Some Felonies Should No Longer Be "Crimes of Violence" for Immigration Purposes, under *Johnson v. United States*

-- Selected California Offenses; Advice for Criminal Defenders

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See *Johnson v. United States* --- S. Ct. ---, 2015 WL 2473450 (June 26, 2015), overruling *James v. United States,* 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011).

See Zota, "How *Johnson v. United States* May Help Your Crime of Violence Case" (July 6, 2015, National Immigration Project of the National Lawyers Guild) at www.nipnlg.org/legalresources/practice_advisories/pa_Johnson_and_COV_07-06-2015.pdf.

Part A of this Advisory gives bottom line summary and advice. Part B is a brief discussion of *Johnson* and the definition of crime of violence. See Zota, *supra*, for a more comprehensive discussion. Part C is a discussion of how *Johnson* may affect selected California offenses.

A. Bottom Line

Conviction of a state offense that meets the definition of a crime of violence (COV) at 18 USC § 16 has two potential immigration penalties. If committed against a victim with whom the defendant shared a protected domestic relationship, a COV may be a deportable crime of domestic violence. 8 USC § 1227(a)(2)(E)(i). If a sentence of a year or more is imposed, a COV is an aggravated felony, regardless of the type of victim. 8 USC § 1101(a)(43)(F).

A beneficial Supreme Court case, *Johnson v. United States, supra,* may change some felony offenses from COVs to non-COVs for immigration purposes. *Johnson* held that another federal definition of crime of violence, which uses language similar to 18 USC § 16(b), is unconstitutionally vague. It held that the "ordinary case" standard may no longer be used to determine if an offense is a COV, and reaffirmed that the "minimum conduct" standard of the categorical approach must be used.[2] See Part B, below, for more about *Johnson*.

It is likely although not guaranteed that these changes will carry over to 18 USC § 16(b) cases and immigration law, and that some state felonies that have been held COVs will become non-COVs. Each state statute must be analyzed individually to see how it will be affected. In California, some felonies that may change from COV to non-COV are residential burglary (PC §§ 459, 460(a)); lewd intent toward a minor aged 14-15 (PC § 288(c)); possession of a sawed-off shotgun, silencer, etc. (PC § 33215, etc.); battery that causes injury (PC § 243(d)) (although there is an unfortunate case); at least some kidnapping (PC § 207(a), (e)); and arguably stalking (PC § 646.9) (BIA decision) and sexual battery (PC § 243.4). See Part C for discussion of these offenses.

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[2] For more on the categorical approach and minimum conduct standard, see Zota, above, and see Brady, "How to Use the Categorical Approach Now" at http://www.ilrc.org/resources/how-to-use-the-categorical-approach-now .

What can criminal defenders do while we wait for a precedent decision on *Johnson* and 18 USC § 16(b)? Absent precedent, we can't guarantee that the above offenses will not be held COVs, but we can take *Johnson* into account when analyzing the possible effect of a prior conviction, or choosing between current imperfect plea options.

First, in considering the effect of a prior conviction of one of the above offenses, assume that it is not a COV for purposes of planning your strategy now. For example, if a defendant has a prior PC § 460(a) with a two-year sentence, assume that this is not a COV, and therefore the defendant may not have an aggravated felony conviction. That may mean it is more important to avoid a plea to an aggravated felony now.

Second, if you are faced with no good plea options in the current case, consider that the above offenses have a good chance of being held not to be COVs. Depending on the individual case, that might make them the better, although still risky, alternative. Warn the defendant that we do not yet have a definitive answer as to whether these are no longer COVS.

This uncertainty can make the task of representing immigrant defendants even more complicated than usual. In case of doubt, seek expert advice.

In removal proceedings, of course, immigration advocates should not be conservative. Advocates should assert *Johnson* as a defense by asserting that the ordinary case standard cannot be used, and preserve the argument for federal appeal that § 16(b) is void for vagueness. See discussion in Zota, above. In affirmative applications such as naturalization or family visas, if having a COV would put the person at risk it may be best to wait for the Ninth Circuit (or BIA) to clarify how *Johnson* will affect § 16(b).

B. *Johnson* Discussion

The definition of a crime of violence (COV) at 18 USC § 16 has two parts. Section 16(a) defines a COV as any offense "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." "Force" means intentional, aggressive, violent, force, and does not include an offensive touching. *Johnson* does not affect § 16(a).

Johnson potentially affects the definition at 18 USC § 16(b), which applies only to felonies. Section 16(b) defines a COV as a felony "that, 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." Again, "force" means violent, intentional force. Some decisions have used the "ordinary case" standard to make this determination, wherein a court will hypothesize whether a "typical" violation comes within § 16(b). This can conflict with the regular, "minimum conduct" standard under the categorical approach, wherein a court will examine the minimum conduct ever prosecuted under the criminal statute, to see if it necessarily meets the §16(b) definition.[3]

Johnson held that a separate but similarly worded federal definition of crime of violence[4] is void for vagueness. It further held that the ordinary case test is not workable and must no longer be employed,

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[3] See n. 2 for Advisories on the categorical approach and minimum conduct rule.

[4] 18 USC § 924(e)(2)(B)(ii) defines a crime of violence in part as an offense that "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*" (emphasis added). The Court held that the italicized section, known as the residual clause, is unconstitutional.

and it overturned its own precedent setting out that standard. Instead, courts must use the minimum conduct standard of the categorical approach. See *Johnson* at 13, 14, overruling *James v. United States* and *Sykes v. United States*, cited above, and see Zota, above.

Based on *Johnson,* it is possible but not guaranteed that the § 16(b) definition also will be held void for vagueness. Even if § 16(b) remains, however, it is clear that the minimum conduct standard, not the ordinary case standard, must be used to determine if an offense comes within § 16(b). That standard might be expressed as follows: a felony offense should not be a COV unless the *minimum conduct ever prosecuted under the statute* "by its nature, involves a substantial risk" that the offender will use violent force in the course of committing the offense.

Cases that held that an offense is a COV based solely on the ordinary case test should be considered overturned. For example, California residential burglary has been held a COV under the "ordinary case" standard, but is not a COV under the minimum conduct test because it has been used to prosecute incidents that did not pose a risk of violence (for example, entering a customer's home by invitation, while intending to commit fraud). See case discussion at Part C.

Johnson should be held to overturn Board of Immigration Appeals (BIA) decisions that, relying upon *James*, employed the ordinary case standard. See *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015) (a Florida statute similar to Cal PC § 243(d) is a crime of violence under 18 USC 16(b) because, even though it can be committed by an offensive touching, in the ordinary case it is committed by violent force); *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012) (California stalking).

However, until the Ninth Circuit rules on the effect of *Johnson* on 18 USC § 16(b), criminal defenders should act conservatively. We can use the minimum conduct test to evaluate whether a felony *might* no longer be a crime of violence under § 16(b), and take that into consideration in analyzing prior convictions or current plea options. See Bottom Line advice at Part A, above.

C. Selected California Offenses

This section considers some California felony offenses that arguably are no longer crimes of violence (COV) under 18 USC § 16(b), because the "ordinary case" standard no longer can be used. Immigration counsel should argue that this standard is disallowed in immigration proceedings now, without need for further federal rulings. Counsel also should preserve the argument for federal appeal that 18 USC § 16(b) is void for vagueness (because the BIA cannot declare a statute unconstitutional). See practice discussion in Zota, above.

The below list of offenses is merely illustrative and intended to be a beginning of discussion.

***Residential burglary*,** PC §§ 459, 460(a). This is the quintessential § 16(b) case, and the subject of the now-overruled *James, supra*. Burglary does not have intent to use force as an element, as is required by 18 USC § 16(a). But felony residential burglary has been held to come within § 16(b), on the grounds that the "ordinary case" presents the risk of use of force because the burglar and resident might meet and have a violent confrontation. This is a real stretch in states like California where residential burglary includes lawful entrants, but the Ninth Circuit repeatedly has upheld PC § 460(a) as a COV using the ordinary case standard.[5]

[5] See, e.g., *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-1113 (9th Cir. 2011), *U.S. v. Ramos-Medina,* 682 F.3d 852 (9th Cir. 2012).

Under the categorical approach, the minimum conduct under § 460(a) should be held not to come within 18 US § 16(b), because PC § 460(a) has been used to prosecute incidents that do not involve force or the risk of force, e.g., entering a house by invitation, with intent to commit fraud.[6]

Conduct with lewd intent toward a minor aged 14 or 15, PC § 288(c). A Ninth Circuit panel held that this offense does not meet the definition at 18 USC § 16(a), but meets the definition at § 16(b) because in the ordinary case there is a danger that the adult might use force.[7]

The minimum prosecuted conduct should not be held to meet the § 16(b) standard, because it includes consensual and/or non-explicit conduct.[8]

Possession of a sawed-off shotgun, silencer, etc. (PC § 33215, etc.). The Ninth Circuit held that simple possession of certain "dangerous weapons" that must be registered under 26 USC § 5841, such as a sawed-off shotgun or silencer, is a crime of violence under 18 USC § 16(b), because the devices have no legitimate use and likely will be used violently.[9] This was the offense at issue in *Johnson*.

The minimum conduct required for guilt, which is to posses such a weapon, even if it is locked up or does not work, should be held not to meet the definition at § 16(b).

Battery causing injury, PC § 243(d). Section 243(d) should not be found a COV, but an arguably flawed Ninth Circuit decision[10] held that a similar offense, PC § 243(c)(2), is a COV under 18 USC § 16(a).

PC § 243(d) under 18 USC § 16(a). The definition of COV at 18 USC § 16(a) requires that the threat or use of violent force is an element of the offense. The Supreme Court and Ninth Circuit have found that an offensive touching does not meet this definition.[11]

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[6] See, e.g., *People v. Nguyen*, 40 Cal. App. 4th 28 (Cal. Ct. App. 1995) (entering a dwelling under invitation in response to advertisements intending to purchase items with bad check); *People v. Salemme*, 2 Cal. App. 4th 775, 778 (Cal. Ct. App. 1992) (upholding burglary conviction for entering dwelling with intent to sell fraudulent securities "even though the act may have posed no physical danger to the victim who had invited defendant in to purchase securities from him"); *People v. Schneider*, No. H032628, 2009 WL 1491400 (Cal. Ct. App. May 28, 2009) (entering victims' homes as invitee and committing real estate fraud); *People v. Balestreri*, No. H030622, 2007 WL 4792846 (Cal. Ct. App. Dec. 18, 2007) (attending an open house with the intent to obtain cash from the real estate agent under false pretenses). Thanks to Sejal Zota for these case examples.

[7] *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013).

[8] *See Rodriguez-Castellon*, 733 F.3d at 862 (citing *People v. Mickle*, 54 Cal. 3d 140, 176, 284 Cal. Rptr. 511, 814 P.2d 290 (1991)) (acknowledging that PC § 288 may be violated where defendant instructed victim to disrobe); *People v. Austin*, 111 Cal. App. 3d 110, 114 (Cal. Ct. App. 3d. 1980) (holding that there must be touching to violate PC § 288, but it could be done by the child victim "on its own person providing such touching was at the instigation of a person who had the required specific intent"); see also *United States v. Castro*, 607 F.3d 566, 570 (9th Cir. Cal. 2010) (holding that § 288(c) is not an aggravated felony as sexual abuse of a minor, and noting that "[l]ewd touching, for purposes of section 288, can occur through a victim's clothing and can involve any part of the victim's body") (citing *People v. Martinez*, 11 Cal. 4th 434 (Cal. 1995)).

[9] See, e.g., *United States v. Dunn*, 946 F.2d 615, 621 (9th Cir. 1991) (possession of a sawed-off shotgun comes within 18 USC § 16(b)); *United States v. Delaney*, 427 F.3d 1224, 1226 (9th Cir. 2005).

[10] See discussion of *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014) in text.

[11] See, e.g., *Johnson v. United States,* 559 U.S. 133 (2010); *Ortega-Mendez v. Gonzales,* 450 F.3d 1010 (9th Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

Section 243(d) does not come within 18 USC § 16(a) because the minimum conduct to commit the offense includes a mere offensive touching that does not involve violent force, but that happens to cause injury. See CALCRIM 925. In fact, § 243(d) was enacted specifically to punish an intentional but *de minimus* use of force that results in an injury, because this conduct is not reached by other assault or battery offenses.[12] California courts repeatedly have held that under the plain language of the statute, the minimum conduct to commit § 243(d) includes *de minimus* force, which can include "moderate, and even innocuous, acts."[13] See also the summary of California case law in the BIA Indexed Opinion[14] *Matter of Muceros* (BIA May 11, 2000), finding that § 243(d) can be committed by "the slightest intentional touching, even though there is no intent to harm, and even if the degree of force used is unlikely to cause harm,"[15] and that therefore it is not a crime involving moral turpitude. People have been convicted for conduct such as pushing the victim, or kicking an ashtray that fell and hit the victim, as long as injury ensued.[16]

However, the Ninth Circuit held that an offense that has similar elements to § 243(d) – battery that causes injury to a police officer, PC § 243(c)(2) -- is a COV under a federal standard identical to 18 USC § 16(a). *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014). *Colon-Arreola* arguably was decided in error, because the panel did not consider that the minimum conduct for § 243(c)(2) is an offensive touching.[17]

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[12] In *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978), the Court reasoned: "The statute [§ 243(d)] makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute. Thus, the statute is able to punish, as a felony, those assaults and batteries outside the purview of section 245. For example, with the enactment of section 243, the thief who pushes an elderly lady to the sidewalk in an effort to grab her purse, could be convicted of a felony if the victim broke her hip in the fall. *Such an action might be hard to prove under the requirements of section 245 in that the People would have to prove that the force used was likely to have caused serious bodily injury. Section 243 was enacted to fill this gap in the law of assault and battery*" (emphasis added).

[13] *People v. Marshall*, 196 Cal. App. 3d 1253, 1260 (Cal. App. 4th Dist. 1987) ("Marshall asks us to limit the use of section 243, subdivision (d) to only those situations where a victim suffers serious bodily injury *as a result of great violence* -- ignoring the fact that moderate, and even innocuous, acts may lead to serious bodily injury. We conclude that by defining the crime solely in terms of the injury inflicted, the Legislature intended to include all batteries which result in serious bodily harm, regardless whether inflicted with great violence, within the reach of this statute.")(emphasis in original); *People v. Mansfield,* 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988) (finding that section 243(d) is not a crime involving moral turpitude because "the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force *likely* to cause serious injury") (emphasis in original).

[14] An Indexed Opinion is a significant but non-precedential decision designated by the BIA to serve as useful guidance for EOIR staff. These decisions used to be posted on the BIA Virtual Law Library. See reference to *Matter of Muceros* in *Uppal v. Holder*, 605 F.3d 712, 718-719 and n. 4 (9th Cir. 2010).

[15] *Matter of Muceros*, at 5 (citing to *People v. Thornton*, 4 Cal. Rptr. 2d 519, 522 (1992)).

[16] See, e.g., *People v. Hayes*, 142 Cal. App. 4th 175 (Cal. App. 2d Dist. 2006) (defendant kicked a large ashtray, which fell over and hit an officer's leg causing a cut and bruising); *People v. Finta*, 2012 Cal. App. Unpub. LEXIS 7488 (Cal. App. 1st Dist. Oct. 17, 2012) (defendant "shoved" a man on his bicycle when he thought that the cyclist had stolen his personal property; cyclist fell and was injured); *People v. Myers*, 61 Cal. App. 4th 328 (Cal. App. 5th 1998) (victim yelled and poked at defendant and defendant pushed victim away defensively; victim slipped and fell on wet pavement and was injured).

[17] This discussion will assume that § 243(c)(2) and (d) both contain the elements of an offensive touching that causes certain injuries. See CALCRIM 925 and 945. Advocates can investigate whether there are grounds to argue that *Colon-Arreola*, which concerned § 243(c)(2), does not apply to § 243(d).

Colon-Arreola stated that § 243(c)(2) necessarily requires violent force, to be "sufficient" to cause an injury requiring treatment. *Id*. at 844-845. However, California courts have found that "force likely to cause serious bodily injury is not a requirement" of such a battery.[18] *Colon-Arreola* found that § 243(c)(2) should be treated like PC § 273.5 (inflicting traumatic injury on a spouse) and cited *United States v. Lauricio-Yeno*, 590 F.3d 818 (9th Cir. Cal. 2010), which held that § 273.5 is a COV because it requires the direct application of force sufficient to cause injury. *Colon-Arreola, supra* at 845. However, *Lauricio-Yeno* specifically held that PC § 273.5 "does not penalize minimal, non-violent touchings." *Lauricio-Yeno, supra* at 822. *Colon-Arreola* did not consider the California cases cited above, which establish that § 243(d) does penalize such touchings.

PC § 243(d) under 18 USC § 16(b). Section 243(d) should not be held a COV under 18 USC § 16(b). The BIA recently held that a Florida felony with similar elements to PC § 243(d) is a crime of violence under § 16(b), but it used the ordinary case standard set out in *James*. *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015). Now that *Johnson* has disallowed the ordinary case standard and reversed *James, Matter of Francisco-Alonzo* should be considered reversed.

If instead the minimum conduct test is employed, an offensive touching does not meet the § 16(b) definition because it does not carry the inherent risk that the perpetrator will use violent force in committing the offense. A finding that the offense is a COV because of the possibility that the injured person might respond violently, which in turn might elicit a violent reaction by the perpetrator, is "too speculative" to support a § 16(b) finding.[19]

At least some kidnapping, PC §§ 207. The Ninth Circuit held that PC § 207(a) (kidnapping by force or fear) lacks the element of use of violent force and thus is not a COV under 18 US § 16(a), because § 207(a) can be committed by "any means of instilling fear," including means other than force. *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012). The court noted that a kidnapping that involves an unresisting child or infant also does not meet the COV definition at 18 USC § 16(a), because pursuant to PC § 207(e), "force" includes simply the amount of physical force required to carry a willing child. *Id*. at 1129. It cited precedent holding that kidnapping by fraud under § 207(d) also does not meet the § 16(a) definition.[20]

The court used the ordinary case standard to find that PC §§ 207(a) and (e) are crimes of violence under 18 USC § 16(b). Among other things, the court noted that even kidnapping by fraud or trickery, § 207(d), had been found a crime likely to result in physical injury under the ordinary case test, so § 207(a) also should. It found that while § 207(e) sets the minimum conduct to meet the definition of "force" in the case of an unresisting child, it does not define the ordinary case.

Counsel can argue that under the minimum conduct test, none of these felony offenses should be held to come within 18 USC § 16(b). This should apply to the amount of force to commit kidnapping of a child under 207(e), which is simply transporting a willing child.[21] Counsel may investigate to what extent §

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[18] See, e.g., *People v. Hopkins, supra* at 320, discussing § 243(d).

[19] See, e.g., *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) (felony reckless shooting at an inhabited home or vehicle, PC § 237, is not a crime of violence under 18 USC § 16(b), because it is "too speculative" to hold that this conduct is substantially likely to start a violent confrontation).

[20] See *United States v. Lonczak*, 993 F.2d 180, 183 (9th Cir. 1993), considering a federal standard identical to 18 USC 16(a), cited at *Delgado-Hernandez v. Holder*, 697 F.3d at 1128.

[21] These cases can involve less egregious facts. See, e.g., California Supreme Court holding *In re Michele D*, 29 Cal. 4th 600, 59 P.3d 164, 166 (Cal. 2002) (a minor defendant was guilty of kidnapping for leaving a store with a

207 is divisible between § 207(e) and other subsections. Arguably § 207(a) does not come within § 16(b), because it can involve, e.g., the threat of arrest,[22] and kidnapping by fraud or trickery, 207(d), does not come within § 16(b) because there is no inherent risk of violence. See also *Castrijon-Garcia v. Holder*, 704 F.3d 1205 (9th Cir. 2013), holding that PC 207(a) is not categorically a crime involving moral turpitude (overruled by *Ceron v. Holder,* 747 F.3d 773, 787 n. 2 (9th Cir. 2014) (en banc) in a "limited way" to the extent it cited *Carr v. INS*, 86 F.3d 949 (9th Cir. 1996)). To best persuade decision-makers, counsel should seek cases showing a minimum conduct that is not egregious.

Stalking, PC § 646.9. Note that any felony or misdemeanor § 646.9 conviction will cause deportability under the domestic violence ground as conviction of "stalking," regardless of sentence imposed or whether the victim and defendant share a domestic relationship.[23] Therefore the issue of whether § 646.9 is a COV is mainly relevant to whether a conviction *also* is an aggravated felony, in cases in which a sentence of a year or more is imposed.

Johnson should not change the Ninth Circuit's approach. The court held that § 646.9 is not a COV under 18 USC § 16(a). It found that the minimum conduct to commit at least felony "harassing" under § 646.9 is not a COV under § 16(b), because persons have been found guilty of harassing who do not have the intention or ability to use force, e.g., who are outside of the country. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1083-84 (9th Cir. 2007). The court employed the minimum conduct rather than the ordinary case standard in the § 16(b) determination.

The court did not reach the issue of whether a felony conviction for "following" under § 646.9 is a COV, and for that reason criminal defense counsel should try to plead to "harassing." However, arguably no felony conviction for § 646.9 is a COV in the Ninth Circuit, whether for harassing or following, because PC § 646.9 should not be found "divisible between following and harassing under the categorical approach because a jury is not required to decide unanimously between the two in order to find guilt.[24]

The BIA held that felony § 646.9 is categorically a crime of violence under 18 USC § 16(b), relying partly on the ordinary case standard set out in *James, supra*. It limited application of the Ninth Circuit *Malta-Espinoza* case to cases arising within the court's jurisdiction.[25] The BIA might continue with this view, *if* 18 USC § 16(b) is not held void for vagueness*, and* the BIA finds that even the most minimal conduct to violate § 646.9 (e.g., writing letters from within prison or outside the country, without intent or ability to use violent force) presents a substantial risk that violent force will be used in the course of committing the offense.

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friend's infant child), which was codified as PC § 207(e); *People v. Arriola,* 2009 Cal. App. Unpub. LEXIS 6574; 2009 WL 2470633 (the defendant gave birth to a son in the hospital and the baby tested positive for meth; instead of releasing the baby to Child Protective Services, the defendant snuck out with the baby and fled the hospital)..

[22] *People v. Majors* (2004) 33 Cal.4th 321, 331 [14 Cal.Rptr.3d 870, 92 P.3d 360] (defendant posed as security guard and ordered victim to accompany him back to the mall; victim believed she would be arrested if she did not comply).

[23] See 8 USC 1227(a)(2)(E)(i); *Matter of Sanchez-Lopez,* 26 I&N Dec. 71 (BIA 2012).

[24] See CALCRIM 1301; see also n.1 for advisories on the categorical approach.

[25] See *Matter of U. Singh*, 25 I&N Dec. 670, 677-79 (BIA 2012), reaffirming *Matter of Malta*, 23 I&N Dec. 656 (BIA 2004) and declining to apply *Malta-Espinoza v. Gonzales* outside the Ninth Circuit.

Sexual battery, PC § 243.4. The Ninth Circuit held that the minimum prosecuted conduct to commit § 243.4 does not meet the definition at 18 USC § 16(a), because the touching can be ephemeral and not by force, and the restraint can be psychological and not by force.[26]

The court found that felony § 243.4 meets the definition at 18 USC § 16(b). It did not rely on the ordinary case standard (the case was published before the Supreme Court's decision in *James*), but it did rely on the example of residential burglary.[27]

Counsel can argue that the minimum prosecuted conduct, which is unwanted sexual touching that can be effected merely by psychological authority,[28] does not meet the § 16(b) standard. Due to the nature of the offense, this may or may not be successful.

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[26] *United States v. Lopez-Montanez*, 421 F.3d 926, 929-30 (9th Cir. 2005).

[27] *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005).

[28] See, e.g., *People v. Arnold*, 7 Cal. Rptr. 2d 833, 838 (Cal. App. 5th Dist. 1992) (teacher with psychological authority blocked one exit, although victim departed by another exit); *People v. Grant*, 8 Cal. App. 4th 1105 (Cal. Ct. App. 1992) (perpetrator stated that he worked for the police and the trespassing defendant could get in trouble if she did not comply).