INHALE, EXILE: LIMITING REVIEW OF AGGRAVATED FELONIES AND CRIMES INVOLVING MORAL TURPITUDE AFTER *MONCRIEFFE V. HOLDER*, 133 S. CT. 1678 (2013)

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I. INTRODUCTION

Although there is a general consensus that the immigration system in the United States is in dire need of reform, it is still unclear whether Congress will pass a comprehensive immigration reform bill in the near future.[1] Under current immigration laws, noncitizens face serious consequences, even minor criminal convictions. The Immigration and Naturalization Act ("INA") currently allows for a lawful permanent resident to be detained and placed in removal proceedings after a conviction for an "aggravated felony," a conviction for a "crime involving moral turpitude" ("CIMT") within five years of admission, or two convictions for "crimes involving moral turpitude."[2] Moreover, the overly broad interpretation of those terms has led to dire immigration consequences for even the pettiest of crimes. For instance, under the CIMT provision, a lawful permanent resident could be placed in removal proceedings for shoplifting no more than an article of clothing and a stuffed animal.[3] Thus, a noncitizen could face removal over criminal convictions that, in many states, constitute misdemeanors and face penalties of no more than court supervision.[4]

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1. Burgess Everett & Seung Min Kim, *Immigration Reform Looks Dead in This Congress*, POLITICO (Mar. 9, 2015, 5:36 AM), http://www.politico.com/story/2015/03/immigration-reform-congress-115880.html.
2. 8 U.S.C. § 1227(a)(2)(A)(i)-(iii) (2013).
3. Lisa Koop, *Rethink Immigration: Minor Crimes Should Not Lead to Immigration Exile*, NAT'L IMMIGRANT JUSTICE CTR. (Mar. 10, 2013, 11:14 AM), http://immigrantjustice.org/staff/blog/rethink-immigration-minor-crimes-should-not-lead-immigration-exile#.UjecYT-E5bU.
4. *See* IND. CODE § 35-43-4-2 (2014) (classifying theft as a Class A misdemeanor); 720 ILL. COMP. STAT. 5/16-1 (2014) (classifying theft of property not exceeding $500 in value is a Class A misdemeanor); WIS. STAT. § 943.20 (2014) (classifying theft not exceeding $2500 in value as a

Yet, even if a comprehensive immigration reform bill were to be enacted, it is unlikely that it would contain any provisions dealing with the disproportionately harsh immigration consequences of minor criminal convictions.[5] In fact, the historical trend has been to broaden the criminal grounds for removability.[6] Thus, judicially imposed limits on the scope of the immigration courts' review of criminal offenses are paramount in preventing minor convictions from resulting in immigration exile.

This Note will examine the effect of *Moncrieffe v. Holder* in removal proceedings based on an aggravated felony conviction or convictions for crimes involving moral turpitude. It will argue that in *Moncrieffe*, the Supreme Court correctly limited the scope of review for determining whether a criminal conviction constitutes an aggravated felony. It will also argue that, because of analogous statutory language, *Moncrieffe* should be interpreted to limit the immigration judges' review of whether a criminal conviction involves moral turpitude.

Section II of this Note will provide an overview of relevant statutes and case law regarding removability of noncitizens on the grounds of aggravated felonies or crimes involving moral turpitude. Next, Section III will specifically discuss the Supreme Court decision in *Moncrieffe*. Finally, Section IV will examine why the majority in *Moncrieffe* correctly limited the aggravated felony review, the effects *Moncrieffe* will have on noncitizens' removability on the grounds of an aggravated felony conviction, and the possible effects of this decision on the scope of review of crimes involving moral turpitude.

II. LEGAL BACKGROUND

Under Section 237 of the INA, a noncitizen is deportable when he is convicted *inter alia* "of a crime involving moral turpitude . . . for which a sentence of one year or longer may be imposed" within five years of admission, "of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct" or "of an aggravated felony."[7]

Class A misdemeanor); KY. REV. STAT. ANN. § 514.030 (West 2013) (classifying theft generally as a Class A misdemeanor).

5. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

6. *See* Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 781 (2012) ("The Anti-Drug Abuse Act of 1988 (ADAA) defined 'aggravated felony,' to include only the crimes of murder, narcotics trafficking, and trafficking in firearms. Subsequent legislation, however, broadened the definition in 1990 and again in 1994 to include both more serious and less serious crimes.").

7. 8 U.S.C. § 1227(a)(2)(A)(i)-(iii) (2013).

Courts have struggled to decide whether an aggravated felony or a CIMT finding should be made solely through the categorical approach, which allows inquiry into the elements of the crime, or also through the modified categorical approach, which allows inquiry into the record of conviction.[8] Yet some courts, along with the Attorney General, have expanded the moral turpitude inquiry beyond the modified categorical approach, allowing inquiry beyond the record of conviction and into the arrest record and charging documents.[9] First, this section will examine the landmark Supreme Court decision defining the categorical and modified categorical approaches in the criminal context. It will then analyze relevant statutes and recent Supreme Court decisions interpreting the aggravated felony provision leading up to the Court's decision in *Moncrieffe*. Finally, this section will analyze recent and relevant decisions regarding CIMTs.

A. The Categorical and Modified Categorical Approaches in the Criminal Context: *Taylor v. United States*

In its landmark categorical approach decision, the Supreme Court examined a sentence enhancement provision under the Armed Career Criminal Act ("ACCA").[10] This provision requires the defendant to have been previously convicted of a "violent felony," including "burglary."[11] The Court concluded that, because "burglary" is not defined within the statute, a state conviction must have all the basic elements of the generic crime of burglary to become grounds for an ACCA sentence enhancement.[12] In reaching its decision, the Court referenced the statutory language, which requires that the defendant be convicted of, rather than simply commit, violent offenses.[13] Further, the Court emphasized "the practical difficulties and potential unfairness of a factual approach" which would, in essence, lead sentencing courts to relitigate prior convictions.[14]

Yet, the Court allowed an exception to the categorical approach "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."[15] The Court concluded that, in those cases, a court may look beyond the elements of the generic crime and into the record of conviction to find whether the "jury was actually required to find all the

8. *See* Taylor v. United States, 495 U.S. 575 (1990).
9. Matter of Silva-Trevino, 24 I. & N. Dec. 687, 699–704 (A.G. 2008); Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010).
10. *Taylor*, 495 U.S. at 577–78.
11. *Id.*, 18 U.S.C. §§ 924(e), 922(g) (2013).
12. *Taylor*, 495 U.S. at 598–99.
13. *Id.* at 600–01.
14. *Id.* at 601.
15. *Id*. at 602.

elements of [the] generic [crime]."[16] This exception to the categorical approach has come to be known as the "modified categorical approach."[17] Although *Taylor* is a criminal case, its reasoning and holding are applied to aggravated felony and CIMT inquiries in the immigration context.[18]

B. Relevant Statutes and Decisions Leading up to *Moncrieffe*

The difficulty in resolving the scope of review for aggravated felonies arises from the complexity of the term. The term "aggravated felony" refers to over twenty categories and subcategories of crimes.[19] Some of these categories refer to common law crimes, such as theft.[20] Others, such as "illicit trafficking of a controlled substance" directly cross-reference the Federal Criminal Code.[21] More than these categories, however, judicial interpretation of the INA and review into state convictions has shaped the scope of "aggravated felony", and thus the grounds for removability.

1. The Categorical Approach in the Aggravated Felony Context: Carachuri-Rosendo v. Holder

In *Carachuri-Rosendo*, the Supreme Court applied the categorical approach underlined in *Taylor* to the aggravated felony provision of the INA.[22] Here, the petitioner had been previously convicted of two minor drug offenses.[23] The first was a conviction for possession of about two grams of marijuana for which he received a twenty-day sentence.[24] The second was a conviction for "possession without a prescription of one tablet of a common antianxiety medication" for which he received a ten-day sentence.[25] Yet, if charged under the federal recidivist statute, the petitioner's second conviction

16. *Id*.
17. Conteh v. Gonzales, 461 F.3d 45, 54 (1st Cir. 2006) (applying the *Taylor* approach in the immigration context and observing the use of the term "modified categorical approach" to refer to the second step of the *Taylor* analysis).
18. *See, e.g.*, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (applying *Taylor* in the immigration context).
19. *See* 8 U.S.C. § 1101(a)(43) (2013).
20. *Id.* § 1101(a)(43)(G) (stating that an alien is removable for "a theft offense . . . or burglary offense for which the term of imprisonment at least one year").
21. *See id.* § 1101(a)(43)(B) (cross-referencing 21 U.S.C. § 802 for definitions related to illicit trafficking of a controlled substance and 18 U.S.C. § 924(c) for elements of a drug trafficking offense).
22. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010); 8 U.S.C. § 1227(a)(2)(A)(iii); *Id.* § 1101(a)(43).
23. *Carachuri-Rosendo*, 560 U.S. at 565.
24. *Id.*
25. *Id.* at 566.

would have amounted to an aggravated felony.[26] The Court acknowledged that it would be "unorthodox to classify this type of petty simple possession recidivism as an 'aggravated felony'" and concluded that, because the statute refers to a *conviction*, the Court's inquiry is limited to the actual conviction and not what could have been.[27] Although the petitioner could have been prosecuted under the federal recidivist statute, he was not; thus, the Court's inquiry was limited accordingly.[28] This decision is in line with the reasoning in *Taylor*, where the U.S. Supreme Court emphasized the inherent unfairness of looking into the nature of the crime, rather than the elements of conviction.[29]

2. Disregarding the Categorical Approach: The Circuit Split

Although the Supreme Court applied *Taylor*'s categorical approach to the immigration context based on the same rationale of fairness and efficiency, some circuit courts adopted a hypothetical federal felony approach to determine whether a state conviction constitutes an aggravated felony.[30] The hypothetical federal felony approach allows a court to base its inquiry into a noncitizen's state conviction on "whether the underlying offense would have been punishable as a felony under federal law."[31] Thus, prior to the Supreme Court's decision in *Moncrieffe*, some circuits applied the categorical approach, which looks at the elements of a conviction, while other circuits applied the hypothetical federal felony approach, which looks at the underlying conduct of a crime by reviewing how the noncitizen's state conviction would have been prosecuted in the federal system.[32]

In *Wilson v. Ashcroft*, the Third Circuit Court of Appeals examined the hypothetical federal prosecution approach in deciding whether a state conviction for possession of marijuana with intent to distribute qualified as an aggravated felony.[33] Yet, the Court decided against adopting this standard finding that, because the elements of Wilson's conviction did not necessarily

26. *Id.* at 569.
27. *See id.* at 575-77 ("Although a federal immigration court may have the power to make a recidivist finding in the first instance, . . . it cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law").
28. *See id.*
29. Taylor v. United States, 495 U.S. 575, 601 (1990).
30. *See Carachuri-Rosendo*, 560 U.S. at 565. *But see* Julce v. Mukasey, 530 F.3d 30, 34–35 (1st Cir. 2008); Garcia v. Holder, 638 F.3d 511, 515–17 (6th Cir. 2011).
31. *Julce*, 530 F.3d at 33 (quoting Berhe v. Gonzalez, 464 F.3d 74, 84 (1st Cir. 2006)).
32. *Compare id.*, *with* Martinez v. Mukasey, 551 F.3d 113, 117 (2d Cir. 2008).
33. Wilson v. Ashcroft, 350 F.3d 377, 379–80 (3d Cir. 2003).

proscribe possession with intent to distribute, a court may not presume otherwise.[34]

Similarly, in *Martinez v. Mukasey*, the Second Circuit Court of Appeals applied the categorical approach to determine whether the respondent's conviction for distribution of a small amount of marijuana constituted illicit trafficking of a controlled substance, and thus an aggravated felony, under the INA.[35] There, the court determined that, because the respondent's conviction could fall under either the felony or misdemeanor provisions of the Controlled Substances Act, it did not constitute an aggravated felony under the INA.[36]

In *Julce v. Mukasey*, however, the First Circuit Court of Appeals applied the hypothetical federal felony approach to find that, because the misdemeanor provision of the Controlled Substances Act is a mitigating sentencing factor, felony is the default punishment.[37] Thus, the respondent's conviction is presumed to be an aggravated felony lest he can prove otherwise.[38] Similarly, in *Garcia v. Holder* the Sixth Circuit Court of Appeals followed the hypothetical federal felony approach to find that, because the felony provision of the Controlled Substances Act is the default punishment, the respondent's conviction for attempted possession of an unknown amount of marijuana with intent to distribute with no statutory remuneration requirement constituted an aggravated felony.[39]

Thus, when the Fifth Circuit Court of Appeals was faced with the respondent's state conviction for possession of a small amount of marijuana in *Moncrieffe v. Holder*, it had to decide whether to follow the categorical approach or adopt the hypothetical federal felony approach.[40] The Court acknowledged the circuit split and decided to adopt the hypothetical federal felony approach, holding that, because felony would be the default punishment in a federal prosecution, Moncrieffe's conviction was presumed to be an aggravated felony.[41] Based on this circuit split, the Supreme Court granted certiorari in *Moncrieffe* to determine the validity of the hypothetical federal felony approach in the immigration context.[42]

Altogether, the decisions regarding removability under the INA's aggravated felony provision illustrate the difficulty in limiting the inquiry into prior state convictions. Although the Court's decision in *Moncrieffe*

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34. *Id*. at 381–82.
35. 8 U.S.C. § 1227(a)(2)(A)(iii) (2013); *Id.* § 1101(a)(43)(B); *Martinez*, 551 F.3d at 115–17.
36. *Martinez*, 551 F.3d at 120.
37. *Julce*, 530 F.3d at 35.
38. *Id.*
39. 638 F.3d 511, 516 (6th Cir. 2011).
40. Moncrieffe v. Holder (*Moncrieffe I*), 662 F.3d 387, 391 (5th Cir. 2011), *rev'd*, 133 S. Ct. 1678 (2013).
41. *Id*.
42. Moncrieffe v. Holder (*Moncrieffe II*), 133 S. Ct. 1678, 1684 (2013).

decidedly narrowed review under the aggravated felony provision, a similar, albeit more polarized, dissonance persists in the context of the "crimes involving moral turpitude" provisions.

C. *Silva-Trevino* and the Three-Step Inquiry into Moral Turpitude

Unlike the aggravated felony provision, which is defined within the INA, the term "crimes involving moral turpitude" lacks a statutory definition or method for immigration judges to determine whether a prior conviction is turpitudinous.[43] The Board of Immigration Appeals ("BIA"), however, has established that "[m]oral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[44] Yet, even this definition fails to define a clear standard for determining which crimes are turpitudinous. Not surprisingly, different circuits began developing different precedent until, in 2008, the Attorney General decided to step in and create a uniform approach to moral turpitude. Instead, the Attorney General's decision in *Silva-Trevino* has resulted in yet another circuit split.

1. An Attempt at Uniformity: Matter of Silva-Trevino

In *Silva-Trevino*, the Attorney General sought to address the lack of statutory methodology and "resulting patchwork" of judicial decisions by creating a uniform approach to the moral turpitude inquiry.[45] To this end, the Attorney General instituted a three-step inquiry. At step one, an immigration judge must, by employing the categorical approach, look to the statute of conviction and determine whether there is a "realistic probability" that it could be applied to reach conduct that does involve moral turpitude.[46] If the conviction is categorically not turpitudinous, the inquiry must end.[47] However, if the categorical inquiry is inconclusive because the "statute encompasses both conduct that involves moral turpitude *and* conduct that does not," the immigration judge should proceed to step two: the modified categorical approach.[48] Under the modified categorical approach, an

43. Jeremiah J. Farrelly, *Denying Formalism's Apologists: Reforming Immigration Law's CIMT Analysis*, 82 U. COLO. L. REV. 877, 882 (2011) ("Despite repeated Congressional acknowledgment of the phrase's vagueness, no statutory definition of 'crime involving moral turpitude' has ever been provided by Congress"). *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 693 (A.G. 2008).
44. Hamdan v. I.N.S., 98 F.3d 183, 186 (5th Cir. 1996) (quoting the BIA's decision on that case).
45. *Silva-Trevino*, 24 I. & N. Dec. at 693–95.
46. *Id.* at 693–98.
47. *See id.* at 690.
48. *Id.* at 698.

immigration judge may look beyond the language of the statute and into the record of conviction, "including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript."[49] However, if even after this second step, the immigration judge finds that the result is inconclusive, the Attorney General allows further inquiry into the underlying facts of the conviction under *Silva-Trevino*'s third step.[50] In so allowing, the Attorney General justified this departure from the *Taylor* limitations, stating, "moral turpitude is a non-element aggravating factor that 'stands apart from the elements of the [underlying criminal] offense.'"[51]

2. Moral Turpitude After Silva-Trevino*: The Circuit Split*

The Attorney General's attempt at creating a uniform inquiry in *Silva-Trevino* resulted in just the kind of "patchwork" he sought to end. Although the Seventh Circuit Court of Appeals embraced the *Silva-Trevino* approach, holding that the Attorney General's review under the three-step approach is entitled to *Chevron* deference,[52] several other circuits have held otherwise. The Third, Fourth, Ninth, and Eleventh Circuits have found that, because the INA requires that a noncitizen be *convicted* of a CIMT, the Attorney General's third step inquiry, which allows an immigration judge to look beyond the record of conviction, is an impermissible reading of the statute and, therefore, not entitled to *Chevron* deference.[53] While the Supreme Court has not yet spoken to this specific inquiry, based on the analogous statutory language between the aggravated felony and the crimes involving moral

49. *See id.* at 690.
50. *See id.* at 699.
51. *Id.* at 704.
52. *See* Mata-Guerrero v. Holder, 627 F.3d 256, 259-61 (7th Cir. 2010) (agreeing with the Attorney General's reasoning that the purpose of the CIMT inquiry "is to look at the actual crime committed by the individual alien"). *See also* Chevron U.S., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 842-44 (1984) (holding that an agency's interpretation of the statute it administers is entitled to judicial deference where the statute is silent or ambiguous and the interpretation is a reasonable reading of the statute).
53. Olivas-Motta v. Holder, 716 F.3d 1199, 1205 (9th Cir. 2013) (concluding that the approach in *Silva-Trevino* applies an erroneous definition of "convicted of" and is not entitled to *Chevron* deference); Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012) (declining to extend deference and holding that because "the moral turpitude statute is neither ambiguous nor silent, but explicitly directs that apart from certain types of admissions made by a defendant at his criminal proceedings, an adjudicator applying the moral turpitude statute may consider only the noncitizen's prior conviction and not the conduct underlying that conviction"); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude."); Jean-Louis v. U.S. Att'y Gen., 582 F.3d 462, 473 (3d Cir. 2009) ("We conclude that we are not bound by the Attorney General's view because it is bottomed on an impermissible reading of the statute, which, we believe, speaks with the requisite clarity.").

turpitude provisions, the Court's decision in *Moncrieffe* can be applied in the CIMT context to resolve the circuit split.

III. EXPOSITION OF THE CASE

In *Moncrieffe v. Holder*, the Supreme Court once again was faced with a case involving the INA's aggravated felony provision.[54] Through this decision, the Court solved the facial discrepancies of its last two decisions involving the same provision, and conclusively limited a court's inquiry under the aggravated felony provision to the categorical approach.

A. Facts and Procedural Posture

Moncrieffe, a native and citizen of Jamaica who had been living in the United States as a permanent resident since 1984, pleaded guilty to possession of marijuana with the intent to distribute after police found about 1.3 grams of marijuana in his car during a traffic stop in 2007.[55]

After Moncrieffe pleaded guilty to possession with the intent to distribute, the trial court sentenced him to five years of probation.[56] The Department of Homeland Security then initiated removal proceedings against Moncrieffe, arguing that possession of marijuana with the intent to distribute constitutes an aggravated felony because it is an offense punishable by up to five years imprisonment under the Federal Controlled Substances Act ("CSA").[57] During removal proceedings, the immigration judge ordered Moncrieffe removed.[58] On appeal, the BIA affirmed that order.[59]

The Fifth Circuit Court of Appeals affirmed the BIA's decision.[60] In so holding, the court applied the categorical and modified categorical approaches, acknowledging the circuit split regarding convictions based on state statutes that cover both "the felony and misdemeanor conduct proscribed by" the CSA.[61] The court ultimately adopted the view that felony is the default punishment in such a case. Accordingly, the court held that,

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54. 133 S. Ct. 1678, 1682 (2013); 8 U.S.C. § 1227(a)(2)(A)(iii) (2013).
55. *Moncrieffe II*, 133 S. Ct. at 1683.
56. *See id.*
57. 21 U.S.C. § 841(b)(1)(D) (2013). *See id.*
58. *Moncrieffe II*, 133 S. Ct. at 1683.
59. *Id*.
60. *Moncrieffe I*, 662 F.3d 387, 389 (5th Cir. 2011), *rev'd*, 133 S. Ct. 1678 (2013).
61. *See id.* at 391 ("[T]he courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor. The First and Sixth Circuits hold that the default punishment . . . is a felony, while the Second and Third Circuits hold that the default punishment is a misdemeanor.").

because Moncrieffe failed to prove otherwise, his conviction constituted a felony and thus a removable offense under the aggravated felony provision.[62]

B. The Majority Opinion

The Supreme Court granted certiorari to resolve the circuit split regarding whether a state conviction, grounded on a statute that criminalizes conduct described by both the felony and misdemeanor provisions of the Controlled Substances Act, is punishable as a felony.[63] As a result, the Court reversed the Fifth Circuit's decision, holding that Moncrieffe's state conviction for possession of marijuana with intent to distribute is not an aggravated felony under the INA.[64]

In reaching this decision, the Court employed the categorical approach, emphasizing that for a conviction to satisfy this approach under the "illicit trafficking in a controlled substance" section of the aggravated felony provision, it must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" proscribe felony punishment for that conduct.[65] Based on this reasoning, the Court found that, because the Georgia statute of conviction could include both a felony and a misdemeanor offense under the CSA, Moncrieffe's conviction did not *necessarily* constitute a felony offense under the CSA.[66] Furthermore, the Court reasoned that the Fifth Circuit's application of a hypothetical federal felony to find a "default" punishment is contrary to the categorical approach, which does not allow inquiry into hypothetical prosecutions, but rather limits the inquiry to the actual conviction.[67] In so holding, the Court abrogated the First and Sixth Circuit's adoption of the hypothetical federal felony approach and effectively resolved the circuit split on this matter.

Lastly, the Court emphasized the possible inequities that would result from following the Fifth Circuit's reasoning, "render[ing] even an undisputed misdemeanor an aggravated felony."[68] The Court further explained the reasoning for this limited inquiry. First, the Court pointed to the language of the statute, which asks what the noncitizen was "convicted of" rather than what the noncitizen actually did.[69] Then, the Court exposed the lack of

62. *See id.* at 391–93.
63. *Moncrieffe II*, 133 S. Ct. at 1684. *Compare* Garcia v. Holder, 638 F.3d 511, 515–17 (6th Cir. 2011), *and* Julce v. Mukasey, 530 F.3d 30, 34–36 (1st Cir. 2008), *with* Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008), *and* Wilson v. Ashcroft, 350 F.3d 377, 381–82 (3d Cir. 2003).
64. *Moncrieffe II*, 133 S. Ct. at 1682.
65. *Id.* at 1685.
66. *Id.* at 1686–87.
67. *Id.* at 1688.
68. *Id.* at 1689.
69. *Id.* at 1690.

statutory language authorizing "case-specific factfinding in immigration court."[70] To allow such inquiry, the Court reasoned, would result in "*post hoc* investigation" and "relitigation of past convictions in minitrials conducted long after the fact."[71] It is better, the Court concluded, to "err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor."[72] Therefore, based on a categorical inquiry, where the statute of conviction for marijuana possession with intent to distribute "fails to establish that the offense involved either remuneration or more than a small amount of marijuana," the conviction does not constitute a removable offense under the aggravated felony provision of the INA.[73]

IV. ANALYSIS

In *Moncrieffe*, the Court correctly held that a prior state conviction for possession of marijuana with intent to distribute, either for a small amount of marijuana or with no requirement of remuneration, does not constitute an aggravated felony because it does not "necessarily" fall into the felony provision of the Controlled Substances Act. This decision is a definite stride forward in preventing disproportionately harsh immigration consequences for minor crimes, both in the aggravated felony and the CIMT contexts. This section will analyze how the majority in *Moncrieffe* correctly interpreted and applied statutory language to limit the inquiry into past convictions in the aggravated felony context. It will then argue that, because of analogous statutory language, *Moncrieffe* should be interpreted to limit inquiry into prior state convictions in the context of crimes involving moral turpitude.

A. The *Moncrieffe* Decision: Limiting the Aggravated Felony Inquiry

The holding in *Moncrieffe* is correct because it narrows the scope of review based on the language of the INA and acknowledges the important policy considerations underlying the categorical approach.

1. Abrogating the Hypothetical Federal Felony Approach

In rejecting the hypothetical federal felony approach employed by the Fifth Circuit to justify felony as the default punishment, the Supreme Court

70. *Id.*
71. *Id.*
72. *Id.* at 1693.
73. *Id.* at 1693–94.

correctly aligned the scope of review with the INA's language and strengthened the foundation of the categorical approach.

Because the INA's aggravated felony provision inquires what the noncitizen was *convicted* of, rather than what crime he committed or what conviction he could have received, the inquiry into the noncitizen's past convictions cannot go beyond his actual convictions.[74] This statutory restriction was the foundation of the categorical approach.[75] It is because of this restriction that the categorical approach limits inquiry beyond the elements of the crime or, at most, beyond the record of *conviction*.[76] Therefore, to allow courts to use hypothetical prosecutions under the guise of the categorical approach would contravene the language of the INA and render the categorical approach futile.

Moreover, a court should not be able to assume a default punishment where there is no statutory indication of such a default. Since the categorical approach looks to both the elements of the offense and the prescribed punishment, to set a default punishment where there is none is equivalent to assuming the existence of an element that is not required under the statute.[77] A court cannot engage in such assumptions as to nonexistent statutory elements.[78] Therefore, the Supreme Court correctly abrogated the hypothetical federal felony approach and rejected the adoption of a default punishment in *Moncrieffe*.

2. Policy Justifications

The Court was also correct in acknowledging the strong policy interests in limiting the scope of review to actual convictions. From its inception, the categorical approach has sought to avert the "practical difficulties and potential unfairness" of inquiry into the underlying facts of a conviction rather than the conviction itself.[79]

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74. 8 U.S.C. § 1227(a)(2)(A)(iii) (2013).
75. *See* Taylor v. United States, 495 U.S. 575, 600–01 (1990). *See also* Carachuri-Rosendo v. Holder, 560 U.S. 563, 579 (2010) (applying *Taylor* in the immigration context and reaffirming that "conviction [is] the relevant statutory hook").
76. *See Taylor*, 495 U.S. at 600–02 (defining the categorical and modified categorical approaches).
77. *See Moncrieffe II*, 133 S. Ct. at 1685 ("[T]o satisfy the categorical approach, a state drug offense must meet two conditions: It must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily'prescribe felony punishment for that conduct.").
78. Matter of Lopez-Bustos, 2010 WL 4213214 (BIA 2010) (citing Woodby v. INS, 385 U.S. 276 (1966)) (A court cannot "simply assume a permanent taking was intended" when "the statute of conviction does not require . . . any findings as to whether a temporary or permanent deprivation of property was contemplated, and where the other conviction records do not provide evidence directly bearing on this issue.").
79. *Taylor*, 495 U.S. at 601.

Yet, through the use of the hypothetical federal felony approach, the Court of Appeals for the First, Fifth, and Sixth Circuits attempted to circumvent the inquiry restrictions of the categorical approach by reviewing how noncitizens could have been convicted in the federal system rather than their actual convictions.[80] This is not an acceptable application of the categorical approach. In allowing a hypothetical conviction inquiry and the default punishment that results from such an inquiry, the circuit courts effectively placed a burden on the noncitizen to prove that his conviction does not fall within the default punishment.[81] This would result in precisely the inherently unfair and inefficient *post hoc* factfinding and relitigation that the categorical approach sought to avoid.[82]

For example, in the case of Moncrieffe, he would have had to prove that his conviction for possession of marijuana was for a small amount, with no remuneration, years after his conviction took place. While the record shows that he was in possession of a small amount of marijuana, there is no indication of any proof as to the remuneration. This was not an element of the original conviction and, therefore, may not be in the record at all. In forcing a noncitizen to prove something outside of the record of conviction, years after the fact, the hypothetical federal felony approach forces the noncitizen to present evidence that the sentencing court never took into consideration, thus forcing the immigration courts to relitigate the conviction. This is especially troublesome in the immigration context, where "most non-citizens come into contact with immigration enforcement officers, are ordered deported, and are physically removed from the United States without ever seeing a lawyer."[83]

While the categorical approach is not perfect, its weaknesses do not outweigh the interest in avoiding such unfair relitigation of noncitizens' convictions. The Court in *Moncrieffe* correctly weighed the inherent

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80. *See Moncrieffe I*, 662 F.3d 387 (5th Cir. 2011), *rev'd*, 133 S. Ct. 1678 (2013); Garcia v. Holder, 638 F.3d 511, 515–17 (6th Cir. 2011) (holding that because the felony provision of the Controlled Substances Act is the default punishment, respondent's conviction for attempted possession of an unknown amount of marijuana with intent to distribute with no statutory remuneration requirement constituted an aggravated felony); Julce v. Mukasey, 530 F.3d 30, 34–36 (1st Cir. 2008) (holding that because the misdemeanor provision of the Controlled Substances Act is a mitigating sentencing factor, felony is the default punishment and respondent's conviction constitutes an aggravated felony).

81. *See Moncrieffe II*, 133 S. Ct. 1678, 1690 (2013).

82. *See Taylor*, 495 U.S. at 601; *Moncrieffe II*, 133 S. Ct. at 1690 (citing Chambers v. United States, 555 U.S. 122, 125 (2009)) ("The categorical approach serves 'practical' purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.").

83. Keren Zwick, *Rethink Immigration: Right to a Lawyer? The Fiction of Legal Counsel in Immigration Proceedings*, NAT'L IMMIGRANT JUSTICE CTR. (Mar. 22, 2013, 12:42 PM), http://www.immigrantjustice.org/staff/blog/rethink-immigration-right-to-lawyer#.UoEA_-ORUQ.

unfairness of such an approach against the possibility that some noncitizens who were convicted of possession of larger amounts of marijuana or of possession with the intent to distribute with remuneration may escape mandatory removal.[84] That possibility, the Court concluded, does not outweigh the inherent unfairness and impractical results that would stem from requiring immigration courts to relitigate prior state convictions.[85] Moreover, the Court reasoned, even if a noncitizen could avoid mandatory removal, he may not be able to avoid discretionary removal.[86] The Court's decision against relitigation is in line with precedent requiring "ambiguity in criminal statutes referenced by the INA" to be "construed in the noncitizen's favor."[87]

Altogether, the Supreme Court's decision in *Moncrieffe* constitutes a stride forward in avoiding disproportionately harsh immigration consequences for minor criminal convictions. By preventing a default punishment system that would deem even undisputed misdemeanors as aggravated felonies and require noncitizens to relitigate their convictions, the Court ultimately strengthened the categorical approach and realigned its application with the language of the INA.

B. Applying *Moncrieffe* to Crimes Involving Moral Turpitude

While *Moncrieffe* has an important impact in preventing minor offenses from resulting in removal in the aggravated felony context, its impact in the moral turpitude context is similarly important. Because of the analogous statutory language and policy considerations between the aggravated felony provision and the crimes involving moral turpitude provisions, *Moncrieffe* is applicable in the CIMT context. Thus, in restricting the aggravated felony inquiry, *Moncrieffe* similarly restricted the moral turpitude inquiry by effectively abrogating the third step of the *Silva-Trevino* test.

1. *Moncrieffe* in the Moral Turpitude Context

The CIMT provisions, like the aggravated felony provision, ask what the noncitizen was *convicted* of. Therefore, inquiry into prior convictions under all of these provisions should be similarly restricted.[88] Yet, under

84. *Moncrieffe II*, 133 S. Ct. at 1691.
85. *Id.* at 1693 ("We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions.").
86. *Id*.
87. *Id*. (citing Carachuri-Rosendo v. Holder, 560 U.S. 563, 580 (2010) and Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)).
88. *Compare* 8 U.S.C. § 1227(a)(2)(A)(i) (2013) ("Any alien who . . . is *convicted* of a crime involving moral turpitude committed within five years . . . after the date of admission") (emphasis added),

Silva-Trevino's third step inquiry, the Seventh Circuit allows inquiry beyond the categorical approach and into the underlying facts of the conviction.[89] The Seventh Circuit's deference to the Attorney General's three-step inquiry is grounded on the finding that the *Silva-Trevino* approach is a permissible interpretation of a statutory gap.[90] Yet, at least four other circuit courts have held that the *Silva-Trevino* approach is not a permissible interpretation of the INA, and therefore not entitled to judicial deference.[91] Moreover, the Supreme Court's interpretation of the aggravated felony provision in *Moncrieffe* adds credence to the notion that *Silva-Trevino*'s third step inquiry is not a permissible interpretation of the INA's "crimes involving moral turpitude" provisions. Based on this rationale, the Seventh Circuit should overturn its deference to *Silva-Trevino* and restrict inquiry into prior state convictions under the crimes involving moral turpitude provision accordingly.

Much like the hypothetical federal felony approach, which the Court rejected in *Moncrieffe*, the third step of the *Silva-Trevino* approach engages in a hypothetical prosecution by inquiring into a noncitizen's underlying conduct, rather than his actual conviction, and therefore basing review on what the noncitizen *could have been* convicted of.[92] Like the aggravated

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and Id. § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is *convicted* of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct") (emphasis added), *with Id.* § 1227(a)(2)(A)(iii) ("Any alien who is *convicted* of an aggravated felony at any time after admission is deportable.") (emphasis added); *see* Franklin v. I.N.S., 72 F.3d 571, 581 (8th Cir. 1995) (citing cases that interpret the aggravated felony and moral turpitude provisions of the INA to conclude that inquiry into both provisions is similarly restricted under the categorical approach).

89. *See* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 704 (A.G. 2008). *See also* Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010).

90. *See Mata-Guerrero*, 627 F.3d at 259–61 (agreeing with the Attorney General's reasoning that the purpose of the CIMT inquiry "is to look at the actual crime committed by the individual alien"). *See also* Chevron U.S., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 842–44 (1984) (holding that an agency's interpretation of the statute it administers is entitled to judicial deference where the statute is silent or ambiguous and the interpretation is a reasonable reading of the statute).

91. Olivas-Motta v. Holder, 716 F.3d 1199, 1205 (9th Cir. 2013) (concluding that the approach in *Silva-Trevino* applies an erroneous definition of "convicted of" and is not entitled to *Chevron* deference); Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012) (declining to extend deference and holding that because "the moral turpitude statute is neither ambiguous nor silent, but explicitly directs that apart from certain types of admissions made by a defendant at his criminal proceedings, an adjudicator applying the moral turpitude statute may consider only the alien's prior conviction and not the conduct underlying that conviction"); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Congress unambiguously intended adjudicators to use the categorical and modified categorical approach to determine whether a person was convicted of a crime involving moral turpitude."); Jean-Louis v. U.S. Att'y Gen., 582 F.3d 462, 473 (3d Cir. 2009) ("We conclude that we are not bound by the Attorney General's view because it is bottomed on an impermissible reading of the statute, which, we believe, speaks with the requisite clarity.").

92. *Moncrieffe II*, 133 S. Ct. 1678, 1688 (2013); *see Silva-Trevino*, 24 I. & N. Dec. at 699 ("[W]hen the record of conviction fails to show whether the alien was convicted of a crime involving moral

felony provision, the moral turpitude provisions ask what the noncitizen was convicted of. Thus, the Court's admonition in *Moncrieffe* that "[c]onviction is the relevant hook," and therefore inquiry should be limited to the categorical approach, is applicable in the moral turpitude context.[93] To allow inquiry beyond the record of conviction in the moral turpitude context, like in the aggravated context, contravenes the plain language of the INA and renders the categorical approach obsolete. Based on *Moncrieffe*, *Silva-Trevino*'s third step is not a permissible interpretation of the INA, which asks only what the noncitizen was *convicted* of, thus it is not entitled to judicial deference. Therefore, *Moncrieffe* effectively abrogates the third step of *Silva-Trevino* because it contravenes the plain language of the INA.

2. Policy Consideration Under the Moral Turpitude Provision

Similar to the aggravated felony context, allowing immigration courts to review the underlying facts of a noncitizen's conviction, rather than the conviction itself, ignores the policy concerns of "practical difficulties and potential unfairness" that gave rise to the categorical approach.[94] By requiring immigration courts to look beyond the record of conviction and into the underlying conduct, the *Silva-Trevino* approach effectively charges the immigration judges with relitigating prior convictions, often many years after the fact. This "sort of *post hoc* investigation into the facts" is precisely the sort of relitigation that the Court has "long deemed undesirable" because of its inherent unfairness and resulting inefficiency.[95] Moreover, in the cases where the noncitizen pleaded down to a lesser offense, this approach would undermine "the important function of recognizing and preserving the results of a plea bargain, where the parties, with the consent of a trial judge, agree to allow the defendant to plead," and effectively deprive a noncitizen of the benefits of his plea bargain.[96]

For example, a noncitizen can be placed in removal proceedings under the CIMT provision for shoplifting no more than diapers and a stuffed animal.[97] Yet, if this noncitizen was charged in Indiana and pleaded down to conversion, her convictions would not amount to crimes involving moral

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turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act's moral turpitude provisions.").

93. *Moncrieffe II*, 133 S. Ct. at 1685 (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 579 (2010)).
94. Taylor v. United States, 495 U.S. 575, 601 (1990).
95. *Moncrieffe II*, 133 S. Ct. at 1690.
96. Matter of Ahortalejo-Guzman, 25 I. & N. Dec. 465 (BIA 2011).
97. Koop, *supra* note 3.

turpitude under either the categorical or modified categorical approaches.[98] The noncitizen could only be removed under *Silva-Trevino*'s third step inquiry if, after engaging in factfinding and relitigation of her conviction, an immigration court found that her underlying conduct was turpitudinous. Not only does *Silva-Trevino*'s third step inquiry defy the plea bargaining system, but it also places lawful permanent residents, many of whom have lived most of their lives in the United States, in removal proceedings for crimes that many states consider undisputed misdemeanors.[99]

Although the Attorney General justified his decision to allow inquiry beyond the record of conviction as a means "to ensure proper application of the Act's moral turpitude provisions," the Supreme Court in *Moncrieffe* effectively rebutted this argument by stating that a certain "degree of imperfection" is preferable "to the heavy burden of relitigating old prosecutions."[100] To advocate for deportation of lawful permanent residents, many of whom have married, raised United States citizens, and made their lives in the United States, in the name of a perfect application of the statute, contravenes longstanding notions of fairness that require courts to resolve "ambiguity in criminal statutes referenced by the INA" in favor of the noncitizen.[101]

Thus, based on the analogous statutory language and policy considerations between the aggravated felony and crimes involving moral turpitude provisions of the INA, *Moncrieffe* should be interpreted to limit review of prior convictions under the moral turpitude provisions to the categorical and modified categorical approaches, effectively abrogating *Silva-Trevino*'s third step inquiry.

V. CONCLUSION

In *Moncrieffe v. Holder*, the Supreme Court was faced with deciding whether a noncitizen's prior state conviction should be considered, by default, to fall under the felony provision of the Controlled Substances Act and thus be rendered an aggravated felony. The Court correctly interpreted the language of the INA to restrict inquiry into the noncitizen's actual conviction. In doing so, the Court prevented noncitizens' removal over minor crimes that would have been rendered aggravated felonies, as well as

98. *See* IND. CODE § 35-43-4-3(a) (2013) (lacking the element of intent to permanently deprive necessary to render a conviction a CIMT).

99. *See* IND. CODE § 35-43-4-2 (classifying theft as a Class A misdemeanor); 720 ILL. COMP. STAT. 5/16-1 (2014) (classifying theft of property not exceeding $500 in value is a Class A misdemeanor); WIS. STAT. § 943.20 (2014) (classifying theft not exceeding $2500 in value as a Class A misdemeanor); KY. REV. STAT. ANN. § 514.030 (West 2013) (classifying theft generally as a Class A misdemeanor).

100. *Moncrieffe II*, 133 S. Ct. at 1693.

101. *Id*.

crimes of which the noncitizens were never convicted. Moreover, because of analogous statutory language and policy considerations, *Moncrieffe* effectively abrogates inquiry into the underlying facts of a conviction in the CIMT context. Altogether, the Supreme Court's decision in *Moncrieffe* is an important step forward in preventing minor criminal offenses from resulting in disproportionately harsh immigration consequences for lawful permanent residents.