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US IMMIGRATION & NATIONALITY LAW

# IS IT MANDATORY TO DETAIN AN AGGRAVATED FELON?

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**by**
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Matt and his buddies are members of Delta Tau Delta at Case Western Reserve University in Cleveland, Ohio. During the fall semester, these fraternity boys came up with a “brilliant” plan to take a road trip to Windsor, Ontario. I mean, what could be more fun than a weekend of drunken debauchery and classy casinos in that booming metropolis outside of Detroit ?

Because Matt, a lawful permanent resident and a native of China , knew it would be the highlight of his Senior year, he immediately included his old friend, Samer, in the plans. This was going to be a weekend to remember. Samer, a native of Lebanon and a resident of Canada , agreed and decided to drive down and join the group. He skipped his Friday afternoon class at McGill University and headed to Windsor.

Friday night was indeed a blast, but the boys lost a lot of money. On Saturday morning, they decided to cut their losses and head back to Cleveland. Samer didn't have class on Monday and asked if he could head back with them for a few days. Incapable of saying no to a friend or a good time, Matt extended a warm welcome to his friend.

There was a problem though. Samer was not a Canadian Citizen. He couldn't just cross the Freedom Bridge with his friends. He needed a visa to enter the United States and didn't have one. Not a problem according to the President of Delta Tau Delta, who knew of a short waterway in northern Michigan. “Just swim across and we'll be there to meet you. Come on, it will be hilarious and will make for an awesome story to tell the brothers back at school.”

And thus begins the tragic demise of Windsor Weekend 2007. The frat boys crossed the border and waited at the beach to pick up their friend. Samer emerged from the water, jumped in the back of Matt's brand new KIA and suddenly sirens went off in the car behind them. The boys were arrested. Matt, a non-citizen, was hit with double charges – both criminal and immigration.

Suppose that by now Matt has a conviction for conspiracy to transport an illegal alien within the U.S. in violation of INA §§ 274(a)(1)(A)(ii) and (a)(1)(A)(v)(I) after a plea bargain. He was sentenced to time served by a federal judge. No probation was imposed, nor supervised release. He was arrested briefly at the time of apprehension and was released on bail prior to entry of his plea agreement. In spite of the fact that he had no jail time, Matt was placed into immigration removal proceedings because the government contended that his conviction amounted to an aggravated felony as defined under §101(a)(43)(N) and (U) of the Immigration and Nationality Act, as a crime "relating to alien smuggling."

After some preliminary research, Matt's counsel would find that the BIA, in *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999), *aff'd Ruiz-Romero v. Reno*, 205 F.3d 837 (5 th Cir. 2000), has held that a conviction under INA § 274(a)(1)(A)(ii) constitutes a crime "relating to alien smuggling" under INA § 101(a)(43)(N), even though the offense pertained to transportation of a noncitizen within the United States and not smuggling him into the country. If he were found to be an aggravated felon, Matt would be deported from the United States and be permanently barred from re-entering the country.

Adding insult to injury the aggravated felony charge invokes the mandatory detention provisions of the INA. So, Matt not only faces removal, but also would be mandatorily detained until the completion of case, something that could take months or years. If he is not successful in fighting the removal charge, he will remain detained until the government deports him to China .

**Helping Matt**

So what is Matt to do? Immigration detention facilities can be terrifying places. They are nothing like the facilities that incarcerate the likes of Martha Stewart or Paris Hilton. Matt is also in his final semester of college. He has a promising career in front of him. But all he sees in the future is a small cell surrounded by hardened offenders.

At the master calendar hearing, Matt's counsel will enter the pleadings, indicate

an intention to challenge the aggravated felony charge and terminate removal proceedings as Matt is otherwise a lawful permanent resident (aka green card). The Immigration Judge ("IJ") will schedule the next hearing and set forth a briefing schedule to support counsel's termination motion. However, upon exiting the courtroom, Matt may very well be picked up by ICE officers, who lurk in the shadows of the federal buildings.

The detention authority derives from section 236(c) of the INA, which states as follows:

The Attorney General **shall take into custody** any alien who—

> A. is inadmissible by reason of having committed any offense covered in section 212(a)(2) of this title,
> B. is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> C. is deportable under section 237(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
>
> D. is inadmissible under section 212(a)(3)(B) of this title or deportable under section 237(a)(4)(B) of this title,
>
> **when the alien is released** , without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

INA § 236(c) (emphasis added). By way of translation, although the mandatory prevention provisions related to excludable noncitizens are fairly sweeping, the provisions related to deportable noncitizens include only those considered by the government to be aggravated felons. Finally, the mandatory detention provisions allow for a limited exception where release from custody is necessary to provide protection to persons cooperating with law enforcement authorities investigating "major" criminal activity, as well as their immediate family members, if the Attorney General is satisfied that the noncitizen will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. *Id.*

**Obtaining a Hearing to Challenge Mandatory Detention**

In *Denmore v. Kim*, 538 U.S. 510 (2003), t he U.S. Supreme Court abrogated a line of cases coming from the Third, Fourth, Ninth and Tenth Circuit Courts of Appeals to hold that the detention without bail provision of INA § 236(c) did not violate the Fifth Amendment proscription against the deprivation liberty without due process of law[1]. *Denmore*, 538 U.S. at 528-531. The Court sanctioned the detention of criminal noncitizens for the brief period necessary to complete their removal proceedings, even without the government providing individualized determinations as to whether each presented a flight risk[2]. The Court reasoned that Congress was justifiably concerned that deportable, undetained criminal noncitizens would continue to engage in criminal activity and were likely to abscond before their removal hearings[3]. *Id.*

A noncitizen may seek a determination by an IJ that he or she is not properly included within any of the categories that require mandatory detention during a *Joseph Hearing*[4] . 8 C.F.R. § 1003.19(h)(ii). In *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1989), the Board of Immigration Appeals ("BIA") held that an alien is not subject to mandatory detention if the IJ or the BIA finds that the Service is "substantially unlikely" to establish a charge of deportability in the merits hearing, or on appeal, which would otherwise subject the alien to mandatory detention. The majority noted that the Respondent, a lawful permanent resident, would have otherwise been free to reside and work in the United States "but for the pendency of the aggravated felony charge brought by the Service." *Id.* at 805. Therefore, the fact that the Service "could prevail" at the merits hearing was insufficient, standing alone, to defeat the safeguard provided in the regulations.

The members of the Board in *Joseph* were divided, however, on what the proper standard ought to be. Chairman Paul W. Schmidt, joined by Fred W. Vacca, Gustavo D. Villaeliu, Lory D. Rosenberg, and John Guendelsberger, concurred in part and dissented in part by opining that the standard should not be that the Service is "substantially unlikely" to establish the charge that subjects an alien to mandatory detention , but rather "whether the Service has demonstrated a *likelihood of success* on the merits of its charge that the respondent is removable because of an aggravated felony." *Id.* at 809 (emphasis added).

Matt's counsel will immediately request the Immigration Judge to schedule a

*Joseph* hearing to determine whether Matt was properly included under one of the mandatory detention categories.

Although Matt would be precluded from challenging the constitutionality of INA § 236(c), under *Denmore*, Matt's attorney may still assert several legal arguments to win his release during the pendency of his removal proceedings. First counsel could argue that Matt is not subject to mandatory detention because he was not ever actually "released" from custody. Second, counsel could contest the government's charge that Matt's conviction under INA § 274(a)(1)(A)(ii) constitutes a crime "relating to alien smuggling" under a plain reading of INA § 101(a)(43)(N), and thus, is not an aggravated felony.

**If There Was No Release, There Is No Mandatory Detention**

As quoted above, under INA § 236(c), t he Attorney General is required to take into custody any noncitizen who is deportable by reason of having committed a crime considered to be an aggravated felony " **when the alien is released**, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." INA § 236(c)(1)(B) (emphasis added).

Because Matt was never taken into custody following his conviction, but rather the district court judge imposed a sentence of time served and declined to order supervised release or probation, Matt is not subject to the mandatory detention. He was not "released," as is required by section 236(c). A plain reading of section 236(c) suggests that this provision triggers only "when the alien is released" post-conviction and post-sentencing, and not upon the initial release following his arrest. The government will argue that release even after a pre-conviction arrest is sufficient to trigger mandatory detention. *Cf*. *In re West*, 22 I&N Dec. 1405, 1408 (BIA 2000) (although the alien was deemed to be released after his pre-conviction arrest, he was nevertheless sentenced to probation following his conviction).

As Matt was not subject to removal until a conviction was entered, it would be contrary to the ordinary meaning of the word "release" for this provision of the statute to take effect prior to a conviction. However, *West* is easily distinguishable in Matt's case because that case focused more on whether a noncitizen's release prior to the effective date of INA § 236(c) would subject him to mandatory detention. It is also not a precedent decision.

Also, the language following the word “release” indicates that a preliminary arrest is irrelevant to the question of whether Respondent is subject to mandatory detention. This language, “ without regard to whether the alien is released on parole, supervised release, or probation,” refers qualified methods of release that only pertain after a conviction has been entered. To read the statute otherwise, and equate a preliminary arrest with physical custody makes this clause of the statute completely superfluous[5].

As Matt was not sentenced to any period of confinement as a result of his conviction, he was not ever, in fact, released from physical custody. “Release” must be understood from its ordinary meaning, and such a phrase would become superfluous if Congress intended that all noncitizens convicted of crimes alleged to be aggravated felonies were subject to mandatory detention, regardless of whether a sentence is imposed or not. Finally, the rule of lenity should be applied in interpreting section 236(c), and any ambiguities in the phrase “when the alien is released” should be resolved in Matt's favor.

**Transportation Is Not An Aggravated Felony Under A Plain Meaning Of Section 101(a)(43)(N)**

Matt's counsel would also argue that it is substantially unlikely that the government will prevail in establishing that Matt's conviction will be characterized as an aggravated felony.

In accordance with recent Supreme Court jurisprudence, the aggravated felony provisions of INA § 101(a)(43) should also be interpreted under their plain, or ordinary, meaning. During the past three years, the U.S. Supreme Court has interpreted two aggravated felony provisions in § 101(a)(43) under the ordinary, or plain meaning approach. *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 127 S.Ct. 625, 166 L.Ed. 2d 462 ( Dec. 5, 2006 ) .

In *Leocal*, 543 U.S. 1, the U.S. Supreme Court held, using the plain and ordinary meaning approach, that a DUI offense could not be categorized as a “crime of violence” under 18 U.S.C. § 16, and thus an aggravated felony under § 101(a)(43)(F). The Court reasoned that the plain meaning of the word “use” in “use of physical force against the person or property of another” could not encompass accidental, harmful conduct resulting from a DUI offense sufficiently to characterize the offense as a crime of violence included in 18 U.S.C. § 16. The following extract of the Court's decision is worth noting:

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes.

*Id.* at 11 (internal citations omitted). The Court further noted that since it had to apply § 16 to both criminal and civil (deportation) contexts, the statute must be interpreted consistently, and the rule of lenity applies[6]. *Id.* at 12.

More recently, the Supreme Court in *Lopez*, 127 S.Ct. 625, reminded the government that the ordinary meaning of the word "trafficking" implied some sort of commercial dealing, and thus Lopez' South Dakota possession conviction, although a felony under state law, did not imply any commercial dealing and could not be considered as an aggravated felony pursuant to § 101(a)(43)(B).

It is a well established doctrine that cases interpreting statutes are "fully retroactive because they do not change the law, but rather explain what the law has always meant." *See e.g. United States v. Rivera-Nevarez,* 418 F.3d 1104, 1107 (10 th Cir. 2005). Moreover, the Supreme Court has more generally pronounced that "hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). The BIA has also held that immigration courts are bound by federal court precedents. *See Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989).

Under the plain, or ordinary, meaning doctrine, it could be argued that *Matter of Ruiz-Romero*, 22 I&N Dec. 486 has been implicitly overruled, as the majority did not follow the Supreme Court's "plain meaning" interpretation of the statute[7]. In *Ruiz-Romero*, the majority opined that the phrase "relating to alien smuggling" was a descriptive phrase, providing the reader with an accurate guidance to the offenses described in § 274(a)(1)(A), rather than a limiting

phrase. *Id.* at 489. The majority further noted that other provisions of § 101(a)(43) had similar descriptive phrases in parentheses, such as the phrase "relating to gambling offenses" in § 101(a)(43)(J)[8]. By analogizing "relating to alien smuggling" with similar phrases in other sections of § 101(a)(43), the majority failed to employ the plain meaning approach embraced by *Leocal* and *Lopez* in interpreting the specific meaning of "relating to alien smuggling" relative to the broad group of offenses in § 274(a)(1)(A) and (2).

It would seem that Lory Rosenberg's dissent, joined by Fred W. Vacca, has more force post- *Leocal* :

*Matter of Ruiz-Romero*, 22 I&N Dec. at 497, 501-503 (Lory D. Rosenberg dissenting) (emphasis added).

A plain reading of the statute provides a clear demarcation between the essential elements of alien smuggling and transportation offenses. Thus, as opposed to INA § 274(a)(1)(A)(i), subsections (a)(1)(A)(ii) and (v) do not obviously constitute crimes " relating to alien smuggling ." T he majority failed to analyze that the crime of transporting has elements different from smuggling.

Smuggling involves the bringing of an alien into the United States[9] . On the other hand, the transportation offense in § 274(a)(1)(A)(ii) involves moving or transporting an alien who has already "come to, entered, or remains in the US in violation of law. . ." The majority opinion is devoid of any analysis as to whether the essential elements of a transportation crime had any similarities to the essential elements of a smuggling crime[10].

Under the plain meaning doctrine, it is reasonable to assume that Congress meant to limit the several offenses in § 274(a) to those actually relating to alien smuggling and not to every offense under § 274(a). Finally, as instructed by the Supreme Court in *Leocal*, the majority failed to use the principle of lenity in interpreting an ambiguous statue in favor of the alien in removal proceedings. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

**Conclusion**

Matt has an extremely uphill battle ahead of him. If he prevails, and the Immigration Judge orders him released, the government can override the IJ's decision and invoke the automatic stay provision by intending to appeal to the Board of Immigration Appeals[11]. He will then remain detained until the BIA

rules in his favor. Whether Matt obtains an unfavorable ruling from the IJ or the Service appeals a favorable ruling, Matt also has the option of filing a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. § 2241, to challenge his detention while the government appeals its case[12].

Of course, if Matt ultimately prevails that he is not subject to detention, as he is not likely to be found to be an aggravated felon, his chances of winning on the merits are wonderful. Thus, fighting the mandatory detention ground and winning is an important battle in Matt's struggle to rid himself of removal charges and continue to partake in Delta Tau Delta activities.

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[1] See Patel v. Zemski, 275 F.3d 299 (3rd Cir. 2001); Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002).

[2] Importantly, the Court noted that INA § 236(e), which states, "No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole," did not bar habeas challenges to 236(c) detention determinations.

[3] Denmore has since been limited in both the Circuit Courts of Appeals and the U.S. District Courts, through use of habeas proceedings. See Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); Uritsky v. Ridge, 286 F.Supp.2d 842 (E. D. Mich. 2003); Parlak v. Baker, 374 F.Supp.2d 551 (E.D. Mich. 2005). Interestingly, as habeas is an equitable exercise of judicial authority, the analyses provided in these cases focuses on the likelihood the detainee would abscond if released and the danger s/he would present to the community, as well as the reasonability of the length of detention

[4] The U.S. Supreme Court, in Denmore, acknowledged that limited review of a custody determination was available through a Joseph Hearing. However, it declined to review the adequacy of Joseph hearings because the respondent in Denmore had conceded deportability based upon a conviction that triggered INA § 1226(c). Denmore, 538 U.S. at 513 (footnote 3). Nevertheless, the Court seemed satisfied that a degree of individualized review was available to screen out those noncitizens who were improperly detained pursuant to § 1226(c) to find this provision of the statute to be constitutional.

[5] See Mary E. Kramer, Immigration Consequences of Criminal Activity, A Guide to Representing Foreign-Born Defendants, pp. 61-62, American Immigration Lawyers Association.

[6] Specifically, the Court stated, "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." Leocal, 543 U.S. at 12. These principles of statutory construction strongly undermine the civil/criminal dichotomy upon which the BIA distinguished its earlier decision in Matter of I-M-, 7 I&N Dec. 389 (BIA 1957) (holding that the crime of "transporting" was not a deportable offense), and found transportation to constitute a ground for removability as an aggravated felony. In re Ruiz-Romero, 22 I&N Dec. 486 at 491-492.

[7] While Ruiz-Romero has been affirmed by the Fifth Circuit in Ruiz-Romero v. Reno, 205 F.3d 837 (5th Cir. 2000) and the Ninth Circuit in US v. Galindo-Gallegos, 244 F.3d 728 (9th Cir. 2001), both of these decisions were rendered before the Supreme Court's pronouncements in Leocal and Lopez.

[8] It could be argued that Congress intended to limit the offenses triggering the aggravated felony consequences in the underlying federal statutes by adopting "relating to ___" language in parenthesis whenever the these federal statutes are cited in the sub-sections of § 101(a)(43). Moreover, the term, "relating to" occurs even without parenthesis in § 101(a)(43)(K)(i), (Q), (S),(T), further bolstering the dissent's position that the term is limiting rather than descriptive.

Of note, in an unpublished decision, the Board of Immigration Appeals ("BIA") decided around the same time as Matter of Ruiz-Romero, that a conviction under 18 U.S.C. § 1546(a) for conspiracy to possess false immigration documents may not be construed as a crime "relating to fraud and misuse of visas, permits, and other entry documents." In re Vazquez-Gonzalez, A92 593 325 (BIA March 22, 1999). Although this case is not binding authority, it provides an example where the BIA has inconsistently construed the phrase "relating to" as merely descriptive in some instances while limiting in others. More important, the BIA acknowledged in Vazquez-Gonzalez that it used the categorical approach to statutory interpretation in Ruiz-Romero, which is no longer valid after Leocal.

The language of section 274(a) is plain; it articulates clearly a list of offenses

and needs no parenthetical modification to "provide() the reader accurate guidance as to the nature and extent of the offenses referenced." Matter of Ruiz-Romero, Interim Decision 3376, at 5 (BIA 1998).

In my opinion, the parenthetical language is not "merely descriptive." Id. (emphasis added). It is descriptive in a narrowing sense, focusing the reader's attention on a subgroup of offenses covered by section 274(a) that Congress deemed to constitute offenses that qualified for categorization as aggravated felony convictions. This conclusion is supported by several principles of statutory construction that we are bound to follow, including the rule of lenity.

The crime of transporting has distinct elements which do not involve the secret, illicit, or unlawful importing or "bringing in" of an alien, or inducing him to enter in violation of law . . . Transporting, after an alien enters, comes to, or remains unlawfully, is transporting after a smuggling incident occurred, if one occurred at all.

Our reasoning in these precedents supports the view that while certain preparatory offenses such as aiding and abetting or conspiracy to bring an alien to the country or encourage him to enter would be an offense "relating to alien smuggling," a crime like transporting, which is a separate and distinct criminal offense and has its own unique legal elements, is not necessarily one relating to alien smuggling.

[9] The "alien smuggling" ground of inadmissibility and deportability at INA § 212(a)(6)(E) and § 237(a)(1)(E) is defined as knowingly encouraging, inducing, assisting, abetting, or aiding an alien to enter or to try to enter the United States in violation of the law. See Matter of I-M-, supra, holding that a conviction for transporting an legal alien was not a deportable offense under former § 241(a)(13) of the INA.

[10] The concurrence also disagreed with the majority that the words, "relating to alien smuggling," are merely descriptive and perform no limiting function, and thus a conviction under INA § 274(a) with no nexus to a smuggling offense would not be an aggravated felony. Matter of Ruiz-Romero, 22 I&N Dec. at 493 (Gustavo D. Villageliu concurring).

[11] 8 CFR § 1003.19(i)(2).

[12] The Sixth Circuit, despite Demore v. Kim, 538 U.S. 510, upholding the

constitutionality of mandatory detention, expressed concerns that deportable aliens may not be indefinitely detained without the government showing a strong special justification. See Ly v. Hansen, 351 F.3d 263.

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