by H. Raymond Fasano

The New Era of Crimmigration Requires a Fundamental Knowledge of How to Read a Conviction Through Immigration Law Lenses

Criminal defense lawyers must have a working knowledge of immigration verbiage to effectively represent their clients in the modern practice of criminal law. In *Padilla v. Kentucky*,[1] the Supreme Court held that counsel has a duty to advise noncitizen clients of the immigration consequences of a plea. The Court reasoned in a majority opinion that was written by Ret. Justice John Paul Stevens that:

> Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsels who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[2]

The Era of Crimmigration

The high court's decision in *Padilla* ushered in a new era of jurisprudence that is often referred to as "crimmigration."[3] Convictions can cause a host of immigration problems for noncitizens. Certain crimes result in a noncitizen being found inadmissible to the United States, such as convictions for crimes involving moral turpitude (CIMT)[4] and controlled substance offense,[5] or deportable for having a conviction for a CIMT committed within five years after the date of admission and for which a sentence of one year or longer may be imposed,[6] having been convicted of multiple CIMTs,[7] having an aggravated felony conviction,[8] high-speed flight,[9] and failure to register as a sex offender.[10] Other convictions that will render a noncitizen deportable are controlled substance offenses,[11] certain firearms offenses,[12] and crimes of domestic violence, stalking, or a violation of a protection order and crimes against children.[13]

Speaking a Common Language

It would seem that most convictions will have an immigration consequence. However, the conviction alone is not necessarily the problem. There are related issues, such as amount of loss in a fraud conviction, that will determine whether the conviction is an aggravated felony,[14] the amount of time to which a noncitizen defendant is sentenced in a crime of violence offense[15] or theft offenses and whether it will trigger an aggravated felony charge,[16] or whether the offense was part of a conspiracy.[17] Because the Supreme Court and various state courts now mandate that the immigration consequences of a plea be explained to a noncitizen defendant,[18] a basic understanding of how to analyze a criminal conviction is essential for a criminal defense attorney and an immigration attorney to speak the same language. Terms or conditions may mean one thing for criminal law purposes but something quite different under our immigration jurisprudence. For instance, a vacated plea or an expungement may mean that a conviction has been vacated under a state's criminal law, but unless it has been vacated based on due process grounds, the original conviction is still considered a conviction for immigration purposes, despite the expungement or vacated conviction.[19]

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Analyzing a Conviction

The Categorical Approach

To begin the analysis as to whether there are immigration consequences to a plea or conviction, the lawyer must start with the elements of the offense. For instance, in the aggravated felony context, the categorical approach does "not look to the facts of a particular prior case but instead whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony."[20] A state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved … facts equating to the generic federal offense."[21] The elements of the criminal statute determine whether the offense fits within a certain category of crime for immigration purposes. The facts of the underlying conviction are not relevant. The lawyer must focus solely on the language of the statute.

The genesis of the categorical approach is born out of the Supreme Court's opinion in *Taylor v. United States*[22] in which the Court had to determine whether a sentence enhancement was justified under the Armed Career Criminal Act that enhanced a sentence if the defendant had three prior convictions for violent felonies. The analysis was related to whether a prior burglary conviction was a violent felony and whether the burglary of a vehicle fit within the traditional meaning of a dwelling. The issue was whether the burglary of a conveyance was correctly categorized as a burglary offense that would justify the sentence enhancement based on the generic definition of the term burglary. Traditionally, a dwelling meant the entry into a building or a structure with the intent to commit a crime therein. The Court reasoned that the burglary of a vehicle did not meet the generic definition of a dwelling as that term is used within the meaning of burglary. Traditionally, a conveyance is not a structure. Accordingly, the burglary of a conveyance could not permit a sentence enhancement because it was not a burglary in the traditional sense as that term is used.

The Modified Categorical Approach

When analyzing a statue that has multiple subsections or disjunctive language, different offenses or unlawful conduct may be contained within the statute at issue. These are known as divisible statutes and may include convictions that may or may not have immigration consequences based on the subsection to which the noncitizen pled guilty. We most often see this in determining whether an offense is an aggravated felony or a CIMT. The categorical approach will not answer the inquiry in determining if there are any immigration consequences when there is a divisible statute. One must look beyond the elements of the statute and consult the criminal record of proceedings to determine to what conduct the noncitizen pled guilty. The record of conviction that may be reviewed while engaging in the modified categorical approach includes the criminal complaint or charging document, the indictment, a supporting deposition, a plea agreement, the plea minutes, and sentencing minutes, and jury instructions.[23]

In contrast to the categorical approach where the analysis does not permit looking beyond the elements of the offense, the modified categorical approach looks to the facts that resulted in the convicted conduct. In other words—what facts form the basis of the conviction?

The *Taylor v. United States* analysis is not employed because the statute in question includes conduct that may fall outside the generic definition of a crime. For instance, in New York, the crime of assault in the third degree includes (1) intentional conduct to cause physical injury to another person;[24] (2) reckless conduct that caused physical injury to another person;[25] or (3) criminal negligent conduct that caused the "injury to another person by means of a deadly weapon or dangerous instrument."[26] Often times a certificate of disposition will merely state that the noncitizen pled guilty to PL§120.00 without listing the subdivision. There is no way to determine the immigration consequences of such a plea without reviewing the record of conviction. Intentional conduct to harm another person is a CIMT.

With respect to assault in New York State, the Board of Immigration Appeals (BIA) held in *Matter of Solon*,[27] that third-degree assault under New York law is a CIMT because the offense requires the intentional infliction of an injury that is "of a kind meaningfully greater than mere offensive touching." By contrast, the BIA held that simple battery that results in the *unintentional* infliction of serious injury is not a CIMT, absent other aggravating factors in *Matter of Fualaau*.[28] The BIA held in *Matter of Fualaau* that recklessly causing bodily injury to another person in violation of Hawaii law is not a crime involving moral turpitude.[29] Likewise, in *Matter of Perez-Contreras*,[30] the BIA held that negligently causing bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering in violation of Washington law is not a CIMT. Thus, the question in the assault context is not what the result of the conduct was for a serious bodily injury, but whether the aspect of the noncitizen's conduct rose to the level of culpability for the offense to such an extent that it may be considered a CIMT.

The takeaway in understanding the modified categorical approach is not to understand what caused the noncitizen to be charged with the offense in question or what happened, but rather to determine whether the record of conviction points to which section of a divisible statute the noncitizen pled guilty. The underlying conduct does indeed lean on what happened, but that is not determinative. What is determinative is to what conduct did the noncitizen plead. With respect to CIMTs, the adjudicator must look at the specific statute under which the noncitizen was convicted and ascertain the least culpable conduct necessary to sustain a conviction under the statute.[31]

Conclusion

It is not expected that this article will enable criminal practitioners to go at it alone and determine whether a particular plea will cause immigration problems for their client. It is urged that criminal practitioners always consult with an immigration specialist upon being retained in a criminal case. Upon understanding the basics of reading a criminal disposition, criminal defense practitioners can effectively represent their client, as they do not have to learn on the run when engaging immigration counsel. When criminal defense and immigration practitioners speak a common language, the noncitizen is effectively represented, assuring intelligent and knowledgeable pleas and finality to a prosecution. Justice is then served.

Finally, informed consideration of possible deportation can only benefit both the state and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsels who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers removal. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. ⊙

Endnotes

[1]559 U.S. 356 (2010).

[2]*Id.* at 373.

[3]The source of the term crimmigration is not known by the author since it has been used loosely for several years. One website states that "[t]he term "crimmigration," coined by law professor Juliet Stumpf, reflects the intersection of these two systems; a convergence of policies has deepened their entanglement." thesocietypages.org/roundtables/crimmigration/.

[4]Moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or society in general. *See Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994); *see also Totimeh v. U.S. Att'y Gen.*, 666 F.3d 109, 114 (3d Cir. 2012). To constitute a crime involving moral turpitude, an offense must have two essential elements: a culpable mental state and reprehensible conduct. *See Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013); *Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013). For the purposes of crimes involving moral turpitude, recklessness can be a culpable mental state. *See Matter of Louissaint*, 24 I&N Dec. 754, 756-57 (BIA 2009) (noting that for the purposes of crimes involving moral turpitude, a culpable mental state may be specific intent, deliberateness, willfulness, or recklessness).

[5]8 U.S.C. §1182(a)(2)(A)(i)(I) and (II).

[6]8 U.S.C. §1227(a)(2)(A)(i)(I)(II).

[7]8 U.S.C. §1227(a)(2)(A)(ii).

[8]8 U.S.C. §1227(a)(2)(A)(iii).

[9]8 U.S.C. §1227(a)(2)(A)(iv).

[10]8 U.S.C. §1227(a)(2)(A)(v).

[11]8 U.S.C. §1227(a)(2)(B)(i).

[12]8 U.S.C. §1227(a)(2)(C).

[13]8 U.S.C. §1227(a)(2)(E).

[14]8 U.S.C. §1101(a)(43)(M)(i).

[15]8 U.S.C. §1101(a)(43)(F).

[16]8 U.S.C. §1101(a)(43)(F).

[17]8 U.S.C. §1101(a)(43)(U).

[18]"[F]undamental fairness ... requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty." *People v. Peque*, 22 N.Y.3d 168, 193 (2013).

[19]*See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2001) (finding significant the distinction between convictions vacated on the basis of a

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backward at his traumatic past. The hero of the play proclaims: "America is God's Crucible, the great Melting-Pot where all the races of Europe are melting and reforming … Germans and Frenchmen, Irishmen and Englishmen, Jews, and Russians—into the Crucible with you all! God is making the American."

[8]Gristle, Gary, American Crucible; Race and Nation in the Twentieth Century, (Princeton University Press, 2001) p. 51. In the 18th and 19th centuries, the metaphor of a "crucible" or "(s)melting pot" was used to describe the fusion of different nationalities, ethnicities and cultures.

[9]A motto on the Great Seal of the United States. The motto was suggested in 1776 by Pierre Eugene du Simitiere to the committee responsible for developing the seal. At the time of the American Revolution, the exact phrase appeared prominently on the title page of every issue of a popular periodical, *The Gentleman's Magazine*,

[10]It was a metaphor for the idealized process of immigration and colonization by which different nationalities, cultures and "races" (a term that could encompass nationality, ethnicity and race) were to blend into a new, virtuous community, and it was connected to utopian visions of the emergence of an American "new man." *American Ethnic History: Themes and Perspectives*, (Edinburgh University Press) pp. 50–52.

[11]Park, Robert (1864-1944) was a member of the Chicago school of sociology and had a major hand in establishing the discipline of sociology in the United States.

[12]Park, Robert and Burgess, E.W. Introduction to the Science of Sociology, (University of Chicago Press, 1921) p. 737.

[13]*See generally* Alba, Richard and Nee, Victor *Rethinking Assimilation Theory for a New Era of Immigration*. Published in International Migration Review Vol 31 Issue 4 (winter 1997).

[14]*See* note 13 above.

Park, Robert and Burgess, E.W., Introduction to the Science of Sociology, (University of Chicago Press, 1921) p. 737.

[15]Gordon, Milton. *Assimilation in American Life*, Chapter 3 of The Nature of Assimilation (Oxford University Press, 1964).

[16]Kallen, Horace. Jewish philosopher, argued that members of every American ethnic group should be free to participate in all of the society's major institutions while simultaneously retaining or elaborating their own ethnic heritage. *See* Ratner, Sidney. *Horace Kallen and Cultural Pluralism*, (Associated University Presses/ Fairleigh Dickinson University, 1987).

[17]Chua, Amy, Day of Empire: How Hyperpowers Rise to Global Dominance and Why They Fall, (Doubleday, 2007).

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procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships).

[20]*Moncrieffe v. Holder,* 133 S.Ct. 1678, 1684 (2013).

[21]*Id*.

[22]495 U.S. 575 (1990).

[23]The Supreme Court reasoned in *Johnson v. United States*, 559 U.S. 133, 144-145 (2010):

When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the "'modified categorical approach'" that we have approved, *Nijhawan v. Holder,* 557 U.S. 29, ——, 129 S.Ct. 2294, 2302, 174 L.Ed.2d 22 (2009), permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms. See *Chambers v. United States,* 555 U.S. 122, ——, 129 S.Ct. 687, 691, 172 L.Ed.2d 484 (2009); *Shepard,* 544 U.S. at 26, 125 S.Ct. 1254 (plurality opinion); *Taylor v. United States,* 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Indeed, the government has in the past obtained convictions under the Armed Career Criminal Act in precisely this manner. See, *e.g., United States v. Simms,* 441 F.3d 313, 316–317 (C.A.4 2006) (Maryland battery); cf. *United States v. Robledo–Leyva,* 307 Fed.Appx. 859, 862 (5th Cir.) (Florida battery), *cert. denied*, 558 U.S. ——, 130 S.Ct. 64, 175 L.Ed.2d 47 (2009); *United States v. Luque–Barahona,* 272 Fed.Appx. 521, 524–525 (7th Cir.2008) (same).

[24]New York Penal Law §120.00(1).

[25]New York Penal Law §120.00(2).

[26]New York Penal Law §120.00(3).

[27]24 I&N Dec. 239 (BIA 2007).

[28]21 I&N Dec. 475, 477-78 (BIA 1996).

[29]Although the BIA held that reckless simple battery is not a CIMT in *Matter of Fualaau*, the author cautions when analyzing reckless conduct it is almost always a CIMT. The author's advice is that generally, reckless conduct is a CIMT. *See Matter of M-W-*, 25 I & N Dec. 748 (BIA 2012)(Reckless and wanton disregard for human life is sufficient to be an aggravated felony); *Keungne v. U.S. Att'y Gen'l*, 561 F.3d 1281 (11th Cir. 2009)(noncitizen's conviction for criminal reckless conduct under Georgia law was for a CIMT). The BIA consistently has interpreted moral turpitude to include recklessness crimes if certain statutory aggravating factors are present, such as where a defendant consciously disregards a substantial risk of serious harm or death to another person. *Matter of Leal*, 26 I&N Dec. 20, 25 (BIA 2012) (one who consciously disregards a known risk of harm exhibits a base contempt for the well-being of the community, which is the essence of moral turpitude); *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (when criminally reckless conduct requires a conscious disregard of a substantial and unjustifiable risk of serious injury or death to another, the crime involves moral turpitude).

[30]20 I&N Dec. 615, 618-19 (BIA 1992).

[31]*See U.S. v. Tucker*, 703 F.3d 205, 214 (3d Cir. 2012) (quoting *Jean-Louis v. U.S. Att'y Gen., supra*, at 466); *Partyka v. U.S. Att'y Gen.*, 417 F.3d 408, 411 (3d Cir. 2005).