The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Practice Advisory for Immigration Practitioners
M.G.L. 275 sec. 2-4, Threat to Commit Crime is neither COV nor CIMT
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The following practice advisory is designed for immigration practitioners representing clients who have been convicted in Massachusetts of Threat to Commit Crime ("Threats"), M.G.L. 275 sec. 2-4. The advisory provides a legal analysis supporting the argument that a conviction for threats is neither a crime of violence ("COV") nor a crime involving moral turpitude ("CIMT").

Note: The following discussion is not designed for criminal defense attorneys advising defendants regarding the potential immigration consequences of alleged criminal conduct. Defense counsel should continue to advise conservatively and should seek case-specific analysis from the IIU or a criminal-immigration expert in every case.

A. M.G.L. 275 sec. 2-4: Threat to Commit a Crime

In Massachusetts, the offense of threatening to commit a crime ("threats") requires the Commonwealth to prove four elements beyond a reasonable doubt:

> 1) the defendant expressed an intent to injure a person, or property of another, now or in the future;
> 2) the defendant intended that his or her threat be conveyed to a particular person;
> 3) the injury that was threatened, if carried out, would constitute a crime; and
> 4) the defendant made the threat under circumstances which could reasonably have caused the person to whom it was conveyed to fear that the defendant had both the intention and the ability to carry out the threat.

Mass. Criminal Model Jury Instructions: 6.700 (Threat to commit crime) (June 2019); *Commonwealth v. Milo M.*, 433 Mass. 149, 151, (2001) ("'[t]he elements of threatening a crime include an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.'" (quoting *Commonwealth v. Sholley*, 432 Mass. 721, 725 (2000))).

B. <u>Threat to Commit Crime is Categorically not a Crime Involving Moral Turpitude</u>

The categorical approach is used to determine whether a particular state criminal conviction matches the generic definition of a crime involving moral turpitude (CIMT). *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 831 (BIA 2016). The generic CIMT is defined as a crime with "two essential elements: reprehensible conduct and a culpable mental state." *Id.* at 834. Under the categorical approach, the Board is not concerned with what the defendant actually did, but only whether the "elements" of the statutory offense categorically involve "reprehensible conduct and a culpable mental state." *Id.*

In October 2019, the Board of Immigration Appeals considered the offense of menacing under an Oregon statute and concluded that the offense is categorically a CIMT. *Matter of J-G-P*, 27 I&N Dec. 642 (BIA 2019). In reaching its conclusion, the Board drew distinctions that lend support for the proposition that the similar offense in Massachusetts of threatening to commit a crime is not a CIMT.

The Oregon statute at issue in *Matter of J-G-P* provides that a "person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." "Serious physical injury" is statutorily defined as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." OR. REV. STAT. § 161.015(8) (2018). The Oregon Supreme Court further defines the harm as that which "can be caused only by a narrow category of conduct, a face to face confrontation between actor and victim." *State v. Garcias*, 679 P.2d 1354, 1361 (Or. 1984) (en banc). Looking at the "minimum conduct that has a realistic probability of being prosecuted under the statute," *Silva-Trevino*, 26 I&N Dec. at 831, the Board reviewed the state's case law and concluded that the offense of menacing under the Oregon statute requires the state to prove the defendant's specific (not general) intent to create fear in the victim of imminent serious physical injury, as perceived by a reasonable person (not as subjectively perceived by the victim), and requires the defendant to take a "substantial step" towards achieving his or her objective. *Garcias*, 679 P.2d at 1361.

In its CIMT analysis, the Board began with the "specific intent to cause fear of imminent serious physical injury," and concluded that the specific intent provides the "culpable mental state" indicative of moral turpitude. *Matter of J-G-P-*, 27 I. & N. Dec. at 645. Turning to "the level of harm required to complete the crime," the Board distinguished the level of harm required for simple assault and the harm required to place a person in apprehension "of imminent *serious* physical injury" (emphasis in original). *Id.* at 646-48. The Board draws a clear distinction between simple assault statutes requiring "*any* physical injury" and the Oregon statute requiring "*serious* physical injury." *Id.* at 647 (emphasis in original). The distinction allows the Board to conclude that a threat to place a person in imminent *serious* physical injury "'reflects a level of immorality that is greater than that associated with a simple offensive touching,' and is therefore morally turpitudinous." *Id.* at 647 (quoting *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006)).

Similar to the offense of menacing at issue in *Matter of J-G-P*, the Massachusetts offense of threats involves a specific intent to convey a threat to a particular person and a level of apprehension as perceived by a reasonable person, not as subjectively perceived by the victim. *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 436 (2004) (intent that threat be conveyed to target is sufficient even when it does not reach target, and the test for victim apprehension is objective). However, unlike the Oregon offense of menacing, the element regarding level of harm in the Massachusetts threats offense is substantially broader than "imminent serious physical injury" and includes any threat to "injure a person, *or property of another*, now or *in the future*."

In Massachusetts, it is clear that a person can be convicted of a threat to commit a property crime. In *Commonwealth v. Muckle*, the Court of Appeals concluded that the offense of threats is not a lesser included offense of stalking. 90 Mass. App. Ct. 384, 394 (2016), *rev'd in part*, 478 Mass. 1001 (2017). In doing so, the Court explained that, while it was not possible under the stalking statute, "a person could be convicted of a threat to commit a property crime." *Id.; see also Commonwealth v. Strahan*, 39 Mass. App. Ct. 928(1995) (upholding threat conviction where complaint charged defendant with threatening to do damage to property belonging to the New England Aquarium). It is equally clear that a person may be convicted of a threat pursuant to M.G.L. 275 sec. 2 where the threatened crime is ill-defined as to person or property, now or in the future. *Commonwealth v. Melton*, 77 Mass. App. Ct. 552, 558 (2010) ("sufficient evidence enabled the jury to determine that the defendant's statement that he would 'play dirty' […] constituted a threat [….]"); *Commonwealth v. Grasso*, 73 Mass. App. Ct. 1108 (2008)(upholding threat conviction where defendant called for the victim to come outside or he would break the window, then menaced her with the broom and stated "next time you'd better be careful. I'm not gonna be so nice."); *Sholley*, 432 Mass. at 725 (upholding conviction for threats where evidence showed defendant began screaming about "war" and "bloodshed," then upon meeting prosecutor pointed his finger in her face and yelled, "Watch out, Counselor"); *Commonwealth v. Rotonda*, 434 Mass. 211, 212–13 (2001) (upholding conviction where defendant threatened and verbally accosted a traffic enforcement officer, screaming invectives and racial slurs at her). Following the distinction delineated in *Matter of J-G-P* between "*any* physical injury" and "imminent *serious* physical injury," the above case law makes it clear that the level of harm required for a conviction for threats in Massachusetts is even less than "any physical injury" as it may include injury to property. Indeed, the threats statute is much closer to the simple assault statutes, which have been found to be overbroad as they relate to the element of "reprehensible conduct," than the Oregon menacing statute.

In addition, a conviction for threat pursuant to M.G.L. 275 sec. 2 does not require an "imminent threat." *Commonwealth v. Ditsch,* 19 Mass. App. Ct. 1005, 1005 (1985) (letter sent by inmate could constitute a threat because "absence of immediate ability, physically and personally, to do bodily harm" does not preclude conviction); *see also Milo M.,* 433 Mass. at 156 (lack of evidence as to immediate ability to carry out a threat does not mean that the threat cannot be carried out at a later time); *Commonwealth v. Strahan,* 39 Mass.App.Ct. 928, 930 (1995) (whether defendant might not ultimately carry out threat is not relevant to sufficiency of proof that a threat was actually made). Contrary to the statute at issue in *Matter of J-G-P*, where the harm "can be caused only by a narrow category of conduct, a face to face confrontation between actor and victim," the threats statute in Massachusetts sweeps in a much broader range of conduct that cannot be found to categorically involve "reprehensible conduct."

Finally, the threats statute is clearly not divisible as it relates to the element of "intent to injure a person, or property of another, now or in the future." *Descamps v. United States*, 570 U.S. 254, 262 (2013) (statute is "divisible" when it "comprises multiple, alternative versions of the crime). The Commonwealth need not prove and the jury need not find unanimously whether a threat was made either to injure a person or to injure property and whether it was imminent or prospective, but only that "the injury that was threatened, if carried out, would constitute a crime." Mass. Criminal Model Jury Instructions: 6.700 (Threat to commit crime) (June 2019). In sum, because the threats statute is both overbroad as it relates to "reprehensible conduct" and indivisible, the offense of threatening to commit a crime is categorically not a crime involving moral turpitude.

C. <u>Threat to Commit Crime is not a Crime of Violence</u>

Under 8 U.S.C. § 1101(a)(43)(F), a crime of violence (COV) with a sentence of imprisonment of one year or more, suspended or imposed, is an aggravated felony. The definition of "crime of violence" is set forth at 18 U.S.C. § 16:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In 2018, the Supreme Court struck down clause (b) as void for vagueness. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). Accordingly, in order to fall within the definition of a "crime of violence" the threats statute must have as an element "the use, attempted use, or threatened use of physical force against the person or property of another." "Physical force" in this analysis is defined as "'violent force—that is, force capable of causing physical pain or injury to another person.'" *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015)(quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). Under the plain language of the statute, the offense of threats does not contain as a necessary element the use, attempted use, or threatened use of *violent force*; in fact, rather than requiring the threatened use of violent force, the threats statute requires only that the defendant express "an intent to injure a person, or property of another, now or in the future." A person may be convicted of a threat to commit assault and battery – an offense that can be satisfied by a mere "offensive touching." Because the threats statute does not include as an element the threatened use of *violent* force, a conviction for threats cannot be a conviction for a crime of violence.