WASHINGTON DEFENDER ASSOCIATION

PRACTICE ADVISORY | 7/25/2018 | Immigration Project

WHY STALKING UNDER RCW 9A.46.110 IS NOT GENERIC "STALKING"[1]

Generic Definition of Stalking

Stalking is among the domestic violence removal grounds at INA 237(a)(2)(E)(i) and is statutorily undefined. In *Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012) ("*Sanchez-Lopez I*"), overruled on other grounds by *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018) ("*Sanchez-Lopez II*")[1], the Board of Immigration Appeals (BIA) derived a generic definition of the deportable offense of a "crime of stalking."

In the absence of a statutory definition of the term "crime of stalking," the Board claims to employ the "ordinary, contemporary,[2] and common meaning," which "is necessarily informed by the term's legal usage." The BIA specifically said that the federal stalking statute, currently at 18 U.S.C. § 2261A (2006), was not dispositive because it was not referenced in the INA. The Board also made reference to federal model anti-stalking language created in 1993, but did not adopt that language in several important respects. The Board concluded that, at the time of enactment, existing statutes contained the "following common elements":

(1) conduct that was engaged in on more than a single occasion,
(2) which was directed at a specific individual,
(3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death.

Sanchez-Lopez I at 74. "A fourth element of the crime of stalking, on which there is no clear consensus in the State statutes, involves the consequence of such conduct." *Id*.

As to that fourth element, the Board found that there is no agreement as to whether a showing that the victim was, in fact, placed in fear of bodily injury or death is required; or, whether it is enough to show *only* that a reasonable person in the circumstances *would have been* placed in such fear; or whether generic stalking should require both. In both iterations of

[1] Mr. Sanchez was convicted under California Penal Code section 646.9(b) and received a two-year sentence. The BIA in 2012 affirmed the IJ's decision that his conviction was a match to the generic definition of stalking. A footnote indicates the IJ ruled the conviction was not an aggravated felony, presumably as a crime of violence, which DHS did not appeal. In 2018, reapplying its generic definition, the BIA held that section 646.9 is overbroad, because it only requires the target to be placed in fear for their *safety*, and does not require that the target be placed in fear of "bodily injury or death." *Sanchez-Lopez* at 256. Based on legislative history, the BIA found there is a realistic probability that this statute would be applied to conduct that falls outside the generic definition of stalking.

[2] In *Sanchez-Lopez II*, the BIA refused to broaden its definition of stalking to include this more contemporary meaning that is increasingly employed by a number of states, because the BIA must employ the "generic, contemporary meaning" of the statutory words "*at the time the statute was enacted*." *Id.* at 260-61 (emphasis added). Since this broader meaning has only evolved after 1996, it cannot be used to broaden the generic definition now.

Sanchez-Lopez, the Board found that it was not necessary to resolve the question because "the California stalking statute, like the Federal stalking statute and those of several other States, requires proof that both the subjective and objective consequences of the defendant's stalking conduct have been established. We therefore leave that issue to a future case." *Id*.; *see also Sanchez-Lopez II*, at 258 n. 4.

RCW Stalking Is Overbroad and Indivisible

First, RCW stalking at 9A.46.110(1)(b) is broader than the federal generic definition under the fourth, "consequence" element. While the statute does require both that the victim be placed in fear *and* that the fear be "one that a reasonable person in the same situation would experience, the fear under 9A.46.110(1)(b) can be of injury to "the person, another person, *or property* of the person or of another person." This is explicitly broader than the *Sanchez-Lopez* requirement, which is limited to fear of injury to a *person*. Moreover, "person" or "property" are together given as one element in Washington pattern jury instructions for stalking, thus that element is indivisible. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.21 (4th Ed.) (Oct. 2016 Update).

The Washington statue is also broader than the Board's generic stalking definition as relates to *mens rea* in the third element:

- Under 9A.46.110(2)(b) "It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker *did not intend* to frighten, intimidate, or harass[3] the person," and
- Under 9A.46.110(1)(c) it is sufficient if the stalker (ii) "[k]nows or *reasonably should know* that the person is afraid, intimidated, or harassed *even if the stalker did not intend* to place the person in fear or intimidate or harass the person" (emphasis added).

"Should have known" is a negligence standard. "A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur …" RCW 9A.08.010(1)(d). Even the *knowledge* required by RCW 9A.46.110 (1)(c)(ii) is a lesser *mens rea* than intentional, and Washington has statutorily encoded the difference.[4]

[3] RCW Harassment is defined at RCW 9A.46.020. Misdemeanor harassment includes a threat to cause damage to property and has several other modes of commission, in addition to knowingly threatening bodily injury.

[4] In United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017), a drug trafficking case, the 9th Circuit ruled that under both federal and state criminal law a person may be convicted either as a principal or for aiding and abetting. Aiding and abetting liability is implicit "in every criminal charge," and every jurisdiction has "expressly abrogated the distinction." *Id.,* slip op. at 11. Federal law requires a *mens rea* of specific intent for conviction for aiding and abetting, whereas Washington requires merely knowledge. RCW 9A.08.020(3)(a).

A Washington jury need not distinguish between principals and accomplices, so no statute is "divisible" between those roles. The Washington law has a more inclusive (lower) *mens rea* requirement for accomplice liability than its federal analogue (knowledge vs. specific intent). If specific intent is an element of generic stalking

Compare RCW 9A.08.010(1)(a) to (b). Therefore the offense described in 9A.46.110(1)(c), if indivisible, does not require intent to intimidate.[5]

Washington pattern jury instructions for gross misdemeanor stalking show that the offense in indivisible. They describe intending to intimidate, and knowing or reasonably should have known that it would cause fear or harassment, *as two alternatives within one element,* about which "the jury need not be unanimous as to which of [of the] alternatives. . . has been proved beyond a reasonable doubt," WPIC 36.21. Therefore these are alternate means of committing one crime, under *Mathis v. United States*, 136 S. Ct. 894 (2016) and *Almanza-Arenas v. Lynch* 815 F.3d 469 (9th Cir. 2016) (en banc).

Conclusion

Since the BIA's definition of stalking requires, without qualification, "intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death," RCW Stalking ought to be deemed *categorically not* a match for the "generic" stalking ground of removal as the Board has defined it. RCW 9A.46.110 is broader because it encompasses more than the federal generic definition's third and fourth elements. Regarding the fourth element, at a minimum, the statute encompasses fear of property damage as sufficient and does not require fear of bodily injury as an element. The statute also does not require "intent to cause that individual or a member of his or her immediate family to be placed in fear" of injury or death, the third element of stalking as defined in *Sanchez-Lopez* at 74.

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as defined by the BIA, then the RCW statute may be broader for yet an additional reason if it only requires a *mens rea* of "knowingly."

[5] RCW Stalking is arguably therefore also not a crime involving moral turpitude (CIMT) or deportable crime of DV. *See Matter of Perez-Contreras*, 20 I&N Dec 615 (BIA 1992) (finding negligence is too low a *mens rea* to involve moral turpitude). Negligence is also too low to be a "crime of violence" under 18 USC 16(a). *Leocal v. Ashcroft,* 543 U.S. 1, 7, 125 S. Ct. 377 (2004).