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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys December 2011

From the U.S. Supreme Court:

Judulang v. Holder, 2011 U.S. LEXIS 9018 (Dec. 12, 2011)

The case overturns *Matter of Blake* and *Matter of Brieva-Perez*, precedent decisions from the Board of Immigration Appeals that severely restricted eligibility for waivers of inadmissibility under 8 U.S.C. §1182(c) (known as the "212(c) waiver," referencing the Immigration and Nationality Act citation). The BIA held in these cases that in order for an immigrant to waive removability under 212(c), the ground of removability under which he was charged had to have a comparable ground of inadmissibility. *Compare* 8 U.S.C. §1227 (grounds of removability) with 8 U.S.C. §1182 (grounds of inadmissibility). This became known as the "comparable grounds" rule. The comparable grounds rule significantly limited the category of offenses eligible for waiver under section 212(c).

The Supreme Court, in a unanimous decision authored by Justice Kagan, held that the comparable grounds rule was arbitrary and capricious. It decided that, while the BIA has the authority to restrict eligibility for a 212(c) waiver, it must do so in a reasoned way. An immigrant's right to remain in the U.S. should not be dependent on "the chance correspondence between statutory categories," because that is not relevant to the underlying purposes of the immigration laws. In other words, the comparable grounds rule does not have any relation to whether an immigrant deserves to stay in the U.S.

Practice Note: Section 212(c) was abolished by immigration laws enacted in 1996. However, immigrants may still apply for a 212(c) waiver, as a defense to deportation, if they pleaded guilty to an offense prior to the effective date of those laws (which, depending on the offense and the procedural posture of the immigration case, is either April 24, 1996 or April 1, 1997). Today, the 212(c) waiver is typically used to waive old aggravated felonies, since aggravated felonies are no longer waivable under the current laws. Now that *Blake* and *Brieva-Perez* are no longer in effect, immigrants should be allowed to apply for a 212(c) waiver for any offense, including aggravated felonies, if they are otherwise eligible for the waiver.

For a more substantive analysis of *Judulang*, please refer to the Dec. 16, 2011 Practice Advisory published by the American Immigration Council, the National Immigration Project, and the Immigrant Defense Project, available at: http://www.legalactioncenter.org/sites/default/files/Judulang-212-c-relief.pdf.

Unpublished Cases from the Massachusetts Appeals Court:

Note that the following cases are unpublished and thus are not precedential or binding on any court.

Commonwealth v. Familia, 2011 Mass. App. Unpub. LEXIS 1209 (Nov. 21, 2011)

In this case, a defendant moved for a new trial based on the trial judge's failure to give a proper immigration warning under G.L. c. 278, §29D. The judge warned the defendant that a guilty plea could result in deportation, but did not warn about exclusion or denial of naturalization. The court denied the motion because the defendant was not facing exclusion or denial of naturalization presently; those immigration consequences were merely hypothetical. While the defendant had been ordered deported nearly a year before he filed his motion for new trial, the court made no mention of the defendant's current location or immigration status, even though that information was essential to a finding that exclusion was merely a hypothetical consequence to him.

Practice Tip: In preparing a motion for new trial based on G.L. c. 278, §29D, it is very important to provide the court with substantial information about a client's immigration status and all of the immigration consequences that she faces, in order to demonstrate that such immigration consequences are not at all hypothetical.

Commonwealth v. Tho Minh Chau, 2011 Mass. App. Unpub. LEXIS 1269 (Dec. 8, 2011)

In this case, a defendant moved for a new trial based, in part, on *Padilla v. Kentucky*. The Court denied his motion because he pleaded guilty to the offense on August 12, 1996, and the SJC has held that *Padilla* is only retroactive for pleas entered after April 1, 1997. *See Commonwealth v. Clarke*, 460 Mass. 30 (2011).

Practice Note: The SJC premised its retroactivity decision in *Clarke* on changes in immigration law caused by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted on September 30, 1996 (with portions of the law effective on April 1, 1997). The Court held that this law changed the professional norms for defense counsel representing immigrants; thus, a failure to provide correct advice after the law's effective date fell below "an objective standard of reasonableness."

However, the SJC did not acknowledge the other immigration law enacted in 1996, which included changes to the immigration laws that were nearly as sweeping as those in IIRIRA. That law, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), was enacted on April 24, 1996, and its changes are usually read in conjunction with those enacted by IIRIRA.

Mr. Chau likely pleaded guilty to an offense that made him deportable due to changes enacted as part of AEDPA. There are strong arguments that *Padilla* should be retroactive to the date of AEDPA's enactment, since it was actually AEDPA, not IIRIRA, that marked "the point at which deportation became 'intimately related to the criminal process' and 'nearly an automatic result for a broad class of noncitizen offenders.'" *See Clarke*, 460 Mass. at 45. **If you file a post-conviction motion based on *Padilla* for a conviction that occurred between April 24, 1996 and April 1, 1997, you should raise this argument regarding the retroactivity of *Padilla*. Contact the Immigration Impact Unit for additional information and assistance on this issue.**

Commonwealth v. Phillips, 2011 Mass. App. Unpub. LEXIS 1283 (Dec. 12, 2011)

A defendant moved for a new trial based on ineffective assistance of counsel under *Padilla*. The basis for his claim was that his trial counsel advised him that he would "likely" be deported if he pleaded guilty to drug distribution. The defendant argued that counsel was required to tell him that deportation was a certainty. The court disagreed, finding that counsel's advice was not deficient and that the defendant had failed to establish prejudice.

Commonwealth v. Vargas, 2011 Mass. App. Unpub. LEXIS 1312 (Dec. 15, 2011)

A defendant moved for a new trial based on a lack of the immigration warnings under G.L. c. 278, §29D. The plea occurred on February 9, 1996, so the tapes from the hearing had long been destroyed. Additionally, the plea judge was deceased. On the docket sheet, the checkbox relating to the immigration warnings was not checked, but the Appeals Court agreed with the motion judge that this omission was merely "ministerial." The Commonwealth argued that the warnings had been given, and attempted to reconstruct the record by providing a copy of the green sheet (the tender of plea form), which contained the immigration warnings and had been signed by defense counsel, the prosecutor and the judge. The Commonwealth argued that the green sheet proved that the judge also gave the warnings orally. The trial court agreed with the Commonwealth and denied the motion, holding that the green sheet proved that the judge had also provided the required oral warnings to the defendant. The Appeals Court agreed.

<u>*Practice Note*</u>: For pleas occurring prior to August 28, 2004, the Commonwealth can use a reconstructed record to demonstrate that the warnings required by G.L. c. 278, §29D were given. This unpublished decision suggests that a green sheet trumps a docket sheet. The unpublished decision appears to contradict prior decisions by the SJC and Appeals Court. *See Commonwealth v. Hilaire*, 437 Mass. 809 (2002); *Commonwealth v. Podoprigora*, 46 Mass. App. Ct. 928 (1999). Note that 2004 statutory amendments do not allow a reconstructed record, but require "an official record or a contemporaneously written record kept in the court file."

<u>From the Board of Immigration Appeals:</u>

***Matter of R-A-M-*,** 25 I&N Dec. 657 (BIA, Jan. 3, 2012).

The California offense of possession of child pornography is an aggravated felony under 8 U.S.C. §1101(a)(43)(I). Also, the BIA found that the offense was a "particularly serious crime," thus barring the immigrant from withholding of removal (which is a deportation defense similar to asylum and based on a fear of persecution). It stated that although child pornography was not "per se" a particularly serious crime, it was so in this case because the immigrant had downloaded numerous pornographic images to his computer. The BIA also held that factors such as a relatively short sentence, lack of violence, the fact that this was possession and not production, and rehabilitation did not mitigate the immigrant's behavior.

<u>*Practice Note*</u>: In determining whether an offense is a particularly serious crime, the BIA is required to analyze the facts of the case and make an individualized determination as to whether the behavior resulting in the conviction constitutes a particularly serious crime. It is allowed to use any document in making this analysis (which is quite different from most other immigration determinations relating to criminal behavior, which are restricted to the record of conviction). Although the BIA claimed that it was

not making a “per se” rule about child pornography, its holding basically amounted to that, as its reasoning was devoid of any specific facts and was based simply on the nature of child pornography itself.