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LITIGATOR'S UPDATE

This has been a very busy year for immigration practitioners trying to keep abreast of Supreme Court and Circuit Courts cases. This paper intends to serve as a guide to understanding recent cases of significance. The cases discussed here are but a few of the very important precedential decisions affecting our practice.

PART I: THE CATEGORICAL APPROACH

a. Current State of Affairs

In *Mathis v. United States*, 123 S.Ct. 2243 (2016), the Supreme Court reaffirms the application of a strict, elements-based categorical approach for determining when a prior conviction triggers adverse sentencing or immigration consequences. The Court clarifies the limited circumstances in which a court can use the modified categorical approach when a criminal statute is deemed divisible. [1]

The Court confirms that under *Descamps v. United States*, 133 S.Ct. 2276 (2013), a person may not be deemed "convicted" of a generic crime triggering adverse federal criminal sentencing consequences unless the elements of the crime of conviction match the generic elements of the generic crime referenced in the federal statute. *Mathis* and *Descamps* both establish that "elements" are the facts set forth in the statute of conviction that have to be proven beyond a reasonable doubt and with *juror unanimity* in order to sustain a conviction.

Mathis makes it clear that when a statute lists alternative facts, the statute is not divisible and the modified categorical approach does not apply unless these facts are actual *elements* of distinct crimes, and not mere alternative *means* for committing a single crime.

In supporting its elements-only inquiry, the Court relied in part on the need to avoid unfairness to the criminally accused and specifically mentioned *In re Gomez-Perez*, No. A200-958-511 (BIA 2014). The Court remarked:

> To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another – as exists in many States, see, *e.g.*, Tex. Penal Code Ann. § 22.01(a)(1) – has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental state are interchangeable means of satisfying a single *mens rea* element. But such a statement, if treated as reliable, could make up a huge difference in a deportation proceeding years in the future, because an intentional

[1] No need to reinvent the wheel. This excellent summary is taken from a practice alert prepared by the National Immigration Project & the Immigration Defense Project. The alert can be found here: https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2016_1July_mathis-alert.pdf

> assault (unlike a reckless one) qualifies as a "crime involving moral turpitude," and so requires removal from the country.

Mathis soon thereafter had an impact on *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. Jul 11, 2016) and *Matter of Chairez-Castrejon* (*Chairez III*), 26 I&N Dec. 819 (2016). In *Gomez-Perez*, relying on *Mathis*, the 5th Circuit completely reversed course (abandoning cases like *Esparza Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012)), now holding that Texas Assault under the § 22.01(a)(1) of the Texas Penal Code (TPC), is not a divisible statute. The Court applied the 'means v. elements' test and concluded that "the three culpable mental states in section 22.01(a)(1) are 'conceptually equivalent' means of satisfying the intent element, so jury unanimity as to a particular one is not required." The 5th Circuit held that "a statute like Texas's assault offense that merely offers alternative means of committing an offense does not allow application of the modified categorical approach."

In *Chairez III*, the Attorney General (after ordering the Board to refer this matter to her for review) also applied the categorical approach in light of *Mathis*. Using the 'means v. elements' test the AG found that the Utah Discharge of a Firearm statute was not a divisible statute and thus could not be an aggravated felony. Interestingly though, unlike *Gomez-Perez*, where the 5th Circuit noted that Texas State courts had held that jury unanimity was not necessary for a jury to reach a conviction of guilty, the Utah State courts had held no such thing. In *Chairez* III, the AG looked to a couple of murder convictions in Utah, where the single crime of second-degree murder could be committed in any of three separate manners. *Chairez III infers* that Utah courts would not require a unanimous jury verdict with respect to the particular mental statute with which a defendant discharged a firearm. WOW!

In *Matter of Silva-Treviño*, 26 I&N Dec. 826 (BIA 2016), on October 12, 2016, the BIA issued a long-awaited decision after a hard fought battle. The court again reaffirmed the categorical and modified categorical approach and clarified the realistic probability test. Because, the case arose out of the 5th Circuit, the BIA did not use the realistic probability test, but rather the "minimum reading" approach applied by the 5th Circuit in *Gomez-Perez*. Under that approach, an offense is a crime involving moral turpitude if the minimum reading of the statute of conviction necessarily reaches only offenses involving moral turpitude. For a further discussion see Part IV of this paper.

Mathis in combination with cases like *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), (which instructs a factfinder to presume that a conviction rests upon the least of the acts criminalized) and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), (the sock drug paraphernalia case) provides ammunition to immigrants fighting removal cases based on criminal convictions.

b. Crime of Violence Cases

The Supreme Court held that a sentencing enhancement provision in one of the most common federal sentencing status is unconstitutionally vague. *United States v. Johnson*, 135 S.Ct. 2551 (2015). The Court interpreted the "residual clause" of the Armed Career Criminal Act (ACCA). This case is extremely important in the immigration context because the language of the residual clause is very similar to that found in 18 U.S.C. §16(b). That's the aggravated felony crime

of violence statute referenced in the Immigration and Nationality Act (the INA). The Supreme Court has now agreed to hear *Lynch v. Dimaya*, case no 15-1498, to settle a circuit split. Several circuits have found that 16(b) is unconstitutionally vague for the INA purposes. *Golicov v. Lynch*, __ F.3d __ (10th Cir. 2016) (copy attached); *Shuti v. Lynch*, __ F.3d __, 2016 WL 3632539 (6th Cir. 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted Lynch v. Dimaya*, case no. 15-1498 (U.S.).

The 5th Circuit in *Gonzalez-Longoria*, after first holding that §16(b) was void for vagueness, later heard the case *en banc* and found that §16(b) was not void for vagueness on its face or as applied to an illegal reentry noncitizen defendant previously convicted of assault causing bodily injury with a prior conviction of family violence. *U.S. v. Gonzalez-Longoria*, __ F.3d __, 2016 WL 4169127 (5th Cir. 2016) (en banc). For a further discussion see Part III of this paper.

While this case is decided, it is important to continue arguing that 18 USC § 16(b) is unconstitutionally vague.

In *Voisine v. United States*, 136 S.Ct. 2272 (2016), the Supreme Court created more confusion. The Court addressed the question of whether a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" for purposes of the federal crime of possession of a firearm by a person who has previously been conviction of a misdemeanor crime of domestic violence. The Court found that "use of physical force" language found in the federal statute may extend to reckless conduct that is volitional even if any resulting harm was not intended, but was the resulted from reckless behavior.

The government may attempt to use this case in the immigration context to argue that 18 U.S.C. § 16 "crime of violence" definitions referenced in the aggravated felony and crime of domestic violence provisions of the INA reaches reckless conduct offenses. However, the Court expressly provided that it's ruling in *Voisine* – finding that a differently worded criminal law definition reaches reckless behavior – does not resolve whether the 18 U.S.C. § 16 definition includes such conduct.

PART II: MOTIONS TO REOPEN AND EQUITABLE TOLLING

a. Mata v. Lynch

The Supreme Court in *Mata v. Lynch*, 135 S.Ct. 2150 (2015), held that circuit courts of appeals indeed have jurisdiction to review Board denials of motions to reopen, including those where the Board declines to exercise its *sua sponte* authority to review a motion to reopen. The Court found that the reason for Board's denial to reopen *sua sponte* "makes no difference to the jurisdiction issue" and whatever the reason the Board may have to reject the alien's motion, the jurisdiction to review is not precluded. In so holding, the Court took its prior decision in *Kucana v. Holder*, 558 U.S. 233 (2010), one step further by resolving critical jurisdictional issue as it relates tor *sua sponte* motions, a step that the Court in *Kucana* expressly declined to take.

Additionally, *Mata* also stands for the proposition that whenever an alien files a motion to reopen his case, he does so under the statutory right to file for a motion to reopen under 8 U.S.C. § 1227a(c)(7), INA § 240(c)(7), and regardless of its timeliness, the courts have jurisdiction to

review the BIA's denial of the motion. The Court emphasized that the timeliness of a motion to reopen is merely one of the many possible merits determinations which does not take away the jurisdiction to review it by the courts of appeals. Indeed, in that case, Reyes Mata had filed an untimely motion to reopen and argued that the ineffective assistance of former counsel in the case was an exceptional situation excusing his untimely motion. The Supreme Court held that the untimeliness of Reyes Mata's motion did not affect the Fifth Circuit's jurisdiction to review its denial where the BIA construed a request to equitably toll the deadline as an invitation to invoke the exercise of its *sua sponte* authority. The Court specifically held that "[n]othing [about a court's jurisdiction to review denials of motions to reopen] changes when the Board denies a motion to reopen because it is untimely – nor when, in doing so, the Board rejects a request for equitable tolling."

b. Lugo-Resendez v. Lynch

Until recently, the First and Fifth Circuit were the only two courts that had not addressed whether the deadlines for motions to reopen are subject to equitable tolling ("ET"). However, in *Lugo-Resendez v. Lynch*, No. 14-60865, 2016 WL 4056051 (5th Cir. July 28, 2016), the Fifth Circuit joined in with the nine other circuits in deciding that the deadline for filing a motion to reopen under § 240(c)(7) is subject to ET [note: The BIA still has not addressed the issue of equitable tolling in a published decision].

The court held that a litigant is entitled to ET only if (1) he has been pursuing his rights diligently (reasonable diligence, not maximum feasible diligence), and (2) some extraordinary circumstances (beyond his control) stood in his way and prevented timely filing.

Apart from these general principles, the court said, the doctrine of equitable tolling does not lend itself to bright-lines rules and courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate. The court noted that the BIA should give due consideration to the difficulties faced by deported immigrants who may be, "poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system – much less read and digest complicated legal decisions." Importantly, the court instructed the BIA not to apply the test "too harshly because denying an alien the opportunity to seek cancellation of removal – when it is evident that the basis for his removal is now invalid – is a particularly serious matter."

In the current landscape of cases dealing with motions to reopen, whether or not a deadline is equitably tolled has important implications on whether the BIA or the IJ will exercise jurisdiction, or whether the circuit courts will review the BIA's decision. This question about the circuit courts' jurisdiction to review BIA's decisions, even those reviewed under its *sua sponte* power, has been initially addressed by two Supreme Court decisions: *Kucana, supra* and *Dada v. Mukasey*, 554 U.S. 1 (2008); and was finally clearly answered in the third: *Mata, supra*.

c. New EOIR Proposed Regulation for *Lozada* Motions

On July 28, 2016, the EOIR proposed new rules establishing the standards for adjudicating motions to reopen based on ineffective assistance of counsel (IAC). Built on the administrative

framework provided by *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) for over 20 years, the proposed rule would establish procedures and substantive requirements for filing and adjudication of such motions. Notably, the proposed rule recognizes that immigration proceedings "are civil proceedings with high stakes, including the potential removal from the United States of an individual with long-standing family or other ties, or the grant or denial of relief or protection to an individual who claims to fear harm in his or her native country." Considering these "serious consequences," the Attorney General believes it is "paramount to ensure the integrity and fairness of such proceedings."

The proposed rule also takes into consideration the varying standards for prejudice that the federal courts of appeals have so far utilized and whether or not equitable tolling should apply in the filing deadlines for untimely motions to reopen based upon the claims of IAC. Additionally, the proposed rule also notes the "lack of uniformity" among the courts with regard to "the precise requirements and standards that an individual must meet to establish due diligence in order to be eligible for equitable tolling." Thus the proposed rule would establish uniform procedural and substantive requirements and also provide instances where equitable tolling would apply.

d. Post-Departure Bar cases

Almost all circuits courts have now held that the post-departure bar regulation wholly invalid as it impermissibly infringes on the alien's statutory right to file a motion to reopen under INA § 240(c)(7).[2] However, in the Second, Third, and Fifth circuits, whether or not the post-departure bar regulation is valid turns on whether an alien filed a motion to reopen pursuant to the statute or the regulation. *See Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Desai v. Att'y Gen.*, 695 F.3d 267 (3d Cir. 2012); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009).

There is a dichotomy that an alien either (1) files a *timely* motion to reopen based on his statutory right, or (2) files an *untimely* motion and invokes the BIA or the IJ's *sua sponte* authority to reopen. It was meaningful insofar as the circuit courts held that untimely filed motions that are not subject to any exceptions (including IAC or equitable tolling), can only be reopened under the IJ or BIA's *sua sponte* authority – and because it is a discretionary decision, they are not subject to review. However, after *Kucana* and *Mata*, the dichotomy of statutory vs. regulatory motions to reopen is less meaningful because neither precludes judicial review.

Additionally, because all circuit courts, including the Fifth Circuit, now hold that an equitable tolling of filing deadline is available, the only way an IJ or BIA could exercise its *sua sponte* authority is if it is actually and literally *sua sponte* reopens a case, i.e. reopens "on its own motion" that is "separate and apart from acting on the alien's motion." *Mata*, 135 S.Ct. at 2153.

[2] *See Perez-Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013) & *Bolieiro v. Holder*, 731 F.3d 32 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) and *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 2345 (2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012); *Lin v. US Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012).

PART III: TRANSFORMATION OF TEXAS ASSAULT STATUTE

a. Gonzalez-Longoria I

The Fifth Circuit seemingly agreed with the Seventh and the Ninth Circuit at the time it decided *U.S. v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016) (*Gonzalez-Longoria I*) and held that 18 U.S.C. § 16(b) is unconstitutionally vague. The court acknowledged that there were similarities between § 16(b) and ACCA's residual clause, 18 U.S.C. § § 924(e)(2)(B)(ii), which was held to be unconstitutionally vague in *Johnson v. United States*, __ U.S. __, 135 S.Ct. 2551 (2015).

The court in *Gonzalez-Longoria I* noted that a statute can be void for vagueness because of its inherent inability to produce "evenhanded, predictable, or consistent" applications – which was what Gonzalez-Longoria argued the problem was with § 16(b). The Fifth Circuit explained that the *Johnson* test for vagueness requires that the court ask: (1) whether § 16(b) requires the analysis of an imaginary, archetypical case to determine whether a crime is a "crime of violence"; and (2) if yes, then whether the archetypical case must be adjudicated under an "imprecise standard."

Both parties and the court itself agreed that § 16(b) required an analysis of an archetypical case. Then finding that the differences between § 16(b) and the residual clause were minimal, the court found that § 16(b) provided an imprecise guidance. Then looking to the presence of absence of clarifying examples, the scope, and judicial agreement or disagreement in determining whether § 16(b) is unconstitutionally vague, the court found that the examples it could look into were confusing and imprecise.[3] Analyzing the potential breadth of the scope of § 16(b), it relied on *Leocal* and concluded that the risk of physical force referenced in § 16(b) must be beyond the physical acts that make up the crime but must be less than a mere possibility that harm will result. Then looking into the judicial agreement or disagreement about § 16(b) (the "least important" factor), the court concluded that there was some evidence of imprecision but less than that was present in *Johnson*. However, in combination with the ordinary case inquiry, the court concluded that § 16(b) becomes unconstitutionally vague.

b. Gonzalez-Longoria II

The Fifth Circuit reversed *Gonzalez-Longoria I* six months later and created a circuit split on the application of *Johnson* to § 16(b). The court found that although the residual clause and § 16(b) require a risk assessment (i.e., estimating the risk posed by a crime) under the categorical approach, the inquiry that a court must conduct under § 16(b) is notably more narrow.[4] Delving into the text of the statute, the court said:

> The [ACAA's] residual clause requires courts, in imagining the ordinary case, to decide whether the ordinary case would present a "serious potential risk of *physical injury*." 18

[3] The court looked at *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and the language of INA § 101(a)(43)(F) for possible clarifying examples.

[4] *United States v. Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127 (Aug. 5, 2016) [hereinafter *Gonzalez-Longoria II*].

> U.S.C. § 924(e)(2)(B)(ii) (emphasis added). In contrast, 18 U.S.C. § 16(b) requires courts to decide whether the ordinary case "involves a substantial risk that *physical force* against the person or property of another may be used *in the course of committing* the offense." 18 U.S.C. § 16(b) (emphasis added). Risk of physical force is more definite than risk of physical injury; further, by requiring that the risk of physical force arise "in the course of committing" the offense, 18 U.S.C. § 16(b) does not allow courts to consider conduct or events occurring after the crime is complete.

Gonzalez-Longoria II, No. 15-40041, 2016 WL 4169127, at *3 (5th Cir. Aug. 5, 2016). It further found that § 16(b) requires courts to apply the test in *Leocal*[5] instead of imagining a potential risk of injury. The amount of risk required or "substantial risk" is also something that judges routinely interpret. Thus, the court concluded, § 16(b) is not unconstitutionally vague.

c. The Future of Gonzalez-Longoria

Five courts of appeals have so far addressed the issue of whether § 16(b) is unconstitutionally vague. Of these, the Ninth, Seventh, Sixth, and the Tenth circuit courts have held that it is. *See Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), cert. granted, No. 15-1498, 2016 WL 3232911 (U.S. Sept. 29, 2016); and *Golicov v. Lynch*, No. 16-9530 2016 WL 4988012 (10th Cir. Sept. 19, 2016).

The Supreme Court has granted certiorari in *Dimaya* and with the way most circuits have decided on the issue, and especially given the Supreme Court's own prior decision in *Johnson*, it is likely that § 16(b) will be held to be unconstitutionally vague.

PART IV: BIA's Standard for CIMT: *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016)

a. Brief History of Silva-Trevino

The BIA decided *Matter of Silva-Trevino* on October 12, 2016, concluding that the categorical approach and the modified categorical approaches provided the proper framework for determining when a conviction is for a crime involving moral turpitude.

Cristoval Silva-Trevino was a Lawful Permanent Resident (LPR) who pled no contest to the offense of indecency with a child under Tex. Pen. Code § 21.11(a)(1). DHS charged him with removability under the INA § 237(a)(2)(A)(iii), pursuant to the aggravated felony definition found in the INA § 101(a)(43)(A), i.e. for sexual abuse of a minor. He asked for adjustment of status as relief, for which the IJ found him ineligible as an alien convicted of CIMT, rendering him inadmissible under the INA § 212(a)(2)(A)(i)(I). The Board remanded the case finding that § 21.11(a)(1) of the Texas Penal Code (TPC) criminalized at least some conduct that does not

[5] "The analysis under 18 U.S.C. § 16(b) is more bounded; it requires courts to apply the well-settled test from *Leocal* and determine whether the offense category 'naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense.'" *Gonzalez-Longoria II*, 2016 WL 4169127, at *4 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)).

involve moral turpitude and the record of conviction did not contain any information about the conduct underlying his offense.

The Attorney General vacated the Board's decision in *Silva-Trevino I* and set up a framework for determining when a conviction is a CIMT, instructing IJs and Board to: (1) examine the conviction statute under the categorical approach and find out if there was a "realistic probability" that the statute would be applied to conduct not involving moral turpitude; (2) if not, then apply the modified categorical approach and look to the record of conviction; and (3) if the record is inconclusive, then consider any outside evidence to resolve the moral turpitude question.

Applying this framework on remand from the Board, the IJ considered extrinsic evidence and concluded that Silva-Trevino had been convicted of CIMT because he knew the victim was underage. The Board affirmed, but the Fifth Circuit reversed, holding that the phrase "convicted of" in the INA § 212(a)(2) of the Act precludes an adjudicator from inquiring into evidence outside the record of conviction. The court joined four other circuits which had similarly declined to defer to the *Silva-Trevino I* framework.

b. Silva-Trevino II

The AG issued *Silva-Trevino II* and vacated its earlier decision entirely and the Board was directed to develop a uniform standard for the proper construction and application of the INA § 212(a)(2)(A)(i)(I) as it applies to aliens "convicted of" a CIMT, as well as other similar provisions. The Board decided that the categorical and modified categorical approaches as developed by the Supreme Court precedents were applicable.

<u>BIA's Categorical Approach:</u>

1) Look to the criminal statute: does it fit within the generic definition of a CIMT?
    a) To evaluate the criminal statute, apply the *realistic probability* test (unless circuit precedent directs otherwise):
        i) What is the minimum conduct that has a realistic probability of being prosecuted under the statute, rather than on the underlying facts of the particular violation of that statute?

The Fifth Circuit in *Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016) has rejected the use of realistic probability test and applies the *minimum reading* approach: an offense is a CIMT if "the minimum reading of the statute [of conviction] necessarily reaches only offenses involving moral turpitude."

<u>BIA's Modified Categorical Approach:</u>

1) Is the statute divisible?
    a) does it list multiple discrete offenses as enumerated alternatives? or
    b) does it define a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction? and
    c) is at least one, but not all, of those listed offenses or combinations of disjunctive elements a categorical match to the relevant generic standard?
2) If yes, modified categorical approach applies:

a) look to the record of conviction to identify the statutory provision that the respondent was convicted of violating.

c. Application of new interpretation to Silva-Trevino's case

To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. This case arose out of the Fifth Circuit; so minimum reading approach applies: an offense will be classified as a CIMT if the minimum reading of a statute only encompasses offenses involving moral turpitude. But because the criminal statute at issue, § 21.11(a)(1) of the TPC is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude.

d. Heightened Standard for alien convicted of sexual abuse of a minor

The Board held that a heightened evidentiary showing of extreme and unusual hardship to establish a favorable exercise of discretion is not required for aliens who engaged in criminal acts constituting sexual abuse of a minor. In these cases, as with any crime, the IJ can consider the victim's age and other relevant factors to determine the full scope of the conduct and harm. Then the IJ can give them proper weight and balance the equities against adverse factors. This framework, the Board concluded was sufficient.