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# Immigration Case Notes for Massachusetts Criminal Defense Attorneys
# August 2015

## U.S. Court of Appeals for the First Circuit

***Mele v. Lynch,*** No. 13-1917, 2015 U.S. App. LEXIS 14568 (1st Cir. Aug. 19, 2015)

This case reveals the power of unproven criminal allegations in the immigration context and the role that discretion plays in all applications for immigration benefits. Mr. Mele appealed the decision of the Board of Immigration Appeals (BIA) affirming the Immigration Judge (IJ)'s denial of his application for adjustment of status in the exercise of discretion based solely on facts alleged in a police report involving a *pending* criminal charge. Mr. Mele was placed in removal proceedings for remaining in the United States after his non-immigrant visa expired, but as a defense to deportation he applied to adjust his status to lawful permanent resident (LPR – green card holder) based on his marriage to a U.S. citizen. While in removal proceedings, Mr. Mele was arrested on six counts related to the illegal sale of prescription drugs. The IJ found him statutorily eligible to adjust status, but denied his application in the exercise of discretion based solely on the facts alleged in the police reports related to Mr. Mele's open criminal case.

On appeal, the First Circuit concluded that it lacked jurisdiction to review this discretionary determination. The Court found that Mr. Mele had failed to adequately raise any constitutional claim or other question of law. The appeals court observed, "We have previously held that an immigration court may generally consider a police report containing hearsay when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction, because the report casts probative light on an alien's character."

***United States v. Whindleton,*** No. 14-1932, 2015 U.S. App. LEXIS 13958 (1st Cir. Aug. 10, 2015)

At issue in this case is whether the Massachusetts offense of assault with a dangerous weapon (ADW), Mass. Gen. L. ch. 265, § 15B(b), "has an element the use, attempted use, or threatened use of physical force" as defined in the federal Armed Career Criminal Act (ACCA).[1] This

[1] The Court also examined New York Penal Code § 220.39(1), criminal sale of a controlled substance in the third degree, and concluded that it is a "serious drug offense" under the ACCA. In so holding, the Court concluded that *offering* to sell or

question is relevant under immigration law, because the aggravated felony definition of "crime of violence" includes identical language. 18 U.S.C. § 16(a). To satisfy the definition of "force" under both the ACCA and 18 U.S.C. § 16, the force must be "violent." *Johnson v. United States*, 559 U.S. 133 (2010). The Court concluded that ADW has as an element the attempted or threatened use of violent force, even though the offense encompasses attempted or threatened offensive touching with a dangerous weapon. The Court found that the definition of "dangerous weapon," which includes objects either constructed to cause serious injury or used in a dangerous manner by the defendant, "imports the 'violent force' required by *Johnson* into the otherwise overbroad simple assault statute." In so holding, the Court failed to distinguish *United States v. Fish*, 758 F.3d 1, 9 (1st Cir. 2014), which held that Massachusetts assault and battery with a dangerous weapon does not have "violent force" as an element.

Practice Tip

Defense counsel should proceed under the assumption that a sentence of imprisonment of one year or more, suspended or imposed, on ADW will be considered an aggravated felony. An aggravated felony is a special class of deportable crimes that make the client subject to nearly automatic deportation, permanent exile from the U.S. and is a bar to almost every defense to deportation. The decision also increases the risk that ABDW will be considered an aggravated felony if the client receives a sentence of imprisonment of one year or more, suspended or imposed.

Immigration attorneys should note that the First Circuit may have left open an argument regarding the degree of intent necessary for an ADW conviction and whether that intent is sufficient for a violent felony or a crime of violence. *See Whindleton* at n.9 & n.12.

**Massachusetts Appeals Court (Unpublished)**

***Commonwealth v. Bisono,*** No. 12-P-1315, 2015 Mass. App. Unpub. LEXIS 881 (Aug. 31, 2015)

Ms. Bisono appealed the denial of her motion to vacate her December 1996 plea to possession with intent to distribute cocaine. Ms. Bison's argued that the judge failed to provide the immigration warnings outlined in Mass. Gen. L. ch. 278, § 29D and that her defense attorney was ineffective for failing to advise her regarding the immigration consequences. The Appeals Court upheld the denial of the motion on both grounds. Of note in this case, the Appeals Court rejected without analysis Ms. Bisono's argument that the right to be advised by defense counsel of immigration consequences under art. 12 of the Massachusetts Declaration of Rights is retroactive to April 24, 1996. This is significant because under *Commonwealth v. Sylvain*, 446 Mass. 422 (2013), it is clear that the Sixth Amendment right to be advised of immigration consequences is retroactive only to April 1, 1997. April 1, 1997 is the effective date of Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Division C of Pub.L. 104–208, 110 Stat. 3009-546. The near-mandatory consequences of criminal convictions, however, were felt as early as April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

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distribute a narcotic is sufficiently related to manufacturing or distributing a controlled substance to meet the definition of "serious drug offense" under the ACCA.