No. 15-9584

IN THE

United States Court of Appeals for the Tenth Circuit

JUAN ALBERTO LUCIO-RAYOS,
Petitioner,

v.

JEFFERSON B. SESSIONS, III,
United States Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

PETITION FOR REHEARING OR REHEARING EN BANC

James S. Lamb
CHAN LAW FIRM
1900 Grant Street,
Suite 750
Denver, CO 80203

Aaron W. Scherzer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 W. 52nd Street
New York, NY 10019

Brian P. Goldman
Haley E. Jankowski
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Robert M. Loeb
Thomas M. Bondy
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Counsel for Petitioner

February 12, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

RULE 35 STATEMENT

The panel opinion addresses an important and recurring question of immigration law regarding the analysis of prior criminal convictions. The panel's holding conflicts with recent decisions of the Supreme Court, this Court, and the First Circuit. And it gravely limits the ability of noncitizens with prior convictions to apply for humanitarian relief like asylum and cancellation of removal. Here, for example, the panel's rule (unlike the First Circuit's) means that a conviction for "petty theft" involving $75 of property will prevent the petitioner from even attempting to show why his deportation would unduly harm his disabled, U.S.-citizen wife. Panel rehearing or rehearing en banc is therefore warranted.

This case presents the question whether the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), abrogates this Court's holding in *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), that immigration tribunals considering applications for relief from removal must assume that convictions analyzed under the modified categorical approach *dis*qualify noncitizens from relief even where the record of

conviction is merely ambiguous. The two-judge panel here held that *Garcia* survives *Moncrieffe*.[1]

Moncrieffe clarifies, however, that courts always "must presume that the conviction 'rested upon nothing more than the *least* of the acts' criminalized," not the *most*. 569 U.S. at 190-91 (emphasis added) (citation and brackets omitted). A conviction under an overbroad state statute presumptively is *not* a disqualifying predicate offense. That presumption is overcome only if the conviction "necessarily" establishes that the elements of the narrower federal offense were found or admitted. *Id.* at 192. A record of conviction that is merely ambiguous does not meet that high bar.

The panel rejected *Moncrieffe*'s application because, as *Garcia* previously held, a noncitizen seeking relief from removal bears the burden of proving his eligibility. But an evidentiary burden applies only to questions of fact, like the length of a noncitizen's continuous residence in the United States, not to questions of law, like whether a state conviction "necessarily" corresponds to a federal offense.

[1] Then-Judge Gorsuch participated in oral argument but was elevated to the Supreme Court before the panel issued its opinion. Slip op. 2 n.1.

Accordingly, *Moncrieffe* held that "[o]ur analysis [of prior convictions] is the same in both [the removal and cancellation] contexts," *id.* at 191 n.4, notwithstanding that the government bears the burden of proof in one and the noncitizen in the other. And that is why, just two years ago, this Court correctly held that *Moncrieffe*'s presumption applies equally when a noncitizen seeks cancellation of removal. *Rangel-Perez v. Lynch,* 816 F.3d 591 (10th Cir. 2016). The panel here contravened *Rangel-Perez* by holding that *Moncrieffe*'s least-acts-criminalized presumption applies only to the removal phase of proceedings, not relief from removal. Slip op. 17-18. That intra-circuit split warrants rehearing.

Moreover, by holding fast to *Garcia,* the panel exacerbated an inter-circuit split regarding *Moncrieffe*'s meaning. The First Circuit recently explained that *Garcia* could not survive *Moncrieffe*. *See Sauceda v. Lynch*, 819 F.3d 526, 532 n.10 (1st Cir. 2016). The panel here expressly rejected *Sauceda*, distinguishing *Moncrieffe* on two grounds that the First Circuit found unpersuasive. *See* slip op. 16-19. That circuit conflict only heightens the need for the en banc Court's attention.

The petition should be granted.

STATEMENT OF THE CASE

Juan Alberto Lucio-Rayos is a 47-year-old native and citizen of Mexico. Administrative Record (AR) 242. He has lived in the United States for 21 years. AR44, 533. His wife, Bessie Edwards, is a U.S. citizen and military veteran. AR44, 247, 256. Ms. Edwards suffers from several medical conditions, including severe vision problems, as well as high blood pressure, asthma, and diabetes. AR223-29. She is unable to work or drive and requires daily assistance from Lucio-Rayos. AR299, 301, 314, 340-45. Ms. Edwards's health problems make it impossible for her to relocate to Mexico, and her husband's removal would deprive her of the essential support he provides. AR242-53.

The government placed Lucio-Rayos in removal proceedings because he was never lawfully admitted into the country. *See* 8 U.S.C. § 1182(a)(6)(A)(i); AR579. Lucio-Rayos conceded his removability and applied for cancellation of removal, citing the "exceptional and extremely unusual hardship" that his removal would cause his disabled wife. *See* 8 U.S.C. § 1229b(b); AR532.

The immigration judge (IJ) held that Lucio-Rayos was ineligible for cancellation based on his only criminal conviction: a guilty plea in Westminster, Colorado municipal court to "petty theft," for which he received just three months of unsupervised probation. AR117, 549-50, 552. The IJ explained that a conviction for a "crime involving moral turpitude" (CIMT) disqualifies non-lawful permanent residents from cancellation of removal. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1229b(b)(1)(C); AR114. She noted that while courts have generally held that theft offenses are CIMTs, "the perpetrator must intend to permanently take the thing of value from its rightful owner" for a conviction to be a CIMT. AR115.

Turning to the municipal ordinance in question, Westminster Municipal Code § 6-3-1(A), she observed that one subsection of the ordinance (subsection (4)) does not require that an individual intend to permanently deprive the owner of the property but only that he "demand any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person." AR115. As a result, the IJ held that the "ordinance is not categorically a CIMT."

AR116. Finding the ordinance divisible, she then analyzed it under the modified categorical approach. AR116.

The IJ determined that Lucio-Rayos's record of conviction was inconclusive because the Municipal Court documents did not reveal which subsection of the ordinance he was convicted under. AR115-16. Relying on this Court's decision in *Garcia*, the IJ held that when the "record is inconclusive," the petitioner is "disqualified from receiving discretionary relief." AR117 (quoting 584 F.3d at 1289). That is, because the conviction documents did not definitively demonstrate that Lucio-Rayos *was* convicted under subsection (4), Lucio-Rayos had failed to prove that he was *not* convicted of a CIMT. AR116.

The IJ also determined that Lucio-Rayos could not rely on the "petty offense exception"—an exception to inadmissibility for noncitizens with a single minor CIMT conviction. *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(II); AR117. Additionally, the IJ denied Lucio-Rayos's motion to recuse the IJ, because she was married to the Deputy Chief Counsel for the Immigration and Customs Enforcement (ICE) field office that was prosecuting Lucio-Rayos's removal. AR474-75, 492.

The Board of Immigration Appeals (BIA) affirmed, but on different grounds. AR3. The BIA read "the entirety of the Westminster Ordinance [to] require[] the intent to deprive another permanently of the use or benefit of his property as an element," concluding that a conviction under the ordinance was categorically a CIMT. AR5-6. The BIA held in the alternative that even if the modified categorical approach applied, Lucio-Rayos did not meet his burden to provide "sufficient evidence establishing that he was not convicted of a [CIMT]," as required under *Garcia*. AR4 n.3.

A two-judge panel of this Court denied Lucio-Rayos's petition for review. Slip op. 3. The panel agreed with Lucio-Rayos that the ordinance is not categorically a CIMT because subsection (4) does not require intent to permanently deprive. Slip op. 10-12. The panel then held that the ordinance is divisible and applied the modified categorical approach. Slip op. 13-14. The panel noted that "it is undisputed that none of the documents in the record indicates under what provision Lucio-Rayos was convicted," and thus the record was inconclusive. Slip op. 14. The panel held that under *Garcia*, "[t]he fact that [the alien] is not to blame for the ambiguity surrounding his criminal conviction does

not relieve him of his obligation to prove eligibility for discretionary relief." Slip op. 16 (quoting 584 F.3d at 1290). And the panel concluded that it could not "say that *Moncrieffe* 'indisputeabl[y]' overruled *Garcia*." Slip op. 19 (internal citation omitted).[2]

REASONS FOR GRANTING THE PETITION

I. *Garcia v. Holder* Conflicts With Recent Supreme Court Decisions And Should Be Overruled.

In *Garcia,* this Court held that an inconclusive record of conviction precludes a noncitizen from seeking cancellation of removal because noncitizens bear the burden of proving eligibility for relief from removal. Under the Supreme Court's intervening decision in *Moncrieffe*, however, an ambiguous record of conviction does *not* render a conviction disqualifying, regardless of which party bears the burden of proof, because the analysis of prior convictions is "the same in both [the removal and cancellation] contexts." 569 U.S. at 191 n.4.

Here, the two-judge panel felt that it "remain[ed] bound to apply *Garcia*" even after *Moncrieffe*, slip op. 19, but this Court should now sit en banc to overrule *Garcia*. As the First Circuit recently held,

[2] The panel also rejected Lucio-Rayos's arguments regarding the petty-offense exception and the IJ's non-recusal. Slip op. 4-6, 20-21.

Moncrieffe "dictates the outcome" where a conviction is ambiguous, because the categorical approach (and its modified variant) entail a purely legal analysis that is unaffected by any evidentiary burden of proof. *Sauceda*, 819 F.3d at 531.

A. Lucio-Rayos's eligibility for cancellation turns on whether he has been "*convicted* of" a CIMT. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis added); *see id.* § 1229b(b)(1)(C). "'Conviction' is 'the relevant statutory hook,'" so the inquiry centers on "what offense the noncitizen was 'convicted' of, not what acts he committed." *Moncrieffe*, 569 U.S. at 191 (citation and brackets omitted). Accordingly, courts must examine a criminal statute's elements to determine "if a conviction of the state offense 'necessarily' involved ... facts equating to the generic federal offense." *Id.* at 190 (some internal punctuation omitted).

The key word is "necessarily." "Because [courts] examine what the state conviction *necessarily* involved, not the facts underlying the case, [courts] must *presume* that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (emphases added) (citation and brackets

omitted); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (categorical rule asks "the legal question of what a conviction *necessarily* established").

Under *Moncrieffe*, then, when a state statute sweeps in more conduct than the corresponding federal offense, a conviction under that statute presumptively is not disqualifying. This least-acts-criminalized presumption may be *rebutted* under the modified categorical approach, but only if "the record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" was the narrower offense corresponding to the federal crime. *Moncrieffe*, 569 U.S. at 190-91, 197-98 (emphasis added). If the record does not *necessarily* establish as much, the least-acts-criminalized presumption is not displaced. Accordingly, "[a]mbiguity" about the nature of a conviction "means that the conviction did not 'necessarily' involve facts that correspond to [the federal offense category]," and so the noncitizen "was not *convicted* of [the federal offense]," as a matter of law. *Id.* at 194-95 (emphasis added). Here, Lucio-Rayos's conviction is ambiguous as to whether it included the requisite element of intent to permanently deprive. Because the conviction does not *necessarily*

establish a CIMT, by default it does *not* count as a "conviction" for a CIMT.

B. *Garcia* held that a noncitizen with an inconclusive record of conviction is ineligible to apply for cancellation of removal because the immigration laws place the burden on noncitizens to prove their eligibility for immigration relief. 584 F.3d at 1289-90 (citing 8 C.F.R. § 1240.8(d)). But that burden applies to *factual* questions of eligibility. Lucio-Rayos, for example, had to marshal evidence that his U.S.-citizen wife would suffer exceptional and extremely unusual hardship.[3] This burden of proof, however, does not apply to *legal* questions. *See, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) (an "evidentiary standard of proof applies to questions of fact and not to questions of law"); *ABC Rentals of San Antonio, Inc. v. C.I.R.*, 142 F.3d 1200, 1203 (10th Cir. 1998).

In applying the modified categorical approach, a court "answers the purely 'legal question of what a conviction *necessarily* established.'"

[3] This is consistent with the common understanding that the "preponderance of the evidence" standard, referred to in 8 C.F.R. § 1240.8(d), applies to factual inquiries. *See generally* 2 McCormick on Evidence § 339 (7th ed. 2013).

Sauceda, 819 F.3d at 534 (quoting *Mellouli*, 135 S. Ct. at 1987). This is a binary "legal question with a yes or no answer … [whose] resolution is unaffected by which party bears the burden of proof." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 488-89 (9th Cir. 2015) (en banc) (Watford, J., concurring). The burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534.[4]

Under *Garcia*, however, an ambiguous conviction like Lucio-Rayos's *would not* count as a CIMT conviction at the removal stage of proceedings, where the government bears the burden of proof, yet it *would* count as a CIMT at the relief stage, where the noncitizen bears the burden. That outcome makes no sense and is flatly inconsistent with *Moncrieffe*'s holding that the analysis of a prior conviction operates

[4] There is nothing unusual about a legal presumption supplanting an evidentiary burden of proof. In a copyright-infringement suit, for example, the plaintiff bears the burden of proving each element of her claim. One element is owning a valid copyright. To satisfy that element, however, she may simply rely on the legal presumption that her registered copyright is valid unless the defendant shows otherwise. *See, e.g.*, *Harris Mkt. Research v. Marshall Mktg. & Commc'ns, Inc.*, 948 F.2d 1518, 1526 (10th Cir. 1991). In contrast, her burden of proof will provide more of a true hurdle when she sets out to prove the second element—that the defendant copied her work—just like the noncitizen's burden here on factual questions like hardship to qualifying U.S.-citizen relatives.

"the same in both [the removal and cancellation] contexts," 569 U.S. at 191 n.4. Congress could not have intended so erratic a result when it used the same term—"conviction"—in both the INA's removal and relief provisions.

Indeed, *Garcia*'s effect is to require that a conviction be assumed to rest on the *most* of the acts criminalized by a divisible statute, unless a noncitizen can affirmatively prove that his conviction was based on a prong of a divisible statute that would not correspond to a CIMT. 584 F.3d at 1289-90. That conclusion improperly reverses *Moncrieffe*'s legal presumption and should be overruled.

C. *Garcia* is also inconsistent with *Moncrieffe* in another respect. *Garcia* rejected the argument that it is unfair to "blame" a noncitizen for details missing from conviction records that he neither creates nor maintains. *Id.* at 1290. *Moncrieffe* has since undercut this rationale by explaining that "[t]he categorical approach was designed to avoid" precisely the sort of "potential unfairness" in which "two noncitizens, each 'convicted of' the same offense, might obtain different [disqualifying-offense] determinations depending on *what evidence remains available*…." *Moncrieffe*, 569 U.S. at 201 (emphasis added).

Here, for example, Lucio-Rayos could not have "submitted testimony from his lawyer" or "the judge who accepted his plea to ascertain what offense was charged and pleaded to in the state court"—subsection (4), or a different subsection—assuming anyone could even remember a years-old municipal petty-theft offense. *Sauceda*, 819 F.3d at 532. *Moncrieffe* "squarely rejected" such "minitrials," *id*. at 533, because after-the-fact testimony is not among the narrow range of official conviction records (the "*Shepard* documents") that courts may look to in determining the basis for a conviction, *Moncrieffe*, 569 U.S. at 191. Congress did not intend that applicants for asylum and cancellation prove the unprovable by requiring them to establish the basis of their conviction using only *Shepard* documents that may no longer exist. Instead, as always under the modified categorical approach, unless the conviction record conclusively establishes a disqualifying offense, the offense is presumptively *not* disqualifying.

This rule would not require immigration judges to grant discretionary relief. It would just remove a mandatory eligibility bar in cases where the record does not *necessarily* demonstrate a prior disqualifying conviction. Noncitizens would still have to satisfy the

other eligibility criteria and persuade immigration judges to grant relief as a matter of discretion. *See Moncrieffe*, 569 U.S. at 204. Therefore, a noncitizen's actual conduct remains relevant at the discretionary phase, but a conviction with an ambiguous record should not and does not pretermit consideration of an application in the first place.

D. The panel justified reaffirming *Garcia* by distinguishing *Moncrieffe* in two ways. Neither withstands scrutiny.

First, the panel concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining removability, not eligibility for cancellation of removal. Slip op. 17-18. But *Moncrieffe* addressed both removal and cancellation. The question in *Moncrieffe*—whether Mr. Moncrieffe's conviction constituted an "aggravated felony"—mattered *only* because, if it did, he could not apply for discretionary relief from removal; there was no dispute that his drug conviction rendered him removable whether or not the conviction was also an aggravated felony. *Moncrieffe*, 569 U.S. at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (correctly recognizing that the Court's "holding" was that the noncitizen was "eligible for cancellation of removal"). That is why the Supreme Court held that, "having been found not to be an aggravated felon" for

removal purposes, "the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." *Id.* at 204 (emphasis added) (citing the criteria in 8 U.S.C. § 1229b(a)(1)-(2), but *not* the "not … convicted of any aggravated felony" criterion in § 1229b(a)(3)). Analyzing the conviction again for cancellation purposes would be redundant.

Second, the panel distinguished *Moncrieffe* because *Moncrieffe* applied only the categorical approach and did not need to reach the modified categorical step. Slip op. 18-19. But any argument "that *Moncrieffe* is inapplicable because it focused on the categorical approach, not the modified categorical approach," is "preclude[d]" by *Descamps*, which clarifies that "[t]he modified categorical approach is not a wholly distinct inquiry." *Sauceda*, 819 F.3d at 534 (citing *Descamps v. United States*, 570 U.S. 254, 263 (2013)). Instead, it is merely "a tool" to "help[] implement the categorical approach." *Id.* (quoting *Descamps*, 570 U.S. at 263).

The panel thus erred in reasoning that the modified categorical inquiry presents a "question of fact or at least a question of law and fact." *See* slip op. 19. The modified categorical analysis involves no

application of law to fact; it concerns only what a conviction under a given statute establishes "as a legal matter." *Mathis v. United States*, 136 S. Ct. 2243, 2255 n.6 (2016).

The modified categorical approach may be used to rebut the least-acts-criminalized presumption. *Moncrieffe*, 569 U.S. at 191 (citing the approach as a "qualification" to the presumption). But, as *Moncrieffe* explained in discussing the modified categorical approach, the presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" was the more severe, disqualifying offense. *Id.* at 190-91, 197-98 (emphasis added); *see also Descamps*, 570 U.S. at 257-263. If the record of conviction is ambiguous, "the unrebutted *Moncrieffe* presumption applies, and, as a matter of law," a noncitizen "was not convicted of [a CIMT]," so the conviction is not disqualifying. *Sauceda*, 819 F.3d at 532.

II. This Court's Rule Conflicts With Other Circuits' Holdings.

En banc review is also warranted because *Garcia* conflicts with decisions of the First, Second, and Third Circuits. Most importantly, by

reaffirming *Garcia*, the panel exacerbated a post-*Moncrieffe* split with the First Circuit.

Expressly rejecting *Garcia*, the First Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption "dictates the outcome" where the record is ambiguous, regardless of who bears the evidentiary burden of proof. *Sauceda*, 819 F.3d at 531, 532 n.10. And, as the panel recognized here, *Sauceda* rejected the two rationales that the panel relied on to distinguish *Moncrieffe*. *See* slip op. 16 n.14, 17; *supra* at 8-9, 16-17.

Before *Moncrieffe*, the Second and Third Circuits had adopted positions consistent with the First Circuit's in *Sauceda*. Both held that, under the categorical and modified categorical approaches, a merely ambiguous record of a prior conviction does not preclude eligibility for relief from removal. *See Thomas v. Att'y Gen.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008); *see also Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009).

The panel stated that several other circuits support its position. Slip op. 16 n.15. But that is inaccurate. *Salem v. Holder*, 647 F.3d 111

(4th Cir. 2011), predates *Moncrieffe*, which cemented the least-acts-criminalized presumption that changed the legal landscape. *Le v. Lynch*, 819 F.3d 98 (5th Cir. 2016), expressly *reserved* the question presented here, *id.* at 107 n.5; the question remains an open one in the Fifth Circuit, *see Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016).

The panel suggested it was joining the Third Circuit as well. Slip op. 17. But the panel ignored the *Thomas* decision cited above and instead cited *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). That case, however, involved a "circumstance-specific" inquiry that *does* require the IJ to examine the actual conduct and facts of a prior criminal offense—a special context in which "the categorical approach does not apply." *Id.* at 356. *Syblis* distinguished *Thomas* on exactly this ground. *Id.* at 357 n.12. The Third Circuit has since applied its earlier cases—not *Syblis*—where, as here, the modified categorical approach governs. *See Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015).[5]

[5] *Syblis* said it was following a Seventh Circuit decision, *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014), on this issue. *See Syblis*, 763 F.3d at 356. But *Sanchez* first found that the categorical approach did not

Until this case, the *only* circuit to conclude that *Moncrieffe* does not apply in this context was the Ninth Circuit. In *Marinelarena v. Sessions*, 869 F.3d 780, 791 (9th Cir. 2017), a divided panel held that the Ninth Circuit's earlier, *Garcia*-like decision survives *Moncrieffe*. The panel here relied extensively on *Marinelarena*. But *Marinelarena* was wrongly decided for the same reasons outlined above. It is the subject of a comparable petition for rehearing en banc, which the government was promptly ordered to answer and which remains pending.

III. The Panel Opinion Creates An Intra-circuit Split.

Rehearing should also be granted because the panel opinion conflicts with *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016). As noted above (at 15-16), the panel distinguished *Moncrieffe* in part by holding that *Moncrieffe*'s presumption does not apply when a noncitizen is seeking cancellation of removal. Slip op. 17-18. This Court's decision in *Rangel-Perez* forecloses the panel's conclusion on this point by (correctly) holding that *Moncrieffe*'s presumption *does* apply in

---

apply, and then discussed this issue in a footnote's worth of dicta, 757 F.3d at 720 n.6, while ruling for the noncitizen on different grounds.

cancellation of removal cases. 816 F.3d at 607. And *Rangel-Perez* applied *Moncrieffe*'s presumption to determine that a noncitizen's prior conviction did not bar him from seeking cancellation. *Id.*

Rangel-Perez was before the panel in this case, *see* 1/6/17 Rule 28(j) Letter, but the panel did not cite or distinguish it. Therefore, *Rangel-Perez* is a "point of law" that "the court has overlooked," and panel rehearing or en banc rehearing is also necessary to maintain the uniformity of this Court's decisions. *See* Fed. R. App. P. 40(a)(2).

CONCLUSION

The panel should grant the petition for rehearing. Alternatively, the full Court should grant rehearing en banc.

Respectfully submitted,

/s/Brian P. Goldman

James S. Lamb
CHAN LAW FIRM
1900 Grant Street,
Suite 750
Denver, CO 80203

Aaron W. Scherzer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 W. 52nd Street
New York, NY 10019

Brian P. Goldman
Haley E. Jankowski
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

Robert M. Loeb
Thomas M. Bondy
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Counsel for Petitioner

February 12, 2018

ADDENDUM

Opinion and Judgment, *Lucio-Rayos v. Sessions*,
No. 15-9584 (10th Cir. Nov. 14, 2017)

FILED
United States Court of Appeals
Tenth Circuit

November 14, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUAN ALBERTO LUCIO-RAYOS,

Petitioner,

v.

JEFFERSON B. SESSIONS III, United States Attorney General,

Respondent.

IMMIGRANT DEFENSE PROJECT; NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; DETENTION WATCH NETWORK; ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK; COLORADO LAWYERS COMMITTEE; NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION; UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; PROFESSOR CHRISTOPHER LASCH; PROFESSOR NOAH B. NOVOGRODSKY; PROFESSOR VIOLETA CHAPIN,

Amici Curiae.

No. 15-9584

Appeal from the Board of Immigration Appeals
(Petition for Review)

James S. Lamb, Chan Law Firm, Denver, Colorado, for Petitioner.

Corey L. Farrell (Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Terri J. Scadron, Assistant Director, and Lisa Morinelli, on the brief), United States Department of Justice, Washington, D.C. for Respondent.

Aaron Scherzer (Jayashri Srikantiah and Lisa Weissman-Ward, Mills Legal Clinic, Stanford, California; Manuel Vargas and Andrew Wachtenheim, Immigrant Defense Project, New York, New York, on the brief), Orrick, Harrington & Sutcliffe, LLP, New York, New York, for Amici Curiae.

Before **HARTZ** and **EBEL**, Circuit Judges.[1]

EBEL, Circuit Judge.

The question presented in this petition for review is whether Petitioner Juan Alberto Lucio-Rayos's municipal theft conviction qualifies as a crime involving moral turpitude ("CIMT"), which would make him ineligible for cancellation of removal. Lucio-Rayos was convicted under a divisible municipal code provision that sets forth several different theft offenses, some of which qualify as CIMTs and some of which do not. Applying the modified categorical approach, it is not possible to tell which theft offense was the basis of Lucio-Rayos's conviction. However, because it is Lucio-Rayos's burden to establish his eligibility for cancellation of removal, he

[1] The Honorable Neil Gorsuch participated in the oral argument but not in the decision in this case. The practice of this court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal. See 28 U.S.C. § 46(d); see also United States v. Wiles, 106 F.3d 1516, 1516 n.* (10th Cir. 1997) (noting that this court allows remaining panel judges to act as a quorum to resolve an appeal). In this case, the two remaining panel members are in agreement.

bears the brunt of this inconclusive record. We, therefore, uphold the Board of Immigration Appeals ("BIA")'s determination that Lucio-Rayos has not shown that he is eligible for cancellation of removal. We also conclude that the immigration judge ("IJ") did not deprive Lucio-Rayos of due process by refusing to recuse from hearing his case. Thus, having jurisdiction under 8 U.S.C. § 1252(a)(2)(D), we DENY Lucio-Rayos's petition for review.[2]

I. BACKGROUND

Lucio-Rayos, a citizen of Mexico who entered the United States without authorization, conceded that he is subject to removal, but seeks discretionary relief from the Attorney General in the form of cancellation of removal under 8 U.S.C. § 1229b(b). The IJ ruled that Lucio-Rayos is not eligible to apply for cancellation of removal because his prior theft conviction under the Westminster, Colorado Municipal Code, WMC 6-3-1(A), is for a CIMT. The BIA affirmed. Lucio-Rayos has petitioned this court to review the BIA's decision. See 8 U.S.C. § 1252. We have jurisdiction to consider his constitutional claims and questions of law involving statutory construction. Id. § 1252(a)(2)(D); see Flores-Molina v. Sessions, 850 F.3d 1150, 1157 (10th Cir. 2017). We review these matters de novo, although in appropriate circumstances we may defer to the BIA's interpretation of the immigration laws it implements. See Flores-Molina, 850 F.3d at 1157.

[2] The panel GRANTS Lucio-Rayos's motion to file a supplemental brief and has considered that brief.

II. DISCUSSION

A. The IJ did not deprive Lucio-Rayos of due process by refusing to recuse

As an initial matter, Lucio-Rayos contends that the IJ erred in refusing to recuse from considering Lucio-Rayos's case because the IJ's spouse is one of two supervising Deputy Chief Counsel for the Immigration and Customs Enforcement ("ICE") office in Denver, the office which initiated this removal proceeding against Lucio-Rayos.[3] The BIA rejected this argument. We do, too.

Lucio-Rayos's recusal argument is essentially a due process claim, which we review de novo. See Hassan v. Holder, 604 F.3d 915, 923 (6th Cir. 2010). He is entitled to a full and fair removal hearing that comports with due process. See Kapcia v. INS, 944 F.2d 702, 705 (10th Cir. 1991) (quoting Vissian v. I.N.S., 548 F.3d 325, 329 (10th Cir. 1977)). That includes a fair and impartial decision-maker. See Vargas-Hernandez v. Gonzales, 497 F.3d 919, 925 (9th Cir. 2007) (citing In re Exame, 18 I&N Dec. 303, 306 (BIA 1982)). In order to prevail on his due process claim, Lucio-Rayos must establish both that he was deprived of due process and that that deprivation prejudiced him.[4] See Alzainati v. Holder, 568 F.3d 844, 851 (10th Cir. 2009); see also Hassan, 604 F.3d at 923 (6th Cir.).

---

[3] Contrary to the Government's argument, Lucio-Rayos adequately raised his recusal argument to the BIA.

[4] Because Lucio-Rayos, to prevail, must show prejudice from a due process violation, his blanket suggestion that the IJ must recuse from all removal proceedings initiated and prosecuted by the Denver ICE office does not warrant relief.

Lucio-Rayos has not made such a showing. Generally speaking, an IJ must recuse if 1) she has "a personal, rather than a judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from [her] participation in the case," 2) "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party," In re Exame, 18 I&N Dec. at 306 (internal quotation marks omitted); see also Vargas-Hernandez, 497 F.3d at 925 (9th Cir.), or 3) the IJ has an inherent bias, see Hassan, 604 F.3d at 923 (6th Cir.).

Lucio-Rayos presents extrajudicial-influence and inherent-bias arguments, relying by analogy on 28 U.S.C. § 455(a), which requires a federal judge to recuse "in any proceeding in which his impartiality might reasonably be questioned."[5] However, the record indicates that the Denver ICE office has a plan in place to ensure that the IJ's spouse has no involvement in cases pending before the IJ. And Lucio-Rayos has not asserted any evidence suggesting that the IJ's spouse played any role in Lucio-Rayos's removal proceedings. A reasonable person, knowing these

[5] 28 U.S.C. § 455 applies to the recusal of federal judges and does not expressly apply to IJs. See Yosd v. Mukasey, 514 F.3d 74, 78 n.4 (1st Cir. 2008). Nonetheless, courts rely on § 455 to inform their analysis of recusal issues involving IJs. See Shewchun v. Holder, 658 F.3d 557, 570-71 (6th Cir. 2011); Yosd, 514 F.3d at 78 n.4.

facts, would not question the IJ's impartiality to conduct Lucio-Rayos's removal proceeding.[6]

Lucio-Rayos also relies by analogy on 28 U.S.C. § 455(b)(5)(i), which requires a federal judge to recuse if her spouse "[i]s a party to the proceeding, or an officer, director, or trustee of a party." But that is not the situation presented here. While the IJ's spouse represents a party to this case, the spouse is not himself a party, nor an officer, director, or trustee of a party.

In addition, Lucio-Rayos has not shown that he was prejudiced by the IJ's refusal to recuse; that is, Lucio-Rayos has not shown that "his rights were violated in a manner so as potentially to affect the outcome of the proceedings," Vargas-Hernandez, 497 F.3d at 926 (9th Cir.) (internal quotation marks omitted). We, therefore, uphold the IJ's refusal to recuse from hearing Lucio-Rayos's case.

B. The BIA did not err in concluding that Lucio-Rayos is ineligible for cancellation of removal

[6] If Lucio-Rayos is also challenging the IJ's decision to deny Lucio-Rayos's application for a subpoena to the Denver ICE office to produce the conflict-avoidance plan and the names, contact information and supervisor for all members of that office, we decline to address that argument, which Lucio-Rayos did not adequately raise to the BIA. See 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies); see also Sidabutar v. Gonzales, 503 F.3d 1116, 1118 (10th Cir. 2007) (stating that this court will "generally assert jurisdiction only over those arguments that a petitioner properly presents to the BIA"). However, we note that the record indicates that Lucio-Rayos, in his motion to the IJ seeking the IJ's recusal, was able to set forth the general details of the conflict-avoidance plan and that the ICE office informed the Colorado Chapter of the American Immigration Lawyers Association of this plan at the time of the IJ's appointment.

To be eligible for cancellation of removal, Lucio-Rayos had to meet four requirements. See 8 U.S.C. § 1229b(b)(1).[7] The only one of those requirements at issue here is whether, under 8 U.S.C. § 1229b(b)(1)(C), Lucio-Rayos's Westminster conviction for theft is a crime involving moral turpitude ("CIMT") as defined by the Immigration and Nationality Act ("INA") in 8 U.S.C. § 1182(a)(2)(A)(i)(I) or § 1227(a)(2)(A)(i). If it is, and if no exceptions apply, Lucio-Rayos is ineligible for cancellation of removal. Id. § 1229b(b)(1)(c); see, e.g., Flores-Molina, 850 F.3d at 1155-56.

1. Convictions under WMC 6-3-1(A) do not categorically qualify as CIMTs

[7] 8 U.S.C. § 1229b(1) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> >
> > (B) has been a person of good moral character during such period;
> >
> > (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5) [regarding waiver for domestic violence victims]; and
> >
> > (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

We first apply the "categorical approach" to determine whether Lucio-Rayos's Westminster theft conviction qualifies as a CIMT by comparing the elements of that offense to the INA's definition of a CIMT. See Flores-Molina, 850 F.3d at 1158. Although "the INA does not provide a generic definition of 'crime involving moral turpitude,'" the Attorney General, the BIA, and federal courts have generally defined "moral turpitude" to "refer[] to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality," and to "reach[] conduct that is inherently wrong, . . . rather than conduct deemed wrong only because of a statutory proscription." Id. at 1158-59 (internal quotation marks omitted). "Alongside these very general translations, the BIA and courts have espoused what might be characterized as subsidiary definitions and rules applicable to narrower classes of conduct." Id. at 1159 (citation, internal quotation marks, alteration omitted). Relevant here, established BIA precedent provides that a theft conviction like Lucio-Rayos's qualifies as a CIMT only if one element of the theft offense is that the perpetrator intended to deprive the victim permanently of his property. See In re Grazley, 14 I&N Dec. 330, 333 (BIA 1973), overruled by In re Diaz-Lizarraga, 26 I&N Dec. 847, 849-52 (BIA 2016); see also De Leon v. Lynch, 808 F.3d 1224, 1229 (10th Cir. 2015) (referencing this line of BIA decisions). The BIA applied that definition of a CIMT involving theft to Lucio-Rayos's case.[8]

[8] Before this Court, the Government suggests that the BIA had "not definitively resolved whether . . . [,] if the [theft] offense required only an intent to temporarily deprive the owner of the use or benefit of the property taken, the crime would not be one of moral turpitude." (Resp. Br. 22 (internal quotation marks omitted).) To the

Later, after the BIA's decision in this case, the BIA "updated" its definition of theft offenses that qualify as a CIMT to provide that "a theft offense is a [CIMT] if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded," In re Diaz-Lizarraga, 26 I&N Dec. at 853. That new definition, however, does not apply retroactively here to Lucio-Rayos's case because a revised rule adopted by the BIA in the exercise of its delegated legislative policymaking authority is presumed to apply prospectively only to cases initiated after its issuance. See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1145-46 & 1146 n.1 (10th Cir. 2016). Neither party suggests any reason why that presumption does not apply here.

We, therefore, turn to the categorical approach to determine whether a Westminster theft conviction categorically requires proof that the perpetrator intended to deprive the victim permanently of his property, see In re Grazley, 14 I&N Dec. at 333. The Westminster Municipal Code provision at issue, 6-3-1(A), provides:

> It shall be unlawful to commit theft. A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, where the value of the thing involved is less than five hundred dollars ($500), and:
>
> > (1) Intends to deprive the other person permanently of the use or benefit of the thing of value; or

---

contrary, in In re Diaz-Lizarraga, a case decided after the BIA ruled in Lucio-Rayos's case, the BIA indicated that "[f]rom the Board's earliest days we have held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property." 26 I&N Dec. at 849.

> (2) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
>
> (3) Uses, conceals, or abandons the thing of value intending that such use, concealment or abandonment will deprive the other person permanently of its use and benefit; or
>
> (4) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

(A.R. 555.)

Lucio-Rayos contends that a conviction under WMC 6-3-1(A)(4) does not require proof that the perpetrator intended to deprive the victim permanently of his property. We agree.[9]

The fact that other provisions of this municipal code provision expressly require proof of the perpetrator's intent to deprive the victim of his property permanently, but WMC 6-3-1(A)(4) does not, strongly indicates that the intent to deprive the victim permanently of his property is not an element under WMC 6-3-1(A)(4). Cf. People v. Mendro, 731 P.2d 704, 706 & n.1 (Colo. 1987) (addressing almost identically worded provisions of Colorado's theft statute, Colo. Rev. Stat. 18-4-401(1), and stating that "[a]ll of the subsections of 18-4-401, except (d) [which is

[9] Lucio-Rayos further argues in his petition for review that WMC 6-3-1(A)(2), which applies when the perpetrator "[k]nowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit," does not require proof that the perpetrator intends to deprive the victim permanently of his property. But because Lucio-Rayos did not exhaust this argument by making it to the BIA, we lack jurisdiction to address it. See Molina v. Holder, 763 F.3d 1259, 1262-63 (10th Cir. 2014).

the same as WMC 6-3-1(A)(4)], contain an express culpable mental state element"); People v. Meyers, 609 P.2d 1104, 1104-05 (Colo. Ct. App. 1979) (addressing sufficiency of evidence to support conviction under § 18-4-401(1)(d) without addressing intent to deprive owner of property permanently).

The Government nevertheless argues, and the BIA concluded, that WMC 6-3-1(A)(4) implies "that the deprivation will be permanent if the rightful owner of the property is unwilling or unable to pay the consideration demanded for return of the property." (Resp. Br. 24.) Owing the BIA no deference to its interpretation of state or local criminal statutes, see Flores-Molina, 850 F.3d at 1157, we disagree that this is sufficient to make the intent to deprive a victim of his property permanently an element of a theft offense under WMC 6-3-1(A)(4).

In reaching that conclusion, we consider, as the BIA did, Colorado's application of its analogous theft statute, Colo. Rev. Stat. § 18-4-401(1), which, with regard to the issue before us, is nearly identical to WMC 6-3-1. See Colo. Rev. Stat. § 18-4-401(8) (2017) (giving municipalities "concurrent power to prohibit theft, by ordinance, where the value of the thing involved is less than one thousand dollars."). See generally Flores-Molina, 850 F.3d at 1166 (looking to analogous Colorado statutes when interpreting a Denver municipal ordinance). Colorado's Criminal Jury Instructions indicate that the intent to deprive the victim permanently of his property is not an element of "theft (demanding consideration)." See Colo. Jury Instructions 4-4:04 (2016). Further, the BIA and the Government have not cited any Colorado case that construes the crime of "theft (demanding consideration)" to require proof

that the defendant intended to deprive the victim of his property permanently. Instead, the BIA and the Government rely only on Colorado cases making general statements about theft offenses as a whole.[10] Those cases do not persuade us that, contrary to the plain language of the Westminster municipal ordinance and the analogous Colorado Criminal Jury Instructions, proof that the defendant intended to deprive the victim of his property permanently is an element of "theft (demanding consideration)." We hold, therefore, in light of WMC 6-3-1(A)(4), that not all convictions under the Westminster code's theft provision require proof that the defendant intended to deprive the victim of his property permanently. A conviction generally under WMC 6-3-1(A), thus, does not categorically qualify as a CIMT.[11]

2. WCM 6-3-1(A) is divisible

[10] See People v. Warner, 801 P.2d 1187, 1188-89 (Colo. 1990) (explaining, in a case addressing theft by deception from a person, Colo. Rev. Stat. § 18-4-401(1)(a), (5), that Colorado's current theft statute, id. § 18-4-401, incorporates the common-law offenses of larceny, embezzlement, false pretenses, and confidence games); People v. Sharp, 104 P.3d 252, 254-58 (Colo. Ct. App. 2004) (stating, in holding that there was sufficient evidence to support a conviction for theft under Colo. Rev. Stat. § 18-4-401(1)(b), by knowingly using, concealing, or abandoning "the thing of value in such manner as to deprive the other person permanently of its use or benefit," that jury can infer intent to deprive another permanently of the use of benefits of a thing of value from defendant's conduct and the circumstances of the case). The Colorado case on which Lucio-Rayos relies, People v. Quick, 713 P.2d 1282, 1285-89 (Colo. 1986), also is not directly on point because it addressed theft offenses under § 18-4-401(1)(a), (b), and (c), rather than the analogous state provision relevant here, § 18-4-401(1)(d), and theft cases brought under an earlier state theft statute.

[11] In light of our conclusion that a theft conviction under WMC 6-3-1(A) is not categorically a CIMT, the Government asks us to remand this case to the BIA to allow it to consider whether a conviction under WMC 6-3-1(A) qualifies categorically as a CIMT for some other reason. But the Government did not argue to the IJ or the BIA any other grounds for deeming Lucio-Rayos's theft conviction to qualify as a CIMT.

The BIA further erred in concluding that WMC 6-3-1(A) is not divisible. It is, instead, divisible because it sets forth different crimes in its four separate provisions. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (explaining that a divisible statute "list[s] elements in the alternative, and thereby define[s] multiple crimes"). The parties have not cited, and we have not found, any cases specifically addressing whether WMC 6-3-1(A), or the state's analogous theft statute, is divisible. But Colorado's Criminal Jury Instructions indicate the analogous state theft statute is divisible by setting forth different pattern instructions, each with different elements, for theft offenses prosecuted under § 18-4-401(1)(a) through (e). See Colo. Jury Instructions 4-4:01 through 4-4:05 (2016). See generally United States v. Titties, 852 F.3d 1257, 1267-71 (10th Cir. 2017) (applying Mathis and looking, e.g., to the text of the statute, state-court decisions and state pattern jury instructions to determine whether state criminal statute is divisible).

Our conclusion that WMC 6-3-1(A) is divisible is bolstered by the history of the analogous Colorado theft statute, by which the state legislature incorporated the common-law crimes against property, including larceny, embezzlement, false pretenses, and confidence games, into a general, consolidated theft statute, while retaining "much of the substantive elements for the offenses." Warner, 801 P.2d at 1189. For these reasons, we conclude that WMC 6-3-1(A) is divisible. The parties do not argue to the contrary.

3. Applying the modified categorical approach does not establish under which provision of WMC 6-3-1(A) Lucio-Rayos was convicted[12]

Having concluded that WMC 6-3-1(A) is divisible, we then apply the modified categorical approach to determine under which provision of WMC 6-3-1(A) Lucio-Rayos was convicted, looking to charging documents, jury instructions, or plea agreement and colloquy. See Mathis, 136 S. Ct. at 2249. We do not spend time addressing those documents here because it is undisputed that none of the documents in the record indicates under what provision Lucio-Rayos was convicted.

4. Lucio-Rayos bears the burden of proving that he was not convicted of a CIMT

Because, after applying the modified categorical approach, we cannot determine under which section of WMC 6-3-1(A) Lucio-Rayos was convicted (e.g., whether his conviction was under WMC 6-3-1(A)(4), which we have held does not satisfy the definition of a CIMT, or under another provision of WMC 6-3-1(A) which may satisfy the test for a CIMT), we must decide who bears the brunt of this unclear record.

Congress has placed the burden of proving eligibility for relief from removal squarely on the alien: "An alien applying for relief or protection from removal has the burden of proof to establish that the alien—(i) satisfies the applicable eligibility

[12] Although the BIA held that WMC 6-3-1(A) was not divisible, the BIA went on to conclude, alternatively, that if it were divisible (as we have concluded), Lucio-Rayos failed to establish, under the modified categorical analysis, that his theft conviction was not a CIMT. We, therefore, continue to review the BIA's decision by applying the modified categorical approach.

requirements . . . ." 8 U.S.C. § 1229a(c)(4)(A); see also Gutierrez-Orozco v. Lynch, 810 F.3d 1243, 1246 (10th Cir. 2016) (applying § 1229a(c)(4)(A) to alien's application for cancellation of removal). 8 C.F.R. § 1240.8(d) reiterates that the alien has "the burden of establishing that he or she is eligible for any requested benefit or privilege," and further provides that where, as here, "the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." See generally R-S-C v. Sessions, 869 F.3d 1176, 1186 (10th Cir. 2017) (affording Chevron[13] deference to Attorney General's regulation that was consistent with reasonable interpretation of statutory scheme). This authority clearly indicates it is the alien that bears the burden of proving he is eligible to seek discretionary relief from removal.

Relying on 8 C.F.R. § 1240.8(d), we have previously held, in a case like this one, that it is the undocumented alien who bears the burden of proof, under the modified categorical approach, to show that his prior conviction was not a CIMT that would make him ineligible for relief from removal. See Garcia v. Holder, 584 F.3d 1288, 1289-90 (10th Cir. 2009) (holding alien failed to meet his burden of proving he was eligible to seek cancellation of removal because the documents used to inform the modified categorical analysis in that case were inconclusive as to whether his

[13] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

prior conviction was a CIMT).[14] "The fact that [the alien] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." Id. at 1290.[15]

We are bound by Garcia "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." Leatherwood v. Allbaugh, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017) (internal quotation marks omitted). Lucio-Rayos contends that the Supreme Court's decision in Moncrieffe v. Holder, 569 U.S. 184 (2013), has overruled Garcia. Other circuits are divided as to whether Moncrieffe applies to the

[14] We disagree with Lucio-Rayos that Garcia involved an improper fact-based, rather than elements-based, inquiry into whether Garcia's prior assault conviction involved the requisite mens rea to qualify as a CIMT. But, in any event, that does not affect Garcia's holding that it is the alien who bears the burden of proving that he has not been convicted of a CIMT and, thus, is eligible for discretionary relief from removal. Lucio-Rayos's argument appears to be that the question of whether his prior theft conviction qualifies as a CIMT is a legal, rather than a factual, question and so the BIA erred in relying on whose burden of proof it is to show Lucio-Rayos is eligible for discretionary relief from removal. But the modified categorical approach relies on documentary evidence to determine of which of the several offenses set forth in a divisible statute the alien was convicted. See Marinelarena v. Sessions, 869 F.3d 780, 791 (9th Cir. 2017) (noting this "is, if not factual, at least a mixed question of law and fact"); Le v. Lynch, 819 F.3d 98, 105 (5th Cir. 2016) ("When an alien's prior conviction is at issue, the offense of conviction is a factual determination, not a legal one."). So burdens of proof are relevant and can be dispositive. See Marinelarena, 869 F.3d at 789-90, 792; cf. Sauceda v. Lynch, 819 F.3d 526, 533-34 (1st Cir. 2016) (stating that "the categorical approach—with the help of its modified version—answers the purely 'legal question of what a conviction necessarily established. As a result, the question of the allocation of the burden of proof when the complete record of conviction is present does not come into play." (emphasis added; quoting Mellouli v. Lynch, —U.S.—, 135 S. Ct. 1980, 1987 (2015))).

[15] Other circuits have reached similar conclusions. See, e.g., Marinelarena, 869 F.3d at 788, 792 (9th Cir.); Syblis v. Att'y Gen., 763 F.3d 348, 355-57 (3d Cir. 2014) (joining Fourth, Seventh, Ninth, and Tenth Circuits, citing cases); Salem v. Holder, 647 F.3d 111, 116 (4th Cir. 2011).

circumstances at issue here, where the documents relevant to the modified categorical analysis are inconclusive as to the alien's offense of conviction. Compare Marinelarena, 869 F.3d at 788-92 (9th Cir.) (holding Moncrieffe does not apply to question of whether noncitizen met her burden of showing she was not convicted of a controlled substance offense that would disqualify her from seeking relief from removal where documents informing the modified categorical analysis are inconclusive), with Sauceda, 819 F.3d at 528, 530-32 (1st Cir.) (holding Moncrieffe governs question of whether noncitizen was convicted of domestic violence offense that would disqualify him from seeking relief from removal, where documents relevant to modified categorical analysis are inconclusive). Lucio-Rayos and Amici specifically argue here that, after Moncrieffe, notwithstanding any ambiguity in the noncitizen's record of conviction, the prior conviction is presumed to have been for the least conduct criminalized under the statute of conviction, which presents a legal, rather than a factual, question for which burdens of proof are irrelevant. Like the Ninth Circuit, we conclude Moncrieffe does not apply to the question at issue here.

In Moncrieffe, the Supreme Court considered whether a noncitizen's prior Georgia drug conviction qualified as an "aggravated felony" under the INA, which would warrant the noncitizen's removal from the United States. 569 U.S. at 187. It is the Government burden to establish, by clear and convincing evidence, that the noncitizen has a prior conviction that warrants his removal. See Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1130 (10th Cir. 2005) (citing 8 U.S.C. § 1229a(c)(3)(A)). That differs from the issue presented in this case, where it is the noncitizen's burden

to establish, by a preponderance of the evidence, that he is eligible to seek cancellation of removal. See 8 U.S.C. § 1229a(c)(4)(A); see also 8 C.F.R. § 1240.8(d). Although Moncrieffe stated that its analysis in that removal case "is the same" in the context of cancellation of removal, 569 U.S at 191 n.4, "that is true, so far as the discussion in Moncrieffe goes: '[c]onviction is the relevant statutory hook' whether determining removability or eligibility for relief from removal," Marinelarena, 869 F.3d at 790 (quoting Moncrieffe, 569 U.S. at 191). In either context, then, a court applies the categorical approach generally, focusing on the elements of the offense of conviction rather than the actual conduct underlying the offense. "But Moncrieffe did not discuss the differences in the burden of proof in those two contexts; it had no reason to." Marinelarena, 869 F.3d at 790.

In Moncrieffe, then, the Supreme Court considered whether the noncitizen's prior Georgia drug conviction categorically matched the relevant federal definition of "aggravated felony" at issue there, possession of more than a small amount of a controlled substance with the intent to distribute it for remuneration. 569 U.S. at 193-94. Unlike here, there was no question as to what offense Moncrieffe was convicted under Georgia law; he was convicted of possession of a controlled substance with the intent to distribute it. Id. at 192. The question at issue in Moncrieffe, in applying the categorical approach, was how Georgia courts defined the elements of that offense, id. at 193-94, clearly a legal question. Focusing its categorical analysis on the least conduct criminalized under the state statute, Moncrieffe noted that Georgia courts applied the state statute to possession of small

amounts of controlled substances for distribution without remuneration. Id. 194. A conviction under that Georgia statute, then, did not categorically meet the federal definition. Id. at 194-95.

Unlike in Moncrieffe, here we do not know of which theft offense set forth in WMC 6-3-1(A) Lucio-Rayos was convicted. That requires us to resort to the modified categorical approach. See Descamps v. United States, 133 S. Ct. 2276, 2283-85 (2013). The Tenth Circuit's decision in Garcia addressed the modified categorical approach; Moncrieffe did not. Furthermore, as previously mentioned, the determination of which offense listed in a divisible, multi-offense statute the petitioner was convicted is a question of fact or at least a question of law and fact, see Marinelarena, 869 F.3d at 791 (9th Cir.); Le, 819 F.3d at 105 (5th Cir.), that turns on findings made from the limited category of documents relevant to the modified categorical approach, see Descamps, 133 S. Ct. at 2283-85. The burden of proof remains relevant to that determination: "It is well-established that the party who bears the burden of proof loses if the record is inconclusive on a critical point." Marinelarena, 869 F.3d at 789.

For these reasons, then, we cannot say that Moncrieffe "indisputeabl[y]" overruled Garcia. See Barnes v. United States, 776 F.3d 1134, 1147 (10th Cir. 2015). Therefore, we remain bound to apply Garcia here. Therefore, "[b]ecause it is unclear from [Lucio-Rayos's] record of conviction whether he committed a CIMT, we conclude he has not proven eligibility for cancellation of removal." Garcia, 584 F.3d at 1290.

5. The "petty theft" exception does not restore Lucio-Rayos's eligibility for cancellation of removal

Lastly, Lucio-Rayos contends that if, as we have concluded, his Westminster theft conviction is a CIMT which makes him ineligible for cancellation of removal, he nevertheless meets an exception to ineligibility available for "petty offenses." 8 U.S.C. § 1229b(b)(1)(C) provides that Lucio-Rayos is ineligible for cancellation of removal if his Westminster theft conviction is a CIMT as defined under either 8 U.S.C. § 1182(a)(2)(A)(i)(I) or § 1227(a)(2)(A)(i). But Lucio-Rayos contends that his Westminster theft conviction meets the "petty offense" exception listed in 8 U.S.C. § 1182(a)(2)(A)(ii)(II), which applies when an alien has "committed only one crime if"

> the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Lucio-Rayos's theft offense was punishable by imprisonment "for a period not to exceed 365 days." WMC 1-8-1(A). Even if Lucio-Rayos's theft conviction met this "petty offense" exception, however, the exception would only apply to CIMTs defined under 8 U.S.C. § 1182. There is no similar exception for CIMTs defined by

8 U.S.C. § 1227(a)(2)(A)(i).[16] In such a situation, the BIA has held that § 1182's "petty offense" exception does not prevent an immigrant's CIMT conviction from disqualifying him from eligibility for discretionary cancellation of removal under § 1227. See In re Cortez Canales, 25 I&N Dec. 301, 303-04 (BIA 2010); see also Mancilla-Delafuerte v. Lynch, 804 F.3d 1262, 1265-66 (9th Cir. 2015); Hernandez v. Holder, 783 F.3d 189, 191-96 (4th Cir. 2015).

III. CONCLUSION

For the foregoing reasons, we DENY Lucio-Rayos's petition for review and uphold the BIA's ultimate determination that he is not eligible for cancellation of removal.

[16] 8 U.S.C. § 1227(a)(2)(A)(i) includes CIMTs "for which a sentence of one year or longer may be imposed." See Andrade-Zamora, 814 F.3d 945, 950-51 (8th Cir. 2016).

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program—Windows Defender version 4.12.17007.18011 with virus definition version 1.261.1049.0, updated on Feb. 11, 2018—and according to the program are free of viruses.

/s/Brian P. Goldman
Brian P. Goldman
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this brief contains 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

/s/Brian P. Goldman
Brian P. Goldman
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, the foregoing Petition for Rehearing or Rehearing En Banc was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Brian P. Goldman
Brian P. Goldman
Counsel for Petitioner