CASE UPDATE: THE DOMESTIC VIOLENCE DEPORTATION GROUND

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The domestic violence deportation ground sets out four bases for deportability. Recent Board of Immigration Appeals and federal decisions significantly affect each of the four bases.

This advisory will provide a brief overview of the deportation ground, and then outline the recent decisions and how they may affect representation in California and the Ninth Circuit. It will reference other advisories that go into more detail on several topics. Remember that offenses that involve domestic violence or child abuse also may have other immigration consequences, for example as crimes involving moral turpitude, aggravated felonies, or negative discretionary factors. See Part I.

For further information on this ground, see ILRC manuals such as *Removal Proceedings* (2017) and *Remedies and Strategies for Permanent Residents* (2017), available at www.ilrc.org/publications. See basic information in ILRC, *Note: Violence, Domestic Violence, Child Abuse* (2014) available at www.ilrc.org/chart and cited practice advisories.

I. Overview

The domestic violence deportation ground ("DV ground") appears at INA § 237(a)(2)(E), 8 USC § 1227(a)(2)(E). It sets out four distinct ways that a noncitizen can become deportable:

- Conviction of a "crime of domestic violence," § 237(a)(2)(E)(i);
- Conviction of "stalking," § 237(a)(2)(E)(i);
- Conviction of a "crime of child abuse, child neglect, or child abandonment," § 237(a)(2)(E)(i); or
- Judicial finding in civil or criminal proceedings of a violation of certain portions of a domestic violence protective order, § 237(a)(2)(E)(ii).

Effective date. The criminal conviction, or the conduct that was found to have violated the protective order, must have occurred 1) after admission to the United States, and 2) on or after September 30, 1996. IIRIRA § 350.

> *Example:* Joe has been admitted to the United States. In July 1996, he was convicted of California Pen C § 273.5, domestic assault with traumatic injury. Because the conviction occurred before September 30, 1996, it does not trigger the DV ground, either as a basis for deportability or as a bar to eligibility for non-LPR cancellation of removal. If he had been convicted of the same offense in November 1996 that would have triggered these penalties.

Effect of Being Deportable under the Domestic Violence Ground. When does this ground apply, and what waivers or exceptions exist?

- Like any deportation ground, the DV ground can cause a permanent resident, refugee, or other person who has been admitted to the United States to be placed in removal proceedings and charged with being deportable. If the person is not eligible for and granted relief, they can be deported.
- Coming within this ground can serve as a bar to eligibility for cancellation of removal for non-permanent residents under INA § 240A(b). The bar applies somewhat differently depending upon whether the person is applying for "ten-year" cancellation under § 240A(b)(1) or VAWA cancellation under § 240A(b)(2).[1]
- There is a discretionary waiver of deportability under the DV ground for people who can show that they were primarily the victim in the relationship and make other showings. See INA § 237(a)(7). This also can be used to waive the bar to eligibility for ten-year or VAWA cancellation of removal for non-permanent residents, discussed above. See INA § 240A(b)(5). One can apply to waive a conviction of a domestic violence or a stalking offense, or being found to have violated a DV protective order, but not a conviction of child abuse, neglect, or abandonment.
- Being deportable under the DV ground *alone* does not "stop the clock" on accruing the seven years of residence that is required for cancellation of removal for permanent residents, INA § 240A(a), (d). Because it is a deportation ground, the DV ground is not "referred to" in INA § 212(a)(2), which is a requirement for stopping the clock.[2] But if the conviction also causes inadmissibility, e.g., under the crime involving moral turpitude ground, it might stop the seven-year clock on that basis.

[1] Ten-year cancellation of removal is barred if the person was "convicted of an offense under" the crimes deportability and inadmissibility grounds. See INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C). The Ninth Circuit held that the bar applies to any noncitizen *convicted* of an offense *described in* the deportation ground, and that it applies to people who entered without inspection (and therefore are not actually subject to the deportation grounds) as well as those who have been admitted. *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004). In contrast, VAWA cancellation is barred if the person actually is inadmissible or deportable under the crimes grounds, or convicted of an aggravated felony. INA § 240A(b)(2)(a)(iv), 8 USC § 1229b(b)(2)(a)(iv). Here the person must have been admitted in order to be deportable under the DV ground. See *Gonzalez-Gonzalez* at n. 3. See also waiver for persons who are primarily the victim in the relationship, discussed in text.

[2] See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (interpreting INA § 240A(d), 8 USC § 1229b(d)).

- Being deportable under the DV ground does not subject the person to mandatory detention. See INA § 236(c), 8 USC § 1226(c), and online practice advisory on mandatory detention.[3]
- There is no analogous inadmissibility ground for domestic violence, child abuse, etc. But make sure that the conviction does not make the person inadmissible (or barred from establishing good moral character, or otherwise ineligible for relief) under a different category, such as crimes involving moral turpitude or having two or more convictions with a total sentence of at least five years.

For further discussion of defense strategies to show eligibility for different forms of relief despite a criminal record, see *Removal Defense* (ILRC 2017), available at www.ilrc.org/publications.

Other consequences. Advocates should consider whether the conviction or conduct has any other potential immigration consequences.

- *Other removal grounds*. An offense that involves domestic violence or child abuse might also constitute a crime involving moral turpitude or an aggravated felony. Any "crime of violence" where a sentence of one year or more was imposed is an aggravated felony, regardless of the type of victim (see Part II). Additionally, advocates should check to make sure a conviction relating to child abuse is not also an aggravated felony as "sexual abuse of a minor." See INA § 101(a)(43)(A), (F). For California offenses, check the *California Quick Reference Chart* at www.ilrc.org/chart.
- *Other bars to relief.* Any criminal conviction is a negative factor for purposes of relief, but some convictions are absolute bars to relief, or trigger strict standards for granting relief. Depending on the facts, the conviction might qualify as a "particularly serious crime" (asylum and withholding), a "violent or dangerous" offense (asylum, adjustment, § 212(h)), or a "significant misdemeanor" (DACA). Check the ILRC *Relief Toolkit*[4] for a concise discussion of eligibility for, and crimes bars to, the various forms of immigration relief.

II. Conviction of a Crime of Domestic Violence: *Dimaya* and *Matter of H. Estrada*

To be deportable under INA § 237(a)(2)(E)(i) based on a conviction of a "crime of domestic violence":

a) the person must be convicted of a **crime of violence as defined at 18 USC § 16(a)**, where

b) sufficient evidence proves that the victim and perpetrator **shared a qualifying domestic relationship**, as that is defined under the DV ground.

The conviction must have occurred after admission and on or after September 30, 1996. All of these factors must be met to be a deportable crime of domestic violence under this prong.

A. Conviction of a "Crime of Violence": *Dimaya* and 18 USC § 16

An offense never is a deportable crime of domestic violence unless it is a "crime of violence" as defined by 18 USC § 16. For example, California spousal battery, Pen C § 243(e), is an offense relating to domestic violence. It is not a deportable "crime of domestic violence," however, because the minimum

[3] See ILRC, *Practice Advisory: How to Avoid Mandatory Detention* (May 2018), available at https://www.ilrc.org/how-avoid-mandatory-ice-detention.

[4] See ILRC, *N.17 Defenders' Relief Toolkit* at www.ilrc.org/chart. For more extensive discussion see manuals such as *Removal Defense* (ILRC 2017), available at www.ilrc.org/publiations.

conduct required for guilt is an offensive touching, and that fails to meet the definition of "crime of violence" at 18 USC § 16.[5]

The definition at 18 USC § 16 has two subsections: § 16(a) and § 16(b). In 2018, the Supreme Court struck down § 16(b) for being unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), upholding *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Now, 18 USC § 16(a) is the only applicable definition. This means that fewer offenses will be deportable crimes of domestic violence.

This section will provide a brief summary of *Dimaya* and discuss how this change affects several California offenses. For a more detailed analysis of *Dimaya* and its consequences, and sample pleadings for reopening immigration proceedings based on the decision, see online practice advisory. [6]

Dimaya* and 18 USC § 16.** For immigration purposes, a crime of violence (COV) is defined at 18 USC § 16. In *Dimaya* the U.S. Supreme Court held that part of this definition – 18 USC § 16(b) – is unconstitutionally vague and can no longer be used. Section 16(b) had stated that a ***felony offense is a COV if "by its nature" it involves a "substantial risk" that violence could be used (often, based on what judges thought might happen in an "ordinary case"). With § 16(b) gone, some felony offenses that used to be classed as COVs no longer are.

The current applicable definition for immigration purposes is:

> 18 USC § 16. The term "crime of violence" means --
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.
>
> ~~, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.~~

A full discussion of the meaning of "force" under 18 USC § 16(a) is beyond the scope of this advisory. Advocates can check California offenses on the *California Chart* or other resources. Generally, "force" here means violent, aggressive force. Courts have interpreted § 16(a) to exclude offenses that can be violated by an offensive touching (e.g., Pen C § 243(e)), negligent conduct (e.g., DUI or DUI with injury, absent a special intent requirement), and recklessness (although ICE might assert that recklessness now should be included[7]).

Impact of *Dimaya* on California offenses. Any felony that was held a COV only under 18 USC § 16(b), and that does not meet the definition at § 16(a), is no longer a COV. There are specific holdings or strong arguments that the following California felonies (and misdemeanors) are not a COV under 18 USC § 16(a):

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[5] See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). While *Sanudo* held that Pen C § 243(e) was "divisible" between violent and offensive conduct, Supreme Court precedent has established that it is not divisible. See ILRC, *How to Use the Categorical Approach Now* (2017), available at https://www.ilrc.org/how-use-categorical-approach-now.

[6] See NIPNLG and IDP, *Sessions v. Dimaya: Supreme Court strikes down 18 USC § 16(b) as void for vagueness* (2018), available at http://nipnlg.org/practice.html

[7] See discussion of *Voisine v. United States*, 136 S.Ct. 386 (2016) in NIPNLG/IDP, *Practice Alert: Voisine v. United States* (2016), available at http://nipnlg.org/practice.html

- California Pen C § 207 (some kidnapping offenses);
- § 236/237 (felony false imprisonment, at least by fraud or deceit and potentially any conviction);
- § 243(d) (simple battery with injury);
- § 243.4 (sexual battery);
- § 460(a) (residential burglary);
- § 646.9 (stalking, see discussion at Part III, below); and
- § 33215 (possession of a sawed-off shotgun).

This is a beginning list; advocates may identify more offenses that no longer are crimes of violence, as we continue to apply *Dimaya.* For a detailed discussion of how *Dimaya* changes the analysis of the preceding offenses, see ILRC practice advisory online.[8]

Crime of Violence Aggravated Felony. This advisory discusses COVs in the context of the domestic violence deportation ground, INA § 237(a)(E)(i). Significantly, a conviction of a COV as defined at 18 USC § 16 is an "aggravated felony" if a sentence of one year or more has been imposed, whether or not there is a domestic relationship. INA § 101(a)(48)(F), 8 USC § 1101(a)(48(F). *Dimaya* applies here as well: some felonies with a sentence of one year or more that used to be aggravated felonies as COVs now no longer are. Note that a person convicted of a California misdemeanor (or a felony that is reduced to a misdemeanor) where a sentence of one year was imposed can ask a criminal court judge to reduce the sentence by one day, to 364 days, under Pen C § 18.5(b).

What to Do about Older Convictions. *Dimaya* should apply retroactively, so that some prior convictions no longer can be held deportable crimes of domestic violence and/or crime of violence aggravated felonies. If you have a current or past client penalized under these provisions, review the case to see if *Dimaya* might change the analysis. Investigate whether the person could re-apply for some relief or move to reopen a prior decision – even if the person already has been removed. See discussion and sample pleadings for dealing with older convictions in online practice advisory.[9]

B. Qualifying Domestic Relationship: *Tokatly* versus *Matter of H. Estrada*

Along with proving that the offense is a crime of violence under 18 USC § 16(a), ICE also must prove that it involved a qualifying domestic relationship. Under INA 237(a)(2)(E)(i), a "crime of domestic violence" is a crime of violence:

> against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

What standards govern how ICE can prove the relationship?

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[8] This advisory pre-dates *Dimaya*, but it analyzed what would happen under California law if 18 USC § 16(b) were to be held unconstitutional, and discussed the above offenses. See ILRC, *Practice Advisory: Some Felonies Should No Longer Be Crimes of Violence for Immigration Purposes under Johnson v. United States* (2015), available at www.ilrc.org/crimes.

[9] See the NIPNLG/IDP practice advisory on *Dimaya,* fn. 6, above.

The Ninth Circuit held that the categorical approach applies to proving the qualifying relationship. This requirement is met if the relationship is an element of the offense. For example, Pen C § 273.5, domestic assault with traumatic injury, has the domestic relationship as an element of the offense.

If the conviction is of a crime of violence without an element of a domestic relationship, the Ninth Circuit held that it becomes a deportable crime of domestic violence only if the reviewable record of conviction contains facts that conclusively prove the relationship, under the modified categorical approach. For example, if the conviction was for California Pen C § 422, criminal threat, which is a crime of violence, and during the plea colloquy the defendant had admitted that the victim was his ex-spouse, that would be evidence from the reviewable record proving a qualifying domestic relationship. But if the record is vague as to the relationship, the conviction is not a deportable crime of domestic violence. See *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006).

The Board of Immigration Appeals (BIA) and some other federal circuit courts of appeal disagree, finding that the categorical approach does *not* apply to proving the qualifying domestic relationship. Instead, the fact-based "circumstance specific" test applies, which permits ICE to use any relevant and probative evidence, including evidence from outside the conviction record, to prove that the defendant and victim shared a qualifying relationship. *Matter of H. Estrada*, 26 I&N Dec 749 (BIA 2016). Under these cases, in the above example of the conviction for Pen C § 422, if the record did not discuss the victim and defendant's relationship, ICE still could prove it in removal proceedings by introducing evidence such as the victim and defendant's divorce ruling, or testimony from the victim or other credible witnesses. If the evidence was sufficiently credible, the person would be found deportable.

How do we deal with this split in authority? Criminal defense counsel should act conservatively and assume that the Ninth Circuit may someday adopt the BIA's rule. To ensure that a conviction is not a deportable crime of domestic violence, counsel must arrange a plea to (a) an offense that is not a crime of violence under 18 USC § 16(a) (in which case a domestic relationship does not matter), or (b) an offense that is a crime of violence, but that is committed either against property or against a *specific person* with whom the defendant does not share a protected relationship (e.g., the ex-girlfriend's new boyfriend, the police officer, the neighbor). Remember that regardless of any relationship, or whether it is against property versus a person, a single conviction of a crime of violence must avoid a sentence imposed of one year or more or it will become an aggravated felony. See Part A, above.

Immigration advocates in removal proceedings in the Ninth Circuit can continue to assert the *Tokatly* rule, which is governing law, but they should try hard to create an additional defense strategy. ICE may appeal decisions relying on *Tokatly*, and someday the Ninth Circuit may decide that it will abandon *Tokatly* and adopt the BIA's rule, based on subsequent Supreme Court decisions.

For further discussion see ILRC, *Practice Advisory: Deportable Crimes of Domestic Violence, Matter of H. Estrada* (2016), available online.[10]

[10] See practice advisory at https://www.ilrc.org/advisory-deportable-crimes-domestic-violence-matter-h-estrada.

III. Conviction of Stalking: *Matter of Sanchez-Lopez* (2018)

A conviction of "stalking" causes deportability under the domestic violence ground. This stalking can be against anyone; it is not limited to domestic relationships. The conviction must be after admission and after September 30, 1996. The categorical approach applies to this determination.

Reversing its own prior precedent, the BIA held that Pen C § 646.9, California stalking, is *not* a deportable crime of stalking. It held that § 646.9 is overbroad and indivisible because § 646.9 prohibits intent to cause fear for one's "safety," while the generic definition of stalking requires intent to cause fear of "death or bodily injury." Therefore, no conviction of § 646.9 is a deportable crime of stalking for any immigration purpose, regardless of any information in the record of conviction. *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018), overruling *Matter of Sanchez-Lopez,* 26 I&N Dec. 72 (BIA 2012).

Sanchez-Lopez should apply retroactively, so that prior § 646.9 convictions no longer can be held deportable crimes of stalking. If you have a current or past client penalized under these provisions, review the case and investigate whether the person could re-apply for some relief or move to reopen a prior decision – even if the person already has been removed. See discussion and sample pleadings for dealing with older convictions in online practice advisory.[11]

Other immigration consequences of Pen C § 646.9. Stalking under Pen C § 646.9 still has the potential to become an aggravated felony or a deportable crime of domestic violence, *if* it is held to be a crime of violence (COV) under 18 USC § 16(a). It should not be, however. The Ninth Circuit held that at least harassing (as opposed to following) under § 646.9 is not a COV. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007). At the time, the court held that § 646.9 was divisible, but under subsequent Court precedent it should not be, so that no § 646.9 conviction should be a COV. The BIA disagreed with *Malta-Espinoza* and declined to follow it outside the Ninth Circuit's jurisdiction. *Matter of U. Singh*, 25 I&N Dec. 670, 676-677 (BIA 2012). However, the BIA found § 646.9 to be a crime of violence only under 18 USC § 16(b), which was struck down by *Dimaya.* Advocates outside the Ninth Circuit should argue that § 646.9 is not a COV under § 16(a).

The BIA has asserted that stalking under Pen C § 646.9 is a crime involving moral turpitude (CIMT). [12] Based on this, criminal defense counsel should conservatively assume that it is a CIMT. Immigration advocates may assert that it is not, based on the interpretation in *Sanchez* and threats to "safety," although they must seek additional defense strategies as well.

IV. Violation of a Protective Order: *Matter of Obshatko* (2017)

Noncitizens are deportable if a civil or criminal court judge makes a finding that they violated a portion of a domestic violence (DV) protective order that "involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." INA 237(a)(2)(E)(ii). The conduct that constituted the violation (as opposed to the finding of violation) must have occurred after admission and on or after September 30, 1996.

This is a dangerous ground because it might be found to include a finding of *any* violation of a DV "stay-away" order, no matter how innocuous the conduct. The BIA and the Ninth Circuit emphasize that the test is whether the person was found to have *violated the part of the order* that is meant to protect against credible threat, etc., even if the person did not actually make a credible threat. As an example of

[11] See the NIPNLG/IDP practice advisory on Dimaya at fn 6, which addresses reopening based on changed law.

[12] In *Matter of U. Singh,* cited in text, the BIA assumed without discussion that Pen C § 646.9 is a CIMT. See also *Matter of Ajami*, 22 I&N Dec. 949 (1999) (finding that Michigan *aggravated* stalking is a CIMT).

how broadly this can be construed, the Ninth Circuit held that a permanent resident was deportable after he was found to have violated a DV stay-away order by walking his child halfway up the driveway after visitation, rather than dropping the child at the curb as agreed. Although the man did not engage in repeat harassment or threats, the court held that because he was found to have violated the section of the DV order designed to protect against this, he was deportable.[13]

How does ICE prove that there was a qualifying judicial ruling that makes this finding? Say that it is established that a civil or criminal court judge found that the person violated some kind of order. Did this finding relate to a DV protective order, and if so was it for the part of the order protecting against repeat harassment, threat, or injury? The Ninth Circuit stated that the categorical approach applies to the inquiry and the government must present conclusive proof from the record of conviction to show that the court made a qualifying finding.[14] It found that ICE must prove that a conviction of Pen C § 237.6 was based on a violation of, e.g., Calif. Family Code §§ 6320 and 6389, because it also could have been based on violation of a non-DV order such as under Pen C § 527.6(c).

The BIA has disagreed. It found that because INA § 237(a)(2)(E)(ii) involves both criminal convictions and civil court findings, and because the categorical approach applies only to criminal convictions, therefore the categorical approach does not apply at all – even if in fact a conviction is the basis for deportability. Instead, for this ground the immigration judge

> should consider the probative and reliable evidence regarding what a State court has determined about the alien's violation. In so doing, an Immigration Judge should decide (1) whether a State court "determine[d]" that the alien "has engaged in conduct that violates the portion of a protection order that involve[d] protection against credible threats of violence, repeated harassment, or bodily injury" and (2) whether the order was "issued for the purpose of preventing violent or threatening acts of domestic violence." Section 237(a)(2)(E)(ii) of the Act.

Matter of Obshatko, 27 I&N Dec. 173, 176-77 (BIA 2017)

Remember that the issue is *what findings the court made*, not what conduct took place. Evidence that the person actually did violate this kind of order does not prove deportability. ICE must prove that the court specifically found the person to have violated the applicable provisions of a qualifying order.

In sum, this means that currently the categorical approach applies to this inquiry within the Ninth Circuit, but the Ninth Circuit may decide in the future to defer to the BIA's ruling. Thus, criminal defenders should act conservatively and try to never admit to violating any DV stay-away order, but instead should plead either 1) to violating a specific provision of the order that does not trigger deportation, for example relating to visits, custody, child support, or possibly anger management classes, or else 2) to a new offense not relating to violation of an order. (While it may not be necessary, the very safest course is to plead to a new offense involving a different victim, whom the order was not intended to protect.) Because of the threat that someday the Ninth Circuit will adopt the BIA's view, defenders should *not* consider it safe to create a vague record by pleading to a statute such as Pen C § 166(a), which can prohibit failing to comply with a variety of court orders. However, in removal proceedings, advocates faced with a vague record can assert the on-point, governing Ninth Circuit rule that the categorical approach applies and ICE cannot meet its burden. At the same time, advocates should try to prepare an additional defense and expect that ICE may appeal positive decisions.

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[13] See *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009), cited approvingly in *Matter of Strydom,* 25 I&N Dec. 507 (BIA 2011); see also *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009).

[14] *Id.* at 837.

V. Conviction of a Crime of Child Abuse: *Matter of Mendoz-Osorio* (2016)

The DV deportation ground provides that a conviction of a "crime of child abuse, child neglect, or child abandonment" (hereafter, "crime of child abuse") causes deportability. INA § 237(a)(2)(E)(i). The conviction must have occurred after admission to the United States and on or after September 30, 1997. The BIA has created fairly vague definitions of this ground, which make it hard to predict which convictions might trigger a charge of deportability. The BIA stated that its definitions apply equally to the three categories (abuse, neglect, and abandonment).[15]

The good news is that the BIA stated that a less serious California child endangerment statute, Pen C § 273a(b), is *not* a deportable crime of child abuse. *Matter of Mendoz-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016). Defenders must assume that a conviction of felony or misdemeanor Pen C § 273a(a) *is* deportable child abuse. In response to a § 273a(a) charge, defenders can offer a plea to § 273a(b) and if needed an additional, immigration-neutral offense, such as vandalism. For further discussion of *Mendez-Osorio*, see ILRC practice advisory online.[16]

Turning to another type of offense, an *age-neutral offense* never can be a deportable crime of child abuse, even if the record of conviction shows that the victim was under age 18. However, due to an older BIA decision that did not correctly apply the categorical approach, immigration advocates should be prepared to explain this rule and criminal defenders should keep information about minor age out of the record in order to avoid any problem. An example of an "age-neutral" offense is battery under Pen C § 243(a), which has no requirement as to age of the victim. An example of an offense that has minor age as an element is Pen C § 273a, endangering a "child," and Pen C § 647.6, annoying or molesting a "child under the age of 18."

The BIA agrees that the categorical approach governs whether an offense is a deportable crime of child abuse.[17] In 2008 the BIA held that a simple battery statute, which had no element relating to age, was not categorically (always) a crime of child abuse, but that it was divisible. If the record of conviction had conclusively proved that the victim in the case was under age 18, the conviction would have been deportable child abuse. See *Matter of Velazquez- Herrera*, 24 I&N Dec. 503 (BIA 2008). This aspect of *Velazquez-Herrera* has been overruled by subsequent U.S. Supreme Court rulings, which the BIA has adopted. These decisions make clear that a statute is divisible only if it sets out multiple offenses phrased in the alternative, and at least one of these offenses is made up of elements that match the generic definition at issue.[18] Because an age-neutral statute has no element (or even statutory language) requiring minor age, it is not divisible and never can be a deportable crime of child abuse, regardless of information in the record.

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[15] See *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008); *Matter of Soram*, 25 I&N Dec. 378, 380-81 (BIA 2010); and *Matter of Mendez-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016).

[16] See ILRC, *Practice Advisory: California Pena Code § 273a(b) is not a Deportable Crime of Child Abuse* (2016), available at www.ilrc.org/crimes.

[17] See, e.g., *Velazquez-Herrera,* 24 I&N Dec. at 503; *Matter of Soram,* above; *Matter of Mendez-Osorio*, above; and *Fregozo v. Holder*, 576 F.3d 1030, 1035 (9th Cir. 2009).

[18] See discussion of *Mathis v. United States*, 136 S. Ct. 2243 (2016) in *Matter of Chairez,* 27 I&N Dec. 21 (BIA 2017) and preceding *Chairez* decisions, and see ILRC, *How to Use the Categorical Approach Now*, at fn. 5, above.

APPENDIX: Case Citations for California Crimes of Violence (COV)

A. Misdemeanor or felony offenses: COV under 18 USC § 16(a)

Under the categorical approach, the minimum conduct required for guilt is the basis for determining whether an offense is a COV. For more information on that analysis see ILRC, *How to Use the Categorical Approach Now* (2017), available at https://www.ilrc.org/how-use-categorical-approach-now.

An offensive touching, e.g. **Pen C § 243(a), (e),** is not a COV. See, e.g., *US v. Johnson*, 130 S.Ct. 1265 (2010); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006).

Battery with injury under **Pen C § 243(d)** is a battery that can be committed by an offensive touching that is neither intended nor likely to cause injury, but that still causes an injury. See, e.g., *People v. Hopkins* (1978) 78 Cal.App.3d 316, 320-21. Therefore it should not be held a COV under 18 USC § 16(a). See, e.g., *Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016). See § 243(d) discussion in the *California Chart* and in ILRC, *Practice Advisory: Some Felonies Should No Longer Be Crimes of Violence under Johnson* (2015) ("*Johnson* Advisory"), available at www.ilrc.org/crimes.

Obstruction or resisting arrest without use of force, **Pen C § 148,** or where force includes offensive touching, **Pen C § 69,** is not a COV. *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (Pen C § 69); *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013) (similar statute to § 148). Nonviolently trying to persuade a witness/victim not to call the police, **Pen C § 136.1(b)(1),** is not a COV by its terms. **Pen C § 32,** accessory after the fact, is not a COV even if the principal's offense was one.[19] However, these offenses should not have a sentence of a year or more imposed because of the risk that the Ninth Circuit would agree that even interfering with an initial arrest is obstruction of justice; see *California Chart.*

Felony false imprisonment by violence, menace, fraud, or deceit, **Pen C § 236/237**, should not be held a COV. While no decision has discussed § 236/237 as a COV, deceit and fraud are not COVs. "Violence" here includes force required to pull someone a few feet,[20] and the Ninth Circuit found that "menace" involves a threat so minor that does not amount to a crime involving moral turpitude.[21] Further, the offense should not be held divisible.[22] See *California Chart*.

Felony shooting at an inhabited vehicle, **Pen C § 246,** is not a COV because the minimum *mens rea* is recklessness. *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011). (But it is possible that ICE will argue that 18 USC § 16(a) should be interpreted to include recklessness, based on the Supreme Court's analysis of a different definition of COV in *Voisine.*[23])

Recklessness, negligence. Negligent conduct is never a COV. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (felony DUI by negligence). Courts have held that recklessness is not a COV. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*). (But see discussion of *Voisine*, above.)

Assault with a deadly weapon, **Pen C §§ 245(a)(1)-(3),** has been held a COV. *U.S. v Grajeda*, 581 F.3d 1186, 1190 (9th Cir. 2009); *U.S. v. Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009). Assault likely to cause

[19] *U.S. v. Innie*, 7 F.3d 840 (9th Cir. 1993).

[20] *People v. Castro* (2006) 138 Cal. App. 4th 137, 140.

[21] *Turijan v. Holder*, 744 F.3d 617, 621-622 (9th Cir. 2014)

[22] See CALCRIM 1240 and *People v. Henderson* (1977) 19 Cal. 3d 86, 95.

[23] See discussion of *Voisine v. United States*, 136 S.Ct. 386 (2016), in NIPNLG/IDP, *Practice Alert: Voisine v. United States* (2016), available at http://nipnlg.org/practice.html

great bodily injury, **Pen C § 245(a)(4**), also has. *U.S. v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015). Some advocates are contesting these based on the minimum conduct to commit the offense, however.

Misdemeanor spousal assault with intent to injure, **Pen C § 273.5**, has been held a COV. *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055-56 (9th Cir. 2010). Some advocates assert that the minimum conduct does not rise to the level of a COV. See also discussion of level of force in *Morales-Garcia v. Holder*, 567 F.3d 1058, 1064-1065 (9th Cir. 2009) (holding some conduct is not moral turpitude).

Criminal threat, **Pen C § 422**, is a COV. *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

Sex with a minor under age 18 or age 16, **Pen C §§ 261.5(c)**, **(d)** respectively, is not a COV. *U.S. v. Christensen*, 558 F.3d 1092 (9th Cir. 2009); *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006). However, § 261.5(d) (but not § 261.5(c)) might be held an aggravated felony regardless of sentence, as sexual abuse of a minor. See advisory[24] discussing *Esquivel-Quintana v. Sessions,* 137 S.Ct. 1562 (2017).

B. New Analyses: *Dimaya* and 18 USC § 16(b)

The Supreme Court held that 18 USC § 16(b) is void for vagueness and can no longer be applied. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). It relied on *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), reversing *James v. U.S.*, 550 U.S. 192 (2007), which struck down a similar COV definition and eliminated the "average case" test. Where, as below, a case held that an offense was a COV *only* under 18 USC § 16(b), the offense is not a COV, based on *Dimaya.* For further discussion of all of these offenses, see ILRC*, Some Felonies Should No Longer Be Crimes of Violence under Johnson* (2015) at www.ilrc.org/crimes.

- **Felony kidnapping, Pen C § 207(a)**, was held a COV under § 16(b) but not § 16(a). *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th Cir. 2012) (ordinary case test).
- **Felony sexual battery, Pen C § 243.4(a),** was held a COV under § 16(b) (*Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005)) but not § 16(a) (*US v. Lopez-Montanez*, 421 F.3d 926 (9th Cir. 2005)).
- **Felony lewd intent toward minor under age 16, Pen C § 288(c),** was held a COV under § 16(b) but not § 16(a). *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013) (ordinary case test). But it is possible that § 288(c) would be held sexual abuse of a minor in the future.[25]
- **Felony stalking, Pen C § 646.9.** The BIA held that harassing under § 646.9 is a COV outside the Ninth Circuit, but it only considered 18 USC § 16(b). *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012). Harassing does not meet § 16(a) because it lacks a threat to use violence as an element. It is not a COV in the Ninth Circuit. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir 2007). The statute may not be divisible between harassing and following. Note that § 646.9 also is not a deportable "stalking" conviction under INA § 237(a)(2)(E). *Matter of Sanchez-Lopez,* 27 I&N Dec. 256 (BIA 2018).
- **Residential burglary, Pen C § 460(a).** *Sessions v. Dimaya, supra,* held that this is not a COV.
- **Possession of a sawed-off shotgun, Pen C § 33215.** The Supreme Court held that possessing this gun is not a COV, under a definition of COV very similar to 18 USC § 16(b). *Johnson.v. U.S., supra.*

[24] See ILRC, *Practice Advisory: Supreme Court Rules on Sexual Abuse of a Minor, Esquivel-Quintana* (2017) at www.ilrc.org/crimes .

[25] The Ninth Circuit held that § 288(c) is not an aggravated felony as sexual abuse of a minor (SAM). *U.S. v. Castro*, 607 F.3d 566 (9th Cir. 2010). But since the Supreme Court in a different context set age 16 as a dividing line for SAM, the Ninth Circuit could decide to reconsider § 288(c). See *Esquivel-Quintana v. Sessions,* 137 S.Ct. 1562 (2017) and *Esquivel* advisory at https://www.ilrc.org/supreme-court-rules-sexual-abuse-minor.