UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
v.	)	Crim. No. 2:19-CR-00142-JAW
TIMOTHY MORONEY, Defendant	)	

MR. MORONEY'S MEMORANDUM OF LAW IN SUPPORT OF A TIER I OFFENDER DESIGNATION[1]

NOW COMES Timothy Moroney, by and through undersigned counsel, and petitions the Court to accept a Tier I Sex Offender Designation for Mr. Moroney. In support thereof, Mr. Moroney offers the following:

STATEMENT OF UNCONTESTED FACTS[2]

1. On November 26, 1985, the defendant was convicted in the State of Massachusetts of Aggravated Rape. Mr. Moroney was sentenced to serve no more than 10 years and no less than 6 years in prison. Following his term of imprisonment, the Sex Offender Registration and Notification Act

[1] Corresponding Motion to Dismiss/Withdrawal of Plea to be filed pursuant to CMECF 2:19-CR-142- #16.
[2] The facts provided are taken from the PSR except as noted in fn. 2.

(SORNA), 42 U.S.C. §§ 16911-16929, went into effect, requiring the defendant to register as s sex offender.[3] See PSR ¶ 4.

2. Institutional records seem to reflect the defendant was paroled on September 11, 1990. For purposes of registration, his period would have commenced on that date. See PSR ¶ 26; 42 U.S.C. § 16915 (2012) §16915. Duration of registration requirement(a) Full registration period ("{a}sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b)). The SORNA registration period begins to run when the sex offender is released from prison on the conviction giving rise to the Case. *United States v. Del Valle-Cruz*, 785 F.3d 48, 55 (1st Cir. 2015).

3. On January 17, 2007, Moroney wrote a letter to the MASORB notifying the Board that he intended to relocate to Maine and reside at 53 Sawmill Road in Berwick, Maine. See PSR ¶ 6. He did in fact relocate that winter. *Id.*

4. On August 27, 2018, Moroney completed an employment application for New England Sporting Goods, LLC in Portsmouth, New Hampshire. At the time, Moroney was residing in Kittery Point, Maine. Moroney was offered a position as a sales associate and began working for New England Sporting Goods in Portsmouth, New Hampshire in early September of 2018. Moroney continued living in Maine and working in Portsmouth, New Hampshire, for approximately five months. At no time, however, after he began traveling regularly in interstate commerce for employment, did Moroney register as a sex offender in either Maine or New Hampshire. See PSR ¶ 7.

[3] The length of time Mr. Moroney was required to register is determined by his tier classification.

APPLICABLE STATUES

18 USC 2241, in pertinent part, states as follows:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act—

by using force against that other person; or

by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

In Massachusetts, the applicable statute was MA Gen L. 265 Section 22a. which stated:

General Laws c. 265, Section 22 (a), as appearing in St. 1980, c. 459, Section 6, provides in material part: "Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission

of [certain felonies] . . . shall be punished by imprisonment in the state prison for life or for any term of years.

MEMORANDUM OF LAW

In *United States v. Morales*, the First Circuit identified the method of determining the proper tier in sex offender matters. 801 F.3d 1 (1st Cir. 2015). It must first be determined if the statute forming the basis for the conviction is comparable to the Federal counterpart. *Id*. To determine whether a state offense is "comparable to or more severe than" a federal offense listed in the Sex Offense Registration and Notification Act (hereafter 'SORNA'), the First Circuit instructs courts to employ the "categorical approach" established in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and *Descamps v. United States*, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). *Morales*, 801 F.3d at 4-6. Under this approach, a court compares the statutory elements of the predicate state offense with the elements of the comparable federal statute. *Id*. at 5. The prior state conviction is "comparable to or more severe than" the federal offense if it is "defined more narrowly or has the same elements as" the federal statute. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir.) citing *Descamps*, 113 S.Ct. at 2283. By contrast, if the elements of the predicate state offense "sweep more broadly" than those of the federal statute, the two statutes are not comparable, and the prior state offense cannot serve as a predicate, or basis for the more stringent tier. *Id.* quoting *Descamps*, 113 S.Ct. at 2283(*emphasis added*). If the conviction is not comparable to either tier III or II, a person is designated a tier I. *34 U.S.C. 20911*. Under the categorical approach, a Court may not consider the facts giving rise to the prior offense, even if the facts show the conduct satisfies the federal elements. *Taylor*, 495 U.S. at 601.

I. THE MASSACHUSETTS STATUTE SWEEPS MORE BROADLY THAN THE FEDERAL COUNTERPART

If the elements of the predicate state offense "sweep more broadly" than those of the federal statute, the two statutes are not comparable, and the prior state offense cannot serve as a predicate, or basis for the more stringent tier. *Cabrera-Gutierrez,* 756 F.3d 1125, 1133. 'Sweeping more broadly' would include adding offenses that would not exist under corresponding Federal law. *United States v. Ramirez-Flores*, D. C. Docket No. 8:12-cr-00169-EAK-MAP-1. In such a scenario, Mr. Moroney would be a tier I offender.

A. The Massachusetts Statute Creates Aggravated Rape Scenarios that Do Not Exist Under the Federal Counterpart

The Massachusetts Statute allows for aggravated rape under the following circumstances:

an act committed by more than one person, see *Commonwealth v. Blair*, 21 Mass. App. Ct. 625 (1986)(*discussed infra*); a rape committed during the course of an unarmed burglary (see *MA Gen Law. 266 Section 15*), a burglary at night (*id*. at Section 16) and during the applicable period, an injury that resulted during the course of a rape not directly attributed to the rape. See *Commonwealth v. Williams*, 505 N.E.2d 233 (1987)("in his instructions to the jury, the judge told them {the jury} that they could find the defendant guilty of aggravated rape if they found a rape committed during the commission of an armed robbery or one which resulted in serious bodily injury.") This has since been clarified to require that the act caused the injury. See *MA Gen L. 265 Section 22(a).* In none of these scenarios is force or threat of force a required finding. In a plain reading of the Federal

counterpart, none of these scenarios would result in a conviction under 18 USC 2241.[4]

B. The Massachusetts Aggravated Rape Statute Allows for a Conviction By General Intent, Thus Creating Less Protections for a Defendant

18 USC 2241, in pertinent part, is read that the perpetrator knowingly causes the sexual act by using force or threatening or placing another in fear…. by simply looking at the plain language of the statute. *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009) (stating that when interpreting a statute a court should start with the language of the statute and resist reading words or elements into a statute that do not appear on its face). In other words, it must be shown that the perpetrator knowingly causes the sexual act through the use of force or threat; *United States v. Fire Thunder*, 908 F.2d 272, 274 (8th Cir. 1990) ("{t}he force requirement of section 2241(a)(1) is met when the 'sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact." (*quotation omitted*)). It is a defense if the Defendant had a reasonable and good faith belief of consent because he would not knowingly have caused the intercourse through force or threat. *United States v. Bruguier*, 735 F.3d 754, (8th Cir. 2013)(error to deny jury instructions on consent or incapacitation). Compare *Commonwealth v. Grant*, 464 N.E.2d 33 (1984)("the elements necessary for rape do not require that the defendant intend the intercourse be without consent. General Laws c. 265, § 22. No specific intent is required.") Massachusetts allows for aggravated rape to be proven by general intent, disallowing any defenses associated with the intent to commit rape. See *Commonwealth v. Blair*, 488 N.E.2d 1200 (1986).

[4] The only contrary argument the Government can present is that rape itself is always committed by force or threat of force. This is inaccurate under 10 USC §920 (emphasis added).

In *Commonwealth v. Grant*, the Defendant was convicted of the same offense as Mr. Moroney. 464 N.E.2d 33 (1984). The Defendant asked for the following jury instructions:

"The burden is on the Commonwealth to prove, beyond a reasonable doubt, that the defendant had a specific intent to compel [the victim] to submit to sexual intercourse by force. A mere desire to have sexual intercourse, without an intent to use force or threat, does not constitute the specific intent necessary to support a charge of rape.

"In evaluating the element of intent, you should consider whether or not [the victim] resisted in any way. In other words, her lack of consent must have been explicitly communicated to the defendant because he could only be guided by her overt acts and the manifestations of her feelings.

"If [the victim] did not express her lack of consent to the defendant, and he had a reasonable, good faith belief that she did consent to sexual intercourse, he would not be guilty of the crime of rape because the element of specific intent to rape would be lacking."

The Court denied those requests with the Massachusetts Supreme Judicial Court holding, on direct appeal, that "those requests for instructions, like the motion for a required finding of not guilty, were based on the contention that a specific intent to have nonconsensual intercourse is an essential element of rape, so that that intent must be proved by the Commonwealth in every rape case (except those cases involving children under the age of sixteen; see G.L. c. 265, §§ 22A and 23, inserted by St. 1980, c. 459, § 11). We have rejected that contention of the defendant in disposing of the required finding issue." *Id.*

This is further explained in *Commonwealth v. Blair* under MA Gen L. 265 Section 22a., a joint enterprise[5] negates the need to prove threat or force:

> "The defendant bases his claim on *Commonwealth v. Henson*, 394 Mass. 584, 476 N.E.2d 947 (1985). In Henson the court stated that "where proof of a crime requires proof of a specific criminal intent and there is evidence tending to show that the defendant was under the influence of alcohol or some other drug at the time of the crime, the judge should instruct the jury, if requested, that they may consider evidence of the defendant's intoxication at the time of the crime in deciding whether the Commonwealth has proved that specific intent beyond a reasonable doubt." Id. at 593, 476 N.E.2d 947. The flaw in the defendant's argument is that the Commonwealth is not required to prove specific intent in order to convict a defendant of aggravated rape. *Commonwealth v. Grant*, 391 Mass. 645, 649-650, 464 N.E.2d 33 (1984). See *Commonwealth v. Lefkowitz*, 20 Mass.App.Ct. 513, 518 n. 11, 481 N.E.2d 227 (1985). The fact that the aggravated rape in the instant case was based on a theory of joint enterprise did not require that the judge give the Henson instruction.
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> 21 Mass. App. Ct. 625, 631 (1986)(*emphasis added*).

Compare to *United States v. Sayetsitty* where the Court found that voluntary intoxication is a defense to the federal statute. 107 F.3d. 1405 (9th Cir. 1997).

Accordingly, based on the factors stated above, the Massachusetts statute sweeps more broadly than its Federal counterpart and therefore, Mr. Moroney should be construed as a Tier I offender.

WHEREFORE, Mr. Moroney respectfully requests that the Court determine he is a Tier I offender or in the alternative, set the matter for an evidentiary hearing together with any and all other relief that is fit and just.

[5] It is Mr. Moroney's contention that the mere fact that MA Gen L. 265 Section 22a allows for a conviction under the theory of a joint enterprise is, in itself, indicative of sweeping more broadly than the Federal counterpart. This is because the Federal Counterpart makes no reference to rape under the theory of joint enterprise, thus creating an offense that does not exist under *18 USC 2241*.

Dated this 31st day of January 2020 at Portland, Maine.

Respectfully submitted,

/s/ David J. Bobrow, Esq.
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CERTIFICATE OF SERVICE

I, David J. Bobrow, Esq., hereby certify that I have caused to be served via ECF the Defendant's Memorandum on the following individuals:

1. Sheila Sawyer, Esq. at Sheila.Sawyer@usdoj.gov;
2. All other attorneys of record in this matter.

Dated this 31st day of January 2020 at Portland, Maine.

Respectfully submitted,

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