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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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First Circuit

United States v. Báez-Martinez, 950 F.Supp.3d 119 (2020).

In *United States v. Báez-Martinez*, the First Circuit holds that, as a matter of first impression, a prior conviction for second-degree murder qualifies as a violent felony under the Armed Career Criminal Act (ACCA) force clause, distinguishing malice aforethought as more than ordinary recklessness. The Court also held that the defendant's prior convictions for attempted murder categorically involved violent force, even where attempted murder, like murder, could be committed by an omission to act.

The defendant in the case received a 15-year mandatory minimum sentence under the ACCA based on his prior violent felonies, including one conviction for second-degree murder and two convictions for attempted murder. Initially, the defendant's prior convictions had been determined to qualify as a violent felony under the ACCA's "residual clause." However, following the Supreme Court's decision striking the residual clause as unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the defendant's sentence was vacated and his case was remanded to determine whether the prior convictions still qualified as a violent felony. To determine whether the prior convictions qualified, the Court had to answer whether the crimes at issue "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2). Applying the categorical approach, the Court turned to the elements of second-degree murder and attempted murder.

With regard to second-degree murder, the Court focused on whether the crime under Puerto Rico law satisfied the *mens rea* requirement of the force clause. Per the Supreme Court's holding in *Begay v. United States*, the word "use" in the force clause requires a higher degree of intent than negligent or merely accidental conduct. 553 U.S. 137 (2008). At the time of the defendant's conviction, the Puerto Rico law on second-degree murder required "malice aforethought" without a specific intent to kill, and "malice" was statutorily defined to include "intentional acts" which itself was defined as crimes in which "the result, though unwanted has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission." P.R. Laws Ann. tit. 33, § 3062. Relying on these statutory definitions, the defendant argued that "malice aforethought" in Puerto Rico included ordinary recklessness at the time of his conviction and so did not meet the *mens rea* requirement of the force clause. The First Circuit disagreed, drawing several distinctions, and ultimately concluding that "malice aforethought" requires "extreme indifference to the value of human life," and so amounts to more than "ordinary recklessness."

With regard to attempted murder, the defendant argued that the convictions could not be considered to require “violent force” because attempted murder, like murder, could be committed by an omission to act. The First Circuit rejected the defendant’s argument, relying on the Supreme Court’s reasoning in *United States v. Castleman*, 572 U.S. 157 (2014) that all bodily injuries necessarily entail some force in the common-law sense. Reasoning that death is the ultimate “bodily injury,” the court concluded, “if murder requires violent force because death results, then attempted murder does, too, because the defendant attempted to reach that result.”

Practice Tip

The definition of “violent felony” under the ACCA mirrors the definition of a “crime of violence” found in 18 U.S.C. § 16 (a) and used in the immigration context to define the deportable offenses of a “crime of violence” aggravated felony and a “domestic crime of violence.” The distinction drawn by the First Circuit in this case therefore helps to further clarify the required *mens rea* for a “crime of violence” as used in the immigration context. In particular, the distinction between “ordinary recklessness” and “extreme indifference to the value of human life” strengthens arguments that offenses, such as ABDW, requiring only “ordinary recklessness” do not satisfy the *mens rea* requirement of a “crime of violence.”

Board of Immigration Appeals

Matter of Salad, 27 I&N Dec. 733 (BIA 2020).

The respondent in this case was a legal permanent resident who first arrived to the United States from Somalia as a refugee. He was convicted of making terroristic threats in violation of section 609.713, subdivision 1 of the Minnesota Statutes. The undisputed conduct underlying the conviction involved the respondent jumping over the counter at a Walmart and pointing a pair of scissors at a clerk in an attempt to retrieve his identification card from the clerk, who, suspecting that the respondent was using a fraudulent bank card, was taking down information from his identification card. In reviewing whether the respondent was removable, the Board considered the unsettled issue of whether the offense is categorically a crime involving moral turpitude (CIMT) and concluded that it is.

An offense is a CIMT if its elements require reprehensible conduct and a culpable mental state. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834(BIA 2016). The Minnesota offense at issue proscribes a range of conduct, including “threaten[ing], directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience.” Taking into account state law regarding the elements of the offense and applying the categorical approach, the Board reached several conclusions. First, the Board concluded that the communication of the terroristic threat, as defined by the Minnesota terroristic threats statute, is a CIMT even if the threatened crime would not necessarily qualify as a CIMT because of the reprehensibility of the terroristic threat itself. Of note, the Board was not persuaded that the respondent’s own conviction proved that Minnesota would prosecute conduct that does not involve moral turpitude but rather found the conduct to be sufficiently reprehensible. The Board further held that making threats “with purpose... to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to

cause serious public inconvenience, or in reckless disregard of the risk of causing such ... inconvenience” is reprehensible conduct because it “entails interference with societal public order serious enough to violate the duties owed to society.” Finally, the Board concluded that a specific intent to “terrorize” another or a conscious disregard of a substantial and unjustifiable risk of terrorizing another is sufficient scienter for the purposes of determining whether an offense is a CIMT.

Practice Tip

The Board’s decision is concerning for a number of reasons, including the breadth of conduct it sweeps in as reprehensible and its reaffirmation that recklessness is a sufficiently culpable mental state for an offense to be deemed a CIMT where it entails a conscious disregard of the substantial and unjustifiable risk posed by one’s conduct.

Similar to the Minnesota statute at issue in *Matter of Salad*, Massachusetts’ bomb threat statute, M.G.L. c 269 § 14, proscribes a wide range of conduct, including willfully communicating or causing to be communicated, either directly or indirectly, by any means a threat that one of the statutorily listed destructive devices is or will be used at a place or location whether or not true, or a threat to hijack a common carrier thereby causing fear or personal discomfort, or willfully communicating or causing serious public inconvenience or alarm. Defense counsel should assume that a conviction under any prong of the statute is a crime involving moral turpitude for immigration purposes.

***Matter of Pedro Josue Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020).**

The respondent in this case was convicted under section 3-324(b) of the Maryland Criminal Law to knowingly soliciting a minor, or a police officer who was posing as a minor, with the intent to engage in unlawful sexual activity in violation of section 3-307 of the Maryland Criminal Law. The statute of conviction did not require proof that the respondent knew or should have known the victim’s age. Regardless, the Board found the offense to be categorically a crime involving moral turpitude (CIMT).

Matter of Jimenez-Cedillo has a long procedural history and the case was most recently before the Board, on remand from the Fourth Circuit, with instructions to explain how the decision was not a departure from a previously stated rule that an offense must require proof of a culpable mental state as to the victim’s age in order to qualify as a CIMT. In the present case the Board reaffirmed its holding that “a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young – that is, under 14 years of age – or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child.” *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 5 (BIA 2017). The Board found the requirement of a culpable mental state to be met by the requirement that the defendant “knowingly” solicit a minor. Still, respecting the Fourth Circuit’s conclusion that this decision represents a shift in precedent, the Board held that the decision would be applied prospectively in the Fourth Circuit, leaving open the question of retroactivity in other circuits.

Practice Tip

The generic federal definition of a CIMT requires a *mens rea* of recklessness or greater. Yet, the Board's earlier decision had left the impression that no *mens rea* was necessary for this offense to be a CIMT. In this decision, the Board clarifies that the requirement of a culpable mental state is met by the requirement that the defendant "knowingly" solicit a minor. Taken together, the cases highlight that the Board is willing to stretch the categorical approach to conclude that an offense is a CIMT when it deems the offense particularly reprehensible.

As a reminder, most Massachusetts offenses involving sexual abuse of a minor are crimes involving moral turpitude. Examples include: M.G.L. c. 272 § 53(A)(b) (paying, agreeing to pay, or offering to pay for sex with a child under fourteen); M.G.L. c. 265, §§ 13B (indecent assault and battery on child under fourteen); M.G.L. c. 265, §§ 22A (rape of child); 23 (rape and abuse of child); 23A (rape and abuse of child aggravated by age difference); 24B (assault on child under sixteen with intent to commit rape); M.G.L. c. 272, §§ 4A (promoting child prostitution); 4B (deriving support from child prostitution); and M.G.L. c. 272, §§ 29A (production of child pornography); 29B (dissemination of child pornography); 29C (possession of child pornography). It is important to note that many of these offenses fall under other categories of inadmissibility and deportability as well.

Appeals Court of Massachusetts

Commonwealth v. Alfeu Barbosa, 97 Mass.App.Ct. 1102 (Feb. 5, 2020)(unpublished).

This unpublished opinion deciding an appeal from a motion to withdraw a plea is worth highlighting for its discussion of the "special circumstances" prong of *Clarke*, under which a defendant may show that a decision to reject a plea bargain would have been rational under the circumstances based on special circumstances supporting the conclusion that the defendant "placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." *Commonwealth v. Clarke*, 460 Mass. 30, 47-48 (2011).

The defendant in this case was a lawful permanent resident of the United States, citizen of Cape Verde, whose plea and resulting sentence rendered him deportable as an aggravated felon. After being ordered deported, the defendant filed a motion to withdraw his plea and to vacate his convictions based on ineffective assistance of counsel. After an evidentiary hearing, the motion judge agreed that defendant's counsel was ineffective, having failed to provide advice that was clear, accurate, and specific as to the immigration consequences of the plea. Nevertheless, the judge denied the motion finding the defendant had not established he was prejudiced by the ineffective representation.

Because the motion judge had not entered specific factual findings on prejudice, the Court remanded but in doing so, offered its view of the record. The Court honed in on the defendant's "special circumstances" and highlighted that the defendant had been brought to the United States from Cape Verde at the age of ten and has not since returned; he has friends, family, and a fiancé in the United States; he has no connection with any family members in Cape Verde; he is not now proficient in the language spoken in Cape Verde; and he has been diagnosed with serious mental health issues, for which treatment would not be available in Cape Verde. Evidence before the Court included a psychological evaluation diagnosing the defendant with severe mental health issues that, if left untreated in Cape Verde, could be fatal; and, evidence that Cape Verdean

deportees do not have access to basic care and medical needs, especially mental health services. The Appeals Court concluded that based on this record, there was a reasonable possibility the defendant would have rationally chosen to go to trial or chosen to negotiate a different plea deal with a longer total period of incarceration that still avoided the aggravated felony for immigration purposes.

Practice Tip

The Appeals Court's analysis highlights the importance of building a strong record in a post-conviction motion and need to think creatively about how to establish prejudice when trial counsel has failed to effectively advise a noncitizen regarding the immigration consequences of a criminal conviction. In this case, the record included a detailed affidavit from the defendant regarding his troubled childhood and remaining family ties, the record of Immigration Court proceedings, including the Immigration Judge's decision to credit the defendant's testimony about his fear of returning to Cape Verde, a psychological evaluation of the defendant's mental health and a diagnosis of major depressive disorder and posttraumatic stress disorder, and a letter from a State Representative and Cape-Verdean American regarding conditions for deportees in Cape Verde.

Post conviction counsel is encouraged to contact the Immigration Impact Unit for assistance when handling a *Padilla* claim, including for help understanding the immigration consequences of a criminal conviction, for assistance in detailing alternative safe pleas that could have been negotiated, and for guidance on establishing a record of special circumstances in a particular case.