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Attorney General Holder Issues Order that Should Give Defense Lawyers Better Ability to Limit the Immigration Consequences of Guilty Pleas to Certain Charges*

On April 10, U.S. Attorney General Eric Holder signed an order that should be good news for immigrants accused of certain crimes and their criminal defense lawyers. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015). The Attorney General's order vacates a November 7, 2008 opinion of former Attorney General Michael Mukasey that allowed immigration judges to consider evidence outside the record of conviction in order to determine whether a noncitizen was removable from the United States on the basis of a conviction for a "crime involving moral turpitude." *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008) (hereinafter, *Silva-Trevino I*). *Silva-Trevino I* had the effect of hampering the ability of defense lawyers to give reliable advice regarding the immigration consequences of a negotiated plea to certain criminal charges, as the opinion allowed a later immigration adjudicator to consider evidence of the underlying facts outside what is established by the criminal disposition and record of conviction. Although Attorney General Holder's order vacating *Silva-Trevino I* and accompanying opinion (hereinafter, *Silva-Trevino II*) authorize the Board of Immigration Appeals to address how adjudicators are to determine whether a criminal offense is a CIMT for immigration purposes in the future, the text of the opinion and cited Supreme Court case law make quite clear that any inquiry should not go beyond the record of conviction. **As explained below, this should give criminal defense lawyers enhanced ability to provide reliable advice regarding the immigration consequences of guilty pleas to certain charges, as well as greater ability to limit those consequences by controlling what is in the record of conviction.** The *Silva-Trevino II* order and opinion followed advocacy by the National Association of Criminal Defense Lawyers ("NACDL") in coalition with the American Bar Association ("ABA"), the American Immigration Lawyers Association ("AILA") and immigrant advocacy groups, including the Immigrant Defense Project and the National Immigration Project, represented by the Cardozo School of Law Immigration Justice Clinic.

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Background

Noncitizens may be deportable or inadmissible upon conviction of a “crime involving moral turpitude” (“CIMT”), or in some cases, after conviction for two CIMTs.¹ The undefined CIMT term has been the subject of decades of administrative and judicial case law. The Board of Immigration Appeals (“BIA”) has held that moral turpitude “refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general.”² Examples of categories of offenses that have been found to be CIMTs under the case law include offenses with intent to defraud or intent to steal as an element;³ offenses in which bodily harm is caused or threatened by an intentional act, or serious bodily harm is caused or threatened by a reckless act;⁴ and various sex-related offenses.⁵

In order to determine whether a person has been “convicted” of a CIMT, immigration adjudicators have historically looked to the “inherent nature” of the offense instead of looking at what the defendant actually did in a particular case.⁶ This approach is called the “categorical” approach.⁷

Under this categorical approach, grounded in Congress’s requirement that noncitizens be “convicted” in order to face specified grounds of removal or bars to relief, courts simply compare the generic federal ground of removal with the minimum conduct necessary to offend the criminal statute. If every violation of the criminal statute necessarily falls within the federal removal ground, then a conviction under that statute categorically triggers deportation. But if the criminal statute can be offended without engaging in conduct that falls within the generic deportation ground, the conviction will not be found to trigger removal, regardless of the actual conduct that resulted in conviction. This categorical approach is the same method of analysis that has long applied in the criminal context where Congress has predicated sentencing consequences on what an individual has been “convicted of” in the past. *See, e.g., Taylor v. U.S.*, 495 U.S. 575 (1990). The categorical approach – along with its variant called the “modified” categorical approach applicable when the statute of conviction is divisible into one or more offenses that satisfy the generic definition along with at least one that doesn’t, in which case the adjudicator may look to the record of conviction to determine the offense of conviction -- was

¹ See 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii).

² *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988).

³ See generally *Jordan v. DeGeorge*, 341 U.S. 223 (1951)(rejecting a void-for-vagueness challenge to the CIMT term and defining it to include any offense involving a specific intent to defraud).

⁴ See, e.g., *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007) (in assault case, criminally reckless conduct may be sufficient depending on level of harm required under the statute).

⁵ See, e.g., *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011) (any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have know that the victim was under the age of 16).

⁶ See *Matter of Short*, 20 I&N Dec. 136 (BIA 1989) (it is the “inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction” and not the facts underlying the particular conviction that determines whether the offense is a CIMT).

⁷ See generally *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (noting the categorical approach’s “long pedigree,” citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669 (2011))

strongly reaffirmed by the Supreme Court in both the immigration and criminal sentencing contexts in two recent decisions, *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), and *Descamps v. United States*, 133 S.Ct. 2276 (2013).

Former Attorney General Mukasey's 2008 *Silva-Trevino I* Opinion

In *Silva-Trevino I*, former Attorney General Mukasey drastically altered the categorical approach in the context of determining whether a particular criminal conviction triggers the negative immigration consequences of conviction of a CIMT. This decision, issued just weeks before the Bush administration left office, permitted immigration judges in certain cases to examine evidence beyond the record of conviction to assess whether the conduct underlying a conviction involved moral turpitude. *Silva-Trevino I* contravened the law of nearly every federal circuit court, which had accepted the BIA's nearly century-old categorical CIMT analysis.⁸

Attorney General Mukasey's decision in *Silva-Trevino I* instructed immigration judges to apply the traditional categorical analysis as a first step to determine whether a given conviction constitutes a CIMT. At this first step, the defendant's actual conduct was irrelevant; the sole question was whether the elements of the statute of conviction either *necessarily* fall within the case law definition of a CIMT or *never* do so.⁹ If this traditional, strict categorical inquiry did not yield a definitive answer—that is, if the immigration judge is unable to determine that the prohibited conduct under the statute either *always* or *never* involves moral turpitude—then the judge was instructed to proceed to consult the record of conviction (including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript) as a court would under the “modified” categorical approach.¹⁰ Again, the moral turpitude inquiry was to end if the court was able to determine, at this second step, whether or not the defendant was necessarily convicted of a CIMT. However, if this modified categorical inquiry did not resolve the question one way or the other, *Silva-Trevino I* provided for an unprecedented third step: the immigration judge was instructed to consider “any additional evidence the adjudicator determines is necessary or appropriate to resolve adequately the moral turpitude question,” whether or not it was contained in the formal conviction record.¹¹

Challenges to *Silva-Trevino I*

In the years following the issuance of the Attorney General's *Silva-Trevino I* opinion, immigrants challenged the opinion in appeals of removal orders to federal circuit courts around the country, arguing that it was contrary to settled law. Immigrant advocacy organizations including the Immigrant Defense Project, the National Immigration Project, and allied

⁸ The Seventh Circuit was the only federal court to have rejected the categorical approach in the CIMT context and had done so just months before Attorney General Mukasey's opinion. See *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

⁹ In making this determination, immigration judges were instructed to consider whether there is a “realistic probability” that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I. & N. Dec. at 698 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

¹⁰ *Silva-Trevino I* at 704.

¹¹ *Id.*

organizations represented by the Cardozo Immigration Justice Clinic, submitted amicus briefing in support of the challenges in several of these cases. In the years from 2009 to 2014, five federal circuit courts – the Third, Fourth, Fifth, Ninth and Eleventh – rejected the *Silva-Trevino I* opinion, finding that where immigration consequences are premised on a “conviction,” the immigration statutes are unambiguous in forbidding adjudicators from considering alleged facts and evidence outside the record of conviction.¹² Only two circuit courts – the Seventh and Eighth – followed the opinion, but only out of deference to the Attorney General.¹³ Finally, in 2014, after the Fifth Circuit reversed the Attorney General opinion in the *Silva-Trevino* case itself, ABA President James R. Silkenat, NACDL Executive Director Norman L. Reimer, and AILA Executive Director Crystal Williams wrote to Attorney General Holder urging withdrawal of *Silva-Trevino I* in light of the Fifth Circuit’s rejection of the opinion.¹⁴

Attorney General Holder 2015 *Silva-Trevino* Order and Opinion

A. What Attorney General Holder did

On April 10, 2015, Attorney General Holder issued the order vacating *Silva-Trevino I* and a five-page accompanying opinion. In his opinion, Attorney General Holder 1) summarized *Silva-Trevino I*; 2) provided his rationale for vacating the decision; and 3) authorized the BIA to address how adjudicators should determine whether a criminal conviction qualifies as a CIMT.

As support for his order, Attorney General Holder pointed to the decisions of the five federal circuit courts that rejected the framework set out in *Silva Trevino I*.¹⁵ Rather than accomplishing “its stated goal of ‘establishing a uniform framework of ensuring the [INA’s] moral turpitude provisions are fairly and accurately applied,’”¹⁶ Attorney General Holder noted that the decision forced immigration judges to apply different standards in different jurisdictions.

Significantly, the order also relied on intervening Supreme Court precedent as a basis for vacating *Silva-Trevino I*. Namely, Attorney General Holder looked to both *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) and *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). In *Carachuri-Rosendo*, the Court held that adjudicators could not consider uncharged conduct to determine whether a noncitizen had been “convicted of” illicit trafficking.¹⁷ In *Moncrieffe*, the Court unequivocally reaffirmed that the phrase “convicted of” requires a categorical approach and limited the inquiry to the elements of the offense. The Court specifically rejected the government’s argument that adjudicators be permitted to look outside of the record of

¹² *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009).

¹³ *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012); *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010).

¹⁴ ABA March 11, 2014 letter posted at

http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014march13_silvatrevinoopinion_1.authcheckdam.pdf; NACDL and AILA joint letters sent to Attorney General Holder on March 28, 2014 and June 13, 2014.

¹⁵ *Silva Trevino II*, at 551-52.

¹⁶ *Id.* at 553.

¹⁷ 560 U.S. at 581-82.

conviction to determine whether the underlying conduct came within the aggravated felony definition. Attorney General Holder concluded that these Supreme Court decisions “cast doubt on the continued validity” of going beyond the categorical approach and inquiring into facts outside the formal record of conviction to determine whether a particular conviction involves moral turpitude.¹⁸

Attorney General Holder concluded the opinion by inviting the BIA to develop a uniform standard to determine whether a criminal conviction qualifies as a CIMT in light of all relevant precedents. The text of the opinion and cited Supreme Court case law make plain that any future standard should not go beyond the record of conviction.

B. What this new development means for immigrants in criminal proceedings and their defense lawyers

Attorney General Holder’s order precludes an immigration judge or other adjudicator from using evidence outside the record of conviction in determining whether an offense involves moral turpitude. As a result, criminal defense counsel now are in a better position to assess whether an offense involves moral turpitude and to help a noncitizen client avoid such a designation. This section provides a general overview of what this change means for a criminal defense attorney and offers some suggested approaches about how to assess whether an offense involves moral turpitude and to help avoid such a finding in later immigration proceedings.

In order to analyze whether a particular offense involves moral turpitude following Attorney General Holder’s order, defense counsel -- now freer to focus only on the statute and record of conviction -- need to answer the following questions:

1) What are the essential elements of the potential conviction offense?

An element is a fact that the prosecution must establish beyond a reasonable doubt to a unanimous jury. In deciding whether a conviction is for a CIMT, an immigration fact-finder will examine the elements of the offense to determine whether the minimum conduct for which there is a realistic probability of prosecution necessarily involves moral turpitude. If every violation of the offense involves moral turpitude, then it does not matter if an individual defendant’s actions are relatively free of moral blameworthiness because such a consideration is irrelevant to the inquiry of whether the conviction is of a CIMT. For example, a father who steals food to give to his starving child has a conviction for a CIMT if the statute of conviction has as an essential element an intent to deprive the owner of the property permanently. This is because a theft offense involves moral turpitude where a permanent taking is an element of the offense.¹⁹

¹⁸ *Silva-Trevino II*, at 553.

¹⁹ See, e.g., *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

But what about a theft statute that does not distinguish between temporary or permanent takings and includes both? A conviction under such a statute would not necessarily be a CIMT because the statute is broad enough to cover a temporary taking.²⁰ For example under a theft statute that reaches joyriding conduct, a defendant would be guilty even where half the jury thought the defendant intended to steal a car and half the jury thought the defendant was merely joyriding. A conviction under an indivisible theft statute that does not have an intent to deprive permanently as an element of the offense should never be a crime involving moral turpitude even where a person may have actually had the intent to deprive permanently because the prosecution did not have to prove the intent to deprive permanently in order to secure a conviction. These examples illustrate the overarching point that under the categorical approach it is the conviction offense that governs, and not an individual defendant's underlying conduct.

2) Does the potential conviction offense involve moral turpitude?

The immigration statute does not define what constitutes a moral turpitude offense, which poses a challenge for criminal defense counsel. That said, there are certain elements that demarcate offenses that involve moral turpitude from those that do not involve moral turpitude. For example, as discussed above, conviction for an offense that has as an essential element an intent to defraud,²¹ an intent to cause physical injury,²² or an intent to deprive another of property permanently²³ are examples of offenses that involve moral turpitude.

3) Does the potential conviction offense define more than one crime?

In assessing the immigration consequences facing a client, a criminal defense attorney must determine whether the potential statute of conviction defines more than one offense with distinct essential elements. If the elements of one of the offenses necessarily satisfy the generic definition of the immigration ground and the elements of another offense do not, then the Supreme Court labels the statute "divisible." Applying that test to moral turpitude means that if one of the offenses defined in a statute involves moral turpitude and another does not, then the statute is "divisible." The significance of a statute being "divisible" is that it permits an immigration fact finder to examine the record of conviction²⁴ to identify of which of the distinct offenses was the defendant convicted.

This is where Attorney General Holder's April 10 order vacating *Silva-Trevino I* comes in. Attorney General Holder's order means that, where a statute covers both turpitudinous and non-turpitudinous conduct and is divisible, an immigration judge is limited to looking to the record of conviction—but not beyond—in order to determine whether the conviction at issue is of a CIMT. This presents immigrants and their defense counsel with opportunities to avoid a

²⁰ See, e.g., *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007).

²¹ See, e.g., *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

²² See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

²³ See, e.g., *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

²⁴ The record of conviction includes the charging document, the plea, the judgment, and "any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

later removal order. As criminal defense counsel, having a defendant allocute to a non-turpitudinous offense defined in a divisible statute is one way to take advantage of Attorney General Holder's order vacating *Matter of Silva-Trevino*. To use again the permanent/temporary taking example, say a statute requires the prosecution to establish beyond a reasonable doubt that the defendant took property from another with the intent to deprive the owner permanently *or* temporarily. In interpreting this hypothetical statute, the highest court in the state has held that the intent to deprive temporarily and the intent to deprive permanently are separate elements of distinct offenses. As a practical matter, if the penalty for each offense is the same, then the prosecutor might be willing to accept a plea to a temporary taking offense, which would not be a CIMT. Alternatively, defense counsel could seek to keep out of the record of conviction any reference to facts that would establish or suggest a permanent taking so that an immigration prosecutor would not later be able to establish conviction of a CIMT.

In sum, Attorney General Holder's April 10 order should give criminal defense lawyers enhanced ability to provide reliable advice regarding the immigration consequences of guilty pleas to any criminal charge that covers both CIMT and non-CIMT conduct, as well as greater ability to limit those consequences by controlling what is in the record of conviction.