PRACTICE ADVISORY FOR VIRGINIA CRIMINAL DEFENDERS

Mathis v. United States and the Categorical Approach: When the Record Matters

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The categorical approach describes the method by which an immigration adjudicator determines if a criminal conviction under state law triggers federal immigration consequences such as deportation. In *Mathis v. United States*, 579 U.S. __ (2016), the Supreme Court of the United States affirmed a strict elements-based categorical analysis of prior convictions in the sentencing context, and explicitly extended that finding to the immigration context. The holding in *Mathis* affirms the approach already in use within the Fourth Circuit Court of Appeals, thereby upholding numerous precedential decisions minimizing the immigration penalties of certain Virginia offenses.

This practice advisory explores the ways the *Mathis* holding – and the categorical inquiry it upheld – provides Virginia criminal defense attorneys with tools to defend noncitizen clients against negative immigration penalties following a Virginia conviction. This advisory answers the following questions:

In a hurry? Consider these offense-specific Practice Tips:

1) **Virginia larceny** and **unauthorized use of a vehicle** can no longer be charged as Aggravated Felonies in immigration proceedings. They may nonetheless trigger other negative immigration consequences. See pp. 2-3.
2) In Virginia **drug** cases, keep the substance name and schedule out of the record of conviction to preserve a defense against the Controlled Substance Grounds of Deportability. See pp. 3-4.
   ⇒ Except: On a first possessory **marijuana** offense, create a record demonstrating the amount of marijuana to be 30 grams or less. See p. 5.
3) In Virginia **burglary** cases, have the record reflect only the statutory language on a plea to statutory burglary under § 18.2-91, with no details regarding means of commission of the offense, to preserve a defense against Aggravated Felony and Crime Involving Moral Turpitude charges of removability. See p. 4.
4) In Virginia **unlawful / malicious wounding cases**, have the record reflect only the statutory language, with no details regarding means of commission of the offense, to preserve a defense against Aggravated Felony charges of removability. See pp. 4-5.
5) Keep the nature of the relationship out of the record entirely when the complaining witness has a **domestic relationship** to the defendant. See p. 5.
6) In Virginia **fraud-related** offenses, create an affirmative record of loss of $10,000 or less to the victim. If this is impossible, consider an alternative larceny plea to avoid an Aggravated Felony charge. See p. 5.

For additional reference guides and practice advisories regarding the immigration consequences of Virginia offenses, visit our website at http://www.caircoalition.org/what-we-do/vjp/vjp-immigration-consequences-resources/. Free case consultations are available for Virginia public defenders and IDC-certified attorneys. To receive a consultation, public defenders should email ashapiro@adm.idc.virginia.gov and attorneys in private practice should email vjpconsultations@caircoalition.org.

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I. What is the categorical approach and what did *Mathis* say?

When a noncitizen is convicted of a state criminal offense, immigration adjudicators will determine whether that offense matches – and therefore triggers – one of the federal grounds of removability. The Supreme Court has long held that in conducting this analysis, immigration adjudicators are bound by a "categorical approach" that limits the inquiry into the underlying conviction.

- The strict categorical approach: Under the strictest application of the rule, the immigration adjudicator considers whether the elements of the state statute of conviction match the elements of the federal definition of the offense of removal. If the elements do not match, the inquiry ends, and the offense cannot trigger the ground of removal. The underlying facts are "irrelevant." *Mathis,* 579 U.S. at __ (slip op., at 12).

- The modified categorical approach: In some cases, the immigration adjudicator can look beyond the statute to the "record of conviction," modifying the categorical approach. **The critical holding in *Mathis* is that this procedure allowing the immigration adjudicator to review the record of conviction is only permissible when an offense is divisible into different *elements*. The court defines elements as those "constituent parts" of a crime that a jury must find beyond a reasonable doubt to convict or a defendant must necessarily admit when pleading guilty. *Mathis*, 579 U.S. at __ (slip op., at 2).** Elements are distinct from various "means" of committing an offense, which a jury need not agree upon in order to convict. In those cases where a statute does divide into alternative elements, the immigration adjudicator may look to the record only to determine "which element played a part in the defendant's conviction."[i]

- The circumstance-specific inquiry: In certain rare cases, the language of the removal statute includes modifying language that courts have found to refer to "the conduct involved in the commission of the offense of conviction, rather than to the elements of the offense."[ii] In these rare cases – the most common examples of which are described in detail in section III below – the immigration adjudicator may look to any relevant evidence to determine whether the circumstances of the offense match the relevant modifier in the federal removal statute.

II. What "safe harbors" remain intact after *Mathis*?

The elements-centric approach to divisibility upheld in *Mathis* had already been embraced by the Fourth Circuit. Now that the Supreme Court has upheld this approach, numerous previous decisions of the Fourth Circuit have been affirmed. Criminal defense attorneys can therefore continue to rely on the following rules which may provide some flexibility in plea bargaining for noncitizens. Note that there are numerous other Fourth Circuit decisions providing plea alternatives for noncitizens, addressed in CAIR Coalition's Chart governing Immigration Consequences of Selected Virginia Criminal Offenses.[iii]

- Virginia larceny (grand or petit) is NOT an aggravated felony: The Fourth Circuit has held that Virginia grand larceny at section 18.2-95 is not a categorical match for the theft aggravated felony ground at 8 U.S.C. § 1101(a)(43)(G) because it criminalizes both fraudulent and non-consensual takings and is not divisible into elements.[iv] This holding applies equally to petit larceny at section 18.2-96.
    - → Remember that larceny offenses may still trigger numerous other negative immigration consequences, including the crime involving moral turpitude grounds of removability.

- Virginia embezzlement is likely NOT a theft aggravated felony: The Fourth Circuit recently considered a federal embezzlement offense and found it not to categorically match the theft aggravated felony

ground defined at 8 U.S.C. § 1101(a)(43)(G).[v] Following this approach, Virginia embezzlement at section 18.2-111 should similarly not be considered a theft aggravated felony.

→ Remember that this offense may still trigger a fraud aggravated felony charge under 8 U.S.C. § 1101(a)(43)(M) if the loss to the victim exceeds $10,000, as well as other negative immigration consequences, including the crime involving moral turpitude grounds of removability.

- Unauthorized use of a vehicle is NOT an aggravated felony or CIMT: The Fourth Circuit has held that Virginia's unauthorized use statute at section 18.2-102 is not divisible into elements and is not a categorical match for the theft aggravated felony ground at 8 U.S.C. § 1101(a)(43)(G) because it criminalizes "glorified borrowing" that does not necessarily meet the federal definition of theft.[vi]

  → Section 18.2-102 provides an attractive plea option for many noncitizens because it is also not a crime involving moral turpitude as it does not require intent to permanently deprive.[vii]

Practice tip! Consider larceny as a plea alternative to fraud charges to avoid an aggravated felony. The fraud aggravated felony ground[viii] has no sentence requirement but is triggered by a loss to the victim exceeding $10,000. Where a plea to embezzlement or another fraud-related offense is accompanied by evidence of such a loss, an alternate plea to larceny will not constitute an aggravated felony regardless of sentence or loss amount. Remember that fraud and theft related offenses still trigger other negative immigration consequences including the crime involving moral turpitude grounds of removability.

III. When and how does the record matter?

As a criminal defense attorney, you may be able to create a record underlying certain dispositions that will preserve defenses to removability if your client is placed in immigration removal proceedings.

If the statute of conviction may be divisible into alternative elements, pay attention to the record of conviction!

If the statute under which your client was convicted may be divisible into component elements, the immigration adjudicator may look to the record of conviction to determine if your client was convicted under an element that is a match to the federal ground of removability.[ix] Therefore, your client's ability to defend against removal in immigration court may be strengthened if a) the record demonstrates she was convicted of an element that does not match the federal ground of removability; or b) the record is completely ambiguous as to the way the offense was committed, simply reflecting the statutory language.[x]

The "record of conviction" consists of a limited, specific set of documents: the charging document, the written plea agreement, the transcript of the plea colloquy, and any explicit factual finding by the judge to which the defendant consented. *Shepard v. United States*, 544 U.S. 13 (2005).

The following bullets provide selected tips for when and how the record matters in commonly charged Virginia offenses. Related tips for other offenses are available in the "Practice Tips" column of CAIR Coalition's Chart governing Immigration Consequences of Selected Virginia Criminal Offenses (see n. iii). Keep in mind that modifications to the record will not usually protect your client against charges of removability, but may preserve critical defenses to those charges once your client is in immigration court.

- **Controlled substance offenses:**[xi] Virginia's controlled substance schedules include substances that are not federally controlled and are therefore not categorical matches for the federal drug-related grounds of removability.[xii] There is no binding authority on the question of whether Virginia's controlled substance possession statute at section 18.2-250 or distribution statute at section 18.2-248

are divisible into elements. Therefore, noncitizens in removal proceedings on the basis of Virginia drug-related convictions may be able to challenge a drug-based charge of removability if the underlying record is inconclusive and the government therefore cannot prove that the conviction involved a federally controlled substance.

→ **Practice tip!** Keep the name of the substance and schedule entirely out of the record of conviction. If necessary, consider asking the Commonwealth's Attorney to physically strike the name of the drug from the charging document or other documents in the record. Note that the lab report should not be considered a part of the record of conviction pursuant to *Shepard*.

→ **Practice tip!** Consult with IDC or CAIR Coalition for lawfully present clients facing charges under § 18.2-250 or § 18.2-248. Some noncitizens may benefit by pleading to a felony possession charge rather than a misdemeanor. We recommend an individual consultation with an immigration expert in these cases – to receive a consultation, public defenders should email ashapiro@adm.idc.virginia.gov and attorneys in private practice should email vjpconsultations@caircoalition.org.

- **Statutory burglary at § 18.2-90 and 18.2-91:** Immigration and Customs Enforcement generally charges this offense as an aggravated felony under the burglary and/or crime of violence grounds and as a crime involving moral turpitude. However, immigration advocates argue that sections 18.2-90 and 18.2-91 are not categorical matches to the aggravated felony grounds because they are used to punish conduct that does not match the federal burglary definition, including nighttime entries that do not involve breaking as well as entries into automobiles, ships, and other locations that are not buildings or structures.[xiii] Section 18.2-91, further, is used to punish breaking and entering with the intent to commit simple assault and battery, which categorically is not a crime involving moral turpitude.[xiv] There is no binding authority on the question of whether Virginia's statutory burglary statutes are divisible into elements. Therefore, noncitizens in removal proceedings on the basis of Virginia statutory burglary convictions may be able to challenge related charges of removability if the underlying record is inconclusive as to manner and location of entry.

  → **Practice tip!** To preserve a defense against an aggravated felony charge for 18.2-90 or 18.2-91, specify in the record if the offense involved entering *without* breaking or entry into an automobile, ship, other non-dwelling or building. If this situation does not apply, seek to have the record simply reflect the general statutory language, omitting any reference to the manner of entry or location of entry. Remember that obtaining a sentence of 364 days or less is the surest way to avoid a burglary or crime of violence aggravated felony charge. Remember too that burglary offenses may trigger other grounds of removability including the crime involving moral turpitude grounds.

  → **Practice tip!** To preserve a defense against a crime involving moral turpitude charge, plead to 18.2-91 rather than 18.2-90 and do not specify the offense the defendant intended to commit upon entry or specify simple assault and battery as the intended offense.

- **Unlawful / malicious wounding at § 18.2-51:** Immigration and Customs Enforcement generally charges this offense as an aggravated felony under the crime of violence grounds. However, immigration advocates argue that this offense should not be considered categorically a "crime of violence" because it can be committed through causation of injury by "any means," including means not involving physical force, such as poisoning.[xv] There is no binding authority on the question of whether this offense is divisible into elements. Therefore, noncitizens in removal proceedings on the basis of

Virginia unlawful or malicious wounding convictions may be able to challenge related charges of removability if the underlying record is inconclusive and therefore the government cannot prove that the conviction involved the use of active force.

→ **Practice tip!** In section 18.2-51 dispositions, leave the means of commission of the offense out of the record entirely, so the record simply reflects the statutory language. If the means did not involve force, such as poisoning, specify as much. Remember that obtaining a sentence of 364 days or less is the surest way to avoid a crime of violence aggravated felony charge. Remember too that this offense may trigger other grounds of removability including the crime involving moral turpitude grounds.

Look out for offenses that might trigger circumstance-specific grounds of removal!

As discussed above, in rare circumstances the federal grounds of removability include modifying language that has been found to be "circumstance specific." In these cases, the immigration adjudicator is not limited to the record of conviction and can look at any relevant evidence to determine if the circumstance is met. The "Practice Tips" column of CAIR Coalition's Chart governing Immigration Consequences of Selected Virginia Criminal Offenses (see note iii) addresses when defense attorneys should be aware of the record for this reason. The following three tips address selected circumstances where courts have clearly found an offense to be "circumstance-specific":

- **Domestic relationship between defendant and complaining witness**: The Fourth Circuit has held that an immigration adjudicator may look to any relevant evidence to determine whether an offense involves a domestic relationship, triggering the "crime of domestic violence" grounds of deportability at 8 U.S.C. § 1227(a)(2)(E).[xvi] Note that a conviction under Virginia domestic assault and battery at § 18.2-57.2 should *not* be considered a "crime of violence" and therefore cannot constitute a "crime of domestic violence" regardless of the nature of the relationship.[xvii]

  → **Practice tip!** Always keep the record clean of reference to the nature of a domestic relationship between the defendant and complaining witness.

- **Loss to victim in fraud-related offenses**: The Supreme Court has held that an immigration adjudicator may look to any relevant evidence to determine if the loss amount to the victim exceeds $10,000, sufficient to trigger the fraud aggravated felony ground.[xviii]

  → **Practice tip!** In a disposition involving a fraud-related offense, create a record through sentencing and restitution orders that the loss to the victim was $10,000 or less. If this is impossible, consider an alternative plea to larceny to avoid an aggravated felony charge, as discussed above. Remember that fraud and larceny related offenses may nonetheless trigger other immigration consequences including the crime involving moral turpitude grounds.

- **First possessory marijuana offense**: The controlled substance grounds of deportability include an exception for a first possessory marijuana offense if the amount involved is 30 grams or less, and this exception also preserves eligibility for a commonly used waiver of inadmissibility.[xix] The Board of Immigration Appeals has held that an immigration adjudicator may look to any relevant evidence to determine whether the amount of marijuana involved in a single offense was 30 grams or less.[xx]

  → **Practice tip!** For a first possessory marijuana offense, create an affirmative record written into the disposition that the amount of marijuana involved was 30 grams or less.

[i] *Descamps v. U.S.*, 133 S.Ct. 2276, 2283 (2013).

[ii] *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) (internal citations and quotations omitted).

[iii] This Chart is frequently updated and available online at http://www.caircoalition.org/what-we-do/vjp/vjp-immigration-consequences-resources/.

[iv] *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014). For a more detailed analysis of *Omargharib*, see CAIR Coalition's Practice Advisory of January 7, 2015, entitled, "Fourth Circuit Holds that Virginia Grand Larceny is Not a Theft Aggravated Felony," available online at http://www.caircoalition.org/wp-content/uploads/2015/11/20150107-Practice-Alert-Omargharib-Grand-Larceny-Decision.pdf.

[v] *Mena v. Lynch*, 820 F.3d 114 (4th Cir. 2016).

[vi] *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015).

[vii] *See Matter of Grazley*, 14 I. & N. Dec. 330 (BIA 1973).

[viii] 8 U.S.C. § 1101(a)(43)(M).

[ix] In *Mathis*, the Court provided that an immigration adjudicator may "peek at the record documents" to assist in the determination of whether an offense is divisible into elements. *Mathis*, 579 U.S. at __ (slip op., at 17-18). A record of conviction that includes nothing but a simple restatement of the statutory text, therefore, will provide support for an argument that the offense of conviction is indivisible and categorically overbroad.

[x] In removal proceedings, the government bears the burden of proving removability, but the burden of proof shifts to the noncitizen to demonstrate eligibility for relief from removal. 8 U.S.C. § 1229a(c). The Fourth Circuit held in *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011), that an inconclusive record is insufficient to demonstrate that an offense is not an aggravated felony for the purpose of demonstrating relief eligibility. Although the validity of this holding is brought into question by *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), defense attorneys should be aware that an inconclusive record may not be sufficient to preserve an argument for relief eligibility.

[xi] For a more detailed analysis of defending noncitizens again Virginia drug-related offenses, see our July 21, 2015 Practice Advisory entitled, "Defending Immigrants Facing Controlled Substance Charges," available online at http://www.caircoalition.org/wp-content/uploads/2015/07/CSA-Practice-Advisory-Final-20150720.pdf.

[xii] *See Mellouli v. Lynch*, 135 S.Ct. 1980 (2015).

[xiii] The generic definition of "burglary" pursuant to the aggravated felony removal ground at 8 U.S.C. § 1101(a)(43)(G) requires: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. U.S.*, 495 U.S. 575, 598 (1990). A "crime of violence" for the aggravated felony removal ground at 8 U.S.C. § 1101(a)(43)(F) is defined at 18 U.S.C. § 16 and generally requires the use, attempted use, or threatened use of physical force against the person or property of another, or a substantial risk that such force will be used.

[xiv] Virginia simple assault and battery should not be considered a crime involving moral turpitude, *see Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), and breaking and entering with the intent to commit a crime involving moral turpitude is not a crime involving moral turpitude. *See Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989).

[xv] In order to constitute a crime of violence under 8 U.S.C. § 1101(a)(43)(F), a conviction must necessarily meet the definition of a crime of violence at 18 U.S.C. § 16, see n. xiii above. The risk-based element of 18 U.S.C. § 16 has been found unconstitutional as void for vagueness by three Circuit Courts of Appeals; the Fourth Circuit has not yet ruled on the issue. *See United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2015), *reh'g granted*, 815 F.3d 189 (5th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).

[xvi] *Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015).

[xvii] *U.S. v. Carthorne*, 726 F.3d 503 (4th Cir. 2013). *See also Matter of Velasquez*, 25 I. & N. Dec. 278, 279 (BIA 2010) ("A 'crime of domestic violence' [as set forth at INA § 237(a)(2)(E)(i)] means any 'crime of violence,' as that term is defined in 18 U.S.C. § 16 (2006), that is committed by a specified person against one of a defined set of victims.").

[xviii] *Nijhawan v. Holder*, 557 U.S. 29 (2009) (considering 8 U.S.C. § 1101(a)(43)(M)).

[xix] *See* 8 U.S.C. § 1227(a)(2)(B)(i), 8 U.S.C. § 1182(h).

[xx] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).