



The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys **April & May 2016**

U.S. Court of Appeals for the First Circuit

Sauceda v. Lynch, No. 14-2042, 2016 U.S. App. LEXIS 7352 (1st Cir. Apr. 22, 2016)

In an unusual move, the First Circuit reversed itself following a petition for rehearing, and issued a new decision addressing the impact of burden of proof when determining the immigration consequences of criminal convictions. 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. There was no dispute that all available court records had been produced to the immigration judge.

In its initial October 2015 decision, 804 F.3d 101 (1st Cir. 2015), the First Circuit concluded that because the record was inconclusive, Mr. Saucedo had failed to establish his eligibility for cancellation of removal. See IIU Case Notes November 2015

(<https://www.evernote.com/pub/immigrationimpactunit/casenotes#st=p&n=7803b867-53de-480e-b22d-05c2377bd9c5>).

After a successful petition for rehearing by Mr. Saucedo, the First Circuit reversed itself. The court concluded that under the U.S. Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), reviewing courts are bound to assume that a conviction is based on the least of

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

the acts criminalized by a statute, unless the statute is divisible and the record of conviction proves that the conviction was for a more serious offense. In short, where all available court records are produced, the question of whether a particular conviction matches a particular removal ground or bar to relief is unaffected by the burden of proof. The court applies the categorical approach to determine whether the noncitizen has been “convicted of” an offense that bars him from a defense to deportation. If a divisible statute includes an offense that does not match the criminal bar and the criminal record is inconclusive as to which offense served as the basis for the noncitizen’s conviction, the noncitizen is not barred from that defense to deportation.

Because all court documents were produced in this case, the court declined to address the question of who – the government or the noncitizen – has the burden of producing those court documents when the noncitizen is applying for relief from removal.

Practice Tip

The safest approach for defense counsel representing a noncitizen charged under a statute that covers offenses that will and will not bar a defense to deportation is to ensure that the record of conviction establishes that the conviction was for the non-barring offense and to provide the noncitizen client with a certified copy of that record. However, when a plea to a non-barring offense is not possible, an ambiguous record may assist a noncitizen client. Counsel should consult with the IIU or an immigration attorney before resolving a case in such a manner.

Reid v. Donelan, Nos. 14-1270, 14-1803, 14-1823, 2016 U.S. App. LEXIS 6713 (1st Cir. Apr. 13, 2016)

Under 8 U.S.C. § 1226(c), noncitizens convicted of certain crimes who immigration authorities detain upon their release from criminal custody must be held for the length of their removal proceedings. There is no individualized determination of flight risk or danger to the community under this provision – detention is mandatory. In *Demore v. Kim*, 538 U.S. 510 (2003), the U.S. Supreme Court upheld the constitutionality of this statute in response to a facial challenge. Mr. Reid, the named plaintiff in this class action, challenged his own prolonged detention under § 1226(c), and asked the court to create a presumption that any detention under § 1226(c) beyond six months is unreasonable. The district court ordered his release and declared that mandatory detention beyond six months was presumptively unreasonable and therefore required an individualized bond hearing. The government appealed these rulings.

On appeal, the First Circuit answered two questions left open by *Demore*: (1) Does due process set a reasonable limit on the length of mandatory detention under § 1226(c)? and (2) Is it appropriate to set a bright line period after which detention under § 1226(c) is presumptively unreasonable? The First Circuit concluded that the length of detention under § 1226(c) must be reasonable, but that the reasonableness determination must be made on a case-by-case basis. A bright line rule is not appropriate. The court then laid out a nonexhaustive list of factors that could be considered by a reviewing court when determining if mandatory detention had become unreasonable: “the total length of the detention; the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); the period of the detention compared to the criminal sentence; the promptness (or delay) of the immigration authorities or the detainee; and the likelihood that the proceedings will culminate in a final removal order.” The court made

clear that a noncitizen's pursuit of relief from removal and the appellate process must not be considered "dilatatory" conduct when considering the reasonableness of prolonged detention. The remedy for unreasonable detention is not immediate release, but a bond hearing.

In so holding, the appeals court rejected the decision of the district court judge setting a six month bright line rule and granting bond hearings to a class of noncitizens held under § 1226(c) for more than six months. The First Circuit recognized the many practical problems with a case-by-case review through habeas, including the limited resources of noncitizens acting without counsel and the harm that prolonged detention causes both to the detainee and to his or her family. The appeals court encouraged the government to arrange a system for reasonableness review that would not require individual federal habeas claims.

Nevertheless, the appeals court affirmed the district court's determination that the named plaintiff's prolonged detention was unreasonable. At the time of the district court's decision, Reid had been held by immigration authorities for fourteen months and, after a successful appeal to the Board of Immigration Appeals, was facing an additional round of appeals that would further prolong his detention.

Massachusetts Supreme Judicial Court

Commonwealth v. Mercado, 474 Mass. 80 (2016) (decided April 6, 2016; corrected May 6, 2016)

The Supreme Judicial Court re-visited the retroactivity date of *Padilla v. Kentucky*, which the Court first set at April 1, 1997,² and concluded that at least some noncitizens may bring claims under *Padilla* based on convictions that occurred on or after April 24, 1996. In 1996, Congress passed two laws - the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigration Act ("IIRIRA") - that significantly expanded the number of noncitizens subject to removal due to criminal convictions and limited the possible defenses against removal. AEDPA became effective April 24, 1996 and IIRIRA became effective April 1, 1997. In particular, AEDPA eliminated a previously available defense to deportation for lawful permanent residents (commonly called "green card" holders) who were deportable due to convictions for (a) any aggravated felony conviction (regardless of the sentence), (b) any controlled substance conviction, (c) any firearms offense, (d) certain national security violations, or (e) two convictions for a crime involving moral turpitude ("CIMT"), not arising from a single scheme, for which a maximum sentence of imprisonment of one year or more may be imposed. The SJC concluded that for noncitizens barred from relief by AEDPA, it was AEDPA and not IIRIRA that made their removal virtually inevitable and it is therefore appropriate to apply *Padilla* to those convictions that occurred on or after the AEDPA effective date.

The SJC also rejected the Commonwealth's argument that the trial court, which denied Mr. Mercado's new trial motion without any findings, necessarily denied Mr. Mercado's motion on the merits, rather than on the legal question of retroactivity. The SJC remanded the case to the trial court to make findings consistent with the court's opinion.

² *Commonwealth v. Clarke*, 460 Mass. 30, 31 (2011); *Commonwealth v. Sylvain*, 466 Mass. 422, 424 (2013).

Practice Tip

Post-conviction counsel reviewing a conviction obtained on or after April 24, 1996 and before April 1, 1996, should review the *Mercado* decision when evaluating whether there is a viable new trial motion under *Padilla*.

Massachusetts Appeals Court

Commonwealth v. Ayala, No. 15-P-866, 2016 Mass. App. Unpub. LEXIS 458 (Apr. 28, 2016)

In this case, the appeals court rejected the Commonwealth's appeal of the trial court's grant following a non-evidentiary hearing of the defendant's motion to withdraw his plea under *Padilla v. Kentucky*. Mr. Ayala was initially charged with trafficking in heroin, but resolved the case on the reduced charge of possession with intent to distribute heroin. He admitted to sufficient facts and the trial court continued the case without a finding for three years. In his motion, the defendant argued – and the Commonwealth conceded – that his defense counsel did not adequately warn him of the immigration consequences of his plea. He further argued that had he known of the consequences, he would not have accepted the plea. The trial court granted Mr. Ayala's motion and the Commonwealth appealed.

On appeal, the Commonwealth argued that the trial court had failed to make the necessary finding of prejudice. The appeals court concluded that while the trial court had not made explicit findings with respect to prejudice, it was clear that the court had found that Mr. Ayala had special circumstances that would have made rejection of the plea reasonable. Specifically, the trial court credited the affidavits of the defendant and plea counsel that at the time of his plea Mr. Ayala had lived in the United States for nine years, was in a serious relationship with the mother of his child (now his wife) and provided for his autistic son. The appeals court quoted the judge – “[w]hen you've lived in the United States for a number of years, you've had a family here, you have a wife, you have a child, they're going to stay here, and you have to go back to wherever it is you came from; that tugs at the human heart strings” – and concluded that the judge had properly determined that Mr. Ayala was prejudiced by defense counsel's incorrect advice and that this conclusion was not an abuse of discretion.

Carbajal v. Zavala, No. 16-P-79, 2016 Mass. App. Unpub. LEXIS 451 (Mass. App. Ct. 2016)

This decision results from an expedited appeal of a Probate and Family Court judge decision denying requested findings necessary for the petitioner, a noncitizen child from Honduras, to obtain Special Immigrant Juvenile (SIJ) status. Predicate findings from a juvenile court that a child has been abused, abandoned or neglected by one or both parents can provide a path to lawful immigration status for that child. *See* A Practice Advisory on *Recinos v. Escobar*: Special Immigrant Juvenile Status in Probate and Juvenile Courts, available at <https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/08/Recinos-practice-advisory-1.pdf>. In this case, the judge reviewed affidavits from the child and her mother documenting abuse by the father and concluded that she had failed to establish that “reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or similar basis found under State law.”

The appeals court reversed and, because the matter was time-sensitive and the judge's findings were based entirely on documentary evidence, took the unusual step of addressing the matter on the merits and making the necessary predicate findings itself.

Commonwealth v. Son Nguyen, 89 Mass. App. Ct. 904 (May 17, 2016)

The defendant, Son Nguyen, was born in Vietnam, but had come to the United States as a lawful permanent resident more than twenty years ago. He was charged with multiple counts of shoplifting and accepted a CWOFF on those charges. Under 8 U.S.C. §1227(a)(2)(A)(ii), his CWOFFs made him deportable. Mr. Nguyen sought to vacate those cases based on a claim of ineffective assistance of counsel under Padilla v. Kentucky, 559 U.S. 356 (2010). His motion was denied. The Appeals Court upheld the denial concluding that because of a repatriation agreement between the U.S. and Vietnam which precludes the physical removal to Vietnam of individuals who entered the U.S. prior to July 1995, Mr. Nguyen could not show that he would be deported based on his convictions. The Appeals Court did not address the fact that even though physical removal is not possible, Mr. Nguyen can still be placed in removal proceedings, held in ICE detention throughout those proceedings and can have his green card revoked.

In so ruling, the Appeals Court makes several additional mistakes. First, the Appeals Court suggested that unless a person is subject to presumptively mandatory deportation, the information provided in the waiver of rights form constitutes sufficient advice. Commonwealth v. Nguyen, 89 Mass. App. Ct. 904, 904 (2016). However, the SJC has repeatedly made clear that "it is not sufficient for a criminal defense attorney, as a matter of practice, merely to give the same warning that the defendant will receive from the judge during the plea colloquy required by G. L. c. 278, § 29D" no matter what the potential immigration consequence. Commonwealth v. Lavrinenko, 473 Mass. 42 (2016)(citing Clarke and DeJesus). In this instance, adequate advice would have entailed an explanation of the repatriation agreement, the possibility of removal proceedings and the possibility of having his green card taken away.

Second, in footnote 2 the court asserts that in order to show prejudice, Mr. Nguyen would have to show that he had a substantial ground of defense. However, under Commonwealth v. Clarke, a defendant is not limited to this and can also show prejudice by showing that 1) "there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time", or 2) the presence of "special circumstances" that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether or not to plead guilty." Commonwealth v. Clarke, 460 Mass. 30, 47-48 (2011).

Finally, the court assumes that because Mr. Nguyen cannot be physically removed, there is no deficient performance. They assume that because it would be incorrect to advise that Mr. Nguyen "would be deported" that proper advice was given. However, as discussed above, despite not being physically removed, there are immigration consequences that result from these convictions about which defense counsel should have advised Mr. Nguyen.

Practice Tip

Post-conviction counsel should argue, at a minimum, that this is a very narrow decision that only applies when the United States has a written repatriation agreement with another country that prevents the removal of the defendant.

Board of Immigration Appeals

Matter of Estrada, 26 I&N Dec. 749 (2016)

This case sheds further light on the question of what constitutes a “crime of domestic violence” under 8 U.S.C. §1227(a)(2)(E). Mr. Estrada was a lawful permanent resident who pled guilty to simple battery in violation of Georgia laws. The Department of Homeland Security (DHS) alleged that this was a crime of domestic violence and placed Mr. Estrada in removal proceedings on this basis.

A “crime of domestic violence” under 8 U.S.C. §1227(a)(2)(E) is defined as

“any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.”

Therefore, to be a crime of domestic violence, the offense must meet the definition of “crime of violence” under 8 U.S.C. §16 and must be domestic in nature. Mr. Estrada did not challenge the fact that simple battery in Georgia is a “crime of violence,” but instead argued that it could not be a domestic violence offense because the state statute did not require proof of the domestic relationship as an element of the crime. The Board disagreed and held that the domestic nature of an offense need not be an element of the offense, but instead may be found by a factual inquiry – referred to as the “circumstance specific approach.” Such factual inquiry can include a review of the record of conviction as well as police reports. Furthermore, the Board rejected the argument that because Georgia has a specific domestic violence statute, a simple battery should not be considered a crime of domestic violence.

Practice Tip

This case highlights the concern that a Massachusetts simple A&B conviction (and other assaultive charges) where the defendant has a “domestic” relationship with the alleged victim (defined as anyone who would qualify for protection under MGL ch. 209A), will be considered a crime of domestic violence under the immigration statute (assuming that A&B is also a crime of violence). If defense counsel is able to affirmatively indicate on the docket that it is NOT domestic, it will provide arguments for our clients that the immigration judge should not be allowed to look to other documents.

If an affirmative finding that the offense is not domestic is not possible, another option is to try to ensure that the conviction is not considered a crime of violence. If it is not a crime of violence, then it does not matter whether it is domestic. For simple A&B, counsel can make clear on the record that the plea is to reckless A&B or involved de minimis touching. For ABDW, counsel can make clear the plea is to the reckless form of ABDW. In doing so, counsel preserves the argument that the offense is not a crime of violence. Note, however, that these arguments would likely require a good immigration attorney and there is no right to appointed counsel in immigration court.

Matter of Garza-Olivares, 26 I & N Dec. 736 (2016)

Ms. Garza-Olivares was a long time lawful permanent resident who in 2014 was convicted of the federal offense of “failing to appear” in violation of 18 U.S.C. §§ 3146(a)(1) and (b)(1)(A)(ii). The Department of Homeland Security placed her in removal proceedings arguing that she had been convicted of an aggravated felony under 8 U.S.C. §1101(a)(43)(T) which covers “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years imprisonment or more may be imposed.”

Generally, to determine whether a criminal offense matches the ground of deportability alleged, the immigration courts must apply the “categorical approach.” Under the categorical approach, the elements of the state or federal criminal offense must match each element of the generic federal offense. When applying the categorical approach, immigration courts are not concerned with the defendant’s actual conduct, only with the statutory offense.

In this case, the Immigration Judge applied a strict categorical approach and concluded that the elements of the federal “failure to appear” offense were broader than the generic aggravated felony category. Therefore, the criminal conviction was not a match and Ms. Garza-Olivares had not been convicted of an aggravated felony. On appeal, the Department of Homeland Security successfully argued that a strict categorical approach was not the proper way to analyze this offense because “the limiting language of section [1101(a)(43)(T)] refers to the particular circumstances relating to an offender’s commission of a generic ‘failure to appear’ crime on a particular occasion, rather than to the elements of such an offense.”

The Board of Immigration Appeals (BIA) agreed in part and found that the aggravated felony provision had five components:

1. failure to appear
2. before a court
3. pursuant to a court order
4. to answer to or dispose of a charge of a felony
5. where the felony was one for which a sentence of 2 years’ imprisonment or more may be imposed

The Board concluded that the first two components refer to common elements of a “generic crime” which requires the application of the categorical approach. However, the final three components do not refer to formal elements of a generic offense, but instead refer to limiting characteristics of the offense that can be determined by a factual inquiry rather than a categorical analysis. This type of analysis is referred to as a “circumstance specific analysis” and allows the Immigration Judge and the Board to look at any sufficiently reliable evidence to determine whether the final three components are met. The Board remanded the case to the Immigration Judge to review the record as to the final three components.

Practice Tip

The Massachusetts “failure to appear” statute, M.G.L 276 §82A is a categorical match for the first two components of the aggravated felony definition. If the facts of a given case correspond to the final three components, then a conviction could be considered an aggravated felony.