



U.S. Department of Justice

Executive Office for Immigration Review

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Name: T [REDACTED] -H [REDACTED], P [REDACTED]

A [REDACTED] -406

Date of this notice: 2/22/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

Userteam: Docket

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Falls Church, Virginia 22041

File: [REDACTED] 406 – Kansas City, MO

Date: **FEB 22 2018**

In re: P [REDACTED] T [REDACTED] -H [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sandrine Lisk, Esquire

ON BEHALF OF DHS: Jayme Salinardi
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's March 17, 2014, decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded.

In a notice to appear filed in August 2010, the DHS charged the respondent with removability as an alien convicted of a crime involving moral turpitude ("CIMT") and also as an alien who is present in the United States without having been admitted or paroled. Sections 212(a)(2)(A)(i)(I) and 212(a)(6)(A)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(6)(A)(i). The factual basis for the CIMT charge is the respondent's 2010 conviction for "aggravated interference with parental custody" under KAN. STAT. ANN. § 21-3422a.

Although the respondent conceded removability based on his unlawful presence, he denied the CIMT charge and requested cancellation of removal (Tr. at 17, Dec. 14, 2010). However, the Immigration Judge sustained both charges and found that the respondent's CIMT conviction was for "an offense under section 212(a)(2)" that renders him ineligible for cancellation of removal pursuant to section 240A(b)(1)(C) of the Act. The respondent challenges the denial of cancellation of removal on appeal.

Whether KAN. STAT. ANN. § 21-3422a defines a CIMT is a legal question that we review de novo. See 8 C.F.R. § 1003.1(d)(3)(ii). When the Immigration Judge rendered his most recent decision in this matter, the controlling CIMT standard was set forth in *Matter of Silva-Trevino* (*Silva-Trevino I*), 24 I&N Dec. 687 (A.G. 2008). During the pendency of this appeal, however, the Attorney General vacated *Silva-Trevino I* and instructed the Board to reconsider the CIMT issue and establish a new test. *Matter of Silva-Trevino* (*Silva-Trevino II*), 25 I&N Dec. 550 (A.G. 2015). The Board complied with that mandate and adopted a new, nationwide standard in *Matter of Silva-Trevino* (*Silva-Trevino III*), 26 I&N Dec. 826 (BIA 2016), which now applies.

To determine whether the respondent's offense of conviction is a CIMT, we employ the "categorical approach," which requires a focus on the minimum conduct that has a realistic

probability of being prosecuted under the offense's elements. *See Matter of Silva-Trevino III*, 26 I&N Dec. at 831; *Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1058-59 (8th Cir. 2016). An offense involves moral turpitude if its elements require reprehensible conduct committed with a culpable mental state. *See Matter of Jimenez-Cedillo*, 27 I&N Dec. 1, 3 (BIA 2017) (citing *Matter of Silva-Trevino III*, 26 I&N Dec. at 834). Conduct is "reprehensible" in the pertinent sense if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general," while a culpable mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Id.*

At all relevant times, Kansas defined the offense of "aggravated interference with parental custody" as follows:

§ 21-3422a. Aggravated interference with parental custody

(a) Aggravated interference with parental custody is:

- (1) Hiring someone to commit the crime of interference with parental custody, as defined by K.S.A. 21-3422 and amendments thereto; or
- (2) the commission of interference with parental custody, as defined by K.S.A. 21-3422 and amendments thereto, by a person who:
 - (A) Has previously been convicted of the crime;
 - (B) commits the crime for hire;
 - (C) takes the child outside the state without the consent of either the person having custody or the court;
 - (D) after lawfully taking the child outside the state while exercising visitation rights or parenting time, refuses to return the child at the expiration of that time;
 - (E) at the expiration of the exercise of any visitation rights or parenting time outside the state, refuses to return or impedes the return of the child; or
 - (F) detains or conceals the child in an unknown place, whether inside or outside the state.

KAN. STAT. ANN. § 21-3422a (2005). As the foregoing language makes clear, a person is guilty of "aggravated interference with parental custody" when he or she hires someone else to commit the separate offense of "interference with parental custody" under KAN. STAT. ANN. § 21-3422 or when he or she personally commits that offense under one or more of the six aggravated circumstances listed in paragraph (2).

At all relevant times, the Kansas offense of “interference with parental custody” has been defined as follows:

§ 21-3422. Interference with parental custody

(a) Interference with parental custody is leading, taking, carrying away, decoying or enticing away any child under the age of 16 years with the intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child.

(b) It is not a defense to a prosecution under this section that the defendant is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order.

(c)(1) Interference with parental custody is a class A person misdemeanor if the perpetrator is a parent entitled to joint custody of the child either on the basis of a court order or by virtue of the absence of a court order.

(2) Interference with parental custody is a severity level 10, person felony in all other cases.

KAN. STAT. ANN. § 21-3422 (2005).¹

Whether this offense is a CIMT is a question of first impression for the Board. KAN. STAT. ANN. § 21-3422a is a “specific intent” crime, so it satisfies the culpable mental state or corrupt “scienter” requirement of our case law. The dispositive question, then, is whether the minimum conduct that has a realistic probability of being prosecuted under the statute is sufficiently “reprehensible” to warrant designation as a CIMT. We conclude that it is not.

Read together, KAN. STAT. ANN. §§ 21-3422 and 21-3422a indicate that aggravated interference with parental custody may be committed by leading, taking, carrying, decoying or enticing a child away from his or her custodian. *State v. Wiggett*, 44 P.3d 381, 386 (Kan. 2002). These alternatives merely describe various factual means by which the statutes’ actus reus element may be proven, however; they are not alternative “elements.” *State v. Ortega*, 335 P.3d 93, 103 (Kan. 2014). Further, the removal of the child must be accomplished with the specific intent to detain or conceal the child from the lawful custodian. *Id.* at 108 (citing *State v. Wiggett*, 44 P.3d at 386). However, there is no requirement that the taking be accomplished by means of force or deception, or that it be done maliciously. *State v. Wiggett*, 44 P.3d at 387. Indeed, the offense may be committed even when one parent removes a child from the custody of the other parent,

¹ In 2010, the Kansas Legislature repealed sections 21-3422 and 21-3422a and re-codified them in consolidated form at KAN. STAT. ANN. § 21-5409 (2016). See 2010 Kan. Sess. Laws Ch. 136, § 44 (effective July 1, 2011).

provided the accused took the child without the other parent's consent and with the intent to deprive him or her of custody. *State v. Renfro*, 193 P.3d 483, 489-90 (Kan. Ct. App. 2008); *see also State v. Meza*, 268 P.3d 12, 2012 WL 309322, at **3-5 (Kan. Ct. App. 2012) (unpublished).

Although the offense defined by KAN. STAT. ANN. § 21-3422a requires the deliberate removal of a child under 16 from his or her custodian, it does not require that the accused use force or deception to accomplish that end. Thus, taken at its minimum, we deem it less egregious than other dangerous crimes involving interference with a victim's autonomy, such as kidnapping or false imprisonment. *See State v. Wiggett*, 44 P.3d at 387 (distinguishing "interference with parental custody" from "kidnapping" on this basis). Indeed, because the statute can be violated by a *parent* of the child, some children accompany the accused voluntarily. *Accord Hamdan v. INS*, 98 F.3d 183, 188-89 (5th Cir. 1996) (holding that attempted kidnapping under Louisiana law was not categorically a CIMT because it covered the removal of a child by a parent and omitted any requirement of an intent to hold the victim for ransom). Further, the statute does not require proof that the accused intends to harm the child, commit any other crime, or seek a ransom for the child's release.

We have no wish to minimize the respondent's offense. Even in its least aggravated forms, the offense remains serious because of the anxiety it causes for the parent or custodian whose child is taken. Yet under the categorical approach, we may consider only the minimum conduct that has a realistic probability of being prosecuted under the statute's elements, not the most aggravated (or even the typical) violation the statute covers. Here, the minimum conduct covered by KAN. STAT. ANN. § 21-3422a is categorically overbroad vis-à-vis the CIMT concept because it requires neither malice, violence, deceit, nor actual or intended bodily harm to any victim.

Because KAN. STAT. ANN. § 21-3422a is overbroad, the respondent's conviction can render him ineligible for cancellation of removal if: (1) the statute is "divisible" into several alternative offenses, at least one of which defines a categorical CIMT; and (2) the respondent's record of conviction is either inconclusive or demonstrates that his particular offense of conviction was a CIMT.

KAN. STAT. ANN. § 21-3422a is phrased in the alternative, and we conclude that two of those alternatives involve moral turpitude—i.e., *hiring* someone to interfere with parental custody under paragraph (1) and interfering with parental custody *for hire* under subparagraph (2)(B)—while the remaining alternatives do not. We find it unnecessary to decide whether the statute is divisible as among these alternatives, however, because even if it is the respondent's conviction record conclusively establishes that he was charged and convicted under subparagraph (2)(F), for concealing the child in an unknown place (Exh. 2, tab B, at 8, 10). Although serious, that offense is not inherently turpitudinous.

In light of the foregoing, we conclude that the respondent's conviction under KAN. STAT. ANN. § 21-3422a does not render him statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. Accordingly, we will sustain the respondent's appeal, vacate the Immigration Judge's decision denying the respondent's application for cancellation of removal on

that basis, and remand the record for further proceedings. We express no present opinion as to whether the respondent is otherwise eligible for cancellation of removal.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated in part, and the record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would hold that K.S.A. §21-3422a(2)(F) is a categorical crime involving moral turpitude.