



The Commonwealth of Massachusetts
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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
May 2019 – October 2019

First Circuit

Reid v. Donelan, 390 F.Supp.3d 201 (2019).

Pursuant to 8 U.S.C. § 1226(c)(1), noncitizens with a conviction for certain crimes or due to acts associated with terrorism are subject to mandatory ICE detention. Plaintiffs in this class action are noncitizens who have been or will be subject to mandatory detention for over six months without a bond hearing. The suit, filed in 2013, has a complex procedural history and was recently remanded to the District Court following the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Upon remand, the District Court held that mandatory detention without a bond hearing violates due process when a noncitizen's individual circumstances render the detention unreasonably prolonged in relation to its purpose in ensuring the removal of deportable noncitizens with criminal records. The Court held that the determination of reasonableness is a fact-specific analysis, and the most important factor is the length of the detention. Although eschewing the use of a bright line rule, the Court nonetheless concluded that detention is likely to be unreasonable if it lasts for more than one year, excluding any dilatory tactics attributable to the noncitizen. The Court also concluded that a noncitizen must bring a habeas petition in federal court to challenge his or her detention as unreasonably prolonged; if successful, the individual is then entitled to a bond hearing before an immigration judge at which the government bears the burden of proving that the noncitizen is either dangerous, by clear and convincing evidence, or a risk of flight, by a preponderance of the evidence. In making its release determination, the immigration court may not impose excessive bail, must evaluate the individual's ability to pay in setting bond, and must consider alternative conditions of release such as GPS monitoring that reasonably assure the safety of the community and the individual's future appearances.

The case is now on appeal to the First Circuit.

Practice Tip for Immigration Practitioners

The PAIR Project and NE-AILA is hosting a training on Dec. 13, 2019 from 12-2 p.m. at the offices of Mintz Levin, One Financial Center, Boston to prepare attorneys to file habeas petitions and assist detained noncitizens in securing new bond hearings. RSVP by Dec.10 by emailing Elena Nouredine at enouredine@pairproject.org and include "December Training-Bond Hearings" in the subject line.

Board of Immigration Appeals

Matter of Jorge Gonzalez Lemus, 27 I&N Dec. 612 (BIA 2019).

The respondent in this case was a legal permanent resident with convictions for possession of methamphetamine and possession of marijuana under section 124.401(5) of the Iowa Code. He was ordered removed for a controlled substance violation pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act (INA), which defines controlled substance according to Section 102 of the federal Controlled Substances Act (21 U.S.C. 802). On appeal, he argued that the section of the Iowa Code at issue was overbroad compared to the federal statute and the identity of the controlled substance was not an element of the state offense so, under the categorical approach, his convictions could not be controlled substance violations as defined in the INA.

The Board agreed that the state crime was not a categorical match to the federal crime because the Iowa controlled substance law contains at least one substance not covered under the federal Controlled Substances Act. However, the Board concluded that the state statute was divisible because Iowa courts have considered the identity of the controlled substance to be a required element of the offense. In reaching its decision, the Board considered the fact that the state prescribes distinct punishments for drug possession depending on the identity of the specific controlled substance; prosecutes a single act of possessing multiple substances as separate offenses; and instructs juries that the State is required to prove the identity of a controlled substance during the course of criminal proceedings. Having found the Iowa code is divisible, the Board upheld the Immigration Judge's application of the modified categorical approach and finding of removability.

Practice Tip

For a discussion of *Mellouli*, please see the IIU Practice Advisory "Controlled Substances Update (June 2015)" (<https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2015/08/Mellouli-controlled-substances-update1.pdf>). To determine how and when state drug convictions in Massachusetts result in immigration consequences for a noncitizen, please contact the IIU directly.

Matter of Navarro Guadarrama, 27 I&N Dec. 560 (BIA 2019).

In this case, the respondent was convicted twice of possession of less than 20 grams of marijuana in violation of section 893.13(6)(b) of the Florida Statutes. On the basis of these two convictions, the Immigration Judge found that the respondent was inadmissible for a controlled substance violation under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (INA).

The respondent argued that the Florida statute and federal Controlled Substance Act are not a categorical match and, therefore, his convictions did not trigger the controlled substance ground of inadmissibility. The Florida statute defines cannabis to include any part of the plant and is therefore broader than the federal definition, which excludes parts such as mature stalks or sterilized seeds. However, the Board held that a noncitizen must establish that there is a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the federal generic definition of a crime in order to show that a state statute prohibits conduct outside the generic definition of an offense in a federal statute. In other

words, a noncitizen can establish that he is not removable based on a conviction for a state drug offense if he can show that in either his own case or other cases, the state court actually applied the statute to an offense involving a substance that is not federally controlled.

In this case, the Board held that the respondent could not point to any prosecutions for conduct involving only forms of marijuana (such as stalks or sterilized seeds) that are not included in the Federal definition of marijuana at 21 U.S.C. § 802(16) and thus could not establish a realistic probability that the State of Florida would prosecute such conduct. The Board concluded that the respondent had been convicted of violating a state law relating to a controlled substance, as defined in 21 U.S.C. § 802, and upheld the Immigration Court's finding of inadmissibility.

Practice Tip

This decision is inconsistent with First Circuit case law on the issue of the realistic probability test. In *Swaby v. Yates*, the First Circuit held that, where the plain terms of the Rhode Island drug schedules make clear that the Rhode Island offense covers at least one drug not on the federal schedules, the offense is “simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug.” 847 F.3d 62, 66 (1st Cir. 2017). While the Board rejected this approach, its decision is not controlling in the First Circuit where the decision in *Swaby v. Yates* remains binding.

Matter of J-G-P-, 27 I&N Dec. 642 (BIA 2019).

The respondent in this case was in removal proceedings based on inadmissibility due to his undocumented status. He sought relief through cancellation of removal but the Immigration Judge found his conviction for menacing in violation of section 163.190 of the Oregon Revised Statutes to be categorically a crime involving moral turpitude (CIMT) that rendered him ineligible for relief. The respondent appealed and argued that this conviction was not a CIMT.

The Oregon Revised Statutes states that a “person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury.” In its review of the Immigration Judge’s decision, the Board considered whether the offense met the two requirements of a CIMT: reprehensible conduct and a culpable mental state. Using the categorical approach, the Board easily concluded that, unlike a simple assault offense that requires general intent, the offense of menacing requires a defendant to have “a specific intent to create fear in the victim,” which reflects a culpable mental state indicative of moral turpitude. Turning to the question of whether the offense involves “reprehensible conduct,” the Board discussed the level of harm required to complete the offense, and distinguished the level of harm in the Oregon statute from that required for simple assault. In particular, the Board highlighted that the Oregon statute requires “fear of imminent *serious* physical injury” and not fear of “*any* physical injury” (emphasis in original). The Board concluded that the conviction at issue is categorically a CIMT and further concluded that the element of actual inflicted fear is not necessary to determine that a crime categorically involves moral turpitude when a statute involves the required evil or malicious intent and a level of threatened harm that is serious and immediate.

Practice Tip

There is no case law specifically addressing whether the Massachusetts offense of Threat to Commit Crime,

M.G.L. 275 §§ 2-4 is a crime involving moral turpitude. So, at this time, defense counsel should continue to advise clients conservatively that immigration officials may consider a conviction for threats to be a CIMT.

On the other hand, immigration practitioners should use the Board's reasoning in *Matter of J-G-P-* to argue that the Massachusetts offense of threats is categorically not a CIMT.

Matter of Fernando Cordero-Garcia, 27 I&N Dec. 652 (BIA 2019).

Respondent was convicted of dissuading a witness in violation of the California Penal Code and found removable for an aggravated felony. The Ninth Circuit remanded to the Board to determine whether the crime of dissuading a witness is categorically an aggravated felony offense relating to obstruction of justice under INA Section 101(a)(43)(S).

While this appeal was pending, the Board in *Valenzuela Gallardo II* defined obstruction of justice as, in part, an offense “that involves (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another’s punishment resulting from a completed proceeding.” 27 I&N Dec. 449, 460 (BIA 2018). Applying this definition, the Board in this case addressed the California offense of dissuading a witness, for which the State must prove (1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making a report to any peace officer or other designated officials. Based upon a review of the case law, the Board concluded that the California offense involves a specific intent to interfere in an investigation or proceeding and so is a categorical match for the definition of obstruction of justice laid out in *Valenzuela Gallardo*.

The Board then addressed the Respondent’s argument that the definition of obstruction of justice could not be applied retroactively to his conviction. Although the Board acknowledged that retroactivity is not favored and concluded that the holding in *Valenzuela Gallardo* was a change in law, it ultimately weighed the retroactivity factors in favor of applying the holding in *Valenzuela Gallardo* retroactively. Accordingly, the Respondent’s appeal was dismissed and the charge of removability was upheld.

Practice Tip

The Massachusetts offense of “witness intimidation” M. G. L. c. 268 § 13B may not be a categorical match for the generic definition of obstruction of justice laid out in *Valenzuela Gallardo*. In Massachusetts, witness intimidation requires an intentional act but this element can be satisfied by a specific intent to interfere with a criminal investigation or proceedings OR a reckless disregard that conduct may interfere with a criminal investigation or proceedings. Therefore, the Massachusetts statute is arguable overbroad when compared to the generic definition of obstruction of justice.

Defense counsel should assume that witness intimidation will be considered an obstruction of justice offense and therefore avoid a one year sentence to avoid an aggravated felony conviction. If unable to avoid a one year sentence, try to make it clear on the record of conviction that the defendant was convicted of the reckless version to preserve the argument in immigration proceedings that it is not an aggravated felony. Note that even if not an aggravated felony, witness intimidation is considered a “crime involving moral turpitude” and could carry other immigration consequences.

On the other hand, immigration practitioners should argue that the witness intimidation statute is overbroad

and indivisible as to the element of intent and so a conviction cannot be an obstruction of justice crime based on this case, and so cannot be an aggravated felony.

Matter of Castillo-Perez, 27 I&N Dec. 664 (A.G. 2019).

Affirming the decision of the Board of Immigration Appeals, Attorney General Barr authored an opinion holding that two or more convictions for driving under the influence, within relevant periods, establish a rebuttable presumption that a noncitizen lacks “good moral character.” The respondent in this case is a Mexican national seeking relief from removal, known as “cancellation of removal,” under section 240A(b) of the Immigration and Nationality Act, which requires that the respondent demonstrate “good moral character” during a ten year period. The Immigration Judge granted cancellation of removal but the BIA vacated the decision on appeal, and the Attorney General had the case referred to him for review.

The opinion is predicated, in part, on the determination that cancellation of removal is “a coveted and scarce form of relief,” and that noncitizens with multiple DUI convictions do not sufficiently deserve the benefit. Further, since “good moral character” is defined as adherence to generally accepted moral conventions of the community and there is a national consensus that impaired driving is unacceptable conduct, multiple DUI convictions is probative of non-adherence to moral conventions of the community. Importantly, the opinion dictates that “rehabilitative efforts, standing alone, do not overcome the presumption.” Rather, a non-citizen must demonstrate that “the multiple convictions were an aberration” in order to demonstrate “good moral character” within the relevant period despite multiple convictions for driving under the influence.

Practice Tip

A conviction for OUI in Massachusetts does not trigger a statutory ground of inadmissibility or deportability; however, as the opinion in *Castillo-Perez* demonstrates, a conviction for OUI is likely to negatively impact a noncitizen seeking a discretionary immigration benefit. In addition, two OUI convictions within certain periods now create a rebuttable presumption that a noncitizen lacks “good moral character.” As such, multiple OUI convictions can negatively impact noncitizens pursuing any application in which a showing of “good moral character” is required, including naturalization, NACARA or the former suspension of deportation, relief under the Violence Against Women’s Act (VAWA), and voluntary departure after removal proceedings.

Matter of Thomas and Thompson, 27 I&N Dec. 674 (A.G. 2019).

The Attorney General held in this case that state-court orders retroactively altering a criminal conviction or sentence will be given effect for immigration purposes only if the order is based on a procedural or substantive defect in the underlying criminal proceeding. The decision overrules *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016). The Attorney General reasoned that these three decisions articulated tests governing the immigration consequences of state-court orders that are inconsistent with each other and cause similarly situated noncitizens to experience disparate outcomes under the immigration laws. In support, the *Matter of Thomas and Thompson* highlights two very similar cases with disparate outcomes. Both respondents, Thomas and Thompson, were legal permanent residents convicted of family violence battery under Georgia

state law and sentenced to a term of imprisonment of 12 months. Both were charged as removable for having committed an aggravated felony of a crime of violence for which the term of imprisonment is at least one year. Both successfully petitioned the state court to alter their sentences to under a year. For respondent Thomas, the Immigration Judge and Board declined to credit the state court order and his removability was upheld. For respondent Thompson, the Immigration Judge rejected the modification but the BIA reversed and he was found no longer removable. The disparate outcomes were a result of a semantic distinction between “clarification” and “modification.” To avoid inconsistencies such as these, the Attorney General held, in accordance with *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), that a respondent remains convicted for immigration purposes when a state court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, such as rehabilitation or the avoidance of immigration consequences.

Practice Tip

Following a conviction in Massachusetts, a defendant may file a Motion to Revise and Revoke or a Motion to Vacate. Regardless of the procedural mechanism with which a noncitizen seeks to alter a conviction, an alteration to a conviction or sentence will only be given effect for immigration purposes if the order is based on statutory or constitutional infirmity in the underlying criminal proceeding.