IN THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11-1095

ABDUL WAHEED,
A 047 699 995,
Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General,
Respondent.

Petition for Review of the Board of Immigration Appeals in file A 047 699 995

BRIEF OF *AMICI CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE AND THE MARYLAND OFFICE OF THE PUBLIC DEFENDER IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amici curiae* submit the following corporate disclosure statements:

North Carolina Advocates for Justice states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

Maryland Office of the Public Defender states that it is a state agency. As a unit of state government, it does not have a parent corporation and it does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

This case does not arise out of a bankruptcy proceeding. *Amici* are unaware of any corporation or other publicly held entity having a direct financial interest in the outcome of the litigation.

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INTEREST OF *AMICI*

The North Carolina Advocates for Justice (NCAJ) is a volunteer professional organization of nearly 4,000 North Carolina lawyers devoted to advocating and protecting the rights of the accused in criminal cases and the injured in civil litigation, and ensuring the integrity of the judicial system. Members of NCAJ regularly represent noncitizen defendants in state criminal proceedings.

The Maryland Office of the Public Defender is a statewide state agency providing representation through all stages of criminal proceedings to indigent defendants, including noncitizens, who cannot afford counsel. With nearly 200,000 cases annually, attorneys protect the constitutional rights of the indigent accused, protect the integrity of the criminal justice system, and advise clients, courts, prosecutors, and other stakeholders in the criminal justice system of the immigration consequences of criminal charges and convictions.

Amici have a strong interest in assuring that the rules governing classification of criminal convictions are fair, predictable, and in accord with longstanding precedent on which immigrants, their lawyers, and the courts have relied for nearly a century.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *amici* submit this brief as *amici curiae* in support of Petitioner Abdul Waheed. *Amici* authored and funded this brief independent of petitioner's counsel or other parties.

PRELIMINARY STATEMENT

Amici offer this brief to supplement Petitioner's arguments regarding the proper approach to determine whether a noncitizen defendant has been convicted of a "crime involving moral turpitude." This brief describes legal and practical complications, particularly in cases resolved by pleas, of the decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008). *Amici* urge this Court to reject the framework announced in *Silva-Trevino* and reaffirm the traditional categorical approach for crimes involving moral turpitude.

The former Attorney General's decision in *Matter of Silva-Trevino* overturned a century of jurisprudence regarding one of the cornerstone principles of immigration law—the categorical approach used to assess the immigration consequences of criminal convictions. The categorical approach requires the reviewing court to examine the elements of the statute of conviction, informed when necessary by reference to a narrow, specified set of documents that are part of the record of conviction, to determine whether

the defendant was convicted of a crime involving moral turpitude. The categorical approach properly bars the reviewing court from considering other sources of information and determining the alleged facts and circumstances in the underlying criminal case. *See Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976) (finding that Congress clearly intended that the agency focus on the "inherent nature of the offense rather than the circumstances surrounding the transgression").

In a dramatic break with precedent, *Silva-Trevino* transforms this settled approach into a retrial of the criminal case, requiring *de novo* findings of fact. It permits immigration judges to go beyond the facts actually established in the criminal proceeding to make their own assessment about whether the defendant committed a crime involving moral turpitude.

If allowed to stand, the ruling in *Silva-Trevino* will significantly disrupt the functioning of state and federal criminal justice systems. It will undermine the ability of criminal defense counsel to comply with their constitutional responsibility—recognized by the Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)—to accurately advise noncitizen defendants about the immigration consequences of a contemplated plea. The resulting uncertainty will make fewer noncitizen defendants willing to negotiate and enter pleas, and many more cases, particularly minor cases,

will proceed to trial, disrupting and burdening already strained criminal justice systems. *Silva-Trevino* also raises serious questions regarding the Sixth Amendment and other constitutional rights of noncitizen defendants in criminal proceedings and the due process rights of immigrants in agency proceedings.

Amici therefore urge this Court to join other courts in reaffirming the categorical approach for crimes involving moral turpitude and to reject the application of *Silva-Trevino* in this Circuit.

ARGUMENT

I. *SILVA-TREVINO* CREATES AN UNWORKABLE STANDARD THAT SUBSTANTIALLY DISRUPTS THE ORDERLY FUNCTIONING OF STATE AND FEDERAL CRIMINAL JUSTICE SYSTEMS.

A. *Silva-Trevino* Interferes with the Ability of Defense Counsel in State and Federal Criminal Courts to Advise Criminal Defendants about the Immigration Consequences of Convictions.

In *Padilla v. Kentucky*, the Supreme Court recognized that defense counsel, as part of the duty to provide effective assistance of counsel under the Sixth Amendment of the United States Constitution, must accurately advise noncitizen clients of the immigration consequences of a criminal conviction. 130 S. Ct. 1473 (2010). In doing so, the Court explained that "preserving the client's rights to remain in the United States may be more

important to the client than any potential jail sentence." *Id.* at 1483. The traditional categorical analysis, reflected in a century of jurisprudence, affords defense counsel a high degree of certainty in providing this advice. Thus, the categorical analysis not only allows counsel to meet their constitutional obligations to their clients but also facilitates the entry of pleas and contributes to the efficient functioning of state and federal criminal justice systems. In cases such as this one, decades of administrative and judicial precedent allow counsel to advise clients as to which offenses constitute a crime involving moral turpitude—a classification increasingly used as a basis for removal of noncitizens from the United States and therefore increasingly a source of concern for noncitizen defendants in deciding whether to terminate the criminal proceedings by plea of guilty.[1]

For example, agency precedent establishes that a conviction for simple assault is generally not considered a conviction for a crime involving moral turpitude. *See Matter of Short*, 20 I. & N. Dec. 36, 39 (BIA 1989); *see also Matter of Fualaau,* 21 I. & N. Dec. 475 (BIA 1996); *Matter of Perez-*

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1. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, INDIVIDUALS CHARGED WITH MORAL TURPITUDE IN IMMIGRATION COURT (2008) (illustrating upward trend from 1996 to 2006 in number of noncitizens charged with crimes involving moral turpitude in immigration courts; a total of 136,896 cases involving charges of crimes involving moral turpitude were handled over that period), http://trac.syr.edu/immigration/reports/moral_turp.html.

Contreras, 20 I. & N. Dec. 615 (BIA 1992); *Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988); *Matter of B*, 5 I. & N. Dec. 538 (BIA 1953); *Matter of E*, 1 I. & N. Dec. 505 (BIA 1943). An offense generally can be characterized as a simple assault if it lacks either an element of specific intent or the infliction of bodily injury. *See e.g., Matter of Sejas*, 24 I. & N. Dec. 236, 238 (BIA 2007) ("The offense of assault and battery against a family or household member in violation of 18.2-57.2 of the Virginia code is not categorically a crime involving moral turpitude" because it does not require the actual infliction of physical injury but merely offensive touching.); *Matter of Fualaau*, 21 I. & N. Dec. 475 (where statute requires only reckless state of mind, Hawaii conviction for third-degree assault is not a crime involving moral turpitude unless the offense requires infliction of serious bodily injury); *Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (holding that Washington conviction for assault in the third-degree is not a crime involving moral turpitude where intentional or reckless conduct was excluded from the statutory definition of the crime); *cf. Matter of Solon*, 24 I. & N. Dec. 239, 239 (BIA 2007) (where the offense "requires both specific intent and physical injury," a New York conviction of assault in the third degree is a crime involving moral turpitude).

Accordingly, under the traditional categorical approach, members of *amici* and other defense counsel have been able to advise noncitizen defendants with a high degree of certainty that simple assault offenses are not considered crimes involving moral turpitude for immigration purposes. A plea to simple assault, members of *amici* have thus advised, will not result in removal.

The new fact-based rule in *Silva-Trevino* undermines defense counsel's ability to assess the immigration consequences of a contemplated plea. Even when a noncitizen defendant is offered a plea to an offense that traditionally has not been considered a crime involving moral turpitude, such as simple assault, defense counsel will be unable to assure the defendant that the plea will preserve the defendant's right to remain in the United States. As in Petitioner's case, the Department of Homeland Security may seek to characterize such a conviction as a crime involving moral turpitude based on alleged infliction of serious bodily injury even if the crime of conviction contained no such element and the criminal court made no such finding. And, as here, an immigration court may be asked to conduct a mini-trial to consider facts that were not proven or admitted in the criminal proceeding.

The inability of defense counsel to provide reliable advice to noncitizen clients will adversely affect the functioning of the criminal courts,

particularly in busy urban areas, which are able to adjudicate cases at a high volume as early as the initial arraignment. Plea advice can be given and decisions made relatively quickly—sometimes in a manner of minutes—in low-level cases, particularly where "pleading out" at arraignment can mean the difference between a defendant remaining in jail for weeks or months awaiting trial or being released immediately under a nonincarceratory sentence, such as probation, community service, a fine, or simply "time served." As discussed in the succeeding section, such early plea resolutions serve both the State and defendants, with minimal costs to the court system. Under the categorical approach, early pleas can occur because counsel is in a position to give clients reliable advice about the immigration consequences of everyday low-level offenses. Under the *Silva-Trevino* framework, however, defense counsel cannot advise immigrant clients of potential immigration consequences because they will be unable to rely on the facts established by the conviction. Counsel will not know what kinds of evidence will be offered against the defendant at a later removal proceeding and nor be able to forecast how different immigration judges will weigh and credit that evidence.

The *Silva-Trevino* framework also will make it difficult to provide meaningful resources and support to defense counsel and other court actors

about the immigration consequences of criminal convictions. The intersection of criminal and immigration law is a complex and specialized area because of the way in which federal immigration law relates to the various criminal codes of the fifty states. *See Padilla*, 130 S. Ct. at 1483 ("Immigration law can be complex, and it is a legal specialty of its own.").

Accordingly, in recent years, criminal justice systems, courts, public defender offices, and defender organizations have expended significant resources in creating and updating practice materials, developing training programs, and establishing mechanisms to consult with defense attorneys who need assistance in advising noncitizen clients about the immigration consequences of contemplated pleas.[2] Practice aids, such as charts that map out the immigration consequences of various criminal statutes, currently

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2. For example, the Maryland Office of the Public Defender recently created an immigration resource counsel position to support public defenders in the determination of immigration consequences of convictions. *See also* National Immigration Project of the National Lawyers Guild, Criminal & Deportation Defense, http://www.nationalimmigrationproject.org/criminal.htm; Immigrant Defense Project, http://www.immigrantdefenseproject.org/; National Center for State Courts, Impact of Immigration on Courts, Technical Assistance Program, http://www.ncsc.org/Topics/Federal-Relations/Immigration/Resource-Guide.aspx; Defending Immigrant Partnership, http://defendingimmigrants.org/; Immigration Advocates Network, Immigration and Crime Resources, http://www.immigrationadvocates.org; Immigrant Legal Resource Center, Criminal and Immigration Law: Defending Immigrants' Rights, http://www.ilrc.org/criminal.php.

allow for quick evaluation of the immigration consequences of criminal convictions. *See, e.g.,* Defending Immigrant Partnership, State Specific Resources and Charts (including charts from fifteen jurisdictions explaining immigration consequences of various dispositions based on traditional categorical approach), *available at* http://defendingimmigrants.org. These materials also are readily available to other court actors in need of the information.[3]

Under *Silva-Trevino,* however, such quick guides would no longer be viable tools for evaluating the immigration consequences of a conviction because they cannot take account of the alleged facts in each case. Likewise, experts in the intersection of criminal and immigration law, who provide crucial consultations on thousands of cases each year, would no longer be able to offer advice and evaluations of contemplated dispositions. Thus, *Silva-Trevino* undermines the infrastructure needed to support defense counsel and other court actors in understanding the immigration

3. The Department of Justice Office of Immigration Litigation, for example, recently developed a resource to provide court actors with a basic understanding of the immigration consequences that flow from a guilty plea. *See* Office of Immigration Litigation, Immigration Consequences of Criminal Convictions (2011), http://www.justice.gov/civil/oil/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf. This guide, however, does not make any mention of the *Silva-Trevino* decision, implying that the Department of Justice itself recognizes that it is a problematic standard for the orderly function of immigration adjudications.

consequences of a conviction and leaves them with no realistic or reliable way to meet their obligations.

B. *Silva-Trevino* Disrupts the Fair and Efficient Administration Of Plea Bargaining in the Criminal Justice System.

Silva-Trevino, if upheld, will interfere with the fair and efficient disposition of cases in the criminal justice system because many noncitizen defendants will be unwilling to enter into plea agreements without greater certainty about the immigration consequences of their pleas. *See INS v. St. Cyr*, 533 U.S. 289, 323 (2001) (explaining that many noncitizen defendants only plead guilty in reliance on reassurances that the plea will mitigate immigration consequences). As described in the preceding section, defense counsel will be unable under the *Silva-Trevino* framework to provide noncitizen defendants with reasonably certain advice about the impact of a plea even to low-level offenses. As a result, many more minor cases will be forced to trial, imposing an additional burden on already strained state and federal criminal justice systems.

Criminal justice systems are, of course, reliant on guilty pleas. *See St. Cyr*, 533 U.S. at 324 n.51 (noting that 90% of convictions are obtained via guilty plea); U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Fig. C & tbl.10 (noting that in 2008, 96.3% of federal criminal cases were resolved by guilty plea and, in some districts, as

high as 99% percent of cases were resolved by guilty pleas). As the Supreme Court has explained "'[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.'" *Id.* at 323 n.47 (quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971)). The cost to government authorities responsible for funding prosecutors and appointed counsel also would mushroom.

All court actors, not only noncitizen defendants, benefit from the clarity of immigration consequences flowing from a guilty plea. *See Padilla*, 130 S. Ct. at 1486 ("Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process."). Prosecutors, for example, must rely on the parties having a clear understanding of immigration consequences of negotiated dispositions in attempting to reach just resolutions of criminal cases involving noncitizen defendants. "By bringing deportation consequences into this process, the parties may not only preserve the finality of pleas, but may also negotiate better agreements on behalf of the State and the noncitizen defendant." *Id.* Robert Johnson, a former President of the National District Attorneys Association, explained: "As prosecutors, we see the effects of these collateral consequences . . . . Defendants will go to trial more often if the

result of a conviction is out of the control of the prosecutor and judge . . . As a prosecutor, you must comprehend this full range of consequences that flow from a criminal conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect." Message from the President Robert M.A. Johnson, Nat. Dist. Attys. Ass'n, The Prosecutor, May/June 2001, http://www.ndaa.org/ndaa/about/president_message_may_june_ 2001.html ("Message from the President, NDAA"). The criminal justice system, therefore, benefits as a whole when immigration consequences can be determined with reasonable certainty.

C. By Retrying the Case in Immigration Court, *Silva-Trevino* Distorts the State and Federal Criminal Law Process.

The *Silva-Trevino* approach permits immigration judges to conduct mini-trials to consider evidence of facts beyond those established in the criminal proceeding when determining whether the offense of conviction constitutes a crime involving moral turpitude. Such mini-trials undermine the result in the criminal justice system of an agreed-upon plea.[4] Moreover,

4. The agency recently recognized the value of "preserving the results of a plea-bargain" in finding that the immigration judge had erred in reviewing sources outside of the record of conviction to determine that the noncitizen was convicted of a different and more serious offense than negotiated and found in the criminal proceeding. *Matter of Ahortalejo-Guzman*, 25 I. & N. Dec. 465, 468 (BIA, April 19, 2011). The agency,

mini-trials in immigration court discredit the criminal justice system's assessment of the worth of the case. Plea-bargaining is an important part of the criminal justice system and occurs on a daily basis for many reasons. *See, e.g., Premo v. Moore*, 131 S. Ct. 733, 741 (2011) ("Plea bargains are the result of complex negotiations . . . ."); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). A prosecutor, for example, may offer a criminal defendant a plea to a lesser-included offense or to the least serious offense charged for any number of reasons, including but not limited to the strength of the evidence, the lack of reliability or cooperation of witnesses, initial overcharging of the defendant, and the cost of litigation. A criminal defendant may enter into a plea-bargain because he or she "gains a speedy disposition of his case and the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation." *Blackledge*, 431 U.S. at 71. Or, he may do so even though innocent because he fears extended pretrial incarceration and the uncertainties of trial. In the process, "defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed

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however, continues to adhere to the former Attorney General's decision in *Silva-Trevino*.

punishment without the expenditure of prosecutorial resources." *St. Cyr*, 533 U.S. at 322. Whatever the end result and its basis, the criminal court actors are in the best position to judge the evidence and dispose of the case. By retrying the case in immigration court and upsetting the result in criminal court, *Silva-Trevino* distorts this important state and federal criminal law process.

II. *SILVA-TREVINO* RAISES SERIOUS QUESTIONS REGARDING THE CONSTITUTIONAL RIGHTS OF NONCITIZEN DEFENDANTS IN CRIMINAL PROCEEDINGS AND THE DUE PROCESS RIGHTS OF NONCITIZENS IN AGENCY PROCEEDINGS.

The categorical analysis has long operated as a fair and predictable process for determining the impact of a conviction. In contrast, *Silva-Trevino* imposes an unworkable system in which noncitizens face the "harsh" and "drastic measure" of deportation, *Padilla v. Kentucky,* 130 S. Ct. at 1478 (2010), without the procedural protections that normally accompany a criminal prosecution and are necessary to ensure a fair hearing.

A. *Silva-Trevino* Reduces the Protections for Criminal Defendants by Allowing Immigration Courts to Conduct Essentially Criminal Inquiries not Subject to the Constitutional Requirements and Evidentiary Rules of Criminal Proceedings.

Immigration courts have no statutory authority to adjudicate a noncitizen's guilt or innocence of a crime. The role of an immigration court is appropriately limited to determining whether a conviction and

concomitant facts established by the state or federal criminal justice system carry immigration consequences. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (stating that role of the immigration judge is to "order deportation," and not to "adjudicate guilt").[5]

The rule in *Silva-Trevino,* however, specifically invites immigration courts to adjudicate guilt or innocence by looking to alleged facts outside of the record of conviction to categorize a crime. When immigration courts rely on extraneous facts to categorize a crime, they inevitably substitute their judgment for that of the criminal justice system and impermissibly retry the facts. *See generally Matter of Teixeira*, 21 I. & N. Dec. 316, 320 (BIA 1996) ("[N]either an Immigration Judge nor this Board can try or retry the criminal case"); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) ("[T]he focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.") (emphasis in original); *Matter of Pichardo*, 21 I. & N. Dec. 330, 334 (BIA 1996) ("No further inquiry into

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5. *See also Matter of Pichardo*, 21 I. & N. Dec. 330, 335 (BIA 1996) (it is a "settled proposition that an Immigration Judge cannot adjudicate guilt or innocence."); *Matter of Khalik,* 17 I. & N. Dec. 518, 519 (BIA 1980) ("[A]n immigration judge cannot go behind the judicial record to determine the guilt or innocence of an alien.") (citing *Matter of McNaughton*, 16 I. & N. Dec. 569 (BIA 1978); *Matter of Fortis,* 14 I. & N. Dec. 576 (BIA 1974); *Matter of Sirhan,* 13 I. & N. Dec. 592 (BIA 1970)).

extrinsic evidence—whether testimonial or otherwise—is permissible in determining whether a person has been 'convicted' of a crime involving moral turpitude."); *cf.* Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 990–93 (2008) (observing that when a fact is not necessarily decided in the criminal proceeding, an immigration court would improperly be determining the fact in the first instance).

The approach in *Silva-Trevino* subverts the constitutional protections guaranteed in the criminal context. First, significant constitutional and procedural protections, such as the right to counsel and the right to jury trial, do not apply in the immigration proceeding. *See* 8 U.S.C. § 1229a(b)(4)(A). Nor do the Fourth Amendment exclusionary rule or the Fifth Amendment privilege against self-incrimination apply with full force. *See INS v. Lopez-Mendoza*, 468 U.S. at 1050–51 (1984) (finding that the exclusionary rule does not apply except for egregious violations). Second, evidentiary standards in immigration proceedings are less rigorous than those in criminal courts, as immigration courts are not governed by formal rules of evidence.[6]

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6. *See, e.g.*, *Hassan v. Gonzalez,* 403 F.3d 429, 435 (6th Cir. 2005) ("Evidentiary matters in immigration proceedings, however, are not subject to the Federal Rules of Evidence, and we review evidentiary rulings by [immigration courts] only to determine whether such rulings have resulted in a violation of due process."); *Zerrei v. Gonzalez,* 471 F.3d 342, 346 (2d Cir.

The immigration courts also are not bound by the Confrontation Clause of the Sixth Amendment, which generally bars on constitutional grounds the introduction of "testimonial" statements by witnesses outside of court (such as witness statements to the police) unless the witness is present and subject to cross-examination. *See Crawford v. Washington,* 541 U.S. 36 (2004). Third, though the immigration statute permits limited discovery, in practice little discovery is granted, and many immigrants face difficulties and delays in obtaining information from the government.[7] Because of these structural differences between criminal and immigration courts, it would be unjust to allow immigration courts to make their own factual findings about the defendant's conduct and substitute them for the "convicted" conduct found in criminal proceedings.

2006) ("The Federal Rules of Evidence do not apply in removal proceedings.").

7. *See* Charles Gordon et al., *Immigration Law & Procedure* § 3.07 (2008); DEP'T OF HOMELAND SECURITY, 2008 ANNUAL FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 12, 20 (2008) (listing backlogs in FOIA requests including the length of time for a response, and the number of backlogged requests) *available at* http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf. It is also impractical for noncitizens to obtain evidence relating to the criminal proceeding, such as the testimony of an arresting officer. While an administrative immigration judge is authorized to issue a subpoena requiring the attendance of witnesses, it can only be enforced by the United States Attorney in the district for which the subpoena was issued. *See* 8 C.F.R. § 1003.35(b).

For example, the immigration court in this case found the petitioner to be deportable based in part on conduct for which he was not convicted. Relying solely on a police report, the immigration court determined that Mr. Waheed was guilty of intentionally inflicting serious injury on his wife in 2004, even though he was not convicted of *any* offense against his wife in the state criminal court. Joint Appendix 108–10. He did not plead guilty to such an offense, nor was it proven by the prosecution or found beyond a reasonable doubt by a judge or jury in the state criminal court. The court adjudicated these facts for the first time without affording Mr. Waheed any constitutional protections that would have attached in the criminal proceeding, such as the Sixth Amendment right to counsel, the Sixth Amendment right to confront and cross-examine witnesses, the application of evidentiary and constitutional rules prohibiting hearsay and testimonial statements, such as police reports, and the Due Process requirement that the allegations be proven beyond a reasonable doubt.

The approach in *Silva-Trevino* authorizes unbounded and wide-ranging inquiries into circumstances alleged in the criminal case, as illustrated by this case, and fails to set a clear and uniform standard to evaluate the immigration consequences of the crime of conviction. This framework impermissibly reduces the protections for noncitizen criminal

defendants by allowing immigration courts to conduct essentially criminal inquiries not subject to constitutional requirements and evidentiary rules in criminal proceedings.

Moreover, fairness and notice concerns preclude immigration courts from relying on evidence outside of the record of conviction. A key assumption underlying the traditional categorical analysis is that the defendant had a full and fair opportunity to litigate his or her guilt in the criminal proceeding. By definition, the only facts relevant in the criminal case were those necessary to establish the elements of the crime. Other facts were not at issue, and the defendant therefore had no reason to dispute them. Extraneous allegations need not be proven at all and therefore certainly are not proven beyond a reasonable doubt. Immigration judges who later rely on these unproven facts to determine the nature of the defendant's conduct deprive noncitizens of notice regarding the immigration consequences of their agreed-upon dispositions. While it is reasonable to expect noncitizens to be on notice regarding the immigration consequences of the facts necessary to the offense as pled, it is unreasonable to expect noncitizens to be on notice that alleged facts outside of the record of conviction, from disparate extraneous sources, may later be used against them. *Cf. Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (recognizing the importance of

noncitizens having notice and the opportunity to contest evidence in both the criminal and immigration court proceedings).

In addition, evidence outside of the record of conviction has not withstood scrutiny or testing in the criminal proceeding. In stark contrast to the broad-ranging inquiry permitted by *Silva-Trevino*, in applying the modified categorical approach the Fourth Circuit has specifically cautioned against the examination of "unreliable evidence," such as untested hearsay and conclusory statements. *See, e.g., United States. v. Harcum*, 587 F.3d 219, 223 (4th Cir. 2009) (applying the categorical approach in a federal criminal sentencing case). This Court should be particularly concerned about the use of hearsay such as police reports, which often contain statements provided by others (making that information double hearsay) and are generally inadmissible under the Confrontation Clause and evidentiary rules in the state and federal criminal courts. *See* FED. R. EVID. 803(8) (defining public records admissible under this hearsay exception as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel"); *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Under the categorical approach the agency has recognized that a police report is inadmissible for the purpose of establishing deportability under even the

limited evidentiary rules that apply in immigration court, unless the police report has been specifically incorporated into the guilty plea and stipulated to by the defendant. *See Teixeira*, 21 I. & N. Dec. at 319 ("The police report . . . does not fit any of the regulatory descriptions . . . found at 8 C.F.R. § 3.41 for documents that are admissible as evidence in any proceeding before an Immigration Judge in proving a criminal conviction."); *Matter of Milian*, 25 I. & N. Dec. 197 (BIA 2010) (permitting the consideration of a police report to assess removability under the modified categorical approach only where the defendant stipulated to the police report prepared in connection with his arrest as the factual basis for the plea); *see also Parrilla v. Gonzalez*, 414 F.3d 1038, 1044 (9th Cir. 2005) (explaining that police reports and complaint applications may not be considered under the modified categorical approach "unless specifically incorporated into the guilty plea or admitted by a defendant").

Accordingly, this Court should reject *Silva-Trevino's* approach in order to protect noncitizens in removal proceedings from the use of allegations outside of the record of conviction.

B. Forcing Noncitizens in Immigration Proceedings to Relitigate the Facts of Old Convictions is Impracticable and Offends Notions of Fairness and Due Process.

Silva-Trevino places on noncitizens—many of whom are *pro se* and in custody—the unrealistic burden of litigating complex factual issues related to events that may have occurred years or even decades earlier.

The categorical inquiry is a straightforward legal determination that immigration judges conduct routinely. Under the *Silva-Trevino* framework, however, the court must base its determination on the factual record created by the parties in the immigration proceedings. Unrepresented noncitizens, lacking an adequate understanding of the legal standards at issue in their cases, have no meaningful opportunity to develop the record regarding the unadjudicated allegations surrounding the old convictions, which they had little reason to investigate or prepare a defense to in the criminal proceedings. Because there is no right to government-appointed counsel in removal proceedings, over 57 percent of noncitizens in immigration court appeared *pro se* in fiscal year 2010. EXEC. OFFICE FOR IMMIGR. REV., FY 2010 STATISTICAL YEARBOOK, at G1 fig.9 (2010), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. The increasing number of detained noncitizens compounds the problem of lack of access to counsel.[8]

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8. In fiscal year 2010, half of all noncitizens were in detention. EXEC. OFFICE FOR IMMIGR. REV., FY 2010 STATISTICAL YEARBOOK, at O1 fig.23 (2010), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. In fiscal year 2007 (the most recent year with publicly available data), 84 percent of detained noncitizens were unrepresented. NINA SIULC ET AL.,

Moreover, detained noncitizens are routinely transferred far from the locus of their crime and place of residence to detention facilities in remote locations,[9] severely restricting their ability to investigate and produce the evidence required under *Silva-Trevino's* new framework. *Cf. Smith v. Hooey*, 393 U.S. 374, 380 (1969) ("Confined in a prison, perhaps far from the place where the offense . . . allegedly took place, [a prisoner's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired."); *United States v. Johnson,* 323 U.S. 273, 275–78 (1944) (constitutional venue policy requires consideration "of hardship to an accused . . . of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise . . . of marshalling his witnesses)").

Silva-Trevino further offends due process by requiring many noncitizens to establish facts surrounding old convictions long after memories have faded and witnesses and other evidence are no longer available. The Framers recognized that long delays between arrest and trial

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IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf.

9. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009), http://trac.syr.edu/immigration/reports/220/.

could impair the preparation of a defense and result in unfairness to the accused. *See* U.S. CONST. amend. VI. As the Supreme Court has explained, the speedy trial right is rooted in concerns of fairness. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (stating that "the inability of a defendant adequately to prepare his case [as a result of long delays] skews the fairness of the entire system"). Although the Sixth Amendment's speedy trial right does not apply in civil removal proceedings, the underlying fairness concerns also sound in Fifth Amendment due process.

Moreover, *Silva-Trevino* significantly diminishes the quality of adjudication in already over-strained immigration courts by requiring them to conduct factual hearings of a type and quantity not previously seen in removal proceedings.[10]

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10. The existing backlog in immigration courts is well documented, and this approach will considerably increase the workload and backlogs of the already overburdened and understaffed courts. *See generally,* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW (2009), http://trac.syr.edu/immigration/reports/235/include/pendingG.html; U. S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 3-4 (2006), *available at* www.gao.gov/products/GAO-06-771 ("From fiscal years 2000 to 2005, despite an increase in the number of immigration judges, the number of new cases filed in immigration courts outpaced cases completed. During this period, while the number of on-board judges increased by 3 percent, the courts' case load climbed about 39 percent from about 318,000 cases to about 531,000 cases.").

Without correction by this Court, the *Silva-Trevino* framework will force unequipped immigrants to relitigate the allegations surrounding settled convictions without adequate procedural safeguards, thereby violating fundamental constitutional principles of fairness, due process, and uniformity. This Court should therefore reaffirm its own precedent recognizing the categorical approach as the proper analysis for crimes involving moral turpitude and reject *Silva-Trevino*.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioner's brief, this Court should grant the Petition for Review and reject the unworkable framework set forth in *Silva-Trevino*.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1095 **Caption:** Waheed v. Holder

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