Third Circuit Court

Case: *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009)
Date: October 6, 2009 **Panel:** Rendell, Roth, Hayden

Opinion: Rendell

Tags: Immigration, cancellation of removal, LPR, CIMT, deportability, categorical approach, Pennsylvania simple assault statute

Question(s) Presented: Whether a conviction under 18 Pa. Cons. Stat. § 2701(b)(2) is a CIMT.

Holdings: No, this conviction is not a CIMT. "[n]o culpability attaches, explicitly or implicitly, to subpart 2701(b)(2)." 467

- Reinforcing that we will use the categorical/modified categorical approach and we will NOT look beyond the record of conviction to investigate the actual act of the alien for these determinations.

Rationale:

- One part of the statute, which lacks a scienter requirement, is a "grading" section, which does not trigger PA's gap-filling statute. Therefore, there is no *mens rea* of intent, knowledge, or recklessness with regard to the age of the victim. Therefore, this can't be a CIMT.
  - "we conclude that the Pennsylvania assault statute as written permits a conviction under subpart 2701(b)(2) where the defendant did not know that the victim was under 12 years old." 468
- We'll use the strict categorical approach because the INA says "conviction," and not "act," in its CIMT provision.

Facts: 464 Haitian citizen LPR struck his wife's daughter to discipline her and pled guilty to simple assault. Daughter was <12. NTA issued; Respondent sought cancellation of removal. The assault happened prior to his completion of 7 years in the U.S.

Procedural History:

- **IJ:** Even though simple assault is not usually held to be a CIMT, the judge found this to be a CIMT because of aggravating factor of the victim's age.
- **BIA:** Affirmed.

Appeals to Statute & Precedent:

- **18 Pa. Cons. Stat. § 2701(b)(2):** simple assault if victim is <12 is a misdemeanor of the first degree.
- **18 Pa. Cons. Stat. § 302(c):** Gap-filling statute: if a criminal statute lacks a scienter requirement, a person can only be convicted if they acted intentionally, knowingly, or recklessly.
- **8 U.S.C. §1227(a)(2)(A)(i):** Crimes of moral turpitude. Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

- **8 U.S.C. §1227(a)(2)(A)(iii):** Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.
- ***Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004):** "Crimes involving moral turpitude have been held to require conduct that is 'inherently base, vile, or depraved.'" *Jean-Louis* at 465
- ***De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 635 (3d Cir. 2002):** Use categorical approach, "focusing in the underlying criminal statute 'rather than the alien's specific act.'" *Knapik* at 88, quoting.
- ***Wilson v. Ashcroft*, 350 f.3d 377, 381 (3d Cir. 2003):** "look to the elements of the statutory state offense, not to the specific facts" *Knapik* at 88, quoting.
- ***Singh v. Ashcroft*, 383 F.3d 144, 162 (3d Cir. 2004):** Modified categorical approach and permitted documents
- ***Joseph v. Att'y Gen.*, 465 F.3d 123, 127 (3d Cir. 2006):** categorical & modified categorical limits
- ***Garcia v. Att'y Gen.*, 462 F.3d 287, 293 n.9 (3d Cir. 2006):** divisible statute, modified categorical
- ***Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 618 (BIA 1992):** CIMT is an act "accompanied by a vicious motive or a corrupt mind"
- ***Matter of Khourn*, 21 I. & N. Dec. 1041, 1046 (BIA 1997):** corrupt mind for CIMT
- ***Matter of Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994):** corrupt mind for CIMT
- ***Matter of Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980):** "An evil or malicious intent is said to be the essence of moral turpitude."
- ***Matter of Abreu-Semino*, 12 I. & N. Dec. 775, 777 (BIA 1968):** noting that "moral turpitude normally inheres in the intent"
- ***Matter of P--*, 2 I. & N. Dec. 117, 121 (BIA 1944)** "One of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. 'It is in the intent that moral turpitude inheres.'" (quoting ***US ex rel. Meyer v. Day*, 54 F.2d 336, 337 (2d Cir. 1931)).**
- ***Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000):** "corrupt scienter" as the "touchstone of moral turpitude."
- ***Chanmouny v. Ashcroft*, 376 F.3d 810, 814-15 (8th Cir. 2004):** corrupt mind for CIMT
- ***Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996):** corrupt mind for CIMT
- ***Matter of Silva-Trevino*, 241 I&N Dec. 687, 706-708 (A.G. 2008) [*Silva-Trevino I*, now abrogated and superseded by *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016) ("*Silva-Trevino III*")]:** [the good part:] "the A.G. treated the perpetrator's knowledge regarding the victim's age as a critical consideration informing the depravity of the crime." 469 "the agency has spoken clearly that *scienter* as to age is critical to the CIMT inquiry, and that the absence of a *scienter* requirement is conclusive." *Id.* [The overruled part:] A.G. says you can go back behind the conviction and do an inquiry about the person's acts to get at whether this was CIMT. (3d Circuit was already having none of this.)
- ***Matter of O--*, 3 I&N Dec. 193 (BIA 1948):** simple assault is generally not held to be CIMT
- ***INS v. Ventura*, 537 U.S. 12 (2002):** *scienter* as to age is critical to a CIMT determination if the statute has an age element
- ***Gertsenshteyn v. U.S. Dept. of Justice*, 544 F.3d 137 (2d Cir. 2008):** "convicted" in INA ag fel statute mandates a categorical analysis. (See passage quoted below)
- ***Tokatly v. Ashcroft*, 371 F.3d 613, 622 (9th Cir. 2004):** "Like all of the other removal provisions we have analyzed in accordance with the categorical and modified categorical approach, the plain language

of the "crime of domestic violence" provision clearly bases deportability on the nature of the alien's conviction, rather than on the alien's actual conduct. We are required to determine whether Tokatly has been "convicted of a crime of domestic violence"-not whether he in fact committed such a crime. INA § 237(a)(2)(E)(i) (emphasis added). That the removable offense at issue is a "crime of domestic violence" in no way warrants a reversal of our fundamental method of determining whether an alien has been convicted of a removable offense under the Act." (emphasis added)

- ***Chang v. INS*, 307 F.3d 1185, 1190 & n.2 (9th Cir. 2002):** noting that term "conviction" necessarily limits inquiry to the elements of the statute of conviction and the record of conviction
- ***In re Velazquez-Herrera*, 24 I.&N. Dec. at 513:** (noting that "convicted" requires the "focus" of the immigration authorities to be on the "crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed.") (emphasis added).
- ***Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008):** Critiqued below for trying to weasel out of the categorical approach
- ***Matter of Babaisakov*, 24 I&N Dec. __ (BIA __):** "the BIA examined evidence outside record of conviction for the narrow purpose of determining whether the monetary threshold for removal under §101(a)(43)(M) was met." *Jean-Louis* at 480
- ***Nijhawan v. Att'y Gen.*, 523 F.3d 387, 391-92 (3d Cir. 2008):** similar to *Babaisakof*—practical impediments to applying categorical approach because of money amount threshold.
- ***Shepard v. U.S.*, 544 U.S. 13 (2005):** "In Shepard v. United States, the Supreme Court opined that the record of conviction includes the charging document, the plea agreement or transcript of the plea colloquy in which the defendant confirmed the factual basis for the plea, or a comparable judicial record of information." N5

Discussion:

- "Where a statute of conviction contains disjunctive elements, some of which are sufficient for conviction of the federal offense and others of which are not, we have departed from a strict categorical approach. In such a case, we have conducted a limited factual inquiry, examining the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted. . . . We have applied this 'modified' categorical approach, even when clear sectional divisions do not delineate the statutory variations, . . . in order to determine the least culpable conduct sufficient for conviction, and, where a CIMT is asserted, **measure that conduct for depravity**." 466
- "Here, the determination of the *scienter* or level of culpability under subpart (b)(2) of the Pennsylvania assault statute is important, for the BIA itself has drawn a distinction for purposes of deciding whether an offense is a CIMT based on this very aspect of culpability. . ." 466
- "The determination that subpart 2701(b)(2) sets forth a grading factor and not an element of the offense is significant. As a 'grading' factor, subpart 2701(b)(2) does not trigger the statutory 'gap-filling' provisions, which provide a mental state requirement that would be otherwise missing from 'elements of an offense." 467
    - Elements and grading factors are distinct; the latter does not trigger the gap-fillers.
    - It's pretty obvious here, because of the headings.
- "Where the conduct is included under a statutory section entitled, 'grading,' rather than under the 'definition' of the offense, the conduct is *per se* not an 'element' of the offense. . . . Accordingly, the Pennsylvania gap-filling provisions—that would ordinarily mandate a specific mental state with respect

to the victim's age—do not apply to subpart 2701(b)(2), and there is no culpability requirement as to that subpart." 468

- So Respondent is left with **recklessness** as the least culpable conduct.
  - The BIA "has repeatedly opined [469] that the hallmark of a CIMT . . . is an act 'accompanied by a vicious motive or a corrupt mind.'"
- "The foregoing analysis tracks the **modified categorical approach** that we have historically applied. Under that approach, our inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." 470
- "Under the **categorical approach** that we followed in *Partyka*, consistent with Supreme Court case law, we look to the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute. . *Partyka*, 417 F.3d at 411. Under our precedents, the possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to avoid removal; proof of actual application of the statute of conviction to the conduct asserted is unnecessary. "As a general rule, a criminal statute defines a crime involving 'moral turpitude only if all of the conduct it prohibits is turpitudinous.'" *Id.* (internal citation omitted) (emphasis added)." 471
- Critique of *Silva Trevino:*
  - Can't look at other evidence besides limited number of documents: "individualized moral turpitude inquiry" (at 700) – "*Silva-Trevino* sets no limitations on the kinds of evidence adjudicators may consider." 472
  - Rejects "realistic probability" approach—whether state or federal statute would be applied to conduct that does not reach moral turpitude, and whether it had been applied in this way.
  - Can't pick apart phrase ("crime *involving* moral turpitude") because it is a term of art. 477
    - "The Attorney General's argument is premised on a fundamental misreading of the relevant language. The Attorney General views "crime" and "involving moral turpitude" as distinct grammatical units and, accordingly, reasons that the clause "involving moral turpitude" modifies "crime." He thus concludes that Congress intended to authorize inquiry into whether an alien committed the offense in a manner reflecting depravity--that is whether the alien's particular acts "involv[ed] moral turpitude." The Attorney General's view, however, overlooks a crucial fact: crime involving moral turpitude is a term of art, predating even the immigration statute itself. . . . As such, its division into a noun and subordinate clause, as the Attorney General seeks to do, distorts its intended meaning. It refers to a specific class of offenses, not to all conduct that happens to "involve" moral depravity, because of an alien's specific acts in a particular case." 477
- "the focus under the categorical approach has always been the conviction, aimed at determining exactly what the defendant was convicted of." 472
- "We believe that we are not bound by the Attorney General's view because it is bottomed on an impermissible reading of the statute, which, we believe, speaks with the requisite clarity. The ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA's own rulings or the jurisprudence of courts of appeals going back for over a century." 473
- "It could not be clearer from the text of the statute--which defines "conviction" as a "formal judgment of guilt," and which explicitly limits the inquiry to the record of conviction or comparable judicial record evidence --that the CIMT determination focuses on the crime of which the alien was convicted--not the

specific acts that the alien may have committed. 8 U.S.C. § 1101(a)(48)(A). The statute presents no ambiguity." 474

- "Because the INA requires the conviction of a crime--not the commission of an act--involving moral turpitude, the central inquiry is whether moral depravity inheres in the crime or its elements--not the alien's underlying conduct." 477
- "Nor do we believe that, as a practical matter, determination of whether a conviction "fits" the requirements of a CIMT requires examination of an alien's underlying conduct." 478
- Critique of *Ali v. Mukasey*, 521 F.3d ___ (7th Cir ___):
  - CIMT might require additional info because charging papers don't say "CIMT"
  - 7th Circuit abandoned its own categorical precedent, saying that "the rational for application of the categorical approach in criminal proceedings is inapplicable in the immigration context" 478

Commentary:

- **18 Pa. Cons. Stat. § 2701 (Simple Assault)**
  (a) Offense defined.--A person is guilty of assault if he:
  (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
  (2) negligently causes bodily injury to another with a deadly weapon; or
  (3) attempts by physical menace to put another in fear of imminent serious bodily injury.
  (b) Grading.--Simple assault is a misdemeanor of the second degree unless committed:
  (2) against a child under 12 years of age by an adult 21 years of age or older, in which case it is a misdemeanor of the first degree.

- ***Gertsenshteyn v. U.S. Dept. of Justice*, 544 F.3d 137 (2d Cir. 2008):** responding to BIA examining particular conduct underlying alien's conviction:
  Our holding today is grounded in history-specifically, the history of why we have applied the categorical approach to [*476] aggravated felony inquiries in the removal context. The primary reason was that 8 U.S.C . § 1227(a)(2)(A)(iii)-the provision of the INA that renders an alien removable for having been convicted of an aggravated felony (leaving to provision 8 U.S.C. § 1101(a)(43) the definition of "aggravated felony")-uses the word "convicted." [**41] That is, the INA premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been formally convicted of in a court of law. . . .

  One way to ensure proper focus on the conviction, we decided, was the method the Supreme Court applied in Taylor and Shepard. See Ming Lam Sui v. INS, 250 F.3d 105, 116-17 (2d Cir. 2001) (stating that "the Taylor opinion provides valuable guidance" to a determination of whether an alien's offense constitutes an "aggravated felony" under the INA because, like the statute at issue in Taylor, " § 1227(a)(2)(A)(iii) renders deportable an alien who has been 'convicted' of an aggravated felony, not one who has 'committed' an aggravated felony"). We also reasoned (1) that "nothing in the legislative history [of 8 U.S.C. § 1227(a)(2)(A)(iii)] suggested a factfinding role for the BIA in ascertaining whether an alien had committed an aggravated felony, just as, in Taylor, nothing suggested such a role for the sentencing court in evaluating the factual basis of a prior burglary conviction," and (2) that "the practical evidentiary difficulties and potential [**42] unfairness associated with looking behind [an alien's] offense of conviction were no less daunting in the immigration [context] than in the sentencing context."

Dulal-Whiteway, 501 F.3d at 125-26 (internal quotation marks and citations omitted). In sum, our use of the categorical approach emanates from our understanding of what Congress intended when it drafted § 1227(a)(2)(A)(iii), a provision that, like the provision in Taylor and Shepard, requires the Government to prove the existence of a qualifying conviction in order to make its case.

- **"Realistic probability" in the CIMT context:**
  - "Curiously, the phrase "realistic probability" has been imported into the CIMT context, with several courts reasoning that an alien may avoid removal only if he demonstrates a "realistic probability" [**58] that non-turpitudinous conduct would, indeed, be prosecuted as a crime under the particular statute at issue. See, e.g., Nicanor-Romero v. Mukasey, 523 F.3d 992, 1005-1006 (9th Cir. 2008); United States v. Becerril-Lopez, 528 F.3d 1133, 1141 (9th Cir. 2008); Martinez v. Mukasey, 551 F.3d 113, 119 n.6 (2d Cir. 2008); United States v. Diaz-Ibarra, 522 F.3d 343, 348 (4th Cir. 2008). We seriously doubt that the logic of the Supreme Court in Duenas-Alvarez, however, is transferable to the CIMT context." 481

  - "Other considerations support our refusal to import a "realistic probability" test into the CIMT context. As the Ninth Circuit Court of Appeals explained in Nicanor-Romero, [*482] "[T]his court and others have developed a substantial body of case law deciding whether various state criminal statutes fall within the scope of the 'crime involving moral turpitude' offense." 523 F.3d at 1004. This jurisprudence has provided predictability, enabling aliens better to understand the immigration consequences of a particular [**60] conviction. See id. Duenas-Alvarez did not purport to alter our and other courts of appeals' case law regarding the examination of the least culpable criminal conduct in resolving the CIMT issue. As the en banc court in Nicanor-Romero noted, the issue is not whether potential offenders have been prosecuted; rather, the issue is whether everyone prosecuted under that statute has necessarily committed a CIMT. 523 F.3d at 1001." 481-82