PRACTICE ADVISORY ADDENDUM

EXPLORING APPLICATIONS OF THE ANTI-RETROACTIVITY HOLDING OF *OBEYA V. SESSIONS* BEYOND THE LARCENY AND STOLEN PROPERTY CONTEXTS[1]

This memorandum serves as an addendum to the Practice Advisory released by the Immigrant Defense Project on April 18, 2018 ("IDP *Obeya* Advisory"), which explored the implications of the Second Circuit's recent decision in *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018). Familiarity with that advisory is presumed. The purpose of this addendum is to provide New York immigration practitioners with guidance regarding possible applications of the *Obeya* decision's retroactivity analysis in criminal-immigration cases outside of the context of the larceny and stolen property offenses discussed in the IDP *Obeya* Advisory.

In the *Obeya* decision, the Second Circuit relied upon a widely-adopted five-factor test for determining the retroactive application of a BIA decision. The five factors are:

1. Whether the case is one of first impression;
2. Whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;
3. The extent to which the party against whom the new rule is applied relied on the former rule;
4. The degree of the burden which a retroactive order places on a party; and
5. The statutory interest in applying a new rule despite the reliance of a party on the old standard.

As the IDP *Obeya* Advisory explains, the court's analysis suggests that factors (3), (4) and (5) will likely militate against retroactive application of virtually all new BIA decisions that broaden the types of convictions that can trigger removal. Accordingly, future retroactivity claims arising from agency decisions that broaden the criminal removal grounds will likely turn on demonstrating that (1) the decision is not a case of "first impression" and that (2) it is an "abrupt departure from well-established practice." Accordingly, we have provided an analysis below of some of the most promising retroactivity claims arising from other recent BIA decisions that have broadened the criminal removal grounds and that may be characterized as an "abrupt departure" under this framework.[2]

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[1] This advisory was authored by Javeria Ahmed, Emily Lundgren and Peter L. Markowitz at the Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law with support from Andrew Wachtenheim at the Immigrant Defense Project.

[2] This addendum is based on analysis of the New York Penal Law and BIA precedent, as it is applied in the Second Circuit. Additional challenges and issues will arise in other jurisdictions and under other penal codes.

Burglary Charged as a CIMT

For litigants with New York burglary convictions under N.Y. Penal Law §§ 140.20, 140.25, or 140.30, that were entered before August 18, 2017, where DHS attempts to rely upon the occupancy status of a dwelling to argue that a conviction is a crime involving moral turpitude ("CIMT"), consider the argument that Matter of Louissaint, *24 I. & N. Dec. 754 (BIA 2009) and* Matter of J-G-D-F-, *27 I. & N. Dec. 82 (BIA 2017) cannot be applied retroactively.*[3]

The Board's pre-2009 generic definition of a burglary CIMT

The contemporary generic definition of burglary has long been understood to involve "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). Prior to the BIA's decision in *Matter of Louissaint*, 24 I. & N. Dec. 754 (BIA 2009), it was well-established that a burglary conviction was a CIMT only if the crime one intended to commit inside the building was itself a CIMT. *See Matter of M-*, 2 I. & N. Dec. 721 (BIA, A.G. 1946); *see also Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2007) (holding that a "burglary statute constitutes a CIMT only if the crime [the defendant] intended to commit upon entry into the victim's house is itself a CIMT"). *Matter of M-* is most frequently cited for this proposition but the practice of relying exclusively on the intended crime to determine whether a burglary conviction was a CIMT pre-dated *Matter of M-*. *See, e.g.*, *Matter of M-*, 2 I. & N. Dec. at 723 (collecting cases). Moreover, *Matter of M-* was followed in numerous BIA decisions in the sixty years after its issuance without any variance from its well-established holding. *See Matter of J-G-D-F-*, 27 I. & N. Dec. 82, 86–87 (BIA 2017) ("In numerous unpublished decisions issued subsequent to *Matter of M-*, we have applied our holding that burglary is a crime involving moral turpitude *only if* the crime accompanying the unlawful entry is itself turpitudinous.") (emphasis added).

***The Board's 2009 and 2017 decisions in* Matter of Louissaint *and* Matter of J-G-D-F-**

However, *Matter of Louissaint*, issued on March 18, 2009, abruptly changed this well-established standard by holding that burglary of an *occupied dwelling* is *always* a CIMT, regardless of the intended crime, because, the BIA reasoned, the "conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter.'" 24 I. & N. Dec. at 756 (relying on a change in the definition of CIMT that occurred one year earlier in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)). Eight years later, the BIA went even further afield of its well-established and long-standing practice. In 2017, it held in *Matter of J-G-D-F-*, 27 I. & N. Dec. 82 (BIA 2017), that a burglary of a dwelling is a CIMT, regardless of the intended crime and even if the statute of conviction does not require that the dwelling actually be occupied, provided that the dwelling is at least "intermittently occupied." *Id*. at 88.

[3] While beyond the scope of this Advisory, litigants challenging whether these burglary convictions are categorically CIMTs should be sure to explore additional challenges to deportability, including whether the Board's new generic definition of a burglary offense is correct and deserving of deference, *see, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (striking down the BIA's generic definition of the sexual abuse of a minor aggravated felony ground), and also whether these statutes of conviction are overly broad and indivisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The BIA attempted to distinguish the facts in *Matter of Louissaint* and *Matter of J-G-D-F-*, from *Matter M-* because the latter involved a statute that criminalized burglaries of unoccupied structures. *Matter of J-G-D-F-*, 27 I. & N. Dec. at 87; *Matter of Louissaint*, 24 I. & N. Dec. at 756; *see also Matter of M-*, 2 I. & N. Dec. at 723 (noting that under the statute at issue "pushing ajar the unlocked door of an unused structure and putting one's foot across the threshold would constitute a breaking and entering."). Thus, we anticipate that any argument that *Matter of Louissaint* and *Matter of J-G-D-F-* were "abrupt departure[s] from well-established practice" will likely be met with a counterargument from DHS that the consideration in those cases of whether burglary of an occupied dwelling was a CIMT was a "question of first impression" merely "fill[ing] a void in an unsettled area of law." *Obeya*, 884 F.3d at 445.

However, notwithstanding its reference to the possibility of burglary of an "unused structure," *Matter of M-*, 2 I. & N. Dec. at 723, the holding of *Matter of M-* was clear and did not distinguish between occupied and unoccupied buildings but instead premised its analysis on a single factor: "We have always maintained that these offenses may or may not involve moral turpitude, *the determinative factor* being whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude." *Id*. at 723 (emphasis added) (citing cases demonstrating the consistent practice of the BIA in looking solely to the intended crime to determine whether burglary is a CIMT). The Board was clear on this point, noting that it is the intended crime element "*alone* that has any significance in the determination of moral turpitude." *Id*. (emphasis added). *See also In Re: Rafael Vazquez-Hernandez*, A92 380 546 - FLOR, 2008 WL 2401144, at *2 (DCBABR May 15, 2008) (holding that burglary of an inhabited dwelling is not categorically a CIMT); *In Re: Varun Mendiratta*, A38 635 682 - NEW, 2008 WL 2079365, at *2 (DCBABR Apr. 16, 2008) (analyzing New York burglary of a usually occupied dwelling and focusing exclusively the "intended crime"); *In Re: Kuen Jei Lee*, A41 822 048 - YORK, 2005 WL 698438 (DCBABR Mar. 2, 2005) (same).

Application to New York's burglary statutes

Based on the foregoing, there is a strong argument that *Matter of Louissaint*'s 2009 holding—that all burglaries of *occupied* dwellings are CIMTs regardless of whether the intended crime was a CIMT—is an "abrupt departure" from long standing agency practice. Moreover, even if *Matter of Louissaint* is applicable, there are also strong arguments that New York burglary convictions fall outside of "occupied dwelling" standard, for two principal reasons: 1) some New York burglary statutes use the term "building," which is broader than the BIA's conception of a "dwelling," and 2) all New York burglary statutes are silent as to whether the structures at issue are occupied at the time of the crime. *See generally* N.Y. Penal Law §§ 140.20, 140.25, 140.30. Though the BIA has not explicitly established a definition of "dwelling," the common aspect of the definitions in the statutes the BIA has analyzed is that dwellings are places designed or used for overnight lodging. *See, e.g.*, *Matter of J-G-D-F-*, 27 I. & N. Dec. at 84 (analyzing an Oregon burglary statute that defined dwelling to be a "building which regularly or intermittently is occupied by a person lodging therein at night" (citing Or. Rev. Stat. § 164.205(2)); *Matter of Louissaint*, 24 I. & N. Dec. at 755 (analyzing Florida burglary statute that defined dwelling to be a building or conveyance "designed to be occupied by people lodging therein at night" Fla. Stat.

Ann. § 810.011(2)). New York's definition of "building," which appears in all three burglary statutes, sets forth multiple alternative definitions, including any "structure, vehicle or watercraft used for overnight lodging of persons," but also including places that are unrelated to overnight lodging. N.Y. Penal Law § 140.00(2). The definitional clause related to "overnight lodging" appears to be a means of satisfying the "building" element and is not an alternative element in and of itself. *See People v. Baez*, 148 A.D.3d 517, 517 (N.Y. App. Div.), *leave to appeal denied*, 29 N.Y.3d 1028 (2017) (characterizing "building" as a single element); *People v. Bright*, 162 A.D.2d 212 (N.Y. App. Div. 1990) (same). Thus, under *Mathis*, the "building" element is overly broad and indivisible and, therefore, cannot categorically establish the burglary of a dwelling. Moreover, even assuming *arguendo* that the "overnight lodging" clause in the definition of "building" were an alternative element, it is still silent as to the occupancy status of the building. Thus, no New York conviction for burglary of a "building" should be a CIMT even under *Matter of Louissaint*'s "occupied dwelling" standard or under *Matter of J-G-D-F-*'s "intermittently occupied dwelling" standard. *See* N.Y. Penal Law §§ 140.25(1), 140.20.

In contrast, First Degree Burglary, N.Y. Penal Law § 140.30, and subdivision 2 of Second Degree Burglary, N.Y. Penal Law § 140.25(2), contain an element that requires that the burglary occurred in a "dwelling" rather than a "building." Dwelling is defined at N.Y. Penal Law § 140.00(3) as "a building which is usually occupied by a person lodging therein at night." "[U]sually occupied," however, is not the same as presently occupied, and thus neither the definition of "building" or "dwelling" should bring any New York burglary statute within the ambit of *Matter of Louissaint*'s 2009 holding that burglary of an *occupied* dwelling is a CIMT, regardless of the intended crime. *See, e.g.*, *People v. Sheirod*, 124 A.D.2d 14, 16–17 (N.Y. App. Div. 1987) (upholding conviction for burglary of a dwelling, N.Y. Penal Law § 140.25(2), notwithstanding the fact that the building had been unoccupied for a year); *In Re: Abayneh Arficho Hegana*, 2017 WL 1130698, at *4 (DCBABR Jan. 26, 2017) (holding that a statute that criminalized burglary of a dwelling was not a CIMT under *Matter of Louissaint* because there was no requirement that the dwelling be occupied at the time of the crime).

The New York definition of "dwelling," however, does appear to place N.Y. Penal Law §§ 140.25(2) & 140.30 (which involve burglary of "dwellings") squarely within the BIA's 2017 CIMT definition, *Matter of J-G-D-F-*, 27 I. & N. Dec. 82; therefore, convictions under these statutes entered after August 18, 2017 will likely be considered CIMTs. However, for any such convictions that occurred prior to the 2009 *Matter of Louissaint* decision, as discussed above, litigants should have a strong argument that any reliance on the occupancy status, regardless of the intended crime, was an "abrupt departure from well-established practice" and thus neither *Matter of Louissaint* nor *Matter of J-G-D-F-* should be retroactively applied.

For convictions that occurred after March 18, 2009 (*Matter of Louissaint*) but before August 18, 2017 (*Matter of J-G-D-F-*), litigants should also consider arguing that the change from actually occupied dwellings in *Matter of Louissaint* (which did not reach the New York statutes) to "regularly or intermittently occupied dwelling," in *Matter of J-G-D-F-* (which encompasses N.Y. Penal Law §§ 140.25(2), 140.30) was also an "abrupt departure," and thus *Matter of J-G-D-*

F- should not be retroactively applied to such cases. The BIA characterizes *Matter of J-G-D-F-*, 27 I. & N. Dec. at 88, as an extension of its holding in *Matter of Louissaint*; however, nothing in *Matter of Louissaint* indicates that a regularly or intermittently occupied dwelling, or anything short of an actually occupied dwelling, would categorically qualify as a CIMT.[4] *See In Re: Abayneh Arficho Hegana*, 2017 WL 1130698, at *4. Notably, the Second Circuit rejected a similar argument that the government advanced in *Obeya* in the context of larceny offenses. *See Obeya*, 884 F.3d at 445-46.

Sexual Contact with Minors Charged as a CIMT

For any litigant convicted of a sex offense under Article 130 of the N.Y. Penal Law between November 7, 2008 and April 6, 2017, where the lack of consent resulted solely from the age of the complainant, see *N.Y. Penal Law § 130.05(3)(a), or where the age of a complainant was an element of the offense,[5] and where DHS attempts to rely on* Matter of Jimenez-Cedillo, *27 I. & N. Dec. 1, 5 (BIA 2017) to argue the conviction is a CIMT, consider the argument that* Matter of Jimenez-Cedillo *cannot be applied retroactively.[6]*

After the Attorney General's November 7, 2008 decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 707 (A.G. 2008) ("*Matter of Silva-Trevino I*") and prior to the BIA's April 6, 2017 decision in *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1, 5 (BIA 2017), the agency rule was clear that engaging in intentional sexual conduct with a minor was categorically considered a CIMT *only if* the defendant knew or should have known the victim was a child.[7] *See Matter of Silva-Trevino I*, 24 I. & N. Dec. at 705 (holding that "*so long as the perpetrator knew or should have known that the victim was a minor*, any intentional sexual contact by an adult with a child involves

[4] Note also that where DHS relies on the traditional rule that a burglary conviction is a CIMT because the intended crime was a CIMT, litigants may argue that under New York law and *Mathis*, the New York burglary statutes are overbroad and indivisible because, in New York, the prosecution need not prove the specific crime intended. *See People v. Mackey*, 49 N.Y.2d 274 (1980); *see also In Re: Varun Mendiratta*, A38 635 682, 2008 WL 2079365, at *2 (DCBABR Apr. 16, 2008) ("In a prosecution for burglary and attempted burglary, the prosecution is not required either to plead or prove the specific crime the defendant had intended to commit in unlawfully entering or attempting to enter subject premises where circumstances and defendant's acts were sufficient to support inference of criminal intent") (citing *People v. Ivory*, 473 N.Y.S.2d 28 (N.Y. App. Div. 1984)).

[5] *See, e.g.*, N.Y. Penal Law §§ 130.25(2); 130.30(1); 130.35(3) and (4); 130.40(2); 130.45(1); 130.50(3) and (4); 130.55; 130.60(2); 130.65(3) and (4); 130.66(1)(c); 130.67(1)(c); 130.70(1)(c); 130.75; 130.80.

[6] In addition to any arguments against the retroactive application of *Matter of Jimenez-Cedillo*, also consider arguing, where applicable: (1) that even under *Matter of Jimenez-Cedillo*, the crime is a categorical mismatch because it criminalizes sexual acts that would be permissible between consenting adults based solely on the age of the complainant, where the complainant is neither under age 14 nor under age 16 with a significant age differential between the defendant and complainant, *see* discussion *infra*; (2) that the provision in N.Y. Penal Law § 130.05(3)(a) defining lack of consent based on the age of the complainant is merely a means of satisfying the element that "that the sexual act was committed without consent of the victim," N.Y. Penal Law § 130.05(1), and thus that provision is overbroad and indivisible under *Mathis*; or (3) that the Board's position in *Jimenez-Cedillo* is contrary to law and undeserving of deference.

[7] Of course, many sex offenses are deemed to be CIMTs regardless of the age of the complainant. *See, e.g.*, *Matter of Z-*, 7 I. & N. Dec. 253, 254-55 (BIA 1956) (holding that taking indecent liberties with a woman without her consent is a crime involving moral turpitude); *Matter of M-*, 2 I. & N. Dec. 17, 19-20 (BIA 1944) (holding that having sexual relations with a woman with the knowledge that her "mental powers are impaired to an extent negativing the idea of consent" is a crime involving moral turpitude). Where a statute's elements involve conduct that would be a CIMT regardless of the age of the victim, no knowledge of age is required.

moral turpitude.") (emphasis added); *see also Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (A.G. 2015) ("*Matter of Silva-Trevino II*") (vacating *Matter of Silva-Trevino I* in part but also stating "[n]othing in this order is intended to affect Board determinations that an offense entails or does not entail 'reprehensible conduct and some form of scienter' and is or is not a crime involving moral turpitude for that reason."); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016) ("*Matter of Silva-Trevino III*") (holding that in *Matter of Silva-Trevino I*, the "Attorney General held that a crime involving sexual conduct by an adult with a child involves moral turpitude *as long as the perpetrator knew or should have known that the victim was a minor*" and finding "no reason to deviate from this holding") (emphasis added); *see generally Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 294-96 (4th Cir. 2018) (summarizing the relevant history of the *Silva-Trevino* decisions).

In 2017, the Board abruptly changed the rule clearly established in *Silva-Trevino I* and affirmed *Silva-Trevino II* and *III* when, in *Matter of Jimenez-Cedillo*, it held that:

> [A] sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young--that is under 14 years of age--or is under 16 and the age differential between the perpetrator and victim is significant, or both, *even though the statute requires no culpable mental state as to the age of the child*.

27 I. & N. Dec. at 5 (emphasis added).

The BIA characterized the *Matter of Jimenez-Cedillo* decision as a clarification of its *Silva-Trevino* decisions. The Board asserted that it had "yet to decide whether sexual crimes that do not require a perpetrator to possess a culpable mental state with respect to the age of the victim are crimes involving moral turpitude." *Id*. at 4. It claimed that:

> While we held in *Matter of Silva-Trevino* that moral turpitude was inherent in a sexual offense against a minor if an alien knew or should have known that the victim was a minor, our decision did not foreclose the possibility that moral turpitude will inhere in some crimes, even if the relevant statute lacks an element that requires the perpetrator to have some culpable mental state regarding the victim's age.

Id. at 4-5. The Board supported this position by citing to a footnote in *Matter Silva-Trevino III*, which stated that that decision does not reach "crimes commonly known as 'statutory rape'" and that it "reserve[d] the question whether [such convictions] are crimes involving moral turpitude." *Id.* at. 4 (citing *Matter of Silva-Trevino III*, 26 I. & N. Dec. at 834 n.9). Thus, we anticipate that any argument advanced by a litigant that *Matter of Jimenez-Cedillo* was an "abrupt departure from well-established practice" will likely be met with a counterargument from DHS that the consideration of whether strict liability child sex crimes are CIMTs was a "question of first impression" and it was merely "fill[ing] a void in an unsettled area of law." *Obeya*, 884 F.3d at 445.

However, as the Fourth Circuit recently made clear in its review of the Board's decision in *Matter of Jimenez-Cedillo*, the decision to abandon the requirement of a *mens rea* as to the victim's age is not justified by the footnote in *Silva-Trevino III* and does in fact constitute an abrupt departure from the Board's holdings in the *Matter of Silva-Trevino* cases. *Jimenez-Cedillo*, 885 F.3d at 298-99.[8] The Board's assertion that *Silva-Trevino I* did "not foreclose the possibility that moral turpitude will inhere in some crimes" that do not require knowledge of the victim's age, is simply not supportable. *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. at 4-5. Contrary to this assertion, *Silva-Trevino I* did not merely hold that knowledge of a child's age necessarily made a sex act morally turpitudinous; but rather, in finding the statute at issue in that decision overbroad, it also explicitly and necessarily held that absence of knowledge of a child's age means that such a crime does not involve moral turpitude. *Silva-Trevino I*, 24 I. & N. Dec. at 708. In regard to the Board's assertion that it had previously not decided whether statutory rape was a crime absent knowledge of the complainant's age, the Fourth Circuit explained that "[t]he requirement of mental culpability as to age, the Attorney General made clear, applied to all sexual offenses against children, including statutory rape." *Jimenez-Cedillo*, 885 F.3d at 298 (citing *Silva-Trevino I*, 24 I. & N. Dec. at 707 n.6). The Fourth Circuit further explained that the footnote in *Silva-Trevino III*, which the Board read as excluding the application *Silva-Trevino*'s knowledge requirement to statutory rape cases, in fact "does no more than 'reserve' the possibility that the Board might in the future reconsider *Silva–Trevino I*'s application to statutory rape; it is not itself a change in position." *Jimenez-Cedillo*, 885 F.3d at 299.[9]

A number of New York sex offense statutes criminalize sexual acts (which would be permissible if occurring between consenting adults) based solely on the age of the complainant. *See* N.Y. Penal Law § 130.05(3)(a); *see also* note 5 (enumerating sex offense statutes that have the complainant's age as an element of the offense). Moreover, New York law is explicit that, for any offense "in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute." N.Y. Penal Law § 15.20(3).

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[8] We note that the Fourth Circuit, in reaching this conclusion, was directly reviewing the Board's precedential decision in *Matter of Jimenez-Cedillo*. The Court granted the petition for review and remanded to the Board with instruction to provide a "good reason" for its departure from the rule announced in *Silva-Trevino I*. *Id*. at 300. It also raised, but did not decide, the retroactivity issue. *Id*. ("If on remand the Board takes the position that a change in *Silva–Trevino I's* approach to mental culpability is appropriate, then it also should consider whether, under the traditional factors that bear on retroactivity analysis, that new position may be applied to *Jimenez–Cedillo* and other aliens similarly situated") (internal citation omitted). We note that, to our knowledge, as of this writing, *Jimenez–Cedillo* remains pending before the agency on remand. Nevertheless, notwithstanding the federal court's disapproval of the decision, a risk remains that immigration courts will continue to apply the rule announced therein, at least outside the Fourth Circuit. *See generally Matter of Lim*, 13 I. & N. Dec. 169, 170 (BIA 1969) (holding that "[t]he fact that a lower federal court has rejected a legal conclusion of this Board does not of itself require us to recede from that conclusion . . . The contrary ruling of a reviewing court in one district is not necessarily dispositive of the issue"), *overruled in part on other grounds by*, *Matter of Raqueno*, 17 I. & N. Dec. 10, 11 (BIA 1979).

[9] Notably, insofar as this was the rule laid out by the Attorney General in *Silva-Trevino I*, 24 I. & N. Dec. at 707 n.6, and insofar as the Attorney General made clear in *Silva-Trevino II* that he was leaving in place the substantive CIMT analysis of *Silva-Trevino II*, 26 I. & N. Dec. at 553 n.3, the Board in *Silva-Trevino III*, being bound by the Attorney General, was powerless to depart from the rule announced in *Silva-Trevino I*.

Accordingly, under the rule set forth in *Silva-Trevino I,* New York sex offense convictions that occurred after the November 7, 2008 issuance of that decision and before the April 6, 2017 issuance of *Matter of Jimenez-Cedillo,* should not be deemed CIMTs based solely on the age of the complainant.[10]

Other Potential "Abrupt Departures from Well-Established Practice"

Below are some other recent changes in Board precedent that have expanded criminal removal grounds that may give rise to *Obeya*-type retroactivity challenges. We provide the below references in summary form only.

- ***Recklessness as Insufficient to Support a CIMT Determination***

It has long been established that recklessness, when coupled with certain conduct or aggravating factors, is a sufficient *mens rea* to trigger a CIMT determination. *See, e.g.*, *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551, 553-54 (BIA 2011), *aff'd*, 682 F.3d 513 (6th Cir. 2012); *Matter of Franklin*, 20 I. & N. Dec. 867, 869-71 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995); *Matter of Wojtkow*, 18 I. & N. Dec. 111, 112-13 (BIA 1981); *Matter of Medina*, 15 I. & N. Dec. 611, 613 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). This body of case law relied upon a common law definition of recklessness that requires a "*conscious* disregard of a substantial and unjustifiable risk posed by one's conduct." *Matter of Leal*, 26 I. & N. Dec. 20, 23 (BIA 2012) (emphasis added). In 2012, however, the Board held that recklessness can trigger a CIMT determination even absent a "conscious disregard" of such risk if the actor "fails to perceive a manifest risk of harm solely because of voluntary intoxication." *Id*. at 23.

New York State's definition of recklessness includes a person who is "unaware [of a substantial and unjustifiable risk] solely by reason of voluntary intoxication." N.Y. Penal Law § 15.05. Thus, prior to *Matter of Leal*, New York's definition of recklessness did not categorically satisfy the "conscious disregard" requirement of prior BIA CIMT case law. Accordingly, anyone facing a CIMT charge based upon a New York conviction with a reckless *mens rea* that was entered before September 21, 2012 should consider arguing that the *Matter of Leal* decision was an "abrupt departure from well-established practice" that should not be retroactively applied. *Obeya*, 884 F.3d at 445.

DHS will likely argue, however, that the question of whether voluntary intoxication can trigger a CIMT finding was a "question of first impression" and that *Matter of Leal "*merely attempts to fill a void in an unsettled area of law." *Id*.; *but see In Re: Marco Antonio Valles-Moreno*, A76 700 382 - ELOY, 2006 WL 3922279, at *3 n.1 (DCBABR Dec. 27, 2006) (finding a conviction was not a CIMT, and noting that the definition of recklessness includes being "unaware of a substantial and unjustifiable risk by reason of voluntary

[10] In addition, even for convictions after April 6, 2017, consider arguing that the new rule announced in *Matter of Jimenez-Cedillo* should not be applied because the Board failed to provide a "reasoned explanation . . . for its change in position" from *Silva-Trevino I*. *Jimenez-Cedillo*, 885 F.3d at 299.

intoxication")*; In Re: Carlos Mario Almeraz-Hernandez*, A78 624 143 - ELOY, 2006 WL 3203649, at *2 n.1 (DCBABR Sept. 6, 2006) (same); *but c.f. In re Torres-Varela*, 23 I. & N. Dec. 78, 81 (BIA 2001) (holding that driving under the influence after having previously been convicted of DUI two times within 60 months is not a CIMT); *In Re Lopez-Meza*, 22 I. & N. Dec. 1188, 1194-96 (BIA 1999) (finding DUI with a suspended license is a CIMT because of the "knowledge that he or she should not be driving under any circumstances.").[11]

- ***Obstruction of Justice Aggravated Felony***

In 1999, in *Matter of Espinoza*, the Board made clear that in order to qualify as an "an offense relating to obstruction of justice" aggravated felony, INA § 101(a)(43)(S), an offense must have as an element "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice." 22 I. & N. Dec. 889, 894 (BIA 1999); *cf. Higgins v. Holde*r, 677 F.3d 97, 104 (2d Cir. 2012) (reserving judgment on whether to defer to the BIA's decision in *Matter of Espinoza*). In *Espinoza*, the Board held that an attempt to conceal a crime alone is insufficient because "concealment of a crime is qualitatively different from an affirmative action to hinder or prevent another's apprehension, trial, or punishment." *Id*. at 895. The Board went on to explain that "[i]t is a lesser offense to conceal a crime *where there is no investigation or proceeding*. . ." *Id*. (emphasis added).

Notwithstanding this language, in 2012 in *Matter of Valenzuela Gallardo*, the Board went on to hold that a statute need not require an "ongoing criminal investigation or trial" to constitute an "an offense relating to obstruction of justice" within the meaning of INA § 101(a)(43)(S). 25 I. & N. Dec. 838, 841 (BIA 2012) (characterizing its holding as a clarification of the rule announced in *Matter of Espinoza*); *but see Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1164 (9th Cir. 2011) (interpreting *Matter of Espinoza* as holding that a conviction constitutes an "obstruction of justice crime when it interferes with an ongoing proceeding or investigation"). For any litigant charged with an aggravated felony under INA § 101(a)(43)(S) because it is alleged that their conviction (which occurred between June 11, 1999 and June 27, 2012) is "an offense relating to obstruction of justice" but where the statute does not require an ongoing investigation or proceeding, consider an argument that *Matter of Valenzuela Gallardo* cannot be applied retroactively.

[11] Note that in *Matter of Wojtkow*, 18 I. & N. Dec. 111 (BIA 1981), the Board held that reckless manslaughter in New York is a CIMT. The definition of recklessness in force at the time included the same provision discussed above related to unawareness of risk arising from voluntary intoxication. *Id*. at 112-13. Accordingly, anyone raising a retroactivity argument regarding *Matter of Leal* should anticipate the DHS argument that the Board had previously held New York's definition of recklessness was sufficient to support a CIMT finding and thus there is no abrupt departure and the ordinary presumption of reliance discussed in *Obeya* is inapplicable. *See Obeya*, 884 F.3d at 448-49. However, the portion of the definition of recklessness related to intoxication was not discussed or relied upon in *Matter of Wojtkow* (though the entire definition was quoted). Indeed, the Board specifically noted that the definition of recklessness in New York was "essentially identical," to the definition of recklessness in prior controlling case law. *Matter of Wojtkow*, 18 I. & N. Dec. at 112 (citing *Matter of Medina*, 15 I & N. Dec. 611 (BIA 1976)). Notably, the "essentially identical" definition did not include the intoxication provision but instead "require[ed] an *actual awareness* of the risk created by the criminal violator's action." *Matter of Medina*, 15 I. & N. Dec. at 613–14. Accordingly, litigants can argue that ***Matter of Wojtkow*** did not consider or decide how the voluntary intoxication provision or the definition of recklessness impacted the CIMT analysis.

- ***Misprision of Felony, 18 U.S.C. § 4, Charged as CIMT***

For forty years, BIA precedent was clear that that misprision of felony under 18 U.S.C. § 4 was not a CIMT. *See Matter of Sloan*, 12 I. & N. Dec. 840 (BIA 1966), *overruled on other grounds*, 12 I. & N. Dec. 840 (A.G. 1968).[12] *But see Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (concluding that misprision of felony is a CIMT because it involves an affirmative act of concealment or participation in a felony); *In re Arreguin-Moreno*, 2006 WL 2008244 (BIA 2006) (holding that misprision of felony under 18 U.S.C. § 4 is a CIMT based on Eleventh and Fifth Circuit precedents). In 2006, however, in *Matter of Robles*, 24 I. & N. Dec. 22, 25-27 (BIA 2006), the BIA abruptly reversed course and announced that it was overruling *Matter of Sloan* and had determined that misprision of felony under 18 U.S.C. § 4 is a CIMT. Accordingly, any litigant who was convicted of misprision under § 4 between 1966 and 2006 should consider arguing that *Matter of Robles* cannot be retroactively applied. Sample briefing on this issue is available on IDP's website at https://www.immigrantdefenseproject.org/wp-content/uploads/Amicus-brief-petit-larceny-CIMT.pdf.

[12] Notwithstanding the fact that the Board's decision was overruled on other grounds by the Attorney General, the Board has made clear that its holding regarding misprision "survive[ed] as precedent." *In Re Robles-Urrea*, 24 I. & N. Dec. 22, 24 (2006).