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Immigration Case Notes for Massachusetts Criminal Defense Attorneys May and June 2015

U.S. Supreme Court

Johnson v. United States, No. 13-7120, 2015 U.S. LEXIS 4251, 576 U.S. ___ (June 26, 2015)

This decision, striking down the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA) as void for vagueness, may impact the definition of "crime of violence" under immigration law.

The ACCA provides for a sentencing enhancement for those who have unlawfully possessed a firearm if they have prior convictions for "violent felonies." Violent felony is defined as:

> any crime punishable by imprisonment for a term exceeding one year . . . that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). Over the years, the Supreme Court has tried to create a method to determine whether a particular crime fits into the last clause of subsection (ii). Most recently, the Court instructed judges to determine whether the "ordinary case" under a particular criminal statute presents the necessary risk, *James v. United States*, 550 U.S. 192 (2007), and if so, is the offense sufficiently similar to the exemplar offenses listed in subsection (ii), *Begay v. United States*, 553 U.S. 137 (2008).

ACCA Residual Clause is Void for Vagueness

The Court found this last clause unconstitutionally vague for two reasons. First, it is unclear how a judge should estimate the risk posed by a particular criminal statute. Justice Scalia, writing for the majority, observed: "Critically, picturing the criminal's behavior is not enough; . . . assessing

the 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." Such analysis is "speculative" and "detached from statutory elements." Second, it is unclear "how much risk it takes for a crime to qualify as a violent felony." Responding to criticism from the dissent, Scalia assured his audience that this opinion should not raise questions about all federal and state criminal provisions that require some probabilistic analysis. Most of those provisions do not include a confusing list of examples and, most importantly, most do not require examining an "imaginary ideal" version of a crime.

Implications for Immigration Law

This analysis may have significant implications for immigration law, because of similar language and similar analysis with respect to the definition of "crime of violence" in 18 U.S.C. § 16. The definition of crime of violence is implicated in two grounds of deportability: A "crime of violence" with a sentence of imprisonment of one year or more, suspended or imposed, is an aggravated felony, 8 U.S.C. § 1101(a)(43)(F); a "crime of violence" against someone protected by domestic violence laws is a domestic violence offense, 8 U.S.C. § 1227(a)(2)(E)(i).

"Crime of violence" is defined as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, *by its nature, involves a substantial risk that physical force* against the person or property of another *may be used* in the course of committing the offense.

18 U.S.C. § 16 (emphasis added). Though the language is not identical to the residual clause in the ACCA "violent felony" definition, § 16(b) involves a very similar probabilistic analysis. So much so that the Board of Immigration Appeals recently confirmed that immigration judges should employ the same "ordinary case" analysis set forth in *James* (and now rejected in *Johnson*) when determining whether a particular offense satisfies § 16(b). *Matter of Francisco Alonzo*, 26 I&N Dec. 594 (BIA 2015) (see discussion below). Because § 16(b) requires similar analysis of an idealized crime, rather than actual conduct, there are strong arguments that § 16(b) is similarly unconstitutionally void.

Practice Tip

Unfortunately, unless and until there is a successful challenge to § 16(b), criminal defense counsel must continue to analyze all potential crimes of violence under both § 16(a) and § 16(b). Immigration counsel, however, should argue that § 16(b) is unconstitutionally vague and therefore should not form the basis of a removal order. For a more thorough analysis of the decision and suggested arguments for immigration practitioners, see the *Johnson* practice advisory from the National Immigration Project, available at www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Johnson_and_COV_07-06-2015.pdf.

U.S. Court of Appeals for the First Circuit

Hinds v. Lynch, No. 13-2129, 2015 U.S. App. LEXIS 10695 (1st Cir. June 24, 2015)

The First Circuit rejected petitioner's argument that the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), had altered the law holding that removal is non-punitive even for those removed as a result of criminal convictions. Petitioner argued that the Eighth Amendment requires a proportionality analysis when determining if deportation is an appropriate "penalty" following a criminal conviction. Despite language in *Padilla* that deportation has become "an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes," the First Circuit concluded that the Supreme Court has not changed the law regarding the civil nature of removal. Instead, "removal continues to operate simply as 'a refusal by the government to harbor persons whom it does not want,' not as a punishment within the meaning of the Constitution intended to acutely sanction a noncitizen for his underlying criminal conviction."

In so holding, the appeals court made the following observations:

- "The mere fact that a criminal conviction triggers a consequence has never been the operative test to determine whether that consequence is punitive or otherwise implicates . . . any [criminal] constitutional protection."
- In *Chaidez v. United States*, 133 S. Ct. (2013), when considering whether *Padilla* created a new rule, the Court identified deportation as a "collateral" and "non-criminal" consequence.
- To treat deportation as a criminal penalty would:
    - "[G]ut Congress' entire removal scheme," by barring removal under the double jeopardy clause (assuming the noncitizen had already received a sentence).
    - Create an "illogical" result where noncitizens convicted of crimes would receive a "benefit" (proportionality review) that would not apply to noncitizens removed for other reasons.
    - Lead to "dramatic separation of powers consequences" where courts are engaging in case-by-case proportionality analysis beyond what has been authorized by Congress.

Board of Immigration Appeals

Matter of Francisco-Alonzo, 26 I. & N. Dec. 594 (BIA 2015)

At issue in this case was whether the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), has changed the way in which immigration courts must determine whether an offense is a crime of violence under 18 U.S.C. § 16(b).[1] The Immigration Judge (IJ) concluded that Francisco-Alonzo's Florida conviction for felony battery was not a crime of violence under § 16(b), because the "least culpable conduct"[2] punishable under the statute did not involve "a

[1] As discussed above, the definition of crime of violence is implicated in two grounds of deportability: A "crime of violence" with a sentence of imprisonment of one year or more, suspended or imposed, is an aggravated felony, 8 U.S.C. § 1101(a)(43)(F); a "crime of violence" against someone protected by domestic violence laws is a domestic violence offense, 8 U.S.C. § 1227(a)(2)(E)(i).

[2] The categorical approach, as elaborated upon in *Moncrieffe*, requires courts to compare the elements of a criminal statute to the elements of the ground of removal to determine whether the least culpable conduct under the criminal statute matches the ground of removal. So long as there is a realistic probability that a person would be prosecuted for such minimum conduct, if the

substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Board of Immigration Appeals (BIA) reversed, concluding that the "least culpable conduct" analysis from *Moncrieffe* did not apply to § 16(b). Instead, § 16(b) is "inherently probabilistic" and so immigration courts must determine whether in the "ordinary case" punishable under the statute there is a substantial risk of force. In doing so, the BIA adopted the analysis from the Supreme Court's decision in *James v. United States*, 550 U.S. 192 (2007) interpreting the residual clause of the "violent felony" definition in the ACCA. Note that the First Circuit has equated the "ordinary case" with the "realistic probability" analysis in *Moncrieffe*, treating them as one in the same. *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014).

As discussed above, subsequent to the BIA's decision, the Supreme Court overruled *James* and concluded that the residual clause is void for vagueness. *Johnson v. United States***,** No. 13-7120, 2015 U.S. LEXIS 4251, 576 U.S. ___ (June 26, 2015). Johnson therefore arguably abrogates *Francisco-Alonzo* and the "ordinary case" test.

Practice Tip

As is evident from the discussion above, criminal defense counsel should consult with an immigration expert or the IIU when evaluating an offense that may be considered a crime of violence.

Immigration attorneys should consider arguing in removal proceedings (1) that § 16(b) is void for vagueness and (2) in the alternative, *Fish* controls the analysis in the First Circuit. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 478 (BIA 2015) (governing federal circuit law controls on pure questions of law).

Matter of J-H-J, 26 I. & N. Dec. 563 (BIA 2015)

The Board of Immigration Appeals (BIA) reconsidered the eligibility requirements for certain lawful permanent residents (LPR – green card holders) to waive criminal grounds of inadmissibility under 8 U.S.C. § 1182(h) (commonly referred to as a 212(h) waiver, after the corresponding provision of the Immigration and Nationality Act). The 212(h) waiver allows a noncitizen to waive a range of criminal grounds of inadmissibility, including certain aggravated felony convictions (significantly, it does not waive any controlled substance grounds, except for a single offense involving possession of 30 grams or less of marijuana for personal use).

However, for a noncitizen "who has been previously admitted to the United States as an alien lawfully admitted for permanent resident residence," these LPRs must not be convicted of *any* aggravated felony to be eligible for a 212(h) waiver. The BIA previously held that a noncitizen who became an LPR after entering the U.S. in some other nonimmigrant status (e.g. a noncitizen who entered the U.S. on a student visa, married a U.S. citizen, and later became an LPR) was subject to these more stringent requirements for a 212(h) waiver. The vast majority of federal circuit courts to have considered the issue disagreed and concluded that a noncitizen who becomes an LPR after entering the U.S. in some other nonimmigrant status is not subject to the more stringent 212(h) waiver requirements. With virtually no reasoning, the Board reversed itself and adopted the holding of the federal circuit courts.

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elements do not match, a noncitizen convicted under that statute is not subject to that ground of removal, regardless of his actual conduct.

Practice Tip

While it is almost always true that an LPR who is convicted of an aggravated felony would have no available defense to deportation, it is possible that this more generous interpretation of the 212(h) waiver would provide a client with a defense to deportation despite an aggravated felony conviction (unless it is a controlled substance aggravated felony or murder). Defense counsel should consult with the IIU or an immigration expert on the availability of 212(h).