Improper Deportation of Legal Permanent Residents: The U.S. Government's Mischaracterization of the Supreme Court's Decision in *Nijhawan v. Holder*

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* © 2013 Michael R. Devitt. Professor of Law, University of San Diego School of Law. I wish to thank my incredibly insightful and loving wife Stacie Shelton Devitt, who, through her deeply held thoughtful empathy for our nation's noncitizens, sparked in me a keen curiosity in this subject. I also thank my research assistant Julia Hunter for her enthusiasm, ideas, and never-ending invaluable assistance in writing this paper.

I. INTRODUCTION

Incarcerated in a federal detention center[1] for over two years and awaiting deportation to his native Mexico, Ricardo Oviedo-Cortez dreamed of once again walking his then seven-year old daughter to school as a free man in the United States of America, the country he called home for almost thirty years.[2] Oviedo-Cortez's journey to federal confinement

1. Oviedo-Cortez was detained at the CCA Detention Center, also commonly referred to as the San Diego Detention Center. The CCA is a privately run detention facility that temporarily houses noncitizen detainees pending their immigration proceeding under a contractual arrangement with Immigration and Customs Enforcement ("ICE"). *See CCA Detention Center*, SAN DIEGO IMMIGRANT RIGHTS CONSORTIUM (Jan. 12, 2010), http://immigrantsandiego.org/2010/01/12/cca-detention-center/.

2. *See* letter from Oviedo-Cortez to author (Mar. 15, 2012) (on file with author). Oviedo-Cortez was raised in Tijuana, Mexico. He first came to the United States as a teenager, but returned to Mexico to perform compulsory military service. After another brief stay in the United Sates, Oviedo-Cortez again returned back to Mexico where he briefly worked as a Tijuana police officer. In 1983, unable to make a sustainable living as a police officer because of his unwillingness to accept bribes and because the peso was then

began on the evening of December 2, 2009, when he entered a San Diego Wal-Mart with a forged Arizona driver's license bearing the name Dr. Smith,[3] a person whose identity had been stolen. Oviedo-Cortez hoped to use this fabricated driver's license to execute an emergency wire transfer from Dr. Smith's American Express account. Oviedo-Cortez walked up to the attendant at the Wal-Mart Money Gram counter and presented himself as Dr. Smith, but before he could complete the wire transfer, he was arrested and detained.

Oviedo-Cortez pled guilty to one count of false personation under section 530.5(a) of the California Penal Code and was ultimately ordered to pay $1,000 in restitution[4] and sentenced to 200 days of confinement. If Oviedo-Cortez were a United States citizen, he would have been able to return home following his state incarceration and carry on with his life. However, because Oviedo-Cortez is a Mexican citizen (albeit a then legal permanent resident of the United States), the Department of Homeland Security ["DHS" or "Government"] initiated removal proceedings against Oviedo-Cortez immediately following his state incarceration, wrongfully claiming that his conviction was an aggravated felony, thus making Oviedo-Cortez removable from the United States.[5]

As a result of the Government's dogged pursuit of its unjust deportation claims, Oviedo-Cortez was detained and not released from custody until March 2012—two years later. After enduring numerous legal proceedings before the immigration court, the Board of Immigration Appeals ["BIA"], and the Ninth Circuit Court of Appeals, Oviedo-Cortez was eventually able to return home to his family.

The Government's claimed linchpin for Oviedo-Cortez's deportation and the resulting lengthy legal battle was an unsigned pre-sentencing report that proclaimed, with no detailed support, that Oviedo-Cortez's actions resulted in approximately $24,000 in loss to an unidentified group of

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experiencing significant devaluations, Oviedo-Cortez again returned to the United States. In 2002, Oviedo-Cortez was granted lawful permanent residence status in the United States. Brief for Petitioner at 5, 9, Oviedo-Cortez v. Holder, No. 11-70404 (9th Cir. Nov. 18, 2011).

3. The real name is replaced with the pseudonym *Smith*.

4. In a non pro tunc order, the criminal trial court reduced the amount of restitution from $24,000 to $1,000. Brief for Petitioner, *supra* note 2, at 12–13.

5. According to section 237(a)(2)(A)(iii) of the INA, any alien is removable if convicted of an aggravated felony. Please note that the author intends to use the terms "alien" and "noncitizen" interchangeably. Immigration and Nationality Act (INA) § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

victims. That was all the evidence the Government offered to satisfy its burden that Oviedo-Cortez had, in fact, caused over $10,000 in loss, as required by section 101(a)(43)(M)(i) of the Immigration and Nationality Act ["INA"]. There were no trial court orders, no admissions, and no other physical evidence of any kind to support the Government's deportation allegations. All the Government could produce was this one inherently untrustworthy document riddled with multiple layers of hearsay.

One might wonder how the Government could lead the immigration judge and the BIA down such a path of clear error, especially since prior to 2009, most immigration courts would never have accepted a pre-sentencing report as sufficient evidence to prove removability.[6] Indeed, at one point in the proceedings, the immigration judge remarked to Oviedo-Cortez:

> [A]t this point, I do not believe the Government has sustained the charge that you have been convicted of an aggravated felony for fraud because there is nothing in [the Complaint or plea agreement] to indicate that the loss to the victim was $10,000 or more.[7]

This journey of compounded error began with the Government's tenacious insistence that the United States Supreme Court in 2009 somehow changed the playing field in favor of deportation by opening the floodgates to the admission of all evidence in the criminal record to assist in satisfying the Government's burden of persuasion. Thus, the Government successfully dangled a single unreliable document and its misinterpretation of the Supreme Court's decision in *Nijhawan v. Holder*[8] in front of the immigration judge and the BIA to justify Oviedo-Cortez's detention and deportation.

Finally, after an appeal to the Ninth Circuit, Oviedo-Cortez's prolonged legal fight came to end.[9] Oviedo-Cortez's opening brief filed before the Ninth Circuit forced the Government to come to grips with reality. It was only then that the Government agreed to file a Joint Motion to Remand to the BIA, articulating that "[b]ecause the record does not support the conclusion that the crime for which [Oviedo-Cortez] was convicted resulted in a loss to the victim exceeding $10,000, as required by the

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6. *See* Dickson v. Ashcroft, 346 F.3d 44, 53–54 (2d Cir. 2003); United States v. Ochoa-Fernandez, 168 F. App'x. 291, 293 (10th Cir. 2006); United States v. Valenzuela-Hernandez, 72 F. App'x. 686, 686 (9th Cir. 2003); United States v. Varela-Marquez, 45 F. App'x. 820, 820 (9th Cir. 2002).

7. Brief for Petitioner, *supra* note 2, at 14.

8. *See* Nijhawan v. Holder, 557 U.S. 29 (2009).

9. The author, director of the University of San Diego School of Law Appellate Clinic, represented Oviedo-Cortez before the Ninth Circuit and upon remand to the BIA.

removal statute, remand to the [BIA] is appropriate."[10] On March 6, 2012, Oviedo-Cortez's nightmare ended with the BIA's order terminating the removal proceedings "[i]n light of the Ninth Circuit's order and the parties' joint motion" that Oviedo-Cortez is not removable as charged under section 101(a)(43)(M)(i) of the INA.[11]

Unfortunately, Oviedo-Cortez's situation is not an isolated incidence of Government overzealous deportation. It is instead an example of an alarming trend in U.S. immigration courts. With over 4,000 aliens deported in 2011 for "fraudulent activities" alone,[12] we must all be watchful that the DHS adheres to the law and properly meets its burden of proof in all removal proceedings.[13]

The purpose of this article is to draw attention to the government's misinterpretation of the central holding in *Nijhawan v. Holder* and how it has led to the improper dilution of evidentiary standards in removal proceedings when determining the $10,000 threshold loss requirement under section 101(a)(43)(M)(i) of the INA [hereinafter "M(i)"]. Section II of this article provides a brief doctrinal overview and summary of my proposed procedural methodology; sections III and IV provide essential background information regarding the Supreme Court's important pre-*Nijhawan* opinions and the inconsistent methods circuit courts have applied when calculating the monetary threshold under the fraud or deceit deportation statute prior to *Nijhawan*; section V provides a detailed analysis of the Supreme Court's opinion in *Nijhawan;* section VI analyzes post-*Nijhawan* cases and highlights the misapplication of the *Nijhawan* rule; and section VII discusses and articulates what evidence the immigration court should admit in a circumstance-specific analysis when determining the loss during a deportation proceeding.

10. Joint Motion to Remand to the Board of Immigration Appeals, Oveido-Cortez v. Holder, No. 11-70404 (9th Cir. Jan. 13, 2012).

11. Matter of Oviedo-Cortez, 2012 WL 911867, at *1 (B.I.A. Mar. 6, 2012).

12. JOHN SIMANSKI & LESLEY SAPP, ANNUAL REPORT IMMIGRATION ENFORCEMENT ACTIONS: 2011, DHS OFFICE OF IMMIGRATION STATISTICS, at 6. (Sept. 20, 2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

13. Under the INA, the government bears the burden of proving, by clear and convincing evidence, that a legal permanent resident is deportable. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2012); 8 CFR § 1240.8(a) (2012).

II. DOCTRINAL OVERVIEW AND SUMMARY OF SUGGESTED PROCEDURAL FRAMEWORK

The INA dictates that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[14] Federal immigration law also proscribes the Attorney General from, in any way, "granting discretionary relief from removal to an aggravated felon, no matter how compelling his case."[15] This statutory scheme defines "aggravated felony" by setting out a long list of enumerated crimes, one of which is any "offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[16]

The INA fails to "prescribe a detailed methodology for determining whether a predicate offense fits within these definitions (and, thus, qualifies as an aggravated felony)."[17] In the absence of statutory direction, the federal circuits and the immigration courts routinely, albeit inconsistently, apply some form of the Supreme Court's categorical approach as conceived in *Taylor v. United States*,[18] to determine precisely when a prior conviction qualifies as an aggravated felony within the meaning of the INA.[19]

In 2009, the Supreme Court's ruling in *Nijhawan v. Holder* attempted to resolve the inconsistencies that had emerged in immigration courts

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14. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
15. Moncrieffe v. Holder, 133 S. Ct. 1678, 1682 (2013).
16. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2012).
17. Conteh v. Gonzales, 461 F.3d 45, 52 (1st Cir. 2006).
18. Taylor v. United States, 495 U.S. 575 (1990). The *Taylor* categorical approach has properly served as guidance for the immigration courts because, like the sentencing court in *Taylor*, an immigration court can only "act within an administrative system addressing the federal statutory consequences of convictions that criminal court judges have already adjudicated." Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1675–76 (2011).
19. *Conteh*, 461 F.3d at 52; *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185–86 (2007) ("In determining whether a conviction (say, a conviction for violating a state criminal law that forbids the taking of property without permission) falls within the scope of a listed offense (*e.g.*, 'theft offense'), the lower courts uniformly have applied the approach this Court set forth in *Taylor v. United States*."). The categorical approach has been applied in the immigration context even before the Supreme Court's decision in *Taylor*. *See* Das, *supra* note 18, at 1688 (explaining the history of federal immigration law and the traditional use of the categorical analysis in the immigration context as "one that limited the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense rather than a review of the facts underlying the crime"); *see also id.* at 1749 (Appendix containing decisions of pre-*Taylor* federal courts, including Attorney General and Board of Immigration Appeals decisions demonstrating the history of categorical analysis in immigration law).

and federal circuit courts across the country as to how to determine the financial threshold under M(i) (the aggravated felony provision for "fraud or deceit in which the loss to the victim or victims exceeds $10,000"). Not surprisingly, in *Nijhawan*, the Government wanted the Court to abandon the categorical approach in favor of a method wherein any and all information found in the criminal defendant's file could be used to show damages exceeding $10,000.[20] The petitioner, on the other hand, wanted the Court to keep the categorical approach and only allow aggravated felony status if the monetary threshold was actually part of the conviction itself.[21]

In *Nijhawan,* the Court rejected all forms of the categorical approach in favor of a circumstance-specific analysis when determining the monetary threshold contained in this INA section. Unlike the categorical approach, which has always prevented immigration courts from looking "'to the facts of the particular prior case,'"[22] the circumstance-specific approach allows for an examination, in immigration court, of the "particular circumstances in which an offender committed the crime on a particular occasion."[23] Regrettably, the Court's opinion, narrow in parts and vague in others, has led to an even more inconsistent and questionable application of immigration law. The Government believes that once the Supreme Court rejected the categorical approach for determining the monetary threshold, the Court also somehow declared "open season" on hunting down and using any information from the criminal defendant's file. A close examination of the *Nijhawan* opinion rejects the Government's overly broad interpretation.

I suggest a balanced, straightforward four-phase procedural framework for how to properly litigate the monetary threshold question for deportation purposes under M(i). When creating such litigation methodology, two paramount principles must guide our way. First, the government must be given a fair opportunity to satisfy its burdens of production and persuasion

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20. Brief for Respondent at 12, 34–43, Nijhawan v. Holder, 557 U.S. 29 (2009) (No. 08-495).

21. At oral argument, Justice Souter summed up the petitioner's argument as follows: "So it seems to me that you've got to go the whole hog or get nothing, and the whole hog is that it's got to be an element of the offense that the loss exceed $10,000." Transcript of Oral Argument at 12, Nijhawan v. Holder, 557 U.S. 29 (2009) (No. 08-495).

22. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (quoting *Duenas-Alvarez*, 549 U.S. at 186).

23. *Nijhawan*, 557 U.S. at 38–40.

that the dollar threshold under M(i) has been met, consistent with due process to the alien, considerations of fairness, and Supreme Court dictates; and second, the alien must be given a fair opportunity to dispute the government's argument that the monetary threshold has been satisfied.

Phase One: The government must present to the immigration judge credible evidence from the underlying criminal file documenting loss to the victim or victims of an amount greater than $10,000. Failure to come forward with such evidence mandates a dismissal of the government's aggravated felony deportation charge under M(i), because the government carries the burden on this issue.

I fully recognize that for a proper calculation of the amount of loss in a circumstance-specific analysis in a fraud or deceit crime, as compared with a pure categorical or modified categorical approach, the criminal element focus is discarded and evidentiary standards are somewhat relaxed. However, common sense and Supreme Court authority neither (a) sanctions the use of unreliable information found in the alien's criminal file as grounds for deportation, nor (b) sanctions an entirely new trial on the monetary threshold issues for deportation. Instead, under a circumstance-specific approach, the government should be able to submit only documentary evidence from the alien's criminal file that maintains traditional minimum guarantees of trustworthiness. As such, the government should be restricted to the following documents from the criminal file to satisfy its burden of persuasion for the monetary threshold requirement:

- State or federal statutory definitions of the offense or offenses the criminal defendant was convicted of;
- Official minutes of a court hearing, verbatim transcript, abstract of record, or other court-prepared document indicating the entry of conviction;
- Charging documents, accompanied by sufficient evidence (admission or otherwise) indicating what the defendant actually pled to;
- Trial court judgment or verdict;
- Signed plea agreement;
- Plea colloquy transcript;
- Documents stipulated to as accurate that form the basis of the conviction or sentence;
- Defendant admissions made as part of his or her plea or sentencing process;
- Specific factual trial court findings, which the criminal defendant admitted to or that are based upon a hearing

where the defendant had a full and fair opportunity to be heard and present evidence;
- Trial court's sentencing order;
- Trial court's restitution order;
- Jury instructions and jury findings resulting in a guilty verdict; and
- Answers to special damage interrogatories propounded to and answered by the jury with an accompanying guilty verdict.

This list is referred to herein as "Reliable and Usable Evidence."

Investigative reports (e.g., pre-sentence, probation, and police reports) are notoriously untrustworthy and often contain a slanted view of reality by utilizing multiple levels of unreliable hearsay.[24] If an immigration judge considered such reports for determining the monetary threshold requirement under M(i) for deportation purposes, the alien respondent would be forced into the unfair position of conducting an actual trial defense of the statements contained in the report that might have happened years earlier. The government should thus be precluded from using any investigative reports found in the alien's criminal file, unless the alien expressly stipulated to the accuracy of such report. Likewise, the government should be precluded from utilizing for deportation purposes informal discussions on or off the record by counsel or the court.

Phase Two: The government must show that the damage threshold has been satisfied for the actual criminal conviction, not for some other crime or broader conspiracy for which no conviction was obtained. In other words, the loss amount must be specifically tethered to the actual offense of conviction and no other conduct.

Phase Three*:* The alien must be given a fundamentally fair opportunity to dispute the government's claim that a prior conviction resulted in the

24. *See, e.g.*, Carlton F. Gunn, *So Many Crimes, So Little Time: The Categorical Approach to the Characterization of a Prior Conviction Under the Armed Career Criminal Act*, 7 FED. SENT'G REP., 66, 67 (1994) ("Presentence reports are notoriously unreliable and, even where reliable, are only one summary of the evidence. If such reports are considered, moreover, the defendant would presumably have to be allowed to try to show that he or she did not really tell the probation officer what the probation officer claims or that other reports or evidence upon which the probation officer relied were erroneous. Consideration of the presentence reports will raise not only the problems of 'mini-trials' [sic] about events years past but also the problems created by translation of those events through the multiple levels of hearsay which go into a presentence report.").

required loss to victims.[25] Thus, the alien has "at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself."[26]

Phase Four: The government bears the burden of going forward and the burden of persuasion (by clear and convincing evidence) that the conviction for "fraud or deceit" resulted in a loss to the victim or victims of greater than $10,000.[27] Accordingly, the immigration court must assess findings with an eye to what was actually lost as a result of the convicted offense and the applicable standard for the government's burden of persuasion.[28] Given the government's burden of persuasion on this issue, the immigration judge should weigh any uncertainties caused by the passage of time in favor of the alien and against the government.[29]

III. PRE-*NIJHAWAN*: FINDING REMOVABILITY UNDER THE *TAYLOR-SHEPARD* CATEGORICAL APPROACH

All immigration proceedings "must conform to the Fifth Amendment's requirement of due process," even though noncitizens are "not subject to the full range of constitutional protections."[30] Accordingly, "an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."[31] Failure to afford an alien "a reasonable opportunity to examine the evidence against [him]"[32] would result in a denial of due process if "the proceeding was 'so fundamentally unfair that the alien was prevented from reasonably presenting his case.'"[33] When the government seeks to remove a lawful permanent resident on the grounds of a criminal conviction, the government bears the burden of proving both (1) the existence of a criminal conviction and (2) that the conviction triggers a ground of deportability.[34]

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25. *Nijhawan*, 557 U.S. at 41.
26. *Id.* at 42.
27. *Id. See also* INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2012).
28. *Nijhawan*, 557 U.S. at 42.
29. *Id.*
30. Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also* Vilchez v. Holder, 682 F.3d 1195, 1199 (9th Cir. 2012); United Sates v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3168 (U.S. July 11, 2012) (No. 12-5286); Pangilinan v. Holder, 568 F.3d 708, 709 (9th Cir. 2009) (order).
31. Colmenar v. Immigration & Naturalization Service (INS), 210 F.3d 967, 971 (9th Cir. 2000).
32. INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4) (2012).
33. Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (quoting Ibarra-Flores v. Gonzales, 439 F.3d 614, 620 (9th Cir. 2006)).
34. *See* INA § 240(c)(3)(A)-(B), 8 U.S.C. § 1229a(c)(3)(A)-(B) (2012).

Taylor involved an interpretation of a section of the Armed Career Criminal Act (ACCA), which contains a provision similar to the aggravated felony provision in the INA.[35] It was *Taylor* that "established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses."[36] The ACCA prescribes a mandatory minimum sentence for any conviction involving the possession of a firearm by a defendant who has a minimum of three prior convictions for a "violent felony or serious drug offense."[37] Analogous to the INA, the ACCA defines "violent felony" by listing certain enumerated offenses.[38] Thus, the Supreme Court instructed sentencing courts to employ a two-step categorical approach when examining whether a prior conviction qualifies as a violent felony under the ACCA.[39]

First, courts must determine whether the violation of the underlying criminal statute includes every element of the generic offense listed in the federal statute. If so, "the mere fact of conviction establishes that the putative predicate crime was a violent felony."[40] In other words, the court will find the defendant committed a violent felony when the elements of the underlying conviction include all of the elements of the generic federal definition.[41]

Courts should implement what has been referred to as the "modified categorical approach" when the underlying criminal statute is divisible (i.e., where a statute "comprises multiple, alternative versions of the crime," some of which constitute an element of the generic offense and others that do not).[42] Under this scenario, a conviction only qualifies as a violent felony "'where a jury was actually required to find all the elements' of the listed offense."[43] As the Supreme Court recently explained, the modified categorical approach is really nothing more than

35. 18 U.S.C. § 924(e) (2011); Taylor v. United States, 495 U.S. 575, 599–602 (1990).
36. Descamps v. United States, 133 S. Ct. 2276, 2283 (2013).
37. 18 U.S.C. § 924(e)(1) (2006).
38. *See id.* § 924(e)(2)(B)(ii).
39. *Taylor*, 495 U.S. at 600, 602.
40. Conteh v. Gonzales, 461 F.3d 45, 53 (1st Cir. 2006) (citing *Taylor*, 495 U.S. at 602).
41. *Descamps*, 133 S. Ct. at 2283. In sum, "*Taylor* adopted a 'formal categorical approach': Sentencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offense, and *not* 'to the particular facts underlying those convictions.'" *Id.* (quoting *Taylor*, 495 U.S. at 600).
42. *Descamps*, 133 S. Ct. at 2284.
43. *Conteh*, 461 F.3d at 53 (quoting *Taylor*, 495 U.S. at 602).

"a tool for implementing the categorical approach."[44] It allows for the examination of "a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction."[45] Most importantly, when a sentencing court is placed in a position to determine actual jury findings, it must limit its inquiry to the records of conviction, including the charging document and jury instructions.[46]

In *Shepard v. United States*, the Supreme Court extended its categorical approach articulated in *Taylor* to further include prior convictions that were the result of a guilty plea rather than a jury trial.[47] Again, the Court reinforced the limited inquiry permitted under *Taylor* and determined that only where the conviction record makes manifest that the defendant's plea necessarily constituted an admission to every element of a listed offense may a sentencing court conclude the defendant pleaded guilty to a violent felony.[48] Specifically, the Supreme Court in *Shephard* defined the "record[] of the convicting court"[49] to include "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicitly factual finding by the trial judge to which the defendant assented."[50] In *Shepard*, the Court:

> [U]nderscored the narrow scope of [the sentencing court's] review: It was not to determine 'what the defendant and state judge must have understood as the factual basis of the prior plea,' but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense.[51]

In establishing the outer boundaries of the categorical approach, the Court expressly rejected the Government's argument that the scope of the prior offense could be ascertained through facts alleged in a police report.[52] The Court reasoned that the limited inquiry was necessary to effectuate Congress's true intent of limiting the sentencing enhancement to only those *convictions* considered to be violent felonies.[53]

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44. *Descamps*, 133 S. Ct. at 2284.
45. *Id.*
46. *Id.*
47. Shepard v. United States, 544 U.S. 13, 19–20 (2005).
48. *Id.* at 26.
49. *Id.* at 23.
50. *Id.* at 16.
51. *Descamps*, 133 S. Ct. at 2284 (citing *Shepard*, 544 U.S. at 25–26).
52. *Shepard*, 544 U.S. at 21.
53. *Id.* at 23 & n.4.

IV. PRE-*NIJHAWAN:* FEDERAL CIRCUIT COURTS' DIFFERENT APPLICATIONS OF THE *TAYLOR-SHEPARD* CATEGORICAL METHODS WHEN CALCULATING THE INA'S FINANCIAL FRAUD AND DECEIT $10,000 THRESHOLD PROVISION

The federal circuits generally viewed the underlying rationale of *Taylor* and *Shepard* as persuasive, and during the pre-*Nijhawan* years invoked some form of the categorical approach in ascertaining whether an alien's prior conviction triggered immigration penalties under the INA.[54] The circuits have not, however, reached agreement on the precise, proper scope or application of the categorical approach in the immigration context; the result has been confusing to say the least.[55]

Much of the inconsistencies in these immigration adjudications seem to stem from the confusion caused by the wide-ranging discrepancies in the state law penal statutes that form the basis of prior criminal convictions.[56] Some federal circuit courts came to realize that the elemental focus of the categorical approach "does not apply neatly to the immigration statute."[57] As a result, the federal circuits have employed different variations of the categorical approach, even going so far as to abandon use of the categorical analysis for certain INA provisions.[58]

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54. *See* Conteh v. Gonzales, 461 F.3d 45, 54 (1st Cir. 2006) (recognizing that although the BIA and the courts of appeals have imported versions of the categorical approach into the context of removal proceedings, there is "no universally accepted definition of what constitutes a 'modified categorical approach' for immigration-law purposes"); *see also* Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 125–26 (2d Cir. 2007); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011).

55. Das, *supra* note 18, at 1679–80, 1711–19; *see also* Kawashima v. Mukasey, 530 F.3d 1111, 1119–20 (9th Cir. 2008) (O'Scannlain, J., concurring) (discussing the restrictive view of the modified categorical approach adopted by the court in *Navarro-Lopez v. United States*).

56. *See* Timothy M. Mulvaney, Note, *Categorical Approach or Categorical Chaos? A Critical Analysis of the Inconsistencies in Determining Whether Felony DWI is a Crime of Violence for Purposes of Deportation Under 18 U.S.C. § 16*, 48 VILL. L. REV. 697 (2003).

57. Das, *supra* note 18, at 1677; *see also id.* at 1711–19; *Dulal-Whiteway*, 501 F.3d at 128 ("Statutes of conviction rarely correlate precisely with statutes of removability . . . .").

58. *See* Arguelles-Olivares v. Mukasey, 526 F.3d 171, 176–77 (5th Cir. 2008); Singh v. Ashcroft, 383 F.3d 144, 161 (3d Cir. 2004).

One provision in particular, the "fraud or deceit" aggravated felony provision,[59] under which the Government sought to deport Oviedo-Cortez, exemplifies the pre-*Nijhawan* incongruous categorical analyses federal courts pursued and the confusion they propagated.

A. Ninth Circuit: Strict Categorical Approach

The Ninth Circuit interpreted M(i)—the fraud and deceit provision—as containing two elements: (1) the offense must involve fraud or deceit, and (2) the offense must have resulted in a loss to the victim or victims of more than $10,000.[60] Because the Ninth Circuit viewed the $10,000 monetary threshold as an element, the court's application of the *Taylor-Shepard* categorical approach led to removal only in the rare situation that the noncitizen was actually convicted of both elements.[61] Under this strict categorical approach, the Ninth Circuit never found that the prior conviction for financial fraud itself resulted in removal under M(i) because it never encountered an underlying conviction that required proof of both elements.[62]

As a result, the Ninth Circuit did allow usage of the modified categorical approach to determine whether an alien's underlying conviction qualified as an aggravated felony.[63] Accordingly, the Ninth Circuit then looked to the record of conviction to determine whether the jury found, or the criminal defendant admitted to, a loss to the victim in excess of $10,000.[64] The Ninth Circuit limited its inquiry to a "'narrow, specified set of documents,'" including "'the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.'"[65] But

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59. INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2012).

60. *Kawashima*, 530 F.3d at 1114 (citing Chang v. INS, 307 F.3d 1185, 1189 (9th Cir. 2002)); *see also* Li v. Ashcroft, 389 F.3d 892, 896 (9th Cir. 2004).

61. *See Kawashima*, 530 F.3d at 1114.

62. *See id.* at 1114–15 (recognizing that subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1), and aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2), does not require proof of monetary loss in excess of $10,000); *see also* Kharana v. Gonzales, 487 F.3d 1280, 1284 (9th Cir. 2007); Scully v. Gonzales, 225 F. App'x 690, 692 (9th Cir. 2007); Haque v. Gonzales, 223 F. App'x 591, 593 (9th Cir. 2007); Fierarita v. Gonzales, 186 F. App'x 769, 771 (9th Cir. 2006); Ferreira v. Ashcroft, 390 F.3d 1091, 1098 (9th Cir. 2004); *Li*, 389 F.3d at 897; *Chang*, 307 F.3d at 1189–90.

63. *See Kawashima*, 530 F.3d at 1114; *Kharana*, 487 F.3d at 128–84; *Ferreira*, 390 F.3d at 1098; *Li*, 389 F.3d at 897; *Chang*, 307 F.3d at 1189–90.

64. *Kawashima*, 530 F.3d at 1115 (noting that four prior Ninth Circuit cases have looked at conviction records to determine if the jury found or the defendant admitted to the required loss (citing *Kharana*, 487 F.3d at 1284; *Ferreira*, 390 F.3d at 1098; *Li*, 289 F.3d at 897; *Chang*, 307 F.3d at 1189–90)).

65. *Id.* at 1114 n.4 (quoting Tokatly v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004)).

the Ninth Circuit refrained from "'look[ing] beyond the record of conviction itself to the particular facts underlying the conviction.'"[66]

In 2007, one year before the Supreme Court decided *Nijhawan*, the Ninth Circuit in *Kawashima v. Mukasey* took an even more restrictive view by precluding the immigration court from examining even the record of conviction.[67] The Ninth Circuit felt compelled to follow its decision in *Navarro-Lopez v. Gonzales*, which foreclosed this further inquiry, since M(i)'s monetary loss requirement was an element of the of generic offense.[68] In *Navarro-Lopez*, the Ninth Circuit held:

> The modified categorical approach . . . only applies when the particular elements in the crime of conviction are broader than the generic crime. When the crime of conviction [–*e.g.*, subscribing to a false statement on a tax return–] is missing an element of the generic crime altogether, [the court] can never find that "a jury was actually required to find all the elements of" the generic crime.[69]

The court in *Kawashima* concluded that since the conviction statutes did not require the Government to prove the amount of loss, no further inquiry was permissible.[70] Although the Ninth Circuit acknowledged that the application of *Navarro-Lopez* to M(i) essentially rendered the provision null,[71] since "there are almost no statutes that punish fraud and also specify that the fraud must cause a loss of $10,000 or more,"[72] it concluded that *Navarro-Lopez*'s rule was "plain and clear" and, therefore, the preceding cases were "impliedly overruled."[73] Additionally, the court recognized that an alternate approach—namely, interpreting the monetary threshold of M(i) as merely a qualifier rather than an additional element—would avoid the anomalous consequence that resulted from applying *Navarro-Lopez*.[74]

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66. *Id.* (quoting *Tokatly*, 371 F.3d at 620).
67. *Id.* at 1117–18 (concluding that *Navarro-Lopez v. Gonzales* was binding precedent, and therefore, the record of the Kawashimas' convictions could not be consulted).
68. Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc).
69. *Kawashima*, 530 F.3d at 1115 (quoting *Navarro-Lopez*, 503 F.3d at 1073).
70. *Id.* at 1115–16.
71. *Id.* at 1116–17 & n.7 (collecting examples of fraud violations).
72. *Id.* at 1120 (O'Scannlain, J., concurring).
73. *Id.* at 1116 (majority opinion).
74. *Id.* (recognizing the approach of the Third and the Fifth circuits, as applied in *Singh v. Ashcroft* and *Arguelles-Olivares v. Mukasey*) (citing Singh v. Ashcroft, 383 F.3d 144, 161 (3d Cir. 2004); Arguelles-Olivares v. Mukasey, 526 F.3d 171, 176–77 (5th Cir. 2008)). Judge O'Scannlain's concurring opinion also recognized that reformulation of the modified categorical approach in *Navarro-Lopez* had no support from any other courts of appeal and was decided without addressing the dissenting views of the

But nevertheless, the court declined to adopt this alternative approach because the *Navarro-Lopez* rule now "control[s the] modified categorical analysis of aggravated felonies defined in Subsection M(i)."[75]

B. Second and Eleventh Circuits: Modified Categorical Approach Allowing Examination of the Conviction Record

The Second Circuit has consistently found the *Taylor-Shepard* approach instructive for establishing removability[76] under the INA. In *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, the court noted four similarities between the INA and ACCA[77] as particularly persuasive in its decision to extend *Taylor*'s rationale in the immigration context.[78]

In applying the categorical analysis to M(i), the Second Circuit acknowledged that "few statutes criminalizing fraud enumerate distinct violations corresponding to the $10,000 loss amount required by the [INA]."[79] Under the Second Circuit's version of the *Taylor* analysis,

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other circuits or acknowledging the precedents it overturned. *Id.* at 1124 (O'Scannlain, J., concurring).

75. *Id*. at 1118 (majority opinion). The court in *Kawashima* reasoned that the lone authority relied upon by the en banc court in *Navarro-Lopez*, Li v. Ashcroft, 389 F.3d 892, 899–901 (9th Cir. 2004) (Kozinski, J., concurring), was a quote from Judge Kozinski stating, "he would not have examined the record at all because Subsection M(i)'s amount of loss requirement 'wasn't an element' of the statutes under which the petitioner had been convicted." *Kawashima*, 530 F.3d at 1117 (citing *Navarro-Lopez*, 503 F.3d at 1073).

76. Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 125 (citing Ming Lam Sui v. INS, 250 F.3d 105, 116–17 (2d Cir. 2001) (applying the categorical approach to determine whether an alien was convicted of an aggravated felony as defined under 8 U.S.C. § 1227(a)(2)(A)(iii)).

77. The sentencing statute at issue in *Taylor* was the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006).

78. *Dulal-Whiteway*, 501 F.3d at 125–26 (citing to *Ming Lam Sui*, 250 F.3d at 117). First, the court noted that the INA's the aggravated felony provision, like the sentencing enhancement provision of the ACCA, applies only to aliens "convicted" of an aggravated felony, not aliens who have merely "committed" an aggravated felony. *Id.* at 125 (citing to *Ming Lam Sui*, 250 F.3d at 117). Second, the court reasoned that "nothing in the legislative history suggested a factfinding role for the BIA in ascertaining whether an alien had committed an aggravated felony, just as, in *Taylor*, nothing suggested such a role for the sentencing court in evaluating the factual basis of a prior burglary conviction." *Id.* at 125–26 (citing to *Ming Lam Sui*, 250 F.3d at 117). Third, the court "found that the practical evidentiary difficulties and potential unfairness associated with looking behind the offense of conviction were 'no less daunting' in the immigration than in the sentencing context." *Id.* at 126 (citing to *Ming Lam Sui*, 250 F.3d at 117). Lastly, the court recognized that the limited scope of the modified categorical approach facilitated the immigration judge's analysis by focusing on the "indictment or jury instructions to determine the basis of an alien's conviction." *Id.* (citing to *Ming Lam Sui*, 250 F.3d at 117–18).

79. *Id.* at 126–28.

the court must first determine whether the underlying statute is divisible.[80] Only if the statute is divisible can the court consult the record of conviction to determine whether the victim suffered the requisite amount of loss.[81] According to the Second Circuit, a statute is divisible "where the removable and non-removable offenses they describe are listed in different subsections or comprise discrete elements of a disjunctive list of proscribed conduct."[82]

The conviction at issue in *Dulal-Whiteway*, however, did not involve discrete elements or different subsections.[83] Rather, the criminal statute prohibited obtaining anything of value aggregating $1,000 or more, by the use of unauthorized access devices with the intent to defraud.[84] The Government argued that the court could consult the conviction records because the statute was divisible since it "proscribe[d] some conduct that is not removable—fraud causing a loss between $1000 and $10,000—and some conduct that is removable—fraud causing a loss greater than $10,000."[85] The Second Circuit agreed and looked to the record of conviction to determine whether the amount of loss exceeded $10,000.[86]

Similar to the pre-*Navarro-Lopez* decisions of the Ninth Circuit, the Second Circuit only considered sources specifically contained in the record

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80. *Id.* at 126. The Supreme Court recently affirmed the Second Circuit's approach as the proper analysis for determining aggravated felony convictions in *Moncrieffe v. Holder* and *Descamps v. United States*. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013); Descamps v. United States, 133 S. Ct. 2276, 2281–83 (2013).

81. *Dulal-Whiteway*, 501 F.3d at 126.

82. *Id.* at 126–27 (giving examples of cases involving divisible statutes); *see, e.g.*, Kuhali v. Reno, 266 F.3d 93, 104, 106 (2d Cir. 2001) (statute divisible); Dickson v. Ashcroft, 346 F.3d 44, 47 (2d Cir. 2003) (statute divisible); Canada v. Gonzales, 448 F.3d 560, 567–68 (2d Cir. 2006) (statute not divisible).

83. *Dulal-Whiteway*, 501 F.3d at 123 (noting that the alien was convicted of "knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period," in violation of 18 U.S.C. § 1029(a)(2)).

84. *Id.*

85. *Id.* at 126.

86. *Id.* at 128. *See also supra* text accompanying notes 62–74. The Ninth Circuit did not use the terminology "divisible," however, the issue regarding the record of conviction and whether it may be examined was essentially the same. In *Dulal-Whiteway*, the Second Circuit presumed it could consult the record of conviction, *Dulal-Whiteway*, 501 F.3d at 128, and the Ninth Circuit determined that *Navarro-Lopez's* interpretation of *Taylor* precluded the court from examining the record of conviction. *See supra* note 68 and accompanying text.

of conviction.[87] The Second Circuit looked to section 240(c)(3)(B) of the INA, which lists the materials that may supply "proof of a criminal conviction,"[88] and held that the "permissible materials include a charging document (such as an indictment), a signed plea agreement, a verdict or judgment of conviction, a record of the sentence; a plea colloquy transcript, and jury instructions."[89]

The Second Circuit expressly rejected the use of a presentence investigation report ["PSR"] to establish the amount of loss.[90] The court expressed doubt regarding the reliability of PSRs since the primary purpose of such reports is to aid the sentencing court and therefore often contain background information and details about a crime drawn from probation officers' own interviews.[91] Moreover, PSRs routinely describe "'conduct that demonstrates the commission of an offense even if the alien was never *convicted* of it.'"[92] The court concluded that the

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87. *Dulal-Whiteway*, 501 F.3d at 128–29; *see also supra* text accompanying notes 65–66.

88. *Dulal-Whiteway*, 501 F.3d at 128–29. Section 240(c)(3)(B) of the INA provides:

> (B) Proof of Convictions. In any proceeding under this Act, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
>
> (i) An official record of judgment and conviction.
>
> (ii) An official record of plea, verdict, and sentence.
>
> (iii) A docket entry from court records that indicates the existence of the conviction.
>
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
>
> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
>
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
>
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2012).

89. *Dulal-Whiteway*, 501 F.3d at 129; *see also* Dickson v. Ashcroft, 346 F.3d 44, 53 (2d Cir. 2003) (discussing the appropriate evidence admissible to prove a conviction).

90. *Dulal-Whiteway*, 501 F.3d. at 129.

91. *Id.* (referencing *Dickson*, 346 F.3d at 54).

92. *Id.* (quoting *Dickson*, 346 F.3d at 54) (emphasis in original).

"unproven (and sometimes inadmissible) facts" included in PSRs are "an inappropriate basis on which to rest a removal decision."[93]

In addition, the Second Circuit also disagreed with the First Circuit and followed a stricter interpretation of *Shepard* expressly rejecting the use of a restitution order to prove loss.[94] Although the court acknowledged that *Taylor* and *Shepard* were criminal sentencing cases, it nonetheless found the more restrictive inquiry convincing[95] and therefore determined that because "the amount of restitution is not constrained by facts on which the plea 'necessarily' rested," it could not be used to determine loss.[96] Thus, in rejecting both PSRs and restitution orders, the Second Circuit held:

> For convictions following a trial, the BIA may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions. For convictions following a plea, the BIA may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript.[97]

The court concluded that its holding was compelled by three principles: (1) the plain meaning of the INA refers only to convicted conduct;[98] (2) the

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93. *Id.* (referencing *Dickson*, 346 F.3d at 54) (giving a thorough analysis of why PSRs are unreliable). Careful criminal defense attorneys representing noncitizen clients routinely object to the PSR findings.

94. *Id.* at 131–32 (rejecting the First Circuit's approach, as demonstrated in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), which found the INA dissimilar from the *Taylor* and *Shepard* decisions, and held that a restitution order was appropriate evidence to establish the requisite amount of loss).

95. *Id.* at 130 (noting that "*Taylor* and *Shepard* were sentencing decisions, and differences between criminal punishment and the civil removal power might justify a circumscribed application of those decisions in the latter context"). This was, however, the First Circuit's rationale in *Conteh*, 461 F.3d at 55 ("declin[ing] the invitation to transplant the categorical approach root and branch—without any modification whatever—into the civil removal context").

96. *Dulal-Whiteway*, 501 F.3d at 130 (referring to *Shepard*'s instruction that when determining whether a prior conviction in a pleaded case was based on a particular offense, the court's inquiry should be limited to facts on which "the plea had 'necessarily' rested," Shepard v. United States, 544 U.S. 13, 21 (citing Taylor v. United States, 495 U.S. 575, 602 (1990))).

97. *Id.* at 131.

98. *Id.* at 131–32 (citing Ming Lam Sui v. INS, 250 F.3d 105, 117 (2d Cir. 2001)). The Second Circuit also explained that because the alien must be "convicted" of an aggravated felony, the facts used to establish removability must be established beyond a reasonable doubt. *Id.* at 132. Furthermore, the court noted the standard in civil removable proceedings—clear, unequivocal and convincing evidence—would not be properly

BIA and appellate courts are institutionally less competent "to re-adjudicate the basis of prior criminal convictions;"[99] and (3) general conceptions of fairness—for example, "'if a guilty plea to a lesser, [non-removable] offense was the result of a plea bargain, it would seem unfair to [order removal] as if the defendant had pleaded guilty to [a removable offense].'"[100]

The Eleventh Circuit adopted an approach similar to the one announced by the Second Circuit.[101] In *Obasohan v. U.S. Attorney General*, the Eleventh Circuit, following its interpretation of *Taylor-Shepard,* first conducted a categorical analysis to determine whether Obasohan was an aggravated felon under M(i).[102] Then, because Obasohan pled guilty to, and was convicted of, one count of conspiracy to produce, use, and traffic one or more counterfeit access devices,[103] the court applied the *Shepard* modified categorical approach.[104] In its review of the immigration court's decision, the Eleventh Circuit chided the immigration judge for "confus[ing] the issues of conviction and restitution."[105] According to the Eleventh Circuit, it was plain error for the immigration judge "to rely solely on the loss amounts contained in the restitution order as 'clear, convincing and unequivocal' evidence."[106] The court explained in depth that, while a sentencing court may consider "a broad range of *relevant* conduct, the plain language of the INA requires that an alien have been *convicted of* an aggravated felony to be removable."[107]

The Eleventh Circuit found the restitution order insufficient as a matter of law because the standard of proof required for the restitution order is only a preponderance of the evidence, but loss must be established by "clear, convincing and unequivocal" evidence in order to support a

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satisfied if the immigration judge ["IJ"] were to rely on sentencing facts, which only require the lower preponderance of the evidence standard. *Id. See also* 8 U.S.C. § 1229a(c)(3)(A) (2012).

99. *Dulal-Whiteway*, 501 F.3d at 132 (expressing concern about reviewing courts acting as fact-finders and weighing evidence in a manner only appropriate for a criminal jury); *see also Ming Lam Sui*, 250 F.3d at 119. Furthermore, the court acknowledged that "[i]t was this very concern about collateral trials, and the oppressive administrative burden they impose, that led the BIA to adopt (and [the second circuit] to endorse) the categorical approach to removability in the first instance." *Dulal-Whiteway*, 501 F.3d at 132 (citing *Ming Lam Sui*, 250 F.3d at 117–18; Michel v. INS, 206 F.3d 253, 264 (2d Cir. 2000); Matter of Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (B.I.A. 1996)).

100. *Dulal-Whiteway*, 501 F.3d at 132–33 (quoting *Taylor*, 495 U.S. at 601–02).

101. *See, e.g.*, Obasohan v. U.S. Attorney Gen., 479 F.3d 785 (11th Cir. 2007).

102. *Obasohan*, 479 F.3d at 788–91. *See also supra* text accompanying notes 37–47.

103. 18 U.S.C. § 1029(a)(1), (b)(2) (2006).

104. *Obasohan*, 479 F.3d at 789.

105. *Id.* at 790.

106. *Id.* at 789.

107. *Id.* at 790 (emphasis in original).

finding of removal.[108] Thus, according to the Eleventh Circuit, appellate courts must confine their review to the record of conviction in order to determine the facts upon which the alien's prior conviction *actually* and *necessarily* rested.[109]

C. First Circuit: Modified Categorical Approach Allowing Examination of Restitution Orders in Addition to the Record of Conviction

The First Circuit consistently employed the modified categorical approach to charges of deportability under M(i), but departed from its sister circuits in *Conteh v. Gonzales*,[110] in which it held that restitution orders were part of the record of conviction.[111] Similar to the Second Circuit, the First Circuit consulted section 240(c)(3)(B) of the INA to determine what evidence the immigration judge and the BIA may consider in assessing whether an underlying conviction is an aggravated felony.[112] The court also considered an implementing regulation containing a catch-all provision stating, "[a]ny other evidence that *reasonably indicates* the existence of a criminal conviction may be admissible as evidence thereof."[113]

Under the guidance of these statutes, the First Circuit reviewed the evidence used by the immigration judge and the BIA to order the alien's removal.[114] The court concluded that the statutes permit the BIA to reference the indictment, the judgment, and the restitution order from the antecedent criminal case because these "documents comprise 'conclusive [judicial] records made or used in adjudicating guilt.'"[115] Elaborating on the reliability of restitution orders, the court emphasized that, although

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108. *Id.* at 791.

109. *See id.* at 789–90 (finding the INA analogous to the inquiry made by the sentencing in court in *Taylor* and *Shepard*, and holding that the IJ erred by "not hav[ing] relied on the statutory elements of the offense, the indictment, the plea or the plea colloquy to conclude that Obasohan was convicted of an aggravated felony, as defined in the INA"); *see also Dulal-Whiteway*, 501 F.3d at 131. *See also supra* text accompanying notes 63–65.

110. Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006).

111. *Id.* at 59.

112. *Id.* at 57.

113. *Id.* at 57 (emphasis added) (citing 8 C.F.R. § 1003.41(d) (2012)).

114. The First Circuit reviewed the indictment, the judgment, the restitution order, the PSR, and the alien's testimony at the removal hearing. *Id.* at 52, 58–59.

115. *Id.* at 59 (alteration in original) (citing Shepard v. United States, 544 U.S. 13, 21 (2005)).

restitution orders alone are not dispositive of actual loss, "'[t]he amount of restitution ordered . . . may be helpful to a court's inquiry into the amount of loss to the victim'" where the district court makes an explicit finding of loss as part of its final judgment and the restitution order corroborates the district court's finding.[116]

Conversely, the First Circuit rejected the BIA's reliance on the alien's testimony and the PSR.[117] The court reasoned that the catchall provision in 8 C.F.R. § 1003.41(d) authorizes the admission of evidence for the sole purpose of proving "'the *existence* of a criminal conviction,'" not the authorization of evidence for the purpose of proving the facts underlying the offense of conviction.[118] Because an alien's testimony contains "after-the-fact statements made in a separate and subsequent proceeding" and the PSR contains narrative statements unrelated to the alien's conviction, these items are only useful to prove the *existence* of a conviction, but not removability.[119]

D. Fifth and Third Circuits: Abandoning the Categorical Approach in Favor of Examining the Underlying Facts

In *Arguelles-Olivares v. Mukasey*, the Fifth Circuit rejected the categorical and modified categorical approaches to determining loss under M(i).[120] The court stated, "[w]hen the amount of loss . . . is not an element of an offense, the focus should not be limited to the conviction itself."[121] Under this reasoning, the amount of loss is a "factual matter"[122] that can be proven by looking beyond the record of conviction to documents produced for sentencing purposes because "[t]he amount of loss is relevant in a criminal prosecution primarily, if not exclusively, to sentencing."[123] Accordingly, "[w]hen a tribunal subsequently examines . . . the amount of

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116. *Id.* at 61–62 (citing Munroe v. Ashcroft, 353 F.3d 225, 227 (3d Cir. 2003). The court distinguished the restitution order in *Conteh* from those "artificially manipulated for the sole purpose of influencing an alien's immigration status" noting, "that award is not controlling with respect to the amount of loss." *Id.*

117. *Id.* at 58–59.

118. *Id.* at 58 (emphasis in original) (quoting 8 C.F.R. § 1003.41(d) (2012)).

119. *Id.* at 58–59.

120. Arguelles-Olivares v. Mukasey, 526 F.3d 171, 177 (5th Cir. 2008); *see also* James v. Gonzales, 464 F.3d 505 (5th Cir. 2006) (representing the circuit's first departure from the categorical/ modified categorical approach under M(i)).

121. *Arguelles-Olivares*, 526 F.3d at 177.

122. *Id.*

123. *Id.* Also note the court's distinction between this and the modified categorical approach– "The modified categorical approach accordingly restricts the documents that may be consulted to determine whether a conviction was for a generic offense, *and the focus is, properly, on the conviction*." *Id.* (emphasis added).

loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain."[124]

While relying on only a PSR, the Fifth Circuit held that the alien's guilty plea to a single count of filing a false tax return in violation of 26 U.S.C. § 7206(1) was a removable offense pursuant to M(i).[125] Rather than requiring the Government produce the alien's written plea agreement,[126] the Fifth Circuit accepted a chart in the PSR purporting to show the amount of tax the alien owed for years 1996-2000 (including $75,982 in 1999) as clear and convincing evidence that the circumstances surrounding the alien's conviction resulted in over $10,000 in loss to the Government.[127] To justify this holding, the court relied on the alien's failure to object to the facts in the PSR during the sentencing phase of his conviction, the alien's admission during sentencing that the amounts contained in the PSR were correct, and the district court's adoption of the PSR as a factual finding.[128] Surprisingly, the majority opinion never mentions that the alien, in his removal proceedings, specifically denied that his conviction resulted in a loss exceeding $10,000, or that he consistently objected to the inclusion of the PSR.[129] No other circuit agreed with the Fifth Circuit's use of a PSR alone as sufficient to establish loss under M(i) by clear and convincing evidence as required by INA section 240(c)(3)(A).

The Third Circuit also found that the language of M(i)'s loss requirement permitted the immigration court to look at sentencing documents to determine whether the alien's underlying conviction caused a

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124. *Id.* at 177–78.

125. *Id.* at 179–80.

126. *Id.* at 181 (Dennis, J., dissenting). The dissent calls attention to the "potential of unfair practices, inequality of justice, and deportations based on constructive paper trails," *id.* at 180, when it points out,

> [t]he DHS does not explain why it failed to introduce this crucial document into evidence. If the written Plea Agreement discloses clearly that Arguelles underpaid his 1999 taxes by more than $10,000, the DHS's failure to file it has caused this court to expend time and effort unnecessarily on the appeal, the oral argument and the opinion writing on this issue. If the Plea Agreement does not contain clear evidence to this effect, then a serious question is raised as to whether the DHS has fairly dealt with Arguelles and honorably with this court.

Id. at 181 n.2.

127. *Id.* at 179 (majority opinion), 181–82 n.4 (Dennis, J., dissenting).

128. *Id.* at 179 (majority opinion); *see also* FED. R. CRIM. P. 32(i)(3)(C).

129. These concerns are raised in the dissent. *Arguelles-Olivares*, 526 F.3d at 181–82 (Dennis, J., dissenting).

loss of over $10,000 to the victim.[130] The Third Circuit therefore discarded the categorical approach in favor of a circumstance-specific method.

Manoj Nijhawan was born in India and immigrated to the United States as a legal permanent resident in 1985.[131] In 2002, Nijhawan was one of 15 defendants arrested and indicted for involvement in a massive "fraudulent scheme to obtain hundreds of millions of dollars in loans from numerous major banks."[132] Of the fifteen defendants originally named in the indictment, five (including Nijhawan) went to trial.[133] On May 12, 2004, the jury convicted Nijhawan of Counts One and Thirty of the indictment.[134] Count One, the overall conspiracy count, contained a general loss allegation as to the entire fraud scheme and involved conspiracy to commit bank fraud, mail fraud, and wire fraud in violation of 18 U.S.C. § 371.[135] Count Thirty alleged conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h).[136] However, the jury was not asked to, nor did it, determine the amount of loss attributable to any individual defendant, including Nijhawan.[137]

Nijhawan entered into a stipulation—for sentencing purposes only—in which he agreed that the total loss from his convicted offenses exceeded $100 million, and therefore a twenty-six level enhancement was warranted.[138] When entering the judgment of conviction, the trial judge filled in the space for "loss" with the amount "$683,632,800.23."[139] However, the trial judge held, and the Government expressly agreed, that this amount was not a determination that Nijhawan had, in fact, caused a loss in excess of $10,000.[140] Nijhawan was sentenced to forty-

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130. Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006); Nijhawan v. U.S. Attorney Gen., 523 F.3d 387, 394–95 (3d Cir. 2008).

131. Brief for Petitioner at 6, Nijhawan v. Holder, 557 U.S. 29 (2009) (No. 08-495).

132. *Id.* at 7; Brief for the Respondent, *supra* note 20, at 4.

133. Brief for Petitioner, *supra* note 131, at 7.

134. *Id.* at 7–8.

135. *Nijhawan*, 523 F.3d at 389.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Brief for Petitioner, *supra* note 131, at 10. From the trial transcript:

> [DEFENSE COUNSEL]: . . . That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. *That's not a finding of over $10,000 specific to this defendant.*
>
> THE COURT: I think that's right. Do you agree with that [Assistant United States Attorney ("AUSA")]?
>
> [AUSA]: Yeah, I think it's right Your Honor, just the loss.

Id. at 10–11 (emphasis and alteration in original).

one months of imprisonment and ordered to pay $683,632,800.23 in restitution.[141]

While Nijhawan was serving his sentence, DHS initiated removal proceedings against him for committing an aggravated felony under sections 101(a)(43)(D) and (M)(i) of the INA.[142] The immigration judge sustained both charges and entered an order of removal against Nijhawan on February 22, 2006.[143] On appeal, the BIA rested its decision upon the M(i) charge.[144] In the BIA's written decision,[145] the single-member panel looked beyond Nijhawan's record of conviction to determine the amount of loss and "held that the stipulation, judgment of conviction, and restitution order were 'sufficient to establish that [Nijhawan's] conviction renders him removable.'"[146]

On appeal to the Third Circuit, Nijhawan argued that the BIA erred by establishing loss based on evidence outside of the record of conviction, particularly the sentencing documents.[147] Nijhawan argued that the BIA was bound by the modified categorical approach and could only consult the limited set of documents from the criminal trial to satisfy the loss requirement of M(i).[148] Specifically, Nijhawan contended that, since the jury did not, and was not instructed to, make a finding of loss under the statute of conviction, his conviction was not an aggravated felony within the meaning of the INA.[149] Conversely, the Government argued that the language of M(i) allows the immigration judge and the BIA to consider

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141. *Nijhawan*, 523 F.3d at 389.

142. *Id.* DHS later amended the charge under M(i) to add a charge under 8 U.S.C. § 1101(a)(43)(U) (2012) (attempt to commit an aggravated felony). Brief for the Respondent, *supra* note 20, at 6–7.

143. *Nijhawan*, 523 F.3d at 389.

144. *Id.*

145. The BIA's decision was a written, non-precedent decision issued by a single board member on August 8, 2006. Brief for Petitioner, *supra* note 131, at 12.

146. *Nijhawan*, 523 F.3d at 390 (citing the BIA's decision from the A.R.); Brief for Petitioner, *supra* note 131, at 12.

147. *Nijhawan*, 523 F.3d at 391.

148. *Id.* at 391–93, 396–97, 400 (Stapleton, J., dissenting). The dissent referenced decisions by the Second, Ninth, and Eleventh Circuits in which the courts limited their inquiry to the record of conviction under the modified categorical approach. *Nijhawan*, 523 F.3d at 400. *See* Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 128 (2d Cir. 2007); Li v. Ascroft, 389 F.3d 892, 895–98 (9th Cir. 2004); Obasohan v. U.S. Attorney Gen., 479 F.3d 785, 788–89 (11th Cir. 2007); *see also supra* Parts IV.A, IV.B.

149. *Nijhawan*, 523 F.3d at 389.

any evidence from the criminal record to determine "what loss was, in fact, occasioned by or attributable to the offense of conviction."[150]

Ultimately, the Third Circuit concluded that the language of M(i) "does not require a jury to have determined that there was a loss in excess of $10,000 [because] [t]o read the 'in which' language as requiring that what follows must have been proven as an element of the crime would bring about an absurd result."[151] The court expressly departed from the restrictions of the categorical and modified categorical approaches of *Taylor* and *Shepard*, stating, "[t]he 'in which' qualifying language renders the analysis under [M(i)] different from the approach in *Taylor* and *Shepard*."[152] "Accordingly, our Court's precedent directs us to 'examine the facts at issue,' because the amount of loss is a 'qualifier,' not an element."[153]

Under this interpretation of M(i), the BIA was permitted to rely on evidence outside of the record of conviction to satisfy the loss requirement.[154] Therefore, the only issue left for the court to decide was "whether the 'tether' of a loss in excess of $10,000 to Count 1 . . . [was] sufficiently strong" to provide clear and convincing evidence that the requisite amount of loss was tied to Nijhawan's offense of conviction.[155]

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150. *Id.* at 391.
151. *Id.* (citing 8 U.S.C. § 1101(a)(43)(M)(i)).
152. *Id.* at 392.
153. *Id.* at 393–94. The court references the following precedent:
   (1) *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003), where Defendant was not required to plead guilty to a loss amount for removal under INA § 101(a)(43)(M)(i). *Nijhawan*, 523 F.3d at 394 (citing *Munroe*, 353 F.3d 225). Instead, the court looked to the indictment "which contained an averment as to loss in excess of $10,000, rather than an amended restitution order, which reduced defendant's restitution to $9,999." *Id.* (citing *Munroe*, 353 F.3d at 227). However, the court stated that under different circumstances, "'the amount of restitution ordered as a result of a conviction may be helpful to a court's inquiry into the amount of loss to the victim *if the plea agreement or indictment is unclear as to the loss suffered*.'" *Id.* (emphasis added) (quoting *Munroe*, 353 F.3d at 227); and
   (2) *Alaka v. Attorney Gen. of U.S.*, 456 F.3d 88 (3d Cir. 2006), which stands for the proposition that "one who has admitted to a loss of less than $10,000 as part of a guilty plea cannot later be said to have been convicted of an offense involving fraud in which the loss to the victim exceeds $10,000." *Nijhawan*, 523 F.3d at 394. "*Alaka* requires only that we 'focus narrowly on the loss amounts that are particularly tethered to the convicted counts.'" *Id.* at 394–95 (citing *Alaka*, 456 F.3d at 107).
154. *Id.* at 395–96.
155. *Id.* at 395.

E. Lower Court's Development of the Tethering Requirement

In *Nijhawan*, the Third Circuit declined to address the "nature of the nexus required" (i.e. the "tether") between the conduct of which the alien was actually convicted and the amount of loss required by the statute.[156] Most courts, however, had already explicitly required that "what constitutes an 'aggravated felony' for purposes of the INA must be tethered to convicted conduct."[157] In other words, only conduct of which the noncitizen was actually convicted may count towards fulfilling the $10,000 loss requirement of M(i).

The BIA has also recognized that "additional conduct that was not 'particularly tethered to convicted counts' cannot satisfy the [Government's] burden . . . under . . . the Act . . . [because] a restitution order based upon additional evidence which is only proven by a "preponderance of evidence" during the criminal proceedings cannot satisfy the DHS's burden of proving an aggravated felony by "clear, convincing and unequivocal evidence."[158] Similarly, the Seventh Circuit in *Knutsen v. Gonzales*[159] reasoned that "'consistent with the statute . . . the court should focus narrowly on the loss amounts that *are particularly tethered to convicted counts* alone.'"[160] Because the loss figure contained in the stipulation was based on both convicted and unconvicted conduct, the court held that it was error for the immigration judge and the BIA to rely on the alien's stipulation as proof of the actual loss.[161]

The tethering requirement is in line with "the plain and unambiguous language of the [INA], which predicates removal on a *convicted* offense,"[162] and it functions as a limit on what evidence the government may use (and subsequently, what the judge may review) in removal proceedings. Thus, when determining whether the noncitizen's conviction actually caused greater than $10,000 in loss, the immigration judge may only

156. *Id.*
157. Obasohan v. U.S. Attorney Gen., 479 F.3d 785, 790 (11th Cir. 2007); *see also* Knutsen v. Gonzales, 429 F.3d 733, 739–40 (7th Cir. 2005).
158. *In re* Osarias Monday Omoregbee, No. A29891115, 2007 WL 2299662, at *2 (B.I.A. July 17, 2007) (citing *Obasohan*, 479 F.3d at 789–90).
159. Knutsen v. Gonzales, 429 F.3d 733 (7th Cir. 2005).
160. *Nijhawan*, 523 F.3d at 396 (alteration and emphasis in original) (citing *Knutsen*, 429 F.3d at 739–40).
161. *Id.* (citing *Knutsen*, 429 F.3d at 739).
162. *Knutsen*, 429 F.3d at 736 (emphasis in original).

consult documents in the criminal record that are explicitly tethered to the noncitizen's conviction.

In spite of strong support for strict adherence to the tethering requirement under the modified categorical approach, the Third Circuit reversed its course and joined the First and Fifth Circuits in allowing removal to be based on documents that were not explicitly tethered to Nijhawan's criminal conduct.[163] Notwithstanding its past claims to the contrary,[164] the Third Circuit claimed that case law "requires an 'inquiry into the underlying facts of the case' to ascertain whether the 'in which' qualifying loss provision is satisfied."[165] In support of its broader inquiry, the court cited the First Circuit's decision in *Conteh* and the Eleventh Circuit's decision in *Obasohan*.

The Third Circuit relied on the reasoning in *Conteh*, wherein the First Circuit recommended a focus on the loss occasioned by the conviction, rather than loss as an element to be found by the jury or explicitly incorporated in the plea agreement.[166] However, the court in *Conteh* noted that the distinction between "'*conviction for* and *commission of* an aggravated felony is an important one; because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone.'"[167]

The Third Circuit also found that its own circuit precedent provided that "the loss amount need not be found specifically by the jury or set forth in the plea agreement or colloquy."[168] In *Alaka v. Attorney General*, the Third Circuit relied on the Seventh Circuit's reasoning in *Knutsen* to hold that courts must "'focus narrowly on the loss amounts that are particularly tethered to the convicted counts.'"[169] In *Alaka*, the total loss alleged in the noncitizen's indictment exceeded $10,000, but this amount was connected with the overall scheme the noncitizen was involved in, not the single count to which the alien pleaded guilty.[170] Because the noncitizen's plea agreement only referenced a loss to the victim of $4,716.68 resulting from the alien's actual conviction,[171] and all other counts against the alien were

163. *See supra* Parts IV.C–IV.E

164. *Nijhawan*, 523 F.3d at 396–999. The Third Circuit repeatedly claims that it has not abandoned the *Taylor-Shepard* approach or the tethering requirement. *Id.*

165. *Id.* at 396.

166. *Id.* at 395 (citing Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006)).

167. *Id.* at 395 (emphasis in original) (quoting *Conteh*, 461 F.3d at 56).

168. *Id.* at 397.

169. *Id.* at 394–95 (citing Alaka v. Attorney Gen. of U.S., 456 F.3d 88, 107 (3d Cir. 2006)).

170. *Id.* at 394 (citing *Alaka*, 456 F.3d at 92).

171. *Id.* (citing *Alaka*, 456 F.3d at 92).

dismissed as a result of the plea agreement,[172] the Third Circuit held that "[w]here there is a plea agreement that sets forth the loss it is to that agreement [the court] must look to determine the loss."[173]

Lastly, the Third Circuit cited the Eleventh Circuit's decision in *Obasohan*[174] in support of its review of the sentencing documents as long as the amount of loss is tethered to the underlying conviction.[175] As previously mentioned, the noncitizen in *Obasohan* had been ordered to pay restitution due to fraudulent charges on other credit cards that were not the subject of the indictment or the plea agreement.[176] The Eleventh Circuit held it was an error to rely on the noncitizen's PSR and restitution order as clear and convincing evidence of loss because the PSR and restitution order "[were] based entirely on other unconvicted conduct . . . 'that was alleged only in the [PSR].'"[177]

Although Nijhawan urged the court to depart from its case law and follow the approach of the Second and Ninth Circuits,[178] the Third Circuit held that since "the loss requirement invites further inquiry into the facts underlying the conviction, . . . that inquiry is satisfied if the amount of loss is sufficiently tethered to the fraud conviction."[179] Therefore, the court concluded that "taken together, the indictment, judgment of conviction, and stipulation provide clear and convincing evidence that the requisite loss was tied to Nijhawan's offense of conviction."[180]

V. *NIJHAWAN*: THE SUPREME COURT'S REJECTION OF THE *TAYLOR-SHEPARD* CATEGORICAL APPROACH FOR THE INA'S FINANCIAL FRAUD AND DECEIT $10,000 LOSS THRESHOLD PROVISION

The Supreme Court recognized the disagreement among the circuits and granted certiorari, framing the issue as,

172. *Id.*
173. *Id.*
174. Obasohan v. U.S. Attorney Gen., 479 F.3d 785 (11th Cir. 2007).
175. *Nijhawan*, 523 F.3d at 396 (citing *Obasohan*, 479 F.3d 785).
176. *Id.* (citing *Obasohan*, 479 F.3d at 789–90).
177. *Id.* (quoting *Obasohan*, 479 F.3d at 789–90).
178. *Id.*
179. *Id.* at 397.
180. *Id.* at 395.

> whether the italicized statutory words '. . . *in which the loss to the . . . victims exceeds $10,000*' should be interpreted . . . as referring to a generic crime, or . . . as referring to the specific way in which an offender committed the crime on a specific occasion.[181]

The Court explained that if the statutory words referred to a generic crime, an appropriate monetary threshold must be included in the statute defining the offense.[182] If, however, the words of the statute referred to the specific circumstances of the offender's crime, the loss may be determined by looking to the facts and circumstances underlying an offender's conviction.[183]

The Supreme Court held that the "fraud and deceit" provision calls for a "circumstance-specific," not a "categorical," interpretation, rejecting Nijhawan's argument in favor of the categorical approach.[184] The Court reasoned that despite some similarities between the ACCA and the INA, the 'fraud and deceit' provision of the INA was sufficiently different from the ACCA's provisions to necessitate departure from the categorical approach.[185]

The Court acknowledged that the aggravated felony statute of the INA "resembles the ACCA in certain respects;"[186] both contain a list of generic offenses and require the court to determine whether the defendant's conviction meets the generic definition.[187] But the Court went on to note that the crucial difference between the ACCA and the INA is that some of the offenses in the INA "us[e] language that almost certainly does not refer to generic crimes but refers to specific circumstances."[188] To illustrate this point, the Court referred to aggravated felony provisions (P) and (N)

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181. Nijhawan v. Holder, 557 U.S. 29, 34 (2009).

182. *Id.*

183. *Id.*

184. *Id.* at 36. The Court referred to the Third Circuit's approach as "circumstance-specific" because it allowed a court to examine the underlying circumstances of the crime, and it referred to the Ninth and Second circuit's approach as "categorical," as adopted from *Taylor*. *Id.* at 34.

185. *Id.* at 36.

186. *Id.* at 37 (comparing 8 U.S.C. § 1101(a)(43), the provision of the INA that defines aggravated felony, to the ACCA).

187. *Id*. (recognizing that "aggravated felony" is defined by certain generic crimes such as, "murder, rape, or sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A)).

188. *Id.* At oral argument, Justice Souter also noted:

> The fact is also that this provision, the $10,000 figure, was placed into the statute at a time when Congress was trying to expand the category of deportable, removable offenses, and it would be passing strange in that context to define the offense by reference to a $10,000 figure as an element of the offense which would cut it down, which would cut the compass of the statute down to three offenses.

Transcript of Oral Argument, *supra* note 21, at 13.

as examples. According to the Court, these provisions contain language that "cannot possibly refer to a generic crime . . . because there is no such generic crime."[189] For instance, subsection (P) refers to convictions for making false passports, but also exempts "a first offense for which the alien . . . committed the offense for the purpose of assisting . . . the alien's spouse."[190] The Court reasoned that "if the provision is to have any meaning at all, the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion."[191]

Following the Supreme Court's decision in *Nijhawan*, if a noncitizen is charged as deportable under one of the provisions of the INA that contains a factual circumstance clause, such as the M(i) requirement of greater than $10,000 in loss, immigration courts should apply the categorical (or modified categorical) approach to the elemental part of the offense and the circumstance-specific approach to the factual part. Thus, the Court sanctioned use of certain documents outside of the record of conviction to ascertain whether the requisite factual circumstances accompanied the noncitizen's criminal conviction.[192]

VI. POST-*NIJHAWAN*: WHAT CONSTITUTES CLEAR AND CONVINCING EVIDENCE UNDER A CIRCUMSTANCE-SPECIFIC ANALYSIS?

The Supreme Court's holding in *Nijhawan* expanded the legal analysis for certain aggravated felony provisions to include an examination of the factual circumstances surrounding the alien's conviction. But the Court failed to clearly define the scope of this evidentiary inquiry.

In one respect, the Court's lack of guidance is understandable given the facts of the *Nijhawan* case. In *Nijhawan*, there was no question that the alien's criminal conduct caused over $10,000 in loss. In fact, the alien stipulated for the sentencing hearing that the loss exceeded $100 million.[193] As the Supreme Court concluded, the immigration judge's reliance on Nijhawan's stipulation and the corroborating restitution order, in the absence of any conflicting evidence, was clear and convincing evidence that

189. *Id.* at 37.
190. *Id*. *See also* 8 U.S.C. § 1101(a)(43)(P) (2012).
191. *Nijhawan*, 557 U.S. at 38.
192. *Id.* at 40.
193. *Id.* at 32.

"the conviction involved losses considerably greater than $10,000."[194] But that was an easy case.

The *Nijhawan* Court's adoption of the circumstance-specific analysis has led the government to tout an array of sentencing and other documents, previously insufficient on their own, as adequate evidence to meet its clear and convincing burden. Whatever qualms one may have with the Supreme Court's departure from the categorical approach in *Nijhawan*, it is clear that the bigger concern is the effect of its holding on evidentiary standards in post-*Nijhawan* immigration courts. Anecdotal evidence suggests that many courts, like the immigration court in *Oviedo-Cortez v. Holder*, have grossly misconstrued the clear and convincing standard under the circumstance-specific inquiry.

A. The Clear and Convincing Evidence Standard Requires Reliable Evidence Consistent with Supreme Court Precedent and the INA

The government "must meet a 'clear and convincing' [evidence] standard"[195] before it can remove a lawful permanent resident for committing an aggravated felony under M(i). This standard is less burdensome than proof beyond a reasonable doubt, but more burdensome than a preponderance of evidence standard.[196] Black's Law Dictionary defines clear and convincing evidence as "[e]vidence indicating that the thing to be proved is *highly probable or reasonably certain*."[197] Typically, the ultimate burden of proof in civil proceedings is proof by a preponderance of evidence—the party carrying this burden will prevail if there is enough evidence to make the desired outcome more likely than not.[198] However, the Supreme Court's 1966 decision in *Woodby v. INS*, setting the burden of proof in removal proceedings for lawful permanent residents, held that proof by a preponderance of evidence was not sufficient given the severe consequence of deportation.[199] The *Woodby* Court stated:

> The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores. And many resident aliens have lived in this country longer and

194. *Id.* at 42–43.
195. *Id.* at 42.
196. Singh v. Holder, 649 F.3d 1161, 1168 (9th Cir. 2011).
197. BLACK'S LAW DICTIONARY 636 (9th ed. 2009) (emphasis added).
198. Woodby v.INS., 385 U.S. 276, 285 (1966).
199. *Id.* at 286.

> established stronger family, social, and economic ties here than some who have become naturalized citizens.[200]

Accordingly, the Court held that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."[201]

The *Woodby* decision was codified in section 240(a)(3)(A) of the INA, which states,

> [i]n the proceeding 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. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.[202]

According to the legislative history cited by the *Woodby* court:

> "The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that of the administrative body."[203]

To fully understand the government's clear and convincing burden of persuasion under INA section 240(a)(3)(A), this burden, along with the requirement that evidence be reasonable, substantial, and probative, must be read in context with what the INA requires the government to prove. INA section 237(a)(2)(A)(iii) states that "[a]ny alien who is *convicted* of an aggravated felony at any time after admission is deportable."[204] Therefore, the plain language of the statute dictates that the government must prove by a high probability or a reasonable certainty that an alien's underlying conviction meets the definition of an aggravated felony through evidence "of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached."[205]

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200. *Id.*
201. *Id.*
202. INA § 240(a)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2012).
203. *Woodby*, 385 U.S. at 284 (quoting S. REP. NO. 82-1137, at 30 (1952). The House Report contains substantially identical language. H.R. REP. NO. 82-1365, at 57 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653.).
204. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (emphasis added).
205. *Woodby*, 385 U.S. at 284.

*B. Clear and Convincing Evidence in Post-*Nijhawan *Courts*

Post-*Nijhawan* courts have held that an alien's admission or stipulation to an amount of loss over $10,000 in the plea agreement is sufficient to meet the government's burden of clear and convincing evidence.[206] Similarly, post-*Nijhawan* courts have allowed the government to rely on restitution orders to meet its burden of proof.[207] But some courts have

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206. *See* Varughese v. Holder, 629 F.3d 272, 275 (2d Cir. 2010) (holding alien's admission during plea colloquy to three fraudulent transactions in excess of $10,000 was clear and convincing evidence); *see also* Doe v. Attorney Gen. of U.S., 659 F.3d 266, 276 (3d Cir. 2011) (holding that the plea agreement, including stipulation that the alien's conduct caused between $120,000 and $200,000 in losses, is clear and convincing evidence); *see* Kawashima v. Holder, 615 F.3d 1043, 1055 (9th Cir. 2010) (finding Mr. Kawashima stipulated in his plea agreement that the "total actual tax loss" associated with his conviction of submitting a false statement on a tax return was clear and convincing evidence of loss); *see* Carlos-Blaza v. Holder, 611 F.3d 583, 586 (9th Cir. 2010) (holding that the Government established loss by clear and convincing evidence with the alien's stipulation and corresponding restitution order for $65,000); Al-Sharif v. U.S. Citizenship & Immigration Servs., No. 10-1435, 2012 WL 1440225, at *3 (D.N.J. Apr. 25, 2012) ("Plaintiff agreed to plead guilty to conspiracy to commit wire fraud, and the parties stipulated that the loss attributable to Plaintiff's crime 'exceeded $120,000 but was less than $200,000.' . . . Plaintiff's conviction clearly constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).").

207. *See* Ragbir v. Holder, 389 F. App'x 80, 83–84 (2d Cir. 2010) (finding restitution order of $350,001 "for [convicted] loss" constituted clear and convincing evidence); *see also* DeGomez v. Holder, 471 F. App'x 591, 592 (9th Cir. 2012) (finding restitution order, supported by alien's stipulation to $18,594 of loss, was sufficient to meet clear and convincing standard); Rivas-Marin v. Holder, 469 F. App'x 521, 522 (9th Cir. 2012) (finding restitution order for $37 million plus alien's admission to fraudulently inflating the value of several real estate properties by more than $100,000 each was clear and convincing); *see* Relvas v. Holder, 382 F. App'x 51, 53 (2d Cir. 2010) ("The BIA took note that Relvas was ordered to pay $106,827.78 in restitution, [] and thus the BIA 'engage[d] the evidence he presented' and provided Relvas with a 'reasoned analysis' as to why that evidence suggested a loss in excess of $10,000." (citing Mohideen v. Gonales, 416 F.3d 567, 571 (7th Cir. 2005))); Rosario-Bencosme v. Holder, 424 F. App'x 34, 34–35 (2d Cir. 2011) (finding restitution order for $5,600,000 resulting from alien's conviction for "acquiring, possessing, using, and redeeming approximately $5,600,000 worth of [United States Department of Agriculture] food stamp coupons in a manner contrary to [law]" and corroborating statements from alien's plea colloquy was clear and convincing evidence of loss); Pilla v. Holder, 458 F. App'x 518, 521 (6th Cir. 2012) (holding the restitution order and sentencing memorandum in which the alien admitted to loss exceeding $10,000, but less than $30,000 is clear and convincing evidence of loss); *see* Olawale-Ayinde v. Holder, 416 F. App'x 629, 630–31 (9th Cir. 2011) (finding the guilty plea, judgment, and restitution order that "specifically referenced only those counts to which [the alien] had pled guilty" were sufficient to establish loss by clear and convincing evidence); Zmeeva v. Holder, 480 F. App'x 245, 246 (4th Cir. 2012) (finding restitution order of $36,514.52 was sufficient evidence to "support[] the finding that Zmeeva's conviction was an aggravated felony"); Yepes v. U.S. Attorney Gen., 479 F. App'x 320, 324 (11th Cir. 2012) (allowing consideration of restitution order in determining loss amount exceeded $10,000).

carelessly accepted restitution orders that encompass unconvicted conduct to equate to clear and convincing evidence.[208] Additionally, courts have accepted information in an alien's plea agreement regarding loss and statements made by the alien during the plea colloquy to assist the government in satisfying its burden of proving loss by clear and convincing evidence.[209] This often occurs where the same amount of loss is stated in the indictment, guilty plea, and sentence order.[210] Even factual allegations regarding loss contained in an alien's criminal information have been held to constitute clear and convincing evidence.[211] Some courts, however, have limited the admission of the criminal information to the situation where the alien was convicted of (or pled guilty to) all of the counts contained in the indictment.[212]

Some courts have allowed the use of PSRs, but most limit such use only to corroborate factual allegations in other documents, such as the plea

208. *See Ragbir*, 389 F. App'x at 83–84 (noting that restitution in a fraud case can include compensation for uncharged conduct closely related to the scheme); *see also* Mahfouz v. Holder, 400 F. App'x 165, 166 (9th Cir. 2010) (finding the BIA's holding that the restitution order attributing losses caused by the alien and co-conspirators was "substantial evidence" of loss and sufficient to removed alien under 8 U.S.C. § 1101(a)(43)(M)(i)); Ezeigwe v. Attorney Gen. of U.S., 491 U.S. 337, 341 (3d Cir. 2012) ("[A]lthough Ezeigwe's restitution order operates as a civil judgment for enforcement purposes, it does not change the underlying criminal nature of the restitution. [Because] Ezeigwe does not dispute that he agreed to pay restitution in the amount of $100,000 at the plea hearing[, . . . the Court was] satisfied that the loss amount was tethered to the actual conviction in this case.").

209. *See* Chhabra v. Holder, 444 F. App'x 493, 495 (2d Cir. 2011) ("[T]he plea colloquy, and the guilty plea itself all clearly indicate that the amount of revenue loss to the United States Government exceeded $42,000."); *see also In re* Sampathkumar, 2010 WL 3780676, at *4 (B.I.A. 2010) ("Under *Nijhawan*, we hold that [the plea colloquy] is sufficient to satisfy the loss requirement of section 101(a)(43)(M)(i) of the Act, *even though it may have included losses relating to other misconduct as well as that in the count of conviction*." (emphasis added)).

210. *See* Ibe v. Holder, 406 F. App'x 23, 26 (6th Cir. 2010).

211. *See Rosario-Bencosme*, 424 F. App'x at 35 ("There is 'nothing unfair' about the BIA's determination that the Government satisfied its burden of demonstrating the requisite loss by clear and convincing evidence when it presented the criminal information and restitution order."); *see also* Masoud v. Holder, 487 F. App'x 633, 636 (2d Cir. 2012).

212. *See* Orozco De Anda v. Holder, 354 F. App'x 588, 590 (2d Cir. 2009) (finding the guilty plea to conduct that was explicitly tied to $1.3 million in loss clear and convincing); Bazuaye v. Holder, 452 F. App'x 15, 17 (2d Cir. 2011) (finding the PSR and restitution order were clear and convincing evidence of loss exceeding $10,000); DeMedeiros v. Holder, 461 F. App'x 633, 635 (9th Cir. 2011) (finding that the state court certified information and abstract of judgment were clear and convincing evidence that the alien's victims suffered more than $10,000 of loss).

agreement, judgment of conviction, restitution order, or criminal information.[213] A few courts have improvidently allowed an unchallenged PSR alone to satisfy the government's burden of clear and convincing evidence.[214]

C. Misapplication of the Nijhawan *Holding to Shift the Burden of Persuasion*

Rule 32 of the Federal Rules of Criminal Procedure states that a sentencing court "may accept any undisputed portion of the presentence report as a finding of fact."[215] This sentencing rule should not be taken as an invitation to shift the burden of persuasion to the alien defendant in a deportation proceeding.

Regrettably, in applying the circumstance-specific analysis, some courts allow the government to satisfy its burden of persuasion and establish the amount of loss by relying solely on an uncontested PSR.[216] In doing so, these courts justify accepting the government's minimal showing of evidence as clear and convincing so long as the alien had at least one "'fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims.'"[217] However, an immigration court's rubber-stamping of any unchallenged evidence the government presents should not necessarily amount to clear and convincing evidence in deportation proceedings. Instead, these courts, in such

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213. *See Ragbir*, 389 F. App'x at 83–84 (accepting the Government's offer of an unchallenged PSR, together with the indictment and judgment of conviction, to establish loss by clear and convincing evidence); Kaplun v. Attorney Gen. of U.S., 602 F.3d 260, 266 (3d Cir. 2010) (finding that the PSR and criminal information alleging that the alien's conviction of securities fraud caused nearly $900,000 of loss was clear and convincing); Rodney v. Attorney Gen. of U.S., 393 F. App'x 859, 861 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2883 (2011) (holding that the PSR and restitution order are sufficient to support the finding that the alien caused a loss of $23,450.21); Tian v. Holder, 576 F.3d 890, 896 (8th Cir. 2009) (finding that the plea agreement, PSR, and restitution order meet the clear and convincing standard).

214. *See* Munez-Morales v. Attorney Gen. of U.S., 379 F. App'x 210, 217 (3d Cir. 2010) (finding that the PSR alone was enough for clear and convincing evidence because the court was not "made aware of the existence of any other evidence that is alleged to contradict the [PSR] . . ."); Familia v. U.S**.** Atty Gen., 507 F. App'x 234, 238 (3d Cir. 2012) (using the PSR to find that loss exceeded $10,000).

215. FED. R. CRIM. P. 32(i)(3)(A); *see Munez-Morales*, 379 F. App'x at 213 (noting that the sentencing court expressly adopted the facts of the PSR); *see Kaplun*, 602 F.3d at 266 (noting that the loss in PSR was adopted by the district court).

216. *See Arguelles-Olivares*, 526 F.3d at 178–79; *see also* Munez-Morales v. Attorney Gen. of U.S., 379 F. App'x 210, 217 (3d Cir. 2010); Familia v. U.S**.** Atty Gen., 507 F. App'x 234, 238 (3d Cir. 2012).

217. Ibe v. Holder, 406 F. App'x 23, 28 (6th Cir. 2010) (quoting Nijhawan v. Holder, 557 U.S. 29, 41 (2009)).

situations, may be in reality impermissibly shifting the burden of persuasion to the alien respondent, and thereby requiring the alien respondent to successfully rebut the charges against him, regardless of whether the government has actually met its mandated burden of persuasion.

An even more disturbing trend is the increase in immigration courts that have found clear and convincing evidence where the alien fails to produce evidence that conflicts with the government's evidence. These courts, relying on *Nijhawan*, have ordered deportation in "'the absence of any conflicting evidence.'"[218] The Supreme Court's language in *Nijhawan*, that "[t]hese considerations, taken together, mean that petitioner and those in similar circumstances have at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself,"[219] does not support this conclusion. Such commentary merely identifies the ability for the alien to present evidence in response. Any attempt to shift the ultimate burden of persuasion away from the government, which creates a presumption of removability that an alien must rebut, is fundamentally wrong.

This befuddled, unjustified acceptance of the government's untrustworthy and unrebutted evidence has now become routine. For example, this improper burden-shifting approach might indeed be present in *Kaplun v. Attorney General*, wherein the Third Circuit says that the Government satisfied its burden with "unrebutted evidence" and specifically pointed to "the documented lack of objection" to a PSR as clear and convincing evidence.[220] Another example might have occurred in *Munez-Morales v. Attorney General*,[221] in which the court's decision relied on the Government's sole piece of evidence, an undisputed PSR. The Third Circuit held that the alien's failure to object to statements contained in the PSR during the presentencing hearing and the lack of contradictory evidence met the clear and convincing standard in a subsequent removal proceeding.[222] The courts should not allow the government to satisfy its burden of persuasion through the use of unreliable evidence just

218. *Kaplun*, 602 F.3d at 266 (quoting *Nijhawan*, 557 U.S. at 43).
219. *Nijhawan*, 557 U.S. at 42.
220. *Kaplun*, 602 F.3d at 273.
221. 379 F. App'x 210.
222. *Id.* at 216–17.

because the alien does not object or introduce evidence conflicting with the government's evidence.[223]

Any shift of the burden, whether intentional or not, is a sweeping misapplication of the Supreme Court's holding in *Woodby* and *Nijhawan*, and is not permitted under the INA. The law is well-defined—when the government moves to deport a legal permanent alien residing in the United States under M(i), it is the government's burden, and the government's alone, to produce reasonable, substantial, and probative evidence that the alien's underlying conviction caused over $10,000 in actual losses by clear and convincing evidence.[224] Though immigration proceedings are civil in nature, the Supreme Court has consistently recognized "the unique nature of deportation" as a "particularly severe 'penalty.'"[225] In fact, the Supreme Court recently acknowledged that "'[p]reserving the [alien's] right to remain in the United States may be more important to the [alien] than

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223. *See* Ragbir v. Holder, 389 F. App'x 80, 83–84 (2d Cir. 2012) ("Ragbir points to nothing in the record that precluded the agency, as a matter of law, from making a clear and convincing finding that the $350,001 restitution order included more than $10,000 attributable to the crimes of conviction."); Rosario-Bencosme v. Holder, 424 F. App'x 34, 35 (2d Cir. 2011) (concluding that "[t]here is 'nothing unfair' about the BIA's determination that the government satisfied its burden of demonstrating the requisite loss by clear and convincing evidence when it presented the criminal information and restitution order, *and Rosario–Bencosme did not present any conflicting evidence*" (emphasis added) (citing *Nijhawan*, 557 U.S. at 42)); Orozco De Anda v. Holder, 354 F. App'x 588, 590–91 (2d Cir. 2009) ("Thus, the government introduced clear and convincing evidence that the funds involved here were 'tied to the specific count[ ] covered by the conviction,' . . . and *Orozco has failed to point to any evidence that rebuts this fact*." (emphasis added) (quoting *Nijhawan*, 557 U.S. at 42)); *Munez-Morales*, 379 F. App'x at 217 ("Given that *Munez–Morales had ample opportunity to object to any factual findings he considered improper and failed to do so*, and given that we have not been made aware of the existence of any other evidence that is alleged to contradict the pre-sentencing report's estimate that over $400,000 was laundered, we can find no fault with the Board's conclusion that *there was clear and convincing evidence that the amount of money laundered by the conspirators exceeded $10,000*." (emphasis added)); *Kaplun*, 602 F.3d at 266 ("[T]he absence of any objections to the PSR by Kaplun, and the absence of any conflicting evidence (and [Kaplun] mentions none), this evidence is clear and convincing." (internal quotations omitted) (citing *Nijhawan*, 557 U.S. at 43)); Rodney v. Attorney Gen. of U.S., 393 F. App'x 859, 861 (3d Cir. 2010) ("Rodney did not challenge the content of the PSR at his sentencing before Judge Marrero, who then ordered him to pay restitution to Fleet Bank in the amount of $23,450.21. App. 394. This evidence is sufficient to establish that Rodney caused an actual loss to Fleet Bank of more than $10,000, [and] that he was therefore convicted of an 'aggravated felony' . . . ."); Tian v. Holder, 576 F.3d 890, 896 (8th Cir. 2009) ("Tian has not identified any evidence indicating that the portion of the investigative costs attributable to his unauthorized access to a computer came to $10,000 or less. As a result, we conclude that the IJ and the BIA correctly determined that Tian's conviction qualifies as an aggravated felony.").

224. 8 U.S.C. §§ 1101(a)(43)(M)(i), 1229a(c)(3)(A) (2012).

225. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

any potential jail sentence.'"[226] The Supreme Court's understanding that legal permanent residents are deserving of heightened constitutional protection directly translates to the varying standards of proof under the INA.

D. A PSR Should Never Be Considered Clear and Convincing Evidence

The government's prolific and unsettling use of PSRs in removal proceedings has, on occasion, received the tacit approval of the immigration courts and the federal circuits since the Supreme Court's decision in *Nijhawan*. Yet these courts fail to realize that this use of PSRs falls outside any notion of fairness and should never be considered reliable evidence (let alone clear and convincing evidence) that an alien's underlying criminal conviction was an aggravated felony. Moreover, with the exception of the Fifth Circuit's *Arguelles-Olivares* decision, most federal circuits prior to *Nijhawan* condemned the use of PSRs to establish the amount of loss occasioned by the defendant's conduct.[227]

When rejecting the use of PSRs, most courts criticized them as inherently unreliable[228] and as insufficient evidence to satisfy the government's clear and convincing burden of persuasion in an immigration context.[229] The Second Circuit summed up the inherent untrustworthiness of a PSR as follows:

> The PSR is a tool used in aid of sentencing, and typically describes conduct that demonstrates the commission of an offense even if the alien was never *convicted* for that activity. . . . Because the factual narratives contained in the PSR are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate. They

226. Chaidez v. United States, 133 S. Ct. 1103, 1112 (2013) (quoting *Padilla*, 559 U.S. at 368).

227. *See supra* Parts IV.A–IV.D.

228. *See* Dickson v. Ashcroft, 346 F.3d 44, 53–54 (2d Cir. 2003); *see also* Lara-Chacon v. Ashcroft, 345 F.3d 1148, 1156 (9th Cir. 2003); John P. Fullam, *Coping With the Sentencing Guidelines*, 10 FED. SENT'G REP. 335, 335–36 (1998) ("For a variety of reasons, unreliable and exaggerated estimates can find their way into Presentence Reports, and defense counsel may be reluctant to object, for fear of jeopardizing the credit for complete acceptance of responsibility.").

229. *See Dickson*, 346 F.3d at 53–54; United States v. Valenzuela-Hernandez, 72 F. App'x 686, 686 (9th Cir. 2003); United States v. Solis-Torres, 16 F. App'x 1, 2 (9th Cir. 2001) ("The bare statements in the PSR do not amount to the clear and convincing evidence necessary to support his sentencing enhancement.").

> may include allegations that were not proven at trial, as well as alleged facts that would have been inadmissible at trial had the prosecution attempted to present them.[230]

According to Rule 32 of the Federal Rules of Criminal Procedure, "[t]he probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence" on the convicted defendant.[231] A PSR often contains additional legal and factual information referring to the defendant's criminal] history, financial impact on the victim, and when a legal bases for restitution exists, information sufficient for a restitution order."[232] None of this additional information is proven in the previous criminal proceeding; in fact, it is usually background information drawn from probation officers' own interviews that "describes conduct that demonstrates the commission of an offense even if the alien was never *convicted* for that activity."[233] And while unconvicted and even acquitted conduct may be pertinent for sentencing purposes,[234] the use of "unproven (and sometimes inadmissible) facts [are] an inappropriate basis on which to rest a removal decision."[235] Otherwise, an alien may be removed based upon unconvicted conduct or because the alien failed to effectively dispute certain inculpatory facts at the sentencing hearing.

An immigration court's consideration of "unconvicted facts" contained in the PSR also improperly allows the government to shirk its burden of proving removability by clear and convincing evidence. During the sentencing hearing, once a defendant objects to factual statements in a PSR, the sentencing court may then only rely on those facts if the government proves them by a preponderance of the evidence.[236] Once the government proves the additional facts by a preponderance of the evidence, the sentencing court may accept them as findings of fact. As previously mentioned, the same is true for an undisputed section of the PSR.[237] While this may be the rule in the sentencing context, immigration courts should not be permitted to rely on the PSR to establish the amount of loss for deportation purposes.

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230. *Dickson*, 346 F.3d at 54; *see also* Hili v. Sciarrotta, 140 F.3d 210, 216 (2d Cir. 1998) (noting that it is "virtually inevitable" for PSRs to contain inaccurate information and hearsay statements).

231. FED. R. CRIM. P. 32(c)(1)(A).

232. FED. R. CRIM. P. 32(d)(2)(A)–(D).

233. *Dickson*, 346 F.3d at 54.

234. Obasohan v. U.S. Attorney Gen., 479 F.3d 785, 790 (11th Cir. 2007).

235. Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 129 (2d Cir. 2007) (citing *Dickson*, 346 F.3d at 54).

236. *See* United States v. Charlesworth, 217 F.3d 1155, 1158–59 (9th Cir. 2000).

237. FED. R. CRIM. P. 32(i)(3)(A).

The government's push to use documents outside of the record of conviction lends credence to a more deliberate strategy to avoid its heightened burden of proof. What is even more regrettable is the Third Circuit's acceptance of this impermissible lower standard of proof. In *Munez-Morales*, the Third Circuit interpreted the Supreme Court's holding in *Nijhawan* as "reject[ing] any artificial limit on the evidentiary sources to which the court can look in determining whether the government has carried [its] burden."[238] This is simply not an accurate portrayal of *Nijhawan*. Although the Supreme Court refused to accept Nijhawan's suggested limits, it never condoned the use of a PSR to justify removal. The use of a fully admitted stipulation to prove the amount of loss is wholly distinguishable from the use of a PSR. Indeed, the entirety of the Supreme Court's holding in *Nijhawan* was that, given the lack of any conflicting evidence, the petitioner's own stipulation to a loss considerably greater than $10,000 and the criminal trial court's restitution order showing the same amount constituted clear and convincing evidence.[239] Nothing more and nothing less was noted. The government has incorrectly construed *Nijhawan* to support its use of any document it can gather from the alien's criminal file.

VII. WHAT EVIDENCE SHOULD BE USED TO PROVE LOSS UNDER M(I)?

A. Implementing a Four-Phase Procedural Framework: Ensuring Due Process Procedures and Allowing Admission of Only Reliable Evidence

Courts should not be bashful in defining the precise scope of the circumstance-specific inquiry under two important governing principles (as first noted above):

1. The government must be given a fair opportunity to satisfy its burden of persuasion that the dollar threshold under M(i) has been satisfied, consistent with due process afforded to the alien, fairness, and Supreme Court dictates; and

238. *Munez-Morales*, 379 F. App'x at 216 (citing Nijhawan v. Holder, 557 U.S. 29, 41–43 (2009)).
239. *Nijhawan*, 557 U.S. at 42–43.

2. The alien respondent must be given a fair opportunity to dispute any such governmental argument that the monetary threshold has been satisfied.

Adoption of one of these procedural guarantees does not presuppose the exclusion of the other; both can be present in a fair and balanced approach. This article attempts to provide a sensible four-phase framework.

Phase One (Presentation of Government Evidence): This initial phase allows the government to present to the immigration judge credible evidence from the underlying criminal file in an attempt to satisfy its burden of persuasion. Such evidence should be limited to Reliable and Usable Evidence, as defined above. This list of usable evidence gives flexibility to the government by allowing proof outside of what is normally considered part of the conviction record; the government can thus not only use a plea colloquy under this method, but also may use defendant admissions, trial court sentencing orders, and trial court restitution orders. This is not, however, an open invitation for the government to bring in anything found in the criminal file. Such inquiry should be limited to those documents identified as Reliable and Usable Evidence. Permitting evidence outside these documents puts the alien in an untenable position to combat in minitrials the unreliable information paraded before the immigration judge.

Phase Two (The Tethering Requirement): This phase mandates that the government show from the Reliable and Usable Evidence submitted that the damage is specifically tethered to the actual conviction. This is one of the central requirements of the circumstance-specific analysis enunciated in *Nijhawan*.[240] As previously mentioned, the aggravated felony provision of the INA predicates removal on the basis of a *convicted* offense.[241] Accordingly, using the circumstance-specific analysis of the monetary threshold under M(i), the only way removal continues to be predicated upon a *convicted* offense is through the tethering of the loss to the conviction.[242]

Even prior to *Nijhawan*, both the Seventh and Third Circuit reasoned that "the 'loss' must 'be tied to the specific counts covered by the conviction.'"[243] Unlike the stipulation in *Nijhawan*, the stipulation in *Knutsen* included conduct that was not limited to the loss caused by the

240. *Id.* at 42.

241. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (providing that any "alien who is convicted of an aggravated felony at any time after admission is deportable").

242. *Nijhawan*, 557 U.S. at 40–41, 42 (rejecting Nijhawan's argument to adopt a modified-categorical approach).

243. *Nijhawan*, 557 U.S. at 42 (citing Knutsen v. Gonzales, 429 F.3d 733, 739–40 (7th Cir. 2005) and Alaka v. Attorney Gen. of U.S., 456 F.3d 88, 107 (3d Cir. 2006)).

actual offense of conviction; therefore, it was error for the immigration judge and the BIA to rely on the alien's stipulation as proof of the actual loss.[244] However, after *Nijhawan*, courts became less rigid in holding the government to the tethering requirement. Especially when cases became more complicated, i.e., when an alien is charged with multiple counts, but not convicted for all of the counts, courts have erroneously begun to use the amount of loss for the entire scheme as clear and convincing evidence of the actual loss caused by the individual alien.[245]

Additionally, even the Government's position in *Nijhawan* supports the view that the loss inquiry is limited to the evidence tethered to the criminal conviction. The Government agreed that any inquiry into the underlying facts must be "tied to the specific counts covered by the conviction."[246]

Phase Three (Full and Fair Opportunity for Alien to Contest): This phase provides the alien respondent a fair procedural opportunity to challenge the government's claim that the monetary threshold has been satisfied under M(i). The Supreme Court in *Nijhawan* specifically acknowledged this right, indicating that the INA removal statute "foresees the use of fundamentally fair procedures."[247] This would include a "fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims."[248]

Phase Four (Immigration Judge Assessment): This phase requires the immigration judge to critically assess the evidence, taking into consideration the government's heightened burden of persuasion, with an eye toward determining the actual loss for the convicted offence. For example, the immigration judge cannot take as absolute proof the amount stated in the restitution order. Indeed, as admitted by the Government during oral argument in *Nijhawan*, the loss calculated for criminal sentencing does not equate to the loss for deportation purposes:

> Justice Alito: . . . [D]oes the government have a theory about how the loss is measured for purposes of this statute? Under the sentencing guidelines, the loss was a very complicated calculation, lots of rules about relevant conduct and lots of cases and different ways of proving loss, and here we just have the statute.

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244. Nijhawan v. Attorney Gen. of U.S.,523 F.3d 387, 396 (3d Cir. 2008) (discussing *Knutsen*, 429 F.3d at 739).
245. *See* Doe v. Attorney Gen. of U.S., 659 F.3d 266, 275–76 (3d Cir. 2011).
246. *Nijhawan*, 557 U.S. at 42.
247. *Id.* at 41.
248. *Id.*

> [Government Lawyer]: Yes, we think that it is not necessarily the same as the loss determination that would be made for sentencing. And so, the board has made it very clear that even though a restitution order, for example, can be sufficient evidence of loss to the victim, that it needs to be assessed with an eye to exactly what losses were determined in the underlying restitution order and with regard to the burden of proof there.[249]

The Government further conceded that the restitution order and even a criminal defendant stipulation to such order is not dispositive in a deportation hearing:

> [Government Lawyer]: Well, I—I think that we are not taking the position that the—the stipulation for sentencing purposes, which was pursuant to (6)(B) of the guidelines and was for stipulation purposes—we're not arguing that that is—is dispositive in the—in the civil removal proceeding.[250]

The Government also seems to acknowledge the difficultly of proving removal under M(i) even with the "easy" facts presented in *Nijhawan*:

> [Government Lawyer]: Well, I—if we had that amount of evidence in this case, we had sentencing stipulations and all sorts of determinations at the time of the sentencing where the defendant did not even try to argue that this wasn't actually the amount of loss associated with his offense and conviction, then we *probably* would be able to establish by clear and convincing . . ..[251]

Adoption of this four-phase procedural framework would give all parties a much-needed certainty in future matters. The government would know exactly what it could draw upon as admissible evidence and the alien and his criminal lawyer would, at the criminal trial stage, know the exact ramifications of admitting to the truth of any of these documents.

B. A Circumstance-Specific Analysis Does Not Warrant a Minitrial for the Admission of Newly Created Evidence

In *Nijhawan*, the Supreme Court noted "that the 'sole purpose' of the 'aggravated felony' inquiry 'is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.'"[252] But the Court left the door open a crack for a circumstance-specific inquiry to ascertain the actual factual circumstances surrounding the individual's conviction and the resulting loss.

Given the opportunity, the government would remove the door entirely and allow newly created evidence to flood the immigration court. Under

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249. Transcript of Oral Argument, *supra* note 21, at 28–29.
250. *Id.* at 32.
251. *Id.* at 34 (emphasis added).
252. *Nijhawan*, 557 U.S. at 42 (citing Brief for Respondent, *supra* note 20, at 44).

this process, both parties would be equally able to engage in discovery, call witnesses, present new evidence, and examine the opposing party's evidence. But anyone familiar with our Nation's overburdened immigration courts would recognize this as a procedural fantasy and would realize that this puts the alien in an unfair position.[253] As the Supreme Court pointed out in a recent decision on a different aggravated felony provision, forcing a noncitizen respondent to relitigate the factual circumstances surrounding his conviction puts the noncitizen at a severe disadvantage since "noncitizens are not guaranteed legal representation and are often subject to mandatory detention."[254] Incorporating a limitless factual inquiry into the noncitizen's criminal conviction in the immigration proceeding is at odds with the longstanding principle that "the relevant INA provisions ask what the noncitizen was 'convicted of,' not what he did, and the inquiry in immigration proceedings is limited accordingly."[255]

The Supreme Court recently reiterated in *Moncrieffe v. Holder* its disapproval of "relitigati[ng] . . . past convictions in minitrials conducted long after the fact."[256] Allowing minitrials during immigration proceedings would convert such proceedings into the "*post hoc* investigation into the facts of predicate offenses that [the Supreme Court has] long deemed undesirable."[257] In *Moncrieffe*, the Government relied on *Nijhawan* in its argument that "[n]oncitizens should be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration, just as a federal criminal defendant could do at sentencing."[258] The Supreme Court rejected the Government's proposed minitrials as "entirely inconsistent with both the INA's text and the categorical approach," since they would only frustrate the primary and "practical" purpose of the categorical approach, to promote "judicial and administrative efficiency."[259] Although lambasting the Government for suggesting "case-specific factfinding," which would only invite the "potential unfairness" that the system has long sought to avoid, the Court

253. Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013).
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

does leave some wiggle room by way of dicta as to whether such a minitrial would be appropriate in the circumstance-specific examination context.[260]

I would strongly urge that the already-mentioned procedural and substantive concerns that counsel against minitrials apply equally to the circumstance-specific analysis. Without any real limitation on the type of evidence the government can present or a means of leveling the playing field for the detained respondent, an inquiry into the factual circumstances of a conviction will allow the government to satisfy its burden by pointing to any document it might find, irrespective of its reliability, authenticity, and relationship to the noncitizen's actual conviction.

One indication that this view is more appropriate is the underlying Third Circuit opinion in *Nijhawan*, which was affirmed by the Supreme Court.[261] Similar to the Supreme Court, the Third Circuit determined that the monetary threshold of subparagraph M(i) was not an element of the offense.[262] Still, the Third Circuit referenced "the prior criminal record" at several points throughout the opinion.[263] Just as the Supreme Court did, the Third Circuit held that the determination of loss requires the court to "examine the facts at issue."[264] However, the Third Circuit expressly limited the inquiry into the facts as evidenced in the *prior criminal record*.[265]

Furthermore, the tension among the circuits, which led to the Supreme Court granting *certiorari*, primarily involved the extent of inquiry into the prior criminal record.[266] The most limited inquiry, used by the Ninth

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260. *Id.* at 1690–91.

261. *See* Nijhawan v. Attorney Gen. of U.S., 523 F.3d 387 (3d Cir. 2008).

262. *Id.* at 391–92; Nijhawan v. Holder, 557 U.S. 29, 29 (2009).

263. *See, e.g.*, *Nijhawan*, 523 F.3d at 391 ("The issue remains, however, whether the language 'in which the loss to the victim or victims exceeds $10,000' requires that a jury have actually convicted defendant of a loss in excess of $10,000, . . . or permits resort to the *prior criminal record* in order to determine what loss was in fact occasioned by or attributable to the offense of conviction.") (emphasis added); *id.* at 395 ("[H]ere, we need only determine whether the *record* is sufficiently clear that the loss resulting from the convicted conduct exceeds $10,000.") (emphasis added); *id.* (noting that it is not the only "court of appeals to have viewed the inquiry into the *record of conviction* to permit examination of loss not specifically admitted in the plea colloquy or agreement or found by a jury as part of the conviction") (emphasis added); *id.* at 397 ("[W]e endorse careful *consideration of the record* to determine whether it is sufficiently clear that the loss connected to the crime of conviction exceeded $10,000."); *id.* at 399 ("It is well within the competence of a court to *examine the record* for clear and convincing evidence of loss caused by the conduct of conviction.") (emphasis added).

264. *Id.* at 393–94.

265. *See id.* at 391.

266. *Nijhawan*, 557 U.S. at 33 (recognizing that "[t]he Courts of Appeals have [reached] different conclusions as to whether the $10,000 threshold in subparagraph (M)(i) refers to an element of a fraud statute or to the factual circumstances surrounding commission of the crime on a specific occasion" and listing the relevant circuits to

Circuit, prohibited examination into the prior criminal record where the underlying offense did not include an appropriate monetary threshold.[267] The most lenient approach, used by the Fifth Circuit, allowed the Government to prove loss by presenting a PSR.[268] But under either side of this spectrum, the government was never afforded a wide-open trial; only evidence from the underlying criminal conviction was considered.

In *Matter of Babaisakov*, the BIA analyzed both the scope and reliability of evidence that may be used to establish the monetary threshold.[269] In doing so, the BIA correctly rejected use of the modified categorical approach[270] and shifted its analysis to the evidence contained in the record of conviction.[271] Eventually, the BIA concluded that any evidence relied upon "must be assessed with an eye to what losses are covered and to the burden of proof employed."[272] In other words, the BIA was concerned with the burden imposed on the government and ensuring that the victim's loss is established by clear and convincing evidence.[273] Specifically, the

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compare). Prior to the Supreme Court's opinion in *Nijhawan*, every circuit court to consider the issue limited the inquiry of loss to the prior criminal and sentencing proceeding. *See, e.g.*, Conteh v. Gonzales, 461 F.3d 45, 55, 59 (1st Cir. 2006) (rejecting the use of a PSR to determine loss, but allowing an indictment, judgment indicating loss, and restitution order); *Nijhawan*, 523 F.3d at 395 (permitting loss to be evidenced by the defendant's stipulation of loss during sentencing, judgment of conviction, and restitution order); Arguelles-Olivares v. Mukasey, 526 F.3d 171, 178–79 (5th Cir. 2008) (permitting loss to be established solely by a PSR); Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 131 (2d Cir. 2007) (rejecting inquiry into both a PSR and restitution order and requiring loss to be established by facts to which the defendant actually and necessarily pleaded, as indicated by a charging document, written plea agreement, or plea colloquy transcript); Kawashima v. Mukasey, 530 F.3d 1111, 1117 (9th Cir. 2008) (prohibiting the record of conviction from being consulted entirely where the underlying criminal offense did not include an element of loss in excess of $10,000); Obasohan v. U.S. Attorney Gen., 479 F.3d 785, 791 (11th Cir. 2007) (rejecting a restitution order and requiring loss to be established by the criminal information, plea, judgment or sentence).

267. *See Kawashima*, 530 F.3d at 1117.

268. *See Arguelles-Olivares*, 526 F.3d at 179.

269. Matter of Babaisakov, 24 I. & N. Dec. 306, 307 (B.I.A. 2007).

270. *Id.* at 316–18.

271. *Id.* at 318–20.

272. *Id.* at 319. The Supreme Court quoted the BIA on this point in the *Nijhawan* opinion. Nijhawan v. Holder, 557 U.S. 29, 42 (2009) ("[T]he Board of Immigration Appeals, too, has recognized that immigration judges must assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'" (*Babaisakov*, 24 I. & N. Dec. at 319)).

273. *See Babaisakoy*, 24 I. & N Dec. at 319–20. The BIA also explained that the amount of loss will suffice to meet a clear and convincing showing only if the loss resulted from the conduct related to the particular charges or criminal counts covered by

BIA contended that the record of conviction was "an uncertain source of reliable information on loss to the victim" because such records sometimes contain facts proved only by a preponderance of the evidence standard.[274]

Despite the BIA's stated concerns with the reliability of evidence and holding the government to its burden of proof, the language of its opinion seems to leave open the possibility of a minitrial where newly created evidence is submitted.[275] Given the current state of the law, however, reliance upon the BIA's decision in *Matter of Babaisakov* for the proposition that there are no limitations on what the immigration judge may consider during the factual circumstance inquiry is misplaced.[276] The Supreme Court's acknowledgement of the BIA opinion only referred to the section instructing courts how to determine loss using the "record of conviction"[277] and thus limited its approval of the BIA's decision to the admonition to immigration judges to "assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'"[278] No justification exists to allow a wide-open trial before the immigration judge determines the amount of loss from the conviction.

VIII. CONCLUSION

It is understandable that a federal statutory mechanism exists for the deportation of legal resident aliens engaged in extreme wrongful behavior. Congress has thus decided (through the INA) that a "noncitizen who has been convicted of an 'aggravated felony' may be deported from this country."[279] Such allegations are quite serious, especially since, if proved, they take away all discretionary relief from removal "no matter how compelling" the case may be.[280]

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the conviction. *Id.* at 320 (citing Alaka v. Attorney Gen. of U.S., 456 F.3d 88, 107–08 (3d Cir. 2006)) (proposing that "even a plea to a fraudulent transaction exceeding $10,000, or a sentencing fact found beyond a reasonable doubt, may be suspect if the admission or sentencing factor covered losses associated with transactions outside the particular count or counts covered by the conviction").

274. *Id.* at 320–21 (noting that the record may contain sufficient evidence of loss, but that it is not always the case).

275. *See id.* at 321 ("[W]e discern no sound reason for prohibiting Immigration Judges from considering other reliable evidence that bears on this question, including but not limited to the testimonial admissions of the respondent made during the removal hearing.").

276. *See id.*

277. *Nijhawan*, 557 U.S. at 42; *Babaisakov*, 24 I. & N. Dec. at 319.

278. *Nijhawan*, 557 U.S. at 42 (citing *Babaisakov*, 24 I. & N. Dec. at 319).

279. Moncrieffe v. Holder, 133 S. Ct. 1678, 1682 (2013); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

280. *Moncrieffe*, 133 S. Ct. at 1682.

With so much at stake, we must be ever mindful that even noncitizens have both a statutory and constitutional right to a full and fair hearing.[281] "[I]t is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence."[282] In sum, I find no justification for the government to use new evidence not in the original criminal conviction file; and I find no support for the government to forage the criminal defendant's criminal file in hopes of finding something, even untrustworthy documents, that announce the minimum damage threshold for deportation. In our system, a napkin found in the criminal file with $10,001 claimed damages scribbled on it should never suffice.

281. Reno v. Flores, 507 U.S. 292, 306 (1993); INA § 239(a)(1)(D), 8 U.S.C. § 1229(a)(1)(D) (2012); 8 C.F.R. § 239.1 (2012).

282. WILLIAM K. CLIFFORD, *The Ethics of Belief* (1877), *in* THE ETHICS OF BELIEF AND OTHER ESSAYS 70 (Timothy J. Madigan ed., 1999).