national IMMIGRATION project of the National Lawyers Guild

Crim-Imm Case Law Updates[1] 2022

This resource is designed to help immigration practitioners stay up to date on case law developments over the past year in the area of immigration law and crimes. It initially lists 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 that address this area of law in 2022 and a case summary list of United States Courts of Appeals published decisions. The latter list focuses primarily on decisions that specifically address the application of the categorical approach and the generic definitions of crime-based inadmissibility and deportability grounds.

 The author of this advisory is Khaled Alrabe of the National Immigration Project of the National Lawyers Guild (NIPNLG). Practitioners should use this resource as a starting point rather than as a substitute for legal research. The author would like to thank Matthew Vogel and Megan Hauptman for their review of this resource.

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Notable Developments Before the Board and Attorney General

- The Attorney General overruled *Matter of G-G-S-*, 26 I. & N. Dec. 339 (B.I.A. 2014). Immigration adjudicators may consider a respondent's mental health when determining whether the respondent was convicted of a particularly serious crime. *Matter of B-Z-R-*, 28 I. & N. Dec. 563 (A.G. 2022).

- The Board applied the unfavorable *Pickering* standard in the context of state court *nunc pro tunc* orders that modify or amend the subject matter of a conviction. *Matter of Dingus*, 28 I. & N. Dec. 529 (B.I.A. 2022).

- The Board affirmed and further expanded its holdings in *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) and *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012) on when a state proceeding that is not criminal under state law could nevertheless result in a conviction for immigration purposes. *Matter of Wong*, 28 I. & N. Dec. 518 (B.I.A. 2022).

- The Board held, in reviewing a deferred adjudication, that a conviction is "by a final judgment" for purposes of the particularly serious crime bar to withholding of removal once a sentence is imposed, even if the sentence is later withheld, deferred, or suspended. *Matter of D-L-S-*, 28 I. & N. Dec. 568 (B.I.A. 2022).

Notable Developments Before the U.S. Courts of Appeals

- *Generic Definition of an Aggravated Felony Obstruction of Justice Does Not Require a Nexus to a Pending or Ongoing Investigation or Judicial Proceeding (Circuit Split)*

In *Silva v. Garland*, 27 F.4th 95 (1st Cir. 2022), the First Circuit joined the Fourth in finding that the generic definition of an aggravated felony obstruction of justice under 8 U.S.C. § 1101(a)(43)(S) does not require that there be a nexus to a pending or ongoing investigation or judicial proceeding. The Fourth Circuit's view is consistent with the Board's decision in *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (B.I.A. 2018). *See Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021). The Ninth and the Third Circuits have gone the other way and apply a nexus requirement. *See Flores v. Att'y Gen.*, 856 F.3d 280 (3d Cir. 2017); *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020). There is currently a cert. petition pending in *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021).

- *Wins Based on the Overbreadth of State Definitions of a Controlled Substance: Methamphetamine in Indiana and Marijuana in Florida are Not Federally Controlled Substances*

In *Said v. U.S. Att'y Gen.*, 28 F.4th 1328 (11th Cir. 2022), the Eleventh Circuit held that a marijuana-related Florida conviction is not an offense related to a federally controlled substance because Florida's definition of marijuana includes all parts of the marijuana plant whereas the federal definition excludes mature stalks and fibers. The Eighth Circuit reached the same conclusion about the Florida definition of marijuana in 2021. *See Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021).

Similarly, in *Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022), the Seventh Circuit held that a methamphetamine-related drug trafficking offense under Indiana law is not an aggravated felony drug trafficking offense because the definition of methamphetamine under state law includes chemical isomers not covered under the federal definition of methamphetamine. The facial overbreadth of the state statute was enough for the Seventh Circuit to find that there was no categorical match. *Id*. at 450. However, the Eleventh Circuit in *Chamu v. U.S. Att'y Gen.*, 23 F.4th 1325 (11th Cir. 2022), rejected a similar isomer-based argument with respect to the definition of cocaine under Florida law. Unlike the Seventh Circuit, the Eleventh rejected the isomer argument based on the realistic probability standard because it was unclear if the overbroad isomer of cocaine actually exists in nature. *Id.* at 1331.

- *Deference to Matter of Thomas & Thompson, 27 I. & N. Dec. 674 (AG 2019)*

In *Zaragoza v. Garland*, 52 F.4th 1006 (7th Cir. 2022), the Seventh Circuit became the first circuit to squarely address the AG's decision in *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674 (AG 2019). In *Thomas & Thompson*, the Attorney General held that state court orders that modified, clarified, or altered a criminal noncitizen's sentence would be given effect for immigration purposes *only* if they are based on a procedural or substantive defect in the underlying criminal proceeding. In *Zaragoza*, the Seventh Circuit held that *Thomas & Thompson* is entitled to *Chevron* deference. The court, however, held that the rule cannot apply retroactively in the petitioner's case.

- *A Mens Rea of Extreme Recklessness is Sufficient for a Crime of Violence (COV)*

In *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), the Ninth Circuit addressed a question left open by the U.S. Supreme Court in *Borden v. United States*, 141 S. Ct. 1817 (2021): whether a crime with a minimum mens rea of

extreme recklessness amounts to a 'violent felony' under the Armed Career Criminal Act's (ACCA) elements clause? The Ninth Circuit found that it does and held second-degree murder in violation of 18 U.S.C. §§ 1111(a) to be a violent felony under ACCA. The definition of a 'violent felony' under ACCA is almost identical to the definition of a COV under 18 U.S.C. § 16(a). There is no published BIA decision post-*Borden* on whether extreme recklessness is sufficient to meet the definition of a COV.

- *Offenses with a Falsity Element are not Necessarily CIMTs: Falsely Representing a Social Security Number under 42 U.S.C. § 408(a)(7)(B) is Not a CIMT (Circuit Split)*

In *Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196 (11th Cir. 2022), the Eleventh Circuit held that the BIA erred in finding that 42 U.S.C. § 408(a)(7)(B) (falsely representing a social security number) is a CIMT. The court distinguishes between making a false statement or engaging in general deception on the one hand, and fraud on the other. While fraud generally requires acting to obtain a benefit or cause a detriment, section 408(a)(7)(B) only requires false representation for "any purpose" which means there is no requirement for fraud. This reasoning is consistent with decisions by the Fourth, and Tenth Circuits in the context of different statutes. *Nunez-Vasquez v. Barr*, 965 F.3d 272, 286 (4th Cir. 2020) (finding that an identity theft statute is not a CIMT because it does not involve fraud or harm to the government); *Flores-Molina v. Sessions*, 850 F.3d 1150, 1168 (10th Cir. 2017) (finding a false statement offense to not be CIMT where it does not require fraud, harm to the government, or a benefit to the speaker).

The Ninth Circuit has also held that 42 U.S.C. § 408(a)(7)(B) is not a CIMT. *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9th Cir. 2000). The Eighth and Fifth Circuits have gone the other way, holding that 42 U.S.C. § 408(a)(7)(B) is a CIMT. *Munoz-Rivera v. Wilkinson*, 986 F.3d 587 (5th Cir. 2021); *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010).

Board of Immigration Appeals and Attorney General Decisions[2]

Aggravated Felony Burglary, § 1101(a)(43)(G)

**Matter of V-A-K-*, 28 I. & N. Dec. 630 (B.I.A. 2022) - holding that a conviction for second degree burglary of a dwelling with a term of imprisonment of at least one year under N.Y. Penal Law §140.25(2) is an aggravated felony burglary offense under INA §101(a)(43)(G) [8 U.S.C. §1101(a)(43)(G)] because the statute requires burglary of a structure or a vehicle that has been adapted or is customarily used for overnight accommodation. Applies *United States v. Stitt*, 139 S. Ct. 399 (2018).

Crime of Domestic Violence, § 1227(a)(2)(E)(i)

****Matter of Dang*, 28 I. & N. Dec. 541 (B.I.A. 2022) - holding that Louisiana's domestic abuse battery statute, La. Stat. Ann. §14:35.3, is not a crime of domestic violence under INA §237(a)(2)(E)(i) [8 U.S.C.A. §1227(a)(2)(E)(i)] because it does not categorically require "physical force" within the meaning of 18 U.S.C.A. §16(a). Rejected an expansive reading of *Stokeling v. United States*, 139 S. Ct. 544 (2019).

Definition of Conviction

**Matter of D-L-S-*, 28 I. & N. Dec. 568 (B.I.A. 2022) - holding that a conviction is "by a final judgment" for purposes of INA §241(b)(3)(B)(ii) [8 U.S.C.A. §1231(b)(3)(B)(ii)] (particularly serious crime bar to withholding of removal) once a sentence is imposed, even if the sentence is later withheld, deferred, or suspended.

**Matter of Dingus*, 28 I. & N. Dec. 529 (B.I.A. 2022) - holding that a conviction remains valid for immigration purposes if the state court's *nunc pro tunc* order modifies or amends the subject matter of the conviction for reasons unrelated to the merits of the proceedings, such as immigration hardships or rehabilitation. Applies the test in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) to determine whether a State court's *nunc pro tunc* order modifying or amending the subject matter of a respondent's conviction affects its validity.

**Matter of Wong*, 28 I. & N. Dec. 518 (B.I.A. 2022) - holding that a finding of guilt in a proceeding that is not considered "criminal" under the laws of the jurisdiction where it occurred is a "conviction" for immigration purposes under INA §101(a)(48)(A) [8 U.S.C.A. § 1101(a)(48)(A)] if the proceeding affords a defendant constitutionally required rights of criminal procedure. The Board distinguishes

[2] 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 opposite.

between "contingent" and required constitutional criminal procedure rights. Contingent rights are not constitutionally required in every criminal proceeding or have not been incorporated against the states. These contingent rights include the right to jury trial, right to counsel, and right to indictment by a grand jury. Required constitutional rights include "proof beyond a reasonable doubt; and the rights to confront one's accuser, a speedy and public trial, notice of the accusations, compulsory process for obtaining witnesses in one's favor, and against being put in jeopardy twice for the same offense."

Divisibility

*[*Matter of Santos*, 28 I. & N. Dec. 552 (B.I.A. 2022)] - holding that any fact that establishes or increases the permissible range of punishment for a criminal offense is an element for purposes of the categorical approach, regardless of whether the state classifies the fact as an element of the offense. A Pennsylvania statute criminalizing possession with intent to deliver a controlled substance, Pa. Stat. Ann. §780-113(a)(30), is therefore divisible. Under the statute, the type of controlled substance alters the range of penalties, which makes the identity of the substance an element of the offense, even though Pennsylvania labels the identity of the controlled substance as merely a "grading factor."

Firearm Offenses, §1227(a)(2)(C)

*[*Matter of Ortega-Quezada*, 28 I. & N. Dec. 598 (B.I.A. 2022)] - holding that a conviction for unlawfully selling or otherwise disposing of a firearm or ammunition under 18 U.S.C.A. §922(d) is not categorically a firearms offense for purposes of INA §237(a)(2)(C) [8 U.S.C.A. §1227(a)(2)(C)]. The statute is overbroad for two reasons: (1) it criminalizes conduct involving only ammunition and (2) it criminalizes simply 'disposing' of firearms rather than sale or offer.

Particularly Serious Crimes

***[*Matter of B-Z-R-*, 28 I. & N. Dec. 563 (A.G. 2022)] - Overruling *Matter of G-G-S-*, 26 I. & N. Dec. 339 (B.I.A. 2014). Immigration adjudicators may consider a respondent's mental health when determining whether the respondent was convicted of a particularly serious crime.

Circuit Court Updates

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

**Mendoza-Garcia v. Garland*, 36 F.4th 989 (9th Cir. 2022) - holding that first-degree burglary of a dwelling under Oregon Revised Statutes section 164.225 is an aggravated felony burglary. Overturning *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016) as inconsistent with *United States v. Stitt*, 139 S. Ct. 399, 406 (2018). In *Stitt*, the Supreme Court expanded the generic definition of burglary to include breaking into a vehicle that is used as a dwelling. The Ninth Circuit also rejected petitioner's argument that the Oregon statute covers curtilage.

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

****Da Graca v. Garland*, 23 F.4th 106 (1st Cir. 2022) - holding that Rhode Island General Laws ("RIGL") § 31-9-1 - driving a motor vehicle without consent of the owner or lessee – is not an aggravated felony theft offense because it criminalizes de minimis conduct. Adopts a useful analysis on whether a statute is an aggravated felony theft offense: "when there is a statute that appears to track the first two requirements of the generic definition of theft [(1) taking of property and (2) criminal intent to deprive] it will be plainly overbroad unless there are either explicit textual clues, or implicit contextual ones (such as separate provisions within the state statutory scheme that cover other kinds of takings), to indicate that the statute does not reach de minimis conduct."

**Baghdad v. Att'y Gen. of United States*, 50 F.4th 386 (3d Cir. 2022) - holding that retail theft under 18 Pa. Cons. Stat. § 3929(a)(1) is an aggravated felony theft offense (where the term of imprisonment is at least one year). Rejected petitioner's argument that a statutory presumption about a defendant's intent renders the statute overbroad.

**Tantchev v. Garland*, 46 F.4th 431 (6th Cir. 2022) - holding a conviction for exporting stolen vehicles under 18 U.S.C.A. § 553 meets the definition of receipt of stolen property and is therefore an aggravated felony (if the term of imprisonment is at least one year) under *Matter of Deang*, 27 I. & N. Dec. 57 (B.I.A. 2017).

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

**Fakhuri v. Garland*, 28 F.4th 623, 626 (5th Cir. 2022) - finds that attempting to launder money in violation of Tennessee Code Sections 39-12-101 ("Section 101") and 39-14-903 ("Section 903") constitutes aggravated felony money laundering and is a divisible statute. Court rejects petitioner's overbreadth argument that the statute prohibits "us[ing] proceeds" of illegal activity to promote illegal activity while the generic crime of money laundering prohibits only using such proceeds in a

"financial transaction." Court finds that the "financial transaction" element is a jurisdictional element because it is there to establish a connection with interstate commerce and jurisdictional elements are ignored under the categorical approach.

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

***Silva v. Garland, 27 F.4th 95 (1st Cir. 2022) - holding that accessory-after-the-fact to the crime of murder under Mass. Gen. Laws ch. 274, § 4 is a categorical offense relating to obstruction of justice. Finds that the statute unambiguously does not require the generic definition of obstruction of justice to include a nexus to a pending or ongoing investigation or judicial proceeding. Also found, in the alternative, that if the statute were ambiguous, the court would defer to the BIA's definition in *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (B.I.A. 2018) under *Chevron*. The court explicitly rejected petitioner's argument that *Chevron* does not apply to aggravated felonies.

> **Circuit split**: The First and Fourth Circuits have agreed with or deferred to the BIA's holding in *Matter of Valenzuela Gallardo*, 27 I. & N. Dec. 449 (B.I.A. 2018) that obstruction of justice does not require a nexus to a pending or ongoing investigation or judicial proceeding. *See Silva v. Garland*, 27 F.4th 95 (1st Cir. 2022); *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021). The Ninth and the Third Circuits apply a nexus requirement. *See Flores v. Attorney General*, 856 F.3d 280 (3d Cir. 2017), *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020).
> **Pending Cert. Petition**: There is currently a pending cert. petition in *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021).

Cordero-Garcia v. Garland, 44 F.4th 1181 (9th Cir. 2022) - Reaffirmed *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) in holding that Cal. Penal Code §136.1 is not a categorical match to INA §101(a)(43)(S) [8 U.S.C.A. §1101(a)(43)(S)] because it is missing the element of a nexus to an ongoing or pending proceeding or investigation. **Pending Cert. Petition.

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

Valdez v. Garland, 28 F.4th 72 (9th Cir. 2022) - raises the issue but does not decide (remands to the BIA) whether the generic federal definition of rape include consensual intercourse obtained through fraud.

Aggravated Felony - Receipt of Stolen Property, § 1101(a)(43)(G)

*Barradas Jacome v. Att'y Gen. United States, 39 F.4th 111 (3d Cir. 2022) - holding that Pennsylvania's receiving stolen property statute, 18 Pa. Cons. Stat. § 3925(a), is an aggravated felony theft offense. Rejected petitioner's argument that the mens rea required under the statute was an objective 'reason to believe' or 'should have

known' (which would have been overbroad as compared with the generic definition of receipt of stolen property).

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

**Morfa Diaz v. Mayorkas*, 43 F.4th 1198 (11th Cir. 2022) - finding that N.Y. Penal Law §220.39 is an aggravated felony drug trafficking offense and is divisible by looking to the text of the statute.

****Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022) - holding that a methamphetamine related drug trafficking conviction under Indiana law, Indiana Code § 35-48-4-1.1, is not an aggravated felony because the definition of methamphetamine under Indiana law includes chemical isomers not covered under federal law.

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

**United States v. Proctor*, 28 F.4th 538 (4th Cir. 2022) - holding that Maryland's since-repealed statute for assault with intent to prevent lawful apprehension or detainer, Md. Code Ann. art. 27, § 386 (repealed 1996), is not a "violent felony" under ACCA's use of force clause. The court found that a battery is sufficient to meet the assault and the intent to prevent lawful apprehension does not necessarily entail the use of force. Rejected the government's argument to extend *Stokeling v. United States*, 139 S. Ct. 544 (2019). *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded elements clause definition of a "violent felony" under ACCA.

United States v. Jackson*, 32 F.4th 278 (4th Cir. 2022) - holding that federal first degree murder 18 U.S.C. § 1111(a) is divisible and a crime of violence under 18 U.S.C. § 924(c)(3)(A). Defendant argued that the statute is overbroad and indivisible because felony murder requires only recklessness. The court found the statute divisible between the various alternatives described and premediated murder (the charge in this case) was a COV. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded definition of a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). **Pending Cert. Petition.

**United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022) - holding that a Texas simple robbery statute, Tex. Penal Code Ann. § 29.02, is divisible and applied the modified categorical approach to find that it is a "violent felony" under ACCA's use of force clause. The divisibility finding was in the face of inconsistent decisions by state courts. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded elements clause definition of a "violent felony" under ACCA.

*United States v. Garner, 28 F.4th 678 (5th Cir. 2022) - holding that aggravated assault with a firearm under Louisiana law, La. R.S. 14:37.4, is a general intent crime that can be committed with a mens rea of negligence or recklessness, and therefore is not categorically a crime of violence under U.S.S.G. § 4B1.2 that could support a Sentencing Guidelines' enhancement. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded definition of a "crime of violence" under U.S.S.G. § 4B1.2

*United States v. Dixon, 27 F.4th 568 (7th Cir. 2022) - holding that conviction under Iowa law for intimidation with a dangerous weapon in violation of Iowa Code § 708.6(1) is a COV for sentencing guidelines purposes. The statute requires that a person creates a reasonable fear of serious injury in another person. The court finds that a person who creates reasonable fear of serious injury has also threatened the use of physical force. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded definition of a "crime of violence" under U.S.S.G. § 4B1.2

*United States v. Thomas, 27 F.4th 556 (7th Cir. 2022) - affirming circuit view that statutes with no overt violent force requirement are nevertheless COVs under U.S.S.G. § 4B1.2 if they require intentional infliction of bodily harm or causing physical injury. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded definition of a "crime of violence" under U.S.S.G. § 4B1.2

> **Circuit split**: The Third, Sixth, and Eleventh Circuits have required an element of overt use of force. *See United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc). The First, Second, Seventh, Eighth, Tenth, and Eleventh Circuit do not require an overt use of force where there is an element of intentional infliction of bodily harm. *See United States v. Báez-Martínez*, 950 F.3d 119 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc); *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016); *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019).

*United States v. Buck, 23 F.4th 919 (9th Cir. 2022) - holding that 18 U.S.C. § 2114(a) (assault on a mail carrier with intent to steal mail while placing the mail carrier's life in jeopardy by the use of a dangerous weapon) is a COV under 18 U.S.C. § 924(c)(3)(A). Joins the Fourth, Fifth, Sixth, Seventh, and Eleventh circuits. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded definition of a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

*Olea-Serefina v. Garland, 34 F.4th 856 (9th Cir. 2022) - holding that a conviction for corporal injury upon a child in violation of California Penal Code § 273d(a) is an aggravated felony COV. The statute covers "[a]ny person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a

traumatic condition." Court finds that California case law requires in every case proof that 'punishment' or 'injury' resulted in a traumatic i.e. physical injury.

**United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc) - holding that second-degree murder in violation of 18 U.S.C. §§ 1111(a) is a 'violent felony' under ACCA's elements clause because it includes a mens rea of 'recklessly with extreme disregard for human life' also referred to as depraved heart/extreme recklessness. The court notes that *Borden v. United States*, 141 S. Ct. 1817 (2021) did not decide the issue of whether a crime with a mens rea of *extreme* recklessness amounts to a COV. The Ninth Circuit finds that it does. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded elements clause definition of a "violent felony" under ACCA.

**United States v. Winrow*, 49 F.4th 1372 (10th Cir. 2022) - holding that aggravated assault and battery in Oklahoma under Okla. Stat. tit. 21, § 646 is not a "violent felony" for purposes of the Armed Career Criminal Act (ACCA) because it criminalizes a touching of another person. The court assumed the statute is indivisible because the divisibility could not be determined based on the statutory language, state case law, or the records materials. *Note: This case does not squarely address 18 U.S.C. § 16(a) but the similarly worded elements clause definition of a "violent felony" under ACCA.

Crime Involving Moral Turpitude (CIMT)

**Ferreiras Veloz v. Garland*, 26 F.4th 129 (2d Cir. 2022) - holding that NY petit larceny N.Y. Penal Law § 155.25 is a CIMT. The Second Circuit previously certified the question to the NY Court of Appeals but that court declined the certification.

**Jang v. Garland*, 42 F.4th 56 (2d Cir. 2022) - holding that a conviction for attempted second-degree money laundering under N.Y. Penal Law §§ 110 and 470.15(1)(b)(ii)(A) is not a CIMT because it does not require an intention to conceal underlying criminal activity, to impair government function, or to deceive the government. The court explained that "[a]lthough the statute requires the defendant's knowledge that the financial transaction is 'designed to ... conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified criminal conduct,' § 470.15(1)(b)(ii)(A), it does not require that the offender act with the 'evil intent,' *Matter of Serna*, 20 I. & N. Dec. at 584, that the BIA has considered to be inherent in a CIMT: that is, an intention to *conceal* the underlying criminal activity that created the proceeds, to *impair* government function, or to *deceive* the government." Rejected the BIA's reliance on *Matter of Tejwani*, 24 I. & N. Dec. at 99 (2009) as misplaced as the statute has changed.

**Diaz Esparza v. Garland*, 23 F.4th 563 (5th Cir. 2022) - finding a conviction under Texas Penal Code section 22.05(a) for deadly conduct to be a CIMT despite a

minimum recklessness mens rea because the elements also require placing another in imminent danger of serious bodily injury.

*Zaragoza v. Garland, 52 F.4th 1006 (7th Cir. 2022) - holding that neglect of a dependent in violation of Indiana Code § 35-46-1-4(a)(2) is a CIMT. The court also rejected a challenge that the statutory phrase "crime involving moral turpitude" is unconstitutionally vague.

**Vasquez-Borjas v. Garland*, 36 F.4th 891 (9th Cir. 2022) - holding that Cal. Penal Code § 472 (misdemeanor forgery for possession of a counterfeit government seal) was a CIMT because the statute includes an intent to defraud element.

**Ortiz v. Garland*, 25 F.4th 1223 (9th Cir. 2022) - holding that voluntary manslaughter under California Penal Code (CPC) § 192(a) is a CIMT because it requires the defendant to cause the death of a person with intent to kill or with conscious disregard for life. Explains that "[a]s the level of conscious behavior decreases, such as from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude (CIMT)."

**Lara-Garcia v. Garland*, 49 F.4th 1271 (9th Cir. 2022) - finding that a California misdemeanor receiving stolen property, in violation of Cal. Penal Code § 496, is not a CIMT because it does not require an intent to deprive. Also finding that a misdemeanor possession of drug paraphernalia, in violation of California Health and Safety Code § 11364(a) is not a CIMT.

Daye v. U.S. Att'y Gen.*, 38 F.4th 1355 (11th Cir. 2022) - holding that a Virginia conviction for transportation with intent to distribute in violation of Va. Code Ann. § 18.2-248.01 is a CIMT under *Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997). The court rejected the petitioner's argument that the sale of large quantities of marijuana is not a CIMT given changing societal views on marijuana. The court also rejected the petitioner's argument that the phrase CIMT is unconstitutionally vague. **Pending Cert. Petition.

****Zarate v. U.S. Att'y Gen.*, 26 F.4th 1196 (11th Cir. 2022) - finding that 42 U.S.C. § 408(a)(7)(B) (falsely representing a social security number) is not a CIMT. The court explains that making a false statement or engaging in general deception as required by the statute does not necessarily equate to fraud. While fraud generally requires acting to obtain a benefit or cause a detriment, the statute here only requires false representation for "any purpose" which means there is no requirement that a person is obtaining benefit or causing detriment.

> **Circuit split**: The Eleventh Circuit has joined the Ninth Circuit in holding that 42 U.S.C. § 408(a)(7)(B) is not a CIMT. *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9th Cir. 2000). The Eighth and Fifth Circuits have gone the other way holding that 42 U.S.C. § 408(a)(7)(B) is a CIMT. *Munoz-Rivera v.*

Wilkinson, 986 F.3d 587 (5th Cir. 2021); *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010). The Second Circuit has an unpublished decision that is consistent with the Eleventh and Third Circuits. *Ahmed v. Holder*, 324 F. App'x 82, 84 (2d Cir. 2009).

**Lauture v. U.S. Att'y Gen.*, 28 F.4th 1169 (11th Cir. 2022) - holding that a Florida burglary statute, Fla. Stat. § 810.02, is divisible and petitioner's conviction under Fla. Stat. § 810.02(3)(b) (listing the various structures the defendant has to enter) is further divisible. Petitioner argued the specific subsection is overbroad because it does not require that "a dwelling be occupied regularly, intermittently, or ever." The Board had rejected his argument under the realistic probability standard. The Eleventh Circuit remanded because the petitioner actually did provide a case that satisfies the realistic probability test and Florida case law indicated that the BIA's understanding of a dwelling in Florida is erroneous.

Crime of Child Abuse, § 1227(a)(2)(E)(i)

**Nunez v. Att'y Gen. of United States*, 35 F.4th 134 (3d Cir. 2022) - holding that endangering the welfare of a child in the third degree under N.J. Stat. § 2C:24-4(a)(1) prohibiting "engag[ing] in sexual conduct which would impair or debauch the morals of [a] child" is a crime of child abuse. That is because the statute requires proof that the defendant's conduct has a "particular likelihood" to cause harm to the child, as is required under Third Circuit precedent.

**Monsonyem v. Garland*, 36 F.4th 639 (5th Cir. 2022) - holding that a conviction under Texas Penal Code § 22.04(a)(3) ("intentionally, knowingly, or recklessly" causing by omission bodily or serious mental injury to "a child, elderly individual, or disabled individual.") is a crime of child abuse even though the statue does not necessarily criminalize conduct involving a child because it's divisible with respect to the victim class.

****Diaz-Rodriguez v. Garland*, __ F.4th __, No. 13-73719, 2022 WL 17493613 (9th Cir. Dec. 8, 2022) (en banc) - holding that a conviction for child endangerment, in violation of Cal. Penal Code § 273a(a), is a crime of child abuse, neglect, or abandonment. Applying Chevron, the court found the statutory definitions of "child abuse" and "child neglect" to be ambiguous and deferred to the Board's definitions of those terms, in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008) and *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010), because it found them to be reasonable. A crime of child abuse, child neglect, or child abandonment includes any "offense involving an intentional, knowing, reckless, or criminally negligent act or omission (including acts or circumstances that create a substantial risk of harm to a child's health or welfare) that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."

*[*Bastias v. U.S. Att'y Gen.*, 42 F.4th 1266 (11th Cir. 2022)] - Holding that a conviction under Fla. Stat. Ann. § 827.03 ("Abuse, aggravated abuse, and neglect of a child") is crime of child abuse, neglect, or abandonment because it requires a mental state of culpable negligence. The Eleventh Circuit deferred to the Board's definition of crime of child abuse under *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008).

Realistic Probability

***[*Da Graca v. Garland*, 23 F.4th 106 (1st Cir. 2022)] - holding that Rhode Island General Laws ("RIGL") § 31-9-1 - driving a motor vehicle without consent of the owner or lessee - is not an aggravated felony theft offense. The court finds that no actual case of overbreadth is necessary if the statute on its face covers de minimis conduct and does not include "explicit textual clues, or implicit contextual ones" that de minimis conduct is not included.

***[*Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022)] - holding that a methamphetamine related drug trafficking conviction under Indiana law, Indiana Code § 35-48-4-1.1, is not an aggravated felony because the definition of methamphetamine under Indiana law includes isomers not covered under federal law. The court found that no realistic probability finding is required because "[i]f the plain language of the state statute is ambiguous or has indeterminate reach, courts then turn to the 'realistic probability' test, which acts as a 'backstop.'" The court explained that that where a statute is overbroad due to isomers, it does not matter if it's unclear whether the overbroad isomer exists in nature or not: "[i]t is not the province of the judiciary to rewrite Illinois's statute to conform to a supposed practical understanding of the drug trade."

***[*Chamu v. U.S. Att'y Gen.*, 23 F.4th 1325 (11th Cir. 2022)] - holding that a Florida cocaine possession statute, § 893.13(6)(a), is an offense related to a federally controlled substance. Petitioner argued Florida's definition of cocaine is overbroad under an isomer theory. The court rejected the argument based on the realistic probability because it's unclear if the overbroad isomer of cocaine actually exists.

***[*Said v. U.S. Att'y Gen.*, 28 F.4th 1328 (11th Cir. 2022)] - holding that a state conviction for a marijuana-related offense under Fla. Stat. § 893.13(6)(a) is not an offense related to a federally controlled substance because Florida's definition of marijuana is overbroad. The state's definition includes all parts of the marijuana plant whereas the federal definition excludes mature stalks and fibers. There is no requirement to show an actual case under the realistic probability test. "A litigant can use facially overbroad statutory text to meet the burden of showing the realistic probability that the state law covers more conduct than the federal." Distinguishes *Chamu* by noting that there was no proof in that case that provided that the overbroad cocaine isomer actually existed.

Relating to Controlled Substances, § 1227(a)(2)(B)(i)

**Romero-Millan v. Garland*, 46 F.4th 1032 (9th Cir. 2022) - holding that Ariz. Rev. Stat. Ann. §13-3415 (use or possession with intent to use drug paraphernalia) is divisible as to drug type. The court looked at the statutory language (the statute uses the phrase "a drug" as opposed to "any drug") and Arizona's sentencing guidelines, jury instructions, and cases from the Arizona Court of Appeals which all suggest that drug type is an element a jury must find unanimously.

****Chamu v. U.S. Att'y Gen.*, 23 F.4th 1325 (11th Cir. 2022) - holding that Florida cocaine possession statute § 893.13(6)(a) is an offense related to a federally controlled substance. Petitioner argued Florida's definition of cocaine is overbroad under an isomer theory. The court rejected the argument due to realistic probability.

****Said v. U.S. Att'y Gen.*, 28 F.4th 1328 (11th Cir. 2022) - holding that a state conviction for a marijuana-related offense under Fla. Stat. § 893.13(6)(a) is not an offense related to a federally controlled substance because Florida's definition of marijuana is overbroad. The state's definition includes all parts of the marijuana plant whereas the federal definition excludes mature stalks and fibers.

Stalking, § 1227(a)(2)(E)(i)

**Vurimindi v. Att'y Gen. United States*, 46 F.4th 134 (3d Cir. 2022) - holding that a Pennsylvania stalking conviction under Pa. Stat. and Cons. Stat. Ann. §2709.1(a)(1) is not "a crime of stalking" because the minimum conduct requires only the intent to cause nonphysical injury.

Violation of a Protective Order, § 1227(a)(2)(E)(ii)

**Alvarez v. Garland*, 33 F.4th 626 (2d Cir. 2022) - joins the Third, Seventh, Ninth, and Tenth circuits in holding that the circumstance specific approach and not categorical approach governs removal under § 1227(a)(2)(E)(ii). No circuit court has gone the other way.

Sentence Modification

**Zaragoza v. Garland*, 52 F.4th 1006 (7th Cir. 2022) - holding that the AG's decision in *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674 (AG 2019), which held that state court orders that modified, clarified, or altered a criminal noncitizen's sentence would be given effect for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding, is entitled to

deference under *Chevron*. The Court, however, held that the rule cannot apply retroactively in the petitioner's case.