

**Immigration Court: BIA****Case:** *Matter of Maitland*, BIA - unpublished**Date:** May 26, 2023**Adjudicated by:** Liebmann, O'Connor, Brown**Opinion:** Brown**Dissent:** O'Connor**Tags:** Removal, controlled substance violation, Modified Categorical Approach, judicially cognizable documents, CIMT, 35 PA § 780-113(a)(30)**Question Presented:** In immigration proceedings, may the adjudicator expand the list of documents that can be examined under the modified categorical approach?**Holdings:** The sentencing hearing transcript is not judicially noticeable under *Shepard*. (5)

- “Nothing in the Immigration Judge’s discussion of these documents or portions thereof constitutes an explicit factual finding by the trial judge to which the defendant assented and thus they are also not judicially cognizable under *Shepard*.” (6)
- “*Pereida* does not authorize an expansion of the documents that are cognizable under the modified categorical approach as applied in this case.” (7, 9)

**Rationale:** “The sentencing hearing transcript does not fall within the limited class of documents that may be considered” under the modified categorical approach. (4)

- The bit in *Pereida* about expanding the *Shepard* documents in the immigration context **was dicta**. (8)

**Facts:** Native and citizen of Jamaica with LPR status charged under 35 PA § 780-113(a)(30) with “the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance.” NTA charged him with controlled substance violation and aggravated felony. Later charged with removability as a noncitizen convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. (2)**Procedural History:**

- **Sept. 2017:** Charged in PA with controlled substance violations.
- **March 2019:** IJ found him ineligible for withholding of removal because convicted of a PSC.
- **Sept. 2019:** BIA dismissed appeal.
- **April 2020:** 3d Circuit granted government’s motion to remand for Board to consider whether 2017 conviction was PSC, since IJ did not do factual findings per *Matter of Y-L- (et al.)*.
- **August 2020:** BIA remanded to IJ for further fact finding and a new decision.
- **February 2021:** IJ sustained charges of removability, PSC because ag fel.
- **March 2021:** Back to BIA

**Appeals to Statute & Precedent:**

- **35 PA § 780-113(a)(30):** Prohibits the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.
- **8 USC § 237(a)(2)(B)(i):** removable for controlled substance violation (requires conviction involving a controlled substance defined in the Federal Controlled Substances Act (CSA))
- **8 USC § 237(a)(2)(A)(iii):** removable for aggravated felony (requires conviction involving a controlled substance defined in the Federal Controlled Substances Act (CSA))
- **8 USC § 237(a)(2)(A)(ii):** removable for conviction of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

- ***Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)**: discretionary factors for determining a Particularly Serious Crime.
- ***Mellouli v. Lynch*, 575 U.S. 798, 813 (2015)**: Categorical approach and CSA
- ***Barradas Jacome v. A.G.*, 3 f.4<sup>th</sup> 111 (3d Cir. 2022)**: Categorical approach and CSA
- ***Matter of Laguerrei*, 28 I&N Dec. 437, 438 (BIA 2022)**: Categorical approach and CSA
- ***Matter of Dikhtyar*, 28 I&N Dec. 214, 215 (BIA 2021)**: when a state statute of conviction is categorically overbroad, must determine whether it is divisible (setting out one or more elements of offense in the alternative)
- ***Descamps v. United States*, 570 U.S. 254, 257 (2013)**: categorical approach and divisibility. 263-64: purpose of modified categorical approach is “to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.”
- ***Matter of German Santos*, 28 I&N Dec. 552 (BIA 2022)**: 35 PA § 780-113(a)(30) is divisible as to the identity of the controlled substance.
  - ***Singh v. A.G.*, 839 F.3d 273, 284 (3d Cir. 2016)**
  - ***Avila v. A.G.*, 826 F.3d 662, 666 (3d Cir. 2016)**
- ***Shepard v. U.S.*, 544 U.S. 13, 16 (2005)**: Limiting the class of documents considered in modified categorical approach to “the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”
- ***Taylor v. U.S.*, 495 U.S. 575 (1990)**: If conviction resulted from jury verdict, then court may consider the indictment or information and jury instructions when using modified categorical approach.
- ***Evanson v. A.G.*, 550 F.3e 284, 293 (3d Cir. 2008)**: “the agency may not look to factual assertions in the judgment of sentence, as facts a judge considers in making a discretionary determination are not necessarily admitted by the defendant.” (*Matter of Maitland* at 5)
- ***Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)**: What documents may IJ consider? Expansion of *Shepard* list in the immigration context?
- ***Rosario-Ovando v. A.G.*, No. 21-1810, 2022 WL 2205257 at \*4 (3d Cir. June 21, 2022)**: unpublished: Court “need not decide if the Supreme Court’s dicta expands the list of documents that may be considered under the modified categorical approach, a question not in front of the Supreme Court in *Pereida*.”
- ***Sasay v. A.G.*, 13 F.4<sup>th</sup> 291, 296 (3d Cir. 2021)**: the categorical approach is “[r]ooted in Congress’ specification of conviction, not conduct, as the trigger for immigration consequences.”
- ***Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)**: modified categorical approach in immigration proceedings.
- ***Matter of Aguilar-Mendez*, 28 I&N Dec. 262, 264 (BIA 2021)**: **CIMT** requires two essential elements: reprehensible conduct and a culpable mental state.
- ***Matter of Vucetic*, 28 I&N Dec. 276, 277 (BIA 2021)**: **CIMT**: Conduct is reprehensible if it is “inherently base, vile or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general.”
- ***Matter of Silva Trevino*, 26, I&N Dec. 826, 834 (BIA 2016)**: **CIMT**: ditto.
- ***Matter of Ortega-Lopez*, 27 I&N Dec. 382, 385 (BIA 2018)**: **CIMT**: “this determination regarding the nature of a crime is governed by ‘contemporary moral standards and may be susceptible to change based on the prevailing views in society.’” (quoting *Matter of Lopez-Meza*, 28 I&N Dec. 1188, 1192 (BIA 1999)).
- ***Matter of Salad*, 27 I&N Dec. 733, 735 (BIA 2020)**: **CIMT**: “The requisite scienter for a crime involving moral turpitude includes either specific intent, deliberateness, willfulness, or recklessness.” (*Matter of Maitland* at 10).
- ***Matter of J.M. Acosta*, 27 I&N Dec. 420, 423 (BIA 2018)**: **CIMT**: determination follows rules of categorical approach.

**Discussion:**

- “The parties do not dispute that the categorical approach governs the determination of whether the respondent’s 2017 conviction necessarily involved, as an element, a substance listed under the CSA. . . . The parties also do not dispute the Immigration Judge’s determination that the Pennsylvania controlled substance schedules include certain drugs excluded from the CSA.” (3)
- “. . . a statute is divisible where it contains multiple different crimes, each described separately, and at least one but not all of them match the generic definition of the offense.” (4)
- This statute was divisible & therefore subject to modified categorical approach.
- “Under the modified categorical approach, the respondent’s record of conviction is examined to ascertain what alternative elements form the basis of his specific conviction.” (4)
- Here, the IJ “identified the judicially noticeable documents in this case as the statutory definition, the information, the transcript from the respondent’s hearing for his guilty plea, and the transcript from the respondent’s sentencing hearing.” (4)
- “The transcript of the guilty plea colloquy reflects that the respondent pled guilty to count one (out of four counts) on the information, which identifies the controlled substance as ‘unknown.’” (5)
- “. . . applying the categorical (and modified categorical) approach differently in immigration proceedings from how it is applied in criminal contexts, particularly in the Sentencing Guidelines and Armed Career Criminal Act (“ACCA”) contexts, would be a marked departure from past practice in which the categorical (and modified categorical) approach has been applied in the same way in each context.” (8)
- “In particular, the Court has consistently applied *Shepard* and *Taylor* to the modified categorical approach in immigration proceedings.” (9)
- Determining **CIMT** applies categorical approach as well: it’s not the conduct that’s in view, but the state statute of conviction. It has to involve “inherently reprehensible conduct committed with a mental state of knowledge or intent.” (11)

**Dissent: O’Connor**

- “How did we get here? This is a question I have often asked myself in cases such as this, where a respondent who was actually convicted of a removable offense cannot be removed based on that offense. Such an absurd result should immediately set off alarm bells, yet somehow, some way, we have reached a point where we simply shrug our shoulders and say this is where the categorical approach has led us. But has it?” (14)