U.S. Department of Justice

Executive Office for Immigration Review

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Name: B[redacted] C[redacted] S[redacted]

A [redacted]-176

Date of this notice: 11/19/2019

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:
Greer, Anne J.
Baird, Michael P.
Wilson, Earle B.

Userteam: Docket

File: A[redacted]-176 – Bakersfield, CA Date: NOV 19 2019

In re: C[redacted] S[redacted] B[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kari E. Hong, Esquire

ON BEHALF OF DHS: Elizabeth Gross
Assistant Chief Counsel

APPLICATION: Termination; withholding of removal; Convention Against Torture

This matter was last before us on September 1, 2017, when we dismissed the respondent's appeal from an Immigration Judge's decision ordering him removed from the United States. The respondent thereafter filed a petition for review with the United States Court of Appeals for the Ninth Circuit. On May 29, 2019, the Ninth Circuit granted the petition and remanded the record for our further review. *Bent v. Barr*, 775 F. App'x 281 (9th Cir. 2019). On remand, the respondent has filed a motion to terminate the removal proceedings or, alternatively, to remand the record. The Department of Homeland Security ("DHS") opposes the respondent's motion to terminate, but has also moved to remand. The respondent's motion to terminate will be denied and the record will be remanded.

I. BACKGROUND

The respondent, a native and citizen of Jamaica and a lawful permanent resident of the United States, was convicted in 2006 of voluntary manslaughter under CAL. PENAL CODE § 192(a) and attempted murder under CAL. PENAL CODE §§ 187(a) and 664.[1] The respondent was sentenced to a term of imprisonment of 11 years for his voluntary manslaughter conviction, and for his attempted murder conviction he was sentenced to a term of imprisonment of 2 years and 4 months, with the sentences to be served consecutively.

The Immigration Judge concluded that the respondent's attempted murder conviction renders him removable 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"—to wit, an "attempt" to commit "murder" under sections 101(a)(43)(A) and (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(A), (U) (IJ at 2-4). The Immigration Judge also found the respondent ineligible for asylum and

[1] The respondent's conviction record identifies his attempted murder conviction as arising under CAL. PENAL CODE §§ 187(a) and 664. Though § 664 governs the sentences which may be imposed on offenders convicted of attempt, the elements of attempt are set forth at CAL. PENAL CODE § 21a. Those elements are coextensive with the elements of generic "attempt" under section 101(a)(43)(U) of the Act. *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1110 (9th Cir. 2009).

withholding of removal as an alien convicted of a "particularly serious crime" (IJ at 6-8), and denied his application for deferral of removal to Jamaica under the Convention Against Torture (IJ at 8-12).

In our prior decision, we agreed with the Immigration Judge's removability determination, concluding that "the full range of conduct punishable as 'murder' under section 187(a) of the California Penal Code corresponds categorically to generic 'murder' under section 101(a)(43)(A) of the Act" (BIA at 1). We also upheld the Immigration Judge's "particularly serious crime" determination (which the respondent had not meaningfully challenged on appeal) and concluded that the Immigration Judge had properly denied the respondent's application for deferral of removal under the Convention Against Torture (BIA at 2-3).

On judicial review, the Ninth Circuit found that our examination of the respondent's attempted murder conviction was incomplete because we "did not consider whether generic INA murder encompasses feticide, which is punishable conduct under California's murder statute." *Bent v. Barr*, 775 F. App'x. at 283. Though that issue had not been argued to us on appeal (or to the Immigration Judge below), the court nonetheless thought it "prudent to remand for the Board to consider whether 'murder' as used in [section 101(a)(43)(A) of the Act] categorically includes the unlawful killing of a fetus as prohibited by California." *Id.* The court also determined that we "did not consider" the respondent's challenge to the Immigration Judge's particularly serious crime determination, and authorized us to consider that argument on remand "if it has not been waived." *Id.*

The respondent and the DHS have both filed motions on remand. The respondent moves to terminate the removal proceedings, arguing that his attempted murder conviction is categorically overbroad vis-à-vis generic "murder" because CAL. PENAL CODE § 187(a) (hereafter " §187(a)") covers feticide, and also because his conviction records do not reliably establish that his conviction was for generic murder. Alternatively, he requests that the record be remanded for further consideration of his applications for withholding and/or deferral of removal. The DHS opposes the respondent's motion to terminate, arguing that § 187(a) is a categorical match to generic "murder" and that the respondent was properly found ineligible for withholding of removal based on his conviction of a particularly serious crime. However, the DHS has also moved to remand the record so the Immigration Judge may review the respondent's plea colloquy transcript, which was not part of the administrative record during the initial proceedings in 2017.

Though the DHS has requested a remand for consideration of additional conviction records, such an inquiry is unnecessary if the DHS is correct that murder under § 187(a) is a categorical match to generic "murder." Moreover, if murder under § 187(a) is *not* a categorical match to generic "murder," as the respondent argues, then consideration of such documents would be impermissible absent a finding that the statute is "divisible." Accordingly, before reaching the question of whether a remand is advisable or permissible, we must first decide whether the elements of § 187(a) correspond to those of generic murder and, if they do not, whether § 187(a) is divisible.

II. ANALYSIS

A. Generic "Murder"

To determine whether the respondent's attempted murder conviction was for an aggravated felony, we employ the categorical approach, which requires us to disregard his offense conduct and to focus instead on the elements of § 187(a) and the minimum conduct that has a realistic probability of being prosecuted thereunder. *Matter of Cervantes Nunez*, 27 I&N Dec. 238, 240 (BIA 2018). If the elements of § 187(a) are the same as, or narrower than, those of generic murder, then his offense is a categorical aggravated felony, but if the elements of § 187(a) are broader than those of generic murder in some respect, then his offense can only qualify as an aggravated felony if the statute is "divisible" into two or more discrete crimes, at least one of which is a categorical match to generic murder. *Id.* at 240-41.

At all relevant times, § 187(a) has defined "murder" as "the unlawful killing of a human being, or a fetus, with malice aforethought." It is these elements we compare with those of generic murder. In *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012), we held that Congress understood generic "murder" to mean "the killing of a human being with malice aforethought," a concept which includes both "intentional" homicides and so-called "depraved heart" or "malignant heart" homicides resulting from extreme recklessness. *Id.* at 752-58. However, we had no occasion in *M-W-* to decide whether the "killing of a human being with malice aforethought"—as used in our generic definition of "murder"—includes the killing of a fetus.

The DHS argues that "fetal homicide fits within the generic definition of murder" by pointing to evidence that the Federal government and "at least 37 states other than California have fetal homicide laws" (DHS Br. at 4). This evidence does lend considerable support to the view that "murder" is now widely understood to encompass feticide. However, the issue to be decided on appeal is not how we think Congress would define "murder" *today*, but rather what we think Congress understood itself to mean by "murder" *when it placed that term in the aggravated felony definition*. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *Perrin v. United States*, 444 U.S. 37. 42 (1979))).

As we noted in *Matter of M-W-*, 25 I&N Dec. at 750-52, "murder" was included in the original "aggravated felony" definition that resulted from passage of the Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (Nov. 18, 1988). Absent some indicia of a contrary legislative intent, we presume that Congress meant by "murder" the sense in which that term was *then* used in the Federal criminal code and in the criminal codes of most States. *Matter of M-W-*, 25 I&N Dec. at 751-52; *Taylor v. United States*, 495 U.S. 575, 598 (1990).

Until recently, most United States jurisdictions followed the common law rule that a person could not be convicted of "murder" for mortal injuries inflicted on a fetus unless the victim died of his or her fetal injuries *after* being "born alive;" thus, the infliction of deadly injury on a fetus was not "murder" if the victim died in utero. Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 45-49 (2008). In 1988, the Federal government and a clear majority of the States interpreted their "murder" statutes in

accordance with this common law rule—known colloquially as the "born-alive" rule.[2] At that time, only a handful of States used the term "murder" to describe "feticide," i.e., the killing of a fetus in utero.[3] This authority persuades us that when the "aggravated felony" definition was

[2] Some States adopted the rule by enacting statutes defining potential murder victims as "persons" or "human beings" who were "born alive." ALASKA STAT. ANN. § 11.41.140 (1978); COLO. REV. STAT. ANN. § 18-3-101(2) (1974); DEL. CODE ANN. tit. 11, § 222(21) (1972); HAW. REV. STAT. ANN. § 707-700 (1972); IND. CODE ANN. § 35-41-1-14 (1986); OR. REV. STAT. ANN. § 163.005(3) (1971); WIS. STAT. ANN. § 939.22(16) (1987). These statutes appear to have been based on the Model Penal Code, which still retains the born-alive rule. *See* MODEL PENAL CODE § 210.0(1).

The Federal government and many States also adopted the born-alive rule through judicial opinions. *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988); *Clarke v. State*, 23 So. 671, 674 (Ala. 1898); *Meadows v. State*, 722 S.W.2d 584 (Ark. 1987); *Vo v. Superior Court*, 836 P.2d 408, 415 (Ariz. Ct. App. 1992); *State v. Anonymous*, 516 A.2d 156 (Conn. Super. Ct. 1986), *aff'd by State v. Courchesne*, 998 A.2d 1, 40-67 (Conn. 2010); *State v. Gonzalez*, 467 So. 2d 723, 726 (Fla. Dist. Ct. App. 1985); *Billingsley v. State*, 360 S.E.2d 451, 452 (Ga. Ct. App. 1987); *State v. Trudell*, 755 P.2d 511, 517 (Kan. 1988); *Hollis v. Commonwealth*, 652 S.W.2d 61, 63 (Ky. 1983); *State v. Gyles*, 313 So. 2d 799, 801 (La. 1975); *People v. Guthrie*, 293 N.W.2d 775, 778 (Mich. Ct. App. 1980); *State v. Soto*, 378 N.W.2d 625, 629 (Minn. 1985); *State v. Beale*, 376 S.E.2d 1, 2 (N.C. 1989); *State v. Doyle*, 287 N.W.2d 59, 63 (Neb. 1980); *State v. Lamy*, 969 A.2d 451, 458 (N.H. 2009); *State in the Interest of A.W.S.*, 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981), *cited with approval by Giardina v. Bennett*, 545 A.2d 139, 144 (N.J. 1988); *State v. Willis*, 652 P.2d 1222, 1224 (N.M. Ct. App. 1982); *People v. Vercelletto*, 514 N.Y.S.2d 177, 179 (N.Y. Co. Ct. 1987); *State v. Dickinson*, 275 N.E.2d 599, 601 (Ohio 1971); *Elliott v. Mills*, 335 P.2d 1104, 1111 (Okla. Crim. App. 1959); *Commonwealth v. Brown*, 6 Pa. D. & C.3d 627, 639 (Pa. Ct. Com. Pl. 1978), *cited with approval by Commonwealth v. Booth*, 766 A.2d 843, 849 n.8 (Pa. 2001); *State v. Amaro*, 448 A.2d 1257, 1259 (R.I. 1982); *State v. Evans*, 745 S.W.2d 880, 883-84 (Tenn. Crim. App. 1987); *Showery v. State*, 690 S.W.2d 689, 692 (Tex. Ct. App. 1985); *State v. Larsen*, 578 P.2d 1280, 1282 (Utah 1978); *Lane v. Commonwealth*, 248 S.E.2d 781, 784 (Va. 1978); *State v. Oliver*, 563 A.2d 1002, 1003 (Vt. 1989); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807, 812 (W. Va. 1984); *State v. Deborah J.Z.*, 596 N.W.2d 490, 493 (Wis. Ct. App. 1999); *Bennett v. State*, 377 P.2d 634, 635 (Wyo. 1963).

[3] In 1988, four States—California, Massachusetts, Missouri, and South Carolina—authorized prosecutions for feticide under their general "murder" statutes. CAL. PENAL CODE § 187(a) (1988); *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984); MO. STAT. ANN. § 1.205 (1988) (providing that unborn children have the same rights, privileges, and immunities as other citizens); *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997) (holding that § 1.205 extended Missouri's "murder" statute to fetuses); *State v. Horne*, 319 S.E.2d 703 (S.C. 1984). Two other States—Minnesota and North Dakota—punished feticide as the discrete offense of "murder of an unborn child," but did not authorize prosecutions for such conduct under their general "murder" statutes. MINN. STAT. ANN. §§ 609.2661 et seq. (1986); N.D. CENT. CODE ANN. § 12.1-17.1-02 (1987).

A number of other States criminalized feticide in 1988, but not as "murder." FLA. STAT. ANN. § 782.09 (1981) ("manslaughter"); GA. CODE ANN. § 16-5-80 (1982) ("feticide"); IOWA CODE ANN.

enacted in 1988, Congress did not understand the term "murder," as it appeared in that definition, to include feticide.[4] From this it follows that § 187(a) is categorically overbroad with respect to generic "murder."

Because § 187(a) is categorically overbroad, the respondent's conviction for attempting to violate that statute cannot support his aggravated felony charge unless: (1) § 187(a) is "divisible" as between murder of "human beings" and "fetuses;" and (2) application of the "modified categorical approach" establishes that he was convicted of attempting to murder a "human being." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

B. Divisibility of CAL. PENAL CODE § 187(a)

In assessing the divisibility of § 187(a), we ask whether the identities of the different victims it covers (i.e., "human being[s]" and "fetus[es]") are discrete "elements" of the offense about which a jury must agree beyond a reasonable doubt, or merely "brute facts" about which jurors may disagree while still rendering a guilty verdict. *Matter of Chairez*, 26 I&N Dec. 819, 822-23, 824-25 (BIA 2016); *Villavicencio v. Sessions*, 904 F.3d 658, 666 (9th Cir. 2018).

Though "murder of a human being" and "murder of a fetus" are both prohibited by § 187(a), California law treats them as separate offenses with distinct elements. This is most clearly illustrated by *People v. Taylor*, 14 Cal. Rptr. 3d 550 (Cal. Ct. App. 2004), in which the California Court of Appeals rejected a defendant's argument that "attempted murder of a fetus" was a lesser included offense of "murder of an [newborn] human being." As the court explained, "[t]he crime of murder of a human being does not include as an element the murder of a fetus. because human

§ 707.7 (1976) ("feticide"); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (1981) ("intentional homicide of an unborn child"); IND. CODE ANN. § 35-42-1-6 (1979) ("feticide"); MICH. COMP. LAWS ANN. § 750.322 (1980) ("manslaughter"); NEV. REV. STAT. ANN. § 200.210 (1911) ("manslaughter"); N.Y. PENAL LAW § 125.40 et seq. (1988) ("abortion"); R.I. GEN. LAWS § 11-23-5(a) (1975) ("willful killing of unborn quick child"); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (1975) ("manslaughter"); WIS. STAT. ANN. § 940.04 (1955) ("abortion").

[4] As the DHS points out, since 1988 many States (and the Federal government) have renounced the "born-alive" rule through statutory amendments, either by extending their general murder statutes to cover feticide or by creating new statutes defining feticide as a species of murder. 18 U.S.C. § 1841 (2004); ALA. CODE ANN. § 13A-6-1(a)(3) (2006); ALASKA STAT. ANN. § 11.41.150 (2006); ARIZ. REV. STAT. ANN. §§ 13-1102 et seq. (2005); ARK. CODE ANN. § 5-1-02(13)(b)(1)(a) (1999); IDAHO CODE ANN. § 18-4001 (2002); KAN. STAT. ANN. § 21-5419(c) (2010); MD. CODE ANN., CRIM. LAW § 2-103(b) (2005); MISS. CODE. ANN. § 97-3-37(1)(d) (2000); N.C. GEN. STAT. ANN. § 14-23.2 et seq. (2011) N.H. REV. STAT. ANN. §§ 630:1-a(IV), 630:1-a(V)(b)(1) (2017); OHIO REV. CODE ANN. § 2903.02(A) (1996); OKLA. STAT. ANN. tit. 21, § 691 (2006); 18 PA. CONS. STAT. ANN. § 2604 (1997); S.D. CODIFIED LAWS § 22-16-1 (1995); TENN. CODE ANN. § 39-13-214 (1989); TEX. PENAL CODE § 1.07(26) (2003); UTAH CODE ANN. § 76-5-201(1)(a) (2002); W. VA. CODE ANN. § 61-2-30 (2005). As these laws were passed after enactment of the aggravated felony definition, however, they do not inform the meaning of the term "murder" as used in section 101(a)(43)(A) of the Act.

beings are murdered all the time without any involvement of a fetus. Thus, applying the elements test, the attempted murder of a fetus is not a lesser included offense to murder of a human being." *Id.* at 560.

This treatment of "murder of a human being" as distinct from "murder of a fetus" is also reflected in the fact that California treats "manslaughter" as a lesser-included offense of "murder of a human being," but *not* as a lesser-included offense of "murder of a fetus." *People v. Dennis*, 950 P.2d 1035, 1054-58 (Cal. 1998) ("the unlawful killing of a human being, or a fetus, with malice aforethought is murder, but only the unlawful killing of a human being can constitute manslaughter. There is no crime in California of manslaughter of a fetus.").

Finally, we note that California's Model Jury Instruction for murder distinguish between "murder of a human being" and "murder of a fetus" by instructing courts to specify either that "[a] human being was killed" as element "1" or that "[a] human fetus was killed" as element "1a," and "[to] delete element 1a ... [i]f a fetus is not involved." CALJIC 8.10.

These authorities lead us to conclude that § 187(a) is "divisible" into two separate offenses—"murder of a human being" and "murder of a fetus." Further, one of these offenses—"murder of a human being"—is a categorical match to generic "murder" under section 101(a)(43)(A) of the Act. *See Sales v. Sessions*, 868 F.3d 779 (9th Cir. 2017) (upholding an aggravated felony "murder" charged based on a California conviction for second-degree murder), *cert. denied*, 138 S. Ct. 1703 (2018).

C. The Parties' Motions to Remand

As § 187(a) is categorically overbroad but divisible vis-à-vis generic "murder," it is permissible to employ the "modified categorical approach" to determine whether the respondent was convicted of "murder of a human being" or "murder of a fetus." *Mathis v. United States*, 136 S. Ct. at 2249. The respondent's conviction record—which presently consists of an Abstract of Judgment and an Information—reflects that he was convicted of attempted murder based on his plea to count 2 of the Information, which charges him with having attempted to kill a "human being" (Exh. 6). In his motion to terminate and/or remand, the respondent challenges the reliability of some of these documents and argues that the DHS did not properly authenticate them below. For its part, the DHS requests that the record be remanded so that it may supplement the conviction record with a copy of the respondent's plea colloquy transcript.

As both parties claim there is "unfinished business" to be resolved below with respect to the respondent's conviction record, we deem it appropriate to grant the parties' respective motions to remand. Once the case is back before the Immigration Judge, the parties shall have an opportunity to supplement the record and to raise whatever evidentiary objections they might have. Once the Immigration Judge has received the parties' evidence, she shall conduct a modified categorical inquiry in order to determine whether the DHS has carried its burden of proving the respondent's

removability.[5] Depending on the outcome of that inquiry, moreover, the Immigration Judge shall then reassess the respondent's claimed eligibility for withholding of removal and/or protection under the Convention Against Torture. We express no present opinion with respect to any of these issues.

III. CONCLUSION

In conclusion, the respondent's attempted murder conviction arose under a criminal statute that is categorically overbroad but divisible with respect to the definition of generic "murder" under section 101(a)(43)(A) of the Act. Accordingly, the respondent's removability depends upon the outcome of the modified categorical inquiry to be conducted by the Immigration Judge on remand. The following orders shall therefore be issued.

ORDER: The respondent's motion to terminate is denied.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD

[5] Nothing in this decision shall be construed to prevent the DHS from lodging additional and/or substituted removal charges on remand. 8 C.F.R. §§ 1003.30, 1240.10(e).