No. 081494

In The

Supreme Court of the United States

JOEL ARGUELLES-OLIVARES,

Petitioner,

v.

ERIC HOLDER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

SIMON AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The definition of an aggravated felony appears in the Immigration and Nationality Act (INA), section 101(a)(43). If an alien, including a legal permanent resident, has been convicted of a crime determined to be an aggravated felony under the INA, the alien must be detained and deported. Deported aliens cannot return to the United States, adjust their status to legal permanent resident, or become U.S. citizens.

This case presents two circuit splits regarding how to determine if a particular conviction renders an alien an aggravated felon:

1. The INA defines an aggravated felony, in part, as a conviction for either (i) fraud or deceit or (ii) an offense described in §7201 of the Internal Revenue Code, namely tax evasion.

   Does the second, more specific, subsection signify that tax evasion is the only tax code violation to constitute an aggravated felony under this subsection of the INA?

2. The categorical approach, derived from this Court's precedents in *Taylor*[1] and *Shepard,*[2] has been adopted by all circuit courts for

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[1] *Taylor* v. *United States*, 495 U.S. 575 (1990).

[2] *Shepard* v. *United States*, 544 U.S. 13 (2005).

QUESTIONS PRESENTED – Continued

ascertaining if an alien has been convicted of an aggravated felony under the INA, without the need for factfinding by the immigration court. The Fifth Circuit has limited the applicability of the categorical approach in certain circumstances, and held that immigration courts are instead required to engage in factfinding.

Does the Fifth Circuit's new rule give a factfinding role to the immigration courts that violates this Court's holdings in Taylor *and* Shepard *and which contravenes Congress's intent?*

Resolution of these two circuit splits is important because of the severe consequences of deportation to aliens and their families, and because commission of a particular crime should have the same immigration consequences in all circuits.

PARTIES TO THE PROCEEDING

The Petitioner here is:

Joel Arguelles-Olivares, also known as Joel Arguelles.

The Respondents here are:

Eric Holder, U.S. Attorney General,

Marc J. Moore, as Field Office Director for Detention and Removal for the Immigration and Customs Enforcement,

Bureau of Immigration and Customs Enforcement, as an Agency of the Government of the United States of America,

Department of Homeland Security, as an Agency of the Government of the United States of America,

Janet Napolitano, Secretary, Department of Homeland Security.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joel Arguelles-Olivares, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 526 F.3d 171 (CA5 2008). This opinion was published on April 22, 2008. On February 5, 2009, it was revised. The revision contained significant changes to Judge Dennis's dissent; however the opinion published on April 22, 2008, continues to be the only version available at the above citation. The revised opinion is located at App. 1 and is referred to throughout this Petition as "Revised Op."

The Board of Immigration Appeals issued an unpublished opinion on October 6, 2005, found at App. 86.

The Immigration Judge issued an oral opinion on September 15, 2004, found at App. 94.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 22, 2008. The Fifth Circuit denied Mr. Arguelles's petition for panel rehearing and for rehearing *en banc* on March 5, 2009.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1227(a)(2)(A)(iii) provides that any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. §1101(a)(43)(M) defines an aggravated felony as an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in 26 U.S.C. §7201, relating to tax evasion, in which the revenue loss to the government exceeds $10,000.

26 U.S.C. §7206(1) provides that one who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony.

PRELIMINARY STATEMENT

Petitioner Joel Arguelles-Olivares (Mr. Arguelles) pled guilty to making or subscribing a false tax return, in violation of 26 U.S.C. §7206(1).

As a consequence, he was charged with being removable under section 237(a)(2)(A)(iii)[3] of the Immigration and Nationality Act (INA), as defined by section 101(a)(43)(M).[4]

INA §101(a)(43)(M) defines an aggravated felony as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion)[5] in which

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[3] 8 U.S.C. §1227(a)(2)(A)(iii).

[4] 8 U.S.C. §1101(a)(43)(M).

[5] 26 U.S.C. §7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

> the revenue loss to the Government exceeds $10,000.[6]

Two circuit splits affect the outcome of this case. The first, the "tax issue," concerns whether a conviction under Internal Revenue Code (IRC) §7206(1), filing a false tax return, can ever be an aggravated felony for deportation purposes. The second, the "fact-finding issue," concerns generally whether Congress intended for the immigration courts to engage in factfinding to determine whether an alien has committed an aggravated felony for deportation purposes, and specifically whether they can go outside the record of conviction for this purpose.

On the tax issue, Mr. Arguelles argues that well accepted rules of statutory construction dictate that a conviction under IRC §7206(1) can never be an aggravated felony under INA §101(a)(43)(M).

First, the specific controls the general. Here, §M(i) is a general provision encompassing all federal and state crimes of fraud or deceit, but §M(ii) singles out violations of IRC §7201 (tax evasion) specifically. The second, more specific, subsection signifies that tax evasion is the only tax code violation to constitute an aggravated felony under this subsection of the INA.

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[6] Because these two subsections are discussed extensively in this Petition, they are referred to as §§M(i) and M(ii), respectively, to spare the Court the cumbersome repetition of their full citations.

Second, the rule against surplusage requires a statute to be interpreted in a way that gives meaning to each word. As any conviction under IRC §7201 will involve fraud or deceit and would thus fall under §M(i), reading INA §M(i) to include other tax crimes renders §M(ii) mere surplusage.

Third, the rule of leniency requires that any lingering ambiguities in a deportation statute be resolved in favor of the alien, due to the serious consequences of deportation.

On the factfinding issue, Mr. Arguelles argues that, if §M(i) is found to include violations of IRC §7206(1), he still cannot be found to have committed an aggravated felony because there was insufficient evidence that he caused a loss exceeding $10,000. The immigration court relied on the pre-sentence investigative report (PSR) to determine the loss amount, in violation of this Court's precedents in *Taylor*[7] and *Shepard*.[8]

The categorical approach, defined in *Taylor* and *Shepard* and applied in the immigration context in all circuits, permits immigration courts to consult only the record of conviction to determine if an alien was convicted of an aggravated felony.

This categorical approach is consistent with the language of INA §237(a)(2)(A)(iii), which finds an

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[7] *Taylor* v. *United States*, 495 U.S. 575 (1990).

[8] *Shepard* v. *United States*, 544 U.S. 13 (2005).

alien deportable only if he has been *convicted* of an aggravated felony, not if he has merely *committed* one. By limiting the immigration court to the conviction record, and thereby preventing it from engaging in factfinding, the categorical approach preserves judicial resources and protects the alien from significant unfairness, for example from finding an alien removable on the ground that he committed a more serious crime than the crime he pled guilty to in a plea bargain.

The PSR is not a record of conviction, and is unreliable for the purpose of determining whether each element of the enumerated generic aggravated felony has been met. PSRs frequently refer to facts neither alleged nor admitted in court, and may contain inaccurate, unproven, and inadmissible facts.

The Fifth Circuit is alone in permitting use of the PSR to determine the loss amount in a §M(i) case. This holding is based on the court's determination that the loss amount, although specified in the statute, is not an element of the aggravated felony but merely a non-elemental collateral factor. The court provides no guidance to the immigration court in how to determine which words in INA §101(a)(43) refer to elements, and which refer to non-elemental factors. Worse, this new rule *requires* the immigration courts to engage in factfinding to determine whether the loss amount has been met.

Because the consequences of the aggravated-felony determination are serious and irreversible,

resolution of these two circuit splits is of national importance, and worthy of this Court's attention.

STATEMENT OF THE CASE

A. Legal Background

1. How immigration courts determine whether an alien has been convicted of an aggravated felony.

At issue in this case is how an immigration court determines whether an alien has been convicted of an aggravated felony, as defined by the Immigration and Nationality Act (INA). This is of vital importance because determination that an alien has been convicted of an aggravated felony opens the door to a cascade of irreversible and serious consequences for the alien, his family, and his extended community.

Most significantly, any alien who is convicted of an aggravated felony, at any time after admission to the United States, is removable.[9,10] Further, an alien in removal proceedings on aggravated-felony grounds is subject to mandatory detention throughout removal proceedings.[11] The aggravated felony conviction bars

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[9] Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, the term "removal" is now used in place of "deportation" to refer to the expulsion of an alien from the United States. Both terms are used interchangeably in this Petition.

[10] 8 U.S.C. §1227(a)(2)(A)(iii).

[11] *Id.* 8 U.S.C. §1226(c)(1)(B).

the alien from virtually all forms of relief from removal, including cancellation of removal,[12] voluntary departure,[13] and even political asylum.[14] Finally, once an alien has been removed for conviction of an aggravated felony, he may never lawfully return to the United States,[15] and he faces a stiff criminal penalty – up to 20 years of incarceration – for returning unlawfully.[16]

As this Court has long recognized, "deportation is a drastic measure and at times the equivalent of banishment or exile."[17] Consequently, much hangs in the balance when the immigration court asks whether a particular conviction constitutes an aggravated felony.

2. The categorical approach in the immigration context.

Where an alien has been convicted of a state or federal crime, the immigration court must determine if the crime of conviction is encompassed by the

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[12] *Id.* 8 U.S.C. §1229b(3).

[13] *Id.* 8 U.S.C. §1229c(b)(1)(C).

[14] *Id.* 8 U.S.C. §1158(b)(2)(A)(ii) and (B)(i).

[15] *Id.* 8 U.S.C. §1182(a)(9)(A)(i) and (ii).

[16] *Id.* 8 U.S.C. §1326(b)(2).

[17] *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948); *see also Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947); *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945).

generic crime identified in INA §101(a)(43).[18] The categorical approach, defined by the Supreme Court in *Taylor*, is used to address this question.[19]

The categorical approach was developed for the purpose of determining if a prior criminal conviction constituted an enumerated generic offense for sentence enhancement, and has been extended to the immigration context by all circuits.[20] In this approach, the court looks to the definition of the crime of conviction, and not to the facts behind the offense.[21] Congress indicated its intent for the sentencing courts to look only to the fact of conviction, and not the underlying facts, by referring to the "conviction" of certain crimes, not their "commission." Additionally, the approach avoids many practical difficulties and potential unfairness to a defendant.[22]

The categorical approach is not absolute. When the statute of conviction prohibits a broader range of conduct than the generic offense, such that a conviction can be obtained for conduct described by the generic offense or for conduct which is not, the Court's

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[18] 8 U.S.C. §1101(a)(43).

[19] *Taylor*, 495 U.S. 575.

[20] *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007).

[21] *Taylor*, 495 U.S. at 600.

[22] *Id.* at 601.

"modified" categorical approach[23] permits the immigration court to go beyond the mere fact of conviction and consult the charging paper and jury instructions in order to determine whether the earlier factfinder was actually required to find all the elements of the generic crime.[24]

In *Shepard*, the Court added that, in a non-trial case, the reviewing court might examine not only the charging document but also the terms of a plea agreement, the transcript of colloquy between judge and defendant, or "some comparable judicial record" of information about the factual basis for the plea.[25]

3. Two circuits split regarding the aggravated-felony determination.

Of relevance to this case is that INA §101(a)(43)(M)[26] defines an aggravated felony as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

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[23] *Conteh* v. *Gonzales*, 461 F.3d 45, 54 (CA1 2006) (observing that some courts refer to this step of the *Taylor* inquiry as a "modified categorical approach").

[24] *Taylor*, 495 U.S. at 602.

[25] *Shepard*, 544 U.S. at 26.

[26] 8 U.S.C. §1101(a)(43)(M).

> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion)[27] in which the revenue loss to the Government exceeds $10,000.

Two circuit splits exist touching this definition.

The first split, which we refer to as the "tax issue," is whether a violation of a *different* section of the tax code, IRC §7206(1) (filing a false tax return),[28] is an aggravated felony under INA §M(i). Three circuits have answered this three different ways:

1. NO: Because Congress specified that §7201 of the tax code is an aggravated felony under §M(ii), it intended for §7201 to be the only tax code violation to constitute an aggravated felony under INA §101(a)(43)(M). (Third Circuit.[29])

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[27] 26 U.S.C. §7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

[28] *Id.* §7206(1) ("Any person who – [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter – shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... , or imprisoned not more than 3 years, or both, together with the costs of prosecution.").

[29] *Lee* v. *Ashcroft*, 368 F.3d 218, 224 (CA3 2004).

2. NO: When the crime of conviction is missing an element of the generic crime, the crime of conviction can never be an aggravated felony because no fact-finder is required to find all the elements of the generic crime. Because there is no element of loss under §7206(1), it cannot be an aggravated felony under §M(i), which requires loss exceeding $10,000. (Ninth Circuit.[30])

3. YES: INA §M(i) includes a violation of §7206(1) by virtue of the fact that conviction under §7206(1) requires proof of fraud. Whether the alien caused a loss exceeding $10,000 is a factual question, not an element of the generic crime. (Fifth Circuit, below.[31])

The second split, which we call the "factfinding issue," arises only if the applicability of INA §M(i) to a conviction under IRC §7206(1) is assumed. This issue is whether and how to apply the Supreme Court's *Taylor-Shepard* categorical approach to determine whether the $10,000 loss requirement has been met.

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[30] *Kawashima* v. *Gonzales*, 530 F.3d 111 (CA9 2008) (*Kawashima II*).

[31] Revised op. at 10-11. *Accord*, *Matter of Babaisakov*, 24 I. & N. Dec. 306, 316 (BIA 2007) ("Our conclusion that the $10,000 loss figure in section 101(a)(43)(M)(i) of the Act was not intended to describe an 'element' of a 'fraud or deceit' crime takes this victim loss aspect of the statute outside the scope of the categorical approach of *Taylor* and *Shepard*.").

Answering this question turns on whether Congress intended for the immigration courts to engage in factfinding beyond an examination of the statutory definition of the crime. Again, there is a circuit split.

1. Five circuits, and Judge Dennis dissenting in the Fifth Circuit's opinion below,[32] have held that each element of the generic crime must be contained in the record of conviction, the immigration court is limited to looking at the record of conviction, and the court may not conduct its own factfinding. (First,[33] Second,[34]

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[32] Revised Op. 29 (J. Dennis, dissent) (arguing that, under *Taylor*, "when a statute of conviction criminalizes both conduct that would constitute a removable offense and conduct that would not, IJs might appropriately consult an indictment or jury instructions to determine the basis of an alien's conviction, but IJs cannot look behind the record of conviction to reach their own determination as to whether the underlying facts constitute a conviction for an aggravated felony.").

[33] *Conteh* v. *Gonzales*, 461 F.3d at 56 (holding that when "the statute on which the prior conviction rests sweeps more broadly [than the generic crime], the government, in accordance with the animating principle of *Taylor*, must demonstrate, by reference only to facts that can be mined from the record of conviction, that the putative predicate offense constitutes a crime designated as an aggravated felony in the INA.").

[34] *Dulal-Whiteway* v. *United States Dep't of Homeland Sec.*, 501 F.3d 116, 131 (CA2 2007) (holding that "the BIA, in determining whether an alien is removable based on a conviction for an offense set forth in the INA, may rely only upon information appearing in the record of conviction.").

Seventh,[35] Ninth,[36] and Eleventh[37] Circuits.)

2. Two circuits and the Board of Immigration Appeals (BIA) have held that where the generic crime specifies an amount of loss suffered by a victim, the immigration court is free to conduct its own factfinding to determine the amount of loss, and may refer to any admissible

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[35] *Eke* v. *Mukasey*, 512 F.3d 372, 379 (CA7 2008) (holding that the court must look "at the 'terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.'" (quoting *Shepard*, 544 U.S. at 26).

[36] *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1073 (CA9 2007) (en banc) ("When the crime of conviction is missing an element of the generic crime altogether, we can never find that 'a jury was actually required to find all the elements of' the generic crime." (citing *Li* v. *Ashcroft*, 389 F.3d 892, 899-901 (CA9 2004) (Kozinski, J., concurring)). *Accord*, *Vizcarra-Ayala* v. *Mukasey*, 514 F.3d 870, 877-78 (CA9 2008).

[37] *Obasohan* v. *United States AG*, 479 F.3d 785, 788 (CA11 2007) (holding that if the statute of conviction sweeps more broadly than the generic office, "the IJ must look to 'the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted.'" (quoting *Matter of Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999)).

evidence. (Third Circuit,[38] Fifth Circuit,[39] and BIA.[40])

If the amount of loss is a factual matter, not an element of the generic crime, testimony, documents, and other evidence can be admitted and considered by the immigration judge. Immigration courts are not bound by the Federal Rules of Evidence, so evidence

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[38] *Nijhawan* v. *AG of the United States*, 523 F.3d 387, 391 (CA3 2007) (holding that "the language of §1101(a)(43)(M)(i) does not require a jury to have determined that there was a loss in excess of $10,000.") cert. granted, in part, by *Nijhawan* v. *Mukasey*, 129 S.Ct. 988 (U.S., Jan. 16, 2009). *Accord, Singh* v. *Ashcroft*, 383 F.3d 144, 142 (CA3 2004) (holding that "a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier 'in which the loss to the victim or victims exceeds $10,000' ... expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.").

[39] Revised Op. 10-11 (holding that "[t]he requirement that the offense was one 'in which the loss to the victim or victims exceeds $10,000' is a factual matter to be determined from the record of conviction, but the amount of loss is not required to be an element of the conviction itself.... When the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself.... We should determine, therefore, whether there was clear and convincing evidence [of the amount of loss] and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative.").

[40] *Babaisakov*, 24 I. & N. Dec. at 316 (holding that "the $10,000 loss figure in section 101(a)(43)(M)(i) of the Act was not intended to describe an 'element' of a 'fraud or deceit' crime [which] takes this victim loss aspect of the statute outside the scope of the categorical approach of *Taylor* and *Shepard*.").

is admissible if it is "probative" and "its use is fundamentally fair so as not to deprive the alien of due process of law."[41] Evidence typically excluded from criminal trials, such as hearsay or privileged communications, may thus be admitted and considered.[42]

4. Factfinding in the immigration courts.

Should this Court find that Congress intended for the immigration courts to conduct such factfinding to determine if non-element factors of the generic crime have been met, one further question remains: does a pre-sentence investigative report (PSR) provide sufficient proof for the purpose of declaring an alien an aggravated felon?

Again, there is a circuit split. This time, the Fifth Circuit stands alone in holding that a PSR is admissible for the aggravated-felony determination.[43]

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[41] *Bustos-Torres* v. *INS*, 898 F.2d 1053, 1055 (CA5 1990) (citing *Calderon-Ontiveros* v. *INS*, 809 F.2d 1050 (CA5 1986); *Baliza* v. *INS*, 709 F.2d 1231 (CA9 1983); *Tashnizi* v. *INS*, 585 F.2d 781 (CA5 1978); *Trias-Hernandez* v. *INS*, 528 F.2d 366 (CA9 1975)).

[42] *See, e.g., Bustos-Torres* v. *INS*, 898 F.2d 1053, 1055 (CA5 1990).

[43] Revised Op. 13-14 (holding that a PSR can be admitted if there is "clear and convincing evidence that the PSR accurately reflects the amount of loss.").

The First,[44] Second,[45] Ninth,[46] and Eleventh[47] Circuits have all held to the contrary. The Seventh Circuit has come to a similar conclusion, without ruling specifically on the admissibility of a PSR,[48] and

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[44] *Conteh* v. *Gonzales*, 461 F.3d at 58 ("[T]he BIA's consultation of the PSI Report as proof of the specific facts underlying the petitioner's prior conviction was improper.").

[45] *Dulal-Whiteway*, 501 F.3d at 128-29 ("The government maintains that it was proper for the IJ to rely upon ... the PSR ... as part of that record in order to establish the loss amount associated with Dulal's fraud and thus his removability. We disagree. In applying the modified categorical approach, we have looked to ... the 'record of conviction.' "); *Dickson* v. *Ashcroft*, 346 F.3d 44, 55 (CA2 2003) (holding that although it is possible that a PSR might be used if it identified the branch of a statute which the alien was convicted under, immigration courts may not rely on factual narratives in a PSR to determine the crime for which an alien has been convicted).

[46] *Lara-Chacon* v. *Ashcroft*, 345 F.3d 1148, 1153 (CA9 2007) ("[A] PSR alone does not 'unequivocally establish' the elements of a conviction where the statute of conviction is not a categorical match."); *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1212 (CA9 2002) (*en banc*) (PSR "reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition."); *Abreu-Reyes* v. *INS*, 350 F.3d 966, 997 (CA9 2002) ("The immigration judge was not authorized to use the pre-sentence report in determining whether petitioner was an aggravated felon for purposes of removal.").

[47] *Obasohan*, 479 F.3d at 789-91 (holding that an immigration court was not entitled to rely on loss amounts that were alleged only in a PSR).

[48] *Lara-Ruiz* v. *INS*, 241 F.3d 934, 941 (CA7 2003) ("[S]entencing courts can look to the charging document, and if that yields no clear answer, they can look beyond such

(Continued on following page)

the Third Circuit, in two unpublished cases, expressed unease at the prospect of admitting a PSR for these purposes. In one case, the Third Circuit avoided addressing the question at all, as it found that "the judgment of conviction, even without the PSR, sufficiently establishes that petitioner's offense involved a loss in excess of $10,000 and was an aggravated felony."[49] In the other case, the court raised significant concerns about the value of the contents of a PSR and cited, with approval, several circuit court decisions limiting the documents which can be consulted for sentencing purposes to charging documents, jury instructions, plea agreements, and plea hearing transcripts.[50]

The weight of the opinion is clear: PSRs are improper to use to determine whether an alien was convicted of an aggravated felony.

B. Facts

The Petitioner, Mr. Joel Arguelles-Olivares, was born in Mexico. He is 52 years old. On April 6, 1977,

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documents (for example, to the criminal complaint), provided that doing so would not require evidentiary hearings into contested issues of fact.").

[49] *Karavolos* v. *Ashcroft*, 95 Fed. Appx. 397, 398 (CA3 2004) (unpublished).

[50] *Woldiger* v. *Ashcroft*, 77 Fed. Appx. 586, 590-94 (CA3 2003) (unpublished).

at age 20, he was admitted to the United States as a Legal Permanent Resident.

Mr. Agruelles has lived in Texas since his arrival. His mother, two sisters, and two brothers – all naturalized U.S. citizens – also live in Texas. His eldest daughter, Ana, graduated from Baylor University with a degree in journalism, and currently works in Dallas for a yearbook publishing company. His two younger girls, [Name Of Minor Child Omitted] (age 11) and [Name Of Minor Child Omitted] (age 8), are in elementary school. All three children, and his wife Pearl, are natural-born U.S. citizens.

Mr. Arguelles has, in many ways, achieved the American Dream. After his arrival in the U.S., he built a very successful masonry contracting business which employed several managers and sub-contractors. He owned two houses, one on 19 acres with a landing strip and a hangar for his private plane. He employed many U.S. citizens and legal permanent residents, and contributed to the local economy and his community.

In April 2003, he was indicted for making or subscribing a false tax return, in violation of 26 U.S.C. §7206(1). On May 1, 2003, Mr. Arguelles pled guilty to that charge, in accordance with a written plea agreement; this plea agreement and the factual basis of his plea are not in the administrative record. Mr. Arguelles was sentenced to 21 months of custody, at the bottom end of the 21 to 27 month range in the

sentencing guidelines. All fines and costs were waived.

Removal proceedings commenced while he was in custody, and upon his release from custody, in 2005, Mr. Arguelles was removed to Mexico. He remains there, separated from his wife and children, pending the outcome of the appeals process.

C. Procedural History

1. Removal Proceedings.

Mr. Arguelles was served with a Notice to Appear (NTA) on June 24, 2004, while he was in custody. This NTA alleged, *inter alia*, that Mr. Arguelles was convicted under 26 U.S.C. §7206(1), which he admitted, and to having caused a loss to the government exceeding $10,000, which he denied. The NTA charged Mr. Arguelles with being removable under INA §237(a)(2)(A)(iii),[51] for having been convicted of an aggravated felony as defined in INA §101(a)(43)(M). Mr. Arguelles denied the charge at a removal hearing on August 11, 2004.

At this hearing, the government introduced Mr. Arguelles's criminal information and the judgment of conviction, to which his counsel did not object. The information charged Mr. Arguelles with willfully making and subscribing a tax return for calendar year 1999 which he did not believe to be true. It

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[51] 8 U.S.C. §1227(a)(2)(A)(iii).

further stated that his reported taxable income was "substantially in excess" of the income stated on this return, and that "a substantial additional tax was due." Neither the information nor the judgment contained any information regarding the dollar value of loss sustained, if any, by the victim (the U.S. Treasury).

The government also introduced the pre-sentence investigation report (PSR), to which his counsel did object, on the grounds that (a) only a conviction record can be used to determine if a conviction constitutes an aggravated felony, and (b) a PSR is a confidential report to be used for the sole purpose of sentencing in a criminal proceeding. The PSR was admitted over objection, for the immigration court to use to determine the nature of the offense. Mr. Arguelles re-raised his objection on confidentiality grounds at the later September 1, 2004, hearing, and his objection was again denied.

The PSR contained the following relevant information:

- The defendant pled guilty in accordance with a written plea agreement, "wherein the Government and the defendant agree that the tax loss for sentencing purposes will include the loss from the tax years 1992 through 2000 for a total tax loss of $248,335."
- The defendant's additional tax due/ owing "as determined by the IRS" for the year 1999 is $75,982.

- "The IRS determined that the defendant owes $248,335 in unpaid taxes."

At a hearing on September 15, 2004, Mr. Arguelles urged that a conviction under IRC §7206(1) does not fall under INA §M(i) because the only tax offense which falls under INA §101(a)(43)(M) is that defined in §M(ii), namely a violation of IRC §7201. Mr. Arguelles cited to the Third Circuit's decision in *Lee* v. *Ashcroft*.[52]

The immigration judge (IJ) issued an oral opinion on September 15, 2004.[53]

The Tax Issue The IJ ruled that a violation of IRC §7206(1) falls under INA §M(i), because the element of fraud is common to both statutes, and because he can envision conduct which constitutes tax evasion but which does not involve fraud or deceit.[54]

The Factfinding Issue The IJ held that it was proper to admit the PSR as it was "a prior report" and "relevant to the factual allegation" that Mr. Arguelles caused a loss exceeding $10,000.[55] The IJ made no mention of the categorical approach, *Taylor*, or *Shepard* in his opinion.

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[52] *Lee* v. *Ashcroft*, 368 F.3d at 220.

[53] IJ Op.

[54] *Id.* at 3-4.

[55] *Id.* at 2.

2. Appeal to the Board of Immigration Appeals.

A timely appeal to the Board of Immigration Appeals (BIA) was filed, challenging the IJ's decision on both issues. A non-precedential, single-author opinion was issued on October 6, 2005.[56]

The Tax Issue Regarding the issue of whether a conviction under section §7206(1) of Internal Revenue Code can constitute an aggravated felony under INA §101(a)(43)(M), the BIA held that it was not bound to follow the precedent established by the Third Circuit in *Lee* v. *Ashcroft*,[57] as that circuit's rulings are not binding on this case, which arose out of the Fifth Circuit.[58]

Additionally, the BIA analyzed the language of §M(i) alone. Noting that a statutory interpretation "begins with the terms of the statute itself," and that the "plain meaning of the words ordinarily controls," the BIA found that Congress did not exempt tax-related crimes from the aggravated felony definition in that section.[59]

The BIA did not address, or even mention, the analysis of the Third Circuit in *Lee*. Instead, it explained that the dissent in *Lee*, penned by then-Judge

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[56] BIA Dec.

[57] *Lee* v. *Ashcroft*, 368 F.3d 218.

[58] BIA Dec. at 1.

[59] *Id.* at 1-2.

Alito, was persuasive.[60] Judge Alito had argued that the drafters of the definition had included a violation of IRC §7201 in INA §M(ii) "simply to make certain – even at the risk of redundancy – that tax evasion qualifies as an aggravated felony."[61]

The Factfinding Issue The BIA next addressed whether the IJ's consultation of the PSR to determine whether the required loss had occurred.[62] The BIA provided three reasons why it was not an error for the IJ to rely on the PSR.

First, the PSR stated that the information it contained reflected information which was in the plea agreement (which was not in the administrative record).[63]

Second, the BIA stated that "the loss is not an element of the underlying criminal statute," but instead is "a collateral issue."[64] The BIA explained that, because the amount of loss is not a specific element in typical fraud statutes:

> [I]ts inclusion in the aggravated felony definition signals that proof, aside from that pertaining to elements of criminal offenses, should be allowed in removal proceedings.

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[60] *Id.* at 2.

[61] *Lee* v. *Ashcroft*, 368 F.3d at 226 (J. Alito, dissenting).

[62] BIA Dec. at 1.

[63] BIA Dec. at 2-3.

[64] *Id.* at 3.

> In making findings regarding collateral matters, the Immigration Judge was entitled to examine any reliable, credible evidence in reaching his conclusion regarding whether the respondent was removable as charged. An Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the case made by the alien or any other person during any investigation or examination. Such evidence may be admitted as long as it is probative and its use is fundamentally fair so as not to violate due process standards.[65]

The BIA concluded that use of the PSR was not "fundamentally unfair" given Mr. Arguelles's failure to object to its contents during his criminal proceedings, and the appeal was dismissed.[66]

3. Appeal to the Fifth Circuit.

A timely petition for review of the BIA's decision was filed with the Fifth Circuit. The court's decision was issued on April 22, 2008. The majority, Judges Owen and Garwood, upheld the BIA's rulings on both issues; Judge Dennis dissented strongly on both.

The Tax Issue At the time, the Fifth Circuit faced a circuit split between the Third and Ninth Circuits regarding which tax offenses may be

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[65] *Id.* at 3-4 (internal citations omitted).

[66] BIA Dec. at 1.

aggravated felonies. The Third Circuit held that IRC §7201 was the only tax offense which fell under INA §101(a)(43)(M), and the Ninth Circuit held that a conviction under §7206(1) could constitute an aggravated felony under §(M)(i).[67] The Fifth Circuit majority sided with then-Judge Alito's dissent in the Third Circuit and the Ninth Circuit's holding in *Kawashima I*.[68]

The majority criticized the Third Circuit's reasoning on a number of grounds. It held that §M(i) "is straightforward and unambiguous," but conceded that the "difficulty in construing (43)(M)(i) is the immediately succeeding subsection" §M(ii). The Fifth Circuit majority, however, felt that Congress "may well have seen" §M(ii) as necessary as "neither fraud nor deceit is a specific element" under §7201.[69]

The Fifth Circuit focused its criticism of *Lee* on its analysis of the role of IRC §§7201 (tax evasion) and 7206(1) (filing a false return) in the tax code scheme,[70] by questioning the Third Circuit's reliance on this Court's decision in *Spies* v. *United States*.[71]

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[67] Op. at 2-3 (citing *Lee* v. *Ashcroft*, 368 F.3d 218 and *Kawashima* v. *Gonzales*, 503 F.3d 1000 (CA9 2007) (*Kawashima I*)).

[68] The Ninth Circuit later withdrew its opinion in *Kawashima I*. This is discussed below.

[69] Op. at 5.

[70] *Id.* at 5-7.

[71] *Spies*, 317 U.S. 492.

Spies characterized tax evasion as the capstone of tax law violations, and the Third Circuit found it consistent with the history and structure of criminal tax offenses for Congress to select tax evasion, the capstone, as the only aggravated tax felony justifying deportation, while sparing lesser tax felons.[72]

The Fifth Circuit criticized the Third Circuit's reasoning by noting that, although the Supreme Court has labeled tax evasion as the capstone crime, it has also noted that filing a false return is "[a] related provision,"[73] interpreting this statement as diluting the capstone argument advanced by the *Lee* Court.[74] It further disagreed that tax evasion and filing a false return differed so significantly that Congress would deport an alien for committing one but not the other, despite Congress's choice to punish tax evasion more severely than it punishes filing a false return.[75]

The majority did not address the Third Circuit's other two points, that the specific governs the general, and that where a deportation statute is ambiguous it should be construed in favor of the alien.

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[72] Op. at 6 (citing *Lee* v. *Ashcroft*, 368 F.3d at 224).

[73] *Id.* at 6 (citing *Boulware* v. *United States*, 128 S.Ct. 1168, 1173 (2008)).

[74] *Id.* at 6-7.

[75] *Id.* at 5 (up to five years of incarceration for tax evasion, up to three years for filing a false return, the same maximum fine for either).

Judge Dennis, in dissent, stated that "the Third Circuit majority's reasoning appears to be well-grounded in familiar statutory interpretation principles."[76] Judge Dennis agreed with the Third Circuit that the juxtaposition of subsections M(i), a general provision encompassing fraud or deceit, and M(ii), a specific provision focused only on federal tax evasion, "suggests, at the very least, an ambiguity."[77] Where a deportation statute is ambiguous, courts are to apply "the longstanding principle of construing any lingering ambiguities ... in favor of the alien."[78]

In an extensive footnote, Judge Dennis explained that he "find[s] puzzling the majority's attempt, unsupported by any authority whatever, to cabin the language used by Justice Jackson in *Spies*...."[79] He argued that "the conceptual difference between evasion and false filing is significant. The former requires knowing intent to cause loss to the Government, whereas the latter requires only knowing intent to file a false return."[80]

Judge Dennis called for a "more encompassing analysis than that offered in the majority opinion

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[76] *Id.* at 21 (J. Dennis, dissenting).

[77] *Id.* at 21.

[78] *Id.* at 21 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001), *INS* v. *Errico*, 385 U.S. 214, 225 (1966)).

[79] *Id.* at 22, n.5.

[80] *Id.* at 22, n.5.

before this Circuit aligns itself with either the Third or Ninth Circuit's position ... which has such serious consequences for aliens and their families."[81]

The Factfinding Issue The majority held that the IJ did not err in relying on the PSR to ascertain whether Mr. Arguelles caused a loss to the government exceeding $10,000.[82]

The majority agreed with Mr. Arguelles that the modified categorical approach restricts the documents that may be consulted to determine whether a conviction was for a generic offense, and thus the focus is, properly on the conviction. However, it held that:

> When the amount of loss to a victim is not an element of the offense, the focus should not be limited to the conviction itself.... When a tribunal subsequently examines, for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain. Our inquiry should be guided by the statute that initiates that inquiry. The Immigration and Nationality Act provides that the government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." The Act further

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[81] *Id.* at 22.

[82] *Id.* at 8, 16.

> specifies, "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." We should determine, therefore, whether there was clear and convincing evidence that Arguelles-Olivares's prior conviction involved an amount of loss greater than $10,000 and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative. These are the standards that apply in determining whether the BIA erred in relying on the PSR to determine the amount of loss.[83]

The majority acknowledged that this new standard is unique to the Fifth Circuit, and conflicts with the Ninth Circuit's standard, in *Li* v. *Ashcroft*,[84] and the Second Circuit's standard, in *Dulal-Whiteway*.[85]

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[83] *Id.* at 11-12.

[84] *Li* v. *Ashcroft*, 389 F.3d 892, 897 (CA9 2004) (holding that "if the record of conviction demonstrates that the jury in Petitioner's case actually found that Petitioner caused, or intended to cause, a loss to the government of more than $10,000, the modified categorical approach will be satisfied," but not otherwise).

[85] *Dulal-Whiteway*, 501 F.3d at 131 (holding that "the BIA, in determining whether an alien is removable based on a conviction for an offense set forth in the INA, may rely only upon information appearing in the record of conviction that would be permissible under the *Taylor-Shepard* approach in the sentencing context.").

Judge Dennis dissented sharply, saying:

> The majority's second decision is particularly unfortunate because it exposes aliens in this Circuit to the potential of unfair practices, inequality of justice, and deportations based on constructive paper trails without juries rather than on records of judicial convictions.[86]

Judge Dennis was concerned with the Fifth Circuit's determination that the *Taylor-Shepard* categorical approach did not apply to this case.[87]

First, he worried about "the unfairness that could result if a factual approach was applied to prior guilty plea convictions,"[88] quoting this Court's opinion in *Taylor* which noted that "if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary."[89] He emphasized that the INA renders removable an alien who has been convicted of an aggravated felony, not one who has committed an aggravated felony.[90]

Second, he was concerned with the consequences of making deportation determinations based on

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[86] Op. at 17 (J. Dennis, dissenting).

[87] *Id.* at 26.

[88] *Id.* at 25.

[89] *Taylor*, 495 U.S. at 601-02.

[90] Op. at 27 (citing *Dulal-Whiteway*, 501 F.3d at 125).

unreliable sources of information, and with the practical difficulties that would arise if immigration courts were permitted to consider the facts behind prior convictions.[91]

PSRs, he explained, frequently refer to facts neither alleged nor admitted in court,[92] and may contain inaccurate, unproven, and inadmissible facts.[93]

By contrast, the record of conviction is "sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty," and if they do not establish those facts, "we must find that the government has not met its burden of proving" that the petitioner was necessarily convicted of an aggravated felony, and the conviction may not be used as a basis for removal.[94]

He concluded that, in this case, the record of conviction was insufficient for concluding that Mr. Arguelles was necessarily convicted of an aggravated felony, and thus subject to removal.[95]

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[91] *Id.* at 24, 26.

[92] *Id.* at 28.

[93] *Id.* at 30 (citing *Dickson* v. *Ashcroft*, 346 F.3d at 54).

[94] Op. at 26 (internal quotations and citations omitted).

[95] *Id.* at 32.

4. Revision of the Fifth Circuit's Opinion.

The Tax Issue The Fifth Circuit revised its opinion on February 5, 2009,[96] after the Ninth Circuit had withdrawn its opinion in *Kawashima I*[97] and replaced it with *Kawashima II* which explicitly held that a conviction under §7206(1) can never be an aggravated felony within the meaning of §M(i) because "Subsection M(i)'s monetary loss requirement [is] an 'element' of the generic offense, [and] the record of petitioner's conviction must demonstrate that the jury actually found or the petitioner (as defendant) necessarily admitted."[98]

Despite this change in the law, the majority opinion continued to align itself with *Kawashima I*, and in fact made no mention that it had been withdrawn.[99] Judge Dennis, however, began his dissent by noting that this change "leaves this Circuit now standing alone in holding that filing a false tax return can be an aggravated felony for purposes of removal."[100] He further chastised the majority's analysis, saying:

> The lack of detailed analysis in the majority's opinion on this matter is now thus all the

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[96] Revised Op. at 1.

[97] *Kawashima I*, 503 F.3d 997, withdrawn 2008 U.S. App. LEXIS 14691, ___ F.3d ___ (CA9 July 1, 2008).

[98] *Kawashima II*, 530 F.3d 1111.

[99] Revised Op. at 3.

[100] *Id.* at 17-18 (J. Dennis, dissenting).

> more troubling. The majority gives no weight whatever to the INA's designation of tax evasion as the sole tax offense explicitly named as an "aggravated felony"; the majority does not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statutes in favor of aliens.[101]

Judge Dennis moved his commentary on the majority's dismissal of the significance of *Spies* from a footnote into the main body of his dissent, and expanded on his assertion that "the conceptual difference between evasion and false filing is significant," saying:

> [T]he gravity of tax evasion as compared to the relatively less serious offense of filing a false tax return is reflected in judicial understandings of the goals of §§7206(1) and 7201-§7206(1) is in essence a perjury statute, while §7201 addresses tax evasion. The crimes have different elements and different levels of blameworthiness.... Congress chose to criminally punish tax evasion more severely than filing a false return; and it is reasonable to infer that Congress intended that the stigma of removal attach to tax evasion but not to false return filing.[102]

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[101] *Id.* at 18.

[102] *Id.* at 23-24.

Again he urged the court to conduct "a more encompassing analysis ... [i]n light of the weighty matters of statutory history, construction, and interpretation involved."[103]

The Factfinding Issue Regarding the use of the PSR, the only change to the opinion was the addition of a footnote in Judge Dennis's dissent quoting a dissent, from Judge Stapleton, in the Third Circuit's recent decision in *Nijhawan* v. *Attorney General*, a case currently before this Court. Judge Stapleton noted that "This Court has never before found an alien deportable for conduct the alien was neither convicted of nor pled guilty to; the Court's approach, therefore, will significantly expand the reach of the INA's 'aggravated felony' provisions...."[104]

5. Further Proceedings before the Fifth Circuit.

Mr. Arguelles petitioned for a panel rehearing, arguing that the Fifth Circuit panel misapprehended two facts critical to its affirmance of the removal order. This petition was denied without comment on March 5, 2009.

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[103] *Id.* at 25.

[104] *Id.* at 32-33, n.11 (quoting *Nijhawan*, 523 F.3d at 403 (Stapleton, J., dissenting) *cert. granted in part*, *Nijhawan* v. *Mukasey*, 129 S.Ct. 988, 2009 WL 10430, 2009 U.S. LEXIS 586 (U.S. Jan. 16, 2009) (No. 08-495)).

Mr. Arguelles also petitioned for a rehearing *en banc*, arguing that, as the majority acknowledged, both holdings conflict with the decisions of other circuits and that as Judge Dennis noted in dissent, the second holding conflicts with precedent of this Court. His petition was denied without comment on March 5, 2009.

REASONS FOR GRANTING THE PETITION

There are at least three reasons why the Court should grant certiorari in this case, which all boil down to this: the lower courts and the immigration courts are in disarray on the two issues, the Fifth Circuit's holdings are incorrect, and these issues are of considerable national importance.

This case is an excellent vehicle for resolving these splits, as there are no factual questions remaining in the case, no questions of waiver, and no jurisdictional challenges.

1. The circuit courts, and the immigration agency's courts, are deeply divided on two major points of law.

There are two clear circuit splits presented in this case. These splits concern how to determine if an alien has been convicted of an aggravated felony, and thus aliens face significantly different immigration consequences according to which circuit they find themselves in. Statutory changes over the last two decades, and political priorities of the immigration

agency, have made deportation automatic upon conviction of aggravated felonies, with no discretionary relief. As *Nijhawan II* shows, the consequences of a conviction can even differ between the state of conviction and the state of removal proceedings for the same alien.[105]

On the first issue, whether a conviction under IRC §7206(1) can constitute an aggravated felony under INA §M(i), the Third, Fifth, and Ninth Circuits have come up with three mutually exclusive answers based on different lines of reasoning.

On the second issue, whether the immigration courts should be engaging in factfinding to determine if certain aspects of the INA's definition of an aggravated felony have been met, five circuits have held that they should not, while two circuits and the immigration agency have held that they should – in contradiction of this Court's rule in *Taylor* and *Shepard*.

These splits produce confusion for the aliens and the counsel who represent them. The distinctions are not merely academic for the thousands of aliens,

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[105] *See* the Petition for a Writ of Certiorari filed in *Nijhawan* v. *Holder*, 08-495, currently before this Court, explaining that under the law of the Second Circuit, where Nijhawan was convicted, he was *not* convicted of an aggravated felony, but under the law of the Third Circuit, where Nijhawan faced removal proceedings, he *was* found to have been convicted of an aggravated felony. Nijhawan Petition at 3.

many of them lawful permanent residents who risk losing their families and livelihoods by pleading guilty to crimes which, depending on the circuit, may or may not be aggravated felonies.

An alien negotiating a plea agreement, and a prosecutor who believes that the alien is deserving of a second chance in the United States, cannot know what plea arrangement will protect the alien from deportation and a permanent ban from his home in the United States if he can become an aggravated felon merely by crossing state lines into another circuit.

In the case of the second issue specifically, an alien cannot even assure protection from deportation through a perfectly crafted plea bargain (assuming such a thing exists) if the immigration courts are permitted to admit and consider evidence outside the record of conviction, and base a deportation on facts it has found but to which the alien did not plead guilty.

The splits also encourage the immigration service to forum shop, as the government has the ultimate power to transfer aliens in custody between circuits.

Because aggravated-felony determinations arise in the immigration courts so often, prompt resolution of these two circuit splits will have significant consequences across the country.

2. Well accepted rules of statutory construction weigh against the Fifth Circuit's determination that INA §M(i) includes convictions under IRC §7206(1).

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.[106] The very fact that there is a three-way circuit split regarding this issue attests to the fact that it is not.

If the text of a statute is not clear and unambiguous, the rules of statutory interpretation are applied, to assist the court in discerning Congress's intent.

The rule that the specific governs the general applies here, where "(M)(i) has a general application – the gamut of state and federal crimes involving fraud and deceit causing losses over $10,000 [and] Subsection (M)(ii) zeroes in on the crime of federal tax evasion, as described in section 7201."[107]

The Fifth Circuit below rejected the majority's analysis in *Lee* regarding the rule against surplusage.[108] It instead adopted the dissent's argument that Congress might have specified the inclusion of §7201

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[106] *Lee* v. *Ashcroft*, 368 F.3d 218, 222 (CA3 2004) (quotation and citation omitted).

[107] *Id.* at 222.

[108] Revised Op. at 5.

in §M(ii) to ensure that aliens convicted under that statute would not avoid deportation under §M(i).[109]

The majority in *Lee*, however, has the stronger argument. If §M(i) includes violations of §7206(1), then §M(ii) would become surplusage, because it is patently unlikely that a conviction for tax evasion under §7201 would not involve fraud or deceit, and thus fall under §M(i).

Finally, the Fifth Circuit "[did] not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statutes in favor of aliens."[110]

3. The Fifth Circuit erred in holding that the definition of an aggravated felony in INA §M(i) contains a non-element "collateral" factor.

This holding ignores the INA's requirement, in §237(a)(2)(A)(iii), that the alien be "convicted" of the enumerated generic crime, not that he have "committed" the elements making up that crime. This is a critical distinction, not because the word "convicted" must bear so much weight, but because this is the way in which Congress distinguished, from the universe of possible criminal acts, only those

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[109] *Id.* at 5, n.16.

[110] *Id.* at 18 (J. Dennis, dissenting).

aggravated felonies deserving of the banishment of deportation.

Further, the practical consequences of this are immense. Should this Court uphold the Fifth Circuit's finding regarding non-element "collateral" factors, the immigration courts will have virtually no guidance for identifying which words in the definition of an aggravated felony refer to criminal elements and which refer to non-element "collateral" factors. The Fifth Circuit stated simply that it "seems highly unlikely that Congress intended for [§M(i)] to apply only to convictions under statutes that included a monetary loss to a victim in excess of $10,000 as an element of the offense."[111]

4. The Fifth Circuit's new standard requires the immigration courts to engage in factfinding, which is wasteful, and which raises due process and fairness concerns.

The final, and perhaps most important reason, is to protect this Court's important concerns regarding duplicate factfinding by the immigration courts. As this Court explained in *Taylor*:

> [T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary,

[111] *Id.* at 9-10.

the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.[112]

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[112] *Taylor*, 495 U.S. at 601-02.

Also, immigration courts have minimal standards for the admission of evidence, enabling evidence that would be inadmissible at trial to be used to determine an alien's deportability. This raises due process concerns, particularly where the consequences – permanent banishment – are so severe.

Factfinding by the immigration courts will result in a tremendous waste of judicial resources, from the agency to the circuit courts to this Court. Simply reaffirming this Court's holdings in *Taylor* and *Shepard* would preserve the efficiency, and fairness, of the aggravated-felony determination.

For each of these reasons, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can resolve these two circuit splits.

Respectfully submitted,

SIMON AZAR-FARR
Counsel Of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122

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