PRACTICE ADVISORY:

Waiting for *Descamps*

How the Supreme Court Might Save Your Crim/Imm Case*

The U.S. Supreme Court will issue a decision in the spring 2013 term in a criminal case, *Descamps v. United States*, that may have very beneficial implications for immigration cases.[1] The issue relates to proper application of the categorical approach, which is the analysis used in federal proceedings to evaluate a prior conviction. The hope is that, if the Court limits modification of the categorical approach as expected, several types of criminal statutes that now are considered to be "divisible" so that a judge can look to the record of conviction to determine the immigration consequences, will have no or fewer such consequences as a matter of law, regardless of the record. For example, depending on the criminal statute of conviction, a good *Descamps* decision might mean that a client's conviction for spousal battery, for broadly defined offenses regarding interaction with minors, or for some burglary offenses will no longer be a deportable or inadmissible offense.

This update will briefly summarize the *Descamps* issue[2] and identify types of cases that may benefit from a good decision. We will discuss one significant challenge, which is that the BIA recently stated that it can apply its own version of the categorical approach in immigration proceedings, which is less strict than the version set out in federal criminal decisions. *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). Based on this, the BIA, or at least ICE, may assert that a good *Descamps* decision need not be followed in immigration proceedings. Most Circuit Courts of Appeal have rejected this

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[1] Descamps v. United States (No. 11-9540) (U.S. argued Jan. 7, 2012).

[2] A more in-depth analysis of the issues to be considered in *Descamps* appears in Brady, Yi, "The Categorical Approach in the Ninth Circuit and *U.S. v. Aguila-Montes de Oca*," *available at* http://www.ilrc.org/files/documents/cat_approach.pdf.

notion and have held that the same or a very similar analysis applies in both venues, but other courts might be open to the *Lanferman* criminal/immigration distinction.

How might* Descamps *change the law? In *Descamps* the Supreme Court will consider when a federal criminal court judge may use facts gleaned from an individual's record of conviction to characterize a prior offense, under a federal sentencing statute that adds penalties for those previously convicted of certain classes of offenses such as "burglary." This review of the individual's record is governed by the "modified categorical approach." To date, the Supreme Court's consistent rule has been that under the modified categorical approach, a judge may consult the record of conviction only to determine which offense, out of multiple offenses that are separately set out in the language of the criminal statute, was the offense of conviction. "When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes… the 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record …" *Johnson v. United States*, 559 U.S. 133, ___, 130 S. Ct. 1265, 1273 (2010).

Thus, for a judge to go to the record of conviction:

1) The criminal statute itself must set out multiple distinct offenses, separated by "or" (i.e., "several different crimes, each described separately"[3]); and
2) At least one of the offenses set out in the statute must be a full (categorical) match with the definition at issue (i.e., it must come within a "a narrow range of cases where a jury was actually required to find all the elements in generic burglary.[4])"

If those requirements are met, a judge may review the individual's record of conviction under the modified categorical approach, for "the purpose … of determining *which* statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction." *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (emphasis supplied). Under this test, a prior conviction never can be for more than the bare elements, or the "least adjudicated elements," of the statute, and the review of the individual's record always is limited to identifying which of these bare elements was the subject of the particular conviction.

In contrast to this standard, the Ninth Circuit Court of Appeals[5] and the BIA,[6] and to a far lesser extent some other Circuit Courts of Appeals, hold that a judge may consider various details from the record to define the offense of conviction, in ways that go far beyond the elements of the offense that are set out in the statute. In fact, these jurisdictions permit a judge to consult the record of conviction if the statute just sets out one broadly defined offense, as opposed to "different crimes, each described separately." If the Supreme Court reaffirms its own rule in *Descamps*, these Ninth Circuit and BIA

[3] *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).
[4] *Taylor v. United States*, 495 U.S. 575, 602 (1990).
[5] *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).
[6] *Matter of Lanferman*, *supra*.

cases should be overturned. A good decision in *Descamps* ought to result in changes such as the following:

- Conviction of simple battery of a spouse will be held not to be a crime of violence for any purpose, regardless of whether the record states "offensive touching" or some other act. Thus, Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006) should be overruled.

- Conviction of vague offenses such as annoying or molesting a minor, endangering the welfare of a minor, or contributing to the delinquency of a minor, could not be sexual abuse of a minor or crimes of violence, regardless of whether the record reveals sexually abusive or violent conduct. Thus, decisions like *United States v. Armistead*, 467 F.3d 943 (6th Cir. 2006), which look behind broadly worded statutes to examine the record of conviction, might be deemed to have been abrogated.

- Convictions of sexual abuse under statutes that include as an element a requirement that the complainant be under 18 might still be sexual abuse of a minor, but statutes that punish sexually abusive conduct and contain no age requirement at all would not be, no matter what the record of conviction reveals about the complainant's age. And, in the Ninth Circuit, based on prior precedent, even a conviction under a statute prohibiting consensual sex with a person under the age of 18 could not be deemed sexual abuse of a minor, regardless of the age of the minor stated in the record of conviction (and no conviction under Cal. P.C. § 261.5(d) would be sexual abuse of a minor, regardless of record).[7]

- No conviction under a burglary statute that prohibits an unspecified "entry" (as opposed to an unlicensed entry) will qualify as "burglary" for aggravated felony purposes. This is the question presented in *Descamps*, which is evaluating Calif. P.C. § 459.

At least in the Ninth Circuit and according to the BIA, in all of the above cases an immigration judge is currently permitted to go to the record of conviction to seek certain details. Under a good *Descamps* decision, however, none of the above convictions should carry the immigration penalty, regardless of the burden of proof in immigration proceedings, and regardless of facts in the criminal record.

Will a good* Descamps *decision apply in immigration proceedings? It should, but there may have to be litigation in at least some jurisdictions.

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[7] A good *Descamps* decision, applied to immigration proceedings, would reinstate the prior rule under *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159-60 (9th Cir. 2008) (en banc) (where a statute prohibits consensual sex with a person under the age of 18, the prior conviction must be considered to be for sex with a 17-year-old regardless of the record of conviction). Regarding Cal. P.C. § 261.5(d), see *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009) (while here the court held that a judge may look to the record to determine whether the offense involved abuse, under a good *Descamps* decisión § 261.5(d) never should be held sexual abuse of a minor under the Ninth Circuit standard.) For further discussion of these standards in the Ninth Circuit, see *California Notes and Chart, Note: Sex Offenses* at www.ilrc.org/crimes.

The Supreme Court has applied the same categorical approach in immigration proceedings as in federal criminal proceedings. *See Nijhawan v. Holder, supra,* and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). So have most federal courts, as discussed below. The Board of Immigration Appeals has challenged this, however. In *Matter of Lanferman,* 25 I&N Dec. 721 (BIA 2012) the three-judge panel asserted that "the categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena, where it was developed" and that federal courts should defer to it on this matter under *Brand X. Id.* at 728, 729 n.7. Further, in *Lanferman* the BIA set out a very broad test for how an immigration judge may use information in the record of conviction. The Board stated that a court may review the individual's record of conviction under a criminal statute regardless of the statute's structure, and even if the statute does not set out multiple individual offenses, if based on the elements of the offense some but not all violations of the statute give rise to grounds for removal or ineligibility for relief. *Lanferman,* 25 I&N Dec. at 724. This is roughly the same rule that is being challenged in *Descamps*, and the BIA approvingly cited *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), the Ninth Circuit decision that is being challenged in *Descamps.*

The *Lanferman* panel appears to be in error, but based on *Lanferman*, ICE will likely assert that a good decision in *Descamps* will not apply in immigration proceedings. The Supreme Court is not expected to give an opinion on immigration proceedings in *Descamps*, a purely criminal case. The issue may go to the federal courts. Federal courts, not the Board, decide whether a court should defer to the BIA. Some courts have made clear, recent pronouncements on the issue, which might obviate the need for litigation. In 2012, the Ninth Circuit directly addressed the assertion that a lesser categorical approach applies in immigration proceedings, and held that it is required to apply the protections of the criminal categorical approach in immigration hearings. *Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc) (rejecting argument that categorical approach should apply differently in immigration than in federal criminal proceedings). Other courts have also explicitly rejected the idea that the categorical approach offers weaker protection in the immigration arena than in the criminal one. *See Campbell v. Holder*, 698 F.3d 29, 33–35 (1st Cir. 2012); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 478–80 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *cf. Perez-Gonzalez v. Holder*, 667 F.3d 622, 625 (5th Cir. 2012) (rejecting without comment dissent's argument that categorical approach should apply with less rigor in immigration cases).

Other courts have not addressed the issue as explicitly but have confirmed that the categorical approach applies at least as forcefully in immigration cases by applying criminal precedents to immigration petitions for review, or vice versa. *See, e.g.*, *United States v. Beardlsey*, 691 F.3d 252, 263–67, 275 (2d Cir. 2012); *Evanson v. Att'y Gen.*, 550 F.3d 284, 290–92 (3d Cir. 2008); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); *Olmstead v. Holder*, 588 F.3d 556, 559 (8th Cir. 2009); *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011); *Jaggernauth v. Att'y Gen.*, 432 F.3d 1346, 1353 (11th Cir. 2005). Only a few courts have suggested that the categorical approach may be less protective in immigration cases. *See Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008); *Salem v. Holder,* 647 F.3d 111, 119 (4th Cir. 2011) (*but see Prudencio*, *supra*); *Godoy-Bobadilla v. Holder*, 679 F.3d 1052, 1056–68 & n.3 (8th Cir. 2012). Moreover,

the distinctions these cases draw may be limited to the narrow contexts the cases addressed (crimes involving moral turpitude, in *Ali* and *Godoy-Bobadilla*; and situations in which a noncitizen bears the burden of proving that a relief bar does not apply, in *Salem*).

What can one do while waiting for* Descamps*?

If your client is currently in **criminal proceedings**:

- If your client is charged under a criminal statute that would benefit from a good decision in *Descamps*—meaning if the elements as set out in the statute would not cause an immigration penalty, but the facts your client might have to plead to would—you may want to advise **delaying a guilty plea** until the *Descamps* decision because the decision might affect your client's calculus in deciding whether to plead guilty or fight the charges (or to seek a different plea agreement). Delay may not be necessary in cases where it is possible to construct a record of conviction that affirmatively makes clear your client is pleading guilty to **non-removable** conduct, since such defendants should be protected even under the BIA/Ninth Circuit rule. Note, however, that in some contexts and in some jurisdictions, an **inconclusive** record of conviction may not be enough to protect your client under a divisible statute, if he or she is applying for immigration status or relief from removal. *See, e.g.*, *Young v. Holder*, *supra; Salem v. Holder*, *supra.*[8]

If your client is currently in **removal proceedings**:

- You may be able to argue that the IJ and/or the BIA is **already bound to apply your circuit's law on divisibility**, if favorable to your client. *See Beardlsey*, *supra,* 691 F.3d at 264–68 (collecting circuit cases that reject the BIA and Ninth Circuit approaches to divisibility). If the favorable circuit law arises in the criminal context, you may be able to argue on the basis of the cases discussed above that the same approach should apply in immigration cases. You may need to preserve this argument for eventual federal court review. (Even if the decision in *Descamps* is favorable, DHS is likely to argue that it does not apply to immigration cases).

- If the immigration judge in your case will apply the BIA or Ninth Circuit rule, you may want to notify the IJ that *Descamps* is pending, with a decision expected by June 2013 at the latest, and **move to postpone** a decision about removability or relief eligibility until after the Supreme Court rules. In cases where the respondent is detained or delay is otherwise not in the client's interests, you should prepare to take advantage of a favorable ruling in *Descamps* by preserving for BIA or federal court review arguments that the BIA/Ninth Circuit approaches are

[8] For further guidance on this issue, see "Practice Advisory: Criminal Bars to Relief and Burden of Proof Considerations" (Mills Legal Clinic of Stanford Law School & Immigrant Defense Project, May 4, 2012), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2012/05/IDP-Practice-Advisory-Cancellation-Burden-of-Proof-Revised-5-4-12-FINAL.pdf.

incorrect and that the majority federal court view is correct. *See Beardlsey*, *supra,* 691 F.3d at 264–68 (collecting circuit cases).

Attorneys with cases raising these issues are encouraged to contact the Immigrant Defense Project for technical support and assistance. Contact litigation staff attorney Isaac Wheeler at iwheeler@immigrantdefenseproject.org.