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Removal Defense Implications of *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019)[1]

I. Overview of *Valencia-Mendoza*

Jose Manuel Valencia-Mendoza pleaded guilty to unlawful reentry after removal, in violation of 8 U.S.C. § 1326(a). At sentencing, the district court applied a four-level upward sentence enhancement under United States Sentencing Guidelines (USSG) for re-entry, § 2L1.2, because he had been previously convicted of a "felony" under Washington law. The USSG's definition of a "felony" for this purpose is, "any federal, state, or local offense *punishable by imprisonment for a term exceeding one year*"[2] (emphasis added).

Mr. Valencia's prior 2007 conviction for possession of cocaine was a Washington Class C felony, which has a statutory ceiling of five years. Previous Ninth Circuit precedent said that this statutory ceiling was the "punishable by" term that counted.[3]

In Washington, in addition to the statutory maximum for each class of felony, there is a standard sentence range that places statutory limits on felony sentences, based on criminal history and other sentencing factors *specific to the defendant being sentenced*. The Sentencing Reform Act of 1981(SRA), found at RCW 9.94A., governs felony sentencing. Under the SRA, there is a presumptive "standard range" sentence for each crime, of months of confinement. The "standard range" is calculated by determining the seriousness level of an offense (ranging from 0- XVI) and the "offender score" (ranging from 0-9+) for each offense. The "standard range" is separate and distinct from the statutory maximum for an entire offense class. In general, trial courts have full discretion to impose a sentence *within* the standard range.

Trial courts can "depart" from the standard range and go above or below the range only when the court finds "substantial and compelling reasons justifying an exceptional sentence." See RCW 9.94A.535 ("Departures from the guidelines").[4] Generally, departures above the guideline are limited to the aggravating circumstances found in RCW 9.95A.535(2) or (3). Departures below the guidelines may be based on the mitigating circumstances found in RCW 9.94A.535(1), or other mitigating circumstances that relate to the crime or the defendant's culpability for the crime. "[U]nless one of the statutorily specified aggravated circumstances was found, the sentencing court was required to impose a sentence within the standard range. RCW § 9.94A.505." *Valencia-Mendoza* at 1218. The findings of fact and conclusions of law that support a departure above, or below, the standard range must be in the record.

Mr. Valencia argued that because the maximum sentence that he *actually could have received* under the SRA was only six months, he was not convicted of an "offense punishable by

imprisonment for a term exceeding one year."[5] The court acknowledged that it had previously sided with the government's argument, and that those cases would control. But the court found that the Supreme Court's decisions in *Carachuri-Rosendo v. Holder*[6] and *Moncreiffe v. Holder*[7] constituted higher intervening authority.[8]

II. *Carachuri-Rosendo* and *Moncrieffe* are immigration cases that provide the rule.

In *Carachuri-Rosendo*, the Court rejected the government's argument that because a second state simple drug possession conviction *could* have been prosecuted federally as a felony, that it was therefore punishable as a "felony" under the Controlled Substance Act and an aggravated felony. The Court found that for "recidivist[simple] possession" to be an aggravated felony, it must actually have been charged as such. But when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he or she has not been "convicted" of a "felony punishable" as such "under the Controlled Substances Act."[9]

In *Moncrieffe*, the Court held that "when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of" sentencing factors.[10] The sentencing factors that determine whether marijuana distribution was an aggravated felony "depend[ed] upon the presence or absence of certain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well."[11] Those factors determined whether or not a state drug crime was one for which the Controlled Substances Act "must 'necessarily' prescribe felony punishment."[12]

The Court in *Valencia-Mendoza* held that its earlier precedents could not survive these higher intervening authorities:

> [I]n *Carachuri-Rosendo* and *Moncrieffe*, the Supreme Court held that, when considering whether a crime is "punishable" by more than one year, the court must examine both the elements and the sentencing factors that correspond to the crime of conviction. Accordingly, we hold that our earlier precedents are irreconcilable with *Carachuri-Rosendo* and *Moncrieffe* and must be overruled.[13]

III *United States v. Rodriquez* supports *Valencia,* and is distinguishable

United States v. Rodriquez,[14] held that Congress intended for courts to consider recidivist sentencing enhancements in determining the "maximum term of imprisonment. . . prescribed by law." *Rodriquez* was misinterpreted by some Courts to mean that the maximum possible sentence was always the statutory ceiling for that class of offense.[15] But in *Valencia-Mendoza* the panel rejected the argument that the top sentence of a mandatory guidelines range such as Washington's was not a relevant consideration, because:

> [U]nlike the statutory question at issue [in *Rodriquez]*—what is the "maximum term of imprisonment ... prescribed by law"—the question at issue here is whether Defendant was convicted of an offense "punishable" by more than one year. "Punishable" suggests a realistic look at what a particular defendant actually could receive, whereas "maximum term

> of imprisonment ... prescribed by law" suggests a mechanistic examination of the highest possible term in the statute. . . . It is plain from the state criminal judgment that the sentencing court did not find any of those circumstances, so the sentencing court was bound by the statutory sentencing range. **In other words, the top sentence of the guidelines range was the maximum possible statutory punishment.**

United States v. Valencia-Mendoza, 912 F.3d 1215, 1223 (9th Cir. 2019)(emphasis added)

Distinguishing *Rodriquez* is important because ICE may use it for counter-argument.[16] But the fact that Mr. Rodriguez's criminal history was in the record, and that it was undisputed that he actually, individually, qualified for the enhanced sentence, meant that when the *Rodriquez* Court said "the phrase 'maximum term of imprisonment ... prescribed by law' for the 'offense' was not meant to apply to the top sentence in a guidelines range,"[17] they meant that Mr. Rodriguez' *specific* sentencing factors exposed him to a *higher*-than-guidelines, statutory range.

IV. At least three other Circuit Courts of Appeal have the same rule, that a state statutory sentence range determines the maximum sentence that may be imposed on an individual

The Ninth Circuit found the following decisions of the Fourth, Eighth and Tenth Circuits supportive and was "aware of no relevant circuit precedent to the contrary."[18]

> [In *Rodriquez*] the Court cautioned that when a judgment of conviction, charging document, or plea colloquy 'do[es] not show that the defendant faced the possibility of a recidivist enhancement, it may well be that *the Government will be precluded from establishing that a conviction was for a qualifying offense.*' . . . (emphasis added). In *Carachuri*, the Court went even further, explaining that in *Rodriquez* it had "held that a recidivist finding could set the 'maximum term of imprisonment,' *but only* when the finding is a part of the record of conviction." 130 S.Ct. at 2587 n. 12 (emphasis added)."

United States v. Simmons, 649 F.3d 237, 243 (4th Cir. 2011)

> [T]he Supreme Court has now interpreted *Rodriquez* to mean a recidivist increase can *only* apply *to the extent that a particular defendant was found to be a recidivist*. This makes all the difference in the world to our Defendant, who was saddled by the district court with the guideline range merited by the worst recidivist imaginable even though his own recidivism did not allow for imprisonment of more than one year.[19]

United States v. Brooks, 751 F.3d 1204, 1210 (10th Cir. 2014)(emphasis in original)

> [W]here a maximum term of imprisonment of more than one year is directly tied to recidivism, *Carachuri–Rosendo* and *Rodriquez* require that an actual recidivist finding—rather than the mere possibility of a recidivist finding—must be part of a particular defendant's record of conviction for the conviction to qualify as a felony.

United States v. Haltiwanger, 637 F.3d 881, 884 (8th Cir. 2011)

The *Valencia-Mendoza* panel concluded:

> [W]e can no longer follow our earlier precedents that eschewed consideration of mandatory sentencing factors. As noted, Washington statutes prescribe a required sentencing range that binds the sentencing court. The sentencing range can be modified, or rendered inapplicable altogether, if but only if the judge or the jury makes certain factual findings. In this case, no such finding was made, so the court was bound to adhere to the statutory sentencing range. **Defendant's offense—as actually prosecuted and adjudicated—was punishable under Washington law by no more than six months in prison.** The district court therefore erred by concluding that his offense was punishable by more than one year in prison.

Id. at 1224 (emphasis added)

V. How could this affect the sentence-related provisions of the INA?

A. First, ICE may argue that, because it is a decision "only" about USSG § 2L1.2, a different statute from the INA, contrary decisions of the BIA should receive "administrative deference," under *Chevron.*[20]

The maximum possible sentence that may be imposed under *Valencia* and *Moncreiffe* is the one that may be imposed *if* the specific factors determining the high end of the statutory guideline range are in the record . So *Matter of Adeniye* is either not on-point-- in relation to the maximum that may be imposed-- or incorrect.[21] The Board *was* correct that the maximum possible sentence is not the sentence actually imposed, but that holding refutes a different and much weaker argument.

There should arguably be no deference to the BIA at *Chevron*'s step one, because the decision in *Valencia-Mendoza*, presupposed a lack of ambiguity in the Supreme Court's reasoning. The Court found it sufficiently unambiguous for it to be necessary to overrule at least three of its own precedential decisions, which requires that "the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

- Although *Valencia-Mendoza* is a federal criminal sentencing case, *both* of the key Supreme Court intervening authorities that rendered the older rule invalid, *Carachuri-Rosendo* and *Moncreiffe*, are *direct interpretations of* the Immigration Act. They are first and foremost immigration cases.
- Just because a term appears in the INA it does not mean that Congress delegated to the BIA authority to creatively interpret it. The BIA is not delegated the authority to decide what punishment a state court may impose for conviction of a state crime. Arguably there is no "gap" that is within the Board's agency expertise. Congress could only have intended for determinations of actual state criminal penalties and punishment under state law to be controlled by state laws. [22]
- The common, ordinary meaning of the terms used also support applying *Valencia-Mendoza* to provision of the INA.

At *Chevron*'s step two, it would be unreasonable for the BIA to define what state law punishment for a crime is, in a way that differs so radically from the Supreme Court rule worked out *in* immigration cases-- based only on a conclusory judgment that "Congress intended" to deport immigrants with convictions-- so that presumed intent of the law nullifies any other interpretive principle. "[A]mbiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor." *Moncrieffe* at 205, 1693. The intent of the § 1326 sentence enhancements themselves are to impose additional punishment and harsher treatment, but that general "purpose" of increased severity does not override the textual meaning.[23]

Finally, in *Matter of Adeniye* the Board seems to have only addressed an argument that it was *the actual sentence imposed* (as opposed to the maximum sentence that could be imposed based on the specific sentencing factors found) that should count as the sentence that may be imposed.[24] The Board's interpretation beyond that point may just be dicta, if not overruled. But there is also support in *Adeniye* that "punishable by" and "may be imposed" are not substantively very different.[25]

> The Board understood *Moncreiffe* to signify that the Court understood the term "'punishable by' to refer to the maximum possible sentence that may be imposed upon conviction, not to the sentence actually ordered or imposed. . . . We agree and see no reason to depart from that commonsense understanding here"[26]

B. Immigration Removal Defense Implications

Valencia-Mendoza has broad implications for removal grounds based on a maximum possible sentence (or similarly-worded phrases).[27] Although ICE might argue that variable wording matters, and-- for example-- argue that a sentence that "may be imposed" is distinguishable from being "punishable by imprisonment for" a certain sentence, the reasoning in *Valencia-Mendoza* should be equally applicable to all iterations of this phraseology. One could argue that *Valencia-Mendoza* should apply all the more to a sentence that "may be imposed," since that phrase focuses even more on the practical aspects of a sentence, based on specific offense characteristics established within a statutory framework by individual criminal history.

C. Practical considerations: In order to make this argument effectively, you will need to be able to analyze a client's criminal history and offender score under Washington's felony sentencing statute, the Sentencing Reform Act, or SRA.[28]

You may need to look a little deeper to find the maximum sentence to which your client was actually subject. The first place to look is the Felony Judgment and Sentence (J&S) form, which could and should have all the information.[29] The J&S is an essential part of the felony record conviction, which you should *always* get, along with the plea form or jury verdict, and the Information. The J&S should have a section looking like this, which the Court analyzed in *Valencia-Mendoza*:[30]

Sentencing Data:

Count No.	***Offender Score***	***Serious -ness Level***	***Standard Range*** *(not including enhancements)*	***Plus Enhancements****	***Total Standard Range*** *(including enhancements)*	***Maximum Term***

If you don't understand it, get help. Ask defense counsel to explain, if there was one. In addition to the WDA's unrestricted Immigration Project, the Washington Defender Association has a vast range of resources on felony sentencing, available to members.[31]

VI. Specific INA Provisions

A. Deportability for a single conviction for a "crime involving moral turpitude" committed within five years of admission, and for which a sentence of one year or longer may be imposed."[32]

Prior to *Valencia-Mendoza*, only a post- 7-22-2011 Washington gross misdemeanor[33] or a simple misdemeanor could ever avoid being an offense "for which a sentence of one year or longer may be imposed." But using the test in *Valencia-Mendoza*, there is a strong argument that any Washington felony for which a specific defendant could not actually receive a sentence of one year or more under the SRA cannot trigger this ground of removal. (See *In Re Juan Emigdio Giron*, 2015 WL 5996701.)[34]

Take Forgery (RCW 9A.60.020) as an example. Forgery is a "crime involving moral turpitude" (CIMT). It is also a Class C felony, which has an overall group statutory ceiling of five years.[35] But under the SRA one *cannot* get a 12-month sentence for forgery until one has an offender score of 5 or higher.[36]

Beside the actual Judgment and Sentence, if there is one, the easiest way to look up the sentence range under the SRA is to use the scoring sheets for individual felonies in the Washington State Adult Sentencing Guidelines Manual (hereafter, the Manual).[37] The sheet for Forgery is at page 336 of the 2018 version of the Manual.(See Appendix II) If the client has no prior criminal history— if the score is zero-- the statutory range is 0 – 60 days. But even with an offender score of 4, the range is only 3- 8 months.[38]

Therefore, if the *Valencia-Mendoza* rule applies, a lawful permanent resident with a single conviction for felony forgery, committed within two years of legal admission, is not deportable for a CIMT.[39] But what about if the same client goes to Vancouver, Canada for the day and returns. Is she inadmissible for a CIMT?

B. The Petty Offense Exception to Inadmissibility for a Single CIMT Conviction

The petty offense exception requires an actual sentence regardless of suspension that is not in excess of six months and that:

t**he maximum penalty possible** for the crime . . . did not exceed imprisonment for one year[40]

The "maximum penalty *possible*" cannot be the 5-year statutory ceiling for class C felonies, because that would ignore the statutory sentencing factors that *Carachuri-Rosendo*, *Moncrieffe*, and *Valencia-Mendoza* say must be taken into account. It is instead the high end of the required, standard statutory sentencing *range* that binds the sentencing court. A one-year sentence for forgery with an offender score of 0, 1, 2, 3, or 4 may not be imposed, barring a statutory exception that allows a departure upward, and that must be specifically found by a court or jury. (See Appendix II). The term "possible" connotes the same "realistic look at what a particular defendant actually could receive" as under USSG § 2L1.2.

Therefore, under the *Valencia-Mendoza* rule a single felony conviction for forgery could fit the petty offense exception.

C. Bail-jump Aggravated Felony: FTA to answer to or dispose of a charge of a felony "for which a sentence of 2 years' imprisonment or more may be imposed" (INA 101(a)(43)(T)).

"May be imposed" is the same language as in the one-CIMT-after-admission ground at 237(a)(2)(A)(i) above. To determine this, you need to look at the sentencing range, based on the offender score for the offense of which the defendant was accused and for which she failed to appear. (*Not* the FTA crime itself.) According to the Board:

> [W]hether the failure to appear in court was . . . to answer to or dispose of a felony charge . . . for which a sentence of 2 years' imprisonment or more may be imposed, do not refer to formal elements of generic "failure to appear" crimes. **Instead, they are limiting components that refer to specific ""aggravating" offense characteristics.** That is, they involve the defiance of a court order . . . **regarding a felony charge that is serious enough to be punishable by at least 2 years of imprisonment** (rather than a misdemeanor). See *Nijhawan v. Holder*, 557 U.S. at 38-39. The inclusion of these narrowing factors serves to underscore the seriousness of the crime that Congress sought to address and demonstrates its effort to ensure that only such offenses will qualify as "aggravated" felonies.

Matter of Garza-Olivares, 26 I. & N. Dec. 736, 739–40 (BIA 2016) (emphasis added).

The above-cited language arguably support*s* applying the *Valencia–Mendoza* rule to 101(a)(43)(T). A offender score sufficiently high to put the offender in a 24-month sentencing range would clearly be a specific and "narrowing" aggravating offense characteristic. "May be imposed" is at least as offense-factor-specific a reference as "punishable by," the phrase from USSG 2L1.2 that *Valencia–Mendoza* interpreted. The statutory celling for a whole class of felonies is more like a "formal element." Since there might not have ever been a conviction of the original underlying felony, one may need to research the underlying offense using the Manual and other resources.

For almost all class C felonies, and many class B felonies, if the client had no prior felony criminal history, it is highly likely that the range was under 24 months. For example, if the client had failed to appear on a charge of Possession of Stolen Property in the First Degree other than a firearm or motor vehicle (RCW 9A.56.150) they would need an offender score of at least 7 to be

subject to a 24-month sentence. See Manual, page 417. The same is true of Theft in the First Degree, RCW 9A.56.030. An offender score of 7 is required. See Manual at p. 454.

D. Bail-jump on Sentence Aggravated Felony: FTA to serve a sentence "if the underlying offense is punishable by imprisonment for a term of 5 years or more" (INA 101(a)(43)(Q)).

"Punishable by imprisonment for" is the same phrase from USSG § 2L1.2 cmt. n.2, that was interpreted in *Valencia-Mendoza*, so that may be the easiest example of its applicability.

IV. Conclusion

To oppose applying *Valencia-Mendoza* (if it survives rehearing requests) DHS may rely on the BIA's interpretive *purposivism*— that the INA is different from § 2L1.2 simply because Congress intended to expel noncitizens with criminal convictions as much as possible, and that this "intent" should override every other canon of statutory construction (including, if there actually were ambiguity, the rule of lenity).

> The government relies primarily on "the express intent of Congress to remove criminal noncitizens convicted of aggravated felony offenses," which purportedly means that Congress would disfavor any obstacle to that goal . . . **This argument illustrates the problems with purposivism; it suggests courts can simply ignore the enacted text and instead attempt to replace it with an amorphous "purpose" that happens to match with the outcome one party wants.** But that has no limiting principle. . . . Congress always wants the statutes it passes to be enforced. . . So the government's argument proves too much. And more fundamentally, statutes are motivated by many competing—and often contradictory—purposes. Congress addresses these purposes by negotiating, crafting, and enacting statutory text. It is that text that controls, not a court's after-the-fact reevaluation of the purposes behind it.

Arangure v. Whitaker, 911 F.3d 333, 344–45 (6th Cir. 2018)

Appendix I.

Chart of INA and Relevant Federal Criminal Provisions That Refer to a Maximum Possible Sentence or Punishment

Provision	Phrase	Case or description
18 USC § 924(e)(2)(A)(ii) ACCA	**maximum term of imprisonment . . . prescribed by law.**	*Rodriquez*
8 U.S.C. § 1326(a) & USSG § 2L1.2,	any federal, state, or local offense **punishable by** imprisonment for a term exceeding one year.	*Valencia-Mendoza*
INA 237(a)(2)(A)	for which **a sentence of one year or longer may be imposed.**	1-CIMT deportability; see *In Re: Juan Emigdio Giron*, 2015 WL 5996701, at *2 (BIA, 2015)
INA 212(a)(2)(A)(ii)(II)	t**he maximum penalty possible for the crime of which the alien was convicted** (or which the alien admits having committed . . . did not exceed imprisonment for one year	1-CIMT petty offense exception, ties in to GMC bar at INA 101(f)(3)
Bail-jump (Fail to Appear) aggravated felony, at INA 101(a)(43)(T)	FTA to answer to or dispose of a charge of a felony "for which a sentence of 2 years' imprisonment or **more may be imposed**"	AF
Fail to Appear to serve sentence aggravated felony, INA 101(a)(43)(Q)	"if the underlying offense i**s punishable by** imprisonment for a term of 5 years or more"	AF ; *but see, contra, Matter of Adeniye*, 26 I. & N. Dec. 726, 726 (BIA 2016)
RICO aggravated felony INA 101(a)(43)(J)	for which a sentence of 1 year imprisonment or more **may be imposed**	AF
Failure to maintain NIV status, 8 CFR 214.1(g)	A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence **for which a sentence of more than one year imprisonment may be imposed** (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status."	

RCW 9A.60.020
CLASS C – NONVIOLENT
OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 248.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 246.

ADULT HISTORY:

Enter number of felony convictions ..... _____ x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions ..... _____ x 1 = _____

Enter number of nonviolent felony dispositions ..... _____ x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions ..... _____ x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) _____ + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... _____

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL I	0-60 days	0-90 days	3m 2 - 5	4m 2 - 6	5.5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	19.5m 17 - 22	25.5m 22 - 29

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 237 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 245.
- ✓ For sentencing alternatives, see page 227.
- ✓ For community custody eligibility, see page 239.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 234.

[1] Jan.10, 2019,opinion by J. Graber. The mandate has not issued. On Jan. 25th the appellee's motion for extension of time until Feb 25, 2019 to file for rehearing was granted.
[2] The commentary to § 2L1.2 defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." U.S.S.G. § 2L1.2 cmt. n.2. *Valencia-Mendoza*, 912 F.3d at 1216
[3] *United States v. Rios-Beltran*, 361 F.3d 1204, 1208 (9th Cir. 2004); *United States v. Murillo*, 422 F.3d 1152,1153 (9th Cir. 2005) (defendant previously convicted of "a crime punishable by imprisonment for a term exceeding one year," pursuant to 18 USC§ 922(g)(1)); *United States v. Crawford*, 520 F.3d 1072, 1079–80 (9th Cir. 2008) (applying *Murillo* to USSG § 4B1.2(b) finding Washington conviction was for "an offense under federal or state law, punishable by imprisonment for a term exceeding one year").
[4] *Valencia-Mendoza* at 1217 (citing RCW 9.94A.535 "[d]epartures from the guidelines")
[5] United States v. Valencia-Mendoza, 912 F.3d 1215, 1218 (9th Cir. 2019)
[6] *Carachuri-Rosendo v. Holder* 560 U.S. 563, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010)
[7] *Moncrieffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013).
[8] *Valencia-Mendoza* at 1218–19 ("We conclude that our earlier holdings are 'clearly irreconcilable,' *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc)…" *id*. at 1219.)
[9] *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 582, 130 S. Ct. 2577, 2589, 177 L. Ed. 2d 68 (2010)
[10] *Moncrieffe*, 569 U.S at 184, 195, 133 S. Ct. 1687
[11] *Valencia-Mendoza* at 1222 (9th Cir. 2019) (citing *Moncrieffe*, 569 U.S. at 195–96, 133 S.Ct. 1678 (one citation omitted)).
[12] *Moncrieffe v. Holder*, 569 U.S. 184, 192, 133 S. Ct. 1678, 1685 (2013)
[13] *Valencia-Mendoza* at 1222.
[14] *United States v. Rodriquez*, 553 U.S. 377, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008).
[15] See e.g., *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014)
[16] "Our holding today also finds a surprising ally: the government's position in several cases in the Fifth Circuit." *Valencia-Mendoza*, at 1224 n4 (9th Cir. 2019) (Noting Supreme Court disapproval of the government taking "inconsistent positions" in separate cases. *Id*.)
[17] *Rodriquez*, 553 U.S. at 390.
[18] *Valencia-Mendoza*, at 1223–24
[19] *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014)(emphasis in original)
[20] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). For more on "step one" and "step two" analysis of administrative "Chevron deference," see
Who Decides? Overview of Chevron, Brand X and Mead Principles by Kathy Brady at
https://www.ilrc.org/sites/default/files/resources/overview_of_chevron_mead__brand_x.pdf
[21] *Matter of Adeniye*, 26 I. & N. Dec. 726 (BIA 2016)
[22] *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 907-908 (9th Cir. 2009) (*en banc*) ("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.")
[23] Assuming that *Valencia-Mendoza* is not reheard, (*see* n.1 *supra*.) and becomes the law applied to immigration provisions, there may be a question as to retroactivity or if it is a new rule of criminal procedure.
[24] *Matter of Adeniye*, 26 I. & N. Dec. 726, 726 (BIA 2016)
[25] *Id*.at 727-28
[26] *Id*. at 728–29
[27] See table at Appendix I.
[28] Chapter 9.94A RCW. https://apps.leg.wa.gov/RCW/default.aspx?cite=9.94A
[29] See the Washington Courts Felony Judgment and Sentence model forms, such as WPF CR 84.0400 FTO Felony Judgment and Sentence – First-Time Offender; WPF CR 84.0400 J Felony Judgment and Sentence – Jail One Year; See or Less, and other variations, at https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=18
[30] *Valencia-Mendoza* at 1217
[31]For information about WDA membership and the resources it has available, go to
https://defensenet.org/engage/join/ and https://defensenet.org/about/membership-benefits/
(Individuals currently performing prosecutorial or judicial work are not eligible for WDA membership.)
[32] INA 237(a)(2)(A)(i)(II). Also:
The RICO aggravated felony definition at INA 101(a)(43)(J) also requires a crime "for which a sentence of 1 year imprisonment or more may be imposed."

"May be imposed" also appears in the regulation at 8 CFR 214.1(g): "A nonimmigrant's conviction . . . for a crime of violence for which a sentence of more than one year imprisonment may be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status."

[33] Washington lowered the statutory maximum for gross misdemeanors from 365 days to 364 days on July 22, 2011.

[34] For an example of a good unpublished BIA decision arising in the 10th Circuit:

> In *U.S. v. Brooks*, . . . **the Tenth Circuit held that courts must consider the defendant's particular prior record level and not merely the worst possible prior record level in determining whether a conviction was for an offense "punishable" by** a term exceeding 1 year. Applying the *Carachuri* line of cases, the Immigration Judge determined that the respondent's 2010 felony burglary conviction does not constitute a crime for which a 1 year or greater sentence may have been imposed, and that the respondent is therefore not removable under section 237(a)(2)(A)(i) of the Act. . . We are not convinced that the Immigration Judge committed reversible error when he concluded that the respondent had not been convicted of a crime for which a sentence of 1 year or longer may be imposed within the meaning of section 237(a)(2)(A)(i)(II). Accordingly, the DHS appeal from the Immigration Judge's decision granting the respondent's motion to terminate proceedings will be dismissed.

In Re: Juan Emigdio Giron, 016 - KAN, 2015 WL 5996701, at *2 (Sept. 14, 2015) (bolding added)

[35] See RCW 9A.20.021.

[36] See RCW 9.94A.525(7)

[3737] See Appendix I. The basic sentencing grid itself is at RCW 9.94A.510, and the seriousness levels defined at RCW 9A.94A.515, and the offender score determined by R W 9.94A.525. See RCW 9/94A.530 Standard sentencing range. The Manual converts them into scoring sheets for individual offenses. The Manual is available at: http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2018.pdf
You may need to find an earlier version of the Manual and guidelines depending on when your client was convicted and sentenced. Earlier versions are available here: https://www.cfc.wa.gov/Publications.htm

[38] If you need assistance calculating an offender score, you can contact us through our website: www.defensenet.org

[39] Forgery can also be an aggravated felony under 101(a)(43)(M)(i) if there is a loss or attempted loss of $10,000.

[40] INA 212(a)(2)(A)(ii)(II)