WHEN CRIMINAL ALIENS ARE REPEAT OFFENDERS FOR PURPOSES OF DEPORTATION: *NGUYEN v. INS*, 991 F.2d 621 (10th Cir. 1993)

The Immigration and Nationality Act of 1952[1] authorizes the government to expel criminal aliens[2] from the United States.[3] In particular, the Act affirmatively requires the government to deport aliens convicted of two or more crimes.[4] Before deporting repeat criminal aliens, however, the government must prove that the crimes did not arise out of a "single scheme" of criminal misconduct.[5] Courts disagree on what constitutes a single scheme of criminal activity.[6] In

1. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1553 (1988 & Supp. IV 1992).

2. The Act defines an alien as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

3. *See* 8 U.S.C. §§ 1251-1260 (outlining procedures and requirements for the deportation of aliens).

4. Section 1251(a)(2)(A)(ii) requires the government to deport any alien who "at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. . . ." 8 U.S.C. § 1251(a)(2)(A)(ii).

In addition, the Act requires the government to deport an alien who is "convicted of a crime involving moral turpitude committed within five years after entry, and . . . either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer." 8 U.S.C. § 1251(a)(2)(A)(i). This Comment does not address this provision of the Act.

5. Section 1252(b)(4) saddles the government with the burden of proving that the crimes did not arise out of a single scheme of criminal activity. *See* 8 U.S.C. § 1252(b)(4) (1988). *See also* Leon-Hernandez v. INS, 926 F.2d 902, 903-04 (9th Cir. 1991) (finding burden to produce clear and convincing evidence on the government); *accord* Nason v. INS, 394 F.2d 223, 226 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968); Sawkow v. INS, 314 F.2d 34, 37 (3d Cir. 1963); Wood v. Hoy, 266 F.2d 825, 831 (9th Cir. 1954). Section 1252(b)(4) provides that "[n]o decision of deportability shall be valid unless it is based on reasonable, substantial, and probative evidence." 8 U.S.C. § 1252(b)(4). For a thorough discussion of the government's burden of proof, see Irving Appleman, *"Single Scheme of Criminal Misconduct" in Immigration Cases*, 25 FED. B. J. 396 (1965).

6. See *infra* notes 29-70 and accompanying text for a discussion of the two interpretations. For a recent annotation of court opinions discussing the single scheme

Nguyen v. INS,[7] the Tenth Circuit adopted the "single criminal episode" test to determine whether two crimes arose out of a single scheme.[8]

Nguyen was an adult Vietnamese male who had been admitted into the United States as a refugee in 1981.[9] On August 1, 1988, Nguyen and a companion were driving a stolen automobile when a Highway Patrol Officer stopped them for speeding.[10] Nguyen shot at the officer,[11] and was convicted of shooting with intent to kill and possession of a stolen vehicle.[12] As a result, the Immigration and Naturalization Service (INS) ordered Nguyen to show cause why he should not be deported.[13] The immigration judge subsequently ordered Nguyen deportable pursuant to section 1251(a)(4) for having committed two crimes of moral turpitude.[14] The Board of Immigration Appeals (Board) affirmed.[15] On petition for review to the Tenth Circuit, Nguyen claimed that section 1251(a)(4) did not create

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issue, see Romualdo P. Eclavea, Annotation, *What Constitutes "Single Scheme of Criminal Misconduct" for Purposes of § 241(a)(4) of Immigration and Nationality Act of 1952 (8 USCS § 1251(a)(4)), Providing for Deportation of Aliens Convicted of Two Crimes Involving Moral Turpitude, Not Arising Out of Single Scheme of Criminal Misconduct*, 19 A.L.R. FED. 598 (1992).

7. 991 F.2d 621 (10th Cir. 1993).

8. *Id.* at 625.

9. *Id.* at 622.

10. *Id.* Nguyen and his companion left from Houston, Texas in the vehicle with Nguyen's companion driving. Nguyen claimed that when they left Houston he did not know that the automobile was stolen. He said his companion told him only after they were out of the Houston area. Approximately seven hours after they left Houston, an officer stopped them for speeding in Oklahoma. *Id.*

11. *Id.* Nguyen's companion did not have a driver's license and the automobile was not registered in his name. Consequently, the officer put Nguyen's companion in the patrol car and "ran a check on the vehicle." Nguyen then exited the stolen auto, approached the patrol car, and shot five times at the officer who was sitting in the driver's seat. *Id.*

12. *Nguyen*, 991 F.2d at 622-23. Nguyen pleaded nolo contendere. The judge sentenced Nguyen to prison for twenty-three years for shooting with intent to kill and two years for possession of a stolen vehicle. The sentences were to run consecutively. *Id.* at 623.

13. *Id.* The INS issued the order to show cause on April 26, 1991. *Id.* at 622 n.1. Thus, the old version of the section (8 U.S.C. § 1251(a)(4) (1988)) applied in *Nguyen* rather than the recodified version (8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. 1992)). The new version is simply a renumbering of the prior section. See generally *infra* note 24 for an explanation of the inapplicability of the renumbered section.

14. *Nguyen*, 991 F.2d at 623.

15. *Id.*

cause for his deportation.[16] He argued that the August 1, 1988 crimes of shooting with intent to kill and possession of a stolen vehicle arose out of a "single scheme of criminal misconduct."[17] The Tenth Circuit disagreed with Nguyen and affirmed the Board's decision that he was deportable.[18]

The United States government has inherent power to expel aliens.[19] The government can deport aliens for any reason Congress

16. *Id.* Nguyen made two other claims, both of which the court denied. First, Nguyen argued that the Board erred in denying his application for granting asylum and withholding deportation. A deportable alien is eligible for asylum if proved to be a refugee due to persecution or a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1988). Nguyen asked for asylum based on his claim that the Vietnamese had mistreated his father and brothers in the past and would punish him for desertion of his military post. *Nguyen*, 991 F.2d at 625. The court found these claims unsubstantiated and held that the petitioner failed to meet his burden of proof on the issue. *Id.* at 625-26.

Second, Nguyen contended that the Board erred in retroactively applying a mandatory deportation regulation, 8 C.F.R. § 208.14(c)(1). *Nguyen*, 991 F.2d at 626. Section 208.14(c)(1) requires mandatory denial of asylum applications on or after October 1, 1990 in cases of serious crimes. Despite the serious nature of the shooting, the Tenth Circuit agreed that the statute did not apply in this case because the application was filed before October 1, 1990. *Id.* at 626. Nevertheless, the court determined that the lower court had actually applied 8 U.S.C. § 1253(h)(2)(B) (1988), which was applicable to Nguyen. Under the Code, an alien can be deported, despite threats to the alien's "life or freedom" upon return to his native country, if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1253(h)(2)(B). The Tenth Circuit held that under this test, the lower court properly exercised its discretion in finding the petitioner's crimes adequately serious. *Nguyen*, 991 F.2d at 626.

17. *Nguyen*, 991 F.2d at 623.

18. *Id.* at 625. See *infra* notes 72-82 and accompanying text for a discussion of the court's reasoning in the *Nguyen* decision.

19. Congress's power to create laws regarding deportation is derived from the sovereign authority of the United States as a nation and the Commerce Clause of the U.S. Constitution. *See* H.R. REP. NO. 1365, 82d Cong., 2d Sess. 5, 6 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1654 (explaining that "the right to exclude or expel all aliens . . . is an inherent and inalienable right of every sovereign and independent nation"); WALTER M. BESTERMAN, UNITED STATES HOUSE OF REPRESENTATIVES, COMMENTARY ON THE IMMIGRATION AND NATIONALITY ACT 60, *in* 8 U.S.C.A., pt. I (1953); *see also* The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (explaining that Congress has unquestionable authority to exclude aliens from the United States under the Commerce Clause). The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

deems necessary to protect the best interests of the United States.[20] In 1952, Congress passed the Immigration and Nationality Act[21] which includes regulations governing deportation.[22] In particular, Congress drafted section 1251 of the Act with the intent to expand the grounds for deportation, specifically, the deportation of criminal aliens.[23] Section 1251 provides that "any alien shall, upon order of the Attorney General, be deported . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct."[24] Congress did not pro-

20. H.R. REP. No. 1365, 82d Cong., 2d Sess. 6 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1654 (explaining that the right to expel aliens is "essential to [this country's] . . . safety . . . independence, and . . . welfare . . .").

21. Congress overrode President Truman's veto and the Immigration and Nationality Act became law on June 27, 1952. BESTERMAN, *supra* note 19, at 4. The purpose of the Act was to provide a "comprehensive, revised immigration, naturalization, and nationality code." H.R. REP. No. 1365, 82d Cong., 2d Sess. 5 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653. This was the first time the United States had one comprehensive statute governing immigration, naturalization, and nationality. BESTERMAN, *supra* note 19, at 2.

22. In the legislative history of the Act, Congress emphasized its absolute authority to set the conditions under which aliens may enter and remain in the United States. Congress emphasized its right to exclude or expel any alien "for any reason, whatsoever." H.R. REP. No. 1365, 82d Cong., 2d Sess. 6 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653.

23. Senator McCarran, a co-sponsor of the bill, explained that the Act was "designed to strengthen the exclusion and deportation procedures so that we can prevent the entry and cause the deportation of subversives, criminals and undesirables." 98 CONG. REC. 8254 (1952). *See also* Pacheco v. INS, 546 F.2d 448, 449 n.3 (1st Cir. 1976) (observing that § 1251(a)(4) was less gentle and more restrictive than previous deportation provisions), *cert. denied*, 450 U.S. 985 (1977); Costello v. INS, 311 F.2d 343, 344 (2d Cir. 1962) (noting that one of the specific objectives of the Immigration and Nationality Act was to "broaden the provisions governing deportation . . ."); BESTERMAN, *supra* note 19, at 61 (commenting that the Immigration and Nationality Act broadened the provisions concerning criminal and subversive aliens).

24. 8 U.S.C. § 1251(a)(4) (1988) (current version at 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. IV 1992)). The Immigration Act of 1990 renumbered this section as 8 U.S.C. § 1251(a)(2)(A)(ii). The new text of § 1251 is broken down into several additional categories. With respect to multiple criminal convictions, the text is nearly identical and substantively the same. Section 1251(a)(2)(A)(ii) provides that "[a]ny alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." 8 U.S.C. § 1251(a)(2)(A)(ii).

The new section governs only orders to show cause issued after March 1, 1991. *See Nguyen*, 991 F.2d at 622 n.1. Since § 1251(a)(4) applied to the case at hand, this

vide any guidance in either the Act[25] or the legislative history[26] for the proper interpretation of the phrase "single scheme."[27] Courts have developed two different tests to determine whether multiple acts of misconduct are part of a single scheme: the "single criminal episode" test and the "common plan" test.[28]

The Board was the first appellate forum to grapple with section 1251(a)(4), and in doing so laid the foundation for the single criminal episode test.[29] In *In re Z*,[30] the Board adopted a "natural and reasonable" interpretation of "single scheme of criminal misconduct."[31] If an alien commits an act "which, in and of itself, constitutes a complete, individual and distinct crime," then commission of

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comment will refer to the old section number. *See id.* (noting that the show cause order in this case was issued in 1990).

25. *See* 8 U.S.C. § 1251(a)(4) (current version at 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. IV 1992)) (providing no explanation of term "single scheme").

26. *See generally* H.R. REP. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653.

27. Courts often emphasize this omission in their analysis. *See, e.g.*, Nguyen v. INS, 991 F.2d 621, 623 (10th Cir. 1993) (stating that legislative history did not reveal any congressional intent on the definition of "single scheme"); Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993) (stating that "there is no clear congressional intent in the definition of a 'single scheme'"); Pacheco v. INS, 546 F.2d 448, 449 (1st Cir. 1976) (stating that legislative history "shed no light on § 1251(a)(4)"); Wood v. Hoy, 266 F.2d 825, 828-29 (9th Cir. 1959) (stating that "[t]he Act does not define . . . 'single scheme' of criminal conduct, [n]or does the legislative history shed any light" on the intent of Congress).

The absence of legislative history regarding this phrase is significant because of the Supreme Court's holding in Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which addressed the appropriate standard of review for an agency's construction of a statute that it administers. In *Chevron*, the Supreme Court held that if a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

28. See *infra* notes 29-52 and accompanying text for a discussion of the single criminal episode test. See *infra* notes 53-70 and accompanying text for a discussion of the common plan test.

29. See generally Appleman, *supra* note 5, at 397-99 for a detailed discussion of Board opinions on § 1251(a)(4).

30. 6 I. & N. Dec. 167 (1954).

31. *Id.* at 168-69. In *In re* Z, the respondent forged the name and cashed the checks of the same individual on two separate occasions. *Id.* at 168. The Board refused to find a single episode of misconduct. The Board reasoned that "the fact that the acts may be similar in character, that the same person is the victim in each instance, or that each distinct and separate crime is part of an overall plan of criminal misconduct is immaterial." *Id.* at 169.

another crime is cause for deportation.[32] The Board refused to consider similarities in nature, circumstances, or common plan of the crimes.[33]

In *In re Z*, the Board in dictum provided two examples of acts that would constitute a single scheme of criminal misconduct.[34] In the first example, convictions for possessing and passing a fake note would constitute a single scheme because possession is a necessary condition of passing the note.[35] In the second example, convictions for burglary and assault of a homeowner would arise out of a single scheme because the assault flows naturally from the burglary.[36] The Board noted, however, that if the burglar in the second example robbed the house next door, the criminal conduct would not arise out of a single scheme.[37] The Board clarified this caveat in *In re J*,[38] which held that a criminal who is free to discontinue criminal activity at any time cannot successfully plead a single scheme.[39]

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32. *Id.* at 168-69. The Board addressed § 1251(a)(4) for the first time in *In re* A, 5 I. & N. Dec. 470 (1953). In *In re* A, the respondent was convicted of three separate robberies, with three different victims, at three different times. Rather than interpret "arising out of a single scheme of criminal conduct," the Board decided simply that they were "certain" that the alien's acts were not a part of a single scheme of conduct, and thus did not provide an analysis of the statute. *Id.* at 470-71. The Board denied the request for abeyance of deportation. *Id.* at 471.

33. *In re* Z, 6 I. & N. Dec. at 169.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id. See also In re* B, 8 I. & N. Dec. 236 (1958), in which the Board considered an interpretation of single scheme which extended only to acts affecting one person, such as counterfeiting. The Board rejected this view as too narrow. Instead, the Board opted for its current position which allows one criminal episode, such as assault and burglary of a store owner. *Id.* at 238.

38. 6 I. & N. Dec. 382 (1954).

39. *Id.* at 385-86. In *In re* J, the respondent pleaded guilty to two counts of income tax evasion occurring in 1947 and 1948. *Id.* at 382. The Board refused to find a single scheme, and held that "respondent was under no compulsion to act as he did and was free to cease his purposeful acts of attempted tax evasion at any time." *Id.* at 386. *Cf.* Costello v. INS, 311 F.2d 343, 348 (2d Cir. 1962) (holding that no connection existed between convictions for tax evasion in 1948 and 1949 because of the substantial time separation). *But cf.* Barrese v. Ryan, 203 F. Supp. 880, 882-83 (D. Conn. 1962) (finding a single scheme when plaintiff failed to pay a federal occupational tax in 1951 and 1952).

The Board's standard has become known as the single criminal episode test.[40] In a recent Board decision, *In re Adetiba*,[41] petitioner was convicted on fifteen counts of misrepresentation and fraud, and claimed that these acts stemmed from a common plan.[42] The Board rejected petitioner's argument, holding that elaborate plans and similar modus operandi do not establish a "single scheme of criminal misconduct."[43] The language "single scheme," the Board explained, is a statutory exception referring to acts in which one crime is a lesser included offense or naturally flows from another crime in furtherance of a single criminal episode.[44]

In *Pacheco v. INS*,[45] the First Circuit adopted the Board's position and held that single scheme implies a single transaction without interruption or opportunity to dissociate from the criminal acts.[46] The First Circuit concluded that the exception's purpose was to give one-time alien offenders a second chance.[47] The court warned against broad interpretations of single scheme[48] because broad,

40. *See In re* B, 8 I. & N. Dec. 236, 238 (1958) (explaining that single scheme means "essentially one act" and does not include continuing criminal misconduct); *In re* M, 7 I. & N. Dec. 144 (1956) ("The fact that one [crime] may follow the other closely, even immediately, in point of time is of no moment."); *In re* P, 6 I. & N. Dec. 795, 799 (1955) (finding that repetition of similar crimes does not constitute a single scheme); *In re* D, 5 I. & N. 728, 729-30 (1954) (finding evidence of planning and similarities of timing and character inconsequential).

41. Interim Dec. No. 3177 (BIA May 22, 1992).

42. *Id.* at 3, 5.

43. *Id.* at 8. *See also* Fitzgerald *ex. rel.* Miceli v. Landon, 238 F.2d 864, 865, 867 (1st Cir. 1956) (holding proof of a single scheme requires evidence of a "single criminal enterprise" and evidence of a similar modus operandi is not enough).

44. *In re Adetiba,* Interim Dec. No. 3177, at 6.

45. 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

46. *Id.* at 451.

47. *Id.* (citing Nason v. INS, 394 F.2d 223, 227 (2d Cir.), *cert. denied*, 393 U.S. 830 (1968)).

48. *Id.* at 450. Notwithstanding the "tempt[ation] to soften the harshness of the requirement by treating 'single scheme' as an elastic concept," the *Pacheco* court refused to condone broad interpretations of § 1251(a)(4). *Id.* For examples of cases in which harsh orders resulted, see, e.g., *In re* Z, 6 I. & N. Dec. 167 (1954) (deporting a twenty-seven year old, who was the wife of a native-born U.S. citizen and the mother of two native-born American children and expecting a third, for two counts of cashing forged checks); *In re* J, 6 I. & N. Dec. 382 (1954) (deporting a forty-four year old, who had resided in the United States since he was eight, for two counts of income tax evasion).

multi-factor tests often lead to bizarre, inequitable results that are contrary to congressional intent.[49]

The Fifth Circuit agreed with the First Circuit in *Iredia v. INS*.[50] The *Iredia* court explained that a focus on criminal planning can lead to theoretical absurdities.[51] For example, under the common plan test, an alien thief convicted of ten burglaries could not be deported pursuant to section 1251(a)(4) if he could prove a common plan and could show that he acted according to that plan.[52]

Despite criticisms such as the Fifth Circuit's in *Iredia*, some courts advocate the common plan test.[53] The Ninth Circuit, in *Wood v. Hoy*,[54] held that the common plan test is the appropriate plain language interpretation of single scheme.[55] The *Wood* court complained that the Board incorrectly read section 1251(a)(4) as if Congress had written "single act."[56] In direct contrast to the Board,

49. *Pacheco*, 546 F.2d at 451. The court noted that a common plan test would doom a criminal "whose crimes were committed during periods of intoxication, but save[ ] from deportation one who coolly mapped out several robberies in advance." *Id.* See *infra* notes 53-70 and accompanying text for an explanation of the common plan test.

50. 981 F.2d 847 (5th Cir.), *cert. denied*, No. 93-5043, 1993 WL 247918 (Oct. 4, 1993).

51. *Id.* at 849 (quoting Gonzalez-Sandoval v. INS, 910 F.2d 617 (9th Cir. 1990) (providing definition of word "scheme")). *See also* Chanan Din Khan v. Barber, 253 F.2d 547, 550 (9th Cir.) (asserting theory that if income tax evasion in successive years was considered a single scheme, then convictions 20 years apart would be also), *cert. denied*, 357 U.S. 920 (1958).

52. *Iredia*, 981 F.2d at 849.

53. See *infra* notes 54-70 and accompanying text for a discussion of courts that apply the common plan test. *See also* Nason v. INS, 394 F.2d 223, 227 (2d Cir.) (holding that section 1251(a)(4) is broader than a single criminal act or transaction, but narrower than a "vague, indeterminate expectation to repeat a prior criminal modus operandi"), *cert. denied*, 393 U.S. 830 (1968); Barrese v. Ryan, 203 F. Supp. 880, 886-87 (D. Conn. 1962) (rejecting expressly a "single criminal episode" test); Zito v. Moutal, 174 F. Supp. 531, 537 (N.D. Ill. 1959) (rejecting the Board's reading of § 1251(a)(4) in favor of the interpretation in *Jeronimo*); Jeronimo v. Murff, 157 F. Supp. 808, 815 (S.D.N.Y. 1957) (commenting that probative factors include the initial planned purpose, circumstances, timing, and modus operandi of the crimes).

54. 266 F.2d 825 (9th Cir. 1959).

55. *Id.* at 830. The *Wood* court, citing Fong Haw Tan v. Phelan, 333 U.S. 6 (1948), noted that statutory ambiguity should be resolved in favor of the alien. 266 F.2d at 830. The Supreme Court in *Fong Haw Tan* said "[w]e resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan*, 333 U.S at 8.

56. *Wood*, 266 F.2d at 830. The *Wood* court provided no rationale for its intuitive interpretation except that "we must take the language as we find it." *Id. See*

the Ninth Circuit found the pivotal criteria to be the nature, time, and circumstances of the crimes.[57] Thus, the Ninth Circuit reversed the lower court's finding of no single scheme because both crimes were first degree robberies, were committed within three days of each other, involved the same four people, and followed similar modus operandi.[58]

The Third Circuit followed the lead of the Ninth Circuit in *Sawkow v. INS*.[59] Sawkow, the petitioner, was convicted of receiving a stolen vehicle and stealing another the next day.[60] Noting the similar nature and the time frame of the crimes, the Third Circuit reversed a finding that there was not a single scheme.[61]

In two recent decisions, the Ninth Circuit reaffirmed *Wood v. Hoy* and its reliance on the common plan interpretation. In *Gonzalez-Sandoval v. INS*,[62] petitioner robbed the same bank twice in two days.[63] The Ninth Circuit reversed a lower court order for deportation on the grounds that the lower court had not applied the *Wood v. Hoy* test for single scheme.[64]

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also Barrese v. Ryan, 203 F. Supp. 880, 886-87 (D. Conn. 1962) (criticizing the Board for adhering to an incorrect interpretation of "single scheme"); Zito v. Moutal, 174 F. Supp. 531, 537 (N.D. Ill. 1959) (noting that the statute does not include the word "episode"); Jeronimo v. Murff, 157 F. Supp. 808, 815 (S.D.N.Y. 1957) (emphasizing that the statute reads "single scheme," not "single transaction"). *But see* Pacheco v. INS, 546 F.2d 448, 452 (1st Cir. 1976) (noting that the adjective "single" denotes a "temporally integrated episode of continuous activity").

57. *Wood*, 266 F.2d at 831. For cases employing similar rationale, see LeTourneur v. INS, 538 F.2d 1368 (9th Cir. 1976); Nason v. INS, 394 F.2d 223 (2d Cir. 1968); Jeronimo v. Murff, 157 F. Supp. 808 (S.D.N.Y. 1957).

58. *Wood*, 266 F.2d at 832. The court remanded the case to the district court for determination according to the court's interpretation of single scheme. *Id.*

59. 314 F.2d 34 (3d Cir. 1963).

60. *Id.* at 38.

61. The court did not hold that a single scheme existed. Rather, the court found that the government had not met its burden of proof. Noting contrary evidence, the court reasoned that "[t]he test of substantial evidence is not met by evidence which gives equal support to inconsistent inferences." *Id.* See generally *supra* note 5 for a discussion about the burden of proof in deportation proceedings.

62. 910 F.2d 614 (9th Cir. 1990).

63. *Id.* at 615. Gonzalez-Sandoval wanted to steal over $10,000, but each teller could access only $1,000 at a time. Therefore, Gonzalez-Sandoval decided on several heists. Gonzalez-Sandoval completed his second attempt and would have attempted a third robbery on the third day but a large crowd in the bank that appeared to be undercover police scared him away. *Id.*

64. *Id.* at 618.

In the second recent Ninth Circuit case, *Leon-Hernandez v. INS*,[65] petitioner pleaded guilty to two counts of oral copulation with a minor.[66] The acts occurred one month apart and involved the same victim.[67] Petitioner could offer only proof of a sketchy plan.[68] He argued that planning, particularly with regard to ongoing criminal activity, was only one factor in determining whether a single scheme existed.[69] The *Leon-Hernandez* court rejected this argument and refused to find a single scheme absent evidence of a specific criminal plan.[70]

In *Nguyen v. INS*,[71] the Tenth Circuit followed the Board and the First and Fifth Circuits and adopted the single criminal episode interpretation of section 1251(a)(4).[72] The *Nguyen* court found that, absent clear congressional intent of the meaning of single scheme, the Board's interpretation was reasonable.[73] The court agreed with two aspects of the Board's reasoning.[74] First, to constitute a single scheme, crimes should be part of a natural flow of events.[75] Second, crimes are separate acts if the criminal is free at any time to cease activity.[76] The *Nguyen* court also agreed that a common plan test leads to absurd results.[77] Thus, the Tenth Circuit adopted the single

65. 926 F.2d 902 (9th Cir. 1991).

66. *Id.* at 903.

67. *Id.*

68. *Id.* at 905. Petitioner argued that he believed the victim was his girlfriend. *Id.*

69. *Id.*

70. *Leon-Hernandez*, 926 F.2d at 905 (citing Nason v. INS, 394 F.2d 223, 227 (2d Cir.) (declining to find a single scheme when the evidence showed only a "nebulous intention to repeat [a] crime with the same or other victims some day in the indefinite future"), *cert. denied*, 393 U.S. 830 (1968)).

71. 991 F.2d 621 (10th Cir. 1993).

72. *Id.* at 623.

73. The Tenth Circuit deferred to the Board pursuant to *Chevron*, discussed *supra* note 27. *Nguyen*, 991 F.2d at 623 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)). *See also* Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993) (holding that the Board's interpretation of "single scheme" was reasonable according to *Chevron*). *But cf.* Leon-Hernandez v. INS, 926 F.2d 902 (9th Cir. 1991) (neglecting to note *Chevron* before declining to follow the Board's interpretation); Gonzalez-Sandoval v. INS, 910 F.2d 614 (9th Cir. 1990) (making no reference to *Chevron* when rejecting the Board's interpretation).

74. *Nguyen*, 991 F.2d at 624-25.

75. *Id.* at 624 (citing *In re* Z, 6 I. & N. Dec. 167, 168-69 (1954)).

76. *Id.* (citing *In re* J, 6 I. & N. Dec. 382, 385-86 (1954)).

77. *Id.* (citing *In re* Adetiba, Interim Dec. No. 3177, at 12 (BIA May 22, 1992)).

criminal episode test articulated by the Board and the Fifth and First Circuits.[78]

Applying the single criminal episode test to the facts of this case, the *Nguyen* court held that Nguyen was deportable because the crimes he committed were not part of a single criminal episode, and thus not part of a single scheme.[79] Nguyen did not need to shoot at the police officer to succeed in stealing the car.[80] The theft was completed before the officer stopped Nguyen's companion for speeding.[81] At the time of the shooting, Nguyen was already enjoying the fruits of the theft.[82]

The Tenth Circuit in *Nguyen* properly adopted the single criminal episode test because that standard advances general congressional intent to expand the government's authority to deport criminal aliens and encourages even-handed application of the law.[83] A plain language interpretation of section 1251(a)(4) is problematic because the language gives rise to multiple reasonable interpretations.[84] The legislative history of section 1251 provides no help in choosing an interpretation of the section because Congress did not

78. *Id.* at 625.

79. *Nguyen*, 991 F.2d at 625. The *Nguyen* court might not have found a single scheme, even if applying a common plan test. Nguyen would have had to present evidence that he planned to shoot if pulled over. Moreover, the court would have likely required additional proof of the similar nature and circumstances of the shooting and theft of the car. *See id.* at 622. See generally *supra* text accompanying notes 53-70 for a discussion of the common plan test.

80. *Nguyen*, 991 F.2d at 625.

81. *Id.* See *supra* text accompanying notes 34-37 for two hypotheticals which highlight the difference between completed acts and those which arise out of a single criminal episode.

82. *Nguyen*, 991 F.2d at 625.

83. When interpreting § 1251(a)(4) (current version at § 1251(a)(2)(A)(ii)), courts are split over whether the Board or the alien should receive the benefit of the doubt. The disparity stems from tension between competing policies: granting deference to the Board and resolving statutory ambiguities in favor of the alien. Compare *supra* note 27 with *supra* note 55 for discussions of the conflicting approaches to this dilemma. The conflict is relevant to a proper interpretation of § 1251(a)(4), but is beyond the scope of this comment. See *supra* note 23 for a brief discussion of congressional intent regarding the Immigration and Nationality Act.

84. Those courts using the single criminal episode test and those using the common plan test both made legitimate claims to a natural translation of § 1251(a)(4) (current version at § 1251(a)(2)(A)(ii)). For a discussion of both interpretations, compare *supra* note 31 and accompanying text with *supra* notes 55-56 and accompanying text.

explain the single scheme exception.[85] Thus, for guidance, courts should look to congressional intent with respect to deportation provisions of the Act in general.[86] Courts also should consider practical concerns surrounding the application of their interpretation of single scheme.[87]

The common plan test broadens the single scheme exception to block the deportation of calculated professional criminals; a result which contravenes general congressional intent.[88] When drafting section 1251, Congress intended to increase the grounds for deportation.[89] Under the common plan test, repeat criminal aliens can escape deportation by plotting and executing careful plans.[90] Moreover, the common plan test is difficult to apply because it centers on an individual's preparation, which encourages fabrication and outright lies.[91] Courts using the common plan test advocate the use of objective criteria such as the nature, time, and circumstances of the

85. See *supra* notes 25-27 and accompanying text for a discussion of the absence of any legislative commentary on single scheme.

86. See *supra* note 23 and accompanying text for a discussion of congressional intent regarding deportation in the Act.

87. See *infra* notes 88-94 and 95-98 and accompanying text for a discussion of pros and cons in applying the two tests.

88. See *supra* note 23 and accompanying text for an explanation of congressional intent with respect to § 1251(a)(4).

89. See *supra* notes 2-5, 24-27 and accompanying text for general and background information on § 1251(a)(4) (current version at § 1251(a)(2)(A)(ii)).

90. Courts have commented that this type of result is "absurd." *See* Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993); Chanan Din Khan v. Barber, 253 F.2d 547, 550 (9th Cir. 1958); *In re* Adetiba, Interim Dec. No. 3177, at 8 (BIA, May 22, 1992). See *supra* note 53 for examples of cases where courts using a common plan test overturned deportation of calculated professional criminals.

91. *See generally* Appleman, *supra* note 5, at 405-06 (arguing that an alien has motivation to testify about a preconceived plan because the alien has already been convicted, and hence faces no risk by presenting such statements). When courts apply a common plan test, aliens convicted of two or more crimes must link the criminal activities through evidence of pre-planning. Since the criminal is the best and sometimes the only source of evidence of pre-planning, the court must rely on the criminal's imagination. Unwittingly, courts may encourage fabrication. In *Leon-Hernandez v. INS*, for example, the Ninth Circuit rejected Leon-Hernandez' sole defense that the victim was his girlfriend and ruled that "an alien must do more than simply present 'any evidence' of a common scheme." 926 F.2d at 904-05. Had Leon-Fernandez had the foresight of the court's opinion, he may have "remembered" specific plans, times, and circumstances.

crimes.[92] However, such criteria are actually highly subjective[93] and lead to theoretical absurdities.[94]

The single criminal episode test narrows the single scheme exception to include only one-time criminal offenders, which furthers congressional intent to increase deportation of criminal aliens.[95] In addition, the single criminal episode test objectively focuses on the criminal act[96] rather than the individual's subjective thoughts.[97] Courts applying the single criminal episode test do not consider the nature, time, or circumstances of the crimes, except the condition that one crime must necessitate the commission of the other.[98]

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92. See *supra* note 57 and accompanying text for an example of a court advocating such criteria.

93. *See, e.g.*, Pacheco v. INS, 546 F.2d 448, 451 (1st Cir. 1976) (commenting that use of a multi-factored test results in "selective law enforcement and disparities in judicial treatment").

94. Despite advocating the use of nature, time, and circumstance criteria in *Gonzalez-Sandoval* and *Leon-Hernandez*, the Ninth Circuit had previously admitted that use of such criteria can lead to absurdities. *See* Chanan Din Khan v. Barber, 253 F.2d 547, 550 (9th Cir. 1958) (finding absurd the possibility that crimes, separated by years, would be of a single scheme because similar in plan). *See also* Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993) (commenting that a planning approach to single scheme accommodates theoretical absurdities); *In re* Adetiba, Interim Dec. No. 3177, at 8 (BIA, May 22, 1992) (protesting that an emphasis on the planning stage renders § 1251(a)(4) impotent in the case of thoughtful criminals).

95. See *supra* notes 19-27 and accompanying text for discussion of congressional intent with regard to deportation.

Despite its advantages in some instances, the single criminal episode test may frustrate congressional intent to deport professional criminal aliens. For example, a criminal who planned and executed a bank robbery knowing that the murder of three guards and the theft of a car were necessary to the success of the heist may escape deportation. This result is possible because courts using a single criminal episode test hinge "single scheme" on the necessity and the natural flow of criminal acts.

96. *See* Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976) (involving a single transaction with no time to disassociate from the criminal acts), *cert. denied*, 430 U.S. 985 (1977); *In re* Adetiba, Interim Dec. No. 3177, at 6 (BIA, May 22, 1992) (noting that crime was a natural consequence); *In re* J, 6 I. & N. Dec. 382, 386 (1954) (stating that a single share of criminal misconduct is present if several criminal offenses are committed during the performance of one unified act of criminal misconduct).

97. *See In re* Z, 6 I. & N. Dec. 167, 169 (1954) (holding that an overall plan of criminal misconduct is immaterial).

98. *See supra* text accompanying notes 31-33.

In *Nguyen*, the Tenth Circuit joined ranks with those courts advocating a single criminal episode interpretation of the single scheme[99] language in section 1251(a)(4) of the Immigration and Nationality Act. The *Nguyen* decision properly prevents the single scheme exception from swallowing the rule requiring deportation of repeat criminal aliens.

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99. See *supra* notes 45-52 and accompanying text for a discussion of courts applying the single criminal episode test.

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