PRACTICE ADVISORY[1]: "REALISTIC PROBABILITY" IN IMMIGRATION CATEGORICAL APPROACH CASES

June 3, 2021

The concept of "realistic probability" as an aspect of the categorical approach first emerged in 2007 in a Supreme Court decision, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). In that decision, and in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and subsequent categorical approach cases, the Court has treated realistic probability as being applicable to determining whether a statute of prior conviction is overbroad only where the claimed "minimum conduct" is not plainly covered by the statute's text or state case law interpreting the statute's text, and is otherwise truly hypothetical. In such a case, a further showing is required to demonstrate that the convicting jurisdiction actually prosecutes that minimum conduct. In recent years, the concept of realistic probability as an additional requirement has become an increasingly frequent topic of litigation, even as the Court has repeatedly affirmed the elements-based categorical approach. The Board of Immigration Appeals ("BIA") has gone beyond the Supreme Court's instruction in several published opinions and, except when prohibited by a circuit court opinion, now requires a realistic probability showing even when the express language of a statute of conviction covers non-generic conduct. Several circuit courts have rejected the Board's approach and apply realistic probability consistently with the Supreme Court's instructions in *Duenas-Alvarez* and *Moncrieffe*—that is, only where there is true uncertainty as to whether a statute of prior conviction reaches the claimed minimum conduct. In that majority of circuits, the Board's decisions are inapplicable. Only two circuits have ruled consistently with the Board's "actual case" requirement. This practice advisory discusses the origins of realistic probability in immigration law, national case law on realistic probability, and litigation issues currently before the immigration agencies and federal courts.

 The authors of this advisory are Andrew Wachtenheim, Leila Kang, and Nabilah Siddiquee of the Immigrant Defense Project (IDP), and Khaled Alrabe of the National Immigration Project of the National Lawyers Guild (NIPNLG). This advisory is an update and revision to the prior version, IDP & NIPNLG, *The Realistic Probability Standard: Fighting Government Efforts to Use It to Undermine the Categorical Approach* (2014), *available at* https://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf.

Practice advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

TABLE OF CONTENTS

I. Supreme Court: *Gonzales v. Duenas Alvarez*, and Subsequent Categorical Approach Cases

The Supreme Court first introduced the concept of "realistic probability" in immigration law in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). The noncitizen in that case had been convicted under a California vehicle theft statute that imposed criminal liability on "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a vehicle. *Duenas-Alvarez*, 549 U.S. at 187 (quoting Cal. Veh. Code Ann. § 10851(a) (alterations omitted)). The Court, like the Ninth Circuit below, read that statutory phrase to permit conviction for "aiding and abetting a theft." *Duenas-Alvarez*, 549 U.S. at 188 (quoting *Penuliar v. Ashcroft*, 395 F.3d 1037, 1044 (9th Cir. 2005)).

The Court first held that "one who aids or abets a theft falls . . . within the scope of" the theft offense aggravated felony ground as defined by INA § 101(a)(43)(G). *Duenas-Alvarez*, 549 U.S. at 189. Duenas-Alvarez then argued that California defined "aiding and abetting" differently and more broadly than generic theft, and thus his conviction was not categorically an aggravated felony—specifically, that "California defines aiding and abetting such that an aider and abettor is criminally responsible not only for the crime he intends, but also for any crime that naturally and probably results from the intended crime." *Id.* at 190 (internal quotation marks and citation omitted).

The Court found that because "many States and the Federal Government apply some form or version of that [natural and probable consequences] doctrine," Duenas-Alvarez "must show something *special* about California's version of the doctrine" in order to show California's aiding and abetting definition was broader than generic theft. *Id.* at 190-91. Unpersuaded by the "several California cases" that Duenas-Alvarez provided "in order to prove his point," *id.* at 191, the Court ruled: "[W]e cannot say that [the] concepts as used in any of these cases extend significantly beyond the concept as set forth in the cases of other States." *Id.* at 193. The thrust of the Court's ruling is that the phrase "aiding and abetting" as defined by California law does not capture a greater range of liability for theft than other state definitions of aiding and abetting, and therefore falls within the generic theft definition.

It is in this context that the *Duenas-Alvarez* Court first introduced the notion of "realistic probability" for categorical approach cases—now the subject of much litigation:

> [I]in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires 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. To show that *realistic possibility*, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (non-generic) manner for which he argues.

549 U.S. at 193 (emphasis added).

Since *Duenas-Alvarez*, the Supreme Court has only raised the issue of realistic probability in one other case. In its 2013 seminal case on the categorical approach, *Moncrieffe v. Holder*, the Supreme Court held that a conviction for the social sharing of a small amount of marijuana is categorically not an aggravated felony. 569 U.S. 184, 187 (2013). The Court applied the categorical approach, which "look[s] . . . to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony" or other criminal ground of removability. *Id.* at 190 (quoting *Duenas-Alvarez*, 546 U.S. at 186, in turn citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). The Court then discussed two "qualification[s]" on the categorical approach. *Moncrieffe*, 569

U.S. at 191. First, the Court discussed the longstanding application of the modified categorical approach in cases of divisible statutes. *Id.* Second, the Court stated:

> [O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense; there must be "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."

Id. (quoting *Duenas-Alvarez*, 549 U.S. at 193). Moncrieffe had pleaded guilty to possession of marijuana with intent to distribute, in violation of a Georgia statute that makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." *Moncrieffe*, 569 U.S. at 192 (quoting Ga. Code Ann. § 16-13-30(j)(1) (alteration in original)). The Court had to determine whether possession of marijuana with intent to distribute is "necessarily" conduct that is an aggravated felony under federal immigration law. *Moncrieffe*, 569 U.S. at 192. The Court noted that "the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved." *Id.* at 194. The Court then cited to Georgia state court cases to ascertain the scope of the statutory term "distribute" and the scope of quantities of marijuana covered under the statute, and concluded that "Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana," and that "distribution does not require remuneration." *Id.* (internal quotation marks omitted).

Later in its opinion, the Court addressed the government's argument that application of the categorical approach "will frustrate the enforcement of other aggravated felony provisions." *Id.* at 205. The government argued, for example, that "a conviction under any state firearms law that lacks [an antique firearms] exception" would fail the categorical inquiry and thus evade being classified under the firearms trafficking aggravated felony ground at INA § 101(a)(43)(C). *Id.* The Court responded that under *Duenas-Alvarez*, "[t]o defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Id.* at 205-06. Put another way: if the state statute does not, standing alone, reveal whether it criminalizes antique firearms or not, the noncitizen would be required to show a realistic probability of prosecution for an antique firearm.[2]

Taken together, *Duenas-Alvarez* and *Moncrieffe* indicate that, in some cases, a noncitizen must make a showing that the convicting jurisdiction actually prosecutes the minimum conduct that the noncitizen claims is covered by the statute of conviction and that does not match the definition of the generic crime. But the Court's language also indicates that a noncitizen must show actual prosecution only when the claimed minimum conduct is based on application of "legal imagination" to the text of the statute of conviction, and not when the text expressly includes the claimed minimum conduct, or when the state court has expressly determined what conduct a state statute includes.

[2] Both the Second and Fourth Circuits have considered this particular issue directly. *See infra* § II.C. (Decisions addressing *Moncrieffe*'s discussion of firearms offenses and the antique firearms exception).

The Supreme Court has never applied *Duenas-Alvarez* to find that a criminal statute does not reach the claimed minimum conduct. In each categorical approach case, the Court has found overbreadth where the statutory text, or cases interpretating and applying the statutory text, reflect non-generic conduct, without resort to any further realistic probability requirement or showing. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754, 759-60 (2021) ("[S]ubsections (a), (b), and (d)" of the Nebraska statute "set forth crimes involving moral turpitude, while subsection (c) does not[.]"); *Stokeling v. United States*, 139 S. Ct. 544, 554-55 (2019) (looking to Florida statutory law defining "robbery" to include taking by "force," and Florida case law defining "force" to require "resistance by the victim that is overcome by the physical force of the offender"); *United States v. Stitt*, 139 S. Ct. 399, 404 (2019) (analyzing Arkansas' statutory definition of "residential occupiable structure" and Tennessee's statutory definition of "aggravated burglary" and "habitation" and comparing to generic definition); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (looking exclusively to California statutory law defining "unlawful sexual intercourse" and "minor" and finding the statute overbroad as compared to sexual abuse of a minor aggravated felony provision); *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) ("Iowa's statute, by contrast, reaches a broader range of places: 'any building, structure, [or] land, water, or air vehicle.'" (quoting Iowa Code § 702.12 (2013)); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015) (citing Kansas statutory law to find "[a]t the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists"); *United States v. Castleman*, 572 U.S. 157, 169 (2014) (concluding, after examination of Tennessee statutory definitions, that the statute at issue is overbroad compared to generic federal crime).

II. Decisions of the Federal Courts of Appeals

Since *Duenas-Alvarez* and *Moncrieffe*, the courts of appeals have issued dozens of opinions addressing realistic probability. A significant majority of circuit courts have adopted an approach sometimes referred to as the "express language rule," holding that where the express language of a statute of conviction includes non-generic conduct, no further realistic probability showing is required. Two outlier circuits, and the BIA, have adopted an "actual case" requirement, applying realistic probability in every case, even where the express language of the statute covers non-generic conduct. This section discusses court of appeals decisions on the express language rule (§ II.A.), the actual case requirement (§ II.B.), and the language in *Moncrieffe* about antique firearms (§ II.C.).

A. "Express Language" Rule: First, Second, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits

Most circuits—the **First, Second, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh—**have explicitly adopted the approach sometimes referred to as the "express language rule." Under the express language rule, no additional showing of realistic probability is required where the statute of conviction expressly includes conduct that falls outside of the generic offense. *See, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (holding that the realistic probability test "has no relevance" where "[t]he state crime at issue clearly does apply more broadly than the federally defined offense"); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond

the definition of the corresponding federal offense."); *Zhi Fei Liao v. Att'y Gen.*, 910 F.3d 714, 724 (3d Cir. 2018) ("Put simply, the elements leave nothing to the 'legal imagination,' because they show that one statute captures conduct outside of the other." (citation omitted)); *Gonzalez v. Wilkinson*, 990 F.3d 654, 656 (8th Cir. 2021) (holding that where "the state offense . . . is broader than the federal offense," there is no additional requirement of realistic probability); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (explaining that "a state statute expressly defin[ing] a crime more broadly than the generic offense" demonstrates realistic probability and that "the relative likelihood of application to non-generic conduct is immaterial"); *United States v. Cantu*, 964 F.3d 924, 934 (10th Cir. 2020) ("[A] defendant need not come forward with instances of actual prosecution when the 'plain language' of the statute proscribes the conduct at issue." (citing *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017)); *Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021) ("[A] petitioner may demonstrate that 'statutory language itself, rather than the application of legal imagination to that language, creates [a] realistic probability that a state would apply the statute to conduct beyond' the reach of a favorable statute." (quoting *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)). *See also, e.g.*, *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) ("But this case does not require an exercise of imagination, merely mundane legal research skills . . . . We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; *we know that they can because the state's highest court has said so*." (emphasis added)); *United States v. Winston*, 850 F. 677, 684 (4th Cir. 2017) ("[O]ur consideration of minimum culpable conduct is informed by decisions of the Supreme Court of Virginia, with decisions of Virginia's intermediate appellate court constituting the next best indicia of what state law is." (internal quotation marks omitted)), *abrogated on other grounds by United States v. White*, 987 F.3d 340 (4th Cir. 2021); *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir. 2020) (also looking to subsequent legislative actions by the state government to identify the state's intended scope and application of the statute of conviction).

In discussing *Duenas-Alvarez*, these circuits hold that the requirement of realistic probability is not applicable where a statute is facially overbroad because such cases require "no legal imagination." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (internal quotation omitted). *See also, e.g.*, *Williams v. Barr*, 960 F.3d 68, 78 (2d Cir. 2020) ("The 'realistic probability test' articulated in *Duenas-Alvarez* has no role to play in the categorical analysis, however, when the state statute of conviction on its face reaches beyond the generic federal definition."); *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) ("Nothing in *Duenas-Alvarez* . . . indicates that this state law crime may be treated as if it is narrower than it plainly is."). In *Singh v. Attorney General*, the Third Circuit pointed out that both *Duenas Alvarez* and *Moncrieffe* involved statutes where "the relevant elements were identical," and concluded that "the 'realistic probability' language is simply not meant to apply" where the text of the state statute is plainly overbroad. 839 F.3d 273, 286 n.10 (3d Cir. 2016). In rejecting BIA applications of realistic probability, several courts have also cited to Supreme Court categorical approach decisions issued after *Moncrieffe* for support. *See, e.g.*, *Gordon v. Barr*, 965 F.3d 252, 259-60 (4th Cir. 2020) (finding flaw in the government's reliance on *Moncrieffe* and highlighting the categorical approach analysis in *Mathis*); *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (11th Cir. 2021) (citing both *Mellouli* and *Mathis* as examples of Supreme Court opinions that conducted the categorical approach without applying a realistic probability test); *Hylton v. Sessions*, 897 F.3d 57, 65 (2d

Cir. 2018) (same). *See also Alexis v. Barr*, 960 F.3d 722, 732 (5th Cir. 2020) (Graves, J., concurring) (same).

A few circuit-specific issues are worth noting:

- The **First Circuit** has further described realistic probability as prohibiting courts from "rely[ing] *solely* on their 'legal imagination' in positing what minimum conduct could hypothetically support a conviction under th[e] law." *Whyte v. Lynch*, 807 F.3d 463, 467 (1st Cir. 2015) (quoting *Duenas-Alvarez*, 549 U.S. at 193) (emphasis added)). In *Whyte*, the statutory text and state court case law did not clarify the least-acts-criminalized and Whyte could not point to a state case in which conviction was sustained for non-generic conduct. The court disagreed with the government's position that the absence of such a case meant that the state had never prosecuted a defendant for conduct outside the generic crime of violence definition. *Id.* at 469. Instead, the court found that "[c]ommon sense . . . suggests there exists a 'realistic probability' that [the state] can punish conduct" outside the generic definition of a federal crime of violence. *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193).

- The **Second Circuit** has similarly described the realistic probability standard as preventing the use of "legal imagination" and "flights of fancy" under the categorical approach. *United States v. Hill*, 832 F.3d 135, 139, 140 (2d Cir. 2016). The court used the word "hypothetical" nine times to describe the conduct that Hill suggested as the least-acts-criminalized under the Hobbes Act. *Id.* at 141-43. These "hypotheticals" included "pour[ing] chocolate syrup on [a victim's] passport" as a means of putting the victim "in fear of injury to his property through non-forceful means." *Id.* at 141 (quoting Hill Supp. Br. 29).

- In the **Third Circuit**, the realistic probability test never applies "*when assessing crimes of moral turpitude* under the categorical (or modified categorical approaches)." *Larios v. Att'y Gen.*, 978 F.3d 62, 72 (3d Cir. 2020) (emphasis added). The Third Circuit explained that because the term "crime involving moral turpitude" (CIMT) is not statutorily defined, and "even if the statute listed the elements of the generic offense," it was "exceedingly unlikely they would be an identical match" with the state statute at issue. *Id.* at 72 n.7; *see also Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009) ("'[M]oral turpitude' is rarely an element of the underlying crime triggering removal."). Accordingly, the Third Circuit has held that the realistic probability test does not apply to any CIMT analysis, recognizing that "the Supreme Court has approved a realistic probability analysis only where the relevant elements . . . were identical." *Larios*, 978 F.3d at 72 n.7 (internal quotation marks omitted); *see also Jean-Louis*, 582 F.3d at 481 ("We seriously doubt that the logic of the Supreme Court in *Duenas-Alvarez* . . . is transferable to the CIMT context.").

- While the **Seventh Circuit** has not clearly decided this issue, recent case law provides support for applying the express language rule when the elements of a statute are plainly overbroad. *See, e.g.*, *United States v. Walker*, 931 F.3d 576, 579 (7th Cir. 2019) ("[I]f the elements of the state conviction sweep more broadly such

that there is a 'realistic probability . . . that the State would apply its statute to conduct that falls outside' the definition of the federal crime, then the prior offense is not a categorical match." (quoting *Duenas-Alvarez*, 549 U.S. at 193)). The Seventh Circuit has held, for example, that state controlled substance offenses that are facially overbroad cannot serve as a predicate felony drug offense in the context of U.S. Sentencing Guidelines cases, without requiring any additional showing of realistic probability. *E.g.*, *United States v. Ruth*, 966 F.3d 642, 648 (7th Cir. 2020) (reaching "the inescapable conclusion that the plain language of the state statute categorically covers a larger swath of conduct than its federal counterpart"); *United States v. De La Torre*, 940 F.3d 938, 952 (7th Cir. 2019) (finding "the plain language chosen by the Indiana legislature dictates that the Indiana statute is categorically broader than the federal definition"). But note that the Seventh Circuit has also taken the contrary approach of applying the realistic probability test to statutes that are facially overbroad. *See, e.g.*, *Familia Rosario v. Holder*, 655 F.3d 739, 748-50 (7th Cir. 2011) (noting that the statute of conviction "by its very terms, includes conduct" that falls outside of generic offense, but nonetheless conducting a realistic probability analysis).

- In *Matter of Navarro-Guadarrama*, the BIA cited the **Eleventh Circuit** as a jurisdiction that "has consistently required that actual examples be identified to demonstrate that a statute falls outside the generic definition of the crime at issue," pointing to decisions that were issued after it adopted an express language rule in *Ramos v. U.S. Attorney General*, 709 F.3d 1066 (11th Cir. 2013). *See* 27 I&N Dec. at 564 (citing cases). However, the Eleventh Circuit has not overruled its holding in *Ramos*, and recently cited it as good law. *See Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021). Litigants in the Eleventh Circuit should still argue that the express language rule still governs cases involving a plainly overbroad statute of conviction.

B. "Actual Case" Requirement: Fifth and Sixth Circuits

Only two circuits have explicitly adopted the government's overreaching interpretation of the realistic probability test:

- The **Fifth Circuit** has held that an actual case requirement applies to all categorical approach cases—even while acknowledging that this rule often places the noncitizen "in a Catch-22 situation." *Alexis v. Barr*, 960 F.3d 722, 729 (5th Cir. 2020) ("[I]t is nearly impossible for Alexis to determine if Texas has ever prosecuted anyone for [non-generic conduct] in a citable state decision."); *see also United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc) (noting that an individual "cannot simply point to" overbreadth in a statute and instead "must also show that [state] courts have *actually applied*" the statute in an overbroad way (emphasis in original)).

- In addition, recent **Sixth Circuit** cases appear to adopt the same rule. *E.g.*, *United States v. Burris*, 912 F.3d 386, 397-98 (6th Cir. 2019) (applying the realistic probability test where the statutes in question "appear to criminalize more conduct" than the generic

offenses); *but see United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (citing prior unpublished decision for proposition that "where the meaning of the statue is plain, the defendant need not provide a case to demonstrate a realistic probability that the statute is broader than the generic offense" (internal quotation marks omitted)).

C. Decisions addressing *Moncrieffe*'s discussion of firearms offenses and the antique firearms exception

The Second Circuit has held that a "textual difference relating to antique firearms creates a categorical mismatch between" the state firearm statute and "the INA's definition of a firearm." *Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020) (quotation marks and citation omitted). In *Jack*, the court compared the New York definition of "firearm" applicable to the New York statutes of conviction at issue and found that the state statutes criminalize conduct involving loaded antique firearms, while the INA's firearm removal provisions exclude all antique firearms regardless of whether they are loaded. Rejecting the Board's position that the petitioner had failed to a show a realistic probability that New York would prosecute conduct involving loaded antique firearms, the court stated that the realistic probability test "has no role to play in the categorical analysis . . . when the state statute of conviction on its face reaches beyond the . . . federal definition." *Id.* (quotation marks and citations omitted). *See also Williams v. Barr*, 960 F.3d 68, 73 (2d Cir. 2020) (holding that a Connecticut firearms offense was a mismatch for the INA firearm offense removal ground because the state offense covers conduct involving antique firearms that is excluded from the federal firearm definition). In *Gordon v. Barr*, the Fourth Circuit similarly applied *Moncrieffe* to hold that a Virginia firearms offense was categorically broader than the federal firearm definition: "The flaw in the government's argument, however, is its failure to recognize that when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete; there is no categorical match." 965 F.3d 252, 260 (4th Cir. 2020). In a firearms case, the Eleventh Circuit cast doubt that "requiring exemplar prosecutions in cases involving obviously overbroad conduct makes sense." *Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021).

III. The BIA's Decisions: *Matter of Navarro Guadarrama, Matter of Ferreira,* and *Matter of Mendoza-Osorio*

A. *Matter of Navarro Guadarrama* and *Matter of Ferreira*: actual case requirement

The Board has significantly expanded the "realistic probability" concept since *Moncrieffe* and has adopted a rule that requires a realistic probability showing in every case in order to meet the minimum conduct test, even where the express language of a state statute is plainly overbroad. Recognizing that its expansive approach is at odds with the law in a number of circuits, the Board has stated that its approach to realistic probability will not be applied in circuits with binding contrary authority. *See Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 567 (BIA 2019).

In *Matter of Ferreira*, 26 I&N Dec. 415, 420 (BIA 2014), the Board considered whether a Connecticut controlled substance conviction triggered deportability as a conviction relating to a

controlled substance under INA § 237(a)(2)(B)(i) or as a conviction for illicit trafficking in a controlled substance (*see* INA §§ 237(a)(2)(A)(iii), 101(a)(43)(B)). Connecticut's controlled substance schedules at the time included (and still include) substances that do not appear on the federal schedules. The Board in *Ferreira* decided that the noncitizen must provide affirmative evidence that Connecticut had actually applied its controlled substance laws to benzylfentanyl or thenylfentanyl, the two substances not on the federal schedules, in order to establish these two substances as minimum conduct for purposes of the categorical analysis. The fact that Connecticut's statute expressly provided that a person is subject to prosecution for either benzylfentanyl and thenylfentanyl was deemed insufficient:

> [T]he import of *Moncrieffe* and *Duenas-Alvarez* is that even where a State statute on its face covers a *type of object or substance* not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime[.]

Matter of Ferreira, 26 I&N Dec. at 420-21 (emphasis added). Absent a noncitizen's showing of actual prosecutions against those two substances, the minimum conduct punishable under the statute of conviction would categorically overlap with the INA controlled substance provisions. The Board remanded Ferreira's case back to the immigration court to give him an opportunity to offer evidence that Connecticut had prosecuted defendants for benzylfentanyl or thenyfentanyl. *Id*. at 422.

Most recently, in *Matter of Navarro Guadarrama*, the BIA reaffirmed *Matter of Ferreira* and articulated that "the realistic probability test is required, even where a State statute is facially broader than its Federal counterpart." *Matter of Navarro Guadarrama*, 27 I&N Dec. at 567 (citing *Moncrieffe*, 569 U.S. at 206). In *Navarro Guadarrama*, the BIA held that where a noncitizen has been convicted of violating a state drug statute that includes a controlled substance that is not on the federal controlled substance schedules, the noncitizen must establish a realistic probability that the state would actually apply the statute to prosecute conduct involving that substance, in order to avoid the immigration consequences of conviction of an offense relating to a federally controlled substance. 27 I&N Dec. at 567.

In *Navarro Guadarrama,* the immigration judge had found the noncitizen inadmissible under § 212(a)(2)(A)(i)(II) of the INA due to a conviction for an offense involving a federally controlled substance, and further ineligible for a § 212(h) waiver. *Id.* at 561. The noncitizen argued that he was not convicted of an offense involving a federally controlled substance because the definition of cannabis under Florida law is broader than the Federal definition. *Id.* Because the statutes were not a categorical match, he argued, he was not convicted of a controlled substance offense as defined by § 212(a)(2)(A)(i)(II). *Id.* at 562. The Board disagreed, stating that "[t]o show that a State statute prohibits conduct outside the generic definition of an offense in a Federal statute, a [noncitizen] must establish that there is '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.'" *Id.* at 562 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The Board relied on and reaffirmed *Matter of Ferreira* and stated that the noncitizen "must show that in either his own case or other cases, the State court actually applied the statute to an offense involving a substance that is not federally controlled." *Navarro Guadarrama*, 27 I&N Dec. at 562-63 (citing *Ferreira*, 26 I&N

Dec. at 420-21). The Board concluded that the Mr. Navarro Guadarrama failed to show a realistic probability that Florida would prosecute a person for possession of a form of marijuana that is not federally controlled, because he had not identified any case where a defendant was "successfully prosecuted" under Florida law for an offense that involved a non-federally controlled form of marijuana under the statute at issue. *Navarro Guadarrama*, 27 I&N Dec. at 563. The Board rejected the noncitizen's argument that the plain language of the statute itself establishes a realistic probability of prosecution, finding that Supreme Court precedent required an additional realistic probability showing even in such cases. *Id.*

Notably, the BIA specified that its interpretation of the realistic probability requirement as articulated in *Navarro Guadarrama* "should be applied in any circuit that does not have binding legal authority requiring a contrary interpretation." 27 I&N Dec. at 565-67 (citing *Swaby*, 847 F.3d at 66; *Hylton*, 897 F.3d at 60-63; *Lorenzo v. Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019)). For this reason, the question of whether the Board's version of the realistic probability standard applies to an individual's case will depend on the circuit in which the case is located, as outlined *supra* § II.

B. *Matter of Mendoza-Osorio*: requiring evidence of conviction, not evidence of prosecution, to demonstrate realistic probability

In 2016, the Board in *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016), further expanding the realistic probability standard to require noncitizens to prove *successful* prosecutions in order to satisfy the standard. In that case the Board held that New York's misdemeanor offense of endangering the welfare of a child, NYPL § 260.10(1), is categorically a crime of child abuse, child neglect, or child abandonment under INA § 237(a)(2)(E)(i). The Board rejected the noncitizen's argument that the crime defined in NYPL § 260.10(1) is broader than the Board's generic definition of child abuse because the New York statute criminalizes a wide range of conduct outside of the Board's definition. *Mendoza Osorio*, 26 I&N Dec. at 705-06. According to the Board, relying on "the statute's breadth in general terms" was insufficient; instead, the noncitizen was required to show a realistic probability that the statute is in fact applied to punish conduct that does not qualify as child abuse under the INA, either by relying on his own case or identifying other instances of actual prosecutions. *Id*. at 706. The noncitizen in *Mendoza Osorio* had identified New York cases in support of his argument, but the Board held: "Since there was no conviction in any of these cases, they are unpersuasive in establishing that there is a realistic probability that § 260.10(1) would be successfully applied to conduct outside our definition of child abuse." *Id*. at 707.

IV. Realistic Probability Issues Currently Before Immigration Courts, BIA, and Federal Courts

A. Litigation challenging the Board's actual case requirement, *Matter of Ferreira* and *Matter of Navarro Guadarrama*

As discussed above, *see supra* § II, a large majority of the circuits—the First, Second, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh—have correctly adopted, in precedential decisions, the rule that the realistic probability standard does not apply if the express terms of the criminal

statute cover conduct outside of the INA removability provision. This rule is consistent with Supreme Court precedent and the categorical approach. The BIA's contrary rule should not apply in these circuits: as noted above, the BIA has explicitly limited application of its rule in *Matter of Navarro Guadarrama* to "any circuit that does not have binding legal authority requiring a contrary interpretation." 27 I&N Dec. at 567.

The "express language" rule is consistent with the Supreme Court's categorical approach case law and the least-acts-criminalized principle. *Cf. Mathis*, 136 S. Ct. at 2257 ("[T]he elements-based approach remains the law."). As discussed above, the Supreme Court has invoked realistic probability only twice, and in both cases it noted that realistic probability is a check on the application of "legal imagination" to the criminal statute. *See Duenas Alvarez*, 549 U.S. at 193; *Moncrieffe*, 569 U.S. at 206. Where no "legal imagination" is required to demonstrate overbreadth—for example, where the express terms of the statute cover conduct outside of the removability provision—a realistic probability showing is not required at all. Requiring a realistic probability showing in these circumstances would severely undermine the categorical approach and its least-acts-criminalized presumption. *See, e.g.*, *Gonzalez*, 990 F.3d at 660 (explaining that the government's rule is "at odds with the categorical approach itself" because it focuses on underlying facts and not "the language of the statutory offense"); *Jack*, 966 F.3d at 98 (finding that by applying a realistic probability test, "the BIA applied the wrong legal standard and displayed a fundamental misunderstanding of the categorical approach").

B. Litigation favoring a wide range of evidence of prosecution for non-generic conduct as reviewable for determining realistic probability

1. Relevant cases from criminal statute's jurisdiction

The courts of appeals and BIA unanimously agree that, where the realistic probability requirement applies, it is satisfied by judicial decisions that apply the statute at issue to conduct that falls outside the generic crime. Courts may differ, however, on what it means for a case to demonstrate the "application" of a statute.

Opinions from the Fifth and Sixth Circuits have suggested that the case examples presented must "hold as a matter of law" that the statute at issue encompasses non-generic conduct. *See United States v. Castillo-Rivera*, 853 F.3d 218, 226 (5th Cir. 2017) (noting that state court case "did not hold as a matter of law" that Texas statute covered non-generic conduct and finding realistic probability not established); *see also, e.g.*, *Alexis v. Barr*, 960 F.3d 722, 727 (5th Cir. 2020) (holding that the court could not rely on a state case presented by the noncitizen "because it does not *specifically analyze* position isomers of cocaine" (emphasis added)); *United States v. Burris*, 912 F.3d 386, 398-99 (6th Cir. 2019) (citing legal conclusions from state appellate cases). By contrast, decisions in other circuits have indicated that the realistic probability standard may be satisfied by state court cases that do not contain an express holding about the breadth of the statute. In those decisions, circuit courts have looked to the underlying facts in the example state cases and have inferred whether the defendant was prosecuted and convicted for non-generic conduct. *See, e.g.*, *Mendez v. Barr*, 960 F.3d 80, 85 (2d Cir. 2020) (citing facts described in federal court cases as proof of realistic probability); *Moran v. Barr*, 960 F.3d 1158, 1164 (9th

Cir. 2020) (discussing underlying facts in state appellate cases to explain why they failed to establish realistic probability).

Courts should hold that any case indicating prosecution for non-generic conduct—even without express legal analysis on that specific issue—establishes realistic probability. This is important because the application of the statute to the non-generic conduct at issue may not be disputed as a legal issue in a criminal proceeding, and thus may not be the subject of analysis in any appellate decision. *See Matthews v. Barr*, 927 F.3d 606, 633 (2d Cir. 2019) (Carney, J., dissenting) ("To import into the Court's 'realistic probability' test a requirement that the state appellate courts describe the farthest contours of the state law's application strikes me as both unworkable and inappropriate, particularly in the context of a misdemeanor crime, and where (as here) courts are unlikely ever to have the opportunity to do so."); *but see id.*, 927 F.3d at 623 (declining to rely on charging documents: "Without specific evidence linking charging documents to guilty pleas, we have no way of knowing the circumstances of the individual offenses that caused the prosecutors to bring the charges or the defendants to plead to those charges."); *Matter of Mendoza Osorio*, 26 I&N Dec. at 707 n.4 (rejecting redacted complaints and charging documents as proof of realistic probability "because a judge or jury may have found that the facts as charged were insufficient to support a conviction").

Courts also should reject any argument that only a decision from the highest court of the relevant jurisdiction is sufficient to meet the realistic probability standard. At no point has the Supreme Court suggested that the realistic probability test requires cases from the highest court, or even an appellate court. *See Duenas-Alvarez*, 549 U.S. at 193 (requiring a showing of "cases in which *the state courts* in fact did apply the statute in the special (non-generic) manner" (emphasis added)); *see also Moncrieffe*, 569 U.S. at 194-96 (citing appellate decisions from Georgia). While some federal courts have found opinions by a state's highest court authoritative in conducting the realistic probability analysis, courts also have looked to decisions from lower courts as proof of realistic probability. *See, e.g.*, *Burris*, 912 F.3d at 401 n.17 ("True, these are Ohio intermediate appellate court decisions and not decisions from the Ohio Supreme Court. But *Moncrieffe* only looked to state intermediate appellate decisions, and those were sufficient to allow the Supreme Court to determine what state law was." (internal quotation marks and citation omitted)); *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017) ("Decisions from the state supreme court best indicate a 'realistic probability,' supplemented by decisions from the intermediate-appellate courts.").

Additionally, case law showing application of a different but related criminal statute to conduct that falls outside the removability provision also should satisfy the realistic probability standard. *See, e.g.*, *Medina-Lara v. Holder*, 771 F.3d 1106, 1116-17 (9th Cir. 2014) (noncitizen convicted under California firearm statute found to meet realistic probability standard for his claim that the statute covered antique firearms based on antique firearm prosecutions under related California statutes using the same firearm definition); *In re M-A-M-G-*, A XXX XXX 875, 2017 WL 7660508, at *2-3 (BIA Nov. 13, 2017) (finding that the noncitizen satisfied the realistic probability test in part by submitting a case demonstrating prosecution for an antique firearm, even though it did not involve his statute of conviction but instead a related provision).

2. Criminal court file documents (e.g., plea agreements, plea colloquies, hearing transcripts)

Because most criminal cases resolve through plea bargains and thus without a written judicial decision, courts should consider alternative evidence of conviction for conduct that falls outside the generic definition of a crime. *See, e.g.*, *Betansos v. Barr*, 928 F.3d 1133, 1147 (9th Cir. 2019) (Murghia, J., concurring) (explaining that while plea agreements are not published, "they would illuminate the possibly broader conduct for which individuals are prosecuted pursuant to various state statutes"). Such evidence may include plea colloquies and transcripts of criminal proceedings, and certificates of disposition.

Both plea colloquies and transcripts identify the statute of conviction and frequently the facts that gave rise to conviction. *See, e.g.*, *United States v. Salgado-Urias*, 541 F. App'x 736, 737 (9th Cir. 2013) (noting that "the plea colloquy . . . establishes a genuine question" whether the defendant was convicted for non-generic conduct). In some instances, transcripts and colloquies can be paired with other documents (for example, documents obtained through discovery) to draw links between a statute of conviction and underlying conduct. Additionally, a certificate of disposition itself will sometimes contain relevant information that shows prosecution and/or conviction for non-generic conduct.

3. Challenges to *Matter of Mendoza-Osorio*: evidence of prosecution without evidence of conviction is sufficient to establish realistic probability under the categorical approach

The question of whether charging documents alone can meet the realistic probability test has never been addressed by the Supreme Court and remains an open question in many jurisdictions. *See, e.g.*, *United States v. Gracia-Cantu*, 920 F.3d 252, 255 n.3 (5th Cir. 2019) (declining to address the question of whether "an indictment alone can show a realistic probability that a state criminal statute will be interpreted a certain way"). Practitioners should argue that charges that do not result in conviction sufficiently demonstrate a realistic probability of the relevant jurisdiction applying its criminal statute to nongeneric conduct. Criminal complaints, indictments, and other documents that contain the charged penal law provision and a description of the defendant's conduct are good evidence of prosecution. *See, e.g.*, *Martinez v. Sessions*, 892 F.3d 655, 662 (4th Cir. 2018) (citing charging documents in unpublished cases, submitted by amici curiae). However, some courts as well as the BIA have found that charging documents, without more, are insufficient evidence for purposes of the realistic probability standard. *See, e.g.*, *Matthews v. Barr*, 927 F.3d 606, 623 (2d Cir. 2019); *Matter of Mendoza Osorio*, 26 I&N Dec. at 707 n.4.

The Supreme Court in *Moncrieffe* characterized the relevant inquiry as the realistic probability of prosecution when it noted that "a noncitizen would have to demonstrate that *the State actually prosecutes* the relevant offense [in the non-generic manner]." 569 U.S. at 206. Across multiple circuits, many cases explicitly reference the realistic probability of *prosecution*. *See, e.g.*, *Mendez v. Barr*, 960 F.3d 80, 85 (2d Cir. 2020) ("As the case law demonstrates, there exists a realistic probability, not just a theoretical one, that *this conduct could be prosecuted* under [the statute of conviction]" (emphasis added)); *United States v. Aparicio-Soria*, 740 F.3d 152, 158

(4th Cir. 2014) (en banc) (framing the inquiry as "whether there is a 'realistic probability' that *Maryland prosecutors will charge* defendants engaged in [the broader conduct]" (emphasis added)); *United States v. Gillis*, 938 F.3d 1181, 1209 (11th Cir. 2019) (noting that the realistic probability test was satisfied in part because "there is a realistic probability that *future federal prosecutions could* charge defendants [with the broader conduct]" (emphasis added)); *United States v. Burgos-Ortega*, 777 F.3d 1047, 1054 (9th Cir. 2015) (referencing a "realistic probability of prosecution"); *Garcia-Martinez v. Barr*, 921 F.3d 674, 681 (7th Cir. 2019) (same). Yet, some cases have erroneously referenced the realistic probability of a conviction. *See Matthews*, 927 F.3d at 621-22 (finding that convictions not upheld by an appellate court are not sufficient to demonstrate realistic probability); *Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) (referring to a "realistic probability of a conviction" (internal quotation marks omitted)).

As a factual matter, charging documents demonstrate how an offense is actually prosecuted by a relevant jurisdiction, and account for the reality that criminal courts resolve nearly all conviction cases with a plea rather than trial and that the factual underpinnings for a conviction are never known to the public in nearly all of those cases. For this reason, it is almost impossible to document the charges sustaining a conviction in the vast majority of state criminal court convictions. *Cf. Whyte v. Lynch*, 807 F.3d at 469 ("The problem with [the government's] argument is that while finding a case on point can be telling, not finding a case on point is much less so. This logic applies with particular force because prosecutions in Connecticut for assault have apparently not generated available records or other evidence that might allow us to infer from mere observation or survey the elements of the offense in practice."). Family and criminal defense lawyers have submitted amicus briefs explaining, based on their experiences, that charging documents are not only evidence of prosecution—a significant state action involving restraints on liberty, loss of critical rights, and other serious consequences—but charging documents are also a reliable indicator of a high likelihood that the individual was convicted for conduct similar to the charged conduct. *See, e.g.*, Brief of Amici Curiae Brooklyn Defender Services et al., in support of Petitioner, *Matthews v. Barr*, *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/Amicus-brief-Matthews-v.-Sessions_Redacted.pdf.

Furthermore, the Supreme Court has extended a "presumption of regularity" to prosecutors' charging decisions. *United States v. Armstrong*, 517 U.S. 456, 464 (1997) (internal quotation marks omitted). In the same vein, the American Bar Association's (ABA) Model Rules of Professional Conduct, adopted in 49 states, require that a prosecutor only file criminal charges if they "reasonably believe[] that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in interests of justice." ABA, Criminal Justice Standards for the Prosecution Function § 3-4.3 (2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition. That the vast majority of criminal cases resolve through plea bargains means that in many cases, criminal charges may be altogether dropped, reduced, or replaced by alternative offense. Nevertheless, a charging document demonstrates that the prosecution had the intention to convict the individual and found sufficient information to move forward with the case on the specified charges.

If charging documents are not available, documents produced by police departments and other law enforcement agencies showing the penal law provision and a description of conduct may arguably be used to satisfy the realistic probability standard. Examples of such documents include arrest reports, officer writeups, and witness statements. *But see, e.g.*, *Vetcher v. Barr*, 953 F.3d 361, 367 (5th Cir. 2020) (finding that the petitioner failed to demonstrate realistic probability where he submitted, inter alia, "anonymous state arrest records" and the state prosecution's brief in a pending appellate case). In addition, news articles, online publications, and press releases from law enforcement agencies may discuss criminal charges and descriptions of conduct that have been prosecuted by police departments or prosecutors' offices. Courts have also accepted case stories, attorney declarations, or expert reports. *See, e.g.*, *Nunez-Vasquez v. Barr*, 965 F.3d 272, 284 n.7 (4th Cir. 2020) (citing stories from amicus brief as demonstrating "'realistic probability' that someone can be convicted under the statute" for non-generic conduct).

Appendix A: Practice Tips

- ☞ Argue the Supreme Court's decisions in *Duenas-Alvarez* and *Moncrieffe* hold or signify that where statutory text reflects non-generic conduct, or state case law interpreting the statutory text reflects non-generic conduct, the statute of conviction is overbroad and no further realistic probability showing is required.

- ☞ In the First, Second, Third, Fourth, Ninth, and Tenth Circuits—as well as Seventh and Eleventh—argue that the BIA's actual case requirement stated in *Matter of Navarro Guadarrama* is inconsistent with the law of the circuit and therefore inapplicable. These Circuits have adopted an express language rule, where no further realistic probability showing is required if the statutory text reflects non-generic conduct.

- ☞ *Always* preserve the argument that the Board's interpretation of the realistic probability test is incorrect and at odds with the categorical approach. In the Fifth and Sixth Circuits, argue that *Matter of Navarro Guadarrama* is incorrect and fundamentally at odds with the categorical approach. Specifically, argue that no legal imagination is necessary where the legislature has specified the conduct criminalized by a criminal statute by express statutory language defining the breadth of the statute. *See* Petition for Writ of Certiorari, *Rodriguez Vazquez v. Sessions*, No. 17-1304 (2018), *cert. denied* 138 S. Ct. 2697 (2018), *available at* https://www.scotusblog.com/case-files/cases/vazquez-v-sessions/.

- ☞ Even if not required by the Supreme Court or circuit court, it can be prudent to submit realistic probability evidence anyway to persuade the immigration adjudicator that the statute is overbroad under the categorical approach. Consider submitting a wide range of evidence: criminal court record documents, charging documents, news coverage of prosecutions for non-generic conduct, affidavits from local practitioners who have represented people charged with non-generic conduct.

- ☞ Consult with public defenders and other local counsel who represent people charged under the statute of conviction. They might have realistic probability evidence that you can submit in your case, or have insightful information about the scope of conduct prosecuted under a statute that is not captured in published case law.

- ☞ Include in your briefing arguments regarding the unavailability of criminal court record documents that demonstrate prosecutions for non-generic conduct. The following briefs submitted to the Supreme Court in *Pereida v. Barr* present detailed factual information about criminal court record maintenance, as well as legal arguments for why it is unfair and contravenes the constitutionally grounded categorical approach to make immigration relief depend on records that are virtually impossible to obtain: Brief for Amici Curiae National Association of Criminal Defense Lawyers, et al., in Support of Petitioner, 2020 WL 583960; Brief of Immigrant Defense Project, et al., as Amici Curiae in Support of Petitioner, 2020 WL 598382.