PRACTICE ALERT[1]:
Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020)

August 24, 2020

On July 30, 2020, the Attorney General (AG) issued *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020), where he endorsed a novel theory of removability. Under the AG's opinion, DHS can now establish removability by charging an individual with two separate aggravated felony grounds of removal, neither of which would independently be a categorical match to the statute of conviction, so long as all means of violating the statute fall within at least one of the charged grounds. Specifically, the decision addresses this new method of establishing removability in the context of the overlap between aggravated felony fraud and aggravated felony theft. The case involved a longtime lawful permanent resident with a single conviction for violating a larceny statute that criminalizes both theft and fraud, and is indivisible as between these means of commission. She had been sentenced to over one year in prison and there was an established loss amount of greater than $10,000.

This practice alert provides a summary of the decision and potential practice tips for both immigration practitioners and criminal defense attorneys.

SUMMARY OF PRACTICE TIPS

- The holding in *Reyes* should *only* apply to indivisible statutes where each of the means of commission matches one aggravated felony ground or another *and* the threshold sentencing or loss amount prerequisites for each aggravated felony ground are met.
- Advocates should preserve the argument that the categorical approach requires a one-to-one categorical match between the statue of conviction and a specific aggravated felony.
- The AG's interpretations of the aggravated felony statute or of any aspect of the categorical approach methodology deserve no judicial deference.

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- Advocates should invoke the doctrine of claim preclusion to contest any attempt by DHS to file a new NTA or reopen a case to bring an alternative aggravated felony based on Reyes.
- Despite the AG's adverse conclusion, there are valid reasons to assert that the holding in Reyes may not be applied retroactively to convictions that were entered before July 30, 2020.
- Criminal defense practitioners should avoid a conviction under a statute similar to New York's grand larceny statute (e.g., Cal. P.C. § 487) where the sentence imposed will be one year or more and the loss amount is more than $10,000. Common strategies for avoiding an aggravated felony conviction under these circumstances include negotiating a disposition under a different statute, a sentence of 364 days or less, or plea language that affirmative establishes a loss amount of less than $10,000 and untethers any additional amount from the count of conviction.
- In all criminal cases of noncitizens (even those that do not involve fraud or theft offenses), defense counsel must remember to consider all grounds of removability and not just those that appear most likely to correspond. *Reyes* serves as an important reminder that the federal government can be aggressive in charging removability by using multiple removability provisions against a single conviction.

I. SUMMARY OF DECISION

A. Factual and procedural background

In 2014, forty-two years after Ms. Reyes became a lawful permanent resident (LPR), she pled guilty to grand larceny in the second degree under New York Penal Law (N.Y.P.L.) § 155.40(1), a statute criminalizing both nonconsensual takings (theft) and consensual takings (fraud). She was sentenced to one to three years in prison and the established loss amount to the complaining witnesses in her case was greater than $50,000.

From the onset of immigration proceedings in 2015, DHS wavered on how to address Ms. Reyes' conviction. DHS initially charged her with removability for having been convicted of an aggravated felony theft offense under sections 237(a)(2)(A)(iii) and 101(a)(43)(G) of the Immigration and Nationality Act (INA). *Reyes*, 28 I&N Dec. at 56. DHS subsequently changed its theory of removability, charging her for an aggravated felony fraud offense instead under INA § 101(a)(43)(M)(i). *Id*. Finally, DHS amended the notice to appear (NTA) to include both charges. *Id.* Ms. Reyes filed a motion to terminate arguing that her conviction is neither an aggravated felony theft offense nor an aggravated felony fraud offense under the categorical approach. *Id*.

The question of whether a conviction is for an aggravated felony is governed by the categorical approach, where the immigration adjudicator compares the elements of the statute of conviction against the generic definition of the removability provision.[2]

An aggravated felony theft offense requires "the taking of, or exercise of control over, property *without consent*." *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008) (emphasis added). An aggravated felony fraud offense entails a taking "*with consent* that has been fraudulently obtained." *Id*. (emphasis added). These are the generic definitions of theft and fraud aggravated felonies. *See Descamps v. United States*, 570 U.S. 254, 261 (2013). Ms. Reyes argued that her statute of conviction is not a categorical match to either fraud or theft because it criminalizes takings with and without consent and is thus broader than both fraud and theft.[3] The immigration judge(IJ) granted Ms. Reyes' motion, terminating proceedings. *See Reyes*, 28 I&N Dec. at 56.

DHS appealed the IJ's decision to the Board of Immigration Appeals (BIA), but the BIA affirmed the IJ in an unpublished decision. *See Reyes*, 28 I&N Dec. at 57. In its decision, the BIA assumed—without deciding the issue—that all the means of violating the New York statute satisfy either the generic definitions of fraud or theft. *Id. See also Mathis v. United States*, 136 S. Ct. 2243, 2246 (2016). The BIA found, however, because the statute criminalizes a taking with fraudulently obtained consent, it is not a categorical match to theft. *Id.* Similarly, since the statute reached takings without consent, it is also broader than the definition of fraud. *Id.*

On November 21, 2019, the AG certified the case to himself for review. *Matter of Reyes*, 27 I&N Dec. 708 (A.G. 2019). He issued a request for amicus briefs to address the question of "whether a[] [non-citizen] who has been convicted of a criminal offense necessarily has been convicted of an aggravated felony for purposes of 8 U.S.C. §1227(a)(2)(A)(iii), where all of the elements of the underlying statute of conviction, and thus all of the means of committing the offense, correspond either to an aggravated felony theft offense, as defined in 8 U.S.C. §1101(a)(43)(G), or to an aggravated felony fraud offense, as defined in 8 U.S.C. §1101(a)(43)(M)(i)." *Id.*

B. Holdings

The AG vacated the BIA decision and adopted DHS's theory of removability that does not require a categorical match between a statute of conviction and a particular aggravated felony where the statute of conviction is similar to the larceny statute in *Reyes*. After criticizing the longstanding categorical approach in dicta, the decision reaches three primary holdings. First, that even when a statute is not a categorical match to a particular aggravated felony offense, a conviction is still an aggravated felony if every means of violating the statute fall within multiple aggravated felony offenses. Second, that every means of committing N.Y.P.L. § 155.40(1) falls under either aggravated felony fraud or theft and the statute therefore constitutes an aggravated felony. Third, this new theory of removability can apply retroactively in her case.

[2] *See* Kathy Brady, ILRC, How to Use the Categorical Approach Now (Dec. 2019), https://bit.ly/34fxJ1m.

[3] For more information about the New York statute *see infra* Section I.B.3.

1. *Dicta Criticizing the Categorical Approach*

Before addressing the merits of the case, the AG dedicates a section to explicitly criticizing the categorical approach, commenting that it is "wooden" and "lead[s] to bizarre results" that "seem random or disconnected from reality" and "can undermine the rule of law." *Reyes*, 28 I&N Dec. at 58-59.

This language is merely dicta and cannot be relied on by DHS or any immigration adjudicator to veer away from the required strict application of the categorical approach. The AG himself admits that the "Supreme Court has spoken" on the issue. *Id*. at 59. The Court has ordered application of the categorical approach because of the "constitutional, statutory, and equitable" rights and interests it protects. *Mathis*, 136 S. Ct. at 2256. Moreover, the Court has already rejected the AG's arguments in a long line of cases that have repeatedly reversed Circuit Court and BIA decisions that have attempted to side-step the categorical approach. *See*, *e.g*. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2016). In fact, contrary to the AG's assertions, the Supreme Court has specifically endorsed the categorical approach because it is a uniquely suitable and administrable method of fairly and predictably assigning immigration consequences to convictions. *See Moncrieffe v. Holder*, 569 U.S. 184, 200-03 (2013) (describing why the categorical approach is useful, for example as it "serves 'practical' purposes: It promotes judicial and administrative efficiency.").

2. *Novel Theory of Removability: Using Two Separate Aggravated Felony Provisions to Render a Conviction an Aggravated Felony.*

The AG's primary holding is that "when all means of committing the offense of a conviction satisfy one or the other of two alternative aggravated felonies" the conviction "is necessarily supported by one or the other, even if the categorical approach obscures which one." *Reyes*, 28 I&N Dec. at 62. For such statutes of conviction, a categorical match with a charged removal offense is not required. In fact, an individual may be removed without knowing *which* aggravated felony they have been convicted of, so long as every means of violating the statute falls within multiple aggravated felony offenses.

To reach this conclusion, the AG relied primarily on a single Ninth Circuit decision, *United States v. Becerril-Lopez,* 541 F.3d 881 (9th Cir. 2008), which has since been superseded by statute. *Id* at 59-61. That case addressed the categorical approach in the context of prior federal Sentencing Guidelines, which have since been modified. Note that the decision in *Becerril-Lopez* substantially precedes the Supreme Court's decisions in *Moncrieffe* and *Descamps*, which overruled much prior federal court precedent on application of the categorical approach. In *Becerril-Lopez*, the Ninth Circuit held that a California conviction satisfies the definition of a "crime of violence" under the Sentencing Guidelines because it was *either* "robbery" or "extortion."[4] In other words, any conduct criminalized by the California conviction that did not match robbery, fell under the definition of extortion and vice versa. *Id.* at 60. No other circuit court case or Board decision has adopted this method of applying the categorical approach.

[4] At the time, the definition of a crime of violence under the sentencing guidelines included both robbery and extortion.

Additionally, the AG suggested that the structure of the INA supports his view. *Id.* at 62. Pointing to the fact that there is an overlap within the definitions of various aggravated felonies, he asserted that "Congress evidently sought to capture more offenses." *Id*. It is unclear why this necessarily supports his conclusion. He further asserted that "what matters is that a serious crime necessarily falls within the definition somewhere, not whether it falls within one particular prong or another." *Id*.

3. *N.Y. Penal Law § 155.40(1): Removable Offense Because All Conduct Covered Is Either Aggravated Felony Fraud or Aggravated Felony Theft*

Applying this theory to Ms. Reyes, the AG concluded that the New York larceny conviction in question is an aggravated felony because, the AG found, every means of committing the statute falls under either the definition of fraud or theft. *Id.* at 63-65.

Under N.Y.P.L. § 155.40(1), a person is guilty "when he steals property and when…the value of the property exceeds fifty thousand dollars." In New York, "a person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." N.Y.P.L. § 155.05(2). The statute lays out five ways of committing larceny:[5]

> (a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;
> (b) By acquiring lost property . . . . ;
> (c) By committing the crime of issuing a bad check . . . ;
> (d) By false promise . . . . ;
> (e) By extortion.

N.Y.P.L. § 155.05(2).

DHS argued that all of these listed means of committing larceny are either generic theft or generic fraud: that trespassory taking, acquiring lost property, and extortion are a match to aggravated felony-theft and that every other means listed is a match with aggravated-felony fraud. *Id*. at 63. Ms. Reyes argued that committing larceny by acquiring lost property is neither theft nor fraud because it does not necessarily involve a taking with or without consent. *Id*. at 64.

The AG rejected this argument, holding that New York's definition of 'larceny by acquiring lost property' matches aggravated felony theft. *Id*. Consequently, the AG concluded, "[b]ecause larceny by acquiring lost property constitutes aggravated-felony theft, and because there is no dispute that the other means of violating New York Penal Law § 155.40(1) correspond to either

[5] All parties agree that under *Mathis* and New York authority establishing the elements of larceny offenses, the statute is indivisible and these are merely means of committing the same offense. *See Reyes*, 28 I&N Dec. at 63 n.4; *see also* N.Y.P.L. § 155.45 (stating that prosecution need not allege method of committing larceny except in cases of extortion).

aggravated-felony theft or aggravated-felony fraud…, conviction under the statute is for an aggravated felony." *Id*. at 65.

4. *Decision Applies Retroactively to Ms. Reyes*

Finally, the AG rejected Ms. Reyes' argument that even if her conviction were an aggravated felony, established retroactivity principles prohibit the agency from applying this new method of conducting the categorical approach to her case. Ms. Reyes relied on *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018), the Second Circuit's most recent decision holding that the permissibility of applying a new agency decision retroactively depends on a five-factor test sanctioned by the Supreme Court and adopted by a majority of Courts of Appeals.[6] In determining whether a new agency standard established through adjudication may be applied retroactively, the test requires courts to consider (1) whether the case is one of first impression; (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden which a retroactive order places on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Obeya*, 884 F.3d at 445 (citing *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015)).

Without explicitly considering the five-factor test *Obeya* requires, the AG rejected Ms. Reyes' argument on three grounds. *See Reyes*, 28 I&N Dec. at 65. First, the AG asserted that "there is no retroactivity problem here" as "this opinion does not announce a 'new' rule, because I have not departed from settled precedent or practice." *Id.* He noted that the lack of precedent addressing this issue does not indicate that the law has been settled. *Id*. at 66. Second, citing to a Seventh Circuit case, he asserted "a well-recognized 'exception' to the anti-retroactivity principle for a litigant whose case gives rise to a new legal interpretation, because that person had an opportunity to present argument to the agency and ran the risk that the agency would use his case to announce the new understanding." *Id*. Third, the AG maintained that Ms. Reyes could not have relied on the old rule when she pled guilty because she "does not explain what authorities would have reasonably supported her understanding" and that she "acknowledged during her plea colloquy that she had consulted with an immigration attorney and understood that a guilty plea could lead to her removal." *Id.*

II. NOTES FOR PRACTITIONERS

A. For Immigration Practitioners:

- **By its own terms, *Reyes* applies only where "*all* of the means of committing the offense" amount to either one aggravated felony ground or another.** The AG's conclusion is premised on the determination that every method of committing the larceny offense at issue fell within either the theft aggravated felony category *or* the fraud

[6] For a complete discussion on *Obeya v. Sessions* and adjudicative retroactivity, *see* Andrew Wachtenheim, IDP, *Practice Advisory: Litigating CIMT Theft Removal Charges and Adjudicative Retroactivity in the Second Circuit After Obeya v. Sessions* (April 2018), https://bit.ly/3fYUJnm.

aggravated category. *See* 28 I&N Dec. at 63-64. The AG specifically rejected the respondent's argument that one of the means of committing larceny—acquiring lost property, N.Y.P.L. § 155.05(2)—constitutes neither aggravated felony ground. 28 I&N Dec. at 64-65. That analysis makes clear that a conviction cannot constitute an aggravated felony if any means of committing the offense does not categorically match an aggravated felony ground. *See id.* at 65 ("*Because* larceny by acquiring lost property constitutes aggravated-felony theft, *and because* there is no dispute that the other means of violating New York Penal Law § 155.40(1) correspond to either aggravated-felony theft or aggravated-felony fraud, I conclude that the respondent's conviction under the statute is for an aggravated felony." (emphasis added)). The AG also noted that the conviction met *both* the term-of-imprisonment requirement for a theft aggravated felony, INA § 101(a)(43)(G), and the $10,000-loss amount requirement for a fraud aggravated felony, *id.* § 101(a)(43)(M)(i). *Id.* at 57 n.2.

Therefore, *Reyes* should *only* apply to (1) indivisible statutes where (2) each of the means of commission matches one aggravated felony ground or another and (3) the threshold sentencing or loss amount prerequisites for each aggravated felony ground are met. The decision does **not** hold that any overbroad conviction constitutes an aggravated felony so long as the elements that fall outside the scope of one aggravated felony provision match another aggravated felony definition—i.e., the government cannot simply mix and match the elements of various aggravated felony grounds to overcome a categorical mismatch. For example, had Ms. Reyes been sentenced to 364 days imprisonment, rather than one to three years, her conviction could not be an aggravated felony because a required element of a theft aggravated felony—a sentence of one year or more—would have been missing.

Practitioners should thus carefully analyze all of the means of commission for any statute of conviction. In particular, one might wish to preserve the argument raised by Ms. Reyes that a larceny offense which covers appropriations of property is overbroad as such an offense may not require exercise of control over the property of another with intent to deprive the owner of the rights and benefits of ownership, and therefore does not necessarily constitute a theft aggravated felony. *Cf. Obeya*, 884 F.3d at 449, 450 (noting the BIA's acknowledgment in the context of a crime involving moral turpitude determination that the New York larceny statute's definition of appropriation of property by its "plain language . . . does not require a showing that a permanent deprivation or substantial erosion of property rights was intended").

- **Preserve the argument that the categorical approach requires a one-to-one categorical match between the statue of conviction and a specific aggravated felony.** Practitioners should argue that the AG's analysis misunderstands the categorical approach. It is well established that the analysis looks to whether a statute of conviction "categorically fits within the 'generic' categorical approach federal definition" of a corresponding ground of removal. *Moncrieffe*, 569 U.S. at 191 (citation omitted). Thus, the adjudicator must necessarily begin by identifying the specific generic offense implicated by the statute of conviction. In every Supreme Court case applying the categorical approach, the Court has first defined a single generic offense, then conducted

a one-to-one comparison against the statute of conviction.[7] In cases involving statutes of conviction that seem to implicate more than one generic definition of an aggravated felony, the BIA has differentiated between the generic offenses and applied a one-to-one comparison between the statute of conviction and a single generic offense.[8] Additionally, the Third Circuit recently held that a conviction must "be compared to *the most similar federal analog*" for purposes of the categorical approach.[9] *Rosa v. Att'y Gen. United States*, 950 F.3d 67, 76 (3d Cir. 2020) (emphasis added) (relying on longstanding federal practice and congressional intent). In doing so, the *Rosa* court rejected the contention that INA § 101(a)(43)(B), defining as an aggravated felony "any felony punishable under the Controlled Substances Act,"[10] permits the government to "choose among federal analogs" in determining the applicable generic offense.

- **Preserve the argument that the AG's interpretations involving an aggravated felony determination deserve no deference.** In anticipation of judicial review, advocates may argue that the AG's analysis in *Reyes* merits no deference, for two reasons:

    - First, the "aggravated felony" definition is not reviewed under the *Chevron* framework because it is a statutory term of both civil and criminal application.[11] A growing chorus of circuit court opinions espouse this position.[12] Thus where the reach of the aggravated felony statute is ambiguous after applying the rules of statutory interpretation, the adjudicator must apply the criminal rule of lenity and not accord *Chevron* deference to the AG. For more on this argument, *see* Point I, Brief of National Association of Criminal Defense Lawyers, National

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[7] *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) ("Courts must ask whether the crime of conviction is the same as, or narrower than, *the relevant generic offense*." (emphasis added)); *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) ("Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of *a corresponding aggravated felony*." (internal quotations omitted) (emphasis added)); *Descamps v. United States*, 133 S. Ct. 2276, 2279 (2013) ("To determine whether a past conviction is for one of those crimes, courts use what has become known as the 'categorical approach': They compare the statutory elements of a prior conviction with the elements of *the 'generic' crime* . . . ." (emphasis added)).

[8] *See, e.g.*, *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008) (distinguishing generic fraud from generic theft and finding that the statute of conviction at issue is not a categorical match to generic theft).

[9] *See also Rosa v. Att'y Gen. United States*, 960 F.3d 67, 77) ("As with the language employed by the Supreme Court, longstanding practice in this Court has steadfastly presupposed that *prior convictions will have only a single, uniform federal analog*." (emphasis added)).

[10] 18 U.S.C. § 924(c)(2), incorporated in INA § 101(a)(43)(B).

[11] *Leocal v. Ashcroft*, 543 U.S. at 11 n.8 (2004). Among other things, the definition of aggravated felony criminalizes aiding or assisting any noncitizen who "has been convicted of an aggravated felony" enter the United States, 8 U.S.C. § 1327, and exposes individuals convicted of certain federal offenses to longer sentences, *e.g.*, *id.* § 1326(b)(2) (authorizing a maximum penalty of 20 years for individuals convicted of illegal reentry following an aggravated felony conviction).

[12] *See, e.g.*, *Valenzuela Gallardo v. Barr*, --- F.3d ---, 2020 WL 4519085, at *6-7 (9th Cir. Aug. 6, 2020) ("[E]ven though it has been presented with several opportunities to defer to the BIA's construction of a dual application statute, the Supreme Court has never done so." (citing cases)); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part).

Immigration Project of the National Lawyers Guild, Immigrant Defense Project et al. as Amici in Support of Petitioner in *Luna-Torres v. Lynch* (Aug. 25, 2015), https://bit.ly/3iY2Qme.

- Second, the BIA concedes that it receives no deference on the question of how the categorical approach methodology is administered. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 354 (BIA 2014). The Supreme Court has made this entirely clear, as it has established the categorical approach methodology interchangeably through immigration and criminal sentencing cases. *See, e.g.*, *Descamps*, 570 U.S. 254 (deciding divisibility analysis in context of Armed Career Criminal Act); *Moncrieffe*, 569 U.S. 184 (refining the contours of the categorical approach in an immigration aggravated felony case). The categorical approach functions identically in immigration and criminal sentencing cases, applying both in immigration cases before the agencies and in federal sentencing cases before the district courts. *See Mathis*, 136 S. Ct. at 2251 n.2. "[T]he interpretation and exposition of criminal law is a task outside the BIA's sphere of special competence." *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004).[13] Advocates may therefore cast *Reyes* as a decision setting forth an erroneous categorical approach methodology to which the AG is entitled to no deference.

- **Contest any attempt by DHS to file a new NTA charging removability under an alternative aggravated felony ground.** Once removal proceedings have concluded, DHS can no longer amend or file additional charges of removability. 8 C.F.R. § 1003.30 (permitting DHS to amend charges "[a]t any time *during* deportation or removal proceedings" (emphasis added)). In some cases, DHS may file a new NTA or seek to reopen a case to bring a new removability charge based on the rationale in *Reyes*. In that case, practitioners should argue that res judicata, through claim preclusion, bars DHS from bringing any new charges based on facts that were available in the prior proceedings because it had the opportunity to amend the charges during the pendency of the prior removal proceedings but chose not to.[14] Indeed, in *Reyes*, DHS initially filed an NTA charging the conviction only as a theft offense; subsequently asserted that the conviction was actually a fraud offense; and then identified theft as an additional charge to fraud. 28 I&N Dec. at 56. The underlying procedural history of *Reyes* shows that DHS could have "chose[n] to pursue both aggravated-felony offenses in the removal proceeding." *Id.* Furthermore, if DHS asserts that *Reyes* represents a change in law that warrants a new NTA or reopening, practitioners should respond that an IJ is precluded from adopting that

[13] Accordingly, even where courts defer to the agency's interpretation of a provision under INA § 101(a)(43), they decline to accord equal deference to the specific issue of whether a criminal conviction categorically matches that generic offense. *See, e.g.*, *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1069 & n.2 (11th Cir. 2013) ("We owe no Chevron deference to the Board's interpretation of the Georgia statute, which the Board has no power to administer."); *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008) ("explaining that deference was warranted for "BIA's articulation of the generic federal definition" for crimes described in INA § 101(a)(43) but *not* "the BIA's interpretations of state law or provisions of the federal criminal code.").

[14] *See*, *e.g.*, *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) (holding that res judicata (claim preclusion) bars DHS from initiating a second removal proceeding on the basis of charges that it could have brought in a prior proceeding).

position because IJs are bound by the AG's statement in *Reyes* that his opinion "does not announce any 'new' rule, because [he has] not departed from settled precedent or practice." *Id.* at 65.[15]

- **Preserve the argument that the AG's opinion may not be applied retroactively.** The AG rejected Ms. Reyes's argument that under retroactivity principles the agency cannot apply this new standard to her past conviction. However, there are strong reasons to continue to fight against retroactive application of this new decision:

    - First, the AG is entitled to no deference on the methodology for determining whether retroactive application of a new administrative rule is permissible. *See SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947). Additionally, the AG did not engage in the proper methodology for determining the permissibility of retroactive application. As explained further below, the AG was obligated to conduct the five-factor adjudicative retroactivity test established by the federal courts, but did not do so. *See Obeya*, 884 F.d at 446 ("We weigh the following [five] factors to determine whether an agency may apply a new rule retroactively."). A majority of the Courts of Appeals[16] have adopted this five-factor test, so advocates with cases in the corresponding jurisdictions should continue to press for its correct application.

    - Second, regarding the issue of whether the rule announced is a question of first impression, advocates may argue that the absence of a published decision does not require the conclusion that this is a matter of first impression. Advocates may argue that the spate of Supreme Court, federal court, and BIA decisions applying the categorical approach have always required a one-to-one comparison with a ground of removal and that the AG's certification decision in *Reyes* manufactured a question where none previously existed. *See Reyes*, 28 I&N Dec. at 59. Similarly, the AG's decision represents an abrupt departure from prior consistent application of the categorical approach in sentencing and immigration cases, cutting against his recasting this as a novel question. It also bears mentioning that "[l]ike most such unweighted multi-factor lists, this one serves best as a heuristic; no one consideration trumps the others." *Velasquez-Garcia v. Holder*, 760 F.3d

[15] One issue to consider when making a res judicata argument outside of the Sixth Circuit is that respondents would also have to challenge *Matter of Jasso Arangure*, 27 I&N Dec. 178, 186 (BIA 2017), which held that res judicata does not apply in the context of removal proceedings involving aggravated felony grounds of removability. Although the Sixth Circuit vacated *Matter of Jasso Arangure*, the case remains a published BIA precedential decision outside of that circuit. *See Arangure v. Whitaker*, 911 F.3d 333, 347-48 (6th Cir. 2018). We encourage practitioners to challenge *Matter of Jasso Arangure* preserving the argument that the BIA is not afforded *Chevron* deference on the question of whether res judicata applies. *See Arangure*, 911 F.3d at 345 (holding that the BIA is not entitled to deference because "the common-law presumption of res judicata makes the INA unambiguous."). Individuals encountering this issue may reach out to khaled@nipnlg.org for more information.

[16] *See De Niz Robles v. Lynch*, 303 F.3d 1165 (10th Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014); *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981); *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972).

571, 581 (7th Cir. 2014). Advocates may use this notion to challenge the strength of the AG's conclusions on these first two factors regarding departure from prior standards. The AG not only drew incorrect conclusions about those two factors, but also advocates may argue that his conclusions are not sufficiently strong for the five-factor test to militate in favor of retroactive application.

- Third, the AG justified retroactive application by noting that Ms. Reyes had not relied on prior standards in entering her guilty plea, but this claim fails for several reasons. The AG cited to record evidence that Ms. Reyes knew that her conviction could lead to removal, but there is a material difference between the possibility of removal and mandatory removal due to an aggravated felony conviction. "Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty." *U.S. v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015). Additionally, several courts of appeals, including the Second Circuit where Ms. Reyes's case took place, do not require actual reliance to prohibit retroactivity. *See, e.g.*, *Obeya v. Sessions*, 884 F.3d 442, 448 (2d Cir. 2018).

- Finally, the AG's opinion does not even consider the final two factors in the court-prescribed retroactivity test. *Compare Reyes*, 28 I&N Dec. at 67, *with Obeya*, 884 F.3d at 448-449. Advocates may attack this deficiency in the AG's reasoning itself, and also argue that those final two factors require that the five-factor test preserve the presumption against retroactivity. Those factors—the "degree of burden" retroactive application would place on the noncitizen, and the "statutory interest" in applying the new standard—are likely to weigh in favor of a noncitizen, as the federal courts addressing adjudicative retroactivity have consistently held. *Retail, Wholesale*, 466 F.2d at 390; *Miguel-Miguel*, 500 F.3d at 952.

B. For Criminal Defense Practitioners:

- **For a defendant charged under a statute similar to New York's grand larceny statute, avoid a conviction if the sentence imposed will be one year or more and the loss amount is more than $10,000.** The distinguishing feature of these statutes is that the government may allege that all conduct covered is either generic theft or generic fraud, and under the categorical approach the statutes are indivisible as between theft and fraud. *E.g.*, Cal. P.C. § 487. If a noncitizen is convicted under such a statute, a sentence of one year or longer is imposed, and the loss amount is more than $10,000, under *Reyes* the conviction will be an aggravated felony. Defense lawyers have an obligation to negotiate to avoid this consequence. These are common strategies for avoiding an aggravated felony conviction in these circumstances:

  - **Negotiate a disposition under a different statute of conviction**. To insulate from the impact of *Reyes*, if possible try to negotiate a plea under a statute that is neither generic theft or generic fraud (e.g., Cal. P.C. § 459/460(b), second degree burglary).

- **Negotiate a sentence of 364 days or less**. For a statute like the New York larceny statute that is indivisible as between theft and fraud, conviction will **not** be an aggravated felony if a sentence of less than one year is imposed, even if the loss amount is greater than $10,000. For example, if Ms. Reyes herself had been sentenced to 364 days or less, her conviction would not be an aggravated felony despite the loss amount of more than $10,000.

- **Negotiate plea language that affirmatively establishes loss amount of less than $10,000 and untethers any additional loss amount from the count of conviction**. The Supreme Court in *Nijhawan v. Holder* held that to constitute a fraud aggravated felony, the greater-than-$10,000 loss amount must be tethered to the count of conviction. 557 U.S. 29, 42 (2009). Defense counsel must recall that the Court also held that immigration authorities may consult evidence from the criminal case beyond the confines of the categorical and modified categorical approach in identifying loss amount attached to the count of conviction. *Id.* at 41-42. Specific language in a plea colloquy or written plea agreement that states that the loss amount attached to the count of conviction is an amount less than $10,000 should sufficiently establish that the convicted loss amount is not for an aggravated felony. An additionally protective measure is to include language affirmatively dismissing all other financial quantities associated with the charges, or affirmatively stating that no other financial quantities are tethered to the count of conviction.

- **In all criminal cases of noncitizens (even those that do not involve fraud or theft allegations and charges), defense counsel must remember to identify and consider all grounds of removability and not just those that appear most likely to correspond.** For example, when evaluating the immigration impact of armed robbery charges, defense counsel must consider, at a minimum, crime of violence and theft aggravated felonies, CIMTs, and firearms deportability. In prostitution cases, defense counsel must consider, at a minimum, prostitution inadmissibility, CIMTs, and aggravated felonies for prostitution businesses. This is not a change in law or practice, but is an important reminder not only that a single conviction can correspond to multiple immigration provisions with different impacts, but also that the federal government can be aggressive in charging removability by using multiple removability provisions against a single conviction. *E.g.*, *Moncrieffe v. Holder*, 662 F.3d 387, 389-90 (5th Cir. 2011), *rev'd on other grounds*, *Moncriffe*, 569 U.S. 184 (noting that DHS charged a marijuana conviction as both an aggravated felony and controlled substance offense).