



# The Commonwealth of Massachusetts

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## **Immigration Case Notes for Massachusetts Criminal Defense Attorneys** **November 2016**

### **U.S. Court of Appeals for the First Circuit**

*Gordon v. Lynch*, 842 F.3d 66 (1st Cir. 2016)

In 2014, the Federal District Court for the District of Massachusetts held in *Gordon v. Johnson*, 300 F.R.D. 31, 2014 WL 2120002 (D. Mass 2014), that the mandatory detention provision in the Immigration and Nationality Act, 8 U.S.C. §1226(c), applied only to persons that Department of Homeland Security (DHS) arrested immediately “when released” from criminal custody. As a form of injunctive relief, the district court ordered that all individuals arrested by ICE more than 48 hours after being released from criminal custody were entitled to a bond hearing in immigration court.

In November 2016, the First Circuit considered the government’s appeal of the district court’s order granting bond hearings to this class of noncitizens. The Court vacated the injunction that guarantees bond hearings to class members because it held that the injunction was inconsistent with prior ruling related to mandatory detention which do not envision a bright line rule about the length of custody gap before a noncitizen is entitled to a bond hearing. *See Castaneda v. Souza*, 810 F.3d 15 (1<sup>st</sup> Circuit). The case was remanded to the district court for the DHS to articulate its position on what, if anything, constitutes a reasonable custody gap under §1226(c) before a bond hearing is required. The vacature was stayed for 90 days to permit the district court to determine how to proceed on remand.

### **Board of Immigration Appeals**

*Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (2016)

The Respondent, a lawful permanent resident, was charged as being removable for two crimes involving moral turpitude (CIMT) based on multiple Arizona shoplifting convictions. Under existing Board precedent, a theft offense, such as shoplifting, only involved moral turpitude if the offense required proof of an intent to permanently deprive the owner of property. The Respondent argued and the Immigration Judge agreed, that because the definition of “deprive” under the Arizona statute included both permanent taking and a taking “for so long a time period that substantial portion of [the property’s] economic value or usefulness or enjoyment is lost,” the statute included temporary takings and was therefore not categorically a CIMT. The

Immigration Judge found that it was not a divisible statute and since the statute was overbroad, the Respondent could not be found to have been convicted of two CIMTs.

The Board acknowledged that under its own precedent, a theft offense involved moral turpitude only if the statute required the intent to permanently deprive an owner of property. However, the Board found that the distinction made in its prior cases was between permanent taking and “de minimis deprivation” which they define as “borrowing” for short term use. The Board distinguishes this from the definition used by the Arizona statute saying that although less than permanent, the taking in the Arizona statute involves property that is returned damaged or after its value or usefulness has been vitiated (i.e. where the owner’s property rights have been substantially eroded). The Board finds that such a taking is more like a permanent taking and categorically involves moral turpitude. Therefore, the Respondent’s convictions were for CIMTs and the removal order was reinstated.

**Practice Tip** – The language in this decision makes it far more difficult for immigration advocates to make the (already difficult) argument that shoplifting in Massachusetts is not a CIMT. Although the Massachusetts shoplifting statute does not use the language of “permanent” deprivation, it no longer needs that language to be considered a CIMT.

*Matter Of Obeya*, 26 I&N Dec. 856 (2016)

This decision was issued the same day as *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (2016) (see above). The Board applies its reasoning in *Diaz-Lizarraga* to a New York petite larceny statute and finds that because the statute requires proof of intent to permanently deprive or intent to “virtually permanently” deprive the owner of his property, it is a CIMT.