Recent Developments on Crimes Involving Moral Turpitude and Inadmissibility in the Ninth Circuit

By Daniel Shanfield

Section INA § 212(a)(2)(A)(i) of the Immigration and Nationality Act renders inadmissible any non-citizen convicted, or who admits committing, or who admits committing the essential elements of, a "crime involving moral turpitude" (CIMT). A key exception to this rule exists however where the non-citizen has been convicted of only one crime involving moral turpitude, and the maximum possible sentence for the offense does not exceed one year, and the sentence ordered does not exceed six months.[1]

To prove up inadmissibility for a CIMT conviction, the normal rules for establishing a "conviction" under INA § 101(a)(48) apply. Inadmissibility may also be established where the non-citizen has admitted to committing a CIMT, or has admitted to committing the essential elements of a CIMT, but only if certain BIA mandated requirements are met.[2] First, the admitted conduct must constitute all essential elements of a CIMT. Second, the non-citizen must have been provided with a definition of the essential elements of the CIMT offense before making the admission. Lastly, the admission must be voluntary, unequivocal, or unqualified. The FAM essentially adopts the BIA's requirements, and a consular officer may similarly prove up CIMT inadmissibility at the visa interview under this standard.[3] The Ninth Circuit however has taken a more liberal stance on which admissions are admissible to prove up a CIMT, ruling that only admissions made to a U.S. government official are subject to these requirements. Admissions made to non-U.S. government personnel, such as an examining physician, will be admissible to establish criminal inadmissibility, if evidence of the admission is otherwise trustworthy and adequately encompasses the offense.[4]

Inadmissibility for crimes involving moral turpitude will generally arise in only one of three contexts: where the non-citizen is seeking adjustment of status in the United States,[5] where the

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[1] INA § 212(a)(2)(A)(ii)(II).
[2] *See Matter of K*, 7 I&N Dec. 594, 598 (BIA 1957); *Matter of L*, 2 I & N Dec. 486, 488 (BIA 1946).
[3] See 9 FAM 40.21(a) N5.
[4] *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1217-18 (2002).
[5] INA § 245(a)(2).

non-citizen is applying at a consular post for an immigrant or non-immigrant visa,[6] and where the non-citizen is seeking admission to the United States at a designated port-of-entry.[7]

Lawful permanent residents are generally not subject to the grounds of inadmissibility.[8] However, when seeking admission to the United States at a designated port-of-entry, an LPR convicted of a CIMT is subject to classification as an "arriving alien" and is thereby subject to all other grounds of inadmissibility.[9] However, LPRs seeking admission to the U.S. who entered their plea to the CIMT prior to April 1, 1997 are permitted to benefit under the *Fleuti* doctrine and thereby avoid classification as "arriving aliens" if departure from the United States was "brief, casual and innocent".[10]

With respect to returning LPRs seeking admission at the port-of-entry, the burden rests with DHS to establish that the LPR shall be treated as an arriving alien pursuant to INA § 101(a)(13)(C).[11] For LPRs placed in removal proceedings as arriving aliens pursuant to INA § 101(a)(13)(C), DHS must produce "some evidence" to show the LPR is inadmissible, which shifts the burden back to the LPR to prove admissibility "clearly and without a doubt".[12]

For non-citizens subject to INA § 212(a)(2)(A)(i) either seeking adjustment of status in the U.S. or pursuing immigrant visa processing at a consular post, inadmissibility may be waived under certain conditions pursuant to INA § 212(h),[13] while those seeking admission as a non-immigrant may in certain cases seek a waiver under INA § 212(d)(3)(A).[14] For lawful permanent residents at the port-of-entry deemed inadmissible under INA § 212(a)(2)(A)(i), these individuals may if otherwise qualified seek a waiver in removal proceedings under INA § 240A(a), or in some cases former INA § 212(c).[15]

Of course, just what constitutes a CIMT has been a source of controversy. Equally controversial has been what evidence may be considered in establishing that a non-citizen's conviction qualifies as a crime involving moral turpitude, particularly where the criminal statute does not perfectly match the generic definition of a CIMT. This conflict has been most intense on the question of "when" DHS and the immigration courts may look at the record of conviction and

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[6] *See* INA § 221(g) (No visa or other documentation shall be issued if (1) it appears that the applicant is ineligible to receive a visa or such other documentation under INA § 212 or any other provision of law, (2) the application fails to comply with the INA or regulations (3) the consular officer knows or has "reason to believe" that the applicant is ineligible to receive a visa or other documentation under INA § 212 or any other provision of law); *See also* 22 CFR § 40.6; 9 FAM 40.6.

[7] 8 CFR § 235.1(a), (f).

[8] INA §101(a)(13)(C).

[9] *Id.*

[10] *Vartelas v. Holder*, 132 S. Ct. 1479, 1483, 182 L. Ed. 2d 473 (2012); *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007); *Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963).

[11] *Matter of Valenzuela-Felix*, 26 I. & N. Dec. 53 (BIA 2012) (DHS bears the burden of proof by clear and convincing evidence that returning LPR is arriving alien seeking admission under INA § 101(a)(13)(C)).

[12] *Kepilino v. Gonzales*, 454 F.3d 1057, 1060 (9th Cir. 2006); 8 C.F.R. § 1240.8(b).

[13] *Hing Sum v. Holder*, 602 F.3d 1092, 1094 (9th Cir. 2010), cf. *Matter of Rodriguez*, 25 I. & N. Dec. 784 (BIA 2012).

[14] *See also* 9 FAM 40.301 N1.

[15] *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 651 (9th Cir. 2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 326, 121 S. Ct. 2271, 2293, 150 L. Ed. 2d 347 (2001); 8 CFR §212.3.

"whether" they may inquire into the actual conduct of the non-citizen in determining whether a conviction is for a crime involving moral turpitude.

This conflict was laid bare in 2008 with publication of the Attorney General's decision in *Matter of Silva-Trevino*.[16] In that case the Attorney General pronounced that to "qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[17] The Attorney General also set out a three-step analysis to determine whether a conviction from a criminal offense constitutes a crime involving moral turpitude. The first step entails a categorical analysis comparing the criminal statute of conviction to the generic CIMT definition. If the essential elements of the criminal statute and generic CIMT definition fail to match, *Silva-Trevino* instructs application of the modified categorical analysis, whereby the finder-of-fact may review documents including the court transcript, criminal complaint, and plea agreement to ascertain which elements the defendant pleaded to. Under the standard categorical and modified categorical analysis, the review would end there. *Silva-Trevino* however instructed that "when the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction."[18]

This added third-step turned defense of non-citizens charged with inadmissibility for CIMTs on its head. Countless non-citizens on the advice of counsel had had entered pleas of guilty or no contest and had fashioned pleas in reliance of a conviction analysis regime that had for decades placed the focus of the analysis of what the non-citizen had actually been convicted of, and not on what conduct may or may not have taken place. Numerous immigration court contested CIMT removal hearings have turned into mini-trials to ascertain the non-citizen's actual conduct beyond the record of conviction, with police reports drafted upon on multiple levels of hearsay used to establish that the non-citizen's conduct constituted moral turpitude.

Now however, a trio of recent federal court decisions has repudiated the three-step *Silva-Trevino* CIMT analysis and given new hope to non-citizens burdened with convictions for crimes involving moral turpitude.[19] The first case, *Olivas-Motta*, decided by the Ninth Circuit on May 17, 2013, rejected the Attorney General's "mini-trial" scheme to determine removability for a crime involving moral turpitude where the state criminal statute and record of conviction fail to establish a clear match with the generic CIMT offense.[20]

With *Olivas-Motta* reasserting the primacy of the traditional categorical and modified categorical analyses in the context of CIMT removability, it was left to the U.S. Supreme Court to clarify (again) the correct application of these two approaches, and correct the confusion inspired by its earlier decision in *Nijhawan*, which permitted a limited factual inquiry beyond the modified

[16] *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (BIA 2008).
[17] *Id*. at 689, fn. 1.
[18] *Id*. at 690.
[19] *Id*. at 687.
[20] *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013).

categorical approach where removal must be established by circumstance specific elements not part of the generic removal offense.[21]

The Supreme Court in the summer of 2013 accomplished this in two decisions, *Moncrieffe v. Holder* and *Descamps v. United States.*[22] Together, these cases establish that a criminal offense statute is a categorical match with a generic federal offense only if a conviction for the criminal offense necessarily involves facts equating to the generic removal offense. If the minimum conduct necessary for conviction does not clearly match elements of the generic removal offense, *i.e.*, the statute is overbroad, then there is no categorical match. Resort to the modified categorical approach is then permitted under very limited circumstances, where the criminal statute is "divisible", *i.e.*, describing different crimes named separately under the same statutory provision and in the alternative. By contrast, other criminal statutes which may be violated by various means but not described disjunctively as alternative offenses are not "divisible" and therefore not appropriate for analysis under the modified categorical approach.[23]

Olivas-Motta leaves important aspects of *Silva-Trevino* undisturbed however, with the BIA's authority under *Chevron* to determine whether a particular statutory criminal offense meets the CIMT definition remaining intact.[24] *Olivas-Motta* likewise leaves undisturbed the Ninth Circuit's previous acceptance in *Marmolejo-Campos* of the minimal *mens rea* standard set forth in *Silva-Trevino*. This standard requires only "some form of scienter".[25] The Ninth Circuit will accordingly defer to Board doctrine that *mens rea* is satisfied for crimes characterized either by recklessness or a conscious disregard of a substantial and unjustifiable risk of harm to other persons constituting gross negligence.[26]

The Ninth Circuit however does not defer lightly. The *Olivas-Motta* decision left intact the court's prior rulings in *Robles-Urrea* and *Castrijon-Garcia* defining the limits of *Chevron* deference.[27] Although the meaning of the term "crime involving moral turpitude" is accepted as vague and Congress has entrusted its interpretation to the Attorney General, the Ninth Circuit

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[21] *Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009).
[22] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1680, 185 L. Ed. 2d 727 (2013) (state law conviction for controlled substance distribution not categorically aggravated felony as minimum conduct necessary for conviction included non-remunerative social sharing thereby qualifying conviction as federal misdemeanor not subject to controlled substance trafficking definition); *Descamps v. United States*, 133 S. Ct. 2276, 2278, 186 L. Ed. 2d 438 (2013) (California burglary statute lacking essential element of unprivileged or unlawful entry will not align with federal generic definition of burglary for ACCA sentencing enhancement under categorical analysis as minimum facts for conviction fail to establish liability for essential element of generic offense).
[23] Notably, the Department of State Foreign Affairs Manual (FAM) which guides inadmissibility determinations at the consular posts has not embraced the *Silva-Trevino* three-Step analysis and hews to a strict categorical and modified categorical analysis for convictions within the jurisdiction of the United States. *See* 9 FAM 40.21(a) N6.1 (TL:VISA-129; 11-09-1995); 9 FAM 40.21(a) N6.2 (CT:VISA-753; 06-29-2005).
[24] Regarding the generic *Silva-Trevino* CIMT definition however, which requires that a perpetrator have committed [a] reprehensible act with some form of scienter") the Ninth Circuit has opted in favor of its own traditional *Carty* definition (crimes involving either fraud or those involving grave acts of baseness or depravity) *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 910 (9th Cir. 2009), *citing Matter of Silva–Trevino*, 24 I. & N. Dec. 687, 688, 706 (2008); *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005).
[25] *Silva–Trevino*, 24 I. & N. Dec. at 706; *Marmolejo-Campos*, 558 F.3d at 916.
[26] *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994); *see also Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012).
[27] *Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012).

will review *de novo* on a case-by-case basis whether the Board's interpretation of the generic CIMT definition is permissible.[28] In *Robles-Urrea*, the Court struck down the Board's determination that misprision of a felony under 18 U.S.C. § 4 constitutes a CIMT. The Court held that the Board had impermissibly deviated from the generic CIMT definition by analyzing the criminal law statute under the wholly irrelevant factor of whether the crime "runs contrary to accepted social duties", while failing to consider in a meaningful way whether the offense under the generic CIMT definition constituted conduct that was base, vile or depraved or fraudulent.[29] The *Robles-Urrea* court, exercising its own non-deferential authority to interpret criminal statutes, reviewed *de novo* whether misprision of a felony may permissibly be interpreted to constitute a CIMT under that term's proper generic definition. As the offense "lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice," the Ninth Circuit concluded that it may not.[30]

In that same vein, the Ninth Circuit in *Castrijon-Garcia* declined to defer to the Board by reversing the BIA's determination that simple kidnapping under Cal. Penal Code § 207(a) constitutes a categorical CIMT.[31] In that case, the Court determined that the offense did not categorically qualify as a CIMT. The Court placed heavy emphasis on the characterization by California court's that simple kidnapping constitutes a general intent crime for which a conviction requires neither an intent to injure, actual injury, nor the intent to instill fear, nor a special class of victims.[32] The Court in *Castrijon-Garcia* reaffirmed that general intent under the circumstances would not support a CIMT, and following a line of Ninth Circuit decisions, ruled that where a CIMT is characterized by intent, that intent must generally involve "evil intent".[33]

Importantly, *Castrijon-Garcia* methodically established why no deference was owed under either a *Chevron* or *Skidmore* analysis to the Board's underlying unpublished decision.[34] As explained by the Court, the Board concluded that Cal. Penal Code § 207(a) qualifies as a CIMT because the simple kidnapping "involves readiness to do evil and is an offense that grievously offends the moral code of mankind in its inherent nature." However, the BIA does not explain *why* simple kidnapping under CPC § 207(a) involves a readiness to do evil (or even what readiness to do evil means), or *why* it so deeply offends our moral code —especially as it is a general intent crime.[35]

The Ninth Circuit's decisions in *Robles-Urrea* and *Castrijon-Garcia*, although standing in the shadow of *Olivas-Motta*, provide several important guideposts in addressing CIMT charges.

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[28] *Id*.
[29] *Id*. at 709.
[30] *Id*. at 710.
[31] Cal. Penal Code § 207(a) (Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping); *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1210-11 (9th Cir. 2013).
[32] *Id*. at 1213.
[33] *Id*. at 1212-13.
[34] *Id*. at 1208; *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).
[35] *Castrijon-Garcia*, 704 F.3d at 1211.

First, it is critical to determine the true meaning of the elements of a statutory offense by looking beyond the statute of conviction and at the state courts' interpretations of these statutes as well as the state's jury instructions. As we have seen from *Castrijon-Garcia*, "force" does not mean actual physical violent force.

Secondly, know your scienter. True, *Marmolejo-Campos* requires deference to the Attorney General's interpretation that only "some" level of scienter is required to meet the generic definition of a CIMT, and so the Ninth Circuit may be willing to defer on criminal statutes possessing the essential element of recklessness or gross negligence involving conscious disregard to human safety. However, that type of scienter is different from a scienter of general intent, which merely is the intent to perform the act and nothing more. Although general intent renders it easier for the prosecution to gain a conviction in the criminal setting, it also makes it harder in the admissibility and removal context to align the conviction with the generic CIMT definition.

Third, keep in mind that the Ninth Circuit is open to arguments to afford no deference to the Board in cases involving hastily prepared decisions with conclusory findings on moral turpitude. Even where it "feels" like your client's conviction is "really serious", the Ninth Circuit will still demand that the Board take its obligations "really seriously", and that it earn its deference by preparing a thoughtful and cogent analysis of why your client's offense lives up to the CIMT definition.

Fourth, the best advocates are the ones who will set the terms of debate. This means taking the initiative to lay out before the immigration judge and Board a generic CIMT definition based on the Ninth Circuit's most favorable interpretation. Although the Ninth Circuit will defer to the Board in applying the generic CIMT definition on a case-by-case basis, a Board decision will likely be overturned, or at least remanded, where the IJ or Board sets out an incorrect generic CIMT definition when analyzing the criminal statute. By contrasting your Ninth Circuit approved CIMT definition with the agency's improper citation to "societal obligations" or conduct "that grievously offends the moral code of mankind in its inherent nature", your client stands a much improved chance of success.