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Analyzing Washington General Assault Convictions after *Moncrieffe, Descamps,* and *Olivas-Motta*: An Overview Guide for Immigration Counsel

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NOTE TO IMMIGRATION COUNSEL:

This analysis is intended to complement the extensive summary on these decisions provided in the practice advisories published jointly by the National Immigration Project, the Immigrant Defense Project, and the Immigrant Legal Resource Center. This overview presumes immigration counsel is familiar with these advisories which are available at:

- *Moncrieffe v. Holder* Advisory: http://www.ilrc.org/files/documents/moncrieffe_ninth_cir_defenses_final_5.28.pdf

- *Descamps v. United States* Advisory: http://immigrantdefenseproject.org/wp-content/uploads/2013/06/Descamps-advisory-7-17-FINAL.pdf

PRACTICE TIP: Step One of analyzing whether any Washington (or other) State conviction triggers conviction-based removal grounds is to clearly identify the criminal statute at issue, obtain available conviction records and clarify what removal grounds could be/are at issue (e.g., crime involving moral turpitude? Crime of violence? Crime of Child Abuse?).

I. Challenging Removal and Relief Ineligibility Due to Convictions: The New and Improved Landscape

PRACTICE HIGHLIGHT: The Supreme Court and 9th Circuit decisions outlined here significantly expand the basis to vigorously contest removal and relief bars in many cases and immigration counsel should be doing so whenever possible.

A. The Categorical Approach Re-Calibrated to Its Original, Traditional Principles

1. Minimum Conduct Test Lives Again!

The categorical and modified categorical approach constitute the legal framework used by immigration judges (IJs) to determine whether a state conviction triggers a conviction-related ground of removability, inadmissibility, or bars relief from removal. In recent years both BIA and Ninth Circuit decisions had significantly compromised the integrity of this framework and eroded its core principles, causing countless unwarranted removals. See, *e.g.*, *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Circuit 2011) (*en banc)* and *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). In *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), and in *Descamps v. United States*, 133 S.Ct. 2276 (2013), the U.S. Supreme Court overruled these decisions, and re-established the strict limitations that govern the categorical approach.

These decisions make clear that the categorical approach is an elements-based test, not an evidence (facts)-based test. In other words, it doesn't matter what happened that dark & stormy night; it only matters what happened that day in criminal court. Under this approach, the relevant inquiry is whether the statute of conviction *necessarily*, in every case, requires that the State prove elements that match the elements of the generic immigration offense. **Traditionally, this was known as the "minimum conduct" test: does the minimum conduct necessary to violate the statute match the generic immigration definition at issue?** If there is no match, that is the end of the inquiry – period – and the conviction cannot trigger the conviction-based removal ground at issue.

EXAMPLE – ASSAULT 4th Degree: Because the minimum conduct necessary for a conviction under RCW §9A.36.041 includes placing someone in apprehension of harm which does not even include touching, a conviction for this offense can never match the elements of the generic definitions relating to crimes of violence, crimes involving moral turpitude or crimes against children and can, thus, categorically never trigger these grounds. No resort to the documents in the record of conviction is necessary or permitted – it does not matter what the actual conduct of conviction was. *See* discussion, *infra*, §II.A.

2. Significant Limitations Re-Imposed on Using the Modified Categorical Approach

While the BIA and Ninth Circuit had sanctioned continuing on to the modified categorical ("mod-cat") approach in almost all cases (*see*, *Lanferman*, *supra*), the *Moncrieffe* and *Descamps* Courts made clear that the mod-cat approach (which permits the examination of a limited number of specific documents from the record of conviction (ROC[1])) was reserved only for statutes which set forth multiple, separately defined offenses, one of which would trigger the generic immigration definition. *Descamps*, 133 S.Ct. at 2286. "[A]pproved extra-statutory documents [can be reviewed] only when a statute defines burglary not (as here) over broadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." Moreover, even where it is used, consultation of the ROC under the mod-cat approach is strictly limited to narrowing the record to identify the specific statutory provision related to the crime of conviction; the defendant's particular conduct or the underlying facts remain irrelevant.

EXAMPLE Assault Third Degree: Like, Descamps, Washington's Assault in the 3rd degree, RCW § 9A.36.031, sets forth 10 separately defined offenses, some of which can match generic immigration definitions and some which do not. The IJ is permitted to consult the ROC for the exclusive purpose of identifying which of the 10 provisions is the subject of respondent's conviction

Missing Element Statutes. Where the statute of conviction is missing an element of the generic immigration definition it can never be a match. The IJ is not permitted to consult the ROC to determine whether specific facts and/or conduct could supply it.

EXAMPLE: Since none of Washington's general assault statutes (RCW §§ 9A.36.011-41) require that the victim be a minor child, a conviction for any of these offenses will no longer risk triggering INA 237(a)(2)(E)(i). Regardless of whether the ROC indicates that the victim was, in fact, a minor, a general assault conviction is categorically missing an essential element of the BIA's generic definition of what constitutes a crime of child abuse set forth in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).[2] *See*, discussion, *infra*, II.A.

3. Underlying Rationale: Upholding the Defendant's Benefit of the Bargain

Moncreiffe and *Descamps* go a long way to righting the categorical approach "ship" (which had been dangerously listing). However, ensuring their full implementation by immigration courts will take strong, vigilant advocacy from immigration counsel. A foundational argument for pushing forward in the application of these cases is the primary rationale that *Descamps* cited in overturning *Aguila-Montes de Oca*, namely the benefit of the bargain.[3]

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[1] Under the modified categorical approach, the IJ can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. U.S.*, 544 U.S. 13, 20-21 (2005).

[2] Note, however, that a conviction for Assault of a child under RCW 9A.36.120-140 do have the victim's minor status as an element will sufficiently match the generic definition of a crime of child abuse and trigger this ground of deportation.

[3] The *Descamps* Court stated:

Ninety-four percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Plea bargaining is not an act of grace by the State, but a contractual agreement where both sides obtain a benefit. *See, e.g., United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir.2002) ("Plea agreements are contractual by nature and are measured by contract law standards."). Just as the defendant chooses rationally to avoid the risk of conviction at trial, the prosecution avoids testing its evidence before a jury. As the U.S. Supreme Court has explained, "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Frye*, 132 S. Ct. at 1407.

The courts have long recognized that honoring a plea bargain is a core concern in the application of the two-step categorical approach. In its seminal decision, *Taylor v. United States*, 495 U.S. 575 (1990), outlining this analytical framework, the Supreme Court stated, "in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* at 602.

The Ninth Circuit has also made clear that protecting a defendant's benefit from the plea bargain is a critical rationale underpinning the use of the modified categorical approach in determining whether immigration consequences attach to a conviction. In *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012), the court found that the respondent's conviction for sexual battery was not an aggravated felony sexual abuse of a minor, despite the fact that it was committed against a victim who was thirteen at the time of the offense. The circuit explained that it could not consider the victim's date of birth, which was stated in the information, because "limitations on the reach of modified categorical analysis are necessary to protect defendants from procedural unfairness." *Id.* at 1018. The circuit explained

> "Sanchez pled guilty to the sexual battery charge in exchange for the dismissal of all of the child- and minor-specific charges against him. He may have expected that this deal would spare him from the consequences of conviction for a child sex crime. To conclude that we may nevertheless penalize him based on the date of birth allegation would risk undoing the bargain he struck with the state prosecutor." *Id.*

This Board has also recognized the importance of preserving the benefit of the bargain for plea agreements when applying the modified categorical approach in *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 465 (BIA 2011).[4]

> Still worse, the *Aguila–Montes* approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary.495 U.S., at 601–602, 110 S.Ct. 2143. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.

Descamps v. U.S. 133 S.Ct. 2276, 2289 (2013)

[4] "[T]he hierarchical approach serves the important function of recognizing and preserving the results of a plea bargain, where the parties, with the consent of a trial judge, agree to allow the defendant to plead to a less serious crime. By recognizing that the evaluation of a crime involving moral turpitude is not an invitation to relitigate a conviction, *Matter of Silva-Trevino* indicates that it does not intend to allow Immigration Judges to undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.

In cases involving noncitizen defendants, the benefit of a plea bargain also includes avoiding the immigration consequences of convictions. The Supreme Court has explained that, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (2010). Moreover, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 1483 (citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. To prevent against deportation, the Supreme Court recognized that "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 130 S.Ct. at 1486.

4. CIMT Analysis: *Matter of Silva-Trevino* Overruled & Categorical Approach Controls

Although *Moncreiffe* and *Descamps* did not directly involve analysis of whether a conviction constitutes a crime involving moral turpitude (CIMT), the reinvigorated categorical analysis framework they set out also controls whether state convictions meet the relevant generic CIMT definition.[5] In its recent decision in *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), the Ninth Circuit rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Thus, in the Ninth Circuit, IJ's are no longer permitted to conduct an additional third step of analysis under *Silva-Trevino*, which let IJs look at "any additional evidence deemed necessary" *outside* of the record of conviction, to determine if a conviction was for a CIMT, when the traditional categorical and modified categorical steps were "inconclusive." Consequently, CIMT determinations are now again subject to the strict limitations set forth in *Moncrieffe* & *Descamps*.

> **EXAMPLE:** both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). Since intent to permanently deprive is NOT an element of Washington theft offenses (*State v. Komok*, 133 Wash 810 (Wash. 1989)), a theft conviction under any degree (RCW §§ 9A.56.030-050) is categorically not a CIMT - period. The analysis ends here and the IJ is not permitted to consult the ROC or any other documents since the facts or conduct involved in respondent's conviction is not relevant to the analysis since the statute does not set forth multiple, separately defined offenses.

B. How Do I Apply this Reinvigorated Categorical Approach to My Case? The Four Key Questions.

To determine whether a Washington (or other state) conviction triggers a conviction-based ground of deportation or inadmissibility, or bars relief from removal, immigration counsel should apply the categorical and modified categorical approach by using the following four questions.

NOTE: The categorical approach only applies to conviction-based inadmissibility and deportation grounds. The categorical approach **does not apply to conduct-based grounds** (e.g., INA § 212(a)(2)(C)'s 'reason to believe" involvement in drug trafficking). The categorical approach **also does not apply to** the limited universe of

[5] While *Silva-Trevino* added a third step to the two step categorical approach, it reaffirmed the use of the first two steps, recognized by *Taylor* and *Shepard* in determining whether a conviction is a CIMT: "(1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript." *Matter of Silva-Trevino*, 24 I&N Dec. at 704. Since this approach has been refined by the Supreme Court, the current approach should apply.

crime-related immigration provisions that are deemed to be "**circumstance specific**" under *Nijhawan v. Holder*, 129 S.Ct. 2294, 2301 (2009).[6].

1. What is the generic definition of the immigration provision at issue?

The generic definition is the legal standard to which your client's conviction will be compared. The INA, Supreme Court, Circuit Courts and the BIA create generic definitions. Some are well-defined while others are not. For example, both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

2. Do the elements in the statue of conviction categorically match the generic definition?

Counsel's task here is to identify the elements necessary to obtain a conviction under the state statute that is the subject of your client's conviction by consulting the statute and caselaw interpreting it, and compare those elements to the elements of the generic definition of the immigration provision at issue. The inquiry is not what a defendant's actual conduct was, but whether the "minimum conduct" that satisfies the elements of the conviction statue also satisfies the generic immigration definition. As the Supreme Court explained in *Moncrieffe*, "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S.Ct. at 1684.

Indivisible Statutes. If the state statute sets out just one unitary offense, it is indivisible. An indivisible statute is a categorical match with a generic immigration offense only if the elements that must be proved by the State to obtain a conviction match the elements of the generic offense. An element is a fact or finding *required* for conviction. In other words, a state offense is a categorical match only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 133 S.Ct. at 1684 (internal citations omitted). As the *Moncrieffe* Court noted, "whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Id.*

If all convictions under the state statute match the federal generic definition, then the conviction categorically matches (and triggers) the immigration consequence. However, if someone could be convicted under the statute for conduct that does not match the federal generic definition, or, where the state statute is missing an element of the generic definition, as it was in *Descamps*, it can NEVER be a categorical match to the generic definition. When this happens, *the analysis stops there*, *regardless of information in the record* since "overbroad" statutes can no longer be deemed to be categorical matches to the generic definitions and, thus, no resort to the modified categorical approach is permitted. In short, game over, respondent prevails.

Realistic Probability Test. It is important to note that there must be a "realistic probability" that the minimum conduct that *could* be prosecuted under the statute actually will be/has been. Applying "legal imagination to a state statute's language" is not enough. *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In *Gonzalez v. Duenas-Alvarez*, the Supreme Court dismissed an argument that a theft offense was broader than an aggravated felony, due to a non-statutory theory of liability. The Court held that "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.'" *Id.* In *Moncrieffe*, the Supreme Court cited examples of Georgia state caselaw demonstrating that social sharing of small amounts of marijuana without remuneration is prosecuted under the statute Mr. Moncrieffe had been convicted under. *See Moncrieffe*, 133 S.Ct. at 1686. However, the Ninth Circuit has held that statutory

[6] Under the circumstance specific approach, IJs are allowed to consider evidence outside the record of conviction related to the conviction to determine whether there is a match. The monetary threshold of $10,000 associated with the fraud aggravated felony under INA §101(a)(43)(M)(i), for example, requires a circumstance specific approach. For more analysis of this issue see *The Impact of Nijhawan v. Holder on Application of the Categorical Approach to Aggravated Felony Determinations*, available at www.nationalimmigrationproject.org.

language alone is sufficient to meet the "reasonable probability" test if it expressly reaches the conduct in question. *See U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Citing to state caselaw, where available, is always a useful precaution.

3. May the IJ go on to the modified categorical approach, and if so, for what purpose?

Divisible Statutes. An IJ may review the record of conviction *only* if the statute is divisible. A statute is "divisible" where the state statute "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S.Ct. at 1684. A divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S.Ct. at 2281. Thus, divisible here means that there are multiple, distinct crimes in one statute.

Layers of Divisibility. Sometimes statutes may have multiple layers of divisibility. The first layer is the statute as a whole, which contains multiple, separately described offenses. For example, in *Moncrieffe*, the respondent was convicted under a divisible Georgia statute which criminalized the possession, manufacture, delivery, distribution, possession with intent to distribute, etc. of marijuana. *Moncrieffe*, 133 S.Ct. at 1685. The Court consulted the record of conviction, specifically the plea agreement, to determine that Mr. Moncrieffe was convicted of possession with intent to deliver marijuana. *Id.* The second layer is whether this prong of the statute is itself divisible. In Georgia, one could be convicted under the "possession with intent to deliver marijuana" prong for social sharing of a small amount of marijuana without remuneration. Therefore the Court found that it was overbroad – but not further divisible. It did not examine any additional conviction records to determine what the respondent's particular circumstances were, finding that "ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to" the generic offense. *Id.* at 1687.

Means v. Elements. Immigration counsel should be alert to the not-always-clear distinction between statutory elements and the alternate *means* of committing the offense. The means of commission are not "elements." One test for an element may be if jury unanimity is required to find it and if the finding increases the maximum possible sentence that may be imposed. For example, the three prongs of the common law definition of "assault" in Washington are not different elements of an assault; rather, they are different means or ways of committing an assault. A jury need not unanimously decide which way the defendant committed the assault. *See*, discussion, *infra* at § II.A.

For What Purpose? The *sole purpose* of the modified categorical approach is to identify which statutory offense in a divisible statute was the subject of the conviction. "If one alternative (say, a building) matches an element in the generic [burglary] offense, but the other (say, an automobile) does not, the modified categorical approach permits [the IJ] . . . to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S.Ct. at 2281. Because the *Descamps* Court expressly overruled *Aguila-Montes*' evidence-based approach and reaffirmed the elements-based approach, IJ's are no longer required or permitted to review the conviction record to determine whether the facts of respondent's conviction can be made to match the generic definition at issue.

4. If the modified categorical approach applies, which documents can an IJ review?

In applying the modified categorical approach to determine which of the separately described offenses the Respondent was convicted of, the IJ can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. U.S.*, 544 U.S. 13, 20-21 (2005). Documents such as police reports and the certification for determining probable cause may be considered only if specifically stipulated or assented to by the defendant as providing the factual basis for the plea. *See e.g., Suazo Perez v.*

Mukasey, 512 F.3d 1222 (9th Cir. 2008) (permitting consideration of police reports and a statement of probable cause because the documents were specifically incorporated into the guilty plea when the respondent checked a box indicating that the Court could review those documents to establish a factual basis for the plea). Additionally, after *Olivas-Motta*, the IJ cannot review evidence outside of the record of conviction to determine whether a state conviction constitutes a CIMT offense.

C. Advocating for Your Client in Light of These Changes

1. Contesting Removal Charges

PRACTICE STRATEGY: The cases outlined above have dramatically altered the landscape for contesting removability for numerous Washington crimes that were previously thought to trigger certain grounds of removability. In order to provide your client with effective assistance, where s/he is facing removal for a criminal conviction, immigration counsel must conduct an analysis pursuant to the framework set forth above to determine what, if any, arguments are available to contest removability for the conviction-based removal charges at issue.

2. Advocating for Relief Eligibility: *Young v. Holder* Currently Under 9th Circuit Review

PRACTICE STRATEGY: Use the four-step analysis in Sec. I.B above to determine whether your client's conviction triggers conviction-based deportation/inadmissibility bars. Where it does not, counsel should be advocating to the Court that *Moncrieffe* and *Descamps* overruled *Young* and establish why, under the reconfigured categorical approach, the conviction does not preclude your client from establishing prima facie eligibility for relief. As of this writing, the Ninth Circuit panel reviewing the BIA's decision in *Almanza-Arenas* has requested briefing from the parties regarding the impact of *Moncrieffe* & *Descamps* on relief eligibility determinations. This supplemental briefing in *Almanza-Arenas is available at*:

- http://www.ilrc.org/files/documents/almanza_arenas_moncrieffe_and_young_brief.pdf

Since 2012, applicants for relief from removal in the Ninth Circuit have been laboring under the weight of *Young v Holder*, 697 F.3d 976 (9th Cir.2012), which required respondents to bear the burden of establishing by a preponderance of the evidence that a conviction *does not* trigger conviction-related deportability/inadmissibility (e.g., is *not* an aggravated felony). Under *Young*, the inquiry is treated as a factual investigation and also requires the respondent to produce all conviction records. Importantly, the applicant can never establish statutory eligibility for the relief sought if the legal record is "inconclusive." *See Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715; *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

Young appears to be wholly incompatible with *Moncrieffe* and *Descamps.* Even if *Young* is not entirely overturned, after reversal of *Aguila-Montes de Oca* and *Silva-Trevino* the universe of "inconclusive" conviction records to which *Young* could apply shrinks considerably to only those where two truly separate, statutory alternatives cannot be narrowed – a very uncommon occurrence in reality. For example, a controlled substance conviction under RCW 69.50.401 criminalizes manufacture, delivery or possession with intent to deliver a controlled substance, and is thus divisible. If the information and the plea agreement both said "possession or deliver marijuana" the record of conviction would be "inconclusive" because it could not be narrowed to one or the other. Given the specificity of plea agreements that is generally required under Washington law and practiced in Washington courts, these scenarios are likely to be rare. Additionally, as the *Moncrieffe* Court pointed out, "ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor." *Moncrieffe*, 133 S.Ct. at 1693.

II. Analysis of Washington General Assault Crimes Post-Moncrieffe & Descamps

PRACTICE TIP: Step One of analyzing whether any Washington (or other) State conviction triggers conviction-based removal grounds is to clearly identify the RCW statute at issue, obtain available conviction

records and clarify what removal grounds could be/are at issue (e.g., crime involving moral turpitude? Crime of violence? Crime of Child Abuse)?

Definition of Assault in Washington: In *Suazo-Perez v. Mukasey*, the Ninth Circuit recognized that "assault" in Washington is defined by common law and "can be committed in three ways: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; or (3) putting another in apprehension of harm." 512 F.3d 1222, 1225 (9th Cir. 2008). Moreover, "a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive." *State v. Stevens*, 127 Wash.App. 269, 277 (2005). Accordingly, throughout the assault statutes (RCW §§ 9A.36.011-041) whenever the term "assault" is used, it is defined using the three pronged definition above. Assault in the first, second, and third degrees each add elements to this base definition (for example, adding an intent to inflict bodily injury, or adding a deadly weapon). However, assault in the fourth degree is indivisible and includes only this base definition without any additional elements.

The following analysis applies the four-question framework outlined in Sec. I.B above to the listed Washington assault offenses.

A. Assault Fourth Degree – RCW § 9A.36.041

1. What Is the Generic Definition of the Immigration Provision at Issue?

a. Crime of Violence under 18 USC 16(a) – Applicable for Aggravated Felony (INA § 101(a)(43)(F)) or DV Deportation Ground (INA § 237(a)(2)(E)(i))

A misdemeanor "crime of violence" is defined by 18 U.S.C. § 16 as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The physical force necessary for a crime of violence must be intentional, violent and active in nature. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-1130 (9th Cir. 2006); *U.S. v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010).

b. Crime Involving Moral Turpitude – INA § 212(a)(2)(A)(i)(I) (inadmissibility) & INA § 237(a)(2)(A)(i) &(ii) (deportability)

A CIMT involves "base, vile, and depraved conduct that shocks the conscience and is contrary to the private and social duties man owes to his fellow men or to society in general." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (*en banc*). The BIA has stated that "it has long been recognized that not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender." *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). Simple assaults, for example, do not inhere moral turpitude. *See e.g., Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007) (recognizing that simple assaults are generally not considered to be CIMTs); *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009) (noting that assault and battery, without more, do not qualify as CIMTs). An assault statute which requires neither willful or intentional conduct nor conduct resulting in substantial bodily injury does not inhere moral turpitude. *Fernandez Ruiz v. Gonzales*, 466 F.3d 1121, 1166-68 (9th Cir. 2006).

In *Silva-Trevino* the Attorney General also set forth a definition of the CIMT term as a "crime [that] must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Silva-Trevino* at 699. Although overruled on other grounds in *Olivas-Mata*, *supra*, this definition remains in effect. Notably, crimes that involve a negligent mens rea (or no mens rea, such as DUI) can never be CIMTs.

The BIA and the Ninth Circuit have held that the presence of an aggravating factor which significantly increases the perpetrator's culpability may render a crime morally turpitudinous. *Matter of Sanudo*, 23 I&N Dec. at 971; *Morales-Garcia*, 567 F.3d at 1065. Aggravating factors include "the infliction of bodily harm upon a

person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer." *Matter of Sanudo*, 23 I&N Dec. at 971-72. These may place an assault in the scope of moral turpitude by reflecting "a level of immorality that is greater than that associated with simple offensive touching" because "the intentional or knowing infliction of injury on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection." *Id.* at 971, 972.

c. Crime of Child Abuse – INA § 237(a)(2)(E)(i)

Since being a minor or a child victim is not an element of any of Washington's general assault statutes (RCW § 9A.36.011-041), pursuant to *Moncreiffe* and *Descamps*, none of the assault statutes analyzed here will qualify as a crime of child abuse under the BIA's generic definition of child abuse set forth in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). This is true even if documents in the criminal record indicate that the victim was, in fact, a minor. *See also, Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) (holding that conviction under general sexual battery statute does not constitute sexual abuse of a minor since minor status was not an element of the offense). Even with a DV designation, the assault is categorically not a crime of child abuse because DV is defined as an assault "between family or household members," and "family or household members" is defined broadly to include non-minor children. *See* RCW § 26.50.010(1)-(2).

Note, however, a conviction under RCW §§ 9A.36.120-140 (Assault of a Child in the 1st, 2nd, and 3rd degrees) will categorically be classified as crimes of child abuse under the BIA's *Velasquez-Herrera* definition.

2. Do the Elements of Assault 4th Degree Categorically Match the Generic Definition at Issue?

a. Is assault fourth degree categorically a crime involving moral turpitude (CIMT)?

NO. Assault Fourth Degree is categorically *not* a CIMT. Assault in the fourth degree is considered an equivalent of simple assault. *State v. Hummell*, 68 Wash.App. 538, 541 (1993). Offenses characterized as simple assaults do not constitute CIMTs. *See Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007); *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009) (noting that assault and battery, without more, do not qualify as CIMTs).

Assault Fourth Degree is categorically *not* a CIMT even if it carries a Domestic Violence (DV) designation. Since the minimum conduct encompassed by the statute includes placing someone in apprehension of an assault, and does not require bodily harm, the mere addition of a domestic relationship does not inhere moral turpitude. The Board found in *Matter of Sanudo* that where the statute does not "require proof of the actual infliction of some tangible harm on the victim" the "existence of a current or former 'domestic' relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime." *Sanudo*, 23 I&N Dec. at 972-73. The existence of a domestic relationship alone is thus insufficient to establish moral turpitude where there is no requirement of actual or intended physical harm. *Id.* at 973; *See also Matter of Sejas*, 24 I&N Dec. 236, 237-38 (BIA 2007) ("an intentional touching of a domestic partner without causing or intending to cause physical injury does not involve moral turpitude"); *Galeana-Mendoza*, 465 F.3d at 1060 ("Given that force that is neither violent nor severe and that causes neither pain nor bodily harm may constitute battery [under the assault statute], the relationship element of [the statute] is not sufficient to, by itself, transform every battery under [the statute] into a crime categorically grave, base, or depraved.").

End of the Analysis – Respondent Prevails. Because assault fourth degree is categorically not a CIMT the IJ cannot consult the record of conviction since no resort to the modified categorical approach is permitted.

b. Is Assault Fourth Degree Categorically a Crime of Violence?

NO - NEVER. Because the minimum conduct necessary to convict—offensive touching—lacks as an element the use of force, it is categorically NEVER a COV under 18 USC 16(a). *See Suazo-Perez* at 1226 (9th Cir. 2008) (internal citations omitted) ("Under Washington law, fourth degree assault can be committed by nonconsensual offensive touching. We have held that 'conduct involving mere offensive touching does not rise to the level of a 'crime of violence' within the meaning of 18 U.S.C. § 16(a).' Accordingly, because the 'full range of conduct' covered by the Washington fourth degree assault statute does not 'fall[ ] within the meaning of' a 'crime of violence,' Suazo's conviction was not categorically a conviction for a 'crime of violence.'").

- **Therefore, Assault Fourth Degree can never be classified as an aggravated felony COV under INA §101(a)(43)(F), even where the sentence imposed was 365 days.**

- **Therefore, Assault Fourth Degree – DV can never trigger the DV-related deportation ground under INA 237(a)(2)(E)(i).**

3. May the IJ go on to the modified categorical approach?

NO - NEVER. Assault Fourth Degree is Indivisible. The three definitions of assault are not the *elements* of an assault offense since they need not be proven by the state. *See State v. Smith*, 159 Wn.2d 778, 788 (Wash. 2007) ("the common law definitions of 'assault' . . . do not constitute essential elements of the crime, [they] are merely descriptive of a term, 'assault,' that constitutes an element of the crime of [for example] second degree assault."). Therefore, pursuant to *Moncrieffe* & *Descamps*, assault fourth degree does not contain any relevant separately described offenses and, thus, is not "divisible" into the three prongs recognized by the Ninth Circuit; rather, it is an indivisible, unitary crime. Consequently, assault fourth degree can never be subject to the modified categorical approach. Respondent/defendant's actual conduct is irrelevant and the record of conviction can never be reviewed to determine whether it meets the generic definition of the crime-related immigration provision at issue. To the extent that *Suazo-Perez* required/permitted the IJ to go on to the modified categorical approach and consult the ROC to determine which of the three types of conduct were involved in the assault, it has been overruled by *Moncrieffe* and *Descamps*; **IJ's are no longer permitted to consult the record of conviction when analyzing whether assault fourth degree convictions constitute crimes of violence.**

B. Assault 3rd Degree – RCW § 9A.36.031

NOTE: The majority of assault third degree convictions involve § 9A.36.031(c), (d) & (f). As such, analysis of only these provisions is provided here. If your client's conviction involved one of the other seven prongs of this statute please consult WDA's Immigration Project staff for additional analysis of the provision at issue.

1. What Is the Generic Definition of the Immigration Provision at Issue?

- See § II.A.1, *supra*, for an analysis of relevant, possible generic definitions.

Additional COV Analysis Under 8 USC 16(b). In addition to the analysis of 8 USC 16(a) at §II.A, since Assault 3rd is a felony, it can also be classified as a COV if it triggers the second prong of 18 USC 16(b). A felony will be classified as a COV under 18 USC 16(b) if it "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." The BIA's definition of felony COV requires that "the nature of the crime—as elucidated by the generic elements of the offense—is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs." *Matter of Sweetser*, 22 I&N Dec. 709, 712-13 (BIA 1999).

2. Do the Elements of RCW § 9A.36.031(d) or (f) or (g) Match the Generic Definition at Issue?

a. RCW 9A.36.031 Is Divisible to Identify Statute of Conviction Only

Since the statute sets forth 10 separately described crimes, some of which may trigger conviction-based inadmissibility or deportation grounds, it is divisible and the modified categorical approach will apply. Thus, the IJ will per permitted to consult the record of conviction for the *sole purpose* of identifying which provision formed the basis of respondent's conviction. As outlined below, under the rules of *Moncrieffe* and *Descamps*, none of these three statutes below is further divisible. Thus, further reliance on the ROC is unwarranted.

b. Are RCW 9A.36.031(d)(, (f) & (g) are categorically CIMT offenses – even if designated DV?

- RCW §9A.36.031(d) & (f) (Negligent Assault)

NO – Never. Both of these provisions have a *mens rea* requirement of negligence and, as such, even if designated domestic violence crimes, they are categorically never CIMT offenses. An assault statute which requires neither willful nor intentional conduct does not inhere moral turpitude. *See Matter of Silva-Trevino, supra; Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1166-68 (9th Cir. 2006).

- RCW § 9A.36.031(g) (Assault of Law Enforcement Officer)

NO. Although ICE (and IJs) may resist, immigration counsel should strongly argue that this offense is categorically not a crime involving moral turpitude (CIMT). Assault 3rd degree has the same common-law elements as assault 4th degree: it can be committed by the minimum conduct of an offensive or unconsented touching only, and is not further divisible. As outlined above at § II.A.2(a), assault 4th degree is not a CIMT. The only extra element is the identity of the official victim. The BIA and Ninth Circuit have held that the presence of an "aggravating factor" which significantly increases the perpetrator's culpability may render a crime morally turpitudinous." *Sanudo*, 23 I&N Dec. at 971; *Morales-Garcia*, 567 F.3d at 1065. However, the addition of an element related only to the official status of the victim does not qualify as sufficiently aggravating. Contrast this statute with *Matter of Danesh* 19 I&N Dec. 669 (BIA 1988) where a conviction for an aggravated assault against a peace officer that was deemed a CIMT because the statute required a finding that the perpetrator had knowingly and intentionally caused bodily harm. *Matter of Logan* 17 I&N Dec. 367 (BIA 1980) where assault on an officer with a deadly weapon was involved, is also distinguishable, since the modified categorical analysis employed there is no longer permissible under *Moncrieffe* & *Descamps*.

c. Are RCW § 9A. 36.031(d), (f) or (g) Crimes of Violence under 18 USC 16?

A conviction under either of provisions (d) & (f) is categorically not a COV under either provision of 18 USC 16 since the *mens rea* is negligence. *See Leocal v. Ashcroft*, 543 US 1, 11 (2004) (a crime of violence requires a *mens rea* higher than negligence). As such they cannot trigger either the COV aggravated felony nor the DV-Deportation grounds, regardless of sentence imposed and/or whether they carry a DV designation.

Assault of an officer under § (c) cannot constitute a conviction pursuant to 18 USC 16(a) in light of the minimum conduct test. However, although the standard sentence range for this offense (without prior convictions) is less than one year, where a sentence of one year or more is imposed, a conviction would present significant risk of being deemed a COV aggravated felony under 18 USC 16(b)'s broader test for felony offenses.

d. Is RCW § 9A.36.031(d) a Firearms Offense under INA § 237(a)(2)(C)?

The language of the statute criminalizes the use of a " weapon or other instrument or thing likely to produce bodily harm". Traditionally, this element of the statute has been deemed to be divisible, thus permitting the IJ to consult the ROC to determine if respondent's conviction actually involved a firearm. Where it did it would be deemed to trigger INA § 237(a)(2)(C). *See Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992). However, in the post-*Moncrieffe* & *Descamps* world, this should no longer hold true. The minimum conduct necessary for a conviction does not require use of a firearm. This crime is not divisible, and the modified categorical approach cannot be applied. A firearm is not an element of the crime, and need not be proven by the State. Thus, it is categorically *not* a firearms offense, regardless of whether the conviction actually involved a firearm.

C. Assault in the 2nd Degree - RCW § 9A.36.021

1. What Is the Generic Definition of the Immigration Provision at Issue?

- See §II.A., *supra*, for an analysis of relevant, possible generic definitions.

- **Additional COV analysis under 8 USC 16(b).** In addition to the analysis of 8 USC 16(a) at §II.A., since Assault 2nd is a felony, it can also be classified as a COV if it triggers the second prong of 18 USC 16(b). See § II.B.

2. Do the Elements of Assault 2nd Categorically Match the Generic Definition at Issue?

a. RCW 9A.36.031 Is Divisible to Identify Statute of Conviction Only

Since the statute sets forth 8 separately described crimes, some of which may trigger conviction-based inadmissibility or deportation grounds, it is divisible and the modified categorical approach will apply. Thus, the IJ will per permitted to consult the record of conviction for the *sole purpose* of identifying which provision formed the basis of respondent's conviction. With the exception of RCW § 9A.36.021(E) (outlined below), under the rules of *Moncrieffe* and *Descamps*, none of th other provisions of the statute is further divisible. Thus, further reliance on the ROC is unwarranted for those provisions.

b. Are RCW § 9A.36.021(a), (b), (c), (d), (f), and (g) Categorically CIMTs & COVs?

YES. In *State v. Byrd*, 125 Wn.2d 707 (1995), the Washington Supreme Court held that specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree. This additional element to Washington's common law assault definition (see II.A.2.a, *supra*) renders a conviction under these prongs categorically CIMT offenses. *Matter of Sanudo*, 23 I&N Dec. at 971; *Morales-Garcia*, 567 F.3d at 1065. This additional element will also be sufficient to classify a conviction under one of these prongs as a COV under 18 USC 16(b). *See e.g., United States v. Jennen*, 596 F.3d 594, 600 (9th Cir. 2010) (holding that Washington's second degree assault with a deadly weapon is categorically a COV). This in turn makes it a categorical match to the COV aggravated felony provision at INA §101(a)(43)(F) *where the sentence imposed was one year or more* and will also satisfy the COV element of the DV deportation ground at INA § 237(a)(2)(E)(i) (regardless of sentence).

c. Is RCW § 9A.36.031(c) a Firearms Offense under INA § 237(a)(2)(C)?

NO. Since the language of the statute criminalizes the use of a "deadly weapon," and not specifically a "firearm," it is overbroad. Traditionally, this element of the statute has been deemed to be divisible, thus

permitting the IJ to consult the ROC to determine if respondent's conviction actually involved a firearm. Where it did it would be deemed to trigger INA § 237(a)(2)(C). *See Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992). However, in the post-*Moncrieffe* & *Descamps* world, this should no longer hold true. The minimum conduct necessary for a conviction does not require use of a firearm. This crime is not further divisible, and the modified categorical approach cannot be applied. A firearm is not an element of the crime, and need not be proven by the State. Thus, it is categorically *not* a firearms offense, regardless of whether the conviction actually involved a firearm.

d. Is RCW § 9A.36.021(e) a CIMT or a COV?

This Provision Is Not Divisible. This provision, which states "with intent to commit a felony, assaults another," is overbroad and, thus, categorically not a CIMT or a COV. Assault here is defined pursuant to the common law definition outlined above at §II. Under recent practice, which felony was involved would be/was deemed to be divisible since some felonies could be deemed, for CIMT purposes to be an "aggravating factor" that would turn the general "simple" assault into a CIMT (see §II.A.1.b above), and some felonies would ensure that the crime meets the COV definition at 18 USC 16(b). However, under *Moncrieffe* & *Descamps*, this is a single, indivisible crime that does not permit further consultation of the record to discern which felony was at issue in the conviction. And, since the minimum conduct test, which controls the analysis post-*Moncrieffe* and *Descamps*, does not qualify the offense categorically as either a CIMT or a COV.

Is RCW § 9A.36.021(e) a CIMT? **NO**. The minimum conduct required for a conviction under this prong is not categorically a CIMT because the element of "felony" encompasses a myriad of offenses including felonies which are *not* CIMTs, such as malicious mischief 2nd degree. See *Rodriguez-Herrera v. INS* , 52 F.3d 238 (9th Cir. 1995) The specific felony need not be proven by the State. *See* Washington Pattern Practice Jury Instructions, WPIC 35.11 (3d ED). Immigration counsel must argue that this is the end of the analysis under *Moncreiffe* & *Descamps*, the statute is not divisible as to this element and the actual felony at issue in respondent's conviction is irrelevant and further consultation of the record (beyond identifying the provision of the statute is unwarranted).

Is RCW § 9A.36.021(e) a COV? Arguably Not. If deemed a COV, a conviction under this statute will trigger removal as an aggravated felony where a sentence of one year or more was imposed and/or under the DV deportation ground where the conviction was designated DV. Note that both provisions of 18 USC 16 will be implicated in this analysis. However, even under 16(b)'s broader standard, the Ninth Circuit has ruled that "the force necessary to constitute a crime of violence must actually be violent in nature." *Ye v. INS*, 214 F. 3d 1128 (9th Cir. 2000). The minimum conduct required for a conviction under this statute is overly broad as to each of these elements of this provision since the general assault definition that controls does not categorically qualify under either provision and, importantly, there numerous felonies (e.g., malicious mischief, vehicle prowl, theft) that do not require the use of force, let alone violent force, to be convicted of the crime. For example, offensively touching someone (assault) while causing a diminution in the value of property (malicious mischief), taking someone else's property (theft), or unlawfully remaining on their car that you intended to wrongfully take something from do not require violent force.

D. Assault 1st Degree - RCW § 9A.36.011

Although divisible (it has three separately defined offenses), because intent to inflict great bodily harm is an additional statutory element of assault 1st degree, every provision of this crime will be classified as categorically a CIMT and COV.