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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys
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From the Board of Immigration Appeals:

Matter of Guerrero, 25 I&N Dec. 631 (BIA, Nov. 9, 2011)

This case deals with the meaning of "crime of violence," which is a category of aggravated felonies. Solicitation to commit a crime of violence is itself a crime of violence under 18 U.S.C. §16(b), and with a term of imprisonment of at least one year, it becomes an aggravated felony. (Section 16(b) requires that an offense involve a "substantial risk" that physical force against a person or the property of another will be used in the course of commission of the offense). In this case, the respondent was convicted of the Rhode Island offense of criminal solicitation, in which he was charged with soliciting someone else to commit the crime of assault with a dangerous weapon. He was sentenced to ten years of imprisonment with two years to serve. The BIA held that this offense qualified as a crime of violence because the underlying offense of assault with a dangerous weapon is a crime of violence. Thus, given the sentence that this defendant received, he was properly charged in Immigration Court as an aggravated felon.

Practice Note: This case is a good example of the broad reach of the "crime of violence" category of aggravated felonies. The offense of solicitation itself does not involve physical force; indeed, the end crime does not actually have to occur for the offense of solicitation to be complete. Rather, the BIA looks at the all of the potential criminal conduct at issue, noting that the risk of force begins at the solicitation stage of the conduct.

Matter of Islam, 25 I&N Dec. 637 (BIA, Nov. 18, 2011)

This case primarily deals with the meaning of "single scheme." An immigrant who was admitted to the U.S. more than five years ago becomes removable if convicted of two or more crimes of moral turpitude not occurring in a single scheme. In this case, the respondent was convicted in separate counties of possession of a stolen credit card and forgery. Both offenses occurred in New York State. The convictions stemmed from an incident in which he purchased goods with stolen credit cards five times during the same day at stores in two different counties.

The respondent argued that the offenses occurred in a single scheme; thus, they did not make him removable. The BIA disagreed, following its 1992 precedent case on this matter, *Matter of Adetiba*. It stated that acts occur in a "single scheme" when they were performed "in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct." A notable example is when someone breaks into a building with intent to commit larceny, and in connection with that act, also commits an assault with a deadly weapon. The BIA would consider those offenses to have occurred in a single scheme.

On the contrary, crimes do not occur in a single scheme when there is an interruption in the events that "would allow the participant to disassociate himself from his enterprise and reflect on what he has done." The BIA can look at any "relevant" evidence in determining if offenses occurred in a single scheme; it is not limited to only the record of conviction.

Notably, although the case should have been controlled by case law of the U.S. Court of Appeals for the Second Circuit, the BIA stated that it was instead following its own precedent, citing to the *Chevron* and *Brand X* cases for the proposition that Circuit Courts must defer to administrative interpretations of ambiguous statutes.

Finally, although the respondent was eligible for immigration relief, that relief was denied and he was ordered deported simply because his application for cancellation of removal was not timely.

Practice Note: For the criminal practitioner, this case is mostly useful as an explanation of the meaning of "single scheme." It is important to understand that this phrase has a very narrow meaning, and offenses charged together or occurring on the same day can still be considered separate offenses so as to make a client removable.

On a broader level, this case is a good example of the expansive power the BIA believes it has. It has held that for certain categories of offenses it can look at any document or other report on a crime, regardless of its fundamental credibility, in determining deportability. It also has held that it can ignore published federal case law, which is supposed to be controlling in the particular jurisdiction in which this case occurred, in favor of its own precedents whenever it finds the controlling statute to be ambiguous.

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

Gonzalez-Ruano v. Holder, No. 11-1138, 2011 U.S. App. LEXIS 22027 (1st Cir., Oct. 31, 2011)

An immigrant was in removal proceedings and applied for a type of immigration relief called special rule cancellation of removal. As part of his application, he was required to reveal his criminal history, which included three Massachusetts convictions, two for domestic assault and battery and one for willful and malicious destruction of property. After he did that, Immigration and Customs Enforcement (ICE) amended the charges against him to include the charge that he was removable due to the criminal history that he had provided to the Immigration Court. His application was later denied due in large part to his criminal history. Notably, the BIA held that the Massachusetts offense of willful and malicious destruction of property was categorically a crime involving moral turpitude, which is a ground of removability.

The First Circuit upheld the decision, noting that ICE is allowed to amend its charging document at any time during removal proceedings.

Practice note: Many immigrants and their attorneys are under the mistaken assumption that if an immigration charging document does not contain particular criminal offenses, then those offenses cannot be used as a basis for removal. This often arises in the context of a motion to vacate, where a practitioner believes that if he can vacate the offenses listed on the charging document, the immigrant cannot be deported, even though he has several other offenses on his record that independently make him removable. This case emphasizes that ICE is free to bring additional charges at any time during removal proceedings, which can include additional offenses on a client's record.

Matos-Santana v. Holder, No. 10-2373, 2011 U.S. App. LEXIS 22098 (1st Cir., Nov. 2, 2011).

The petitioner, who had long been deported, appealed a decision of the BIA denying his motion to reopen his removal proceedings based on *Padilla v. Kentucky*. He had asked the BIA to reopen his case to allow him to file a motion to vacate a New York conviction for auto stripping. The BIA held that it lacked jurisdiction to hear the motion to reopen because the petitioner had already been deported from the U.S. Furthermore, it held that the criminal court was the appropriate venue to raise a *Padilla* claim, and that until that court allowed a motion to vacate, the conviction remained valid for immigration purposes. The First Circuit affirmed that decision.

Practice note: The case demonstrates the many hurdles faced by clients who have already been deported from the U.S. Until a client is able to vacate a criminal conviction, his removal order remains valid. However, even if a client is successful in vacating the criminal case that caused his deportation, the BIA still cannot reopen the removal proceedings because it loses jurisdiction over the case upon the immigrant's deportation from the U.S.