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## – PRACTICE ADVISORY – FOURTH CIRCUIT HOLDS THAT VIRGINIA GRAND LARCENY IS NOT A THEFT AGGRAVATED FELONY

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On December 23, 2014, the U.S. Court of Appeals for the Fourth Circuit issued a decision in *Omargharib v. Holder* (Case No. 13-2229),<sup>1</sup> ruling that Virginia’s grand larceny statute<sup>2</sup> is categorically overbroad with regard to the aggravated felony theft offense provision of the Immigration and Nationality Act (INA).<sup>3</sup> **In cases within the jurisdiction of the Fourth Circuit, the *Omargharib* ruling means that a noncitizen cannot be deported based on a theft aggravated felony charge arising from a conviction for Virginia grand or petit larceny.**<sup>4</sup>

\*\*\*Although the *Omargharib* decision will benefit many noncitizens facing larceny charges, **defense attorneys should remember that a grand or petit larceny conviction still has adverse immigration consequences.** Among other consequences, larceny is considered a “crime involving moral turpitude,” which can lead to a determination of deportability or inadmissibility. Additionally, a larceny conviction may trigger Immigration and Custom Enforcement’s (ICE) new enforcement priorities and can cause undocumented noncitizens to be barred from deferred action or other benefits, such as Temporary Protected Status.<sup>5</sup>\*\*\*

The court’s reasoning: The court in *Omargharib* applied the “categorical approach” to determine whether a conviction under Virginia’s grand larceny statute constitutes an “aggravated felony” theft offense under the INA. Pursuant to the categorical approach, a state law criminal conviction only qualifies as an aggravated felony under the INA if the state statute has the same elements as, or is narrower than, the generic version of the offense as codified in the INA’s aggravated felony statute. In most circumstances, the categorical approach dictates that when a state statute is overbroad as compared to the federal generic version of that offense, a conviction under the state statute cannot be deemed an aggravated felony regardless of the underlying facts of the case.

In *Omargharib*, the Fourth Circuit held that the elements of “larceny” under Virginia law are not a categorical match with the elements of the aggravated felony theft offense in the INA. Specifically,

<sup>1</sup> As of the date of this advisory, the time for the government to petition for rehearing or to petition for a *writ of certiorari* had not expired. Should such a petition be filed, CAIR Coalition will issue a subsequent advisory.

<sup>2</sup> Va. Code 18.2-95.

<sup>3</sup> 8 U.S.C. 1101(a)(43)(G) (“a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.”)

<sup>4</sup> Although the Court’s opinion does not address Virginia’s petit larceny statute, Va. Code 18.2-96, its analysis regarding the definition of “larceny” applies equally to that offense.

<sup>5</sup> For further information concerning enforcement priorities and deferred action, see CAIR Coalition’s practice advisory on executive action, available at <http://www.caircoalition.org/what-we-do/vjp/vjp-immigration-consequences-resources/>.

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the court found that Virginia case law defines larceny to include both theft *and* fraud offenses. By contrast, the INA’s aggravated felony statute categorizes theft and fraud as separate offenses.<sup>6</sup> Thus, the Court held that Virginia’s larceny statute sweeps much more broadly than the aggravated felony theft statute, which excludes fraud.

The court also rejected the government’s related argument that Virginia’s grand larceny statute is “divisible” on the basis that larceny can be committed by “wrongful” *or* “fraudulent” takings of property. Had the court agreed with the government’s divisibility argument, convictions for Virginia larceny would be subject to the “modified categorical approach,” pursuant to which an immigration adjudicator is permitted to review documents in the record of conviction to analyze the facts underlying the offense. However, as the court recognized, a statute is only divisible if it sets forth elements of an offense in the alternative. In *Omargharib*, the court held that wrongful or fraudulent takings were merely separate *means* of committing larceny, not distinct elements of the offense, thereby refuting the government’s divisibility analysis.

For the above reasons, and relying on the Supreme Court’s ruling in *Descamps v. United States*,<sup>7</sup> the Fourth Circuit held that Virginia larceny is not divisible and is categorically overbroad with regard to the aggravated felony theft offense in the INA. Accordingly, a conviction for grand or petit larceny in Virginia cannot constitute an aggravated felony theft offense irrespective of the underlying facts of the crime.

**Practice tips for Virginia defense attorneys:**

- *A plea to petit or grand larceny can no longer trigger the theft aggravated felony ground of deportability. This will make larceny a safe plea for some noncitizens but not for others. It also means that a larceny conviction will trigger fewer bars to relief from removal for noncitizens who are already deportable.*
- *Larceny still constitutes a crime involving moral turpitude (CIMT). This is important for all undocumented individuals seeking to maintain eligibility to adjust status to lawful permanent residents and to many lawful permanent residents who are within their first five years of admission or who have a prior conviction that is a CIMT. In some cases, the sentence imposed may determine the immigration penalties. Consult with CAIR Coalition in these matters. An alternative plea to trespass, VA Code 18.2-119, avoids the CIMT designation.*
- *A larceny conviction may also trigger bars to temporary or permanent relief, including, for example: deferred action (i.e., the new Deferred Action for Parental Accountability program); Temporary Protected Status; and adjustment of status to lawful permanent residency. If your client may be otherwise eligible for these or other types of relief, consult with CAIR Coalition.*

**Analyzing divisibility:** The court’s ruling in *Omargharib* emphasizes a few points about the divisibility component of the categorical analysis that attorneys should keep in mind when analyzing the potential immigration consequences of a criminal statute. Whether or not a statute is divisible is a

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<sup>6</sup> The fraud aggravated felony provision is set forth at 8 U.S.C. 1101(a)(43)(M).

<sup>7</sup> 133 S. Ct. 2276 (2010).

threshold determination that dictates whether a court can use the categorical approach or the modified categorical approach. This, in turn, determines whether the immigration adjudicator can look behind the statute of conviction to documents in the record when determining whether a state offense gives rise to federal grounds of removability.

- The use of the word “or” in a criminal statute or common law definition of an offense does not necessarily make the statute divisible for the purpose of the categorical analysis. According to the court, a disjunctive like “or” can signify different *means* of committing an offense instead of alternative *elements*, and a statute is only divisible if it contains alternative lists of elements. As the court recognized, the Supreme Court in *Descamps* defined “elements” as factual circumstances of an offense that a jury must find unanimously and beyond a reasonable doubt.<sup>8</sup>
- In determining the elements of an offense, the language of model jury instructions is an important part of the analysis. While the text of jury instructions should not preclude analysis of relevant case law and legislative history, jury instructions can be helpful in showing which words in a statute a jury must find unanimously and beyond a reasonable doubt.
- The divisibility analysis applies equally to crimes defined by statute and to those defined by common law. Thus, if the elements of an offense are not set forth in a statute, it is important to review how those elements have been articulated by state case law.

The court’s decision in *Omargharib* can be accessed on CAIR Coalition’s website on this page: <http://www.caircoalition.org/what-we-do/vjp/vjp-immigration-consequences-resources/>. For any questions about the decision or this practice advisory, please contact Morgan Macdonald ([morgan@caircoalition.org](mailto:morgan@caircoalition.org)).

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<sup>8</sup> *Id.* at 2288.