



## CRIMINAL LAW

# New Hope In Deportation Defense During A Time Of Otherwise Great Uncertainty

By Derek A. DeCosmo

Immigration attorneys across the United States celebrated last June when the Supreme Court rendered its decision in *Mathis v. United States*. The Court reaffirmed its preference for employing the "categorical" approach when determining whether a particular offense carries a negative immigration consequence. For practitioners in New Jersey, the celebration of the *Mathis* decision turned into elation when the Third Circuit on August 28, 2016, in the unpublished decision *Chang-Cruz v. Attorney General*, followed the *Mathis* analysis and ruled that a conviction under N.J.S.A. Section 2C:35-7 for distributing, dispensing or possessing a controlled dangerous substance on or within 1,000 feet of school zone is categorically not an aggravated felony for immigration purposes.

The *Chang-Cruz* decision, despite not being published, has been a game-changer for attorneys representing noncitizen clients in both criminal and removal

proceedings. The decision is routinely being followed by the Immigration Courts and the Board of Immigration Appeals for cases arising out of the Third Circuit. This article attempts to explain the recent and rapid evolution of the case-law, which led to the *Chang-Cruz* decision, and offer practice pointers to immigration and criminal defense attorneys who represent noncitizens.

Under the immigration laws as interpreted by the courts, a noncitizen generally is not subject to removal or other negative immigration consequences based on a criminal conviction unless the conviction (whether state or federal) fits categorically within one of the criminal removal grounds. It is a greater challenge to determine whether a state conviction (as opposed to a federal conviction) matches a federal criminal ground of removal. For example, when a criminal ground of removal lists a conviction for "theft" as the ground of removal, it is

referring to the federal generic definition of a "theft." If a non-citizen is convicted of theft under federal law, we know that the conviction meets the federal immigration law definition of "theft." However, in keeping with "theft" as the example, not all states define "theft" the same way it is defined under federal law. This is true for many of the federal criminal grounds of removal and inadmissibility. A particular state may only require a "temporary" taking for a "theft" conviction whereas federal law requires the violator's intent to "permanently" deprive an owner of her property.

The question becomes...how do we determine whether a state criminal conviction fits categorically within a federal criminal ground of removal? We must understand the various analytical approaches the courts will employ and the order in which they will employ them. The favored approach is the "categorical approach," which requires

(Continued on Page 8)



## LEGAL BRIEFS

We rely on members to provide announcements for the Legal Briefs section. If you have a new member of the firm, you've moved or you or a member of your firm has received an award or recognition for a professional or community activity, we want to know and share it with fellow bar members. Please email your submissions to [lbp@camdencountybar.org](mailto:lbp@camdencountybar.org).

◆ Capehart Scatchard's **Vincent T. Cieslik** served as Chair of the Inaugural March of Dimes 5K Run for Babies which took place on Sunday, April 30, on the campus of Rowan University in Glassboro. Mr. Cieslik has taken on the role to raise awareness and important funding to help babies born prematurely or with birth defects. Mr. Cieslik handles high risk litigation for insured and self-insured companies, and represents individuals and companies in sophisticated real estate and banking matters.

◆ Capehart Scatchard is pleased to announce that **Vania Fider** recently joined the Firm's Family Law Department in its Mt. Laurel office. Ms. Fider focuses her practice in all aspects of family law, including divorce, post judgment motions, custody and visitation, child support, alimony and simple adoption matters.

◆ Capehart Scatchard Shareholder, **Yasmeen S. Khaleel** spoke at a seminar sponsored by the Food Bank of South Jersey. Her presentation was entitled, "The Need for Estate Planning at Any Age: How to Protect Your Assets." During her presentation, Ms. Khaleel, addressed the salient estate planning issues; necessary documentation; common mistakes and ways to facilitate a smooth transition of control or wealth upon disability or death.

Ms. Khaleel is the co-chair of the firm's Wills, Trusts and Estates Department, as well as the Business and Tax Department. She focuses her practice on representing individuals, business owners, medical, dental and other professionals in estate planning, estate and trust administration, business succession planning and transactional and tax planning.

◆ **John Giordano** has joined Archer & Greiner as a Partner in the firm's Philadelphia office,

where he will concentrate on government and regulatory affairs. Mr. Giordano has had an extensive career serving in government positions in Washington, D.C., Pennsylvania and New Jersey, and will be a key member of Archer's Government Affairs Group. Prior to joining Archer, Mr. Giordano served as Deputy General Counsel to the Presidential Transition Committee of President Donald J. Trump. Immediately before joining the Trump Transition Team, he was the founding Assistant Commissioner for the division of Air Quality, Energy and Sustainability at the New Jersey Department of Environmental Protection (DEP).

Mr. Giordano is a Lecturer in Law at the University of Pennsylvania Law School, and a Faculty Advisor at The Wharton School's Initiative for Global Environmental Leadership.

(Continued on Page 17)

## CRIMINAL LAW

## New Hope In Deportation Defense During A Time Of Otherwise Great Uncertainty

(Continued from Page 7)

adjudicators to determine whether all of the conduct covered under the statute of conviction fits within the alleged criminal removal classification. If it does not, the conviction does not fit within the removal classification. Importantly, adjudicators may not consider the particular conduct underlying the defendant's conviction. Application of the categorical approach follows upon Congress' choice to require a conviction and thus to rely on the criminal process to determine immigration consequences of criminal conduct.

When the categorical approach resolves the issue there is no further inquiry. The Immigration Judge under the categorical approach should only review the state statute of conviction and the federal definition of the offense. When the underlying state criminal statute creates multiple offenses and some of the offenses match the federal definition and some do not, the statute is considered to be divisible and the Immigration Judge may employ the modified categorical approach. Under

the modified categorical approach, the Immigration Judge may look at criminal court documents to determine what part of a criminal statute the defendant violated. They look to the indictment, plea colloquy, disposition, and other documents composing the conviction record. The Immigration Judge, however, will still not independently investigate criminal conduct, and will rely only on the conviction record.

The U.S. Supreme Court has repeatedly stated recently that "when the Government alleges that a state conviction qualifies as an 'aggravated felony' under the Immigration & Nationality Act ("INA"), we will generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is "the relevant statutory

hook." *Id.* at 1685.

The most difficult area to determine whether the categorical or modified categorical approach should be employed is the area of drug trafficking immigration aggravated felonies. INA Section 101(a)(43)(B) relates to controlled substance trafficking and defines aggravated felony using two phrases: "illicit trafficking," and a "federal drug trafficking crime." In essence, there are two separate routes by which a state felony controlled substance conviction may be deemed to be an aggravated felony. For every state of New Jersey CDS conviction, we must determine whether the offense would be an aggravated felony drug trafficking offense under either route. All courts prior to *Mathis* and *Chang-Cruz* would employ the modified categorical approach when analyzing N.J.S.A Section 2C:35-5 or 2C:35-7. Specifically, the courts believed that "manufacture, distributing or dispensing" all created separate offenses,

(Continued on Page 16)

# ATTENTION

## Camden County Bar Association

*BIRE Financial Services a Partner in Progress of the CCBA is able to offer members a discount on disability insurance offered through Guardian.*

Please call Marshall Shigon for more information

Main Office 4066 Butler Pike, Plymouth Meeting, PA 19462

Meetings by appointment in the following areas: Egg Harbor, NJ, Cherry Hill, NJ, Northampton, PA

610-825-4066 or 1-800-838-BIRE [www.bireswan.com](http://www.bireswan.com)



Business Individual Retirement Estate

...helping you experience financial security  
through informed decision making.

## CRIMINAL LAW

# New Hope In Deportation Defense During A Time Of Otherwise Great Uncertainty

(Continued from Page 8)

thus making the statute divisible and requiring the use of the modified categorical approach to determine for which offense within 2C:35-7 the noncitizen was convicted. In most cases this led to a finding by the Immigration Judge that the noncitizen was convicted of a drug trafficking offense as that term is defined under federal law.

The *Mathis* decision bolstered strict application of the categorical approach for determining when a conviction will cause adverse immigration consequences. In *Mathis*, the Supreme Court emphasized that courts should focus on the elements of the state and federal crimes. 136 S. Ct. at 2254 & n. 4 (2016) (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013)). See also *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). If the elements of the state offense match up with, or are narrower than those of the generic federal offense, then the state offense is an aggravated felony. Otherwise, the offense is not an aggravated felony. The *Mathis* Court concluded that the elements of Iowa's burglary law were broader than those of federal generic burglary and that, consequently, *Mathis*'s convictions could not give rise to a sentence enhancement under the Armed Career Criminal Act ("ACCA").

*Mathis* requires that, when "faced with an alternatively phrased statute," we must "determine whether its listed items are alternative elements," which must be unanimously found by a jury (or found by a judge at a bench trial) beyond a reasonable

doubt to sustain a conviction, or instead are alternative "means" that a jury need not unanimously find. 136 S. Ct. at 2256.

Since the Supreme Court's decision in *Mathis* was issued, the Third Circuit Court of Appeals, in a non-precedential decision, *Chang-Cruz v. Attorney General*, \_\_\_F.3d \_\_\_, No. 14-4570 (3d. Cir. 2016), relied upon *Mathis* in applying the categorical approach to find that a New Jersey conviction for controlled-substance violations near a school was not an aggravated felony drug trafficking offense for immigration purposes.

In *Chang-Cruz* the Court was analyzing New Jersey's possession with intent to manufacture, dispense and distribute statute at N.J.S.A. Section 2C:35-7 in light of the *Mathis* decision. In addition to finding that manufacturing, dispensing and distributing constituted alternative means and not alternative elements, the Court determined that the least culpable conduct in the New Jersey statute was to possess with the intent to dispense a controlled substance. The court compared this least culpable conduct to sustain a conviction under the New Jersey statute to the generic federal definition of a federal controlled substance violation and established that such conduct would not be a federal CSA felony. *Id.* The court reasoned that N.J.S.A. Section 2C:35-7 sweeps more broadly than U.S.C.A. Section 860, which criminalizes distribution but not dispensing.

While not precedential, the *Chang-Cruz* decision is being followed by Immigration Judges within the jurisdiction of the Third Circuit as well as by the Board of Immigration Appeals, which is the appellate body that engages in the first level of review of all Immigration Judge decisions. It is widely expected that within the next year a precedential decision will be rendered that will either affirm or reject the analysis of *Chang-Cruz*. For now, immigration practitioners should follow the analytical framework of *Chang-Cruz* and the case should be appropriately cited when facing 2C:35-7 conviction. They should also argue that its reasoning extends to 2C:35-5 convictions as well. Criminal practitioners should look to plead their clients under 2C:35-7 even if the indictment only charges a 2C:35-5 offense when protection of immigration status is a critical concern for your client. In addition, any factual basis should utilize language as it relates to "dispensing" in the event that the courts in the future return to the modified categorical approach.



ANDRES & BERGER  
Award-Winning Certified Civil Trial Attorneys

## Reputation and Results

With over 60 years of experience serving Southern New Jersey, the law firm of Andres & Berger, P.C. is recognized as one of the leading firms whose practice is limited to medical malpractice and personal injury litigation.

Top 100 New Jersey Super Lawyers  
New Jersey Monthly

Precminent Lawyers (AV rated)  
Martindale-Hubbell

The Best Lawyers in America  
Woodward/White, Inc

Referral of malpractice and personal injury claims involving significant permanent injury or death are invited from members of the bar and referral fees are honored pursuant to Rule 1:39-6(d).

264 Kings Highway East | Haddonfield, NJ 08033  
t. 856.795.1444 | www.andresberger.com



Furnished legal office space 500 to 1,500 sq. ft.,  
Rt. 70 in Cherry Hill, contact Crissy 856-424-4494