Matter of H. Estrada and Congressional Intent

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Introduction

A recent opinion of the Board of Immigration Appeals (BIA) affirmed a removal order on the deportability ground at Immigration and Nationality Act (INA) § 237(a)(2)(E). (*Matter of H. Estrada*, 26 I. & N. Dec. 749 (BIA 2016).) The appeal in *Estrada* arose in the context of an Immigration Judge's review of documents outside the record of conviction to find (1) the identity of a domestic violence victim and (2) a domestic relationship between the respondent and this victim. The BIA found that Congress intended for victim identity and domestic relationship to be subject to a circumstance-specific approach.

This article argues that the BIA should have never opined that congressional intent rendered application of the circumstance-specific approach proper. This article also questions the BIA's position that victim identity is subject to the circumstance-specific approach. Under *Nijhawan* and *Kawashima*,[1] the circumstance-specific approach is only applicable to a qualifying fact on the face of the federal statute defining the deportability ground. No reference to victim identity appears in the statute.

In reliance on congressional intent, the BIA applied the circumstance-specific approach. The BIA reasoned that Congress passed INA § 237(a)(2)(E) when only one-third of states had statutes prohibiting domestic violence. The BIA conceded how ubiquitous domestic violence statutes are now.

A. The concurring opinion in *Mathis v. U.S.* by Justice Kennedy, whose swing vote gave the plurality a majority, cited *Nijhawan* for congressional intent to conduct a circumstance-specific approach and gave Congress an ultimatum to replace the categorical approach with a new standard.

A recent opinion of the United States Supreme Court reaffirmed that the modified categorical approach is applicable only if a state statute lists alternative "elements" on which a jury must reach consensus to return a verdict of conviction, as opposed to "means" on which no consensus is necessary, and only if there is at least one "element" satisfying a generic definition as well as at least one element not satisfying the same generic definition. (*Mathis v. United States*, 579 U.S. ___ (2016).) Justice Kennedy authored a concurring opinion. As the Court's swing vote who gave the plurality in *Mathis* a majority, Justice Kennedy questioned whether Congress intended sentencing disparities that result under the categorical approach. Justice Kennedy expressed an interest in moving away from the categorical approach, and urged Congress to enact legislation that sets a new standard. In the same breath that Justice Kennedy emphasized Congress's authority to do so, he cited *Nijhawan* for the Court's compliance with congressional intent by tailoring the circumstance-specific approach. Justice Kennedy further states in his opinion that congressional inaction on this matter "should require this Court to revisit its precedents in an appropriate case." (*Id.* J. Kennedy concurring.) Justice Kennedy's concurring opinion gives an alarming peek into what the future could hold for the categorical approach and raises troubling possibilities: a pre-*Descamps* analysis; uniformity in applying a circumstance- specific approach; or imputing congressional intent without proper analysis, as the BIA did in *Estrada*.

B. The circumstance-specific approach was applied in *Estrada* based on a congressional intent analysis that ignored the unavailability of SCAAP funds under VAWA to any state without laws incorporating domestic relationship by reference into statutes prohibiting domestic violence.

The BIA in *Estrada* ignored the historic passage of the Violence Against Women Act (VAWA)[2] by Congress in 1994. This law encouraged passage of state statutes exclusive to domestic violence by offering massive federal financial incentives, called "state criminal alien assistance program" (SCAAP) funds, exclusively for prosecution of state statutes tailored to domestic violence. SCAAP funds became available well before passage of INA § 237(a)(2)(E) with the

[1] Nijhawan v. Holder, 557 U.S. 29 (2009), 129 S.Ct. 2294; Kawashima v. Holder, 565 U.S. ___ (2012), 132 S.Ct. 1166.

[2] Violent Crime Control and Law Enforcement Act, H.R. 3355 signed as Pub. L. 103-322.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996. By 1996, SCAAP funds had become the motivating force behind the growing number of state statutes defining domestic relationship and proscribing domestic violence.

Estrada announced that Congress could not have intended to exempt convictions in the many states that had not yet created statutes patently-proscribing domestic violence from the breadth of INA § 237(a)(2)(E). *Estrada* ignores the obvious: Congressional intent drew on the availability of SCAAP funds under VAWA to prompt an unprecedented and unbridled movement among state legislatures to pass statutes defining domestic relationship and patently-proscribing domestic violence.

Exercise of congressional power to motivate state legislatures to undertake legislative action was not an unknown or uncommon legislative function. Only a decade before VAWA, Congress passed the National Minimum Drinking Age Act of 1984. (23 U.S.C. § 158 (1984).) The Minimum Drinking Age Act incentivized State laws setting the minimum drinking age at 21 years old. The incentive came in the form of a cap on receipt of federal highway funds: any state failing to do so would suffer a 10% decrease in federal highway funds. Federal highway funds motivated uniform state laws.

Similar to Congress's actions to establish a uniform standard drinking age of 21 years old through a federal highway funds incentive, Congress passed VAWA to encourage uniformity in state statutes proscribing domestic violence by offering SCAAP funds as an incentive.

C. While the U.S. Supreme Court has never applied the circumstance-specific approach to more than one qualifying fact, the BIA applied the circumstance-specific approach to both domestic relationship and identity of the victim after erroneously concluding both were qualifying facts.

The BIA relied on a published opinion of the Federal Court of Appeals for the 11th Circuit to conclude that the generic definition of a crime of violence (COV), as set out at 18 U.S.C. § 16, categorically matched what was at issue in *Estrada*: a Georgia statute proscribing intentional causation of harm through physical contact, rather than simple battery as the BIA labelled it.[3] The BIA's opinion was accordingly exclusive to the circumstance-specific approach. Despite no stipulation to documents that were outside the traditional record of conviction, the BIA affirmed the removal order based on the deportability ground at INA § 237(a)(2)(E) because of its review of "reliable" records and because there was nothing presented by the *Estrada* respondent to ". . .contest either the identity of the victim or her relationship to him."[4] (*Id*. at 754.)

The BIA is limited by the doctrine of stare decisis. No BIA opinion should be taken as authority for applying the circumstance-specific approach to more than one qualifying fact.[5] The Office of Chief Counsel (OCC) should be held to its burden to present the statute of conviction as a categorical match to a COV by satisfying the generic definition. OCC should also be held to its burden to establish that the existence of a relationship between respondent and any victim is a qualifying fact as a condition precedent to reliance on the circumstance-specific approach for proof of domestic relationship. OCC should finally be held to its burden of establishing that identity of the victim is a qualifying fact as a condition precedent to reliance on the circumstance-specific approach for proof of this identification.

D. The circumstance-specific approach should be contested in removal proceedings to preserve the issue for appeal as well as persuade the Immigration Judge that *Estrada* should not be followed.

Motions to terminate should be presented to attack notices to appear alleging INA § 237(a)(2)(E). Such attacks should be couched in due process, which was expressly stated as a limitation on the circumstance-specific approach. (*Id*. at 752 ("Such a limited assessment of the nature of the crime comports with due process and is fundamentally fair, because a respondent has two opportunities to contest the domestic nature of

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[3] Hernandez v. U.S. Att'y Gen., 513 F.3d 1336, 1339-42 (11th Cir. 2008).

[4] The BIA held that, when applying the circumstance-specific approach, the burden of proof lies on the government to prove the existence of a qualifying fact by clear and convincing evidence. Under the circumstance-specific approach, the government is not subject to the limitations of the categorical approach or the modified categorical approach. Thus, the government may provide the record of conviction as well as any other documents admissible in removal proceedings provided that the information in the document is "reliable". *See* Matter of Garza-Olivares, 26 I. & N. Dec. 736, 742 n.4 (BIA 2016); Matter of Babaisakov, 24 I. & N. Dec. 306, 320-321.

[5] The circumstance-specific approach has been used to erroneously bootstrap factors into the analysis by dividing statutory language into multiple qualifying facts. *See* Matter of Garza-Olivares, 26 I. & N. Dec. 736 (BIA 2016). In *Matter of Garza-Olivares*, the BIA stated that the maximum penalty was a separate qualifying fact subject to the circumstance-specific approach; an aggravated-term sentence can be ascertained from the statute of conviction.

the offense–first during the criminal proceedings and again at the removal hearing itself.").)

Additional means to contest application of the circumstance-specific approach can be reached by extrapolation from opinions of the U.S. Supreme Court. For example, even assuming the *Estrada* respondent's conviction was a COV under the categorical approach, and even if identity of the victim were a qualifying fact, removal on the deportability ground of INA § 237(a)(2)(E) should not have been ordered in *Estrada* because the circumstance-specific approach has only been applied to a single qualifying fact under U.S. Supreme Court jurisprudence.

The aforementioned discussion is intended to encourage practitioners to contest application of the circumstance-specific approach in the context of removal proceedings on the deportability ground at INA § 237(a)(2)(E). Many immigration judges may adhere to a position of equipoise by finding victim identity not subject to the circumstance-specific approach, but that the domestic relationship is so subject. Such a position would be consistent with the circumstance-specific approach being a rarely-applicable vehicle that should be narrowly construed to what Congress intended.

E. *Estrada* did not involve a statute patently-proscribing domestic violence, so the circumstance-specific approach should be foreclosed where there is a conviction of a statute patently-proscribing domestic violence because the domestic relationship is categorically established.

In *Estrada*, the BIA applied the circumstance-specific approach to affirm the Immigration Judge's finding of the domestic relationship as corroborated by the victim's identity confirming the common address of the respondent and the victim. The BIA opined that no due process violation would result from the circumstance-specific approach because the respondent could contest proof of the domestic relationship in both the criminal case and in the removal proceedings. Because the *Estrada* case involved a statute that was not exclusive to domestic violence, nothing could be further from the truth.

Estrada's due-process rationale for applying the circumstance-specific approach defies the truth because a respondent defending against a statute not exclusive to domestic violence would have no legal authority for a finding of fact on whether there was a common address. In the context of defending against such a statute before a criminal court, a common address would be far afield from any element of the crime with which the respondent had been charged. Common sense would militate against seeking to refute a common address in defending against such a statute, as no finding on a common address would be entered even if facts negated a common address. Respondent would suffer prejudice before the criminal court for presenting irrelevancies in subordination of judicial economy.

The BIA has previously addressed a statute patently-proscribing domestic violence, on which the qualifying facts of domestic relationship and COV were both subject to the categorical approach. (*Matter of Milian-Dubon*, 25 I. & N. Dec. 197 (BIA 2010).) The statute of conviction in *Milian-Dubon* categorically involved a domestic relationship, so the only question was whether a COV was established by a document to which the respondent stipulated for a factual basis. The BIA opined in *Milian-Dubon* that under *Shepard*[6] the stipulation to a factual basis of the *Milian-Dubon* respondent rendered proper a finding of a COV, as incorporated by reference under 18 U.S.C. § 16. While the *de minimis* misconduct under the relevant criminal statute[7] and jury instruction was an offensive touching that did not satisfy the definition of a COV, a remand was proper on whether the deportability ground at INA § 237(a)(2)(E) applied because of a document that would not be in the record but for a factual-basis stipulation to this document.

Milian-Dubon is not undermined by the opinion of the United States Supreme Court in *Descamps*[8], which presented a modified categorical approach as inapplicable to a statute found indivisible under the strict categorical approach. On one hand, under the strict categorical approach, there would necessarily be a finding under *Descamps* that the statute involved in *Milian-Dubon* was not divisible. Because of the uniquely non-divisible state statute at issue in *Milian-Dubon*,[9] review of the document to which there was a factual basis stipulation should have been foreclosed because *Shepard* only applies where there are grounds on which a modified categorical approach should be undertaken. On the other hand, there should be adherence to the rule of law that *Milian-Dubon* presents. This

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[6] Shepard v. United States, 544 U.S. 13 (2005), 125 S. Ct. 1254.

[7] California Penal Code § 243(e)(1) contains the same statutory language and corresponds to the same set of jury instructions today as it did when the BIA's opinion in *Milian-Dubon* was entered.

[8] Descamps v. United States, 570 U.S. ___ (2013), 133 S. Ct. 2276.

[9] Matter of Sanudo, 23 I. & N. Dec. 968, 973-74 (BIA 2006).

rule of law is distinct from what *Estrada* presents in the context of any statute patently-proscribing domestic violence that is divisible between misconduct rising to a COV and misconduct that does not rise to a COV. Such a statute under *Milian-Dubon* would render application of the modified categorical approach appropriate. Review of documents on which there is a factual basis stipulation under *Shepard* would be part of the modified categorical approach to discern whether a COV is established. Such a statute under *Milian-Dubon* would also foreclose a circumstance-specific approach to the domestic relationship, which would already be established by application of the categorical approach to the statute of conviction.

Because judicial economy is also of value before the Immigration Court, redundancy should be avoided. Where the categorical approach has already succeeded in determining that the statute of conviction meets the generic definition under the categorical approach, further inquiry about victim identity would serve neither judicial economy nor equity. Also, because no reference to identity of the victim appears in INA § 237(a)(2)(E), there should be a very strong argument against application of the circumstance-specific approach to identify the victim. This prohibition on incorporation by reference to identify a victim, whose identity would otherwise be barred from disclosure, should impede reliance on "reliable" records of victim identity to substantiate a domestic relationship. Even if identity was construed as potentially a qualifying fact despite any reference to identity in INA § 237(a)(2)(E), its potential for characterization as a qualifying fact should be refuted as duplicative in the context of a statute patently proscribing domestic violence. The circumstance-specific approach would accordingly be unnecessary because victim identity could only be relevant to domestic relationship.

Public policy also militates against application of the circumstance-specific approach in the aforementioned context. Immigration judges will otherwise be tempted to enter findings that reliable documents make the victim appear especially vulnerable. By finding the victim to be in a class of persons deserving of special protection, immigration judges may be tempted to consider the victim's vulnerability as an overarching factor in concluding whether an offense is a COV. Similar reasoning has been described in the context of INA § 237(a)(2)(E). (*Matter of Sanudo,* 23 I. & N. Dec. 968, 973-74 (BIA 2006).) If such analysis led to a COV finding in a context that would not traditionally result in such a finding, then there would be strong grounds to allege prejudicial error under traditional norms.

Conclusion

The *Estrada* opinion arbitrarily ignores alternative considerations about congressional intent. The *Estrada* opinion is sophomoric in presenting the circumstance-specific approach as unilaterally applicable, except as to whether the offense is a COV under 18 U.S.C. § 16, to all other allegations of removal on the deportability ground of INA § 237(a)(2)(E) without addressing the BIA's own prior case law. This oversimplification of immigration law should be attacked, especially in light of Justice Kennedy's concurrence in *Mathis*. Rather than a Herculean task, undertaking the aforementioned strategies merely requires deliberation in distinguishing statutes patently-proscribing domestic violence from statutes that do not. The analysis from there will either be an attack on *Estrada* using any applicable techniques if there is a statute that does not patently-proscribe domestic violence, or presentation that the case should more appropriately be evaluated by the Immigration Judge under *Milian-Dubon* and *Sanudo* if the statute patently proscribes domestic violence.

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