Washington Defender Association's Immigration Project

Practice Advisory on Representing Noncitizens Accused of Misdemeanor Assault Offenses – Both DV and Non-DV Cases- Under RCW 9A.36.041

By Ann Benson and Jonathan Moore
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Introduction

A misdemeanor assault conviction under RCW 9A.36.041 can trigger removal (a.k.a. deportation) for a noncitizen under several different grounds of the immigration statute. Such a conviction can also prevent otherwise eligible noncitizens from obtaining immigration benefits such as lawful status (e.g. greencards), U.S. citizenship, asylum and relief from removal known as "cancellation of removal. However under current case law from the Ninth Circuit and the Board of Immigration Appeals (BIA), many of these negative immigration consequences (especially deportation) can be avoided with careful pretrial analysis, clear plea negotiations and, most importantly, carefully crafted plea statements.

This advisory provides defense counsel with strategies to avoid triggering removal (deportation) for noncitizen defendants charged with fourth degree assault and violations of a no-contact order.

Summary of Best Practices

- **Identify your client's immigration status, and, if she has status, for how long. This is essential to devise a strategy to minimize immigration consequences.**
- **Advocate for a sentence imposed (regardless of time suspended) of less than 365 days. Remember that numerous misdemeanors, including fourth degree assault can be deemed aggravated felonies under immigration law.**
- **Keep specific acts involving the use of force *out* of the "record of conviction"—the criminal complaint, judgment & sentence, plea agreement and statement— pleading only to non-forceful "offensive touching" whenever possible. Alford pleas are bad.**
- **Attempt to negotiate getting the "DV" label out of the record—off the judgment. And ensure that the record of conviction does not identify the relationship of the alleged victim to the defendant. This can keep a fourth degree assault conviction from triggering deportation as a DV offense.**
- **If the alleged victim is under 18, keep her age out of the record of conviction to avoid any chance that the conviction could trigger deportation as a 'crime of child abuse.'**
- **You must use the "immigration-safe" deferral language in any deferred adjudication (e.g. SOC). If you do not, the agreement will *be a conviction in perpetuity* for immigration purposes. Remember that deferred sentence agreements are convictions in perpetuity under immigration law, regardless of any subsequent withdrawal and dismissal.**
- **Remember that a straight Assault 4 conviction (i.e., non-DV; sentence not 365; not against a child) does not normally trigger any criminal ground of removal.**

I. The First Step – Determining your Client's Immigration Status

PRACTICE POINT:

Identifying that your client is a noncitizen and determining his/her immigration status are the critical first steps to effective representation of a noncitizen client.[1] You and any immigration practitioner that you consult with will need to know the person's immigration status to fully understand potential immigration consequences and develop appropriate strategies.

- Whether a misdemeanor assault or no-contact order violation conviction will trigger removal (a.k.a. deportation), or render your client ineligible for immigration benefits, depends upon your client's current immigration status. A person's immigration status is often the most important aspect of determining what immigration consequences she will face due to a criminal conviction.

- Defense counsel should ascertain the whether the client is undocumented or has lawful status, such as a lawful permanent residency (a.k.a. a greencard), refugee or asylum status, or was lawfully admitted with some other status (e.g. a student or tourist visa).

- If your client has no lawful immigration status and is, therefore undocumented, defense counsel should determine whether s/he is undocumented because they entered the U.S. illegally or because they entered lawfully on some type of status that is no longer valid (e.g. overstayed a tourist visa).

- Criminal convictions, dispositions and arrest can violate immigration law provisions and trigger deportation. They can also render a noncitizen ineligible for immigration benefits such as lawful permanent resident status (a greencard), asylum and citizenship. All arrests and convictions will constitute negative discretionary factors that will impact any application for immigration benefits even if they do not trigger deportation.

[1] Pages 4- 8 of Immigration and Washington State Criminal Law (2005) contain a short guide to divining a person's immigration status. The WDA Immigration Project is also available to help you figure it out. Immigration and Washington State Criminal Law is available on the WDA's website at *www.defensenet.org.*

II. Cracking the DaVinci Code: Carefully Crafting the "Record Of Conviction"

PRACTICE POINT:

In analyzing whether a conviction will trigger removal, the courts and immigration authorities will first look to the language of the statute (not the conduct of the defendant). If the statute is unclear, or includes both offenses which do and offenses which do not fall under the immigration provision(s) at issue (e.g. the domestic violence ground of deportation), then the reviewing authority will consult the "record of conviction" to determine the elements of the offense this defendant was convicted of to see whether they fall within the immigration statute provision.

Consequently, The documents contained in the "record of conviction" (ROC), particularly the plea statement, will often determine whether or not the conviction will trigger removal or bar a noncitizen from immigration benefits. Defense counsel should keep the ROC as vague/generic as possible. In particular, keep the ROC free of information that an offense involved violence (e.g., went beyond mere offensive touching or reckless infliction of injury) and that the victim had a domestic relationship with the defendant and/or was a minor.

A. Understanding How Criminal Convictions Are Analyzed Under Immigration Law: the Categorical & Modified Categorical Analysis

When the courts and the immigration authorities are reviewing a conviction to determine whether it triggers grounds of removal or statutory bars to obtaining immigration benefits (e.g. greencard, asylum, citizenship), they will engage in what is called the "categorical" and "modified categorical" analysis. Understanding the basics of this analysis is important in order to effectively represent noncitizen defendants since it often determines when a conviction will trigger deportation/removal.

The key aspects of the categorical/modified categorical analysis are:

- **Under the categorical analysis the elements of the offense as defined by statute and case law, *not the actual or alleged conduct of the defendant*, are used to evaluate whether an offense falls within the relevant provisions of immigration law**, i.e. whether the offense is an aggravated felony, or crime of domestic violence or crime involving moral turpitude, or some other immigration violation.

- In theory, the "pure" categorical analysis test requires that the minimum conduct that could violate the statute must fit within the definition of the immigration provision at issue (e.g. the aggravated felony definition's crime of violence provision). If it does not, then a criminal conviction under this statute cannot trigger this immigration provision.

- In practice, most immigration courts and federal circuit courts often bypass the "pure" categorical test and find that the statue (or caselaw defining it) is broad enough to include various offenses (or various ways of committing the offense), some of which fall within the scope of the crime-related immigration provisions while others do not (referred to in

immigration proceedings as a "divisible" statute). This determination allows the court to engage in the "modified categorical" analysis.

- **To determine whether a conviction triggers a particular immigration provisions (e.g. the DV ground of deportability) under the modified categorical analysis, the immigration judge or other reviewing authority may look to a strictly limited official set of documents known as the "record of conviction" to determine the elements of the offense of conviction and whether they trigger the crime-related immigration provisions.[2]**

- If the ROC does not clearly establish that the elements of the offense fall within the immigration provision at issue, then the noncitizen cannot be penalized under this provision, i.e. cannot be deported/removed or be held statutorily ineligible for an immigration benefit.

- In many cases, the BOP is on the government to establish through the ROC documents that the conviction falls within the scope of the immigration provision(s) at issue (e.g. an assault fourth degree is an aggravated felony under 8 U.S.C. 1101(a)(43)(F)). Thus, **carefully crafting an ROC is a crucial defense strategy for avoiding the immigration consequences of a conviction.**

B. Criminal Documents that Constitute the "Record of Conviction"

The documents that a court, or other immigration authority, is permitted to review as part of the record of conviction are a limited set of documents. The information contained in these documents is often the key to whether or not a conviction will trigger removal for a noncitizen defendant.

The record of conviction INCLUDES the following documents:

- Information in the charging papers (however, only the count that has been pled to or proved, not original charges that have been amended or dismissed charges);

- The judgment of conviction;

- Jury instructions;

- A signed guilty plea or a written plea agreement;

- The transcript from the plea proceedings; and

- The sentence and transcript from sentence hearing.

The record of conviction DOES NOT INCLUDE:

- Prosecutor's remarks during the hearing;

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[2] United States v. Rivera-Sanchez, 247 F.3d at 908 (9th Cir. 2001) (en banc), quoting from Taylor v. United States, 495 U.S. 575 (1990). See also, e.g., Chang v. INS, 307 F.3d 1185 (9th Cir. 2002); Matter of Sweetser, Int. Dec. 3390 (BIA 1999); Matter of Short, Int. Dec. 3125 (BIA 1989).

- Police reports;
- The affidavit of probable cause;
- Probation or "pre-sentence" reports;
- Statements by the noncitizen outside of the judgment and sentence transcript (e.g., to police or immigration authorities or the immigration judge) may not be consulted.[3]
- A court docket summary prepared by clerical staff may not be consulted.[4]
- Information from a co-defendant's case may not be consulted.[5]

WARNING!
The police report and/or affidavit of probable cause WILL BE INCLUDED in the ROC if it is incorporated into the plea statement as the factual basis for the plea. Consequently, DO NOT do Alford pleas or any other agreement that incorporates these documents as the factual basis for the plea or sentence (e.g. stipulations to "real facts").

C. Carefully Crafting the Plea Statement and Other Documents

One of defense counsel's most important goals is to keep the record of conviction as clean as possible of damaging information that will trigger grounds of removal (or other negative consequences). In particular, it is imperative that defense counsel maintain control of the content used as the factual basis for a plea.

This task often presents defenders with two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to state a factual basis for the plea under criminal law requirements. Because the government often bears the burden of proving deportability based on a conviction record, a crucial criminal defense strategy to avoid immigration consequences is first, to direct a plea to a divisible statute that covers at least one offense that would not trigger the feared immigration consequence, and second, to keep the record of conviction vague enough so that it does not preclude the possibility that this offense was the offense of conviction.

While the law here is conflicted, there is some clear advice for criminal defense counsel:

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[3] See, e.g., *Taylor v. U.S., infra* n. 247. This doctrine applies across the board in immigration cases and has been upheld regarding moral turpitude (see e.g., *Matter of Mena*, 7 I. & N. Dec. 38 (BIA 1979); *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989)(co-defendant's conviction is not included in reviewable record of conviction); *Matter of Y*, 1 I. & N. Dec. 137 (BIA 1941) (report of a probation officer is not included); *Matter of Cassissi*, 120 I. & N. Dec. 136 (BIA 1963) (statement of state' attorney at sentencing is not included)); firearms (see e.g., *Matter of Madrigal*, 21 I. & N. Dec. 323 (BIA 1996)(transcript of plea and sentence hearing is included); *Matter of Teixeira*, 21 I. & N. Dec. 316 (BIA 1996)(police report is not included); *Matter of Pichardo*, 21 I. & N. Dec. 330 (BIA 1996)(admission by respondent in immigration court is not included)). See also Abreu-Reyes v. INS, 350 F.3d 966 (9th Cir. 2003)(withdrawing and reversing Abreu-Reyes v. I.N.S., 292 F.3d 1029 (9th Cir. 2002) to reaffirm that probation report is not part of the record of conviction for this purpose, in accord with ruling in Corona-Sanchez, *supra* n. 89, 106, 112).

[4] U.S. v. Navidad-Marcos, 367 F.3d 903 (9th Cir. 2004.

[5] Matter of Short, 20 I. & N. Dec. 136 (BIA 1989).

Counsel should try to provide a minimal factual basis, should retain as much control as possible over the contents of the factual basis, and should assume conservatively that if the defense stipulates to a police report or some other document as providing a factual basis, its contents will become part of the record of conviction for immigration purposes.

Therefore, if the police report contains factual details that would establish that the client was convicted of, e.g., an aggravated felony, do not stipulate to it – or at least warn the defendant of the likely consequences.

1. General Rules for Crafting Noncitizen Defendant's Plea Statement

- Do not incorporate the police report or affidavit of probable cause into the plea statement as the factual basis for the plea, which means **DO NOT DO ALFORD PLEAS FOR NONCITIZEN DEFENDANTS OR ANY OTHER AGREEMENTS THAT REQUIRE A STIPULATION TO FACTS CONTAINED IN A POLICE REPORT OR AFFIDAVIT OF PROBABLE CAUSE**.[6]

- Avoid having the defendant provide the factual basis, because it surrenders control of the record of conviction. Defense counsel should always provide the factual basis, and should try to negotiate a factual basis for a plea that minimizes or avoids the adverse immigration consequences of a conviction.

- Defendant's statement should (unless advised otherwise by competent immigration counsel):

    - Be as vague/generic as possible;

    - Simply recite the language of the statute (in the disjunctive when possible;

    - Omit any reference to the age or relationship of any alleged victims;

    - Omit any reference to the use/threatened use of force.

Two examples of sample language for a defendant's plea statement for misdemeanor assault charges under RCW 9A.31.041:

> **Example 1**: "On December 8, 2006, I, John Lennon, [intentionally] placed the victim in reasonable fear of unwarranted [or offensive] touching."

[6] Some criminal law provisions permit a defendant to accept a conviction without admitting that he or she committed the crime. A defendant can plead "nolo contendere" to a charge, or can offer a plea patterned after North Carolina v. Alford, 400 U.S. 25 (1970). This disposition is a "conviction" for immigration purposes. The statutory definition of conviction in the immigration statute specifically includes a conviction based on a "plea of guilty or nolo contendere.." See 8 U.S.C. 1101(a)(43)(A). At present there is a conflict in the Ninth Circuit as to whether the factual basis used in a nolo contendere or Alford plea will be included in the ROC . See United States v. Dalvan Nguyen, 465 F.3d 1128 (9th Cir. October 18, 2006); United States v. Guerrero-Velasquez, 434 F.3d 1193 (9th Cir. January 19, 2006). This opinion was modified in minor ways and reprinted at 2006 U.S. App. LEXIS 2900 (9th Cir. February 7, 2006). Until the issue is definitively resolved, counsel must conservatively assume that it will be included and avoid such pleas in favor of straight pleas where counsel can exercise greater control over the factual basis for the plea.

Example 2: "On December 8, 2006, I, John Lennon, committed an assault against the victim that did not amount to an assault 1,2 or 3.

NOTE: Only include victim's name where the judge requires it. Case law does not require it.[7]

2. Charging Documents

Information alleged in a Count is not part of the record of conviction absent proof that the defendant specifically pled guilty to that Count. A charge coupled with only general proof of conviction under the statute is not sufficient. There must be proof not only that the person pled to the specific charge, but also proof of the specific allegations contained in the charge *at the time of plea.*

Information from dismissed charges should never be considered in a modified categorical analysis.

Where defendant is pleading to an amended charge, make as clear a record as possible to reflect that the plea is to the amended charge, not the original or other charges.

D. Applying this Analysis to Fourth Degree Assault Offenses

1. Definition and Elements of Fourth Degree Assault in Washington

PRACTICE POINTS:

For immigration purposes one of the most important things to understand is that assault 4 includes both offenses that involve the use of force (and consequently trigger immigration consequences) and those that do not. This means assault 4 convictions are subject to the modified categorical analysis. Thus, the record of conviction, in particular defendant's plea statement, will often determine whether an assault 4 conviction will—or will not—trigger deportation.

In most cases involving assault 4, whether the record of conviction (especially the plea statement) indicates that force was used in the commission of the offense will determine whether or not the noncitizen defendant is deported/removed. Consequently, it is critical to ensure that the record of conviction, especially the plea statement indicates that the offense was committed in a manner that did not involve the use of force or that the record remains unclear. (See examples above.)

Fourth Degree Assault under RCW 9A.36.041 states: A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

Assault in Washington is not defined by statute, and Courts apply a common-law definition of assault.[8]

[7] State v. Johnston, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000), citing State v. Plano, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992). Cf. State v. Clowes 104 Wn. App. 935, 942 (2001).

Washington courts use three definitions of assault:

1) An attempt, with unlawful force, to inflict bodily injury upon another;

2) An unlawful touching with criminal intent; and

3) Putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. [9]

Another way the courts have expressed it, is that assault is:

- Attempted battery;
- Actual battery (a touching, whether or not with force or harm); and
- Common law assault.[10]

One way of committing actual battery is through an offensive touching, which constitutes a completed battery.[11] "[A] touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful *or* offensive."[12] **Therefore, non-consensual touching— without any additional requirement of harm or the use or threat of violent force-- is one way of committing Assault 4.**[13]

The ways of committing Assault in the Fourth Degree have also been expressed as:

- Intending to inflict bodily injury on another, accompanied with the apparent present ability to do so;
- Intentionally creating in another person reasonable apprehension and fear of bodily injury;
- Intentionally committing an unlawful touching, regardless of whether physical harm results.[14]

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[8] State v. Walden, 67 Wn. App. 891, 893, 841 P.2d 81 (1992); State v. Byrd, 887 P.2d 396, 399 (Wash. 1995); see also Washington Pattern Jury Instructions – Criminal (WPIC) 35.26, 35.50 (2005)

[9] *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988); State v. Nicholson, 119 Wn. App. 855, 859-860 (Wash. Ct. App. 2003). *Cf, Byrd, supra.*, at 399, where the three ways are defined as (1) assault by actual battery; (2) an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent, present ability to give effect to the attempt if not prevented, or (3) putting another in reasonable apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm. Whether it is defined broadly as a "battery" or as an "unlawful touching," offensive touching without harm or violent force is one way of committing assault, and thus Assault 4 is "divisible" for immigration purposes as a crime of violence. This means the courts will look to the record of conviction to determine whether the element of force was proven in any given case.

[10] Wash. v. Wilson, 125 Wn.2d 212, 217-218 (Wash. 1994).

[11] "The gravamen of the offense is the physical contact constituting the battery." State v. Duncan, 1996 Wash. App. LEXIS 625, 3-5 (Wash. Ct. App. 1996)

[12] Seattle v. Taylor, 50 Wn. App. 384, 386 (Wash. Ct. App. 1988), citing State v. Garcia, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978). (Emphasis added.)

[13] "Under Washington law, fourth degree assault includes conduct such as nonconsensual, offensive touching or spitting. See State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325, 1328 n.12 (Wash. 1995) (en banc); State v. Humphries, 21 Wn. App. 405, 586 P.2d 130, 133 (Wash. Ct. App. 1978)." Velazquez-Herrera v. Gonzales, 466 F.3d 781, 783 (9th Cir. 2006)

[14] State v. Davis, 60 Wash. App. 813; 808 P.2d 167 (1991). This version of the three ways has also been offered for assault generally. See State v. Hupe, 50 Wn. App. 277, 282 (Wash. Ct. App. 1988). Regardless

Assault can be validly charged without specifying the particular acts constituting the offense.[15] A jury is not required to be unanimous as to which of the three alternative ways of committing assault is the way that covers the conduct for which a defendant is convicted.[16] That is because Assault 4 is considered a single crime that can be committed by alternate means, rather than a set of distinct offenses.[17] "[T]he various manners in which an assault may be committed do not comprise 'essential elements' of the offense of fourth Degree Assault."[18]

The name of the victim is not an essential element of the offense.[19]

2. The "Modified Categorical Analysis" Will Apply to Assault in the Fourth Degree for Immigration Purposes

As outlined above, there are multiple ways to violate the Assault 4 statute, some of which may trigger removal under a particular ground, some of which may not. For example, an attempt, through the use of unlawful force, to inflict bodily injury on another would likely constitute a "crime of violence" under 18 U.S.C. 16 and, consequently can trigger removal under the aggravated felony or a domestic violence provisions of immigration law. However, merely committing an unlawful touching would not constitute a crime of violence and, thus, would not trigger removal.

To determine whether an assault conviction in any given case triggers a ground of removal such as the aggravated felony crime of violence provision or the domestic violence provision, the reviewing authorities will engage in the "modified categorical analysis," articulated above, to determine what elements the defendant actually pled to in her Assault 4 case and, thus, whether her conviction is for a part of the Assault 4 statute encompassed in the deportation/removal ground at issue or not.

This means that they will look to the record of conviction – in particular, the plea statement - to determine which elements of assault were committed by the defendant and then make a determination as to whether those elements trigger the immigration provision at issue.

Example: David is convicted of assault 4 for hitting his spouse. He is a Guatemalan citizen who has lived in the U.S. for 20 years with a greencard (lawful permanent resident status). He is now

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of whether mere offensive touching is described as a separate "way" unto itself, or is lumped generically with all touchings as a battery, (see n.9, *supra*) it is recognized as one among other types of assault by battery. See also WPIC 35.50 (2005).

[15] State v. Hamilton, 69 Wash. 561, 125 P. 950 (1912); State v. Steele, 83 Wash. 470, 145 P. 581 (1915).

[16] State v. Bland, 71 Wn.App. 345, 860 P.2d 1046 (1993). In a jury trial ,"unanimity is not required as to each of the alternative means by which the crime was committed, provided there is substantial evidence presented to support each alternative means. State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002), cert. denied 538 U.S. 945, 123 S.Ct. 1633, 155 L.Ed.2d 486 (2003); State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988)." WPIC 4.20, West Publishing Co., (2005). "When the crime charged can be established by alternative means, jury unanimity is unnecessary as to the means. State v. Whitney, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987)." State v. Hupe, 50 Wn. App. 277, 282 (Wash. Ct. App. 1988).

[17] WPIC 4.26, West Publishing Co., (2005)

[18] Davis, *supra*, 60 Wn. App at 821.

[19] State v. Johnston, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000), citing State v. Plano, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992). Cf. State v. Clowes 104 Wn. App. 935, 942 (2001) (Interfering with the reporting of domestic violence— a different offense— does have the domestic relationship as an element that must be charged.)

in removal proceedings and charged with deportation because the government says that his assault 4 conviction is a basis for deportation both as a crime of violence aggravated felony and as a domestic violence offense.

If David's plea statement states "On August 9, 2006, I committed an unlawful touching against Mary", or his plea statement states, "On August 9th, 2006, I committed and assault against Mary that does not amount to assault 1, 2, or 3." then David will cannot be deported under these provisions for this conviction. If, however, David's plea statement states, " On August 9, 2006, I hit/punched/slapped Mary" then David's misdemeanor assault will constitute a crime of violence and he will face deportation under these provisions (if the other statutory elements are met).

III. Removal Grounds that Can Be Triggered by a Conviction for Misdemeanor Assault Under RCW 9A.36.041

A misdemeanor assault conviction under RCW 9A.36.0.41 can potentially trigger removal under any one of the following four provisions of immigration law. An offense can fit into more than one removal ground at the same time. Thus, when dealing with a noncitizen facing an assault 4 charge it is important to make sure that whatever strategies are employed, defense counsel is doing so in light of all four provisions.

These provisions, and strategies for how to avoid a conviction triggering them, are outlined in detail as follows:

- **A conviction for an aggravated felony "crime of violence" (COV) for which the term of imprisonment is one year or more.**[20] A COV is defined here in relevant part as an offense that has, an element, the use or threatened use of force against persons or property.

- **A conviction for a "crime of domestic violence,"** which is defined as "any crime of violence (as defined in section 16 of title 18, United States Code) against a person" protected by domestic or family violence laws;[21]

- **A conviction constituting a "crime of child abuse.**"[22]

- **A conviction constituting a "crime involving moral turpitude;"**[23]

[20] See 8 U.S.C. 1101(a)(43)(F) and 8 U.S.C. 1227(a)(2)(A)(iii).
[21] 8 USC 1227(a)(2)(E)(i)
[22] 8 U.S.C. 1227(a)(2)(E)(i). This is in of the "crime of domestic violence" subsection.
[23] A CIMT is both a ground of "inadmissibility," 8 U.S.C. 1182(a)(2)(A)(i)(I); and of "deportability," 8 U.S.C. 1227(a)(2)(A)(i).

A. Fourth Degree Assault as an Aggravated Felony Crime of Violence

PRACTICE POINTS:

A sentence imposed (regardless of time suspended) of LESS THAN 365 days will ensure that an assault 4 conviction does not trigger this provision.

NOTE: It is important to be sure if this case involves DV, that you also follow the guidance outlined here, since the DV ground of deportation has no sentence requirement and simply obtaining a 364 day sentence will not protect a noncitizen defendant from that provision.

Immigration-safe deferred adjudication agreements (e.g. SOCs) will avoid triggering this provision, which requires a conviction under immigration law.

Careful crafting of the defendant's plea statement will also avoid a misdemeanor assault from constituting an aggravated felony crime of violence (as well as a deportable DV offense). See Section II, *supra*. Either of these examples will work:

Example #1: "On August 5, 2005, I committed an assault against Leonardo that does not amount to an assault 1, 2, or 3."

Example #2: On December 16, 2006, I [intentionally] placed Sarah in reasonable apprehension (fear) of unwarranted touching.

1. The Immigration Statutory Provision

Any non-citizen convicted of an offense defined under immigration law as an "aggravated felony" is deportable.[24] Careful attention is needed to avoid having a misdemeanor assault constitute an aggravated felony under this definition as a "crime of violence".

For an assault conviction to be an aggravated felony crime of violence it must meet the following two requirements:

1) The conviction must be for a "crime of violence as defined in 18 U.S.C. § 16," and

2) The conviction must have a sentence imposed (regardless of time suspended) of one year or more.[25]

WARNING!
A misdemeanor, including an assault 4 conviction, can be an aggravated felony even though Washington law only classifies it as a misdemeanor. Consequently, a misdemeanor assault that constitutes a "crime of violence" will be an aggravated felony where a sentence of 365 days was imposed (regardless of time suspended).

[24] See 8 U.S.C. 1227(a)(2)(A)(iii) and 8 U.S.C. 1228(b).
[25] INA§ 101(a)(43)(F); 8 U.S.C. § 1101(a)(43)(F)

2. A Crime of Violence as Defined Under 18 U.S.C. § 16

This definition has two parts,[26] but the only part applicable to misdemeanors is §16(a), which requires that the offense have *as an element* the use, attempted use, or threatened use of physical force against a person or property.

The Ninth Circuit has joined a majority of other federal circuits, in limiting this crime of violence definition to crimes requiring intentional use of force.[27]

Since RCW 9A.36.041 can be committed in ways that do and ways that do not involve the intentional use of force, a record of conviction (most importantly a plea statement) that establishes that the defendant did not use force will ensure that the conviction does not constitute an aggravated felony under the crime of violence provision.

If unable to craft a plea statement that specifically states that the defendant did not use force (e.g. committed an offensive touching), leave the record of conviction sufficiently ambiguous (see Example #2 at Sec. II.D., *supra*). Where possible ensure that the charging document is similarly opaque and the defendant does not admit to violent conduct during a plea or sentencing colloquy with the judge.[28] This will avoid an assault conviction from constituting a crime of violence.[29]

See Section II, *supra*, to understand how crimes are analyzed under immigration law.

Offenses involving a negligent mens rea, such as negligent assault, or attempted negligent assault under RCW § 9A.36.031(f) cannot be aggravated felony offenses under this provision.

3. Term of Imprisonment of One Year or More

A suspended sentence *is* a sentence for immigration purposes, as is any specified period of incarceration or confinement.[30] Avoiding a 365-day sentence for a gross misdemeanor like Assault 4 will eliminate any chance that it could be deemed an "aggravated felony" under this ground, even if it otherwise fit the definition of a crime of violence.

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[26] 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. 18 U.S.C. § 16.

[27] Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1129 (9th Cir. 2006)

[28] In a removal proceeding against a non-citizen who was legally admitted— a permanent resident, or a person with a student, visitor's, or work visa--- the government has the burden of proving deportability. INA 240(c)(3); 8 U.S.C. 1229a(c)(3) "In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

[29] Mere offensive touching may not be the only way of committing Assault 4 not covered by the crime of violence definition under 18 U.S.C. 16(a). In an unpublished 2003 decision that an RCW 9A.36.041 conviction was not an aggravated felony crime of violence, the BIA noted— with uncharacteristic acuity— that "putting another in reasonable apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm" was a separate, common law way of committing assault in Washington, and that this definition also "does not have the use or threatened use of physical force as an element." In re Palomares-Ramirez, A92-499-772, Seattle (Nov. 10, 2003) 2003 WL 23521883 (BIA), citing State v. Byrd, 887 P.2d 396, 399 & n.3 (Wash. 1995). This requires an adjudicating authority to accept that a person can be placed in apprehension of harm, without a threat of the use of force being an element of creating apprehension.

[30] INA §101(a)(48)(B); 8 U.S.C. 1101(a)(48)(B)

Ensure a sentence imposed of less than 365 days, regardless of time suspended. Regardless of whether the offense is deemed to be a crime of violence, obtaining a sentence of 364 days (or less) will ensure that it will not constitute and aggravated felony.

4. Conviction Required

In order to trigger this ground of removal, the noncitizen must have a conviction.

Thus, carefully crafted "immigration-safe" deferred adjudication agreements (e.g. SOCs) will not constitute a conviction and consequently cannot serve as a basis for removal/deportation. See Sec. VI.

5. Aggravated Felony Conviction Triggers Harsh Immigration Penalties

In addition to being a ground of deportation[31], a conviction that constitutes an aggravated felony triggers some of the harshest immigration consequences, including:

- Barring a noncitizen from most forms of "relief" from deportation such as asylum,[32] cancellation of removal (i.e. pardon) for LPRs;[33]
- Rendering a noncitizen ineligible to establish the requisite "good moral character" needed to apply for US citizenship;[34]
- Allowing non-LPRs to be removed without ever seeing an immigration judge;[35]
- Triggering significant sentence enhancements for illegal reentry prosecutions.

B. Assault Four as a Crime of Domestic Violence Under Immigration Law

1. The Elements of the DV Deportation Ground

The deportation ground defines crime of domestic violence as follows:

> "any crime of violence (as defined in section 16 of title 18, United States Code) <u>against a person</u> 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 violence or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the 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."[36] (Emphasis added)

Thus, a deportable crime of domestic violence has four elements. An offense that lacks one of these elements, as established by the statute, case law, and reviewable record of conviction, is not

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[31] INA § 237(a)(2)(A)(iii); 8 USC 1227(a)(2)(A)(iii)
[32] INA §§ 208 (b)(2)(A)((ii), (B)(i)
[33] INA§ 240A(a)(3); 8 U.S.C. § 1229b(a)(3)
[34] 8 CFR § 316.10(b)(1)(ii)
[35] INA § 238(b); 8 U.S.C.§ 1228 (b)
[36] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

a deportable "crime of domestic violence." To establish deportability under this ground the conviction:

- Must be a conviction under immigration law;
- Must be a crime of violence as defined in 18 U.S.C. § 16;
- Must be a crime against a person (as opposed to against property); and
- Must have been committed against a person with a defined domestic relationship.

2. To Whom Does the Domestic Violence Ground of Deportation Apply?

PRACTICE POINT:

The DV ground of deportation can only serve as a basis to remove/deport lawful permanent residents and other "lawfully admitted" persons; not undocumented persons. However, as a practical matter a conviction for a DV assault (or other DV offense) will significantly impact any noncitizen's ability to obtain lawful immigration status (a greencard).

Certain crimes of domestic violence (including assault) became a basis for deportation where the conviction occurred on or after 30, 1996.[37] Congress amended the immigration statue to make these crimes grounds of deportation. This means that DV convictions can trigger deportation/removal for any "lawfully admitted" noncitizen.

Most importantly, this includes lawful permanent residents (LPRs, a.k.a. greencard holders). Consequently, it is absolutely critical to identify LPRs charged with DV crimes and apply the analysis contained here.

Importantly, the government has the burden of proof to establish that an LPR (or other lawfully admitted noncitizen) is deportable under this provision. Consequently, carefully crafting the record of conviction (especially the plea statement) can prevent the government from meeting its burden and avoid deportation/removal.

Conviction of a "crime of domestic violence" is a basis for deportability regardless of sentence imposed.

Congress did not amend the grounds of inadmissibility to add a DV ground. Consequently, DV convictions per se cannot be used as a basis to remove undocumented noncitizens or deny re-admission to returning LPRs. However, the DV ground of inadmissibility will significantly impact any applications for lawful status or citizenship.[38]

[37] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Sept. 30, 1996); INA §237(a)(2)(E)(i); 8 U.S.C. § 1227(a)(2)(E)(i).
[38] INA§ 240A(b)(1)(C); 8 U.S.C. § 1229b(b)(1)(C); Gonzalez-Gonzalez v. Ashcroft, 390 F.3d 649 (9th Cir 2004).

3. Practice Strategies to Ensure that a DV Fourth Degree Assault Conviction/Disposition Does Not Trigger the DV Ground of Deportation

a. There Must Be a "Conviction" Under Immigration Law

In order to trigger this ground of removal, the noncitizen must have a conviction as defined by immigration law.[39]

PRACTICE POINT:

Carefully crafted "immigration-safe" deferred adjudication agreements (e.g. SOCs) will not constitute a conviction and, thus, cannot serve as a basis for removal/deportation. See Sec.VI, *infra*. Consequently, "immigration-safe" deferral agreements can be an effective strategy for avoiding deportation/removal.

b. The Conviction Must Be a Crime of Violence Under 18 U.S.C. § 16

If the reviewable or 'judicially noticeable" documents in the record of conviction (especially the plea statement) do not permit the immigration judge to determine in which way the offense was committed— or if the documents affirmatively state that the offense was committed by an offensive touching without the use or the threat of force—a conviction under RCW § 9A.36.041 will not be a deportable crime of domestic violence.

PRACTICE POINT:

The most effective way to keep an assault 4 conviction from triggering the DV deportation ground is to ensure that the record of conviction does not establish that the offense is a crime of violence. For details on how to do this, see sections. II.B and III.A, *supra*.

c. The Offense Must Be Committed "Against A Person"

While the general definition of a crime of violence at 18 U.S.C. §16 includes force used against persons or property, under the language of the immigration statute a deportable crime of domestic violence only includes offenses "against a person." [40]

[39] See 8 U.S.C. 1101(a)(48)(A); see also, Chapter Two of Immigration and Washington State Criminal Law, WDA's Immigration Project (2005).
[40] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

PRACTICE POINT:

Offenses that are potential crimes of violence against property only, such as malicious mischief or criminal trespass will not be deportable offenses under the DV ground. [41] **However, to avoid a conviction falling under the aggravated felony ground, a sentence of 365 days should still be avoided for *any* offense that could possibly be deemed a crime of violence (e.g. malicious mischief), whether against property or a person.**

d. The Record Must Establish that the Offense Was Committed Against a Person Protected Under Washington DV Laws

PRACTICE POINTS:

Whenever possible, negotiate to remove the DV designation. If a DV designation is removed and the record is sanitized of information establishing the relationship between the defendant and the victim, the conviction will not qualify as a deportable offense under this provision.

Even where it is not possible to eliminate the DV designation it is still important to sanitize the record of conviction of any relationship link between the defendant and the victim.[42]

If you have succeeded in removing a DV label from the Judgment, then-- if possible-- instead of having the J&S specify batterer's treatment, try for an agreement that the defendant will go to such treatment ordered by probation, while agreeing separately that batterer's treatment may be ordered by probation.

The deportation statute provides that a "crime of domestic violence" is a crime of violence directed against anyone protected under Washington DV, family violence or tribal laws.[43]

Because Washington's Assault 4 does not have a "relationship" requirement as an element, immigration authorities will look to the "record of conviction" to see whether those documents establish the requisite relationship. (See §II, *supra*, on the ROC).[44]

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[41] Malicious Mischief 2— or less— in addition to being a crime against property, is also not a CIMT. Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995). Although the definition of property damage clearly includes damage without violent force, see, e.g.: RCW 9A.48.100(1), it would still be better to also avoid a 365 day sentence for MM and to plead as close to the statutory language as possible. A conviction for RCW 9A.46.020(1)(a)(ii), misdemeanor harassment, if only the threat-to-cause-physical-damage-to-property subsection, should avoid being a "crime of domestic violence… against a person" for the same reason.

[42] Although current caselaw is not favorable, the Ninth Circuit has not yet specifically resolved the issue of whether a "DV stamp," as is often used in Washington DV cases, will be sufficient. If the issue is resolved favorably in the future, it will be imperative that the rest of a noncitizen defendant's record of conviction be as sanitized as possible regarding the relationship element.

[43] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

[44] Tokatly v. Ashcroft, 371 F.3d 613 (9th Cir. 2004) (an Immigration Judge cannot consider facts from outside of the official record of conviction to determine whether the victim and defendant had the required

Under current Ninth Circuit caselaw, a "DV stamp" or other administrative identification indicating that the case was designated as a DV case will almost certainly constitute sufficient proof to meet the relationship prong.

Washington caselaw is unclear about how exactly cases are designated DV under RCW 10.99.020.[45]

However, Washington caselaw is clear that the name of the victim does not have to be included in the court record, including the charging document, the plea statement and the judgment.[46]

A dropped or superseded criminal complaint is not part of the record of conviction and, thus, cannot be used to establish the requisite relationship[47]

In a recent decision, the Ninth Circuit held that the government had not established deportability under the DV ground where the *victim was not named* in the count of conviction for a California battery similar to Assault 4 the noncitizen.[48] The Court found for the noncitizen despite the fact that the government had submitted evidence establishing:

- dropped charges that had named a victim and alleged that the victim had a domestic relationship;
- as part of the judgment, the defendant received a stay-away order relating to a person of the same name as in the dropped charge;
- as part of the judgment, the defendant was ordered to attend domestic violence counseling; and
- the defendant in immigration proceedings stated that the person named in the stay-away order had the domestic relationship, e.g. was an ex-wife.

Therefore, if the criminal judgment does not contain the "DV" label, and the defendant does not plead or admit to such a DV aspect, nor make an unmodified plea to a criminal complaint with such a characterization, then a sentencing order that a defendant go to DV or batterer's treatment *might* not be enough by itself to establish a deportable DV offense.

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domestic relationship. Testimony at an immigration hearing or other evidence outside the record of conviction cannot be used to establish the relationship). See also U.S. v Nobriga, 408 F.3d 1178 (9th Cir. 2005) (admission by defendant in a criminal hearing not reviewable to determine his domestic relationship with the victim in a prior conviction, in a sentence enhancement under 8 U.S.C. §922(g)(9)).

[45] See State v. Parrish, 2002 WL 31854832, no. 27745-0-II (Ct. App. 12/20/02).

[46] State v. Plano, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992); State v. Johnston, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000).

[47] The strongest authorities for this are Shepard v. United States 125 S. Ct. 1254, 1257,1269; (2004) and Taylor v United States 495 U.S. 575; 110 S. Ct. 2143 (1990). A dropped charged could not possibly be reviewed under the modified categorical approach to learn that "a jury was actually required to find all the elements" of a removable offense . *Id.*, 495 U.S. 602. See *Ruiz-Vidal v. Gonzales*, 2007 U.S. App. LEXIS 1015, 14-16 (9th Cir. 2007) (Modified categorical analysis cannot rely on an Information where "the defendant had pleaded guilty to an offense different from the one charged in the information" *id.*); Cisneros-Perez v. Gonzales, 2006 U.S. App. LEXIS 24750, 17-19 (9th Cir. 2006.

[48] Cisneros-Perez v. Gonzales, 2006 U.S. App. LEXIS 24750, 17-19 (9th Cir. 2006). See State v. Wilkerson, 107 Wn.App. 748; 31 P.3d 1194 , (Div. I, 2001) (a district court judge can order conditions not directly related to the crime).

C. Assault Four as a "Crime Involving Moral Turpitude (CIMT)"

PRACTICE POINT:

The safest defense against having an Assault 4 conviction be classed as a CIMT, is to follow the same steps given above in sections II.C and III.A. to avoid a "crime of violence," by carefully crafting the record of conviction (especially the plea statement). Since a simple assault conviction by itself is not a CIMT, where it is possible to keep the DV label (and age of the victim, if a minor) out of the record of conviction, that should also ensure it is not a CIMT.[49] Assault with sexual motivation is likely to constitute a CIMT.

1. Relevant Immigration Statutory Provision and To Whom it Applies

A conviction that constitutes a "crime involving moral turpitude" (CIMT) is a ground of deportation. Thus, a CIMT conviction can trigger deportation/removal proceedings for any noncitizen (including greencard holders) where such conviction is obtained after a lawful admission.[50].

CIMTs are also a ground of inadmissibility under the immigration law. Consequently, convictions that are CIMTs will serve to bar noncitizens from entering the U.S., obtaining lawful status (e.g. a greencard), and acquiring citizenship.[51] As a ground of inadmissibility, they will also provide an additional basis for removal for undocumented noncitizens.

Therefore, CIMT provisions apply to all noncitizens.[52]

The CIMT provisions under immigration law have other important requirements and exceptions that may prevent your client from triggering them. For example, a greencard holder with only one CIMT conviction will not get deported for it unless it was committed within five years of her admission to the U.S.

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[49] An additional precaution is to ensure that the sentence (regardless of any suspension) is not more than 180 days. Where a non-citizen has no other CIMT convictions, this will avoid triggering the CIMT ground of inadmissibility, since there is an exception for one CIMT. Avoiding this ground of inadmissibility will keep an otherwise eligible non-citizen from being refused admission to the US, barred from receiving a green card, or denied citizenship. INA§ 212(a)(2)(A)(ii)(II); 8 U.S.C. 1182§(a)(2)(A)(ii)(II) (This exception by definition can not apply to a felony.)

[50] INA § 237(a)(2)(A)(i), (ii); 8 USC §§1227(a)(2)(A)(i), (ii). There is an exception to deportability for one CIMT, if it was not committed within 5 years of admission, but since there is no such exception for the "crime of violence"-based grounds (aggravated felony or DV), and avoiding those grounds will also works to avoid the CIMT, we needn't explore it here.

[51] INA § 212(a)(2)(a)(i)(I); 8 USC § 1182(a)(2)(a)(i)(I). The inadmissibility grounds make non-citizens ineligible to receive visas or to enter the US. A person can become inadmissible for a CIMT conviction, but also if she "admits having committed" a CIMT or admits "committing acts which constitute the essential elements" of a CIMT. 8 U.S.C. § 1182(a)(2)(a)(i). The admission of the elements of a CIMT is hedged with certain restrictions. See, e.g. Matter of G-M-, 7 I. & N. Dec. 40 (Att'y Gen. 1956). Matter of S-8 I. & N. Dec. 409 (BIA 1959); Matter of C-Y-C-, 3 I. & N. Dec. 623 (BIA 1950).

[52] Note that the CIMT deportability and inadmissibility provisions are not identical. They have numerous other requirements and exceptions under the statute. Thus, the specific application in any noncitizens case may vary. However, the important point here is to avoid have a conviction classified as a CIMT. For more detail, see and compare 8 U.S.C. 1182(a)(2)(A) and 8 U.S.C. 1227(a)(2)(A)(i)& (ii).

2. What Is "Moral Turpitude" in Regard to Assault Anyway?

"Simple" assault has been repeatedly held to not be a CIMT.[53] When applied to assault, moral turpitude ordinarily requires an aggravating factor. [54]

There is no statutory definition of this nebulous term. Moral turpitude refers generally to conduct inherently "base, vile, or depraved," contrary to accepted rules of morality and the duties owed between persons or to society. It has been defined as an act which is *per se* intrinsically morally wrong or *malum in se*, so it is the nature of the act itself and not the prohibition of it which makes it a CIMT.[55] Both the BIA and the federal courts have repeatedly held that offenses are CIMTs where they have *mens rea* requirements that the defendant acted intentionally or knowingly, coupled with the element of causing serious harm, or acting in disregard of causing serious harm.[56]

The BIA has laid out three broad categories of assault and battery offenses that meet this criterion:

1) Assault and/or battery with a deadly weapon;

2) Assaults that "necessarily involved the intentional infliction of serious bodily injury"[57] and

3) Offenses defined by "intentional or knowing infliction of injury" upon "persons deserving of special protection" such as children, domestic partners or peace officers.[58]

An assault on a domestic victim would be a CIMT, if it were in that last category, but in a key precedent the BIA ruled that a California domestic battery conviction did not automatically fall within that "special protection" third class of persons, because:

- the minimal conduct required by the statute was unconsented touching, without violence or injury;

- key cases involving battery against a protected class member, had a statutory requirement of actual harm;[59] and

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[53] Fernandez-Ruiz at 1167; See, e.g.: Matter of Fualaau, 21 I. & N. Dec. 475 (BIA 1996); Matter of Short, 20 I. & N. Dec. 136, 137 (BIA 1989); Matter of Baker, 15 I. & N. Dec. 50, 51 (BIA 1974), modified on other grounds, Matter of Short, *supra*.

[54] Matter of Sanudo 23 I&N Dec 968, 971 (BIA 2006); Matter of Medina, 15 I. & N. Dec. 611 (BIA 1976), aff'd sub nom. Medina-Luna v. INS, 547 F.2d 1171 (7th Cir. 1977)

[55] Matter of Ajami, 22 I&N Dec. 949, 950 (BIA 1999); see discussion of moral turpitude in Matter of Torres-Varela 23 I&N Dec, 78 (BIA 2001)

[56] Fernandez-Ruiz v. Gonzales 468 F.3d 1159, 1167 (9th Cir. 2006); Grageda v. INS, 12 F.3d 919 (9th Cir. 1993); Nguyen v. Reno, 211 F.3d 692 (1st Cir. 2000); Ajami *supra*; Matter of Tran, 21 I&N Dec. 291 (BIA 1996).

[57] Sanudo at 971; (emphasis in original).

[58] *id*., at 971-972. Note that the requirement in Sanudo for "intentional infliction of bodily harm" on the person in the protected class, supports the argument that Assault in the Third Degree, RCW §§ 9A.36.031 (b), (c) (e) and (g) or (i), on a transit operator, peace officer, etc, are not aggravated assaults and do not rise to the level of a CIMT. RCW §§ 9A.36.031(d) and (f) are known to not be CIMTs. (Matter of Perez-Contreras I&N (BIA))

[59] Sanudo at 972. Actually all the cases cited therein involve non-negligent, injurious child abuse or an aggravated assault.

- "neither the statute of conviction nor the admissible portion of the respondent's conviction record reflects that his battery was injurious to the victim or that it involved anything more than minimal nonviolent 'touching' necessary to constitute the offense."[60]

The 9th Circuit recently ruled that the mere fact of a domestic relationship to the victim does not automatically bring a simple assault into the category of moral turpitude, since "force that is neither violent nor severe and that causes neither pain nor bodily harm may constitute battery."[61] So even some domestic batteries that go beyond mere offensive touching, do not rise to the level of a CIMT if they are not capable of causing injury.[62]

D. Child Abuse Convictions as a Basis for Deportation

1. Relevant INA Provision and Effective Date

Under INA § 237(a)(2)(E)(i), a noncitizen who has been convicted of a crime relating to "child abuse, neglect, or abandonment" is subject to removal (deportation).

The ground is effective for convictions after September 30, 1996, the date IIRIRA was enacted. The conviction must occur in the United States, and the government bears the burden of demonstrating that the noncitizen's conviction constitutes, in this case, "child abuse."

Like the DV ground of deportation, this provision can only serve as a basis for deportation/removal for noncitizens who have been "lawfully admitted" such as greencard holders and refugees.

The definition of what constitutes "child abuse" under this immigration law provision, and whether Washington's fourth degree assault statute fits within such definition is at present an unsettled question of law. The Ninth Circuit recently remanded a case to the Board of Immigration Appeals (BIA) to address these specific issues.[63]

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[60] Sanudo at 972-973.

[61] Galeana-Mendoza v. Gonzales, 465 F.3d 1054, 1060 (9th Circuit 2006)

[62] *Id*. Galeana-Mendoza notes that "throwing a cup of cola on the lap of someone to whom one is or had been engaged, slighting shoving a cohabitant, or poking the parent of one's children rudely with the end of a pencil are all "offensive touching[s]" of qualifying individuals and can constitute domestic battery. . . . None of these acts, however, can be characterized as inherently grave, base, or depraved." *Id*. Spitting is an assault in Washington: "any rational trier of fact would have found assault beyond a reasonable doubt by Nordstrom's act of spitting on or at… . By the trial court's instructions, the jury knew that intentionally spitting on or at somebody was assault." State v. Nordstrom, 2003 Wash. App. LEXIS 1587 (Wash. Ct. App. 2003); See also Fernandez-Ruiz v Gonzales 468 F.3d 1159, 1167 (9th Cir. 2006) clarifying that prior 9th Circuit precedents do "not suggest that a spousal contact that causes minor injury or a spousal threat that results in no physical injury constitutes a crime of moral turpitude. Rather, the California spouse abuse and child abuse statutes that we held to involve moral turpitude in Grageda and Guerrero de Nodahl both required the willful infliction of bodily 'injury resulting in a traumatic condition.'" Moral turpitude does not reach statutes that include "physical contacts that result in the most minor of injuries or threats that cause no injury at all." *id*. at 1167

[63] *Velazquez-Herrera v. Gonzalez,* 466 F.3d 781, 782 (9th Cir. 2006). The broad definition of child abuse employed by the immigration judge, and upheld initially by the BIA is at odds with definitions suggested by other case law, federal statutes, state statutes, and the immigration act itself. INA § 214(d)(3), referencing the Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. 13925, defines child abuse as "any recent act or failure to act on the part of the parent or caregiver with the intent to cause death or serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which

2. Strategies for Avoiding Removal

a. Carefully Craft the Record of Conviction to Ensure that the Age of the Victim Is Not Included

Control the record of conviction, as outlined in section II, *supra*, to ensure that the offense that defendant pleads to does not identify the victim's age where the victim is a minor.

Control the record of conviction, as outlined in section II, *supra*, to attempt to get the conduct outlined in the plea to be as innocuous as possible – e.g. "offensive touching."

b. Plead an Alternative Offense

Given that "child abuse" remains undefined, defense attorneys should assume that, where the record identifies an assault committed against a child, the offense will constitute "child abuse, neglect, or abandonment."

Where the victim is a minor, one strategy is to negotiate a plea to one of the alternative offenses listed in section. However, counsel should take care to avoid triggering an alternate ground of removal such as crimes involving moral turpitude.[64]

c. Ascertain the Wishes of the Alleged Victim

If possible, defense counsel should work with the victim's advocate to ensure that the victim is fully aware that certain convictions may trigger the deportation of the defendant. The victim may have reasons not to want to have the defendant deported.[65] If appropriate, for example, counsel should demonstrate that removal of the parent would harm the family.

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presents a serious risk of imminent harm." Several federal statutes define "child abuse" identically as "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." See, for example, 18 U.S.C. § 3509, 42 U.S.C. § 13031; and 42 U.S.C. 5119(c). Under Washington state law, a child is a person under eighteen years of age. RCW § 26.44.020(6). Child abuse or neglect under state law is defined as "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding [reasonable and moderate physical discipline]; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." RCW § 26.44.202(12) (2006).

[64] Counsel should take care to avoid triggering an alternate ground of removal such as a crime involving moral turpitude. In Matter of Perez-Contreras, 20 I. & N. Dec. 615, 617-20 (BIA 1992), the BIA held that fourth-degree assault, because it lacks a mens rea requirement, is not a crime involving moral turpitude. See also Matter of Sweetser, 22 I. & N. Dec. 709 (BIA 1999) (criminally negligent child abuse is not a crime of moral turpitude). However, in Matter of Adcock, 12 Immigr. Rep. B1-175 (BIA 1994) (unpublished), the BIA held that a willful act or omission causing injury to a child is an offense involving moral turpitude.

[65] Removal of the accused will mean, for example, that the accused no longer provides child support, the marriage cannot be saved through counseling, or that the child-parent relationship cannot continue. Note that the accused's inability to provide child support may not be dispositive. In Re Michael Baron, 2004 WL 2943559 (BIA 2004) ("In light of the fact that the respondent has twice been convicted of assaulting his child's mother, we are reluctant to conclude that the respondent's removal would work a serious hardship to the child, even when we consider the fact that his removal will likely interfere with his ability to make child support payments").

IV. Violations of No-Contact Orders

PRACTICE POINT:

Whenever possible, plead to an alternative offense, such as an underlying misdemeanor assault charge that gave rise to the VNCO. A simple assault conviction, structured using the guidelines articulated in this advisory, will always be a better alternative than pleading to VNCO.

A. Relevant Immigration Law Provision and to Whom it Applies

Under INA § 237(a)(2)(E)(ii), a noncitizen is deportable who "violates . . . a [domestic violence] protection 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." A court need only "determine" that a protective order was violated—a conviction is not required. It applies to offense committed after September 30, 1996.

VNCO convictions became a basis for deportation where the conviction occurred on or after 30, 1996.[66] Congress amended the immigration statue to make these crimes grounds of deportation. This means that DV convictions can trigger deportation/removal for any "lawfully admitted" noncitizen.

Most importantly, this includes lawful permanent residents (LPRs, a.k.a. greencard holders). Consequently, it is absolutely critical to identify LPRs charged with DV crimes and apply the analysis contained here.

Conviction for a VNCO offense is a basis for deportability regardless of sentence imposed.

Congress did not amend the grounds of inadmissibility to add a VNCO ground. Consequently, DV convictions per se cannot be used as a basis to remove undocumented noncitizens or deny re-admission to returning LPRs. However, the DV ground of inadmissibility will have a significant negative impact any applications for lawful status or citizenship.[67]

B. Strategies for Avoiding Removal

1. Challenge the No-Contact Order

Although no-contact orders may not be collaterally attacked after the alleged violation,[68] defense counsel should aggressively challenge the underlying validity of the order, which can be challenged at any time.[69] The validity of the order must be established by the prosecution.[70] The

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[66] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Sept. 30, 1996); INA §237(a)(2)(E)(i); 8 U.S.C. § 1227(a)(2)(E)(i).

[67] INA§ 240A(b)(1)(C); 8 U.S.C. § 1229b(b)(1)(C); Gonzalez-Gonzalez v. Ashcroft, 390 F.3d 649 (9th Cir 2004).

[68] State v. Miller, 123 P.3d 827, 831 (2005). Information in this paragraph is from Chris Jackson, "The (In)validity of Written Protection Orders or How to Dismantle (The) Atomic Bomb in Your VNCO Case," The Defender Association (June 2, 2006), available from the author, chris.jackson@defender.org.

[69] Challenging the validity of a court order is not a collateral attack. Miller, 123 P.3d at 831. A void order may be attacked at any time. Doe v. Fife Mun. Ct., 874 P.2d 182 (Wash. Ct. App., 1994).

order may be challenged on a number of grounds, including vagueness,[71] insufficient warning,[72] and validity or "applicability."[73] An order is inapplicable if it was not issued by a competent court, it does not comply with relevant statutes (for example, a protection order may issue only for the victim of the crime and not, for example, children or other nonvictims, RCW 10.99.050(1)), or it fails to support a conviction due to some other inadequacy.[74]

2. Structure Findings of the Violation to Exclude Removable Acts

A noncitizen is removable if the state court determines that he or she has violated "the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury" to the person(s) for whom the order was issued. A noncitizen found to have violated a different portion of the order should not be removable.

However, both the BIA and the Ninth Circuit have interpreted this provision broadly. The Ninth Circuit upheld an order of removal when the defendant was convicted of violating a provision of a protective order that forbid him to call his estranged wife at night.[75] The BIA similarly upheld deportation in the case of a man who approached his wife in a sandwich shop in violation of a no-contact order, reasoning that "preventing the respondent's contact with his spouse protected her against threats of violence, harassment, and bodily injury."[76] As a practical matter, the government often will place any noncitizen who has violated a protection order in deportation proceedings.

Nevertheless, when a protection order is broad, counsel should attempt to structure findings of violation to exclude reference to "violence, harassment, and bodily injury."

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[70] "The 'validity' of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence." Miller, 123 P.3d at 828.
[71] City of Seattle v. Edwards, 941 P.2d 697 (Wash. Ct. App. 1997).
[72] State v. Marking, 997 P.2d 461 (2000), overruled on other grounds by State v. Miller, 123 P.3d at 827.
[73] Miller, 123 P.3d at 831.
[74] *Id.*

[75] Alesenko v.Ashcroft, 14 Fed. Appx. 794 (9th Cir. 2001). The court held that "every provision of [the protection] order prohibits Alesenko from harassing or threatening his wife." *Id*. at 796 (emphasis in original).
[76] In Re Pierre Noel, 2004 WL 2374329 (BIA). Case law is somewhat contradictory regarding whether more than a mere violation of a no-contact order is required to satisfy this provision. As in In Re Pierre, the BIA has upheld deportation in the case of a protection order's violation on the simple theory that a protection order is meant to protect from "threats of violence, harassment, and bodily injury." However, the BIA also has held that because a violation included "circumstances involving a credible threat of bodily injury to the order's beneficiary" the violation was sufficient to sustain deportability. In Re Arturo Isidro Palomares-Ramirez, 2003 WL 23521883 (BIA). In support of the latter approach, the court remanded a case to an immigration judge, stating, "we cannot determine from this record whether the respondent violated the portion of the protection order necessary in order to establish the respondent's removability as charged or whether he violated the simple 'no contact' provision of the protective order." In Re Ernesto Ramirez-Mendoza, 2006 WL 2427915 (BIA). The cases cited here are unpublished; no published decisions resolve this issue.

3. Plead to an Alternate Offense

If possible, defense counsel should plead to an offense that will not lead to deportation.[77] For example, if the charge is assault, the defendant should plead instead to malicious mischief, which is not a deportable offense. Under RCW 26.50.110(4), a violation that involves assault or reckless conduct that "creates a substantial risk of death or serious physical injury" is a class C felony. If possible, counsel should plead to the underlying misdemeanor assault. If this is not possible, counsel should craft a plea statement that states a violation that does not involve threats of violence, repeated harassment, or bodily injury.

V. Alternative Charges and Strategies to Assault 4 to Avoid Removal [78]

A. Bail Forfeiture

Bail forfeiture as a disposition, without a guilty plea or other stipulation to facts, is a terrific alternative, wherever possible, for avoiding potential immigration consequences. It does not constitute a conviction for immigration purposes because there is no plea, judgment of guilt, nor admission of or stipulation to facts. Thus, regardless of the charged offense, it will not trigger grounds of deportation, inadmissibility, or any provisions of the aggravated felony definition. *Note, however, that it is imperative that counsel ensures that there are no additional written admissions of guilt by the defendant to the charged offense.*

B. Non-DV Assault 4 with a Sentence, Regardless of Suspension, of Less than 365 Days

Remember that a 'plain-vanilla' **Assault 4 that is not DV, and for which the sentence is less than 365 days**, and the victim is not specified as a minor, is not a crime of domestic violence, child abuse, aggravated felony crime of violence, nor a crime involving moral turpitude, and therefore is not a criminal ground of removal at all.

C. Assault 3 with Negligence.

RCW §§ 9A.36.031(d) and (f) are known to *not* be CIMTs.[79]

Because an offense committed negligently cannot meet the definition of a crime of violence, [80] a conviction under these subsections cannot be either a "crime of DV" (regardless of how labeled)

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[77] The BIA has held that a conviction for violating a protection order that involved a sentence of more than one year was a crime of violence and thus an aggravated felony that constituted a deportable offense under INA § 101(a)(43)(F). In re Aldabesheh, 22 I. & N. Dec. 983, 985 (BIA 1999).

[78] Practice Point: remember that if your client has Temporary Protected Status (TPS), any felony or any second misdemeanor will jeopardize her or his status.

[79] Matter of Perez-Contreras, 20 I. & N. Dec. 615 (BIA 1992). Immigration counsel should note that the requirement in Matter of Sanudo, *supra*., that "intentional infliction of bodily harm" on the person in the protected class, supports the argument that other subsections of Assault in the Third Degree, RCW §§ 9A.36.031 (b), (c) (e) and (g) or (i), on a transit operator, peace officer, etc, are not aggravated assaults and do not rise to the level of a CIMT.

[80] Fernandez-Ruiz (*supra*); Leocal v. Ashcroft, 125 S. Ct. 377 (2004).

or an aggravated felony crime of violence. Therefore, in some cases, this felony will be safer than the gross misdemeanor of Assault 4. Be aware that if a person pleads guilty to 9A.36.031(d), and the weapon is specified in the record of conviction as a firearm, then they will be deportable for a firearms offense.

D. Attempted Assault 3 with Negligence.

If it is possible to plead to Attempted Assault 3 RCW §§ 9A.36.031(d) or (f), as a gross misdemeanor under RCW § 9A.28, then that also should not be a deportable offense.

E. Malicious Mischief

- RCW § 9A.48.080(1)(a) is not a CIMT.[81] Therefore the gross misdemeanors of Attempted MM 2 or MM 3 are also not CIMTs.

- MM as a "crime of violence": although the definition of property damage for MM clearly includes damage without violent force[82] and should be okay, avoid a 365-day sentence for MM and **plead as close to the statutory language as possible**.

WARNING!
If the record of conviction, for example, the plea statement, contains an explicit admission of the use of violent force in committing MM, and the sentence were 365 days, there is a danger this could be treated as an aggravated felony.

- MM as a "crime of domestic violence": to be deportable for a "crime of domestic violence" it must be against a person. Therefore, since RCW §§ 9A.48.080(1)(a) and .090 (MM 2 & MM 3) are crimes against property and not against people, a conviction should not trigger deportation under this ground even if labeled as DV. Nonetheless, a "DV" label in the judgment raises the risk that a non-citizen would erroneously be put in proceedings by DHS.

F. Misdemeanor Harassment Under RCW § 9A.46.020(1)(a)(ii)

Since this subsection penalizes a threat to cause physical damage to property only, it should avoid being a "crime of domestic violence… against a person," by definition.

Since this is a threat to commit property damage that includes minor property damage, it should avoid being a CIMT for the same reasons as Malicious Mischief does.

Caveat: RCW § 9A.46.020(1)(b) does require an additional element that the victim have been placed in reasonable fear that the threat would be carried out. However it would seem to collapse any distinction between property crimes and crimes against persons to consider this a crime of violence against a person (since all crimes are against a person, in some sense). Similarly, a threat to commit a minor crime that does not rise to the level of moral turpitude, and which does not

[81] *Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995).*

[82] See e.g.: RCW 9A.48.100(1)

require an intent to carry out the threat, shouldn't itself rise to the level of depravity needed for "moral turpitude." But we don't know of an immigration case directly on point.

G. Criminal Trespass and Disorderly Conduct

These offenses will not trigger deportation/removal or render a noncitizen inadmissible to the U.S.

WARNING!
Since a finding of a violation of a domestic violence protection order is a separate ground of deportation, it is not a safe alternative charge to an Assault 4-DV charge.

VI. Crafting an Immigration-Safe Deferred Adjudication Agreement

The immigration statute contains a specific definition of what constitutes a conviction under immigration law. That definition states:

> The term "conviction" means, with respect to an alien,[83] a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> - A judge or jury has found the alien [noncitizen] guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> - The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[84]

Thus,

The crux of the issue here is what constitutes a conviction for immigration purposes. In short, even though the deferral scheme may allow for a dismissal under Washington state law of the offense(s), *any deferral scheme which requires the defendant, at the time of the deferral, to agree to admissibility of the police report, and/or stipulate to facts and/or enter a guilty plea puts a non-citizen at risk that the deferral scheme will be a conviction for immigration purposes regardless of whether the case is subsequently dismissed by the Court after defendant complies with the condition(s).*

In the case *Matter of Roldan*, Int. Dec. 3377 (BIA 1999), the Board of Immigration Appeals interpreted the statutory language extremely broadly such that any admission of guilt will constitute a conviction in perpetuity for immigration purposes. The recent Ninth Circuit decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) tempers this broad interpretation only for first-time simple possession and lesser drug offenses.

Meanwhile, as a practical matter, the DHS treats virtually all diversionary schemes as convictions for immigration purposes where, at a minimum, the police report was admitted into evidence at the time of the deferral and/or the defendant stipulated to facts.

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[83] For more information on noncitizen rights and risks, please see Chapter 1, Section A2.
[84] 8 USC § 1101(a)(48)(A); INA § 101(a)(48)(B).

As an alternative, non-citizen defendants could agree to a deferral scheme that was structured as follows:

> **Rather than admission of the police report at the time of the deferral, non-citizens would agree to waive their right to object and/or contest ANY evidence presented at any subsequent violation/revocation hearing and agree that the judge will review the evidence presented at that time (which would be the police report) and make a decision as to her/his guilt based solely on that evidence.**

Thus, it would be understood at the time that the deferral scheme is agreed upon by the parties, that the prosecutor would present the police report at a *subsequent violation/revocation hearing* if the defendant does not comply with conditions. However, if the defendant complies with the conditions, the case is dismissed without any admissions by the defendant and the police report will not have been entered into evidence for purposes of determining guilt. This will (hopefully) avoid the offense being deemed a conviction for immigration purposes.

Sample Alternative Language for Pre-Trial Diversion Agreements/SOCs

NOTE: If boilerplate forms are used, it is necessary to cross-out/eliminate language referencing admissions or stipulations of guilt/police reports/facts and substitute in the following language.

I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.

I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will read and review that evidence in determining my guilt or innocence.

VII. Strategies for Cases Involving A Sexual Motivation Enhancement

PRACTICE POINTS:

Where defense counsel has followed the advice here, adding a "sexual motivation" enhancement to an assault 4 is not likely to convert a non-deportable assault 4 conviction result into a removable offense.

EXCEPTION: The exception to this analysis is that such an enhancement may turn the offense into a "crime involving moral turpitude", which is a removable offense (as well as a statutory basis for ineligibility for many immigration benefits and re-entry into the United States).

Assault 4 with sexual motivation is often a good strategy for avoiding a conviction for a much more onerous offense that will result in certain deportation. However, it is imperative to consult with competent immigration counsel before pursuing this option.

A. Assault 4 with Sexual Motivation

Under RCW § 9.94A.835 a "special allegation" of sexual motivation can be charged in any criminal case that is not itself a sex offense as defined in RCW § 9.94A.030(38) (a) or (c). The special allegation must be proved beyond a reasonable doubt to the trier of fact.[85] While Washington case law does treat it as a sentencing enhancement [86] it can be used to define an offense as a sex offense.[87]

- There is as yet no immigration case directly on Washington's sexual motivation enhancement.

- Immigration caselaw excludes a recidivist enhancement from consideration when determining the nature of an offense for removal purposes.[88] However, sentence enhancements "based on circumstances of the crime itself" can be considered in the categorical analysis of how a conviction is analyzed at a later proceeding.[89]

B. Crime of Violence Grounds

Adding the sexual motivation enhancement to Assault 4 should not make it a "crime of violence" if the record of conviction does not make it so– and thus neither an aggravated felony crime of violence nor a crime of domestic violence-- and the analysis given above should still work.

C. 'Crime of Child Abuse' and 'Sexual Abuse of a Minor' Grounds

Adding the sexual motivation enhancement to Assault 4, where the alleged victim is identified as a minor in the record of conviction, runs a risk that the offense could be treated as:

- the deportation ground of a "crime of child abuse."[90] As explained above, in section §III.D. Child Abuse Convictions as a Basis for Deportation, the issue of whether Assault 4 against a minor is "child abuse" is unsettled.[91] Adding the element of sexual motivation can't help.

- the aggravated felony of "sexual abuse of a minor."[92] The BIA has used a broad definition of sexual abuse,[93] that does not require physical contact. Even that definition, however, requires

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[85] RCW 9.94A.835(2); State v. Halstien, 65 Wash.App. 845, 851 (1992).
[86] "[T]he finding of sexual motivation [must] be based on some conduct forming part of the body of the underlying felony. The statute does not criminalize sexual motivation. Rather, the statute makes sexual motivation manifested by the defendant's conduct in the course of committing a felony an aggravating factor in sentencing." State v. Halstien, 65 Wn. App. 845, 853 (Wash. Ct. App. 1992) (treating the juvenile counterpart to RCW 9.94A.835); State v. Thomas, 138 Wn.2d 630, 636 (1999).
[87] State v. Halgren, 137 Wn.2d 340, 349-350 (Wash. 1999)
[88] United States v. Corona-Sanchez, 291 F.3d 1201, 1209 (9th Cir. 2002)
[89] United States v. Moreno-Hernandez, 397 F.3d 1248, 1250 (9th Cir. 2005) ("Substantive offense-based enhancements are inseparable from the underlying offense" *id*.)
[90] INA § 237(a)(2)(E)(i); 8 USC §1227(a)(2)(E)(i)
[91] *Velazquez-Herrera, supra* at 782. The Court remanded to the BIA to clarify contradictory rulings. There are good immigration-side arguments that Assault 4 against a minor is not categorically "child abuse."
[92] INA §101(a)(43)(A); 8 USC § 1101(a)(43)(A).
[93] Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (BIA 1999) (adopting the definition of sexual abuse delineated in 18 USC § 3509(a) (1994)).

"the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct" or other type of sexual exploitation.[94]

Therefore, defense counsel should do everything possible to eliminate the age of a minor victim from the record of conviction of Assault 4 with sexual motivation. If you cannot, it is even more essential to control the record of conviction to not specify which way the offense was committed.

D. Crime Involving Moral Turpitude

- Adding the sexual motivation enhancement to Assault 4 presents a significant risk that the offense will constitute a "crime involving moral turpitude (CIMT)". Simple assault by itself is not a CIMT. The sexual motivation enhancement adds an element of "evil" intent that must be found under the same standard of guilt as the assault itself, and increases punishment. There arguments on the immigration side that this enhancement is not sufficient to make Assault 4 into a CIMT,[95] but it has not been decided yet and, since the immigration authorities tend to treat "sex-related" offenses more harshly; it is imperative to be prudent.

- If Assault 4 with sexual motivation is the best offer a defendant can get, it is still important to assume that the statute is divisible, and that the full range of conduct covered by the statute includes conduct that does not amount to moral turpitude. So a plea statement such as:

  > "On August 5, 2005, I committed an assault against the victim *[or person's name if required by the judge]* that did not amount to an assault 1, 2, or 3."

  should still preserve any possibilities that the government will be unable to establish that the non-citizen was convicted of a CIMT.

- Because there is a danger that the government could try to treat Assault 4 with sexual motivation as a CIMT, it may be especially important to analyze your client's status to see what his objectives are and how a CIMT conviction could affect him. Sometimes one CIMT is not fatal.[96]

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[94] *Id*.

[95] See, e.g: Matter of Torres-Varela, 23 I. & N. Dec. 78, __ (BIA 2001) ("Furthermore, although crimes involving moral turpitude often involve an evil intent, such a specific intent is not a prerequisite to finding that a crime involves moral turpitude." *id*.) The range and types of culpable conduct are not changed by the enhancement being added. But cf. Matter of Flores, 17 I. & N. Dec. 225, 227 (BIA 1980) ("evil or malicious intent is said to be the essence of moral turpitude")

[96] The CIMT deportability and inadmissibility provisions are not identical and have numerous other requirements and exceptions under the statute. The CIMT grounds are unique in each having a (narrow) exception for one CIMT, but the exception to deportability is different from the exception to inadmissibility. It may be important to analyze priors to see if the client already has one CIMT. Waivers are available for CIMTs in some cases. The WDA Immigration Project stands ready to help you analyze this. For more detail, see and compare 8 U.S.C. 1182(a)(2)(A) & (A)(ii)(II) and 8 U.S.C. 1227(a)(2)(A)(i)& (ii).