Immigration Court: BIA

Case: *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002) (en banc) **Date:** April 4, 2002

Adjudicated by: Schmidt, Villageliu, Guendelsberger, Rosenberg, Miller, Brennan, Espenoza, Osuna; Concurring = Filppu, Pauley, Scialabba; Dissenting = Holmes, Cole, Grant, Moscato, Ohlson, Hess. **Opinion:** Rosenberg

Tags: Immigration, Motion to Reconsider, Motion to Terminate, aggravated felony, crime of violence, DUI, mens rea, negligence, recklessness, intention, use of force

Question Presented: Is the offense of driving under the influence (a felony in MA) a "crime of violence" under 18 U.S.C. § 16(b) for purposes of INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) [aggravated felonies list]?

Holdings: Affirmed prior decision to terminate removal proceedings against respondent.

- Driving under the influence is not a "crime of violence" under the aggravated felonies list in the INA.
- Repudiation of *Matter of Puente* (BIA 1999) and *Matter of Magallanes* (BIA 1998).

Rationale: MA statute too broad—doesn't limit "operating a vehicle while intoxicated" to what could be classified as a "crime of violence" under the INA.

- INS has failed to establish that the respondent committed an aggravated felony (a "crime of violence"), so he is not removable for that reason.

Facts: Citizen of Portugal entered on a visitor's visa in 1968, adjusted to LPR in 1969. March 2000 convicted in MA of DUI. Second offense in two years, so subject to enhanced penalties and received 2-year sentence.

Procedural History:

- **2000: NTA** based on aggravated felony. IJ found respondent removable.
- **Feb. 2001: BIA** denied respondent's appeal.
- **2001: BIA** vacated Feb. order and granted respondent's Motion to Reconsider & Motion to Terminate
- **2002: INS** filed a motion to reconsider

Appeals to Statute & Precedent:

- **8 U.S.C. §16(b):** defining "crime of violence"
- **INA § 101(a)(43)(F):** crime of violence
- ***Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994):** nature of a crime, as elucidated by its generic elements, determines whether it is a crime of violence under § 16(b). **Categorical**

approach—look to the statutory definition, not the underlying circumstances of the crime.

- ***Matter of B-*, 21 I&N Dec. 287 (BIA 1996):** categorical approach
- ***Matter of Sweetser*, Interim Decision 3390 (BIA 1999):** categorical approach, then modified—but looking at the elements that had to be proven to sustain a conviction, not the underlying facts of the case.
- ***Matter of Puente*, Interim Decision 3412 (BIA 1999):** DUI under TX Penal Code was "crime of violence."
- ***Matter of Magallanes*, Interim Decision 3341 (BIA 1998):** drunk driving is an inherently reckless act.
- **10th & 11th Circuits have deferred to BIA's decision in *Matter of Puente*.**
- "In contrast, four circuit courts that have reviewed the statute, de novo, have agreed that the risk involved in driving under the influence is not the risk that the driver may 'use' force against the person or property of another to carry out the crim and therefore driving under the influence does not amount to an offense covered by § 16(b)." 341
    - ***U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001)**
    - ***Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001)**
    - ***Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001)**
    - ***U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)**
    - ***Montiel Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002)**
- ***Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001):** inclined to follow the above CAs.
- ***U.S. v. Doe*, 960 f.2d 221 (1st Cir. 1992):** "The court found, in dicta, no reason to believe that Congress intended a risk-creating crime such as drunken driving to constitute a violent felony, warranting sentence enhancement." 342

Relevant U.S. History:

Discussion:

- In previous BIA grant, they found the MA law to be broader than "crime of violence" listed in INA—"operating a vehicle while intoxicated" could mean a lot of things, not all of them dangerous (or involving "a substantial risk that force might be used in the commission of the crime," 338). (e.g., sleeping behind wheel while motor is running.)

- Previous BIA decisions: start with categorical approach; then "if the language of a statute encompasses some offenses that would constitute a crime of violence under § 16(b) and some that would not, we may look to the record of conviction and the other documents admissible in proving a criminal conviction to assess the nature of the specific offense for which the alien was convicted." 340
    - **Focus is not on the underlying facts presented in criminal proceeding, but the elements of the offense that had to be proven to sustain a conviction.**

- Point here is not to decide whether the respondent was actually convicted of DRIVING under the influence – it's about whether driving under the influence is a "crime of violence" under § 16(b).
- **CAs**: "the language of § 16(b) specifically excludes offenses in which the accidental application of physical force may result from the commission of the offense." 342
    - IOW: "the physical force involved must be **volitional rather than accidental**, and there must be a substantial risk that such force may be ***used*** in the course of committing the crim, i.e., to accomplish the original objective." 342
    - Mens rea must be either intentional or reckless.
    - "May be *used*" requires volitional, not accidental, force. 343
    - "one cannot be said to *use* force in an accident as one might use force to pry open a heavy, jammed door" *Dalton v. Ashcroft* at 206.
    - "it does not make sense to say that the person is volitionally using physical force *against* someone or something when he neither intended to hit the person or thing nor consciously disregarded the risk that he might do so." *U.S. v. Trinidad-Aquino* at 1145.
- **Reexamining *Matter of Puente***
    - CA's: No weight given to the inherent risk that an accident may occur (*Puente* theme)
    - "The focus on action rather than inaction in these circuit courts' DUI decisions underscores that it is the conduct that may be used to perpetrate the offense, rather than the risk of injury or consequences flowing from the crime, that is crucial in determining the nature of the offense." 346
- "Given these considerations and our strong interest in ensuring that aliens receive uniform treatment nationwide, we withdraw from our rulings in *Matter of Puente* . . . and *Matter of Magallanes*." 346
- Will follow law in circuits that have declared DUI to be NOT a crime of violence
- "In those circuits that have not yet ruled on the issue, we will require that the elements of the offense reflect that there is a substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence." 347
- **"Simply put, the risk that the respondent may have an accident is not the same as the risk contemplated by § 16(b)."** 347

Commentary:

- **Mens rea:**

  NEGLIGENCE < RECKLESSNESS < INTENTION

Concurrence: Filppu

- "The principal concern I have with the majority's ruling is that it once again can be seen to announce *the Board's* reading of criminal law for Immigration Judges and the parties to follow in removal cases, if there is no controlling law in the particular circuit in which the case arises." 349

Concurrence: Pauley with Scialabba

- Narrow holding, bcz other volitional uses of a vehicle might qualify as a crime of violence.
- "Although I do not believe that the Board should withdraw from precedent decisions it considers to be well reasoned simply because one or more courts of appeals announces its disagreement, here the number of adverse appellate court rulings, and the fact that the scoreboard is so lopsidedly arrayed against the *Puente* precedent, counsels strongly in favor of the Board's abandoning *Puente* and adopting the prevailing appellate court view. If Congress wishes to overturn this outcome and to include negligent DUI felony offenses within the "crime of violence" definition, it is of course free to do so." 351

Dissent: Hurwitz with Dunne, Holmes, Cole, Grant, Moscato, Ohlson, & Hess

- Would still use *Puente* where there is no controlling Circuit Court precedent.