HOW TO USE THE CATEGORICAL APPROACH NOW (2021)

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I. Introduction

With a few exceptions, immigration authorities must use the "categorical approach" to determine whether a criminal conviction triggers a ground of removal. The general rule is that the categorical approach is required where the Immigration and Nationality Act (INA) uses the statutory term "conviction." Some state courts also have adopted the categorical approach. See, e.g., *People v Gallardo* (2017) 4 Cal 5th 120.

Competent use of the federal categorical approach may be the single most important defense strategy available to immigrants convicted of crimes. This is especially true now that the Supreme Court has clarified how the categorical analysis functions, in four recent decisions: *Pereida v. Wilkinson*, 141 S.Ct. 754 (2021); *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013), and *Moncrieffe v. Holder,* 569 U.S. 184 (2013). Following *Mathis*, the BIA expressly acknowledged that it is bound by this Supreme Court precedent regarding the application of the categorical approach in immigration cases. See *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016) ("*Chairez III*"[1]).

Mathis, Descamps and *Moncrieffe* overrule a lot of past precedent on immigration consequences of convictions in very helpful ways, while *Pereida* affects the modified categorical approach in damaging ways. If you represent an immigrant charged with or convicted of a crime and do *not* understand how to use the categorical approach in light of these decisions, you will be doing your client a terrible disservice. Relying on older precedent, you may incorrectly analyze the offense.

This article provides a current step-by-step guide on how to use the categorical approach. Part I outlines the three steps in the analysis. This section can stand alone as a summary of the approach. Part II addresses frequently asked questions about the steps. Part III discusses the contexts in which the categorical approach does not apply.

[1] The BIA's 2016 *Chairez* decision adopts the Supreme Court's reasoning in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013) and clarifies the earlier BIA decisions *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) and *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015). The Attorney General had stayed the earlier *Chairez* opinions while awaiting the Supreme Court's decision in *Mathis*. After *Mathis* was published, the Attorney General lifted the stay and remanded *Chairez* to the Board to decide in accord with *Mathis*. See *Matter of Chairez* and *Sama*, 26 I&N Dec. 796 (AG 2016), lifting the stay imposed at 26 I&N Dec. 686 (AG 2015). The Board then published the current decision, which is cited in the text, *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). It further published *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) *(Chairez IV),* where it denied the government's motion to reverse its earlier decisions and discussed the "peeking" strategy set out in *Mathis.*

This article[2] is more of a how-to guide than an analysis of the reasoning and full implications of the key cases. For an in-depth discussion of *Pereida*, *Moncrieffe, Descamps*, and *Mathis*, as well as related opinions such as *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), see Practice Advisories on these opinions that are available online.[3]

As always, how one uses new arguments depends on where one is in proceedings. Advocates representing people in removal proceedings can advance any good argument. Advocates considering whether to file an affirmative application that would expose a potentially removable person to authorities must be more conservative and should consider the chances that the argument might be rejected and the person placed in removal proceedings. Criminal defenders should always try to act conservatively by pleading specifically to one of the "good" immigration offenses within a criminal statute, even if this ought not to be necessary under the categorical approach.

II. Categorical Approach in Three Steps

A. Overview

Let's say that a client comes in who has an Iowa conviction for burglary for which she was sentenced to 16 months. You know that a burglary conviction with a sentence of a year or more is an aggravated felony for immigration purposes. How do you know whether *her* conviction is an aggravated felony? Is every offense that a state labels "burglary" an aggravated felony if a year or more is imposed?

No, it isn't, and this is the core of the categorical approach. The title of the offense – burglary, theft, assault – does not control. Instead, we undertake a detailed legal analysis, based on the elements of the offense the client was convicted of and the minimum conduct necessary to

[2] Many thanks to Kara Hartzler, Raha Jorjani, Alison Kamhi, Dan Kesselbrenner, Graciela Martinez, Michael Mehr, Manny Vargas, and Andrew Wachtenheim for their very helpful comments, and especially to Avantika Shastri for her work on this update to the advisory.

[3] See, e.g., ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at https://www.ilrc.org/pereida-v-wilkinson-and-california-offenses; IDP, NIPNLG, *Practice Alert: Pereida v. Wilkinson* (March 10, 2021) at https://nipnlg.org/practice.html and Kahn, *I'll Never Be Your Beast of Burden (Unless You're a Noncitizen): Pereida v. Wilkinson* (March 7, 2021) at https://topoftheninth.com/. In addition, at http://www.nipnlg.org/practice.html scroll to see practice advisories by IDP and NNIPNLG, including: *Practice Alert: In Mathis v. United States, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach* (July 1, 2016); *Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability under Drug Deportation and Other Conviction-Based Removal Grounds* (June 8, 2015) and advisories on opinions such as *Esquivel, Mellouli,* and *Dimaya.*

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