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Practice Pointer re *Matter of Hernandez*

Since the Supreme Court's decision in *Mathis v. United States*, 579 U.S. _____ (2016), 136 S. Ct. 2243 (2016), some people have suggested (more likely hoped!) that the BIA's decision in *Matter of Hernandez*, 26 I. & N. Dec. 464 (BIA 2015) may no longer be good law. I disagree with this view and hold to the view that *Matter of Hernandez* remains good law.

Matter of Hernandez held that a conviction for deadly conduct under section 22.05(a) of the Texas Penal Code is categorically a crime of moral turpitude, notwithstanding the fact that the provision only requires a mental state of recklessness. Does this holding survive the Supreme Court's opinion in *Mathis*? I believe it does. In sum I reach this conclusion because *Matter of Hernandez* did not reach *Mathis*'s divisibility analysis, and *Mathis* surely does not control the BIA's determination that this crime can constitute a CIMT.

If you are wondering why, here is my analysis as to why *Matter of Hernandez* remains good law. *Matter of Hernandez* addressed the crime of deadly conduct under section 22.05(a) of the Texas Penal Code, which provides that someone commits the crime if he "recklessly engages in conduct that places another in imminent danger of serious bodily injury."

The BIA cited past case law holding that recklessness can qualify as sufficient scienter to qualify a crime as involving moral turpitude "if it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct."[1] This language is similar to Texas Penal Code

[1] *Matter of Hernandez*, 26 I. & N. Dec. at 465-66 (citing *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551, 553–54 (BIA 2011), *aff'd*, 682 F.3d 513 (6th Cir.

§ 6.03(c), which defines reckless conduct as when a defendant is "aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." It therefore meets this standard of recklessness.

The BIA rejected Mr. Hernandez's argument that the lesser mental state required a greater showing of harm than it was operative under the deadly conduct statute. The BIA noted that previously it had held a crime committed with the requisite degree of recklessness constitutes a CIMT when it resulted in death, risk of death, or it involved use of a deadly weapon.[2] Given Texas's definition of "serious bodily injury"—"bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ"[3]—the BIA concluded that conduct under Texas Penal Code 22.05(a) was similarly reprehensible, noting that "actual infliction of harm" is not necessary for the commission of the crime.[4] From here, it was not much of a logical extension for the BIA to hold that the crime categorically constituted a CIMT, without ever assessing the divisibility of the statute.

To me, this does not seem to run afoul of *Mathis* and the post-*Mathis* case law. *Mathis* addressed the situation of how to apply the divisibility analysis, a step the BIA never reached in *Matter of Hernandez*, and it seems to me that *Mathis*'s dicta does not pertain.[5]

2012); *Matter of Franklin*, 20 I. & N. Dec. 867, 869–71 (BIA 1994), aff'd, 72 F.3d 571 (8th Cir. 1995); *Matter of Wojtkow*, 18 I. & N. Dec. 111, 112–13 (BIA 1981); *Matter of Medina*, 15 I. & N. Dec. 611, 613–14 (BIA 1976)).

[2] *Matter of Franklin*, 20 I. & N. Dec. at 870; *Matter of Wojtkow*, 18 I. & N. Dec. at 113; *Matter of Medina*, 15 I. & N. Dec. at 614; *Matter of Leal*, 26 I. & N. Dec. 20 (BIA 2012), *aff'd*, 771 F.3d 1140 (9th Cir. 2014),

[3] Section 1.07(a)(46) of the Texas Penal Code.

[4] *Matter of ernandez*, 26 I. & N. Dec. at 467 (quoting *Matter of Leal*, 26 I. & N. Dec. at 25) (elipse omitted).

[5] *Mathis* stated: "To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that

Mathis suggested that a mental state of recklessness would not constitute a CIMT for the violation of Texas's simple assault statute. This is consistent with cases finding that assault, without specific intent or some extra aggravating factor, is not sufficient to constitute a CIMT.[6] Other crimes however can be CIMTs even if committed recklessly.[7] Therefore, it is likely that the dicta pertains only to simple assaults. The Fifth Circuit's conclusion in *Gomez* is similarly limited.[8]

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criminalizes 'intentionally, knowingly, or recklessly' assaulting another—as exists in many States, see, e.g., Tex. Penal Code Ann. §22.01(a)(1) (West Cum. Supp. 2015)—has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying a single mens rea element. But such a statement, if treated as reliable, could make a huge difference in a deportation proceeding years in the future, because an intentional assault (unlike a reckless one) qualifies as a 'crime involving moral turpitude,' and so requires removal from the country. See In re Gomez-Perez, No. A200–958–511, p. 2 (BIA 2014)." *Mathis v. United States*, 579 U.S. ___, ___ n.3 (2016).

[6] *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996) (for an assault to constitute a CIMT, "the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury.").

[7] *Gelin v. United States AG*, 837 F.3d 1236 (11th Cir. 2016) ("both this Court and the BIA have held that 'moral turpitude may inhere in criminally reckless conduct.'").

[8] *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) ("Texas's *assault statute* can be committed by mere reckless conduct and thus does not qualify as a crime involving moral turpitude, which requires a more culpable mental state.") (emphasis added).