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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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U.S. Court of Appeals for the First Circuit

United States v. Castro-Taveras, No. 14-1879, 2016 WL 6407844, -- F.3d -- (1st Cir. 2016)

At issue in this case is whether a federal defendant may bring a claim of ineffective assistance of counsel based on affirmative misadvice regarding immigration consequences challenging a plea that occurred before the Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Chaidez v. United States*, _ U.S. _, 133 S. Ct. 1103 (2013), the Supreme Court concluded that as a matter of federal law, *Padilla* announced a "new rule" that would not apply retroactively in federal courts.[1] The question addressed in this case is whether that "new rule" includes affirmative misadvice as well as the failure to provide any advice. If the *Padilla* holding that affirmative misadvice regarding immigration consequences constituted ineffective assistance of counsel does not constitute a "new rule," then Mr. Castro-Taveras could seek retroactive application of that holding in order to attempt to vacate his federal plea.

The First Circuit concluded that the application of ineffective assistance of counsel doctrine to affirmative misadvice regarding immigration consequences is not a "new rule" and therefore could be applied retroactively to Mr. Castro-Taveras' plea. In so holding, the court first concluded that neither *Padilla* nor *Chaidez* had answered this question. The court further reviewed First Circuit law from the time of Mr. Castro-Taveras' plea in 2002 and found that while there was no case directly on point, the case law that did exist strongly suggested that the First Circuit would have applied the ineffective assistance of counsel doctrine to affirmative misadvice regarding immigration consequences. Finally, the court reviewed the case law from other jurisdictions and concluded that all the courts to consider the question held that ineffective assistance of counsel included misadvice regarding immigration consequences. Therefore "all reasonable jurists" prior to *Padilla* would have agreed and so the doctrine did not meet the definition of a "new rule" as set out in *Teague v. Lane*, 489 U.S. 288 (1989). Mr. Castro-Taveras

[1] In *Commonwealth v. Sylvain*, 466 Mass. 422 (2013), the Massachusetts Supreme Judicial Court held that *Padilla* is retroactive in Massachusetts courts as a matter of Massachusetts common law.

could benefit from the doctrine and the appeals court remanded the case to the district court for an evidentiary hearing.[2]

Practice Tip

For defense attorneys practicing in Massachusetts state courts: This case has little impact, because the SJC has already held that all holdings in *Padilla* must be applied retroactively in Massachusetts state courts. *Commonwealth v. Sylvain*, 466 Mass. 422 (2013).

For defense attorneys practicing in federal court and for immigration counsel representing clients with federal convictions: This case opens the possibility, at least within the First Circuit, of vacating convictions entered prior to the *Padilla* decision if the defendant alleges that his or her defense attorney provided incorrect advice regarding the immigration consequences of the charges.

Massachusetts Appeals Court

Commonwealth v. Lobodepina, No. 15-P-1365, 2016 WL 6138661, 60 N.E.3d 1199 (Mass. App. Ct. Oct. 21, 2016)

Mr. Lobodepina moved to vacate his admission to sufficient facts on charges of possession with intent to distribute heroin and possession with intent to distribute cocaine, arguing that the trial judge did not accurately recite the warnings required by G.L. c. 278, § 29D. In particular, the trial judge advised Mr. Lobodepina of the consequences of "a continuance without a finding," the disposition following his admission to sufficient facts, rather than the "admission to sufficient facts" as required by the statute. The court of appeals, however, affirmed the denial of his motion. The court concluded that "the error is without consequence because the deviation from the statutorily prescribed language did not omit any of the potential consequences the defendant might face by virtue of his plea" and further noted that the trial court "correctly advised the defendant that a continuance without a finding, which is the disposition resulting from his admission to sufficient facts, could subject him to deportation."

In re Guardianship of Quillay, No. 15-P-1694, 2016 WL 5956013, 90 Mass. App. Ct. 1110 (Oct. 14, 2016)

Pedro Quillay filed a petition in Probate and Family Court for guardianship of his brother, Washington Quillay, and simultaneously submitted a motion requesting that the court enter special findings necessary for Washington to obtain special immigrant juvenile (SIJ) status under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J). In support of the motion, Washington and Pedro submitted affidavits detailing the abuse and neglect that Washington suffered at the hands of his biological mother. The judge ultimately denied the request, stating, "the Court failed to find exigent circumstances to warrant entry of findings of abuse and abandonment."

[2] The First Circuit affirmed dismissal of Mr. Castro-Taveras' claim regarding the prosecutor's alleged misrepresentations regarding immigration consequences.

The court of appeals reversed, concluding that the judge applied the wrong legal standard. "Motions for special findings related to SIJ cases are evaluated under the best interests of the child standard; there is no requirement that the petitioner demonstrate exigent circumstances. See *Recinos v. Escobar*, 473 Mass. 734, 738 (2016)." The court of appeals reviewed the documentary evidence in the record (there was no evidentiary hearing) and issued the requested special findings.

Practice Tip

For more information on Special Immigrant Juvenile (SIJ) status, see the IIU practice advisory on *Recinos v. Escobar*, available at https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/08/Recinos-practice-advisory-1.pdf

Board of Immigration Appeals

Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016) ("*Silva-Trevino* III")

This third installment in the three-part *Silva-Trevino* series announces the method courts must use when determining whether a particular offense is a crime involving moral turpitude (CIMT). In April 2015, the Attorney General issued *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015) ("*Silva-Trevino* II") which vacated the decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) ("*Silva-Trevino* I"). *Silva-Trevino* I concluded that the categorical approach did not strictly apply to the CIMT analysis and permitted, in certain circumstances, looking beyond even the record of conviction to the underlying facts in order to determine whether an offense is a CIMT. *Silva-Trevino* III confirms that the categorical approach is, once again, the proper framework for making the CIMT determination. The BIA justifies the application of the categorical approach largely by the need for a uniform national framework, though the Board acknowledges the statutory language which requires that the person be "convicted of" a CIMT to be inadmissible or deportable and further the long-standing use of the categorical approach in the immigration context.

Categorical Approach and CIMTs

In very brief, the categorical approach requires a comparison of the elements of the criminal statute with the federal ground of removal, without consideration of the particular circumstances of the crime. If the minimum conduct punishable by the criminal offense – as reflected by the elements of the crime – does not match the definition of a CIMT, then the offense is not and can never be a CIMT.

- Realistic Probability

The BIA adds a wrinkle to this analysis, however, by requiring courts to determine "the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction." Therefore, even if the state offense appears to cover conduct that does not match the federal definition of a CIMT, if the reviewing court determines that there is no "realistic probability" that such conduct would actually be prosecuted by the statute, there may still be a match. What exactly satisfies the "realistic probability" analysis is consequently important and subject to much litigation.

In the First Circuit, advocates can look to *Whyte v. Lynch*, 807 F.3d 463, 469–70 (1st Cir. 2016). In that case, the court used "common sense" to conclude that under the plain terms of a Connecticut statute that there is a realistic probability the offense covered conduct that does not match the relevant federal removal ground. The fact that Mr. Whyte could not point to an actual prosecution was of no matter. The First Circuit explained:

> The absence of such a case, says the government, means that violent force is required. The problem with this argument is that while finding a case on point can be telling, not finding a case on point is much less so. This logic applies with particular force because prosecutions in Connecticut for assault have apparently not generated available records or other evidence that might allow us to infer from mere observation or survey the elements of the offense in practice. *See* Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005) (discussing the "extensive problem" of state criminal record databases lacking information regarding disposition).

Id.

- Modified Categorical Approach

The only time when the court is permitted to look beyond the statute of conviction is when that statute is "divisible." The BIA confirms that the determination of whether or not a statute is divisible is governed by the Supreme Court decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013). Therefore, a statute is only divisible if it includes distinct crimes – meaning offenses with different elements that must be found unanimously and beyond a reasonable doubt by a jury – some of which match the definition of a CIMT and some of which do not. If the statute of conviction is divisible, then the court may look to certain enumerated documents in the record of conviction to determine the actual offense of conviction, in what is called the modified categorical approach.

- Application to Mr. Silva-Trevino: Whether Indecency with a Child under Texas law is a CIMT

Applying the above approach to Mr. Silva-Trevino's conviction, the BIA begins by stating the generic definition of CIMT in the context of sexual abuse of a child: "a crime involving sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was a minor." The Board excludes statutory rape from this definition. Because the Texas statute at issue did not require the state to prove that the defendant knew the victim was a minor, and because the Fifth Circuit (the jurisdiction governing this case) does not apply a separate realistic probability analysis, the BIA concluded that the offense was not a CIMT.

- No Heightened Discretionary Standard

As part of this litigation, the Department of Homeland Security asked the Board to impose a heightened discretionary standard for those convicted of sexual offenses involving minors. The

BIA concluded that no such heightened standard would be required, because the factors already inherent in the discretionary calculation consider the seriousness of the crime.

Practice Tips

With *Silva-Trevino* III the Board puts to rest the fact-specific analysis of *Silva-Trevino* I. Instead, courts are limited by the elements of the crime, not the underlying circumstances of the particular offense, when deciding if the offense involves moral turpitude. This should make it somewhat easier for defense counsel to analyze the consequences of criminal dispositions and for immigration counsel to challenge the CIMT designation. The realistic probability analysis, however, threatens to undermine the categorical approach. In the First Circuit, immigration practitioners should argue vigorously that under *Whyte*, if the elements clearly encompass non-turpitudinous conduct, the realistic probability test is satisfied and the offense is not a CIMT.