No. 07-1337

In the Supreme Court of the United States

JUAN CARLOS CALDERON-DOMINGUEZ, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Immigration Judge properly relied on a charging document to establish that petitioner's state-law assault conviction included the elements making it a crime involving moral turpitude.

2. Whether petitioner is barred from seeking a waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h), because he concededly has been convicted of an aggravated felony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the *Federal Reporter*, but is reprinted in 261 Fed. Appx. 671.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2008. A petition for rehearing was denied on February 26, 2008 (Pet. App. 11-12). The petition for a writ of certiorari was filed on April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Mexican native and citizen, was admitted to the United States as a permanent resident

alien in April 1973. App., *infra*, 2a. He has since been convicted of a number of state and federal crimes.

In 1990, petitioner was convicted in federal district court of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). App., *infra*, 3a-4a; A.R. 124, 132-136. Although that offense rendered him deportable, in 1993 an immigration judge granted petitioner a waiver of deportability under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). App., *infra*, 4a; A.R. 113, 122.[1]

In 1999, petitioner was charged by information in Texas state court with one count of assault, in violation of Tex. Penal Code Ann. § 22.01(a) (Vernon 2003).[2] App., *infra*, 2a-3a; A.R. 102-110. The information alleged that petitioner had intentionally, knowingly, and recklessly caused bodily injury to his spouse, Maricruz Calderon, by choking her. App., *infra*, 2a-3a. Petitioner entered a plea of guilty, and the court imposed a fine and a suspended prison sentence. *Id.* at 3a; Pet. App. 3.

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[1] Section 212(c) has since been repealed. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597.

[2] Under this provision, a person commits an assault if the person:
(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
At the time, a first violation of subsection (a)(1) was a misdemeanor unless the victim was a public servant discharging an official duty. See Tex. Penal Code Ann. § 22.01(b) (Vernon Supp. 1998).

2. Federal immigration officials served petitioner with a Notice to Appear, charging that he was removable from the United States on two grounds. A.R. 158-167. First, the Notice alleged that petitioner's convictions were for "two or more crimes involving moral turpitude" (CIMT). See INA § 237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii). Second, the Notice alleged that petitioner's conviction for assaulting his wife was a "crime of domestic violence." See INA § 237(a)(2)(E)(i), 8 U.S.C. 1227(a)(2)(E)(i) (defining "crime of domestic violence" to include "any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person"). Petitioner admitted the factual allegations contained in the Notice to Appear and conceded his removability for committing a crime of domestic violence, but he denied that his past crimes involved moral turpitude. App., *infra*, 2a.

The Immigration Judge (IJ) found petitioner removable as charged. App., *infra*, 3a. First, she determined that petitioner was removable under Section 237(a)(2)(E)(i) because his 1999 assault conviction was a crime of domestic violence, inasmuch as the record evidence "clearly show[ed] that [he] assaulted his spouse." *Ibid.* Second, she found that both the assault conviction and the 1990 drug conviction were crimes involving moral turpitude. *Id.* at 3a-4a. Her conclusion with respect to the assault conviction rested on the fact that the crime "involve[d] an assault against a family member [that] resulted in injury." *Id*. at 3a.

Petitioner sought re-adjustment of his status to that of lawful permanent resident, pursuant to Section 245 of the INA, 8 U.S.C. 1255. The immigration judge found that petitioner was ineligible because his prior convictions made him inadmissible. See App., *infra*, 5a; INA

§ 245(a)(2), 8 U.S.C. 1255(a)(2). The immigration judge further concluded that petitioner could not seek a discretionary waiver of that inadmissibility pursuant to Section 212(h) of the INA because his drug conviction was an aggravated felony. See App., *infra*, 4a-5a; INA § 212(h), 8 U.S.C. 1182(h); see also INA § 101(a)(43)(B) and (U), 8 U.S.C. 1101(a)(43)(B) and (U) (conspiracy to commit illicit trafficking in a controlled substance is an aggravated felony).

The IJ accordingly ordered petitioner removed to Mexico. App., *infra*, 5a.

3. The Board of Immigration Appeals (BIA) adopted and affirmed the decision of the IJ. Pet. App. 9-10. The BIA noted that petitioner conceded removability on the domestic-violence ground, and the BIA agreed that petitioner was removable on the moral-turpitude ground. *Id.* at 10.

4. The court of appeals denied a petition for review in an unpublished per curiam disposition. Pet. App. 1-6.

The court of appeals first agreed that petitioner's conviction for assaulting his wife was a crime involving moral turpitude. Pet. App. 3. The court noted that the charging instrument stated that petitioner choked Maricruz Calderon and that she was petitioner's wife, permitting a finding that petitioner pleaded guilty to intentionally assaulting his spouse. *Id.* at 3-4; see also *id.* at 4 n.8 ("The Conditions of Supervision portion of Calderon's judgment also reveals that his spouse was the victim of his assault, as Calderon was ordered to participate in a Domestic Violence Treatment Program."). Under the BIA's precedent, which the court of appeals upheld as reasonable, an intentional assault on a close family member is a crime involving moral turpitude. *Id.* at 4-5 & n.10. The same is true of drug distri-

bution. Thus, the record established that petitioner had been convicted of two crimes involving moral turpitude that were not part of the same scheme, and he therefore was properly removable. *Id.* at 5.

The court also confirmed that petitioner's drug conviction was an aggravated felony that continued to bar him from the discretionary relief he sought. Pet. App. 5-6. The fact that an IJ had previously waived deportation based on that conviction was irrelevant, the court held. See *ibid.*

ARGUMENT

Petitioner expressly confirms (Pet. 30) that "[t]his petition presents no circuit split," and that he seeks only error correction. Because the court of appeals did not err, and because petitioner's contentions are wholly fact-bound in any event, no further review is warranted.

1. Petitioner does not disagree that a crime involving intentional assault on a spouse involves moral turpitude.[3] Rather, he principally contends that in determining that he committed such a crime, the IJ and the court of appeals misapplied the "categorical approach" set out in this Court's decisions in *Shepard* v. *United States*, 544 U.S. 13 (2005), and *Taylor* v. *United States*, 495 U.S. 575 (1990). Petitioner's argument substantially depends upon the notion that the IJ relied on "extraneous documents, not forming part of the official conviction re-

[3] Petitioner does not separately address the alternative ground for removal, *i.e.*, that he committed a crime of domestic violence, which he conceded at the hearing. See Pet. App. 10. Rather, he appears to assume that the latter ground for removal can be attacked on the same basis. See Pet. 27 n.12. That assumption is incorrect. See, *e.g.*, note 5, *infra*. Accordingly, even if petitioner could successfully attack one of the two alternative grounds for removal, the other would remain fully effective.

cord," to establish that his crime involved moral turpitude. Pet. 5; accord Pet. 7, 14, 21, 22, 24, 25, 26. That factual assertion is simply inaccurate.

The IJ was clear and unequivocal: she relied only on the information charging petitioner with assault. App., *infra*, 3a ("The Information attached to the Judgment of Conviction * * * clearly shows that [petitioner] assaulted his spouse."). The information is the charging document, used in place of an indictment, in Texas misdemeanor cases. See Tex. Code Crim. Proc. Ann. art. 21.20 (Vernon 1989).[4]

Reliance on a charging document is entirely proper even under the modified categorical approach set out in *Shepard* and *Taylor*. Under that approach, a court looks first at whether a conviction under a particular statute must necessarily meet the federal definition (*e.g.*, of "violent felony") because all of the conduct criminalized by that statute is within the federal definition. If the statute of conviction sweeps more broadly, then the question becomes whether the particular defendant was convicted of a crime meeting the federal definition. In *Shepard*, this Court cautioned that only a limited set of judicial records and documents may be used in the latter inquiry. But this Court has *never* restricted the use of charging documents. Indeed, in *Shepard* the Court stated that "in any sort of case"—whether involving a bench trial, a jury trial, or a guilty plea—"the details of a * * * charging document would do." 544 U.S. at 20-

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[4] At the hearing, the IJ verified as much with petitioner's counsel:

Q. Exhibit number 2, on the assault conviction, consists of the information and starting with the second page is the [judgment] from the courts * * * .

A. Yes.

A.R. 78.

21; accord *id.* at 23 n.4 ("[A]ny enquiry beyond statute *and charging document* must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes.") (emphasis added).[5] Thus, the court of appeals correctly applied the modified categorical approach to the charging document here.

Petitioner does not seriously dispute these legal principles. Rather, he presses the fact-bound assertion that the IJ and the court of appeals mischaracterized the document in question. Even if that contention were correct—and it is not—it would not warrant review.[6] Petitioner also contends (Pet. 20) that the modified categorical approach cannot be used to determine which of the alternative elements of the Texas assault statute petitioner violated, because some of those elements are not captioned as discrete subdivisions. That argument merely asserts that the Fifth Circuit misapplied its own precedent in reviewing Texas law, which is no basis for further review. In any event, the Fifth Circuit correctly explained that the Texas statute was sufficiently divisible that the IJ was "entitled to consider evidence in the

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[5] Even if the charging document were out of bounds, the court of appeals noted that in this case the *judgment* itself established that petitioner had committed a crime involving domestic violence. See Pet. App. 4 n.8. And because that fact alone makes petitioner removable under Section 237(a)(2)(E)(i), see App., *infra*, 3a, any dispute about whether the crime also involved moral turpitude is irrelevant to petitioner's removal.

[6] Petitioner also suggests (Pet. 23-24) that the absence of a finding of "family violence" from the record should be dispositive. That contention is incorrect under Texas law. *State* v. *Eakins*, 71 S.W.3d 443, 445 (Tex. App. 2002) ("The failure of the trial court * * * to affirmatively find that family violence was involved * * * does not necessarily mean that the court considered the issue and determined that family violence was *not* involved.").

record of conviction bearing on the specific crime to which [petitioner] pleaded guilty, namely evidence that (1) [petitioner] choked the victim, which suggests an intentional act, and (2) the victim was his spouse." Pet. App. 5 n.9.

An additional reason counseling against review is that the immigration laws do not mandate adoption of the categorical approach at all; although the court of appeals has used it to determine whether a crime involves moral turpitude, the BIA in the exercise of its administrative discretion has begun to acknowledge that IJs may consider evidence extrinsic to a conviction even in some instances that might not be consistent with the approach of *Shepard* and *Taylor*. See *Ali* v. *Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008) (deferring to the BIA's determination that "when deciding how to classify convictions under criteria that go beyond the criminal charge—such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction"). See also *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1085 (9th Cir. 2007) (en banc) (Bea, J., dissenting) (stating that under this Court's precedent, "[t]he question whether a state crime qualifies as a 'crime involving moral turpitude' * * * cannot be answered * * * by turning to the categorical approach of [*Taylor*]"). Even if there were an alleged conflict over the application of the categorical approach to moral-turpitude crimes, the BIA may be able to resolve in the first instance the propriety of considering particular evidence in such cases.

2. Petitioner also urges (Pet. 27-30), for the first time on judicial review, that he was not in fact admitted to the United States as a lawful permanent resident and

that Section 212(h) therefore does not bar him from seeking a discretionary waiver of inadmissibility. See INA § 212(h), 8 U.S.C. 1182(h) (providing that "[n]o waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" and who, "since the date of such admission[,] * * * has been convicted of an aggravated felony"). Petitioner never presented this contention to the court of appeals, and the court therefore did not consider it. Rather, petitioner contended below that the entirely different waiver he had received under former Section 212(c) obviated the need for a waiver under Section 212(h). See, *e.g.*, Pet. C.A. Br. 20 (conceding that "the Immigration Judge may be correct that Petitioner is ineligible for § 212(h) waiver due to an aggravated felony"); Pet. C.A. Reply Br. 15-18. He did not argue that he was eligible to seek (and was seeking) a Section 212(h) waiver. As the latter question was neither pressed in, nor passed upon by, the court of appeals, it does not warrant this Court's review.

Even if the question were properly presented and called for plenary review, the factual basis of petitioner's contention is inaccurate. Petitioner contends that "his adjustment to LPR status occurred [two days] after his entry and admission to the United States" in 1973. Pet. 28. The IJ found otherwise based on the administrative record. See App., *infra*, 3a ("[Petitioner] * * * was admitted as a permanent resident alien on April 25, 1973."). Although one document in the administrative record, the Notice to Appear served upon petitioner, did suggest that his status had been "adjusted," A.R. 159, that suggestion was apparently inaccurate, and indeed would have been legally impossible at the time. See

8 U.S.C. 1255(c) (1970) ("The provisions of this section [permitting adjustment of status] shall not be applicable to any alien who is a native of any country of the Western Hemisphere"), amended by Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706.

Finally, the decision on which petitioner relies for the proposition that the IJ erred, *Martinez* v. *Mukasey*, 519 F.3d 532 (5th Cir. 2008), held that an alien whose status was adjusted to lawful permanent resident *ten years* after admission had unambiguously not been "admitted * * * as an alien lawfully admitted for permanent residence." *Id.* at 542, 544. Even if petitioner's factual allegations were correct, the brief two-day interval between his alleged entry and his alleged adjustment would present the question whether both events might be seen as occurring at the time of "admission." See *id.* at 544 (discussing the definition of "admission"). It would be premature to take up these questions without administrative factfinding and a reasoned BIA decision on the subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2008

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT - SAN ANTONIO, TX

A34-349-186

IN THE MATTER OF JUAN CARLOS
CALDERON-DOMINGUEZ, RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(E)(i) of the INA-alien who, at any time after entry, has been convicted of a crime of domestic violence.

Section 237(a)(2)(A)(ii) of the INA-alien who, after admission, has been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

APPLICATION: ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE INA; 212(h) WAIVER

IN BEHALF OF THE RESPONDENT:
Antonio Reyes-Vidal, Esq.

ON BEHALF OF THE DHS:
Carmen Leal
Assistant Chief Counsel

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The Respondent is a married male alien, native and citizen of Mexico, who was admitted as a permanent resident alien on April 25, 1973. The Department of Homeland Security issued a Notice to Appear against the aforementioned Respondent alleging that the respondent was convicted on February 25, 1999 for the offense of Assault, a misdemeanor, in violation of the Texas Penal Code Section 22.01. In addition, the DHS has alleged that the Respondent was also convicted on February 18, 1980 for the offense of Involuntary [M]anslaughter in the District Court at Val Verde County, Texas. See Exhibit #1. The DHS lodged an additional allegation asserting that the Respondent was convicted on October 18, 1990 in the U.S. District Court, Middle District of North Carolina of Conspiracy to Possess with Intent to Distribute Marijuana. See Exhibit #4.

The DHS has charged the respondent with being subject to removal from the United States pursuant to Sections 237(a)(2)(E)(i) and Sections 237(a)(2)(A)(ii) of the INA.

The Respondent appeared before the Court and, through his attorney of record[,] admitted all of the allegations in the Notice to Appear, admitted the charge of removability under Section 237(a)(2)(E)(i), but denied the charge under Section 237(a)(2)(A)(ii). The respondent also admitted allegation #7 in Exhibit #4.

The government offered, and the Court received into evidence, Exhibit #2, the Information, Judgment and Sentence in Respondent's criminal case for Assault dated February 25, 1999. The Information established

that the Respondent intentionally, knowingly and recklessly caused bodily injury to Maricruz Calderon, his spouse, by choking her. For this offense, he was given a 30 day suspended sentence and a $500 fine. The government also offered, and the Court received into evidence, Exhibit #3. Exhibit #3, is the Indictment and Judgment of Conviction dated February 14, 1980 for the offense of Involuntary Manslaughter, a 3rd degree felony, for which the imposition of sentence was suspended and the Respondent was placed on probation for three years. The Indictment establishes that the Respondent "did then and there recklessly cause the death of an individual, Sylvia Athayde, while driving a motor vehicle."

The Information attached to the Judgment of Conviction, Exhibit #2, clearly shows that respondent assaulted his spouse. The Court finds the Respondent's conviction for assault against his wife to be a crime of domestic violence. Accordingly, because of Respondent's admissions and concessions, and more particularly, because of Exhibit #2, the Court finds that the charge of removability under Section 237(a)(2)(E)(i) has been established.

In reference to the charge of removability pursuant to Section 237(a)(2)(A)(ii), the Court FINDS that the Respondent's conviction for misdemeanor assault against his wife is a crime involving moral turpitude. Respondent's conviction involves an assault against a family member which resulted in injury. *See Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996); *See, also, Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); and *Matter of Perez-Contreras*, 20 I&N Dec. 415 (BIA 1992). Further, Respondent's 1990 conviction for Conspiracy to Possess with Intent to Distribute Marijuana is also a

crime involving moral turpitude. *See Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997). *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Therefore, the charge under Section 237(a)(2)(A)(ii) will also be sustained.

The Court finds that Respondent's conviction for Involuntary Manslaughter is not a conviction for a crime involving moral turpitude. *See Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971).

The Court finds that the respondent was granted a waiver under Section 212(c) of the INA on October 18, 1990. (See Order Granting 212(c) Relief dated June 8, 1993 by Immigration Judge Brodsky in San Antonio, Texas) This waiver, under Section 212(c), waived Respondent's deportability under Sections 214(a)(2)(B)(i) and Sections 241(a)(2)(A)(iii) due to the Respondent's conviction for Conspiracy to Possess with Intent to Distribute Marijuana. Although Respondent was granted a waiver under Section 212(c), his prior conviction can be brought up in a second proceeding as one of two crimes involving moral turpitude. *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

The Court finds that Respondent's conviction for [a] federal drug offense dated October 18, 1990 is an aggravated felony as defined in Section 101(a)(43)(U) as it relates to 101(a)(43)(B) of the INA.

Accordingly, after considering all the evidence of record, the Court finds that removability pursuant to Section 237(a)(2)(E)(i); and 237(a)(2)(A)(ii) have been established by clear and convincing evidence. *Woodby v. INS*, 385 U.S. 276, 87 S. Ct. 484, 17 L. Ed. 2d 362 (1966).

Since this Court has determined that the Respondent has been convicted of an aggravated felony pursuant to Section 101(a)(43)(U), as it relates to 101(a)(43)(B) of the INA, the Court determines that Respondent is not statutorily eligible for re-adjustment of status under Section 245 of the INA. *See* 212(h)(2) of the INA. Respondent is also ineligible for cancellation of removal pursuant to Section 240A(a) due to the prior grant of 212(c) relief. See 240A(c)(6) of the INA.

Accordingly, the following is the Order of the Court:

ORDER

IT IS HEREBY ORDERED THAT THE RESPONDENT IS HEREBY REMOVED FROM THE UNITED STATES TO MEXICO PURSUANT TO SECTIONS 237(a)(2)(E)(i); AND 237(a)(2)(A)(ii) OF THE INA.

Date: December 2, 2004 /*s*/ BERTHA A. ZUNIGA
BERTHA A. ZUNIGA
IMMIGRATION JUDGE