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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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From the U.S. Supreme Court:

Arizona v. United States, 2012 U.S. LEXIS 4872 (June 25, 2012)

In April 2010, the state of Arizona enacted a new law aimed at creating state enforcement of immigration laws. The law, known as S.B. 1070, included the following provisions: 1) the law made it a state misdemeanor to fail to comply with federal alien registration requirements (Section 3); 2) the law made it a state misdemeanor for an undocumented alien to seek or engage in employment (Section 5(C); 3) the law authorized state officers to arrest any person they had probable cause to believe committed an offense that made them removable (Section 6); and 4) the law authorized police officers to verify immigration status pursuant to any lawful stop or arrest (Section 2(B)). The U.S. Department of Justice challenged these provisions of the law arguing that they were pre-empted by federal immigration laws.

In *Arizona v. United States*, the U.S. Supreme Court struck down the first three of the four provisions listed above (Sections 3, 5(C) and 6). The Court held that all but the status verification (Section 2(B)) were pre-empted by federal law. However, as to 2(B), the Court held that the provision was not prima facie pre-empted for two reasons. First, despite the mandatory nature of the status checks, since federal immigration law "leaves room for a policy requiring state officials to contact ICE," this provision was not *per se* unconstitutional. Second, the requirement of section 2(B) could be interpreted in a variety of ways. Without initial interpretation of the statute from the state courts, it would be wrong for the Supreme Court to construe the provision as conflicting with federal law. However, the opinion did "not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."

Practice Tip: Massachusetts does not currently have a law similar to Section 2(B), although there have been recent attempts by state legislators to enact such a law. In addition, probation officers and a few individual judges have had both formal and informal policies to question people about their immigration status and share that information with immigration officials. The Supreme Court gave some guidance in the opinion as to whether such laws or policies may be unconstitutional, however, there remain many open questions.

From the U.S. Court of Appeals for the First Circuit:

Viveiros v. Holder, 2012 U.S. App. LEXIS 12950 (1st Cir., June 25th 2012)

Mr. Viveiros was admitted to the U.S. as a legal permanent resident in 1984. Nearly 25 years later he was charged with shoplifting and larceny offenses. He pleaded guilty to both. He received 18 months of probation on the larceny case. On the shoplifting offense, the docket reflected that the disposition was a "guilty finding with no fines or costs." However, the original disposition included a $250 fine which was later waived at probation's request. Subsequently, Mr. Viveiros was placed in removal proceedings for having been convicted of two crimes involving moral turpitude (CIMTs). He contested his removal arguing that the shoplifting disposition did not meet the definition of "conviction" under 8 U.S.C. §1101(a)(48)(A) because there was no sentence imposed.

Under federal immigration law, a conviction takes place if there is

1) a formal judgment of guilt of the alien entered by the court, or

2) if a judge or jury has found the alien guilty…and the judge has ordered some form of punishment, penalty to restraint on liberty.

8 U.S.C. §1101(a)(48)(A).

The Department of Homeland Security argued that Mr. Viveiros was "convicted" under the first part of the definition. Mr. Viveiros argued that in order for a conviction to be "a formal judgment of guilt," under the first part of the definition, a sentence must necessarily be imposed. First, the Court found that because the guilty plea initially carried a $250 fine there was a sentence and so even if they accepted Mr. Viveiros's argument, his appeal would be denied. However, the Court went further and rejected the notion that without a punishment it could not be a conviction under the first part of the definition, explaining that since Congress explicitly included a punishment requirement in the second definition of 'conviction' but withheld it from the first definition, this was indisputable evidence that "a formal judgment of guilt," does not require any punishment to be considered a conviction. However, the court does not elaborate further on what would constitute a "formal judgment of guilt" if no punishment were imposed.

Practice Tip: In a footnote, the decision appears to confirm that a guilty file without a restraint on liberty is distinct from a formal judgment of guilt and is NOT considered a conviction.

From the Massachusetts Appeals Court:

Commonwealth v. Fitzgerald, 2012 Mass. App. Unpub. LEXIS 817 (June 22, 2012)

In 2004, Mr. Fitzgerald received a CWOF on one count of Assault and Battery with a Dangerous Weapon (ABDW). He filed a motion for a new trial based on his trial counsel's failure to advise him of the immigration consequences of his admission. The judge initially granted the motion, but the Commonwealth filed a motion to reconsider and after an evidentiary hearing, the judge reversed his decision and denied Mr. Fitzgerald's motion based on the fact that trial counsel had informed Mr. Fitzgerald that his plea could have a "potentially adverse impact" on his

immigration status. The judge further found that the alien warnings given by the judge sufficed to apprise Mr. Fitzgerald of his risk.

The appeals court reversed finding that the deportation consequences of the crime of ABDW are clear and therefore Mr. Fitzgerald was entitled to specific advice about the *certain* immigration consequences of a plea. The general advice given by trial counsel was not sufficient.

Furthermore, the Commonwealth argued that the alien warnings given by the judge and the defendant's signature on the green sheet cured any prejudice. The court disagreed, citing *Commonwealth v. Clarke,* and reiterated that the judicial warnings and the green sheet do not relieve defense counsel of his obligation to specifically advise his client. The case was then remanded back to the trial court for findings on prejudice.

Practice Tip: The appeals court affirmed that when the immigration consequences of an offense are clear, the defense attorney must provide specific advice about such consequences. The duty under *Padilla* is not met by giving general warnings.

From the Board of Immigration Appeals:

Matter of Taveras, 25 I&N Dec. 834 (BIA 2012)

In 2004, Mr. Taveras was in removal proceedings based upon a controlled substance conviction. He was granted a form of relief from removal (called cancellation of removal) which allowed him to remain in the United States. Subsequently, he committed two new offenses and was placed back in removal proceedings. Mr. Taveras sought relief a second time by applying for a green card (adjustment of status). The Immigration Judge granted the green card finding that under 8 U.S.C. 1101(a)(13)(C)(v) the grant of cancellation of removal precluded consideration of his prior drug offense (which would have otherwise made him ineligible for his green card).

The BIA reversed finding that 1101(a)(13)(C)(v) is only applicable upon re-entry from a trip abroad and not for adjustment of status. Therefore, although because of his grant of cancellation Mr. Taveras would not be considered inadmissible for re-entry, his grant of cancellation does not prevent him from being inadmissible for adjustment. He was therefore not entitled to relief and was ordered removed.

Practice Tip: Offenses committed before a grant of relief from removal may still have immigration consequences for a client, particularly if there are new convictions which occurred subsequent to the grant of relief. When reviewing a client's criminal history, offenses that occurred prior to a grant of relief may still impact what relief is available, therefore, a client's criminal history must be carefully reviewed.

Matter of Valenzuela-Gallardo, 25 I&N Dec. 838 (BIA 2012)

The respondent, Mr. Valenzuela-Gallardo, was convicted of being an "accessory to a felony" under California law. Mr. Valenzuela-Gallardo argued that his offense did not qualify as an "offense relating to obstruction of justice" (a category of aggravated felony) because the statute under which he was convicted did not require that the offense relate to any ongoing investigation or judicial proceeding.

In its decision, the BIA held that a crime that falls within the category of "obstruction of justice" involves all offenses in which there is an "affirmative and intentional attempt, with specific intent, to interfere with the process of justice." They explained that often such offenses will involve interference with an ongoing investigation, however, that is not required for an offense to be an obstruction of justice.

Therefore, although the California crime of accessory to a felony does not require that there be an ongoing criminal investigation, it was an obstruction of justice offense as listed in the aggravated felony statute because it requires intent to interfere with the process of justice.

Practice Tip: This does not alter the understanding of obstruction of justice aggravated felonies, it merely broadens the scope of crimes that may fall within this category. In Massachusetts, the most common obstruction of justice offenses are perjury and witness intimidation. Both crimes are considered obstruction of justice and with a sentence of imprisonment, imposed or suspended, of one year or more, they become aggravated felonies.