

PRESENTED AT
40th Annual
Conference on Immigration and Nationality Law

October 27-28, 2016
Austin, Texas

Implications for Immigration Relief After *Mathis v. US* and *Gomez-Perez v. Lynch*

Simon M. Azar-Farr

Note: This paper was converted from a scanned image. The conversion has been reviewed for accuracy; however, minor spelling or text-conversion errors may still be present.

Vol. 93, No. 31 • August 15, 2016

IN THIS ISSUE

1. Implications for Immigration Relief After <i>Mathis v. U.S. and Gomez-Perez v. Lynch</i> —How to Address Crimes Involving Moral Turpitude in the Fifth Circuit, Part I	1
2. DOS Issues September Visa Bulletin; Big Gains for EB-3 Dates for the Philippines	8
3. BIA Seeks Amicus Briefs on Duress Exception to Persecutor Bar	10
4. Seventh Circuit Holds That Where Employee Ports to New Position, Successor Employer, Not Employee, is Entitled to Notice of Intent to Revoke Prior Employer's Petition	10
5. DOL Updates H-2B Case Processing Times	12
6. USCIS Releases Transcript of USCIS-DOS-HHS Press Call on Syrian Refugee Processing	12
7. Federal Case Summaries	12
8. ALJ Upholds \$183,000 Backpay Award in Case Against H-1B Employer That Failed to Effect Bona Fide Termination	20
9. BALCA Reverses Denials of Certification Based on Employer's Primary and Alternative Requirements for Position	22
10. USCIS Posts Affirmative Asylum Scheduling Bulletin	23
11. Department of Homeland Security Issues Notice of Establishment of New System of Records	23
12. Company Agrees to Pay \$1.5 Million Following Investigation into Criminal Hiring Violations	23
13. SEVP Schedules August 23 Q&A Session to Answer Questions Raised by Grades K-12 Webinar	24
14. SEVP Directs Schools to Correct As Soon As	

Practicable Forms 1-20 That Were Issued Incorrectly to Students Lacking English Proficiency

15. SEVP Reminds SEVIS Batch Users of August 12 Deployment of Release 6.28, Schedules August 19 Webinar	24
16. Agencies Seek Comments on Information Collections	24
17. Noteworthy	25

1. Implications for Immigration Relief After *Mathis v. U.S. and Gomez-Perez v. Lynch*—How to Address Crimes Involving Moral Turpitude in the Fifth Circuit, Part I* *

by Simon Azar-Farr**

In *Esparza-Rodriguez v. Holder*,¹ the Fifth Circuit found that, for immigration purposes, a Class A misdemeanor assault conviction under Texas Penal Code § 22.01(a)(1) was a crime involving moral turpitude (CMT). In so doing, it blurred the lines between simply taking note of the /bet of a conviction, as directed by the categorical approach, and considering the *facts about* the conviction, which is not permissible. Four years later, in *Gomez-Perez v. Lynch*,² the Fifth Circuit returned to § 22.01(a)(1), reversing *Esparza-Rodriguez* and reorienting its application of the categorical approach. This opinion followed *Mathis v. United States*.³ the latest in a series of U.S. Supreme Court opinions that chastised circuit courts for allowing an assessment of the facts to creep into their analysis.

Gomez-Perez changed the landscape of how crimes of moral turpitude are assessed in the Fifth Circuit. However,

Copyright © Simon Azar-Farr. This article is reprinted with permission.

** Simon Azar-Farr is a nationally respected immigration defense and federal criminal defense lawyer. He is also a noted appellate lawyer. Mr. Azar-Farr's offices are in San Antonio, Texas. He may be reached at 210-736-4122 or simon@simonagarfarr.com. From the same author, you may also read the following: Untangling Categorical and Modified Approaches in Immigration Law, 15-12 Immigration Briefings 1 (Dec. 2015); Admissibility of PSRS in Removal Proceedings, 90 Interpreter Releases 1471 (July 15, 2013); The Texas Speedy Trial Act—Texas Law, San Antonio Lawyer, 14-19 (May-June 2010); Material Witness Detention in the Federal Courts: A Primer, San Antonio Lawyer, 12-17 (July-August 2009); The Right to Effect a Citizen's Arrest Under Texas Law, San Antonio Lawyer, 8-12 (May-June 2008), An Immaculately Foggy Case: Matter of Magallanes-Garcia Examined, Interpreter Releases, Vol. 75, No. 39 (October 9, 1998).

it left open two important questions: whether *Gomez-Perez* and *Esparza-Rodriguez* have overruled BIA case law permitting a finding that, in certain circumstances, a crime involving moral turpitude (CMT) can be committed through mere recklessness; and what happens when the alien bears the burden of proof regarding a past conviction, and the conviction record does not reveal whether the conviction qualifies under the categorical approach as a CMT (or other disqualification for immigration relief). This two-part article will address these questions, and examine the implications of *Gomez-Perez* more broadly. Part I will first explain the recent jurisprudence and its legal background. Part II will assess the implications of *Gomez-Perez* and how it affects the landscape of CMT cases.

BACKGROUND: THE CATEGORICAL APPROACH

The Immigration and Nationality Act (INA) contains a number of provisions that render a non-citizen who has been convicted of certain kinds of crimes inadmissible, removable, or ineligible for relief from removability.⁴ Of particular interest in this article is the class of crimes described in the INA as “crimes involving moral turpitude”—a term of art not defined in the INA, but interpreted by the Board of Immigration Appeals (BIA) as:

conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the appreciated rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.⁵

The method by which it is determined whether a particular criminal conviction is for a CMT is the *categorical approach*, which focuses exclusively on the nature of the crime of conviction rather than the underlying facts in a particular case,⁶

The Supreme Court has informed us (within the context of criminal sentencing enhancements,⁷ which are governed by the same analysis⁸) that applying a categorical approach,

rather than a fact-based inquiry, serves several interests. The categorical approach carries out Congress’s intent that it be the *conviction*, not the underlying acts leading to the conviction, which determines the defendant’s fate. It does not undercut a plea bargain by bypassing the crime pleaded to and looking anew at the activity that gave rise to the criminal charge. And it spares the courts the burden of relitigating the case, an activity that, in addition to being time-consuming and costly, could be significantly compromised by the vagaries of past records.⁹

Courts have applied the categorical approach for over a century, in both criminal and immigration contexts. The resulting case law is rich and occasionally contradictory. Exceptions abound. Still, there are consistent threads that run through these court opinions, originating with two seminal criminal cases, *Taylor v. United States* and *Shepard v. United States*.¹⁰

In summarizing the essential holdings of these two cases, this article will refrain from delving too deeply into their facts or even their context (a sentencing enhancement for armed career criminals¹¹) as that ground has been well covered elsewhere. But it does need to establish a few nomenclature conventions to clarify the discussion.

The *crime of conviction* is the prior conviction that may bring adverse criminal or immigration consequences, such as a sentence enhancement, removal from the United States, or denial of relief from removal. It is also referred to as the *predicate conviction*, and it is often, but not always, a state conviction.

The *generic crime* is the crime named in the federal criminal or immigration statute which imposes the adverse criminal or immigration consequence on the party. For a sentencing enhancement, the generic crime is usually either a “violent felony” or a “serious drug offense,” each of which is further described in the federal statute as including certain more specifically named crimes, such as “burglary.” In immigration law, the three main categories of generic crimes are aggravated felonies, serious drug offenses, and CMTs. This article focuses on the immigration law’s generic CMT,

The Categorical Approach as Established by the Supreme Court

It was in *Taylor* that the Supreme Court first held that

INTERPRETER RELEASES (ISSN 0020-9686) (USPS 000-191) is issued weekly (48 times per year; no issue the weeks of May 30, June 27, November 28, and December 26). - Attorney Editors: Beverly Jacklin, Colleen Courtade and Carolyn Bower. . Published and copyright by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. ■ Address correspondence concerning content to: Beverly Jacklin, Interpreter Releases, Thomson Reuters/West, 50 Broad Street East, Rochester, NY, 14614; (585) 627-2504; fax (585) 258-3768, BeverlyJacklin@thomsonreuters.com. Customer Service: (800) 328-4880, ext. 65411. <http://www.west.thomson.com>. For subscription information: call (800) 221-9428. Periodicals postage paid at St. Paul, MN. POSTMASTER: Send address changes to INTERPRETER RELEASES, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

© 2016 Thomson Reuters. Reproduction, storage in a retrieval system, or transmission of this publication in any form or by any means, electronic, mechanical, photocopying, xerography, facsimile, recording, or otherwise, without permission of Thomson Reuters, is prohibited. For authorization to photocopy, please contact the West’s Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West’s Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

Also available as part of the eCourse

[Immigration Relief for Crimes Involving Moral Turpitude](#)

First appeared as part of the conference materials for the
40th Annual Conference on Immigration and Nationality Law session

"Implications for Immigration Relief After *Mathis v. US* and *Gomez-Perez v. Lynch*"