

Ninth Circuit Court

Case: *Marinelarena v. Barr*, F.3d 2019 WL 3227458, 19 Cal. Daily Op. Serv. 6909 (en banc)

Date: July 18, 2019

Votes: ____ for Marinelarena

Opinion: Tashima

Dissents: Ikuta

Tags: Immigration, cancellation of removal, state convictions, federal offense, guilty plea, controlled substance offense, predicate offense

Question(s) Presented: If a noncitizen's criminal record is ambiguous as to whether a state law conviction constitutes an offense that matches with a federal offense that would bar cancellation of removal, is the noncitizen ineligible for that relief?

- Specifically, does petitioner's CA conviction for conspiracy to sell and transport a controlled substance match the federal law about controlled substances?

Holdings:

- "an ambiguous record of conviction does not demonstrate that a petitioner was convicted of a disqualifying federal offense." (2)
- *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc) is overruled by this case.
- *Montcrieffe v. Holder* (U.S. 2013) influenced this decision.

Rationale:

- The statute under which petitioner was convicted was overbroad at that time.

Facts:

- Petitioner is a noncitizen from Mexico who entered U.S. in 1992. Has two U.S. citizen children. Convicted in 2000 of a misdemeanor for false personation of another (under CA penal code). In 2006, charged with one count of conspiracy to commit a felony (CA), re. drugs. She served a brief sentence. Convictions were later expunged. She concedes she is removable, but petitioned for cancellation of removal under 8 U.S.C. § 1229b(b).

Legal History, Prior Appeals & Trial Court Input:

- **1992:** entered U.S. from MX
- **1999:** briefly lived in MX again
- **2000:** reentered U.S.
- **2000:** misdemeanor: false impersonation (CA)
- **2006:** conspiracy (CA)

IMMIGRATION: CANCELLATION OF REMOVAL

- **2007:** NTA from DHS bcz in U.S. longer than permitted; conceded removability but petitioned for cancellation of removal
- **2009:** both convictions expunged
- **2011—IJ:** denied application for cancellation of removal; even though expungement had gone through, false impersonation was still a CIMT, and “conspiracy to distribute heroin” would also bar her from relief.
- **BIA:** Affirmed IJ’s decision
- **2017—9th Circuit:** Denied in part & dismissed in part
- **9th Circuit:** Rehearing en banc

Attorneys’ Arguments:

- **For Marinelarena:**
 - Controlled substances conviction documents on record in CA did not specify that the crime involved a specific controlled substance; therefore, did not match Controlled Substances Act (CSA).
 - *Young* is incompatible with *Moncrieffe*, which held that “ambiguity in the record as to a petitioner’s offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief.” (6)

Appeals to Statute & Precedent:

- **21 U.S.C. § 802:** Controlled Substances Act (CSA)
- **8 U.S.C. § 1227(a)(2)(A)(i):** CIMTs
- **8 U.S.C. § 1229b(b):** Cancellation of Removal
- **8 U.S.C. § 1182(a)(2)(A)(i)(II):** conviction for controlled substance offense
- ***Taylor v. U.S.*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990):** three-step process for determining whether a state conviction constitutes a predicate offense for immigration purposes
- ***Shepard v. U.S.*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion):** what documents can be used to determine a match between state & federal statutes.
- ***Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc):** overruled by this case. Held that if there is ambiguity in the record of conviction, “a petitioner is ineligible for cancellation of removal because she has not met her burden of showing that she was not convicted of a disqualifying federal offense.” (6)
- ***Moncrieffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013):** “an ambiguous record of conviction does not demonstrate that a petitioner was convicted of a disqualifying federal offense.” (2) Involved steps to decide whether a crime qualified as an aggravated felony.
- ***Descamps v. U.S.*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013):** categorical match between state & federal if state’s statute is same or narrower (at 257).
- ***Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014):** re. matching state & federal law for controlled substance offenses

Dicta/Discussion:

- “We agree with Marinelarena that [the CA code at this point] is overbroad, and we assume for purposes of this appeal that it is divisible. Therefore, we apply the modified categorical approach.” (5)
- CA Penal Code re. conspiracy: doesn’t have to involve controlled substance.
 - “A conviction under [CA code here], therefore, cannot count as a controlled substance offense under the categorical approach.” (5)
- Modified categorical approach: examining the documents
 - Only thing in the record is the criminal complaint, which mentions heroin by name. But this complaint is not enough to prove a conviction for a specific substance. (5)
 - “the record is inconclusive as to whether Marinelarena’s guilty plea could have rested on an overt act that did not relate to heroin.” (6)
- *Moncrieffe*’s holdings are the opposite of *Young*’s: ambiguity means petitioner is NOT convicted under federal statute.
- “...the key question in the categorical approach—like the modified categorical approach—addresses a question of law. What do the uncontested documents in the record establish about the elements of the crime of conviction with the requisite certainty?” (8)
 - This is a legal question: doesn’t involve actual facts of case. Just look at the documents: “the documents either show that the petitioner was convicted of a disqualifying offense under the categorical approach, or they do not.” (9)
- Marinelarena will still have to meet her burden of proof for the other three parts of the cancellation of removal test.
- “A court must compare the elements of the offense of which the noncitizen was convicted to the elements of a generic federal offense disqualifying her from relief, and then determine what facts are *necessarily* established by that conviction.” (9)
- “Under the modified categorical approach, it was error for the BIA to deem Marinelarena ineligible to apply for cancellation because her record of conviction is ambiguous.” (10)

Dissent:

- You’re creating a new rule and misreading *Moncrieffe*.

Commentary:

- **Cancellation of Removal Requirements (8 U.S.C. § 1229b(b)):**
 - Physically present in US for at least 10 years
 - A person of good moral character during this period
 - Not been convicted of a controlled substance offense under CSA
 - Removal would constitute extreme hardship for family members
- **Taylor factors for determining predicate offense for immigration purposes:**
 - Is state law a categorical match as per statutory definitions?
 - Match = if state law is same or narrower (*Descamps v. U.S.* at 257)

- No match = if state law is broader
- If state law is broader, then is the statute of conviction “divisible”?
 - That is, if it effectively lists several different crimes (*Descamps* at 264)
 - Single, indivisible set of elements = no categorical match
- If state statute is overbroad and divisible, apply “modified categorical approach”:
 - Look at conviction documents from court to see what phrase they used.
 - Only use charging document, terms of plea agreement, transcript of plea colloquy, and comparable judicial records.
- ***Moncrieffe* factors for determining match between state & federal statute:**
 - Whole inquiry = “categorical approach” (including examining judicially noticeable documents, as in “modified categorical approach” above)