PRACTICE ADVISORY[*]
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THE REALISTIC PROBABILITY STANDARD: FIGHTING GOVERNMENT EFFORTS TO USE IT TO UNDERMINE THE CATEGORICAL APPROACH

INTRODUCTION

The subject of this practice advisory is the categorical approach, the predominant analytical tool by which an adjudicator determines whether a criminal conviction triggers adverse immigration consequences. The specific focus is on the "realistic probability" standard, an increasingly important element of the categorical analysis. The categorical approach has strong implications for criminal defense practice as well, but the focus here is on the application of the categorical approach in immigration-related proceedings.

In recent years, the Supreme Court has made clearer than ever that a strict categorical approach applies when determining whether a noncitizen's criminal conviction triggers a negative immigration consequence that Congress has based on "conviction" of a generic crime. *See*, *e.g.*, *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). Under the categorical approach, the adjudicator must consider the "least of the acts criminalized" under the criminal statute of conviction—regardless of what the underlying facts might have been in the noncitizen's own case—and then determine if that minimum conduct falls completely within the definition of the generic crime referenced in the immigration provision.[1] *Id.* at 1684. The Court has indicated that only then can one be assured that the noncitizen has necessarily been "convicted" of the crime to which Congress attached the negative immigration consequence. *Id.* at 1685.

In *Gonzalez v. Duenas-Alvarez*, though, the Court announced a "realistic probability" standard as an apparent check on certain noncitizen claims regarding minimum conduct covered under a statute of conviction. 549 U.S. 183,193 (2007). Concerned that the claim in that case might be

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This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[1] In this context, "generic crime" refers to the definition of a crime in a particular immigration provision. Examples include the federal definition of burglary used in the burglary aggravated felony provision at INA § 101(a)(43)(G), and the federal definition of child abuse used in the deportability provision at INA § 237(a)(2)(E)(i). Determining whether a criminal conviction can trigger an immigration consequence requires a comparison between the statute under which the noncitizen was convicted and the "generic crime."

based on no more than the application of "legal imagination" to the statutory text, the Court found that it would not consider the claim absent a showing that the convicting jurisdiction has applied the statute in the manner claimed either in the noncitizen's own case or in other cases. *Id*.

Since that 2007 decision, the Supreme Court in *Moncrieffe v. Holder*, Courts of Appeals, and the Board of Immigration Appeals ("Board" or "BIA") have applied this standard in different ways. Most recently, the BIA issued two decisions that give conflicting signals about the BIA's position on application of this standard: *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014), and *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014). This practice advisory assesses the current state of the federal court and agency case law on the realistic probability standard, and provides practice tips and litigation strategies for meeting this standard when representing noncitizens in immigration and criminal proceedings.

I. WHAT IS THE REALISTIC PROBABILITY STANDARD?

A. The Supreme Court's Decisions in *Duenas-Alvarez* and *Moncrieffe*

The Supreme Court first announced the "realistic probability" standard in 2007 in *Gonzalez v. Duenas-Alvarez*. The noncitizen in that case had been convicted under a California vehicle theft statute that included aiding and abetting vehicle theft. The issue presented was whether aiding and abetting a theft offense, under California law, was an aggravated felony. Duenas-Alvarez argued that California's definition of aiding and abetting differed from that of the majority of states, and covered conduct that, technically, would not match the elements of the immigration theft offense provision. The Court dismissed Duenas-Alvarez's claims for a variety of reasons, and issued the following language regarding a realistic probability standard which has become 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 (nongeneric) manner for which he argues.

549 U.S. at 193 (emphasis added). The Court was concerned that the statute did not truly reach the conduct claimed by the noncitizen. *Id*. at 191.

The Supreme Court again referenced the realistic probability standard in *Moncrieffe v. Holder*. In *Moncrieffe*, the Court, in dictum, addressed the firearms trafficking aggravated felony ground at INA § 101(a)(43)(C) that has an exception for antique firearms. The Court explained that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, "a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." 133 S.Ct. at

1693. As in *Duenas-Alvarez*, the Court here was concerned with the application of legal imagination to state statutes whose terms did not expressly cover nongeneric crime conduct. Whereas in *Duenas-Alvarez* the Court was concerned with a creative interpretation of California's aiding and abetting doctrine, the Court in *Moncrieffe* was concerned with state firearms statutes that did not expressly include antique firearms.

Taken together, *Duenas* 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 expressly determines what conduct a state statute includes.

B. The BIA's Competing Decisions in *Matter of Chairez-Castrejon* and *Matter of Ferreira*

The BIA's decision in July 2014 in *Matter of Chairez-Castrejon* supports the view that no showing of actual prosecutions is required when the text of the statute of conviction expressly covers the claimed minimum conduct. In *Chairez-Castrejon*, the Board referenced the realistic probability standard during its discussion of whether the respondent's conviction was a categorical match with the crime of violence aggravated felony ground. 26 I&N Dec. 349, 351 (BIA 2014) ("we employ the 'categorical approach,' which requires us to focus on the minimum conduct that has a realistic probability of being prosecuted . . ."). Significantly, though, the Board concluded that the language of the statute of conviction reached the minimum conduct at issue – reckless conduct – and precluded a finding of deportability without any discussion of Utah case law or other evidence that Utah prosecutors actually prosecute cases involving only reckless conduct. The strong implication is that no such finding or showing of actual prosecutions is required when the terms of the statute expressly cover the nongeneric crime conduct. *See* additional discussion in IDP & NIPNLG "*Matter of Chairez-Castrejon* Practice Advisory" (July 30, 2014).

In *Matter of Ferreira*, the BIA offered conflicting guidance regarding its view of the need to show actual prosecutions for claimed minimum conduct. In that case, the BIA considered whether a Connecticut controlled substance conviction triggered deportability as a conviction relating to a controlled substance, *see* 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 laws at the time of the noncitizen's conviction included, and now include, substances that do not appear on the federal schedules.[2] The Board in *Ferreira* decided that the

[2] The Board noted that at the time of the respondent's conviction, two substances—benzylfentanyl and thenylfentanyl—were on the Connecticut controlled substance schedules but not on the federal schedules. The Board did not mention trifluoromethylphenylpiperazine (TFMPP), which appears on Connecticut's schedules but which the Attorney General chose not

noncitizen had to provide affirmative evidence that Connecticut had actually applied its controlled substance laws to benzylfentanyl or thenylfentanyl, the two substances not on the federal schedules at the time of Ferreira's conviction. The Board did not care that Connecticut's statute expressly provided that a person is subject to prosecution for either benzylfentanyl and thenylfentanyl:

> [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 . . . .

Ferreira, 26 I&N Dec. at 420-21 (emphasis supplied). According to the BIA, to establish benzylfentanyl or thenyfentanyl as the minimum conduct for purposes of categorical analysis, a noncitizen would have to provide evidence of actual prosecutions against those substances. *Id*. Absent that showing, the minimum conduct punishable under the statute of conviction would categorically overlap with the immigration controlled substance provisions. The BIA remanded Ferreira's case to the Immigration Judge to give him an opportunity to offer evidence that Connecticut has prosecuted defendants for benzylfentanyl or thenyfentanyl. *Id*. at 422.

However, the Board in *Ferreira* did not say it was articulating a general rule about whether, where the state legislature has expressly included nongeneric crime language in a criminal statute, a noncitizen must show case examples of actual prosecutions in order to satisfy the realistic probability standard. In fact, by saying "object or substance" rather than "conduct," the Board suggests that its ruling is limited to criminal statutes that pertain to drug paraphernalia and drugs, and nothing more. For that reason, a practitioner may argue that the decision in *Ferreira* is narrow and limited exclusively to state controlled substance statutes and how they compare to the federal immigration statute.

II. SATISFYING THE REALISTIC PROBABILITY STANDARD

In *Duenas-Alvarez*, the Court clarified that a noncitizen may use the facts established in his own criminal case as evidence of the State applying its criminal statute to conduct that falls outside the generic definition. When the facts giving rise to the individual noncitizen's conviction cannot defeat the charge of removability, the noncitizen is left to proffer other proof. The Supreme Court, as well as the Courts of Appeals, has spoken about the range of ways a noncitizen can establish the realistic probability of "State" action. In this section, we discuss arguments a practitioner can marshal to assert that the realistic probability standard has been satisfied.

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to designate as a federally controlled substance. *See* 69 Fed. Reg. 12794 (Mar. 18, 2004); Conn. Agencies Regs. § 21a-243-7(c)(36) for TFMPP. Nor did the Board mention a fourth substance, Chorionic Gonadotropin (CGH), a hormone listed on Schedule IV of Connecticut's drug schedules but not on the federal schedules. *See* Conn. Agencies Regs. § 21a-243-9(g) (2009).

A. Use Supreme Court and Circuit Court Case Law and Agency Precedent to Argue That the Express Terms of the Criminal Statute (Including Case Law Elucidating the Express Terms) Are Sufficient Evidence of the State's Intent to Prosecute Conduct That Falls Outside of the Removability Provision

The Board's decision in *Matter of Ferreira* has emboldened the government to argue that in every case a noncitizen must proffer evidence of actual prosecution of nongeneric crime conduct in order to satisfy the realistic probability standard. The government's interpretation of *Ferreira* is incorrect, and ignores the significant body of federal court and agency case law that authorizes noncitizens to satisfy the realistic probability where the express terms of a criminal statute cover conduct that does not meet the generic definition of a crime in the immigration removability provision.

Three Circuits—the Third, Ninth, and Eleventh—have held unambiguously that where the express language of the criminal statute covers conduct that falls outside the relevant removal ground, the realistic probability standard is satisfied. For example, in *Ramos v. Att'y Gen.*, the Eleventh Circuit rejected the Government's overreaching proposed interpretation of *Duenas-Alvarez* and held that where the language of the criminal statute expressly covers minimum conduct that does not meet the generic-crime definition, the realistic probability standard has been satisfied. 709 F.3d 1066 (11th Cir. 2013). In *Ramos*, the court examined a Georgia theft statute that punished conduct that both matched and did not match the generic definition of theft in the aggravated felony provision for theft offenses. In finding the realistic probability standard had been satisfied and the noncitizen was not required to make any showing of past prosecutions for nongeneric-crime conduct, the court wrote:

> [T]he [criminal] statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition. Here, the statute expressly requires alternate intents. One of those intents (the one at issue here) does not render the crime a theft offense. The statute's language therefore creates the realistic probability that it will punish crimes that do qualify as theft offenses and crimes that do not. *Duenas-Alvarez* does not control this case.

Ramos, 709 F.3d at 1071-72 (internal quotation remarks and citation omitted). The Third and Ninth Circuits have held the same. *See Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (explicitly distinguishing the circumstances of that case from those at play in *Duenas-Alvarez* and holding that "no application of 'legal imagination' to the Pennsylvania simple assault statue is necessary" because "[t]he elements of" the assault statute "are clear."); *U.S. v. Grisel*,488 F.3d 844, 850 (9th Cir. 2007) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 127 S.Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime")*; see also Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572-73 (6th Cir. 2007) (unpublished) (rejecting application of *Duenas-Alvarez* because the statute's "clear language…expressly and unequivocally" included conduct outside the generic definition's scope).

One Circuit—the Fourth—has found that even where the language of the statute does not expressly include the minimum conduct, but the *case law* interpreting the statutory language does do so, the realistic probability standard is satisfied. *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc). There, in deciding whether there was a realistic probability that a Maryland conviction for resisting arrest included non-violent conduct, the Fourth Circuit sitting en banc stated, "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." *Id*.

> ***Practice Tip 1: Look for cases interpreting breadth of the statute***
> Even where the statute does not expressly include language about the minimum conduct, a practitioner should look for case law interpreting the breadth of the statute.

These circuit court decisions, as well as the Board's own precedent in *Chairez-Castrejon*, undermine any argument by the government that *Matter of Ferreira* eliminated express statutory language as a means of satisfying the realistic probability standard. Moreover, the BIA in *Matter of Ferriera* did not provide any indication that it was attempting to supersede existing circuit case law. When the BIA is attempting to contravene existing authority it customarily does so expressly.[3] In *Ferreira*, the BIA mentioned that the Ninth Circuit granted a petition for review based on the discrepancy between California's drug laws and the federal schedules, the very issue at play in *Ferreira*. However, rather than acknowledge that the Ninth Circuit disagreed with its new rule announced in *Ferreira*, the BIA attempted to distinguish the Ninth Circuit case by stating that the "Court did not apply the 'realistic probability' analysis under *Moncrieffe* and *Duenas-Alvarez*." *Ferreira*, 26 I&N Dec. at 419, n.3. Further, the Board itself has conceded the limitations on its authority to define the parameters of the categorical approach when there is circuit case law on point. *See Chairez-Castrejon*, 26 I&N Dec. at 354 (stating that the Board is "not given deference" here).

> ***Practice Tip 2***: A practitioner in the 3rd, 4th, 9th, or 11th Circuits should argue that *Matter of Ferreira* is inconsistent with the law of the circuit.

Outside of these circuits, *Ferreira*'s reach is still limited by both *Duenas-Alvarez* and *Moncrieffe*. Both decisions are consistent with the holdings in the Third, Fourth, Ninth, and

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[3] *See, e.g., Matter of Diaz and Lopez***,** 25 I&N Dec. 188, 190-91(BIA 2010) (expressly declining to follow Ninth Circuit precedent, citing to *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967 (2005) (where a statute is ambiguous, and the implementing agency's construction is reasonable, *Chevron* requires the federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory construction)); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008) (citing to *Brand X*); *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008) (same); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) (same); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) (same).

Eleventh Circuits. The Supreme Court's stated concern in *Duenas-Alvarez* was that a lawyer's legal imagination could conjure up a variety of ways to violate a statue that a state would never prosecute in the real world. However, conduct covered under the express terms that a legislature includes in a statute is not the product of any legal imagination, which means that a noncitizen at least arguably establishes a realistic probability where the legislature expressly included language that covers the minimum conduct at issue.

Similarly, in its short statement about the realistic probability standard, the *Moncrieffe* Court stated that where a noncitizen points only to the fact that a state firearms statute does not *exclude* antique firearms, that noncitizen "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Moncrieffe*, 133 S.Ct at 1693. This rationale conforms with the Court's precedent set in *Duenas-Alvarez*, requiring evidence of actual prosecution where the express language of the statute of conviction did not cover the claimed minimum conduct. For practitioners litigating outside of the Third, Fourth, Ninth, and Eleventh Circuits, argue that *Moncrieffe*'s language is consistent with the reasoning those circuit courts have adopted and preempts any government contention that *Ferreira* limits the ways in which the realistic probability standard can be met.

Practice Tip 3: argue that Matter of Ferreira is wrong
For cases outside the 3rd, 4th, 9th, and 11th Circuits, preserve the argument that the BIA erred in *Matter of Ferreira* because no legal imagination is necessary where the legislature or a court has provided the conduct included in a criminal statute either by the express legislative language or a judicial decision interpreting the breadth of the statute.

B. Where the Express Terms of the Statute Do Not Establish Realistic Probability of State Action, Provide Alternative Evidence of State Action

Where the express language of a criminal statute does not satisfy the realistic probability standard, it becomes necessary to provide other proof of the State applying the criminal statute to conduct that falls outside the generic definition of the crime. This section discusses other options for satisfying the realistic probability standard.

1. Case law from criminal statute's jurisdiction

Case law showing conviction under a statute for conduct that does not meet the generic definition of the crime plainly shows that the State *would* apply its statute to that conduct. However, proof of *conviction* may not be necessary to satisfy the realistic probability standard. Case law that shows the State's *prosecution* of nongeneric conduct should also be adequate to show that the State *would* apply the statute to such conduct. Citing *Duenas-Alvarez*, the government may argue a noncitizen is required to show *conviction* for nongeneric crime conduct to satisfy the realistic probability standard. The issue turns on the few sentences in *Duenas-Alvarez* that discuss the realistic probability standard. The Court first discusses a "realistic probability…that the State would apply its statute to conduct that falls outside the generic definition of a crime," and next to "cases in which the state courts in fact did apply the statute in

the special (nongeneric) manner." 549 U.S. at 193. However, in *Moncrieffe* the Court clarified that to satisfy the realistic probability standard in such cases, the "noncitizen would have to demonstrate that the State actually *prosecutes* the relevant offense." *Moncrieffe,* 133 S.Ct at 1693 (emphasis added). Notably, the Court did not use the language of "conviction" in either *Duenas-Alvarez* or *Moncrieffe*.

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*, __ F.3d__, 2014 WL 5072684 (9th Cir. Oct. 10, 2014) (noncitizen convicted under California firearm statute found to meet realistic probability standard for his claim that statute covered antique firearms based on antique firearm prosecutions under related California statutes using the same firearm definition). For example, the New York Penal Law's ("NYPL") controlled substance provisions punish, *inter alia*, possession, sale, or possession with intent to sell "controlled substances," the statutory definition of which includes at least two substances that are not federally controlled. These two substances constitute the minimum conduct necessary to sustain conviction under any of New York's controlled substance laws. Thus, case law showing prosecution under NYPL § 220.03, possession of a controlled substance in the seventh degree, for chorionic gonadotropin (one of the New York substances that is not federally controlled) is sufficient to show a realistic probability of prosecution under any NYPL provision targeting controlled substances (i.e., NYPL §§ 220.31 (sale of a controlled substance) and 220.06 (possession of a controlled substance with intent to sell)).

2. Plea colloquies, certificates of disposition, and other evidence of conviction

Because the vast majority of criminal cases resolve without a written judicial decision, practitioners can seek alternative evidence of conviction for conduct that falls outside the generic definition of a crime, including plea colloquies and transcripts of criminal proceedings. Both plea colloquies and transcripts identify the statute of conviction and frequently the facts that gave rise to conviction. In some instances, transcripts and colloquies can be paired with other documents (e.g., 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 nongeneric crime conduct.

3. Criminal complaints, indictments, and other charging documents

As discussed above, charges that do not result in conviction are still sufficient to demonstrate the realistic probability of the State 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.

4. Arrest reports and other documents establishing law enforcement action

Similarly, documents produced by police departments and other law enforcement agencies showing the penal law provision and a description of conduct can also be used to satisfy the realistic probability standard. Examples of such documents include arrest reports, officer write-ups, and witness statements. Even if the individual case does not continue beyond an arrest (i.e.,

declined prosecution), the fact of police action under the statute for the alleged conduct may be adequate to establish the realistic probability of State action.

5. Secondary sources (e.g., news articles, press releases, online postings) discussing government action

Finally, in circumstances where criminal records are not available, secondary sources can attest to State action. News articles, online publications, and press releases from law enforcement agencies are all good examples of secondary sources likely to discuss criminal charges and descriptions of conduct that have been prosecuted by police departments or prosecutors' offices.

> ***Practice Tip 4: Where to Find Prosecution Examples***
> In anticipation of a harmful Supreme Court decision addressing the realistic probability test or in cases where the rule in *Matter of Ferreira* applies, offer any evidence of actual prosecutions of the "minimum conduct" covered under the statute of conviction. This evidence can include:
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> - noncitizen's own case
> - Published cases
> - Unpublished cases
> - Declarations of criminal defense lawyers
> - Media reports
> - Any other evidence that demonstrates that the conduct is not merely the product of a fertile legal imagination.
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> In offering evidence other than cases, a practitioner should describe the efforts she or he took to obtain more traditional forms of evidence. *See infra* Section II.C

C. Strategies for Documenting the Unavailability of Evidence That Shows Actual Prosecutions

This section of the advisory describes arguments that may be raised where evidence showing prosecutions for minimum conduct is unavailable. In the circumstances described below, a practitioner should consider arguing that evidence of actual prosecutions should not be required.

1. Document the nonexistence of criminal records that would show prosecutions for minimum conduct

In addition to arguing that the express language of the statute demonstrates a realistic probability, it may be helpful to document the unavailability of criminal records showing prosecutions for the minimum conduct. These records are largely unavailable because most cases are resolved through plea agreements that are not appealed; many records simply do not exist because they were not generated or maintained; and records that do exist are not in practice readily accessible. The Board's expansion of the realistic probability test thus disregards the practical impossibility of requiring noncitizens to produce records that are largely unobtainable. Practitioners should argue for an implicit exception where they can demonstrate such records are in fact unavailable. *Cf.* 8 C.F.R. § 103.2(b)(2)(i) (where primary evidence is not available to establish that a

noncitizen applicant or petitioner is eligible for the requested benefit, she must submit secondary evidence, such as church or school records, pertinent to the facts at issue, and where secondary evidence is also not available, the petitioner must demonstrate that fact and submit two or more affidavits by persons not parties to the petition who have direct personal knowledge of the event and circumstances).

First, the vast majority of criminal convictions are resolved by plea bargains. *See Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (stating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas). As standard legal databases on Westlaw or LexisNexis are typically limited to reported decisions from state appellate courts, it is very unlikely that a guilty plea would result in a reported decision from a state court. Thus, citable state decisions will only be available in the very small percentage of prosecutions that result in both a trial and appeal.

Moreover, in some states, such plea records are never generated. In North Carolina, for example, the state courts do not create any transcript or recording of misdemeanor criminal proceedings.[4] Similarly, the Virginia General District Courts, which have jurisdiction of misdemeanor charges, produce no record of the charges, trial or plea, conviction and sentence beyond an "executed warrant of arrest." *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010). As other state courts operate in the same way, practitioners should research whether or not such records are created in the jurisdiction of conviction, and point out where they are not.

Even where conviction records were created, they may no longer exist years later when a noncitizen is placed in removal proceedings and needs to provide evidence of realistic probability to defeat removal. In Maryland, for example, district courts permit the destruction of criminal court records as little as three years after conviction. Md. Code Ann., Cts. & Jud. Proc. § 16-505(d)(4),(5) (2013). Also, in South Carolina, untranscribed recordings of trial court criminal proceedings may be destroyed five years after the date of the proceedings. South Carolina App. Court R. 607(i). Practitioners should research for how long records are maintained in the jurisdiction in which the conviction arose and point to statistics about lost records to demonstrate the unavailability of records.

Finally, in jurisdictions where specific conviction records do exist, it is exceedingly difficult to locate helpful records. Westlaw does not provide access to any state criminal records for twenty-five states.[5] And criminal records for the other twenty-five states are limited to a small number of specific counties. Similarly, Lexis only provides access to state court documents in specific counties in fifteen states.[6]

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[4] *See* North Carolina Administrative Office of the Courts, *The North Carolina Judicial System* 27–28 (2008 ed.), *available at* http://www.nccourts.org/citizens/publications/documents/judicialsystem.pdf#page=6&zoom=auto,0,537.

[5] *See* Thomson Reuters, *Court Dockets and Court Wire Coverage*, http://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map

[6] *See* LexisNexis, *Support Center*, https://support.lexisnexis.com/courtlink/record.asp?ArticleID=9439 .

2. Investigate when the statute of conviction was enacted or amended to include the minimum conduct that does not match the immigration provision

Practitioners should also investigate how recently a statute was enacted or amended to include the minimum conduct that falls outside of the removal ground. If, for example, a statute was very recently enacted or amended to cover the minimum conduct, prosecutions for that particular conduct may not yet have occurred, even though the legislature expressly intended for that conduct to be prosecuted. In that case, a practitioner could argue that there is no evidence that can yet be obtained and thus should not preclude a finding that the state statute is broader than the removal ground. *Cf.* 8 U.S.C. § 1158(b)(1)(B)(ii) (Under REAL ID, "where the trier of fact determines that the [asylum] applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided *unless the applicant does not have the evidence and cannot reasonably obtain the evidence*") (emphasis added).

Also, even where records do exist, there may not be any evidence of the claimed minimum conduct if it relates to facts that are not true elements of the offense. For example, in a case where the noncitizen is being charged as deportable under the controlled substance ground for possession of drug paraphernalia, she may be arguing that she is not deportable because the minimum conduct is for possession of paraphernalia related to a non-federally controlled substance.[7] A practitioner, however, may be unable to find prosecutions for this minimum conduct in states that do not require that the particular substance be identified to convict an individual for possession of drug paraphernalia. And even in those states that require that the substance be identified, the substance may not be identified on the criminal docket.

3. Argue that barriers for detained, pro se noncitizens to obtaining this kind of evidence shift the burden to DHS[8]

Locating required conviction records places an insurmountable burden on noncitizens in removal proceedings, many of whom are unrepresented, detained, or limited English proficient. In 2013, 37% of all completed immigration cases involved detained noncitizens,[9] nearly eighty-five percent of whom were unrepresented.[10] The Board's interpretation is especially harsh for unrepresented, detained noncitizens who will not have the resources needed to obtain conviction records demonstrating prosecution of minimum conduct. Most notably, detainees' access to legal

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[7] The Third Circuit has found that where the drug paraphernalia is for a non-federally controlled substance, is it not a deportable offense under the controlled substance ground of deportability. *Rojas v. Att'y Gen.*, 728 F.3d 203 (3d Cir. 2013).

[8] The data in this section was primarily drawn from the Brief Amici Curiae of National Immigrant Justice Center, et al., filed in support of petitioner in *Mellouli v. Holder*, No. 13-1034.

[9] *See Executive Office for Immigration Review, FY 2013 Statistics Yearbook*, G-1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[10] Amer. Bar Ass'n, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010).

materials is significantly limited, with apparently no access to state-specific legal materials.[11] Moreover, detainees do not appear to have any access to email or the internet, including online legal databases,[12] and only limited access to telephone or facsimile communications.[13]

Also, language barriers and limited education further exacerbate the difficulties noncitizens face under the Board's interpretation. Approximately eighty-one percent of noncitizens in removal proceedings are not fluent in English.[14] Nearly half of noncitizens have not completed high school, and many others have completed no schooling at all.[15]

Noncitizens, particularly pro se noncitizens, should consider arguing that under *Matter of Vivas*, 16 I&N Dec. 68 (BIA 1977), the burden of obtaining evidence of prosecutions where the statute expressly covers the minimum conduct should be placed on the government. In *Vivas*, the government bore the burden of establishing deportability, but where it made a prima facie showing, the Board required the respondent to go forward with evidence to rebut that prima facie showing. *Id*. at 69-70. The Board reasoned that the government was under a "serious practical handicap" in obtaining the required evidence which was within the respondent's control and relied on the rule that "the burden of going forward with evidence can be placed on a party not bearing the burden of proof when the facts are within his particular knowledge or control." *Id*. at 70 (citing *United States v. Fleischman*, 339 U.S. 349 (1950); *Commercial Molasses Corp. v. New York Tank Barge Corp*., 314 U.S. 104 (1941); *Williams v. Administrator of Nat. Aero. & Space Admin*., 463 F.2d 1391 (C.C.P.A.1972)). Applied here, an individual could argue that a prima facie case has been made where the minimum conduct expressly covered by the statute of conviction is broader than the removal ground, and that obtaining the required evidence poses an insurmountable burden for the noncitizen, so the burden of going forward should be placed on the government, which is in much better position to obtain the evidence of prosecutions.

III. POSSIBLE RELEVANCE OF *MELLOULI V. HOLDER*

The Supreme Court granted certiorari in *Mellouli v. Holder* to decide whether a conviction under Kansas' drug paraphernalia statute is a violation of a law relating to a controlled substance as defined in 21 U.S.C. § 802 and, therefore, a deportable offense under INA § 237(a)(2)(B)(i). *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013) *cert. granted* 134 S. Ct. 2783 (Jun. 30, 2014).

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[11] *See 2011 Operations Manual ICE Performance-Based National Detention Standards*, Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf.

[12] *Id*.

[13] *See Id.*, Part 5.6 (Telephone Access), 362-363, https://www.ice.gov/doclib/detention-standards/2011/telephone_access.pdf; Part 5.1 (Correspondence and Other Mail),334, http://www.ice.gov/doclib/detention-standards/2011/correspondence_and_other_mail.pdf.

[14] *See Executive Office for Immigration Review*, *FY 2013 Statistics Yearbook*, E-1, Figure 9 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[15] *See Educational Attainment in the United States: 2009*, (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (reflecting a forty-eight percent rate of high school completion among foreign-born Hispanics).

The Eighth Circuit held that a Kansas conviction for paraphernalia (a sock) is a deportable controlled substance offense even though Kansas' controlled substance schedules are broader than the federal schedules, and the record does not mention the substance involved. The Eighth Circuit deferred to the BIA's reasoning in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009), and held that paraphernalia offenses are categorically deportable offenses because they are "associated with the drug-trade" regardless of whether each state substance is on the federal schedules. Neither the BIA nor Eighth Circuit mentioned the words "realistic probability" in their respective decisions. Under the doctrine in *S.E.C. v. Chenery, Corp*, 332 U.S. 194, 196-97 (1947), a Court should not uphold an agency decision on a basis other than that of the agency itself. Nevertheless, as a cautionary matter, Petitioner Mellouli briefed the issue to the Court. Since no one knows what the Court will do, a practitioner's best approach is to preserve all arguments.

It is possible, though, that the Court in *Mellouli* will say something indicating that a noncitizen must demonstrate examples of state prosecution of conduct even where language describing the conduct (or the substance) is in the statute. For that reason, a practitioner should anticipate the worst and try to find examples where a state prosecuted conduct not included in the generic crime definition.