CALIFORNIA PENAL CODE § 245(A) IS NOT A CRIME OF VIOLENCE

New Defenses to Criminal Grounds of Removability

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IMPORTANT DATES

- For cases with final removal orders, consider filing a motion to reopen or reconsider. Motions can be equitably tolled based on change of law.
- Motions to reconsider a decision should be filed within 30 days of the new decision, on or before February 12, 2026.
- Motions to Reopen Based Solely on the Change in Law Should Be Filed on or before April 13, 2026.

On January 13, 2026, the Ninth Circuit issued an en banc decision holding that a violation of California Penal Code § 245(a)(1) (assault with a deadly weapon) is not a crime of violence. *United States v. Gomez, No. 23-435 (9th Cir., Jan. 13, 2026) (en banc)*. This case is important because a conviction for a crime of violence with a sentence of a year or more is an aggravated felony. INA § 101(a)(43)(F). After this decision, no conviction for PC § 245(a)(1) can be an aggravated felony. The court explained that for a crime to be a crime of violence, the mens rea must be greater than "recklessness" and the "use of force" must be directed against a target or another individual. *Gomez*, slip op at 14. The court held that the minimum conduct for an assault conviction, including assault with a deadly weapon, under California law does not meet that mens rea requirement of greater than recklessness and cannot be a crime of violence.

Criminal Defenders: Best practice is to still avoid PC § 245(a)(1) until the timeline for certiorari on *Gomez* has expired. The government has ninety days to file for certiorari, and can file for a sixty-day extension. The ninety-day period ends on April 13, 2026. *See* U.S. S. Ct. R. 13. Also, note that PC § 245(a) currently remains a crime involving moral turpitude (CIMT) under Ninth Circuit precedent, *Safaryan v. Barr*, 975 F.3d 976 (9th Cir. 2020).

Immigration Advocates: *Gomez* should immediately govern issues of deportability and eligibility for relief in cases that triggered domestic violence or aggravated felony consequences based on convictions for PC § 245(a)(1). Advocates should explore arguments (detailed below) that all sections of PC § 245 are not crimes of violence (COVs), crimes of domestic violence, or CIMTs. Finally, immigration advocates should

consider filing motions to reconsider/reopen and motions to remand for those cases where a person was ordered removed because of a conviction under PC § 245. Aside from motions to remand, which are appropriate for any case still pending with the Board of Immigration Appeals (BIA), choosing which motion to file is a strategy decision, and will depend on the timing, circuit and other risk considerations in a given case.

The *Gomez* decision re-starts the tolling period for a motion to reconsider or motion to reopen. Advocates will have 30 days from the date of the opinion to file a motion to reconsider or until February 12, 2026. *See* 8 CFR § 1003.23(b)(1). Advocates will have 90 days from the date of the opinion to file a motion to reopen or until April 13, 2026. *Id.* In any case currently pending before the BIA where the noncitizen was found removable or denied relief because of a finding that a conviction under PC § 245 was a crime of violence, advocates should be filing a motion to remand. A motion to remand does not have any numerical or time limits and does not count as a motion to reopen or to reconsider.

See below for more information about motions to reconsider or remand.

I. Summary of the Gomez Decision

PC § 245(a)(1) is not a Crime of Violence (COV). For a crime to be a COV, it must require a mens rea greater than recklessness. Because the assault statute (PC § 240) on its face does not specify the mens rea necessary for a violation of PC § 245, the Ninth Circuit looked to the California Supreme Court's interpretation of the mens rea required for a conviction under PC § 245. *Gomez*, slip op at *16. The California Supreme Court held that "the requisite mens rea for a conviction under Section 245(a)(2) is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *People v. Williams, 111 Cal. Rptr.2d 114, 122-23, 29 P.3d 197 (Cal. 2001)*.

Based on this holding, the Ninth Circuit reasoned that although PC § 245 requires an intentional act:

- PC § 245 does not require an intent to apply force;
- PC § 245 does not require knowledge that an action will cause force to be applied;
- PC § 245 does not require subjective awareness of a risk that such force will result.

Slip op. at 16. The Ninth Circuit distinguished the subjective standard outlined by the Supreme Court in *Borden v. United States*, 593 U.S. 420 (2021)—that a person "acts knowingly when 'he is aware that [a] result is practically certain to follow from his conduct'"—from PC § 245, which requires only that a "reasonable person… would find that the act would directly, naturally and probably result in a battery." Slip op. at 18. The lack of subjective intent to apply force and the lack of awareness of risk made the mens rea for PC § 245 insufficient to be a COV. The Court also noted that while the language of *Williams* says that the mens rea requires more than "mere recklessness," the term "recklessness" at the time the statute was enacted was a synonym for criminal negligence. In other words, the mens rea requirement for a COV is more than mere criminal negligence. *Gomez*, slip op at 18 n.5 *citing People v. Williams*, at 203 n.4.

A. Immigration implications

PC § 245(a)(1) with a year or more sentence is not an Aggravated Felony as a crime of violence. A conviction under California Penal Code § 245(a)(1) is not a COV under the definition at INA § 101(a)(43)(F) and thus cannot support a finding of deportability under INA § 237(a)(2)(A)(iii) and cannot bar relief as an aggravated felony.

PC § 245(a)(1) is not a Crime of Domestic Violence. To be a crime of domestic violence, the underlying offense must be a crime of violence. INA § 237(a)(2)(E)(i). Because PC § 245(a)(1) is not a COV it cannot be a crime of domestic violence—regardless of the identity of the victim.

Application to other Sections of PC § 245: The Ninth Circuit in *Gomez* held that PC 245(a)(1) (assault with a deadly weapon) is not a crime of violence because the mens rea required to violate the statute was less than extreme recklessness. This holding should apply to all of the subsections of PC § 245, because a violation of those subsections requires the same mens rea. *See* CALCRIM 875. At a minimum, *Gomez* should apply to PC § 245(a)(2) (assault with a firearm) because the *Williams* case, which was the basis for the *Gomez* decision, interpreted PC § 245(a)(2). However, some sections of PC § 245 could still trigger other immigration consequences such as under the firearms removal ground or the Laken Riley Act where there is a serious injury to the victim.

Expansion beyond PC § 245. Arguably this holding should encompass all California assault statutes because it is based on the required mens rea for assault as defined under PC § 240. *See Gomez*, slip op at *16. These statutes include: PC §§ 220, 240, 241, 241.1, 245, 245.2, 245.3 and 245.5, and 17500.

Removal Defense: Argument that a violation of PC § 245 is also not a CIMT. While there is both BIA and Ninth Circuit precedent holding that a violation of PC § 245(a)(1) is a CIMT, it is not clear if that holding withstands the Ninth Circuit's en banc decision in *Gomez*. Advocates in removal proceedings should argue that *Gomez's* holding on the mens rea for PC § 245 shows that the statute lacks the mens rea to be either a COV or CIMT.

- The BIA previously concluded that PC § 245(a) was a CIMT. *Matter of Wu*, 27 I&N Dec. 8, 11 (BIA 2017) ("[w]eighing the dangerous conduct necessarily involved in a violation of section 245(a)(1) along with the culpable mental state needed to commit such a violation, we conclude that an assault under this statute is no less base, vile, and depraved than the reckless aggravated assault offense we deemed turpitudinous in *Medina*."). The BIA's decision in *Wu* was premised on a misunderstanding of the mens rea required for PC § 245. A reckless mens rea can suffice for a CIMT if there is a conscious disregard of a substantial and unjustifiable risk. See *Matter of Perez-Contreras, 20 I&N Dec. 615, 618-19 (BIA 1992))*. But PC § 245 does not require such conscious disregard or a subjective awareness of the risk of force. That is exactly what the Ninth Circuit in *Gomez* was analyzing, and it held that "a defendant who lacks a subjective awareness of any risk cannot "consciously disregard[] a substantial and unjustifiable risk." Slip op. at 19.
- *Ninth Circuit Precedent.* The Ninth Circuit deferred to the BIA's decision in *Matter of Wu* under *Chevron* deference in holding that PC § 245(a)(1) is a CIMT. *Safaryan v. Barr*, 975 F.3d 976 (9th Cir. 2020). In *Safaryan*, the Ninth Circuit found that the California Supreme

Court had said assault could not be satisfied by "mere recklessness or criminal negligence." *Safaryan*, 975 F.3d at 985. But in *Gomez*, the Ninth Circuit rejected this reasoning in a footnote, explaining that the California Supreme Court had actually meant recklessness only as a synonym for criminal negligence. California courts have repeatedly acknowledged that the "more than mere recklessness" standard set out by the California Supreme Court in *Williams* is actually a negligence standard. *People v. Wright*, 100 Cal. App. 4th 703, 712 (2002) (stating that *Williams* "define[d] the mental state by a negligence standard"); *People v. Rainville*, No. A143179, 2017 WL 712603 at *3 (Cal. Ct. App., Feb. 23, 2017) (finding, under *Williams*, the mens rea required for assault is merely "a species of negligent conduct").

The *Gomez* court was emphatic that PC § 245 does not require any subjective knowledge of actual risk. Accordingly, there is an argument that PC § 245 and all California assault statutes should not be CIMTs, because they lack the mens rea of conscious disregard of substantial and unjustifiable risk.

II. Motions to Reconsider, Reopen, or Remand

Whether a motion to reconsider or motion to reopen is the appropriate vehicle after a change in law has been the subject of much debate. While the BIA favors a motion to reconsider, the regulation that supported this premise was enjoined and then replaced with current regulations. *See* 89 Fed. Reg. 46742 (May 29, 2024). While the Fifth Circuit has found that a motion to reconsider is required for a change in law that takes place after the final decision in a case (*see Gonzalez Hernandez v. Garland*, 9 F.4th 278 (5th Cir. 2021)), the Ninth Circuit has not. Arguably a change in law after a final decision is a new fact the necessitates a motion to reopen. Nonetheless, courts have put great weight in acting diligently in cases requiring equitable tolling, which can complicate arguments, particularly in older cases. See *Ventura-De Martinez v. Bondi*, 2025 WL 3540855 (9th Cir. 2025). Advocates will need to balance the risk factors of filing a motion in cases where considerable time has passed since the final order in their case.

A. Motion to reconsider

A motion to reconsider asks the deciding authority—Immigration Judge (IJ) or Board of Immigration Appeals (BIA)—to review its prior decision based on mistakes of law or fact. 8 CFR §§ 1003.2(b)(1), 1003.23(b)(2). It can also be based on a change in the law that could cause the BIA or IJ to change its decision, under the theory that the prior decision was based on an error in law. While the Board has suggested this is the proper motion after a change in law, the statute indicates that such a motion is for errors of law in the previous order (yet if the change in law occurs after the final order, the adjudicator arguably did not commit error at the time.)

If the noncitizen or DHS appealed the IJ's decision and the BIA entered an order of removal, the motion to reconsider should be filed with the BIA, since jurisdiction vested with the BIA. 8 CFR § 1003.23(b)(1). If the client did not appeal the IJ's decision to the BIA, then the motion to reconsider should be filed with the IJ. *Id.*

Motions to reconsider are numerically and timed barred—they must be filed within 30 days of the final administrative order and as a general rule, a party may file only one motion to reconsider. 8 CFR §§ 1003.2(b)(2), 1003.23(b)(1). A change in the law re-starts the tolling period and a new 30-day period begins from the date of the change in the law. *See Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020). The deadline to file a motion to reconsider based on this change in law is February 12, 2026. The requirements for filing a motion to reconsider with the BIA are found at Chapter 5.7 of the BIA Practice Manual. The requirements for filing a motion to reconsider with the IJ are found at Chapter 5.8 of the Immigration Court Practice Manual. Generally, motions to reconsider must comply with the general requirements for filing a motion—they must be a) clearly captioned ["Motion to Reconsider"], b) in writing, signed, and served on all parties, c) accompanied by a copy of the underlying order, d) accompanied by a copy of the application for relief. BIA PM Ch. 5.2; ICPM Ch. 5.8(b) and 5.2. See below for filing fee information.

PRACTICE TIP: If you can file within 30 days (either of this decision, or your removal order if less than 30 days ago but before *Gomez*), then file a motion to reconsider. But if not, file it as a motion to reopen based on new material facts (*Gomez* decision) within 90 days or argue equitable tolling (client didn't have access to attorney or other facts).

B. Motion to reopen

A motion to reopen asks the deciding authority—Immigration Judge (IJ) or Board of Immigration Appeals (BIA)—to reopen the case to review new material facts that were unavailable or unable to be discovered at the previous hearing. 8 CFR §§ 1003.23(b)(3), 1003.2(c)(1). If your client's case is already beyond the 30 days, your client can bring a motion to reopen asserting that the *Gomez* decision is a new material fact and your client is no longer deportable as charged or is newly eligible for relief based on a change in law. Motions to reopen are subject to a 90-day filing deadline, and practitioners can argue that this is subject to equitable tolling until the date of the change in law. 8 CFR §§ 1003.23(b)(1), 1003.2(c)(2). Advocates will consider a motion to reopen both for those that are within 90 days from the final decision in their immigration case, as well as for those past 90 days from the decision in their case (but hopefully within 90 days since the Ninth Circuit issued its decision in *Gomez*.)

If needed, Practitioners first will argue that the time and/or numerical bars are subject to equitable tolling due to the change in law. Where other bases for a motion to reopen exist the moving party should brief both the change in law and any other change in facts in the client's case (for example, post-conviction relief or change in personal circumstances) in addition to any equitable tolling arguments (why they could not have filed until now). Those helping clients with a PC § 245(a)(1) conviction and a removal order outside the Ninth Circuit must check circuit caselaw before pursuing such a motion.

Second, advocates will move the adjudicator to exercise *sua sponte* authority to reopen the case in the alternative. Courts have used their *sua sponte* authority to grant motions to reopen where there has been a fundamental change in law that renders the noncitizen no longer removable or newly eligible for relief. See *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (discussing that the Board can invoke its *sua sponte* authority to reopen or reconsider a case following fundamental changes in law).

Third, advocates filing motions to reopen may also argue that, in the alternative, the adjudicator construe their motion as a motion to reconsider, subject to equitable tolling beyond 30 days based on extraordinary circumstances, in addition to the change in law (such as ineffective assistance of counsel). This argument will also be important to those that are filing within 90 days of the decision in their case, but want to preserve arguments that, even if a motion to reconsider is required, their motion should be construed as timely based on the doctrine of equitable tolling.

C. Motion to remand

If a case is currently on appeal with the BIA [because the noncitizen was charged or denied relief based on a finding that a Penal Code § 245 conviction was a crime of violence] the proper vehicle is filing a motion to remand. A motion to remand is appropriate where you seek to return jurisdiction to the IJ either because there is new evidence that has come to light or the noncitizen has become newly eligible for relief, such as because of a change in the law, for which they were not eligible when their proceedings were pending before the IJ. See BIA PM Ch. 5.8(a). If the noncitizen erroneously files a motion to reconsider while the case in on direct appeal to the BIA, the BIA will treat the motion to reconsider as a motion to remand the proceedings to the IJ. 8 CFR § 1003.2(b)(1). Motions to remand, unlike motions to reconsider, are not numerically or time barred. BIAPM Ch. 5.8(c). This eliminates the need to prove timeliness and avoids using up a noncitizen's one-time shot at a motion to reconsider. If a need later arises for a motion to reconsider, the noncitizen will generally be numerically barred if they previously filed a motion to reconsider instead of a motion to remand. Motions to remand are subject to the same substantive requirements as motions to reopen. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). See below for filing fee information.

D. Filing fee

A motion to reconsider, a motion to remand, and a motion to reopen filed with the BIA require a $1,010.00 payment, while a motion to reconsider or motion to reopen filed with the immigration court require a $1,045.00 payment. Payment can be made through the Executive Office for Immigration Review's (EOIR) Payment Portal at https://epay.eoir.justice.gov/index. A copy of the payment must be included with the appropriate motion. Fee waivers are not prohibited at the BIA or immigration court. If a fee waiver request is made but does not establish the noncitizen's inability to pay the required fee, the BIA or IJ will grant 15-days to re-file the rejected motion with the filing fee or a new waiver request, and any applicable filing deadline is tolled during the 15-day cure period. 8 CFR §§ 1003.8(a)(3), 1003.24(d). There is a presumption that any non-detained respondent who is represented by private counsel is ineligible for a fee waiver. *Matter of Garcia-Martinez*, 29 I&N Dec. 169 (BIA 2025).

E. Conclusion

Criminal defenders should still avoid pleading to PC § 245 with a one-year sentence until after April 13, 2026, when the period for filing a petition for certiorari with the Supreme Court has ended. Criminal defenders should presume that a conviction for PC § 245 is a crime involving moral turpitude. Immigration advocates should be filing motions to reconsider or to remand in any case where a client has been ordered deported for having been convicted of an

aggravated felony COV where the client was convicted of PC § 245. The deadline for a motion to reconsider is February 12, 2026; but advocates can file motions to reopen within 90 days of a final removal order. In immigration court proceedings, advocates should be arguing that no California assault conviction is 1) an aggravated felony COV with a year or more sentence or 2) a CIMT, because the mens rea required under those statutes is less than the mens rea required for a COV, as outlined by the Supreme Court in *Borden*, and is less than the mens rea required for a CIMT.

The full opinion is available here: *U.S. v. Gomez*, No. 23-435 (9th Cir. Jan. 13, 2026), https://cdn.ca9.uscourts.gov/datastore/opinions/2026/01/13/23-435.pdf.

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