WASHINGTON DEFENDER ASSOCIATION

PRACTICE ADVISORY |4/15/2019 | **WDA Immigration Project**
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Recent case-law on Immigration Consequences of Convictions for Assault in the Second Degree, RCW § 9A.36.021

NOTE: This advisory is intended to assist immigration attorneys representing clients in immigration proceedings. Criminal defenders should first consult WDA Immigration Project staff and our advisory for clients in criminal proceedings facing felony assault charges.

I. Washington Assault in the Second Degree (A2): Potential Removal Grounds and WDA's Immigration Project Advice.

Until recently, ICE has been able or has attempted to charge class B felony, RCW § 9A.36.021 Assault Second Degree convictions under one or more of these removal grounds:

- **An aggravated felony crime of violence** (only possible if sentence is 12 months);[1]
- **A crime involving moral turpitude (CIMT)**;[2]
- A deportable **crime of domestic violence** (where designated a DV offense).[3]

Although WDA's Immigration Project (Immigration Project) advice is tailored to the specific circumstances of an individual's case, the following has been general guidance for defense counsel when negotiating guilty pleas on A2 charges for lawful permanent residents (LPRs) – in order of priority:

1. Seek a reduction to RCW § 9A.36.041 Assault 4 degree (gross misdemeanor), ideally with a sentence of 180 days or less, regardless of suspension;
2. Seek a reduction to Assault 3 degree (class C felony) pursuant to negligence prong, RCW 9A.36.031 §§ d or f, whether DV or not and regardless of sentence.[4] Th e addition of a sexual motivation enhancement pursuant to RCW 9.94A.835 adds an element, and creates some risk that ICE may charge an Assault 3 with sexual motivation (A3-SM) conviction as a crime involving moral turpitude (CIMT). However, in a well-reasoned 2017 unpublished decision, the Board of Immigration Appeals (BIA) held that A3-SM is not a CIMT.
3. If one had to plea to Assault 2 (A2), try to plead to Assault 2 under §(e), "with intent to commit a[ny] felony," ideally without specifying a felony, or specifying a "safe" nonviolent one. This best

[1] INA § 101(a)(43)(F); 237(a)(2)(A)(iii)
[2] § 237(a)(2)(A)(i)
[3] § 237(a)(2)(E)(i)
[4] See *Matter of Perez-Contreras* 20 I&N Dec 615 (BIA 1992) (negligence *mens rea* insufficient to be a CIMT); *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377 (2004) (negligence *mens rea* insufficient to be crime of violence under 18 USC §16)

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preserved the argument that A2 is not a CIMT, nor a crime of violence, since assault offenses under RCW § 9A.36 are common law assaults that include minimal conduct equivalent to a simple assault; and since the intended felony under §(e) could be a felony such as negligent Assault 3 or Malicious Mischief 2[5] that are neither crimes of violence nor CIMTs.[6]

II. Under the Categorical Analysis Framework, Assault 2 Is Not Divisible.

In *United States v. Robinson*, 869 F.3d 933, 941 (9th Cir. 2017), the Ninth Circuit analyzed whether Washington's A2 constituted a crime of violence under a federal sentencing guideline that is consistent with the crime of violence definition used for immigration purposes, 18 USC § 16(a). [7] Assault 2 has seven subsections, (a)-(g). The court held that it is clear that these are "alternate means" of committing a single crime, and that Assault 2nd is not divisible under the traditional categorical approach reaffirmed in *Mathis v. United States,* 136 S. Ct. 894 (2016).

The *Robinson* Court looked to Washington law, citing *State v. Smith*, 159 Wash.2d 778, 154 P.3d 873 (2007) (en banc) which held that that "the second degree criminal assault statute articulates a single criminal offense " and that each subsection" represents an alternative means of committing the crime of second degree assault." citing *Smith* at 876, *Robinson*, at 939.[8] *Robinson* overruled *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010) as "clearly irreconcilable" with the Supreme Court's decisions in *Descamps* and *Mathis,* since *Lawrence* failed to consider if whether § 9A.36.021 was divisible. *Robinson*, at 936–37.[9]

The Ninth Circuit refuted the government's argument that Washington's substantial evidence requirement for each alternative means presented to a jury is proof that these alternatives are

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[5] *Rodriguez-Herrera v. INS* 52 F.3d 238 (9th Cir.1995) (MM2 is not a CIMT.)

[6] This strategy did not necessarily reduce the likelihood that A2 would be charged under one of the above grounds by ICE but, at least, best tracked arguments for appeal based on the minimum conduct covered.

[7] *United States v. Robinson*, 869 F.3d 933, 937–38 (9th Cir. 2017):

> Guidelines section 2K2.1 defines a "crime of violence," in relevant part, as "any offense ... that ... has as an element the use, attempted use, or threatened use of physical force against the person of another." . . . (incorporating by reference the definition of "crime of violence" given in U.S.S.G. § 4B1.2(a)). As used in this definition, "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (interpreting identical language used in 18 U.S.C. § 924(e)(2)(B)(i), a provision of the ACCA)

[8] *Robinson* cited *State v. Peterson*, 168 Wash.2d 763, 230 P.3d 588 (2010) (en banc), *State v. Owens*, 180 Wash.2d 90, 323 P.3d 1030, 1032 (2014) (en banc)("[W]hen there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required." *Robinson* at 939, and *State v. Fuller*, 185 Wash.2d 30, 367 P.3d 1057 (2016) (en banc). *Robinson at* 940-941. The Court also referred to Washington's pattern jury instructions for criminal cases (WPIC) for Assault 2, WPIC 35.12. *Id at* 939-40.
See also United States v. Slade, 873 F.3d 712, 716 (9th Cir. 2017).

[9] The court overruled *United States v. Jennen*, 596 F.3d 594 (9th Cir. 2010) on the very same basis, in *United States v. Slade*, 873 F.3d 712, 715 (9th Cir. 2017)

functionally separate crimes. *Id.* at 941. In so doing the court stated, "the Supreme Court has never held that a requirement that 'substantial evidence' support each relied-upon statutory alternative demonstrates that the statutory alternatives are separate crimes. Instead, what matters is whether a jury must agree unanimously on a particular listed alternative." *Id.* This is a particularly useful explicit finding, since it is applicable to all of Washington's many alternate means offenses.

In Washington there is no statutory definition of "assault." The common law definition is employed.[10] This base definition reaches intentional touching that is merely offensive.[11] "Common law definitions of assault listed in a jury instruction are not alternative means for committing the crime, but rather define an element of the crime." *State v. Smith*, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007). Therefore the assault definition itself is not divisible.

III. Under the Categorical Analysis Framework, Assault 2 Is Not a "Crime of Violence."

Robinson held that A2 under RCW § 9A.36.021 is broader than the crime of violence definition used in federal sentencing guidelines (USSG), under USSG § 4B1.2(a).[12] That definition is nearly identical to 18 USC §16(a),[13] the definition currently used for crime of violence-related removal charges, except that it is restricted to the use, attempt or threat of force only against persons, and not to "persons or property" as in the §16(a) definition. One key passage reads:

> [A] person commits second-degree assault if "he or she ... [w]ith intent to commit a felony, assaults another." Robinson argues that this subsection provides a means of committing second-degree assault that does not necessarily require the actual, attempted, or threatened use of force capable of causing physical pain or injury to another. The government did not dispute Robinson's argument before the district court or on appeal,[8] and we agree with Robinson that subsection (1)(e) criminalizes conduct that is not covered by section 2K2.1's definition of "crime of violence." . . .
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> > N.8 In its answering brief, the government states: "Because Washington's second-degree assault statute includes one variant that does not require 'physical force' within the meaning of Johnson (subsection (1)(e)), the statute as a whole does not categorically define a crime of violence under a *Taylor* analysis."

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10 *Peasley v. Puget Sound Tug & Barge Co*., 13 Wash.2d 485, 504, 125 P.2d 681 (1942)

11 *Id; State v. Villanueva-Gonzalez,* 180 Wash. 2d 975, 982, 329 P.3d 78, 81 (2014)

12 Incorporated in § 2K2.1; see n. 7, *supra*.

13 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. 18 USC §16. (Note: 18 USC § 16(b) was found void for vagueness in *Sessions v. Dimaya*, 138 S. Ct. 1204, (2018))

Robinson, at 938. [14]

Just as A2 reaches more conduct than does the generic federal definition of a crime of violence under USSG § 2K2.1, for the same reason it must cover more conduct than does 18 USC § 16(a). If assault with intent to commit a felony does not necessarily require the actual, attempted, or threatened use of force capable of causing physical pain or injury, a proposition the Court endorsed, it cannot be a crime of violence under 18 USC § 16(a). The *Johnson* language that "the phrase 'physical force' means violent force," *Johnson*, 559 US at 140, applies equally to the almost identical §16(a) definition used in immigration proceedings.[15] *Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 821 (BIA 2016).[16]

The 18 USC § 16(a) crime of violence definition is used in two key removal grounds: for aggravated felony crimes of violence and crimes of domestic violence.[17] 18 USC § 16(a) is distinct from the sentencing guidelines definition analyzed in *Robinson* only in that § 16(a) also extends beyond persons, to also include use of force against property. This should be of no consequence, since A2 clearly pertains only to the crime against a person portion of the definition.

In an unpublished BIA case from January 31, 2018, DHS conceded that an A2 "DV" conviction was not a removable crime of domestic violence under § 237(a)(2)(E)(ii).[18]

IV. Under the Categorical Analysis Framework, There is a Strong Argument that Assault 2 Is Not a Crime Involving Moral Turpitude.

Washington assault by itself, under its common law, baseline definition, is not a crime involving moral turpitude (CIMT).[19] Since A2 can be committed with intent to commit *any* felony, turpitudinous or

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[14] *See also United States v. Vederoff,* 1244–46 (9th Cir. 2019) (RCW Assault 2 also does not qualify as "aggravated assault" under the enumerated offenses clause of the same USSG, because, unlike most states and like only five other states, Washington's "assault with intent to commit a felony" is unrestricted as to the kind of felony intended, or whether it must be committed *in the course of* committing a felony); also *United States v. Door,* 917 F.3d 1146, 1154 (9th Cir. 2019)(§ 9A.36.021(1) is not a crime of violence under the same USSG's former "residual clause" because "the offense, in the ordinary case, does not "present a serious potential risk of physical injury to another," because it includes intent to commit any non-violent felony *Id*.)

[15] *Johnson v. United States*, 559 U.S. 133, 140–41, 130 S. Ct. 1265, 1271 (2010). See *United States v. Castleman*, 572 U.S. 157, 165, 134 S. Ct. 1405, 1412, N4 (2014)(distinguishing and affirming continued validity of *Matter of Velasquez*); *Rodriguez-Castellon v. Holde*r, 733 F.3d 847, 853–54 (9th Cir. 2013) (quoting *Johnson* and applying it to § 16(a)); *United States v. Garcia-Lopez*, 903 F.3d 887, 892 (9th Cir. 2018); *Solorio-Ruiz v. Sessions,* 881 F.3d 733, 736–37 (9th Cir. 2018), and others.

[16] Among BIA decisions on § 16(a), see *Matter of Velasquez,* 25 I&N Dec. 278, 282 (BIA 2010) ("We have previously held that *Johnson* controls our interpretation of a crime of violence under § 16(a)" *id*.); *Matter of Kim*, 26 I. & N. Dec. 912, 914 (BIA 2017); *Matter of Guzman-Polanco*, 26 I. & N. Dec. 806, 807 (BIA 2016); *Matter of Cervantes Nunez*, 27 I. & N. Dec. 238, 240 (BIA 2018).

[17] See n.13, supra

[18] *In Re: Rasheed A. Osman*, 2018 WL 1872000, at *3, N1 (Jan. 31, 2018) (The respondent was represented by Northwest Immigrant Rights Project attorney Emma Rekart.)

[19] *See Matter of Danesh*, 19 I. & N. Dec. 669, 671 (BIA 1988), *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992), *Matter of Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996) (simple assault not a CIMT).

not, the minimum conduct required to violate the statute is on its face is broader than any definition of moral turpitude. *See, e.g. Matter of Short* 20 I&N Dec. 136 (BIA 1989). In *Short*, the BIA held:

> Accordingly, **if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.** Moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude. As such, there must be a finding that the felony intended as a result of the assault involves moral turpitude.

Id at 139 (boldface added).[20]

Washington's A2 is broader than similar statutes of most other states. According to the Ninth Circuit only five other states have a similar, assault with intent to commit a felony statute, where the intended felony is unrestricted as to type or kind, or where the assault itself does not have be committed *in the course of committing* a felony.[21] And, the intent to injure is not an element of RCW second degree assault.[22]

The crime involving moral turpitude (CIMT) analysis is separate from "crime of violence" analysis and the one does not control the other. However, some of the conclusions about the nature of the minimum conduct are arguably applicable, since under the categorical approach it is presumed that "the state conviction 'rested upon ... the least of th[e] acts' criminalized by the statute" *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

The Court accepted and the government did not dispute, that the assault with intent to commit a felony subsection "provides a means of committing second-degree assault that does not necessarily require the actual, attempted, or threatened use of force capable of causing physical pain or injury to another. The government did not dispute Robinson's argument before the district court or on appeal …." *Robinson* at 938. In *United States v. Door*, 917 F.3d 1146, 1154 (9th Cir. 2019) the Court found explicitly that A2 under § 9A.36.021(1)(e)

> includes the intent to commit any non-violent felony offense. The "assault" may also be non-violent because Washington defines assault broadly to include "an intentional touching ... that is harmful or offensive regardless of whether any physical injury is done to the person." . . . Thus,

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[20] *But cf. Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1196 (BIA 1999), *affirmed in Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009). *Lopez-Meza* did not deal with assault or overturn *Short*, but distinguished it from a turpitudinous combined DUI-suspended license offense, where it allowed the alchemical "building together" of separately non-CIMT acts to attain moral turpitude. *Lopez–Meza* at 1196.

[21] *Vederoff* at 1244–46. A2 is broader than the generic definition of "aggravated assault." *Id.* at 1246.

[22] S*tate v. Morreira* (2001) 107 Wash.App. 450, 27 P.3d 639; *State v. Fryer* (1983) 36 Wash.App. 312, 673 P.2d 881.

a defendant may violate Wash. Rev. Code § 9A.36.021(1)(e) in a way that poses no serious risk of physical injury to others.

Id.

Therefore RCW § 9A.36.021 ought not to be deemed a CIMT. It is precisely like the offense which the Board distinguished in *Lopez-Meza* as being merely "a simple assault with intent to commit a felony of unproven seriousness."[23]

Neither *Robinson*, *Slade*, *Door* or *Vederoff* mention "realistic probability."[24] This is undoubtedly because § 9A.36.021(1)(e)'s minimum culpable conduct explicitly reaches a non-violent, common-law assault with intent to commit a non-violent felony. In the 9th Circuit, realistic probability is met where "[t]he state statute's greater breadth is evident from its text." *United States v. Grisel,* 488 F.3d 844, 850 (9th Cir. 2007)(en banc).

V. Conclusion

RCW § 9A.36.021 – Assault in the second degree, and all its subsections, must be treated as one single crime in the immigration context as well as the federal sentencing context. The categorical analysis methodology is the same in the federal sentencing and immgration removal contexts.

Washington offenses that have been found under state law to have alternate means are not divisible into separate crimes on that basis, even though there is an evidentiary "sufficient evidence" standard required to present each alternate means theory to a jury.

Using the categorical approach *Robinson* provides virtually irrefutable arguments that A2 is not a crime of violence under 18 USC § 16, and is therefore neither a deportable crime of domestic violence nor an aggravated felony COV, and a strong argument that it is not a CIMT.

Notwithstanding the clear indivisibility of § 9A.36.021, if a plea to A2 were unavoidable and had not yet been entered, the optimum way to plead is under § (e), the "assault with intent to commit a felony" prong. One would frame it to the extent possible as a Washington simple assault (e.g., by the battery of an offensive touching) with an unspecified intended felony, or a specified non-violent felony such as Malicious Mischief 2 RCW 9A.48.080.

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[23] *Lopez-Meza* at 1196 (Distinguishing assault in *Short*, *supra*, from unrelated DUI offense).

[24] *See Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193, 127 S. Ct. 815, 822, 166 L. Ed. 2d 683 (2007)("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.") *But see Matter of Ferreira*, 26 I. & N. Dec. 415, 415 (BIA 2014).