The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Case Notes for Massachusetts Criminal Defense Attorneys June 2016

U.S. Supreme Court

***Mathis v. United States*,** No. 15-6092, 195 L. Ed. 2d 604 (U.S. June 23, 2016)

This case affirmed and clarified the strict, elements-based categorical approach that is typically used to determine whether a criminal conviction matches a federal ground of deportability or inadmissibility. The categorical approach is also used in the criminal context – including under the Massachusetts Armed Career Criminal Act (ACCA) to determine whether a sentencing enhancement is appropriate. In fact, the *Mathis* decision is a federal ACCA case.

In very brief, when deciding if a particular conviction matches a removal ground under the categorical approach, immigration courts look to the elements of the state criminal offense and determine if those elements match the elements of the federal ground. An element is defined as a fact that a jury must decide unanimously and beyond a reasonable doubt. Only if the criminal statute of conviction is "divisible," meaning it includes multiple separate crimes (i.e. different offenses with different elements), may a court look to the record of conviction to determine the offense of conviction.

At issue in *Mathis* was whether courts are really limited to comparing elements, if the criminal statute lists certain alternative "means" of committing the crime. A "means" of committing a crime is a fact that the jury does not need to agree upon in order to convict. For example, the jury could find a defendant guilty of assault and battery with a dangerous weapon, but still disagree as to whether the weapon was a baseball bat or a pipe.

In *Mathis*, the Court looked at an Iowa burglary statute that required entry into a range of places ("any building, structure, [or] land, water, or air vehicle"), but Iowa law was clear that the jury did not have to unanimously select one of these locations to convict. Of these alternatives, only building or structure would match the generic definition of burglary necessary for a criminal enhancement. Therefore, if the Iowa statute is not divisible, then the offense can never match the generic definition of burglary. But if, as the Government argued, it was appropriate to look to the record of conviction to determine which means the defendant employed, the offense might sometimes justify the burglary enhancement. The Court rejected the Government's argument, concluding that under a long line of precedent, most recently reflected in *Descamps v. United*

States, 133 S. Ct. 2276 (2013), the categorical approach is limits consideration to the elements of a crime.

For a more thorough analysis, please see the following practice alert: https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2016_1July_mathis-alert.pdf

Voisine v. United States**,** No. 14-10154, 195 L. Ed. 2d 736 (U.S. June 27, 2016)

In this decision, the Supreme Court concluded that a "crime of domestic violence" under 18 U.S.C. § 922(g)(9) includes reckless conduct. This may be relevant to immigration law because the definition of "crime of violence," at 18 U.S.C. § 16, includes similar language. A "crime of violence" with a sentence of imprisonment of one year or more, suspended or imposed, is an aggravated felony. And a "crime of violence" against a person protected by domestic violence laws is considered a "crime of domestic violence," which is a ground of deportability.

The First Circuit (along with virtually all circuits to consider the question) has held that reckless conduct is insufficient to qualify as a crime of violence under 18 U.S.C. § 16. *United States v. Fish*, 758 F.3d 1, 9-10 (1st Cir. 2014). *Voisine* expressly reserved the question of whether § 16 covers reckless conduct. Nevertheless, immigration authorities may argue that the Supreme Court's decision in *Voisine* undermines *Fish* and other cases in that line and therefore even a reckless offense can be a crime of violence for immigration purposes.

Practice Tip

Because of the risk that immigration authorities will now argue that reckless conduct is sufficient to establish a crime of violence, defense counsel should proceed understanding that reckless offenses may now be treated as crimes of violence (at least by ICE). Immigration attorneys should continue to argue vigorously that *Fish* remains controlling on this question and that *Voisine* does not change the legal landscape for § 16. For more analysis and arguments, see: https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2016_1July_voisine-alert.pdf

The offensive or de minimis touching (rather than harmful or reckless) form of simple assault and battery should not be treated as a crime of violence – this remains unchanged by *Voisine*. Making it clear on the record that a client is pleading to the de minimis form of assault and battery may help protect your client against a finding that the offense is a crime of violence.

Massachusetts Appeals Court

Commonwealth v. Ramirez-Moscat, No. 15-P-1359, 2016 Mass. App. Unpub. LEXIS 617 (June 17, 2016)

The appeals court reversed the denial of a motion for new trial, filed pursuant to *Padilla v. Kentucky* and its progeny, concluding that the motion judge erred in denying the motion without an evidentiary hearing. The defendant filed his motion seeking to vacate a 1999 plea to possession with intent to distribute class B. The motion judge based the denial on two grounds: first, the judge found the defendant's affidavit incredible because in one paragraph he stated that

he did not remember receiving any immigration advice from his trial counsel and in another paragraph the defendant said that he was not advised that the conviction would make him deportable; second, the motion judge did not credit evidence that the defendant was not properly advised of the immigration consequences because of trial counsel's representation "that it would have been his practice to read the plea sheet word for word."

The appeals court rejected both grounds, concluding that an evidentiary hearing was necessary. The defendant's affidavit, "posed an ambiguity, rather than a conflict" that should have been explored in an evidentiary hearing. Moreover, trial counsel's affidavit "itself raises significant questions as to the adequacy of the immigration advice he customarily gave defendants," because the language of the green sheet – that the defendant "may" be deported – was insufficient to satisfy the specific advise required here under *Commonwealth v. DeJesus*, 468 Mass. 174, 181 (2014). Though the Commonwealth argued that the motion should have been denied, regardless, because the record was insufficient to establish prejudice, the appeals court concluded that the defendant's seven years residence in the United States at the time of his plea (arriving when he was just fourteen) raised a factual issue that should be explored in a hearing.