BOARD OF CONTRIBUTORS 11th Circuit rejects AG's approach

Government cannot retry criminal case in deportation proceedings

by Ken Swartz

One month after Camilo Sanchez Fajardo was admitted to the United States as a lawful permanent resident, he ran into trouble with the law. He had a physical altercation with his wife that led to Florida convictions for false imprisonment, misdemeanor assault and misdemeanor battery.


Swartz

Three years later these convictions brought him trouble with immigration. While returning from a visit outside the U.S., Sanchez Fajardo was stopped at the Miami International Airport and placed in removal proceedings by the Department of Homeland Security on the ground that his convictions qualified as crimes involving moral turpitude. In his removal proceedings the department conceded that the assault and battery convictions were not crimes involving moral turpitude. But the immigration judge concluded that the false imprisonment conviction qualified as a conviction of a crime involving moral turpitude because the assault and battery convictions showed he committed false confinement by use of force. The judge ordered his removal and the Board of Immigration Appeals (BIA) upheld the order.

The 11th U.S. Circuit Court of Appeals reversed the removal order, admonishing the immigration judge for considering the underlying facts of the conviction rather than only the record of the conviction. The 11th Circuit surveyed prior moral turpitude cases and found that courts have historically looked to the inherent nature of the conviction as defined by the statute for the conviction rather than the conduct surrounding the offense. Federal courts have directed immigration judges to focus on the crime which the alien was convicted, "to the exclusion of any other criminal or morally reprehensible acts he may have committed."

Known as the "categorical" approach, this analysis requires immigration judges to look only to the statutory definition of the prior conviction and not the particular facts underlying the conviction.

If the statutory definition of a crime includes conduct that would be grounds for removal and conduct that would not be grounds for removal, the immigration judge may apply what is known as the "modified categorical" approach. Under this analysis, an immigration judge may look beyond the statute and consider the record of conviction — for example, the charging document, the plea, verdict and the sentence. But the judge may not look beyond this record.

In Sanchez Fajardo's case, however, the immigration judge relied upon Fajardo's misdemeanor assault and battery convictions — information outside the record of his false imprisonment conviction — to find that his false imprisonment conviction qualified as a conviction involving moral turpitude. In reaching this decision, the immigration judge and the BIA relied on the attorney general's earlier decision in Matter of Silva-Trevino. In Silva-Trevino, the attorney general created a third prong, which went beyond the categorical or modified categorical approach. It allowed immigration judges to consider extraneous information, such as Sanchez Fajardo's misdemeanor assault and battery convictions, which the Department had already conceded were not crimes involving moral turpitude.

The 11th Circuit found Sanchez Fajardo's false-imprisonment charge merely tracked the general language of the false-imprisonment statute, which states that the crime of false imprisonment is committed by either the use of forcible threats or by merely secretly confining a person. According to the statute a person can be convicted of false imprisonment in Florida by force or by secretly restraining someone, as for example, by locking a door. In Sanchez Fajardo's case, it was not clear from the state court record whether Sanchez Fajardo's false imprisonment

conviction resulted from violent force or merely nonviolent restraint. Under the categorical approach, if either forcible threats or secret confinement did not constitute a crime involving moral turpitude, Fajardo could not be removed.

The 11th Circuit rejected the Attorney General's decision in Matter of Silva-Trevino that allowed the immigration judge to abandon the categorical approach by considering the facts underlying Fajardo's false imprisonment conviction to find his conviction was a crime involving moral turpitude. Now, as a result of Sanchez-Fajardo, an immigration judge must only look to the record of the conviction for the particular crime to decide if the conviction qualifies as a crime involving moral turpitude. The end result is the Department of Homeland Security is once again limited to the record of conviction and cannot retry the criminal case in removal proceedings.

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SECURITY: System problems arise when agencies have security issues

In some courthouses, representatives of different agencies didn't always attend the same meetings on courthouse security, so there were fewer opportunities to engage in interagency talks, the report found.

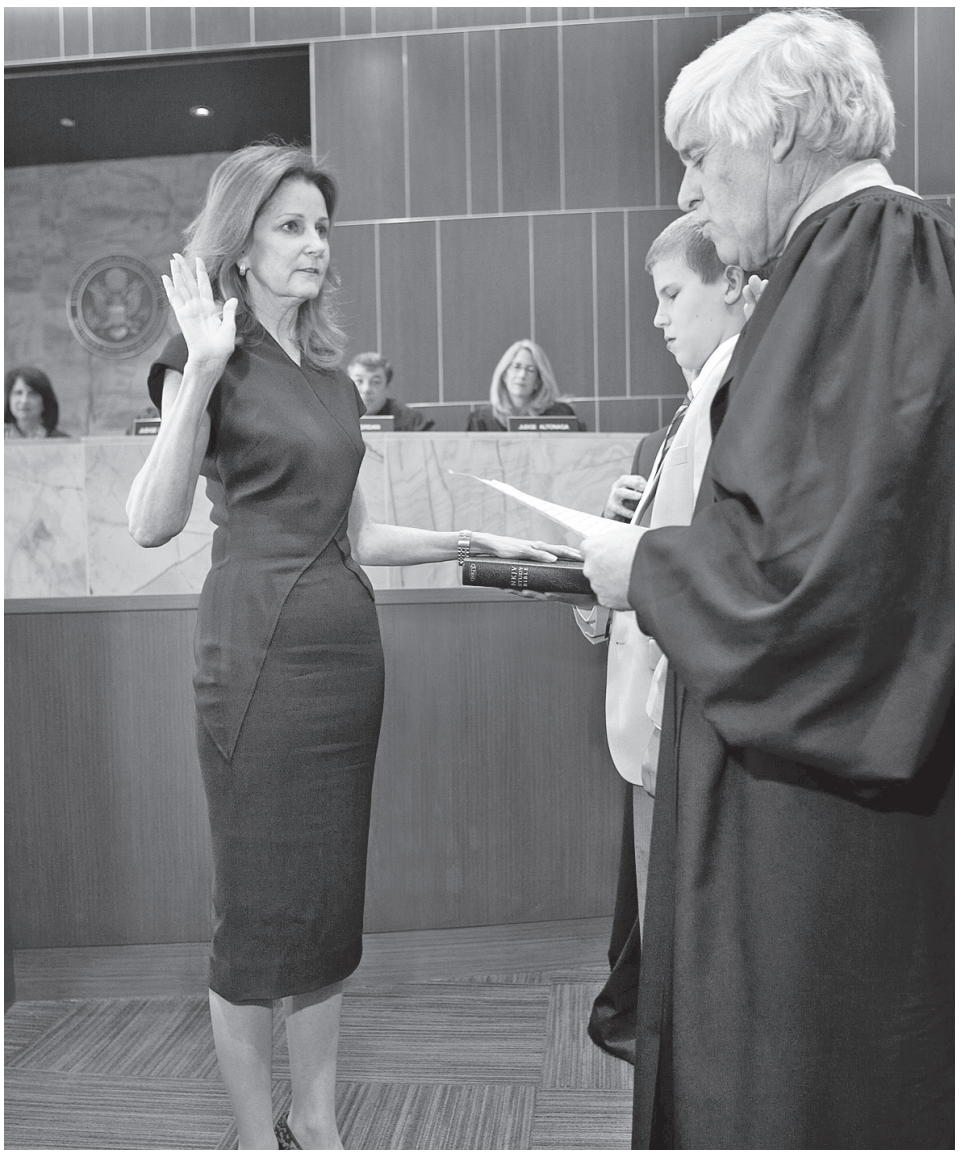
It also noted some of the unique challenges to protecting courthouses. Of the 424 federal courthouses, 146 have historic status, making it more difficult to modernize new security features.

The GAO recommends defining the security roles of each federal agency, detailing ways to bring all agencies involved to communicate with one another and making sure the U.S. Marshals Service and Federal Protective Service are writing up the required reports on risks facing individual courthouses.

Marshals Service spokesman Jeffrey Carter said Monday, "The U.S. Marshals Service concurs with the recommendations contained in the report." He declined to comment on conditions at individual courthouses.

Zoe Tillman reports for the National Law Journal, an ALM affiliate of the Daily Business Review.

TAKING THE BENCH



DANIEL PORTNOY

Former Federal Public Defender Kathleen Williams is sworn in as a federal district judge by Chief U.S. District Judge Federico A. Moreno. Her godchild, Christian Peacock, holds the Bible.