PRACTICE ADVISORY[1] June 23, 2016

DEPORTABLE CRIMES OF DOMESTIC VIOLENCE: *MATTER OF H. ESTRADA*

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See *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA May 27, 2016) at https://www.justice.gov/eoir/file/862581/download

A. Bottom Line; Advice for Immigration Advocates and Criminal Defense Counsel

A noncitizen who is convicted of a "crime of domestic violence" is deportable.[2] In *Matter of H. Estrada* the BIA found that in determining whether an offense is a crime of domestic violence:

- The categorical approach must be used to determine that the offense is a "crime of violence" under 18 USC § 16;

- The circumstance-specific approach, not the categorical approach, can be used to determine whether the victim and defendant shared the required domestic relationship. ICE can use any reliable evidence, including evidence from outside the record of conviction, to try to meet its burden of proving the relationship.

All courts agree that the categorical approach must be used to determine whether an offense is a crime of violence (COV) under 18 USC § 16.

Courts differ when it comes to proving the domestic relationship. Some circuit courts of appeals agree with the *Matter of H. Estrada* position and have long held that any reliable evidence can be used to prove the domestic relationship. The Ninth Circuit employs a different rule. In cases such as *Tokatly* and *Cisneros-Perez,*[3] it has held that the categorical approach applies, in that the domestic relationship need not be an element of the offense but it must be conclusively proved by evidence *found in the reviewable record of conviction*. Evidence from outside the record cannot be used. See further discussion of these points in Part B.

The Ninth Circuit does not owe deference to the BIA on this issue, and *Matter of H. Estrada* does not purport to change Ninth Circuit law. *Tokatly* and *Cisneros-Perez* still govern all immigration cases

[1] The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, please contact kbrady@ilrc.org.
[2] INA 237(a)(2)(E)(i), 8 USC 1227(a)(2)(E)(i).
[3] *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006).

arising within Ninth Circuit jurisdiction. However, at some point the Ninth Circuit may well decide to change this rule and permit use of any reliable evidence to prove the relationship. Moreover, ICE is likely to start asserting *Estrada* and appealing cases in the Ninth Circuit, now.

Immigration advocates in the Ninth Circuit should continue to assert *Tokatly/Cisneros-Perez* as a defense, but should try to preserve other defense strategies as well in case we lose that rule. Among other things, consider whether the offense really is a crime of violence under 18 USC § 16, especially since the Ninth Circuit found 18 USC 16(b) to be unconstitutional.[4] Consider whether evidence from outside the record is sufficiently tied to the offense of conviction.[5]

Criminal defenders should continue to act conservatively to avoid a deportable crime of DV. The following are basic strategies. See also a free online crim/imm resource, *Note: Domestic Violence*.[6]

- Plead to an offense that is not a crime of violence (COV) under 18 USC § 16. If the offense is not a COV then it is not a deportable crime of DV, even if the D and V have a domestic relationship. For example, some state spousal battery statutes are not deportable crimes of domestic violence, because the battery is not a COV because it can be committed by an offensive touching. See Part B. For suggestions for non-COV offenses, see the California Chart at www.ilrc.org/chart and other state and federal charts listed at www.nipnlg.org.

- If a plea to a COV is unavoidable, plead to a specific victim who does not have a protected domestic relationship – e.g., the ex-wife's new boyfriend, the police officer, or the neighbor. Or, plead to violence against property, not a person. These avoid a deportable crime of DV. But be sure to avoid a sentence of 365 days or more imposed on any single count, in order to prevent the COV conviction from becoming an aggravated felony.[7]

- Defenders in the Ninth Circuit have another option. If it is not possible to avoid a plea to a COV where the V and D share a qualifying relationship, then at least try to keep information about the relationship out of the record of conviction (generally, the charge pled to, plea colloquy, plea agreement, judgment, and factual basis for the plea). For example, plead to a "Jane Doe" victim, or if necessary include the victim's name but nothing about the relationship. That provides some protection under current law; see discussion in *Note: Domestic Violence,* above. Warn the defendant that this protection might not work well now (because ICE is likely to appeal), and might be gone in the future.

B. Discussion

A deportable crime of domestic violence is defined as a conviction of a "crime of violence" as defined in 18 USC § 16, where the victim and defendant share a qualifying protected domestic relationship. The relationship includes a former or current spouse or equivalent, co-habitant, co-parent, or any other relationship protected under the jurisdiction's (e.g., the state's) domestic violence laws. See detailed definition at INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

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[4] See *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) and see Advisories on the related Supreme Court decision in *Johnson v. United States* at www.nipnlg.org and www.ilrc.org/crimes. A petition for certiorari has been filed in *Dimaya.*
[5] See Advisories on *Nijhawan v. Holder*, 557 U.S. 29, 42 (U.S. 2009), where the Supreme Court first set out the circumstance specific test, at www.ilrc.org/crimes and www.nipnlg.org See also *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014) (possession of 30 grams or less marijuana is determined by circumstance specific approach).
[6] Go to http://www.ilrc.org/files/documents/9_violence_dv_child_abuse_2014_final.pdf. This article was last updated in 2014 (before *Dimaya* and *Johnson*).
[7] Conviction of a COV as defined at 18 USC § 16 is an aggravated felony if a sentence of a year or more was imposed. INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F). For suggestions on sentencing see *Note: Sentence* at www.ilrc.org/chart

In *Matter of H. Estrada* the BIA reaffirmed that the categorical approach is used to determine whether the offense is a crime of violence (COV). Note that on a quick read it might appear that *Estrada* did not follow this well-established rule, because it held that the "simple battery" was a COV. However, Mr. Estrada was convicted of a subsection of a Georgia offense that, while titled "simple battery," actually requires intentional causation of harm through physical contact. Based on those elements and on controlling Eleventh Circuit precedent, the BIA found the offense is categorically a COV under 18 USC § 16(a). *Estrada*, pp. 750-751.

Thus *Estrada* did not hold that a "simple battery" that can be committed by an offensive touching is a COV, and did not abandon the categorical approach as the method for determining that an offense is a COV. It is well-established that a battery that includes an offensive touching is not a COV under 18 USC § 16, and thus is not a deportable crime of domestic violence.[8]

The BIA did take a new stand regarding the domestic relationship. It applied the circumstance specific rather than the categorical approach, holding that the relationship can be proved by any "reliable" evidence, including evidence from outside the record of conviction. Here the BIA used police reports from the scene that reported that the victim and defendant said they resided with each other as a couple. The BIA dismissed objections that the police reports were not sufficiently "reliable." *Estrada* at 753-754. (In fact, police reports are notoriously unreliable as evidence and should be contested. But where the report is used only as evidence of a common address, and where the respondent cannot assert or present evidence to show that the report is wrong on this point, these cases may be difficult to win.)

The Ninth Circuit has a different rule. It has held that the domestic relationship must be proved conclusively by evidence in the reviewable record of conviction, i.e. not by any reliable evidence, regardless of the source. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006). These cases govern in the Ninth Circuit, and immigration attorneys should continue to cite them. The Ninth Circuit need not defer to the BIA on this issue, which is when the circumstance specific rather than categorical approach should apply.

However, the Ninth Circuit may well decide to change the *Tokatly* rule when it next addresses the issue. Based on intervening case law, *Tokatly* can be read as using neither the categorical nor circumstance specific approach. The court could hold that the full categorical approach applies to a "crime of domestic violence" determination, and therefore only offenses that have the domestic relationship *as an element* are deportable crimes of DV. That would beneficial to immigrants, but would go against the trend of law. Or the court could hold that the circumstance specific approach governs proof of the relationship, as *Estrada* held. But in any event, starting now, especially for the great majority of immigrants who are not represented, ICE attorneys likely will assert the *Estrada* rule, appeal adverse decisions, and try to persuade immigration judges to (wrongly) apply *Estrada* even without a new Ninth Circuit opinion.

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[8] See, e.g., discussion in *Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016); *Matter of Velasquez*, 25 I&N Dec. 278, 282 (2010). See also *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (the minimum conduct required to commit spousal battery under California Penal Code § 243(e), an offensive touching of a spouse, is not a crime of violence, a deportable crime of domestic violence, or a crime involving moral turpitude).

Confusion can arise from the fact that the term "crime of violence" appears in different contexts in federal law, using different definitions. In particular, the Supreme Court held that an offensive touching does meet the definition at 18 USC § 922(g)(9) of a federal crime of domestic violence. That section uses similar language to the domestic violence deportation ground, but does not employ 18 USC § 16. But the Court specifically stated that this ruling on 18 USC § 922(g)(9) does not affect 18 USC § 16 determinations, including the domestic violence deportation ground. See *U.S. v. Castleman*, 134 S.Ct. 1405, 1411, n. 4 (2014) and see Advisory, "Why *United States v. Castleman* Does Not Hurt Your Immigration Case and May Help It," at http://nipnlg.org/PDFs/practitioners/practice_advisories/crim/2014_07Apr_castleman.pdf . Note that the Court will consider this same statute this year in *Voisine v U.S.* (No. 14-10154).