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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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U.S. Court of Appeals for the First Circuit

Coelho v. Sessions, 864 F.3d 56 (2017)

The First Circuit considered, and ultimately did not decide, whether Massachusetts assault and battery with a dangerous weapon (ABDW) is categorically a "crime involving moral turpitude" (CIMT). This mattered to Mr. Coelho because a single conviction for a CIMT barred him from his only available defense to deportation, called cancellation of removal.

The focus of the First Circuit's discussion was the reckless form of ABDW which, under *Commonwealth v. Welansky*, 316 Mass. 383 (1944), is an objective, rather than a subjective test. Unlike the majority of states, a person may be reckless under Massachusetts law "even if [he] is so stupid or so heedless that in fact he did not realize the grave dangers . . . if an ordinary normal man under the same circumstances would have realized the gravity of the danger." *Welansky*, 316 Mass. at 398. "Knowing facts that would cause a reasonable man to know the danger is equivalent to knowing the danger" under Massachusetts law. *Id.*

The court of appeals was not satisfied that the Board of Immigration Appeals, when considering Mr. Coelho's appeal, had sufficiently considered this aspect of the Massachusetts definition of "reckless." And while the Board had recently issued a published decision, *Matter of Wu*, 27 I&N Dec. 8 (2017), that addresses a similar, objective measure of recklessness under California law, the *Coelho* court was not convinced that *Matter of Wu* definitely resolved the question of how the Board would treat Massachusetts recklessness, where there are some differences between the California and Massachusetts mental states.

The First Circuit therefore remanded the matter to the BIA to determine: "First, what is the effect, if any, of *Matter of Wu* on the outcome that Massachusetts ABDW is categorically a CIMT? Second, how does *Welansky*'s prescription—that a defendant "so stupid or so heedless that ... he did not realize" the risk posed by his conduct can nonetheless be deemed to have acted recklessly, so long as "an ordinary normal man under the same circumstances would have realized" the risk—impact the BIA's analysis of the moral depravity of Massachusetts reckless ABDW? Finally, was Coelho convicted of intentional or reckless ABDW?"

Practice Tip

Criminal defense attorneys should continue to assume that Massachusetts ABDW will be treated as a CIMT by immigration authorities – as the immigration judge and the BIA did in this case (repeatedly). Immigration attorneys, however, should vigorously argue that reckless ABDW is not a CIMT (and further that ABDW is not a divisible offense, *see United States v. Faust*, 853 F3d 39, 55-60 (2017), *but see United States v. Tavares*, 843 F.3d 1, 14-17 (2017)).

De Lima v. Sessions, 867 F.3d 260 (2017)

At issue in this case was whether third-degree larceny under Connecticut law can constitute a "theft offense" aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Mr. De Lima raised three arguments on appeal: (1) it cannot be a "theft offense" because it does not require an intent to permanently deprive another of the property, (2) it cannot be a "theft offense" because it includes theft of services, (3) it cannot be a theft offense because it also includes fraud offenses. The *De Lima* court rejected the first two arguments and found that Mr. Lima failed to exhaust the last argument by not raising it before the Board.

The court concluded that the argument regarding intent to permanently deprive was controlled by *Lecky v. Holder*, 723 F.3d 1 (1st Cir. 2013), where the court considered a similar statute and found that, under *Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000), no intent to permanently deprive is necessary to constitute a "theft offense" aggravated felony. The court next rejected the argument that "theft offense" cannot include theft of services, the term is broader than the common law definition of theft. Finally, the court declined to consider the argument that Connecticut theft is broader than "theft offense" because it includes fraud offenses, *see Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008), because the argument had not been raised before the Board.

Dissent

Writing in dissent, Judge Lipez maintains that the court should have considered the argument regarding theft and fraud and reversed the Board's decision on this ground.

Practice Tip

A "theft offense" with a sentence of imprisonment of one year or more, suspended or imposed, constitutes an aggravated felony. Defense counsel should assume that larceny offenses with a sentence of imprisonment of one year or more, suspended or imposed, will constitute an aggravated felony.

Immigration counsel should argue, with support from Judge Lipez's dissent and *Matter of Garci-Madruga*, that Massachusetts larceny under MGL ch. 266, § 30 cannot categorically be a "theft offense" because it includes fraud. Moreover, the generic larceny complaint will not reveal whether the crime was one of fraud or theft. *See Commonwealth v. Mills*, 436 Mass. 387, 391-92 (2002) ("The word 'steal' has become 'a term of art and includes the criminal taking or conversion' by way either of larceny, embezzlement or obtaining by false pretences.").

United States v. Windley, 864 F.3d 36 (2017); ***Bennett v. United States***, 870 F.3d 34 & 868 F.3d 1 (2017)

In an unusual series of events, the First Circuit declared the case of *Bennett v. United States* moot, because Mr. Bennett died before the Court issued its decision. Before the Court withdrew that decision as moot, however, another panel in *United States v. Windley* acted to "endorse and adopt" the *Bennett* reasoning – essentially, incorporating the discussion in *Bennett* into the *Windley* decision. Therefore, we will discuss both the *Windley* decision and the *Bennett* decision together.

Bennett and *Windley* represent the continuation of a series of First Circuit decisions exploring the meaning of "violent felony" and "crime of violence," in both cases in the context of the Armed Career Criminal Act (ACCA). Given the similar language used in the ACCA and the definition of a crime of violence in 18 U.S.C. § 16 (which is incorporated into immigration law both as an aggravated felony at 8 U.S.C. § 1101(a)(43)(F) and in the crime of domestic violence ground of deportability at 8 U.S.C. § 1227(a)(2)(E)) and the Court's reliance on prior First Circuit and Supreme Court decisions interpreting 18 U.S.C. § 16, these decisions have great relevance to immigration law.

United States v. Windley

The government challenged the district court's conclusion that Mr. Windley's conviction for Massachusetts assault and battery with a dangerous weapon (ABDW) was not a "violent felony" under the ACCA (18 U.S.C. § 924(e)(2)(B)). Mr. Windley's criminal records did not reveal whether he was convicted of intentional or reckless ABDW, so in order for the offense to be a "violent felony" both forms must match that definition. Mr. Windley argued (like Mr. Bennett, see below) that reckless ABDW does not have as an element the "use . . . of physical force against the person of another," as required under the first clause of the ACCA "violent felony" definition. This language mirrors language in 8 U.S.C. § 16. The *Windley* court "endorse[d] and adopt[ed]" the reasoning in *Bennett* to conclude that there was grievous ambiguity as to whether reckless ABDW satisfied this definition and therefore the rule of lenity required the conclusion that it did not.

In so holding, the Court observed that reckless ABDW does not require that the defendant intend to cause injury or even be aware of the risk of serious injury. Like the Maine statute explored in *Bennett*, reckless ABDW covered reckless driving that results in non-trifling injury. All this, the Court concluded, pointed to a mismatch between reckless ABDW and a "violent felony" under the ACCA.

United States v. Bennett

This case arose when the defendant, George Bennett, challenged his lengthy sentence resulting from an ACCA enhancement. In particular, Mr. Bennett contended that his two prior convictions for the Maine offense of aggravated assault were not violent felonies as defined in the ACCA (18 U.S.C. § 924(e)(2)(B)) because the statute in question encompasses reckless conduct. This case

did not involve any determination of whether the statute in question is divisible as between its reckless and intentional/knowing versions, because the District Court found that regardless of divisibility, Mr. Bennett had been convicted of the reckless variant of aggravated assault.

The First Circuit ultimately applied the rule of lenity in concluding that an offense defined broadly enough to include reckless conduct does not necessarily involve the use of force against a person, *see* 18 U.S.C. § 924(e)(2)(B), and therefore is not a categorical crime of violence. In reaching this decision, the First Circuit provided a helpful summary of First Circuit and Supreme Court precedent regarding the parameters of several definitions of "crime of violence" and "violent felony":

- *Leocal v. Ashcroft*, 543 U.S. 1 (2004)

The Supreme Court held in *Leocal* that the Florida offense of causing serious bodily injury to another while driving under the influence does not fall under either the "force clause" (subsection (a)) or the "residual clause" (subsection (b)) of 18 U.S.C. § 16[1] because the statute in question encompasses negligent conduct. In reaching this decision, the Court emphasized the requirement under § 16 that force be used against another person or property, and noted that while the term "use" is "elastic" in that its meaning depends on the context in which it is used, the "against" phrase is critical in the statutory definition in that one may not "actively employ physical force against another person by accident." The Court further applied the rule of lenity, though Mr. Leocal faced immigration rather than criminal consequences.

- *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014)

The next case the *Bennett* court discussed is *Fish*, in which the First Circuit stated that the Massachusetts offense of assault and battery with a dangerous weapon (ABDW) is not a categorical crime of violence under 18 U.S.C. § 16(b) because it encompasses reckless conduct. In particular, the Court noted that because the Massachusetts statute could be applied to a conviction for OUI and causing serious bodily injury, "Leocal's rationale would seem to apply equally to crimes encompassing reckless conduct wherein force is brought to bear accidentally, rather than being actively employed." This decision brought the First Circuit into agreement with ten other Circuits regarding the breadth of 18 U.S.C. § 16.

- *Voisine v. United States*, 36 S. Ct. 2272 (2016)

The *Bennett* court next addressed the government's contention that *Fish*'s analysis is no longer applicable due to a "controlling intervening event"--namely, the Supreme Court's 2016 decision in *Voisine*. *Voisine* concerned a third statute, 18 U.S.C. § 921(a)(33)(A), which defines "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9). *Voisine* held that the phrase "use… of physical force" in § 921(a)(33)(A) does not apply exclusively to knowing or intentional conduct, but rather may include reckless offenses.

[1] *Bennett* concerned only the corresponding "force clause" of the ACCA's crime of violence definition, as the ACCA "residual clause" has been found unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). A decision from the Supreme Court as to whether the corresponding residual clause of 18 U.S.C. § 16 is void for vagueness is forthcoming. *See Dimaya v. Lynch*, 803 F.3d 110 (9th Cir. 2015), *cert granted, Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

In analyzing *Voisine*'s impact, the First Circuit noted several distinctions between the statute in question in *Voisine* and both the ACCA and 18 U.S.C. § 16. First, while 18 U.S.C. § 16 and the ACCA require the use of force against another, § 921(a)(33)(A) does not contain the "against" phrase" which the *Leocal* Court found so critical. Secondly, the statute at issue in *Voisine* was enacted for the purpose of addressing "an acute risk to an identifiable class of victims--those in a relationship with a perpetrator of domestic violence," whereas the "ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons." Quoting *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011). While it found these distinctions persuasive, the *Bennett* court also discussed several arguments against their significance.

Bennett Holding:

In conclusion, the First Circuit reflected that while Voisine calls into question its prior analysis in *Fish*, it does not necessarily invalidate *Fish*'s reasoning. Therefore, the First Circuit stated: "given the differences in 'contexts and purposes' between the statute construed in *Voisine* and ACCA, we are left with a 'grievous ambiguity'" (internal citations omitted). So, the First Circuit applied the rule of lenity, citing *Leocal* and noting that Mr. Bennet's case concerned "a sentencing enhancement of great consequence. Therefore, the Court found that Mr. Bennett's Maine conviction for aggravated assault did not constitute a crime of violence.

Practice Tip

Taken together, *Windley* and *Bennett* mean that under current First Circuit law, reckless ABDW should not be considered either a "violent felony" under the ACCA or a "crime of violence" under 8 U.S.C. § 16. Therefore, immigration counsel should argue vigorously that reckless ABDW (or ABDW where it is not possible to determine whether the conviction is for intentional or reckless ABDW) cannot become an aggravated felony or a crime of domestic violence.

However, given the "grievous uncertainty" in this area of law, the chance that a defendant might end up in removal proceedings in another federal circuit, and the likelihood that the Supreme Court will ultimately decide the issue – and therefore could change the law in the First Circuit – criminal defense counsel should proceed with the understanding that there is still a significant risk that reckless ABDW might be considered by immigration authorities a domestic crime of violence if the complaining witness is someone covered under MGL ch. 209A or a crime of violence aggravated felony if the client receives a sentence of incarceration of one year or more (imposed or suspended).

Supreme Judicial Court

Lunn v. Commonwealth, 477 Mass. 517 (2017)

Mr. Lunn was held by the trial court for several hours after his criminal case was dismissed based solely on a detainer filed by Immigration and Customs Enforcement (ICE). An ICE detainer is a request to local custodians from federal immigration authorities to hold a person for up to 48 hours after the person would otherwise be released from state custody. Mr. Lunn filed an emergency petition under M.G.L. ch. 211, § 3, and the Single Justice referred the matter to the

full bench, even though ICE had already taken custody of Mr. Lunn himself. The SJC, in a per curiam decision, made the following findings:

The detainer is not a command from federal immigration authorities, but instead a request for voluntary assistance; if it were a command, it would likely violate the Tenth Amendment. Holding a person based solely on an ICE detainer constitutes an arrest under Massachusetts law. This arrest is for civil immigration purposes, not for any crime. "The authority to arrest is generally controlled by Massachusetts common law and statutes, which confer the power and also define the limits of that power." Neither Massachusetts common law nor statutes authorize arrest for civil immigration purposes. The SJC rejected the argument of the United States, as amicus curiae, that Massachusetts law enforcement officers have "inherent authority" to arrest under Massachusetts law, noting no history of "inherent" or "implicit" authority recognized in Massachusetts, beyond what has been expressly authorized under common law or by statute. The SJC further concluded that no federal statute purports to grant authority to arrest based on ICE detainers absent authority under state law.

The Court declined to address the state and federal constitutional arguments raised by the parties – specifically, whether arrests based on ICE detainers without any judicial oversight and without individual determinations of probable cause violate art. 14 and the Fourth Amendment. The Court did note that those arrested under ICE detainers are "without the protections afforded to other arrestees under Massachusetts law.

Practice Tip

No person in Massachusetts should be held for any length of time based solely on an ICE detainer. This includes prolonging the release process in court or at the police station or jail in order to give ICE sufficient time to arrive to arrest the person. Defense counsel should make sure (to the extent possible) that their noncitizen clients are released from custody as promptly as their citizen clients.

Assuming timely release, however, nothing in *Lunn* prevents ICE officers from arresting persons themselves. With the increase in ICE enforcement in and around the courthouses, defense counsel should advise their noncitizens clients about the risk of posting bail in court and being arrested by ICE upon release – especially where that client is unlikely to be brought back to criminal court from immigration detention in order to resolve any pending criminal case. Please feel free to contact the IIU for assistance in dealing with these issues.

Board of Immigration Appeals

Matter of J-G-D-F, 27 I&N Dec. 82 (BIA 2017)

At issue in this case is when a burglary (or a breaking or unlawfully remaining) charge constitutes a crime involving moral turpitude (CIMT). It represents a further expansion of the types of burglary and breaking charges that will constitute a CIMT.

The respondent was convicted of two counts of burglary under Oregon law (§ 164.225), which

punishes burglary (entering or remaining unlawfully) of a dwelling with the intent to commit any crime. "Dwelling" is defined as "a building which regularly or intermittently is occupied by a person lodging therein."

There are two key decisions governing this case. First, in *Matter of M*, 2 I&N Dec. 721 (BIA, AG 1946), the Board and the Attorney General stated that breaking and entering a building does not constitute a CIMT unless the intended crime was also a CIMT. Then, in *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), the BIA concluded that breaking and entering into an occupied dwelling with the intent to commit *any* crime is enough for a CIMT.

In this case, the Board concludes that breaking and entering into a "regularly or intermittently" occupied dwelling, regardless of whether it was occupied at the time of the offense, with the intent to commit any crime also constitutes a CIMT.

Practice Tip

For the criminal defense bar, the ever-expanding scope of the CIMT designation to breaking and entering crimes means that counsel should warn that all breaking and entering crimes carry some risk of being designated a CIMT.

However, there is much variation among the Massachusetts breaking and entering offenses. Massachusetts burglary (MGL ch. 266 §§ 14, 15) – which requires entry into a dwelling – would almost certainly be considered a CIMT under *Matter of J-G-D-F*. Massachusetts breaking and entering charges under MGL 266, §§ 16, 16A arguably still fall under the *Matter of M* ruling, which turns on whether the intended offense is a CIMT (and since the intended offense is not an element of these crimes, immigration counsel can argue that these offenses should never be considered CIMTs). Massachusetts breaking and entering under MGL 266, § 17, where a person present is put in fear, carries greater risk of the CIMT designation. This is not an exhaustive review, so immigration lawyers should review the elements of any B&E-type statute carefully to determine whether there is an argument against the CIMT designation.

Matter of Izaguirre, 27 I&N Dec. 67 (BIA 2017)

This case involves the provision of the Adam Walsh Act that bars persons (including U.S. citizens) with certain criminal convictions from petitioning to have family members enter the U.S. as legal permanent residents (LPRs, commonly referred to as "green card holders"). A conviction for a "specified offense against a minor" – defined to include, among other things, "criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct" – would bar such a petition. To determine whether a particular crime matches the definition of "offense against a minor" courts look to the underlying criminal conduct. *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014).

In this case, the petitioner was convicted of computer-aided solicitation of a minor under Louisiana law. The conviction records showed that the petitioner communicated with someone he thought was a 14 year old girl, but who was actually an undercover police officer. The petitioner argued that these facts could not be an "offense against a minor" because no minor was actually harmed.

The BIA rejected the petitioner's arguments, concluding that "offense against a minor" did not necessarily involve an "actual minor" and further that the facts clearly showed an attempt to engage in sexual conduct with a minor.

Practice Tip

It is important to note that, under the narrow circumstances of the Adam Walsh Act, even *U.S. citizens* may be directly impacted by immigration-related consequences of certain criminal convictions. Specifically, they may be prevented from bringing family to the U.S. or helping family members obtain green cards.