WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 5/February 2021**

What You Need to Know for Your Noncitizen Client

If your noncitizen client is facing criminal charges or adverse findings in Family Court...

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York. *Email contact is most efficient during the pandemic.*

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We are funded by the New York State Office of Indigent Legal Services to assist mandated representatives in their representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky,* 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b counsel to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our service.

Please consider also contacting us if you need assistance interviewing your client to determine immigration status or communicating immigration consequences; or if you would like us to intercede with the DA or the judge to explain immigration consequences. We speak Spanish and French.

Free CLE via Zoom

Hosted by the WNYRIAC & the New York State Defenders Association (NYSDA)

February 19, 2021, 1-3PM

"UNDERSTANDING YOUR FOREIGN-BORN CLIENT: Refugee and Immigrant Communities and their Perspectives of the U.S. Criminal Justice System and Court-Ordered Treatment"

Featuring:

David Engel, UB Law School Professor Emeritus
https://www.law.buffalo.edu/faculty/facultyDirectory/EngelDavidM.html

Ye Myo Aung, Operations and IT Manager, Legal Aid Bureau of Buffalo, Inc.

Fidèle Menavanza, JD, Director of Compliance and Risk Management at Jericho Road Community Health Center, Buffalo

Hassan Shibly, Esq. Former Executive Director, Council on American-Islamic Relations, Florida

Ting Lee, Licensed Mental Health Counselor, Senior Counselor, Best Self Behavioral Health, Buffalo

1.0 Diversity credit
1.0 Professional Practice credit

This CLE will help criminal defense lawyers to better understand the language and cultural barriers faced by immigrant clients from Southeast Asia, Africa and the Middle East in the criminal justice system. The CLE will present insight on cultural norms in these regions of the world and offer practical solutions for criminal defense lawyers when such barriers prevent a client from understanding court procedures, such as mandated treatment services.

Register here: https://www.nysda.org/events/register.aspx?id=1480584

LEGAL AID BUREAU of Buffalo, Inc.

Ontario County NEW YORK

Requisite Mental States for Crimes Involving Moral Turpitude: Where does that leave Recklessness?

By Brian Whitney, Law Graduate/Staff Attorney, WNYRIAC, Ontario County Public Defenders Office

One type of immigration offense that defense counsel should always try to avoid for noncitizen clients are crimes involving moral turpitude (CMTs). A conviction for or a plea to a CMT can negatively affect a noncitizen in many ways. While a single CMT committed more than five years after admission may be a surmountable obstacle for certain noncitizen clients with neither prior nor subsequent criminal histories, two CMTs can clearly render noncitizens deportable, inadmissible, and ineligible for immigration benefits or relief in removal proceedings.

To complicate matters, CMTs are undefined in the Immigration and Nationality Act (INA) and only nebulously defined in case law. They refer "to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). To determine whether a crime involves moral turpitude, one must also "consider whether the act is accompanied by a vicious motive or corrupt mind." *Id*. Despite this ambiguity, the Board of Immigration Appeals (BIA) has held that CMTs can be distilled into two essential elements: "[1] reprehensible conduct and [2] a culpable mental state." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (B.I.A. 2016); see *Rodriguez v. Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006).

Therefore, one critical question in determining whether a crime is a CMT is: What mental state satisfies the generic criminal offense? As the Second Circuit Court of Appeals has long noted, moral turpitude "inheres in the intent." *United States ex rel. Meyer v. Day*, 54 F.2d 336, 337 (2d Cir.1931). As such, intent to cause great bodily harm, commit a lewd act, defraud, or permanently deprive an owner of property or substantially erode property rights is generally required. Here are examples of convictions, most from other States, that illustrate this concept: *Matter of Corte Medina*, 26 I&N (BIA 2013) (indecent exposure, where lewd intent is an element, is categorically a CMT), *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (conspiracy to defraud the United States of taxes on distilled spirits under federal law is CMT), *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016) (shoplifting property worth less than $1,000 in violation of Arizona law is a CMT); *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016) (NY petty larceny is a CMT). The Second Circuit has also observed, that "[c]rimes committed knowingly or intentionally generally have been found [...] to be crimes involving moral turpitude." *Gill v. INS*, 420 F.3d 82, 89 (2d Cir. 2005); see also, *Mendez v. Mukasey*, 547 F.3d 345 (2d Cir. 2008).

> "Crimes involving moral turpitude include those with an *intent* to cause great bodily harm, to commit a lewd act, to defraud, or to permanently deprive an owner of property or substantially erode his/her property rights, as well as sexual offenses against children regardless of the *mens rea*."

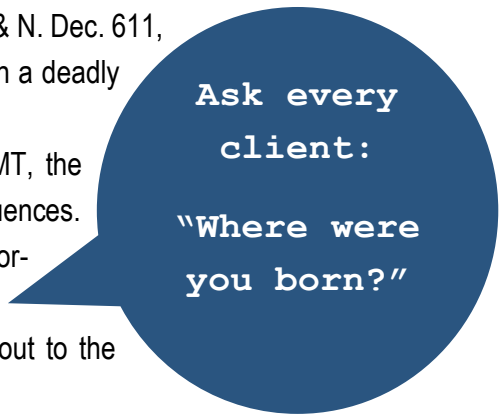
Conversely, "generally, where intent is not an element of a crime, that crime is not one involving moral turpitude." *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551, 551 (BIA 2011) (emphasis added). For example, an offense involving negligence is generally not a CMT. See*, Matter of Perez-Contreras*, 20 I&N Dec. 615 at 618 (Assault in the third degree in Washington is not a CMT where intentional and reckless conduct is excluded from the statuto-

ry definition of the crime); *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017) (holding criminally negligent homicide in violation of NYPL 125.10 is not a CMT). One exception is for sexual crimes involving minors, which implicate moral turpitude absent a statutory intent element. See, *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020). Clearly, the analysis is more straightforward for crimes requiring either a high or low degree of mental culpability, but where does this leave offenses committed with recklessness?

Crimes committed with recklessness *have been* found to involve a sufficiently corrupt mental state to constitute a CMT when coupled with *aggravated circumstances*. See, e.g., *Matter of Medina*, 15 I. & N. Dec. 611, 613-614 (BIA 1976) (holding that an Illinois reckless assault with a deadly weapon is a CMT); *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015) (Texas offense of "recklessly engag[ing] in conduct that places another in imminent danger of serious bodily injury" is categorically a CMT); *Matter of Leal*, 26 I&N Dec. 20, 24-26 (BIA 2012) ("recklessly endangering another person with a substantial risk of imminent death" in violation of Arizona law is categorically a CMT); *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994) (Missouri involuntary manslaughter is a CMT); cf. *Matter of Fualaau*, 21 I. & N. Dec. 475, 478 (BIA 1996) (holding that a reckless assault under Hawaii law was not a CIMT, as no serious bodily injury is required).

For example, NYPL §120.20, reckless endangerment in the second degree, requires "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Considering the aggravating circumstances, the Second Circuit held the offense is categorically a CMT. See *Gayle v. Sessions*, 719 F. App'x 68 (2d Cir. 2018). Note also that "[p]roperty damage is generally not considered a [CMT] where the offense does not require an evil intent and a high degree of damage." *Louisaire v. Muller*, 758 F. Supp. 2d 229 (S.D.N.Y. 2010) (considering reckless damage to property under NYPL §215.51[d]); see also *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (Canadian reckless endangerment of property not a CMT); cf. *Matter of M*, 3 I&N Dec. 272 (BIA 1948) (CMT where committed "maliciously and wantonly").

One interesting tool for defense attorneys to consider is pleading to an "attempted recklessness" offense. In New York it is possible to plead guilty to logically incoherent "attempted reckless" offenses, saving clients from potential CMTs. See, *People v. Foster*, 19 N.Y.2d 150 (1967). Such pleas may be sustained "on the ground that it was sought by [the] defendant and freely taken as part of a bargain which was struck for the defendant's benefit." Id. at 153-154. Under immigration law, an attempted offense is the same as an underlying CMT offense and does not minimize its effect. *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011). However, since one cannot intend to commit or conspire to commit a reckless act, "particularly not one defined by an unintended result such as bodily injury," it does not give rise for immigration purposes to any clearly discernable mental state, "let alone the sort of aggravated recklessness that has been found to demonstrate moral turpitude." See *Gill v. INS*, 420 F.3d 82, 91 (2d Cir.2005) (citing Matter of Medina, 15 I. & N. Dec. 611, 613-14 [BIA 1976]). Thus, in *Gill v. INS*, attempted reckless assault with a deadly weapon (firearm) is not a CIMT.



Please keep in mind that even where an offense is not a CMT, the crime may still constitute other immigration offenses with harsh consequences. It is always advisable for defense counsel to consult with immigration attorneys when representing a noncitizen client as soon as possible in the representation. Ask every client: Where were you born? Then reach out to the WNYRIAC. We are here to assist you.

Early/Conditional Release for Deportation Only and International Prison Transfers

Certain non-violent offenders may be released early from their prison term for the sole purpose of deportation. This is governed by either state or federal law.

In NYS, the offender must have served at least half of his/her sentence, have no unsettled criminal cases pending, and an order of removal must have been entered against them. In addition, s/he must give up all rights to appeal any immigration decisions. Therefore, one must act very carefully to make certain that there are no valuable immigration benefits available before opting for this remedy. Also, before his or her release, s/he must be informed of the penalties relating to illegal re-entry.

It is the Immigration Court at the Ulster Correctional Facility that hears the immigration cases of those serving time in the NYDOCC's system. That court may issue the requisite final order of removal. The NYS Department of Parole then makes decisions about early or conditional release for deportation.

Once deported it is very difficult, if even possible, for a noncitizen with a criminal record to return to the United States. If s/he returns illegally, s/he may face a *minimum* federal sentence of ten years of imprisonment.

In addition, under prisoner transfer treaties, nationals of 59 signatory nations who are serving state or federal sentences in the U.S. could seek transfer back to their native country to complete their sentences. See, https://www.justice.gov/criminal-oia/iptu. The embassy of the home country should be contacted for information on the terms of the treaty. The prisoner may only be transferred to a nation of which s/he is a citizen or national, and only with his or her consent, which, once given and verified, is irrevocable.

In order to qualify for such a transfer, the offense for which the sentence is being served must be a crime in both countries at the time of the transfer, and the prisoner must have at least six months left to serve. The applicant must also have good behavior in prison. If the applying prisoner is a permanent resident, s/he must give up his or her rights to remain in the country and not fight deportation. The individual treaties may have additional or different requirements.

WNY Regional Immigration Assistance Center

A partnership between the Ontario County Public Defender's Office and the Legal Aid Bureau of Buffalo, Inc.

New Cases

* The Board of Immigration Appeals (BIA) recently held in *Matter of Rivera-Mendoza*, 28 I&N Dec. 184 (BIA 2020), that an Oregon conviction for child neglect constituted a "crime of child abuse" under INA §237(a)(2)(E)(i), finding the statute required proof of a "likelihood" or "reasonable probability" that a child would be harmed. In its analysis, the BIA noted that endangering the welfare of a child in violation of NYPL 260.10(1) has already been held to constitute a deportable "crime of child abuse" offense under immigration law. See *Matter of Mendoza Osorio*, 26 I&N Dec. at 705, 711–12 (BIA 2016).

* A divided Circuit Court of Appeals held that first degree manslaughter in violation of NYPL §125.20 is not an immigration aggravated felony since it is not crime of violence as defined by 18 USC §16, though it remains a crime involving moral turpitude. The reasoning is that manslaughter 1st can be committed by omission. *U.S. v Scott,* 954 F.3rd 74 (2d Cir, Mar. 31, 2020). However, a rehearing *en banc* was granted in July in this case.

News Alerts

* The City of New York Bar issued a report in October calling for the independence of Immigration Courts from the USDOJ due to inherent conflict between law enforcement and the fair adjudication of cases. *See report here*: https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/independence-of-us-immigration-courts

* On January 26, the Southern District Court of Texas reviewed the Biden Administration's recent memo on new enforcement policies, and issued a nationwide TRO preventing a categorical bar on all deportations for 14 days. *See decision*, https://www.court listener.com/recap/gov.uscourts.txsd.1811836/gov.uscourts.t xsd.1811836.16.0_1.pdf

Other sections of the January 20 memorandum remain in place. For more, *see*, https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2021_27Jan-100-day-facts.pdf