



The Commonwealth of Massachusetts

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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys **May 2012**

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

Palmeira v. Holder, 2012 U.S. App. LEXIS 9550 (1st Cir., May 10, 2012).

In 2006, Mr. Palmeira received a CWOFF on malicious destruction of property after an incident in which he got drunk and kicked in his estranged wife's door at a New Year's Eve party. Shortly thereafter, he was detained by ICE and placed in removal proceedings. He applied for a defense to deportation called cancellation of removal, which, if granted, would have resulted in a green card for Mr. Palmeira. The Immigration Judge denied that application, finding that Mr. Palmeira was unable to show the requisite ten years of good moral character due to the malicious destruction conviction, which the judge held was a crime involving moral turpitude. (Note that a CWOFF is considered a conviction under the immigration laws).

On appeal, Mr. Palmeira argued that the offense was not a crime involving moral turpitude; however, both the BIA and the First Circuit disagreed. They both affirmed that the crime of malicious destruction of property is a crime involving moral turpitude, making Mr. Palmeira ineligible for cancellation of removal and instead subject to deportation.

Practice note: For the criminal practitioner, this case is significant for two reasons. First, the BIA held that while malicious destruction is a CIMT, wanton destruction of property is not a CIMT. The First Circuit recounted this holding in an approving manner, though it did not specifically affirm the holding. However, the approving language in the case should still provide support for the argument that wanton destruction is not a CIMT.

Secondly, the First Circuit chose not to weigh in on *Matter of Silva-Trevino*, a controversial Attorney General decision that has been rejected by four circuit courts. (This decision has been discussed at length in prior Case Note publications). Under *Silva-Trevino*, adjudicators are allowed, in certain circumstances, to consider documents beyond the record of conviction in determining whether a particular offense involves moral turpitude. Such documents may include police reports, applications for criminal complaints, and testimony of both the victim

and defendant. The Court seemed to go to great lengths not to reach *Silva-Trevino*, leading many to wonder how the Court will ultimately deal with this case.

A note from Mr. Palmeira's counsel: In addition to this appeal, Mr. Palmeira had filed a motion for new trial in the district court, which was on appeal after the motion judge denied it. Shortly after the First Circuit's decision, the Massachusetts Appeals Court remanded Mr. Palmeira's motion back to the District Court for further consideration. See *Commonwealth v. Palmeira*, 2012 Mass. App. Unpub. LEXIS 721 (June 1, 2012), also discussed below. Mr. Palmeira remains in ICE custody to date, but there is hope that the BIA will reopen his case so that he can proceed with his application for cancellation of removal.

From the Board of Immigration Appeals:

Matter of Diaz-Garcia, 25 I&N Dec. 794 (BIA, May 14, 2012).

Mr. Diaz-Garcia, a long-time permanent resident, was convicted in Arkansas as an accomplice to robbery and residential burglary. He received a suspended sentence of ten years. An Immigration Judge found that he was deportable as one convicted of an aggravated felony, and he was ordered removed. While his direct appeal was pending with the Board of Immigration Appeals, the Department of Homeland Security unlawfully deported Mr. Diaz-Garcia, who had been in ICE custody. (Immigrants have a right to remain in the U.S. until their appeals with the BIA have been decided). After the deportation, DHS argued that the BIA no longer had jurisdiction to hear the appeal, as Mr. Diaz-Garcia had departed from the U.S. (even though the "departure" had occurred due to a DHS error).

The BIA held that it did indeed have jurisdiction to hear the appeal because Mr. Diaz-Garcia's departure from the U.S. was due to an unlawful deportation. It noted that there was a public interest in preventing immigrants from unlawful deportation. However, it denied his appeal, finding that one who is an accomplice in an aggravated felony offense has likewise been convicted of an aggravated felony. Mr. Diaz-Garcia's offenses constituted aggravated felonies under the theft offense and crime of violence categories, both of which require a term of imprisonment of at least one year.

Practice note: It is important to note that while the BIA had jurisdiction to hear this appeal, it does not have jurisdiction over cases where it has already issued a final removal order, the immigrant files a motion to reopen those proceedings, and in the meantime, he is deported. (This is true in the First Circuit; other circuits have rejected the regulation that takes away BIA jurisdiction under these circumstances). The immigrant is only allowed to stay in the U.S. as long as his direct appeal is still pending with the BIA. Deportation is not stayed due to the filing of a petition for review with the First Circuit, open criminal charges, or filing for collateral review of a criminal conviction.

Unpublished Case from the Massachusetts Appeals Court:

Commonwealth v. Palmeira, 2012 Mass. App. Unpub. LEXIS 721 (June 1, 2012).

Mr. Palmeira moved to vacate his 2006 admission to sufficient facts on charges of violation of an abuse prevention order, breaking and entering with intent to commit a misdemeanor, and malicious destruction of property over \$250. His motion was denied by the district court, but the Massachusetts Appeals Court decided to remand the motion to the district court. The Appeals Court stated that there were several issues raised in the motion that indicate that justice may not have been done. These include the question of whether Mr. Palmeira was entitled to appointed counsel and whether Mr. Palmeira's trial counsel incorrectly advised him about the immigration consequences he faced upon conviction for these offenses. The court also remanded as to the issue of whether the immigration warnings under G.L. c. 278, §29D were deficient, and the fact that the motion judge did not have an affidavit from trial judge regarding his common plea colloquy practice. As to this last point, it should be noted that after the 2004 amendments to G.L. c. 278, §29D, reconstruction of the record is not permitted, so an affidavit from the trial judge should not be permitted.