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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

Swaby v. Yates, 847 F.3d 62 (1st Cir. 2017)

The plaintiff-appellant, Oral Swaby, is a citizen of Jamaica and was a lawful permanent resident of the United States. In 2017, he pled *nolo contendere* in Rhode Island Superior Court to three counts of manufacturing, delivering, or possessing with intent to distribute a controlled substance—to whit, marijuana—in violation of Rhode Island General Laws Section 21-28-4.01(a)(4)(i). Mr. Swaby was subsequently placed in removal proceedings for having been convicted of an offense relating to a controlled substance (8 U.S.C. § 1227(a)(2)(B)(i)).

After Mr. Swaby initially appeared *pro se* and accepted an order of removal, he later retained counsel and was able to reopen proceedings. The main issue in Mr. Swaby's case before the Immigration Judge, the BIA, and the First Circuit was whether his Rhode Island conviction in fact qualified as a controlled substance offense. Mr. Swaby argued, based on the Supreme Court's decision in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), that because the Rhode Island controlled substances schedule contains at least one substance not included in the federal schedules cited by the Immigration and Nationality Act—thenylfentanyl—his conviction was not a categorical match for the federal ground of removal.

The IJ and the BIA both held that Mr. Swaby's conviction was categorically a controlled substance offense under § 1227(a)(2)(B)(i), making him removable, and denied his application for cancellation of removal. The BIA based its decision on the Supreme Court case *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which held that to succeed on an argument that a statute of conviction is overbroad, a noncitizen must show that there is a "realistic probability" that the state actually would prosecute cases involving conduct that would not qualify as a federal predicate conviction. Because Mr. Swaby failed to demonstrate that the Rhode Island statute met this "realistic probability" test, the BIA found that Mr. Swaby's convictions were categorically controlled substance offenses.

The First Circuit disagreed with the BIA on this point, and held that because the Rhode Island controlled substances schedule specifically listed a substance not included in the federal schedules, the prosecution of crimes involving that substance is automatically a realistic

probability. Therefore, the First Circuit concluded that the statute of conviction was overbroad, and moved on to consider the government's alternative argument, that the statute of conviction was divisible among offenses related to each individual substance listed in the schedule. The First Circuit looked to Rhode Island state law which it found established that under § 21-28-4.01(a)(4)(i), a particular substance is an element of an offense rather than a possible means by which the offense may be committed. The First Circuit therefore found that the statute of conviction was divisible, and that the indictment made clear that Mr. Swaby had been convicted of an offense involving marijuana, which is a substance included on the federal schedules. Mr. Swaby's conviction therefore made him deportable.

Finally, the First Circuit rejected arguments by Mr. Swaby that his application for cancellation of removal had been impermissibly denied. The First Circuit held that it is within the Immigration Judge's and BIA's discretionary authority to evaluate the strength of positive factors and weigh some more heavily than others, and that as long as the Immigration Judge weighed the positive factors against the negative factors overall, there was no basis for judicial review.

Practice Tip

This case is a reminder that where a controlled substance statute is overbroad, an ambiguous record of conviction regarding the specific substance involved may protect against a conviction triggering immigration consequences. In Massachusetts, class E is clearly overbroad and there are arguments that class C is overbroad. Defense attorneys should consult with the IIU in these cases.

Moreover, along with the First Circuit's decision in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2016), this case is useful to immigration attorneys arguing that wherever a statute of conviction is overbroad, the realistic probability test is satisfied when the least conduct punishable is simply listed in the statute.

Board of Immigration Appeals

Matter of Calcano De Milan, 26 I&N Dec. 904 (2017)

This case involved a United States citizen who petitioned for a visa for his spouse. Under the Adam Walsh Act (8 U.S.C. § 1154(a)(1)(A)(viii)(I)), a citizen is barred from sponsoring a family member's immigration if s/he has been convicted of a "specified offense against a minor." Here, the BIA considered the question of whether the Immigration and Nationality Act's definition of a "conviction" in § 1101(a)(48), applies equally to noncitizens and citizens, and ultimately concluded that it does.

Based on this finding, the BIA determined that the petitioner had sustained a conviction for a crime barring his ability to petition for a visa for his spouse (sexual battery by restraint, under California Penal Code § 243.4(a)), despite having been granted limited rehabilitative relief. Moreover, the BIA reaffirmed its prior decision in *Matter of Introcaso*, 26 I&N Dec. 304 (2014), in which it concluded that when determining whether a conviction is for a "specified offense against a minor" as defined in 42 U.S.C. § 16911(7), the circumstance-specific rather than the categorical approach must be applied. Under the circumstance-specific approach, an adjudicator is permitted to look into the circumstances and facts underlying a conviction, and is not limited by the elements of the statute.

Matter of Kim, 26 I&N Dec. 912 (2017)

The BIA held in *Matter of Kim* that a crime of mayhem under California Penal Code § 203 is categorically an aggravated felony crime of violence as defined in 18 U.S.C. § 16(a). Based on the Supreme Court's decisions in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) and *Johnson v. United States*, 559 U.S. 133, 140 (2010), the § 16(a) definition of a crime of violence has been interpreted as requiring both intentional and violent force. Mayhem under the California statute has two requirements: (1) an unlawful and malicious act; and (2) that resulted in another person's body part being removed, disabled, or disfigured. The BIA held that the statute's required *mens rea*—maliciousness—is sufficient to prove intentional conduct. Furthermore, the BIA held that despite the statute lacking any direct reference to use of force against a person, "violent force" is intrinsic to the statute because the defendant's malicious act must cause serious bodily injury to the victim. The BIA further concluded that there is no realistic probability that crimes involving mere offensive touching or any other minimal level of force would be prosecuted under the California mayhem statute.

Practice Tip

This case shows how adjudicators often shy away from a strict application of the elements-based categorical approach, particularly in analyzing whether aggravated assault and battery type convictions constitute crimes of violence. *Matter of Kim* contradicts *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2016), in which the First Circuit found that a Connecticut assault statute requiring intent to injure and actual injury to a victim was not a crime of violence (and therefore that 18 U.S.C. § 16(a)'s requirement of "violent force" cannot be inferred from actual harm caused). In the First circuit immigration lawyers should continue to argue that violent force cannot be inferred from actual injury. However, defense counsel should assume that any conviction that requires intent and actual injury, including the Massachusetts crime of mayhem, may be charged as a crime of violence.