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THE UNANSWERED CONUNDRUM: INCONCLUSIVE
RECORD AND THE BURDEN OF PROOF FOR IMMIGRATION
RELIEF

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ABSTRACT

*In 2017, the Ninth Circuit Court of the United States decided a case of an undocumented noncitizen that went against United States Supreme Court precedent. The appellant in *Marinelarena v. Sessions* was removed despite the fact that she had not been convicted of any crimes. This comment examines the arguments and strategies of the case that the judges relied upon in their opinion.*

INTRODUCTION

On August 23, 2017, the United States Court of Appeal for the 9th Circuit found Aracely Marinelarena, an undocumented noncitizen, ineligible for cancellation of removal because she failed to show that her state conviction did not relate to a federally controlled substance.¹ For immigration purposes, a noncitizen that commits a state offense can be removed if their state criminal offense matches the generic federal statutory definitions.² Once a noncitizen is deemed removable, she may petition for cancellation of removal on grounds of inadmissibility if she can prove that she has not been convicted of any crime listed under the Immigration and Nationality Act.³ However, in the present case, the 9th Circuit determined that Ms. Marinelarena failed to prove that she was not convicted of a removable offense simply due to the inconclusive status of her state conviction record, and was, therefore, still subject to removal.⁴ This comment argues that the 9th Circuit, by sidestepping the United States Supreme Court and its prescribed analytical method in crime-based immigration,⁵ arrived at an ill-advised decision. Notably, this comment asserts that the 9th Circuit's argument not only directly collides with a higher authority, but also unfairly burdens a disadvantaged party with an unjustified duty.

Part I explains the origins and organization of the categorical approach used to determine removability under the INA for criminal offenses under state law. Part II outlines *Marinelarena v. Sessions* and the arguments made according to the categorical approach. Finally, part III criticizes the 9th Cir-

¹ *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017).

² *Escobar v. Lynch*, 846 F.3d 1019, 1024 (9th Cir. 2017).

³ 8 U.S.C. § 1229b (2008).

⁴ *Marinelarena*, 869 F.3d 780.

⁵ *Taylor v. United States*, 495 U.S. 575, 600 (1990).

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cuit's decision to abscond with the categorical approach. In conclusion, this comment argues that the 9th Circuit's flawed analysis of the categorical approach results in the accused being unduly burdened with proving their right to remain in the United States.

I. CATEGORICAL APPROACH

The categorical approach is an analytical method prescribed by the Supreme Court to determine whether a criminally convicted noncitizen can be removed from the United States under immigration law.⁶ Under this approach, immigration judges or the reviewing court may only analyze and compare the statutory definition of the convicted crime with its "generic federal definition."⁷ The Supreme Court reasoned that, "[b]y 'generic,' we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison."⁸ For purpose of the Immigration and Nationality Act (INA), the main goal is to determine "what the noncitizen was 'convicted' of, not what he did;"⁹ namely, the categorical approach "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense" and "whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'"¹⁰

Generally, the categorical approach can be summarized into three steps.¹¹ First, the immigration judge or the reviewing court must identify "the federal immigration category relevant to the migrant's situation." In particular, it involves "perusing the INA for potentially applicable bases of removal."¹² Second, courts must determine the "least culpable conduct necessarily required for a conviction to occur under the statute of conviction," whereby a match can only occur "if a conviction of the state offense 'necessarily' involved. . . facts equating to the generic federal offense."¹³ Specifically, immigration courts must honor and rely on the state's interpretation of its criminal law.¹⁴ Therefore, states are the final authority in this step of analysis.

⁶ CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 30 (2015).

⁷ *Taylor*, 495 U.S. at 599–600.

⁸ *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

⁹ *Id.* at 200.

¹⁰ *Id.*; *Taylor*, 495 U.S. at 602.

¹¹ HERNÁNDEZ, *supra* note 6, at 31.

¹² *Id.*; 8 U.S.C. § 1227 (2008).

¹³ HERNÁNDEZ, *supra* note 6, at 32; *see also Moncrieffe*, 569 U.S. at 200.

¹⁴ HERNÁNDEZ, *supra* note 6, at 32.

When the generic definition of the federal crime contains elements that exactly match or are narrower than that of the state statutory conviction, the state conviction is deemed to be a removable offense and, thus, completes the last step. However, if there's a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime," the state offense is overbroad and the noncitizen cannot be deemed removable.¹⁵ When a mismatch is final, the analysis also ends.¹⁶

However, the last step of the categorical approach is not always as straightforward when a state statute is overbroad and divisible, that is, when it "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile."¹⁷ When a statute is divisible, the analysis must include an extra step dubbed the "modified categorical approach."¹⁸ At this stage, the immigration judge must determine whether that state conviction "can be divided into discrete prongs," namely, "if one alternative. . . matches an element in the generic offense, but the other. . . does not."¹⁹ The immigration judge must then examine a narrow pool of relevant materials often referred to as "Shepard documents," including "charging documents, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assent."²⁰ This supplemental step allows the court to "do what the categorical approach demands: compare the elements of the crime of conviction. . . with the elements of the generic crime," since "when a statute lists multiple, alternative elements," "it effectively creates 'several different crimes.'"²¹ Once the particular conviction is identified, the analysis returns to the categorical approach where a comparison between the state conviction and the federal crime would be conducted.²² However, when a statute is overbroad and indivisible, it is a mismatch and the noncitizen cannot be removed for the particular state criminal conviction.²³ A visual representation of the categorical approach is illustrated below in Exhibit 1.

¹⁵ *Moncrieffe*, 569 U.S. at 191.

¹⁶ *See id.* at 192.

¹⁷ *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

¹⁸ *Id.*

¹⁹ *Id.*; HERNÁNDEZ, *supra* note 6, at 31.

²⁰ *See Shepard v. United States*, 544 U.S. 13, 17 (2005); HERNÁNDEZ, *supra* note 6, at 31.

²¹ *Descamps*, 133 S.Ct. at 2281–85.

²² *See id.* at 2283.

²³ *See id.*

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As illustrated by Garcia Hernandez, the purpose of categorical approach's elements-but-not-facts focus is largely three-fold.²⁴ First, as the Supreme Court aptly put, "conviction is the relevant statutory hook."²⁵ Since Congress is silent as to how a state conviction is translated into a removal offense in the immigration context, the Supreme Court is obliged to define the term and more importantly, to "ensure[s] that everyone convicted of the same removable offenses is treated identically instead of removal turning on what some did and could have been convicted of."²⁶ Second, in light of the Sixth Amendment, the categorical approach ensures that only those facts that are found by a unanimous jury to be beyond a reasonable doubt would be admitted into the analytical process for immigration purposes.²⁷ Third, by setting factual boundaries around the analysis, the Supreme Court sets out to "promote[] judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact."²⁸ Because immigration proceedings are civil and, thus, unequipped for criminal investigations and proceedings, applying the categorical approach would effectively streamline the practice and ensure proper efficiency.

II. MARINELARENA V. SESSIONS

In *Marinelarena v. Sessions*, the court is concerned with two major issues.²⁹ First, whether a California charge of conspiracy to sell and transport controlled substance qualifies as a removable offense for immigration purposes.³⁰ Second, whether the noncitizen can satisfy her burden of proof for cancellation of removal with an inconclusive record for her state conviction.³¹ This section describes *Marinelarena* and the arguments used by the government and petitioner employing interpretations of the categorical approach.

²⁴ HERNÁNDEZ, *supra* note 6, at 38–39.

²⁵ *Moncrieffe*, 569 U.S. at 191 (citation and quotation omitted).

²⁶ HERNÁNDEZ, *supra* note 6, at 39.

²⁷ *Id.* at 40.

²⁸ *Moncrieffe*, 569 U.S. at 200–01.

²⁹ *See Marinelarena*, 869 F.3d at 784.

³⁰ *Id.* at 785.

³¹ *See generally id.* Briefly discussing the issue of expungement, the court summarized that around the same time when the Petitioner filed for cancellation of removal, she also applied in state court to vacate her conspiracy conviction. For that reason, the Petitioner argued that the court should include the expungement of her conspiracy conviction and thereby find her not convicted of a removable offense. However, the court dismissed her argument.

A. The Government Applied the Categorical Approach and the Modified Categorical Approach and was Unable to Prove the State Conviction a Removable Offense.

On March 23, 2007, the petitioner, an undocumented noncitizen, was convicted of transporting a controlled substance and was sentenced to 136 days of imprisonment and three years of probation.³² Two days after the conviction, the Board of Immigration Appeals (BIA) initiated removal proceeding against the petitioner on grounds of her overstay as a removable alien.³³ She conceded to removability and subsequently petitioned for cancellation of removal.³⁴ The immigration judge denied relief contending that the petitioner had failed to meet her burden of proof to show that her state charge was not a removal offense.³⁵ On appeal, the BIA upheld the decision on the same reasoning. The petitioner subsequently filed for review with the 9th Circuit.³⁶

At the appeal level, the court employed the categorical approach and the modified categorical approach to examine whether the petitioner's conviction under the state qualifies as a federally removable offense.³⁷ As explained in Part I, for a state statute to be a categorical match with the federal one, the court reasoned, the state law must "proscribe the same amount of or less conduct than that qualifying as a federal controlled substance offense."³⁸ Upon finding that the petitioner could be convicted for any criminal conspiracy under Section 182(a)(1), the court found the state statute overbroad and therefore a categorical mismatch.³⁹ However, the court also found the state statute divisible, because California requires unanimous jury agreement on "which felony defendants conspired to commit, and if that

³² *Id.* at 784 (describing that the Petitioner was found transporting three bags containing heroin, which is a state as well as federally listed controlled substance); *see also* CAL. PENAL CODE § 182(a)(1) (Deering 2017).

³³ *Marinelarena*, 869 F.3d at 784; *see also* 8 U.S.C. § 1227(a)(1)(B) (2008).

³⁴ *Marinelarena*, 869 F.3d at 784–85 ("To be eligible for cancellation of removal under 8 U.S.C. § 1229b, a petitioner must meet the following requirements: (1) have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of application; (2) have been a person of good moral character during that period; (3) not have been convicted of, as applicable here, a controlled substance offense; and (4) show that removal would cause "exceptional and extremely unusual hardship to a family member who is a citizen of the United States or an alien lawfully admitted for permanent residence."); *see also* 8 U.S.C. § 1229b(b)(1) (2008).

³⁵ *See Marinelarena*, 869 F.3d at 784.

³⁶ *Id.* at 783.

³⁷ *Id.* at 785–88 (applying the categorical approach and the modified categorical approach separately).

³⁸ *Id.*

³⁹ *Id.*

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felony is divided into degrees," the statute is divided by "alternative means by which a defendant might commit the same crime."⁴⁰

Because the statute was found to be overbroad and divisible, it warranted further inquiry into the petitioner's conviction record.⁴¹ At the modified categorical approach stage, nevertheless, the court still arrived at a mismatch. Although the criminal complaint does identify transportation of heroin as one of the overt acts alleged as part of the charged conspiracy, the conspiracy count to which the petitioner pleaded guilty does not corroborate that.⁴² While there are no other available documents, "'charging papers alone are never sufficient' to establish the elements of conviction."⁴³ With a lack of relevant record to specify the actual conviction, the court pronounced the state charge and the federal statute a mismatch and the petitioner not removable for the conspiracy offense.

B. The Government Found the Noncitizen Ineligible for Relief Since the Inconclusive Record Cannot Affirmatively Disqualify the Conspiracy Charge.

While the court deemed the state conspiracy charge not a categorically removable offense, it nonetheless found the petitioner ineligible for cancellation of removal for failing to prove "her conviction did not relate to a federally controlled substance."⁴⁴ The court referred to its prior decision in *Young v. Holder* that, "a petitioner cannot carry the burden of demonstrating eligibility for cancellation of removal by establishing an inconclusive record of conviction."⁴⁵ Additionally, the court contended that, under the federal statutory prescription, it established that the burden of proof would be on the moving party seeking relief and the party would lose if the record were inconclusive.⁴⁶

To buttress its reasoning, the court emphasized that its decision in *Young* was not "clearly irreconcilable" with the Supreme Court's holding in *Moncrieffe v. Holder*, since the former concerned cancellation while the latter concerned removability.⁴⁷ The court argued that, while the *Moncrieffe*

⁴⁰ *Marinelarena*, 869 F.3d at 786–87 (quoting *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039 (9th Cir. 2017); *People v. Horn*, 524 P.2d 1300, 1304 (Cal. 1974)).

⁴¹ *Id.* at 787.

⁴² *Id.*

⁴³ *Id.* (quoting *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003)).

⁴⁴ *Id.* at 788; *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012).

⁴⁵ *Young*, 697 F.3d at 990.

⁴⁶ *Id.*; 8 U.S.C. § 1229a(c)(4) (2006) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien [is eligible]. . . ."); 8 C.F.R. § 1240.8(d) (2009).

⁴⁷ *Marinelarena*, 869 F.3d at 792; *see also Moncrieffe*, 569 U.S. at 184.

court says that its analysis for determining whether a particular state conviction is categorically a federally removable crime is the same in cancellation contexts, the Supreme Court failed to delineate any difference in the burden of proof and did not even mention the topic.⁴⁸ Furthermore, because *Moncrieffe* only discussed the categorical approach, its holding does not pertain to the present discussion, "which pertained only to the operation of the burden of proof when the modified categorical approach applies."⁴⁹

III. ANALYSIS

A. The 9th Circuit's Reasoning Was Flawed Because It Has Misunderstood the Applicable Contexts of the Categorical Approach.

When the *Marinelarena* court argued that the *Moncrieffe* decision did not necessarily negate its *Young* decision, it is not entirely wrong. That is, the *Moncrieffe* court was indeed silent as to whether an inconclusive record satisfies the noncitizen's burden of proof for cancellation of removal. However, the Supreme Court was loud and clear in one very important principle: "our analysis is the same in both contexts."⁵⁰ Be it a determination of removability or cancellation, the *Moncrieffe* court reasoned that, "conviction is the 'relevant statutory hook.'"⁵¹ In other words, whether a noncitizen is removable or eligible for relief depends on whether "a conviction of the state offense 'necessarily involved. . . facts equating to the generic federal offense."⁵² If the analysis points to ambiguity in the state conviction record, it means that "the conviction 'did not necessarily involve facts that correspond to an offense punishable'" and the noncitizen is not convicted of a deportable offense.⁵³ In sum, the categorical approach is the ultimate litmus test in crime-based immigration: if a noncitizen is not convicted, he or she is neither removable nor ineligible for relief. Therefore, by putting removability and cancellation into separate analytical contexts, the 9th Circuit queued a head-on collision with *Moncrieffe* and built its reasoning on a flawed foundation.

⁴⁸ *Moncrieffe*, 569 U.S. at 192 n.4; *Marinelarena*, 869 F.3d at 790–91.

⁴⁹ *Marinelarena*, 869 F.3d at 794 (emphasis omitted).

⁵⁰ *Moncrieffe v.*, 569 U.S. at 192 n.4.

⁵¹ *Id.* at 191.

⁵² *Id.* at 190 (quoting *Shepard*, 544 U.S. at 24).

⁵³ *Marinelarena*, 869 F.3d at 793 (Tashima, J., dissenting).

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B. The 9th Circuit Has Misunderstood the Categorical Approach and the Modified Approach

In *Marinelarena*, the 9th Circuit reasoned that since the modified categorical approach was an inquiry of "a mixed question of law and fact," it warrants further factual finding to satisfy the burden of proof.⁵⁴ In *Moncrieffe*, however, the Supreme Court emphasized that the modified categorical approach is not an independent, separate analysis, but a part of the categorical approach as a whole.⁵⁵ The same contention was illustrated in *Descamps v. United States*, in which the Supreme Court classified the modified categorical approach as an implemental tool applied only when "a statute lists multiple, alternative elements, and so effectively creates 'several different. . . crimes.'"⁵⁶ Ultimately, despite its method of inquiry, the modified categorical approach serves but one identical purpose with the categorical approach: to determine whether a noncitizen is convicted of a state offense that "necessarily involved facts equating to the generic federal offense."⁵⁷

To regard the modified categorical approach simply as a separate, factual inquiry, as the 9th Circuit contended, clearly demonstrates a profound misunderstanding.⁵⁸ While the modified categorical approach examines factual documents, the analysis does not aim for facts. Integral to and congruent with the core concept of the categorical approach, the modified categorical approach is an "element-centric" analysis.⁵⁹ According to the Court, the 9th Circuit's decision runs contrary to Congress' intent that the examination of relevant conviction documents is meant to determine "which statutory phrase was the basis for the conviction", not to "discover what the defendant actually did."⁶⁰ Under the 9th Circuit's reasoning, the modified categorical approach became a creature of its own making, disconnected and contrary to the element-centric principle of the categorical approach. It turned the process of element-finding into one of fact-finding. These facts may or may not be permitted in the analysis: any facts disclosing the noncitizen's actual

⁵⁴ *Id.* at 791 ("Although the modified categorical approach, like the categorical approach, involves some strictly legal issues—such as a statute's divisibility—the inquiry into the which part of a divisible statute underlies the petitioner's crime of conviction is, if not factual, at least a mixed question of law and fact.").

⁵⁵ See *Moncrieffe*, 569 U.S. at 190; see also *Marinelarena*, 869 F.3d at 794 (Tashima, J., dissenting).

⁵⁶ *Descamps*, 133 S.Ct. at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

⁵⁷ *Moncrieffe*, 569 U.S. at 190 (quoting *Shepard*, 544 U.S. at 24).

⁵⁸ See *Marinelarena*, 869 F.3d at 791.

⁵⁹ *Descamps*, 133 S.Ct. at 2287.

⁶⁰ *Id.* at 2287 (2013) (quoting *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010)).

conduct, according to *Moncrieffe*, are irrelevant and barred from being admitted into the analysis.⁶¹

C. The 9th Circuit's Reasoning is Flawed Because It Misjudges the Meaning of Ambiguity

In *Marinelarena*, the 9th Circuit failed to find Ms. Marinelarena convicted under the federal statute, because the ambiguous state record "cannot conclusively connect the transportation of heroin with her conviction."⁶² However, by finding her ineligible for relief for precisely the same reason, the court is implementing a double standard. The government cannot find her deportable because it cannot prove she was convicted of a federal controlled substance offense, but neither is she eligible for relief because she cannot prove that she was *not* convicted of federal controlled substance offense. Under the court's reasoning, the ambiguity afforded by the record indirectly satisfies the government's burden of proof for removability. In other words, ambiguity means the noncitizen was convicted of a federally removable offense.

Judge Tajima, however, criticizes the majority's reasoning and referred to it as clearly irreconcilable with *Moncrieffe*. She writes,

Young holds that ambiguity in the record as to whether the noncitizen committed an aggravated felony means that she was convicted of the offense for purposes of the immigration statutes. *Moncrieffe* holds the opposite: If the record does *not* conclusively establish that the noncitizen committed the offense, then she was *not* convicted of the offense for purposes of the immigration statutes.⁶³

CONCLUSION

Though the Supreme Court is still largely silent to the issue at play in *Marinelarena v. Session*, the 9th Circuit rested its decision on a structurally flawed argument. By misinterpreting the categorical approach, the 9th Circuit turned the noncitizen's burden of proof for relief a grossly unfair one. In its reasoning, the noncitizen would be left with two choices: one, to be subject to a much heavier burden of enquiry into the factual details in order to satisfy her burden of proof; or two, to be deemed ineligible for relief despite no crime-based removability ever being successfully established. Despite it being a clear conundrum, neither of the two options is a viable solution, especially when the noncitizen's bargaining power is significantly

⁶¹ See *Moncrieffe*, 569 U.S. at 200.

⁶² *Marinelarena*, 869 F.3d at 787.

⁶³ *Id.* at 793–94.

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weaker than that of the government. Until the Supreme Court makes any further clarifications, the 9th Circuit is still bound by the proper application of the categorical approach and obliged to honor its key principle, that is, effectiveness and fairness. To act in any way astray from it, however compelling the government's imperatives may be, would be fundamentally disruptive to our core constitutional framework.

