OBSTRUCTION OF JUSTICE

Pugin v. Garland and California Offenses

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I. Overview

Conviction of "an offense relating to obstruction of justice" is an aggravated felony for immigration purposes if a sentence of a year or more is imposed. INA § 101(a)(43)(S).

In *Pugin v. Garland*, No. 22-23 (June 22, 2023), the Supreme Court overturned the Ninth Circuit's definition of "obstruction of justice," but failed to provide a clear definition of its own. See a brief summary of *Pugin* at **Part II**, below, and more in-depth discussions online.[1]

Based on *Pugin*, some California offenses that were considered safe even with a year's sentence imposed now will be charged as obstruction of justice aggravated felonies. This includes at least Penal Code §§ 32, 69, several offenses between §§ 92 and 183 including 136.1, 140, 148, 167, Vehicle Code § 10851, and perhaps PC § 4532, VC 2800.2, 20001. See **Part III**, below.

Criminal defenders should avoid conviction of the above offenses if the immigrant defendant will be sentenced to a year or more on a single count. See **Part IV**, below, on sentencing strategies that have effect in immigration proceedings. Immigration advocates should try to hold off filing affirmative applications in this situation, and should investigate post-conviction relief to vacate the conviction[2] or wait for more clarity in the law.

ILRC later will publish an advisory or briefings with arguments that some of the above offenses are not obstruction of justice even under *Pugin*. Removal defense advocates will make these arguments but also should start now to try to vacate the risky conviction or sentence. In the Ninth Circuit, advocates also can argue that *Pugin* does not apply retroactively to convictions from before September 11, 2018, when the BIA published *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018)—although there is no guarantee that the argument will prevail.

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[1] See analysis of *Pugin* in Merle D. Kahn, "Obstruction of Justice and 'Obstruction-Adjacent' Offenses" (July 9, 2023) in *Top of the Ninth: A Review of Ninth Circuit and BIA Decisions*, https://topoftheninth.com/ and at https://www.scotusblog.com/case-files/cases/pugin-v-garland/. The NIPNLG plans to publish an Advisory.

[2] See ILRC Practice Advisory, *Overview of California Post-Conviction Relief for Immigrants* (July 2022), https://www.ilrc.org/resources/overview-california-post-conviction-relief-immigrants; ILRC manual, *California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (Jan. 2023), https://store.ilrc.org/publications/california-post-conviction-relief-immigrants-how-use-criminal-courts-erase-immigration; and materials at www.ilrc.org/post-conviction-relief-for-immigrants.

II. The Supreme Court Decision in *Pugin*

Conviction of "an offense relating to obstruction of justice" is an aggravated felony if a sentence of a year or more is imposed. INA § 101(a)(43)(S), 8 USC § 1182(a)(43)(S). The Board of Immigration Appeals (BIA) and various federal courts have disagreed on the federal ("generic") definition of obstruction of justice.

The Ninth Circuit has held that obstruction requires the intent to interfere with a *pending* (already existing) investigation or proceeding. It found that Penal Code § 32, accessory after the fact, is not obstruction because it can be committed before an investigation or proceeding has begun.[3] For example, accessory includes helping a person who you know has committed a felony to escape possible arrest. There is no requirement that an investigation already exists. The court also found that Penal Code § 136.1(b)(1), non-violent witness dissuasion, is not obstruction because it includes trying to persuade a witness not to file an initial police report.[4]

Other circuit courts of appeals disagreed with the Ninth Circuit and deferred to the BIA's definition of obstruction. The BIA held that obstruction does not require a pending, but only a "foreseeable," investigation or proceeding. It held that §§ 32 and 136.1(b)(1) are obstruction.[5]

In *Pugin v. Garland*, the Supreme Court resolved the split and not in a good way. The Court rejected the Ninth Circuit's requirement of a pending investigation or proceeding and did not appear to incorporate the BIA's requirement of a "foreseeable" one. Clearly obstruction includes an offense with an element of "corruption" or intent to interfere with a legal process, but beyond that, it failed to articulate limits on definition of obstruction and implied that the statutory term "relating to" obstruction of justice may be expansively interpreted. It appeared to agree that misprision of felony under 18 USC § 4, which requires failing to report or "concealing" that a felony was committed, is not obstruction. *Pugin* *7, n. 2.

As Justice Sotomayor, joined by Justices Kagan and Gorsuch, stated in the dissent, "By eliminating a central constraint on what qualifies as 'an offense relating to obstruction of justice' under §1101(a)(43)(S), while providing zero affirmative guidance as to what sorts of offenses are a match for that category, the majority leaves lower courts and the Board of Immigration Appeals without direction and invites the Government to advance far-ranging constructions of §1101(a)(43)(S), that bear little resemblance to core obstruction of justice." *Pugin* at *18.

This is a critical lack for immigrant defendants and their counsel because they need to know which criminal charges are likely aggravated felonies. As the dissent said, it invites over-charging in immigration proceedings and resulting litigation. Remember, however, that an

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[3] See *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056-58 (9th Cir. 2020) holding that PC § 32 is not obstruction of justice and declining to follow *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018).
[4] See *Cordero-Garcia v. Garland*, 44 F.4th 1181 (9th Cir. 2022), holding that PC § 136.1(b)(1) is not obstruction and declining to follow *Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019); reversed and remanded in *Pugin v. Garland* at *1.
[5] See BIA decisions above and see *Pugin v. Garland*, 19 F.4th 437, 449 (4th Cir. 2021) where the Fourth Circuit deferred to the BIA's definition of obstruction set out in *Matter of Valenzuela-Gallardo II, supra*. The court held that Virginia accessory after the fact is obstruction even though it does not require a pending investigation or proceeding. The Supreme Court affirmed the Fourth Circuit in its *Pugin* decision.

offense can be an aggravated felony as obstruction *only if* a sentence of a year or more was imposed. See **Part IV**, below, for a discussion of immigration-effective sentencing strategies.

III. California Offenses That May be Charged as Aggravated Felonies under *Pugin*

Convictions of the following offenses are likely to be charged as aggravated felonies in immigration proceedings if a sentence of a year or more was imposed. Advocates will argue that some offenses are not obstruction, but criminal defense counsel and immigration advocates considering affirmative filings must conservatively assume these will not prevail.

For a more complete discussion of the other immigration consequences for these offenses, criminal defenders and immigration advocates can register for the free ILRC *California Chart*.[6] (*Pugin* updates will not appear in the *Chart* until August 2023.) Note that several of the below offenses are immigration neutral as long as a sentence of a year or more is not imposed.

Note: Pre-2015 Misdemeanors*.* Since January 1, 2015, a California "one year" misdemeanor has had a cap of 364 days.[7] Thus, no misdemeanor conviction from 2015 on can be an aggravated felony as obstruction. But misdemeanor convictions from before 2015 could have a year imposed. If they did, they must be evaluated as possible obstruction aggravated felonies.

PC § 32 and Vehicle Code § 10851. Accessory after the fact and vehicle taking/ accessory. Assume that PC § 32 and VC § 10851 always are aggravated felonies (AFs) if a year or more is imposed, and that Ninth Circuit decisions holding that these offenses are not obstruction of justice are reversed.[8]

Without a year or more, however, § 32 and § 10851 have real immigration advantages*.* Section 32 does not take on the character of the principal's offense and is a good substitute plea, including when it is a legal fiction, to charges of drug offenses, domestic violence, etc. In the Ninth Circuit, PC § 32 is not a crime involving moral turpitude (CIMT). (However, the BIA has held that accessory after the fact is a CIMT if the principal's offense was one, and that rule might be followed outside the Ninth Circuit. Best practice is to plead to a specific underlying felony that is not a CIMT, e.g., burglary, in case the person ends up in another circuit.) Section 10851 is not a CIMT in any jurisdiction because it includes a "true" temporary taking (joyriding). Neither offense is a crime of violence. See discussion and citations in the *California Chart.*

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[6] To register for this free resource, go to https://calchart.ilrc.org/registration/.

[7] While PC § 18.5(a) provides that the 364-day limit extends to convictions from before 2015, the Ninth Circuit held that this retroactivity clause does not have effect in federal proceedings. *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021). Further, § 18.5(a) governs potential, not imposed, sentence.

[8] The Ninth Circuit held that California accessory after the fact, PC § 32, is not obstruction of justice. See *Valenzuela-Gallardo v. Barr*, *supra*. But in *Pugin* the Supreme Court held that accessory after the fact under a similar Virginia statute is obstruction. The Ninth Circuit held that VC § 10851, vehicle-taking, would have been an AF as theft with a year's sentence, but for the fact that § 10851 also includes accessory after the fact, which is neither theft nor obstruction. Because § 10851 is not divisible between accessory and theft, a conviction never is an AF. *Lopez-Marroquin v. Barr*, 955 F.3d 759 (9th Cir. 2020). We must assume conservatively that *Pugin* reverses both *Valenzuela Gallardo* and *Lopez-Marroquin.*

PC § 69, 148. Resisting arrest. Assume that PC §§ 69 and 148 are always AFs if a year or more is imposed. (While § 148(a) is a misdemeanor, other sections of § 148 can be felonies.) Regarding other consequences, sections of PC 69 and 148 have been held not to be CIMTs or crimes of violence. See *California Chart.*

PC § 136.1(b)(1). Witness dissuasion (trying to persuade a victim or witness not to file a police report). The Supreme Court considered this offense in reviewing the companion case to *Pugin*, *Cordero-Garcia v. Garland*, 44 F.4th 1181 (9th Cir. 2022), which had held that it was not obstruction. The Supreme Court remanded to the Ninth Circuit to rule on § 136.1(b)(1) in light of its opinion. Upon remand advocates will argue that § 136.1(b)(1) is not obstruction but defenders must assume that it will be so held and must avoid a sentence of a year or more.

Without a sentence of a year or more, felony § 136.1(b)(1) can be a useful alternative plea to a serious domestic violence or other charges, because it is a strike. It has been held not to be a CIMT and by definition it is not a crime of violence. See *California Chart*.

Carefully consider offenses in PC §§ 92-183. Each felony offense should be carefully examined before accepting a sentence of a year or more. For example, PC §§ 92, 140, 167 are likely to be charged as obstruction of justice. As always, evaluate pre-2015 misdemeanors as obstruction if a year was imposed.

PC § 4532(a), (b). Prison escape. It is possible that evading imprisonment by escape would be included in the definition of obstruction. See, e.g., *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 455 (obstruction includes intent to avoid punishment). Defenders should act conservatively and avoid a year or more sentence imposed. Regarding other consequences, in older opinions the BIA found that non-violent prison escape is not a CIMT or crime of violence. See *California Chart*.

VC § 2800.2. Reckless flight from a police officer. Although § 2800.2 does not include language indicating intent to interfere, ICE might charge the offense as obstruction of justice because the person “flees or attempts to elude” the police. Regarding other consequences, the Ninth Circuit found that § 2800.2 never is a CIMT because the recklessness may consist of violation of three traffic offenses. See *California Chart*.

VC § 20001. It is conceivable that ICE would charge felony hit and run as obstruction, although the only intent required is knowledge that death or injury occurred. A plea to remaining at the scene but failing to provide registration should avoid that, as well as avoid a CIMT. See options at *California Chart*.

IV. Immigration Sentencing Strategies to Avoid a Year or More

No offense is an aggravated felony as obstruction of justice unless a year or more sentence is imposed. INA § 101(a)(43)(S). If we avoid a year or more, we avoid the aggravated felony—and in several cases the offense without that sentence is an immigration-neutral disposition.

Immigration has its own definition of sentence. INA § 101(a)(48)(B). As an example, say that a defendant is charged with felony PC § 136.1(b)(1) after a domestic violence incident. The DA wants 16 months, but defense counsel must assume that the conviction will be an aggravated felony (AF) if a year is imposed. Immigrant-based defense options include:

- Take the 16 months on a different offense that does not become an AF if a year is imposed, e.g., PC §§ 236/237, 459 (first- or second-degree), or 594. If a lot of time and a strike is required, the person could plead to § 136.1(b)(1) as the subordinate felony offense to one of these, with a sentence of 8 months.
- Plead to two counts of 8 months each, to run consecutively.
- Have the defendant spend time in pre-hearing custody and waive credit for time served at the sentencing hearing. For example, waiving five months of pre-hearing custody is the equivalent of a 10-month sentence, so bargain for a 6-month sentence.
- Do not take suspended *execution* of sentence. For immigration purposes, 16 months imposed with execution suspended is a sentence of 16 months. Suspended *imposition* of sentence will avoid the aggravated felony as long as custody time ordered as a condition of probation does not exceed 364 days.
- If the client violates probation, do not accept additional time that brings the total sentence to a year or more. The total amount on a single count is the total for immigration purposes. If necessary, plead to a new offense and take additional time on that.
- If it is possible to plead to a misdemeanor, then a sentence of a year or more cannot be imposed because there is a 364-day cap. See Penal Code § 18.5(a) (2015).

For further discussion of sentencing strategies, see ILRC, *California Sentences and Immigration* (2019), https://www.ilrc.org/resources/california-sentences-and-immigration.

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