No. 08-495

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide, and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the statutory interpretation of criminal laws. In furtherance of this and its other objectives, NACDL files approximately 50 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision below abandons the well-settled categorical approach for determining whether a prior conviction constitutes an aggravated felony. This decision raises significant questions regarding the Sixth Amendment and Due Process rights of criminal defendants that our members represent, as well as

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for a party authored any part of the brief, and no person or entity other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief.

policy concerns regarding the ability of our members to counsel their clients about the consequences of certain criminal convictions.

SUMMARY OF ARGUMENT

In recent years, this Court has left little doubt that interpretive issues in a statute that has applications in multiple contexts should be resolved consistently across applications. *Clark v. Martinez*, 543 U.S. 371 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This Court has held that, when faced with multiple plausible interpretations, a need for a limiting construction in one context mandates the same construction in other contexts. Whether to avoid raising constitutional doubt or to provide fair warning under the rule of lenity, this rule of consistent interpretation ensures that congressional intent is respected.

These principles apply with full force to the instant case. Pursuant to 8 U.S.C. § 1101(a)(43)(M)(i), an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony. While the Petitioner's case arises from application of the provision in immigration removal proceedings, the provision has application in the criminal sentencing context as well. Specifically, a criminal defendant facing illegal re-entry charges is subject to an increased maximum penalty of twenty years incarceration if deemed an aggravated felon. 8 U.S.C. § 1326(b)(2). Thus, Section 1101(a)(43)(M)(i) is a classic example of a dual use statute that

straddles the intersection between criminal and immigration law.

The criminal application of the provision compels a consistent reading of Section 1101(a)(43)(M)(i) that conforms to this Court's adherence to a categorical framework for determining whether an individual has been "convicted" of a designated prior criminal offense for purposes of a sentence enhancement. *See Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). The approach adopted by the Third Circuit and advocated by the Government, by dispensing with the *Taylor/Shepard* model, raises grave Sixth Amendment and Due Process questions by inviting a sweeping collateral inquiry into nonconvicted conduct. The rule of constitutional avoidance requires rejection of this approach. The rule of lenity, also applicable here, further rejects this approach. By contrast, the *Taylor/Shepard* approach to Section 1101(a)(43)(M)(i) avoids these problems and provides clarity to actors in the criminal justice system.

The Third Circuit and Government's approaches are inconsistent with this Court's clear instruction regarding the interpretation of dual use statutes. The concerns these approaches would raise with respect to the Sixth and Fourteenth Amendments, the rule of lenity, and the fair administration of the criminal justice system are manifold. Accordingly, the Third Circuit's decision should be reversed.

ARGUMENT

I. The "Aggravated Felony" Fraud Definitional Provision Must be Construed Consistently Across Immigration and Criminal Contexts and in Accordance with *Taylor/Shepard*.

A. Section 1101(a)(43)(M)(i) has criminal as well as immigration consequences.

Like other aggravated felony definitional provisions, Section 1101(a)(43)(M)(i) serves dual purposes. Section 1101(a)(43)M)(i) provides that an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an "aggravated felony." In the immigration context, conviction of an aggravated felony has numerous severe consequences. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii); *see also id.* § 1229b(a)(3), (b)(1)(C) (cancellation of removal unavailable); *id.* § 1158(b)(2)(A)(ii), (b)(2)(B)(i) (asylum unavailable). A prior conviction for an aggravated felony also has severe criminal consequences. The maximum sentence for illegal re-entry after a prior deportation is increased from 2 years to 20 years for any noncitizen "whose removal was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2).

Thus, Section 1101(a)(43)(M)(i) is located at the intersection of immigration law and criminal law. Congress could have drafted two distinct aggravated felony provisions, one applicable to immigration law and the other to criminal law. Congress chose not to take that course. Instead, Congress enacted a single

provision, Section 1101(a)(43)(M)(i), that serves a dual purpose. The provision must be given a uniform meaning that avoids constitutional problems in all applications.

B. The statutory interpretation canons set forward in *Leocal v. Ashcroft* and *Clark v. Martinez* require a consistent reading of Section 1101(a)(43)(M)(i).

Petitioner should prevail under the plain language of the statute, which requires that an individual have been "convicted of" an aggravated felony in order to be subject to mandatory deportation. 8 U.S.C. § 1227(a)(2)(A)(iii). Similarly, the illegal re-entry sentence enhancement statute requires that re-entry occur subsequent to "a conviction for" an aggravated felony. 8 U.S.C. § 1326(b)(2). It is well-settled that the *Taylor/Shepard* analysis applies to determine the nature of a prior conviction. To hold, as the Third Circuit did, that evidence of the loss amount need only be "tethered" to the conviction defies the express textual requirement that the noncitizen have been "convicted of" the aggravated felony.[2] *Nijhawan v. Att'y Gen. of the U.S.*, 523 F.3d 387, 396 (3d Cir. 2008).

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[2] The Government analogizes loss amount to provisions that require imposition of certain sentence terms to trigger aggravated felony definitions. *See In re Babaisakov*, 24 I. & N. Dec. 306, 314 (BIA 2007). Yet, those provisions on their face turn on the sentence imposed, and not the facts – such as loss amount – necessary for conviction.

Assuming *arguendo* that the statute's plain language does not compel adherence to the *Taylor/Shepard* approach, such an approach still remains among the provision's most plausible interpretations. Where the Court must select among facially plausible constructions of a statute, it initially "must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 380-81.

Leocal presented a question similar to that posed in the instant case in important respects. The petitioner had been ordered deported as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and the question was whether his conviction constituted an "aggravated felony." *Leocal*, 543 U.S. at 7-8. The Court recognized that the definitional provision had been "incorporated into a variety of statutory provisions, both criminal and noncriminal." *Id.* at 7. Consequently, the Court explained:

> we [are] constrained to interpret any ambiguity in the statute in petitioner's favor. Although we here deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 12 n.8; *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (applying the rule of lenity in civil tax setting because statute had criminal applications).

Just one year later, *Clark* provided further guidance on the interpretation of dual use statutes. *Clark* considered and rejected the notion that an immigration detention provision could have different meanings when applied to different sets of noncitizens. Such an approach "would be to invent a statute rather than interpret it." 543 U.S. at 378.

Clark held that, in determining the scope of a statute with applications in multiple contexts, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 380. *Clark* made clear that the interpretive principle it enunciated honors congressional intent. The constitutional avoidance doctrine is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts," thereby "giving effect to congressional intent, not . . . subverting it." *Id.* at 381-82. Finally, where constitutional doubt would arise in one application of a statute with multiple applications, the Court roundly rejected the use of inconsistent

interpretations between applications: such a rule would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.

Any doubt remaining after *Clark* as to whether a statute with both criminal and immigration applications must be interpreted consistently across the two contexts was resolved by a third case in as many years, *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* concerned whether an offense that is a felony under state law but a misdemeanor under federal law qualifies as a "drug trafficking" aggravated felony, thereby triggering mandatory deportation. At the same time that the Court granted certiorari in *Lopez*, it also did so in *Toledo-Flores v. United States*, 547 U.S. 1054 (2006), *cert. dismissed*, 549 U.S. 69 (2006), an illegal re-entry sentencing case raising the same question as *Lopez* with respect to the scope of the drug trafficking aggravated felony definition.

Toledo-Flores was subsequently dismissed as moot, but this Court clearly intended *Lopez*'s holding to apply consistently across the immigration and criminal contexts. *Lopez* cited and abrogated a series of both removal and sentencing cases that had reached a contrary conclusion as to the scope of the aggravated felony provision at issue. *Lopez*, 549 U.S. at 52 n.3. Courts after *Lopez* have recognized the decision's applicability to both criminal and immigration cases. *United States v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir. 2007) ("*Lopez*

ineluctably applies with equal force to immigration and criminal cases"), *cert. denied*, 549 U.S. 1291 (2007); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1216 (9th Cir. 2007) ("it is beyond dispute that *Lopez* applies in both criminal sentencing and immigration matters").

The Third Circuit justified its decision as "consistent with the different evidentiary standards used in criminal sentencing, and immigration proceedings, respectively." *Nijhawan*, 523 F.3d at 398. The Court asserted that if the *Taylor/Shepard* analysis were required in the immigration context then this would require removal to be based on proof beyond a reasonable doubt, rather than by the immigration standard of clear and convincing evidence. *Id.* at 398. This reasoning, however, ignores the teachings of *Clark* and *Leocal*: that statutory language should be interpreted consistently across different applications and, where one application requires a limiting construction due to constitutional concerns, the "lowest common denominator" governs.[3] If application in the sentence enhancement context requires that only evidence proven beyond a reasonable doubt be considered, then *Clark* and *Leocal* teach that this

[3] The Court also acknowledged that the *Taylor* rule governs the fraud element, which means this element must have been proven beyond a reasonable doubt. *Nijhawan*, 523 F.3d at 392-93.

limiting construction shall also apply in the removal context.[4]

C. The *Taylor/Shepard* categorical approach governs whether an individual has been "convicted of" a section 1101(a)(43)(M)(i) fraud offense whether for immigration or criminal purposes.

It is well-established that *Taylor/Shepard* governs whether an individual has been convicted of a prior offense that would trigger a sentencing enhancement. *See Shepard*, 544 U.S. at 19, 26; *Taylor*, 495 U.S. at 600-02. The *Taylor/Shepard* approach applies to determine whether the maximum sentence enhancement for illegal re-entry is triggered under 8 U.S.C. § 1326(b)(2) no less than to any other statutory sentencing enhancement. *See, e.g.*, *United States v. Lopez-Zepeda*, 466 F.3d 651, 652-53 (8th Cir. 2006); *United States v. Hernandez-Neave*, 291 F.3d 296, 298-99 (5th Cir. 2001). Since 8 U.S.C. § 1101(a)(43) defines an aggravated felony under § 1326(b)(2) to include an "offense that involves fraud or deceit in which the loss . . . exceeds $10,000," § 1101(a)(43)(M)(i), *Taylor/Shepard* determines whether the requisite elements were present in the underlying conviction.

The federal courts and the immigration agency have moreover applied some form of the categorical

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[4] The other circuits that fail to apply the *Taylor/Shepard* approach to the fraud aggravated felony provision similarly overlook *Clark* and *Leocal*. *See Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 3003 (2007).

approach to determine the immigration consequences of predicate criminal convictions for nearly a century. *See, e.g.*, *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137, 145-46 (2d Cir. 2008); *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 515 (BIA 2008). Congress enacted the illegal re-entry sentencing enhancement and aggravated felony statutes against this backdrop. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (first codifying "aggravated felony,"); Pub. L. No. 100-690 § 7345, 102 Stat. 4471 (amending § 1326(b) to provide a fifteen-year enhancement for re-entry after deportation subsequent to an aggravated felony conviction). Section 1101(a)(43)(M)(i) was added in 1994, four years after the *Taylor* decision. Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321-22. Congress is presumed to know the judicial and administrative agency backdrop against which it legislated and did not, post-*Taylor*, express a countervailing intent in either § 1101(a)(43)(M)(i) or in the illegal re-entry and removal statutes, respectively. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978); *In re Velazquez-Herrera*, 24 I. & N. Dec. at 515. Thus, "Congress is presumed . . . to [have] adopt[ed] that [categorical approach] interpretation." *See Lorillard*, 434 U.S. at 580.

Taylor/Shepard is not an approach adopted for convenience. Rather, it stems from fundamental Sixth and Fourteenth Amendment rights. These rights "guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact

essential to increase the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25. Unless all facts necessary for sentencing enhancement are based on a jury finding or plea admission by the defendant, the enhancement violates these rights and collides with this Court's holding in *Apprendi* and progeny. *See Apprendi v. New Jersey*, 530 U.S. 466, 487-88 (2000) (distinguishing *Almendarez-Torres* because defendant there admitted to prior convictions in plea). *Taylor/Shepard* accordingly "limit[s] the scope of judicial fact-finding" to avoid serious risk of rendering sentencing enhancement statutes unconstitutional. *See Shepard*, 544 U.S. at 25-26.

Taylor/Shepard contemplates two steps. First, the categorical approach dictates that a court applying a statutory sentencing enhancement "look only to the fact of conviction and the statutory definition of the prior offense." *See Shepard*, 544 U.S. at 17 (quotation marks omitted). Using only these materials, the court then examines whether the elements of the statute of conviction are the same as those required for the statutory enhancement. Where the statute of conviction contains all necessary elements, *Taylor/Shepard* is satisfied. *See Taylor*, 495 U.S. at 599.

Second, the Court created an exception, the so-called "modified categorical approach," for a "narrow range of cases" in which the statute of conviction is broader than the definition in the enhancement statute. *Taylor*, 495 U.S. at 602; *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007). In these cases, the statute of conviction contains a series of

disjunctive elements and the fact of conviction does not indicate "which of [the] series of disjunctive elements a defendant's conviction satisfies." *United States v. Gonzales-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008) (quotation marks omitted). The modified categorical approach permits a "sentencing court to go beyond the mere fact of conviction in [this] narrow range of cases [to determine whether] a jury was actually required to find all the elements" needed for the statutory enhancement. *Taylor*, 495 U.S. at 602. A statute of conviction susceptible to application of the modified categorical approach is sometimes referred to as a "divisible" statute. *Gertsenshteyn*, 544 F.3d at 143.

In the case of a jury verdict, the modified approach permits examination of the "indictment or information and jury instructions . . . [to determine if] the jury necessarily had to find" all the elements required for the statutory enhancement. *Taylor*, 495 U.S. at 602. In the case of a guilty plea, the examination "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26. The sentencing court may not look to other non-comparable documents, including police reports or complaint applications. *See id.* at 16. Nor may the court look to materials that "might shed light on what the defendant *probably* did or *probably* admitted to, or what the jury *probably* found." *In re Sealed Case*, 548 F.3d 1085, 1090 (D.C. Cir. 2008).

Petitioner prevails under the strict categorical approach: the fraud statute under which he was convicted contains no loss provision. The analysis should go no further because a fraud statute of conviction that does not contain a loss provision is not susceptible to the modified categorical approach to determine whether the offense falls within the aggravated felony definition. As the Ninth and Fifth Circuits have held, *Taylor/Shepard* requires that "the statute of conviction must contain every element of the [enhancing offense] before we resort to the modified categorical approach." *Kawashima v. Mukasey*, 530 F.3d 1111, 1116 (9th Cir. 2008); *see Gonzales-Terrazas*, 529 F.3d at 297-98.

This application of the rule is true to *Taylor*'s dictates, for when the underlying statute is "missing an element of the [enhancing offense] altogether, we can never find that 'a jury was actually required to find all elements of' the [enhancing offense]." *Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring).[5] To hold otherwise would be to "call

[5] The Third Circuit's suggestion that "insistence on loss as [a] part of the [convicted] conduct would render § 1101(a)(43)(M)(i) largely inoperative," *Nijhawan*, 523 F.3d at 398, is simply incorrect. As Petitioner notes, numerous federal and state fraud statutes either include a loss amount element or would lead to guilt phase findings establishing loss. *See* Pet. Brief Appendix at 1a-12a. Furthermore, in federal cases, loss amounts will be found by a reasonable doubt standard where the Government seeks an increased fine under 18 U.S.C. § 3571(d) (authorizing fine of up to "twice the gross loss" caused). *See United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006) ("[T]he Sixth Amendment requires that any fact (other than the fact of prior conviction) that

into question the categorical approach's commitment to a limited review of the 'fact of conviction,' rather than the 'particular factual circumstances' underlying a conviction." *Dulal-Whiteway v. DHS*, 501 F.3d 116, 127 (2d Cir. 2007) (internal citation omitted). Interpreting a statute to encompass an element it does not explicitly contain rings of result-oriented jurisprudence, not the fairness mandated by Due Process and *Taylor/Shepard*. *Cf. Michel v. INS*, 206 F.3d 253, 264 (2d Cir. 2000) (lauding the categorical approach as "the essence of evenhanded administration of the law to define rules *ex ante* and apply them regardless of the particular circumstances of a given case.").

Moreover, as *Shepard* held, the constitutional doubt canon requires a narrow construction of the categorical approach. *See* 544 U.S. at 24-26. *Shepard* observed that the existence of all requisite elements in the record of the prior conviction used to enhance a sentence ameliorates constitutional concerns under *Apprendi*. *See id.* at 25; *see also United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004) (en banc) (per curiam) ("The elements of an offense of course come from the statute of conviction . . . not from the particular manner and means that attend a given violation of the statute."). But when facts beyond the elements are at issue, disputes on those facts "raise[ ] the concern underlying *Jones* and *Apprendi*: the Sixth and

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increases the maximum 'penalty' for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt.").

Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of the potential sentence." *Shepard*, 544 U.S. at 25.[6]

While the Court need not reach the issue here, there are situations in which a loss finding during the guilt determination phase would be permissible despite the absence of loss as an element of the underlying offense.[7] Specifically, where a loss finding is required to increase the maximum sentence for the underlying offense, such a finding would satisfy *Taylor* and avoid constitutional doubt. Prosecutors must ask a jury to find any fact that is the basis for an increased maximum sentence. *See Apprendi*, 530 U.S. at 490; *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004); *United States v. Booker*, 543 U.S. 220, 230-31 (2005). Federal law requires such findings regarding loss amount in certain circumstances. *See* 18 U.S.C. § 3571(d); *United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006). Such findings may also be made under state law. *See, e.g.*, 720 ILCS 5/16-1. A jury finding or plea admission in these circumstances comports with *Taylor/Shepard* because the finding or

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[6] Justice Thomas suggested not constitutional doubt but constitutional error would result if a broader range of evidence were considered. *See Shepard*, 544 U.S. at 28 (Thomas, J., concurring).

[7] Petitioner prevails under either the strict or modified categorical approach because there is no evidence in his case that satisfies *Taylor/Shepard*.

admission of loss is "necessary." *See Shepard*, 544 U.S. at 25.

Despite the dictates of *Taylor/Shepard*, there is another view that would permit use of the modified categorical approach where the underlying statute broadly prohibits one type of generic conduct, and a defendant could commit the conduct both in ways that trigger the enhancement and in ways that would not. *See Gonzales-Terrazas*, 529 F.3d at 299-300 (Owen, J., concurring). Under this view, the modified categorical approach is applied "even [though] the statute under which the defendant was prosecuted lacks all the requisite elements." *Id.*

Putting aside the question of when a statute of conviction is susceptible to the modified categorical approach, it is well-settled that all approaches forbid the scouring of evidence outside of what was charged and proven at trial or admitted by plea.[8] *See, e.g.*, *In*

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[8] The Government erroneously contends that insistence on a loss finding as part of the convicted conduct would nullify the companion provision, Section 1101(a)(43)(M)(ii). Gov't Opp. to Cert. at 8. This is incorrect. An element of 26 U.S.C. § 7201 is "the existence of a tax deficiency." *Boulware v. United States*, 128 S. Ct. 1168, 1172 (2008) (internal citation omitted). "The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Holland v. United States*, 348 U.S. 121, 138 (1954); *see also United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001). Thus, there will be instances in which evidence of loss amount will be available in tax evasion cases that was proven beyond a reasonable doubt. Furthermore, because section 1101(a)(43)(M)(ii), defines a tax evasion aggravated felony as "an offense that . . . is described in" 26 U.S.C. § 7201, it is not limited to violations of the federal tax code. As the Second

re Sealed Case, 548 F.3d at 1093 (noting *Shepard*'s "rejection of otherwise reliable evidence" that fell outside these bounds). Therefore, even applying the modified categorical approach, courts may not resort to the evidence that the Third Circuit and the Government would permit. To do so would raise serious constitutional questions under the Sixth and Fourteenth Amendments in the criminal law context. Therefore, the *Taylor/Shepard* approach governs whether an individual has been "convicted of" a Section 1101(a)(43)(M)(i) fraud offense, whether for immigration or criminal purposes.

Finally, nothing in *United States v. Hayes*, No. 07-608, 2009 U.S. LEXIS 1634 (U.S. Feb. 24, 2009), supports a contrary conclusion. Fundamentally, *Hayes* is inapposite. *Hayes* concerned 18 U.S.C. § 922(g)(9), which criminalizes the possession of a firearm by anyone previously "convicted . . . of a misdemeanor crime of domestic violence." The Court concluded that the prior conviction requirement is an element of a Section 922(g)(9) offense. *Taylor* and *Shepard*, by contrast, concerned sentence enhancement statutes that based increased maximum sentences on the existence of certain predicate offenses. *Taylor*, 495 U.S. at 599; *Shepard*,

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Circuit explained in *Gertsenshetyn* regarding another aggravated felony provision, such language encompasses state laws that criminalize the offenses "described in" the referenced federal statute. 544 F.3d at 147. There are state offenses "described in" Section 7201 that contain a loss element. *See, e.g.*, Tex. Tax Code § 151.7032(b) (separating misdemeanors from felonies based on the amount of tax deficiency or loss); D.C. Code § 47-4102 (same).

544 U.S. at 16-17. Section 1326(b) is also such a statute.

Without mentioning *Taylor* or *Shepard* – which apply in a different context – the *Hayes* majority held that the domestic relationship aspect of the prior misdemeanor offense required to violate 922(g)(9) does not have to have been an element of that prior offense. The domestic relationship element must, however, be established beyond a reasonable doubt, just like any other element in a Section 922(g)(9) prosecution. *Hayes*, 2009 U.S. LEXIS 1634, at *20. And, while this Court has found that the fact of a prior conviction for purposes of a sentence enhancement statute is not an element that must be found by a jury beyond reasonable doubt, *see Shepard*, 544 U.S. at 24-25 (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)), *Taylor* and *Shepard* require the fact of the prior conviction must nonetheless be based solely on the record of what was charged and either proven to a jury, or admitted by plea, in the prior proceeding. *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 20-21. This is necessary to avoid the "serious risks of unconstitutionality" that would otherwise arise. *Shepard*, 544 U.S. at 25. While *Hayes* did not apply the *Taylor/Shepard* method due to the different context in which it arose, the majority's holding reaffirmed the central role of the Sixth Amendment in determining the nature of a prior conviction.

D. By contrast, the Government's approach would impermissibly invite inquiry into a broad range of nonconvicted conduct to determine whether an individual was "convicted of" a section 1101(a)(43)(M)(i) fraud offense.

The Third Circuit's approach in *Nijhawan* establishes an ill-defined "tethering" test that unavoidably and impermissibly invites inquiry into conduct beyond that charged and proven or admitted by plea in the underlying criminal case. Whatever else it may mean, the Third Circuit's approach permits courts to consider nonconvicted conduct. *See Nijhawan*, 523 F.3d at 394.

The Government would govern further, permitting consideration in a removal proceeding of nonconvicted conduct contained in the underlying criminal case record, such as evidence from the sentencing phase, as well as evidence outside of the underlying record altogether, such as new testimonial evidence introduced at the removal hearing. *See* Gov't Opp. to Cert. at 11 (citing *In re Silva-Trevino*, 24 I. & N. Dec. 687, 702-03 (A.G. 2008)); *Babaisakov*, 24 I. & N. Dec. at 321.

In even its most conservative application, the Third Circuit's standard permits use of nonconvicted facts, thereby expanding the scope and rules of permissible evidence to severely undermine reliability and *Apprendi* principles. Should the Third Circuit's test converge with the Government's view, judges could determine the underlying loss amount based on pre-sentence investigation ("PSI") reports, police reports, or select evidence from the

prior trial or even a subsequent hearing.[9] *See Nijhawan*, 523 F.3d at 401 (Stapleton, J., dissenting).

The majority relied on two nonconvicted facts to find the loss amount under § 1101(a)(43)(M)(i) satisfied: (1) the "total loss" amount entered by the judge in the judgment of conviction, for which restitution was ordered, and (2) Mr. Nijhawan's sentencing stipulation concerning loss amount for purposes of calculating his Sentencing Guidelines offense level. *See id.* at 389, 395.

While calculated with different parameters, both restitution and loss findings determined at sentencing are made in a less rigorous environment than guilt phase findings and may be based on conduct well beyond that of which a defendant was convicted. Most significantly, the Government's burden of proof at sentencing for establishing these figures is only a preponderance of the evidence. *See* 18 U.S.C. § 3664(e) (restitution); *United States v. Pira*, 535 F.3d 724, 728 (7th Cir. 2008) (loss amount), *cert. denied*, 129 S. Ct. 583 (2008); *United States v. Erhart*, 415 F.3d 965, 970-71 (8th Cir. 2005) (loss amount); *People v. Consalvo*, 303 A.D.2d 202, 202 (N.Y. App. Div. 2003) (restitution); *see also Booker*,

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[9] Even the Third Circuit recognized the inappropriateness of basing an aggravated felony determination on mere "relevant conduct," asserting that its "tethered" requirement "exclud[es] consideration of relevant conduct." *Nijhawan*, 523 F.3d at 398 n.9. The Government also opaquely asserts that "DHS must prove a connection between the loss and the specific conduct" that led to conviction. *See Babaisakov*, 24 I. & N. Dec. at 321 n.12. Despite these ill-defined qualifications, both rules invite consideration of a broad swath of nonconvicted conduct.

543 U.S. at 227 (noting preponderance findings at sentencing). A fact found pursuant to a preponderance of the evidence standard is entirely distinct as a constitutional matter from one established beyond a reasonable doubt. Consideration of such findings is wholly inconsistent with the *Taylor/Shepard* mandate that sentencing enhancement elements be "actually found" by a jury or "necessarily admitted" by the defendant, consistent with *Apprendi* Sixth Amendment protections. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602.

In addition, evidence presented at sentencing is not subject to the normal evidentiary rules that ensure its reliability. *See, e.g.*, *State v. Jeppesen*, 57 P.3d 782, 786 (Idaho 2002) (rules of evidence, except privilege rules, inapplicable); *State v. Gulledge*, 487 S.E.2d 590, 594-95 (S.C. 1997) (rules of evidence inapplicable at sentencing and restitution hearing). Sentencing judges are "largely unlimited" in the kind and source of information they may consider. *See United States v. Tucker*, 404 U.S. 443, 446 (1972). They may for example rely upon hearsay. *United States v. Omole*, 523 F.3d 691, 702 (7th Cir. 2008).

Similarly, at sentencing defendants lack the same Sixth Amendment right to confrontation and due process protections that protect them at trial. *See United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007) (Confrontation Clause does not apply to sentencing proceedings); *State v. Dumont*, 507 A.2d 164, 167 (Me. 1986) (no per se due process right to cross examination in state sentencing proceedings).

Those rights contribute fundamentally to the integrity and reliability of findings of conviction.

In calculating restitution and applying the Sentencing Guidelines, federal courts include nonconvicted conduct. Restitution may be ordered for a victim not named in the indictment. *See United States v. Dickerson*, 370 F.3d 1330, 1339 (11th Cir. 2004) (collecting cases). A court "may order restitution 'for acts of related conduct for which the defendant was not convicted.'" *United States v. Lawrence*, 180 F.3d 838, 846 (9th Cir. 1999) (internal citation omitted). And, in at least one Circuit, restitution may include losses caused by conduct outside of the statute of limitations of the offense. *See Dickerson*, 370 F.3d at 1342.[10]

As a factor under the Sentencing Guidelines, "loss" calculations are subject to even greater inclusion of nonconvicted conduct than restitution findings at sentencing. In calculating loss pursuant to the Guidelines, "The court need only make a reasonable estimate." U.S.S.G. § 2B1.1 Application

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[10] The Third Circuit's reliance on a restitution figure contained in a judgment of conviction was also erroneous because *Taylor*/*Shepard* limits the inquiry to evidence "actually found" by a jury or "necessarily admitted" by the defendant. *See Shepard*, 544 U.S. at 16; *Taylor*, 495 U.S. at 602. In the experience of amicus, judgments of conviction typically include information that is outside of that question. For example, the penalty is memorialized in the judgment. Likewise, the judge may list findings that go to collateral issues, such as whether the victim was a minor (triggering application of sex registration laws). Thus, the judgment of conviction is not a record of convicted conduct.

Notes 3(C). Moreover, these loss calculations take into account all "relevant conduct" and not merely conduct of which a defendant has been convicted. *See* U.S.S.G. § 1B1.3, Application Notes 1-2. The judge may consider unindicted and acquitted conduct in determining the loss amount. *See, e.g.*, *United States v. Boesen*, 541 F.3d 838, 851 (8th Cir. 2008) ("A district court may consider unindicted criminal activity" and its "determination of loss need not be precise"); *United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004) ("[W]ell-settled that acquitted conduct can be taken into account in sentencing"); *Carter v. State*, 711 N.E.2d 835, 840 (Ind. 1999) (uncharged crimes may be considered); *see also* Hector Gonzalez et al., *Is Booker a "Loss" for White Collar Defendants?*, 20 Fed. Sent'g Rep. 181, 182 (2008) ("[L]oss calculations . . . can often be based on facts never considered – or considered and rejected – by the jury."). Even conduct that underlies charges that were dismissed may be considered. *See United States v. Phillips*, 516 F.3d 479, 483 n.4 (6th Cir. 2008).

Moreover, a defendant's ability to challenge evidence of nonconvicted conduct in a sentencing proceeding is severely circumscribed. There is no right to a hearing to challenge such evidence contained in the PSR. *See United States v. Wise*, 515 F.3d 207, 219 n.7 (3d Cir. 2008). A hearing will be granted only in the sentencing court's discretion. *Id.* At the hearing in order to prevail the defendant must show that information "relied on by the district court in the PSR is materially unreliable." *United States v. Valles*, 484 F.3d 745, 759-60 (5th Cir. 2007);

see also Carter, 711 N.E.2d at 840 (defendant generally has burden to identify errors in PSR). The defendant must produce some evidence of his own even to call the facts of the PSR into question. *United States v. Duckro*, 466 F.3d 438, 449 (6th Cir. 2006). These procedural limitations make findings at sentencing inherently less reliable than those established at trial or pled to by a defendant.[11]

These problems with the scope and integrity of nonconvicted evidence introduced at sentencing are compounded by other, practical challenges for defendants. Prior to conviction, defendants lack adequate means to establish or rebut evidence regarding conduct that does not prove or disprove the elements required for conviction. Post-conviction, the sentencing procedures for such effort are inadequate. During a criminal case, a defense attorney has less incentive and ability to litigate facts that are not dispositive with respect to the conviction. Many discovery rights go principally to assist in litigating guilt. *See* 18 U.S.C. § 3500 (requiring discovery occur after testimony)[12]; Fed. R. Crim P. 16 (targeting disclosure of evidence applicable to trial). Moreover, where loss is not a charged element of the offense, a criminal defendant

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[11] The "stipulation for sentencing purposes" on which the Court relies, *Nijhawan*, 523 F.3d at 389, arose from this same sentencing context that permits inclusion of non-convicted, "relevant conduct." Such post-conviction or post-plea stipulations therefore do not establish that the stipulated amount is the loss amount for which defendant was *convicted*.

[12] As previously noted, there is no per se right to an evidentiary hearing at sentencing. *See supra*, at 24.

has "no reason to cast doubt on the Government's evidence as to amount of loss" at trial, and such evidence would "probably [be] excluded as irrelevant." *Li*, 389 F.3d at 900 (Kozinski, J., concurring).

Finally, for many defendants, it is pointless to challenge restitution findings that the Court is required to make, but defendants are unable to pay. *See* 18 U.S.C. § 3663A(1)(a) (mandatory restitution). The Government has wide latitude in admissible evidence and a lesser burden of proof. The defendant faces extraordinary difficulty in challenging the Government's assertions, and risks detrimental treatment under the Guidelines should he fail. *See generally United States v. Cannel*, 517 F.3d 1172, 1176-77 (9th Cir. 2008) (Government entitled not to move for acceptance of responsibility adjustment where defendant challenged PSR findings); *United States v. Quinonez*, Case No. CR-02-27-E-BLW, 2006 U.S. Dist. LEXIS 82780, at *8 (D. Idaho Nov. 13, 2006) (applying upward adjustment for obstruction of justice based on defendant's sentencing hearing testimony).

E. The criminal rule of lenity favors construing Section 1101(a)(43)(M)(i) to require application of the *Taylor/Shepard* approach.

Even apart from constitutional doubt, the criminal rule of lenity requires applying *Taylor/Shepard* to the fraud aggravated felony definition. *See generally Crandon v. United States*, 494 U.S. 152, 158 (1990) ("because the governing standard is set forth in a criminal statute, it is

appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage").

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). Thus, ambiguity in Section 1101(a)(43)(M)(i) should be resolved in favor of criminal defendants – this means proscribing an approach that would permit a free-ranging inquiry into nonconvicted conduct. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997); *Crandon*, 494 U.S. at 158.

These observations are entirely apt here. In the criminal context, the scope of evidence that may be considered in determining whether a prior conviction falls within Section 1101(a)(43)(M)(i) will determine whether a criminal defendant faces an increased maximum penalty of 20 years in prison under 8 U.S.C. § 1326(b)(2). Abandonment of *Taylor/Shepard* would mean a defendant could not know what evidence will later determine whether the conviction was for an aggravated felony. This is precisely the problem the rule of lenity works to avoid.

Just last term, Justices Scalia, Souter, and Ginsburg explained that lenity is an important concern in dual use statutes that have criminal applications. *See United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (opinion of Scalia, Souter, Ginsburg, JJ.).[13] After restating the principles established in *Clark*, the opinion explained, "Our obligation to maintain the consistent meaning of words in statutory text does not disappear when the rule of lenity is involved. . . . If anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Id.*; *see also Hayes*, 2009 U.S. LEXIS 1634, at *38 (Roberts, C.J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history."). Twenty years imprisonment is far too much to "hinge on the will-o'-the-wisp of statutory meaning." *Hayes*, 2009 U.S. LEXIS 1634, at *38.

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[13] Those same Justices joined by Justice Stevens explained in dissent in *Almendarez-Torres* that even "where the doctrine of constitutional doubt does not apply, the same result may be dictated by the rule of lenity, which would preserve rather than destroy the criminal defendant's right to jury findings beyond a reasonable doubt." *Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia, J., dissenting). "Whichever doctrine is applied for the purpose, it seems to me a sound principle that whenever Congress wishes a fact to increase the maximum sentence without altering the substantive offense, it must make that intention unambiguously clear." *Id.* Notably, "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, 544 U.S. at 27 (Thomas, J., concurring in part and in the judgment).

II. Abandoning Application of *Taylor/Shepard* to Section 1101(a)(43)(M)(i) Would Compromise the Ability to Understand the Consequences of Fraud Convictions.

A. Criminal defense attorneys have a duty to advise clients of the criminal consequences of convictions for deportable offenses.

For noncitizen and citizen defendants alike, the "[d]isposition of charges after plea discussions is . . . an essential part" of the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Over 95% of all federal criminal cases in 2007 were resolved by guilty plea. *See* U.S. Sentencing Comm'n, 2007 Sourcebook of Federal Sentencing Statistics, Fig. C. Increasingly, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello*, 404 U.S. at 260.

Criminal defense attorneys in plea negotiations have well-recognized duties to investigate all relevant considerations and advise their clients accordingly:

> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a

> plea unless appropriate investigation and study of the case has been completed.

ABA Standards for Criminal Justice, Standard 14-3.2(b) (3d ed. 1999).

While this duty represents a broader professional responsibility, Sixth Amendment ineffective assistance cases are instructive. There is little doubt that the "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempha v. Rhay*, 389 U.S. 128, 134 (1967). This includes advising on plea bargains to ensure that defendants are "fully aware of the direct consequences" of their sentences, "including the actual value of any commitments made to him by the court, prosecutor, or his own counsel" in terms of the length and terms of those sentences. *Brady v. United States*, 397 U.S. 745, 755 (1970) (quotation marks omitted).

Absent such advice, the criminal defendant may unknowingly consent to harsher criminal penalties. This Court's "jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). Thus, an attorney's advice on criminal penalties – or failure to provide such advice – can be critical to the defendant. Certainly, criminal defense attorneys have an ethical responsibility to advise their clients fully about possible criminal penalties stemming from a conviction. *See* ABA Standards for Criminal Justice, Standard 14-3.2(b).

Convictions for deportable offenses typically affect the amount of time a defendant will spend in jail as compared with alternative forms of confinement, as well as the conditions of confinement while in jail. For instance, noncitizens convicted of a deportable offense generally are ineligible for community-based sentences. United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System*, Jan. 2009, at 23 n.42 *available at http://www.ussc.gov/general/20090206_Alternatives.pdf*, ("*Alternative Sentencing*"). This generally excludes them from alternative confinement conditions allowed under the federal Sentencing Guidelines such as community confinement (in a treatment center or halfway house), home detention, or intermittent confinement. *Id.* at 2.[14]

Moreover, in the federal system, "deportable alien" status is a Public Safety Factor, alongside "sex offender" or "threat to government official," used for federal inmate classification to determine the "most appropriate security level institution." Federal Bureau of Prisons, Program Statement P5100.08: *Inmate Security Designation and Custody Classification*, at 5-5, 5-8 to 5-9 (Sept. 12, 2006), *available at* http://www.bop.gov/policy/progstat/5100_008.pdf ("*BOP Program Statement*"). When the factor is applied, "the inmate or the long-term detainee shall be housed in at least a Low security

[14] Also, whether in the federal or state system, such options generally are unavailable to noncitizens convicted of a deportable offense because they are typically subject to immigration holds or "detainers" issued under 8 C.F.R. § 287.7.

level institution." *Id.* at 5-9. The "Bureau of Prisons assigns deportable aliens to confinement at their second highest custody level, which requires a normal level of institutional supervision and prohibits work details or other programs outside the secure perimeter of the institution." *Alternative Sentencing,* at 4. Consequently, the inmate is ineligible for placement "at an institution which would permit inmate access to the community." *BOP Program Statement*, at 2-4. The resulting differences in terms of confinement are striking. In fiscal year 2007, 86.3% of the 2,166 noncitizen offenders sentenced at the lowest level of the guidelines (Zone A) were given imprisonment only (no alternative sentence). By contrast, only 18.1% of the 2,744 citizen offenders in Zone A were given imprisonment only. *See Alternative Sentencing*, at 5 (tbls. 4 & 5). "Because of these sentencing policies, rates of alternative sentences are substantially different for United States citizen and non-citizen offenders." *Id.* at 4.

Thus, there are criminal sentencing implications for conviction of deportable offenses. An interpretation of Section 1101(a)(43)(M)(i) that leaves unclear what evidence renders one an "aggravated felon" would undermine the ability of defense counsel to advise their clients regarding these consequences.

B. Immigration consequences also affect plea negotiations.

In *INS v. St. Cyr*, this Court recognized that immigration consequences often play a central role

in plea negotiations. *See INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001). This Court's reasoning pragmatically recognized that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 323; *see also* ABA Standards for Criminal Justice, Standard 14-3.2(f) & commentary at 127 ("[I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.").

Under the present consensus on professional ethics, competent defense counsel must inform noncitizens of potential immigration consequences of a plea. *See St. Cyr*, 533 U.S. at 322 n.48 (citing authorities); ABA Standards for Criminal Justice, standard 14-3.2 (f).

The ability to apprehend immigration consequences is no less vital for prosecutors. As Robert Johnson, a former president of the national district attorneys association, explained:

> [A]s prosecutors, we see the effects of these collateral consequences. . . . Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge. . . . As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.

Message from the President Robert M.A. Johnson, Nat'l Dist. Atty's Ass'n, May/June 2001, http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html ("Message from the President, NDAA").

C. The Third Circuit's approach magnifies uncertainty during plea negotiations.

The *Taylor/Shepard* doctrine confers both finality and predictability on criminal adjudication, thereby promoting rational and orderly plea-bargaining. By departing from *Taylor/Shepard*, the Third Circuit – and even more so the Government's embrace of the BIA's unprecedented decision in *Babaisakov* – threaten to undermine the ability to apprehend a proposed plea's consequences when deciding whether to plead guilty, the issue at the center of the *St. Cyr* decision.

In permitting the use of findings made after the guilty plea, the Third Circuit rewrites the bargain between noncitizen defendants and the Government at a point where it is effectively too late for that bargain to be undone. Such an approach is irreconcilable with the text of Section 1101(a)(43)(M)(i), which requires the noncitizen to have been "convicted" of such conduct as a prerequisite for the aggravated felony label to attach.

Furthermore, criminal defense lawyers determining whether a conviction will render a noncitizen client deportable must confront the "labyrinthine character of modern immigration law – a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the

Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). When it comes to immigration law, "the issues are seldom simple and the answers are far from clear." *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1308 (11th Cir. 2000). The Third Circuit's decision erodes one of the few remaining pillars of relative certainty, adding an additional and unpredictable variable to a calculus that is already extremely complex.

Preserving some measure of predictability under the present regime has implications for everyday practice. Currently, criminal attorneys investigating whether a conviction would constitute a deportable offense may examine widely circulated and continually updated "checklists" and other practice guides that discuss immigration consequences of a given offense under the penal code in the pertinent jurisdiction. *See, e.g.*, Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law And Crimes* § 4:19 (2008); Manuel D. Vargas, *Representing Immigrant Defendants in New York*, Appendix A (4th ed., NYSDA 2006).

Under the Third Circuit's approach – and even more so under the Government's approach – the value of such resources would be greatly diminished. The "aggravated felony" definition would turn not on the offense of conviction, but on a wide array of case-specific information that comes to light only *after* the plea is entered, much of it unknown, even unknowable, at the time of the plea. Moreover, whether such information enters the record at all depends upon hard-to-verify idiosyncrasies of state

and local practices concerning conviction forms and evidentiary practices.

The tactical and strategic calculations would thus prove ever more vexing under the Third Circuit's and the Government's approach. Indeed, the *raison d'être* of plea negotiations is often that the Government is not yet prepared to show its hand, as doing so could "disrupt ongoing investigations and expose prospective witnesses to serious harm." *United States v. Ruiz*, 536 U.S. 622, 631-32 (2002) (internal quotation marks omitted). Without any practical or legal ability to compel adequate discovery, a criminal defense attorney would be hard-pressed to recommend a plea offer that, in all other respects, might be the best option available to the client.

D. The Third Circuit's approach could lead to burdensome and inefficient proceedings subsequent to entry of a plea.

Even assuming, *arguendo*, that defense counsel were able to fully identify the legal issues and the sources of evidence relevant to their clients, the most formidable challenges would still lie ahead.

Recognizing the myriad of obstacles impairing accurate fact-finding at immigration hearings, such as the absence of a right to appointed counsel or possible years of delay, criminal defense counsel may feel it necessary to conduct a full-scale factual investigation in a prophylactic effort to place in the criminal case record evidence that *disproves* any loss scenario with immigration consequences. The defense attorney would need not only to uncover

evidence challenging the amount of loss, but also evidence disputing that any loss figure is, in fact, "tethered" to the offense of conviction. *See Nijhawan*, 523 F.3d at 395.

Besides diverting significant resources from defense counsel, prosecutors, and the court, such a strategy would likely prove unworkable in practice. First, although "defendants are entitled to due process protection in the sentencing hearing, they are not entitled to the same degree of process as they would be entitled at trial." *United States v. Radix Labs., Inc.*, 963 F.2d 1034, 1039 (7th Cir. 1992). Furthermore, as Judge Kozinski observed, a criminal court could refuse to entertain fact disputes regarding issues of loss amount (to say nothing of the "tethering" of loss) not relevant to any issue in the criminal case. *See Li*, 389 F.3d at 900 (Kozinski, J., concurring) (noting such evidence would "probably [be] excluded as irrelevant").

Finally, sometimes a defendant's best option might be to withdraw the plea altogether and go to trial. For example, where subsequent to pleading guilty the defendant is confronted with new evidence with respect to loss amount (such as a new witness), it may be nearly impossible to adequately confront such evidence at the sentencing phase. A defendant, however, does not enjoy an unfettered right to withdraw his guilty plea. Fed. R. Crim. P. 32(e). For example, the Third Circuit has noted that "[a] shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the [G]overnment the expense, difficulty, and risk of

trying a defendant who has already acknowledged his guilt by pleading guilty." *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001) (quotation marks omitted).

If *Taylor/Shepard* is not applied to Section 1101(a)(43)(M)(i), a number of noncitizen defendants may opt for trial rather than live with the multiplied uncertainty of the new regime, in which pleading guilty even to relatively minor offenses could expose defendants to certain deportation and criminal penalties. Perhaps more troublingly, other noncitizen defendants will plead guilty to offenses and will, contrary to their reasonable expectations, later be deemed aggravated felons.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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