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PRACTICE ADVISORY¹
VIRGINIA FIREARMS OFFENSES AND THE CATEGORICAL APPROACH
IN THE FOURTH CIRCUIT UNDER *GORDON V. BARR*

July 30, 2021

I. Introduction

This practice advisory addresses the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”)’s decision in *Gordon v. Barr*, No. 19-1539, 965 F.3d 252 (4th Cir. 2020). In *Gordon*, the Court reiterated its established precedent on the categorical approach and ruled that a conviction under **Virginia Code § 18.2-280(A)** - Willfully discharging any firearm in a public place without resulting in bodily injury to another person - is not a removable firearms offense under the Immigration and Nationality Act (INA) § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).² The Court held that the Virginia firearms statute is categorically overbroad because it encompasses antique firearms, which are explicitly excluded from the federal ground of deportability for firearm offenses. The Court also held that the realistic probability analysis does not apply when the plain language of a statute is unambiguously broader than the federal offense.³

This practice advisory will first offer a summary and analysis of *Gordon v. Barr*. After an overview of the categorical approach in the Fourth Circuit and the Court’s reasoning in the decision, the advisory will then explain the *Gordon* Court’s four-step analysis for analyzing other firearms offenses under the categorical approach. Finally, the advisory will apply the Court’s reasoning to identify categorical approach challenges available for two additional firearms statutes in Virginia: (a) **Virginia Code § 18.2-282** - Pointing, Holding, or Brandishing Firearm and (b) **(for all convictions prior to July 1, 2017, and for convictions on or after July 1, 2017 if the convicted individual has a violent felony record) Virginia Code § 18.2-308.2** - Possession or Transportation of Certain Firearms by Certain Persons.

II. Firearms Ground of Removability⁴

8 U.S.C. § 1227(a)(2)(C) states: “Any [noncitizen] who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning

¹ The instructions in this practice advisory are general and should not be considered absolute. This information should not be considered legal advice for any particular individual. The circumstances or facts of an individual’s particular case may render some or all of this information inapplicable.

² *Gordon v. Barr*, 965 F.3d 252, 254, 259 (4th Cir. 2020).

³ *Id.* at 260.

⁴ This practice advisory addresses removability under 8 U.S.C. § 1227(a)(2)(C); it does not analyze how a Virginia Code firearms conviction implicates other grounds of removal.



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possessing, or carrying . . . any weapon, part, or accessory which is a firearm . . . (as defined in section 921(a) of Title 18) in violation of any law is deportable.”

The applicable federal definition of a firearm, under 18 U.S.C. § 921(a)(3)(A), states that a firearm is “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” The statute explicitly states that such term does not include an antique firearm.⁵

Virginia Code § 18.2-280(A), the state statute at issue, states: “If any person willfully discharges or causes to be discharged any firearm in any street in a city or town, or in any place of public business or place of public gathering, and such conduct . . . does not result in bodily injury to another person, he shall be guilty of a Class 1 misdemeanor.”

III. Background

In 2008, Mr. Conroy Steve Gordon, a citizen of Jamaica and lawful permanent resident of the United States, obtained a misdemeanor conviction under Virginia Code § 18.2-280(A) - Willfully discharging any firearm in a public place without resulting in bodily injury to another person.⁶ In 2017, the Department of Homeland Security (DHS) charged Mr. Gordon with removability under 8 U.S.C. § 1227(a)(2)(C) for his 2008 conviction.⁷ Mr. Gordon filed a motion to terminate removal proceedings, arguing that his conviction did not qualify as a removable offense because the definition of “firearm” in the Virginia statute, unlike the federal definition, includes antique firearms.⁸ The Immigration Judge (IJ) agreed and terminated removal proceedings against Mr. Gordon.⁹

The Board of Immigration Appeals (BIA) reversed the IJ’s ruling. Even though the BIA “acknowledged that the Virginia statute was facially broader than the INA’s federal firearm offense,” the BIA held that “[Mr.] Gordon was required, but failed, to show there was ‘realistic probability’ that the Commonwealth would prosecute a case under Virginia Code § 18.2-280(A).”¹⁰ The IJ subsequently granted Mr. Gordon cancellation of removal for certain lawful permanent residents.¹¹ Despite DHS’s concession that Mr. Gordon was statutorily eligible for cancellation of removal, DHS again appealed to the BIA.¹² Mr. Gordon cross-appealed, arguing that he was not removable as charged because the Virginia statute was overly broad in comparison to the federal offense.¹³ The BIA sustained DHS’s appeal, reaffirmed that Mr.

⁵ 18 U.S.C. § 921(a)(3). An antique firearm, by its federal definition, includes any firearm manufactured in or before 1898 and any muzzle loading rifle, shotgun, or pistol, which is designed to use black powder, or a black powder substitute, which cannot use fixed ammunition. 18 U.S.C. § 921(a)(16)(A), (C).

⁶ *Gordon*, 965 F.3d at 255.

⁷ *Id.*

⁸ *Id.* at 255-56.

⁹ *Id.* at 256.

¹⁰ *Id.*

¹¹ *Id.*, n.3.

¹² *Id.*

¹³ *Id.*



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Gordon was convicted of a removable firearms offense, and ordered Mr. Gordon removed.¹⁴ Mr. Gordon subsequently appealed the BIA's decisions to the Fourth Circuit, which found that the BIA erred as a matter of law in determining that Mr. Gordon was convicted of a removable firearms offense and vacated Mr. Gordon's order of removal.¹⁵

IV. *Gordon* Reiterates the Categorical Approach.

In its decision, the Court restated the categorical approach as already established by earlier Fourth Circuit¹⁶ and Supreme Court¹⁷ precedent. First, the Court addressed the threshold matter of burden. Pursuant to 8 U.S.C. § 1229a(c)(3)(A) and 8 C.F.R. § 1240.8, the government bears the burden of proving removability by clear and convincing evidence.¹⁸ Thus, the government had to prove “that [Mr.] Gordon’s Virginia conviction qualifies as a federal ‘firearm offense’ for purposes of the INA removal statute.”¹⁹

To determine whether Gordon’s state conviction qualified as a removable offense, the Court applied the categorical approach. Under the categorical approach, the Court explained, courts “focus on the statutory definition of the state offense.”²⁰ Courts must determine whether the “elements of the state offense fall within the definition of the federal offense under the INA.”²¹ If so, the state offense qualifies as a removable offense. However, if the state offense “‘sweeps more broadly,’ criminalizing more conduct than the federal offense, the prior conviction does not qualify as a removable offense” and the categorical analysis is complete.²²

The Court then applied this framework to the statute at issue in Mr. Gordon’s case, Virginia Code § 18.2-280(A). First, the Court reviewed the Virginia Code’s statutory language and interpretation of the appellate courts. It noted that Virginia Code § 18.2-280(A) prohibits the willful discharge of “any firearm” in public places, rather than the discharge of “a firearm.”²³ This, the Court stated, indicates that the General Assembly of Virginia “manifested a clear intent to bring all firearms within the ambit of the statute, irrespective whether they are more recently manufactured or are antique.”²⁴ Moreover, the statute’s purpose, addressing “the physical danger [that] the discharge of a firearm in such a place would pose to the general public,”²⁵ “underscores

¹⁴ *Id.*

¹⁵ *Id.* at 261.

¹⁶ *E.g., Castendet-Lewis v. Sessions*, 855 F.3d 253 (4th Cir. 2017); *Larios-Reyes v. Lynch*, 843 F.3d 146, 152 (4th Cir. 2016); *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014).

¹⁷ *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Taylor v. United States*, 495 U.S. 575 (1990).

¹⁸ *Omargharib*, 775 F.3d at 196.

¹⁹ *Gordon*, 965 F.3d at 257.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 258.

²⁴ *Id.*

²⁵ *Id.* (internal quotation marks omitted).



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the General Assembly’s clear intent to protect the general public from the discharge of ‘any firearm.’”²⁶

The Court further stressed that the Virginia legislature has explicitly excluded antique firearms in some provisions that regulate firearms, such as in Section 18.2-308.2, but not in others, such as in Section 18.2-280.²⁷ This demonstrates that “when the Virginia legislature has sought to narrow the applicability of a statute to exclude ‘antique firearms,’ the legislature has done so explicitly.”²⁸

Based on the plain language of the statute, as supported by Virginia’s appellate courts’ interpretations and legislative schema, the Court concluded that Virginia Code § 18.2-280(A) encompasses a “broader range of conduct than that covered by the INA removal statute, which excludes ‘antique firearms.’”²⁹ Therefore, Mr. Gordon’s conviction did not qualify as a removable firearms offense.

a. The Fourth Circuit Holds That the Realistic Probability Analysis is Improper When the Plain Language of the Firearm Element in the Statute is Overbroad.

Notably, the Fourth Circuit rejected the government’s argument that dictum in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), required Mr. Gordon to show a realistic probability that the state actually prosecutes the relevant offense in cases involving antique firearms from the outset.³⁰ In *Moncrieffe*, the issue was whether a conviction under Georgia Code § 16-13-30(j)(1), which criminalizes possession of marijuana with intent to distribute, qualified as an aggravated felony under the INA.³¹ The Supreme Court, in addressing the government’s hypothetical concern regarding state firearms statutes that do not have antique firearms exceptions, stated that in such an instance the noncitizen would need to show that there is a realistic probability, not a theoretical possibility, that the state would apply the firearms statute to cases involving antique firearms.³² In stating this, the Supreme Court did not have before it for analysis any specific state firearms statute upon which to apply the firearms removability ground.

The Fourth Circuit correctly declined to apply that dictum regarding firearm offenses in *Moncrieffe* here. The Court held that per the categorical approach, when the plain language is clear, a petitioner does not also have to find a case where the state successfully prosecuted a defendant for the overbroad conduct.³³ The Court pointed to the Supreme Court’s decision in *Mathis v. United States*, issued three years after *Moncrieffe*, where the Supreme Court held that “the ‘undisputed disparity between the [state] statutory language and the generic offense resolved

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 258-59.

²⁹ *Id.* at 259.

³⁰ *Id.* at 260.

³¹ *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013).

³² *Moncrieffe*, 569 U.S. at 185.

³³ *Gordon*, 965 F.3d at 260.



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the case in the defendant's favor."³⁴ Additionally, the Court noted that the majority of sister circuits also rejected the realistic probability analysis in cases where the statutory language is clearly overbroad.³⁵

Gordon reiterated several key aspects of the categorical approach. First, the government bears the burden of proving removability by clear and convincing evidence. Second, the categorical analysis focuses on the elements of the state offense's statutory definition, rather than on the criminal conduct underlying the conviction. If the plain language of the elements of the state offense are broader than the federal offense, then the state offense is not a removable offense. The plain language of the statute is informed by the state's appellate courts' interpretations and legislative schema, by which the Court is constrained. When the plain language of the state statute is overbroad, the realistic probability analysis does not apply.

V. The Impact of *Gordon* on Additional Firearms Statutes in Virginia and Beyond.

The Fourth Circuit's reinforcement of the categorical approach and rejection of the realistic probability analysis when the statutory language establishes the firearm element of the state offense is clearly overbroad provide noncitizens ground to challenge charges of removability for convictions under additional firearms statutes.

The Court's reasoning in *Gordon* provides four steps to guide the categorical approach analysis of a state firearms offense: (1) place the burden on the government; (2) observe the overbreadth of the elements of the state offense under the plain statutory language of the state statute; (3) analyze the definitions of the term "firearm" in case law from the state's highest courts; and (4) identify the state legislature's deliberate exclusion of certain types of firearms in other firearms statutes for comparative purposes.

Regarding other Virginia firearms offenses, the Court's analysis can be applied to the following two statutes: (a) Virginia Code § 18.2-282 - Pointing, Holding, or Brandishing Firearm and (b) (for all convictions prior to July 1, 2017, and for convictions on or after July 1, 2017 if the convicted individual has a violent felony record) Virginia Code § 18.2-308.2 - Possession or Transportation of Certain Firearms by Certain Persons.

The following section will apply step-by-step the Court's reasoning in *Gordon* to these two Virginia firearm statutes.

a. Virginia Code § 18.2-282 - Pointing, Holding, or Brandishing Firearm.

Step 1: The Government Bears the Burden to Establish Removability by Clear and Convincing Evidence.

³⁴ *Id.* (citing *Mathis v. United States*, 136 S.Ct. 2243, 2251 (2016)).

³⁵ *Id.* at 260-61 (citing *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), *Singh v. Att'y Gen.*, 839 F.3d 273 (3d Cir. 2016), *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015), *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017), *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066 (11th Cir. 2013)).



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The government must establish that the offense is categorically a removable firearms offense as opposed to the noncitizen having the burden to establish their offense is not a removable firearms offense.³⁶ If the government cannot meet its burden, the noncitizen cannot have a removable firearms offense under this statute.³⁷

Step 2: The Plain Statutory Language of the Statute Is Overbroad.

Virginia Code § 18.2-282 makes it unlawful “for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another.” The statute itself defines “firearm” in subsection (C) as “*any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion of a combustible material.*” (emphasis added). The statute’s text is broader than the federal definition: it would permit a conviction for brandishing an object that is similar in appearance to a firearm but is not a firearm, as not all weapons are firearms. Moreover, as the Court emphasized in *Gordon*, the statute’s prohibition of pointing, holding, or brandishing “*any firearm*” rather than “*a firearm*” demonstrates that “the General Assembly of Virginia manifested a clear intent to bring all firearms within the ambit of the statute.”³⁸

Step 3: The Definition of the “Firearm” Element in Appellate Court Decisions Involving Section 18.2-282 Is Overbroad.

Precedent from the Virginia Appellate Court confirms the statute’s overbroad definition of the “firearm” element. In *Gerald v. Commonwealth*, 805 S.E.2d 407 (Ct. App. Va. 2017), the Court of Appeals interpreted Section 18.2-282 and its definition of “firearm.” The Court noted that pointing an object “in a manner intended to induce fear based upon its appearance as a weapon apparently capable of firing one or more times” is “legally sufficient to establish the requisite elements of brandishing a firearm.”³⁹ Section 18.2-282 criminalizes more conduct, including an object bearing the *appearance* of a firearm, than the federal offense and is thus overbroad.

Step 4: The Legislative Schema Reveals the Legislature’s Intent to Include Antique Firearms.

When the Virginia Legislature enacted certain laws governing the regulation and possession of firearms, it did not explicitly exclude antique firearms in the language of Section

³⁶ 8 U.S.C. § 1229a(c)(3)(A); *Omargharib*, 775 F.3d at 196.

³⁷ The noncitizen can leverage this burden by requesting that the government first brief the categorical removability of the noncitizen based on the firearms statute at issue.

³⁸ *Gordon*, 965 F.3d at 258.

³⁹ *Gerald*, 805 S.E.2d at 410-11.



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18.2-282 despite doing so in other statutes. This further confirms that Section 18.2-282 encompasses antique firearms and is therefore overbroad.

- b. Convictions Before July 1, 2017, and On or After July 1, 2017 if the Convicted Individual Has a Violent Felony Record: Virginia Code § 18.2-308.2 - Possession or Transportation of Certain Firearms by Certain Persons.

Step 1: The Government Bears the Burden to Establish Removability by Clear and Convincing Evidence.

See Step 1 above.

Step 2: The Plain Statutory Language Is Overbroad.

Section 18.2-308.2 makes it unlawful for certain individuals, including felons, “to knowingly and intentionally possess or transport *any* firearm . . .” (emphasis added). The plain text of the statute indicates that it encompasses antique firearms and is therefore overbroad: as the Court emphasized in *Gordon*, by prohibiting the use of “*any* pistol, shotgun, rifle, or other firearm” rather than “*a* firearm,” “the General Assembly of Virginia manifested a clear intent to bring all firearms within the ambit of the statute.”⁴⁰

Step 3: Definitions of “Firearm” in Appellate Court Decisions Involving Section 18.2-308.2 Are Overly Broad.

Precedent from Virginia Courts confirms the statute’s overbroad definition of “firearm.” In *Armstrong v. Commonwealth*, 562 S.E.2d 139 (Va. 2002), the Virginia Supreme Court held that the term “any firearm” in Section 18.2-308.2 encompasses *all* firearms, regardless of whether they are “‘operable,’ ‘capable’ of being fired, or had the ‘actual capacity to do serious harm.’”⁴¹ This broad definition includes antique firearms. The definition of “firearm” in Section 18.2-308.2, as interpreted by the court in *Armstrong*,” is thus overbroad.

Step 4: The Legislative Schema Reveals the Legislature’s Intent to Include Antique Firearms Prior to July 1, 2017, and On or After July 1, 2017 If the Convicted Individual Has a Violent Felony Record.

The Virginia legislature amended Section 18.2-308.2 in 2017 to allow felons, save for a certain class of individuals convicted of violent felonies, to possess antique firearms.⁴² This

⁴⁰ *Gordon*, 965 F.3d at 258.

⁴¹ *Armstrong*, 562 S.E.2d at 145.

⁴² Va. Code §18.2-308.2(C)(2), effective July 1, 2017.



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explicit carveout demonstrates that prior to 2017, felons were not allowed to possess antique firearms under Section 18.2-308.2 and antique firearms were therefore included in the firearm definition. With this amendment, an individual with a felony conviction cannot violate this Section for an antique firearm unless he or she is classified as an individual convicted of a violent felony. The pre-2017 amendment legislative schema thus confirms the overbreadth of the statute prior to July 1, 2017.

Note that this analysis does not apply to convictions under Virginia Code § 18.2-308.2 on or after July 1, 2017 if the convicted individual does not have a violent felony record. That is, the amended version of the statute is not overbroad as applied to convictions involving nonviolent felons.

Section 18.2-308.2 remains overbroad, however, for individuals convicted on or after July 1, 2017 whose underlying criminal records include convictions for “an act of violence” or a “violent felony.”⁴³ In *Henry v. Rosen*, No. 19-2054 (4th Cir. filed Jan. 13, 2021), the Court remanded to the BIA for termination of removal proceedings after the government *conceded* that the petitioner’s conviction under Virginia Code § 18.2-308.2 was not a removable firearms offense.⁴⁴ The petitioner had a violent felony record, and therefore he could be convicted of possessing an antique firearm under Section 18.2-308.2.⁴⁵ The government’s concession in *Henry* affirms that Section 18.2-308.2 is categorically overbroad for individuals convicted of violent felonies, even following the July 1, 2017 amendment.

VI. Conclusion

Gordon reiterates the government’s burden to prove removability “by clear and convincing evidence” and rejects the realistic probability analysis when the statutory language is clear. This practice advisory has provided examples of how to apply the Court’s analysis to convictions under select Virginia firearm statutes. Four steps of analysis that mirror the Court’s reasoning in *Gordon*—placing the burden on the government, observing the overbreadth of the plain statutory language of the elements of the state offense, analyzing the definitions of the term “firearm” in state case law from the Virginia appellate courts, and pointing out the Virginia legislature’s deliberate exclusion of firearms in certain statutes—can be effective when arguing that the elements of a state statute and a federal statute do not categorically match.

APPENDIX:

- *Gordon v. Barr* decision

⁴³ *Id.*

⁴⁴ Respondent’s Unopposed Motion to Remand for Termination of Proceedings at 2, *Henry*, No. 19-2054.

⁴⁵ *Id.*