The Latest Developments in Crimmigration Law

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CIMT Challenges: Topics

A. Status of categorical analysis after *Matter of Silva-Trevino*, 24 I.&N. Dec. 687 (AG 2008) & related litigation

B. Arguments and strategies to challenge *Silva-Trevino* on categorical analysis

C. Definition of "turpitude" after *Silva-Trevino* & progeny

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A. Categorical Analysis of CIMT

- Categorical analysis of immigration consequences of offenses first arose in the context of CIMTs
  - See, *e.g.*, *United States ex rel Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914).
- Virtually every circuit had adopted/ratified it
  - See, *e.g.*, *Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010); *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 n.4 (8th Cir. 2006); *Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006); *Partyka v. Att'y Gen.*, 417 F.3d 408 (3d Cir. 2005); *Padilla v. Gonzales*, 397 F.3d 1016, 1019 (7th Cir. 2005); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999); *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976).
- *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) radically altered this framework

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Silva-Trevino Methodology – 3 Steps

- 1st Step => Apply **categorical approach**.
  - If statute overbroad, go to second step.
    - "realistic possibility" that the statute reaches non-CIMT conduct (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183(2007))
- 2nd Step => **modified categorical approach**
  - If record does not conclusively show client necessarily admitted to (or found guilty of) a CIMT, go to third step.
- 3rd Step => IJ may consider **any evidence** he or she deems "necessary and appropriate" to resolve the turpitude inquiry.

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Methodology
Step 3 – Any Evidence (?!)

- When it is "necessary and appropriate" to look at evidence outside the ROC?
  - If cannot figure from step 1 and 2 analysis that client was *necessarily convicted* of a CIMT.
  - *Ahortalejo-Guzman,* 25 I & N 465, 469 (BIA 2011)(only apply step 3 if ROC doesn't conclusively show whether convicted of CIMT).

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What *Silva-Trevino* is NOT

- …not an invitation to re-litigate criminal case.
- …not broadly applied: only applicable to figuring out if offense is a CIMT.
- …not a wholesale departure from the categorical approach.

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Silva-Trevino Rejected

3d Circuit
Jean-Louis v. Att'y Gen., 582 F.3d 462 (3d Cir. 2009)

4th Circuit
Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012)

8th Circuit
Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010)

11th Circuit
Fajardo v. US AG, 659 F.3rd 1303 (11th Cir. 2011)

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Silva-Trevino Upheld

7th Circuit
Mata-Guerrero v. Holder, 627 F.3d 256 (7th Cir. 2010) (deferring to *Silva-Trevino*); *see also Ali v. Mukasey*, 521 F. 3d 737 (7th Cir. 2008) (allowing resort to extra-ROC evidence prior to *Silva-Trevino*, citing *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007)).

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Undecided

1st Circuit
Da Silva Neto v. Holder, No. 11-1847, ___ F.3d ___, 2012 WL 1648909 (1st Cir. May 10, 2012) (declining to reach the question).

2d Circuit
Ahmed v. Holder, 324 F. App'x 82, 84 (2d Cir. Apr. 28, 2009) (applying "the modified categorical approach applicable in this Circuit" without discussion).

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Undecided

6th Circuit

Kellermann v. Holder, 592 F.3d 700 (6th Cir. 2010) (applying the modified categorical approach and noting 3d Cir. disagreement with *Silva-Trevino* without discussion).

9th Circuit

Hernandez-Cruz v. Holder, 651 F.3d 1094 (9th Cir. 2011) (expressly reserving question). *Cf. United States v. Aguila-Montes de Oca,* 655 F.3d 915 (9th Cir. 2011) (en banc) (altering categorical test).

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Undecided

10th Circuit

Efagene v. Holder, 642 F.3d 918 (10th Cir. 2011) (declining to reach question).

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Cases Pending

5th Circuit

Silva-Trevino v. Holder, No. 11-60464 (lead case).

9th Circuit

Olivas-Motta v. Holder, No. 10-72459 (argued Sept. 2011)

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Status of *S-T-* Framework: BIA

- In *Matter of Guevara-Alfaro*, 25 I.&.N. Dec. 417 (BIA 2011), BIA instructed IJs to apply *S-T-* 3-step framework "absent otherwise controlling authority"
  - BIA noted that the relevant circuit (9th) "has not expressly rejected" *S-T-*
  - DHS will argue that IJs must follow *S-T-* in circuits that have contrary pre-*S-T-* law but have not yet "expressly rejected" it.

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What is "Controlling Authority"?

- *NC&TA v. Brand X Internet Servs.*, 545 U.S. 927 (2005): Court must defer under *Chevron* when agency interprets ambiguous law in conflict with an earlier court interpretation
- Notably, BIA did *not* invoke *Brand X* in this section of *Guevara-Alfaro*
- Argue that *pre-Silva cases* still control IJs in silent circuits b/c statute *un*ambiguously requires categorical approach to CIMTs
  - "The ambiguity that the [AG] perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century." *Jean-Louis*, 582 F.3d at 473.

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B. Arguments and Strategies

1. Preserve the argument that step 3 of *S-T-* is a misinterpretation of unambiguous terms of INA.
   a. Term "convicted" requires categorical inquiry. See *Jean-Louis*, 582 F.3d at 473-77.
      - Only exception is where statute requires further factual inquiry through use of qualifying phrase, *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

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B. Arguments and Strategies

1. Preserve the argument that step 3 of *S-T-* is a misinterpretation of unambiguous terms of INA, cont'd
   b. Term "involving" does not invite inquiry into specific facts.
      - *Nijhawan* 129 S. Ct. at 2298 (2009) ("involving fraud or deceit")
      - *James v. US*, 550 U.S. 192, 202-04 (2007) ("involves conduct that presents a serious potential risk of physical injury to another")

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B. Arguments and Strategies

1. Preserve the argument that step 3 of S-T- is a misinterpretation of unambiguous terms of INA, cont'd.
   c. Turpitude is not commonly an element of criminal offenses: red herring
      - "CIMT" is unitary term of art describing a class of crimes
      - "risk that physical force . . . may be used" is not an element of most "crimes of violence" either, but that analysis is purely elements-based. E.g. Brooks v. Holder, 621 F.3d 88 (2d Cir. 2010).

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B Arguments and Strategies

2. Preserve the argument that S-T- cannot be applied retroactively to pre-S-T- convictions under "Retail/Wholesale" test for adjudicative retroactivity:
   1) whether the issue as presented is one of first impression
   2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area
   3) the extent to which the party against whom the rule is applied relied on the former rule,
   4) the degree of the burden which a retroactive order imposes on a party, and
   5) the statutory interest in applying a new rule despite reliance of a party on the old standard

   Retail, Wholesale and Dept. Store Union, AFL-CIO v. N. L. R. B., 466 F.2d 380 (D.C. Cir. 1972).

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B. Arguments and Strategies

3. Challenge "realistic probability" requirement as inapplicable to CIMTs at Silva step 1
   - See *Jean-Louis*, 582 F.3d at 481-82; *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008), rev'd on other grounds, *Marmolejo-Campo v. Holder*, 558 F.3d 903 (9th Cir. 2009).
4. "You want a trial? Let's have a trial!"
   - Preserve fairness arguments by demanding full discovery, subpoenas of records and witnesses, and exclusion of hearsay or otherwise inadmissible evidence, consistent with what would have happened (but did not) in criminal court

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B. Arguments and Strategies

5. Argue to that the A.G. is not owed Chevron deference on the method of interpreting a state or federal criminal statute (Chevron "step zero")
   - See, *e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) ("The BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes and, thus, has no special administrative competence to interpret the petitioner's statute of conviction")

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B. Arguments and Strategies

6. Argue that the flawed process behind the issuance of Silva-Trevino lessens any deference that would otherwise be due
   - See *Jean-Louis*, 582 F.3d at 470 n.11 (finding that the "lack of transparency, coupled with the absence of input by interested stakeholders, . . . serves to dissuade us . . . from deferring to the Attorney General's novel approach")

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CIMT Definition: Traditionally

(1) Moral turpitude generally refers to **inherently base, vile, or depraved** conduct that is **contrary to the accepted rules of morality and the duties owed between persons or to society in general**. *Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988).

(2) Where crimes not of the gravest character, **fraud** has been the touchstone in determining CIMTs. *Jordan v. De George,* 341 U.S. 223 (1951).

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The Definition of "Turpitude" After *Silva-Trevino*

- In Silva-Trevino, the AG "rearticulates" the definition of a CIMT:
  - "[T]o qualify as a [CIMT] . . . A crime must involve both reprehensible conduct and some form of scienter, whether specific intent, deliberateness, willfulness, or recklessness." 24 I.&N. Dec. at 689 n.1.

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Paraphrase or New Definition?

- Some subsequent BIA decisions rely on this language to reach results arguably inconsistent with pre-*Silva* case law.
- *Matter of Louissaint*, 24 I.&.N. Dec. 754 (BIA 2009)
  - Fla. burglary of dwelling = CIMT because intentional and reprehensible
  - Contra *Matter of M-*, 2 I.&N. Dec. 721 (AG 1946); *Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2008) (deferring to M-)
  - Cites *Silva* as "intervening law," 24 I.&N. Dec. at 759.

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Paraphrase or New Definition

- Matter of Ruiz-Lopez, 25 I.&N. Dec. 551 (BIA 2011):
  - Wash. high-speed flight involving wanton/willful disregard of damage to lives or property of others = CIMT
  - rejects prior decisions holding reckless mens rea requires actual injury or other aggravator to be CIMT, *e.g. Fualaau*, 21 I.&N. Dec. 475 (1996)
  - arguably contra *Solon*, 24 I. & N. Dec. 239 (BIA 2007): "[A]s the level of conscious behavior decreases from intentional to reckless conduct, more serious resulting harm is required" for CIMT

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Paraphrase or New Definition?

- Argue that S-T- does not require re-examination of favorable agency law or circuit cases built on that body of law
  - "The foregoing general definition . . . encompasses and describes existing Board precedents classifying many different crimes . . . ." *Id.* at 706 n.5.
  - "I believe definition in existing Board precedent merits judicial deference" under *Brand X* and *Chevron*. *Id.* at 689 n.1.
  - *Cf. Mata-Guerrero v. Holder*, 639 F.3d 276 (7th Cir. 2011) (gov't motion to "clarify" that pre-*Silva Trevino* decisions on scope of "turpitude" "may be entitled to deference or respect")

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Paraphrase or New Definition?

- Argue that to that extent *S-T-* announces a new definition, it is too vague to merit deference
  - See, *e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 910 (9th Cir. 2009) ("[B]ecause the Board's general definition of 'moral turpitude' fails to particularize the term in any meaningful way, giving Chevron deference ... has no practical significance.").

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Other Practice Tips

- Get involved early in the criminal case to direct what is in the ROC -- sanitize or make one fact clear?
- Can you amend ROC after the fact?
- Figure out how your state defines particular states of mind: pull jury instructions, research state criminal cases
- Don't make the government's case: specifically identify purpose for which evidence offered & pre-emptively object to gov't using.

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Matter of M-W-, 25 I&N Dec. 748 (BIA 2012) (April 9, 2012)

A. BIA expands generic definition of murder for aggravated felony under INA §101(a)(43)(A) even where there is no intent to kill.
B. BIA found that generic definition for murder includes those committed where extreme recklessness was present despite the lack of intent to kill. *M-W-* at 754.

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Addresses Michigan §750.317, Second Degree Murder

- All murders in Michigan require "malice aforethought", which is defined as:
  - The intent to kill
  - The intent to cause great bodily harm
  - The intent to do an act in a wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.

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Under *M-W-*, BIA Generic Definition of Murder Is:

A. Taking of a life with malice aforethought
B. Includes extreme recklessness even where recklessness is result of voluntary intoxication
C. No intent to kill required.

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Supreme Court Modifies Generic Definition of Fraud Under INA §101(a)(43)(M)

- The BIA had defined fraud or deceit as an offense that had fraud or deceit as an element of the offense. *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007).
- In *Kawashima v. Holder*, 132 S.Ct. 1166 (2012), the Supreme Court determined that an offense may "involve fraud or deceit," the statutory language, even if fraud or deceit is not an element of the offense.

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"Involves" Broadens Description that Follows

- In *Kawashima*, the Court made the generic definition less clear than it had been under *Babaisakov*. Under the new test, "offenses with elements necessarily entailing fraudulent or deceitful conduct."
  - *Kawashima*, 132 S.Ct at 1172

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Divisible Offenses 2012 - BIA

- Many statutes contain multiple discrete offenses, some of which satisfy a ground of deportability while others do not. This includes statutes:
  - that are broken up into subsections
  - that use disjunctive phrasing (intentional or negligent
  - capable of being committed in a way that violates ground of deportability and other that does not

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Matter of Lanferman, 25 I&N Dec. 721 (BIA 2012)

- Case clarifies administrative view of when a factfinder will use modified categorical approach.
- Holding: 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 or ineligibility for relief. *Id.* at 724.

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Lanferman Continued: Test Still Tied to Elements

- Although under new test, factfinder can consider conduct, the test is still tied to the elements.
- The first step in the categorical approach remains whether the offense always or never satisfies the ground of deportability.

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Categorical v. Modified

- A crime with a negligent mental state is an example of an offense where a factfinder should not use the modified approach to reach deportability based on a crime of violence or moral turpitude because the mental state is too low.

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Government's Burden

- The government has the burden of proving that a respondent is deportable by "clear and convincing evidence."
  - 8 USC 1229a(c)(3)
- If the record is not clear, then the government cannot establish that a noncitizen is deportable.
  - See, *e.g., Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965)

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Firearms

- Firearm deportability ground is codified at 8 USC §1227(a)(2)(C).
- The firearm ground explicitly refers to 18 USC §921(a) for the definition of firearm
- 18 USC §921(a)(3) excludes an antique firearm from the controlling definition
- Under federal law government doesn't have to prove that it wasn't an antique firearm unless defendant offers some evidence that it was.

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California Example

- A defendant can be convicted of carrying a concealed weapon under California Penal Code §25400(a) if the defendant possess an antique firearm.

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Burden Shifting

- The BIA puts burden on respondent to demonstrate that offense involved an antique. *Matter of Mendez-Orellana*, 25 I&N Dec. 254, 256 (BIA 2010). BIA reasons that government doesn't have burden to prove that it is not an antique in a federal trial means that the DHS should not have burden in a removal case. Ninth Circuit agrees. *Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011).

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Controlled Substances

- For an unnamed controlled substance offense, the government still bears the burden of proving that it was a federally listed controlled substance. Keeping the name of the substance out of the record has worked so far especially if the state offense includes controlled substances that aren't federally controlled.
  - *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965)

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Distribution of Marijuana Without Renumeration

- A misdemeanor violation of federal drug laws is not an aggravated felony.
- Under 21 USC 841(b)(1)(D), a person commits a felony if offense involves less than 50 kg of marijuana except as provided in paragraph 4.
- Under paragraph 4, federal law treats distributing a small amount of marijuana for no remuneration as a misdemeanor.
  - 21 USC 841(b)(4)

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Circuits Split

- *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *certiorari granted* --- S.Ct. ---, 2012 WL 1069211 (Apr. 2 2012) (holding not part of government's burden); *Garcia v. Holder*, 638 F.3d 511 (6th Cir.2011) (same); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir.2008) (same); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir.2008) (requiring government to prove that conviction was a felony); *Jeune v. Attorney General*, 476 F.3d 199 (3d Cir.2007) (same).

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BIA View

- BIA again says that where defendant in federal court bears burden, it will not require government to bear burden in removal proceedings even though government bears burden of proving that defendant convicted of an aggravated felony to establish deportability. *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012) (putting burden on respondent, but permitting testimony or other evidence).

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Constructing a Non-Deportable Conviction

- If a state statute is subject to modified categorical approach (divisible), the safest approach is to allocute affirmatively to a non-deportable violation of the statute.
  - *Matter of Ahortalejo-Guzman*, 25 I. & N. Dec. 465 (BIA 2011)

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Duenas Quote

"[T]o 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 falling outside the generic definition To make that showing, 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 special (nongeneric) manner for which he argues."

- *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

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BIA Adopts Test Generally

- In *Matter of Lanferman*, 25 I&N Dec. 721, 723 (BIA 2012), BIA adding "realistic probability" test to all grounds of deportability.

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Example

- Statute: Unlawful possession of a gun or gravity knife
- Definition of gun is coextensive with federal definition at 18 U.S.C. § 921(a)
- Indictment: defendant unlawfully possessed a gun or gravity knife at 3333 Quebec Street, Denver, Colorado

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Dangerous Weapon Example Analysis

- Not clear whether weapon was a gun (deportable) or gravity knife (non-deportable)
- Traditionally divisible
- Before determining that offense is divisible, immigration judge will ask respondent for evidence that anyone has been prosecuted for something other than a gun

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Realistic Possibility, cont'd

- If there is any other example of a prosecution for a gravity knife, respondent wins
- Best course of action, plead affirmatively to gravity knife. *Matter of Ahortalejo*-Guzman, 25 I. & N. Dec. 465 (BIA 2011)
- Assuming can't plead to knife, respondent will need help to show that there is a realistic possibility that Colorado is prosecuting gravity knife possession.

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U.S. v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (*en banc*)

- "Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' 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."

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Questions & Answers

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