

Crimmigration's Muddy Waters: The Problem With State Authority and “Divisible Statutes”

by Alicia Triche



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Determining whether a statute is divisible will often be harder than the Court acknowledges. ... The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or another. And such cases do not arise frequently.

—Justice Alito, *DesCamps v. United States*.¹

Assessing whether a state conviction renders an alien removable under the Immigration and Nationality Act² has always been a tricky endeavor. In the context of “divisibility,” recent judicial instructions have made the process even harder. Following the U.S. Supreme Court’s decision in *DesCamps*, the Board of Immigration Appeals has issued *Matter of Chairez I and II*, instructing consultation of state authority to determine which part of a statute an immigration judge must use in a removability determination.³ The *Chairez* decisions are true to *DesCamps*, but in practical application, utilizing their methodology can feel like a hunt for the Emperor’s New Clothes. Under the *Chairez* framework, immigration law requires asking questions that state law truly does not answer—at least, not very often.

A long-standing tenet of U.S. immigration law is that serious criminal activity renders an alien subject to removal. Immigration judges must therefore compare an existing state criminal record to the language of the Immigration and Nationality Act (INA), deciding if the conviction matches the category of crimes intended by Congress to trigger deportation. To avoid any requirement that immigration courts “go behind” the conviction or “re-try” the crime, reviewing courts have applied the “categorical approach,” which, according to the Supreme Court in *Moncrieffe v. Holder*, “has a long pedigree in our Nation’s immigration law.”⁴

Under the categorical approach, and in language

very familiar to removal practitioners, a court will not assess the facts of a particular conviction but instead look to the “minimum conduct” that has a “realistic probability” of being prosecuted under the statute at hand.⁵ The minimum conduct is then compared to the immigration category—such as crime of moral turpitude, crime of violence, or firearms offense—and it is determined whether the state statute fits well enough into the immigration category to trigger removability. The immigration decision thus turns not on the facts that led to the conviction but on the parameters of the particular statute involved. For example, although domestic violence is generally considered a “crime of moral turpitude” under the INA,⁶ a perpetrator of California domestic battery has not committed such a crime, regardless of what their particular plea agreement or indictment might read. This is because California has ruled that, under the statute itself, “the force used need not be violent or severe and need not cause pain or bodily harm.”⁷

When a statute is “divisible,” only part of it is considered in the minimum conduct analysis. In general, this is worse for the respondent. For example, a conviction for unlawful possession of a weapon is a deportable offense if that weapon is a firearm as defined in U.S. Criminal Code.⁸ In Texas, unlawfully carrying a weapon involves “a handgun, illegal knife, or club.” TEXAS (PENAL) CODE ANN. § 46.02(a) (Westlaw 2015). If the statute is not divisible, a respondent looks to the whole of it for minimum conduct and can easily argue that both knives and clubs do not match the federal definition of firearm at 18 U.S.C. § 921. If the statute is divisible, however, and the record establishes that the respondent pled guilty to possession of the gun, then the “modified categorical approach” allows for a comparison of the Texas definition of handgun to the federal definition of firearm, as designated by the INA. (And, by the way, they are substantially similar.)

It used to be, in many jurisdictions, that an element of a crime was also “divisible” if any of the violating

conduct was a deportable offense. For example, simple assault, which is usually not turpitudinous, would be, if the record of conviction established the respondent had battered a spouse. This method was established in *Matter of Lanferman*, where New York menacing in the second degree was upheld as a “firearms” offense because the plea colloquy proved that menacing was effected with a “revolver.”⁹ The *Lanferman* test held that a “criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but not all violations of the statute give rise to grounds for removal.”¹⁰ This approach is what the Supreme Court specifically rejected in *DesCamps*, as now acknowledged in the *Chairez* duo.

Now the approach centers on determining “elements” and comparing them. *DesCamps* held that, for an offense to match to a federal definition, it must be true that the “jury (or judge at a plea hearing) has convicted the defendant of every **element** of the generic crime.” 133 S. Ct. at 2290 (emphasis added). A divisible statute must, therefore, consist of alternative “elements,” as opposed to means, and the language of the statute is not necessarily the dispositive evidence of where the elements lie. Instead, language in a statute does not constitute an element unless “the jury must find that element, unanimously and beyond a reasonable doubt.” *Id.* Only what “the jury necessarily found” to sustain a conviction—i.e., the “elements” of the statute—are “divisible” when phrased in the alternative.

The definition of “element” is clear. The problem arises in the attempt to hunt for one, using state law. The general rule is that determining which particular conduct in a state statute requires unanimity is a question of legislative intent, as interpreted by state courts.¹¹ And, in some cases, state courts have indeed spoken directly to the issue. For example, in *Chairez I*, the Board of Immigration Appeals cited Utah precedent that allowed for a conviction under certain firearms offenses so long as all the jury members agreed that at least one of three mental states had been committed—intent, knowledge, or recklessness. 26 I&N Dec. at 354. Texas, in turn, has defined at least two offenses that are not “divisible” despite very clear subdivisions in the statute. *Gandy v. State* holds that the Texas murder statute, TEXAS (PENAL) CODE ANN. § 19.02 (Westlaw 2015), which consists of three entirely different, disjunctive subsections, defines “different manner and means of committing the same offense, not distinct and separate offenses.”¹² Likewise, *Jefferson v. State* held, tracking the statute, that “in a prosecution for injury to a child relating to a single incident, the jury did not have to be unanimous regarding the act or the omission by the defendant, i.e., whether the defendant injured the child by striking her or by failing to prevent the child’s mother from injuring her or by failing to provide proper medical care for her.”¹³

The existence of such cases is misleading. In many, if not most, instances, state law does *not* answer the question of whether the conduct described in a specific statute is meant to be an “element” or a “means.” Because state defendants do not challenge state code as a whole, jurisprudence is also often devoid of any consistent methodology for determining means versus elements under state law. The Texas weapons possession statute, referenced above, is a prime example. Citing references in state digests do not seem to contain a case on point indicating whether a jury must unanimously agree on one or more of the three listed weapons of “handgun, illegal knife, or club.” TEXAS (PENAL) CODE ANN. § 46.02(a) (Westlaw, 2015). A would-be interpreter of divisibility is instead left to guess whether a Texas court would take the approach it did under the murder and child abuse statutes, listed above, or whether it would take an approach

more like that in *Burks v. Texas*, a 1985 case in which, sitting en banc, the Court of Criminal Appeals used an approach to “elements” in a forgery offense that more or less tracked the language and subsections of the statute.¹⁴

Another informative example is state shoplifting, an offense that appears with some frequency in immigration court. In Tennessee, under TENN. CODE ANN. § 39-14-146 (Westlaw, 2015), shoplifting can be committed with or without a permanent intent to deprive and through various listed actions, including “conceal” at section (a) (1), “remove” in (a)(2), “alter” in (a)(3), or “transfer” in (a)(4).¹⁵ Digested cases do not reveal whether a jury has to be unanimous about *which* action(s) occurred. Tennessee criminal cases do sometimes discuss elements—but, similarly to Texas, no general methodology seems to have been approved; and though some cases track statutory language to find the “elements” in a common sense fashion, at least one case indicates that felony murder is a single, indivisible offense.¹⁶ As for Tennessee shoplifting, the pattern jury instructions (which are often considered informative in the divisibility context) list all the Tennessee shoplifting alternatives in brackets.¹⁷ This clearly indicates that a prosecutor must choose at least one alternative (remove, conceal, etc.)—but does it indicate that a jury must agree unanimously to each, if more than one is alleged? Often, after all, shoplifting will be charged as concealing and then removing an item, and a defendant will claim they had intention to pay.

In the apparent absence of informative case law, one approach might be to interview a state prosecutor. Dean DeCandia, assistant district attorney for Shelby County, generously took the time to discuss the Tennessee shoplifting offense for purposes of this column.¹⁸ He indicated that in Memphis criminal court, prosecutors regularly consult the pattern jury instructions to determine the format in which an indictment should be issued. In the case of shoplifting, they interpret the brackets in those instructions to indicate acts that must be charged in separate counts, each of which must be then sustained by the jury. Applied to immigration law, this amounts to “divisibility,” and the statement by the district attorney amounts to Shelby County’s (informally) verified interpretation on that issue.

DeCandia’s account of local interpretation may well be the best and most reliable authority there is regarding whether § 39-14-146 of the Tennessee Code is “divisible.” It is very likely that similar (theoretical) interviews throughout the country would be the best authority on divisibility for numerous state offenses. This reflects the reality that, in a substantial number of cases, precedential authority does not answer the questions required by *DesCamps* and *Chairez I*. The implications of this are profound for a system that handles such a vast number of criminal-based removal decisions, and the problem will need to be fixed. *Chairez I* informs us what to do when state case law is clear. What should be done, though, when case law merely gives a hint? ☺

Editor’s Note: After this article went to press, the decisions were vacated.

Endnotes

¹ 133 S. Ct. 2276, 2301-302 (2013) (Alito, J., dissenting). The author wishes to thank Dan Kesselbrenner of the National Lawyers Guild for his generous personal and national guidance regarding the modified categorical approach. Any mistakes or material omissions are entirely my own.

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206 U.S. 46, 90, 27 S. Ct. 655, 664 (1907) (stating that the 10th Amendment’s “principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—‘we, the people of the United States,’ not the people of one state, but the people of all the states; and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States.”).

⁴ *Glossip v. Gross*, 576 U.S. _____, 135 S.

Ct. 2726, 2731 (2015).

⁵ *Id.* at 2731 (quoting *In re Kemmler*, 10 S. Ct. 930 (1890)).

⁶ *Id.* at 2732 (quoting *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion)).

⁷ *Id.* at 2735.

⁸ *Id.*

⁹ *Id.* at 2733.

¹⁰ *Id.*

¹¹ See *Warner v. Gross*, 776 F.3d 721, 727 (10th Cir. 2015).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 728 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008)).

¹⁵ *Id.* at 724.

¹⁶ See *Glossip*, 135 S. Ct. 2737.

¹⁷ See *Baze v. Rees*, 128 S. Ct. 1520 (2008).

¹⁸ See *Glossip*, 135 S. Ct. 2737.

¹⁹ See *Farmer v. Brennan*, 114 S. Ct. 1970, n. 9 (1994).

²⁰ See *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion).

²¹ See *Glossip*, 135 S. Ct. 2738.

²² *Id.*

²³ *Id.* at 2731 (citing *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion)).

²⁴ *Id.* at 2731.

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² 8 U.S.C. §§1101 *et seq.* [INA]. Under the INA, “removal” is the legal term for deportation of noncitizens. See INA § 240(a)(1) (“An immigration judge shall conduct [removal] proceedings for deciding the inadmissibility or deportability of an alien.”) (WESTLAW 2015).

³ *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014) [*Chairez I*]; *modified in part*, 26 I&N Dec. 478 (BIA 2015) [*Chairez II*].

⁴ *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011)); see also *Matter of Lanferman*, 25 I&N Dec. 721, 723 (BIA 2012), *withdrawn on other grounds*, 26 I&N Dec. 349 (BIA 2014) (“The principal purpose served by the categorical approach is to limit the inquiry to what crime the offender was necessarily convicted of . . . and, thus, to avoid ad-hoc mini trials on whether an offender’s conduct was more or less culpable than what his actual conviction required.”) Former FBA ILS Chair H. Raymond Fasano wrote an introduction to the categorical approach in our 2014

Immigration Law issue. 61[8] THE FEDERAL LAWYER 47 (Oct./Nov. 2014).

⁵ *Moncrieffe*, 133 S. Ct. at 1685-86; see also *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 822 (2007) (“To show that realistic probability, an offender . . . must at least point to his own case or other cases in which the state courts in fact did apply the statute” in the manner for which he argues.).

⁶ INA §§ 212(a)(2)(A)(i)(I); 237(a)(2)(A)(i).

⁷ *Matter of Sanudo*, 23 I&N Dec. 968, 969 (BIA 2006) (assessing CAL. PEN. CODE §§ 242, 243(e)(1)) (other citations omitted).

⁸ INA § 237(a)(2)(C).

⁹ 25 I&N Dec. at 730.

¹⁰ *Id.* at 721.

¹¹ Amicus Br. for Pet’r, American Immigration Law Association and National Immigration Project of the National Lawyers Guild, *Cardenas Garcia v. Holder*, No. 14-606920 (5th Cir. 2015), AILA Doc. No. 15043008 (Apr. 30, 2015), 18, (citing *Schad v. Arizona*, 111 S. Ct. 2491, 2499 (1991)).

¹² 222 S.W.3d at 529 (citing *Aguire v. State*, 732 S.W.2d 320, 325-26 (Tex. Crim. App. 1982)).

¹³ 189 S.W.3d 305 (Tex. Crim. App. 2006).

¹⁴ *Burks v. State*, 693 S.W.2d 932, 936 (Tex. 1985).

¹⁵ “Deprive” is defined at T.C.A. § 39-11-106(a)(8).

¹⁶ See, e.g., *State v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000) (listing elements of aggravated assault under T.C.A. § 39-13-102); *State v. LeMacks*, 996 S.W.2d 166 (Tenn. 1999) (criminal responsibility is not an additional “element” in a DUI offense); *Carter v. State*, 958 S.W.2d 620, 624 (Tenn. 1997) (addressing jury requirements for first degree murder finding).

¹⁷ Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 11.17 (WESTLAW 2015).

¹⁸ Telephonic interview with Dean DeCandia, Sept. 18, 2015 (notes on file with author).