holder*, 129 S.Ct. 2294, 2301 (2009).[6].

1. What is the generic definition of the immigration provision at issue?

The generic definition is the legal standard to which your client's conviction will be compared. The INA, Supreme Court, Circuit Courts and the BIA create generic definitions. Some are well-defined while others are not. For example, both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must

[5] While *Silva-Trevino* added a third step to the two step categorical approach, it reaffirmed the use of the first two steps, recognized by *Taylor* and *Shepard* in determining whether a conviction is a CIMT: "(1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript." *Matter of Silva-Trevino*, 24 I&N Dec. at 704. Since this approach has been refined by the Supreme Court, the current approach should apply.

[6] Under the circumstance specific approach, IJs are allowed to consider evidence outside the record of conviction related to the conviction to determine whether there is a match. The monetary threshold of $10,000 associated with the fraud aggravated felony under INA §101(a)(43)(M)(i), for example, requires a circumstance specific approach. For more analysis of this issue see *The Impact of Nijhawan v. Holder on Application of the Categorical Approach to Aggravated Felony Determinations*, available at www.nationalimmigrationproject.org.

contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

2. Do the elements in the statue of conviction categorically match the generic definition?

Counsel's task here is to identify the elements necessary to obtain a conviction under the state statute that is the subject of your client's conviction by consulting the statute and caselaw interpreting it, and compare those elements to the elements of the generic definition of the immigration provision at issue. The inquiry is not what a defendant's actual conduct was, but whether the "minimum conduct" that satisfies the elements of the conviction statue also satisfies the generic immigration definition. As the Supreme Court explained in *Moncrieffe*, "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S.Ct. at 1684.

Indivisible Statutes. If the state statute sets out just one unitary offense, it is indivisible. An indivisible statute is a categorical match with a generic immigration offense only if the elements that must be proved by the State to obtain a conviction match the elements of the generic offense. An element is a fact or finding *required* for conviction. In other words, a state offense is a categorical match only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 133 S.Ct. at 1684 (internal citations omitted). As the *Moncrieffe* Court noted, "whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Id.*

If all convictions under the state statute match the federal generic definition, then the conviction categorically matches (and triggers) the immigration consequence. However, if someone could be convicted under the statute for conduct that does not match the federal generic definition, or, where the state statute is missing an element of the generic definition, as it was in *Descamps*, it can NEVER be a categorical match to the generic definition. When this happens, *the analysis stops there*, *regardless of information in the record* since "overbroad" statutes can no longer be deemed to be categorical matches to the generic definitions and, thus, no resort to the modified categorical approach is permitted. In short, game over, respondent prevails.

Realistic Probability Test. It is important to note that there must be a "realistic probability" that the minimum conduct that *could* be prosecuted under the statute actually will be/has been. Applying "legal imagination to a state statute's language" is not enough. *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In *Gonzalez v. Duenas-Alvarez*, the Supreme Court dismissed an argument that a theft offense was broader than an aggravated felony, due to a non-statutory theory of liability. The Court held that "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.'" *Id.* In *Moncrieffe*, the Supreme Court cited examples of Georgia state caselaw demonstrating that social sharing of small amounts of marijuana without remuneration is prosecuted under the statute Mr. Moncrieffe had been convicted under. *See Moncrieffe*, 133 S.Ct. at 1686. However, the Ninth Circuit has held that statutory language alone is sufficient to meet the "reasonable probability" test if it expressly reaches the conduct in question. *See United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Citing to state caselaw, where available, is always a useful precaution.

3. May the Immigration Judge go on to the modified categorical approach, and if so, for what purpose?

Divisible Statutes. An Immigration Judge may review the record of conviction *only* if the statute is divisible. A statute is "divisible" where the state statute "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S.Ct. at 1684. A divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S.Ct. at 2281. Thus, divisible here means that there are multiple, distinct crimes in one statute.

Layers of Divisibility. Sometimes statutes may have multiple layers of divisibility. The first layer is the statute as a whole, which contains multiple, separately described offenses. For example, in *Moncrieffe*, the respondent was convicted under a divisible Georgia statute which criminalized the possession, manufacture, delivery, distribution, possession with intent to distribute, etc. of marijuana. *Moncrieffe*, 133 S.Ct. at 1685. The Court consulted the record of conviction, specifically the plea agreement, to determine that Mr. Moncrieffe was convicted of possession with intent to deliver marijuana. *Id.* The second layer is whether this prong of the statute is itself divisible. In Georgia, one could be convicted under the "possession with intent to deliver marijuana" prong for social sharing of a small amount of marijuana without remuneration. Therefore the Court found that it was overbroad – but not further divisible. It did not examine any additional conviction records to determine what the respondent's particular circumstances were, finding that "ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to" the generic offense. *Id.* at 1687.

Means v. Elements. Immigration counsel should be alert to the not-always-clear distinction between statutory elements and the alternate *means* of committing the offense. The means of commission are not "elements." One test for an element may be if jury unanimity is required to find it and if the finding increases the maximum possible sentence that may be imposed. For example, the three prongs of the common law definition of "assault" in Washington are not different elements of an assault; rather, they are different means or ways of committing an assault. A jury need not unanimously decide which way the defendant committed the assault. *See*, discussion, *infra* at § II.A.

For What Purpose? The *sole purpose* of the modified categorical approach is to identify which statutory offense in a divisible statute was the subject of the conviction. "If one alternative (say, a building) matches an element in the generic [burglary] offense, but the other (say, an automobile) does not, the modified categorical approach permits [the IJ] . . . to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S.Ct. at 2281. Because the *Descamps* Court expressly overruled *Aguila-Montes*' evidence-based approach and reaffirmed the elements-based approach, IJ's are no longer required or permitted to review the conviction record to determine whether the facts of respondent's conviction can be made to match the generic definition at issue.

4. If the modified categorical approach applies, which documents can an Immigration Judge review?

In applying the modified categorical approach to determine which of the separately described offenses the Respondent was convicted of, the Immigration Judge can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. United States*, 544 U.S. 13, 20-21 (2005). Documents such as police reports and the certification for determining probable cause may be considered only if specifically stipulated or assented to by the defendant as providing the factual basis for the plea. *See e.g.*, *Suazo Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (permitting consideration of police reports and a statement of probable cause because the documents were specifically incorporated into the guilty plea when the respondent checked a box indicating that the Court could review those documents to establish a factual basis for the plea). Additionally, after *Olivas-Motta*, the Immigration Judge cannot review evidence outside of the record of conviction to determine whether a state conviction constitutes a CIMT offense.

C. Advocating for Your Client in Light of these Changes

1. Contesting Removal Charges

PRACTICE STRATEGY: The cases outlined above have dramatically altered the landscape for contesting removability for numerous Washington crimes that were previously thought to trigger certain grounds of removability. In order to provide your client with effective assistance, where s/he is facing removal for a

criminal conviction, immigration counsel must conduct an analysis pursuant to the framework set forth above to determine what, if any, arguments are available to contest removability for the conviction-based removal charges at issue.

2. Advocating for Relief Eligibility: *Young v. Holder* Currently Under 9th Circuit Review

PRACTICE STRATEGY: Use the four-step analysis in Sec. I.B above to determine whether your client's conviction triggers conviction-based deportation/inadmissibility bars. Where it does not, counsel should be advocating to the Court that *Moncrieffe* and *Descamps* overruled *Young* and establish why, under the reconfigured categorical approach, the conviction does not preclude your client from establishing prima facie eligibility for relief. As of this writing, the Ninth Circuit panel reviewing the BIA's decision in *Almanza-Arenas* has requested briefing from the parties regarding the impact of *Moncrieffe* & *Descamps* on relief eligibility determinations. This supplemental briefing in *Almanza-Arenas is available at*:

- http://www.ilrc.org/files/documents/almanza_arenas_moncrieffe_and_young_brief.pdf

Since 2012, applicants for relief from removal in the Ninth Circuit have been laboring under the weight of *Young v Holder,* 697 F.3d 976 (9th Cir.2012), which required respondents to bear the burden of establishing by a preponderance of the evidence that a conviction *does not* trigger conviction-related deportability/inadmissibility (e.g., is *not* an aggravated felony). Under *Young*, the inquiry is treated as a factual investigation and also requires the respondent to produce all conviction records. Importantly, the applicant can never establish statutory eligibility for the relief sought if the legal record is "inconclusive." *See Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715; *Matter of Almanza-Arenas,* 24 I&N Dec. 771 (BIA 2009).

Young appears to be wholly incompatible with *Moncrieffe* and *Descamps.* Even if *Young* is not entirely overturned, after reversal of *Aguila-Montes de Oca* and *Silva-Trevino* the universe of "inconclusive" conviction records to which *Young* could apply shrinks considerably to only those where two truly separate, statutory alternatives cannot be narrowed – a very uncommon occurrence in reality. For example, a controlled substance conviction under RCW 69.50.401 criminalizes manufacture, delivery or possession with intent to deliver a controlled substance, and is thus divisible. If the information and the plea agreement both said "possession or deliver marijuana" the record of conviction would be "inconclusive" because it could not be narrowed to one or the other. Given the specificity of plea agreements that is generally required under Washington law and practiced in Washington courts, these scenarios are likely to be rare. Additionally, as the *Moncrieffe* Court pointed out, "ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor." *Moncrieffe*, 133 S.Ct. at 1693.

II. Analysis of Washington Property Crimes Post-*Moncrieffe & Descamps*

PRACTICE TIP: Step One of analyzing whether any Washington (or other) State conviction triggers a conviction-based removal ground is to clearly identify the RCW statute at issue, obtain available conviction records and clarify what removal grounds are, or could be, at issue (e.g., crime involving moral turpitude? Aggravated felony?). Each ground has to be analyzed separately. A court docket print-out is not enough of a record, unless the physical records have been destroyed and it is the only record available. If they exist, you need copies of the actual complaint, judgment, and plea statement.

A. Theft 1st, 2nd and 3rd – RCW §§ 9A.56.030-050.

1. What Is the Generic Definition of the Immigration Provision at Issue?

a. Crime Involving Moral Turpitude – INA § 212(a)(2)(A)(i)(I) (inadmissibility) & INA § 237(a)(2)(A)(i) &(ii) (deportability).

A CIMT involves "base, vile, and depraved conduct that shocks the conscience and is contrary to the private and social duties man owes to his fellow men or to society in general." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (*en banc*). Acts of petty theft can constitute a CIMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1100 (9th Cir. 2011); *Matter of Kochlami*, 24 I&N Dec. 128, 129 (BIA 2007). However, under BIA and Ninth Circuit case law, a theft offense inheres moral turpitude, and is base, vile, and depraved, *only* if it evidences the intent to permanently deprive a person of his or her property. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

b. Theft Aggravated Felony – INA § 101(a)(43)(G).

An aggravated felony is defined to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." INA § 101(a)(43)(G). Aggravated felony "theft" is generically defined as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Ramirez Villalpando v. Holder*, 645 F.3d 1035, 1039 (9th Cir. 2011). However, a statute that criminalizes the taking of labor or services is not categorically an aggravated felony. *Id.*

c. Fraud Aggravated Felony – INA § 101(a)(43)(M)(i).

This aggravated felony provision is triggered when a conviction "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i). The BIA has distinguished between theft and fraud this way: ["w]hereas the taking of property *without consent* is required for a section 101(a)(43)(G) 'theft offense,' a section 101(a)(43)(M)(i) 'offense that involves fraud or deceit' ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained." *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008).

The Supreme Court has held that, if a crime is found to involve fraud or deceit as an element under the categorical approach, then determining the loss amount is subject, not to the categorical approach, but rather, a "circumstance-specific" approach. *See Nijhawan v. Holder*, 557 U.S. 29, 36 (2009). This means that for crimes involving fraud or deception, Immigration Judges are allowed to consult any document relating to the conviction in order to determine the amount of loss to the victim.

If a crime is found to involve fraud or deceit as an element, the Court has held that the loss amount, although circumstance-specific, must be sufficiently connected to the actual offense of conviction. Losses from uncharged conduct or dismissed charges do not count. In *Nijhawan*, the Court, requiring that "the loss must be tied to the specific counts covered by the conviction," found that the defendant's stipulation of loss at sentencing was a sufficient basis upon which to find a loss exceeding $10,000, particularly because the restitution order reflected the same loss range and because the record contained no conflicting evidence of loss. *Id.* at 2303.

2. Do the Elements of Washington Theft Categorically Match the Generic Definition at Issue?

a. WA theft overview.

Washington has three degrees of theft. Theft in the 1st (RCW § 9A.56.030) and 2nd degrees (RCW § 9A.56.040), are felonies while theft in the 3rd degree (RCW § 9A.56.050) is a gross misdemeanor. Attempted theft will make the offense go down one level.[7] For example, attempted theft 3rd degree is a misdemeanor with a maximum possible sentence of 90 days in prison. Since July 22, 2011, the maximum penalty for gross misdemeanors, such as theft in the 3rd degree or attempted theft 2nd degree, was amended from 365 to 364 days.[8]

[7] RCW 9A.28.030, anticipatory offenses.

[8] It is possible for an older theft 3 conviction to carry a 365 day sentence, which would likely make the theft an aggravated felony. If this is the case, it is critical that counsel seeks to modify the sentence from 365 to 364 in order to avoid it being found an aggravated felony.

The three theft statutes are distinguishable by the amount in controversy, ranging from up to $750 to over $5,000. While theft 2nd and theft 1st include alternative elements relating to what was taken (such as taking "commercial metal property"), immigration law is not concerned with what specifically was taken.

b. WA theft defined.

Theft is defined by RCW § 9A.56.020(1) to include the following three acts:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

The first means of committing theft is the most common.

c. Means v. Elements.

The Government may argue that the above three-pronged definition of theft makes Washington theft a divisible offense. Particularly if, in the plea agreement, your client pleaded to "theft by deception," for example. However, the three pronged definition of theft provides different *means* of committing theft, not *elements* of theft. Counsel should argue that the three ways of committing theft, outlined in the definition of theft (RCW § 9A.56.020(1)), are not the *elements* of theft and that these therefore do not make the theft statutes (RCW §§ 9A.56.030-050) divisible. Because the Washington theft offense statutes (RCW §§ 9A.56.030-050), and thus your client's statute of conviction, do not contain these alternatives, they are not divisible.

In *Descamps*, the dissent (ALITO, J.) raised the distinction between the elements of a crime and the means of committing the crime. *Descamps*, 133 S.Ct. at 2297. The *Descamps* majority addressed this issue in a footnote, stating: "A court need not parse state law . . . When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense." *Id.* at 2285 n.2. The Washington theft statues (RCW § 9A.56.030-050) are not drafted to include these three means of committing theft as alternatives, and are thus not divisible as to these means of committing theft.

The three means of committing theft, therefore, are not the elements of Washington theft. This is evidenced by the fact that Washington jurors need not be unanimous as to which means the defendant used to commit the theft. *See e.g.*, *State v. Joy*, 851 P.2d 654, 655 (Wash. 1993) ("The jury instructions did not require unanimity as to which means of committing theft the jury found, nor did the special verdict form direct the jury to indicate a means it unanimously found."). The definition of theft at RCW § 9A.56.020(1) creates alternate *means*, but "under an alternative means analysis of [a] case . . . [u]nanimity is not required if there is substantial evidence supporting each of these alternative means." *State v. Linehan*, 56 P.3d 542, 547 (Wash. 2002). The BIA has strongly implied that it believes jury unanimity to be a requirement for an "element." *Matter of Martinez–Zapata*, 24 I&N Dec. 424, 425-26 (BIA 2007). Therefore, Washington theft is not divisible by the definition of theft set out in RCW § 9A.56.020(1). *See*, means v. elements discussion, *supra* at § I.B.3.

d. Intent to permanently deprive.

Theft in Washington lacks, as an element, the intent to permanently deprive. In *State v. Komok*, the Washington Supreme Court recognized that "[t]he language of our theft statute, RCW § 9A.56.020, and the legislative history indicate that the legislature, in its 1975 revision of the criminal code, did not intend to retain the common law requirement of intent to 'permanently deprive.'" 783 P.2d 1061, 1064 (Wash. 1989). While there is an intent to deprive the rightful owner of property or services, that intended deprivation need not be permanent.

e. Is Washington theft categorically a crime involving moral turpitude (CIMT)?

No. Washington Theft (any degree)[9] is categorically *not* a CIMT. In *State v. Komok*, 783 P.2d 1061 (Wash. 1989), the Washington Supreme Court held that the intent to permanently deprive is not an element of theft in Washington. Since the generic definition of a CIMT theft requires a permanent taking, theft in Washington is categorically not a CIMT. Therefore, theft in Washington can *never* be subject to the modified categorical approach. Respondent's actual conduct is irrelevant and the record of conviction should never be reviewed to determine whether it meets the generic definition of the crime-related immigration provision at issue. The analysis ends here.[10]

f. Is Washington theft categorically a theft aggravated felony?

No. Washington theft is not *categorically* a theft aggravated felony. Theft in Washington is divisible under the aggravated felony analysis. Because Washington's theft statute criminalizes the theft of "property *or* services" it is not categorically an aggravated felony, even with a 12-month sentence. Because the theft statutes are drafted in the alternative, they are divisible as to whether the offense is an aggravated felony. Therefore, the Immigration Judge can go to the modified categorical approach and determine whether the conviction was for either a theft of property (which is an aggravated felony) or a theft of services (which is not an aggravated felony).

Sentencing Issues. A one-year sentence is required for a theft offense to be an aggravated felony. Misdemeanor theft (theft in the 3rd degree) has had a maximum sentence of 364 days since July 22, 2011. Therefore, after July 21, 2011, only a Respondent convicted of theft in the 1st or 2nd degree could potentially have the requisite one year sentence for a theft to constitute an aggravated felony.

The likelihood of getting a 1-year sentence on a felony theft offense is low. In order to be sentenced to 1 year in prison for Theft in the 1st degree (a class B felony), one must have an offender score of 3, or an offender score of 5 for a Theft 2 (class C felony). This means that the Respondent would likely have a number of other felonies and convictions that would render him deportable or inadmissible, in addition to the potential aggravated felony theft.

However, before the maximum penalty for a gross misdemeanor was changed to 364 days instead of 365 days on July 22, 2011, courts would routinely impose 365 day sentences with 364 days suspended for misdemeanor thefts. If your client has an old theft in the 3rd degree conviction with a sentence of 365 days, it is *critical* that you work with a defense attorney to get the sentence modified to 364 days. This may be the *only* way to avoid having an older Theft 3 conviction classified as an aggravated felony.

g. Does Washington theft match the generic definition of a fraud or deceit aggravated felony?

No. Because theft in the 1st degree can involve a loss of $10,000, the issue of whether it is a fraud-or-deceit-based aggravated felony is more likely to arise than for lesser degrees of theft. It is possible that you will have a client whose record of conviction states that s/he pleaded guilty to, or that ICE alleges was convicted of,

[9] Theft 1st degree has an alternative element of theft of "Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, *taken from the person of another.*" RCW § 9A.56.030(1)(b). We have never seen this charged. If your client was convicted under this provision, call us to strategize arguments.

[10] In the rare case, your client may have a plea statement or other record of conviction document that indicates that the theft offense was committed "by deception." "By deception" indicates a *means* of committing the theft offense but that "deception" is not an *element* that a jury must find unanimously. *See*, discussion, *supra*, §II.A.2.c. Therefore, even theft by deception should be analyzed as a non-divisible "theft" offense and the Immigration Judge should not be permitted to go to the modified categorical approach.

"theft by deception." Counsel should argue that even if the *means* of committing the offense involved deception, that deception is not an element of theft. *See* discussion of alternative means vs. elements, *supra*, § II.A.2.c. Indeed, theft in Washington is divisible only as to whether property or services were taken.

The generic fraud or deceit aggravated felony offense requires that the statute at issue have fraud or deceit as elements. *Olivas-Motta v. Holder,* 716 F.3d 1199, 1206 (9th Cir. 2013). Since neither fraud nor deceit is an element of theft offenses, a Washington theft offense is categorically not a crime of fraud or deceit. Note that only the *monetary threshold portion* of the fraud/deceit aggravated felony is circumstance-specific. *Nijhawan* at 2302. *Nijhawan* "only considered how to calculate the amount of loss once a conviction for a particular *category* of aggravated felony has occurred." *Carachuri-Rosendo v. Holder,* 130 S.Ct. 2577, 2587 n11 (2010) (emphasis added).

3. May the Immigration Judge go on to the modified categorical approach in analyzing a theft conviction?

CIMTs: No. For a CIMT analysis theft is indivisible because it lacks the element of intent to permanently deprive. Washington's theft statutes are drafted in the alternative only as to whether property or services are at issue, which is not a consideration for CIMT theft.

Theft aggravated felony analysis where sentence is 365 days or more: Yes. For the theft aggravated felony analysis, the Immigration Judge may consult the record of conviction to determine whether property *or* services were taken. If the record of conviction establishes that property was taken, the offense is an aggravated felony. If it establishes that services were taken, then it is not an aggravated felony.

Fraud aggravated felonies where the loss to the victim is over $10,000: No. Counsel should argue that the Immigration Judge is not permitted to consult the record of conviction since theft by deception is merely another means by which a theft crime can be committed—not a separate element of the offense. Counsel should argue that the alternative means of committing theft are not elements for purposes of the categorical approach.

B. Taking Motor Vehicle Without Permission (TMV) – RCW §§ 9A.56.070-075.

1. What Is the Generic Definition of the Immigration Provision at Issue?

a. Crime Involving Moral Turpitude – INA § 212(a)(2)(A)(i)(I) (inadmissibility) & INA § 237(a)(2)(A)(i) &(ii) (deportability).

See § II.A.1, *supra* for an analysis of the CIMT generic definition.

b. Theft Aggravated Felony – INA § 101(a)(43)(G).

See § II.A.1, *supra* for an analysis of the theft aggravated felony generic definition.

2. Do the Elements of TMV Categorically Match the Generic Definition at Issue?

a. Overview of TMV.

Felony TMV 1st degree (RCW § 9A.56.070), for taking a car with the intent to alter, strip it for parts, sell it, etc. is divided into subsections and is, thus, divisible. TMV 2nd degree (RCW § 9A.56.075), also a felony, is Washington's "joy-riding" statute. While it is written in the alternative as to being the "taker," one who "drives away" or is a mere "rider" in the car, these distinctions are irrelevant for immigration law purposes.

b. Is TMV categorically a crime involving moral turpitude (CIMT)?

TMV 1st degree: Yes. TMV 1st degree is categorically a CIMT. This statute is divisible and each of the alternative provisions involves elements that indicate a permanent taking, such as "with intent to sell." If your client is convicted under prong (a) "alters the motor vehicle for the purpose of changing its appearance," counsel should argue that the minimum conduct required by the statute (including painting the car) does not require proof of a permanent taking and is thus not a CIMT. All other prongs are categorically CIMTs.

TMV 2nd degree: No. TMV 2nd degree is categorically NEVER a CIMT. TMV 2nd degree is Washington's "joyriding" statute. The BIA has recognized that joyriding does not have the intent to permanently deprive and is thus not a CIMT. *See e.g., Matter of M-*, 2 I&N Dec. 686 (BIA 1946). As Washington Courts have explained, "[w]hile proof of intent to *permanently* deprive is not necessary under the theft statute, the 'intent to deprive' element nevertheless implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission. Accordingly, the joyriding statute proscribes the *initial* unauthorized use of an automobile, while the theft statute proscribes the *continued or permanent* unauthorized use of an automobile." *State v. Walker*, 879 P.2d 957, 960 (Wash.Ct.App. 1994) (emphasis in the original). Since it lacks the intent to permanently deprive, TMV2 can *never* be subject to the modified categorical approach for CIMT analysis. The Respondent's actual conduct should be irrelevant and the record of conviction can never be reviewed to determine whether it meets the generic definition of the crime-related immigration provision at issue.

c. Is TMV categorically a theft aggravated felony?

Yes. But ONLY a TMV conviction with a sentence of 365 days or more is a theft aggravated felony. A TMV 1st degree or TMV 2nd degree conviction with a sentence of 365 days is a theft aggravated felony since the statutes criminalize the taking of property.[11]

For TMV 1st degree, a defendant can be sentenced to 12 months in prison even if they have no prior criminal history. The standard sentencing range is 6-12 months without any prior convictions. In order for a defendant to be sentenced to 12 months or more for TMV 2nd degree, s/he would need an offender score of 5, meaning that if your client has a 12 month sentence for TMV 2nd (which is an aggravated felony), it is likely that s/he would also likely have other felony convictions that would trigger removal or preclude relief. A conviction for attempted TMV 2nd degree is a gross misdemeanor and would thus not be an aggravated felony since the maximum penalty as of July 22, 2011, is under 365 days.

C. Possession of Stolen Property (PSP) – RCW §§ 9A.56.150-9A.56.170.

1. What Is the Generic Definition of the Immigration Provision at Issue?

a. Crime Involving Moral Turpitude – INA § 212(a)(2)(A)(i)(I) (inadmissibility) & INA § 237(a)(2)(A)(i) &(ii) (deportability).

In *Matter of Serna*, the BIA recognized that "possession of stolen goods or mail, *with the knowledge that they are stolen*, has been held to be a crime involving moral turpitude." 20 I&N Dec. 579, 585 (BIA 1992) (emphasis added). However, the intent to permanently deprive is still a requirement for a theft offense (including possession of stolen property) to be a CIMT. In *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), the Ninth Circuit determined that a conviction under California's receipt of stolen property statute, which also has 'knowing that the property was stolen' as an element, was not categorically a CIMT because the statute did not require an intent to permanently deprive. *Id.* at 1160-61.

[11] If your client was convicted of TMV 2nd degree under the "voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken" prong, and is sentenced to 12 months in prison, contact us. Counsel should argue that merely riding in a stolen car does not meet the generic theft aggravated felony definition of "a taking of property or an exercise of control over property."

b. Theft Aggravated Felony – INA § 101(a)(43)(G).

The theft aggravated felony statute expressly includes "receipt of stolen property." The generic definition of a theft aggravated felony includes possession of stolen property with a sentence of 365 days or more. The BIA has found that this phrase "include[s] the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner." *Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000). The Ninth Circuit further explained, "[a] theft offense is generically defined as 'the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. Under California law, the crime of 'receipt of stolen property' basically consists of three elements: (a) the property was stolen, and (b) the defendant was in possession of it, (c) knowing it was stolen. That fits within the generic definition of theft." *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1061 (9th Cir. 2009).

2. Do the Elements of PSP Categorically Match the Generic Definition at Issue?

a. Overview of PSP.

PSP 1st degree (RCW § 9A.56.150) and PSP 2nd degree (RCW § 9A.56.160), are both felonies, and PSP 3rd degree (RCW § 9A.56.170), is a gross misdemeanor. They are distinguishable by the amount in controversy.

The element "possessing stolen property" is defined by statute to mean "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen." RCW § 9A.56.140(1). While this list does not make the statute divisible, it does demonstrate that the *mens rea* of the offense is "knowingly" and that the State must prove that the defendant knows that the property was stolen. The model jury instructions also require that the State prove that the defendant had knowledge that the property was stolen.
See 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.06 (3d Ed). However, the intent to permanently deprive is not an element of the offense. *Id.*

b. Is PSP categorically a crime involving moral turpitude (CIMT)?

No. Washington PSP (any degree) is NEVER a CIMT. Although the Washington PSP statutes require possessing stolen property with the knowledge that it has been stolen, intent to permanently deprive is not an element of the offense. *See* 11A Wash. Prac. Pattern Jury Instr. Crim. WPIC 77.06 (3d Ed). The intent to permanently deprive is not expressly included as an element of the offense, and Washington caselaw makes clear it is not an element of theft offenses in general (see § II.A.2.d, *supra*). Therefore, counsel should argue that a conviction for PSP, under any degree, does not match the generic definition of theft CIMTs and, thus, is categorically not a CIMT.

c. Is PSP categorically a theft aggravated felony?

PSP 1st and 2nd degree: Yes. ONLY a PSP conviction with a sentence of 365 days or more is an aggravated felony. A PSP conviction with a sentence of 365 days is a theft aggravated felony since the Washington PSP statutes criminalize the knowing possession of stolen *property*.

For PSP 1, a defendant can be sentenced to 12 months in prison with an offender score of 3, and for PSP2, the defendant can be sentenced to 12 months only with an offender score of 5. Therefore, for your client to be sentenced to 12 months in prison for PSP (either degree), they are likely to have other felonies that might trigger removal or preclude relief.

PSP 3rd degree: No. Because the maximum possible penalty for PSP 3rd degree is 364 days, it is categorically not an aggravated felony.

However, before the maximum penalty for a gross misdemeanor was changed to 364 days instead of 365 days on July 22, 2011, courts would routinely impose 365 day sentences with 364 days suspended for

misdemeanors. If your client has an old PSP 3rd degree conviction with a sentence of 365 days, it is critical that you work with a defense attorney to get the sentence modified to 364 days. This may be the only way to avoid having an older PSP 3 conviction classified as an aggravated felony.

D. Burglary – RCW §§ 9A.52.020-9A.52.030.

1. What Is the Generic Definition of the Immigration Provision at Issue?

a. Crime Involving Moral Turpitude – INA § 212(a)(2)(A)(i)(I) (inadmissibility) & INA § 237(a)(2)(A)(i) &(ii) (deportability).

The Ninth Circuit has held, based on BIA precedent, that a burglary offense is a CIMT if the crime intended after one enters a building is a CIMT. It explained: "the act of entering is not itself 'base, vile or depraved,' [but] that it is the particular crime that accompanies the act of entry that determines whether the offense is one involving moral turpitude." *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1019 (9th Cir. 2005) (overturned on other grounds). Therefore, the generic definition of a CIMT burglary offense in the Ninth Circuit was an unlawful entry into a building with the intent to commit a CIMT, which could be determined by the record of conviction.

If the generic definition in *Cuevas-Gaspar* is applied in conjunction with *Moncrieffe* and *Descamps*, then the intended crime, which makes a burglary offense turpitudinous, must be an element of the statutory offense. Therefore, while the generic definition remains the same, the method of analysis has changed.[12] The statute of conviction must have "the intent to commit a CIMT" as an element of the offense. Moreover, Immigration Judges can only go to the modified categorical approach and review the record of conviction if the statute contains an intent to commit a CIMT and is divisible. For example, if a burglary offense had the elements of "an unlawful entry, with the intent to commit an assault against an adult or child." Since an assault against a child would likely be a CIMT, under this hypothetical example, an Immigration Judge would be able to go to the record of conviction to determine whether the Respondent had been convicted of a burglary with the intent to assault a child, and if so, find that the Respondent had been convicted of a burglary CIMT. Therefore, under Ninth Circuit and Supreme Court case law, the generic definition for a CIMT burglary offense is an unlawful entry into a building with the element of intending to commit a CIMT while in the building.

Additionally, the BIA has held that for residential burglary, the unlawful entering of an occupied dwelling inheres moral turpitude. In *Matter of Louissaint*, the BIA recognized that the "act of unlawfully entering or remaining in an *occupied dwelling* with the intent to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter,' as required by *Matter of Silva-Trevino*."[13] 24 I&N Dec. 754, 758 (BIA 2009) (emphasis added). The Florida statute in *Louissaint* had burglary of an occupied dwelling as a statutory element.

b. Burglary Aggravated Felony – INA § 101(a)(43)(G).

The theft aggravated felony statute expressly includes "burglary" with a sentence of 365 days or more. The generic definition of aggravated felony burglary has been defined by the U.S. Supreme Court as "any crime, regardless of its exact definition or label, having basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). The *Taylor* definition of burglary does not include "'places . . . other than buildings' such as

[12] Since there has not been any published case to the contrary, we will assume that the Cuevas-Gaspar definition of a turpitudionous burglary continues to govern.

[13] Although it is based on *Silva-Trevino*, which was overturned in the 9th Circuit, *Louissaint* is still currently accepted.

automobiles, vending machines, booths, tents, boats and railway cars." *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003) (citing *Taylor*, 495 U.S. at 599).[14]

c. Crime of Violence (COV) Applicable for Aggravated Felony (INA § 101(a)(43)(F)) or DV Deportation Ground (INA § 237(a)(2)(E)(i)).

A burglary offense with a sentence of 365 days or more can trigger either prong of 18 USC 16. For the DV deportation ground under INA § 237(a)(2)(E)(i), the sentence is irrelevant.

The term "crime of violence" under 18 USC 16(a)-(b) is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The physical force necessary for a crime of violence must be intentional, violent and active in nature. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-1130 (9th Cir. 2006); *U.S. v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010). The BIA's interpretation of felony COV under 16(b) requires that "the nature of the crime—as elucidated by the generic elements of the offense—is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs." *Matter of Sweetser*, 22 I&N Dec. 709, 712-13 (BIA 1999). The Ninth Circuit has held that residential burglary is a COV under 16(b) because "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." *United States v. Becker*, 919 F.2d 568, 571 (9th Cir.1990).

2. Do the Elements of WA Burglary Categorically Match the Generic Definition at Issue?

a. Burglary overview.

Washington burglary offenses are divided into burglary 1st degree (RCW § 9A.52.020), burglary 2nd degree (RCW § 9A.52.030), and residential burglary (RCW § 9A.52.025), all of which are felonies.

- The elements of burglary 1st degree are: 1) entering or remaining unlawfully in a building, 2) with intent to commit a crime against a person or property therein, 3) in entering, while in the building, or in flight from the building, being armed with a deadly weapon, *or* assaulting another. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02 (3d Ed).
- The elements of residential burglary are: 1) entering and remaining unlawfully in a *dwelling*, 2) with intent to commit a crime against a person or property therein. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02.02 (3d Ed).
- The elements of burglary 2nd degree are: 1) entering or remaining unlawfully in a building (that is not a dwelling), 2) with intent to commit a crime against a person or property therein. *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.04 (3d Ed).

b. Washington burglary offenses are not divisible as to the intended crime.

In Washington, burglary is a single crime that can be committed in many ways – but this does not mean that it "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S.Ct. at 1684. The second

[14] Accordingly, a conviction for vehicle prowl 2nd degree (RCW § 9A.52.100) is categorically not a burglary aggravated felony under INA § 101(a)(43)(G) since it involves the unlawful entry into a vehicle.

element of all of the burglary offenses, "the intent to commit a crime," is unitary; it is not an element that is divisible into every possible crime under the Washington statutes. Prior to *Moncrieffe* and *Descamps*, Washington's burglary statute was seen as overbroad, since some Washington crimes are CIMTs and others are not, and thus subject to the modified categorical approach. Previously, the Immigration Judge could go to the modified categorical approach and look at the record of conviction to determine what the intended crime was.

However, under *Moncrieffe* and *Descamps*, an Immigration Judge can only go on to the modified categorical approach if the statute itself has alternative elements and is thus divisible. While the Washington burglary statutes list as an element "with intent to commit a crime against a person or property therein," the actual intended crime is not divisible into every crime in the RCWs against people or property. As the Washington Supreme Court has recognized in *State v. Bergeron*, "[t]he intent to commit a specific named crime inside the burglarized premise is not an 'element' of the crime in the State of Washington." 105 Wash.2d 1, 4 (Wash. 1985). The Court noted that "for over nine decades the law of this state was settled—in burglary cases neither the information, jury instructions nor findings and conclusions were required to designate the specific crime intended." *Id.* at 7-8. Indeed, the State need not prove what the intended crime was. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02 (3d Ed).

c. Washington burglary offenses are not divisible as to person or property.

While *Moncrieffe* and *Descamps* allow judges to proceed to the modified categorical approach where elements of an offense are described in the alternative, under Washington law, there is no separate offense for committing a burglary against a "person *or* property"—in Washington, these are not two separate crimes. It is taken as a unitary element to mean that the defendant had the intent to "commit *any* crime." *See e.g.*, *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1019 (9th Cir. 2005) (analyzing Washington's residential burglary statute). In Washington, the intent is to commit a crime, not the intent to commit a *specific* crime. *Id.* As the Washington Supreme Court explained in *State v. Bergeron*, "[t]he intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises." 105 Wash.2d at 4. Again, jurors need not be unanimous as to what crime the defendant intended to commit once inside the premise. *State v. Johnson*, 674 P.2d 145, 156 (Wash. 1983).

d. Washington's definition of "dwelling" and "building" are overbroad.

"Dwelling" and "building" are defined broadly in Washington. This is particularly relevant to the COV aggravated felony analysis. Under RCW § 9A.04.110(7), "dwelling" is defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." "Building" is defined by the RCWs as "in addition to its ordinary meaning, includes any dwelling, *fenced area*, vehicle, *railway car, cargo container*, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building." RCW § 9A.04.110(5) (emphasis added). For purposes of residential burglary, "dwelling" has also been held to include an attached garage. *State v. Murbach*, 843 P.2d 551 (1993).

In *United States v. Wenner*, a federal sentencing enhancement case, the Ninth Circuit found that a conviction for residential burglary under RCW § 9A.52.025 was categorically not a "crime of violence" under the federal sentencing definition's "burglary of a dwelling" definition or the catchall provision, because burglary in Washington does not meet the *Taylor* generic definition of burglary. The Ninth Circuit recognized that "some things that are dwellings under Washington law (*e.g.*, fenced areas, railway cars, and cargo containers) are not buildings or structures under federal law, and so cannot support a conviction for generic 'burglary' under *Taylor*." *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003). Therefore, the Circuit concluded that "Washington['s] statute is broader than federal law; burglarizing a fenced area that doubles as a dwelling is a residential burglary under Washington law, but not a 'burglary' under *Taylor*, and thus not a burglary of a dwelling under the [Federal Sentencing] Guidelines." *Id.* at 972-73.

e. "Occupied" or "unoccupied" is not an element of Washington Burglary.

Burglary in Washington does not require that the premises be occupied or unoccupied. Under the minimum conduct test applied in *Moncrieffe* and *Descamps*, this means that the minimum conduct necessary to obtain a conviction for a burglary offense in Washington is an unlawful entry into an *unoccupied* building or dwelling. *See*, discussion on minimum conduct test, *supra* § I.A.1. Therefore, in applying the categorical approach, the minimum conduct that Immigration Judges should consider involves entrance into an unoccupied dwelling or building, even for residential burglary. Washington cases show that people have been prosecuted under the Washington residential burglary statute for unlawful entry into a vacant home. *See e.g., State v. J.P.*, 125 P. 3d 215 (Wash. 2005); *State v. McDonald*, 96 P. 3d 468 (Wash. 2004). Therefore, immigration counsel can demonstrate that there is a realistic probability that burglary charges can be brought for unlawful entry into an unoccupied building. *See*, discussion on realistic probability test, *supra* § I.B.2.

f. Is Washington burglary categorically a crime involving moral turpitude (CIMT)?

Burglary 2nd degree and residential burglary: No. Burglary 2nd degree and residential burglary are never CIMTs. Prior to *Moncrieffe* and *Descamps*, these could have been CIMTs under the Ninth Circuit's framework in *Cuevas-Gaspar* since Immigration Judges routinely continued to the modified categorical approach to determine what the intended crime was. However, under *Descamps*, the analysis has changed. Burglary in Washington cannot match the generic definition of a burglary CIMT under *Cuevas-Gaspar* because the specific intended crime is not an element of the offense.

In *Cuevas-Gaspar*, which reviewed whether a conviction under Washington's residential burglary statute constitutes a CIMT, the Circuit found that the statute was overbroad. It concluded that "under Washington law, an intent to commit *any* crime satisfies the accompanying crime element of burglary, the offense encompasses conduct that falls outside the definition of a crime of moral turpitude." *Cuevas-Gaspar*, 430 F.3d at 1019. Because Washington burglary offenses are not divisible as to what crime the defendant intended to commit (*see* discussion, *infra*, § II.D.2.b), the minimum conduct criminalized by the statute involves non-CIMT crimes. As the Ninth Circuit discussed in *Cuevas-Gaspar*, one could be convicted of burglary with the intent to commit malicious mischief—a non-turpitudinous crime. *Id.* Therefore, Washington's burglary statutes are categorically not CIMTs under the Ninth Circuit's caselaw.

Additionally, Washington's burglary statutes are categorically not CIMTs under the BIA's caselaw since they lack an element that the dwellings or buildings be occupied. Therefore, the minimum conduct for a conviction involves an unlawful entry into an unoccupied building, which does not match the BIA's generic definition set forth in *Louissaint*.

Since these burglary statutes are not divisible as to these issues, the analysis ends here. Immigration Judges are not permitted to look to the record of conviction for further information as to the Respondent's actual conduct.

Burglary 1st degree: Yes. Burglary 1st degree is highly likely to be categorically a CIMT because of the additional elements of either carrying a deadly weapon or assaulting another. However, there is a possible argument for why it is not—but it is an uphill battle. For a burglary 1st degree conviction, counsel should argue that it is not a CIMT, not only because the intended crime is not an element of the offense (as discussed above), but also because the additional elements (either that burglary was committed with a deadly weapon, or that an assault occurred) do not render the provision turpitudinous. Assault, without more, is categorically not a CIMT in Washington.[15] Moreover, to be convicted under the deadly weapon prong, one need only to use the weapon, such as a knife, in the commission of entering a building. In *State v. Gamboa*, 154 P.3d 312 (2007), it was held that a machete could be deemed a deadly weapon in a first degree burglary case even though the machete was only used as a tool to effect the unlawful entry.

[15] *See* WDAIP's advisory on assault crimes post-*Moncrieffe* and *Descamps*: http://www.defensenet.org/immigration-project/immigration-resources/moncrieffe-descamps-analysis-for-immigration-attorneys.

Additionally, one can be convicted of burglary 1st degree if someone other than the defendant (an accomplice) had a deadly weapon or assaulted someone. *See* RCW § 9A.52.020(1). Therefore, the minimum conduct required for a burglary 1st degree conviction involves the unlawful entrance into an unoccupied building (not even a dwelling), *by another participant* in the crime who assaulted a person or carried a deadly weapon. In *State v. Davis*, 682 P.2d 883 (Wash. 1984), a prosecution for first degree robbery, the Court held that the State is not required to prove that the defendant had knowledge that the accomplice was armed. Counsel can argue that it does not constitute a CIMT, if the record does not rule out that it could have been another participant who was armed or committed the assault.

g. Is Washington burglary categorically a burglary aggravated felony?

No. Because Washington's definition of "dwelling" and "building" are broader than the federal definition of a "building or structure," counsel should argue that no burglary offenses in Washington are burglary aggravated felonies (note: they may be crime of violence aggravated felonies, see below). Washington's definition of burglary is broader than the *Taylor* generic definition of "burglary" because in Washington, "a 'dwelling' can include a fenced area, a railway car, or cargo container. RCW § 9A.04.110(5). And *Taylor* limits burglary to buildings or other structures." *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003). Therefore, Washington's definition of "burglary" is not a categorical match to the *Taylor* federal generic definition of "burglary" used in the aggravated felony analysis. *See Taylor v. United States*, 495 U.S. 575, 599 (1990). Thus, the minimum conduct necessary for a burglary conviction in Washington is the unlawful entry into a fenced area, which would not be a burglary under the *Taylor* generic definition. Accordingly, Washington burglary (any degree) is categorically not an aggravated felony under INA § 101(a)(43)(G). Since it is not a categorical match and since it is not divisible (into the various types of buildings or structures that can be entered into), the analysis stops here.

h. Is Washington burglary categorically a COV?

Burglary 1st degree: Yes. Since Burglary is a Class A felony, even a defendant with no prior criminal history will get at least a 12 month sentence (the minimum standard sentencing range is 15+ months). Because it requires the additional elements of either the use of a deadly weapon or an assault, both of which involve a risk that physical force against person or property will be used, burglary in the 1st degree is categorically a COV. Therefore, if it has a DV designation, it will also trigger the DV ground of deportation under INA § 237(A)(2)(E)(i).

Burglary 2nd degree: No. Burglary 2nd degree is not a crime of violence aggravated felony. Burglary 2nd degree includes an unlawful entry into a "building, *other than a vehicle or a dwelling*." RCW § 9A.52.030(1). The Washington definition of "building" is broad and includes fenced areas, railway cars, and cargo containers. RCW § 9A.04.110(5). Additionally, there is no element to indicate that the building was occupied or unoccupied. *See* discussion, *supra*, at §II.D.2.e. Therefore, the minimum conduct required for a burglary 2nd degree conviction is unlawful entry into an unoccupied building, such as a cargo container. Therefore, the risk of confronting another is low. In *United States v. Wenner*, the Ninth Circuit also found that burglary in Washington was not a crime of violence under the federal sentencing enhancement guidelines (which uses a slightly different definition of crime of violence than 18 USC 16(a)-(b)). 351 F.3d 969 (9th Cir. 2003). As the Ninth Circuit recognized "[a] determination that residential burglary encompasses too much (potentially nonviolent) conduct to constitute a categorical crime of violence therefore necessarily compels the conclusion that second-degree burglary is not a categorical crime of violence either." *United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1196 n.3 (9th Cir. 2006).

Moreover, for a burglary 2nd degree conviction to result in a sentence of 365 days or more, the defendant would have had to have an offender score of at least 3, which indicates that s/he has other felonies that would likely have additional immigration consequences.

Residential Burglary: Yes. It is very likely that Washington's residential burglary offense is categorically a COV. In a case dealing directly with 18 USC 16(b) the Court found that burglary of a dwelling with the intent to commit any felony carries with it a substantial risk that force will be used against the person or property of another. *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990).

However, there is an argument that *Becker* may not apply to Washington residential burglary. Because Washington's residential burglary statute lacks the element of the dwelling being "occupied" and because dwelling in Washington is defined broadly, Counsel should argue that the statute criminalizes non-COV conduct. Under the minimum conduct test, residential burglary in Washington requires only an unlawful entry into an unoccupied attached garage. *See State v. Murbach*, 843 P.2d 551 (1993). Therefore, the threat of confronting another is not automatically present and a conviction for residential burglary should not be a COV aggravated felony. Additionally, the Ninth Circuit has ruled that Washington's residential burglary statute is categorically not a COV in the federal sentence enhancement arena. *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003).

3. May the Immigration Judge Go on to the Modified Categorical Approach in Analyzing a Washington Burglary Conviction?

For CIMTS: Never. While Immigration Judges went to the modified categorical approach in the past to determine whether the intended crime was a CIMT under *Cuevas-Gaspar*, under the current CIMT analysis, because the intended crime is not an element, burglary is indivisible. Therefore, the Immigration Judge should not go on to the modified categorical approach.

For Aggravated Felonies: Never. The burglary statutes are indivisible as to the aggravated felony analysis. Therefore, for Washington burglary crimes, there are no alternative offenses for the Immigration Judge to review under the modified categorical approach. Under the aggravated felony analysis, burglary 1st degree will categorically be an aggravated felony (COV), while burglary 2nd degree and residential burglary, should categorically not be aggravated felonies.