Committee for Public Counsel Services
Public Defender Division
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

WENDY S. WAYNE
DIRECTOR

TEL: (617) 623-0591
FAX: (617) 623-0936

JEANETTE KAIN
IMMIGRATION LAW SPECIALIST

Practice Advisory re: G.L. c. 278, §29D
Commonwealth v. Grannum - July 12, 2010

On June 18, 2010, the Supreme Judicial Court decided Commonwealth v. Grannum, No. SJC-10516, 2010 Mass. LEXIS 389 (2010), a case that addresses motions to vacate guilty pleas based on violations of G.L. c. 278, §29D, the "immigration warnings statute". This Practice Advisory provides an overview of the case and practice tips for future motions to vacate based on G.L. c. 278, §29D.

In summary, the Grannum case holds that, in order for a defendant to win a motion to vacate based on the threat of deportation, he must prove to the court that the criminal conviction in question will actually result in deportation proceedings. Simply providing a Federal statute that indicates that he is deportable is not enough to meet this burden. Rather, a motion to vacate will turn on the specificity of the defendant's affidavit, evidence of written Federal policies regarding deportation for criminal convictions, and any proof that the Federal government has taken steps to deport the defendant.

Overview of Case

In 1987, Mr. Grannum pleaded guilty to receiving stolen property and several motor vehicle offenses. Over ten years later, he moved for a new trial based on the fact that the judge failed to warn him of the immigration consequences of his guilty plea pursuant to G.L. c. 278, §29D. The District Court denied the motion and his subsequent motion to reconsider. The Appeals Court affirmed the District Court, holding that Mr. Grannum had failed to meet his burden of proving that his guilty plea may have one of the immigration consequences enumerated in G.L. c. 278, §29D. The SJC then granted further appellate review.

The SJC affirmed the denial of the motion for new trial and addressed both

requirements to successfully vacate a conviction pursuant to G.L. c. 278, §29D: 1) whether the judge warned the defendant of potential immigration consequences prior to accepting the plea or admission as required by the statute, and 2) whether the plea or admission "may" result in one of the immigration consequences about which the defendant was not warned. [1]

A. Presumption of regularity

The Court held that the "presumption of regularity" that applies to post-conviction motions to vacate guilty pleas under Mass.R.Crim.P. 30(b) does not apply to motions to vacate pursuant to G.L. c. 278, §29D because the statute explicitly states that, absent a record that the judicial immigration warnings were given, the defendant is presumed to have not received the warnings. Thus, the Court clarified its holdings in Commonwealth v. Jones, 417 Mass. 661 (1994) and Commonwealth v. Lopez, 426 Mass. 657 (1998), cases which dealt with the presumption of regularity but did not deal specifically with the presumption in relation to motions to vacate brought under G.L. c. 278, §29D. Because the Commonwealth had failed to meet its burden of proving that Mr. Grannum had been warned about the immigration consequences of pleading guilty, he was entitled to the presumption that he had not been warned. Grannum, at *13.

Note that for pleas or admissions that occurred prior to the statute's amendments in 2004, the record can be "reconstructed" by, for example, an affidavit from the plea judge indicating that his standard practice during the time of the plea was to give the warnings as required by the statute.

B. Whether a conviction "may have" immigration consequences

The SJC then considered whether the plea and conviction may have or has had one of three enumerated immigration consequences (exclusion[2], deportation[3] or denial of

[1] At the time of the defendant's plea, M.G.L. c. 278, §29D stated, in relevant part: "The Court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the Court advises him of the following: 'If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.' … If the Court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have one of the enumerated consequences, the Court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of "not guilty." Absent a record that the Court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." The statute was amended in 2004, so the amended language did not apply in this case.

[2] Congress amended the immigration statute in 1996 so that exclusion is now referred to as "inadmissibility." The most traditional manner in which inadmissibility arises is when a noncitizen applies for a visa at a U.S. Consulate. If she is inadmissible, her application will be denied and she will not be allowed to enter the U.S. Noncitizens physically present in the U.S. who apply for "green cards" (to

naturalization) as required under the statute. The Court reiterated its holding in Commonwealth v. Berthold, 441 Mass. 183 (2004), stating that the statute required a defendant to prove that he "actually faced the prospect of suffering any of the enumerated consequences." Id. at *14. In Mr. Grannum's case, because his motion was based on the risk of deportation, the Court held that a showing that the conviction makes him statutorily eligible for deportation is insufficient. Rather, a defendant must provide proof of deportation proceedings against him based on the conviction, proof that the Federal government has "taken some step toward deporting him" or "an express written policy of the Federal immigration authorities [that] calls for the initiation of deportation proceedings against him." Id. at *18. Because Mr. Grannum had only submitted a boiler-plate affidavit that failed to allege that this conviction caused him to be deportable and an unsworn letter from an immigration attorney as proof that he faced deportation, the Court held that he had not met this burden.

The Court also suggested that a defendant could meet this burden by proving that "he intended to travel outside the United States and faced a substantial risk of exclusion if he attempted to re-enter, or that he intended to apply to become a naturalized United States citizen if the conviction at issue would not doom his application." Id. at *14-15. Since these consequences had not been raised in Mr. Grannum's motion, the Court only focused on the consequence of deportation in this case.

Because Mr. Grannum had not provided sufficient proof that his guilty plea to receiving stolen property may have one of the enumerated immigration consequences, the SJC affirmed the denial of his motion. Justice Cowin wrote a separate concurrence, disagreeing that an "express written policy" should be sufficient and suggesting that this will foster future litigation on this issue. Id. at *23.

Practice Tips

A. Legal requirements for a motion to vacate

Under Mass.R.Crim.P. 30(c), a defendant is required to submit a detailed affidavit that provides sufficient evidence of why his motion should be granted. See, e.g., Commonwealth v. Antonio DeJesus, 440 Mass. 147, 151-152 (2003) (discussing parallel requirement for motions to revise and revoke); Commonwealth v. Julio DeJesus, 71 Mass.App.Ct. 799, 811 (2008). Failure to do so can result in the denial of the motion. See, e.g., Commonwealth v. Colantonio, 31 Mass. App. Ct. 299, 302 (1991) (affirming denial of motion for new trial due in part to the fact that a substantive affidavit had not

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become lawful permanent residents) are also subject to the grounds of inadmissibility. Inadmissibility will also arise when a lawful permanent resident travels abroad and then seeks readmission to the U.S. If he is inadmissible, he would be placed in removal proceedings at the border.

[3] Congress' 1996 amendments to the immigration statute changed the term "deportation" to "removal."

been included); Commonwealth v. Tobin, 392 Mass. 604, 618-619 (Mass. 1984) (affirming denial of motion for new trial because exculpating letter upon which it was based was not in affidavit form). Trial judges are authorized to deny these motions without a hearing if "no substantial issue is raised by the motion or affidavits." Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 406 (1983).

The SJC denied Mr. Grannum's motion to vacate primarily due to the fact that he provided almost no evidentiary support for his motion. His boiler-plate affidavit failed to allege any immigration consequences that he was facing or expected to face. Grannum, at *14. The Court gave little weight to the letter from the immigration attorney, repeatedly observing that it was "unsworn." Although Mr. Grannum was in deportation proceedings during part of the time that his motion was pending, he did not provide the trial court with any documents demonstrating that fact until the case was on appeal. Id. at *17, n.13. Had the record been more explicit about the immigration consequences he was facing, the outcome of this case may have been different.

In addition to a detailed affidavit from the defendant that explicitly sets out the immigration consequences he faces due to his criminal conviction, counsel should also submit other evidence of the immigration consequences that a defendant faces, preferably in affidavit form.

B. Evidence of immigration consequences

As discussed above, the SJC held that a defendant can prove that his conviction "may have" the immigration consequence of deportation by showing that he is already in deportation proceedings, or that the Federal government has taken a step toward deporting him, or that the Federal government has a written policy of initiating deportation proceedings against people like him. Grannum, at *18. Some suggestions for proof of this include:

- Immigration & Customs Enforcement ("ICE") detainer or arrest warrant;
- Notice to Appear (an Immigration charging document that is filed in Immigration Court to initiate removal proceedings);
- Written denial of an application for immigration relief, such as an application for adjustment of status, asylum or Temporary Protected Status;
- Order of removal or deportation;
- Letter from the Department of Homeland Security ("DHS") notifying a defendant that he is required to appear with his luggage for deportation (also known as a "bag and baggage letter");
- Sworn affidavit from experienced immigration attorney;
- Evidence of express, written Federal policies, as discussed below.

It is important to note that the Court was very clear that statutory cites alone are not sufficient proof that a defendant is actually facing deportation. Id. at *17.

The Grannum decision is less clear in regard to proving inadmissibility or denial of naturalization, because these consequences were not before the Court. It suggests that it may be sufficient to demonstrate a "substantial risk" of exclusion or prove that a conviction would "doom" a naturalization application. Id. at 14-15. Because the immigrant bears the burden of proof in exclusion and naturalization cases and presents herself to DHS in both situations, these consequences are not based on ICE discretion and resources in the same way that deportation is. Thus, there is at least an argument that statutory and regulatory cites should be sufficient to prove that an immigrant may face these consequences. It would still behoove defense counsel to provide proof of written policies relating to denial of naturalization or exclusion in anticipation of an extension of the Grannum decision to these immigration consequences.

C. Express, written Federal policy

As discussed above, the Court held in Grannum that a defendant need not wait until he is actually in deportation or removal proceedings to file a motion to vacate, if he can show that it is the Federal government's "express written policy" to initiate removal proceedings against immigrants convicted of such crimes. Grannum, at *18. The Court does not elaborate on what this might be, aside from stating that statutory citation is not sufficient. Id. at *17. Judge Cowin, in her concurrence, observed that Federal statutes *are* a type of written Federal policy. She further stated, "the Court provides no guidance on how to differentiate written policies that are sufficient to form a basis for relief under the statute from those that are not." Id. at *23.

The main forms of written policy in the immigration context are the Federal statute and the regulations, which can be found at Title 8 of the Code of Federal Regulations. Practitioners, and certainly pro se litigants, do not have access to DHS's internal memoranda, except in the occasional circumstances that a memo is released to the public or is obtained through a Freedom of Information Act request.

Some ideas of places to look for written policy include:

- DHS websites, particularly the website for Immigration & Customs Enforcement (www.ice.gov). ICE is the agency in charge of arresting, detaining and deporting immigrants.
- Board of Immigration Appeals cases. Precedent decisions are available at http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html, but this website does not provide a "keyword search" function. Also available on Westlaw and Lexis.

- Bender's Immigration Bulletin (www.bibdaily.com). A free compilation of DHS announcements, news stories, cases, and other developments in immigration law, including an archive search.
- American Immigration Lawyers Association (www.aila.org). This organization has a database that includes most memoranda released to the public or obtained through FOIA. Some content is only available to members.
- Interpreter Releases. A weekly Westlaw publication that includes articles on immigration topics, as well as policy memoranda. Available on Westlaw and through subscription.

Attached to this advisory are documents recently released by ICE that set forth its priority to deport non-citizens with criminal convictions. These are examples of the type of documents that counsel may want to include with a motion to vacate pursuant to G.L. c. 278, §29D.

Conclusion

There are two important points to take away from the Grannum case. First, when preparing the motion, it is important to include and discuss all of the immigration consequences that the defendant faces. Do not limit your motion to deportation if your client intends to travel and is inadmissible, or if she faces denial of naturalization as a result of the conviction you seek to vacate. Secondly, it is important to submit substantial documentary proof of the consequences that your client faces. This includes a detailed and thorough affidavit from the defendant, proof of any contact that he has had with DHS, and evidence of written Federal policies relating to your client's deportation, inadmissibility or ineligibility for naturalization.

Policy Number: 10072.1
FEA Number: 601-14

Office of the Assistant Secretary

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: All ICE Employees

FROM: John Morton
Assistant Secretary

SUBJECT: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum outlines the civil immigration enforcement priorities of U.S. Immigration and Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens. These priorities shall apply across all ICE programs and shall inform enforcement activity, detention decisions, budget requests and execution, and strategic planning.

A. Priorities for the apprehension, detention, and removal of aliens

In addition to our important criminal investigative responsibilities, ICE is charged with enforcing the nation's civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls. ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security.

To that end, the following shall constitute ICE's civil enforcement priorities, with the first being the highest priority and the second and third constituting equal, but lower, priorities.

Priority 1. Aliens who pose a danger to national security or a risk to public safety

The removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration enforcement priority. These aliens include, but are not limited to:

- aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
- aliens not younger than 16 years of age who participated in organized criminal gangs;
- aliens subject to outstanding criminal warrants; and
- aliens who otherwise pose a serious risk to public safety.[1]

For purposes of prioritizing the removal of aliens convicted of crimes, ICE personnel should refer to the following new offense levels defined by the Secure Communities Program, with Level 1 and Level 2 offenders receiving principal attention. These new Secure Communities levels are given in rank order and shall replace the existing Secure Communities levels of offenses.[2]

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in § 101(a)(43) of the Immigration and Nationality Act,[3] or two or more crimes each punishable by more than one year, commonly referred to as "felonies";
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors"; and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.[4]

Priority 2. Recent illegal entrants

In order to maintain control at the border and at ports of entry, and to avoid a return to the prior practice commonly and historically referred to as "catch and release," the removal of aliens who have recently violated immigration controls at the border, at ports of entry, or through the knowing abuse of the visa and visa waiver programs shall be a priority.

Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls

In order to ensure the integrity of the removal and immigration adjudication processes, the removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls, shall be a priority. These aliens include:

[1] This provision is not intended to be read broadly, and officers, agents, and attorneys should rely on this provision only when serious and articulable public safety issues exist.
[2] The new levels should be used immediately for purposes of enforcement operations. DRO will work with Secure Communities and the Office of the Chief Information Officer to revise the related computer coding by October 1, 2010.
[3] As the definition of "aggravated felony" includes serious, violent offenses and less serious, non-violent offenses, agents, officers, and attorneys should focus particular attention on the most serious of the aggravated felonies when prioritizing among level one offenses.
[4] Some misdemeanors are relatively minor and do not warrant the same degree of focus as others. ICE agents and officers should exercise particular discretion when dealing with minor traffic offenses such as driving without a license.

- fugitive aliens, in descending priority as follows:[5]
  - fugitive aliens who pose a danger to national security;
  - fugitives aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - fugitive aliens with criminal convictions other than a violent crime;
  - fugitive aliens who have not been convicted of a crime;
- aliens who reenter the country illegally after removal, in descending priority as follows:
  - previously removed aliens who pose a danger to national security;
  - previously removed aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - previously removed aliens with criminal convictions other than a violent crime;
  - previously removed aliens who have not been convicted of a crime; and
- aliens who obtain admission or status by visa, identification, or immigration benefit fraud.[6]

The guidance to the National Fugitive Operations Program: Priorities, Goals and Expectations, issued on December 8, 2009, remains in effect and shall continue to apply for all purposes, including how Fugitive Operation Teams allocate resources among fugitive aliens, previously removed aliens, and criminal aliens.

B. Apprehension, detention, and removal of other aliens unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States, although attention to these aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority. Resources should be committed primarily to advancing the priorities set forth above in order to best protect national security and public safety and to secure the border.

C. Detention

As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are

[5] Some fugitives may fall into both this priority and priority 1.
[6] ICE officers and special agents should proceed cautiously when encountering aliens who may have engaged in fraud in an attempt to enter but present themselves without delay to the authorities and indicate a fear of persecution or torture. *See* Convention relating to the Status of Refugees, art. 31, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. In such instances, officers and agents should contact their local Office of the Chief Counsel.

primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, ICE officers or special agents must obtain approval from the field office director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Prosecutorial discretion

The rapidly increasing number of criminal aliens who may come to ICE's attention heightens the need for ICE employees to exercise sound judgment and discretion consistent with these priorities when conducting enforcement operations, making detention decisions, making decisions about release on supervision pursuant to the Alternatives to Detention Program, and litigating cases. Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens. Additional guidance on prosecutorial discretion is forthcoming. In the meantime, ICE officers and attorneys should continue to be guided by the November 17, 2000 prosecutorial discretion memorandum from then-INS Commissioner Doris Meissner; the October 24, 2005 Memorandum from Principal Legal Advisor William Howard; and the November 7, 2007 Memorandum from then-Assistant Secretary Julie Myers.

E. Implementation

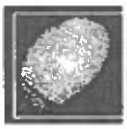
ICE personnel shall follow the priorities set forth in this memorandum immediately. Further, ICE programs shall develop appropriate measures and methods for recording and evaluating their effectiveness in implementing the priorities. As this may require updates to data tracking systems and methods, ICE will ensure that reporting capabilities for these priorities allow for such reporting as soon as practicable, but not later than October 1, 2010.

SECURE COMMUNITIES FACT SHEET

Secure Communities: Mission

Secure Communities is a comprehensive Department of Homeland Security (DHS) initiative to modernize the criminal alien enforcement process. It supports public safety by strengthening efforts to identify and remove the most dangerous criminal aliens from the United States. Congress appropriated $1.4 billion to U.S. Immigration and Customs Enforcement (ICE) for criminal alien enforcement efforts.

Secure Communities is built on three pillars that address the frequent challenges associated with accurately identifying and successfully removing criminal aliens from the United States.



Identify criminal aliens through modernized information sharing

Prioritize enforcement actions to ensure apprehension and removal of dangerous criminal aliens

Transform criminal alien enforcement processes and systems to achieve lasting results

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IDENTIFY
The Challenge:

Arrestees often use aliases and furnish other false biographic data, which can make it difficult to properly determine their immigration status. Relying on this biographic data alone slows federal officials' ability to accurately and efficiently identify the immigration history of criminals booked into local custody, and on probation and parole.

The Solution:
Modernize Criminal Alien Identification Using Biometrics

New technology being deployed across the country enables the criminal alien's fingerprints to be checked against DHS's biometric database. This technology and the use of biometrics helps to more accurately and efficiently confirm a suspect's identity because, unlike a name or date of birth, biometrics are almost impossible to forge.

ICE, along with the FBI and DHS's US-VISIT Program provide the technology to help local law enforcement agencies (LEAs) complete an **integrated records check** to determine both the criminal history and immigration status of individuals in their custody.

A single submission of fingerprints as part of the normal criminal booking process automatically checks for information in both the Integrated Automated Fingerprint Identification System (IAFIS) of the FBI's Criminal Justice Information Services (CJIS) Division and the Automated Biometric Identification System (IDENT) of DHS's US-VISIT Program.

The LEA continues to be notified when there is a positive identification within IAFIS. Now, both ICE and the LEA can be notified when a match occurs in IDENT.

ICE evaluates each case to determine the individual's immigration status and communicate their findings to local law enforcement **within a few hours.**

SECURE COMMUNITIES FACT SHEET

PRIORITIZE
The Challenge:

The size, location, and characteristics of the nation's criminal alien population are based on estimates, making it difficult to strategically assess operational needs and deploy resources to identify and remove criminal aliens.

The Solution:
Prioritize Enforcement Actions

Secure Communities is using a **risk-based approach** to prioritize enforcement actions involving criminal aliens. ICE is focusing efforts first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses. ICE will give priority to those offenses including, crimes involving national security, homicide, kidnapping, assault, robbery, sex offenses, and narcotics violations carrying sentences of more than one year.

By prioritizing the removal of the most dangerous criminals, Secure Communities enables ICE to heighten public safety while reducing disruption to communities and law-abiding immigrant families.

Deployment Strategy:

Beginning in October 2008, ICE prioritized deployment of biometric identification capability to high-risk jurisdictions. Continued deployment plans project nationwide coverage by 2013. For more information including current status and recent successes, please visit our website at: www.ICE.gov/Secure_Communities

TRANSFORM
The Challenge:

The deployment of biometric identification capability to more than 30,000 local jails and booking locations nationwide will dramatically increase the number of dangerous criminal aliens coming into ICE custody. That means ICE must boost its capabilities to arrest, process, detain, and ultimately remove aliens from the United States. Finding solutions to identify, locate, and detain criminal aliens currently considered at-large is a high priority.

The Solution:
Transform ICE Business Processes and Systems

To meet these demands, ICE is working to **optimize capacity** by modernizing and expanding detention space, transportation resources, and staff. Automated systems and greater **process efficiency** will speed the removal of criminal aliens from the United States, reducing the amount of time they spend in ICE custody. Some of the modernization and process enhancements include:

- Video teleconferencing to conduct interviews and immigration hearings
- Computer technology to track the use of detention beds and transportation systems
- Integrated case and detainee management systems
- Working groups to address identifying, locating and detaining criminal aliens who are currently at-large

These enhancements to the processes and systems ICE uses to manage its criminal alien caseload are designed to **strengthen ICE capabilities** to:

- Assess future needs for detention beds, transportation, and staffing
- Optimize ICE's overall operating efficiency