



The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys **October 2015**

U.S. Court of Appeals for the First Circuit

Sauceda v. Lynch, 804 F.3d 101 (1st Cir. 2015)

This case reveals the importance of burden of proof in deportation proceedings. Criminal convictions can make a person deportable, but they may also bar a noncitizen from an otherwise available discretionary defense to deportation. The burden is on the Department of Homeland Security (DHS) to establish that a person is deportable, but the burden is on the noncitizen to show eligibility for a discretionary defense to deportation.

In this case, the question presented was whether a conviction for assault under Maine statute 17-A, § 207(1)(A) barred Mr. Saucedo from a discretionary defense to deportation called cancellation of removal. *See* 8 U.S.C. § 1229b(b). A noncitizen who is not a lawful permanent resident is ineligible for cancellation of removal if they have a conviction for a crime of domestic violence. The Maine statute covered different crimes, some of which qualified as crimes of domestic violence and some of which did not.¹ Mr. Saucedo's court file did not establish, however, which type of offense formed the basis of Mr. Saucedo's conviction. The First Circuit concluded that because the record was inconclusive, Mr. Saucedo had failed to establish his eligibility for cancellation.

The First Circuit's decision leads to the strange result that the same conviction could constitute a crime of domestic violence in one immigration context (relief from removal) and not a crime of domestic violence in another immigration context (determining deportability).

The First Circuit assumes, without analysis, that an offense can be a crime of domestic violence even where the domestic nature is not an element of the crime.

¹ The decision assumes without analysis that this statute is divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013).

Practice Tip

For defense counsel, when a criminal statute is “divisible” in that it defines multiple crimes, some of which are deportable or inadmissible offenses (removable offenses) and some of which are not, it is important to make sure the court record is clear that your client was convicted of a non-removable offense. For example, M.G.L. ch. 269, § 10(h)(1) punishes possession of a firearm without a firearm identification card, which falls within a ground of deportability, and possession of ammunition without an FID card, which does not fall within a ground of deportability.

Immigration counsel should continue to preserve this issue regarding burden of proof as it is likely to eventually appear before the Supreme Court. *See* “Records of Conviction and the Burden of Proof,” Immigrant Defense Project, <http://immigrantdefenseproject.org/litigation/criminal-bars-and-relief-from-removal>.

Supreme Judicial Court

Commonwealth v. Lavrinenko, 473 Mass. 42 (2015)

This decision provides further clarification of defense attorney duties to noncitizen clients. The Court explained that defense counsel must make a “reasonable inquiry” into the defendant’s immigration status, including whether the defendant was admitted into this country as a refugee or has been granted asylum. The Court clarified that it is not the client’s responsibility to tell defense counsel that she is a noncitizen – defense counsel must affirmatively investigate whether the client is a U.S. citizen, and if not, determine the client’s specific immigration status. With respect to the advice that must be given, the Court recognized that defense counsel may not be experts in immigration law, but expects attorneys “either to research the applicable immigration law or to seek guidance from an attorney knowledgeable in immigration law.” Defense counsel does not meet her obligation by simply reading the waiver of rights form and must inform a client of the substantial risk of any immigration consequence, including the denial of a discretionary defense to deportation, even where the consequence is not certain (in Mr. Lavrinenko’s case, he faced a substantial risk of being denied adjustment of status to lawful permanent resident).

With respect to establishing prejudice in any post-conviction motion, the Court held that a defendant’s refugee or asylee status constitutes a special circumstance which is entitled to “particularly substantial weight” in evaluating the “totality of the circumstances” relevant to the finding of prejudice. Refugee or asylee status, “in essence, is a ‘special’ special circumstance.”

For more information on this decision, please see the IIU practice advisory, available at <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/08/Lavrinenko-advisory.doc>

Massachusetts Appeals Court

Commonwealth v. Henry, 88 Mass. App. Ct. 446 (Oct. 2015)

Mr. Henry appealed the denial of motions to vacate two separate pleas – a 2004 plea to violating a restraining order and a 2005 plea to violating a restraining order and witness intimidation – on the grounds that defense counsel in both cases failed to give him accurate immigration advice. The appeals court reversed both denials and remanded both motions for further factual findings and, if necessary, additional evidentiary hearings.

Mr. Henry was a lawful permanent resident (LPR – or “green card” holder) at the time of both pleas. In 2010, however, he was placed in removal proceedings based on these convictions and was deported to his native Jamaica. His family members, including three U.S. citizen children, remain in the United States. Following his removal, Mr. Henry submitted motions to vacate both sets of convictions. In support of both motions Mr. Henry submitted his own affidavit, stating that neither counsel advised him that he could face deportation due to these charges and asserting that the complaining witness in both charges had lied. Mr. Henry also submitted an affidavit from the complaining witness averring that she lied to police regarding Mr. Henry’s conduct. After some delay,² Mr. Henry also submitted affidavits from defense counsel in both cases, in which counsel reported that they did not recall Mr. Henry’s cases. At an evidentiary hearing, plea counsel in the 2004 case reported that his standard practice at the time, whenever immigration appeared to be an issue, was to advise the client to speak to an immigration attorney. The plea judge on the 2005 case denied the motion on the grounds that the Commonwealth had a strong case against Mr. Henry and the judge did not find the complaining witness’ affidavit credible. The plea judge in the 2004 case denied the motion on the grounds that the immigration consequences of a conviction for violating a restraining order were not clear and so there was no deficient performance.

In reversing both denials, the appeals court began by finding that it was clear under the plain terms of the immigration statute in effect since 1996 that a violation of a restraining order would make a noncitizen deportable. *See* 8 U.S.C. § 1227(a)(2)(E) (violation of domestic “protection orders” is ground of removal). Therefore, defense counsel was obligated to advise Mr. Henry that an admission to sufficient facts followed by a continuance without a finding or a plea of guilty would make Mr. Henry subject to presumptively mandatory deportation unless eligible for and granted one of a few limited defenses to deportation. Defense counsel cannot meet his obligations by simply advising a client to consult with an immigration attorney. The 2004 plea judge therefore erred when he found that the immigration consequences were unclear. On remand, both plea judges should make specific factual findings as to whether Mr. Henry was given the necessary and accurate advice. Significantly, the appeals court did not explore the immigration consequences of the 2005 witness intimidation conviction, but concluded that it too must be included in the vacatur of the denial because it was “inextricably entwined” with the simultaneous restraining order plea.

On the issue of prejudice, the appeals court concluded that while the record below was poorly developed on the question of special circumstances, remand was appropriate in light of Mr.

² Mr. Henry’s motions were initially both denied on the grounds that the holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010) could not be applied retroactively. *See Chaidez v. United States*, 133 S. Ct. 1103 (2013). Following the Supreme Judicial Court’s decision in *Commonwealth v. Sylvain*, 466 Mass. 422 (2013), holding *Padilla* to be retroactive in Massachusetts, both trial courts reconsidered the initial denials.

Henry's family ties to the United States and the failure of either plea judge to make any findings regarding special circumstances. In particular, the court concluded that Mr. Henry might be able to establish prejudice if he could show substantial relationships with his children and grandchildren in the United States. These facts were not developed in the record.

Commonwealth v. Rua, No. 14-P-1623, 2015 Mass. App. Unpub. LEXIS 980 (Oct. 19, 2015)

At issue in this case is how to win a *Padilla* motion where the defendant lacked any lawful status and therefore was deportable independent of any criminal conviction. Mr. Rua was without lawful status when he pled guilty to larceny from a person with eleven months of probation. He was later ordered removed and appealed that order up to the U.S. Court of Appeals of the First Circuit which affirmed the removal order stating, Mr. Rua was "both removable and ineligible for relief from removal on multiple grounds, including particularly his conviction and sentence for larceny."

There appears no dispute that his defense counsel erroneously advised him that such a plea would have no impact on his immigration status. Both the motion judge and the appeals court found that Mr. Rua failed to establish prejudice, largely because Mr. Rua lacked lawful status and because he accumulated several other convictions after this plea to larceny from a person. It is unclear from the opinion how, precisely, the larceny conviction impacted Mr. Rua's immigration circumstances.

Practice Tip

It is true that someone who lacks immigration status is already subject to removal. That person may, however, be eligible to apply for lawful status. For example, someone who entered on a tourist visa and remained illegally, but married a U.S. citizen, would be eligible to apply for lawful permanent resident status (a green card) based on that marriage. That person must be admissible or eligible for and granted a waiver of inadmissibility to be granted permanent resident status. A conviction for a crime involving moral turpitude (such as larceny from a person) would make that noncitizen inadmissible and therefore could bar that person from obtaining a green card. The failure to advise that noncitizen of this consequence would constitute deficient performance that should support a successful motion to vacate.

In any motion to vacate it is important to articulate what the immigration consequences of the conviction are and therefore what advice should have been given. This is especially true for a client who was already deportable at the time of the plea, but faced some added immigration consequence due to the plea.