MillsLegalClinic
StanfordLawSchool

Immigrants' Rights Clinic

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 724-1900
Fax 650 723-4426
www.law.stanford.edu

November 30, 2021

***Via Personal Delivery (BIA Service)***
Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Re: **Amicus Invitation No. 21-30-09**

Dear Sir or Madam:

Enclosed for filing please find the following documents in the above referenced matter:

- Letter granting additional time to file amicus curiae brief.
- Request To Appear As Amici Curiae And Brief Of The American Immigration Counsel, American Immigration Lawyers Association, Immigrant Defense Project, And The National Immigration Project Of The National Lawyers Guild As Amici Curiae In Support Of Respondent.
- Two (2) copies of the above.

If you have any questions, please do not hesitate to contact our office at (650) 724-2442. Thank you for your attention to this matter.

Sincerely,

Jayashri Srikantiah

Enclosures
Cc: Department of Homeland Security–Office of the Chief Counsel; Benjamin R. Winograd, Immigrant & Refugee Appellate Center, LLC; Rosina Stambaugh, The Law Office of Rosina Stambaugh

**U.S. Department of Justice**
Executive Office for Immigration Review
*Board of Immigration Appeals*
*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

Office of the Chief Clerk

November 10, 2021

Katherine Evans
Immigrant Rights Clinic
Duke University School of Law
210 Science Dr., Box 90360
Durham, NC 27708

Jayashri Srikantiah
Immigrants' Rights Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94303

Re: Amicus Invitation No. 21-30-09

Dear Amici:

The Board of Immigration Appeals received on November 2, 2021, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **December 1, 2021.** In addition please attach a copy of this letter to the front of your brief. Please note: No further extensions will be considered. The Board is also hereby increasing the page limit for the Amicus briefs to 30 pages.

Respectfully,

McKayla Bobitski

McKayla Bobitski
Appeals Examiner
Information Management Team

cc: James T. Dehn, Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters
Potomac Center North
500 12th Street, S.W., MS 5900
Washington, DC 20536

Rosina Stambaugh, Esquire
Law Office of Rosina C. Stambaugh
2930 Carol Road, Suite A
York, PA 17402

DHS/ICE Office of Chief Counsel - BAL
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Jayashri Srikantiah (EOIR #OI135802)
Lisa Weissman-Ward (EOIR #CN458129)
Shanti Tharayil (EOIR #GG244784)
Immigrants' Rights Clinic
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305
Telephone: (650) 724-2442
Facsimile: (650) 723-4426
Attorneys for Amici Curiae

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**BOARD OF IMMIGRATION APPEALS**

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| **Amicus Invitation No. 21-30-09** | ) |
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# REQUEST TO APPEAR AS AMICI CURIAE

# AND

# BRIEF OF THE AMERICAN IMMIGRATION COUNSEL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF RESPONDENT

## REQUEST TO APPEAR AS AMICI CURIAE

In response to the Board's Amicus Invitation No. 21-30-09, the American Immigration Counsel (AIC), American Immigration Lawyers Association (AILA), Immigrant Defense Project (IDP), and the National Immigration Project of the National Lawyers Guild (NIPNLG) respectfully request permission from the Board to appear as amici in the above-captioned matter. The Board may grant permission to appear, on a case-by-case basis, if it serves the public interest. 8 C.F.R. § 1292.1(d). Proposed amici are all national organizations with deep expertise in the interrelationship between criminal and immigration law. Amici have a strong interest in ensuring that the laws governing the impact of criminal convictions on immigration outcomes are consistent with existing precedent and principles of fundamental fairness.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration our nation's immigration law, protect the rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. AIC has previously appeared as amicus before the Board, the federal courts of appeals, and the Supreme Court on issues relating to removability and eligibility for relief.

The American Immigration Lawyers Association, founded in 1946, is a non-partisan, non-profit national association of more than 15,000 attorneys who practice and teach immigration law. AILA members represent individuals in pursing immigration benefits and against removal, often on a pro bono basis, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA aims to promote justice, advocate for fair and reasonable immigration law and policy and advance the quality of immigration and nationality law and practice. AILA has participated as amicus curiae in numerous cases before the Board, U.S. Courts of Appeals and the U.S. Supreme Court.

The Immigrant Defense Project is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes and has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has served as amicus curiae in numerous cases before the Board, the circuit court of appeals, and the Supreme Court on cases interpreting and applying the categorical and modified approach.

The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates and others working to defend immigrants' rights and secure fair administration of the immigration and nationality laws. NIP provides technical assistance to the bench and bar, litigates on behalf of noncitizens as amici curiae in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories as well as *Immigration Law and Crimes* and three other treatises published by ThomsonWest. Through its membership network and its litigation, the National Immigration Project is acutely aware of the risk noncitizens who have had contact with the criminal legal system experience in removal proceedings.

Proposed amici have decades of experience litigating issues related to the categorical approach before the immigration courts, the Board, and the federal courts, including as amici in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), and in numerous circuit court cases preceding *Pereida*. Proposed amici have a deep interest in the questions raised by the Board in its request for the participation of amicus curiae in the above-captioned case. The Board's resolution of

these questions could significantly alter the way that immigration courts analyze removability and eligibility for relief for noncitizens with convictions, and the way that criminal defense attorneys advise noncitizen defendants facing criminal charges. Proposed amici respectfully request leave to appear as amici and file the following brief.

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## SUMMARY OF ARGUMENT

Amici submit this brief to address the first two questions in the Board's Amicus Invitation No. 21-30-09, regarding the applicability of Section 240(c)(3)(B) of the Immigration and Nationality Act (INA) to the modified categorical approach, in light of *Pereida v. Wilkinson*, 141 S. Ct. 754, (2021); and whether a transcript from a sentencing modification hearing may be considered as part of that approach.[1] Established precedent from the Third Circuit, the Supreme Court, and the Board conclusively resolves these questions. Under this precedent, which is unchanged by *Pereida*, immigration courts conducting the modified categorical inquiry may consult only a narrow subset of reliable records—not including sentence modification transcripts—that the Supreme Court enumerated in *Shepard v. U.S.*, 544 U.S. 13 (2005).

The purpose of the modified categorical approach is to determine whether a conviction corresponds to a ground of removability. Section 240(c)(3)(B)—which permits consideration of a broad range of records—is not relevant to this question. Rather, as the Board has recognized, INA § 240(c)(3)(B) concerns a different, threshold question: which records an immigration judge may admit to determine whether a noncitizen has sustained a conviction in the first place. *See Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012). While *Pereida* mentioned INA § 240(c)(3)(B) in dicta, it left untouched Supreme Court precedent repeatedly affirming the application of the modified categorical approach in immigration cases, which would preclude consideration of the many non-*Shepard* records covered by INA § 240(c)(3)(B). *See*, *e.g.*, *Moncrieffe v. Holder,* 569 U.S. 184, 190-91 (2013).

*Pereida* reaffirmed that the categorical approach governs the immigration consequences of criminal convictions, *see Pereida*, 141 S. Ct. at 762-63, as it has for a century. *See Matter of*

[1] Amici agree with Respondent and the briefs of other amici as to the third question posed in the Board's invitation, but do not repeat those arguments here in the interest of efficiency.

*Velazquez-Herrera*, 24 I&N Dec. 503, 515 (BIA 2008) (acknowledging that the Board has applied categorical approach for "more than 80 years" by the time Congress enacted the 1996 amendments to the INA). Under the categorical approach, the key question to decide removability is whether the elements of a noncitizen's offense "necessarily" match a ground of removability. *Moncrieffe,* 569 U.S. at 190. As the Supreme Court once again recognized in *Pereida*, when a statute of conviction is overbroad and divisible—in that it contains some crimes that match removability and others that do not—immigration courts proceed to the modified categorical inquiry. *See Pereida*, 141 S. Ct. at 763; *Moncrieffe*, 569 U.S. at 191. *See also Matter of Chairez-Castrejon*, 27 I&N Dec. 21, 22 (BIA 2017).

During the modified categorical inquiry, immigration courts may consult only a small set of reliable documents, enumerated by the Supreme Court in *Shepard*, that serve to establish the factual basis for a plea or judgment as accepted by a criminal court. *Moncrieffe*, 569 U.S. at 191. The *Shepard* documents are the only ones that the Supreme Court, Third Circuit, and Board have held are sufficiently reliable as to the elements of conviction and whether a defendant was *necessarily* convicted of the prong of the statute of conviction that corresponds to removability. *See*, *e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007); *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010); *Matter of Milian-Dubon*, 25 I&N Dec. 197, 200 (BIA 2010). Under this precedent, which was left untouched by *Pereida*, documents such as sentence modification transcripts are not part of the *Shepard* set of documents in immigration cases because they are not sufficiently reliable to establish the factual basis for a plea or judgment. *See*, *e.g.*, *Evanson v. Att'y Gen.*, 550 F.3d 284, 293 (3d. Cir. 2008) (finding that an immigration judge may not "may not look to factual assertions in the judgment of sentence" because they "are not necessarily admitted by the defendant.").

INA § 240(c)(3)(B) is not relevant to the modified categorical inquiry at all. Rather, it applies during an earlier, threshold stage during which immigration courts decide whether a noncitizen has sustained a conviction in the first place. During this earlier stage, the Board has recognized that immigration courts may consider the wide range of documents listed and referenced in INA § 240(c)(3)(B)—including potentially sentencing transcripts—to decide if a conviction exists. *See J.R. Velasquez*, 25 I&N Dec. at 683.

If the Board were to depart from Third Circuit, Supreme Court, and its own precedent, and permit immigration courts to consider non-*Shepard* criminal records covered by INA § 240(c)(3)(B) in the modified categorical inquiry, immigration outcomes would be unreliable, unfair, and non-uniform. Two individuals with the same conviction could face different removability determinations based on how immigration judges assess a broad range of unreliable criminal records. In addition, it would be virtually impossible for criminal defense lawyers to meet their constitutional obligations to advise clients of the immigration consequences of their pleas under *Padilla v. Kentucky*, 559 U.S. 356 (2010). Defense attorneys would be required to review a broad range of unreliable criminal records that may be untethered to a plea or criminal court judgment in order to guess what might be relevant to an immigration judge. And a defense attorney's negotiations resulting in a plea agreement would be meaningless if an immigration judge could later consider such records outside of the plea agreement and colloquy to decide removability. *Compare id.* at 373 (requiring "informed consideration of possible deportation . . . during the plea bargaining process.").

Amici urge the Board to adhere to Supreme Court, Third Circuit, and its own precedent, under which the only records that an immigration court may consider during the modified categorical approach are the *Shepard* documents.

## ARGUMENT

### I. The Board Is Bound By Supreme Court, Third Circuit, and Board Precedent Restricting Review During the Modified Categorical Inquiry to the Limited Set of Reliable *Shepard* Documents.

The only criminal records an immigration court may consider during the modified categorical approach are the *Shepard* documents: "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Moncrieffe*, 569 U.S. at 191 (internal quotations omitted). As the Supreme Court has explained, the categorical approach, and its modified categorical variant, answer the question of whether a noncitizen's conviction *necessarily* corresponds to a ground of deportability. *Id*. at 190-91. The *Shepard* documents are the only records of sufficient reliability to indicate what a defendant necessarily plead to, or what a jury necessarily found to convict. *See*, *e.g.*, *Evanson*, 550 F.3d at 293; *Milian-Dubon*, 25 I&N Dec. at 200.

In contrast, INA § 240(c)(3)(B) includes myriad records of varying reliability pertinent not to the modified categorical inquiry, but rather to the threshold question of whether a noncitizen has accrued a conviction in the first place. *See J.R. Velasquez*, 25 I&N Dec. at 683 & n.6. The expansive list of non-*Shepard* documents permitted by the Board's interpretation of INA § 240(c)(3)(B) to answer this threshold question fall far short of the reliability requirements of *Shepard* and have no place in the modified categorical inquiry.

The Board should continue to apply binding precedent limiting immigration judges' consideration during the modified categorical approach to the *Shepard* documents.

### A. Under Supreme Court, Third Circuit and Board Precedent, the Only Records Relevant to the Modified Categorical Inquiry Are the *Shepard* Documents.

When deciding deportability based on a criminal conviction, immigration judges apply the categorical approach and its modified categorical variant, which turn on whether the elements of the crime of conviction match a ground of deportability. *See Mellouli v. Lynch*, 575 U.S. 798, 805 (2015). The modified categorical approach applies, as the Supreme Court recently reaffirmed in *Pereida,* when "a single criminal statute . . . list[s] multiple stand-alone offenses, some of which trigger immigration consequences and some of which do not." 141 S. Ct. at 763. In such cases, an immigration court decides whether the offense of conviction corresponds to a ground of deportability by examining the *Shepard* documents. *Moncrieffe*, 569 U.S. at 191. *See also Matter of L-G-H-*, 26 I&N Dec. 365, 373 (BIA 2014) (citing *Shepard*, 544 U.S. at 26). Only these records reliably establish "what crime, with what elements, a defendant was convicted of." *Mathis v. U.S.*, 136 S. Ct. 2243, 2249 (2016). *See also Larios v. Att'y Gen.*, 978 F.3d 62, 69 (3d Cir. 2020); *Matter of Nemis*, 28 I&N Dec. 250, 252 (BIA 2021).

The Supreme Court, Third Circuit, and the Board have repeatedly recognized that immigration courts are limited to the *Shepard* records when conducting the modified categorical inquiry. *See*, *e.g.*, *Esquivel-Quintana v. Sessions,* 137 S. Ct. 1562, 1568 n.1 (2017); *Moncrieffe*, 569 U.S. at 190-91; *Gonzales,* 549 U.S. at 189; *K.A. v. Att'y Gen.*, 997 F.3d 99, 108 n.2 (3d Cir. 2021); *Rosa v. Att'y Gen.*, 950 F.3d 67, 75 & n.38 (3d Cir. 2020); *Larios*, 978 F.3d at 69; *Hillocks v. Att'y Gen.*, 934 F.3d 332, 338 (3d Cir. 2019); *Singh v. Att'y Gen.*, 839 F.3d 273, 278-79 (3d Cir. 2016); *Thomas*, 625 F.3d at 147; *Evanson*, 550 F.3d at 294; *Matter of Al Sabsabi*, 28 I&N Dec. 269, 274 (BIA 2021); *Nemis*, 28 I&N Dec. at 252; *Milian-Dubon*, 24 I&N Dec. at 199-200; *Matter of Babaisakov*, 24 I&N Dec. 306, 311 (BIA 2007).

The Supreme Court's recent decision in *Pereida* is not to the contrary. While the Supreme Court mentioned INA § 240(c)(3)(B) in dicta, the issue of whether that section applies to the categorical rule was not briefed, argued, or otherwise raised by the parties, nor was it a part of any of the multiple court of appeals decisions constituting the circuit split that the Supreme Court granted certiorari to resolve in *Pereida*. Section 240(c)(3)(B) was also unnecessary to the Supreme Court's analysis and holding. Indeed, the *Pereida* Court actually affirmed the general structure and purpose of the categorical and modified categorical approaches in its opinion. *See Pereida*, 141 S. Ct. at 762-63. And even though, as DHS argues, the Sixth Amendment concerns present in the criminal sentence enhancement cases are not applicable in immigration cases (DHS Supp. Br. at 2, 15), the Third Circuit and Supreme Court have limited the documents considered *in immigration cases* to the *Shepard* set of records. *See*, *e.g.*, *Mathis*, 136 S. Ct. at 2251 & n.2 (explaining that the principle that courts look to elements, and not facts, is a "mantra" of cases "applying the categorical approach outside the ACCA context—most prominently, in immigration cases."); *Rojas v. Att'y Gen.*, 728 F.3d 203, 216 n.12 (3d Cir. 2013) (en banc), *abrogated in part by Mellouli*, 575 U.S. at 798 (rejecting "any notion that the [categorical or modified categorical] analysis is different depending on whether the federal baseline statute resides in the [Immigration and Nationality Act] or the ACCA.").

Much more than the *Pereida* dicta would be required for the Supreme Court to overrule its established precedent regarding the modified categorical approach in immigration cases. *See*, *e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1 ("Under [the modified categorical] approach . . . the court may review the charging documents, jury instructions, plea agreement plea colloquy, and similar sources to determine the actual crime of which the [noncitizen] was convicted."); *Mellouli*, 575 U.S. at 805 & n.4 (applying the categorical approach to determine removability);

*Moncrieffe*, 569 U.S. at 190-91 (citing and applying *Shepard*); *Nijhawan v. Holder*, 557 U.S. 29, 35, 41 (2009) (citing *Shepard* and explaining the purpose of the *Shepard*-documents); *Gonzales*, 549 U.S. at 189 (describing the modified categorical approach and the Shepard documents).

### B. Section 240(c)(3)(B) Broadly Includes Myriad Criminal Records That Fall Short of the Strict Requirements of *Shepard* and Have No Place in the Categorical Rule Inquiry.

Section 240(c)(3)(B) lists records admissible to establish the initial question of whether a noncitizen accrued a conviction in the first place (before any application of the categorical rule to determine removability). *See J.R. Velasquez*, 25 I&N Dec. at 683 & n.6. The plain language, statutory evolution, and the Board's interpretation of INA § 240(c)(3)(B) all show it delineates what records an immigration judge may admit to decide the threshold question of whether a conviction exists. After an immigration judge so decides, the judge then proceeds to determine deportability, applying the categorical (and modified categorical) rules. The two inquiries are distinct, and the criminal records that an immigration judge can review in the modified categorical inquiry are far more limited because they must be of sufficient reliability to show what elements a conviction *necessarily* involved.

#### 1. The Plain Language and Statutory Evolution of Section 240(c)(3)(B) Demonstrate That It Pertains to the Admissibility of Documents Sufficient to Show the "Existence of a Conviction," Not the Modified Categorical Rule.

The plain language of the INA § 240(c)(3)(B) makes clear that its purpose is to identify which documents an immigration judge may admit to decide the threshold question of whether a conviction exists. As the Board has clarified, in Section 240(c)(3)(B), "Congress has enacted special provisions that govern and clarify the admissibility of evidence to prove the existence of a conviction." *J.R. Velasquez*, 25 I&N Dec. at 683.

Section 240(c)(3)(B)'s plain language (in subsections (i)-(iv)) "enumerates . . . types of conviction documents that are categorically admissible in removal proceedings," *J.R. Velasquez*, 25 I&N Dec. at 683, to prove the existence of a conviction, and also contains two catch-all provisions. Subsection (vi) covers "[a]ny document or record prepared by, or under the direction of, the court . . . *that indicates the existence of a conviction*." INA § 240(c)(3)(B)(vi) (emphasis added). And Subsection (vii) includes "[a]ny document or record *attesting to the conviction* . . . maintained by an official of State or Federal penal institution . . ." *Id.* at (vii) (emphasis added). This language underscores that the purpose of INA § 240(c)(3)(B) is to list documents an immigration judge may admit to decide whether a conviction exists, not the subsequent question of whether that conviction matches a ground of deportability. Consistent with this understanding, the title of INA § 240(c)(3)(B) is "Proof of Conviction." *See Si Min Cen v. Att'y Gen.*, 825 F.3d 177, 194 (3d Cir. 2016) (finding "confirmation of Congress's intent in the title of the statute and the heading of a section, both of which are tools available for the resolution of a doubt about the meaning of a statute.") (internal citations omitted).

Section 240(c)(3)(B)'s evolution tracks its plain language. Congress added the section to the INA with the passage of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996. Pub. L. No. 104-208, 110 Stat. 3009-546. Congress incorporated, almost verbatim, a prior immigration regulation promulgated three years earlier following the passage of the Immigration Act of 1990 (IMMACT). *See* 8 C.F.R. § 1003.41 (1993).[2] In the rulemaking

[2] The textual differences between the statute and regulation are as follows: 1) the statute added the word "official" before the described documents in INA § 240(c)(3)(B)(i), (ii), and (iv); 2) the statute made minor changes to subsection (iv), to indicate that the hearing must be a "court hearing" where the conviction was entered; and 3) the statute added subsection (vii) to allow an immigration judge to find a document or record that attests to the existence of a conviction admissible if it maintained by an official of a State or Federal penal institution.

preceding the regulation's promulgation, the Department of Justice (DOJ) explained that the regulation "finalizes the types of documents that are admissible in proceedings to prove a criminal conviction." 58 Fed. Reg. 38952-01 (July 21, 1993) (summary). *See also* 57 Fed. Reg. 60740-01 (Dec. 14, 1992) (describing the purpose of the list as establishing safeguards for accepting certain documents to establish the "existence of a conviction."). The DOJ further clarified that an immigration judge's decision as to whether a conviction exists precedes the judge's determination of deportability: "While the rule sets forth the types of records that are admissible to prove a criminal conviction, and expands the types of documents which have been traditionally submitted to establish a criminal conviction, the *burden remains with the Service to prove the underlying issue of deportability by 'clear, convincing, and unequivocal evidence*.'" 58 Fed. Reg. 38952-01 (emphasis added). The purpose of the regulation from which Congress drafted INA § 240(c)(3)(B) was to enumerate documents sufficient to prove the existence of a conviction, an inquiry that precedes and is distinct from a determination of deportability. The regulation continues in effect today. *See* 8 C.F.R. 1003.41 (2021).

In the decades since Congress enacted INA § 240(c)(3)(B), including after the Supreme Court decided *Shepard* and numerous other categorical rule cases, Congress amended the immigration statute several times, but left INA § 240(c)(3)(B) intact. *See*, *e.g.*, Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266; REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. If Congress wished to amend INA § 240(c)(3)(B) to make it applicable to the categorical approach, it could have; Congress did not do so. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or

judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

### 2. Third Circuit and Board Precedent Recognize That Section 240(c)(3)(B) Pertains Only to the Threshold Question of Whether a Conviction Exists.

The Board and the Third Circuit have recognized that INA § 240(c)(3)(B) governs which records an immigration judge may admit to decide the existence of a conviction. It is not applicable to the modified categorical inquiry.

In *J.R. Velasquez*, the Board considered whether an immigration judge erred in admitting certain unauthenticated records when deciding whether a noncitizen had accrued a conviction. 25 I&N Dec. at 682. The Board clarified that INA § 240(c)(3)(B) is a "provision[] that govern[s] and clarif[ies] the admissibility of evidence to prove the existence of a conviction." 25 I&N Dec. at 683. The Board further explained: "Those provisions do not apply when documents relating to criminal proceedings are proffered to prove a fact *other than* the existence of a conviction." *Id.* at 683 n.6 (emphasis in original). The Board permitted the immigration judge to consider even criminal records outside of INA § 240(c)(3)(B)'s list because of its catch-all provision and broad language, mirrored in the corresponding regulation of 8 C.F.R. § 1003.41(d). *Id.* at 686. The Board remanded for further proceedings, explaining that, if the immigration judge finds that a conviction exists on remand, then the immigration judge should subsequently decide the question of removability (at that time, using the framework in the Board's now-vacated decision in *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008), *vacated*, 26 I&N Dec. 550 (A.G. 2015)).

As the Board acknowledged in *J.R. Velasquez*, immigration court proceedings follow a two-step framework. First, an immigration judge determines whether a conviction exists as DHS alleges, by reviewing the broad list of records in INA § 240(c)(3)(B) and 8 C.F.R. § 1003.41(d). Second, if a conviction exists, the immigration judge then determines whether the noncitizen is

removable as charged, using the categorical rule. The Board has confirmed this structure in many unpublished decisions. *See*, *e.g.*, Juan Mauricio Betancourt-Aguayo, A092 847 773 (BIA Aug. 17, 2010) (distinguishing between the admissibility question of § 240(c)(3)(B) and the removability inquiry); Manuk Muradkhanyan, A047 198 131 (BIA June 25, 2014) (same); Jose Armando Ruiz-Alvarez, A091 465 790 (BIA Oct. 16, 2008) (same); Dariusz Stanislaw Garncarz, A045 030 578 (BIA Mar. 25, 2005) (same).[3]

The Third Circuit has recognized this structure as well. In *Jean-Louis v. Attorney General*, the Third Circuit clarified that INA § 240(c)(3)(B)—and its corresponding regulation (8 C.F.R. § 1003.41)—constitute "catch-all provision[s] authoriz[ing] the admission of evidence for the sole purpose of proving the existence of a criminal conviction; it does not authorize the admission of evidence for the purpose of proving the facts underlying the offense of conviction." 582 F.3d 462, 473 n.17 (3d Cir. 2009).

INA § 240(c)(3)(B) applies during the first stage of removal proceedings—to decide the existence of a conviction—and not during the modified categorical inquiry.

### 3. Federal Courts, Including the Third Circuit, and the Board Have Rejected Reliance on Documents That Could Be Covered by Section 240(c)(3)(B) During the Modified Categorical Inquiry.

To further underscore the inapplicability of INA § 240(c)(3)(B) to the modified categorical inquiry, that section permits consideration of many records that the Third Circuit, other federal circuits, and the Board have disallowed from the *Shepard* set of records. The plain language of Section 240(c)(3)(B) is so broad as to include "*any* document or record prepared by, or under the direction of" the criminal court and "*any* document or record attesting to the conviction . . . maintained by . . . a State or Federal penal institution." INA § 240(c)(3)(B)

[3] Copies of these opinions are included in the addendum filed with this brief.

(emphasis added). The Board has interpreted this language broadly: it could be read to cover virtually every document created as part of a defendant's criminal case, so long as the document references the existence of a conviction. *See J.R. Velasquez*, 25 I&N Dec. at 686 (interpreting 8 C.F.R. 1003.41, the regulation corresponding to Section 240(c)(3)(B), as including a "non-exhaustive" list of records admissible to demonstrate the existence of a conviction).

For example, Section 240(c)(3)(B)(vi) could be read to permit an immigration judge to review and rely on the facts contained in a judgment of sentence, even though, as DHS concedes (DHS Supp. Br. at 17), the Third Circuit has held that it "may not look to factual assertions in the judgment of sentence" because they have not been proven beyond a reasonable doubt or admitted to by the defendant. *Rosa*, 950 F.3d at 82 (citing *Evanson*, 550 F.3d at 293).

Even beyond sentencing judgments and transcripts, Section 240(c)(3)(B)(vi) could be read to permit review of a restitution award as well as a no-contact order issued by a trial judge at the time of sentencing. However, the Board has held that that neither a restitution award nor a no-contact order may be relied upon under the modified categorical approach because both may be issued on the basis of "facts that were not necessarily admitted by the defendant or proven beyond a reasonable doubt in order to establish the defendant's guilt with respect to the underlying crime." *Velazquez-Herrera,* 24 I&N Dec. at 517.

The broad statutory language of Section 240(c)(3)(B) also permits an immigration judge to review and rely on "… a transcript of a court hearing in which the court takes notice of the existence of the conviction." INA § 240(c)(3)(B)(iv). This might include a transcript from a sentencing hearing—or a sentence modification hearing—in which the criminal court judge referenced the conviction and various facts she considered in sentencing the defendant or awarding restitution (as the sentencing court did in Respondent's case). While the transcript is

admissible under INA § 240(c)(3)(B)(iv), it is not reviewable as part of the modified categorical inquiry under precedent from the Third Circuit and the Board. *See Evanson*, 550 F.3d at 293; *Velazquez-Herrera*, 24 I&N Dec. at 516-17. This is because the facts a trial judge considers during sentencing or in awarding restitution are not proven beyond a reasonable doubt nor necessarily assented to by the defendant. *See Evanson*, 550 F.3d at 293; *Velazquez-Herrera*, 24 I&N Dec. at 516-17. This is so even if a judge states the facts of the conviction during the sentencing hearing, as DHS alleges occurred in Respondent's case (DHS Supp. Br. at 18), because a defendant has no incentive to correct the record—for instance, as to the substance—especially if it does not affect his sentence. *See, e.g., Evanson*, 550 F.3d at 293.[4]

The wide-ranging language of INA § 240(c)(3)(B) could also be read to cover numerous other documents that the Third Circuit, other courts of appeals, and the Board have excluded from consideration under the modified categorical approach, including a stand-alone police report or RAP sheet. *See*, *e.g.*, *Thomas*, 625 F.3d at 147 (finding that a police officer's written statement was not part of the record of conviction when it had not been incorporated into the guilty plea); *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1087-88 (9th Cir. 2017) (finding that a RAP sheet without evidence of the factual basis of the conviction could not be considered under the modified categorical approach). *See also Milian-Dubon*, 25 I&N Dec. at 200 (finding

[4] The government incorrectly contends that, because the substance was an element in Respondent's plea, an exchange about the substance during sentencing somehow satisfies the requirements of *Shepard*. DHS Supp. Br. at 19 n.7. Even if the Third Circuit permitted consideration of discussions during sentencing hearings—which DHS concedes it does not (*id.* at 17)—a sentencing judge's mention of a controlled substance does not *necessarily* indicate the agreement of the parties during the plea stage, as required by the modified categorical rule. Because a wide range of controlled substances correspond to the same sentence in Pennsylvania, *see, e.g.*, 35 Pa. Con. Stat. Ann. § 780-113(f), a discussion of a specific controlled substance may well be irrelevant to the sentence imposed.

that a police report is not part of the record of conviction, except when it is incorporated into the plea as the factual basis).[5]

The Board continues to be bound by Supreme Court, Third Circuit, and Board precedent, under which the modified categorical approach permits review of only the *Shepard* documents. *Cf. Chairez-Castrejon*, 27 I&N Dec. at 22 ("[W]hile [the Board has] the authority to apply intervening Supreme Court precedent that supersedes contrary circuit court authority, [the Board] may not extend the rationale of a Supreme Court decision in the face of contrary precedent from the controlling circuit."); *Matter of Carachuri*, 24 I&N Dec. 382, 388 (BIA 2007) (holding that the Board could not declare that controlling circuit court precedent had been "implicitly overruled by the Supreme Court").

## II. Abandoning Reliance on the *Shepard* Documents Would Result in Unfair and Inconsistent Outcomes in Removal Proceedings and Undermine Criminal Defense Lawyers' Constitutional Obligations Under *Padilla v. Kentucky*.

If INA § 240(c)(3)(B), and not *Shepard*, applied to the modified categorical inquiry, immigration judges would be permitted to rely on unreliable criminal records that do not indicate what a defendant necessarily admitted during criminal proceedings. With a broad range of unreliable records available for review, immigration judges could come to different and non-uniform decisions based on the same record of conviction. And criminal defense lawyers,

[5] DHS relies on inapplicable cases from outside the Third Circuit (and even their Westlaw headnotes) to argue for an expansion of the modified categorical approach to include consideration of sentencing records. DHS Supp. Br. at 23 n.8. Neither the Second nor the Ninth Circuit cases DHS cites addresses, much less endorses, the unqualified use of sentencing documents under the modified categorical approach. Instead, both cases affirm the *Shepard* framework: that courts may only consult documents that reliably establish what the noncitizen was necessarily convicted of. *See Flores v. Holder*, 779 F.3d 159, 166 (2d Cir. 2015); *U.S v. Snellenberger*, 548 F.3d 699, 701-02 (9th Cir. 2008). The only Third Circuit case DHS was able to find, *United States v. Graham*, predates *Shepard* and is not about the modified categorical approach or the reviewable record of conviction at all. 169 F.3d 787 (3d. 1999).

attempting to meet their constitutional obligation under *Padilla v. Kentucky*, would face the potentially insurmountable task of advising their clients about every criminal record created by a court in their cases, regardless of what facts in those records they agreed to as part of their plea negotiations or were found by a jury after trial.

In these ways, inclusion of the wide-ranging list of records covered by INA § 240(c)(3)(B) would frustrate the purpose of the categorical approach, which, as the Supreme Court has clarified, exists to "promote efficiency, fairness, and predictability in the administration of immigration laws." *Mellouli*, 575 U.S. at 806.

### A. If Immigration Judges Were Required to Consider Records Outside of the *Shepard* Set of Documents, They Would Reach Non-Uniform and Unfair Results.

The criminal process generates an expansive array of records. Many of these documents could be read to be included under the broad language of INA § 240(c)(3)(B) but fall far short of the reliability requirements of *Shepard*. Such records include: restitution orders, judgments of sentence, hearing transcripts, no-contact orders, and RAP sheets. *See supra* Section I.B.3. If immigration courts could consider these and other criminal records, they would be deciding removability based on facts that a defendant never assented to, and which a jury never found. Noncitizens would face deportation based on facts that did not form the basis for their convictions in the first place. *See*, *e.g.*, *Thomas*, 625 F.3d at 147 (finding that because the record of conviction was silent as to the factual basis of the plea, it was plausible that the defendant's admission of guilt was to conduct that "would *not* constitute a hypothetical federal felony"). That is directly contrary to the goal of the categorical approach. *See Babaisakov*, 24 I&N Dec. at 311 ("*Taylor* and *Shephard* confine review of the record…and do so a part of a search for the

*elements* that led to a prior conviction.") (emphasis in original). *See also Gonzales*, 549 U.S. at 187.

### 1. State Criminal Courts Generate a Range of Records That Could be Covered by Section 240(c)(3)(B), But That Are Unreliable for the Purposes of the Modified Categorical Inquiry.

Many criminal court records fail to meet the reliability requirements of the modified categorical approach. For example, in jurisdictions across the country, including in Texas, California, New Jersey, Louisiana, Massachusetts, Georgia, and Vermont, a noncitizen's criminal record might include a pre-sentence investigation report (PSI) or a court docket sheet. *See* Declaration of Jordan Pollock, appended hereto as Exhibit (Exh.) A; Declaration of Raha Jorjani, Exh. B; Declaration of Susannah Volpe, Exh. C; Declaration of Dawn Seibert, Exh. D; Declaration of Wendy Wayne, Exh. E; Declaration of Sarah O'Brien, Exh. G. While both documents may be included in INA § 240(c)(3)(B)'s expansive language, neither reliably establishes what the noncitizen was *necessarily* convicted of.

A PSI is a sentencing or probation recommendation drafted by a probation officer or other non-party to the case after guilt is established. As a public defender responsible for *Padilla* compliance in Texas clarifies: PSIs do not need to meet evidentiary standards, may contain hearsay, and are "often rife with inconsistencies and errors" that defense attorneys, prosecutors and courts have no incentive to correct. Pollock Decl., Exh. A, ¶ 3(a)-(b). *See also* Jorjani Decl., Exh. B, ¶ 12-14 (noting that PSIs in California often contain hearsay and allegations unrelated to the final conviction that go uncorrected); Volpe Decl., Exh. C, ¶ 6(a) (noting the same in New Jersey); Seibert Decl., Exh. D, ¶ 11, 18 (noting the same in Georgia and Vermont). In some jurisdictions, the parties may not even review the PSI in the case of a negotiated plea. Pollock Decl., Exh. A, ¶ 3(b).

"Docket sheets are similarly unreliable," because they too are typically not reviewed nor assented to by criminal defense lawyers. Pollock Decl., Exh. A, ¶ 3(c) (as to Texas). *See also* Jorjani Decl., Exh. B, ¶ 15 (noting the same in California); Seibert Decl., Exh. D, ¶ 12, 19 (noting the same in Georgia and Vermont); Wayne Decl., Exh. E, ¶ 3(b) (noting the same in Massachusetts); O'Brien Decl., Exh. G, ¶ 3 (noting the same in New Orleans). Defense attorneys rarely correct docket entries because they are not reflective of the actual plea agreement between the parties. O'Brien Decl., Exh. G, ¶ 4-5. *See also* Seibert Decl., Exh. D., ¶ 12, 19. In situations where prosecutors amend the charge orally, that amendment may not be reflected in the docket sheet. Wayne Decl., Exh. E, ¶ 3(b). And on a more basic level, docket sheets may be handwritten and illegible in many cases. Pollock Decl., Exh. A, ¶ 4.

In Massachusetts, a noncitizen's record might also include a CORI, a criminal record kept by the Massachusetts Department of Criminal Justice Information Services that "includes all Massachusetts criminal court appearances of an individual, along with the charges and dispositions of each criminal case," which are notoriously "inaccurate, incomplete, and difficult to correct." Wayne Decl., Exh. E, ¶ 3(a). Like a PSI or a docket sheet, a CORI may fall within the scope of INA § 240(c)(3)(B) but does not reliably establish what a noncitizen was necessarily convicted of.

Documents such as a CORI, presentence report, or docket sheet are not subject to the constitutional protections of due process or confrontation, *see* Pollock Decl., Exh. A, ¶ 2, unlike the *Shepard* records, which "are subject to strict requirements through statutes, court rules and case law designed to ensure accuracy, consistency, and reliability." Wayne Decl., Exh. E, ¶ 2. *See also* Seibert Decl., Exh. D, ¶ 8, 15 (in Vermont and Georgia, the *Shepard* documents are subject to constitutional challenge if incorrect). If an immigration court were to consult non-

*Shepard* documents in the modified categorical analysis, the court would reach unfair outcomes that are based on facts never admitted nor proven beyond a reasonable doubt.

### 2. Criminal Court Record-Keeping Practices Exacerbate the Unfairness of Relying on Section 240(c)(3)(B) Instead of Limiting Review to the *Shepard* Records.

Trial court record-keeping practices across the states further illustrate the unfair consequences of relying on records outside of the *Shepard* documents when determining removability.

Consider, for example, a situation in which portions of the record of conviction such as the plea agreement existed, but have been destroyed as part of state record-keeping practices by the time DHS initiates removal proceedings, years later. *See*, *e.g.*, Cal. Gov't Code § 68152(c)(7)-(8) (permitting destruction of records in most misdemeanor offenses after five years, or two years for certain marijuana offenses); Kentucky Court of Justice, *Records Retention Schedule* 3 (July 12, 2010) (permitting destruction of most misdemeanor case records after 5 years); Mass. Gen. Laws Ann. ch. 221 § 27A (permitting destruction of criminal court records after ten years). *See also Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (DHS brought charges over 11 years after conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (DHS initiated proceedings nearly 19 years after plea). If INA § 240(c)(3)(B) determined which documents an immigration judge could review under the modified categorical approach, the judge could find a noncitizen removable based on a non-*Shepard* record stating facts to which he never assented and that might contradict the guilty plea to which he did agree, but the evidence of which was destroyed. Such a result is unfair and contrary to binding Third Circuit precedent. *See*, *e.g.*, *Rosa*, 950 F.3d at 82 (holding that an immigration court could not rely on a judgment

of sentencing under the modified categorical approach even when the plea agreement or colloquy was unavailable).

The unfairness of allowing immigration judges to rely on the broad list of documents in INA § 240(c)(3)(B) is compounded by the inconsistent immigration outcomes that such reliance may produce. Jurisdictions vary, not only as to criminal records destruction practices, but also as to whether non-*Shepard* records are created in the first place. For instance, a docket sheet might be created in one county of a state, but not in another. *See* Pollock Decl., Exh. A, ¶ 4 (noting that, In Texas, for instance, some courts do not use docket sheets at all, and others may not generate presentence reports in all cases); Volpe Decl., Exh. C, ¶ 7 (noting wide variation in record-keeping practices of New Jersey municipal courts); Seibert Decl., Exh. D, ¶ 13 (noting similar variations in Georgia). The unlucky noncitizen whose non-*Shepard* criminal record exists and contains unsubstantiated allegations could face removal, while the individual whose records have been destroyed or that lack those allegations would not. Non-uniform and unfair outcomes are particularly likely when the underlying conviction was for a misdemeanor, given the rushed and haphazard nature of misdemeanor criminal record-keeping. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vanderbilt L. Rev. 1055, 1064 (2015) (misdemeanor courts are "[w]idely derided as 'assembly line,' 'cattle herding,' and 'McJustice'" because they "rush hundreds of cases through en mass.").

As the Supreme Court has explained, adherence to the categorical rule avoids the potential unfairness that stems from "two noncitizens, each 'convicted' of the same offense…obtain[ing] different aggravated felony determinations depending on what evidence remains available or how it is interpreted by an individual immigration judge." *Moncrieffe*, 569 U.S. at 200-01. To avoid the non-uniformity and unfairness that would otherwise result, the

Board should continue to restrict review when applying the modified categorical rule to the *Shepard* documents.

### B. Abandoning the Categorical Approach By Permitting Reliance on Non-*Shepard* Documents Would Impede Defense Attorneys' Ability to Comply With Their Constitutional Obligations Under *Padilla v. Kentucky.*

Allowing immigration judges to rely on the many non-*Shepard* documents enumerated in INA § 240(c)(3)(B) would frustrate criminal defense attorneys' ability to provide effective assistance of counsel to noncitizens in criminal proceedings, as required by *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the Supreme Court held that criminal defense attorneys have a constitutional obligation to "inform [their] clients whether [their] plea carries a risk of deportation." *Id*. at 374. Defense attorneys' ability to satisfy their *Padilla* obligation hinges on whether they can reliably predict the immigration consequences of a conviction.

Virtually all criminal cases in this country are decided by plea bargain. Ram Subramanian et al., *In the Shadows: A Review of Research on Plea Bargaining*, VERA INST. OF JUSTICE 1 (Sept. 2020). A criminal defendant's plea agreement lists those facts and elements to which a defendant (through counsel) has agreed. When subsequent immigration court review is limited to the plea agreement and *Shepard* records, criminal defense attorneys can "anticipate potential immigration consequences of guilty pleas" and negotiate for "safe harbor guilty pleas [that] do not expose the [noncitizen defendant] to the risk of immigration sanctions." *Mellouli*, 575 U.S. at 806 (internal citation omitted).

#### 1. Expanding Review to Unreliable, Non-*Shepard* Records Ignores the Settled Expectations of the Plea Bargain Process.

The plea process is a negotiation through which the defense attorney and prosecutor agree to an outcome in the case. If documents beyond those that reflect the parties' actual agreement—such as those permitted by the broad language of INA § 240(c)(3)(B)—can be relied upon to

determine what a defendant plead to, there is little point in a defense attorney's negotiation of the plea language. A noncitizen might be found removable on the basis of facts in unreliable records, despite the defense attorney's negotiation of plea agreement language to the contrary.

Take, for example, a situation in which INA § 240(c)(3)(B) were read to permit an immigration court to rely on a pre-sentence investigation report as part of the modified categorical inquiry. As explained by numerous public defenders across the country, PSIs are often unreviewed by the parties; there is no purpose or mechanism for defense attorneys to negotiate the facts contained within or to correct inaccuracies because they are produced and introduced after the negotiated plea has been entered. *See* Volpe Decl., Exh. C, ¶ 6(a). *See also* Pollock Decl., Exh. A, ¶ 3(b), 5(a); Jorjani Decl., Exh. B, ¶12-13; Seibert Decl., Exh. D, ¶ 11, 18. A noncitizen defendant might be deemed removable on the basis of a fact raised in a PSI that neither party agreed to (and may have specifically left unaddressed) during plea negotiations, rendering the carefully negotiated language of the plea effectively meaningless.

In some jurisdictions, like Colorado, this unfairness is compounded by rules—widely used by defense lawyers—that allow a defendant to "waive establishment of a factual basis in any case that is resolved through a plea agreement." Swift Decl., Exh. F, ¶ 5. If immigration judges were permitted to rely on the full panoply of documents enumerated in INA § 240(c)(3)(B), even where a defendant has waived the factual basis, then the defendant could be ordered removed based on facts to which he never even had the opportunity to assent. *Id.* at ¶ 5.

**2. Without the Strict Limits of *Shepard*, Criminal Defense Lawyers Would Be Required to Review Virtually Every Document from a Criminal Case to Satisfy Their *Padilla* Obligations.**

Unless immigration court review is restricted to the *Shepard* documents, criminal defense attorneys will not know which records they should focus on to accurately reflect the terms of the plea and the precise elements to which a defendant agreed.

Criminal courts generate numerous documents during the pendency of a criminal proceeding, each of which may raise various facts, including those to which a defendant did not agree and that are irrelevant to the ultimate plea. *See*, *e.g.*, Pollock Decl., Exh. A, ¶ 3; Jorjani Decl., Exh. B, ¶ 12, 15; Volpe Decl., Exh. C, ¶ 6-7; Seibert Decl., Exh. D, ¶ 9-19; Wayne Decl., Exh. E, ¶ 3(a)-(c); O'Brien Decl., Exh. G, ¶ 2, 3. Requiring criminal defense attorneys to review and address virtually every record created during the criminal process, some of which may be generated after a conviction during sentencing—as would happen if INA § 240(c)(3)(B) applied during the categorical approach—is unrealistic, particularly given the high caseloads that characterize the criminal process. As a public defender in Colorado explained, "[i]f I were to have to review a myriad of other documents that could someday be considered in immigration court in order to provide an accurate advisement, I would be unable to perform my obligations as a public defender immigration liaison while also carrying my own caseload of felony trial cases." Swift Decl., Exh. F, ¶ 4. *See also* Pollock Decl., Exh. A, ¶ 5 ("It would be nearly impossible for me to satisfy my obligations under *Padilla* if I had to track and attempt to contest every non-*Shepard* document in a case.").

The Board should continue to adhere to Supreme Court, Third Circuit, and Board precedent, which limits review during the modified categorical rule to the *Shepard* documents, and allows criminal defense lawyers to meet their constitutional obligations under *Padilla*.

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## CONCLUSION

The Board should continue to apply binding precedent limiting inquiry during the modified categorical approach to the *Shepard* documents. The Board should continue to hold that INA § 240(c)(3)(B) applies to an immigration judge's determination of whether a conviction exists, and not to the modified categorical inquiry.

Dated: November 30, 2021

Respectfully submitted,

Jayashri Srikantiah
Immigrants' Rights Clinic
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Amici Curiae

## Index of Exhibits

| Exhibit | Document |
|---|---|
| A. | Declaration of Jordan Pollock, Immigration Attorney, Dallas County Public Defender's Office (Nov. 16, 2021). |
| B. | Declaration of Raha Jorjani, Managing Attorney, Immigration Representation Unit, Alameda County Public Defender's Office (Nov. 18, 2021). |
| C. | Declaration of Susannah Volpe, Immigration Specialist, New Jersey Office of the Public Defender (Nov. 18, 2021). |
| D. | Declaration of Dawn Seibert, Attorney, Vermont Office of the Defender General (Nov. 19, 2021). |
| E. | Declaration of Wendy Wayne, Director, Impact Immigration Unit, Massachusetts Committee for Public Counsel Services (Nov. 19, 2021). |
| F. | Declaration of Ruth Swift, Senior Deputy Public Defender, Office of the Colorado State Public Defender (Nov. 18, 2021). |
| G. | Declaration of Sarah O'Brien, Supervising Attorney, Orleans Public Defender (Nov. 23, 2021). |
| H. | Copies of unpublished BIA decisions cited in brief. |

# EXHIBIT A

**Declaration of Jordan Pollock**

I, Jordan Pollock, declare as follows:

1. I am an attorney admitted to practice in the State of Texas. I work at the Dallas County Public Defender's Office, where I am the on-staff immigration attorney. In my position, I provide *Padilla* advisals to the nearly 100 criminal defense attorneys in my office, as well as to private attorneys who are appointed on indigent cases in Dallas. I am in my eighth year in this position and, in that time, have advised more than 3,000 non-citizen clients concerning the immigration consequences of the criminal charges against them. I am also an adjust professor at Texas A&M Law School, where I teach a course on the intersection of immigration and criminal law.

2. In Texas, the *Shepard* documents, such as indictments, pleas, judgements, and jury instructions, are governed by statute and subject to certain due-process protections. Moreover, because deficiencies in any of these documents can lead to a post-conviction challenge, there is a strong incentive for all parties to ensure their accuracy. Because of these safeguards, these documents conform to general standards of uniformity and reliability.

3. Unlike the *Shepard* documents discussed above, documents such as pre-sentence investigation reports (PSI), court-docket sheets, and examining-trial transcripts vary greatly between individual officers and courts. These documents do not possess the same safeguards concerning their accuracy. Moreover, there is little if any incentive to correct these ancillary documents when an error is discovered: these documents are typically not part of the appellate record and have no bearing on a final plea agreement or trial verdict.

    a. For example, PSIs in Texas are often rife with inconsistencies and errors. A PSI is a sentencing or probation recommendation made by a non-party and only reviewed after guilt is established. PSIs are written by probation officers, sometimes in conjunction with a social worker if the county has a social worker on staff. Probation is not required to submit any factual basis or evidence to support the assertions in their report. Past Texas court rulings have held that almost any type of information can be included, including hearsay, extraneous offenses, prior bad acts, and juvenile records. Moreover, none of the assertions in a PSI are subject to the constitutional protections of due process, confrontation, or evidentiary standards. A defendant in Texas is not even entitled to personally examine the PSI report if their attorney has reviewed it.

    b. Even if defense counsel had the ability to challenge a PSI, there is often little incentive to do so. Because there must be a finding of guilt before the trial judge even considers the PSI, discussion of the charged offense in the PSI is irrelevant in most contexts. While a defense attorney can sometimes submit testimony or evidence to contest a particular assertion in the PSI, the document itself never gets corrected. In fact, even if a trial judge found on the record that the PSI included false statements, that would not be reflected anywhere on the PSI itself. Moreover, in an agreed plea, it may that be none of the parties even reviewed the PSI.

c. Docket sheets are similarly unreliable. They are rarely even seen by the parties, and there is typically no reason to contest an inaccuracy or means to do so. Additionally, docket sheets are usually handwritten, rendering them illegible in many cases.

d. Examining Trials, if requested by the defendant, are a hearing where the State is required to show why they believe they had probable cause for arresting the defendant. They are only available in felony cases and the right to such a hearing terminates upon the filing of the indictment. Because the record is inadmissible for most purposes, the parties often ask a wide range of questions, explore ideas, and investigate charges, none of which will come to bear in the final plea agreement or trial. The sole function of the examining trial is to look at the State's basis for arrest and there is no plea or admission of guilt by the defendant. Most importantly, many defendants do not have the benefit of counsel in these hearings, as the magistrate is not obligated to appoint counsel for this hearing. As such, many of the prosecution's theories are presented without the benefit of a thorough examination by defense counsel.

4. These and other non-*Shepard* documents may not be created by every court or in every case. For example, court dockets sheets not only lack uniformity, but some courts do not use them at all. Similarly, PSIs are not required in all cases and may be waived by the defendant in certain cases. Examining trials only occur if the defendant requests them and are only available in felony cases. This discrepancy in availability of documents could result in disparate outcomes for the same statutory offense.

5. If the Board of Immigration Appeals were to allow the immigration court to look beyond *Shepard* documents to determine the nature of a non-citizen's underlying conviction, it would radically alter the responsibilities of criminal defense attorneys and significantly increase their burden. For example, as a *Padilla* attorney, it is not only my job to advise non-citizen clients, but also, as the Supreme Court instructed in *Padilla*, to negotiate immigration-neutral pleas if possible. Non-*Shepard* documents are documents we cannot negotiate. They are un-litigated and not even part of the court's record in most cases. It would be nearly impossible to satisfy my obligations under *Padilla* if I had to track and attempt to contest every non-*Shepard* document in a case. For example:

   a. As noted above, there is no way to have the PSI document corrected. If PSI became part of the immigration court record, defense counsel may have to discourage clients from seeking them, which in turn would have a chilling effect on probation and might even force clients into jail pleas or to seek punishment by jury in avoidance of a PSI.

   b. Again, as noted above, a court docket sheet is not a court order, cannot be appealed and is often not even seen by the parties.

   c. If immigration courts begin relying upon transcripts of examining trials, this will have a chilling effect on defense counsel's ability to explore various theories of the case and possible defenses.

6. Immigration courts have rightly limited their consideration to documents it can trust are accurate and uniform. Reliance on the non-*Shepard* documents discussed above would

undermine any certainty about the nature of the conviction. These documents, which vary widely from court to court, commonly include factual errors and hearsay. Moreover, defendants often have not had the opportunity to review the documents or contest inaccuracies. Relying on non-*Shepard* documents would lead to disparate outcomes for the same statutory conviction. Further, it would create a significant new burden for defense counsel to scrutinize and attempt to contest errors wherever they may be—from docket sheets to pre-sentencing reports—regardless of their relevance to the proceeding at hand.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 2021 in Dallas, Texas.

Jordan Pollock

Jordan Pollock

# EXHIBIT B

**Declaration of Raha Jorjani**

I, Raha Jorjani, declare as follows:

1. I am an attorney and member in good standing of the California bar. I am licensed to practice before all the courts of California, the Executive Office for Immigration Review, and various federal courts, including the Northern District of California and the Ninth Circuit Court of Appeals.

2. I am the Managing Attorney of the Immigration Representation Unit ("IRU") of the Alameda County Public Defender's Office. My place of business is 312 Clay St., 2nd Floor, Oakland, California, 94607.

3. When I first founded the IRU in 2014, I was the sole attorney in the first county public defender office in California to provide direct representation in removal proceedings to clients facing deportation. Today, I supervise six immigration defense attorneys, a legal assistant, and a rotating cohort of law clerks in representing our clients before United States Citizenship & Immigration Service, the Immigration Courts, the Board of Immigration Appeals, federal district and appellate courts, and the Alameda County Superior Court. I also personally practice before all of these agencies and courts. The focus of my practice, and the IRU's practice as a whole, is in the complex area of the law known as "crimmigration"—the intersection of criminal and immigration law and the study of the immigration consequences of criminal convictions. The IRU currently represent approximately 100 noncitizens in immigration matters, including detained and non-detained noncitizens in removal proceedings. All of those clients have had contact with the criminal legal system and nearly 100 percent have criminal convictions.

4. In addition to directly representing noncitizens in their immigration proceedings, I also have extensive experience advising on and working to minimize the adverse immigration consequences of criminal convictions. I have advised criminal defense attorneys regarding immigration consequences since 2007. In 2009, I began serving as the primary attorney for the Alameda County Public Defender's Office advising Alameda County's public defenders on the immigration consequences of the criminal charges our clients are facing and helping defense attorneys secure immigration-safer alternatives as part of the plea-bargaining process. In 2010, the Supreme Court issued a landmark decision mandating this type of advisal, which is now widely referred to as a "*Padilla*" advisal. Today, in addition to continuing to provide *Padilla* advisals directly to criminal defense attorneys, I train and supervise the other IRU attorneys in providing these consultations. In 2020, the IRU provided approximately 900 *Padilla* advisals to criminal defense attorneys.

5. Since 2007, I have provided office-wide trainings regarding the immigration consequences of criminal convictions to California public defender offices in multiple counties and served as faculty at conferences of the California Public Defenders Association attended by criminal defense attorneys statewide and the First District

Appellate Project attended by appellate attorneys. I've provided additional trainings made available to members of the private bar and conflict panels through the Continuing Education of the Bar (CEB), Alameda County Bar Association, San Francisco Collaborative Courts, and the Alameda County Law Library. Similarly, I have provided trainings on the intersection of immigration and criminal law to state court judges both in and out of California.

6. In addition to my work with the Alameda County Public Defender's Office, I previously served as a Supervising Staff Attorney and Clinical Professor at UC Davis School of Law's Immigration Law Clinic, and as a Staff Attorney at the Florence Immigrant and Refugee Rights Project. In Fall 2014, I taught the first course on the intersection of criminal and immigration law offered at UC Berkeley School of Law. In total, I have over 15 years of experience in immigration law and removal defense.

7. In California, the requirements of *Padilla* are further codified in California Penal Code 1016.3 which not only requires defense counsel to provide "accurate and affirmative advice about the immigration consequences of a proposed disposition" and to "defend against those consequences" but also requires the prosecution to "consider *the avoidance of adverse immigration consequences* in the plea negotiation process…" Cal. Penal Code 1016.3(b). The importance of a narrow record of conviction under *Shepard* to an attorney's ability to advise and defend with respect to immigration consequences cannot be overstated.

8. As *Padilla* counsel, I am responsible for providing competent, consistent, and effective advice to noncitizen defendants in criminal cases. I help craft plea bargains in such a way as to avoid or mitigate immigration consequences as a way of protecting my noncitizen client's interests and in compliance with the Sixth Amendment to the U.S. Constitution. In order to narrowly tailor a plea, I rely on *Shepard* documents to define the exact terms of a plea bargain; documents such as a plea agreement or plea colloquy that the defendant signs or otherwise directly assents to. These documents most reliably communicate the terms of the agreement made with the prosecution in exchange for the defendant foregoing their substantial right to hold the government to their burden of proof. Once the agreed upon terms are clarified in reliable *Shepard* documents, the plea is entered. Allowing immigration judges to consult non-*Shepard* documents in order to determine immigration consequences would make compliance with *Padilla* and the requirements of the Constitution to provide effective assistance of counsel impossible.

9. First, I would be unable to provide my client with a reasonable degree of clarity regarding immigration consequences, which my client would need to make an informed decision about whether or not to go to trial or accept a plea bargain.

10. Second, the only way to protect noncitizen clients from various immigration consequences even after a plea bargain is struck, would be for counsel to scour over *every* document in a criminal case and challenge every witness statement or allegation – regardless of its relevance to the resolution of the case; this is not only impossible for counsel to do in every case, but is not something criminal courts currently allow for or could reasonably take on. For example, criminal defense attorneys I work with regularly

report that they rarely have occasion to correct allegations in a pre-sentence report because such an action was "inconsequential" to their client's criminal case. Moreover, criminal courts are already extremely overburdened and judges do not preside over hearings to litigate factual allegations that are immaterial to agreed upon resolutions. Furthermore, the COVID-19 pandemic has exacerbated already overtaxed courts that are operating under strained conditions.

11. Finally, such a rule would directly undermine the finality of criminal convictions across the State of California. California Penal Code 1473.7 allows noncitizen defendants to collaterally attack and vacate prior (often decades-old) convictions if they can show a prejudicial error that impacted their ability to meaningfully understand the immigration consequences of their plea or their decision to forego a plea and take their case to trial. A rule that invites, if not ensures, uncertainty regarding immigration consequences in the criminal case, undermines the finality of a noncitizen's convictions and leaves such convictions vulnerable to collateral attacks under state statutes.

12. One example of a non-*Shepard* document is a probation report or pre-sentence report. In California, these reports make it into the official record of conviction but are prepared for sentencing and therefore are only available for review *after* a finding of guilt has been rendered. Despite the fact that the statute requires probation reports to be provided to the defense at least 5 days before the sentencing hearing (*see* Cal. Penal Code 1203(b)(2)(E)), they are routinely provided to the defense on the same day as sentencing and at best receive a cursory review. In my practice, I have heard defense attorneys regularly provide that they did not have sufficient time to review the contents of a probation report (particularly in private with their clients) because it was provided to them *at* the sentencing hearing as opposed to in advance of the hearing, and that since the terms of sentence are often worked out as part of plea agreements, the probation report is often of limited significance.

13. On the occasion where the defense attorney is able to review and identify errors in a pre-sentencing report, corrections are made on the record and not necessarily in the document itself. As such, without ordering a full transcript of the sentencing hearing, such an amendment would remain undiscoverable.

14. Another key problem with consideration of pre-sentencing reports in California is that both the defense and the prosecution are permitted to attach letters to the report. One defender I work with recalled a letter attached by the district attorney to a pre-sentencing report that contained highly prejudicial allegations unrelated to the facts of the underlying criminal case and sources of hearsay *not produced in discovery* during the proceedings. This included allegations that were not subjected to cross-examination nor confrontation. Still, the report was accepted by the criminal court with the attachment in place, over the defense's objections.

15. Court docket entries are another example of a non-*Shepard* document. Court docket entries are created by clerks and are only as accurate as the attention and care given to them by various individual clerks who make the entries. Such docket sheets rarely end up in court files or are provided to criminal defense attorneys or defendants for review. As

such, they may – and often do – contain various errors or omissions and are not reliable records of exactly what took place.

16. The result of a rule that allows immigration judges to review unreliable non-*Shepard* documents from a criminal case will ultimately create the need for defense counsel to litigate *every single* fact alleged in a criminal case, *even where a plea bargain has been struck* to avoid the very need to spend the government and defendant's resources on protracted litigation. Criminal cases would become unduly prolonged and criminal courts would have to create space, resources, and time for parties to litigate facts that despite being irrelevant to the resolution of the criminal case, are nevertheless relevant in assessing potential immigration consequences. Such a rule would be terrible for courts, prosecutors, defendants, probation officers and defense attorneys alike.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2021 in Oakland, California.

Raha Jorjani

# EXHIBIT C

**Declaration of Susannah Volpe**

I, Susannah Volpe, declare as follows:

1. I am an attorney admitted to practice in the States of Texas and New Jersey. I work for the New Jersey Office of the Public Defender (NJOPD) as an Immigration Specialist. The New Jersey Office of the Public Defender is responsible for providing indigent representation to all individuals charged with offenses that are prosecuted in Superior Courts in the state of New Jersey. The New Jersey Office of the Public Defender does not represent clients whose cases are going forward in municipal court, nor does NJOPD continue representing clients in cases initially prosecuted in Superior Court that are downgraded and remanded to municipal court.

2. I became a full-time employee of the NJOPD in August 2021. However, I have provided *Padilla* advice to NJOPD attorneys as a consultant to the office since approximately March 2019. In my current role, I provide *Padilla* advice to the criminal defense attorneys throughout the state, as well as to private attorneys who are appointed to represent indigent clients that our office cannot represent. Since becoming a full-time employee at NJOPD, I have provided Padilla advice on over 150 cases.

3. In addition to the *Shepard* documents, in New Jersey, there are additional documents produced during the course of a criminal case which purport to provide information on the defendant, on current charges and convictions, and on past criminal history. These documents include, among others: the New Jersey Criminal History Detailed Record (CCH), the Public Safety Assessment (PSA), and the Pre-Sentence Report (PSR), each generated by a different state agency. To my knowledge, the data relied upon to generate these documents is not regularly reviewed for accuracy, nor to ensure it is up to date.

4. The New Jersey Criminal History Detailed Record (CCH):
    a. The CCH purports to contain a record of all arrests and their dispositions but often contains errors and inaccuracies. These errors range from the more innocuous, such as misspellings of names, to the more egregious such as an incorrect outcome for an arrest. In my experience, when charges are not resolved by the Superior Court in which they were first filed, the CCH often states, "disposition unavailable." Without further information, it remains unknown whether the charges were dismissed by the prosecutor, resolved without resulting in a conviction, or resulted in a conviction.
5. The Public Safety Assessment (PSA):
    a. The PSA is created after the initial arrest of an individual and to provide recommendations as to whether someone should be released from custody pre-trial. The PSA is created by the Pretrial Services Unit, which is a branch of the judiciary and not a party to the case. The report uses data obtained from multiple state and federal databases. A defense attorney reports that he has represented clients in cases where all parties to the case agreed that the PSA contained inaccurate information, but the division responsible refused to create a new PSA document with accurate information.

b. Additionally, in cases where an error is detected in the PSA, a judge can determine that no weight will be given to the erroneous fact without requiring correction of the PSA document itself. This document thus retains erroneous information without any recognition of the inaccuracy, apart from the statements of the judge made during the hearing.

6. The Pre-Sentence Report (PSR):

   a. The PSR is created by the probation department in all cases where a person is found guilty, either after trial by jury or upon plea, of an indictable offense. PSRs contain information that is quoted verbatim from police reports or other hearsay documents. PSRs may discuss allegations concerning charges that have been dismissed by the prosecutor as part of a negotiated plea. Finally, the PSR may include statements from the victim of the offense. If there is a negotiated plea, a defense attorney may not object to specific allegations in a PSR, as they should not be considered by the judge in sentencing. For example, in one case, a client was charged with possession of both controlled substances and firearms and plead to only possession of controlled substances. The defense attorney did not challenge all mentions of firearms in the PSR because this offense had been dismissed by the prosecutor as part of plea negotiations, and therefore could not be considered by the judge in sentencing. Nonetheless, the mention of firearm possession remained in the PSR.

   b. Additionally, in New Jersey, the PSR is a confidential document. Written at the top of each PSR is the text: "This report shall remain confidential, and copies thereof shall not be made nor the disclosure of the contents of such report be made to third persons except as may be necessary in subsequent court proceedings involving the sentence imposed or disposition made." Thus, this document is expressly not intended to be relied on for the purposed of defining or clarifying information in other court proceedings, including immigration courts.

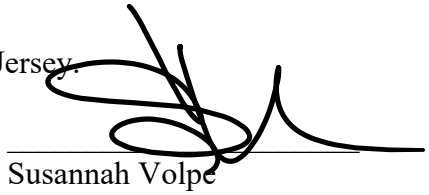
7. While New Jersey has a single system of Superior Courts, the state municipal court system does not have the same uniformity. In New Jersey, disorderly persons, petty disorderly persons, and motor vehicle offenses are prosecuted in municipal courts. These offenses can give rise to statutory grounds of removal. Municipal courts are managed and overseen by individual municipalities and vicinages and each court has its own processes for appointment of attorneys, recording of cases, obtaining documents, as well as local laws and ordinances which can be prosecuted only within the locality. The variance in local procedures makes it difficult to ensure the accuracy of all documents in these proceedings, as the documents produced and relied upon may vary based on the municipality or vicinage. Additionally, because each court has a unique model for providing *Padilla* advice to noncitizen defendants, it would be near impossible to ensure that attorneys were effectively contesting all inaccurate information in all documentation issued during municipal court proceedings to protect a client's interests in removal proceedings.

8. If the Board of Immigration Appeals were to allow the immigration court to look beyond *Shepard* documents to determine the nature of a non-citizen's underlying conviction, it would radically alter the responsibilities of criminal defense attorneys and significantly increase their burden, as well as increasing litigation over the admissibility of documents. In New Jersey due to COVID-19, the Superior courts are only hearing one jury trial at a

time to allow for social distancing and appropriate COVID-19 safety measures in the courthouses. Additional litigation over the admissibility and accuracy of documents would cause extreme delays and be an untenable burden for defense attorneys.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2021, in Newark, New Jersey.



Susannah Volpe

# EXHIBIT D

**OFFICE OF THE DEFENDER GENERAL**
6 Baldwin Street, 4th Floor
Montpelier, VT 05633-3301

Matthew F. Valerio
Defender General

(802) 828-3168 (voice)
(802) 828-3163 (fax)

**Declaration of Dawn Seibert, Esq.**

I, Dawn Seibert, declare as follows:

1. I am an attorney admitted to practice in Georgia, Vermont, the Third Circuit Court of Appeals, and the United States District Court in Vermont.

2. Between 2015 and 2017, I was an Assistant Public Defender for the Georgia Public Defender Council, the statewide public defender system. I did *Padilla* consultations for defense attorneys throughout state and also trained public defenders two or three times a year on their *Padilla* obligations to non-citizen clients. When I served as Assistant Public Defender in Georgia, I provided approximately two hundred *Padilla* consultations. Additionally, I represented individuals charged with criminal offenses at the trial level and on direct appeal of their convictions.

3. Currently I work for the Vermont Office of the Defender General. I also worked at this office from 1999 to 2011. I am in charge of the *Padilla* unit that provides *Padilla* advisals and training statewide. I also represent convicted individuals on direct appeal and in post-conviction relief cases.

4. From 2011 to 2015, I was a staff attorney at the Immigrant Defense Project (IDP). I was responsible for training and consulting with defense attorneys across the country on effective non-citizen representation at all stages of the criminal process. My area of expertise was training and advising defense attorneys nationwide on appellate and post-conviction relief strategies for non-citizens.

5. Since 1999, in my work in Vermont, Georgia and at IDP, I have reviewed court files and court records in thousands of cases stemming from courts across the country.

6. Since 2010, I have advised thousands of defense attorneys and non-citizens about the immigration consequences of their criminal cases and also helped them to negotiate a disposition that mitigated or avoided immigration consequences.

7. Georgia has five different courts of general jurisdiction that hear criminal cases: superior, state, magistrate, municipal, and probate (in counties with no state court). https://georgiacourts.gov/wp-content/uploads/2019/09/Your-Guide-2017_final.pdf

8. In Georgia, the *Shepard* documents, such as indictments, pleas, judgments, and jury instructions, are subject to constitutional challenge if incorrect. Deficiencies in these documents can impact the fact, length and conditions of confinement and so errors could lead to a post-conviction challenge. For those reasons, the parties and the court system have an incentive to ensure that these are accurate. Because of these safeguards, these documents are basically reliable.

9. Unlike the *Shepard* documents, documents such as Pre-Sentence Reports (PSR), court docket sheets, and certain court transcripts, such as of committal hearings, vary greatly between individual courts.

10. Committal hearings are intended to ascertain whether there is probable case to detain an individual but they also serve a discovery function. They occur at the inception of the case, often before the law enforcement investigation has been completed. Hearsay is admissible. Many facts "established" at this state turn out to be unreliable, inaccurate, or plainly untrue. Also, the scope of examination of the investigating officer varies widely based on the defense attorney, the type of case, the court calendar, and other case-specific factors. There is much evidence taken at a committal hearing that ends up being inaccurate and irrelevant to the eventual conviction.

11. PSRs often contain inconsistencies or errors. Sometimes those errors are corrected on the record at a sentencing hearing, but the PSR is not amended. Sometimes the errors go uncorrected, especially if the parties agree on the recommended sentence.

12. Court docket sheets are even more likely to contain inaccuracies and omissions. They are as good, or bad, as a clerk's ability to take notes during a proceeding. They have no effect on the actual plea, judgment, or sentence so the parties pay little attention to them. Due process protections generally do not apply to docket sheets. Even if a party noticed an error and wanted to correct a docket sheet, there might be no way to fix the error.

13. I have represented individual defendants and consulted on criminal cases in municipal courts in several cities in Georgia, as well as provided direct representation in the state, magistrate, and superior courts in various counties. As part of my appellate work, I would review court files and records closely to ascertain whether they were accurate and complete. I have observed that the level of accuracy and completeness of the record-keeping varies dramatically between the various types of court, between different counties, and between separate municipalities.

14. Vermont has a unified court system with one trial level court in each county that hears criminal cases, the Criminal Division of the Superior Court. https://www.vermontjudiciary.org/court-divisions

15. In Vermont, the *Shepard* documents, such as indictments, pleas, judgments, and jury instructions, are governed by statute and case law and are fairly uniform. They are subject to constitutional challenge if incorrect. Deficiencies in these documents can impact the fact, length and conditions of confinement and so errors could lead to a post-conviction challenge. For those reasons, the parties and the court system have an incentive to ensure that these are accurate. Because of these safeguards, these documents are basically reliable.

16. Unlike the *Shepard* documents, documents such as Pre-Sentence Investigation Reports (PSI), court docket sheets, and mittimuses to the Department of Corrections are far less reliable and often contain inaccurate information about the conviction actually obtained.

17. A mittimus is a document prepared by a court clerk at the instruction of the court. It is sent to the Department of Corrections to authorize the Commissioner to effectuate the sentence imposed by the court. I have had clients whose mittimuses listed the incorrect offense of conviction. If the error in the offense listed did not alter the sentence, I would not challenge the error.

18. A pre-sentence investigation report is ordered by the court and prepared by a staff person at the Department of Corrections. PSIs often contain inconsistencies or errors. As part of my representation on direct appeal and post-conviction review, I review the PSI closely and compare it to the record at sentencing and to other parts of the court file. I often spot inaccuracies and errors in the PSI and also direct conflicts between information in the PSI and other parts of the court record. Sometimes the PSI errors are corrected on the record at a sentencing hearing, but the PSI is not amended. Sometimes the errors go uncorrected, especially if the parties agree on the recommended sentence. I have seen the court excise large portions of the PSI at the sentencing hearing because the court deemed the information unreliable, yet the PSI itself would not necessarily be altered.

19. Court docket sheets are even more likely to contain inaccuracies and omissions. They are as good, or bad, as a clerk's ability to take notes during a proceeding. They have no effect on the actual plea, judgment, or sentence so the parties pay little attention to them. Due process protections generally do not apply to docket sheets. Even if a party noticed an error and wanted to correct a docket sheet, there might be no way to fix the error.

20. If the Board of Immigration Appeals were to allow the government to use non-*Shepard* documents to establish the nature of a conviction, it would place an untenable burden on defense counsel. Defense counsel would have to track and contest documents that have

no effect on the plea and sentence. Courts would likely not entertain these efforts to create a perfect record, as it does not further the goals of the state criminal justice system. This would place an impossible burden on defense attorneys and the court systems.

21. It would also result in many instances in a mini-trial in the immigration court, where the non-citizen seeks to rebut the unreliable or inaccurate information in the non-*Shepard* documents and the government seeks to bolster the dubious reliability of those same documents.

22. Immigration courts have rightly limited their consideration to documents that can be trusted to be accurate, complete and uniform. Opening the door to non-*Shepard* court documents will create fundamental unfairness because the government's ability to succeed in removal proceedings will depend on the vagaries of record keeping across the various courts, and it will leave non-citizens vulnerable to inaccuracies in court records that they had no means or motive to fix.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2021 in Montpelier, Vermont.

Dawn Seibert, Esq.

# EXHIBIT E

**Declaration of Wendy Wayne**

I, Wendy Wayne, hereby declare as follows:

1. I am an attorney licensed to practice in the Commonwealth of Massachusetts. I have specialized in the interplay of immigration and criminal law since 2003. I am the founder and director of the Immigration Impact Unit (IIU) of the Committee for Public Counsel Services (CPCS), the statewide public defender agency of Massachusetts. The IIU provides training, support and advice on individual cases regarding the immigration consequences of criminal conduct to approximately 3,000 court-appointed attorneys. We distribute written training and resource materials about this area of law and engage in systemic litigation on immigration enforcement issues. I lecture frequently in Massachusetts and nationally on the intersection of immigration and criminal law. Prior to becoming an immigration expert, I was a trial attorney with CPCS representing individuals charged with serious felonies in Massachusetts state courts.

2. In Massachusetts, documents allowed in immigration proceedings pursuant to *Shepard v. United States*, 544 U.S. 13, 16 (2005), such as the charging document, written plea agreement, and transcript of the plea colloquy, are subject to strict requirements through statutes, court rules and case law designed to ensure accuracy, consistency, and reliability.

3. Unlike the *Shepard* documents mentioned above, many other documents that would be permissible under 8 U.S.C. 1229a(c)(3)(B) do not reliably provide evidence of the specific criminal offense an individual was convicted of under a divisible statute, i.e., a statute containing more than one criminal offense (Massachusetts has many statutes that contain multiple offenses). Some of these types of documents are known to be rife with errors or they do not contain sufficiently specific information about the nature of the conviction.

    a. For example, a document containing Massachusetts criminal court records of an individual, known as a "CORI," would presumably be admissible as proof of a conviction under § 1229a(c)(3)(B)(v). A CORI is a compilation of information provided by the courts to the Massachusetts Department of Criminal Justice Information Services, and includes all Massachusetts criminal court appearances of an individual, along with the charges and dispositions of each criminal case. CORIs are notoriously inaccurate, incomplete and difficult to correct. Inaccurate information on CORIs is so common that websites have been created to help individuals correct mistakes on their CORIs, see e.g., https://www.masslegalhelp.org/cori/mistakes, and a local legal services agency has had a specialized CORI unit for a long time, see https://www.gbls.org/our-work/cori-and-re-entry-project. Moreover, CORIs rarely include information about which specific criminal offense an individual was convicted of under a divisible statute.

    b. Docket sheets in Massachusetts courts, presumably admissible to prove a conviction under § 1229(a)(c)(3)(B)(iii), often contain inaccurate, incomplete and

incomprehensible information about the specific criminal offense an individual was convicted of. In the District Courts of Massachusetts, where misdemeanors and all but the most serious felonies are prosecuted, there is no uniformity regarding how and what is written on the docket sheets. Most docket sheets in the District Courts are handwritten and any detailed information on them is very often illegible. In addition, docket sheets often do not reflect the offense on which an individual was ultimately convicted. For example, a complaint may charge someone with one offense under a divisible statute. During plea negotiations, the individual may agree to plead to a different offense under the same statute. During the plea colloquy, the prosecutor may orally amend the complaint and the judge may orally accept the plea to an offense different than originally listed on the complaint. However, that amended charge may not be written on the docket sheet, so the docket sheet will incorrectly suggest that the individual was convicted of the original charge. Moreover, District Court proceedings are taped, not recorded by stenographers, and the tapes are routinely destroyed after two and a half years, pursuant to District Court Special Rule 211, https://www.mass.gov/special-rules-of-the-district-court/district-court-special-rule-211-recording-of-court-proceedings. Therefore, noncitizens may not be able to establish that the docket sheet inaccurately reflected the actual conviction.

4. If the Board of Immigration Appeals were to allow non-*Shepard* documents to establish the nature of a criminal conviction which renders a noncitizen removable, this would significantly hamper the ability of criminal defense attorneys to fulfill their constitutional duties under *Padilla v. Kentucky*, 559 U.S. 356 (2010) and make my work and that of the IIU virtually impossible.

    a. *Padilla* requires that defense attorneys properly advise their clients regarding the immigration consequences of criminal convictions prior to pleading guilty. Massachusetts common law has affirmed this duty and extended it to require defense attorneys to attempt to negotiate with prosecutors and to advocate at sentencing for dispositions that minimize immigration consequences.

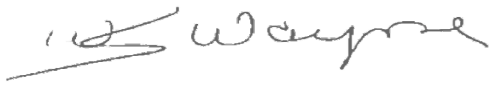
    b. Because of the vast array of documents potentially permissible under § 1229(a)(c)(3)(B)(iii), it would be impossible for me or any attorney in the IIU to properly advise defense attorneys about what immigration consequences may stem from a particular conviction. Some of the documents that immigration judges could consider to determine an underlying conviction may either not include a sufficient level of detail or may contain inaccurate information about the specific charge on which the defendant was convicted. It would be impossible to accurately predict in advance of a plea what information regarding the conviction would be subsequently considered by an immigration judge or to ensure that the documents used to establish the conviction accurately reflected the nature of the conviction.

    c. Moreover, all of the noncitizens represented by CPCS are indigent. Even if it were possible to correct and provide the level of detail required on each type of

document listed in § 1229(a)(c)(3)(B)(iii), this would be virtually impossible without the assistance of an attorney. CPCS would not compensate court-appointed counsel to attempt to correct or add information to these types of records, as this work would be considered not relevant to the disposition of the underlying criminal case and thus beyond the scope of constitutionally required counsel.

5. Allowing immigration judges to consider the types of documents listed in § 1229(a)(c)(3)(B)(iii) would create vastly different immigration consequences for noncitizens convicted of the same offense. It would inevitably result in wrongful deportations when immigration judges relied on inaccurate or incomplete information regarding the nature of the conviction. In addition, it would effectively eviscerate the constitutional right of noncitizens to be accurately advised about immigration consequences stemming from a conviction, as required under *Padilla.*

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 19, 2021 in Wayland, Massachusetts.



Wendy Wayne

# EXHIBIT F

**Declaration of RUTH M. SWIFT**

I, RUTH M. SWIFT, declare as follows:

1. I am an attorney admitted to practice in Colorado. I have represented indigent criminal defendants as an attorney for the Office of the Colorado State Public Defender since 2017. I defend clients primarily in felony cases at the trial level as a Senior Deputy Public Defender assigned to the Grand Junction Regional Office, which serves Mesa County, Colorado.

2. I am also one of the designated immigration liaisons for the Office of the Colorado State Public Defender. In that capacity I have provided advisements on the immigration consequences of pending charges for attorneys across the state. I am routinely responsible for all immigration consequences advisements that arise in the 12st, 9th, and 14th Judicial Districts (covering 7 counties in northwestern Colorado). During 2020, I provided approximately 40 advisements on the immigration consequences of pending charges.

3. As an Immigration Liaison, I advise other attorneys regarding the immigration consequences their clients will face based on potential dispositions of pending criminal cases. These attorneys, many of whom work in other locations, send me specific information about a client's immigration status and history as well as their pending criminal charges and offered plea dispositions.

4. I rely on the longstanding president of limiting review to the *Shepard* documents when I provide these advisements. If I were to have to review a myriad of other documents that could someday be considered in immigration court in order to provide an accurate advisement, I would be unable to perform my obligations as a public defender immigration liaison while also carrying my own caseload of felony trial cases. Examples of non-*Shepard* documents that I would be required to review in Colorado include presentence investigation reports, sentencing transcripts, and minute orders. Because a defendant must be advised of the consequences of conviction *prior* to entry of plea, and the majority of these documents are only prepared *after* a plea is entered, it would be impossible to know whether any advisement I provide will ultimately be accurate.

5. Moreover, under Colorado law, a defendant may waive establishment of a factual basis in any case that is resolved through a plea agreement. Colo. R. Crim. P. 11 ("If the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement, and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads."). In the jurisdiction where I practice, it is common to waive establishment of a factual basis in the vast majority of criminal cases. Because of this, I almost never formally challenge any inaccurate factual allegations contained in a presentence investigation report or even statements made by opposing counsel on the record at the sentencing hearing. I advise my clients that they can rely on the waiver of factual basis and that their record will reflect their conviction for the elements of the offense they pleaded to, but they are not admitting to any specific act they may have been accused of.

6. If the Board of Immigration Appeals (BIA) were to allow Immigration Judges to look beyond the record of conviction to determine the nature of a non-citizen's underlying conviction, a non-citizen defendant would not receive the same benefit that a citizen defendant receives of the waiver of a specific factual basis. This rule would require criminal defense attorneys to take unusual and significantly time-consuming measures to attack every inaccuracy in the record, compared to in the average case of a citizen where the attorney simply waives establishment of a factual basis.

7. Reliance on documents outside of the established *Shepard* record of conviction would make it nearly impossible to accurately advise non-citizen criminal defendants, especially in the role of an immigration liaison advising other attorneys on cases where I have not reviewed and do not have access to the full court file and factual allegations. I can easily imagine a situation where I provide an advisement based on the documents provided to me, and then later an Immigration Judge makes a finding that a presentence investigation report or sentencing transcript or other non-*Shepard* document establishes a conviction for different elements of a divisible statute, rendering my advisement inaccurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2021 in Grand Junction, Colorado.

RUTH M. SWIFT

# EXHIBIT G

## Declaration of Sarah O'Brien

I, SARAH O'BRIEN, declare as follows:

1. I am an attorney admitted to practice in the State of Louisiana. I work at the Orleans Public Defenders [OPD] in New Orleans, where I am a Supervising Attorney. OPD represents 85% of the criminal defendants in Orleans Parish. I am in my sixth year at OPD. I have represented hundreds of people at sentencing in criminal court. I also supervise OPD's Immigration Support Attorney, whose job it is to provide *Padilla* advisals to our immigrant clients. In 2020 my office provided *Padilla* advisals in approximately 40 cases.

2. In New Orleans, every felony arrest generates a "Pretrial Services Assessment" [PSA] that includes a list of the arrestee's supposed prior criminal history, including the offense, sentence, and date of conviction. This document is prepared under the direction of the court by the Court Intervention Services division, and becomes part of the court file if the arrestee is eventually charged with a crime. These PSAs are rife with factual errors. The information on a person's PSA is typically not fact-checked before it is entered into the court record. The PSAs are prepared daily in real time as arrest bookings occur, and they are not litigated or formally corrected even when a judge acknowledges that they contain errors. I have seen numerous PSAs that list the criminal history for a different person; that have incorrect charge and sentence information; and that categorize offenses as felonies when they are actually misdemeanors. The purpose of the PSA is to assist a magistrate commissioner of criminal court in setting the person's bond; they are not intended for use as a formal document of conviction, and that is why criminal defense lawyers and others, including judges, do not formally correct them when they contain factual errors.

3. Every case in Orleans Parish Criminal District Court also generates a "Docket Master," which is an electronic record of the minute entries for the case. Often, the Docket Master will list the entirely wrong statute or charge being prosecuted. This likely means that some record in the court clerk's office misstates the person's charged offense. Criminal defense attorneys, prosecutors, criminal court judges, and court personnel do not bother to correct the court clerk documentation reflected in the Docket Master prior to a plea, because we rely upon the fact that what actually matters for the person's criminal record is what is actually written on their plea form and signed by the defendant and the judge

4. Likewise, the minute entries reflected in the Docket Master are written by the court's minute clerk, and are rarely ever reviewed by the judge or defense counsel. If a minute entry contains an error that does not adversely affect a defendant—including because of an anticipated plea bargain—criminal defense attorneys are unlikely to request that the minute entry be formally edited to reflect the correct information. Again, because the attorneys and judges understand the bill of information or the plea form to be the actually controlling documents in these cases, attorneys and judges do not correct errors in Docket Master.

5. In every criminal court in Louisiana, a person facing a felony charge is entitled, upon request, to a preliminary hearing prior to trial, unless or until the case has been indicted. The purpose of a preliminary hearing is for the court to determine whether the state has probable cause for the continued detention of the defendant. A transcript of the preliminary hearing may be generated upon request, at the court's discretion. The rules of evidence generally do not apply at a preliminary hearing, or are applied at a much lower standard. Hearsay is admissible, and both parties generally try to explore a wide range of allegations, claims, or potential arguments at this hearing. As such, the state is permitted to elicit testimony that may have nothing to do with the ultimate facts to which the defendant ultimately pleads guilty, and the defense attorney often has no reason to demonstrate the unreliability of that hearsay testimony on cross-examination because it will not be admissible at trial.

6. Furthermore, while it is OPD's general policy to request a preliminary hearing in every felony case, many defense lawyers waive their clients' right to a preliminary hearing. There may be strategic reasons for this in some cases, or the defense lawyer may use this time-saving gesture in an attempt to curry favor with the prosecutor or judge in anticipation of a plea negotiation. In my experience that is especially true outside of Orleans Parish. In some parishes, holding a preliminary hearing appears to be the exception rather than the rule. Thus, the existence of a preliminary hearing record is not only unreliable as a source of information about a person's ultimate conviction offense, but also varies widely among the different parishes within Louisiana.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 2021 in New Orleans, Louisiana.

Sarah Davis O'Brien

# EXHIBIT H

2010 Immig. Rptr. LEXIS 4109

Board of Immigration Appeals

Date: AUG 17, 2010

File: A092-847-773 - Eloy, AZ

*BIA & AAU Non-Precedent Decisions*

Reporter

2010 Immig. Rptr. LEXIS 4109 *

# In re: *JUAN MAURICIO BETANCOURT-AGUAYO* a.k.a. *Juan* Aguayo Betancourt

## Core Terms

immigrate, removal proceedings, burden of proof, criminal conviction, further proceedings, proffered evidence, terminate

## Counsel

[*1]

ON BEHALF OF RESPONDENT:

Benjamin T. Wiesinger, Esquire

ON BEHALF OF DHS:

Erica L. Seger

Assistant Chief Counsel

## Opinion

IN REMOVAL PROCEEDINGS

APPEAL

APPLICATION: Reinstatement of proceedings

The Department of Homeland Security ("DHS") has appealed the Immigration Judge's November 19, 2008, decision terminating the respondent's removal proceedings. The respondent did not file a timely response to the DHS's appeal. The record will be remanded to the Immigration Court for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. We review all other issues, including whether the parties have met their relevant burden of proof, and issues of discretion, under a *de novo* standard. *8 C.F.R. §§ 1003.1(d)(3)(i), (ii); see also Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008).*

The Immigration Judge terminated the respondent's removal proceedings, concluding that the documents submitted by the DHS were not properly certified and, therefore, inadequate **[*2]** to satisfy its burden of proving the respondent's removability under *section 237(a)(2)(A)(iii) of the Immigration and Nationality Act* ("Act"), *8 U.S.C. § 1227(a)(2)(A)(iii)* (aggravated felony). On appeal, the DHS has argued, *inter alia,* that the Act, the regulations in *8 C.F.R. § 1003.41(d)*, and the case law from the United States Court of Appeals for the Ninth Circuit [1] do not require that evidence submitted to establish the existence of a conviction be certified. The Immigration Judge in her decision did not address the applicability of these relevant provisions and case law before rejecting the DHS's proffered evidence as inadequate to satisfy its burden of proof. Accordingly, the record will be remanded to the Immigration Court so that it may consider and address in the first instance the DHS's arguments regarding the admissibility of its proffered evidence and whether such evidence **[*3]** is sufficient to establish the existence of a criminal conviction according to prevailing law. If the Immigration Judge determines that the evidence is admissible and adequate to establish the existence of a criminal conviction, the Immigration Judge thereafter should consider whether the DHS has satisfied its burden of establishing that the respondent is removable from the United States as charged on the Notice to Appear. If the respondent is determined to be removable as charged, the Immigration Court should consider the respondent's eligibility for any relief from removal requested by the respondent. Both parties may submit any other relevant arguments and evidence in remanded proceedings. The following order shall be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

Panel Members: Grant, Edward R., Malphrus, Garry D., Mullane, Hugh G.

Return to Text

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[1] Footnote 1. The DHS has cited to the Ninth Circuit decisions in *Sinotes-Cruz v. Gonzales, 468 F.3d 1190 (9th Cir. 2006)* and *United States v. Chavaria-Angel, 323 F.3d 1172 (9th Cir. 2003)* , in support of its argument that certification of documents, while preferable, was not the only method of establishing the existence of a conviction. The DHS has noted that in determining the admissibility of evidence to establish the existence of a conviction, the "normal rule" in the Ninth Circuit is that the "documents may be authenticated under the INS regulation, or by 'any other procedure that comports with the common law rules of evidence.' " Sinotes-Cruz v. Gonzales, supra, at 1195-97 (citation omitted).

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*2014 Immig. Rptr. LEXIS 1538*

Board of Immigration Appeals

Date: JUN 25 2014

File: A047 198 131 -- San Francisco, CA

*BIA & AAU Non-Precedent Decisions*

Reporter

2014 Immig. Rptr. LEXIS 1538 *

# In re: *MANUK MURADKHANYAN* IN REMOVAL PROCEEDINGS APPEAL

## Core Terms

aggravated felony, immigration judge, alien, immigrate, racketeer

## Counsel

[*1]

ON BEHALF OF RESPONDENT:

Houman Varzandeh, Esquire

CHARGE:

## Opinion

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -- Convicted of aggravated felony as defined under sec. 101(a)(43)(G), I&N Act [8 U.S.C. § 1101 (a)(43)(G)]

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -- Convicted of aggravated felony as defined under sec. 101(a)(43)(J), I&N Act [8 U.S.C. § 1101(a)(43)(J)]

APPLICATION: Termination

The respondent, a lawful permanent resident and native and citizen of Armenia, has appealed the Immigration Judge's decision dated January 3, 2014, which found him removable from the United States under section

237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined under section 101(a)(43)(J) of the Act, 8 U.S.C. § 1101(a)(43)(J).' The respondent's appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1 (d)(3)(i). We review all other issues, including whether the parties have met their **[*2]** relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was charged with being removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony as defined under section 101(a)(43)(J) of the Act. Section 101(a)(43)(J) of the Act provides, in pertinent part, that an "aggravated felony" means "an offense described in [18 U.S.C. § 1962]," which encompassed prohibited acts under the Racketeer Influenced and Corrupt Organizations statute, for which a sentence of one year imprisonment or more may be imposed. [1]

The respondent argues that the Department of Homeland Security ("DHS") failed to meet its burden of establishing with clear and convincing evidence that he was removable as an alien convicted of an aggravated felony because the judgment shows that he was convicted of the offense under 18 U.S.C. § 1926(d), a non-existent statute (Respondent's Br. at 6). Indeed, the 2012 judgment of conviction in the **[*3]** record indicates that the respondent pled guilty to "count 1," adjudged guilty of the offense of "racketeering conspiracy" under "18 U.S.C. § 1926(d)," and sentenced to a term of imprisonment of 52 months (Exh. 3: "Judgment in a Criminal Case"). The respondent argues that the immigration judge erred in failing to apply *Descamps* v. *U.S.*, 133 S.Ct. 2276 (2013), when he turned to the indictment to conclude that the respondent was in fact convicted of 18 U.S.C. § 1962(d) and determined that the reference to 18 U.S.C. § 1926(d) in the judgment was merely a typographical error.

We affirm the Immigration Judge's determination that the respondent is removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony as defined in section 101(a)(43)(J) of the Act. *See Matter of Burbano, 20* I&N Dec. 872, 874 (BIA 1994). The Immigration Judge properly consulted the judgment of conviction, the federal code and the indictment for the sole purpose of determining "the existence of a criminal conviction." 8 C.F.R. § 1003.41(d) (delineating a range of documents that may be used as proof of a conviction, including "[a]ny other evidence that reasonably indicates **[*4]** the existence of a criminal conviction ..."). We agree with the Immigration Judge that the totality of the record evidence established that the respondent was convicted and sentenced for violating 18 U.S.C. § 1962(d), and that the reference to 18 U.S.C. § 1926(d), a statute that does not exist, was merely a typographical error -- a transposition of two digits -- that "in no way negate[d] the effect (or existence) of the prior conviction." *See United States* v. *Bonilla-Montenegro*, 331 F.3d 1047, 1049 (9th Cir. 2003). The Immigration Judge's determination is supported by the judgment of conviction [2] itself which explicitly named the

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[1] Footnote 1. The Immigration Judge did not make a determination regarding the respondent's removability as an alien convicted of an aggravated felony as defined under section 101(a)(43)(F) of the Act. In view of this and the ultimate disposition in this case, we need not further address this additional **[*8]** charge of removability.

nature of the respondent's offense as "racketeering conspiracy" and which tracks the language of 18 U.S.C. § 1962(d). [3] *See id.* Count 1 of the associated indictment did not contradict **[*5]** the Immigration Judge's finding, as it consistently identified 18 U.S.C. § 1962(d) as the statute at issue (Exh. 3: "Indictment," at 14).

Having established the existence of the respondent's conviction under 18 U.S.C. § 1962(d), we now apply the analytical framework set forth by the Supreme Court in *Descamps* v. *U.S., supra*, to determine whether the respondent's prior conviction for racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), constitutes an aggravated felony as defined in section 101(a)(43)(J) of the Act. The respondent's statute of conviction under 18 U.S.C. § 1962(d) is narrower than the aggravated felony definition under section 101(a)(43)(J) of the Act, which describes an offense in 18 U.S.C. § 1962, and they are therefore a categorical match (I.J. at 2). *Descamps* v. *U.S., supra*, at 2281. The Immigration Judge properly determined that the respondent was removable from the United States under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony as defined under section 101(a)(43)(J) of the Act.

Finally, the respondent on appeal' opposes the admission into the record of the Additional Charges of Inadmissibility/Deportability **[*6]** (Form 1-261) and his record of conviction because they were filed with the immigration court on November 14, 2013, one day before a copy of the record was mailed to him on November 15, 2013, in contravention of 8 C.F.R. § 1003.32(a). The respondent also points out that the DHS did not comply with the local rules and practice manual in its submission of these documents. The respondent argues that whether or not he was prejudiced by the DHS's violations is irrelevant.

We agree with the Immigration Judge that even assuming arguendo that the regulations were violated, there is no indication that the respondent's interest that was protected by the regulations was prejudiced (I.J. at 3). *See Matter of Hernandez*, 21 I&N Dec. 224, 226 (BIA 1996), and cases cited therein; *Chuyon Yon Hong* v. *Mukasey*, 518 F.3d 1030, 1035 (9th Cir. 2008). The regulations at issue ensure that the parties provide each other with copies of all documents to be presented to the immigration judge. In the instant case, the respondent received and was able to timely examine and respond to the additional charges lodged by the DHS, as well as the additional evidence the DHS submitted. Similarly, the respondent **[*7]** has not established how the DHS's failure to comply with the local rules and practice manual -- which he claimed included, failing to paginate its documents and failing to provide a table of contents, a criminal history chart, and a completed certificate of service -- prejudiced his case or deprived

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[2] Footnote 2. Contrary to the respondent's suggestion on appeal, the Immigration Judge did not rely on a presentence report to establish the fact of the respondent's conviction (Respondent's Br. at 8).

[3] Footnote 3. This section provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *18 U.S.C. § 1962* (2012). Subsections (a), (b) and (c) of *18 U.S.C. § 1962* describes various prohibited racketeering activities.

him of a full and fair hearing. [4] *See generally Gutierrez* v. *Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011). The following order shall be entered.

**ORDER:**

The respondent's appeal is dismissed.

**FOR THE BOARD**

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[4] Footnote 4. The respondent's reliance on *Urooj v. Holder, 734 F.3d 1075 (9th Cir. 2013),* **[*9]** does not persuade us that termination of his removal proceedings, as he has requested, is the proper remedy for the regulatory and rule violations he has alleged. The Ninth Circuit in Urooj v. Holder, supra, found that the agency impermissibly conflated impeachment evidence and substantive evidence. The Ninth Circuit found that the adverse evidence that was offered for "impeachment purposes only," and thus without advance notice to the respondent, cannot be used as substantive evidence that could satisfy the DHS's burden of proof. Urooj v. Holder, supra, at 1078-79. The due process concerns in *Urooj* are not present in the instant case and there is no issue raised that the respondent did not have notice of the documents and the evidence submitted by the DHS.

# *2008 Immig. Rptr. LEXIS 9454*

Board of Immigration Appeals

Date: OCT 16, 2008

File: A091-465-790 - Houston, TX

*BIA & AAU Non-Precedent Decisions*

Reporter

2008 Immig. Rptr. LEXIS 9454 *

## In re: *JOSE ARMANDO RUIZ-ALVAREZ* a.k.a. *Jose Armando Ruiz-Alvarez*

## Core Terms

aggravated felony, ineligible, immigrate, offense of possession, drug possession, recidivist, cocaine, cancel

## Counsel

[*1]

ON BEHALF OF RESPONDENT:

Tony E. Parada, Esquire

ON BEHALF OF DHS:

James Edward Manning

Assistant Chief Counsel

## Opinion

IN REMOVAL PROCEEDINGS

APPEAL

APPLICATION: Termination

ORDER:

PER CURIAM. The respondent, a native and citizen of the Mexico, has appealed from the Immigration Judge's decision dated June 20, 2008. The appeal will be dismissed.

The respondent was admitted to the United States as a lawful permanent resident on November 9, 1990. On August 13, 1979, the respondent was convicted under Texas law for the offense of possession of marijuana. On January 5, 1996, he was convicted of unlawful possession of cocaine in violation of Texas law. On August 20,2007, the respondent was again convicted under Texas law for the offense of possession of cocaine. The respondent does not dispute the existence of the convictions on appeal, or that his 1979 and 2007 convictions were entered after each preceding conviction became final. The respondent only challenges the Immigration Judge's determination that one or both of these convictions is an aggravated felony, and that the respondent is therefore rendered ineligible for cancellation of removal **[*2]** (Brief at 3, 6).

We will affirm the Immigration Judge's determination that the respondent is removable as charged and ineligible for any relief. The respondent's arguments concerning whether his 1979 or 2007 drug possession convictions qualify as aggravated felonies in the absence of proof that recidivist drug offender status was admitted by the respondent or determined by a court or jury are foreclosed by our decision in *Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007)* (no recidivist determination is required for a subsequent drug possession conviction to qualify as an aggravated felony in cases arising in the Fifth Circuit). *See also* *United States v. Sanchez-Villalobos, 412 F.3d 572, 576-77 (5th Cir.2005)* , *cert, denied, 546 U.S. 1137 (2006)* ; *United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir.2008)* (finding nothing in *Lopez v. Gonzales, 549 U.S. 47 (2006)* , to overrule *Sanchez-Villalobos).*

The Immigration Judge correctly determined that the respondent's aggravated felony convictions render him ineligible for cancellation of removal. *See* *section 240A(a)(3) of the Immigration and Nationality Act* **[*3]** , *8 U.S.C. § 1229c(a)(3)*.

Accordingly, the appeal is dismissed.

Panel Members: Adkins-Blanch, Charles K.

FOR THE BOARD



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*2005 Immig. Rptr. LEXIS 9237*

Board of Immigration Appeals

Date: MAR 25, 2005

File: A045-030-578 - York

*BIA & AAU Non-Precedent Decisions*

**Reporter**

2005 Immig. Rptr. LEXIS 9237 *

# In re: *DARIUSZ* STANISLAW *GARNCARZ* a.k.a. Darius Stanley *Garncarz*

## Core Terms

involving moral turpitude, prostitute, cancel, continuous residence, immigrate, alien, theft, theft offense, ineligible

## Counsel

**[*1]**

ON BEHALF OF RESPONDENT:

Douglas A. Grannan, Esquire

## Opinion

**IN REMOVAL PROCEEDINGS**

**APPEAL**

**CHARGE:**

**Notice: Sec. 237(a)(2)(A)(i), I&N Act *[8 U.S.C. § 1227*(a)(2)(A)(i)] -Convicted of crime involving moral turpitude**

**Sec. 237(a)(2)(A)(ii), I&N Act *[8 U.S.C. § 1227*(a)(2)(A)(ii)] -Convicted of two or more crimes involving moral turpitude**

**Sec. 237(a)(2)(C), I&N Act *[8 U.S.C. § 1227*(a)(2)(C)] -Convicted of firearms or destructive device violation**

**Lodged: Sec. 237(a)(2)(A)(ii), I&N Act *[8 U.S.C. § 1227*(a)(2)(A)(ii)] -Convicted of two or more crimes involving moral turpitude**

**APPLICATION: Cancellation of removal**

On September 7, 2004, an Immigration Judge found the respondent removable as charged and statutorily ineligible for cancellation of removal under *section 240A(a) of the Immigration and Nationality Act*, *8 U.S.C. § 1229b(a)*. The respondent has appealed from this decision. The appeal will be sustained in part and dismissed in part. The respondent's request for oral argument is denied. *See* *8 C.F.R. § 1003.1(e)(7)* **[*2]** .

**I. BACKGROUND**

The respondent is a native and citizen of Poland. On January 31, 1996, he entered the United States as an immigrant. Since that time, he has been convicted of a series of crimes. The Immigration Judge found him removable on the basis of these offenses and determined that he could not meet the continuous residence requirement of section 240A(a) of the Act due to his acts. The respondent has appealed from this decision.

On appeal, the respondent has challenged both the Immigration Judge's finding of removability and her finding that he is ineligible for cancellation of removal. Regarding removability, he contends that the Immigration Judge lacked the authority to consider his conviction for prostitution under *18 Pa. Cons. Stat. § 5902* as a basis for removal because the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) withdrew the allegation pertaining to this crime and never reinstated it in compliance with section 239(a)(l)F) of the Act, *8 U.S.C. § 1229(a)(1)(F)*. In addition, he maintains that, even if the Immigration Judge could **[*3]** consider his prostitution offense, the offense is not a crime involving moral turpitude. He therefore contends that the crime does not make him removable under section 237(a)(2)(A)(i) of the Act and that it cannot be considered as one of the crimes necessary to make him removable under section 237(a)(2)(A)(ii) of the Act.

The respondent also claims that his theft conviction in Virginia does not make him removable under section 237(a)(2)(A)(i) of the Act. First, he contends that the DHS has not submitted sufficient proof of this conviction, and he raises procedural challenges to the validity of the conviction itself. In addition, he argues that the DHS has not established that the offense could result in a sentence of a year or longer as required by section 237(a)(2)(A)(i) of the Act. Given these facts, the respondent maintains that the Immigration Judge erred in finding him removable under sections 237(a)(2)(A)(i) and (ii) of the Act.

On the issue of his eligibility for cancellation of removal, the respondent contends that the Immigration Judge erred in concluding that his prostitution and theft offenses cut off his period of continuous residence. He claims that neither offense **[*4]** makes him inadmissible under section 212 of the Act or removable under section 237 of the Act and that they therefore do not end his period of continuous residence for cancellation purposes.

**II. REMOVABILITY**

The respondent's arguments regarding his prostitution offense are incorrect. First, the DHS never withdrew its allegation that the respondent had been convicted of prostitution under Pennsylvania law (Tr. at 14). The DHS *did* withdraw the charge that the respondent was removable under section 237(a)(2)(A)(ii) of the Act, *8 U.S.C. § 1227(a)(2)(A)(ii)*, as an alien who had been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of misconduct, but it then reinstated this charge on July 13, 2004, when it filed a Form 1-261 (Additional Charges of Inadmissibility/Deportability) (Tr. at 27). The Immigration Judge continued the proceedings at that time to allow the respondent to address the new charge and then issued a written decision on September 7,2004. Given these facts, we find no procedural problems with the Immigration Judge's reliance on the respondent's conviction for prostitution to **[*5]** find him removable under section 237(a)(2)(A)(ii) of the Act.

Moreover, we find sufficient evidence in the record to show that the respondent has been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of misconduct. The Immigration Judge is correct that the respondent's conviction for prostitution is a crime involving moral turpitude. *See* *Matter of Lambert, 11 I&N Dec. 340 (BIA 1965).*

Nevertheless, even if this offense is not a crime involving moral turpitude, his convictions for retail theft under *18 Pa. Con. Stat. § 3929* and theft under *Va. Code § 18.2-103* are. Theft offenses involve moral turpitude, and because the respondent has committed more than one crime involving moral turpitude, the fact that each theft offense would qualify as a petty offense if it were his only crime is irrelevant. *See* section 237(a)(2)(A)(ii) of the Act; *see also* *Nugent v. Ashcroft, 367 F.3d 162,165 (3rd Cir. 2004)* ; *Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981)* (stating that "burglary and theft or larceny, whether grand or **[*6]** petty, are crimes involving moral turpitude).

Based on the foregoing, we find that the record contains sufficient evidence to establish that the respondent is removable under section 237(a)(2)(A)(ii) of the Act as an alien convicted of two or more crimes involving moral turpitude not arising out of a single scheme of misconduct. The DHS cited both of the respondent's theft offenses and his conviction for prostitution in the charging documents. And the record contains records of conviction for all of these offenses. The respondent has not presented any information to suggest that the conviction documents do not pertain to him, and his challenges to his Virginia conviction relate to issues of state procedure. The challenges therefore must be presented to the Virginia courts and do not alter the fact that he has been convicted for immigration purposes. We have no authority to look behind the record of conviction to consider this type of argument. *See, e.g.,* *Matter of Mendez-Morales, 21 I&N Dec. 296, 304 (BIA 1996)* (noting thai neither the Immigration Judge nor the Board may go beyond the judicial record to determine the guilt or innocence of an alien, the alien must be **[*7]** considered guilty of the crime for which he was convicted). Given these facts, we find that the record contains clear and convincing evidence to show that the respondent is removable under section 237(a)(2)(A)(ii) of the Act.

On the other hand, the respondent is correct that there is not sufficient evidence in the record to show that he is removable under section 237(a)(2)(A)(i) of the Act. The respondent's conviction for theft under *Va Code § 18.2-103* and his conviction for prostitution under *18 Pa. Con. Stat. § 5902* do not appear to be offenses that could result in a sentence of 1 year or more. *See* *Va. Code §§ 18.2-11* and *18.2-104*; Pa. Con . Stat. §§ 106 and 3929. Accordingly,

these offenses cannot make him removable under section 237(a)(2)(A)(i) of the Act. Moreover, the respondent committed his Pennsylvania theft offense more than 5 years after his admission to this country. Thus, this offense also fails to meet the criteria of section 237(a)(2)(A)(i) of the Act. And the respondent's conviction **[*8]** for resisting arrest is not a crime involving moral turpitude. *See* Pa. Cons. Stat. § 5104 (stating that person commits offense if he or she "with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty… creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance"); *Knapik v. Ashcroft, 384 F.3d 84 (3rd Cir. 2004)* (indicating that court must employ the formal categorical approach in determining whether an offense is a crime involving moral turpitude and therefore must look only to the language of the statute itself unless certain, specific circumstances not evident here justify looking to the record of conviction).

Given these facts, we reverse the Immigration Judge's finding that the respondent is removable under section 237(a)(2)(A)(i) of the Act. The respondent, however, remains removable under the two other grounds charged and therefore must seek relief from removal if he is to be allowed to remain in this country.

## III. CANCELLATION OF REMOVAL

Turning to the issue of whether the respondent is eligible **[*9]** for cancellation of removal, we find that the respondent's crime of theft in Virginia is a crime "referred to in section 212(a)(2)" that made him removable under section 237(a)(2)(A)(ii) of the Act. *See* section 240A(d)(l) of the Act; *cf* *Matter of Deanda-Romo, 23 I&N Dec. 597 (BIA 2003)* (finding that alien who had been convicted of two crimes involving moral turpitude was not statutorily ineligible for cancellation of removal under section 240A(a) of the Act because the first offense qualified as a petty offense and the alien had accrued 7 years' continuous residence by the time he committed the second offense). The offense therefore cut off his period of continuous residence on the date it was committed, October 11,2000. *See* *Matter of Perez, 22 I&N Dec. 689 (BIA 1999).* Because the respondent only became a lawful permanent resident in 1996, he did not accrue 7 years of continuous residence before this date. Accordingly, he cannot meet the continuous residence requirement of section 240A(a) of the Act, and he is statutorily ineligible for cancellation of removal. Given this fact, we uphold the Immigration Judge's decision finding him ineligible for this **[*10]** form of relief, and we dismiss his appeal.

ORDER: The appeal is dismissed,

Panel Members: PAULEY, ROGER



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Amicus Invitation No. 21-30-09

**PROOF OF SERVICE**

I, Erika Madriz, the undersigned, say:

I am over the age of eighteen years and not a party to the above action or proceedings; my business address is: Stanford Law School Immigrants' Rights Clinic, 559 Nathan Abbott Way, Stanford, CA 94305

On the date set forth below, I caused to be served a true and correct copy of the following documents:

- **Request To Appear As Amici Curiae And Brief Of The American Immigration Counsel, American Immigration Lawyers Association, Immigrant Defense Project, And The National Immigration Project Of The National Lawyers Guild As Amici Curiae In Support Of Respondent**

upon the following counsel by First Class U.S. Mail to the following address:

U.S. Dept. of Homeland Security
Office of the Chief Counsel
2350 Freedom Way, Suite 254
York, PA 17402

U.S. Dept. of Homeland Security
Office of the Chief Counsel
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Rosina Stambaugh
The Law Office of Rosina C. Stambaugh
2930 Carol Road, Suite A
York, PA 17402

Benjamin R. Winograd
Immigrant & Refugee Appellate Center, LLC
3602 Forest Drive
Alexandria, VA 22302

Executed on November 30, 2021 at Stanford, California. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Erika Madriz