

8th Circuit Court

Case: *Mumad v. Garland*, No. 20-2140 (8th Cir., Aug. 27, 2021)

Date: August 27, 2021

Panel: Kelly, Grasz, and Kobes

Opinion: Grasz

Concurrence in Judgment: Kelly

Tags: Immigration, removal, Particularly Serious Crimes, non-per-se PSCs, constitutional vagueness, categorical approach

Question(s) Presented: Is the non-per-se-PSC category mentioned in §1231(b)(3)(B)(iv) constitutionally void for vagueness?

Holdings: No, the non-per-se-PSC category is not void for vagueness.

Rationale: Two textual limits save the statute from constitutional vagueness (even though it allows for some ambiguity about what else constitutes a non-per-se PSC):

- “First, the ‘particularly serious’ modifier places the non-per-se PSC in context: it must be excessive in quality or extent to some unusual degree.” 8
- “And second, we agree with the Ninth Circuit that the phrase ‘danger to the community of the United States’ modifies what comes before it. . . . So, only a crime that makes the alien a ‘danger to the community’ can count as a non-per-se PSC.” 9

Facts: (2) Citizen of Ethiopia who from childhood experienced violence because of the conflict between the Oromos and Tigrayans. Father was kidnapped and presumed murdered by the Tigrays after helping to arm the Oromos. Mother killed by Tigrayans, who set the house on fire, killing one brother. Respondent and other brother escaped by jumping from 2nd story. That brother was killed, while Respondent was in a coma for weeks. Came to U.S. at age 14. Experienced homelessness, mental health issues. Sexually assaulted another minor, which triggered predatory-offender-registration duties.

Procedural History:

- **State Court:** sentenced to a year and a day for failing to register as a predatory offender.
- **DHS:** used that conviction to issue removal order.
- **IJ:** denied asylum, but granted withholding of removal
- **DHS:** Reopened case seven years later to end withholding, “citing intervening criminal convictions and corresponding prison sentences.” 3
- **IJ:** granted DHS’s request, “finding that Mumad had committed multiple **non-per-se PSCs**.”

Respondent’s Arguments:

- The undefined statutory term “Particularly Serious Crime” “is void for vagueness because it gives the executive and judicial branches free rein to label *any* conviction a PSC.” 2
- Three SC opinions found that certain “crimes of violence” are “void for vagueness”:
 - *U.S. v. Davis*, 139 S. Ct. 2319 (2019): “crime of violence” definition in Firearms Chapter of criminal code
 - *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018): “aggravated felony” definition in INA
 - *Johnson v. U.S.*, 576 U.S. 591 (2015): “crime of violence” definition under Armed Career Criminal Act’s “violent felony” definition.

Appeals to Statute & Precedent:

- §1231(b)(3)(B)(ii): no withholding “if the A.G. decides that: . . . the alien, having been convicted by a final judgment of a *particularly serious crime* is a danger to the community of the U.S.”
- §1231(b)(3)(B)(iv): “an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a *particularly serious crime*. *The previous sentence shall not preclude the A.G. from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.*”
- 8 C.F.R. § 1208.16(d): defining PSCs
- *Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021): per se PSC exists when ag fel(s) result in (at least) a five-year aggregate sentence. Court found “non-per-se” PSC term ambiguous, because “the statute and accompanying regulations merely define a category of per se [PSCs] but are otherwise silent[.]” *Id.* at 448.
- *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018): every conviction outside of the per-se-PSC category requires a case-by-case analysis. (8th Circuit disagrees with this.)
- *Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018): Vagueness challenge to non-per-se PSC term failed because it was not constitutionally vague on its face.
- *Silvestre-Giron v. Barr*, 949 F.3d 1114 (8th Cir. 2020): Standard for reversal of denial of CAT relief (only if the record evidence is so compelling that no reasonable factfinder could fail to find in Respondent’s favor).

Relevant World History:

- Conflict between Oromos & Tigrayans in Ethiopia
- IJ found “evolving and improving conditions” in Ethiopia since the election of an ethnically Oromo PM.

Discussion:

- IJ found non-per-se PSCs where during theft & simple robbery, Respondent threatened or actually used physical violence.

- “Even for those crimes outside of the per se category, though, the A.G. may still decide that an alien committed a PSC based on Section 1231(b)(3)(B)(ii)’s final sentence. . . **So, we have identified that two PSC categories exist: (1) the per-se PSCs; and (2) the non-per-se PSCs.**” 4-5
- 8th Circuit previously found the non-per-se-PSC category “ambiguous” because the statute was otherwise silent, but that’s not the same as saying “void for vagueness.” 5
- “While only elected representatives can criminalize conduct, . . . [v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable’ officials in the judicial and executive branches, which ‘erode[s] the people’s ability to oversee the creation of the laws they are expected to abide.’” 6 (quoting *Davis* at 2325)
- “Vague, ‘standardless’ statutes also ‘invite[] arbitrary enforcement.’ *Johnson v. United States*, 576 U.S. 591, 595 (2015).” 6
- *Davis, Dimaya, Johnson*: Court took categorical approach.
 - “That approach analyzes how the law defines the offense[,]’ not how the individual committed it.” 7
 - “Under the categorical approach, the challenged clauses . . . created uncertainty about how to: (1) estimate the risk posed by the crime; and (2) set the threshold risk-level for a crime to fall within the definition.” 7
- *Guerrero v. Whitaker* (9th 2018): found that the non-per-se PSC term was NOT vague on its face.
 - 8th Circuit takes different route to get to this conclusion
 - 9th Circuit said statute “requires the agency to place the alien’s conviction along a spectrum of seriousness,” show that the crime allows the inference that the person is a danger to the community, and that other crimes beyond the enumerated ones may be particularly serious. *Guerrero* at 544-545.
 - Uncertainty did not render it constitutionally vague. 8
 - Concluded that the non-per-se PSC inquiry applies only to real-world facts. 8

Concurrence in Judgment: Kelly

- Agrees with 9th Circuit that there ought to be a case-by-case analysis, but that this case would fall into the category of non-per-se PSCs.

Commentary:

- **CAT Relief:**

- Circuit court will “only grant CAT relief if the record evidence is ‘so compelling that no reasonable factfinder could fail to find in [Mumad’s] favor[.]’” 10 (quoting *Silvestre-Giron* at 1118)