3rd Circuit Court

Case: *Quinteros v. A.G.*, No. 18-3750 (3rd Cir. 2019)
Date: Dec. 17, 2019 **Adjudicated by:** McKee, Ambro, Roth

Opinion: Roth **Concurrence:** McKee *[best quotes here!]*

Tags: Immigration, aggravated felony, CAT, conspiracy, categorical approach, El Salvador, gangs, expert witness

Question(s) Presented:
1. Did Quinteros commit an aggravated felony under INA?
2. Did the BIA err in applying 3rd Circuit precedent to CAT claims?

Holdings: BIA vacated; case remanded.
1. It was not an aggravated felony.
2. BIA was way out of bounds re. CAT.

Rationale:
1. The INA requires an overt act for a conviction of "conspiracy" to count as an ag fel.
2. BIA did not consider all of the evidence favorable to Quinteros when considering the possibility that he would be tortured in El Salvador with the acquiescence of public officials.

Facts: Quinteros came to U.S. with mother at age 8 from El Salvador. In his teens, he joined MS-13. He has a NY Yankees tattoo that he claims symbolizes the location of his gang. He was indicted for conspiracy to commit assault with a dangerous weapon in 2011, though no assault took place. Quinteros pled guilty and was sentenced to 30 months. He converted to Christianity while in prison and left the gang.

History of Case:
- 2001: entered U.S. and settled in NY.
- 2011: indicted & pled guilty to conspiracy to commit assault with dangerous weapon. 30 months in prison.
- 2014: DHS issued I-851 Notice of Intent to Issue a Final Administrative Removal Order
    - Charged as removable for having committed an ag fel under 8 U.S.C. § 1101(a)(43)(F), (U), and (J). Checked the box on the form to contest deportability.
    - Sought withholding of removal and demonstrated reasonable fear in interview.
    - ICH with IJ supported by expert witness & Harvard Law School study.
    - IJ said testimony demonstrated clear likelihood of torture, but not enough evidence that police would fail to protect Quinteros. Used modified categorical approach to find that crime was a crime of violence and that conspiracy did not require an overt act.
    - Quinteros appealed CAT findings to BIA, which affirmed.

- Quinteros appealed BIA's decision to 3d Circuit, which granted gov't's request to remand to an IJ to determine whether Salvadorian gov't would acquiesce in torture or not.
- Second IJ adopted first IJ's findings.
- Quinteros appealed to BIA.

- 2018 (while appeal was pending): ***Sessions v. Dimaya*, 138 S.Ct. 1204 (2018):** 18 U.S.C. § 16(b) held to be unconstitutionally vague.
  - Quinteros moved to remand based on *Dimaya*.
  - BIA said he couldn't challenge status as an aggravated felon because he was in expedited removal proceedings. Also reversed IJs on credibility of torture claims, and dismissed as ludicrous the idea that Quinteros would be recognized by his tattoo or that the government wouldn't protect him (given the steps El Salvador was taking to combat gang violence).

Appeals to Statute & Precedent:

- **18 U.S.C. § 1959(a)(6):** Punishment for committing violent crime upon agreement
- **8 U.S.C. § 1101(a)(43)(F):** A crime of violence is an aggravated felony.
- **8 U.S.C. § 1101(a)(43)(U):** A conspiracy to commit a crime of violence is an aggravated felony.
- **8 U.S.C. § 1101(a)(43)(J):** Certain racketerring offenses are classified as aggravated felonies.
- ***Myrie v. Attorney General*, 855 F.3d 509 (3d Cir 2017):** Sets up two prongs that BIA must follow when evaluating a CAT claim:
  - Has the applicant met the burden of establishing torture, more likely than not?
  - Will public officials acquiesce in the torture?
- ***Sessions v. Dimaya*, 138 S.Ct. 1204 (U.S. 2018):** 18 U.S.C. § 16(b) held to be unconstitutionally vague.
- ***Chavarria v. Gonzalez*, 446 F.3d 508, 515 (3d Cir. 2006):** re. Jurisdiction: if "the BIA issues a decision on the merits and not simply a summary affirmance, we review the BIA's, and not the IJ's, decision."
- ***Voci v. Gonzalez*, 409 F.3d 607, 612 (3d Cir. 2005):** Circuit court reviews whatever parts of IJ's decision that BIA adopts or defers to.
- ***Lin v. Att'y Gen.*, 543 F.3d 114, 123-25 (3d Cir. 2008):** if an agency *sua sponte* considers an issue on appeal, it revives a claim even if the applicant had not yet administratively exhausted all remedies.
- ***Mathis v. United States*, 136 S.Ct. 2243, 2256 (U.S. 2016):** Categorical & modified categorical approaches. Are the listed elements in an alternatively phrased statutes *elements* or *means*?

Discussion:

- (On remand after *Dimaya*:) "In a footnote, the Board noted that Quinteros was subject to expedited removal proceedings because he committed an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), (U), and (J). To accept such logic would render it impossible for anyone in such a situation to challenge their status before the BIA." *Quinteros v. A.G.*, No. 18-3750, 1, 9-10 (3rd Cir. 2019).

<u>Aggravated Felony Issue</u>

- "When determining whether a particular offense is an aggravated felony, we apply the categorical approach." *Quinteros v. A.G.*, No. 18-3750, 1, 14 (3rd Cir. 2019).

- Don't look at the facts of the case, but compare state statute of conviction with federal. Presume the conviction rests on the least of those acts listed in the state statute, and see whether the least of these are contained within the federal offense. *Id.*

- Conviction under **18 U.S.C. § 1959(a)(6)**, an alternatively phrased statute.
  - So are the alternatives *elements* or *means*?
    - If *elements*, that means that some of the suggested alternatives would qualify as an agg fel, and some wouldn't.
    - If *elements*, then modified categorical approach applies and can look at documents of actual crime to narrow down which elements were involved. Were they the ag fel kind?
- Quinteros's crime was not a crime of violence.
  - "The first IJ found that § 1959(a)(6) constituted a crime of violence as defined in § 16(b). Because the Supreme Court found that § 16(b) was unconstitutionally vague, the IJ's aggravated felony finding based on §16(b) cannot stand." *Quinteros v. A.G.*, No. 18-3750, 1, 16 (3rd Cir. 2019). *See Sessions v. Dimaya*.
- Quinteros's conviction was not a conspiracy or attempt to commit a crime of violence under § 1101(a)(43)(U).
  - "We must determine whether the INA's generic definition of conspiracy requires an overt act. We hold that it does." *Quinteros v. A.G.*, No. 18-3750, 1, 17 (3rd Cir. 2019).
  - There's a difference here between what's required for a conviction in §1959(a)(6) and the INA re. a conspiracy: the former does not require an overt act, and the latter does.
  - No *Chevron* deference to BIA here, because "the meaning of 'conspiracy' in § 1101(a)(43)(U) of the INA is ambiguous when employing the ordinary tools of statutory construction." *Quinteros v. A.G.*, No. 18-3750, 1, 18 (3rd Cir. 2019).
  - With majority of states' codes and the Modern Penal Code, 3d Circuit applies the modern definition of conspiracy as one that **requires an overt act.**

CAT Issue

- "…before remanding, we need to discuss the standard to be applied by the Board in determining state acquiescence." *Quinteros v. A.G.*, No. 18-3750, 1, 22 (3rd Cir. 2019).
- Board erred re. considering evidence favorable to Quinteros related to likelihood of torture.
  - "Because…the Board failed to consider evidence that would have undermined its conclusion that Quinteros was unlikely to be recognized as a gang member, the Board must conduct its *Myrie* analysis anew." *Quinteros v. A.G.*, No. 18-3750, 1, 26 (3rd Cir. 2019).
- Board erred re. acquiescence of public officials.
  - "…neither the IJ nor the Board came to a decision about how public officials would likely respond to the treatment that Quinteros feared. That requires a remand." *Quinteros v. A.G.*, No. 18-3750, 1, 27 (3rd Cir. 2019).
  - "We have previously made clear to the BIA that a government can acquiesce in torture despite opposing the group inflicting the harm. . . . **The Board was required to consider whether the government of El Salvador is capable of preventing the harm Quinteros would likely face.**" *Quinteros v. A.G.*, No. 18-3750, 1, 27-28 (3rd Cir. 2019).

Concurrence (McKee):

- ". . . it is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring Quinteros's removal rather than as the neutral and fair tribunal it is expected to be. That criticism is harsh and I do not make it lightly." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 1 (3rd Cir. 2019).

- "I am at a loss to understand what the BIA is referring to by requiring 'objective' evidence." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 2 (3rd Cir. 2019).

- "I am . . . unable to ascertain any justification for the BIA's sudden reversal after the three previous cycles of review all arrived at the opposite conclusion. I also remain baffled by the BIA's usage of 'objective evidence.'" *Quinteros v. A.G.*, No. 18-3750, Concurrence at 2 (3rd Cir. 2019).

- "The firsthand testimony of the victim of any crime is probative evidence if it is credible—the issue is the credibility of the witness. Once a witness's testimony is found to be credible, it cannot arbitrarily be rejected merely to achieve a particular result." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 3 (3rd Cir. 2019).

- "Even more salient, the BIA's rejection of Quinteros's credible testimony is inconsistent with controlling precedent and the regulations governing CAT relief. Those regulations state: '[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.'" *Quinteros v. A.G.*, No. 18-3750, Concurrence at 3 (3rd Cir. 2019) (quoting 8 C.F.R. § 208.16).

- Re. expert witness & Harvard study:
    - "It is impossible to discern from the record why the BIA refused to accept that external evidence. Moreover, given its apparent disregard for these three distinct, previously accepted pieces of evidence, I seriously doubt whether any evidence would have been capable of changing the agency's analysis. Thus, it is the BIA's own objectivity that concerns me here." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 3 (3rd Cir. 2019).

- ". . . not only was there never a dispute about the existence of the tattoo, there was also no dispute as to its location, and the BIA's abortive suggestions to the contrary are simply inconsistent with a fair and neutral analysis of Quinteros's claim." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 4 (3rd Cir. 2019).

- "It therefore pains me to conclude that the BIA simply ignored evidence in an effort to find that Quinteros's tattoo would not place him in peril as it was underneath his clothing." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 4 (3rd Cir. 2019).

- "As troubling as the mishandling of Quinteros's evidence might be standing alone, the BIA's errors here are not an isolated occurrence. There are numerous examples of its failure to apply the binding

precedent of this Circuit delineating the proper procedure for evaluating CAT appeals. Indeed, that framework has been mishandled, or simply absent, from several BIA opinions in the two years since we explicitly emphasized its importance in *Myrie*." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 5 (3rd Cir. 2019).

- ". . . the BIA cannot act arbitrarily . . . Here, as already seen, the BIA's conclusions fell far short of that low bar. According deference would therefore be to compound a mistaken application of law." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 6 (3rd Cir. 2019).

- "By declining to reach clear findings of what would happen upon removal, the BIA prevented itself from then being able to determine whether those results met the legal standard for torture. The *Myrie* framework cannot be so easily evaded." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 7 (3rd Cir. 2019).

- Re. gov't acquiescence even if gov't is making efforts to combat violence:
    - ". . . few countries admit to torturing and killing their citizens, even when privately condoning such conduct. Thus, if we simply took countries at their word, there would barely be anywhere on the globe where CAT could apply." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 7 (3rd Cir. 2019).
    - "The BIA is thus on notice that results, not press releases or public statements, are what drive the test for acquiescence under *Myrie*." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 7-8 (3rd Cir. 2019).
- After litany of examples of BIA's disregard for evidence in such cases:
    - "There are simply too many additional examples of such errors to feel confident in an administrative system established fo rthe fair and just resolution of immigration disputes. Most disturbing, these failures gravely affect the rights of petitioners, such as Quinteros, who allege that they will face torture or death if removed to their country of origin." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 8 (3rd Cir. 2019).

- "I doubt that any court or any other administrative tribunal so regularly addresses claims of life-changing significance, often involving consequences of life and death." *Quinteros v. A.G.*, No. 18-3750, Concurrence at 9 (3rd Cir. 2019).

- (Further honest analysis at Concurrence 9-10.)

Commentary:

- Circuit split wrt "what alien must do on appeal to have properly preserved a challenge to DHS's aggravated felony finding." *Quinteros v. A.G.*, No. 18-3750, 1, 11 n.23 (3rd Cir. 2019)**.** IOW, if it wasn't raised right, some Circuits say they don't have jurisdiction to consider the matter since alien hasn't exhausted all administrative remedies. (Not actually relevant here, though, because BIA raised the ag fel question *sua sponte*, so Circuit Court has jurisdiction to consider this now.)

- Food for thought:
    - "Where Congress has not specifically defined a word in a statute, we presume the common law definition applies. But the presumption that a term be given its common-law meaning does not apply when the common law 'meaning is obsolete or inconsistent with the statute's purpose.' In those instances, the approach taken 'in the criminal codes of most states' replaces the common law definition. We have stated before that, when determining the elements of the generic crime, we look to 'the Model Penal Code (MPC), state laws, and learned treatises.' But 'the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime.' We therefore contrast the common law definition of conspiracy with the majority of states' definition of conspiracy and hold that conspiracy in § 1101(a)(43)(U) require an overt act." *Quinteros v. A.G.*, No. 18-3750, 1, 19 (3rd Cir. 2019) (footnotes omitted).
        - **Common law:** Conspiracy was complete upon the making of the agreement.
        - **States' laws:** Conspiracy requires an overt act.
        - **MPC:** Conspiracy requires an overt act.