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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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Supreme Court of the United States

Barton v. Barr, 140 S. Ct. 1442 (2020).

Andre Barton was a long-time, lawful permanent resident convicted of several deportable offenses who applied in Immigration Court for cancellation of removal as a defense from deportation. For a lawful permanent resident such as Mr. Barton to be eligible for cancellation of removal, he had to demonstrate, among other requirements, that he had not committed an offense triggering the criminal grounds of inadmissibility, defined at 8 U.S.C. § 1182(a)(2), during the initial seven years of continuous residence in the United States. In fact, Mr. Barton had been convicted of an offense that triggered inadmissibility and the offense had been committed six and a half years after admission, so the Immigration Judge concluded he was ineligible for cancellation of removal. In his appeal, Mr. Barton argued that the offense that rendered him ineligible for cancellation of removal had to be the same offense as the one that rendered him removable, which was not so in his case.

Addressing a circuit split on this question, the Supreme Court rejected Mr. Barton's position and construed the relevant statute as not requiring that the offense that precludes cancellation of removal be one of the same offenses that triggers removal. Rather the Court concluded that the cancellation of removal statute functions like a traditional recidivist sentencing statute by providing that a noncitizen's prior crimes can render him ineligible for cancellation of removal even when the prior crime does not itself render the individual removable.

Practice Tip:

This decision does not change existing precedent for cases in the First Circuit. While the First Circuit had not ruled on the specific question raised in *Barton v. Barr*, the Board of Immigration Appeals (BIA) has long interpreted the relevant statute, 8 U.S.C. § 1229b(d)(1)(B), to mean that a noncitizen need not actually be found inadmissible or removable in order for the criminal conduct in question to terminate continuous residence in this country and preclude cancellation of removal. *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (BIA 2006). The majority of circuits that had considered the question had also agreed with the BIA, such that the Supreme Court's holding only impacts the Ninth Circuit, which had held otherwise in *Nguyen v. Sessions*, 901 F.3d 1093, 1097 (2018).

Practically, for criminal defense attorneys, the decision is a reminder that convictions that trigger only inadmissibility may still have long-term, negative consequences for a noncitizen because they may foreclose defenses, including defenses that are not available to the noncitizen at the time of the conviction.

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020).

After years of litigation, the Supreme Court held that the Department of Homeland Security (DHS) had improperly rescinded Deferred Action for Childhood Arrivals, known as DACA, which is a form of temporary relief from deportation and of temporary work authorization. The Court did not rule on the legality of DACA itself, but instead held that DHS had violated the APA in the manner in which it rescinded the policy. The Court therefore remanded the decision to the agency for review. On July 28, 2020, following the Supreme Court decision, DHS issued a memo outlining the steps it will take with respect to DACA and indicated that the agency is currently reviewing the DACA program anew to determine whether it should be maintained, modified, or terminated.

Practice Tip:

Please see our updated practice advisory for information on how the decision impacts defendants who have DACA or may be eligible for DACA: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/DACA-update-August-2020.pdf. In light of the constantly changing landscape for DACA recipients, we encourage practitioners to contact the IIU for the most up-to-date information prior to advising a client with DACA status. Our intake form and other information are available at www.publiccounsel.net/iiu/

First Circuit

Diaz Ortiz v. Barr, 959 F.3d 10 (1st Cir. 2020).

In *Diaz Ortiz v. Barr*, the First Circuit upheld the denial of asylum, withholding of removal, and protections under the Convention against Torture for a youth, Cristian Diaz Ortiz, seeking asylum from El Salvador. Mr. Diaz Ortiz alleged that the MS-13 gang had attacked him and threatened his life in El Salvador in 2015 because he was a practicing evangelical Christian, and he feared that the gang would kill him if he returned to El Salvador. The Immigration Judge denied the application for asylum based on an adverse credibility determination, finding that Mr. Diaz Ortiz's faith-based claim for asylum could not be credible in light of the field reports contained in the Boston Regional Intelligence Center (BRIC) gang database concerning Mr. Diaz Ortiz's alleged association with MS-13 gang members. Mr. Diaz Ortiz had no criminal record and argued that the Immigration Judge's adverse credibility determinations were not supported by substantial evidence and that the introduction of the gang database violated his due process rights.

Although the First Circuit rejected all of Mr. Diaz Ortiz's arguments, the opinion is notable for Judge Lipez's dissent. After reviewing the evidence gathered by the Boston Police Department and the Boston School Police Department and compiled by the BRIC into the Gang Assessment Database, Judge Lipez concludes that the information is "so seriously flawed" that reliance upon it violates due process rights. In particular, he highlights the potential of the gang database "for criminalizing ordinary behaviors of minority youth, such as spending time with peers of the same ethnicity" and ensnaring youth in a system of "guilt-by-

association -- developed through 'violation of the privacy and constitutional rights of individuals.'" While acknowledging the need for federal and state monitoring of criminal gang activity, he concludes that the need "does not justify intelligence gathering by police that treats the mere proximity of any young Hispanic man to his peers -- even those suspected to be gang members -- as gang-related activity. That inferential leap crosses the line from legitimate monitoring to racial profiling."

Practice Tip

As highlighted in *Diaz Ortiz v. Barr*, the federal rules of evidence do not apply in immigration removal proceedings. Immigration Judges are permitted to rely on a plethora of information and documents, including hearsay contained in police reports or police reports from dismissed cases, which would be excluded in criminal proceedings. Defense attorneys should be aware that evidence from a case may be used differently in immigration court and advise their client's accordingly.

For immigration attorneys, Judge Lipez's dissent provides the framework to continue challenging the admission of unreliable evidence in removal proceedings and to raise arguments related to the fundamental fairness of proceedings and the due process rights of noncitizens.

Sanabria Morales v. Barr, 967 F.3d 15 (1st Cir. 2020).

The respondent in this case, Luis Elias Sanabria Morales, was convicted of drug trafficking, an aggravated felony, which clearly rendered him ineligible for asylum. The issue in this case was whether the conviction also rendered him ineligible for a corollary defense to asylum known as withholding of removal. Per 8 U.S.C. § 1231(b)(3)(B)(ii), a noncitizen is ineligible for withholding of removal if they have been convicted of a "particularly serious crime," which is defined differently for purposes of withholding than for purposes of asylum. For purposes of withholding, a "particularly serious crime" includes an aggravated felony (or felonies) for which the noncitizen has been sentenced to an aggregate term of imprisonment of at least 5 years, but may also include any other offense the Attorney General deems to be a "particularly serious crime." Under existing case law, a conviction for drug trafficking is presumptively a "particularly serious crime" for purposes of withholding of removal but that presumption is a rebuttable one that applies only absent "circumstances that are both extraordinary and compelling." *Matter of Y-L-*, 23 I. & N. Dec. 270, 274 (A.G. 2002).

In this case, Mr. Sanabria Morales argued that the IJ and BIA had not adequately evaluated the "extraordinary and compelling" circumstances of his offense and so erred in their conclusion that his conviction was a "particularly serious crime" that rendered him ineligible for withholding of removal. In support of his argument, Mr. Sanabria Morales provided evidence that he had committed the offense under duress and in fear that a drug cartel would kill his family if he did not comply with their demand to transport controlled substances into the United States. On appeal, the First Circuit acknowledged that neither the IJ nor the BIA had specifically addressed the six-point test articulated in *Matter of Y-L-* for determining whether the presumption has been rebutted. Nevertheless, the Court found that Mr. Sanabria Morales, who had appeared *pro se*, had not meaningfully challenged the conclusion that his conviction was for a "particularly serious crime" and that the IJ was not required to set forth a detailed analysis of the "extraordinary and compelling circumstances" exception where the IJ had at least referenced the *Matter of Y-L-* presumption. The Court then found that, assuming arguendo that the argument was not waived, the record did not compel a conclusion that Mr. Sanabria Morales had demonstrated "extraordinary and

compelling circumstances," and upheld the finding that he was also not eligible for deferral of removal under the Convention against Torture.

Practice Tip

The First Circuit's decision in this case highlights the very serious challenges noncitizens with criminal convictions face in removal proceedings where there is no right to counsel. Although the majority assumed arguendo that Mr. Sanabria Morales had not waived his arguments, it is clear that Mr. Sanabria Morales was unable to fully articulate the legal arguments or establish the strong factual record he would have needed to prevail on his argument. In fact, in her dissent Judge Thompson urges that Mr. Sanabria Morales' "pro se status does not in any way lessen the immigration agencies' obligations to enunciate the reasons for rejecting, or in this case ignoring, his sufficiently raised arguments."

Soto-Vittini v. Barr, No. 19-1372, 2020 WL 4933669, at *1 (1st Cir. Aug. 24, 2020).

"[I]llicit trafficking in a controlled substance," including any felony punishable under the federal Controlled Substances Act, is an "aggravated felony" under the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). Manuel Soto-Vittini was a legal permanent resident who pled guilty to drug possession with the intent to distribute under M.G.L. ch. 94C §32A(a), and an Immigration Judge concluded that the conviction was for an aggravated felony and ordered his removal.

On appeal, Mr. Soto-Vittini challenged the conclusion that his drug conviction is an aggravated felony under the INA and argued that section 32A(a) is categorically overbroad because of the differing *mens rea* requirements for accomplice liability under state and federal law, which, he argued, makes it such that a defendant could be held liable under section 32A(a), but not under the federal Controlled Substance Act. The First Circuit disagreed and upheld the removal order. After reviewing the *mens rea* requirement for accomplice liability, the Court concluded, "there is no realistic probability […] that a defendant could satisfy the Massachusetts standard, but not the federal one" and the *mens rea* to convict an accomplice under section 32A(a) is no broader than under the federal Controlled Substance Act.

Practice Tip

As a reminder, controlled substance convictions can have devastating consequences for noncitizens. In Massachusetts, convictions for trafficking, distribution, or possession with intent to distribute a controlled substance under M.G.L. ch. 94C § 32-32E are all aggravated felonies. Each is a conviction-based aggravated felony meaning the conviction alone, regardless of any length of sentence, is an aggravated felony. Because a CWOF is a conviction for immigration purposes, even a CWOF on any of these charges is an aggravated felony that exposes a noncitizen to the harshest possible immigration consequences.

Board of Immigration Appeals

Matter of P-B-B-, 28 I&N Dec. 43 (BIA 2020).

In *Matter of P-B-B-*, the Board applies the categorical approach to determine whether a conviction for attempted possession of a dangerous drug for sale, in violation of sections 13-3407 of the Arizona Revised Statutes, is a controlled substance violation under 8 U.S.C. § 1227(a)(2)(B)(i) or an aggravated felony illicit

trafficking offense under sections 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(B). Generally, the categorical approach is used to determine whether a particular state criminal conviction matches the federal criminal grounds of deportability or inadmissibility. Under the categorical approach, a court is not concerned with what the defendant actually did, but only with the "elements" of the statutory offense, meaning those facts that must be found beyond a reasonable doubt by a unanimous jury. Only when a statute is considered "divisible" – i.e. only when a statute includes two or more different crimes – may courts look beyond the statute to the record of conviction (a limited class of documents, such as a complaint or indictment, docket sheet, and plea colloquy, but not the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

For drug offenses to fall within the generic definitions for a controlled substance violation or illicit trafficking offense, the state conviction must have, as an element, a substance listed under the federal controlled substances schedule. In this case, it was undisputed that Arizona's definition of "dangerous drug" is categorically broader than the federal definition of "controlled substance." However, the Board concludes that the specific controlled substance at issue in a conviction under the Arizona drug statute is an element of the offense, such that the statute is divisible as to the "dangerous drug" involved in a violation of that statute. To reach this conclusion, the Board relies heavily on the fact that the Arizona statute provides for different punishments depending on the substance involved in a violation, as well as on a reading of state case law on double jeopardy. Reversing the order of the categorical and modified categorical approach in this case, the Board also "peeks" at the record of conviction for the purpose of determining whether the statute is divisible. In doing so, the Board sees that the charging document in this case referenced one drug at the exclusion of others and so concludes that the statute is divisible and further, that the respondent had been charged with possessing a federally controlled substance.

Practice Tip

For possession with intent to distribute under MGL c. 94C § 32 in Massachusetts, the specific identity of the drug at issue is an element of the offense, and, like the statute at issue in *Matter of P-B-B-*, the statute is divisible as to the specific controlled substance. This case provides an example of the way the Board applies the categorical approach for such a statute, but also demonstrates that the Board is prepared to "peek" at the record of conviction before concluding that a statute is divisible.

Matter of Reyes, 28 I&N Dec. 52 (A.G. 2020).

Onesta Reyes, a longtime, lawful permanent resident, was convicted of violating grand larceny in the second degree under New York Penal Law § 155.40(1), a statute criminalizing both theft and fraud. Ms. Reyes was sentenced to over one year in prison and there was an established loss amount of greater than $10,000. DHS initially charged her with removability for having been convicted of an aggravated felony *theft* offense under 8 U.S.C. § 1101(a)(43)(G), then changed its theory and charged her for an aggravated *fraud* offense under 8 U.S.C. § 1101(a)(43)(M)(i), before finally amending the charges to include both. Typically, the question of whether a conviction is for an aggravated felony is governed by the categorical approach, where the immigration adjudicator compares the elements of the statute of conviction against the generic definition of the removability provision. In this case, all parties conceded that the statute of conviction is indivisible as between the means of commission. And Ms. Reyes argued that the statute is not a categorical match to either fraud or theft because it criminalizes takings with and without consent and is thus broader than either

fraud or theft because it encompasses both. Agreeing, the Immigration Judge terminated proceedings, and the BIA affirmed.

However, the Attorney General (AG) certified the case to himself to review and vacated the BIA's decision. He concluded that there is no requirement that there be a categorical match between a statute of conviction and a specific type of aggravated felony. Instead, the AG held that even when a statute is not a categorical match to a particular aggravated felony offense, a conviction is still an aggravated felony if every means of violating the statute fall within multiple aggravated felony offenses. In other words, an individual may be removed without knowing which aggravated felony they have been convicted of, so long as every means of violating the statute falls within multiple aggravated felony offenses.

Practice Tip

The holding in *Reyes* should only apply to indivisible statutes where each of the means of commission matches one aggravated felony ground or another and the threshold sentencing or loss amount prerequisites for each aggravated felony ground are met.

In Massachusetts, a conviction for larceny, MGL c. 266, §30, may be accomplished by stealing or by false pretense but, unlike the statute in *Reyes*, the statute is divisible between the two. This means that defendants can only be convicted of *either* larceny by stealing *or* larceny by false pretense. Criminal defense practitioners should still be able to insulate a client from an aggravated felony conviction by, depending on the facts and charge, either negotiating a sentence of 364 days or less on a plea of larceny by stealing or by negotiating plea language that affirmatively establishes larceny by false pretenses and a loss amount of less than $10,000.

Massachusetts Court of Appeals

Commonwealth v. Silva Feijao, 97 Mass. App. Ct. 1127 (2020).

The noncitizen defendant moved to withdraw his plea to possession of a class B substance, arguing plea counsel had failed to properly advise him that his guilty plea would nullify his prior efforts to obtain lawful permanent residence status and would result in his mandatory deportation. The defendant acknowledged that plea counsel had informed him that his plea would be "grounds for deportation," and plea counsel had showed him the IIU chart on immigration consequences that indicates that a conviction for possession of a controlled substance triggers inadmissibility and deportability. In addition, the record indicated that plea counsel had spoken to defendant's immigration counsel. But the defendant argued that plea counsel's advice was inadequate because it failed to take into account the particulars of his status as a recipient of Deferred Action for Childhood Arrivals (DACA) or his pending application for a green card based on his marriage to a United States citizen. The motion was denied without a hearing.

On appeal, the Appeals Court highlighted that criminal defense attorneys are obligated to inquire into the *specific* immigration status of a client. The Court concluded that there remained a substantial question concerning whether plea counsel made sufficient inquiry into his client's particular immigration status and how that status affected the availability of relief from deportation, because had plea counsel been aware of the client's DACA status, he would have realized and advised the defendant that pleading guilty would foreclose several avenues of potential relief from deportation and so render his deportation "practically

inevitable." The Court emphasized that the IIU chart, while indicating that a plea would render a noncitizen inadmissible and deportable, did not explain the ways a plea would bar forms of discretionary relief from deportation for a DACA recipient. The Court then remanded for an evidentiary hearing to determine "whether an ordinary fallible lawyer would have done more than show his client a chart and defer to immigration counsel."

Practice Tip

As detailed in the opinion, knowing a client's specific immigration status is an integral part of providing effective advice on immigration consequences. In addition, effective advice should go beyond a statement that a conviction will render a noncitizen deportable or inadmissible and should include the impact of a conviction on the availability of defenses to deportation. Finally, a reminder that the "Immigration Consequences of Selected Massachusetts Offenses Reference Chart" provided by the IIU analyzes individual offenses in a vacuum. The actual impact of an offense will vary dramatically depending on the client's immigration status, prior criminal record, and other pending charges. Because immigration consequences of crimes is a complex and ever-evolving area of law, practitioners are urged to request an individual analysis, by submitting an intake form to the IIU, for every noncitizen client: https://www.publiccounsel.net/iiu/iiu-intake-forms/

Commonwealth v. Providence, 97 Mass. App. Ct. 1107 (2020).

Commonwealth v. Providence involves a plea from 1998 and a motion for a new trial, filed 20 years later, arguing ineffective assistance of counsel on the grounds that plea counsel had failed to inform the defendant of the immigration consequences of his guilty plea. The motion was denied without a hearing based on the Judge's finding that the signed tender of plea form was sufficient to advise the defendant of the consequences. But plea counsel had specifically indicated in her affidavit that she would not have provided specific advice on immigration consequences in 1998, and would have merely provided the advice consistent with the language on the plea form. The Appeals Court concluded that if the motion Judge credited plea counsel's affidavit, plea counsel's statement would alone satisfy the first prong of the ineffective assistance analysis because precedent already dictates that language on the tender of plea form is not an adequate substitute for defense counsel's professional obligation to advise a client of the likelihood of *specific* immigration consequences that arise from a plea. The Court remanded for the motion judge to enter findings on whether the defendant had established prejudice.

Commonwealth v. Siaw, 97 Mass. App. Ct. 1112 (2020).

In *Commonwealth v. Siaw*, it was uncontested that the defendant had met the first prong of the test for ineffective assistance of counsel under *Saferian*, and that trial counsel's behavior fell measurably below that which might be expected from an ordinary fallible lawyer. The motion judge also acknowledged the existence of "special circumstances" in the defendant's case that would have caused the defendant to have placed particular emphasis on immigration consequences, but found that it was not credible that the defendant would have chosen trial over a plea and that the decision to plead was not an irrational decision.

The Appeals Court reversed, vacating the judgment and the guilty plea, and clarifying that it "is not whether it would have been rational to plead guilty if properly informed, but whether it would have been rational to

reject the plea offer." The Court explained "the question before the judge is not whether the defendant is credible in his assertion, in response to an unanswerable question about a decision the defendant never made" but rather "[t]he judge must determine, based on the credible facts, whether there is a reasonable probability that a reasonable person in the circumstances of the defendant would have chosen to go to trial had he or she received constitutionally effective advice from his or her criminal defense attorney regarding the immigration consequences of a guilty plea."