CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Criminal Consequences Updates from the BIA and the Ninth Circuit[1]

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I. Introduction

This practice advisory provides updates on notable case law announced over the last year out of the Ninth Circuit and the Board of Immigration Appeals ("BIA") on subjects related to the intersection of criminal and immigration law such as crimes involving moral turpitude ("CIMTs"), aggravated felonies, controlled substance offenses, and post-conviction relief. The practice advisory includes key holdings, analytical frameworks of recent cases, and strategic considerations for removal defense.

II. Crimes Involving Moral Turpitude

a. The Ninth Circuit determines that solicitation of a CIMT is itself a CIMT under both INA § 237 and INA § 212.[3]

i. Case Summary

In *Romo v. Barr*, the Ninth Circuit concluded that an Arizona conviction under Arizona Revised Statutes § 13-1002 (solicitation) and § 13-3405(A)(2) (possession of marijuana for sale), is a CIMT not just for purposes of INA § 237 (as it had previously held in *Barragan-Lopez v. Mukasey*)[4] but also for purposes of INA § 212.[5] In so concluding, the Ninth Circuit rejected Respondent's contention that because INA § 212(a)(2)(A)(i)(I) only expressly applies to two inchoate crimes (attempt and conspiracy), it does not apply to the separate inchoate crime of solicitation, which is not mentioned anywhere in the statute.[6]

The court found such reasoning unpersuasive because (1) CIMT is a unique term used by Congress throughout the INA, and it is doubtful that Congress intended to ascribe the term one meaning in INA § 212 (i.e., as not applicable to solicitation crimes) and a different meaning in INA § 237 and elsewhere (i.e., applicable to all inchoate crimes), (2) although the legislative history does not clearly indicate why attempt and conspiracy were referenced in INA § 212(a)(2)(A)(i)(I), while solicitation was not, the most likely explanation is that Congress intended the former to constitute examples of all inchoate crimes covered rather than to articulate an exhaustive list, and (3) to interpret the statute otherwise would lead to the unlikely result that Congress was more generous to the category of individuals seeking admission under INA§ 212 (by allowing a carve-out for solicitation crimes), than to those who have already been granted status and are subject to the ground of deportability under INA § 237(a)(2)(A)(i)(I) (which includes no such carve-out and is therefore triggered by solicitation CIMTs).[7]

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[3] *Romo v. Barr*, 933 F.3d 1191 (9th Cir. 2019).
[4] 508 F.3d 899 (9th Cir. 2007).
[5] *Romo*, 933 F.3d at 1199.
[6] *Id.* at 1196.
[7] *Id.* at 1197–98.

Accordingly, the Ninth Circuit concluded that solicitation offenses are covered under the grounds of inadmissibility at INA § 212(a)(2)(A)(i)(I) and because possession of marijuana for sale is a CIMT,[8] solicitation of possession of marijuana for sale is also a CIMT.[9]

ii. Strategic Considerations

Based on the Ninth Circuit's decision in *Romo*, practitioners in that jurisdiction should focus their CIMT analysis for solicitation convictions on whether the underlying offense itself is a CIMT, regardless of whether INA § 237 or INA § 212 may apply. Notably, however, the solicitation analysis in the Ninth Circuit may be different in relation to other grounds of removal.[10]

For example, Ninth Circuit case law indicates that some generic solicitation convictions relating to an underlying controlled substance offense may not trigger the controlled substances ground of removal under INA § 237.[11] Similarly, the Ninth Circuit has determined that because the federal Controlled Substances Act does not mention solicitation crimes, a conviction for solicitation to possess marijuana for sale in Arizona cannot be a drug trafficking aggravated felony.[12]

Accordingly, when evaluating whether a client's solicitation conviction will trigger immigration consequences in the Ninth Circuit, it is important to first identify the category of removal grounds that may apply and then to analyze the solicitation case law specifically related to that category. For that same reason, pleading to a solicitation charge may or may not be safe for immigration purposes, depending on the kind of solicitation statute charged and the possible categories of immigration consequences implicated.

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[8] *See, e.g., Baragan-Lopez v. Mukasey*, 508 F.3d 899, 903–04 (9th Cir. 2007) (noting that drug trafficking offenses generally involve moral turpitude but declining to decide whether solicitation to possess a very small quantity of marijuana for sale would also be a CIMT).

[9] *Romo*, 933 F.3d at 1199.

[10] Case law regarding the immigration consequences of different solicitation-related offenses is extremely variable across the country, depending on how a given state has codified and charged the solicitation crime and what ground of removal is at issue. Jurisdiction-specific research is recommended for any clients with a criminal history that falls under this broad category of offenses.

[11] *See, e.g., Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1326 (9th Cir. 1997) (concluding that Arizona's ARS § 13-1002 is a generic solicitation offense that, even when based on the commission of an underlying drug crime, does not trigger removal for a controlled substance offense); *but see Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009) (concluding that although California's HSC § 11352(a) encompasses solicitation conduct, it is not a generic solicitation offense, but rather, is specifically aimed at controlled substances and thus can support removal under INA § 237(a)(2)(B)(i)); *Mizrahi v. Gonzales*, 492 F.3d 156, 174 (2d Cir. 2007) (deferring to the BIA's conclusion in *Matter of Beltran*, 20 I.&N. Dec. 521 (BIA 1992), that solicitation offenses are encompassed within the INA's removal provisions and concluding that Respondent's conviction for NYPL § 100.05(1) (solicitation in the fourth degree) includes the underlying act of NYPL § 220.31 (criminal sale of a controlled substance) and can support a charge of inadmissibility under INA § 212(a)(2)(A)(i)(II)).

[12] *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999).

b. The Ninth Circuit concludes that Oregon's third-degree robbery is not categorically a CIMT.[13]

i. Case Summary

In *Barbosa v. Barr*, the Ninth Circuit evaluated whether Oregon's third-degree robbery statute (ORS § 164.395) is a CIMT under either a theft or assault framework.[14]

First, the court compared the elements of section 164.395 to California's robbery statute (PC § 211) (which was deemed a categorical CIMT in *Mendoza v. Holder),*[15] and concluded that the Oregon statute is broader because it encompasses the temporary unauthorized use of a vehicle.[16] The court then reaffirmed its prior determination that the BIA's new theft CIMT framework announced in *Matter of Diaz-Lizarraga* (concluding that statutes need not include an intent to permanently deprive as an explicit element in order to constitute theft CIMTs),[17] does not apply retroactively.[18] Accordingly, because the theft CIMT standard applicable at the time of Barbosa's conviction did not apply to temporary takings, his section 164.395 conviction was not categorically a theft CIMT.[19]

Second, the Ninth Circuit compared the elements of section 164.395 to the assault/use of force category of CIMTs and determined that because the minimum conduct proscribed by the statute is the use of "minimal physical force," it does not amount to a CIMT under that framework either.[20] Specifically, the Ninth Circuit cited to an Oregon case holding that "sufficient evidence supported a conviction under section 164.395 even though the victim only 'felt that she was losing her purse,'"[21] and determined that such conduct is overbroad for the level of force contemplated by CIMT case law.[22]

Thus, the Ninth Circuit concluded that ORS § 164.395 is not categorically a CIMT.[23] It did not, however, reach the question of whether the modified categorical approach might apply because it determined that the government had waived the issue.[24] Instead, the Ninth Circuit remanded the case to the BIA for review of Barbosa's cancellation of removal application on the merits.[25]

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[13] *Barbosa v. Barr*, 926 F.3d 1053 (9th Cir. 2019).
[14] *Id.* at 1058–1059.
[15] 623 F.3d 1299, 1302 (9th Cir. 2010).
[16] *Barbosa*, 926 F.3d at 1058.
[17] 26 I&N Dec. 847 (BIA 2016).
[18] *Barbosa*, 926 F.3d at 1058.
[19] *Id.* at 1058–1059.
[20] *Id.* at 1059.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

ii. Strategic Considerations

Although the Ninth Circuit determined that Barbosa's section 164.395 conviction was not a CIMT, it left open the possibility that the statute could still be considered a CIMT in two scenarios including: (1) as a theft offense for convictions post-dating *Matter of Diaz-Lizarraga* and (2) upon application of the modified categorical approach, if the statute is divisible.

Regarding the first scenario, there are strong arguments that the temporary unlawful taking of a vehicle included in section 164.395 is analogous to other states' joyriding statutes that have survived *Diaz-Lizarraga* and have still been deemed too broad to constitute theft CIMTs.[26] Accordingly, advocates should continue to argue that section 164.395 is categorically not a theft CIMT even for convictions that post-date *Diaz-Lizarraga*.

Regarding the second scenario, Oregon state case law does not readily resolve the question of whether third-degree robbery (which is also encompassed in second and first-degree robbery) is divisible between the theft and unauthorized use of a vehicle language.[27] However, in another recent Ninth Circuit decision, *Lopez-Aguilar v. Barr* — where the court concluded that section 164.395 is not a generic theft offense for aggravated felony purposes — it seemed to indicate that the statute is not divisible.[28] Specifically, it stated, "...we hold that section 164.395 is facially overbroad and indivisible."[29] Although the court's holding explicitly concludes that the statute is indivisible, it engaged in no analysis to reach that conclusion and appears to have relied, at least in part, on the fact that the government had waived the issue.[30] Accordingly, while advocates should certainly use such language to support arguments that the modified categorical approach does not apply to section 164.395, the strange procedural posture at hand, whereby the court seems to have ruled on an issue that was not actually argued, could result in pushback from the Department of Homeland Security moving forward.

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[26] *See, e.g., Martinez v. Sessions*, 892 F.3d 655, 662 (4th Cir. 2018) (concluding that because Maryland's theft statute (section 7-104) encompasses *de minimis* temporary takings like joyriding and is not divisible, it is categorically overbroad for the generic offense of theft CIMTs under the standard spelled out in *Diaz-Lizarraga*).

[27] *See, e.g., State v. White*, 346 Or. 275, 285, 211 P.3d 248, 254 (2009) (explaining that third degree robbery constitutes the "taking or attempting to take property from another, while preventing or overcoming the victim's resistance to giving up the property by using or threatening to use physical force"); *State v. Roalsen*, 266 Or. App. 541, 542, 337 P.3d 984, 985 (2014) (indicating that in the defendant's case the jury was instructed that "one of the elements of the [first degree] robbery charge was that the defendant 'committed unauthorized use of a vehicle.'"); and *State v. Byam*, 284 Or. App. 402, 406, 393 P.3d 252, 255 (2017) (referencing language from a criminal complaint charging first-degree robbery and stating, "The defendant, on or about November 16, 2013, in Lane County, Oregon, in the course of committing and attempting to commit unauthorized use of a vehicle and theft, did unlawfully use and threaten the immediate use of physical force . . . contrary to statute and against the peace and dignity of the State of Oregon[.]").

[28] 948 F.3d 1143 (9th Cir. 2020). The court's opinion in *Lopez-Aguilar* also mentions that the BIA had "disagreed with the IJ's alternative conclusion that Lopez-Aguilar's conviction under section 164.395 was for a crime of violence under section 101(a)(43)(F) of the INA." *Id.* at 1146 n.1.

[29] *Id.* at 1149.

[30] *Id.*

c. The Ninth Circuit and the BIA determine that two sex-related crimes, California's PC § 314(1) (indecent exposure),[31] and Maryland's MCL § 3-324(b) (solicitation of a minor),[32] are CIMTs.

i. Case Summaries

Betansos v. Barr

In *Betansos v. Barr*, the Ninth Circuit deferred to the BIA's determination[33] that California's PC § 314(1) (indecent exposure) is categorically a CIMT.[34] In reaching that conclusion, the court reversed its own prior precedent in *Nunez v. Holder*,[35] and predicated its reversal on a determination that the BIA's definition of a CIMT related to indecent exposure (requiring that the statute of conviction have an element of lewd intent), is reasonable and properly grounded in published case precedent.[36] The court reached this conclusion even though the BIA's definition is broader than the circuit's own definition of the same generic offense, as had been previously articulated in *Nunez*.[37] The Ninth Circuit also deferred to the BIA's application of the broader definition to Betansos' conviction under section 314(1) and to its conclusion that because section 314(1) requires a lewd intent (as demonstrated by California case law), it is categorically a CIMT.[38]

Additionally, applying its five-factor test from *Montgomery Ward & Co., Inc. v. FTC*,[39] the Ninth Circuit held that the new categorization of PC § 314(1) as a CIMT could be applied retroactively to Betansos' conviction, due in significant part to the fact that he did not demonstrate any specific reliance on the prior rule from *Nunez*.[40]

Matter of Jimenez-Cedillo

In *Matter of Jimenez-Cedillo*, the BIA held that Maryland's solicitation of a minor offense (under section 3-324(b)) is categorically a CIMT.[41] Through its analysis, the BIA departed from its prior case law indicating that "a crime involving intentional sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was a minor."[42] Instead, the Board determined that knowledge of the victim's age is not a necessary

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[31] *Betansos v. Barr*, 928 F.3d 1133 (9th Cir. 2019) (California's PC § 314(1) (indecent exposure) is categorically a CIMT).
[32] *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020) (Maryland's § 3-324(b) (sexual solicitation of a minor), is categorically a CIMT).
[33] *Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013).
[34] *Betansos*, 928 F.3d at 1136.
[35] 594 F.3d 1124, 1128 (9th Cir. 2010).
[36] Betansos, 928 F.3d at 1142.
[37] *Id.* at 1140–42.
[38] *Id.* at 1141–42.
[39] 691 F.2d 1322 (9th Cir. 1982).
[40] *Betansos*, 928 F.3d at 1145–46.
[41] *Jimenez-Cedillo*, 27 I&N Dec. at 793–94.
[42] *Id.* at 783 (citing to *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016)).

element for a sexual offense involving a minor to qualify as a CIMT.[43] This is particularly true in sexual offenses related to victims under the age of 13 or where there is a significant age difference between the victim and the perpetrator, the BIA explained, because commission of those acts is so morally reprehensible that the culpable mental state required for a CIMT finding is "implicitly satisfied."[44]

In reaching its conclusion, the BIA analogized to statutory rape offenses that have been deemed CIMTs even in the absence of a *mens rea* element[45] and also cited to the Third Circuit's analysis in *Mehboob v. Attorney General of the U.S.*,[46] which determined that Pennsylvania's indecent assault statute (18 Pa. Cons. Stat. § 3126(a)) was a CIMT even without a specific intent element regarding knowledge of the victim's age.[47]

Having concluded that section 3-324(b)) is categorically a CIMT, the BIA acknowledged that its holding represented a change from the previous rule articulated in *Matter of Silva-Trevino*[48] regarding when sexual offenses related to a minor constitute CIMTs.[49] Accordingly, the BIA determined that it would not apply its new rule retroactively to Jimenez-Cedillo's conviction or more generally in the Fourth Circuit, from where his case arose.[50]

ii. Strategic Considerations

Practitioners should assume that any conviction under California's PC § 314 will now be a CIMT regardless of the conviction date. Accordingly, this is not a safe plea for individuals with pending charges and may trigger CIMT-based grounds of removal for individuals with a prior conviction under this statute.

Additionally, Maryland's § 3-324(b) will be considered a categorical CIMT for any conviction post-dating the BIA's decision in *Jimenez-Cedillo*. More generally, the BIA's new rule indicating that knowledge of the victim's age is not a necessary element for sex offenses involving minors to be CIMTs, will apply prospectively in all jurisdictions and may still apply retroactively in some jurisdictions outside of the Fourth Circuit. Therefore, convictions under this category of offenses now face a higher risk of being deemed CIMTs and should also always be evaluated for possibly triggering other grounds of removal such as a crime of child abuse under INA § 237(a)(2)(E)(i) or an aggravated felony under INA § 237(a)(2)(A)(iii).

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[43] *Id.* at 792.
[44] *Id.* at 791–92.
[45] *Id.* at 787–88.
[46] 549 F.3d 272 (3d Cir. 2008).
[47] *Jimenez-Cedillo*, 27 I&N Dec. at 791–92.
[48] 26 I.&N. Dec. at 834.
[49] *Jimenez-Cedillo*, 27 I&N Dec. at 784.
[50] *Id.* at 784, 794.

d. The Ninth Circuit and the BIA conclude that two assault analogous statutes, Hawaii's § 707-721(1) (first degree unlawful imprisonment)[51] and Oregon's § 163.190 (menacing)[52] are CIMTs.

i. Case Summaries

Fugow v. Barr

In *Fugow v. Barr*, the Ninth Circuit concluded that Hawaii's § 707-721(1) (first degree unlawful imprisonment) is categorically a CIMT because it requires a knowing mental state coupled with risk of serious bodily injury.[53] This is distinguishable, the Ninth Circuit noted, from California's robbery statute (deemed not a categorical CIMT in *Castrijon-Garcia v. Holder*),[54] because that statute articulates a general intent crime and does not require any risk of harm to the victim.[55] Instead, the Ninth Circuit opined, [56] Hawaii's statute is more similar to Arizona's § 13-1201 (endangerment), which the court deemed a CIMT in *Leal v. Holder*.[57] Although the type of harm contemplated in section 707-721(1) ("exposure to a risk of serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ"), is lower than the harm articulated in Arizona's statute ("exposure to a substantial risk of imminent death"), the *mens rea* is higher in the former (knowingly) than in the latter (recklessly).[58] Accordingly, on balance, Hawaii's statute is categorically a CIMT.[59]

Matter of J-G-P

Similarly, in *Matter of J-G-P*, the BIA held that Oregon's § 163.190 (menacing) is categorically a CIMT because it requires a specific intent to cause fear of imminent serious physical injury.[60] In so holding, it noted that a CIMT finding need not include an element requiring that the victim actually have experienced subjective fear of harm because the pertinent inquiry is into whether the defendant *intended* to cause such fear.[61] Additionally, the BIA differentiated section 163.190 from other simple assault crimes which require only a general intent plus any degree of injury to the victim, and which do not reflect a vicious motive or serious bodily injury in the way that Oregon's menacing statute

[51] *Fugow v. Barr*, 943 F.3d 456 (9th Cir. 2019) (Hawaii's § 707-721(1) (first-degree unlawful imprisonment) is categorically a CIMT).
[52] *Matter of J-G-P*, 27 I&N Dec. 642 (BIA 2019) (Oregon's § 163.190 (menacing) is categorically a CIMT).
[53] *Fugow*, 943 F.3d at 459.
[54] 704 F.3d 1205 (9th Cir. 2013).
[55] *Fugow*, 943 F.3d at 459.
[56] *Id.*
[57] 771 F.3d 1140 (9th Cir. 2014).
[58] *Fugow*, 943 F.3d at 459.
[59] *Id.*
[60] *Matter of J-G-P*, 27 I&N Dec. at 647.
[61] *Id.*

does.[62] For all of those reasons, the BIA held that menacing in Oregon is a categorical CIMT and thus the respondent could not establish eligibility for cancellation of removal.[63]

ii. Strategic Considerations

These two recent cases involving different assault analogous state statutes confirm the importance of weighing a statute's *mens rea* element together with harm to the victim when evaluating for possible CIMTs. These cases also demonstrate that the kind of offenses which fall into this CIMT framework is broader than statutes that articulate assault or battery crimes.

As the published case law in this category of CIMTs expands, more and more statutes are available to analogize to when evaluating the immigration consequences of state offenses that have not yet been reviewed in the courts of appeals or by the BIA. Other examples of recent case law coming out of the Ninth Circuit in this field include *Fernandez-Ruiz v. Gonzales* (holding that respondent's assault convictions under Arizona's § 13-1203 are not categorical CIMTs),[64] *Latter-Singh v. Holder*, (concluding that California's PC § 422 (making threats with intent to terrorize) is categorically a CIMT because it causes the victim to experience an immediate and sustained fear of serious injury),[65] and *Coquico v. Lynch*, (holding that California's PC § 417.26 (unlawful laser activity) is not a categorical CIMT because it requires only an intent to place the victim in apprehension or fear of bodily harm).[66]

Finally, it is worth noting that Oregon's menacing statute includes a requirement that the defendant intend to cause *serious* bodily injury, which is distinguishable from other state menacing statutes that only require an intent to cause fear of *any* bodily injury.[67] Accordingly, for clients with menacing convictions in other jurisdictions that include the broader injury requirement, advocates should certainly distinguish *Matter of J-G-P* and argue that such statutes are more analogous to simple assault and therefore do not constitute CIMTs.

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[62] *Id.* at 646.
[63] *Id.* at 650.
[64] 468 F.3d 1159 (9th Cir. 2006).
[65] 668 F.3d 1156 (9th Cir. 2012).
[66] 789 F.3d 1049 (9th Cir. 2015).
[67] *See, e.g.*, NY Pen. Law § 120.15. In *Matter of J-G-P*, the BIA explicitly references this version of New York's menacing laws and, although not making any conclusions about whether it would be considered a CIMT, seems to indicate that its lower physical injury threshold renders it more analogous to simple assault statutes than to Oregon's section 163.190. 27 I&N Dec. at 647.

e. The BIA's "single scheme of criminal misconduct" definition takes hold in the Ninth Circuit.[68]

i. Case Summary

In *Szonyi v. Barr*, the Ninth Circuit affirmed the BIA's determination that Szonyi's convictions for two counts of oral copulation (PC § 288a(c)) and two counts of sexual penetration with a foreign object (PC § 289) did not arise out of a single scheme of criminal misconduct and therefore properly supported a charge of removal under INA § 237(a)(2)(A)(ii) for conviction of two CIMTs.[69] In so doing, the court abrogated its pre-*Chevron* opinion in *Wood v. Hoy*, which had implemented the Ninth Circuit's own interpretation of the term "single scheme of criminal misconduct,"[70] and instead concluded that because the term itself is ambiguous and the legislative history provides no clarity regarding the Congressional intent, it must defer to the BIA's "reasonable" interpretation.[71] Specifically, the BIA's interpretation states that:

> When an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.[72]

The Ninth Circuit then went on to conclude that the BIA's standard could be applied retroactively to Szonyi's case, noting, in significant part, that at the time of his conviction the BIA had not yet clearly indicated which definition of "single scheme" it would follow and therefore it could not have come as a "complete surprise" to him when the BIA ultimately applied a definition that rendered him removable.[73]

Finally, the Ninth Circuit determined that the BIA had reasonably applied its own standard for evaluating a "single scheme of criminal misconduct" to the facts of Szonyi's case when it determined that because he had an opportunity to stop and reflect on what he had done between commission of the various offenses, the convictions did not arise out of a single scheme.[74]

ii. Strategic Considerations

Generally, the Ninth Circuit's switch to this new rule will narrow the range of cases in which respondents can contend that their convictions were part of a single scheme of criminal misconduct.

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[68] *Szonyi v. Barr*, 942 F.3d 874 (9th Cir. 2019).
[69] *Id.* at 896.
[70] 266 F.2d 825 (9th Cir. 1959).
[71] *Szonyi*, 942 F.3d at 893.
[72] *Id.* at 891 (quoting *Matter of Adetiba*, 20 I&N Dec. 506, 509 (BIA 1992).
[73] *Id.* at 894.
[74] *Id.* at 895.

The practical impact of the new rule, however, will depend on the facts involved in a given case. Still, when trying to evaluate that potential impact for clients, it can be helpful to analogize to fact patterns from other published cases. For example, application of the BIA's rule can be found in *St. Pierre v. Attorney Gen. of United States* (concluding that respondent's act of receiving stolen property was sufficiently distinct from the subsequent act resulting in an aggravated manslaughter charge, such that convictions for the two crimes did not arise out of a single scheme)[75] and in *Chavez-Alvarez v. Attorney Gen. United States* (affirming the BIA's conclusion that because respondent's convictions for false statements did not naturally flow from his sodomy conviction and because he had an opportunity to reflect between the commission of the offenses, the convictions did not arise from a single scheme).[76]

Furthermore, it is important to remember that the government maintains the burden of proof for charges under INA § 237(a)(2)(A)(ii) and therefore must establish by clear and convincing evidence that a given respondent's convictions did not arise out of a single scheme of criminal misconduct.[77]

III. Aggravated Felonies

a. The Ninth Circuit holds that Oregon's § 163.187(1) (strangulation) is categorically a crime of violence.[78]

i. Case Summary

In *Flores-Vega v. Barr*, the Ninth Circuit determined that Oregon's § 163.187(1) is a crime of violence because the statute requires that the defendant "knowingly impede[ ] the normal breathing or circulation of the blood of another person" and therefore categorically involves the use of physical force.[79] The Ninth Circuit was not persuaded otherwise by Respondent's reference to a state case upholding a conviction under the statute based on what he contended was non-violent conduct.[80] In that case, a nursing home staffer covered a resident's mouth for ten seconds, and the resident "was bright red in the face and looked terrified."[81] Such conduct, the court noted, still encompassed more than "mere offensive touching" and thus was not overly broad *vis a vis* the use of force element required for a crime of violence.[82] Accordingly, and because Flores-Vega had been sentenced to one year of incarceration, he had been convicted of an aggravated felony.[83]

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[75] 779 F. App'x 1000 (3d Cir. 2019).
[76] 850 F.3d 583, 587 (3d Cir. 2017).
[77] See INA § 240(c)(3)(A); *Matter of Pataki*, 15 I&N Dec. 324 (BIA 1975).
[78] *Flores-Vega v. Barr*, 932 F.3d 878 (9th Cir. 2019).
[79] *Id.* at 883–84.
[80] *Id.* at 883.
[81] *Id.* (internal quotation marks omitted).
[82] *Id.*
[83] *Id.* at 884.

The Ninth Circuit went on, however, to conclude that the BIA had failed to conduct a "case specific factual analysis" of Flores-Vega's conviction for purposes of evaluating whether it was a particularly serious crime ("PSC") in the withholding of removal context.[84] Instead, the BIA had improperly (1) imagined the circumstances that might apply to a conviction under the statute (rather than properly focusing on the circumstances that actually did apply in Flores-Vega's case) and (2) highlighted the potential incarceration sentence under the statute (rather than properly focusing on the specific fact that Flores-Vega received an entirely suspended one-year sentence).[85] Accordingly, the BIA had abused its discretion.[86] Because, however, the Ninth Circuit agreed with the BIA's determination that Flores-Vega did not merit withholding or protection under the Convention Against Torture as a matter of discretion, the court still denied the petition.[87]

ii. Strategic Considerations

Advocates should assume that strangulation convictions under Oregon's § 163.187 are for crimes of violence and avoid incarceration sentences of one year for aggravated felony purposes under INA § 237(a)(2)(A)(iii) and/or references in the record of conviction to a domestic partner for domestic violence purposes under INA § 237(a)(2)(E)(i). Additionally, advocates should consider using language from the court's analysis in *Flores-Vega* when briefing arguments regarding withholding of removal eligibility for clients who may have a PSC conviction.

b. The BIA updates two less common aggravated felony categories—"obstruction of justice"[88] and "offenses relating to the demand for or receipt of ransom."[89]

i. Case Summaries

Matter of Cordero-Garcia

In *Matter of Cordero-Garcia*, the BIA concluded that California's PC § 136.1(b)(1) (dissuading a witness) is categorically an aggravated felony offense relating to obstruction of justice under INA § 101(a)(43)(S).[90] In so concluding, the BIA first clarified that its definition of an obstruction of justice aggravated felony had been recently updated in its decision, *Matter of Valenzuela Gallardo* ("*Valenzuela Gallardo II*").[91] Under that definition, obstruction of justice aggravated felonies include any "Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is

[84] *Id.* at 885.
[85] *Id.*
[86] *Id.* at 886.
[87] *Id.* at 888.
[88] *Matter of Cordero-Garcia*, 27 I.&N. Dec. 652 (BIA 2019) (The crime of dissuading a witness in violation of California's PC § 136.1(b)(1) is categorically an aggravated felony offense relating to obstruction of justice).
[89] *Matter of A. Vasquez*, 27 I&N Dec. 503 (BIA 2019) (kidnapping in violation of 18 U.S.C. § 1201(a) (2012) is not an aggravated felony under INA § 101(a)(43)(H)).
[90] *Cordero-Garcia*, 27 I&N Dec. at 663.
[91] 27 I&N Dec. 449, 460 (BIA 2018).

motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding."[92]

The BIA went on to explain that PC § 136.1(b)(1) requires a specific intent to interfere in an investigation or proceeding and that, by definition, such investigation must be ongoing, pending, or reasonably foreseeable, or else there would be no need to interfere with the witness.[93] Accordingly, it is a categorical match to the elements of an obstruction of justice aggravated felony.[94]

Additionally, the BIA concluded that the obstruction of justice definition from *Valenzuela Gallardo II* could be applied retroactively to Cordero-Garcia's conviction (which predated that decision) because, most notably, (1) there was no well-established definition for obstruction of justice before *Valenzuela Gallardo II*, upon which he could have reasonably relied, and (2) the rule articulated in that case merely represented an effort to fill the void within existing law, rather than an abrupt departure from a prior rule.[95] The BIA did not, however, reach the issue of how retroactivity may apply "in other contexts, including those involving other grounds for removal and discretionary or mandatory relief."[96]

Matter of Vasquez

Analyzing a different aggravated felony in *Matter of Vasquez*, the BIA determined that the federal offense of kidnapping (under 18 USC § 1201(a) (2012)) is not categorically an aggravated felony "relating to the demand for or receipt of a ransom."[97] At the core of the BIA's analysis was its conclusion that the language of INA § 101(a)(43)(H)—defining that category of aggravated felonies and including an explicit list of federal statutes which apply—is plain and does not reference section 1201(a).[98] Additionally, because the section 1201 statute existed at the time Congress enacted the aggravated felony provision, it could have readily included that offense within the express definition, if it had wanted to.[99] Finally, even if the ground encompassed a more generic definition of the offense (i.e., and applied to crimes outside of the articulated list but still "relating to the demand for or receipt of ransom"), the elements of section 1201(a) are still not a categorical match because the minimum conduct proscribed includes a victim being held for ransom or reward, or "otherwise," which could capture broader conduct than the elements articulated at INA §

[92] *Cordero-Garcia*, 27 I&N Dec. at 654.
[93] *Id.*
[94] *Id.* at 654–55.
[95] *Id.* at 659–62.
[96] *Id.* at 663.
[97] *Matter of A. Vasquez*, 27 I&N Dec. at 508.
[98] *Id.* at 505–06.
[99] *Id.* at 507.

101(a)(43)(H) .[100] Ultimately, therefore, the crime of kidnapping under 18 USC § 1201(a) is not an aggravated felony relating to the demand for or receipt of ransom.[101]

ii. Strategic Considerations

Based on the BIA's retroactivity analysis in *Cordero-Garcia*, practitioners should assume that the obstruction of justice definition articulated in *Valenzuela Gallardo II* will apply retroactively to convictions predating that decision. Simultaneously, however, practitioners should continue monitoring further litigation in the courts of appeals on this question, especially in the Ninth Circuit, which has jurisdiction over a petition for review of that decision.

Another notable outcome of *Cordero-Garcia* is the BIA's decision to apply the retroactivity test articulated in *Montgomery Ward & Co. v. FTC*,[102] (and also applied in the Second, Third, Fourth, Sixth, Seventh, and Tenth circuits) to cases across the country, unless precedent in a given court of appeals indicates to the contrary. Accordingly, where applicable, practitioners should analogize to case law which uses retroactivity principles under the *Montgomery Ward* framework when articulating arguments against retroactivity in a given client's case.

Finally, there is very little case law regarding aggravated felonies related to ransoms, and it is a less commonly charged ground of removal. Still, based on the analysis in *Matter of Vasquez,* advocates should certainly argue that the list of statutes articulated in INA § 101(a)(43)(H) is exhaustive for purposes of applying that ground to federal offenses and should also use language from the opinion to argue that state statutes which are analogous to section 1201(a) are similarly overbroad.

IV. Controlled Substance Offenses

a. The BIA holds that Iowa's § 124.401(5) (possession of a controlled substance) is divisible as to the kind of drug possessed.[103]

i. Case Summary

In *Matter of Gonzalez Lemus*, the BIA held that because the kind of drug possessed is an element of Iowa's § 124.401(5) (possession of a controlled substance) the statute is divisible and subject to the modified categorical approach.[104] In support of its holding, the BIA noted that (1) distinct penalties are articulated under the statute for possession of different drugs, (2) state case law indicates that Iowa has prosecuted separate cases for the single act of possessing two or more kinds of drugs, and (3) contrary to the jury instructions pointed to by the Respondent, case law also indicates that the

[100] *Id.* at 506.
[101] *Id.* at 508.
[102] 691 F.2d 1322 (9th Cir. 1982).
[103] *Matter of Gonzalez Lemus*, 27 I&N Dec. 612 (BIA 2019).
[104] *Id.* at 616.

state is required to prove the type of drug possessed in order to obtain a conviction.[105] Accordingly, the Immigration Judge properly applied the modified categorical approach to conclude that Respondent's conviction was for possession of methamphetamine (a drug proscribed by federal statute), and therefore constituted a controlled substance offense under the INA.[106]

ii. Strategic Considerations

As a result of this decision, individuals with convictions under section 124.401(5) will likely be deportable for a controlled substance offense unless the record of conviction points to possession of a drug not proscribed under federal law.

This case joins a recent wave of decisions from various courts of appeals concluding that similar state statutes are divisible as to the controlled substance possessed.[107] There have, however, been a few exceptions where courts of appeals have concluded that a state statute is not divisible as to the drug possessed. [108] Therefore, practitioners may want to review helpful language from those cases when setting forth arguments related to state controlled substance offenses that have not yet been evaluated in other circuit court case law.

b. The BIA concludes that the plain language from Florida's § 893.13(6)(b) (possession of marijuana) is insufficient to meet the realistic probability test under the categorical approach.[109]

i. Case Summary

In *Matter of Navarro Guadarrama*, the BIA evaluated Respondent's contention that because Florida defines marijuana as including the plant's stalk and the federal government does not, his conviction for Florida's § 893.13(6)(b) (possession of marijuana) was overbroad and could not trigger inadmissibility under INA § 212.[110] Although the BIA agreed that Florida's marijuana definition was

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[105] *Id.* at 614–15.
[106] *Id.* at 616.
[107] *See, e.g., Martinez v. Sessions*, 893 F.3d 1067, 1073 (8th Cir. 2018) (concluding that "because the identity of the controlled substance is an element of the offense under [Missouri's § 195.211 (distribution of a controlled substance)], the statute is divisible based on the drug involved."); *Raja v. Sessions*, 900 F.3d 823, 829 (6th Cir. 2018) (Pennsylvania's § 780-113(a)(3) (possession with intent to deliver) is divisible as to the controlled substance possessed and therefore the modified categorical approach applies); *Bah v. Barr*, 950 F.3d 203, 208 (4th Cir. 2020) ("Because Virginia authority requires the Commonwealth to prove '[t]he specific type of substance found in a defendant's possession,' the drug's identity is an element of the crime, not merely a means...and the modified categorical approach is appropriate."); and *Guillen v. U.S. Attorney Gen.*, 910 F.3d 1174, 1176 (11th Cir. 2018) ("We hold that Fla. Stat. § 893.13(6)(a) is divisible by the identity of the drug possessed, permitting the use of the modified categorical approach to determine what substance was involved in a particular offense.").
[108] *See, e.g., Najera-Rodriguez v. Barr*, 926 F.3d 343, 347 (7th Cir. 2019) (holding that Illinois' 720 ILCS § 570/402(c) (unlawful possession of a controlled substance) is not divisible regarding the substance possessed); and *Harbin v. Sessions*, 860 F.3d 58, 61 (2d Cir. 2017) (holding that New York's NYPL § 220.31 (criminal sale of a controlled substance in the fifth degree) is not divisible as to the kind of drug sold).
[109] *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019).
[110] *Id.* at 561.

overbroad, it focused its analysis on whether Navarro Guadarrama could demonstrate "a realistic probability, not a theoretical possibility, that [Florida] would apply its statute to conduct that falls outside the generic definition of [marijuana possession]."[111]

Under that analysis, the BIA explained that after the Supreme Court's decision in *Moncrieffe v. Holder*,[112] and based on recent Eleventh Circuit precedent, the plain language of a statute is insufficient to demonstrate such a realistic probability.[113] Rather, Navarro Guadarrama must point to at least his own case or another in which the state "in fact did apply" the statute to the overly broad conduct (e.g., possession of just marijuana stalk).[114] Because Navarro Guadarrama did not do so, he was unable to meet his burden of proving that the statute was not a categorical match to the generic federal crime.[115]

In so holding, the BIA reaffirmed its decision in *Matter of Ferreira*[116] and determined that for all circuits that do not have binding authority to the contrary, application of the realistic probability test will presume that "[e]ven if the language of a statute is plain, its application may still be altogether hypothetical and may not satisfy the requirements of *Moncrieffe* if the respondent cannot point to his own case or other cases where the statute has been applied in the manner that he advocates."[117] And, regarding controlled substance offenses specifically, the BIA determined that respondents must demonstrate that states will actually prosecute cases related to drugs that are broader than the federal schedule.[118]

ii. Strategic Considerations

Confusion still reigns regarding the realistic probability test, especially in regard to whether the statutory language is sufficient to pass that test for state drug schedules that are broader than the federal schedule. The BIA's conclusion in *Navarro Guadarrama* contradicts recent precedent out of several other circuits indicating that the statutory language of an overly broad drug schedule is, in fact, sufficient to meet the requirements of the realistic probability test.[119]

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[111] *Id.* at 562 (internal quotation marks omitted).
[112] 569 U.S. 184 (2013).
[113] *Navarro Guadarrama*, 27 I&N Dec. at 563–64.
[114] *Id.* at 564–65 (quoting *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1252 (11th Cir. 2018).
[115] *Id.* at 568.
[116] 26 I&N Dec. 415 (BIA 2014).
[117] *Navarro Guadarrama*, 27 I&N Dec. at 567.
[118] *Id.*
[119] *See, e.g., Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (concluding that "the plain terms of the Rhode Island drug schedules make clear that…[the offense] covers at least one drug not on the federal schedules. That offense is simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug."); *Hylton v. Sessions*, 897 F.3d 57, 60–63 (2d Cir. 2018) (holding that "[b]y its plain language, NYPL § 221.45 [third degree sale of marijuana] punishes conduct that is classified as a misdemeanor under 21 U.S.C. § 841(b)(4)" and therefore it is not categorically a drug trafficking aggravated felony).

Accordingly, practitioners will have to vary their litigation approach depending on the applicable court of appeals case law. And while it should be assumed that the BIA will apply *Matter of Ferreira* in all cases arising out of jurisdictions without case law to the contrary, arguments should still be preserved in all circuits that statutory language is sufficient to render drug crimes involving a substance not proscribed by the federal government overly broad for purposes of the categorical approach. Specifically, practitioners should continue citing to *Mellouli v. Lynch,*[120] (which the BIA wholly ignored in *Navarro Guadarrama*) for the proposition that the plain language of a state statute proscribing overbroad conduct renders the realistic probability test articulated in *Ferreira* unnecessary.

c. The Ninth Circuit certifies a question to the Arizona Supreme Court regarding whether A.R.S. § 13-3415 (possession of drug paraphernalia) and § 13-3408 (drug possession) are divisible as to drug type.[121]

i. Case summary

In *Romero-Millan v. Barr*, the Ninth Circuit reviewed whether the Arizona-based drug convictions of three respondents constituted controlled substance offenses under the INA.[122] In so doing, the court confirmed that the categorical approach applies for purposes of determining whether a state conviction is "related to a controlled substance" under federal law.[123] And because Arizona's definition of controlled substances is broader than the federal definition, the court explained, the statutes at issue in the respondents' cases (section 13-3415 (possession of drug paraphernalia) and section 13-3408 (drug possession)) are not a categorical match to the federal law.[124] Accordingly, the court focused its attention on step two of the categorical approach to determine whether or not those state statutes are divisible as to drug type such that the court can apply the modified categorical approach and consider the specific drug at issue in each of the respondents' convictions.[125]

In an uncommon twist, however, the court decided not to conduct its own divisibility analysis. Instead, it certified the following three questions to the Arizona Supreme Court:[126]

(1) Is Arizona's possession of drug paraphernalia statute, A.R.S. § 13-3415, divisible as to drug type?
(2) Is Arizona's drug possession statute, A.R.S. §13-3408, divisible as to drug type?

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[120] *575* U.S. *798* (2015).
[121] *Romero-Millan v. Barr*, 958 F.3d 844 (9th Cir. 2020).
[122] *Id.*
[123] *Id.* at 847.
[124] *Id.* at 848 n.1.
[125] *Id.* at 848.
[126] *Id.* at 849.

(3) Put another way, is jury unanimity (or concurrence) required as to which drug or drugs listed in A.R.S. § 13-3401(6), (19), (20), or (23) was involved in an offense under either statute?

In providing context for its certification request, the court noted that although the respondents' cases and the legal inquiries therein were "a product of federal law," Arizona may very well have a vested interest in the outcome of the divisibility analysis due to the possible corollary implications for what the state must prove when bringing forth prosecutions under those drug statutes.[127] Assuming that the Arizona Supreme Court accepts the certification request, the Ninth Circuit agreed to "abide by [its] decision]."[128]

ii. Strategic considerations

The Ninth Circuit's decision to certify the divisibility question to the Arizona Supreme Court may represent an increasingly more common tool for how federal courts apply the categorical approach. Should other circuits follow in the Ninth Circuit's footsteps, advocates will want to consider the possibility of ending up in state court when strategizing about and preparing petitions for review that might implicate the modified categorical approach and/or the realistic probability test.[129] Those state court proceedings may present complex advocacy questions more generally, whereby a precedent that is friendly to criminal defendants more broadly (e.g., a conclusion that the drug type is an element of the state statute and therefore must be found unanimously by jurors) is problematic to immigrants later in removal proceedings (because their drug convictions would then be subject to the modified categorical approach).

[127] *Id.* at 850.
[128] *Id.*
[129] The Ninth Circuit made no reference to the realistic probability test in its certification order. This is likely because previous Ninth Circuit precedent indicates that a statute's expressly overbroad language (e.g., a state drug schedule that is broader than the federal schedule) is sufficient to meet the realistic probability test. *See, e.g., Coronado v. Holder*, 759 F.3d 977 (BIA 2014) (concluding that (1) California's HS § 11377(a) is not categorically a controlled substance offense based on the language of the statute, without applying the realistic probability test but that (2) the statute is divisible, and the modified categorical approach applies). Other circuits, however, may still require additional evidence that the minimum conduct of a given statute has a realistic probability of being prosecuted and thus may consider including that inquiry in a state certification request.

V. Post-Conviction Relief

a. Both the Ninth Circuit[130] and the BIA[131] affirm that legal defects are the benchmark requirement for ameliorating immigration consequences of convictions through post-conviction relief.

i. Case Summaries

Prado v. Barr

In *Prado v. Barr*, the Ninth Circuit concluded that even though Prado had obtained post-conviction relief reducing her felony possession of marijuana for sale conviction to a misdemeanor, she was still removable for a drug trafficking aggravated felony and a controlled substance offense.[132] In so concluding, the court highlighted its own precedent indicating that a conviction that has been vacated due to a procedural or substantive defect in the original prosecution cannot be used as a predicate for removal charges whereas a conviction that has been vacated for purposes of rehabilitation can.[133] It then reviewed the history of California's Proposition 64—a voter initiative legalizing recreational marijuana and the basis upon which the Respondent had reduced her conviction—and determined that its purpose was rehabilitative, not procedural or substantive, as demonstrated by records stating, for example, "Prop. 64 will stop ruining people's lives for marijuana."[134] Additionally, the court noted that Respondent's post-conviction relief under Proposition 64 merely reclassified her conviction to a misdemeanor offense rather than fully expunging it, and therefore could not eliminate the immigration consequences of the original conviction.[135] Ultimately, the court held that despite Prado's relief under Proposition 64, "[her] initial conviction retained its immigration consequences and rendered her removable."[136]

Matter of Thomas

In Attorney General Barr's referred decision, *Matter of Thomas*, he concluded that *Matter of Pickering*[137] will be the only relevant legal framework for determining whether any kind of post-conviction relief ameliorates immigration consequences.[138] In so doing, he abrogated the BIA's

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[130] *Prado v. Barr*, 949 F.3d 438 (9th Cir. 2020) (Respondent's conviction for California's HSC § 11359 (possession of marijuana for sale) still triggered the controlled substance offense and aggravated felony grounds of removal even though she had successfully obtained state relief reducing the conviction to a misdemeanor).
[131] *Matter of Thomas*, 27 I&N Dec. 674 (A.G. 2019) (*Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), is the correct legal framework for evaluating the immigration impact of all post-conviction relief categories).
[132] *Prado*, 949 F.3d at 440.
[133] *Id.* at 441 (citing to *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010)).
[134] *Id.* at 442.
[135] *Id.*
[136] *Id.*
[137] 23 I.&N. Dec. 621 (BIA 2003).
[138] *Matter of Thomas*, 27 I&N Dec. at 674.

previous decisions in *Matter of Cota-Vargas*[139] and *Matter of Song*[140] (indicating that an order modifying a noncitizen's criminal sentence for any reason will be given "full…faith and credit" for immigration purposes), as well as *Matter of Estrada*[141] (concluding that a state order clarifying a noncitizen's criminal sentence will be evaluated for immigration purposes based on several factors including whether there were any discrepancies in the original order).[142] As a result, the opinion nullified any prior differentiation between categories of state-based post-conviction relief and instead concluded that the only relevant inquiry for evaluating whether such relief ameliorates the immigration consequences of a conviction is whether it was based on a substantive or procedural defect in the original proceedings, as articulated in *Pickering*.[143]

ii. Strategic Considerations

Moving forward, the focus of any post-conviction relief—regardless of whether it is related to a new sentence or a new plea—should be on identifying a legal defect in the original proceedings and seeking out a procedural mechanism for addressing it.

Additionally, any new state legislation that is looking to ameliorate immigration consequences of criminal convictions more broadly, must explicitly articulate legal defects as the basis for doing so. For example, California's PC § 1203.43—which provides post-conviction relief for individuals who completed the state's deferred entry of judgment program for controlled substance-related convictions starting in 1997—was passed with language expressly indicating that the convictions impacted by the new law were *legally invalid* because defendants were improperly advised of the possible immigration consequences of their plea in the original proceedings. Such legislation provides a framework for how other states should approach structuring post-conviction relief that will have beneficial immigration implications and will meet the requirements articulated in *Matter of Pickering* and other court of appeals case law.

Finally, *Matter of Thomas* represents a significant departure in BIA precedent and limits the scope of post-conviction relief available to individuals seeking to ameliorate the immigration consequences of criminal convictions. Notably, the opinion does not explicitly discuss the retroactivity implications of its holding. It does, however, state that "*[g]oing forward*, immigration courts should apply the test articulated in *Matter of Pickering* in determining the immigration consequences of any change in a state sentence, no matter how the state court describes the order."[144] Accordingly, any clients who relied on the BIA's prior rule regarding the immigration effects of seeking sentence modifications as

[139] 23 I&N Dec. 849, 850–52 (BIA 2005).
[140] 23 I&N Dec. 173 (BIA 2001).
[141] 26 I&N Dec. 749 (BIA 2016).
[142] *Matter of Thomas*, 27 I&N Dec. at 674.
[143] *Id.* at 682–83.
[144] *Id.* at 675 (emphasis added).

articulated in *Matter of Cota-Vargas* and *Matter of Song*, should use that language and other retroactivity principles to argue that Attorney General Barr's decision does not apply to them.[145]

VI. Conclusion

These recent criminal/immigration updates out of the BIA and the Ninth Circuit provide important frameworks and tools for supporting immigrant clients with criminal histories. The landscape, however, is always changing, and advocates are encouraged to monitor ongoing litigation and case law updates in this arena.

[145] For an additional discussion of possible retroactivity arguments see: www.ilrc.org/sites/default/files/resources/matter_of_thomas_sentence_pcr.pdf. And for additional commentary on *Matter of Thomas* generally see: cliniclegal.org/resources/ground-inadmissibility-and-deportability/ag-decision-ends-recognition-sentence.