AIC NATIONAL LITIGATION MEETING
Criminal-immigration Issues Session Handout

Agenda

1. Introductions (name, affiliation, issues of particular interest)
2. Issues to watch
    a. Categorical analysis issues – Silva-Trevino-related litigation, divisibility analysis questions
    b. "Conviction" definition & scope issues – Ninth Circuit litigation on expungments, BIA litigation on drug treatment pleas, Third Circuit/BIA litigation on whether "disorderly persons offenses" are convictions, finality litigation
    c. Criminal grounds of removal
        - Reason to believe drug trafficker
        - Crimes involving moral turpitude definition issues
        - Aggravated felony definition issues
        - Other
    e. Particularly serious crime issues
    f. Crim-related relief issues (212(c) plea-trial, comparable grounds, etc.; clock-stopping; etc.)
    f. Others?

Selected recent cases list (2010-2011)

Categorical analysis issues

- Pending:
    - *Prudencio v. Holder*, No. 10-2382 (4th Cir.) (addressing *Silva-Trevino*)
    - *Olivas-Motta v. Holder*, No. 10-72459 (9th Cir.) (*Silva-Trevino* and missing element rule)
    - *Aguila-Montes de Oca v. Holder*, No. 05-50170 (9th Cir.) (en banc) (whether a conviction under the California burglary statute is a categorical match to generic burglary given the fact that the latter requires an element of non-consensual entry and the former does not, i.e., missing element rule)
    - *Singh v. Holder*, No.08-71682 (9th Cir.) (pet'n for reh'g) (whether a mens rea element of a state statute may be inferred under the categorical approach)
- *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (declining to follow *Silva-Trevino*)
- *Matter of Guevara Alfaro***,** 25 I&N Dec. 417 (BIA 2011) (declining to follow *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007), and instead holding that any 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 under the age of 16. Also holding that absent otherwise controlling authority, Immigration Judges and the Board of Immigration Appeals are bound to apply all three steps of the procedural framework set forth by the Attorney General in *Matter of Silva-Trevino* for determining whether a particular offense constitutes a crime involving moral turpitude.)

- *Rosa-Castaneda v. Holder*, --- F.3d ----, 2011 WL 9504 (9th Cir. Jan. 4, 2011) (REAL ID did not statutorily overrule *Sandoval-Lua*; an applicant for LPR cancellation has met the burden of proving that s/he has not been convicted of an aggravated felony if the record of conviction does not establish that the conviction necessarily was for all elements constituting an aggravated felony.)
- *United States v. Hernandez-Galvan*, ___ F.3d ___, 2011 WL 285222 (5th Cir. Jan. 31, 2011) (North Carolina conviction for attempted common law robbery constitutes a "crime of violence," requiring a 16-level increase under the Guidelines for an illegal reentry sentence, since defendant raises only a theoretical possibility, rather than a realistic probability, that the offense would criminalize conduct falling outside the generic, contemporary definition of attempted robbery).
- *United States v. Strickland*, ___ F.3d ___, 2010 WL 1529414 (9th Cir. Apr. 19, 2010) (*en banc*) (Maryland docket sheet, which Maryland law requires be prepared and maintained by a court clerk, and which defendant has a right to review and correct, is of sufficient reliability under *Shepard* and *Snellenberger* to establish that the Maryland offense was for sexual abuse of a child).

"Conviction" definition, scope, and finality issues

- Pending
  - *Matter of Cardenas-Abreu* (BIA, on remand from 378 Fed. Appx. 59 (2d Cir. May 24, 2010) (did finality rule survive enactment of 101(a)(48)(A) in IIRIRA).
  - *Nunez-Reyes v. Holder*, No. 05-74350 (9th Cir. *en banc*) (fate of *Lujan-Armendariz*)
- *Crespo v. Holder*, ___ F.3d ___, 2011 WL 73616 (4th Cir. Jan.11, 2011) (Virginia deferred adjudication under Virginia Code § 18.2-251 for possession of marijuana did not qualify as a "conviction" under INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), since the deferred adjudication followed a plea of not guilty and, although the facts found by the court would justify a finding of guilt, the court did not make a finding of guilt and the defendant did not admit the facts).
- *Jimenez-Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010) (first-time offender whose state conviction of using or being under the influence of a controlled substance is subsequently expunged under state law is eligible for the same immigration treatment as those convicted of simple drug possession whose convictions are expunged under the Federal First Offender Act)
- *Wellington v. Holder*, 623 F.3d 115 (2d Cir. 2010) (New York Certificate of Relief from Disabilities did not preclude use of underlying drug offense as basis for removal)
- *Bakarat v. Holder*, 2010 U.S. App. LEXIS 19213, __ F.3d __ (6th Cir. 2010) (following prior Sixth Circuit decision in *Pickering* and finding that BIA improperly placed burden on immigrant)
- *Mejia Rodriguez v. U.S. Dep't of Homeland Security*, __ F.3d __, 2011 WL 9573 (11th Cir. Jan. 4, 2011) (per curiam) (a guilty plea followed by a finding of guilt and credit for time served constitutes a conviction for immigration purposes under INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), since credit for time served is a punishment for purposes of INA § 101(a)(48)(A)))

Reason to believe drug trafficker

- *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337 (11th Cir. 2010) (after individual's guilty plea was vacated based on a finding that it was involuntary, there was no substantial evidence that he admitted anything when he pleaded guilty sufficient to support "reason to believe" that he was a drug trafficker)
- *Matter of Casillas-Topete*, 25 I&N Dec. 317 (BIA 2010) ("reason to believe" may be based on information known to immigration officials other than the inspecting immigration officer as long as the conduct at issue predated or occurred contemporaneously with the alien's application for admission)
- Other recent cases?

Crime involving moral turpitude

- Pending
    - BIA remand as per *Castillo v. Attorney General*, NO. 09-2594 (3rd Cir. Jan. 11, 2011) (remanding to determine whether NJ disorderly persons offense of shoplifting constitutes a "crime," referencing *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), for purposes of being a crime involving moral turpitude (also raises "conviction" definition issues)).
    - BIA remand as per *Johnson v. Holder*, No. 09-3478 (3rd Cir. Dec. 29, 2010) (remanding to determine whether NY theft of services statute is a crime involving moral turpitude).
- *Matter of Vo***,** 25 I&N Dec. 426 (BIA 2011) (Where the substantive offense underlying an alien's conviction for an attempt offense is a crime involving moral turpitude, the alien is considered to have been convicted of a crime involving moral turpitude for purposes of INA § 237(a)(2)(A), even though that section makes no reference to attempt offenses.)
- *Tijani v. Holder*, --- F.3d ----, 2010 WL 4925449, (9th Cir. Dec. 6, 2010) (Noonan, J.)(Tashima, J., concurring in part and dissenting in part) (Callahan, J., concurring and dissenting) (withdrawing March 11, 2010 opinion and denying requests for panel rehearing and rehearing en banc) (Cal. PC 532a(1) – false imprisonment – is categorically a CIMT even though the statute does not explicitly require intent to defraud; BIA gets no deference as to what the elements of a given criminal offense are).
- *Saavedra-Figueroa v. Holder*, --- F.3d ----, 2010 WL 4367047 (Nov. 5, 2010) (Misdemeanor false imprisonment, Cal. P.C. 236, is not categorically a CIMT)
- *Cortez-Guillen v. Holder*, --- F.3d ----, No. 09-72358 (9th Cir. Oct. 5, 2010) (Alaska "coercion" offense, Alaska Stat. § 11.41.530(a)(1), is not categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F)).

Aggravated felony issues

Illicit/drug trafficking AF

- *Carachuri-Rosendo v. Holder*, __ U.S. __ 130 S. Ct. 2577 (2010) (second or subsequent state simple possession offenses are not aggravated felonies unless the fact of the first conviction is proven or admitted beyond a reasonable doubt in the course of the criminal proceeding regarding the second possession charge)
- *Matter of Sanchez-Cornejo*, 25 I&N Dec. 273 (BIA 2010) (holding that the offense of delivery of a simulated controlled substance in violation of Texas law is not an aggravated felony, as defined by INA § 101(a)(43)(B,) but it is a violation of a law relating to a controlled substance under former INA § 241(a)(2)(B)(i)) [Note that this case cites *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (stating that, outside those non-felonies that might fall within the definition of "drug trafficking crime," the offense must be a felony in order to be a drug AF)]
- *Thomas v. AG*, 625 F.3d 134 (3d Cir. 2010) (a marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not be considered an "illicit trafficking" AF if the offense might cover transfer of a small amount of marijuana for no compensation, by analogy to 21 U.S.C. 841(b) (4) ("distributing a small amount of marijuana for no remuneration" is treated as simple possession misdemeanor under 21 U.S.C. 844))
- *Catwell v. AG*, 623 F.3d 199 (3d Cir. 2010) (120.5 grams of marijuana is not a "small" amount of marijuana for purposes of 21 U.S.C. 841(b)(4)).
- *Davila v. Holder*, 2010 U.S. App. LEXIS 12230 (5th Cir. 2010) (unpublished) (N.Y. PENAL LAW § 220.41 criminal sale of a controlled substance could cover an offer to sell, which is not an offense under the CSA, and therefore is not categorically a drug trafficking crime aggravated felony);
- *Young v. Holder*, ___ F.3d ___, 2011 WL 257898 (9th Cir. Jan. 28, 2011) (California conviction of sale or offer to sell a controlled substance, in violation of Health & Safety Code § 11352(a), was not an aggravated felony for immigration purposes, even though charging document was phrased in the conjunctive)
- *United States v. Marban-Calderon*, ___ F.3d ___, 2011 WL 135040 (5th Cir. Jan. 18, 2011) (Texas conviction of delivery of a controlled substance, which includes "offer to sell" qualified as a drug trafficking offense for illegal re-entry sentencing purposes, since the Sentencing Guidelines have been amended, in 2008, to include solicitation).
- Legislative change: State drug possession offense should not be considered an "illicit trafficking" AF as falling within the referenced federal definition of "drug trafficking crime" unless the offense would be a felony under federal law, i.e., conviction required a showing of intent to sell, possession of more than five grams of crack (possession of more than five grams of crack no longer a federal felony, eff. August 3, 2010 – see Fair Sentencing Act, Pub. L. 111-220, Section 3) or any amount of flunitrazepam, or a prior final drug conviction.

Sexual abuse of a minor AF

- *Restrepo v. AG*, 617 F.3d 787 (3d Cir. 2010) (deferring to BIA definition of sexual abuse of a minor in *Matter of Rodriguez-Rodriguez*)
- *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. May 20, 2010) (Arizona conviction for violation of ARS § 14-1405, sexual conduct with a minor under 18, is not categorically

an aggravated felony for immigration purposes, since it does not meet the generic federal definition of "sexual abuse of a minor"), following *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir.2008) (en banc), *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir.2009))

- *Oouch v. U.S.D.H.S.*, ___ F.3d ___, 2011 WL 257336 (2d Cir. Jan. 28, 2011) (New York conviction of use of a child in a sexual performance, in violation of N.Y. Penal Law § 263.05, categorically constitutes aggravated felony "sexual abuse of a minor," since it involves knowingly using a child in a sexual performance).

Crime of violence AF

- *Brooks v. Holder*, 621 F.3d 88 (2d Cir. 2010) (New York felony conviction for possession of a loaded firearm with the intent to use it unlawfully against another person plainly "involves a substantial risk that physical force against the person or property of another may be used" and therefore constitutes a "crime of violence")
- *Johnson v. U.S.*, __ U.S. __, 130 S. Ct. 1265 (2010) (Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another," and thus does not constitute a "violent felony" for purposes of Armed Career Criminal Act)
- *U.S. v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010) (Arizona aggravated assault statute does not require either the use of a deadly weapon or the intent to cause serious bodily injury, and, therefore, its elements do not substantially correspond to the elements of the generic offense of aggravated assault and a conviction of this crime is not per se a "crime of violence" under the Sentencing Guidelines)
- *U.S. v. Espinoza-Morales*, __ F.3d __ (9th Cir. Sept. 10, 2010) (Neither Cal. PC § 243.4(a) (sexual battery) nor § 289(a)(1) (forcible acts of sexual penetration) is a categorical "crime of violence" under a test that is identical to 18 USC § 16(a)).
- *Teposte v. Holder*, --- F.3d ----, 2010 WL 4189306 (9th Cir. Oct. 26, 2010) (Conviction for shooting at inhabited vehicle requires only reckless intent under California law, and is not categorically "crime of violence" under 8 U.S.C. § 16(b))
- *Covarrubias Teposte v. Holder*, 623 F.3d 1094 (9th Cir. Oct. 26, 2010), amended and superseded, __ F.3d __, 2011 WL 167037 (9th Cir. Jan. 20, 2011) ("We have yet to establish whether the word "felony" in § 16(b) is defined as an offense punishable by more than one year in prison, or alternatively as an offense that is characterized as a felony under state law.")
- *Dale v. Holder*, 610 F.3d 294 (5th Cir. Jun. 25, 2010) (New York conviction for first degree assault, in violation of New York Penal Code § 120.10, is not necessarily an aggravated felony crime of violence since the statute is divisible and includes reckless assault; BIA erred in finding that defendants in New York cannot be convicted of "attempted" reckless assault – although attempted reckless assault does not necessarily appear logical from a criminal standpoint, New York case law indicates that the offense is an acceptable plea)
- *United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. Jun. 8, 2010) (Texas conviction for injury to child, in violation of Texas Penal Code § 22.04(a), did not constitute a crime of violence, for illegal re-entry sentencing purposes, since it does not require use of force; Texas Penal Code § 22.04(a) can be committed, for example, "by intentional act without

the use of physical force by putting poison or another harmful substance in a child's food or drink.")

- *United States v. Rodriguez-Gomez*, 608 F.3d 969 (7th Cir. Jun. 11, 2010) (Illinois conviction for aggravated battery, in violation of 720 Ill. Comp. Stat. 5/12-4(b)(6), which includes any provoking physical contact with certain listed individuals, is not categorically an aggravated felony crime of violence, for illegal re-entry sentencing purposes; applying the modified categorical analysis; however, the charging documents show that respondent was convicted of the portion of the statute that involves use of force)

Fraud AF

- *Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010) (federal conviction for violation of 18 U.S.C. § 656, stealing, embezzling, and misapplying bank funds, is an aggravated felony fraud offense since knowing misapplication of funds necessarily involves fraud).
- *Kawashima*v. *Holder*, 615 F.3d 1043, 1057 (9th Cir. 2010) (en banc) (affirming removal order for one petitioner's fraud offense under *Nijhawan* and remanding for further analysis for other petitioner's fraud offense)

Other AFs

- *Matter of Gruenangerl*, 25 I&N Dec. 351 (BIA 2010) (holding that the crime of bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(A) (2006) is not an offense "relating to" commercial bribery and is therefore not an aggravated felony under INA section 101(a)(43)(R))
- *Denis v. Attorney General*, ___ F.3d ___, 2011 WL 223024 (3d Cir. Jan. 27, 2011) (New York conviction of tampering with physical evidence, in violation of Penal Law § 215.40(2) constituted an obstruction of justice aggravated felony, and a particularly serious crime for purposes of withholding of removal. No deference is due to the BIA interpretation of the phrase "relating to" in the aggravated felony definition of an obstruction of justice aggravated felony.)

AF scope

- *Ledezma-Galicia v. Holder*, __ F.3d __, 2010 U.S. App. LEXIS 26400 (9th Cir. 2010) ("the 1988 law that made aliens deportable for aggravated felony convictions did not apply to convictions prior to November 18, 1988; and ... neither Congress's overhaul of the grounds for deportation in 1990 nor its rewrite of the definition of aggravated felony in 1996 erased that temporal limitation")

Other criminal grounds of removal

- *Matter of Soram***,** 25 I&N Dec. 378 (BIA 2010) (holding that the crime of unreasonably placing a child in a situation that poses a threat of injury to the child's life or health in violation of section 18-6-401(1)(a) of the Colorado Revised Statutes is categorically a crime of child abuse under INA § 237(a)(2)(E)(i), even though no proof of actual harm or

injury to the child is required. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), clarified.)

- *Rodriguez v. Holder*, --- F.3d ----, 2010 WL 3293348 (9th Cir. Aug. 23, 2010) (per curiam) (A prior drug conviction destroys eligibility for the 30 grams of marijuana for personal use exception to the controlled substances ground of deportability under INA 237(a)(2)(B)(i)).
- *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010) (the antique firearm exception in 18 U.S.C. § 921(a)(3) is an affirmative defense that must be proven by the noncitizen after the DHS has established the conviction by clear and convincing evidence).

Particularly serious crime issues

- Pending
    - Rehearing en banc granted on Sept. 2, 2010 in .*Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (petitioner's DUI offenses "do not exceed the 'capital or grave' standard of 'serious' nonpolitical crimes, and *Frentescu* indicates that particularly serious crimes should exceed that standard")
- *Denis v. Attorney General*, ___ F.3d ___, 2011 WL 223024 (3d Cir. Jan. 27, 2011) (New York conviction of tampering with physical evidence, in violation of Penal Law § 215.40(2) constituted an obstruction of justice aggravated felony, and a particularly serious crime for purposes of withholding of removal.)

Other crim-imm relief eligibility issues

- *Lanier v. United States AG*, __ F.3d __, *6-*8, 2011 U.S. App. LEXIS 2317 (11th Cir. Feb. 4, 2011) (LPR bar to § 212(h) based on an aggravated felony conviction will only apply to a noncitizen who was admitted to the United States as a lawful permanent resident at the border or its equivalent (e.g., an airport)). Merely adjusting status to permanent residency does not trigger the bar. Declined to follow *Matter of Kolijenovic*.)
- *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010) (LPR bar to § 212(h) based on an aggravated felony conviction will only apply to a noncitizen who was admitted to the United States as a lawful permanent resident at the border or its equivalent (e.g., an airport)). Merely adjusting status to permanent residency does not trigger the bar.)
- *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) (determining what qualifies as admission for purposes of 7 year continuous residence requirement for 212(h) waiver eligibility for someone who has "previously been admitted" as an LPR))
- *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010) (the phrase "previously admitted as a lawful permanent resident" for purposes of barring certain lawful permanent residents from relief under INA § 212(h) means any prior admission as a lawful permanent resident, not only the most recent; LPR who later entered without admission was still barred from 212(h) as an aggravated felon).
- *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010) (no 212(c) relief for person convicted at trial)
- *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) (held that conviction for a single crime

involving moral turpitude that qualifies as a “petty offense” is not for an "offense referred to in section 212(a)(2)" for purposes of triggering the "stop-time" rule in section 240A(d)(1), even it renders the noncitizen removable under section 237(a)(2)(A)(i)))

- *Matter of Pedroza,* 25 I. & N. Dec. 312 (BIA 2010) (held that a noncitizen's conviction for a crime involving moral turpitude was not "described under" either section 212(a)(2) or 237(a)(2)(A)(i) of the Act where the maximum possible sentence for his crime was less than 1 year and he was sentenced to 10 days in jail, so it did not render him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act);
- *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010) (held that a noncitizen's conviction of a crime involving moral turpitude that was punishable by a sentence to imprisonment for a year was therefore "described under" section 237(a)(2), even though the crime was not committed within five years of admission as required for deportability under 237(a)(2), explaining that in determining which offenses are “described under” sections 212(a)(2), 237(a)(2), and 237(a)(3), only language specifically pertaining to the criminal offense, such as the offense itself and the sentence imposed or potentially imposed, should be considered)
- *Vazquez-Hernandez v. Holder*, 590 F.3d 1053 (9th Cir. 2010) (finding an inadmissible noncitizen ineligible for cancellation of removal under section 240A(b)(1)(C) because his conviction was “described under” section 237(a)(2)(E)(i) (deportability ground for domestic-related offenses))
- *Matter of Nelson,* 25 I&N Dec. 410 (BIA 2011) (holding that once an alien has been convicted of an offense that stops the accrual of the 7-year period of continuous residence required for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2006), section 240A(d)(1) of the Act does not permit such residence to restart simply because the alien has departed from, and returned to, the United States)
- *Matter of Alyazji***,** 25 I&N Dec. 397 (BIA 2011) (holding that, in general, an alien’s conviction for a crime involving moral turpitude triggers removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C.§ 1227(a)(2)(A)(i) (2006), only if the alien committed the crime within 5 years after the date of the admission by virtue of which he or she was then present in the United States. *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), overruled in part.)