

Massachusetts Sentencing Enhancements

Middlesex County District Attorney's Office

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Credit to Dave Solet

- Dave Solet's power point for his 2013 training on this topic is available on the global drive
- <R:\Superior Court Training\Sentencing\Powerpoint on Sentencing Enhancements for Superior Court ADAs updated 11-1-13.pptx>

Topics

- Subsequent Offenses
- Possession of Firearm During Felony
- Armed Career Criminals
- Habituals
- Common and Notorious Thief
- Common Receiver of Stolen Goods
- Proof at Grand Jury
- Proof at Trial
- Sentencing

Subsequent Offenses

- OUI, G.L. c. 90, § 24(1)(a)(1)
- Drug offenses
- Receiving stolen property
G.L c. 266, § 60
- Almost anything in which
the victim is over 60
- Armed Robbery G.L. c. 265,
§ 17
- Possession of a firearm G.L
.c. 269, § 10(d)
- Domestic A&B G.L. c. 265, §
13M(b)
- Sexual Assaults G.L. c. 265,
§§ 13B³/₄, 23B
- Criminal Harassment G.L. c.
265, § 43A
- Failure to register as a sex
offender G.L. c. 6, § 178H(2)
- Improperly advertising
margarine for sale G.L. c. 94,
§ 51
- And more...

Possession of a Firearm During the Commission of a Felony

- Additional charge that imposes an additional sentence when a felony is committed by means of a firearm
- You must establish a nexus between the firearm and the felony
 - Commonwealth v. Hines, 449 Mass. 183, 190 (2007) (holding sufficient nexus between firearm and narcotics possessed with intent to distribute)

Possession of a Firearm During the Commission of a Felony - Sentencing

- A person who possesses a firearm while committing a felony “shall in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than five years”
 - G.L. c. 265, § 18B
- Because no maximum sentence is prescribed, the maximum is presumed to be life
 - Commonwealth v. Logan, 367 Mass. 655, 657 (1975)
- The defendant cannot receive a probation sentence
 - Commonwealth v. Hines, 449 Mass. 183, 191 (2007)
- There is an ongoing debate about whether the Court can sentence someone to less than five years...

Armed Career Criminal Act

G.L. c. 269, § 10G

What is the Armed Career Criminal Act?

- A sentencing enhancement of certain firearms charges for persons previously convicted of serious drug offenses and/or violent crimes
- There are three levels to the enhancement depending on how many prior convictions an individual has
 - Each level has a higher mandatory minimum sentence

What Crimes Does it Enhance?

- Carrying a firearm in violation of G.L. c. 269, § 10(a)
- Possessing a machine gun or sawed-off shotgun in violation of G.L. c. 269, § 10(c)
- Possessing a firearm or ammunition in violation of G.L. c. 269, § 10(h)

What Crimes are not Enhanced?

- Large capacity firearms, G.L. c. 269, § 10(m)
- Trafficking firearms, G.L. c. 269, § 10E
- Anything that is not a violation of G.L. c. 269, §§ 10(a), 10(c), or 10(h)

What is a Serious Drug Offense?

Drug crimes in various jurisdictions, “for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance...for which a maximum term of ten years or more...”

G.L. c. 269, § 10G

Possession to Distribute/Distribution of Everything Except Class C, D, or E

- You look at the potential penalty the crime has; not what penalty the defendant received, or if the court had jurisdiction to impose the maximum penalty
 - Commonwealth v. Ware, 75 Mass. App. Ct. 220 (2009) *review denied* 455 Mass. 1106 (2009)
- Note, subsequent convictions of possession with intent to distribute and distribution of class C qualify

What is a Violent Crime?

“Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use, or threatened use of physical force or a deadly weapon against the person of another, (ii) is burglary, extortion, arson, or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.” G.L. c. 140, § 121

Violent Crime Breaks Down into Three Categories

- The “physical force clause”
 - (i) has as an element the use, attempted use, or threatened use of physical force or a deadly weapon against the person of another,
- The “enumerated clause”
 - (ii) is burglary, extortion, arson, or kidnapping; (iii) involves the use of explosives
- The “residual clause”
 - (iv) otherwise involves conduct that presents a serious risk of physical injury to another

Commonwealth v. Eberhart, 461 Mass. 809 (2012)

The Physical Force Clause

- Two alternatives:
 - the use, attempted use, or threatened use of **physical force** against the person of another
 - the use, attempted use, or threatened use of a **deadly weapon** against the person of another

Physical Force

- “[T]he Legislature by using ‘violent’ to describe the predicate offenses necessary for a Massachusetts ACCA enhancement, intended to require the ‘element of the use of physical force’ necessary for such offenses to include only substantial physical force capable of causing pain or injury.”

Commonwealth v. Colon, 81 Mass. App. Ct. 8, 18 (2011) *overruled on other grounds* Commonwealth v. Beal, 474 Mass. 341, 353 (2016)

What Crimes Constitute Physical Force?

- Two approaches:
 - “Categorical approach”
 - Requires the fact finder to look only to the fact of the conviction and the statutory definition of the prior offense
 - “Modified categorical approach”
 - Requires the fact finder to look at extrinsic evidence to determine the material elements that formed the basis of the conviction

Commonwealth v. Eberhart, 461 Mass. 809, 815-816 (2012)

Categorical Approach

- Look at the elements of the crime
- For example ABDW
 1. The defendant touched the person of another, however slightly, without right or excuse for doing so
 2. The defendant intended to touch the other person
 3. The touching was done with a dangerous weapon

G.L. c. 265, § 15A(b)

Dangerous Weapon

- Two types:
 1. Per se dangerous weapon
 - “any instrument or instrumentality so constructed or used as to be likely to produce death or great bodily harm”

Commonwealth v. Farrell, 322 Mass. 606, 601-615 (1948)
 2. Weapon that is dangerous as used
 - Innocuous item used in a manner that is “capable of producing serious bodily harm”

Commonwealth v. Marrero, 19 Mass. App. Ct. 921, 922 (1984)

ABDW is Categorically a Violent Crime

- Remember the definition of physical force:
 - “...`element of the use of physical force’ necessary for such offenses to include only substantial physical force **capable of causing pain or injury**” Commonwealth v. Colon, 81 Mass. App. Ct. 8, 18 (2011)
- With the element of dangerous weapon, a prior conviction for ABDW is categorically a violent crime
 - No matter what weapon was used, it was either a per se dangerous weapon, which is **likely to produce death or great bodily harm**, or an innocuous item used in a manner **capable of producing serious bodily harm**; the weapon was capable of causing pain or injury

See Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015) *review denied* 473 Mass. 1105 (2015) (noting prior adult ABDW conviction is a violent crime)

Modified Categorical Approach

- Look at the facts supporting the conviction
- For example, A&B
 - There are three types of A&B
 1. Harmful battery
 - Any touching with such violence that bodily harm is likely to result
 2. Reckless battery
 - A willful, wanton, and reckless act, which results in personal injury to another
 3. Offensive battery
 - An intentional touching of another, however slight, without justification or excuse
 - Harmful and reckless batteries are violent crimes, offensive battery is not

Commonwealth v. Eberhart, 461 Mass. 809, 818 (2012)

Critically Review Your Prior Convictions

- Some crimes may appear at first glance to be violent crimes, but given alternative theories of prosecution, are not categorically violent crimes
- Unarmed robbery is not categorically a violent crime because it only requires either (1) the slight use of force, or (2) an assault to steal the victim's property
- You must present sufficient evidence that the prior is a violent crime both before the grand jury and at trial
 - Commonwealth v. Mora, 477 Mass. 399, 406-408 (2017)

Burden at Trial

- Pursuant to the modified categorical approach, during an ACCA trial the Commonwealth must prove which type of A&B the defendant was convicted of
- The Commonwealth does not need to retry the original charge, just establish the basis of conviction

Commonwealth v. Eberhart, 461 Mass. 809, 816 (2012)

Evidence at Trial

- Because of the jury trial requirement, more evidence is admissible in Massachusetts than the federal courts
- Examples: charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and charging forms
 - Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16 (2011)
- Also look for a reported appellate court decision for the underlying case

Deadly Weapon

- What we have been talking about up until this point is the “physical force” alternative within the “physical force clause”
- Two alternatives:
 - the use, attempted use, or threatened use of **physical force** against the person of another
 - the use, attempted use, or threatened use of a **deadly weapon** against the person of another

What is a Deadly Weapon?

- “[F]or purposes of conviction under G.L. c. 269, § 10G, a deadly weapon is a weapon that is inherently deadly.”
- “[D]eadly’ has both a stronger and narrower meaning than ‘dangerous.’ ‘Deadly’ connotes an inevitability of death, or at least a higher certainty of death than does ‘dangerous.’”

Commonwealth v. Rezendes, 88 Mass. App. Ct. 369 (2015)

- Examples include loaded firearms, certain knives, and explosives
 - Commonwealth v. Rezendes, 88 Mass. App. Ct. 236, 380 n.14 (2015) *review denied* 473 Mass. 1105 (2015)

For Adult Convictions, it Does not Matter

- You do not have to worry if the weapon was dangerous or deadly
 - If it was deadly, then you are all set
 - If it was dangerous, then it qualifies under the “physical force” alternative
- Remember, this is the **use** of a deadly weapon
 - Prior convictions for possessing deadly weapons do not count

Both Youthful Offender and Delinquency Adjudications for **Violent Crimes** are Prior Convictions for ACCA Purposes

- Commonwealth v. Foreman, 63 Mass. App. Ct. 801, 802 (2005) *review denied* 442 Mass. 1102 (2005) (holding prior juvenile delinquency adjudication qualifies as a prior conviction under ACCA)
- Commonwealth v. Furr, 58 Mass. App. Ct. 155, 157-158 (2003) *review denied* 439 Mass. 1109 (2003) (holding prior youthful offender adjudication as a prior conviction under ACCA)
- Commonwealth v. Beaz, 480 Mass. 328 (2018) (holding juvenile priors enhancing ACCA do not violate Eighth Amendment or Article 26)

The Issue for Juvenile Offenses is the Language in the Statute

- “Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use, or threatened use of physical force or a deadly weapon against the person of another, (ii) is burglary, extortion, arson, or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.”

G.L. c. 140, § 121; Commonwealth v. Anderson, 461 Mass. 616, 631-632 (2012)

Juvenile Offense Must Involve the **Use or Possession** of a Deadly Weapon

- Regardless of which category or clause of offenses you pull from, the juvenile offense must have involved the use or possession of a deadly weapon
- It appears that you could use the modified categorical approach to determine what weapon was used or possessed
- The weapon must have been inherently deadly; you cannot use the modified categorical approach to determine if the weapon was deadly as used

Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 379 (2015)

The Enumerated Clause

- (ii) is burglary, extortion, arson, or kidnapping;
(iii) involves the use of explosives
 - For adult priors, the categorical approach should satisfy the elements of a prior conviction
 - For juvenile priors, you may have to use the modified categorical approach to establish whether a deadly weapon was used or possessed during the commission of one of the enumerated offenses

The Residual Clause...

- Is unconstitutional
- The Supreme Judicial Court followed the United States Supreme Court, which struck down the federal counterpart
- The Court found the residual clause violated due process because it “denies fair notice to defendants and invites arbitrary enforcement by judges”

Commonwealth v. Beal, 474 Mass. 341, 351 (2016)

A Note on ABPO

- Assault and battery on a police officer was previously found to be categorically a violent crime pursuant to the residual clause
 - Commonwealth v. Colon, 81 Mass. App. Ct. 8 (2011)
- ABPO may still be a violent crime, but you will have to use the modified categorical approach to establish the nature of the battery the defendant was convicted of

Imprisonment for a Term Exceeding One Year

- Do not forget about this element

Separate Incidences

- “[T]he phrase ‘arising from separate incidences’ is best understood to mean that each previous conviction serving as a predicate offense under § 10G must result from a separate prosecution, and not simply from a separate criminal event”

Commonwealth v. Resende, 474 Mass. 455, 464 (2016); Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703-704 (2017) *review denied* 478 Mass. 1102 (2017) (holding unrelated charges resulting in consolidated concurrent guilty pleas one incident for ACCA)

What Does this Mean?

- “[A] person who commits a string of armed robberies in Suffolk County over a period of months and who is eventually apprehended, linked to, charged with, and convicted of all of the robberies, in a combined prosecution, would have only ‘one’ prior felony conviction for purposes of the Massachusetts ACCA statute – no matter how many robberies he is convicted of committing.”

Commonwealth v. Resende, 474 Mass. 455, 471 (2016) (J. Cordy dissenting)

Habitual

G.L. c. 279, § 25

What is the Habitual Statute?

- A sentencing enhancement for persons convicted of felony offenses that, upon conviction, requires the sentencing judge to impose the maximum sentence
- Essentially, this is Massachusetts' three strikes law

There are Two Types of Habitual Charges

1. “Habitual Criminal”

The defendant was twice previously convicted and sentenced to at least three years in state prison for each offense. G.L. c. 279, § 25(a)

2. “Habitual Offender”

The defendant was previously twice convicted of crimes enumerated in § 25(b)(i) and sentenced to at least three years in state prison for each offense. G.L. c. 279, § 25(b)

Habitual Criminal – § 25(a)

1. New felony conviction
2. Two prior felony convictions
3. The sentence for each prior felony conviction must have been for at least three years in state prison

Twice Convicted

- The first charging option states “twice convicted” which has been interpreted to mean separate incidents
 - Commonwealth v. Garvey, 477 Mass. 59, 63-64 (2017)
- Concurrent sentences for separate incidents are sufficient to invoke the habitual criminal statute
 - Commonwealth v. Perry, 65 Mass. App. Ct. 624, 632 (2006) *review denied* 446 Mass. 1108 (2006)
- “[P]redicate convictions arising from separate qualifying criminal incidents or episodes need not be separately prosecuted in order for a person to be considered a habitual criminal pursuant to § 25(a).”
 - Commonwealth v. Ruiz, 480 Mass. 683, 690 (2018)

Habitual Criminal – Grand Jury

- The grand jury must receive evidence that the prior convictions arose from separate criminal episodes

Commonwealth v. Garvey, 477 Mass. 59 (2017)

- This is one, of many reasons, why you should never indict based solely on a BOP!

Habitual Offender – § 25(b)

1. New felony conviction listed in § 25(b)(i)
2. Two prior felony convictions, which:
 - a) Are listed in § 25(b)(i);
 - b) Arose “out of separate and distinct incidents that occurred at different times”;
 - c) “The second offense occurred subsequent to the first conviction”;
 - d) New felony conviction had to occur subsequent to the second conviction;
 - e) Minimum sentence of three years state prison for each prior conviction

What is the Difference?

- Under the first option, the defendant is parole eligible
- Under the second option, the defendant is **never** parole eligible

Juvenile Priors – Habitual Offenders

G.L. c. 279, § 25(b)

- Youthful offender and delinquency adjudications, even if listed in G.L. c. 279, § 25(b)(i), cannot be used in a prosecution pursuant to § 25(b)

G.L. c. 279, § 25(c)

Juvenile Priors – Habitual Criminals

G.L. c. 279, § 25(a)

- Because § 25(c) is limited to § 25(b) offenses, there is an argument that juvenile priors qualify for habitual criminals pursuant to § 25(a)
 - The legislative history may not support this argument
- There is conflicting law for whether youthful offender adjudications are “convictions”
 - Commonwealth v. Connor C., 432 Mass. 635, 646 (2000) (“[w]e adhere to our long-standing jurisprudence that an ‘adjudication’ that a child has violated a law generally is not a ‘conviction’ of a crime”)
 - Commonwealth v. Hampton, 64 Mass. App. Ct. 27, 34 n. 10 (2005) (noting “in passing” youthful offender adjudication is a conviction)
 - Commonwealth v. Clint C., 430 Mass. 219, 223 (1999) (“[o]nce a juvenile is treated as a youthful offender, he is no longer given the protections and privileges afforded to delinquent children”)
- Delinquency adjudications would likely never qualify as priors, even if the juvenile was committed to DYS for at least three years

Sentenced vs. Committed

- Prior to the 2012 amendments, the defendant had to be both sentenced and committed to a term of not less than three years
- The 2012 amendments removed the requirement that the defendant be committed and left just that the defendant be sentenced to not less than three years
- Remember the prior requirement if you are indicting an old case – think CODIS hit

Commonwealth v. Luckern, 87 Mass. App. Ct. 269 (2015) *review denied* 472 Mass. 1104 (2015)

Massachusetts vs. Other Jurisdiction

Prior Convictions

- Prior to the 2012 amendments, only Massachusetts and other states' convictions applied, not federal
 - Youngworth v. Commonwealth, 436 Mass. 608, 611-612 (2002)
- The 2012 amendments now include Massachusetts, other state, and federal convictions
- Again, remember the prior language if you are indicting an old case

Parole Eligibility for Habitual Criminals Not Receiving Life Sentences

- For sentences to less than life in prison, the defendant becomes parole eligible “within 60 days before the expiration of two-thirds of the maximum sentence”
 - For example, an offender convicted of ABDW-SBI, which carries up to 15 years in state prison, is parole eligible within 60 days before serving 10 years
- An offender not paroled during that period is entitled to parole consideration at least once during every two year period following the initial parole consideration

G.L. c. 127, § 133B

Parole Eligibility for Habitual Criminals Receiving Life Sentences

- The court sets the minimum term at not less than 15 years nor more than 25 years
- The maximum term is still life

G.L. c. 279, § 24

- The difference is the court only sets the maximum term for non life sentences; the court sets both the minimum and maximum term for life sentences

Common & Notorious Thief

G.L. c. 266, § 40

What is This?

- Sentencing enhancement for persons convicted of larceny or of being an accessory to larceny before the fact

Two Alternatives

1. Defendant was previously convicted, after indictment, of larceny or being an accessory to larceny before the fact; or
2. Defendant is convicted at the same sitting of the court of three separate and distinct larcenies

Commonwealth v. Ryan, 79 Mass. App. Ct. 179, 186 (2011) *review denied* 460 Mass. 1103 (2011)

Charging the First Theory

- The first theory is really a subsequent offense for larceny that is reserved for Superior Court
- Therefore, the common and notorious thief letter should be read during a subsequent presentation (to be discussed later)

Charging the Second Theory

- The second theory has to do with whether the defendant committed at least three separate and distinct larcenies
- So long as the separate and distinct larcenies are properly brought in the same grand jury presentation, then the common and notorious thief letter can be presented in that prosecution and tried with the larcenies

But You Do Not Have to Actually Charge the Second Theory

- A defendant can be sentenced pursuant to the common and notorious thief statute even if it is not charged
- So long as the defendant is convicted of at least three separate and distinct larcenies in the same sitting of the court, the defendant is subject to the sentencing scheme outlined in the statute

Commonwealth v. Crocker, 384 Mass. 353, 355-356 (1981);
Commonwealth v. Lepper, 60 Mass. App. Ct. 36, 47-49
(2003) *review denied* 441 Mass. 1102 (2004) (upholding trial judge's adjudication of common and notorious thief where not charged and defendant was convicted of twenty-three individual larcenies)

But Not According to Kevin Curtin

- Kevin believes that a judge “adjudging” a defendant a common and notorious thief under this theory violates Apprendi v. New Jersey, 530 U.S. 466 (2000)
- Also, Kevin wants to make sure everyone thinks about the issues early in the process
- Therefore, charge it

Separate and Distinct Larcenies

- Commonwealth v. Lepper, 60 Mass. App. Ct. 36 (2003)
(upholding common and notorious thief adjudication when defendant convicted of 23 separate larcenies that occurred on separate days with different victims)
- Commonwealth v. Crocker, 384 Mass. 353 (1981)
(upholding common and notorious thief adjudication when defendant convicted of three different larcenies on three different days)
- Collins v. Commonwealth, 315 Mass. 167 (1943)
(upholding common and notorious thief adjudication when defendant convicted of six larcenies on the same day, but from different people)

Common Receiver of Stolen Goods

G.L. c. 266, § 62

Two Theories

1. Defendant convicted of buying, receiving, or aiding the concealment of stolen or embezzled property, having been previously convicted; or
2. The defendant is convicted of three or more distinct acts in the same sitting of the court of buying, receiving, or aiding the concealment of stolen or embezzled property

First Theory

- This is essentially a subsequent offense
- Note, this is a different subsequent offense than the subsequent offense codified in G.L. c. 266, § 60
- The difference is the potential penalty the defendant would receive
- Unlike common and notorious thief, there is no requirement that the prior conviction be “upon indictment”

Second Theory

- This operates the same way as the second common and notorious thief statute

Getting Ready for Grand Jury

- Request your prior convictions early!!!
 - Make sure the request includes any complaints/indictments, the docket, plea forms, sentencing findings, sentence mitts, attorney appearance/appointment, and probation contracts
- Request PEN PACKS
- Request RMV photo history
- Check Masscourts (if you can)
- Run your defendant in Westlaw and the Massachusetts appellate docket to see if there is a reported decision for an appeal from the prior conviction

The Grand Inquest for the County of Middlesex

- For any enhancement that relies on a prior conviction, you have to do a bifurcated grand jury presentation
 - After the grand jury votes to indict on the underlying charges, you go back in and present the enhancement portion
- You do not need certified copies for grand jury
 - Copy your certified records so that you can use them at trial without having to re-request them

Redacting Records vs. Limiting Instruction

- Your records are going to contain A LOT of prejudicial information
 - Prior convictions – other charges/convictions not probative of the sentencing enhancement
 - PEN PACKS – other commitments (both bail and sentences)
 - You can go through and redact the records or you can give a limiting instruction

Sample Limiting Instruction

- I instruct the members of the Grand Jury that to the extent that you have heard any testimony or received any exhibits during the course of this investigation that makes reference to prior conduct or prior bad acts by [*named individual*], that you may only consider such evidence for whether [*named individual*] is subject to the letter that was just read to you. Any reference to any act, charged or not charged, convicted or not convicted that is not probative of the letter read to you may not be used by you in any manner during your deliberations. You may not use such evidence as showing that [*named individual*] is a person of bad character or that [*he/she*] has a disposition to commit a crime.

The Trial

- The defendant is statutorily entitled to a jury trial
- The defendant is not, however, entitled to a “fresh” jury
- The same jury that convicted the defendant of the new offense can sit for the sentencing enhancement trial
- That means you should raise with your judge at the final pre-trial how they would want to handle any potential second trial

G.L. c. 278, § 11A

Sentencing

- The defendant can only receive one sentence per crime
- Charge as many enhancements as possible
 - NP the enhancements you do not want the sentence to run on prior to sentencing
- Note on common and notorious thief and common receiver of stolen property

Commonwealth v. Richardson, 469 Mass. 248 (2014) (discussing sentencing enhancement sentences)