PRACTICE ALERT[1]:
Overview of *Pereida v. Wilkinson*
for Immigration and Criminal Defense Counsel

March 9, 2021

On March 4, 2021, the Supreme Court issued *Pereida v. Wilkinson*, No. 19-438 (2021), a 5-3[2] opinion damaging to noncitizens with past criminal convictions who intend or need to seek relief in removal proceedings. The decision creates a national rule concerning the impact of inconclusive criminal court plea and conviction documents for noncitizens applying for relief from removal in immigration proceedings, specifically in cases where the modified categorical approach applies. This practice alert provides a summary of the opinion (*see* Part I), and initial advice and guidance for immigration (*see* Part II) and criminal defense lawyers (*see* Part III) in anticipation of how immigration authorities are likely to apply *Pereida* in removal proceedings and other immigration contexts.

In *Pereida* the Court found that where a removable noncitizen is applying for relief from removal and has a conviction under a multiple-offenses statute, the noncitizen has the burden of proving the offense of conviction. Where the conviction is under a divisible statute and the "record of conviction" documents before the adjudicator do not necessarily establish conviction for a disqualifying crime, the Court ruled that the noncitizen cannot satisfy their burden of proving relief eligibility by relying only on the inconclusiveness of that record. Rather, the noncitizen must submit evidence to establish conviction of a non-disqualifying crime. Slip op. at 17.

Pereida reverses immigrant-favorable decisions on this issue in the First, Second, Third, and Ninth Circuits: *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010); *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc). It affirms much of the reasoning and holdings in immigrant-adverse decisions on this issue in the Fourth, Sixth, Eighth, and Tenth Circuits: *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017).

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[2] Justice Barrett took no part in the consideration or decision of this case. Slip op. at 17.

IDP and NIPNLG disagree firmly with the Court's decision in *Pereida* as an incorrect, ahistorical application of the categorical approach that will cause significant fairness and due process problems for noncitizens with criminal convictions. *See* *Brief of Immigration Law Professors as Amici Curiae in Support of Petitioner*, 2020 WL 598383 (describing how the categorical approach is a legal inquiry that courts have applied consistently for over a century focused on the minimum conduct covered by a conviction, irrespective of the burden of proof); *Brief for Amici Curiae National Association of Criminal Defense Lawyers, et al., in Support of Petitioner*, 2020 WL 583960 (describing how criminal court records of conviction are often unavailable or inconclusive through no fault of the noncitizen); *and* *Brief of Immigrant Defense Project et al as Amici Curiae in Support of Petitioner*, 2020 WL 598382 (describing how requiring noncitizens who are often detained and unrepresented to obtain criminal record documents, even if they exist, ignores the fairness rationales underlying the categorical approach).

I. SUMMARY OF DECISION IN *PEREIDA V. WILKINSON*

Clemente Avelino Pereida has lived as an undocumented person in the United States for 25 years. *See* Dissent at 1. He has worked in construction and cleaning to support his wife and three children, one of whom is a U.S. citizen. *Id.* The Department of Homeland Security ("DHS") initiated removal proceedings against Mr. Pereida in 2011, charging him as being removable for being present without admission. Slip op. at 2. He applied for cancellation of removal for certain nonpermanent residents, *see* 8 U.S.C. § 1229b(b)(1), INA § 240A(b)(1), based on his long duration of residence in the United States and the "exceptional and extremely unusual hardship" his family would suffer if he were deported. Slip op. at 2; *see* 8 U.S.C. § 1229b(b)(1)(D), INA § 240A(b)(1)(D).

He has a single misdemeanor conviction from Nebraska, under a criminal statute that punishes a broad range of conduct, including "[c]arr[ying] on any profession, business, or another occupation without a license, certificate, or other authorization required by law." Slip op. at 3 (citing Neb. Rev. Stat. §28-608 (2008)). The only fact the county prosecutor alleged was that Mr. Pereida had "use[d] a fraudulent Social Security card to obtain employment at National Service Company of Iowa," the cleaning company where he worked. Pet. Br. 7 (internal citation omitted). If Mr. Pereida's conviction were found to be a crime involving moral turpitude ("CIMT"), it would render him ineligible to apply for cancellation of removal; an immigration judge ("IJ") would not be permitted to consider the exceptional and extremely unusual hardship to his family, his "good moral character," or any of his personal circumstances. Slip op. at 3. If the conviction were not a CIMT, an IJ would then be able to give individualized consideration to his case and determine whether he warranted a favorable exercise of discretion.

It was undisputed in the case that the minimum conduct punishable under the Nebraska statute was not for a CIMT, and thus under the categorical approach the statute was overbroad. Slip op. at 4. The statute was treated as divisible and subject to the modified categorical approach.

However, the reviewable "record of conviction"[3]—the carefully prescribed set of documents that an immigration adjudicator may consult to identify the elements of conviction under a divisible statute[4]—did not conclusively establish the prong of the statute under which Mr. Pereida had been convicted. Slip op. at 5. The BIA and Eighth Circuit invoked the statutory and regulatory provisions that allocate the burden of proof in removal proceedings, and both held that due to the inconclusive record of conviction, Mr. Pereida did not satisfy his burden of proving relief eligibility. Slip op. at 5.

The Supreme Court affirmed the decision of the Eighth Circuit: "He has not carried his burden of showing that he was not convicted of a crime involving moral turpitude." Slip op. at 10. The Court principally found that the burden of proof provision at 8 U.S.C. § 1229a(c)(4)(A), INA § 240(c)(4)(A), requires a noncitizen to prove they do not have a relief-disqualifying conviction. Slip op. at 5-6. The Court found that the relief requirements regarding prior convictions were indistinguishable from other relief requirements like duration of residence and hardship to family members. Slip op. at 6. The Court based its reasoning partly on two neighboring INA provisions. First, 8 U.S.C. § 1229a(c)(3)(B), INA § 239(c)(3)(B), which lists out the kinds of documents that can be introduced and reviewed in removal proceedings to establish the existence of a conviction. The Court reasoned that this provision indicates that Congress intended that the existence of a prior criminal conviction to be a factual question that requires proof and that the burden is sometimes assigned to the noncitizen. Slip op. at 6. Second, 8 U.S.C. § 1182(a)(2)(A)(i)(I), INA § 212(a)(2)(A)(i)(I), which assigns to a noncitizen seeking admission the burden of proving they are not inadmissible. Slip op. at 7. The Court reasoned that a noncitizen in this situation bears the burden of proving they are not inadmissible for having been convicted of a disqualifying CIMT, and that it would not be rational to think Congress intended to assign a burden to a noncitizen seeking admission but not to a noncitizen seeking relief from removal. *Id.*

The Court continued that within the categorical approach, there is a threshold question of what offense the noncitizen was convicted of, and held this to be a *factual*, rather than *legal*, question, and thus the provision in the INA that assigns the burden of proof in removal proceedings applies. Slip op. at 9, 13. The Court held that its precedents in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013), did not require otherwise, because in those cases there was certainty as to the offense of conviction, and thus the Court could then conduct the categorical analysis comparing the offense's minimum conduct to the generic federal definition. Slip op. at 14. Finally, the Court dismissed the substantial concerns the litigants raised concerning widespread systemic unfairness in allocating an often-insurmountable evidentiary burden to noncitizens with limited access to court records, often detained in remote locations far from counsel. Slip op. at 15-16.

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[3] *See generally Shepard v. United States*, 544 U.S. 13, 20-23 (2005).

[4] *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 n.1 (2017) ("Under [the modified categorical] approach . . . the court may review the charging documents, jury instructions, plea agreement, plea colloquy, and similar sources to determine the actual crime of which the alien was convicted." (citation omitted)).

Justices Breyer, Sotomayor, and Kagan dissented, reasoning that whether an individual has been "convicted of" a disqualifying offense is a question of *law* requiring the application of the categorical approach, unaffected by the burden of proof provisions. Because an inconclusive record of conviction does not necessarily establish conviction for a removable offense, under the categorical approach the conviction is not relief-disqualifying. Dissent at 1. The dissent discusses the origins and continued affirmation of the categorical approach in immigration and Armed Career Criminal Act ("ACCA") cases, as well as its numerous practical and fairness benefits. In particular, re-litigating the basis of convictions is both impracticable and unfair considering the often-long length of time in between a conviction and subsequent removal proceeding, and frequent vagaries and omissions in criminal court documents. The dissent discusses the roots of categorical analysis in common statutory phrasing in the INA and ACCA, requiring identical application in both contexts. Dissent at 8. Finally, addressing a common refrain from a segment of the federal judiciary that the categorical approach leads to absurd results, the dissent responds that it is unknown whether the categorical approach actually leads to counterintuitive results with any frequency, and also that immigration adjudicators in many cases have discretion to deny relief even where a conviction does not bar relief. Dissent at 8.

Critically, the dissent disagrees with the majority's contention that identifying the elements of a conviction is a "threshold factual" question to be resolved before reaching the categorical approach. Dissent at 10. The dissent views determining the offense of conviction as a purely legal one, governed by the categorical approach and unaffected by the burden of proof. Dissent at 10-12. The existence of a conviction is a factual question, but ascertaining what are the elements of conviction is a legal one. Dissent at 12. The dissent concludes by reviewing the strict limitations on what criminal court documents are reviewable under the modified categorical approach, and criticizing the majority for wrongly speculating that noncitizens may introduce other forms of evidence in support of relief eligibility. Dissent at 14-15.

II. ADVICE FOR IMMIGRATION PRACTITIONERS

A. For noncitizens seeking relief in removal proceedings

Most immediately, immigration practitioners can expect that, in cases that are factually and procedurally similar to *Pereida*, the government will argue that a noncitizen convicted under a divisible statute including both relief-disqualifying and non-disqualifying offenses is precluded from satisfying their burden of proving eligibility for relief when that record of conviction is inconclusive as to the prong under which the noncitizen was convicted. The following is a ***non-exhaustive*** list of forms of relief to which the government may seek to extend *Pereida*:

- Adjustment of status: The government may argue that an inconclusive record of conviction under a divisible statute that could render an applicant permanently inadmissible will preclude the applicant from qualifying for adjustment; or that an inconclusive record of conviction under a divisible statute that could render an applicant

inadmissible, but if waivable, will require a waiver (most commonly 8 U.S.C. § 1182(h), INA § 212(h)).

- LPR cancellation: The government may argue that an inconclusive record of conviction under a divisible statute that could be an aggravated felony will preclude the applicant from qualifying for cancellation; or that an inconclusive record of conviction under a divisible statute that could trigger the "stop-time rule" will preclude the applicant from qualifying for cancellation.

- Non-LPR and VAWA cancellation: The government may argue that an inconclusive record of conviction under a divisible statute that could be a disqualifying inadmissible or removable conviction will preclude the applicant from qualifying for cancellation.

In cases where the government argues that *Pereida* would disqualify a form of relief, practitioners should both investigate alternate relief and consider some of the following defense options:

- Immediately investigate post-conviction relief[5] to either: 1) vacate the conviction and replead to a statute that categorically does not carry immigration consequences, or 2) clarify the record of conviction to conclusively establish your client's conviction is to the statute's non-disqualifying prong. Ensure that, where applicable, any post-conviction relief satisfies the BIA's decision in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). However, in immigration proceedings also argue that, if the criminal court clarifies the "record of conviction" or other criminal documents to conclusively establish conviction under the divisible statute's non-relief-disqualifying prong, that clarification is given full immigration effect without further inquiry into the basis for the modification, and the BIA's and Attorney General's decisions in *Matter of Pickering*, and *Matter of Thomas & Matther of Thompson*, 27 I&N Dec. 674 (AG 2019), are inapplicable. Post-conviction relief can be a lengthy process, so it is advisable to start this process as early as possible in a person's immigration case.

- In *Pereida*, the majority opinion suggests that in the specific context presented—where a noncitizen bears the burden of proving relief eligibility and has been convicted under a divisible statute and has an inconclusive record of conviction—the noncitizen may be able to proffer documents from outside the record of conviction to establish they were convicted under the statute's disqualifying prong. The opinion refers to the "broader array" of documents listed in 8 U.S.C. § 1229a(c)(3)(B), INA § 240(c)(3)(B), ("Proof of conviction") as documents that someone like Mr. Pereida might have sought to offer to overcome any unavailability or incompleteness of the *Shepard* "'limited' set of judicial

[5] For an overview of post-conviction relief vehicles in select states and the federal courts, *see* Immigrant Defense Project, *Post-Conviction Relief State Summary Chart* (Oct. 2020), https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Post-Conviction-Relief-State-Summary-Chart-10.2020.pdf.

records." Slip op. at 16-17 (quoting *Shepard v. United States*, 544 U.S. 13, 20-23 (2005)). The opinion also states: "Nor is it even clear whether these many listed forms of proof are meant to be the only permissible ways of proving a conviction . . . ." *Id.* at 17. This suggests the possibility of other creative proffers of evidence where a noncitizen is applying for relief or other immigration benefit where the noncitizen bears the burden of proof, especially where the standard *Shepard* documents do not resolve the question of the identity of the crime of conviction. For example, if no other evidence is available to resolve the question, could someone like Mr. Pereida offer affidavits (or even testimony) of former defense counsel, the prosecutor or even the criminal court judge—where such person would be willing and it would be helpful—in order to seek to establish that the conviction fell under a non-CIMT prong of the statute?

- Investigate whether the statute of conviction is *actually* divisible. If not, then the conviction is categorically not relief-disqualifying, as the Court in *Pereida* acknowledged. Slip op. at 7-8. In particular, consider whether the strict divisibility rule affirmed in *Mathis v. United States*, 136 S. Ct. 2243 (2016), creates an argument the statute is not divisible. Since *Mathis*, it has become clear that numerous statutes are indivisible and categorically do not fall within removal provisions. There is voluminous Court of Appeals and BIA case law establishing the indivisibility of certain state statutes. *See, e.g.*, *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017) (New York Penal Law § 220.31, sale of a controlled substance, indivisible as to controlled substance offense and aggravated felony); *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015) (California Penal Code § 484, theft, indivisible as to aggravated felony theft offense); *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016) (Texas Penal Code § 22.01(a)(1), assault, indivisible as to CIMT). Remember to conduct updated research into state case law regarding the statute of conviction to determine if there are new sources to support an indivisibility argument. A number of additional resources on the categorical approach are available on IDP and NIPNLG's websites, and our litigation staff frequently provide technical assistance and amicus briefing support on divisibility issues.[6]

B. For noncitizens applying for affirmative immigration benefits

If the government tries to invoke *Pereida* in cases of noncitizens applying for benefits before U.S. Citizenship and Immigration Services or the Department of State, practitioners should first argue that the decision applies *only* to relief applications in removal proceedings. The Court refers multiple times to the INA statutory provision regarding the noncitizen's burden to prove eligibility for relief in removal proceedings, 8 U.S.C. § 1229a(c)(4). Depending on the specific nature of the affirmative application—*e.g.*, adjustment of status, naturalization—advocates should investigate the applicable burden of proof provisions to see if there are distinguishing

[6] Immigrant Defense Project, *Using and Defending the Categorical Approach*, https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/; National Immigration Project of the National Lawyers Guild, *Practice Advisories*, https://nipnlg.org/practice.html.

characteristics or phrasing. Alternatively, consider the strategies suggested above for noncitizens in removal proceedings, *e.g.,* investigating indivisibility arguments and post-conviction relief.

C. Pushing back against DHS/EOIR overreach

The Court necessarily decided nothing beyond the specific question of a noncitizen's eligibility for relief when convicted under a divisible statute with an inconclusive or ambiguous record of conviction. Practitioners should be prepared to push back against any DHS, IJ, or BIA efforts to argue that *Pereida* in any way abrogates or alters application of the categorical or modified categorical approach otherwise.

For example, as discussed above, the majority opinion suggests that Mr. Pereida and similarly situated noncitizens may proffer evidence from outside the "limited" set of *Taylor/Shepard* record of conviction documents to show conclusively they were convicted under a non-relief-disqualifying prong of the statute. Slip op. at 16-17. This dicta in the majority opinion responded to the specific fairness concerns implicated if a noncitizen were to be irretrievably barred from qualifying for relief just because the limited record of conviction in their individual case does not identify the elements of conviction. The Court suggested that in such a circumstance a noncitizen might be able to supplement the record of conviction in order to identify the elements of their offense. Any argument the government may make to support proffering non-*Shepard* documents in other contexts is foreclosed by the Court's multiple categorical approach precedents limiting the proof that the government may offer in categorical approach contexts. *See Esquivel-Quintana*, 137 S. Ct. at 1568 n.1; *Moncrieffe*, 569 U.S. at 190-91; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007).

If you encounter such overreaching government arguments, please contact IDP (e-mail address: litigation@immdefense.org) or NIPNLG (khaled@nipnlg.org).

III. ADVICE FOR CRIMINAL DEFENSE LAWYERS

Pereida raises significant new challenges and responsibilities for criminal defense lawyers representing noncitizens who may in the future seek relief from removal or possibly other immigration benefits for which the burden of proof to show eligibility is on the noncitizen.

First and foremost, the decision highlights the importance for criminal defense counsel, working with a *Padilla* specialist, to investigate and ascertain the client's individual immigration circumstances in order to better understand how important it might be for the particular client to preserve eligibility for relief from removal, or for any other immigration benefit where the noncitizen has the burden of proof to show eligibility—*e.g.*, admission to the United States, adjustment of status in the United States, and naturalization to become U.S. citizen. The government may seek to extend the majority's reasoning in *Pereida* to such other benefits even though the opinion specifically addressed only the burden of proof in removal proceedings.

Second, the decision further highlights the close scrutiny that criminal court documents generally may receive in immigration proceedings. While there are restrictions on which documents can be used for certain purposes, the decision opens up the possibility of scrutiny of non-*Shepard* documents for identifying the crime of conviction under a divisible statute. Moreover, it remains the case that most documents from a criminal court proceeding—from the arrest process through administrative documents created by the clerk's office—may be considered and impact any discretionary determination in an immigration case. Understanding how documents are admitted and may be reviewed in immigration cases creates critical opportunities to create plea bargains that defend against immigration consequences.

With this information in hand, defense counsel may employ some of the following strategies to overcome the challenge of *Pereida* and to negotiate and achieve dispositions in criminal cases that preserve relief eligibility and guard against other adverse immigration consequences.

- Work with a *Padilla* specialist to identify a statute of conviction that is overbroad and indivisible under the categorical approach. For a conviction under an indivisible statute, it remains the case that only the statute of conviction is reviewable in immigration proceedings. Individual documents (e.g., complaints, indictments, plea minutes) cannot be consulted to determine if the conviction corresponds to a removability provision, bar to relief from removal, or bar to some other benefit in immigration law, irrespective of the burden of proof. The *Pereida* majority opinion itself approvingly references and discusses the Court's precedents so applying the categorical approach. Slip op. at 8 ("[A] court asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law.").

- If there is no better alternative to pleading to a divisible statute, work with a *Padilla* specialist to ensure that the "record of conviction"[7] and additional criminal case documents that may now be reviewed under the *Pereida* decision to identify the crime of conviction affirmatively establish conviction for a non-disqualifying crime covered under the divisible statute.

- If it is not possible to create a "record of conviction" that affirmatively establishes conviction of a non-disqualifying crime for purposes of preserving eligibility for relief from removal or other immigration benefit, but the client may still benefit from avoiding removability itself, it is a remaining defense option to create ambiguity in the "record of conviction"—and other documents in the criminal case—as to whether the conviction triggers removability where the burden of proof is on the government. For example, ambiguity in the record of conviction should prevent DHS from establishing that a person is deportable. *See* 8 U.S.C. § 1229a(c)(3)(A) (assigning DHS burden of proving deportability). However, even in cases where the concern is deportability and not relief eligibility, defense counsel should be vigilant about trying to ensure, where possible, that

[7] *See generally Shepard v. United States*, 544 U.S. 13, 20-23 (2005).

the record of conviction—or other documents in the criminal case—relate to a crime that does not disqualify your client from relief eligibility should the client later need to apply for relief. Under *Pereida*, ambiguity in the record of conviction prevents noncitizens from establishing relief eligibility (noncitizens bear the burden of proving relief eligibility).

IV. ADDITIONAL CATEGORICAL APPROACH RESOURCES

- IDP & NIPNLG, *Practice Advisory:* Esquivel-Quintana v. Sessions*: Supreme Court Limits Reach of Aggravated Felony "Sexual Abuse of a Minor" Ground and Provides Support on Other Crim-Imm Issues* (June 8, 2017), https://www.immigrantdefenseproject.org/wp-content/uploads/6-8-17-Esquivel-Quintana-practice-advisory-FINAL.pdf.

- IDP & NIPNLG, *Practice Alert: In* Mathis v. United States*, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach* (July 1, 2016), https://www.immigrantdefenseproject.org/wp-content/uploads/2016/07/MATHIS-PRACTICE-ALERT-FINAL.pdf.

- IDP, *Using and Defending the Categorical Approach*, https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/; *Records of Conviction and the Burden of Proof*, https://www.immigrantdefenseproject.org/records-of-conviction-and-the-burden-of-proof/; *Briefs and Decisions*, https://www.immigrantdefenseproject.org/briefs-and-decisions/.