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Understanding Bobadilla v. Holder: A Pragmatic Approach to Analyzing Crimes Involving Moral Turpitude for Eighth Circuit Attorneys

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UNDERSTANDING *BOBADILLA V. HOLDER*: A PRAGMATIC APPROACH TO ANALYZING CRIMES INVOLVING MORAL TURPITUDE FOR EIGHTH CIRCUIT ATTORNEYS

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I. INTRODUCTION

Ray is a noncitizen who was admitted to the United States five years ago as a lawful permanent resident (LPR).[1] Ray was convicted of

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[1] *See infra* note 22 (explaining the different treatment of LPRs based on the amount of time residing in the United States).

misdemeanor theft at the age of eighteen when he first arrived to the United States, but turned his life around and works at a fast food restaurant in Saint Paul, Minnesota. One day, Ray borrowed his friend's car to drive to work. Running late, Ray drove over the speed limit and was pulled over by Officer Jones, who asked him to identify himself. Ray nervously blurted out a fictitious name while rummaging for the car's insurance card. Officer Jones checked this information and discovered that Ray lied to him. Officer Jones confronted Ray, and Ray told the officer his real name and explained that he was borrowing a friend's car, so he did not know whether or not it was insured. In his report, Officer Jones wrote that Ray lied about his name because he could not provide proof of insurance. The local prosecutor charged Ray with driving over the speed limit and two misdemeanors: failing to provide proof of insurance and providing a false name to a peace officer.[2] Ray, appearing *pro se*, pleaded guilty to all charges and was sentenced to six months of probation and ordered to pay fines.

Not long after, Ray received a Notice to Appear in Immigration Court.[3] Immigration officials alleged that Ray should be deported because his conviction for providing a false name to a peace officer constituted a "crime involving moral turpitude" (CIMT).[4] Ray argued that he should not

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[2] *See infra* note 60 (providing the relevant text of MINN. STAT. § 609.506 (2012)). The "providing a false name to a peace officer" statute is divisible into one misdemeanor and two gross misdemeanor offenses. *See* MINN. STAT. § 609.506. Bobadilla was convicted of the misdemeanor offense. *See infra* text accompanying note 60 (describing Bobadilla's conviction). *See also* MINN. STAT. § 169.791, subd. 2 (2012) (stating that failure to provide proof of automobile insurance upon a peace officer's request is a misdemeanor). However, MINN. STAT. § 169.791, subd. 2 would not constitute a CIMT because a conviction under this statute does not necessarily involve inherently base, vile, and reprehensible conduct. *See infra* text accompanying note 78 (describing the Eighth Circuit's definition of morally turpitudinous conduct).

[3] The Notice to Appear is a written notice to the alien that includes the following information:

> the nature of the proceedings; the legal authority under which the proceedings are conducted; the acts or conduct alleged to be in violation of the law; the charge(s) against the alien and the statutory provision(s) alleged to have been violated; the opportunity to be represented by counsel at no expense to the government; the consequences of failing to appear at scheduled hearings; [and] the requirement that the alien immediately provide the Attorney General with a written record of an address and telephone number.

Dep't of Justice, *Immigration Court Practice Manual 4.2* (2008) (describing a notice to appear).

[4] *See* BLACK'S LAW DICTIONARY 846 (8th ed. 2005) (defining moral turpitude as "[c]onduct that is contrary to justice, honesty, or morality"); *see also* 9 *Foreign Affairs Manual* (FAM) 40.21(a) N2.2 (2012) (noting that CIMTs most often involve elements of fraud, larceny, and intent to harm persons or things); *see also* Ann Benson & Jonathan Moore, *Crimes Involving Moral Turpitude: What Advocates Need To Know To Represent Self-Petitioners & U Visa Applicants*, WASHINGTON DEFENDER ASSOCIATION'S IMMIGRATION PROJECT (December 2009), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDcQFjAB&url=http%3A%2F%2Fwww.asistahelp.org%2Fdocuments%2Ffilelibrary%2Fdocuments%2FASISTA_crimes_webinar_december_09_A8F0BB24E501F.

be deported because providing a false name to a peace officer was not a CIMT.[5] Who is correct?

According to the Eighth Circuit's recent decision in *Bobadilla v. Holder*, it depends.[6] In *Bobadilla*, the Eighth Circuit adopted the *Silva-Trevino* framework, a three-step process for analyzing whether a criminal conviction constitutes a CIMT. [7] The Eighth Circuit held that, although providing a false name to a peace officer was not *categorically* a CIMT, it may still be considered a CIMT under the framework's third step.[8] The Eighth Circuit's sudden adoption of the *Silva-Trevino* framework surprised many observers, especially after the court appeared to reject the framework in a similar 2010 decision.[9]

This article explores the impact of the *Bobadilla* decision for practicing criminal and immigration attorneys. The *Bobadilla* court's approval of the *Silva-Trevino* framework has serious implications on the determination of CIMTs in the Eighth Circuit. The most important change requires adjudicators to look beyond the record of conviction when the record of conviction is inconclusive.[10] This additional step necessitates that

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ppt&ei=f7pQUeG5N6qqyAHop4DoBg&usg=AFQjCNFjAf3PZ4pE6CTFCse3pR9xWyLsIw&bvm=bv.44158598,d.aWc [hereinafter Benson & Moore, *Crimes Involving Moral Turpitude*] (discussing and providing examples of traditional CIMTs, including: (1) offenses with elements involving theft with intent to permanently deprive, fraud and deceit; (2) offenses of morally offensive character committed with willful/evil intent; (3) crimes that have as an element intent to cause or threaten to cause significant bodily harm (usually requiring willful or intentional conduct, but also recklessness in some cases); or (4) drug trafficking offenses).

[5] *See infra* text accompanying notes 60–65 (providing the facts and background of Bobadilla v. Holder, 679 F.3d 1052 (8th Cir. 2012)).

[6] *See infra* Part III (providing the Eighth Circuit's reasoning and holding in *Bobadilla*).

[7] *See infra* Part II.B (describing the *Silva-Trevino* framework and its alteration of the traditional CIMT analysis in several important ways). The categorical approach has two steps. The traditional categorical approach employs one of three tests to determine whether the elements of the criminal statute inherently constitute a CIMT. *See infra* Part II.A.1 (describing the traditional categorical approach). If it is unclear whether the elements of the statute constitute a CIMT, then the adjudicator applies the modified categorical approach. The modified categorical approach allows, at minimum, for the adjudicator to look to the record of conviction to determine which subdivision of the statute the alien was convicted under. A broader modified categorical approach permits the adjudicator to look at all documents in the record of conviction to complete the CIMT analysis. *See infra* Part II.A.2 (discussing the modified categorical approach).

[8] *See infra* text accompanying notes 52–54 (describing the *Silva-Trevino* framework).

[9] *See infra* text accompanying note 70 (noting the Eighth Circuit's reversal of its prior decision in Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 2445 (2011)).

[10] *See infra* Part IV.A (explaining what "looking beyond the record of conviction" might entail for immigration attorneys and adjudicators). Extra-record documents may include police reports, prosecutorial remarks, and probation or pre-sentence reports. *See infra* note 54 (providing other potential examples of extra-record documents an adjudicator may be able to consider under step three of the *Silva-Trevino* framework).

immigration attorneys be aware of all pertinent documents related to their client's conviction.[11] Finally, these changes highlight the need for criminal defense attorneys to be aware of the possible consequences LPR clients may face when they plead guilty to certain crimes.[12] Accordingly, an understanding of how adjudicators analyze CIMTs is necessary in order to provide context for the *Bobadilla* decision.[13]

II. BACKGROUND OF CRIMES INVOLVING MORAL TURPITUDE

The United States Congress established the legal term "crimes involving moral turpitude" in immigration law over one hundred years ago.[14] Congress did so to prevent immigrants convicted of CIMTs from entering the United States.[15] Recently, federal courts have held that if an alien is convicted of a crime constituting a CIMT, the alien can either be removed from, or simply denied legal access to, the United States.[16] However, Congress failed to define what constitutes a CIMT, and the United States Supreme Court has characterized the term as "indefinable."[17] According to

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[11] *See infra* Part IV.A (exploring the effect *Bobadilla*'s application of the *Silva-Trevino* framework has on CIMT cases in the Eighth Circuit).

[12] *See infra* Part IV.B (discussing the need for defense attorneys counseling LPRs to be aware of potential immigration consequences).

[13] *See infra* Part II.A (explaining the history of CIMTs and noting that courts have used various forms of the categorical approach to determine whether a criminal conviction constitutes a CIMT).

[14] *See* Act of March 3, 1891, ch. 551, 26 Stat. 1084 (codified at 8 U.S.C. §§ 1182, 1227 (2012) (excluding ". . . persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude . . .").

[15] *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689 n.1 (A.G. 2008) (demonstrating that the Act of Mar. 3, 1891, ch. 551 was the seminal statute that created CIMTs). The act did not cover persons convicted of political offenses, "notwithstanding said political offense may be designated as a 'felony, crime, infamous crime, or misdemeanor, involving moral turpitude' by the law of the land whence he came or by the court convicting." Act of March 3, 1891, ch. 551. For a discussion regarding the history of exclusion and deportation for crimes, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007). It appears the term "CIMT" was a response to joint hearings in Congress, which recommended implementing immigration laws to "separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities." *Id.* at 115 (quoting Special Comm. on Immigration and Naturalization, 51st Cong., 2d Sess., Rep. (ii) (1891) (internal quotation marks omitted)).

[16] *See infra* Part II.A (discussing the relevant parts of the INA); *see also Immigration Consequences of Convictions Summary Checklist*, NYSDA IMMIGRANT DEFENSE PROJECT (Dec. 2006), http://nm.fd.org/index_files/ImmigrationConsequencesChecklist.pdf (providing a brief outline of immigration consequences for CIMTs and various other criminal convictions, including involuntary and/or permanent removal and a twenty-year prison sentence for attempting to return after removal).

[17] *See infra* Part II.A (explaining the INA's failure to define the term "crime involving moral turpitude"); Jordan v. De George, 341 U.S. 223, 234–35 (1951) (Jackson, J., dissenting) ("[N]o one can really say what is meant by say a crime involving moral turpitude.").

the United States Attorney General, this failure has caused lower courts to apply the term inconsistently.[18] To remedy this inconsistency, the Attorney General called for a unified, three-step inquiry to determine whether a crime constitutes a CIMT.[19] This framework was developed in the 2008 *Silva-Trevino* case, and it has been a source of controversy among the federal circuits. Several have explicitly rejected the framework while the Seventh and Eighth Circuit have adopted it.[20]

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[18] *See, e.g.*, *Silva-Trevino*, 24 I. & N. Dec. at 688 (stating that the federal courts have disagreed in how to approach CIMTs); *Bobadilla*, 679 F.3d at 1055 (noting that the federal circuit courts' application of the categorical approach to CIMTs has been "far from uniform"); *see infra* Part II.A (examining the various approaches the federal courts have taken to define CIMTs).

[19] *See infra* Part II.B (describing the three-step *Silva-Trevino* framework altering the traditional and modified categorical approaches and allowing adjudicators to look beyond the record of conviction if the traditional and modified categorical approaches failed to resolve the CIMT inquiry).

[20] *See infra* Part II.B (describing the *Silva-Trevino* framework); *see also* Mata-Guerrero v. Holder, 627 F.3d 256, 260–61 (7th Cir. 2010) (analyzing and adopting the *Silva-Trevino* framework); *but see* Jean-Louis v. Att'y Gen., 582 F.3d 462, 473–74 (3d Cir. 2009) (rejecting the *Silva-Trevino* framework as an impermissible reading of the INA statute). The Third, Fourth, and Eleventh Circuits have argued that the Attorney General's new methodology is an impermissible reading of the INA statute, and thus have split from the Seventh and Eighth Circuits. *See Jean-Louis*, 582 F.3d 462, 473 (3d Cir. 2009); *accord* Prudencio v. Holder, 669 F.3d 472, 483–84 (4th Cir. 2012); Fajardo v. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011). For example, in *Jean-Louis*, the Third Circuit refused to defer to the Attorney General's new methodology, stating that the Board of Immigration Appeals (BIA) and numerous other courts have repeatedly held that the term "convicted" prevents the immigration courts from inquiring into an alien's specific conduct or examining extra-record evidence. *Jean-Louis*, 582 F.3d at 473. These circuits refuse to bind themselves to the Attorney General's view because, in their view, the INA statute is clear. *Id.* (stating that "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."). Thus, because Congress's intent was clear, *Chevron* fails, and these courts are not required to follow *Silva-Trevino*. *Id.*; *see infra* note 68 (discussing the *Chevron* deference test). The Third, Fourth, and Eleventh Circuits held that an individualized inquiry into an alien's specific conduct and consideration of "extra-record" evidence is not permitted. *See Jean-Louis,* 582 F.3d at 473–74; *accord Prudencio*, 669 F.3d at 483–84; *Fajardo*, 659 F.3d at 1310. Other circuits have acknowledged parts of Silva-Trevino, but have not adopted the methodology. *See, e.g.*, Mustafaj v. Att'y Gen., 369 Fed. Appx. 163, 167–68 (2d Cir. 2010) (deferring to *Silva-Trevino*'s definition of CIMT, but applying the traditional categorical and modified categorical approaches); Kellerman v. Att'y Gen., 592 F.3d 700, 704–05 (6th Cir. 2010) (citing both *Silva-Trevino* and *Jean-Louis* before applying the modified categorical approach); Marmolejo-Campos v. Att'y Gen., 558 F.3d 903, 907 n.6 (9th Cir. 2009) (acknowledging that *Silva-Trevino* permits looking beyond the record of conviction "when applying the modified categorical approach," but nevertheless confining its inquiry to the record of conviction).

A. The Federal Courts Use Various Forms of the Categorical Approach to Decipher CIMTs

Adjudicators have struggled with deciphering CIMTs since the Immigration and Nationality Act (INA) was enacted.[21] This statute states that any alien is deportable if convicted of a CIMT committed within five years (or ten years in the case of an LPR) after the date of admission to the United States for which a sentence of one year or longer may be imposed.[22] Without a firm definition, adjudicators in the Department of Justice (DOJ) and federal appellate courts have long used varying forms of the categorical approach to determine whether a crime constitutes a CIMT.[23] The categorical approach analyzes the substantive elements of the criminal conviction, as opposed to looking at the individual defendant's acts underlying the conviction, in order to determine whether a particular conviction constitutes a CIMT.[24] The

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[21] *See supra* text accompanying note 15 (describing the history of CIMTs).

[22] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i-ii). Section 1227, in relevant part, provides the following:

> (i) Any alien who—
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> > (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status . . .) after the date of admission, and
> >
> > (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.
>
> (ii) Any alien who at any time after admission is convicted of 2 or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

§ 1227(a)(2)(A)(i-ii).

Section 1182 provides, in relevant part, that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible." § 1182(a)(2)(A)(i)(I). "'Removable' means, in the case of an alien not admitted to the United States, that the alien is inadmissible under [8 U.S.C. § 1182(a)], or, in the case of an alien admitted to the United States, that the alien is deportable under [8 U.S.C. § 1227(a)]." AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:5 (4th ed. 2011). An alien who has been in the United States for less than five years and has not petitioned for LPR status is considered a "non-immigrant" or "parolee." § 8 U.S.C. 1255. The alien does not actually have to be sentenced to one year in order for the crime to be considered a CIMT; rather, the statute specifies that the crime must simply be one for which a sentence of one year or longer *may* be imposed. § 1227(a)(2)(A)(i)–(ii).

[23] Franklin v. I.N.S., 72 F.3d 571, 572 (8th Cir. 1995) (citing Cabral v. I.N.S., 15 F.3d 193, 195 (1st Cir. 1994)) (stating that whether a crime is one for moral turpitude is a question of federal law). Immigration judges and the BIA typically apply the law of the circuit in which it sits; therefore, immigration courts vary in CIMT analysis as much as the circuit courts. *See Silva-Trevino*, 24 I. & N. Dec. at 688. *See also infra* text accompanying notes 26–40 (describing the various approaches circuit courts have used in determining CIMTs).

[24] United States *ex rel*. Mylius, 210 F. 860, 862 (2d Cir. 1914) (describing the categorical nature of CIMT inquiry and using a categorical approach in 1914); *but see* Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008); *Mata-Guerrero*, 627 F.3d at 260 (allowing

categorical approach involves a two-step process: the "traditional categorical approach" and the "modified categorical approach."[25]

1. Step One: The Traditional Categorical Approach

The traditional categorical approach considers the elements of conviction and whether the offenses defined under a criminal statute "necessarily" involve moral turpitude.[26] Three different tests applying the traditional categorical approach arose out of the circuit courts: the "minimum conduct" test, the "realistic probability" test, and the "common case" test.[27]

These tests analyze criminal statutes of convictions differently. The minimum conduct test states that a conviction will be a CIMT only if moral turpitude is part of even the most minimal conduct that could hypothetically permit a conviction.[28] Conversely, the realistic probability test considers

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adjudicators to look at evidence outside of the record of conviction in order to determine whether the alien's conviction constitutes a CIMT). The substantive elements of the criminal statute are the elements that define the crime; the conduct that constitutes the crime, and defenses, which specify under what circumstances that conduct is not a crime. 1 WILLIAM R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.6 (2d ed. 2013).

[25] *See* Taylor v. United States, 495 U.S. 575, 601–02 (1990) (providing an outline of the traditional categorical approach). The *Taylor* outline has been adopted by courts in the immigration context, including the analysis of whether a conviction constitutes a CIMT as used in the statute. *See Jean-Louis*, 582 F.3d at 478 (noting several cases where the *Taylor* approach was employed to determine the existence of a CIMT). The "modified categorical approach" is only used if the traditional categorical approach fails to resolve the ambiguity of whether moral turpitude necessarily inheres to the criminal statute. *See Bobadilla*, 679 F.3d at 1055 (describing the modified categorical approach). A criminal statute could be ambiguous if, for example, it is divisible into several subsections and some convictions under the statute involve moral turpitude while others do not. *See Jean-Louis*, 582 F.3d at 466 ("where a statute of conviction contains disjunctive elements, some of which are sufficient for conviction of the . . . offense and others of which are not, we have departed from a strict categorical approach."); Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("If the statute is divisible, 'we look at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [CIMT].'" (quoting Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003))).

[26] *Taylor*, 495 U.S. at 601–02 (describing the traditional categorical approach). *Taylor* involved the sentencing enhancement for felonies. However, the Supreme Court imported the categorical approach into the immigration context to determine whether a conviction was a theft offense and therefore an aggravated felony. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–87 (2007). The categorical approach has also been adopted by various courts for crimes of violence and CIMTs in the immigration arena. *See supra* note 25 and accompanying text (discussing the *Taylor* outline); *see, e.g.*, United States v. Diaz-Ibarra, 522 F.3d 343, 348 (4th Cir. 2008) (using the categorical approach to determine if conviction is for a crime of violence); Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1067 (9th Cir. 2007) (using the *Taylor* framework to determine if conviction involved moral turpitude).

[27] *Silva-Trevino*, 24 I. & N. Dec. at 696 (analyzing the three traditional categorical approach tests and adopting the realistic probability test).

[28] *Id.* The Second, Third, and Fifth Circuits have adopted the minimum conduct test. *See, e.g.*, Mendez v. Mukasey, 547 F.3d 345, 348 (2d Cir. 2008) ("Under the categorical approach, we look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime, not the particular circumstances of the defendant's conduct");

whether moral turpitude would inhere in acts that would realistically be prosecuted under the statute in question.[29] Alternatively, the common case test determines whether moral turpitude is inherent in the "usual" case or in the "general nature" of the crime.[30] Regardless of the test used, if the traditional categorical approach failed to resolve the inquiry, adjudicators would move to the modified categorical approach.

2. Step Two: The Modified Categorical Approach

The "modified categorical approach" is used only if the traditional categorical approach does not clarify whether the criminal statute at issue involves moral turpitude.[31] The type of test used under the traditional categorical approach step affects the way adjudicators reach the modified

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Amouzadeh, 467 F.3d at 455 ("Under the categorical approach, we read the statute at its minimum, taking into account 'the minimum criminal conduct necessary to sustain a conviction under the statute.' An offense is a crime involving moral turpitude if the minimum reading of the statute necessarily reaches only offenses involving moral turpitude." (quoting Hamdan v. I.N.S., 98 F.3d 183, 189 (5th Cir. 1996))); Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005) ("Under this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute."). The Eleventh Circuit has conflicting precedent, but appears to have also adopted this approach. *See* Keungne v. Att'y Gen., 561 F.3d 1281, 1284 n.3 (11th Cir. 2009) ("In the [first step of the] categorical approach, we analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude"). For an example of the application of the minimum conduct test, see Martinez v. Mukasey, 551 F.3d 113, 122 (2d Cir. 2008) (holding that "[u]nder the categorical approach, a showing that the minimum conduct for which [the alien] was convicted was not an aggravated felony suffices" to show that he "has not been convicted of an aggravated felony").

[29] *Silva-Trevino*, 24 I. & N. Dec. at 696. By 2008, the Ninth Circuit adopted the realistic probability test, which asks whether moral turpitude necessarily inheres in all cases that have a realistic probability of being prosecuted. *See, e.g.*, Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004–05 (9th Cir. 2008) (applying the realistic probability test to a CIMT analysis of a California criminal statute). The Attorney General stated:

> A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude."

Silva-Trevino, 24 I. & N. Dec. at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

[30] *Silva-Trevino*, 24 I. & N. Dec. at 696. Prior to 2008, the First and Eighth Circuits adopted the common case test. *See, e.g.*, Marciano v. I.N.S., 450 F.2d 1022 (8th Cir. 1971) (using the crime's general nature and its common usage classification in determining whether moral turpitude is inherent); Pino v. Nicholls, 215 F.2d 237, 245 (1st Cir. 1954), *rev'd on other grounds*, Pino v. Landon, 349 U.S. 901 (1955).

[31] *Silva-Trevino*, 24 I. & N. Dec. at 690 (discussing the modified categorical approach). The modified categorical approach applies when the criminal statute could apply to crimes that both do and do not involve moral turpitude. *Id.*

categorical approach step.[32] Under this approach, adjudicators consult the alien's record of conviction to determine which portion of the statute his conviction fell under in order to establish whether convictions under that portion necessarily involve moral turpitude.[33] The record of conviction generally consists of some or all of the following: (1) the charging document, (2) a written plea agreement, (3) a verdict or judgment of conviction, (4) a record of the sentence, (5) a plea colloquy transcript, and (6) any factual finding by a trial judge or the jury.[34] Adjudicators are not permitted to

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[32] *Id.* at 694. Some courts, especially those that use the least culpable conduct test for the first step, have referred to this second step as "an exception to [the categorical approach] . . . if the statute is divisible into discrete subsections of acts that are and those that are not CIMTs." *Hamdan*, 98 F.3d at 187. *See also Jean-Louis*, 582 F.3d at 466 ("where a statute of conviction contains disjunctive elements, some of which are sufficient for conviction of the . . . offense and others of which are not, we have departed from a strict categorical approach."); *Amouzadeh*, 467 F.3d at 455 ("If the statute is divisible, 'we look at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [CIMT].'" (quoting *Smalley*, 354 F.3d at 336)). The courts that use the realistic probability test, on the other hand, tend to treat the modified categorical approach like a second step in the CIMT inquiry, and it is used primarily when the traditional categorical approach is inconclusive. *See Silva-Trevino*, 24 I. & N Dec. at 708 (treating the modified categorical approach as a second step in the CIMT inquiry). The modified categorical approach is used when crimes that both do and do not involve moral turpitude can be prosecuted under the criminal statute due to broad language in the statutes. *Id.* at 694. In addition, adjudicators using the realistic probability test will also use the modified categorical approach when a statute is divisible. *See infra* text accompanying notes 33, 63 (defining the term "divisible statute").

[33] *See, e.g.*, *Kellermann*, 592 F.3d at 703. The court states:

> We must first examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a CIMT . . . and our analysis ends. However, if the statute contains some offenses which involve moral turpitude and others which do not, it is . . . a 'divisible' statute, and we look to the record of conviction . . . .

Id. (quoting *In re* Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)). A divisible statute is a statute that has several sections or uses disjunctive language to define multiple offenses. *See* United States v. Beardsley, 691 F.3d 252, 269–270 (2d Cir. 2012). Each of the sections or the language of the statute can be separated and made into stand-alone statutes with its own distinct elements. *See In re* T-, 2 I. & N. Dec. 22, 23 (B.I.A. 1944) ("If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude."). A statute need not be formally divided into subsections; "rather, the key is whether the provision is disjunctive in a relevant sense," meaning that a statute can be broad enough to involve conduct that both does and does not involve moral turpitude. Garcia v. Att'y Gen., 462 F.3d 287, 293 n.9 (3d Cir. 2006). *Garcia* involved aggravated felonies. *Garcia*, 462 F.3d at 289. However, *Jean-Louis* affirmed the *Garcia* approach as applicable in CIMT inquiries. *See Jean-Louis*, 582 F.3d at 466 (applying the modified categorical approach from *Garcia* "when clear sectional divisions do not delineate the statutory variations").

[34] Shepard v. United States, 544 U.S. 13, 26 (2005) (allowing the use of the "charging document," "the terms of a plea agreement," "transcript of colloquy between judge and defendant," or "some comparable judicial record" regarding "factual basis for the plea" in nonjury cases); *Taylor*, 495 U.S. at 602 (allowing the use of "the indictment or information

consider any facts underlying the alien's conviction that are outside the record of conviction.[35] The adjudicator looks to the record of conviction to determine if the elements, as revealed in the record of conviction, fall within the CIMT definition.[36] However, if the record of conviction remains ambiguous, then the categorical inquiry ends because the adjudicator is unable to conclude that the alien was convicted of a CIMT.[37] Under those circumstances, the alien's conviction would not be considered a CIMT and the alien would not be subject to removal.[38]

There are two versions of the modified categorical approach. The majority of circuits use the record of conviction narrowly to determine under what portion of the statute the alien was convicted.[39] The minority, used by the Board of Immigration Appeals (BIA) and the First and Seventh Circuits, permits broader use of the record of conviction because the elements of a CIMT may not be the same as those for conviction under the criminal statute.[40] In light of these different interpretations, former Attorney General Mukasey developed a new framework for analyzing CIMTs.[41]

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and jury instructions"); *see also* Wala v. Mukasey, 511 F.3d 102, 108 (2d Cir. 2007) ("The record of conviction includes, *inter alia*, 'the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript.'" (quoting Dickson v. Ashcroft, 346 F.3d 44, 53 (2d Cir. 2003))).

[35] *See In re* Sweetser, 22 I. & N. Dec. 709, 714 (B.I.A. 1999) ("Where a statute under which an alien was convicted is divisible, we look to the record of conviction . . . . This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction."). *Sweetser* was also an aggravated felony case. *Id.* at 710. However, the statement that the modified categorical approach is limited to the record of conviction remains the same for cases involving CIMTs. *See Jean-Louis*, 582 F.3d at 472 ("We review[] only the record of the conviction to ascertain the particular variation of the statute under which the defendant was convicted.").

[36] *See, e.g.*, *Kellerman*, 592 F.3d at 704 (stating that under the modified categorical approach, "the court conducts a limited examination of documents in the record to determine whether the particular offense for which the alien was convicted constitute a CIMT"). *See* 9 FAM 40.21(a) N2.2 ("A conviction for a statutory offense will involve moral turpitude if one or more of the elements of that offense have been determined to involve moral turpitude. The most common elements involving moral turpitude are: (1) Fraud; (2) Larceny; and (3) Intent to harm persons or things.").

[37] *See Silva-Trevino*, 24 I. & N. at 688–89; *see also* Benson & Moore, *Crimes Involving Moral Turpitude* ("Under [the] traditional "modified" categorical analysis, if [the record of conviction] does not clearly establish elements of conviction that fall [within the] CIMT definition then CIMT grounds [are] not triggered and analysis ends.").

[38] Benson & Moore, *Crimes Involving Moral Turpitude* (noting that the removal analysis ends if the record of conviction does not clearly establish that the elements of conviction fall within the CIMT definition).

[39] *See, e.g.*, Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1160 (9th Cir. 2006) (stating that the record of conviction should be used if the alien "'pled guilty to elements that constitute a [CIMT]'" (quoting Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1020 (9th Cir. 2005))); Vargas v. Dep't of Homeland Sec., 451 F.3d 1105, 1109 (10th Cir. 2006) (explaining that the *Taylor* modified categorical approach is an inquiry into whether the jury had to find elements of the underlying offense that would constitute CIMT).

[40] *See In re* Grazley, 14 I. & N. Dec. 330 (B.I.A. 1973) (using the record of conviction to assess the underlying conduct even though it was not a necessary element in the

B. The Attorney General Establishes a New Framework to Analyze CIMTs in Silva-Trevino

Former Attorney General Mukasey viewed *Silva-Trevino* as an opportunity to unify the federal circuit courts' approaches to determining CIMTs.[42] While the DOJ generally defers to the relevant circuit court when deciding which approach to use in a given case, the DOJ is responsible for providing a method for interpreting and applying ambiguous immigration law provisions.[43] The Attorney General sought to resolve a major issue concerning what courts should consider if the traditional categorical analysis failed to resolve the CIMT inquiry.[44] Some courts prohibited immigration judges from inquiring into specific facts of cases.[45] Others courts 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 "prohibit[ed] conduct

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criminal conviction). *See Ali*, 521 F.3d at 743 (holding that the BIA could use evidence outside of the record of conviction to determine a crime's moral turpitude).

[41] *Silva-Trevino*, 24 I. & N. Dec. at 693–96 (discussing the Attorney General's reasoning for establishing the *Silva-Trevino* framework for CIMT analysis).

[42] The Attorney General is authorized to review BIA cases in three circumstances: (1) when the Attorney General directs the BIA to refer a case to him; (2) when the Chairman or a majority of the BIA decides to refer a case; or (3) when the Secretary of Homeland Security or designated officials request referral to the Attorney General. 8 C.F.R. § 1003.1(h)(1) (2013) (discussing referral of cases to Attorney General). The Attorney General's decisions are considered binding authority within the Department of Homeland Security. 8 C.F.R. § 1003.1(g) (2013); *see also* 8 U.S.C. § 1103(a)(1) (2012) ("[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

[43] *Silva-Trevino*, 24 I. & N. Dec. at 695. *See also* INA § 103(a)(1) (stating that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 C.F.R. § 1003.1(d)(1) (2013) ("[T]he Board through precedent decisions, shall provide clear and uniform guidance to [the Department of Homeland Security], the immigration judges, and the general public on the proper interpretation and administration of the Act."); 8 C.F.R. § 1003.1(g) (2013) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States."); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting I.N.S. v. Abudu, 485 U.S. 94, 110 (1988))); Shao v. B.I.A., 465 F.3d 497, 502 (2d Cir. 2006) (noting that "only a precedential decision by the [Board]—or the Supreme Court of the United States—can ensure the uniformity that seems to us especially desirable in [asylum] cases such as these").

[44] *Silva-Trevino*, 24 I. & N. Dec. at 694 (exploring the various ways federal courts view the use of the record of conviction in CIMT analyses).

[45] *Id.* (citing Rodriguez-Castro v. Gonzales, 427 F.3d 316, 320–21 (5th Cir. 2005)) ("In our de novo interpretation and evaluation of a state law, we look to the statutory crime definition as interpreted by the state's courts, without regard to the particular circumstances surrounding the specific offender's violation").

that may not necessarily involve moral turpitude."[46] Still other courts considered the record of conviction only if the statute of conviction was divisible into multiple sections.[47] Furthermore, the Seventh Circuit allowed the BIA to consider all relevant evidence bearing on the particular facts of an alien's prior criminal conviction.[48] These differences, according to the Attorney General, were problematic because of the impact differing laws had on individuals' fundamental right to fairness.[49]

The Attorney General rejected both the minimum conduct and common case tests.[50] Instead, the DOJ adopted the realistic probability test as

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[46] *Silva-Trevino*, 24 I. & N. Dec. at 694 (citing *Nicanor-Romero*, 523 F.3d at 1007) (limiting review to record of conviction).

[47] *Id.* (citing *Amouzadeh,* 467 F.3d at 455) ("If the statute is divisible, 'we look at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [CIMT].'" (quoting *Smalley*, 354 F.3d at 336)). A divisible statute is a statute that has multiple sections or uses disjunctive language to define multiple offenses. The sections or language can be separated and each made into stand-alone statutes with their own elements. *See T-,* 2 I. & N. Dec. at 23 ("If one statute defines several crimes, some of which involve moral turpitude and some of which do not, and the statute is divisible, it is permissible to ascertain by examination of the record of conviction whether the particular offense involved moral turpitude.").

[48] *Silva-Trevino*, 24 I. & N. Dec. at 694 (citing *Ali*, 521 F.3d at 742–43) (permitting consultation of the presentence report, which is not part of the record of conviction, to classify the noncitizen's offense as one that involves moral turpitude).

[49] *Silva-Trevino*, 24 I. & N. Dec. at 694 (citing *In re* Cerna, 20 I. & N. 399, 408 (B.I.A. 1991)); *see also* Rosendo-Ramirez v. I.N.S., 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen."). The Attorney General noted that aliens committing identical offences may be treated differently based on geographical location under the existing arrangement. *Silva-Trevino*, 24 I. & N. Dec. at 694–95 (arguing determinations of admissibility eligibility and adjustment of status should not be tied to geographical location).

[50] *Silva-Trevino*, 24 I. & N. Dec. at 694–95. The Attorney General compared both tests and found that the minimum conduct test was likely to be under-inclusive of CIMTs, while the common case test would probably be over-inclusive. *Id.* The Attorney General noted that the minimum conduct test would be under-inclusive of CIMTs because the test would require an adjudicator to refrain from applying the INA CIMT provisions to crimes that actually do involve moral turpitude if the adjudicator hypothesized a situation in which the statute might be applied to conduct that does not involve moral turpitude. *Id.* at 695 (citing *Marciano*, 450 F.2d at 1028 (Eisele, J., dissenting) (stating, "I cannot believe that Congress intended for [persons who have committed CIMTs] to be allowed to remain simply because there might have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment")). Conversely, the common case test would be over-inclusive of CIMTs because that test allows adjudicators to generalize the criminal statute so that if most convictions under the statute involved moral turpitude, then the adjudicator would find that an individual alien had also likely committed a CIMT regardless of the facts underlying the individual alien's conviction. *Id.* (citing *Marciano*, 450 F.2d at 1028 (Eisele, J., dissenting) (stating that "[t]he statute says deportation shall follow when the crime committed involves moral turpitude, not when that crime 'commonly' or 'usually' does")). This finding could lead to the unfair exclusion of aliens whose conviction did not, in fact, constitute a CIMT. *Id.*

part of the *Silva-Trevino* framework.[51] Under the *Silva-Trevino* framework, to determine whether a conviction is for a CIMT, the court should first look to the statute of conviction under the categorical inquiry to establish whether there is a realistic probability that the state or federal criminal statute under which the alien was convicted would be applicable to conduct not involving moral turpitude.[52] If the traditional categorical approach is not satisfied and the adjudicator determines that the statute could apply to conduct not involving moral turpitude, then the modified categorical approach requires that the immigration judge examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, for evidence that the alien was in fact convicted of a CIMT.[53] Finally, if the record of conviction is inconclusive, the third step of the framework allows an adjudicator to consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.[54] The third step has been the subject of the majority of the controversy and criticism regarding the decision in *Silva-Trevino*.[55] Several circuit courts, including the Eighth Circuit, expressly rejected the *Silva-Trevino* framework.[56]

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[51] *Silva-Trevino*, 24 I. & N. Dec. at 696 (adopting the realistic probability test). The Attorney General stated:

> A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude."

Silva-Trevino, 24 I. & N. Dec. at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

[52] *Silva-Trevino*, 24 I. & N. Dec. at 687. Under the categorical approach, the court must examine the case law of the statute of conviction and determine if that statute of conviction requires reprehensible conduct undertaken with some form of intent. *Mata-Guerrero*, 627 F.3d at 260 (citing *Silva-Trevino*, 24 I. & N. Dec. at 701–03). The case law for the statute of conviction may illustrate that all convictions under the statute categorically constitute a CIMT. *Silva-Trevino*, 24 I. & N. Dec. at 697. The case law for the statute of conviction may also illustrate that no convictions under the statute categorically constitute a CIMT. *Id.* The case law for the statute of conviction may also illustrate that the court cannot treat all convictions under the statute as categorically similar. *Id.*

[53] *Mata-Guerrero*, 627 F.3d at 260 (citing *Silva-Trevino*, 24 I. & N. Dec. at 699, 701–03). Under this approach, the court examines the record of conviction for indications that the alien's conduct constituted a CIMT. *Silva-Trevino*, 24 I. & N. Dec. at 698. The record of conviction may show that the conviction was for conduct that reflected "specific intent, deliberateness, willfulness, or recklessness." *Id.* at 697.

[54] *Silva-Trevino*, 24 I. & N. Dec. at 704. *See* Benson & Moore, *Crimes Involving Moral Turpitude* (providing that prosecutor's remarks, police reports (unless incorporated into plea as factual basis), probation or pre-sentence reports, dismissed charges, and defendant's statements outside judgment and sentence are not considered part of the record of conviction). However, these documents may be part of the extra-record evidence that an adjudicator could consider under *Silva-Trevino*'s third step.

[55] *See, e.g.*, *Jean-Louis,* 582 F.3d at 474 (stating that "the CIMT determination focuses on the crime of which the alien was convicted—not the specific acts that the alien

III. STATEMENT OF THE CASE

Bobadilla marks a shift in the Eighth Circuit's analysis of CIMTs. In *Bobadilla*, the Eighth Circuit applied the *Silva-Trevino* framework to determine whether providing a false name to a peace officer constitutes a CIMT.[57] By applying the *Silva-Trevino* framework, the Eighth Circuit abandoned its prior case law, taking into consideration evidence beyond an alien's record of conviction to determine whether the alien was convicted of a CIMT.[58]

A. Bobadilla v. Holder*: Factual Background*

Orlando Manuel Godoy Bobadilla, a native and citizen of Canada, had been a lawful permanent resident in the United States since 1998.[59] He was convicted in Minnesota state court of giving a false name to a peace officer and theft.[60] The Department of Homeland Security commenced

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may have committed"); *accord Prudencio*, 669 F.3d at 483–84 (rejecting the third step of the *Silva-Trevino* framework for allowing an immigration judge to "rely on documents of questionable veracity as 'proof' of an alien's conduct," including police report and warrant application, which "often contain little more than unsworn witness statements and initial impressions" that do not account for later events, such as witness recantations, amendments, or corrections); *Fajardo*, 659 F.3d at 1311 (holding that the BIA and the immigration judge erred by considering evidence beyond the record of the alien's false imprisonment conviction).

[56] *See supra* note 55 and accompanying text (discussing the various circuit court cases rejecting the *Silva-Trevino* framework); *see also Guardado-Garcia*, 615 F.3d at 902 (rejecting the *Silva-Trevino* framework as inconsistent with the Eighth Circuit precedent).

[57] *See infra* text accompanying note 66 (describing the Eighth Circuit's adoption of the *Silva-Trevino* framework).

[58] *See infra* text accompanying note 70 (noting the Eighth Circuit's reversal of its 2010 decision in *Guardado-Garcia*).

[59] *Bobadilla*, 679 F.3d at 1052–53 (providing the background information leading up to the *Bobadilla* decision).

[60] *Id.* at 1053. MINN. STAT. § 609.506, subd.1 provides, in relevant part:

> Whoever with intent to obstruct justice gives a fictitious name other than a nickname, or gives a false date of birth, or false or fraudulently altered identification card to a peace officer . . . when that officer makes inquiries incident to a lawful investigatory stop or lawful arrest, or inquiries incident to executing any other duty imposed by law, is guilty of a misdemeanor.

Although immigration judges have considered providing a false name to peace officer, these decisions have never been reviewed by the BIA or a federal court because, in each case, the alien failed to raise the argument prior to appealing the immigration judge's decision or conceded that the crime did constitute a CIMT. *See* Pinos-Gonzales v. Mukasey, 519 F.3d 436, 438 (deferring to the BIA's rejection of the alien's claim that his petition should be reviewed *de novo*); Reyes-Morales v. Gonzales, 435 F.3d 937, 944 n.3 (8th Cir. 2006) (stating that the alien conceded that his conviction under MINN. STAT. § 609.605 was a CIMT). Bobadilla's theft conviction is only noteworthy because the INA requires two or more convictions for crimes involving moral turpitude in order to deport a long-term resident alien.

deportation proceedings, while Bobadilla denied removability.[61] The immigration judge concluded that both convictions constituted CIMTs and ordered Bobadilla's deportation.[62] Bobadilla appealed to the BIA, arguing that the immigration judge failed to apply step two of the *Silva-Trevino* analysis, the modified categorical approach, because the conviction was under a divisible law.[63] The BIA affirmed the immigration judge's ruling, concluding that because "the statute reflects an intentional attempt to evade responsibility, the conduct covered by the statute is inherently base, vile, and reprehensible, and thus, morally turpitudinous."[64] The Eighth Circuit granted Bobadilla's petition for review of the BIA's decision.

B. Procedural Posture and the Reasoning of the Court

The only issue on appeal was whether Bobadilla's conviction for providing a false name to a peace officer was categorically a CIMT.[65] In

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See infra text accompanying note 22 (describing the INA CIMT provisions). Theft has consistently been found to constitute a CIMT, and therefore Bobadilla's best chance at avoiding deportation was to argue that his second conviction was not a CIMT. *See* DAN KESSELBRENNER ET AL., IMMIGRATION LAW AND CRIMES ch. 6 (2002) (reviewing and describing what crimes constitute CIMTs and their potential immigration consequences).

[61] *Bobadilla*, 679 F.3d at 1053 (providing the background of *Bobadilla*). Bobadilla denied removability because admitting removability would automatically lead to deportation. *See Reyes-Morales*, 435 F.3d at 944 (noting that failing to contest removability is essentially an admission that the conviction constituted a CIMT).

[62] *Id.* In order for an alien to be deported for a CIMT, he or she must first go through a removal proceeding to determine whether the crime involves moral turpitude. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., EOIR AT A GLANCE 1–2 (2010), *available at* http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm (describing removal proceedings in the DOJ). This determination is made by an immigration judge in administrative courts through the DOJ under the Executive Office for Immigration Review (EOIR). *Id.* at 1, 3 (providing organizational information about the EOIR). An immigration judge's decision can be appealed to the BIA. 8 C.F.R. § 1003.1(b) (2013) (describing the appellate jurisdiction of the BIA). The Attorney General may then review cases before the BIA under limited circumstances. 8 C.F.R. § 1003.1(h)(1) (2013) (describing referral of cases to Attorney General). Federal courts may also review BIA decisions in limited circumstances. *See* INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2012) (describing the scope and standard for review by federal circuit courts).

[63] *Bobadilla*, 679 F.3d at 1053. MINN. STAT. § 609.506 has three subdivisions; subdivisions two and three constitute gross misdemeanors and would be considered CIMTs because these subdivisions specify fraudulent conduct. MINN. STAT. § 609.506.

[64] *Bobadilla*, 679 F.3d at 1053. While it acknowledged the *Silva-Trevino* decision, the BIA did not apply the third step of the *Silva-Trevino* framework as it concluded that the statute covered conduct that was inherently morally turpitudinous. *Id.* (describing the BIA's holding in *Bobadilla*).

[65] *Id. See supra* text accompanying note 60 (explaining that Bobadilla's best chance at fighting deportation was to argue that his conviction for providing a false name to a peace officer did not constitute a CIMT). Although immigration judges have considered providing a false name to peace officers in at least one prior case, this decision was never reviewed by the BIA or a federal court because the alien failed to raise the argument prior to appealing the immigration judge's decision. *See Pinos-Gonzales*, 519 F.3d at 438 (deferring to the BIA's rejection of the alien's claim that his petition should be reviewed *de novo*).

remanding the decision, the Eighth Circuit adopted the framework laid out by the United States Attorney General in *Silva-Trevino* and held that Bobadilla's Minnesota conviction for giving a false name to a peace officer is not categorically a CIMT.[66]

The INA expressly gives the Attorney General the authority to decide questions of law that arise under the INA.[67] The United States Supreme Court's decision in *Chevron, U.S.A. v. Natural Res. Def. Council, Inc*. is the seminal case addressing the issue of when federal courts must defer to administrative agencies.[68] The deference principles established in *Chevron* were used to determine whether *Silva-Trevino* should be adopted based on the INA's expressed grant of power to the Attorney General.[69] In doing so, the Eighth Circuit overruled *Guardado-Garcia* by accepting the *Silva-Trevino* framework as a reasonable interpretation of the INA.[70]

The Eighth Circuit joined the Seventh Circuit in applying the *Silva-Trevino* framework to CIMTs.[71] Acknowledging the circuit split involving

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[66] *Bobadilla*, 679 F.3d at 1053 (adopting the *Silva-Trevino* framework). The dissent, written by Judge Gruender, disagreed with the majority's adoption of the *Silva-Trevino* framework in this case. *Id.* at 1059. In his view, the majority mistakenly focused on Bobadilla's conduct rather than the nature of the act itself, and thus it was reasonable for the BIA to maintain, regardless of the *Silva-Trevino* decision, that "the act of providing false information to law enforcement with the intent to obstruct justice is categorically an act of moral turpitude" without having to "look behind Bobadilla's conviction." *Id.* at 1061. He stated that the BIA's error was therefore harmless to Bobadilla, and so the majority erred in addressing the issue of whether the *Silva-Trevino* framework is a reasonable way of determining whether a crime involves moral turpitude because it was not essential to the Court's decision. *Id.* at 1061–62.

[67] 8 U.S.C. § 1103(a)(1) (describing the Attorney General's authority to review questions of law).

[68] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (providing the test for when federal courts ought to defer to administrative agencies decisions). The first prong of the *Chevron* deference test asks whether Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. If Congress's intent is clear, then the court and the administrative agency must give deference to it. *Id.* at 842–43. The second prong states that even if Congress has yet to speak to the precise question at issue, the court cannot simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. *Id.* at 843. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 843. The court in *Bobadilla* also noted that that "[t]he Supreme Court has repeatedly held that agencies may validly amend regulations to respond to adverse judicial decisions, or for other reasons, so long as the amended regulation is a permissible interpretation of the statute." *Bobadilla*, 679 F.3d at 1054.

[69] *Id. See Aguirre-Aguirre*, 526 U.S. at 424 (applying *Chevron* deference principles to determine whether the agency's interpretation of a statute was reasonable).

[70] *Bobadilla*, 679 F.3d at 1057 (rejecting *Guardado-Garcia* as dicta and holding that it was wrong based on *Chevron* deference principles). The *Guardado-Garcia* decision rejected the *Silva-Trevino* framework because it was not consistent with Eighth Circuit precedent, which did not allow adjudicators to look beyond the record of conviction. *Guardado-Garcia*, 615 F.3d at 902.

[71] *Bobadilla*, 679 F.3d at 1057 (adopting the *Silva-Trevino* framework). The Seventh Circuit deferred to the *Silva-Trevino* framework because the framework adopts the

the framework's adoption, the Eighth Circuit stated that while other circuit courts refused to apply the *Silva-Trevino* framework, none of these courts had carefully analyzed the Attorney General's reasoning in *Silva-Trevino*.[72] The Eighth Circuit alleged that these courts failed to conclude that the Attorney General's new methodology was an unreasonable interpretation of the INA statute.[73] The Eighth Circuit concluded that the *Silva-Trevino* methodology was a reasonable interpretation of the statute, and therefore must be given deference by a reviewing court.[74]

The court then proceeded to apply the *Silva-Trevino* framework to *Bobadilla*. In addressing the issue of intent, the Eighth Circuit found that the BIA had failed to conduct an analysis under the realistic probability test required by the *Silva-Trevino* framework.[75] Determining that the statute's requirement of proof of "intent to obstruct justice" was broad and undefined, the court reasoned that, under these circumstances, the record reflected a realistic probability that Minnesota would apply the subdivision to conduct not involving moral turpitude.[76] The Eighth Circuit then proceeded to apply the modified categorical approach to assess Bobadilla's crime in light of its conclusion that the Minnesota statute was divisible—embracing some offenses involving moral turpitude and others not involving moral turpitude.[77] It observed that the "Register of Action" revealed that Bobadilla

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Seventh Circuit's approach to determining CIMTs in *Ali*. *See Ali*, 521 F.3d at 743; *Mata-Guerrero*, 627 F.3d at 260 (acknowledging and adopting *Silva-Trevino*).

[72] *See, e.g.*, *Jean-Louis*, 582 F.3d at 473–74; *Prudencio*, 669 F.3d at 483–84 (4th Cir. 2012); *Fajardo*, 659 F.3d at 1310 (rejecting the Silva-Trevino framework).

[73] *Bobadilla*, 679 F.3d at 1057 (noting that the other circuits had failed to go beyond the first step of the *Chevron* deference test, and therefore never examined whether the Attorney General's interpretation was reasonable).

[74] *Id.* (analyzing and rejecting the Third Circuit's rationale for rejecting the *Silva-Trevino* framework in *Jean-Louis*). The Eighth Circuit did not clarify why it viewed the *Silva-Trevino* framework as a reasonable interpretation. *Bobadilla*, 679 F.3d at 1057 ("We conclude that the methodology is a reasonable interpretation of the statute and therefore must be given deference by a reviewing court.").

[75] *Bobadilla*, 679 F.3d at 1058 (stating that the BIA purported to apply *Silva-Trevino*, but its decision simply reasoned "that because the statute reflects an intentional attempt to evade responsibility, the conduct covered by the statute is inherently base, vile, and reprehensible" without using the realistic probability test).

[76] *Id.* MINN. STAT. § 609.506, Subd. 1, requires proof of "intent to obstruct justice," a term the court considered to be broad and undefined. *Id.* The application notes following the obstruction-of-justice enhancement in the Federal Sentencing Guidelines include a wide variety of conduct that reflects a broad range of anti-social intentions can legitimately be called "obstruction of justice." *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. 4, 5 (2010)). The court held that there is a real risk of both over-inclusiveness and under-inclusiveness under the Federal Sentencing Guidelines. *Bobadilla*, 679 F.3d at 1058.

[77] *Bobadilla*, 679 F.3d at 1057. MINN. STAT. § 609.605 has three subdivisions; subdivisions 2 and 3 constitute gross misdemeanors and would be considered CIMTs because these subdivisions specify fraudulent conduct. MINN. STAT. § 609.605 (2012). Eighth Circuit courts appear to be increasingly likely to consider context-based evidence to determine moral turpitude. *See, e.g.*, Abdi v. U.S. Citizenship & Immigration Servs., 923 F. Supp. 2d 1160,

had given a false name in the course of a traffic stop and suggested that, in this context, many citizens who are not "base, vile or depraved" may be less than fully truthful or cooperative.[78] The Eighth Circuit remanded the case to the BIA to determine whether Bobadilla's conviction constituted a CIMT based on the facts underlying his conviction.[79]

IV. APPLICATION: PUTTING *BOBADILLA* INTO PRACTICE

The *Bobadilla* decision has important implications for immigration attorneys in the Eighth Circuit. First, adjudicators will now be using the realistic probability test instead of the common case test when applying the traditional categorical approach. Second, adjudicators are now encouraged to take a broad view of the record of conviction when applying the modified categorical approach. Finally, the most dramatic change allows adjudicators to look beyond the record of conviction at any evidence the court deems relevant to determine whether the conviction constitutes a CIMT. Immigration attorneys must be aware of all of the information related to their clients' convictions.

Criminal attorneys should also have a basic understanding of the process of determining CIMTs because criminal convictions will very likely impact an alien's immigration status. Providing a false name to a peace officer, along with various other crimes under divisible statutes, may be CIMTs and will be subject to the *Silva-Trevino* framework.[80] Therefore, criminal defense attorneys should try to plead an alien client's charge down

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1166 (D. Minn. 2013) (discussing the alien's various convictions prior to the removal process and noting his conduct did not "comport with that of the average citizen" in his community).

[78] *Bobadilla*, 679 F.3d at 1058. The Eighth Circuit determined that the BIA erred in failing to consider the "Register of Action" in determining whether Bobadilla's conviction qualified as a CIMT. *Id.* The court cited *State v. Costello*, which upheld a conviction under the statute, even though the defendant admitted that he gave a peace officer a false name when he stopped but claimed that he did not intend to obstruct justice because he immediately gave his correct name when the officer warned him that giving a false name to a peace officer was a chargeable offense. *Id.* (citing State v. Costello*,* 620 N.W.2d 924 (Minn. Ct. App. 2001) (noting that the defendant's testimony that he gave a false name to a peace officer was sufficient to uphold a conviction under the statute), *rev'd on other grounds*, 646 N.W.2d 204 (Minn. 2002)).

[79] *Bobadilla*, 679 F.3d at 1059. Dissenting Judge Gruender expressed his concern that the Court may be inviting the BIA to conduct an inquiry of the specific facts of each individual's conduct at step one of the *Silva-Trevino* methodology or to require the BIA to always address steps two and three after concluding that a conviction categorically constitutes a CIMT. *Id.* at 1061. He noted that the solution to this issue would be for the BIA to use its case-by-case adjudicatory process to clarify when a conviction requiring deception with intent to obstruct justice constitutes a CIMT until or unless Minnesota clarified that the statute does in fact require conduct that categorically involves a CIMT. *Id.*

[80] *See supra* note 4 and accompanying text (noting that CIMTs most often involve elements of fraud, larceny, and intent to harm persons or things).

to a crime that does not involve moral turpitude (e.g., one in which the mens rea is negligence) and under a statute that is non-divisible.[81]

A. The Eighth Circuit's Application of Silva-Trevino *Changes the CIMT Analysis*

In *Bobadilla*, the Eighth Circuit remanded the case because the immigration judge and the BIA failed to apply the *Silva-Trevino* framework.[82] Through its application of the *Silva-Trevino* framework in *Bobadilla*, the Eighth Circuit moved away from the common case test and accepted the realistic probability test.[83] The Eighth Circuit held that there was a realistic probability that the statute would be applied to both morally and non-morally turpitudinous conduct because Bobadilla was convicted under a statute that did not include an intent element.[84] As a result, an immigration judge must now take additional steps to determine whether there is a realistic probability that courts would apply a particular statute to crimes that both do and do not involve moral turpitude.[85] Therefore, immigration attorneys should be familiar with the realistic probability test in order to best serve their clients.

Additionally, the Eighth Circuit held that the immigration judge and the BIA erred when they failed to consider any conviction documents to determine whether Bobadilla's conviction constituted a CIMT.[86] As a result, it is necessary to consider the context in which the crime occurred in order to correctly determine whether Bobadilla's conviction actually constituted a CIMT under Minnesota law.[87] The Eighth Circuit endorsed a broader use of

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[81] *See supra* note 4 and accompanying text (describing CIMTs as crimes involving willful or intentional conduct and noting that recklessness may suffice in some cases to include moral turpitude).

[82] *See supra* text accompanying note 64 (stating that the BIA depended on prior decisions that did not analyze MINN. STAT. § 609.506, subd.1, instead of applying the *Silva-Trevino* framework). Judge Gruender argued in his dissent that the BIA rightfully determined that providing a false name to a peace officer constitutes a CIMT. *See supra* note 66 and accompanying text (arguing that the court should have deferred to the BIA's determination of Bobadilla's status).

[83] *See supra* text accompanying note 29 (explaining the realistic probability test).

[84] *See supra* text accompanying note 4 (describing what types of crimes generally involve "morally turpitudinous" conduct"); *see also supra* text accompanying note 76 (discussing the Eighth Circuit's application of the realistic probability test to Bobadilla's conviction for providing a false name to a peace officer).

[85] *See supra* text accompanying note 76 (discussing the Eighth Circuit's reasoning that the Minnesota statute could apply to non-turpitudinous convictions).

[86] *See supra* text accompanying notes 62–64 (discussing the holdings of the immigration judge and the BIA).

[87] *See supra* text accompanying note 79 (detailing the Eighth Circuit's remand to the BIA in *Bobadilla*).

the record of conviction, a position rejected by the majority of federal circuit courts.[88]

If the broader use of the record of conviction fails to resolve the inquiry, step three of the *Silva-Trevino* framework allows the adjudicator to consider any additional evidence deemed necessary or appropriate to accurately resolve the moral turpitude question.[89] This is the most dramatic change facing practitioners because the BIA and federal courts have traditionally refused to consider evidence outside of the record of conviction.[90] The Eighth Circuit rationalized the court's decision to allow this practice by noting that there is an important distinction between the individual who mistakenly gives a false name during a traffic stop and the individual who fraudulently does so in an attempt to benefit from obstructing the legal process.[91] This distinction is important because it is part of the very reason Congress adopted the CIMT terminology: to exclude or deport those who would flagrantly break state and federal law.[92] Aliens convicted of theft or drug trafficking are two of the most common examples of CIMTs.[93]

The ability to look beyond the record of conviction has major consequences for aliens fighting deportation. Prior to *Silva-Trevino*, if the second step (the modified categorical approach) failed to resolve the inquiry, the immigration judge was instructed to dismiss the case, essentially ruling that the DOJ failed to meet their burden of proving that the conviction constituted a CIMT.[94] The narrow modified categorical approach rarely resolves the conviction analysis because it only allows the adjudicator to determine under which subdivision of the divisible statute the alien was convicted.[95] However, the broader approach advocated by *Silva-Trevino* allows the adjudicator to examine the complete record of conviction, which

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[88] *See supra* text accompany notes 39–40 (discussing the majority and minority views on applying the modified categorical approach). The majority (narrow) approach simply looks to the record of conviction to determine what statutory subsection the conviction was for, while the minority (broad) approach allows adjudicators to use other documents in the record to assess the conduct underlying the alien's conviction. *Id.*

[89] *See supra* text accompanying note 54 (describing the third step of the *Silva-Trevino* framework).

[90] *See supra* text accompanying note 55 (exploring various circuit court decisions rejecting the *Silva-Trevino* framework and viewing the third step as inconsistent and an impermissible reading of the INA section).

[91] *See supra* text accompanying note 78 (noting that a person in Bobadilla's position of being pulled over by a police officer may not always be completely forthcoming with police officers).

[92] *See supra* text accompanying note 15 (explaining Congress's rationale for establishing the CIMT provision in the INA).

[93] *See supra* note 4 and accompanying text (describing the type of crimes that typically constitute CIMTs).

[94] *See supra* text accompanying note 37 (stating that, prior to *Silva-Trevino*, the conviction analysis ended at the end of the modified categorical approach if the record of conviction failed to solve the inquiry).

[95] *See supra* text accompanying note 39 (explaining the narrow modified categorical approach applied by the majority of federal circuit courts).

may include information that hurts the alien's case.[96] The *Silva-Trevino* framework essentially gives the DOJ another opportunity to prove that the conviction was for a CIMT, should the adjudicator choose to look beyond the record. This prospect could be especially damaging for aliens who might have negative witness statements or police reports regarding the alien's intent at the time of the crime. Immigration attorneys must therefore know the circumstances surrounding their client's conviction for a CIMT, even if that evidence is not contained within the record of conviction. In order to assist immigration attorneys, however, the criminal defense attorneys defending the clients prior to removal proceedings should have an understanding of potential immigration consequences their clients face.

B. Defending Aliens in Court: What Criminal Defense Attorneys Need to Know

The Eighth Circuit's application of the *Silva-Trevino* framework has repercussions for criminal defense attorneys with alien clients. These attorneys must understand the immigration consequences these clients face if convicted of any crime because criminal convictions are very likely to impact an alien's immigration status.[97] A criminal conviction could potentially lead to the alien's removal from the United States. Therefore, it is essential for defense attorneys representing legal immigrants to have a basic understanding of the process of determining CIMTs.

Based on the Eighth Circuit's holding in *Bobadilla*, criminal defense attorneys will need to be especially aware of the consequences a misdemeanor conviction for providing a false name to a peace officer will have for an alien client.[98] An immigration judge is permitted to look beyond the record of conviction in order to determine whether the alien client's conviction constitutes a CIMT.[99] This is a shift in the Eighth Circuit's past position, which did not allow immigration judges to look beyond the record

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[96] *See supra* text accompanying note 40 (noting various courts' broadened use of the record of conviction to determine whether an alien's conviction constituted a CIMT). For instance, the broader approach would allow an adjudicator to use an alien's confession of providing a false name for fraudulent reasons during his plea testimony, while the narrow approach limits the adjudicator's use of the record of conviction to the statute. Therefore, under the broader approach, the adjudicator would find that the alien's conviction constituted a CIMT, while the analysis would remain unresolved under the narrow approach because the statute does not specify fraudulent conduct. Because the narrow-approach jurisdictions continue to reject the *Silva-Trevino* framework, the conviction analysis would likely end here and the alien would not be removed (deported) from the United States.

[97] *See supra* note 16 and accompanying text (describing some of the consequences facing aliens convicted of CIMTs).

[98] *See supra* note 63 and accompanying text (noting that the two gross misdemeanor subdivisions of MINN. STAT. § 609.605 involve fraudulent conduct and therefore constitute CIMTs).

[99] *See supra* note 54 and accompanying text (exploring the type of documents that can be included in a "beyond the record" analysis).

of conviction.[100] The largely fact-specific analysis that immigration judges will undertake to determine whether the alien's conviction under the statute constitutes a CIMT could essentially lead to a sort of "retrial." This "retrial" allows immigration judges to examine any material he or she deems necessary to resolve the conviction analysis, including witness statements, police reports, and the alien's own confessions.[101] Therefore, the alien will not only be subject to criminal punishment for his or her actions, but may also be permanently removed from the United States.[102]

Bobadilla's application of the *Silva-Trevino* framework may also be used in the analysis of other divisible crimes. As of this writing, the *Bobadilla* decision has already been cited by a federal district court applying the *Silva-Trevino* framework to a domestic assault conviction.[103] Thus, Eighth Circuit courts appear to be increasingly likely to consider context-based evidence to determine moral turpitude.[104] Whether *Bobadilla*'s adoption of the *Silva-Trevino* framework is a legal aberration that will be ignored or overruled in the future, or whether it will remain the law of the land, remains to be seen.

Based on the foregoing, criminal defense attorneys should urge their alien clients to plead to an offense that cannot constitute a CIMT under any step of the categorical approach.[105] Alternatively, criminal defense attorneys should seek a reduced plea to any other offense that would not be considered reprehensible or even to include reprehensible conduct based on the elements of the statutes.[106] The offense selected should only have one set of elements and should not be divisible.[107] Pleading to a non-divisible statute would allow immigration attorneys to later argue that there is no ambiguity in the

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[100] *See supra* note 70 and accompanying text (providing that *Guardado-Garcia* rejected the *Silva-Trevino* approach, including the third step, as inconsistent with the Eighth Circuit's precedent).

[101] *See supra* note 55 and accompanying text (discussing the types of extra-record evidence circuit courts opposing the *Silva-Trevino* framework were concerned would be considered by immigration judges).

[102] *See supra* note 16 and accompanying text (explaining several important immigration consequences for a CIMT conviction, including permanent removal from the United States).

[103] Ghanim v. Napolitano, No. 4:12CV1818SNLJ, 2013 WL 4401837 (E.D. Mo. 2013) (applying the *Silva-Trevino* framework to a domestic assault conviction).

[104] *See supra* note 77 and accompanying text (noting an Eighth Circuit court's use of an aliens prior convictions to note that his conduct did not "comport with that of the average citizen" in his community).

[105] *See supra* notes 2–4 and accompanying text (discussing the types of criminal acts normally considered CIMTs).

[106] *See supra* text accompanying note 75 (discussing the BIA's rationale that Bobadilla's act of providing a false name to a peace officer "reflect[ed] an intentional attempt to evade responsibility, [and therefore] the conduct covered by the statute is inherently base, vile, and reprehensible . . . .").

[107] *See supra* note 47 and accompanying text (defining when a statute is divisible).

statute, barring the alien's conviction from being labeled a CIMT.[108] The conviction would not meet the standard of the traditional categorical approach because the conviction would specify a lower level of scienter than "specific intent, deliberateness, willfulness, or recklessness."[109] Therefore, the CIMT analysis would end, the alien would not be deported, and there would be no reason to move on to step two of the analysis.

C. In Practice: Ray's Story

Ray, the LPR from the introduction, faces deportation due to his recent conviction for providing a false name to a peace officer.[110] Ray's first mistake was failing to retain a criminal defense attorney to help guide him through the criminal process. Ray had a conviction for theft, a CIMT, on his record from a few years ago.[111] Ray's criminal defense attorney would be aware that Ray may face removal if he pleads guilty to providing a false name to a peace officer. Ray's attorney could then work with the prosecutor to plead his charges down to misdemeanor charges for failing to provide proof of insurance and speeding.[112] Therefore, Ray's immigration status would not be affected by the failure to provide proof of insurance charge because that misdemeanor is not considered a CIMT.

Without the assistance of a criminal attorney, Ray pleaded guilty and now faces the removal process. Suppose Ray retained an immigration attorney to help him avoid deportation. The immigration attorney read the *Bobadilla* decision, which held that providing a false name to a peace officer was not a CIMT under the realistic probability test of the traditional categorical approach.[113] Therefore, the immigration attorney should argue that there is a strong likelihood under the *Bobadilla* decision and other state law cases that the providing a false name to a peace officer statute would be considered non-morally turpitudinous conduct.

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[108] *See supra* note 25 and accompanying text (noting that a conviction under a statute that is divisible into several subsections may result in only some convictions that involve moral turpitude).

[109] *See supra* note 53 and accompanying text (stating that the record of conviction may demonstrate that the conviction was for conduct that reflected "specific intent, deliberateness, willfulness, or recklessness").

[110] *See supra* Part I (introducing and explaining the hypothetical Ray's situation).

[111] *See supra* note 59 and accompanying text (stating that theft is automatically considered a CIMT).

[112] *See supra* note 2 and accompanying text (noting that failing to provide proof of insurance to a peace officer is not considered a CIMT because it does not involve inherently base, vile, or turpitudinous conduct).

[113] *See supra* text accompanying notes 75–76 (discussing the Eighth Circuit's rationale for finding that there was a realistic probability that providing a false name to a peace officer may not constitute a CIMT).

Ray's attorney should then proceed to step two, the modified categorical approach.[114] The modified categorical approach allows the immigration judge to look to Ray's record of conviction to determine whether his conviction constituted a CIMT.[115] Immigration attorneys are likely familiar with the narrow modified categorical approach used by the Eighth Circuit prior to *Bobadilla*. The narrow modified categorical approach only allowed adjudicators to look at the record of conviction in order to determine under what subdivision of the divisible statute the alien was convicted.[116] In Ray's situation, the immigration judge applying the narrow modified categorical approach would only have discovered that Ray was convicted under the first subdivision of the statute.[117] The first subdivision of the statute would not be helpful to the immigration judge, who would then likely find that the categorical analysis results were inconclusive and end the removal process.[118] The end of the removal process allows Ray to remain in the country.

Ray is not as fortunate after *Bobadilla*'s adoption of the *Silva-Trevino* framework. The *Silva-Trevino* framework adopted an expansive view of the record of conviction, enabling adjudicators to examine the complete record of conviction to determine whether an alien's conviction constituted a CIMT.[119] Therefore, Ray's immigration judge will be able to use the charging document citing Officer Jones' report to prove that Ray committed a CIMT.[120] In this case, Ray will likely be deported, unless there is other evidence in his record of conviction to refute this statement.[121] Thus, in Ray's case, the results from the broad categorical approach would be the exact opposite of the narrow categorical approach. This is one of the main reasons immigration attorneys need to be familiar with their clients' complete records of conviction.

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[114] *See supra* text accompanying notes 31–40 (describing the two primary forms of the modified categorical approach).

[115] *See supra* text accompanying notes 33–38 (exploring the modified categorical approach).

[116] *See supra* text accompanying note 39 (explaining the narrow modified categorical approach).

[117] *See supra* note 60 and accompanying text (setting out the language of MINN. STAT. § 609.506).

[118] *See supra* text accompanying note 38 (noting that, prior to *Silva-Trevino*, the conviction analysis ended if the modified categorical approach failed to establish that the criminal conviction constituted a CIMT).

[119] *See supra* text accompanying note 40 (describing the minority view permitting a broader use of the record of conviction to determine whether a crime constitutes a CIMT).

[120] *See supra* text accompanying note 34 (explaining what documents are considered part of the record of conviction under the *Silva-Trevino* framework).

[121] *See supra* text accompanying note 34 (explaining evidence could include Ray's written plea agreement, his plea testimony, and/or the criminal judge's statements when accepting Ray's plea). These documents would need to indicate that Ray's conduct did not involve fraudulent intent (i.e., Ray was not lying in order to avoid a criminal charge for failing to have proof of insurance).

Presume that there is evidence in Ray's record of conviction suggesting that he provided a false name out of fear, rather than in order to avoid criminal liability for not having insurance. Ray's immigration attorney should then be prepared for step three.[122] Under *Silva-Trevino*, Ray's immigration judge is allowed to consider any evidence outside of the record of conviction deemed necessary to resolve the conviction analysis.[123] Evidence outside of the record may include Officer Jones' police report, prosecutor remarks, and any statement Ray made outside of the judgment and sentence.[124] These documents have the potential to help or hurt Ray's case depending on their contents.

Ray's unfortunate story illustrates the importance for immigration attorneys to be aware of all of the documents related to their client's criminal conviction. Documents that would have previously been inadmissible in an immigration proceeding can now be used against an alien. Immigration attorneys should try to mitigate harmful statements and documents in order to prevent their clients' deportation.

V. CONCLUSION

Bobadilla has important implications for attorneys in the Eighth Circuit. The court's adoption of the controversial *Silva-Trevino* framework increases the obstacles aliens face in proving that their convictions are not CIMTs. Criminal defense attorneys must be familiar with these changes in CIMT analysis in order to help alien clients avoid potential immigration consequences. Immigration attorneys need to adjust to arguing the realistic probability test under the traditional categorical approach. Immigration attorneys must also be aware of the broadened use of the record of conviction and the potential use of documents outside of the record, in order to best represent clients.

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[122] *See supra* text accompany note 54 (exploring the third step of the *Silva-Trevino* framework).

[123] *See supra* text accompanying note 53 (noting the *Silva-Trevino* framework permits a broader use of the record of conviction under the modified categorical approach).

[124] *See supra* note 54 and accompanying text (providing a full list of extra-record evidence an adjudicator may consider to resolve the conviction analysis).