CRIMMIGRATION COMMUNICATION

LONG ISLAND
REGIONAL IMMIGRATION ASSISTANCE CENTER

SECOND CIRCUIT CASES ADDRESS CRIMMIGATION ISSUES IN 2022

2022 was a prolific year for decisions regarding the immigration consequences of criminal contacts at the Second Circuit. Eight precedential cases touch on "crimmigration" issues. A careful look at the cases below reveals that some long unresolved issues regarding the classification of convictions (including for some attempts and for the common petit larceny offense) have been definitively resolved, and reaffirms the Second Circuit's commitment to engage in and hold immigration agencies to careful, step-by-step analysis of immigration consequences of criminal convictions. While there remain some open questions as to the classification of certain crimes, the Court has provided some clarity and guidance as to the means by which we can predict the consequences of criminal convictions.

***Debique v. Garland*, 58 F.4th 676 (2d Cir. January, 2023)** The Court held that a conviction under NYPL § 130.60(2), is a "sexual abuse of a minor" aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii), which leads to automatic deportation. In so holding, the Court reiterated its commitment to the categorical approach. "Under this approach, we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding Aggravated Felony."*Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The Court again relied on the federal offense found at 18 U.S.C. § 3509(a)(8) as the appropriate generic reference point,*In re Guo*, 965 F.3d 96, 105 (2d. Cir. 2020), and found the New York statute a categorical match for the sexual abuse of a minor aggravated felony.

In ***Singh v. Garland*, Slip Op 19-2910, decided *per curium* in January, 2023**, the Court found that Attempted Assault in the First Degree, a B Felony, NYPL §§ 110.00 + 120.10(1), qualifies as an Aggravated Felony because it is a categorical match with the Crime of Violence definition found at 18 U.S.C. § 16(a). The Court used the "modified" categorical approach, because New York's assault statute is "divisible" into several separate crimes, each with its own elements. See *Singh v. Barr*, 939 F.3d 457, 462 (2d Cir. 2019) (discussing NYPL § 120.05 and finding a divisible statute). In discussing this subsection, the Court found that the intent to cause serious physical injury, particularly in combination with the deadly weapon or dangerous instrument element, necessarily encompasses the use of violent force required under Section 16(a) to qualify as an Aggravated Felony.

***Castillo v. Garland*, 36 F.4th 431 (2022)** arises in the context of sentence enhancements rather than deportation. Nevertheless, because the "crime of violence" definition in the sentencing context mirrors the "crime of violence" Aggravated Felony definition in immigration law, such cases are instructive for understanding the immigration consequences of New York convictions. The analysis here is especially helpful for understanding when an inchoate crime will avoid triggering the same immigration consequences as the completed offense. Under New York law, "a plea to a legally impossible offense should 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." *People v. Foster*, 19 N.Y.2d 150, 154 (1967). Here, New York's Gang Assault statute requires (1) an intent to cause "*physical injury*," (2) aid from two or more other

persons actually present, and (3) a resulting "*serious physical injury*." New York's Attempt statute, however, requires an intent to complete *all* elements of the crime. *Gill v. I.N.S.*, 420 F.3d 82, 90 (2d Cir. 2005). Where a penal statute imposes strict liability for creating an *unintended* result, an attempt to commit that crime is not a legally cognizable offense because "one cannot attempt to create an unintended result." *People v. Prescott*, 95 N.Y.2d 655, 659 (2001). New York's crime of Attempted Gang Assault, NYPL 110.00 + 120.06, while permissible to resolve a criminal charge under New York law, cannot qualify as a "crime of violence," because one cannot intend an unintended result. Since second-degree gang assault involves the specific intent to cause physical injury and the unintended result of a *serious* physical injury, it cannot be attempted because "there can be no attempt to commit a crime where one of the elements is a specific intent but another, an unintended result." *In re Cisely G.*, 918 N.Y.S.2d at 24(emphasis added) (quoting *McDavis*, 469 N.Y.S.2d at 510); *cf. United States v. Moreno*, 821 F.3d 223, 230 (2d Cir. 2016)("Because it is legally impossible to intend to commit a crime that is defined by an unintended result, one cannot attempt to commit reckless second degree assault"). Thus, the crime cannot qualify as a "crime of violence," and therefore avoids Aggravated Felony classification on this ground.

***Jang v. Garland*, 42 F.4th 56 (2d. Cir. 2022)** found that the New York offense of attempted money laundering, NYPL 110.00 + 470.15(1)(b)(ii)(A) does not qualify as a Crime Involving Moral Turpitude ("CIMT") because it lacks the requisite *mens rea*. The Court reaffirmed that elements of a CIMT are "reprehensible conduct and a culpable mental state." *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833-34 (B.I.A. 2016). In conducting the CIMT analysis, courts usually focus on the "specific mental purpose that is inherently base, vile, or depraved." *Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020). But for CIMT purposes, where a conviction is for attempt, Courts consider whether the substantive crime is a CIMT. *See Santana-Felix v. Barr*, 924 F.3d 51, 54 (2d Cir. 2019). After punting on the question of whether the categorical approach or the modified categorical approach should be the method of analysis, the court found that under either approach, the result here is the same. Second-degree money laundering under § 470.15(1)(b)(ii)(A) does not require that the individual conducting the illicit transaction act with the "evil intent" or "specific mental purpose that is inherently base, vile or depraved" needed to qualify as a CIMT. For this reason, a conviction for this crime is not a CIMT.

In ***Alvarez v. Garland*, 33 F.4th 626 (2d. Cir 2022)** the Second Circuit re-affirmed the longstanding rule that a "circumstance-specific" approach is to be used where a ground of removability refers to conduct rather than a conviction. Thus, immigration adjudicators may examine the relationship between a protected party and the violator of an order of protection to determine if the domestic violence deportability ground at 8 USC 1227(a)(2)(E)(ii) is triggered.

In ***Cupete v. Garland*, 29 F. 4th 53 (2d Cir. 2022)**, the Second Circuit reaffirmed that a *mens rea* of "knowingly and willfully making a false statement" necessarily requires "deceit and an intent to impair the efficiency and lawful functioning of the government." Together, these two elements were sufficient to give CIMT status to violations of 18 U.S.C. § 1542, which forbids making false statements in a passport application.

In ***Ferreirras Veloz v. Garland*, 26 F4th 129 (2d Cir 2022)**, the Second Circuit held definitively that the New York crime of Petit Larceny, NYPL § 155.25, qualifies as a CIMT. The New York Court of Appeals declined the Circuit Court's invitation to answer whether or not a petit larceny conviction "requires an intent to deprive the owner of his or her property either permanently or under

circumstances where the owner's property rights are substantially eroded," which the BIA had said was necessary for a theft crime to be a CIMT. *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 853 (B.I.A. 2016). Absent a determination from New York's highest Court, the Second Circuit held definitively what immigration practitioners have long predicted, that NYPL 155.25 is categorically a CIMT.

Finally, in ***Ojo v. Garland*, 25 F4th 152 (2d. Cir 2022)**, the Second Circuit remanded a non-citizen's application for withholding of removal because the Immigration Judge failed to engage in the analytical process proscribed by the Courts to assess whether or not a crime is "particularly serious," and thus bars eligibility for Withholding of Removal. Precedent requires a two step-process: "If the *elements* of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal." *In re N-A-M-*, 24 I. & N. Dec. at 342. However, "once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information." *Id.* The ultimate decision to categorize an offense as a particularly serious crime after weighing relevant facts is a matter of discretion.

At step one, "crimes against persons are more likely to be particularly serious than crimes against property." Here, the Immigration Judge improperly categorized the conviction for conspiracy to commit wire fraud and identity theft as "crimes against persons" rather than properly consider them "crimes against property." This error ignored the rule that crimes against persons must contain as an element the use or threatened use of force. The Immigration Court must revisit the question on remand under the proper standard.

It is important to remember that the Immigration and Nationality Act contains many and varied classifications of crimes. A particular New York conviction may qualify as an Aggravated Felony, a Crime Involving Moral Turpitude, a Controlled Substance Offense, a Crime Against a Child, or some other specific category in the immigration law. We must carefully analyze each conviction - especially for inchoate crimes like attempt - under all relevant potential basis for negative immigration consequences, and we must understand a non-citizen's particular immigration status and goals for future immigration status in order to understand the impact of a specific conviction. The Second Circuit has in the cases considered here provided some clarity, but it has not resolved all open questions related to the classification of crimes under immigration law.