U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ROMERO CANCHOLA, MANUEL **A 044-094-053**

Date of this notice: 11/13/2018

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:
Donovan, Teresa L.
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket

File: A044-094-053 – Houston, TX Date: NOV 1 3 2018

In re: Manuel ROMERO CANCHOLA a.k.a. Manuel Canchola Romero

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anne E. Kennedy, Esquire

APPLICATION: Termination

This case is before us pursuant to a March 29, 2016, order of the United States Court of Appeals for the Fifth Circuit, granting the Government's unopposed motion to remand for further consideration of the respondent's removability. We previously concluded that the respondent was removable as charged under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), as an alien convicted of an aggravated felony, and statutorily ineligible for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). Only the respondent has filed a brief following remand. The respondent's removal proceedings will be terminated.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2018). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident (IJ at 1, Apr. 3, 2014; Exh. 1).[1] In 2009, he was convicted of misdemeanor terroristic threats in violation of section 22.07 of the Texas Penal Code and was sentenced to 3 days in jail for this offense (*see* Exh. 1A). In 2012, he was convicted of retaliation in violation of section 36.06(a) of the Texas Penal Code and was sentenced to 4 years in prison for this crime (IJ at 1, Apr. 3, 2014; Exhs. 1, 2; Respondent's Br. at 3). Based on the latter conviction, an Immigration Judge found that the respondent was removable as charged under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S) (IJ at 3-5, Apr. 1, 2014).[2] Because he was removable as an aggravated felon, the Immigration Judge

[1] In his April 3, 2014, decision, the Immigration Judge incorporated by reference his previous decision from April 1, 2014 (IJ at 2 n.1, Apr. 3, 2014).

[2] The respondent was also charged as being removable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted of two or more crimes involving moral turpitude not arising out of the single scheme of criminal misconduct, and section 237(a)(2)(C) of the Act, as an alien convicted of a

concluded that the respondent was statutorily ineligible for cancellation of removal pursuant to section 240A(a)(3) of the Act (barring an alien convicted of an aggravated felony from applying for cancellation of removal) (IJ at 2, Apr. 3, 2013). We affirmed this determination on appeal.[3] On remand, the respondent contends that his removal proceedings should be terminated because his conviction under section 36.06(a) is not one for an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act (Respondent's Br. at 3-5).

Section 101(a)(43)(S) of the Act defines an aggravated felony as "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year."[4] To establish whether the respondent's conviction is for "an offense relating to obstruction of justice" under section 101(a)(43)(S), we apply the categorical approach by focusing on the minimum conduct proscribed by the elements of his State statute of conviction and determining whether that conduct categorically falls within the Federal generic definition of an offense relating to obstruction of justice. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Nevertheless, "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013) (citation omitted); *see also Vazquez v. Sessions*, 885 F.3d 862, 872–73 (5th Cir. 2018), *cert. denied sub nom. Rodriguez Vasquez v. Sessions*, 138 S. Ct. 2697 (2018). In the event the State crime is not a categorical match but the statute is divisible—that is, comprised of "multiple alternative elements"—we may look to the relevant conviction records under a "modified categorical approach" to determine "what crime, with what elements, [the respondent] was convicted of." *Mathis v. United States*, 136 S. Ct. at 2249 (citation omitted).

We recently issued our precedential decision in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 460 (BIA 2018), in which we held that the phrase "offense relating to obstruction of justice" in section 101(a)(43)(S) encompasses

> offenses covered by chapter 73 of the Federal criminal code or any other Federal or State offense that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding.

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firearms offense (*see* Exh. 1A). However, the Immigration Judge did not address these charges, nor did he analyze the immigration consequences of his conviction for terroristic threats.

[3] We initially remanded the record for additional fact-finding on November 8, 2013, but we ultimately affirmed the Immigration Judge's conclusion regarding the respondent's removability under section 237(a)(2)(A)(iii) of the Act on September 22, 2014.

[4] It is undisputed that the term of imprisonment for the respondent's retaliation offense was at least 1 year.

However, we made clear that this definition does not cover "every offense that, by its nature, would tend to 'obstruct justice.'" *Id.* (citation omitted).

At the time of the respondent's conviction, the respondent's State statute of conviction provided as follows:

> (a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act:
> (1) in retaliation for or on account of the service or status of another as a:
> (A) public servant, witness, prospective witness, or informant; or
> (B) person who has reported or who the actor knows intends to report the occurrence of a crime; or
> (2) to prevent or delay the service of another as a:
> (A) public servant, witness, prospective witness, or informant; or
> (B) person who has reported or who the actor knows intends to report the occurrence of a crime.

Tex. Penal Code Ann. § 36.06(a) (West 2012).

Texas has applied section 36.06(a)(1) to individuals who lack the "specific intent to inhibit or influence the type[] of public service" rendered. *Raybon v. State*, No. 02-12-00071-CR, 2013 WL 4129126, at *6 (Tex. App. Aug. 15, 2013) (per curiam); *see also Lindsey v. State*, No. 13-09-00181-CR, 2011 WL 2739454, at *5 n.4 (Tex. App. July 14, 2011). In other words, so long as a violator of section 36.06(a)(1) "issues a threat, knowingly and intentionally, and for the reasons set out in the statute, then she is guilty of the crime." *Lindsey v. State*, 2011 WL 2739454, at *5 ("The statute does not implicitly or explicitly require that . . . the defendant *intend that the victim be intimidated or inhibited from engaging in certain behavior*." (emphasis added)).

Moreover, as we noted in our prior decision, the State has used section 36.06(a) to punish a man who threatened a school superintendent because he was withholding his wife's paycheck. *See Moore v. State*, 143 S.W.3d 305, 310-11 (Tex. App. 2004). It has also been used to punish a high school student who threatened to kill a school employee after that employee confiscated and refused to return the student's property. *See In re B.M.*, 1 S.W.3d 204, 207 (Tex. App. 1999).

Accordingly, there is a realistic probability that the State would apply section 36.06(a) to conduct falling outside the definition of an offense relating to obstruction of justice we outlined in *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 460. The conduct proscribed by this statute is not necessarily covered by chapter 73 of the Federal criminal code.[5] Further, as noted, a violation of

[5] Specifically, the respondent's offense could not be punished under 18 U.S.C. § 1513(a)-(b), (e), which proscribes retaliating against a person by killing or attempting to kill them, by engaging in any conduct causing bodily injury to another person or tangible damage to their property, or by any act of harm to any person for attending official proceedings or reporting a crime. As noted, one can violate section 36.06(a) by threatening a school official who has neither attended a proceeding nor reported a crime to officials. Further, an unlawful act under section 36.06(a) need

section 36.06(a) does not necessarily involve a specific intent to interfere in a pending, ongoing, or foreseeable investigation or proceeding, or in another's punishment resulting from a completed proceeding. Accordingly, section 36.06(a) is categorically overbroad relative to "an offense relating to obstruction of justice" under section 101(a)(43)(S) of the Act.

We may not resort to the conviction record under a modified categorical approach to determine whether the respondent's offense involved conduct falling within the definition we outlined in *Matter of Valenzuela Gallardo* because section 36.06(a) is comprised of alternative means of violating that provision, rather than alternative crimes. *See Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (clarifying that a statute is not "divisible unless each statutory alternative defines an independent 'element' of the offense, as opposed to a mere 'brute fact' describing various means" of violating the statute (quoting *Mathis*, 136 S. Ct. at 2248)). A State court has held that "a plain reading of section 36.06 yields a conclusion that subsections (a)(1) and (a)(2) are merely *alternative means* of 'intentionally or knowingly harm[ing] or threaten[ing] to harm another by an unlawful act . . . .'" *Brock v. State*, 495 S.W.3d 1, 9 (Tex. App. 2016) (emphasis added). "In other words, subsections (a)(1) and (a)(2) are [not] two separate and distinct offenses. They are but two sides of the same coin." *Id.* at 10. Because the respondent's State statute of conviction "sweeps more broadly than the generic crime" and is indivisible relative to the generic definition of that crime, "a conviction under that law cannot count as . . . predicate" for his removal under section 237(a)(2)(A)(iii) of the Act. *Descamps v. United States*, 570 U.S. 254, 261 (2013).

Further, a violation of section 36.06(a) cannot qualify as a crime involving moral turpitude under section 237(a)(2)(A)(ii) of the Act. For purposes of section 36.06(a), the term "harm" is defined as "anything reasonably regarded as *loss*, *disadvantage*, or injury, including harm to another person in whose welfare the person affected is interested." Tex. Penal Code Ann. § 1.07(a)(25) (emphasis added). It therefore reaches crimes involving threats to property. *See Brock v. State*, 495 S.W.3d at 17 ("[A] threat of physical injury is not required" by section 1.07(a)(25). (citation omitted)); *see also Matter of Wu*, 27 I&N Dec. 8, 10-11 (BIA 2017) (holding that "threatened offensive touching of another committed with general intent that does not result in serious bodily harm is not considered to involve moral turpitude" (citation omitted)); *cf. Matter of M-*, 3 I&N Dec. 272 (BIA 1948) (concluding that malicious destruction of property to be a crime involving moral turpitude where malicious intent was required by statute). The only other conviction that may serve as a basis for the respondent's removal is his 2009 conviction for terroristic threats in violation of section 22.07 of the Texas Penal Code (*see* Exh. 1A).[6] However,

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not involve a death threat or conduct causing bodily injury. *See, e.g.*, *United States v. Martinez-Mata*, 393 F.3d 625, 628 (5th Cir. 2004) ("[I]t is possible to harm an individual in retaliation [under Texas law] *without* availing oneself of force against that person.").

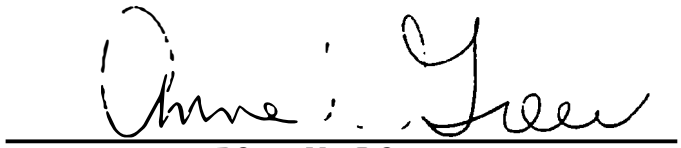
[6] At the time of the respondent's conviction, section 22.07 provided, in relevant part, as follows:

> (a) A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to:
>
> (1) cause a reaction of any type to his threat by an official or volunteer agency organized to deal with emergencies;

even assuming that this offense is a crime involving moral turpitude, it cannot by itself support a charge of removability under section 237(a)(2)(A)(ii) of the Act.

Finally, the respondent's State crimes cannot support a charge of removability under section 237(a)(2)(C) of the Act because a "firearm" is not an element of either terroristic threats under section 22.07(a) or retaliation under section 36.06(a) of the Texas Penal Code. *See Descamps v. United States*, 570 U.S. at 276 (concluding that, where a State criminal statute is "missing an element" of the generic offense, "a person convicted under that statute is never convicted of the generic crime"). Because the respondent is not removable as charged, we will terminate his removal proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) (providing that termination of proceedings is appropriate where the DHS cannot establish an alien's removability). Accordingly, the following order will be entered.

ORDER: The proceedings are terminated.



FOR THE BOARD

(2) place any person in fear of imminent serious bodily injury;

(3) prevent or interrupt the occupation or use of a building, room, place of assembly, place to which the public has access, place of employment or occupation, aircraft, automobile, or other form of conveyance, or other public place;

(4) cause impairment or interruption of public communications, public transportation, public water, gas, or power supply or other public service;

(5) place the public or a substantial group of the public in fear of serious bodily injury; or

(6) influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state.