The Commonwealth of Massachusetts

Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Case Notes for Massachusetts Criminal Defense Attorneys November 2018 – April 2019

U.S. Supreme Court

Nielsen v. Preap, 139 S.Ct. 954 (2019)

In an opinion by Justice Alito, the Court adopted an expansive interpretation of 8 U.S.C. § 1226(c), a statutory provision that eliminates the possibility of bond for a special category of noncitizens who are arrested for immigration purposes "when [they are] released" from custody on criminal charges. The case presented the issue of whether noncitizens who are arrested at a point in time well after their release from criminal custody rather than at the time of release are eligible for bond. The plaintiffs in the case had been taken into custody on immigration grounds between five and eleven years after their release from criminal custody. They argued that they were not subject to mandatory immigration detention but were instead eligible for bond hearings available to those held under the general arrest and release authority provided by 8 U.S.C. § 1226 (a). Rejecting the plaintiff's textual arguments, the Supreme Court concluded that the "when release" directive applies whenever there is a release from criminal custody regardless of the lapse of time between release from criminal custody and the immigration arrest. Accordingly, the Court held that the plaintiffs were ineligible for bond from immigration custody despite the fact that they were arrested between five and eleven years after their release from custody on criminal charges.

Practice Tip

In 2013, the District Court of Massachusetts had held in *Gordon v. Napolitano* that the plain language of 8 U.S.C. § 1226(c) did not allow the government to hold the referenced special category of noncitizens in mandatory, no-bond detention if they had not been detained by ICE immediately upon their release from criminal custody. *Gordon v. Napolitano* 991 F. Supp. 2d 258, 264 (D. Mass. 2013), *aff'd sub nom. Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015). The decision and injunction in *Gordon v. Napolitano* allowed noncitizens detained pursuant to 8 U.S.C. § 1226(c) to request bond and ultimately allowed hundreds to be re-united with family pending the outcome of their proceedings after a showing that they did not pose a danger to the community or a flight risk. However, on June 24, 2019, following *Nielsen v. Preap*, the District Court of Massachusetts dismissed *Gordon v. Napolitano* and as a result, noncitizens in

Massachusetts who fall within the category described in 8 U.S.C. § 1226(c) may again be detained by ICE at any time after their release from criminal custody and held without bond for the duration of removal proceedings. In this way, *Nielsen v. Preap* raises the stakes for noncitizens facing criminal charges who, upon conviction, would be covered by 8 U.S.C. § 1226(c) and so be subject to indefinite, mandatory ICE detention upon release from criminal custody.

Stokeling v. United States, 139 S.Ct. 954 (2019)

In *Stokeling v. United States*, the Supreme Court considered whether a robbery offense that has as an element the use of force sufficient to overcome a victim's resistance necessitates the use of "physical force" within the meaning of the Armed Career Criminal Act (ACCA). The ACCA defines "violent felony" 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." 18 U.S.C. § 924(e)(2)(B). This definition mirrors the definition of "crime of violence" found in 18 U.S.C. § 16 (a) and used in the immigration context to define the deportable offenses of a "crime of violence" aggravated felony and a "domestic crime of violence."

The conviction at issue in *Stokeling* involved a Florida statute in which robbery was defined as "the taking of money or other property. . . from the person or custody of another, … when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13 (1) (1995). The Florida Supreme Court has interpreted this reference to "use of force" in the statute to require "resistance by the victim that is overcome by the physical force of the offender." *Robinson v. State*, 692 So. 2d 883, 886 (1997). In an opinion written by J. Thomas, the Court held that the "physical force" element of the ACCA encompasses robbery offenses that require only that force necessary to overcome the victim's resistance. The 5-4 majority reasoned that this definition was not a departure from its holding in *Johnson v. United States*, 559 U.S. 133 (2010), in which it found that "physical force" did not include slight offensive touching but required "*violent* force – that is force capable of causing physical pain or injury to another person." *Id.* at 140. In distinguishing *Johnson*, the Court in *Stokeling* concluded that "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*, and 'suggest[s] a degree of power that would not be satisfied by the merest touching."

In her dissent, J. Sotomayor, joined by Justices Kagan, Ginsburg, and Roberts, writes that the majority's position is "flatly inconsistent" with *Johnson* and creates two conflicting interpretations of "physical force" depending on whether the underlying crime is a battery or a robbery. She warns that the majority's position in *Stokeling* foreshadows the end of the *Johnson* analysis.

<u>Practice Tip</u>

The decision in *Stokeling* arguably broadens the definition of "physical force" but does not appear to impact the analysis of Massachusetts criminal offenses for defense counsel representing non-citizen clients because Massachusetts offenses are not defined by an element of force which can be satisfied by overcoming physical resistance, however slight, by the alleged victim.

In light of *Stokeling*, however, immigration counsel should watch out for any attempt by the Department of Homeland Security to lower the threshold of "physical force" required to define assault, A&B, or other offenses as a "crime of violence." Immigration counsel can argue that the *Stokeling* analysis of "physical force" is circumscribed to the context of the case involving robbery, and should rely on Massachusetts case law to argue that overcoming the resistance of an alleged victim is not required to satisfy the elements of the crime in question. Please notify the IIU if you see evidence of *Stokeling* being used to support arguments that a Massachusetts offense constitutes a "crime of violence."

United States v. Stitt, 139 S.Ct. 399 (2018)

The Armed Career Criminal Act (ACCA) imposes a fifteen year minimum prison term on a person convicted of unlawfully possessing a firearm who has three prior convictions for certain violent or drug-related crimes, including "burglary." 18 U.S.C § 924(e). In *United States v. Stitt,* the Supreme Court considered the question of whether the statutory term "burglary" in the ACCA includes burglary of a structure or vehicle that has been "adapted or is customarily used for overnight accommodation." In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court had held that the word "burglary" refers to a generic crime, the elements of which it defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." In *United States v. Stitt, t*he Court held that burglary of a structure or vehicle that has been "adapted or is customarily used for overnight accommodation" qualifies as the enumerated violent felony of burglary, for purposes of the mandatory minimum sentence under the ACCA. In distinguishing *Mathis v. United States,* 579 U.S. ___ 136 S. Ct. 2243 (2016), the Court explained that the underlying statute at issue in *Mathis* covered ordinary vehicles, which was outside the conduct covered by generic burglary, but that coverage of vehicles designed or adapted for overnight use did not take the statute outside the generic burglary definition.

Practice Tip

While the decision in *Stitt* appears to broaden the definition of the generic crime of burglary to include more types of structures, the relevant breaking and entering offenses in Massachusetts do not have as one of their elements a structure or vehicle that has been adapted or is customarily used for overnight accommodation. As a result, the *Stitt* decision should not impact the immigration analysis of Massachusetts offenses for breaking and entering.

Board of Immigration Appeals

Matter of A. Vasquez, 27 I&N Dec. 503 (BIA 2019)

The Immigration and Nationality Act (INA) at 8 U.S.C. 1101 (a)(43)(H) defines the term "aggravated felony" to mean "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)." Notably, the crime of kidnapping under 18 U.S.C. 1201 is not one of the statutes listed in 8 U.S.C. 1101 (a)(43)(H). In *Matter of A. Vasquez*,

the Board of Immigration Appeals (BIA) considered whether a conviction for kidnapping in violation of 18 U.S.C. 1201 nevertheless rendered a noncitizen deportable under this definition of an aggravated felony. The government argued that the offense of kidnapping was "described in" the other statutes listed. However, after reviewing the statutory language and the context, the Board concluded that the plain language of the statute did not allow 8 U.S.C. 1101 (a)(43)(H) to be interpreted to include an offense under a federal statute not enumerated there. As a result, the crime of kidnapping under 18 U.S.C. 1201 does not fall within the definition of aggravated felony laid out in 8 U.S.C. 1101 (a)(43)(H).

Practice Tip

Despite *Matter of A. Vasquez,* a conviction for kidnapping in Massachusetts with a sentence of a year or more is still an aggravated felony. This is so because an "aggravated felony" is also defined as "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101 (a)(43)(F). And the First Circuit held in *Choeum v. INS* that kidnapping was a "crime of violence" because it satisfies the terms of 8 U.S.C. § 16(a). 129 F.3d 29, 35 n.4 (1st Cir. 1997).Therefore, whenever a Massachusetts conviction for kidnapping cannot be avoided, defense counsel should continue to advocate for a sentence of less than one year to avoid an aggravated felony conviction for a noncitizen client.

Matter of M-S-, 27 I&N 509 (BIA 2019)

In *Matter of M-S-*, Attorney General William Barr held that asylum seekers in expedited removal proceedings at the border of the United States remain ineligible for bond even after they establish a credible fear of return to their home country. The impact of this decision will be felt primarily at the border, but also covers individuals seeking asylum who are transferred from the border to facilities in the Commonwealth. These asylum seekers, previously eligible for bond, will now be detained for the duration of their asylum proceedings. For more information see: https://www.immigrantjustice.org/staff/blog/attorney-general-barr-strips-bond-eligibility-asylum-seekers-matter-m-s-analysis-and-qa

Supreme Judicial Court

Commonwealth v. Chicas, 481 Mass. 316 (2019)

In *Commonwealth v. Chicas*, the SJC examined the relevance of a noncitizen's immigration status in the context of criminal proceedings. The Trial Court had ruled that the defendant could probe a witness' citizenship status "in any instance where [he knew or had a good faith basis in believing that] there ha[d] been any discussion with any member of law enforcement about [the witness'] citizenship status" but limited the defendant's cross examination where he could not establish this foundation. The SJC agreed with this approach, concluding that it did not violate the defendant's right to confrontation and that the inquiry into citizenship depends on a showing that the noncitizen witness is testifying in order to curry favor with the Commonwealth. In effect, the decision suggests that immigration status is not relevant unless it can be tied to a motive to lie.

The Court also held that the Trial Court's use of two interpreters during the trial, one for the non-English speaking witnesses and one for the defendant at counsel's table, was not an abuse of discretion.

Practice Tip

When cross-examining a noncitizen witness, defense counsel should lay a foundation to establish a good faith basis for believing that the Commonwealth has engaged in some discussion with the witness as to their immigration status prior to probing into the witness' immigration status.

Commonwealth v. Lys, 481 Mass. 1 (2018)

In *Commonwealth v. Lys*, the SJC considered a post-conviction motion for a Haitian national and legal permanent resident of the U.S. who, faced with a 28 count complaint, pleaded guilty to violating multiple controlled substances laws. The guilty plea rendered him deportable. In his post-conviction motion, the defendant argued that he had received ineffective assistance of counsel, and he would not have pleaded guilty had counsel properly advised him about the plea's immigration consequences. Neither plea counsel nor motion counsel submitted affidavits in support of the post-conviction motion. Seemingly based on the absence of these affidavits, the judge fully credited the defendant's affidavit and found that plea counsel had performed deficiently but went on to find that there were no special circumstances suggesting that the defendant would have placed particular emphasis on the immigration consequences, such that the deficient performance had not prejudiced the defendant.

Believing the judge may not have recognized his discretion to credit or discredit the defendant's affidavit in the absence of an affidavit from plea counsel, the SJC remanded to the trial court, explaining that a judge hearing a motion for a new trial has discretion to decide whether or not to credit a defendant's affidavit in the absence of corroborating affidavits. See Practice Tip below.

With regard to prejudice, the defendant alleged that he had established "special circumstances" that he had placed such significant emphasis on avoiding immigration consequences that he would have chosen to go to trial or negotiate a different disposition if he had been properly advised. The SJC remanded to the judge to make findings as to special circumstances and determine if under the "totality of the circumstances" the defendant had established prejudice, consistent with its prior ruling in *Commonwealth v. Lavrinenko*, 473 Mass. 42, 47 (2015).

Practice Tip

This SJC decision does not change Massachusetts *Padilla* case law. If the motion and supporting affidavit(s) present a "substantial issue" of facts in dispute or conflicting evidence, the judge should hold an evidentiary hearing. If not, a judge has discretion to rule solely on the affidavits. *See Commonwealth v. Sylvain*, 473 Mass. 832 (2016) (*Sylvain II*) and Mass. R. Crim. P. 30 (c)(3). Lack of an affidavit from plea counsel does not necessarily require the motion judge to discredit the defendant's affidavit as self-serving, especially if postconviction counsel details efforts made to obtain an affidavit. *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545, 551(2014) (lack of affidavit from plea counsel does not defeat motion where postconviction

counsel’s affidavit detailed lack of cooperation from plea counsel).