Matter of Silva-Trevino and determining whether your client committed a Crime Involving Moral Turpitude?

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An oft-confronted problem for immigration law practitioners as well as the courts is to discern whether a client's criminal conviction is a crime of moral turpitude (CIMT). This is important because admitting to or conviction for a CIMT is often a grounds of inadmissibility,[1] and deportability,[2] and also can bar eligibility for important forms of relief from removal, such as adjustment of status,[3] Cancellation of Removal for Certain Nonpermanent Residents[4] and voluntary departure.[5]

Historically a CIMT has been vaguely defined[6]. For example, the Board of Immigration Appeals defined it as "conduct that shocks the public conscience as being inherently base, vile, or depraved."[7] In and *en banc* decision,[8] the Ninth Circuit summarized the definition of a CIMT, finding that the offenses can be understood as belonging to two basic types: (1) offenses involving "fraud," and (2) offenses involving conduct that is both (a) "inherently base, vile, or depraved" and (b) "contrary to the [accepted] private and social duties man owes to his fellow men or to society in general."

Because few if any crimes include the definitional elements of a CIMT as elements of the crime except crimes that include "fraud" as an element, and many crimes have multiple elements,

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[1]INA § 212(a)(2)(A)(i)(II).
[2]INA §§ 237(a)(2)(A)(i)and (ii).
[3]INA § 245(a).
[4]INA §§ 240A(b)(B) and (C).
[5]INA § 240B(b)(B).
[6]Despite the perennial difficulty in defining moral turpitude, the Supreme Court held that the term is not void because of its vagueness. *Jordan v. De George*, 341 U.S. 223 (1951).
[7]*Matter of Perez-Contreras,* I&N Dec. 615, 618 (BIA 1992).
[8]*Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (*en banc*) (Pregerson, J., writing for the majority).

it is hard to discern whether a particular conviction is or is not for a CIMT. A common example is a crime where the fraud element is in the disjunctive, such as a crime where an element of the crime is that the defendant committed "false or fraudulent"[9] conduct. In such a statute, a person who is convicted under the "false" element may not have been convicted of a CIMT while a person convicted under the "fraudulent" element more likely has been convicted of a CIMT. To parse whether your client has committed a CIMT has traditionally involved a two-step approach.

Step One: The Categorical Approach. In the categorical approach, the court examines the offense as defined by statute and case law and compares it to the relevant "generic definition" to see if there is a categorical (automatic) match. Here, the "generic definition" is the definition of a CIMT,

If there is no way to violate the statute that does not involve moral turpitude, the statutory offense is categorically (automatically) a CIMT. For example, a statute that requires fraudulent intent to commit a crime is categorically a CIMT. *All* convictions under the statute will be a CIMT. If the immigrant wants to prove that there is some conduct that violates the statute and that does not come within the generic definition, he or she must show that there is a likelihood that such conduct is prosecuted under the statute, *i.e.,* that he or she is not merely using his or her "legal imagination"[10] in order to avoid a categorical ruling.

Step Two: The Modified Categorical Approach. If the first step does not resolve the issue, the court will consider whether it will go on to the second step, the "modified categorical approach,"

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[9]*See, e.g.,* 18. USC § 1001(b), which states"[W]whoever ... knowingly and willfully ...(2) makes any materially *false, fictitious, or fraudulent* statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially *false, fictitious, or fraudulent statement* or entry; shall be fined ...." *(emphasis added).*

[10]*See, Gonzales v. Duenas-Alvarez,* 127 S.Ct. 815 (2007).

in which it will review the individual's record of conviction to see whether the elements of the crime the client was convicted of render the crime a CIMT. Under the traditional second step, a court is limited to specific documents that compose the record of conviction which include the statutory definition, the charging document, the written plea agreement, the transcript of plea, the plea colloquy, any explicit factual finding by the trial judge to which the defendant assented, jury instructions, comparable records to these,[11] and a clerk's minute order.[12] Thus, if a statute has "false or fraudulent" conduct as an element of the crime and the record of conviction indicates that your client engaged in fraudulent conduct, his or her crime would likely be found to be a crime of moral turpitude. Conversely, if the conviction documents show that your client committed false conduct, his or her crime likely would not be found to be a crime of moral turpitude.

Matter of Silva-Trevino changes the definition of moral turpitude and the two-step analysis

In late 2008, the then-outgoing Attorney General, Michael Mukasey, issued *Matter of Silva-Trevino*.[13] The decision proffered a new definition of a CIMT and abandoned the two-step analysis to determine whether a client was convicted of a CIMT.

New definition of a CIMT

In *Matter of Silva-Trevino*, Attorney General Mukasey wrote that a CIMT requires "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." [14] Compared to the definition in *Navarro-Lopez, supra*, which was an offense involving "fraud," or an offense involving conduct that is both "inherently base, vile,

[11] *Shepard v. United States*, 544 U.S. 13 (2005).
[12] *United States v. Snellenberger*, 480 F.3d 1187 (9th Cir. 2007).
[13] 24 I&N Dec. 687 (AG 2008).
[14] *Id.* at 697.

or depraved" and "contrary to the [accepted] private and social duties man owes to his fellow men or to society in general," arguably *Matter of Silva-Trevino* does not substantively change the definition of moral turpitude or overrule existing case law. Attorney General Mukasey stated in *Matter of Silva-Trevino* that "[t]his definition rearticulates with greater clarity the definition that the Board (and many courts) have in fact long applied."[15] In fact, the change from "inherently base, vile, or depraved" to "reprehensible" appears meaningless. However, practitioners should be on guard that government attorneys may assert that this is a real definitional change, and in particular that the definition now includes more offenses that involve recklessness or willfulness. To the extent that immigration judges and the BIA consider the new definition substantially different than the old ones, reliance on precedents about what is a CIMT may be ill-advised. Further, the new definition, in some respects, is no easier to interpret than the older ones. As Judge Berzon discussed in her dissent in *Marmolejo-Campos*,[16] the *Silva-Trevino* definition including the "scienter" requirement makes an already conflicted definition even more

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[15] *Id.* at 689, n. 1.

[16] 558 F.3d 903, 924 (9th Cir. 2009) (en banc), Judge Berzon states in her dissent:

> The Attorney General's recent holding in *Silva-Trevino* is no improvement on the existing mess. *Silva-Trevino* holds that "some degree of scienter" is required for a CIMT. 24 I. & N. Dec. at 689. Yet, the common definition of "scienter" is nothing more than "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." BLACK'S LAW DICTIONARY 1081 (7th ed. 2000). So *Silva-Trevino* merely begs the question: What "degree of knowledge" is sufficient to indicate moral turpitude? The Attorney General suggests that "specific intent, deliberateness, willfulness, or recklessness," *id.*, may be sufficient -- a list he later rounds out by adding "knew, or reasonably should have known," as well. *Id.* at 707. Of course, "reasonably should have known" is not a culpable mental state; it is an objective standard of negligence, disregarding the defendant's actual state of mind. The Attorney General's concept of "some scienter" therefore includes just about every possible mental state and even one imputed mental state, without providing any indication of which one would be sufficient in what circumstances. *Silva-Trevino*'s "scienter" standard is thus wholly vacuous.

meaningless than it had been.

The abandonment of the two-step analysis

The revolution in *Matter of Silva-Trevino* is that it permits use of evidence outside the record of conviction to determine whether an offense in a divisible statute involves moral turpitude. It does this by adding a controversial "third step" to the two-step analysis.

Step Three: Considering evidence outside the record of conviction.

In CIMT cases only, if the review of the record of conviction does not establish the elements of the offense of conviction, the immigration judge may decide that it is necessary and appropriate to go to evidence from outside the reviewable criminal record, *e.g.*, testimony by the respondent taken in immigration court or evidence from police reports.

The BIA confirmed in a subsequent case, *Matter of Ahortalejo-Guzman*,[17] that, under *Silva-Trevino*, evidence beyond the record of conviction may be considered only where the record of conviction *does not* conclusively demonstrate whether the noncitizen was or was not convicted of engaging in conduct that constitutes a CIMT. Respondent Ahortalejo-Guzman pleaded guilty to simple assault in Texas, and the plea included a finding by the judge that "[t]his Court finds that this offense did not involve family violence." The respondent was charged with removability under INA § 212(a)(6)(A)(i) (presence without permission), and applied for Cancellation of Removal for Certain Nonpermanent Residents. The immigration judge, purporting to follow *Matter of Silva-Trevino*, examined evidence outside the record of conviction to determine that the offense was a CIMT because it involved his "common law wife," and found that the respondent was therefore ineligible for Cancellation of Removal.

[17]25 I&N Dec. 465 (BIA 2011).

The BIA sustained the appeal, holding that the immigration judge had improperly gone beyond the record of conviction in contravention of the process set forth by *Matter of Silva-Trevino*. The BIA first noted that "[s]imple assault or battery is generally not considered to involve moral turpitude for purposes of the immigration laws.... This general rule does not apply, however, where an assault or battery necessarily involves some aggravating factor that indicates the perpetrator's moral depravity, such as the use of a deadly weapon or the infliction of serious injury on a person whom society views as deserving of special protection, such as children, domestic partners, or peace officers."[18] The BIA described the *Silva-Trevino* procedure as "hierarchical or sequential," and reasoned that this approach "serves the important function of recognizing and preserving the results of a plea bargain, where the parties, with the consent of a trial judge, agree to allow the defendant to plead to a less serious crime."[19] Therefore, "[w]here the record of conviction conclusively shows that a conviction does not involve family violence, the fact that other evidence outside the record of conviction may indicate that the victim was part of the offender's family does not establish that the offender was *convicted* on that basis.... Therefore, the third stage analysis outlined in *Matter of Silva-Trevino* is properly applied only where the record of conviction does not itself resolve the issue, that is, where the record does not conclusively demonstrate whether an noncitizen was convicted of engaging in conduct that constitutes a [CIMT]."[20]

Defenses against Step Three

In certain cases, *Matter of Silva-Trevino* may benefit your client, such as when the conduct

[18] *Id.*, at 466.
[19] *Id.*, at 468.
[20] *Id.* at 468-79.

involved in your client's conviction unambiguously does not meet the CIMT definition. In such a situation, there is no need to challenge the decision. However, when *Matter of Silva-Trevino* creates problems, Counsel must argue that it was wrongly decided. A methodology for attacking the case is by attacking the bases for it. Attorney General Mukasey provided five bases for departing from the long-recognized two-part test:

1. Variations in the analysis in different circuits. Different circuits have different standards when determining whether conduct matches a crime categorically, with some circuits looking at the the minimal conduct necessary for a conviction,[21] while other circuits have considered the "general nature" of the crime and its classification in "common usage,"[22] and the Ninth Circuit looking at whether moral turpitude necessarily inheres in all cases that have a "realistic probability" of being prosecuted.[23]

Additionally, different circuits have different rules as to when to go to the second step and what can be analyzed in the second step. Some courts have refused to allow an immigration judge to inquire at all into the specific facts of a case.[24] Others have looked to the record of conviction for the alien's prior offense—but not beyond that record—in all cases where the criminal statute at issue "prohibits conduct that may not necessarily involve moral turpitude."[25]

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[21] *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (analyzing the "minimum criminal conduct necessary to sustain a conviction under the statute"); *Partyka v. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005) (considering whether the "least culpable conduct" covered by the criminal statute in issue would necessarily involve moral turpitude); *Quintero-Salazar v. Keisler*, 506 F.3d 688, 692 (9th Cir. 2007).

[22] *Marciano v. INS*, 450 F.2d at 1025; *Pino v. Nicolls*, 215 F.2d 237, 245 (1st Cir. 1954), *rev'd on other grounds sub nom. Pino v. Landon*, 349 U.S. 901 (1955).

[23] *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-05 (9th Cir. 2008).

[24] *Rodriguez-Castro v. Gonzales* 427 F.3d 316, 320-21 (5th Cir. 2005); *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995).

[25] *Nicanor-Romero*, 523 F.3d at 1007.

And still others have considered the record of conviction only if the statute of conviction is "divisible" into multiple subsections.[26] Most recently, the Seventh Circuit rejected any evidentiary limitation, concluding that the Department may in its discretion consider all relevant evidence bearing on the particular facts of an alien's prior criminal conviction.[27]

2. Inadmissibility does not require a conviction. In defining inadmissibility for a CIMT,[28] the Immigration and Nationality Act renders one inadmissible based on *admissions* to committing morally turpitudinous crimes as well as *convictions* for them. The fact that admissions can render one inadmssible, Mr. Mukasey reasoned, means that evidence outside of the record of conviction could be considered.

3. Immigration cases do not rely on the rules established in criminal cases. The two-step approach was conceived in the context of sentencing in criminal cases where the federal appellate courts define the scope of a sentencing court's inquiry and where the Sixth Amendment's right to a jury trial applies, while in the immigration court context, the Agency involved, the Attorney General should determine the scope of inquiry.

4. Moral turpitudinous is not an element of criminal offenses. Moral turpitude is not an element of an offense and thus it is appropriate to look outside the record of conviction.

Challenging the bases underpinning *Matter of Silva-Trevino*

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[26]*Amouzadeh*, 467F.3d at 455. It is noteworthy that the Ninth Circuit has departed from the standard second step analysis where an immigration court may examine only the actual elements of the offense to a more expanded analysis where an immigration court can consider "missing elements" if the conviction documents demonstrate that the court relied on the facts that support this element in convicting the alien. *U.S. v. Aguila-Montes de Oca*, __ F.3d __ (9th Cir. Aug. 11, 2011)(*en banc*).

[27]*Ali v. Mukasey*, 521 F.3d 737, 742-43 (7th Cir. 2008).

[28]INA § 212(a)(2)(A)(i)(I).

Practitioners can challenge the case by challenging these bases. In *Jean-Louis v. Attorney General*,[29] the Third Circuit articulated powerful arguments that can be used to combat *Matter of Silva-Trevino* and the Seventh Circuit's *Ali v. Mukasey* decision, *supra*, that also allowed for a third step.

1. Argument that variations in the analysis in different circuits allow the abandonment of the two-step approach.

In *Jean-Louis*,[30] the court wrote, "Although courts employ different labels to describe the categorical and modified categorical approaches, the fundamental methodology is the same. Each court begins with an analysis of the statute of conviction. If the statute of conviction is divisible, defining variations of the same offense, some of which would constitute a CIMT and others of which would not, inquiry into the record of conviction is permissible solely to determine the particular subpart under which the alien was convicted. Otherwise, scrutiny of the alien's particular acts is prohibited. The court then cited immigration cases decided by the Supreme Court[31] and by six circuits[32] that applied the two-step approach in immigration cases, and noted that only one circuit, the Seventh Circuit Court,[33] abandoned the categorical approach in CIMT's. Whatever variation there may be in the details, all circuits but the Seventh adhere to the two-step analysis.

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[29]582 F.3d 462 (3d Cir. 2009).

[30]582 F.3d at 474, *supra.* The Third Circuit also rejected *Matter of Silva-Trevino in Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010), stating. "[T]o the extent *Silva-Trevino* is inconsistent, we adhere to circuit law."" However, this is all the case said about *Matter of Silva-Trevino.*

[31]*Gonzales v. Duenas-Alvarez, supra.*

[32]*Partyka v. Att'y Gen., supra*; *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 450 (4th Cir.2005); *Chanmouny v. Ashcroft*, 376 F.3d 810, 812 (8th Cir.2004); *Cabral v. INS*, 15 F.3d 193 (1st Cir.1994); *Gonzalez-Alvarado v. INS*, 39 F.3d 245 (9th Cir.1994); *Okabe v. INS*, 671 F.2d 863 (5th Cir.1982); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir.1939).

[33]*Ali v. Mukasey, supra.*

2. Argument against the basis that inadmissibility does not require a conviction. The Third Circuit rejected this argument in *Jean-Louis*. The court wrote:

> We conclude that we are not bound by the Attorney General's view because it is bottomed on an impermissible reading of the statute, which, we believe, speaks with the requisite clarity. The ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century. The specific ambiguity is as to the use of the words convicted" and committed." The inclusion of committed, the Attorney General urges, permits inquiry into any and all acts-whether or not admitted by the alien, and whether or not established by the record of conviction-to determine whether the petitioner was convicted of a CIMT. To say that this reading has been rejected is an understatement: the BIA, prior attorneys general, and numerous courts of appeals have repeatedly held that the term "convicted" forecloses individualized inquiry in an alien's specific conduct and does not permit examination of extra-record evidence. It could not be clearer from the text of the statute-which defines "conviction" as a "formal judgment of guilt," and which explicitly limits the inquiry to the record of conviction or comparable judicial record evidence – that the CIMT determination focuses on the crime of which the alien was convicted – not the specific acts that the alien may have committed. 8 U.S.C. § 1101(a)(48)(A). The statute presents no ambiguity.

3. Argument against the basis that immigration cases do not rely on the rules established in criminal cases.

In *Jean-Louis*, as noted, the court explained that all circuits except the Seventh Circuit apply the two-step approach in the immigration context as well as the criminal context. There is no basis, therefore, to assert that precedents can be ignored because they are based on a criminal law rather than an immigration law context. As for the argument that concerns about efficiency , *i.e.*, that it is not the business of the courts of appeal if the Attorney General wants immigration judges to conduct trials within trials to discern if a conviction was a CIMT, the *Jean-Louis* court

determined that such an expansion of the scope of an immigration judge's inquiry is prohibited by statute. The court explained:

> We believe our discretion to adopt such an approach to be foreclosed by the immigration statute itself, which predicates removal on *convicted* conduct, and which, we conclude, expressly limits our inquiry to the official record of judgment and conviction, or other comparable judicial record evidence. 8 U.S.C. §§ 1229a(c)(3)(B) [INA § 240(c)(3)(B)], 1101(a)(48)(A) [INA § 101(a)(48)(A); *see Conteh* [*v. Gonzales*], 461 F.3d [45] at 54 [(1st. Cir. 2006)]; *cf. Chevron*, [*U.S.A., Inc. v. Natural Res. Def. Council, Inc.,*] 467 U.S. [837] at 842-843 [(1984)].

4. Argument against the basis that moral turpitudinous is not an element of criminal offenses.

In *Jean-Louis*,[34] the court noted that there are other terms, such as "crime of violence" that are also not elements of a crime, but this does not give the immigration judge *carte blanche* to abandon the two step approach to determine whether a crime is a crime of violence. Similarly, he or she may not abandon the two step approach in the CIMT context. The *Jean-Louis* court also addressed a line of cases where immigration courts are allowed to stray from the two part test in considering whether a crime is an aggravated felony under the section of law which defines an aggravated felony, *inter alia*, as a fraud with a loss to the victim of more than $10,000.[35] In *Nijhawan v. Mukasey*,[36] the Supreme Court decided they could, thus applying a "circumstance specific" approach rather than the two-step generic approach, because of the unique nature of the fraud definition of an aggravated felony, which includes a monetary amount not found in criminal fraud statutes.[37] As to whether this provides a similar basis to stray from the two part

[34] *Id.*, at 477-478.
[35] INA § 101(a)(43)(M)(I).
[36] 555 U.S. 1131 (U.S. 2009).
[37]For an in-depth discussion of whether an element of a removal ground must be an element of the crime and thus the generic two-step approach applies or whether an element of the removal

test in CIMT cases, the *Jean-Louis* court wrote:

> The practical impediments to application of the categorical approach identified in *Nijhawan* and *Babaisakov*,[38] however, are not present in the CIMT context. The BIA and courts of appeals have determined whether moral turpitude inheres in the convicted conduct using a categorical approach for over a century. Hence, *Nijhawan* and *Babaisakov* do not support abandoning our established methodology.

Conclusion

In *Matter of Silva-Trevino* the Attorney General overturned long-standing precedent that in determining whether a crime is a CIMT, an immigration judge must apply the two-step categorical and modified categorical approaches which limits inquiry into the record of conviction. The case allows an immigation judge to look outside the record of conviction to determine whether a crime is a CIMT if the record of conviction is inconclusive. Should your client be adversely affected by the case, you should attack it so as to lay the groundwork for its being overturned by challenging the Attorney General's rationales for changing issuing the decision.

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ground need not be an element of the crime and a "circumstance specific" approach applies, see, Brady, *Nijhawan v. Holder – Defense Analysis*, at *www.ilrc.org/crimes*.

[38]24 I. & N. Dec. 306 (BIA 2007). In this case, the Board of Immigration Appeals held, like the Supreme Court later in *Nijhawan*, that the two-step approach could be abandoned in a INA § 101(a)(43)(M)(I) analysis.