Crim-Imm Case Law Updates 2024[1]

December 16, 2024

This resource is designed to help immigration practitioners stay current on significant case law developments over the past year in the intersection of immigration and criminal law. This resource assumes readers are familiar with the categorical approach. It begins with an overview of notable case law developments before the BIA and the United States Courts of Appeals. This is followed by case summaries of all published Board of Immigration Appeals decisions addressing this area of law in 2024, along with a curated list of case summaries from the United States Courts of Appeals. The case law from the Courts of Appeals focuses primarily on decisions analyzing the categorical approach and the generic definitions underlying crime-based grounds of inadmissibility and deportability.

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I. Notable Developments Before the BIA and the U.S. Courts of Appeals

Impact of *Loper-Bright* on Crim-Imm Cases

On June 28, 2024, the Supreme Court issued *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), a case that overturned the doctrine of *Chevron* deference, which had for decades required federal courts to defer to a federal agency's reasonable interpretation of an ambiguous statute it administers.[2] In the crim-imm context, federal courts regularly invoked *Chevron* deference to uphold the BIA's interpretation of key terms in the Immigration and Nationality Act (INA), such as the definition of a conviction and the generic definitions of the various grounds for removal. Circuit Courts are now no longer required to defer to the BIA when interpreting the INA, although prior decisions premised on *Chevron* deference remain good law until overturned.

Following *Loper Bright*, the Supreme Court granted certiorari, vacated, and remanded four published crim-imm circuit court decisions that deferred to the BIA under *Chevron*:

- *Bastias v. U.S. Att'y Gen.*, 42 F.4th 1266 (11th Cir. 2022), *cert. granted, judgment vacated sub nom. Bastias v. Garland*, 144 S. Ct. 2704 (2024) (deferring to the BIA on the definition of a crime of child abuse, child neglect, or child abandonment);
- *Diaz-Rodriguez v. Garland,* 55 F.4th 697 (9th Cir. 2022), *cert. granted, judgment vacated*, 144 S. Ct. 2705 (2024) (same);
- *Solis-Flores v. Garland*, 82 F.4th 264, 268 (4th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 2709 (2024) (deferring to the BIA on the definition of a crime involving moral turpitude);
- *Wong v. Garland*, 95 F.4th 82 (2d Cir. 2024), *cert. granted, judgment vacated*, No. 24-92, 2024 WL 4654950 (U.S. Nov. 4, 2024) (deferring to the BIA on the definition of a conviction under the INA).

Recent post-*Loper Bright* circuit court decisions offer a glimpse into how courts may handle BIA deference moving forward. For example, in *Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024), a Ninth Circuit panel heavily relied on *Skidmore* deference, which allows courts to give weight to an agency's interpretation based on its persuasiveness, consistency, and reasoning, to defer to the BIA's definition of a crime involving moral turpitude (CIMT). In contrast, the Eighth Circuit took a more dismissive approach towards the BIA's interpretation of the meaning of the rape aggravated felony ground in *Quito-Guachichulca v. Garland*, No. 23-1069 (8th Cir. Dec. 9, 2024). The court referred to deference to the Board as a "relic of the past," did not raise *Skidmore* deference, and stated that the BIA's interpretations are no longer controlling or even especially informative.

[2] For more information on *Loper Bright* as well as other Supreme Court cases from the October 2023 term, *see* National Immigration Project, *Supreme Court Roundup: What Immigrants' Rights Legal Representatives Should Know from the October 2023 Supreme Court Term* (September 17, 2024).

Sentencing Enhancements and "Compound Crimes"

In *Matter of Khan*, 28 I&N Dec. 850 (BIA 2024), the BIA adopted a relatively novel and alarming approach to analyzing the elements of a criminal offense under the categorical approach. The Board held that certain offenses with sentencing enhancements may be viewed as a compound crime combining the elements of the underlying offense and the elements of the sentencing enhancement. The Board concluded that a California vehicular manslaughter offense that included a sentencing enhancement is a crime involving moral turpitude even though the underlying crime only had a mens rea of negligence because knowledge of an injury is an essential element of the sentencing enhancement. Specifically, the Board held that when the government must prove the elements of a sentencing enhancement beyond a reasonable doubt, those additional elements are combined with the elements of the underlying criminal statute and all the elements are then evaluated as a single compound crime when comparing the offense to the generic definition under the categorical approach.

Applying the "Circumstance-Specific Approach" to Aggravated Felony Money Laundering

In *Matter of Dominguez Reyes*, 28 I&N Dec. 878 (BIA 2024), the Board concluded that the circumstance specific approach applies to the aggravated felony money laundering ground of removal. Specifically, in determining whether a money laundering offense involved more than $10,000, adjudicators are not limited to the categorical approach and may consider any admissible evidence to determine if the amount of funds exceeded $10,000. The Second, Fifth, and Ninth Circuits had already reached the same conclusion.[3]

Attempt Crimes Qualify as 'Crimes of Child Abuse'

In *Matter of Rodriguez*, 28 I&N Dec. 815 (BIA 2024), the Board determined that the definition of "crime of child abuse" under 8 U.S.C § 1227(a)(2)(E)(i) includes attempt offenses even though the statute is silent with respect to attempts whereas other removal grounds explicitly mention attempt crimes. The Board rejected the respondent's argument that this statutory silence implies that attempt offenses fall outside of the crime of child abuse ground. The Board has already made a similar determination with respect to CIMTs.[4]

Exhaustion as a Barrier to Challenging the Fifth Circuit's "Realistic Probability" Requirement

The Fifth Circuit takes an outlier approach to the "realistic probability" test under the categorical approach. In most circuits, if the statutory language explicitly covers conduct beyond the generic offense, non-citizens have met the realistic probability test and need not provide

[3] *See Varughese v. Holder*, 629 F.3d 272, 275 (2d Cir. 2010) (applying the circumstance specific approach to assessing the $10,000 monetary threshold in the money laundering aggravated felony ground); *United States v. Mendoza*, 783 F.3d 278, 281 (5th Cir. 2015) (same); *Fuentes v. Lynch*, 788 F.3d 1177, 1183 (9th Cir. 2015) (same).

[4] *See Matter of Vo*, 25 I&N Dec. 426 (BIA 2011) (CIMT definition includes attempted CIMTs).

additional proof that the statute applies to the overbroad conduct.[5] By contrast, the Fifth Circuit always requires proof of actual prosecutions for overbroad conduct, even when the statute's text is plainly overbroad.[6]

In *Alejos-Perez v. Garland*, 93 F.4th 800 (5th Cir. 2024), the Fifth Circuit compounded this stringent requirement by dismissing evidence of non-generic prosecutions on procedural grounds. The petitioner argued that a Texas controlled substance offense was overbroad because it covered possession of non-federally controlled substances. Although the statute is indivisible as to the identity of the drug, and the petitioner produced case examples to support overbreadth, the court declined to consider the case examples. It held that the petitioner had failed to exhaust administrative remedies by not presenting those examples to the BIA.

Eighth Circuit Joins Sixth Circuit in Rejecting *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017)

In *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017), the Board held that aggravated felony rape under 8 U.S.C. § 1101(a)(43)(A) includes an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight. In 2018, the Sixth Circuit rejected the Board's decision and held that rape as defined in 1996 did not include digital or mechanical penetration. *Keeley v. Whitaker*, 910 F.3d 878 (6th Cir. 2018). In *Quito-Guachichulca v. Garland*, No. 23-1069 (8th Cir. Dec. 9, 2024), the only other circuit court decision to squarely address *Matter of Keeley*, the Eighth Circuit joined the Sixth Circuit in holding that the definition of rape excludes digital or mechanical penetration.

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[5] *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (holding that the realistic probability test "has no relevance" where "[t]he state crime at issue clearly does apply more broadly than the federally defined offense"); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Zhi Fei Liao v. Att'y Gen*., 910 F.3d 714, 724 (3d Cir. 2018) ("Put simply, the elements leave nothing to the 'legal imagination,' because they show that one statute captures conduct outside of the other." (citation omitted)); *United States v. Salmons*, 873 F.3d 446, 451 (4th Cir. 2017) (holding that a defendant could simply "point to the statutory text ... to demonstrate that a conviction for a seemingly violent state crime could in fact be sustained for nonviolent conduct"); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022) ("If the statute is overbroad on its face under the categorical approach, the inquiry ends. After applying the categorical approach, if the court determines that the statute is ambiguous or has indeterminate reach, only then will the court turn to the realistic probability test."); *Gonzalez v. Wilkinson*, 990 F.3d 654, 656 (8th Cir. 2021) (holding that where "the state offense . . . is broader than the federal offense," there is no additional requirement of realistic probability); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (explaining that "a state statute expressly defin[ing] a crime more broadly than the generic offense" demonstrates realistic probability and that "the relative likelihood of application to non-generic conduct is immaterial"); *United States v. Cantu*, 964 F.3d 924, 934 (10th Cir. 2020) ("[A] defendant need not come forward with instances of actual prosecution when the 'plain language' of the statute proscribes the conduct at issue."); *Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021) ("[A] petitioner may demonstrate that 'statutory language itself, rather than the application of legal imagination to that language, creates [a] realistic probability that a state would apply the statute to conduct beyond' the reach of a favorable statute.").

[6] *See*, *e.g.*, *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc) (noting that an individual "cannot simply point to" overbreadth in a statute and instead "must also show that [state] courts have actually applied" the statute in an overbroad way).

II. Board of Immigration Appeals Decisions[7]

Crimes Involving Moral Turpitude (CIMT)

**Matter of Thakker*, 28 I&N Dec. 843 (BIA 2024) – Holding that a conviction for retail theft under 18 Pa. Stat. and Cons. Stat. 3929(a)(1) is not a CIMT if it predates *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), and if the case is in a jurisdiction where a United States court of appeals has ruled that *Diaz-Lizarraga* does not apply retroactively.[8] Before *Diaz-Lizarraga*, the BIA required that theft offenses involve an intent to permanently deprive the owner of property in order to qualify as a CIMT. Here, the BIA determined that the Pennsylvania statute does not meet this definition. In doing so, it overturned *Matter of Jurado*, 24 I&N. Dec. 29 (BIA 2006), a pre-*Diaz-Lizarraga* case that had misapplied the categorical approach by incorrectly assuming that retail theft offenses include an intent to permanently deprive based on the offense's context rather than its statutory elements.

****Matter of Khan*, 28 I&N Dec. 850 (BIA 2024) – Holding that a conviction for gross vehicular manslaughter while intoxicated under section 191.5(b) of the Cal. Penal Code with a sentencing enhancement for fleeing the scene of an accident under section 20001(c) of the California Vehicle Code is a CIMT. The BIA concluded that even though the underlying base offense, § 191.5(b), is not a CIMT because it can be committed negligently, the enhancement renders the offense a compound crime that qualifies as a CIMT. Specifically, the Board held that when the government must prove the elements of a sentencing enhancement beyond a reasonable doubt, those additional elements are combined with the elements of the underlying criminal statute and all the elements are then considered together as one compound crime.

Crimes of Child Abuse

****Matter of Rodriguez*, 28 I&N Dec. 815 (BIA 2024) – Holding that a conviction for attempted injury to a child under sections 15.01(a) and 22.04(a)(1) of the Tex. Penal Code constitutes a "crime of child abuse" under 8 U.S.C § 1227(a)(2)(E)(i). Although § 1227(a)(2)(E)(i) is silent with respect to attempt whereas other removal grounds explicitly mention attempt crimes, the Board rejected the respondent's argument that this silence implies that attempt offenses fall outside of the crime of child abuse ground. The Board asserted that respondent's interpretation would conflict with the broader statutory context and Congressional intent to protect children from a spectrum of abusive and harmful conduct, including conduct that is incomplete but poses significant risks of harm.

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[7] In this list, one green asterisk (*) indicates a decision that is generally favorable to non-citizens and three green asterisks (***) indicates a highly favorable decision. Red asterisks (*) indicate the opposite.

[8] Every United States Circuit Court of Appeals that has addressed the retroactivity of *Matter of Diaz-Lizarraga*—the Second, Fifth, Ninth, and Tenth Circuits—has concluded that *Diaz-Lizarraga's* interpretation of CIMT theft offenses cannot apply retroactively. *See Obeya v. Sessions,* 884 F.3d 442, 449 (2d Cir. 2018); *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019), *as revised* (Apr. 26, 2019); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295-96 (9th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017).

Aggravated Felony – Money Laundering, § 1101(a)(43)(D)

*Matter of Dominguez Reyes, 28 I&N Dec. 878 (BIA 2024) – Holding that the circumstance-specific approach applies to the money laundering aggravated felony ground under 8 U.S.C. § 1101(a)(43)(D) when determining whether the amount of funds involved exceeds $10,000. The respondent's money laundering conviction under 18 U.S.C. § 1956(h) (2018) met this threshold because the amount laundered exceeded $10,000. The Board rejected the respondent's argument that the uncertified conviction records submitted by DHS were insufficient, because the records were accompanied by a sworn statement from a DHS officer attesting to their authenticity and identifying the court record depository used. The Board also rejected respondent's argument that forfeiture orders do not meet DHS's evidentiary requirement to establish the monetary amount involved in the offense.

Post-Conviction Relief

*Matter of Azrag, 28 I&N Dec. 784 (BIA 2024) – Holding that when a state court vacates a conviction without specifying the reason, and no other evidence clarifies the basis of the vacatur, the respondent has not met the burden to prove that the vacatur was due to a substantive or procedural defect in the original proceedings as required by *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The Board clarified in a footnote, however, that this case does not impact the question of which party bears the burden of proof in the context of a motion to reopen but only determined whether the evidence presented satisfies that burden. For example, in the Ninth Circuit, the government has the burden of showing that a conviction remains valid for immigration purposes. *See Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006).

III. U.S. Circuit Courts of Appeals Updates

Crimes Involving Moral Turpitude (CIMT)

*Gomez-Ruotolo v. Garland, 96 F.4th 670 (4th Cir. 2024) – Holding that attempted sexual battery, Va. Code § 18.2-67.4(A) (2007), and electronic solicitation of a minor, Va. Code § 18.2-374.3(C), are CIMTs. The court determined that the attempted sexual battery statute is divisible and applied the modified categorical approach to conclude that the petitioner's conviction involved morally turpitudinous conduct based on non-consensual sexual contact. It also rejected the argument that attempted offenses cannot qualify as CIMTs, affirming that an attempt offense is a CIMT if the underlying offense is itself a CIMT. With respect to the electronic solicitation offense, the court addressed the statute's "reason to believe" mens rea regarding the victim's age, finding it sufficient to meet the CIMT mens rea requirement.

*Ortega-Cordova v. Garland, 107 F.4th 407 (4th Cir. 2024) – Holding that a conviction for soliciting prostitution in violation of Va. Code § 18.2-346(B) constitutes a CIMT. The court rejected the petitioner's arguments that prostitution offenses should no longer be considered CIMTs in light of evolving views regarding their moral reprehensibility. The court rejected this view by looking to case law finding a societal consensus that prostitution offenses violate moral codes and distinguished the debate about decriminalization of prostitution from societal consensus regarding its immorality. The court also rejected the petitioner's argument that the offense is not a CIMT because the minimum conduct required for a conviction under the statute

encompasses non-turpitudinous, consensual conduct between two adults where a person with disability or other extenuating circumstances is unable to find a willing sexual partner.

*Huynh v. Garland, 102 F.4th 943 (8th Cir. 2024) – Holding that possession of child pornography under Iowa Code § 728.12(3) is not a CIMT. The court agreed with the petitioner that the statute does not necessarily entail morally reprehensible behavior because it only requires a defendant to have known they possessed an image, not that the image depicted a minor. The court also rejected the BIA's requirement that the petitioner demonstrate a realistic probability of the statute being applied in cases where the possessor of an image did not know it depicted a minor, noting that the statute is expressly overbroad.

*Lopez v. Garland, 116 F.4th 1032 (9th Cir. 2024) – Holding that petit larceny under section 8.10.040 of the Reno Municipal Code is a CIMT. The court rejected petitioner's argument that the statute is overbroad because it does not specify whether the deprivation of property is permanent or temporary. In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), the BIA had already established that such an offense would be a CIMT. While the court acknowledged that following *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), *Chevron* deference is inapplicable and it is no longer bound to defer to the BIA on the generic definition of a CIMT, it nevertheless held that *Diaz-Lizarraga* is entitled to *Skidmore* deference. The court concluded that section 8.10.040 was a CIMT because it met the generic definition under *Diaz-Lizarraga*.

Aggravated Felony - Rape, § 1101(a)(43)(A)

***Quito-Guachichulca v. Garland, No. 23-1069 (8th Cir. Dec. 9, 2024) – Holding that a conviction for engaging in sexual penetration under Minn. Stat. § 609.344, subd. 1 (2013) is not an aggravated felony rape offense. The court found, based on a survey of state law, that in 1996, when rape was listed as an aggravated felony under the INA, the generic definition of rape did not include digital or mechanical penetration. The court rejected the government's attempts to use analogous non-rape offenses from 1996 to inform the generic definition of rape. The court concluded that because the Minnesota statute encompasses conduct involving digital or mechanical sexual penetration it cannot be an aggravated felony rape conviction.

Aggravated Felony - Sexual Abuse of a Minor (SAM), § 1101(a)(43)(A)

*Huynh v. Garland, 102 F.4th 943 (8th Cir. 2024) – Holding that possession of child pornography under Iowa Code § 728.12(3) is not an aggravated felony SAM. The court found that the statute falls outside of the generic definition of SAM because it criminalizes mere possession of child pornography without requiring any sexual act directed at a minor.

*Leon Perez v. Garland, 105 F.4th 1226 (9th Cir. 2024) – Holding that a conviction for attempted lewdness with a child under 14 in violation of Nev. Rev. Stat. §§ 193.330 and 201.230(2) is an aggravated felony as an attempt to commit an aggravated felony SAM offense under 8 U.S.C. § 1101(a)(43)(U), which treats attempts to commit an aggravated felony as an aggravated felony itself. The petitioner conceded that the Nevada attempt statute, § 193.330, is a categorical match to § 1101(a)(43)(U) but argued that the offense of lewdness with a child under 14, § 201.230(2), is not a categorical match to SAM under § 1101(a)(43)(A) because it is broader than 18 U.S.C. § 2243(a), a federal offense defining SAM. The court rejected petitioner's

argument because § 2243(a) does not provide an exclusive definition of SAM under the INA and because the Nevada offense matched the generic definition of SAM under Ninth Circuit precedent: the offense involved (1) sexual conduct, (2) with a minor, (3) that constitutes abuse.

*Leger v. U.S. Attorney General, 101 F.4th 1295 (11th Cir. 2024) – Holding that a Florida conviction for lewd and lascivious battery under Fla. Stat. § 800.04(4) is not an aggravated felony SAM. To determine the generic federal definition of SAM, the court considered 18 U.S.C. § 2243 (1996), which criminalizes engaging in a sexual act with a minor; the Model Penal Code's definitions of statutory rape and sexual assault; and a survey of state statutory rape and sexual abuse laws in effect in 1996. Based on this analysis, the court concluded that, for statutory rape offenses criminalizing consensual sexual activity between adolescents aged 12 to 15, the generic federal definition requires the perpetrator to be at least one year older than the victim. Because the Florida statute lacks any age differential, the court held that it was broader than the generic definition and therefore does not constitute an aggravated felony SAM.

Aggravated Felony - Drug Trafficking, § 1101(a)(43)(B)

*Stankiewicz v. Garland, 103 F.4th 119 (2d Cir. May 31, 2024) – Holding that a New Jersey conviction for distributing a controlled substance on or near school property in violation of N.J. Stat. § 2C:35-7 is not an aggravated felony drug trafficking offense. While the court agreed with the government that the statute would be an aggravated felony if it categorically matches *any* felony under the Controlled Substance Act (CSA), not just the closest analog punishing distribution in school zones, the court held that the statute does not match any federal CSA felony.

Aggravated Felony - Crimes of Violence (COV), § 1101(a)(43)(F)[9]

**United States v. Hurtt, 105 F.4th 520 (3d Cir. 2024) – Holding that a conviction for Pennsylvania aggravated assault under 18 Pa. Stat. and Cons. Stat. § 2702(a)(6) is a COV. The statute criminalizes attempting by physical menace to put specific officials in fear of imminent serious bodily injury. The court found that it cannot reasonably conceive of any situation where a person violates that statute without engaging in an attempted or threatened use of physical force. ***Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.*

**United States v. Jordan, 96 F.4th 584 (3d Cir. 2024) – Holding that a conviction for armed bank robbery under 18 U.S.C. § 2113(d) is a COV under 18 U.S.C. § 924(c)(3)(A). The defendant argued that § 2113(d) could be violated with a recklessness mens rea and was therefore not a COV under *Borden v. United States*, 593 U.S. 420 (2021). The court concluded that the statute is divisible with respect to the overbroad conduct by looking at the text of the statute, the record of

[9] For information about the crime of violence ground generally and *Borden v. United States*, 593 U.S. 420 (2021) specifically, *see* *Practice Advisory: Overview of Borden v. United States for Immigration Counsel*, National Immigration Project, Immigrant Defense Project, and National Immigration Litigation Alliance (June 22, 2021).

conviction, and prior Third Circuit precedent examining similarly structured statutes. Applying the modified categorical approach, the court found that the defendant pled guilty to an offense that required a mens rea of purpose or knowledge rather than recklessness. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).*

**United States v. Fulks*, 120 F.4th 146 (4th Cir. 2024) – Holding that a carjacking conviction under 18 U.S.C. § 2119 is a COV under 8 U.S.C. § 924(c)(3)(A). Defendant argued that *United States v. Taylor*, 596 U.S. 845 (2022), which held that attempted Hobbs Act robbery is not a COV under the elements clause, extends to attempted carjacking and that the carjacking statute is indivisible. The court, however, found the statute divisible between attempted and completed carjacking, and applied the modified categorical approach to determine that the defendant was convicted of completed carjacking, which necessarily involves the use, attempted use, or threatened use of physical force. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).*

**Sanchez-Perez v. Garland*, 100 F.4th 693 (6th Cir. 2024) – Holding that a conviction for domestic assault under Tenn. Code Ann. § 39-13-111 is not a COV. The court reasoned that while the statute requires intentionally or knowingly causing another to reasonably fear imminent bodily injury, Tennessee defines bodily injury as including impairment of mental faculties, which does not encompass an attempted use or threatened use of physical force and is therefore not a COV.

**United States v. Parham*, 119 F.4th 488 (6th Cir. 2024) – Holding that a Tennessee conviction for attempted second-degree murder under Tenn. Code Ann. § 39-13-210(a)(1) constitutes a COV under the Sentencing Guidelines. The court rejected the defendant's argument that an attempted second-degree murder is not a COV because one of the elements of the offense—taking a substantial step toward killing the alleged victim—does not necessarily require the use, attempted use, or threatened use of force. The court reasoned that the minimum conduct required for the offense, described as "a person's possession of materials capable of killing someone near the scene of the intended crime—for example, poison…along with conduct that makes possession of such materials strongly corroborative of the actor's overall criminal purpose," inherently communicates a threat of force capable of causing physical pain or injury. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.*

**United States v. Smith*, 109 F.4th 888 (7th Cir. 2024) – Holding that an Illinois aggravated robbery, 720 ILL. Comp. Stat. 5/18-5(a) (2008), is a COV. The court found that because in Illinois "the gist of the offense of robbery is the force or fear of violence directed at the victim in order to deprive him of his property" the statute comports with the definition of a COV as explained in *Borden v. United States*, 593 U.S. 420 (2021), where the use of force requires that it be directed or targeted. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.*

*United States v. Daye, 90 F.4th 941 (8th Cir. 2024) – Holding that a domestic assault offense under Iowa Code § 708.2A(3)(b) is not a COV under the sentencing guidelines. Applying the categorical approach, the court found that the statute allows conviction for conduct as minimal as offensive touching or poking, which lacks the required element of violent force. The government waived divisibility arguments by failing to meaningfully develop them in briefing. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.

*Gutierrez v. Garland, 106 F.4th 866 (9th Cir. 2024) – Holding that California carjacking under Cal. Penal Code § 215(a) is not a COV. The court found the statute broader than 8 U.S.C § 16(a) in two ways. First, California carjacking does not necessarily require the use of physical force, as it can be accomplished by fear or force, and the statute is indivisible between these means. Second, while a COV requires a purposeful or knowing mens rea, the California statute permits convictions based on the unintentional use of force.

*United States v. Gomez, 115 F.4th 987 (9th Cir. 2024) – Holding that assault with a deadly weapon under Cal. Penal Code § 245(a) is not a COV. Relying on *Borden v. United States*, 593 U.S. 420 (2021), which held that crimes involving recklessness do not meet the COV mens rea requirement, the court concluded that the statute criminalizes conduct involving a mens rea less culpable than even recklessness. Specifically, the court found, based on a review of California law, that the statute does not require intent to apply force, knowledge that an act will result in force, or even a subjective awareness of a substantial risk that force will occur. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.

*United States v. Venjohn, 104 F.4th 179 (10th Cir. 2024) – Holding that a Colorado menacing conviction under Colo. Rev. Stat. § 18-3-206 is not a COV. The court's analysis relied on *United States v. Taylor*, 596 U.S. 845 (2022), which held that the threatened use of force for purposes of a COV requires some form of communication (verbal or non-verbal) directed at a second person, and therefore attempted Hobbs Act robbery is not a COV even when the completed offense is one.[10] The court concluded that the Colorado felony menacing statute as interpreted by state courts does not require that the defendant communicate any threat and is therefore not a match with a COV. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "crime of violence" under United States Sentencing Guidelines (U.S.S.G.) § 4B1.2.

*United States v. Ferguson, 100 F.4th 1301 (11th Cir. 2024) – Holding that a Georgia conviction under O.C.G.A. § 16-10-32(b) for threatening physical harm to a witness qualifies as a violent felony under the Armed Career Criminal Act (ACCA). The court found the statute divisible as to three distinct alternatives criminalizing (1) harm to a person, (2) damage to property, and (3)

[10] Practitioners should note that the INA aggravated felony grounds include a ground for attempting to commit an aggravated felony (e.g. a crime of violence) under 8 U.S.C. § 1101(a)(43)(U). Therefore, arguments based on *Taylor*'s distinction between completed and attempted offenses may have limited application to the aggravated felony context.

attempted harm to a person. It further found that the first clause is itself divisible between physical harm and economic harm. Applying the modified categorical approach, the court determined that the defendant's conviction for threatening physical harm satisfies the violent felony definition. *Note: This case does not squarely address 18 U.S.C. § 16(a), the federal definition of a "crime of violence" for immigration purposes, but the similarly worded definition of a "violent felony" under ACCA.*

Aggravated Felony - Theft, § 1101(a)(43)(G)

**Guzman-Maldonado v. Garland*, 92 F.4th 1155 (9th Cir. 2024) – Holding that robbery under Arizona Revised Statutes § 13-1904(A) is an aggravated felony theft offense. The court concluded that a conviction under the statute necessarily required proof of each element of generic theft: a taking, without consent, with the intent to deprive the owner of the rights and benefits of ownership. The court rejected the petitioner's arguments that the statute encompasses consensual takings or thefts of services, finding these interpretations to be misreadings of Arizona law.

****United States v. Orozco-Orozco*, 94 F.4th 1118 (9th Cir. 2024) – Holding that California carjacking under Cal. Penal Code § 215(a) is not an aggravated felony theft offense. The court first clarified that generic theft requires the specific intent to deprive a person with a superior possessory interest of the rights and benefits of ownership. Looking to California case law, the court then found that carjacking does not require that specific intent, as it can be committed against a person who has no possessory interest in the vehicle. The court concluded, therefore, that the statute is broader than the generic definition of theft.

Aggravated Felony - Obstruction of Justice, § 1101(a)(43)(S)[11]

**Orellana v. Garland*, 117 F.4th 679 (5th Cir. 2024) – Holding that Louisiana's accessory-after-the-fact statute, La. Rev. Stat. § 14:25, is not a categorical match for the generic federal offense of obstruction of justice and therefore is not an aggravated felony. The court agreed with the petitioner that while an obstruction of justice offense requires a specific intent to interfere with the process of justice, the Louisiana Supreme Court has repeatedly held that conduct violating § 14:25 can be committed with either a general or a specific intent.

**Cordero-Garcia v. Garland*, 105 F.4th 1168 (9th Cir. 2024) –s Holding that a conviction for dissuading a witness from reporting a crime under Cal. Penal Code § 136.1(b)(1) was an aggravated felony obstruction of justice offense. The court found that the statute, like the generic definition, required a specific intent to prevent a witness from reporting a crime. The court rejected the petitioner's argument that the statute is overbroad because it could apply to conduct such as intending to protect a victim from retaliation without interfering with the administration of justice.

[11] For more information about the generic definition of obstruction of justice *see* *Practice Alert: Overview of Pugin v. Garland*, National Immigration Project, American Immigration Council (August 22, 2023).

Particularly Serious Crimes (PSC)

***Lafortune v. Garland*, 110 F.4th 426 (1st Cir. 2024) – Holding that in determining whether an offense is a PSC, *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) does not require an agency to undertake an explicit elements-only analysis before addressing the case-specific factual circumstances surrounding the conviction. The court affirmed the BIA's finding that the petitioner's conviction for conspiracy to commit bank fraud under 18 U.S.C. § 1349 constituted a PSC.

**Annor v. Garland*, 95 F.4th 820 (4th Cir. 2024) – Holding that the BIA erred in its assessment that the petitioner's conviction for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) was a PSC. The court reaffirmed that immigration adjudicators must begin the PSC analysis by accurately identifying and evaluating the elements of the offense before considering the facts of the case. The court also found that the BIA erred in its application of the *Frentescu* factors by failing to consider whether the type and character of the offense indicate a danger to the community.

Pardon Waiver

**Lopez v. Garland*, 116 F.4th 1032 (9th Cir. 2024) – Holding that the possibility of obtaining a pardon is not a prerequisite to removal under 8 U.S.C. § 1227(a)(2). Certain criminal grounds of removability "shall not apply in the case of a [non-citizen] with respect to a criminal conviction if the [non-citizen] subsequent to the criminal conviction has been granted a full and unconditional pardon." 8 U.S.C. § 1227(a)(2)(A)(vi). Petitioner argued, based on this language, that he cannot be removed where there is no available pardon for his offense. Looking to the plain text of the statute, the court rejected this argument, explaining that the statute does not indicate that a pardon must be available only that relief is available when a pardon is granted.

Realistic Probability Test

***Alejos-Perez v. Garland*, 93 F.4th 800 (5th Cir. 2024), cert. denied, No. 23-1325, 2024 WL 4874675 (U.S. Nov. 25, 2024) – Holding that petitioner's conviction for possession of a controlled substance under Tex. Health & Safety Code § 481.1161 rendered him deportable under 8 U.S.C. § 1227(a)(2)(B)(i). Although the state statute criminalizes possession of substances not controlled under federal law and was found to be indivisible with respect to the identity of the drug, the Court held it was nevertheless a deportable offense because the petitioner failed to demonstrate a realistic probability that Texas would apply the statute to non-federally controlled substances. Notably, the court held it cannot review evidence of realistic probability in the form of case law if the petitioner "failed to exhaust his administrative remedies" by presenting these cases to the BIA below.

Denaturalization

****Farhane v. United States*, 121 F.4th 353 (2d Cir. 2024) (en banc) – Holding that criminal defense counsel has a Sixth Amendment obligation to inform a client of serious adverse immigration consequences, including an obligation to warn of the risk of denaturalization. Reversed *Farhane v. United States*, 77 F.4th 123 (2d Cir. 2023).