



“Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Legal Standards and Sample Case Law Determinations

This resource¹ is meant to assist the legal representation of (1) immigrant defendants in criminal proceedings who are seeking to avoid conviction of an offense that will bar relief from removal based on a fear of persecution in the country of removal and (2) immigrant respondents in removal proceedings who are seeking such fear-based relief but have a past criminal conviction. Specifically, this resource is meant to help evaluate whether a criminal conviction constitutes a “particularly serious crime” barring asylum or withholding of removal.

This resource first provides a general overview of particularly serious crime legal standards. Next, this resource provides a quick-reference chart for analyzing whether specific criminal offenses may be considered particularly serious crimes based on Board of Immigration Appeals (“BIA”) and federal circuit court opinions. Lastly, this resource provides summaries of sample case law determinations discussing whether certain offenses are particularly serious, organized by type of offense. This resource is not meant to replace independent legal advice provided by an attorney familiar with a client’s case. These materials should thus be relied upon only as a first step to further individualized legal research and fact investigation.

Aggravated Felonies as “Particularly Serious Crimes”

In the asylum context: For asylum purposes, a felony or misdemeanor that qualifies as an aggravated felony (“AF”) is automatically considered a “particularly serious crime” (“PSC”). See 8 U.S.C. § 1158(b)(2)(B)(i).

In the withholding of removal context: For withholding of removal purposes, an AF is automatically considered a PSC if the individual has been sentenced to an aggregate term of imprisonment of at least five years for all AF conviction(s). See 8 U.S.C. § 1231(b)(3)(B).

For guidance on AF case law and arguments to defeat AF charges, see IDP resource “Fighting Aggravated Felony Charges” available at <https://www.immigrantdefenseproject.org/product/fighting-aggravated-felony-charges/>.

Other Crimes as “Particularly Serious Crimes” / Factor Balancing Test

The BIA and most courts have held that an offense may be deemed a PSC even if it is not an AF. See Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007), aff’d, N-A-M- v. Holder, 587 F.3d 1052 (10th Cir. 2009), holding that Congress did not intend to limit what offenses may be PSCs to those offenses classified as AFs. See also Ali v. Achim, 468 F.3d 462 (7th Cir. 2006), Nethagani v. Mukasey, 532 F.3d 150 (2d Cir. 2008), Delgado v. Holder, 563 F.3d 863 (9th Cir. 2009); Zhan Gao v. Holder, 595 F.3d 549 (4th Cir. 2010). But see Alaka v. Att’y Gen. of the U.S., 456 F.3d 88 (3d Cir. 2006) where the court concluded that an offense must be an AF in order to be classified as a PSC. (Note: The Third Circuit has been hesitant to address whether the holding in Alaka is still viable following the decision in In re M-H-, 26 I&N Dec. 46 (BIA 2012), which stated that the BIA would apply the holding of N-A-M- to cases within the Third Circuit with the goal of national uniformity. See Aguilar v. Att’y Gen. of U.S., 665 F. App’x 184, 188 n.4 (3rd Cir. Dec. 13, 2016)).

Generally, the adjudicator must determine whether a crime is particularly serious based on the circumstances of the specific case:

- **In the asylum context:** when the offense is not an AF.
- **In the withholding context:** when the offense is not an AF, or the offense is considered to be an AF but did not result in a sentence of five years or more of imprisonment.

In making an individual determination of the offense, BIA case law calls for the following steps:

¹ This resource was updated through July 2018 by IDP intern Grace Paras under the supervision of IDP Senior Counsel Manuel D. Vargas after it was earlier updated through 2016 by Juliana Ratner and Marin Tollefson of the Harvard Immigration and Refugee Clinical Program under the supervision of Managing Attorney Philip L. Torrey.

- **Examining elements of the offense:** First, the adjudicator must look at the elements of an offense to determine if the crime is clearly not particularly serious. (See Matter of N-A-M-, 24 I&N Dec. at 342.)
- **Examining case-specific factors:** Once the elements of an offense are found to potentially bring it within the ambit of a PSC, all reliable information may be considered in determining whether the offense constitutes a PSC, including but not limited to the record of conviction and sentencing information. See Matter of N-A-M-, 24 I&N Dec. at 342–44. Based on BIA case law, the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts for the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. (See Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988)).
- **Examining mitigating factors:** According to the BIA, adjudicators are not required to analyze the mitigating circumstances surrounding the offense, and, in fact, the BIA discouraged such considerations, explaining that “offender characteristics” are irrelevant because they “may operate to reduce a sentence but do not diminish the gravity of a crime.” (See N-A-M-, 24 I&N Dec. at 343.)
 - **Mental health:** For example, the BIA has stated that a petitioner’s mental health condition is not a factor to be considered in assessing whether he or she has been convicted of a PSC. (Matter of G-G-S-, 26 I&N Dec. 339, 347 (BIA 2014).) However, the Ninth Circuit has since held that the adjudicator must take into consideration a petitioner’s mental health condition at the time of the crime when determining whether it should be considered a PSC. (See Gomez-Sanchez v. Sessions, 887 F.3d 893 (9th Cir. 2018); but see Wai Kwong Ng v. Holder, 585 F. App’x 617 (9th Cir. 2014) (finding that an individual’s mental health status did not mitigate the circumstances of his robbery conviction.))
- **For more information see:** Matter of L-S-, 22 I&N Dec. 645 (BIA 1999), overruled in part, Matter of Y-L- 23 I&N Dec. 270 (A.G. 2002), supra; Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), overruled in part, Matter of Y-L-, supra; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992), Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). Note that the PSC test may be slightly different depending on the jurisdiction. See, e.g., Estrada-Martinez v. Lynch, 809 F.3d 866 (7th Cir. 2015) (citing Matter of N-A-M-, 24 I&N Dec. 336, 342 (2007) and noting that Matter of Frentescu has been superseded by statute).

Offenses involving unlawful trafficking in a controlled substance, regardless of the sentence imposed, are presumptively deemed to be PSCs. See 8 U.S.C. § 1231(b)(3)(B); Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002). [See below at page 16.]

Without unusual circumstances, a single conviction of a misdemeanor offense is typically not a PSC. See Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Sample Determinations of Specific Offenses Found to be PSCs

For sample determinations of some specific crimes that have been found to be PSCs, see the quick-reference chart that follows. Note that whether a particular offense will be deemed a PSC may vary state-to-state despite a common label, depending on the specific elements of the state’s statute. Additionally, many PSC determinations rely not only on the statutory elements within the convicting jurisdiction but also the nature and circumstances of the crime. Thus, it is difficult to determine whether a conviction will result in a PSC abstractly. While the below chart summarizes general factors to be aware of when evaluating whether a particular type of offense will be considered a PSC, it is only a starting point. The chart groups offenses by general category (for example, “drug trafficking offenses”) and then indicates whether courts have found specific state and federal offenses to be PSCs. While case law may only analyze a handful of specific state convictions per offense type, users of this resource may be able to draw parallels or make distinctions between the specific offenses enumerated in the chart and other similar state and federal offenses.

Sample PSC Case Law Determinations

NOTE: Many of the crimes listed below that have been found to be PSCs would now be considered AFs due to the expansion of the AF definition.

OFFENSE	SPECIFIC OFFENSE & STATUTORY CITATION	PSC?	CASE REFERENCES
DRUG OFFENSES			
Drug trafficking offenses	Keep in Mind: Many drug trafficking offenses will be deemed AFs, which are <i>per se</i> PSCs for asylum (and withholding if the sentence is 5 years or more of imprisonment). In addition, drug trafficking offenses are presumptively considered PSCs for withholding even if the sentence is less than 5 years of imprisonment, unless the individual can demonstrate extenuating circumstances that are both extraordinary and compelling. See <i>Matter of Y-L-, A-G-, R-S-R-</i> , 23 I&N Dec. 270 (A.G. 2002).		
	Possession of marijuana Cal. Health & Safety Code § 11359	PSC based on the circumstances of the case	See Calvillo v. Sessions , page 16.
	Felony possession of cocaine with intent to deliver 720 Ill. Comp. Stat. § 570/ 401(c)(2)	PSC based on the circumstances of the case	See Delgado-Artega v. Sessions , page 17.
	Marijuana possession with intent to distribute (Francisco Rodriguez-Trinidad) Cocaine possession with intent to distribute/deliver (Music ; Gelaneh) 35 Pa. Stat. and Cons. Stat. Ann. § 780–113(a) (30)	Not an AF because the law is overbroad (Francisco Rodriguez-Trinidad); PSC based on the circumstances of the case (Music ; Gelaneh)	See Francisco Rodriguez-Trinidad ; Music v. Att’y Gen. ; Gelaneh v. Ashcroft , pages 17-18.
	Attempted possession for sale of marijuana [Citation not specified]	PSC based on the circumstances of the case	See Usher v. Lynch , page 17.
	Attempted sale of a controlled substance N.Y. Penal Law, § 220.39(1)	PSC as an AF (for asylum) and PSC based on the circumstances of the case (for withholding)	See Baboolall v. U.S. Att’y Gen. , page 17.
	Sale of a controlled substance Fla. Stat. Ann § 893.13(1)(a)(1)	PSC as an AF (for asylum) and PSC for withholding (offense is presumptively a PSC)	See Matter of L-G-H- , page 17.
	Using a telephone to facilitate a drug trafficking offense under the Controlled Substances Act [Citation not specified]	PSC based on the circumstances of the case	See Lezama v. Holder , page 17.
	Delivering or manufacturing, or possessing with intent to deliver, between five and forty-five kilograms of marijuana Mich. Comp. Laws § 333.7401 (2)(d)(ii)	PSC based on the circumstances of the case	See Luambano v. Holder , page 17.
	Sale of cocaine N.H. Rev. Stat. Ann. § 318-B:2	PSC based on the circumstances of the case	See Infante v. Att’y Gen. , page 17.

Conspiracy to distribute and possess with intent to distribute at least a kilogram of heroin 21 U.S.C. §§ 841(b)(1)(A)(i) and 846 (2006)	PSC based on the circumstances of the case	See Matter of G-K , page 17.
Delivery of a controlled substance Wyo. Stat. Ann. § 35-7-1031(a)(ii)	PSC based on the circumstances of the case	See Diaz v. Holder , page 17.
Possession for sale Cal. Health & Safety Code § 11378	Unclear whether it is an AF (see Notes column for conflicting cases); PSC based on the circumstances of the case (Santos-Melitante)	See Garcia Tellez v. Holder ; Santos-Melitante , page 18.
Selling and transporting methamphetamine [Citation not specified]	PSC based on the circumstances of the case	See Castillo v. Holder , page 18.
Selling a small amount of cocaine (less than a gram) Wis. Stat. § 961.41(1)(cm)	PSC based on the circumstances of the case	See Tunis v. Gonzalez , page 18.
Importing heroin 21 U.S.C. § 952	PSC as an AF; PSC based on the circumstances of the case	See Perez v. Loy , page 18.
Selling drug samples 21 U.S.C. §§ 353(c)(1) and 333(b)(1)(B)	Unclear, remanded	See Steinhouse v. Ashcroft , page 18.
Trafficking in cocaine Fla. Stat. Ann. § 893.135 (West 2000 & Supp. 2002)	PSC based on the circumstances of the case	See Matter of Y-L, A-G, R-S-R , page 16.
*CASES DECIDED BEFORE MATTER OF Y-L-		
Conspiracy to distribute heroin; possession of heroin with intent to distribute 21 U.S.C. §§ 846, 841(b)	PSC as an AF; PSC based on the circumstances of the case for withholding	See Chong v. Dist. Dir. , page 18.
Sale of cocaine; possession with intent to sell or deliver [Florida offense; citation not specified]	Offense is <i>per se</i> PSC	See Eskite v. INS , page 18.
Possession of cocaine with intent to distribute Mass. Gen. Laws. ch. 94C, § 32A	Inherent PSC based on the nature of the offense	See Mosquera-Perez v. INS ; Matter of U-M , page 18.
Sale of a controlled substance (LSD); sale or transportation of marijuana Cal. Health & Safety Code §§ 11379; 11360(a)	Inherent PSC based on the nature of the offense	Matter of Gonzalez , page 18.
Conspiracy to distribute; possession with intent to distribute a controlled substance 21 U.S.C. §§ 955a	PSC based on the nature of the offense and dangerousness to the community	See Arauz v. Rivkind , page 18.

Simple possession of drugs

Keep in Mind: While a simple possession conviction is generally not an AF and therefore may not be deemed a *per se* PSC, evidence of underlying trafficking conduct may change this. In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982). If the offense is a misdemeanor and not a felony, there is a lower chance the conviction will be deemed a PSC. A smaller quantity of drugs involved, a lower sentence length, and the absence of other criminal activity in connection with the possession offense also decrease the chance the conviction will be a PSC.

Drug possession [Citation not specified]	PSC based on the circumstances of the case	See Vaskovska v. Lynch , page 19.
Possession of cocaine [Citation not specified]	Not a PSC based on the circumstances of the case	See Matter of Toboso-Alfonso , page 19.

OFFENSES AGAINST PERSONS

Keep in Mind: Depending on the term of imprisonment imposed, many offenses against persons will be deemed "crime of violence" AFs, which are *per se* PSCs for asylum (and withholding if the sentence is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982).

Assault, aggravated	Aggravated assault N.J. Stat. Ann. § 2C:12-1(b)(1)	Not an AF – the Courts are split on whether the offense can be deemed a PSC based on the circumstances of the case or whether the offense cannot be considered a PSC because it is not an AF, based on Third Circuit precedent.	See United States v. Reyes-Romero ; Aguilar v. Att’y Gen. , page 19.
Assault with a dangerous or deadly weapon	Aggravated assault [Citation not specified]	PSC based on the circumstances of the case	See Flores v. Holder , page 19.
	Assault in the third degree [Citation not specified]	PSC based on the circumstances of the case	See Guangzu Zheng v. Lynch , page 19.
	Assault with a deadly weapon Cal. Penal Code § 245(a)(1)	Unclear. May be a PSC based on the circumstances of the case	See Matter of G-G-S ; Gomez-Sanchez ; page 19.
	Assault with a deadly weapon other than a firearm [California offense; citation not specified]	PSC based on the circumstances of the case	See Konou v. Holder , page 19.
	Unspecified assault conviction [New York offense; citation not specified]	Under the statutory provision, the court is unable to determine the degree of violence involved and thus whether it is an AF.	See Hernandez v. Att’y Gen. , page 19-20.
	Pointing a firearm at another person S.C. Code Ann. § 16-23-410	PSC as an AF for asylum & withholding (received a 5-year sentence)	See Cole v. U.S. Att’y Gen. , page 20.

	Substantial battery with intent to cause substantial bodily harm by using a dangerous weapon Wis. Stat. §§ 940.19(3), 939.63	PSC based on the circumstances of the case	See Ali v. Achim , page 20.
	Felony firearm and felonious assault Mich. Comp. Laws §§ 750.227b-a and 750.82	PSC based on the circumstances of the case	See Pjeter Juncaj , page 20.
	Assault with a weapon or with force likely to produce great bodily injury [California offense; citation not specified]	PSC based on the circumstances of the case	See Singh v. Ashcroft , page 20.
	Assault with a dangerous weapon D.C. Code Ann. § 22-502	Unclear, remanded to BIA for further analysis.	See Yousefi v. INS , page 20.
Battery, aggravated	Battery with serious bodily injury [California offense; citation not specified]	PSC based on the circumstances of the case	See Konou v. Holder , page 20.
	Aggravated battery by use of a firearm [Citation not specified]	PSC based on the circumstances of the case (but the Court also found the offense to be an AF for asylum, and for withholding based on the sentence length)	See Matter of B- , page 20.
Kidnapping and battery	Kidnapping in the third degree and burglary in the first degree [New York offense; citation not specified]	PSC based on the circumstances of the case (but the Court also found the offense to be an AF)	See Choeum v. INS , page 20.
Manslaughter	Voluntary manslaughter Cal. Penal Code § 192(a)	Not an AF because it is not a crime of violence	See Quijada-Aguilar v. Lynch , page 20.
	Second degree manslaughter N.Y. Penal Law § 125.15(1)	PSC based on the circumstances of the case	See Denis v. Att'y Gen. ; Matter of Jean , page 20-21.
	First-degree manslaughter N.Y. Penal Law § 125.20	<i>Per se</i> PSC (though not an AF); no consideration of mitigating factors	See Ahmetovic v. INS , page 21.
Manslaughter, involuntary	DUI/Manslaughter Fla. Stat. § 316.193(3)	PSC based on the circumstances of the case	See Ursu v. INS , page 21.
Menacing	Felony menacing Colo. Rev. Stat. §§ 18-3-206(1)(a)-(b)	PSC based on the nature of the elements of the offense	See Matter of N-A-M- , page 21.
Reckless endangerment	First degree reckless endangerment [Citation not specified]	PSC based on the circumstances of the case	See Nethagani v. Mukasey , page 21.
Robbery	Second degree robbery Cal. Penal Code § 211	PSC based on the circumstances of the case	See Wai Kwong Ng v. Holder ; Castillo-Interiano v. Holder ; Villegas v. Mukasey , pages 21.
	Robbery Fla. Stat. Ann. §§ 812.13(1), 812.13(2)(c) (West 1998)	PSC based on the circumstances of the case	See Matter of S-V- , page 21.

Robbery with a firearm or deadly weapon	Attempted robbery in the third degree N.Y. Penal Law §§ 110.00, 160.05	PSC based on the circumstances of the case	See Salazar Quiceno v. Att'y Gen. , page 21.
	Robbery, criminal conspiracy, and possessing instruments of a crime 18 Pa. Cons. Stat. §§ 3701(a)(1)(i), 903, 907	PSC based on the circumstances of the case	See Gweh v. U.S. Dep't of Justice , page 21.
	First degree robbery while armed with a handgun Wash. Rev. Code § 9A.56.200(1)(a)	Considered an AF for asylum, and PSC based on the circumstances of the case for withholding	See Matter of S-S- , page 22.
	Robbery with a deadly weapon [Florida offense; citation not specified]	Considered an AF for asylum, and PSC based on the circumstances of the case for withholding	See Matter of L-S-J- , page 22.
	Robbery with a firearm, to wit, a pistol; attempted robbery with a firearm, to wit, a pistol; grand theft second degree; accessory after the fact Fla. Stat. Ann. §§ 812.13, 812.014, 777.03	PSC based on the circumstances of the case	See Matter of Carballe , page 22.
Shooting with intent to kill	Shooting with intent to kill [Oklahoma offense; citation not specified]	Would likely be considered a PSC (in dicta)	See Nguyen v. INS , page 22.
Threats with intent to terrorize	Threat with intent to terrorize Cal. Penal Code § 422	PSC based on the circumstances of the case	See Latter-Singh v. Holder , page 22.

SEX OFFENSES

Keep in Mind: If the conviction is based on elements establishing rape or sexual abuse of a minor, then the crime is an AF and it will be a *per se* PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982).

Child molestation	Court characterizes the offense as sexual abuse of a minor Cal. Penal Code § 647.6	PSC as AF for asylum; PSC based on the circumstances of the case for withholding	See Lazovic v. Ashcroft , page 22.
	Court characterizes the offense as sexual abuse of a minor Cal. Penal Code § 288(a)	Deems the offense an AF	See U.S. v. Baron-Medina , page 22.
	Lewd and lascivious acts upon a child under the age of 14; child molesting [Citation not specified]	PSC based on the circumstances of the case	See Pablo v. INS , page 22.
Communication with a minor for immoral purposes	Communication with a minor for immoral purposes Wash. Rev. Code § 9.68A.090	Unclear	See Morales v. Gonzales , page 22.

Criminal sexual abuse	Attempted sexual abuse in the first degree Or. Rev. Stat. § 163.427	PSC as an AF for the purposes of asylum	See Diego v. Sessions , page 22.
	Felony aggravated criminal sexual abuse 720 Ill. Comp. Stat. 5/12–16(b)	PSC as an AF for the purposes of asylum; PSC based on the circumstances of the case for withholding	See Espinoza-Franco v. Ashcroft , page 22-23.
	First degree sexual abuse N.Y. Penal Law § 130.65	Not an AF, but a PSC based on the circumstances of the case	See Flores v. Holder , page 23.
	Lewd and lascivious acts Cal. Penal Code § 288(a)	PSC based on the circumstances of the case	See Landaverde v. Lynch ; Gomez-R v. Holder , page 23.
	Sexual abuse of a minor in the first degree [Citation not specified]	PSC based on the circumstances of the case	See Obdalla v. Holder , page 23.
Criminal sexual assault, attempted	Attempted criminal sexual assault 720 Ill. Comp. Stat. 5/8-4(a), 5/12-13(a)(1) (since renumbered as 720 Ill. Comp. Stat. 5/11-1.20(a)(1) (West 2016))	PSC based on the circumstances of the case	See Fuller v. Lynch , page 23.
Criminal sexual conduct	Fourth degree criminal sexual contact N.J. Stat. Ann. § 2C:14-3(b)	PSC as an AF for the purposes of asylum; PSC based on the circumstances of the case for withholding	See Remoi v. Att’y Gen. of the U.S. , page 23.
Criminal sexual intercourse with a person under 18	Lewd and lascivious acts on a child under 14 Cal. Penal Code § 288(a)	AF of “sexual abuse of a minor” unless it’s for statutory rape convictions.	See Estrada-Espinoza; United States v. Medina-Villa , page 23.
Endangerment of welfare of child	Second degree endangering the welfare of a child N.J. Stat. Ann. § 2C:24–4(a)	PSC as an AF (for both asylum and withholding, as sentence was over 5 years)	See Uzoka v. Att’y Gen. , page 23.
Lascivious acts against a dependent person	Lascivious acts against a dependent person Cal. Penal Code § 288(c)(2)	PSCs based on the circumstances of the case	See Corleto v. Lynch , page 23.
Lewd and lascivious act with a child	Attempted lewd act upon a child under 14; contacting a child with intent to commit a specific crime [Citation not specified]	PSC based on the circumstances of the case	See Sandoval-Lemus v. Sessions , page 23.
	Lewd and lascivious acts with a child under the age of 14 Cal. Penal Code § 288(a)	PSC based on the circumstances of the case for withholding	See Blandino-Medina v. Holder , page 23.
	Indecent liberties with a child Va. Code Ann. § 18.2–370	PSC as an AF for the purposes of asylum; PSC based on the circumstances of the case for withholding	See Pervez v. Holder , page 23-24.

	Unlawful sexual intercourse with a person under age 18; lewd or lascivious acts with a child 14 or 15 years of age Cal. Penal Code §§ 261.5, 288(c)	PSCs based on the circumstances of the case	See Bogle-Martinez v. INS , page 24.
Rape	Willfully inflicting corporal injury resulting in a traumatic condition on spouse Cal. Penal Code § 273.5(a)	PSCs based on the circumstances of the case	See Sosa v. Holder , page 24.
	Rape in the first degree [New York offense; citation not specified]	PSC as an AF (for both asylum and withholding, as sentence was over 5 years)	See Smith v. U.S. Dep't of Justice , page 24.
Rape, attempted	Attempted rape [Citation not specified]	"Inherent" PSC	See Gatalski v. INS , page 24.

PROPERTY OFFENSES

Keep in Mind: There is little case law in this area, but crimes against property are less likely to be considered PSCs than crimes against people, especially when they are single-conviction misdemeanors. See page 24. Note, however, that if the conviction is based on elements establishing burglary or theft with a sentence imposed of 1 year or more of imprisonment, or based on elements establishing fraud with a loss to the victim exceeding \$10,000, then the crime is an AF and it will be a *per se* PSC for the purposes of asylum (and withholding if the sentence of imprisonment imposed is 5 years or more). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982).

Access device fraud, conspiracy to commit	Access device theft and identity fraud 18 U.S.C. §§ 1028A, 1029	PSC based on the circumstances of the case	See Zhong Qin Yang v. Holder , page 24.
Bank fraud, aiding and abetting	Aiding and abetting bank fraud 18 U.S.C. §§ 1344 and 2	Not an AF; not a PSC	See Alaka v. Att'y Gen. of the U.S. , page 24.
Bank fraud, conspiracy	Conspiracy to commit bank fraud 18 U.S.C. §§ 371, 1344	PSC as an AF for asylum	See Leo Martinez , page 24.
Bank fraud, in general	Federal bank fraud 18 U.S.C. § 1344	PSC based on the circumstances of the case	See Sopo v. Att'y Gen. , page 24.
	Knowingly making a false statement under penalty of perjury in a bankruptcy proceeding 18 U.S.C. § 152(3)	Not a PSC based on the circumstances of the case (and not an AF because actual loss was less than \$10K)	See Singh v. Att'y Gen. , page 25.
	Insurance fraud 18 U.S.C. §§ 1033(b)	PSC as an AF for asylum; PSC for withholding based on the circumstances	See Ugochukwu v. Gonzales , page 25.
Burglary, aggravated	Burglary in the first degree N.Y. Penal Code § 140.30	PSC "on its face"	See Matter of Garcia-Garrocho , page 25.
Burglary, attempted	Attempted burglary [Citation not specified]	PSC based on the circumstances of the case	See Backoulas-Spring v. Mukasey , page 25.

	Attempted burglary 18 Pa. Con. Stat. Ann. § 3502	PSC as an AF for asylum; not a PSC for withholding (where sentence did not amount to 5 years or more)	See Wonlah v. DHS , page 25.
Burglary, residential (burglary of a dwelling)	Burglary of a habitation Tex. Penal Code § 30.02(a)(1)	PSC based on the circumstances of the case	See Cana-Coronado v. Holder , page 25.
	First degree residential burglary Cal. Penal Code § 459	PSC as an AF for asylum; PSC for withholding as a crime of violence (where sentence did not amount to 5 years or more)	See Lopez-Cardona v. Holder , page 25.
Burglary of a building, non-aggravated	Burglary in the third degree Del. Code Ann. tit. 11, § 824	PSC as an AF for asylum; not a PSC for withholding (where sentence did not amount to 5 years or more)	See Mekenye v. Att'y Gen. , page 25.
	Burglary 18 Pa. Cons. Stat. Ann. § 3502(a)	Not a PSC for withholding (where sentence did not amount to 5 years or more)	See Romanishyn v. Att'y Gen. , page 25.
Burglary of a vehicle	Vehicle burglary Cal. Penal Code § 459	Not an AF (but may be a PSC based on the circumstances of the case)	See Sareang Ye v. INS , page 25.
Burglary with intent to commit theft	Burglary with intent to commit theft Ill. Rev. Stat., ch. 38, ¶ 19-1	Not a PSC based on the circumstances of the case	See Matter of Frentescu , page 25.
Carjacking	Carjacking Cal. Penal Code § 215(a)	Unclear whether offense is a PSC based on the circumstances of the case	See Wolfgramm v. Mukasey , page 25-26.
Counterfeit credit cards, conspiracy to traffic in	Providing false information to obtain credit cards Cal. Penal Code § 532a(1)	PSC for asylum (court does not say on what grounds the crime was determined a PSC)	See Tijani v. Holder , page 26.
	Conspiracy to traffic in counterfeit credit cards 18 U.S.C. § 371	PSC as AF for asylum; not PSC for withholding (where sentence was less than 5 years)	See Unuakhaulu v. Gonzales , page 26.
Criminal trespass, with intent to commit crime	Trespass of an automobile with intent to commit a crime; possession of burglary tools Colo. Rev. Stat. §§ 18-4-502, 18-4-205(1)	Offense is an AF	See Novitskiy v. Ashcroft , page 26.
Grand larceny in the fourth degree	"Break and enter" and grand larceny [Virginia offense; citation not specified]	<i>Per se</i> PSC for withholding as an AF with a sentence over 5 years	See Matter of Walter Alexander Landaverde Garcia , page 26.
	Grand larceny in the fourth degree N.Y. Penal Law § 155.30 (McKinney 1998)	PSC as AF for asylum; not a PSC for withholding of removal (sentence less than 5 years)	See Bastien v. DHS , page 26.

Grand theft, person	Grand theft person Cal. Penal Code § 467(c)	PSC as an AF for asylum; not a PSC for withholding based on circumstances of the case (sentence less than 5 years)	See Matter of M.N. , page 26.
Identity theft	Aggravated identity theft and mail fraud 18 U.S.C. §§ 1028A, 1341	Not an AF, but a PSC based on the circumstances of the case	See Valerio-Ramirez v. Sessions , page 26.
	Conspiracy to commit wire fraud and identity theft [Citation not specified]	PSC as an AF for asylum; PSC based on the circumstances of the case for withholding	See Doe v. Sessions , page 26.
	Access device fraud; aggravated identity theft 18 U.S.C. §§ 1029(b)(2), 1028A(a)(1)	Considered an AF; PSC based on the circumstances of the case for withholding	See Zhong Qin Yang v. Holder , page 26.
Receipt of stolen property	Receipt of stolen property [Citation not specified]	While an AF, not a PSC for withholding based on the circumstances of the case	See Hernandez-Barrera v. Ashcroft , page 26.
Securities fraud	Securities fraud with losses of nearly \$900,000 15 U.S.C. §§ 77q, 77x; 18 U.S.C. § 2	AF; PSC based on the circumstances of the case for withholding	See Kaplun v. Att'y Gen. of U.S. , page 27.
Theft of services, generally	Theft of services Pa. Stat. and Cons. Stat. § 3926(b) (West 1983)	AF	See Ilchuk v. Att'y Gen. of U.S. , page 27.
Unauthorized access to a computer network	Unauthorized access to a computer; wire fraud 18 U.S.C. §§ 1030(a)(4), 1343, 1346.	PSC as AF for asylum; PSC based on the circumstances for withholding	See Tian v. Holder , page 27.

FIREARM OFFENSES

Keep in Mind: Firearm trafficking offenses are likely to be found PSCs as firearm trafficking AFs, which are *per se* PSCs for asylum (and withholding if the sentence is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982).

Discharging a firearm into a dwelling	Illegal discharge of a firearm Cal. Penal Code § 246	PSC based on the circumstances of the case	See Granados v. Ashcroft , page 27.
Firearm trafficking offenses, generally	Conspiracy to deal in firearms without a license 18 U.S.C. §§ 371, 922(a)(1)(A); 26 U.S.C. §§ 5812, 5861(e)	PSC as AF for asylum; PSC based on the circumstances of the case for withholding	See Matter of Q-T-M-T , page 27.
Pointing a firearm at another person	Pointing a firearm at another person S.C. Code Ann. § 16-23-410	PSC as crime of violence AF for withholding of removal (where sentence was 5 years)	See Cole v. Att'y Gen. , page 27.
Possession of a firearm by a convicted felon, drug addict, or fugitive	Possession of a firearm and ammunition 18 U.S.C. § 922(g)(2)	PSC based on the circumstances of the case (IJ determination)	See Hill v. Att'y Gen. , page 27.

	Possession of firearm by a felon or an addict Cal. Penal Code § 12021(a)(1) (repealed and recodified at § 29800(a)(1))	PSC as an AF for asylum and withholding (sentence was 5 years or more)	See Pagayon v. Holder , page 27.
	Possession of a firearm by a convicted felon [Citation not specified]	PSC (no analysis provided)	See Pena-Esparza v. Att'y Gen. , page 27.
Possession of a firearm during the commission of another crime	Possession of a firearm during a drug trafficking offense [Citation not specified]	PSC as an AF for asylum; PSC for withholding (no analysis provided)	See Rangolan v. Mukasey , page 27.
	Felony firearm and felonious assault Mich. Comp. Laws §§ 750.227b-a, 750.82	PSC based on the circumstances of the case for withholding	See Matter of Pjeter Juncai ; Matty v. INS , page 28.
	Felonious assault; possession of a firearm during a felony; carrying a weapon in a vehicle Mich. Comp. Laws Ann. §§ 750.82(1), 750.227b, 750.227(2).	PSCs based on the circumstances of the case	See Hamama v. INS , page 28.
	Breaking and entering an occupied dwelling with the intent to commit larceny while carrying a concealed handgun [Michigan offense; citation not specified]	PSC based on the circumstances of the case	See Matty v. INS , page 28.
	Use of a firearm during a drug trafficking crime or crime of violence 18 U.S.C. § 924(c)(1) (Supp. II 1990)	PSC as an AF	See Matter of K-L , page 28.
Simple possession of a firearm, generally	Keep in Mind: If the conviction is based on elements establishing an offense described in certain federal firearms statutes (those listed in INA Section 101(a)(43)(E)), then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu , 18 I&N Dec. 244 (BIA 1982). However, if the conviction is a single misdemeanor, the sentence imposed is light, and there is no evidence of the firearm being used against another person, then the conviction is not likely to be found a PSC.		
	Misdemeanor offense of assault upon another with a deadly weapon [California offense; citation not specified]	Not a PSC based on the circumstances of the case	See Matter of Juarez , page 28.

OTHER OFFENSES

Alien smuggling	<p>Keep in Mind: If the conviction is based on elements establishing an offense described in certain federal smuggling statutes (those listed in INA § 101(a)(43)(N)), then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982). Thus, the Court will look to the circumstances underlying the offense. The more aliens smuggled, the longer the sentence imposed, and the more involved the individual was in organizing the smuggling scheme, the more likely the conviction will be considered a PSC.</p>		
	Conspiracy to smuggle aliens 18 U.S.C. § 371	Conviction might be a PSC	See Matter of Kam Kwun Chow , page 28.
	Conspiracy to smuggle other aliens into the United States 8 U.S.C. § 1324(a)(1)(A)(v)(I) (Supp. II 1996)	PSC based on the circumstances of the case	See Zhang v. INS , page 28.
	Bringing an illegal alien into the United States 8 U.S.C. § 1324(a)(2)(B)(iii)	Not a PSC based on the circumstances of the case	See Matter of L-S- , page 28.
Concealing and harboring illegal aliens	Concealing and harboring illegal aliens 8 U.S.C. § 1324(a)(1)(A)(iii)	PSC as an AF for asylum	See Zhen v. Gonzales , page 28.
Criminal contempt (under a crime of violence statute)	<p>Keep in Mind: If the conviction is based on elements establishing a crime of violence (see 18 U.S.C. § 16 definition cross-referenced in INA § 101(a)(43)(F)) and the term of imprisonment is at least one year, then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).</p>		
	Criminal contempt in the first degree N.Y. Penal Law § 215.51(b)(i)	PSC as AF for asylum; not a PSC for withholding of removal (sentence less than 5 years)	See In re Aldabesheh , page 28-29.
Driving under the influence	<p>Keep in Mind: Repeated offenses might trigger discretionary denial of asylum. The Court will consider the factors surrounding the DUI charge to determine the degree of reckless disregard for persons or property, such as the degree of reckless disregard for persons or property.</p>		
	Driving under the influence Cal. Veh. Code § 23153(b)	PSC based on the circumstances of the case	See Mau v. Holder ; Anaya-Ortiz v. Holder , pages 29.
	Driving under the influence [Citation not specified]	Not a PSC for asylum; likely not a PSC for withholding	See Delgado v. Holder (2009); Delgado v. Holder (2011), page 29.
	Driving under the influence (3 convictions) [Michigan offense; citation not specified]	Discretionary denial of asylum without determining whether offense was a PSC	See Koulijinski v. Keisler , page 29.

Exploitation of an elderly person or disabled adult	Keep in Mind: If the offense is based on elements establishing a fraud offense involving loss to victim(s) exceeding \$10,000 (see INA § 101(a)(43)(M)), then such an offense may be deemed an AF, and therefore a <i>per se</i> PSC for asylum, and for withholding if the sentence amounts to 5 years or more. In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. <u>See Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982).	Exploitation of an elderly person or disabled adult Fla. Stat. Ann. §§ 825.103(1), 825.103(2)(c)	PSC as AF for asylum and withholding (sentence of 5 years)	See <u>Matter of Tamara Aleman</u> , page 29.
Failure to appear before a court	Keep in Mind: If the conviction is based on elements establishing an offense relating to failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years' imprisonment may be imposed (see INA § 101(a)(43)(T)), then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. <u>See Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982).	Failure of defendant on bail to appear Fla. Stat. Ann. § 843.15(1)	PSC as AF for asylum and withholding (sentence of 5 years)	See <u>Matter of Tamara Aleman</u> , page 29.
Harming a living animal, maliciously and intentionally	Maliciously and intentionally maim[ing], mutilat[ing], tortur[ing], or wound[ing] a living animal, or maliciously and intentionally kill[ing] an animal Cal. Penal Code § 597(a)		PSC based on the circumstances of the case	See <u>Madrid v. Holder</u> , page 29.
Hostage taking	Hostage taking 18 U.S.C. § 1203		PSC as AF for asylum; IJ determined not a PSC for withholding based on the circumstances of the case	See <u>Acero v. INS</u> , page 29.
Mail fraud	Keep in Mind: If the offense is based on elements establishing a fraud offense involving loss to victim(s) exceeding \$10,000 (see INA § 101(a)(43)(M)), then such an offense may be deemed an AF, and therefore a <i>per se</i> PSC for asylum, and for withholding if the sentence of imprisonment amounts to 5 years or more. In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. <u>See Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982).	Mail fraud 8 U.S.C. § 1341	PSC based on the circumstances of the case	See <u>Maurice Wilson</u> ; <u>Arbid v. Holder</u> , page 30.

Money laundering	Keep in Mind: If the conviction is based on elements establishing an offense described in certain federal money laundering statutes (those listed in INA § 101(a)(43)(D)) and the amount of the funds exceeded \$10,000, then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu , 18 I&N Dec. 244 (BIA 1982).		
Tax fraud and money laundering [Citation not specified]	PSC for withholding based on the circumstances of the case	See Hakim v. Holder , page 30.	
Money laundering 18 U.S.C. § 1956(h)	Conflicting determinations, see Notes column. Not a PSC (no analysis) (Merlos); PSC as AF for asylum and withholding (sentence longer than 5 years) (Bankhole)	See Merlos v. INS ; Bankhole v. INS , page 30.	
Obstruction of justice	Keep in Mind: If the conviction is based on elements establishing an offense relating to obstruction of justice for which the term of imprisonment is at least one year (see INA § 101(a)(43)(S)), then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu , 18 I&N Dec. 244 (BIA 1982).		
Accessory after the fact S.C. Code Ann. § 16-1-55	Not an AF or PSC	See Flores v. Att’y Gen. of U.S. , page 30.	
Obstruction of justice 18 U.S.C. § 1503	PSC as AF for asylum and withholding (sentence longer than 5 years)	See Bankhole v. INS , page 30.	
Possession of child pornography	Keep in Mind: If the conviction is based on elements establishing an offense described in certain federal child pornography statutes (those listed in INA § 101(a)(43)(I)), then the crime is an AF and it will be a <i>per se</i> PSC for the purposes of asylum (and withholding if the sentence imposed is 5 years or more of imprisonment). In addition, even if the offense is not deemed an AF (or the sentence is less than 5 years for purposes of the withholding AF bar), the adjudicator must look to the circumstances surrounding the offense, including: (i) the nature of the conviction; (ii) the circumstances and underlying facts of the conviction; (iii) the type of sentence imposed; and (iv) whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See Matter of Frentescu , 18 I&N Dec. 244 (BIA 1982).		
Possession of child pornography Cal. Penal Code § 311.11(a)	PSC based on the harm caused by the offense	See Matter of R-A-M , page 30.	
Prostitution	Prostitution [Citation not specified]	Unclear; but prostitution is not a <i>per se</i> PSC for withholding	See Yuan v. Att’y Gen. , page 30.
Prostitution, soliciting or engaging while knowingly HIV+	Soliciting or engaging in prostitution, while knowingly having AIDS [Citation not specified]	Not a PSC based on the circumstances of the case for withholding	See Jose Luis Ramirez , page 30.

Racketeering	Racketeering 18 U.S.C. § 1962	Unclear (remanded to BIA for further analysis)	See Steinhouse v. Ashcroft , page 31.
Resisting arrest (resisting and obstructing officer)	Keep in Mind: The adjudicator may consider factors such as whether the crime disrupted the orderly pursuit of justice, created a risk of harm to others, or resulted in the injury of an officer.		
	Resisting an executive officer Cal. Penal Code § 69	Unclear (remanded to BIA for further analysis)	See Alphonsus v. Holder , page 31.
	Resisting and obstructing an officer with an injury [Citation not specified]	PSC based on the circumstances of the case	See Silevany v. Holder , page 31.
Stalking	Third degree stalking N.Y. Penal Law § 120.50(3)	Unclear (remanded); ruled PSC by IJ based on the circumstances of the case	See Wassily v. Holder , page 31.
	Internet stalking of a child [Arkansas offense; Citation not specified]	PSC (no analysis provided)	See Ezike v. Holder , page 31.
Tampering with physical evidence	Tampering with physical evidence N.Y. Penal Law § 215.40(2)	PSC based on the circumstances of the case	See Denis v. Att'y Gen. , page 31.
Telephoning a bomb threat	Telephoning a bomb threat Okla. Stat. Ann. tit. 21, § 1767.1(A)(7)	Unclear (remanded to the BIA for further analysis)	See Abpikar v. Holder , page 31.
Unlawful export of military technology	Unlawful export of military technology 50 U.S.C. §§ 1702, 1705(b)	Not an AF, but PSC based on the circumstances of the case for asylum and withholding	See Zhan Gao v. Holder , page 31.

Summaries of Cases Referenced in Chart

Below are summaries of the cases referenced in the above Sample Case Law Determinations Chart. These case summaries are organized by offense category, type of offense, and date of decision (generally listing decisions in reverse chronological order, except when there is a key older case precedent listed first).

DRUG OFFENSES

Drug trafficking offense (or offenses that may be deemed drug trafficking offenses)

Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002). A conviction for an AF involving unlawful trafficking in controlled substances will presumptively be deemed a PSC for withholding of removal purposes. To overcome that presumption, an individual would have to demonstrate the extenuating circumstances are both extraordinary and compelling. Those circumstances must include, at a *minimum*, all of the following: (1) a very small quantity of the controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the individual in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. The Attorney General noted that the following circumstances do not affect presumption of PSC: cooperation with law enforcement authorities; limited criminal histories; downward departures at sentencing; and post-arrest claims of contrition or innocence.

Calvillo v. Sessions, 713 F. App'x 682 (9th Cir. 2018). Matter of Y-L- is retroactively applicable to determine that a conviction is a PSC because there is no evidence that the respondent relied on the pre-Y-L- rule and the degree of burden is minimal.

Delgado-Artega v. Sessions, 856 F.3d 1109 (7th Cir. 2017). The BIA inappropriately considered two factors when determining whether a drug trafficking conviction was PSC: (1) whether there was an absence of organized crime involvement and (2) whether there were unusual circumstances (i.e. whether the drugs were to be distributed solely for social purposes). However, while improper, the consideration of these two factors did not prejudice the respondent, and he was therefore still found to have a PSC for failing to satisfy two Y-L- factors.

Francisco Rodriguez-Trinidad, A044 892 640 (BIA Feb. 24, 2016) (unpublished). Respondent was convicted of marijuana possession with intent to distribute in Pennsylvania. DHS argued that because there was also a separate statute criminalizing possession of a small amount of marijuana, the overbroad statute issue in Moncrieffe was not present here, and the crime was therefore an AF. The BIA reversed the IJ's conclusion that this was an AF, holding that there remained a "realistic probability" that Pennsylvania still might apply the statute to conduct outside the generic definition of a drug trafficking AF.

Matter of J-S-S-, 26 I&N Dec. 679, 684 (BIA 2015). Petitioner had been convicted of two separate unspecified drug offenses. The IJ considered only the first offense and concluded it was a PSC, but relied upon the facts of the second offense in this analysis. The BIA held this to be inappropriate and remanded.

Usher v. Lynch, 609 F. App'x 521 (9th Cir. July 15, 2015). Affirmed the BIA and found that trafficking in marijuana was a PSC despite "evolving societal standards" concerning marijuana.

Baboolall v. U.S. Att'y Gen., 606 F. App'x 649 (3d Cir. Apr. 14, 2015). IJ properly found that Baboolall's conviction in New York of attempted sale of a controlled substance in the third degree in violation of New York law was a PSC. Baboolall could not demonstrate that he was merely a peripheral participant, a Y-L- factor.

Matter of L-G-H-, 26 I&N Dec. 365, 365 (BIA 2014). Respondent was convicted of selling a controlled substance in violation of a Florida statute that lacked a *mens rea* element with respect to the illicit nature of the substance. The Eleventh Circuit had previously found this offense to be broader than the corresponding federal crime, but left open the possibility that the offense could be an AF under the "illicit trafficking" clause of § 101(a)(43)(B). The BIA held that the offense indeed qualified as an AF under the "illicit trafficking" clause.

Lezama v. Holder, 565 F. App'x 618 (9th Cir. Mar. 21, 2014). Affirmed the IJ's decision that using a telephone to facilitate a drug trafficking offense, a provision of the Controlled Substances Act that is categorically an AF, made petitioner ineligible for asylum and was presumptively a PSC, which made her ineligible for withholding of removal unless she rebutted the presumption.

Luambano v. Holder, 565 F. App'x 410 (6th Cir. Apr. 30, 2014). Held that the BIA properly dismissed Luambano's appeal of an IJ decision denying his applications for withholding of removal under the INA and CAT because his conviction for "delivering, manufacturing, or possessing with intent to deliver" between five and forty-five kilograms of marijuana in violation of Michigan law was a PSC. A conviction does not need to result in incarceration to be considered a PSC.

Infante v. Att'y Gen. of the U.S., 574 F. App'x 142 (3d Cir. July 23, 2014). Court affirmed the BIA's finding that Infante committed a PSC by selling 1.62 grams of cocaine to a police detective for \$100. Even assuming that the amounts of cocaine and money exchanged could be considered small and modest, respectively, factors three through six of Matter of Y-L- could not be met.

Music v. Att'y Gen. of the U.S., 591 F. App'x 97 (3d Cir. Nov. 3, 2014). Upheld BIA's determination that respondent's role as a deliveryman did not make him a peripheral figure, but rather a direct actor. See Matter of Y-L- [above] (a "drug courier" plays more than a sufficiently active part in a distribution conspiracy). His conviction for possession with intent to deliver cocaine constituted a PSC, making him ineligible for withholding of removal.

Matter of G-K-, 26 I&N Dec. 88 (BIA 2013). The respondent was convicted of conspiracy with intent to distribute at least a kilogram of heroin. The offense was presumptively a PSC pursuant to Matter of Y-L-. The IJ did not err when he did not make a separate determination to address whether the respondent was a danger to the community, and the individual did not satisfy the Matter of Y-L- requirement of "a very small quantity of a controlled substance." The fact that the individual cooperated with law enforcement and agreed to testify against his coconspirators did not provide independent basis for relief from removal.

Singh v. Holder, 516 F. App'x 387 (5th Cir. Mar. 15, 2013). The respondent argued that the BIA erred in its application of Matter of Y-L- because it did not consider his lack of criminal history or criminal intent; however, the Fifth Circuit found lack of jurisdiction because the BIA's determination was factual, not a legal challenge falling under the 8 U.S.C. § 1252(a)(2)(D) exception.

Diaz v. Holder, 501 F. App'x 734 (10th Cir. Nov. 1, 2012). Upheld BIA decision that Diaz failed to satisfy the Matter of Y-L- six factor test. He failed to show as a matter of law that \$320 is an inconsequential amount of money. Also, his involvement in the drug transaction was not "merely peripheral" because he introduced the buyer and seller and was present when the transaction took place. Upon finding the two factors unmet, the BIA did not err in failing to

analyze all six factors.

Garcia Tellez v. Holder, 451 F. App'x 655 (9th Cir. Oct. 3, 2011). The BIA erred in applying Matter of Y-L- presumption because the BIA erroneously determined that the individual was convicted of a drug-trafficking AF. The conviction under California law was not a categorical AF because California law regulates the possession and sale of many substances that are not also regulated by the federal Controlled Substances Act. See Cheuk Fung S-Yong v. Holder, 600 F.3d 1028, 1034 (9th Cir. 2010). The BIA erred in determining that Garcia Tellez's conviction was an AF under the modified categorical approach because the conviction record was inconclusive as to whether he pled guilty to the offense as charged in the felony complaint.

Castillo v. Holder, 460 F. App'x 671 (9th Cir. Dec. 2, 2011). Conviction for selling and transporting methamphetamine, with a sentence of probation (including 168 days of community service) constituted a PSC.

Tunis v. Gonzales, 447 F.3d 547 (7th Cir. 2006). State conviction of two counts of sale of a small amount (less than a gram) of cocaine constituted a conviction for a PSC thus barring withholding. Tunis failed to satisfy the third Matter of Y-L- factor because her involvement in the transaction as a seller was not "merely peripheral."

Santos-Melitante v. Gonzales, 161 F. App'x 634 (9th Cir. Dec. 7, 2005). The court upheld the IJ's decision that two convictions under California law for "unlawful possession of a controlled substance for sale" constituted a PSC. The Court found persuasive the fact that intent to sell was an element of the state crime and concluded that because the individual's crimes were also classified as an AF, there was an additional presumption that the individual's AFs were PSCs. See Matter of Q-T-M-T-, 21 I&N Dec. 639, 1996 WL 784581 (1996); but see Garcia Tellez v. Holder [see above].

Gelaneh v. Ashcroft, 153 F. App'x 881 (3d Cir. Nov. 14, 2005). It was "highly improbable" that conviction for possession with intent to deliver between twenty-one and forty-one grams of cocaine with a sentence of five years probation could satisfy the Matter of Y-L- six-factor test.

Perez v. Loy, 356 F. Supp. 2d 172 (D. Conn. 2005). Conviction for importing one kilogram of heroin into the United States could not satisfy the test set forth in Matter of Y-L- and thus constituted a PSC, which would bar withholding of removal.

Steinhouse v. Ashcroft, 247 F. Supp. 2d 201 (D. Conn. 2003). The respondent suffered from bi-polar disorder and was convicted of racketeering and selling drug samples. She received a three-year sentence – a downward departure from the sentencing guidelines due to her "significantly reduced mental capacity." The court remanded to the BIA to consider the four Frentescu factors in their totality, not simply "whether the type and circumstance of the crime indicate that the alien will be a danger to the community." By failing to apply the fourth factor in Frentescu, the BIA had neglected to consider whether Steinhouse's mental impairment affected the determination whether she posed a danger to the community. "When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community."

CASES DECIDED BEFORE MATTER OF Y-L-:

Chong v. Dist. Dir., 264 F.3d 378 (3d Cir. 2001). Left undisturbed, the BIA's determination that conspiracy to distribute heroin and possession of heroin with intent to distribute with aggregate two year sentence were AFs that -- under the facts and circumstances of that case -- were also PSCs for withholding of removal purposes.

Eskite v. INS, 901 F. Supp. 530 (E.D.N.Y. 1995). Notwithstanding a pardon, a noncitizen who was convicted in Florida of the sale of thirty dollars of crack cocaine and of possession with intent to sell or deliver was convicted of a *per se* PSC.

Mosquera-Perez v. INS, 3 F.3d 553 (1st Cir. 1993). A noncitizen convicted of possessing a half ounce of cocaine with intent to distribute, and who had received a suspended sentence and probation, had been convicted of a PSC.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991). Conviction for the sale or transportation of marijuana is a PSC. The BIA found that "the crime of trafficking in drugs is inherently a particularly serious crime. The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes."

Matter of Gonzalez, 19 I&N 682 (BIA 1988). Two convictions for possession of a controlled substance with intent to deliver with a three-year prison sentence are PSCs.

Arauz v. Rivkind, 845 F.2d 271 (11th Cir. 1988). Conviction of possession of marijuana with intent to distribute is a PSC.

Simple possession of drugs, generally

May depend on factors such as whether the offense is a felony or misdemeanor, the quantity of drugs involved (also whether the drugs were for personal use or for distribution), and the sentence imposed by the criminal court. See Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (Simple possession of cocaine is not a PSC).

Vaskoska v. Lynch, 655 F. App'x 880 (2d Cir. Aug. 31, 2016). The Court upheld a BIA decision that a simple drug possession offense without a drug trafficking element, while not a *per se* PSC, was still deemed to be a PSC based on the underlying facts outside of the elements of the offense. Here, the BIA weighed the respondent's testimony that in conjunction with the drug possession conviction, she sold drugs as well.

OFFENSES AGAINST PERSONS

Assault, aggravated

United States v. Reyes-Romero, 2:17-cr-292, 2018 WL 3218658 at *24-25 (W.D. Pa. July 2, 2018). A New Jersey aggravated assault conviction was not an AF. The Court held that "because the Defendant does not carry a conviction for an AF as that term is defined in the INA...his conviction could not qualify under Third Circuit law as a 'particularly serious crime' for purposes of the withholding of removal statute."

Aguilar v. Att'y Gen. of the U.S., 665 F. App'x 184 (3d Cir. Dec. 13, 2016). While the underlying offense of aggravated assault was not *per se* a PSC, it was still a PSC because of the underlying circumstances of the conviction, namely that the respondent "manifest[ed] extreme indifference to the value of human life" by attempting to cause serious bodily harm to a minor.

Assault with a dangerous or deadly weapon

Flores v. Holder, 603 F. App'x 30 (2d Cir. Mar. 16, 2015). BIA reasonably found that an aggravated assault conviction was a PSC because it was a crime against another person. Flores "knowingly and intentionally use[d] a deadly weapon, to-wit: a firearm, to threaten [an individual] with imminent bodily injury by use of the said deadly weapon," demonstrating that the nature of the crime was inherently dangerous and reasonably suggested that he was a danger to the community.

Guangzu Zheng v. Lynch, 629 F. App'x 60 (2d Cir. Oct. 23, 2015). The IJ properly considered all the factors in deciding that Guangzu Zheng's assault crime was a PSC, including (1) the nature of assault in the third degree, which involves intentionally causing physical injury to another person, (2) the circumstances of the crime, including that Zheng acted with others, some of whom used a weapon (a metal baton), to beat the victim, who was hospitalized; (3) the sentence imposed, which was probation; and (4) his dangerousness to the community, which was evident because he attacked the victim violently on two consecutive days.

Matter of G-G-S-, 26 I&N Dec. 339, 347 (BIA 2014), overruled by Gomez-Sanchez v. Sessions, 892 F.3d 985 (9th Cir. 2018). Individual who suffered from schizophrenia was convicted of assault with a deadly weapon and sentenced to less than five years. In affirming the IJ's determination that the offense was a PSC, the BIA found that his illness was not a relevant factor within the circumstances element of the PSC analysis. "Although we are mindful of the impact mental illness can have on an individual's behavior, we conclude that an alien's mental health is not a factor to be considered in assessing whether he or she has been convicted of a particularly serious crime under section 241(b)(3)(B) of the Act." Note: Matter of G-G-S- has been overturned by Gomez-Sanchez in the Ninth Circuit. See Gomez-Sanchez v. Sessions, 887 F.3d 893 (9th Cir. 2018), where an individual who suffered from schizophrenia was convicted of assault with a deadly weapon. The Ninth Circuit found that the immigration court must take into consideration a defendant's mental condition at the time of the crime when determining whether it should be considered a PSC, regardless of whether his mental condition was considered during the criminal proceedings or not.

Konou v. Holder, 750 F.3d 1120 (9th Cir. 2014). The BIA did not abuse its discretion by adopting the IJ's finding that the individual's assault with a deadly weapon other than a firearm and battery with serious bodily injury were PSCs. The IJ considered, *inter alia*, the fact that the criminal judge enhanced the sentence with three additional years for causing bodily injury. Although a sentence enhancement cannot be considered for the purpose of determining whether the crime is an AF, it can be considered for determining whether it is a PSC.

Hernandez v. Att'y Gen., 527 F. App'x 130 (3d Cir. July 30, 2013). Case remanded because the documentation concerning the individual's New York assault conviction was sparse. Importantly, it failed to reveal the statutory

provision under which the conviction occurred, thus the court could not determine whether it was a crime of violence. Even assuming that the individual was convicted of assault in the first degree under New York law, it is unclear that all convictions under that divisible statute constitute crimes of violence.

Cole v. US Att'y Gen., 712 F.3d 517 (11th Cir. 2013). Conviction under South Carolina law which criminalizes presenting or pointing a loaded or unloaded firearm at a person, qualifies as a crime of violence under 18 U.S.C. § 16(b). Because the individual had an indeterminate five-year sentence, he was deemed to have committed an AF with aggregate five years sentence of imprisonment, which is a PSC.

Ali v. Achim, 468 F.3d 462 (7th Cir. 2006). In finding that the conviction for battery with a dangerous weapon was a PSC, the court noted that the "designation of AFs as per se 'particularly serious' creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also 'particularly serious.'"

Satamian v. Gonzales, 175 F. App'x 874 (9th Cir. Apr. 10, 2006). If a conviction under California provision penalizing assault with a deadly weapon or by force is likely to produce great bodily injury carries one year or more in prison, it constitutes an AF and is also a PSC, rendering the individual ineligible for withholding of deportation. The court reasons that an "aggravated felony is a 'particularly serious crime'" for withholding of removal, despite the fact that the sentence imposed was less than five years of imprisonment without providing further explanation of its analysis.

Pjeter Juncaj, A90 316 467 (BIA Jan. 13, 2004). The Court looked to the record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC.

Singh v. Ashcroft, 351 F.3d 435 (9th Cir. 2003). A conviction for assault with a weapon or with force likely to produce great bodily injury, a two-year sentence, and the individual's conduct in kicking the victim in the head, supported the finding that this crime was particularly serious and barred eligibility for withholding.

Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001). Where neither BIA nor IJ considered the several factors set forth in Matter of Frentescu [see above], the case was remanded for such analysis. Here, the sentence was fifteen to forty-five months imprisonment, the 'dangerous weapon' was a rock, and the crime was committed in the context of a running dispute between two street vendors.

Battery, aggravated

Konou v. Holder, 750 F.3d 1120 (9th Cir. 2014). The BIA did not abuse its discretion by adopting the IJ's finding that the individual's assault with a deadly weapon other than a firearm and battery with serious bodily injury were PSCs. The IJ considered, *inter alia*, the fact that the criminal judge enhanced the sentence with three additional years for causing bodily injury. Although a sentence enhancement cannot be considered for the purpose of determining whether the crime is an AF, it can be considered for determining whether it is a PSC.

Matter of B-, 20 I&N Dec. 427 (BIA 1991). Aggravated battery by use of a firearm in which a bullet struck the victim in the head is a PSC.

Kidnapping and burglary

Choeum v. INS, 129 F.3d 29 (1st Cir. 1997). The First Circuit found kidnapping to be an AF, but because the IJ's decision and BIA's affirmance came before October 1, 1996, the definition of "aggravated felony" in IIRIRA did not apply. Instead, the Court found kidnapping to be a particularly serious crime under the AEDPA, and the petitioner was not entitled to a separate dangerousness inquiry.

Manslaughter

Quijada-Aguilar v. Lynch, 799 F.3d 1303 (9th Cir. 2015). Quijada-Aguilar was not ineligible for withholding of removal based on having been convicted of voluntary manslaughter law. The crime was not categorically a crime of violence because a person could have been convicted of voluntary manslaughter for reckless conduct, which fell outside the definition of a crime of violence set forth in 18 U.S.C. § 16.

Denis v. Att'y Gen., 633 F.3d 201 (3d Cir. 2011). The individual hid the body of the victim who died by accident in his office by dismembering her limbs with a machete and burying the body under his garage. He was convicted of second degree manslaughter and tampering with physical evidence, with an indeterminate sentence of 2/3 to 8 years. The individual argued that since the victim was deceased when the tampering occurred, it could not constitute a crime against a person. The AG, however, said that just because crimes against persons are more likely to be considered PSCs does not mean that other crimes cannot also be PSCs. The BIA and IJ properly exercised their discretion in determining that the conviction constituted a PSC in light of the gruesome brutality of

the individual's actions.

Matter of Jean, 23 I&N Dec. 373 (A.G. 2002). Individuals convicted of violent or dangerous crimes will not be granted asylum, even if they are technically eligible, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the individual clearly demonstrates that denial would result in exceptional and extremely unusual hardship. Here, the Attorney General found Jean "manifestly unfit" for a discretionary grant of asylum relief under circumstances that included alien's confession to beating and shaking a 19-month-old child, and that a coroner corroborated a "wide-ranging collection of extraordinarily severe injuries."

Ahmetovic v. INS, 62 F.3d 48 (2d Cir. 1995). The Second Circuit affirmed the findings of the IJ and the BIA that first-degree manslaughter is a *per se* PSC notwithstanding evidence of mitigating factors. (Ms. Ahmetovic shot and killed her husband following a domestic dispute and there was evidence that the killing had been in self-defense.)

Manslaughter, involuntary

Ursu v. INS, 20 F. App'x 702 (9th Cir. Oct. 5, 2001). The BIA was reasonable in determining that a DUI/ manslaughter with a sentence of eighteen months constituted a PSC, considering that the individual caused the death of another human being and that he was so impaired that he continued to operate his vehicle without realizing what he had done.

Menacing

Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007), *aff'd*, N-A-M- v. Holder, 587 F.3d 1052 (10th Cir. 2009). The court found that Congress did not intend to limit what offenses may be PSCs to those offenses classified as AFs. The petitioner's offense in violation of Colorado law was a PSC "based solely on its elements, i.e., that the offense by its 'nature' is a particularly serious one."

Reckless endangerment

Nethagani v. Mukasey, 532 F.3d 150 (2d Cir. 2008). Although first degree reckless endangerment is not a *per se* PSC, the BIA determined that the individual's offense was a PSC based on Frentescu analysis: (1) reckless endangerment "involves behavior which could end a human life"; (2) the individual was sentenced to several months of incarceration followed by five years of probation; (3) by shooting a gun in the air, the individual created "a high potential for serious or fatal harm to the victim or an innocent bystander."

Robbery

Wai Kwong Ng v. Holder, 585 F. App'x 617 (9th Cir. Oct. 31, 2014). The BIA did not abuse its discretion in finding that robbery of an elderly, blind, quadriplegic person in a wheelchair was a PSC. The mental health status of the petitioner did not mitigate the underlying offense.

Castillo-Interiano v. Holder, 474 F. App'x 691 (9th Cir. July 23, 2012). Conviction of second-degree robbery under California law with a sentence of three years of imprisonment constituted a conviction for a PSC.

Villegas v. Mukasey, 523 F.3d 984 (9th Cir. 2008). The IJ determined that robbery conviction with a sentence of only two years was a conviction for a PSC. The Ninth Circuit denied petition for review of withholding of removal claim due to lack of jurisdiction.

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). Robbery was a PSC because the conviction required intent to deprive a person of property through use of force, violence, assault or putting in fear, sentence imposed was four years, and the record indicated violence against persons.

Robbery with a firearm or deadly weapon

Salazar Quiceno v. Att'y Gen., 304 F. App'x 40 (3d Cir. Dec. 17, 2008). Attempted armed robbery, with a sentence of five years' probation, constituted a PSC. The use or threat of violence during a crime is a significant factor in determining whether it is a PSC.

Gweh v. U.S. Dep't of Justice, 218 F. App'x 195 (3d Cir. Feb. 20, 2007). The individual's armed robbery conviction, with three and a half to seven years sentence, is a conviction for a PSC, even though the individual used a toy gun. The IJ properly reviewed all relevant factors, including intent to frighten the victim and the use of violence.

Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), overruled in part, Matter of Y-L-, supra. An alien convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to fifty-five months imprisonment is convicted of a PSC.

Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997). Conviction resulting in a two-and-a-half-year sentence was an AF, and the committed offense threatened violence with a handgun and put lives in danger.

Matter of Carballe, 19 I&N Dec. 357 (BIA 1986). Robbery is a "grave, serious, aggravated, infamous and heinous crime," and the BIA had "little difficulty concluding" that armed robbery was a PSC.

Shooting with intent to kill

Nguyen v. INS, 991 F.2d 621 (10th Cir. 1993). In dicta the court noted that "shooting with intent to kill" would qualify as a PSC for asylum purposes.

Threats with intent to terrorize

Latter-Singh v. Holder, 668 F.3d 1156 (9th Cir. 2012). Conviction for making threats "with intent to terrorize" in violation of California law constituted a PSC. The BIA applied correct legal standards by considering Frentescu factors.

SEX OFFENSES

Child molestation

Courts have held that Congress intended the phrase "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A) (listing AFs) and 18 U.S.C. § 2243, to broadly encompass all acts falling within the "ordinary, contemporary, and common meaning of the words." See U.S. v. Baron-Medina, 187 F.3d 1144, 1146-7 (9th Cir. 1999) (appellant's conviction under California law qualified as conviction for "sexual abuse of a minor" and thus an AF).

Lazovic v. Ashcroft, 101 F. App'x 660 (9th Cir. May 21, 2004). Conviction of touching the "intimate parts" of a twelve-year-old individual constituted a PSC, rendering individual ineligible for asylum and withholding.

Pablo v. INS, 72 F.3d 110 (9th Cir. 1995). Court held that child molestation was a PSC, saying, "sexual offenses perpetrated on children are exceptionally serious crimes."

Communication with a minor for immoral purposes

Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007). The IJ erred in relying on the facts recited in the state appellate court's opinion because those facts were not admitted or established as "the circumstance and underlying facts of conviction." The facts recited in the state appellate court's opinion applied to crimes of which the petitioner was not convicted. Morales was later abrogated. See Anaya-Ortiz v. Holder, 594 F.3d 673 (9th Cir. 2010). In determining whether a crime is a PSC, IJs do not have to limit their inquiry to the record of conviction and sentencing information. IJs may consider "all reliable information" including a police report. Yet, there has been no case so far that held that "communication with a minor for immoral purposes" constitutes a PSC. This offense is a misdemeanor under Washington statute.

Criminal sexual abuse, aggravated (felony, against a minor)

Diego v. Sessions, 857 F.3d 1005 (9th Cir. 2017). Respondent was convicted of attempted sexual abuse in the first degree under Oregon law after sexually touching a nine-year-old. Using the modified categorical approach, the Court found that the Oregon sexual abuse of a minor conviction fell within the generic federal definition and was therefore an AF. Because the conviction was an AF, it was also a PSC, which terminated the individual's asylum status.

Espinoza-Franco v. Ashcroft, 394 F.3d 461 (7th Cir. 2004). The individual argued that he had not committed an AF because the Illinois statute under which he was convicted had a broader definition of "sexual abuse of a minor" than INA did. Yet the court held that when the victim is under thirteen, touching *any* part of the victim's body with lewd intent qualifies as sexual abuse of a minor within the "ordinary, contemporary and common meaning" of the phrase.

For more recent cases in which sexual abuse of a minor was determined to constitute a PSC based on Frentescu analyses, see Flores v. Holder, 779 F.3d 159 (2d Cir. 2015); Landaverde v. Lynch, 632 F. App'x 912 (9th Cir. Dec. 14, 2015); Gomez-R v. Holder, 556 F. App'x 578 (9th Cir. 2014); Obdalla v. Holder, 535 F. App'x 639 (9th Cir. 2013).

Criminal sexual assault, attempted

Fuller v. Lynch, 833 F.3d 866 (7th Cir. 2016). The Seventh Circuit upheld the BIA's finding that an Illinois conviction for attempted criminal sexual assault is a PSC, disqualifying an individual from withholding of removal. A crime can be particularly serious without being an AF, and the BIA appropriately considered the elements of the offense, the sentence received, and the circumstances underlying the conviction.

Criminal sexual contact

Remoi v. Att'y Gen. of the U.S., 175 F. App'x 580 (3d Cir. May 3, 2006). Conviction of criminal sexual contact, for which initial sentence was 364 days, but, subsequent to a probation violation, individual was re-sentenced for eighteen months, constituted a crime of violence AF and a PSC barring both asylum and withholding.

Criminal sexual intercourse with a person under 18

Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008). When Congress added "sexual abuse of a minor" to the list of AFs in the INA it meant "sexual abuse of a minor" as defined in 18 U.S.C. §2243, which requires (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of twelve and sixteen; and (4) an age difference of at least four years between the defendant and the minor. California statutory rape offenses, which had as elements either the fact that victim was under eighteen or that there was at least three-year difference between ages of defendant and victim, proscribed conduct broader than the federal offense of "sexual abuse of a minor," and the individual's conviction under the statute did not provide basis for removal.

U.S. v. Medina-Villa, 567 F.3d 507 (9th Cir. 2009). Ninth Circuit clarified that the holding of Estrada-Espinoza [see above] only applies to statutory rape crimes. As for other offenses constituting "sexual abuse of a minor," Baron-Medina decision [see above] remains good law: "sexual abuse of a minor" still encompasses all conducts that are "sexual abuse" within the ordinary, contemporary and common meaning of the phrase.

Endangerment of welfare of child

Uzoka v. Att'y Gen., 489 F. App'x 595 (3d Cir. July 26, 2012). A second degree offense of endangering the welfare of a child under New Jersey law is an AF of "sexual abuse of a minor" under INA. Because the individual was sentenced to five years in prison, the conviction was presumptively a PSC.

Lascivious acts against a dependent person

Corleto v. Lynch, 630 F. App'x 678 (9th Cir. Nov. 12, 2015). Affirmed BIA finding that, in this case, lascivious acts against a dependent person (an elderly person in his care) was a PSC.

Lewd and lascivious act with a child

Sandoval-Lemus v. Sessions, 709 F. App'x 437 (9th Cir. Sept. 11, 2017). Found that the BIA did not err when it consulted the pre-plea report in order to determine that two convictions arising out of the same incident (attempted lewd act upon a child under fourteen and contacting a child with the intent to commit a crime) constituted a particularly serious crime. While the Ninth Circuit has "suggested" that there may be "hypothetical limits" to the use of police reports, the BIA's analysis did not implicate these limits, as the petitioner did not specifically dispute the facts in the report.

Blandino-Medina v. Holder, 712 F.3d 1338 (9th Cir. 2013). Lewd and lascivious act with a child under fourteen, with a sentence of less than five years, is not a *per se* PSC, and still requires a case-by-case Frentescu analysis. The Blandino-Medina Court also held that because INA unambiguously provides one category of *per se* PSCs for withholding of removal, the BIA may not create additional categories of facially PSCs. *Id.* at 1346-47. The Court found that, while two other circuits had assumed that the BIA could make a PSC determination based solely on the elements of the offense, no Ninth Circuit decision had yet done so.

Pervez v. Holder, 546 F. App'x 157 (4th Cir. Nov. 7, 2013). Conviction for attempted "indecent liberties with a child," in violation of Virginia law with a sentence of one day short of five years, constituted conviction for a PSC, even

though no child was actually harmed or even involved as a potential victim. A PSC does not have to be violent or potentially violent. The IJ and BIA did not err in its case-specific analysis.

Bogle-Martinez v. INS, 52 F.3d 332 (9th Cir. 1995). The Ninth Circuit denied petition for review after the BIA found that the California convictions of (1) unlawful sexual intercourse with a person under age eighteen and (2) lewd or lascivious acts with a child fourteen or fifteen years of age were PSCs.

Rape

Sosa v. Holder, 457 F. App'x 691 (9th Cir. Nov. 3, 2011). Marital rape was found to be a PSC. The IJ properly relied upon the nature of the conviction and the underlying circumstances in which the crime was committed to find that it was "particularly serious."

Smith v. U.S. Dep't of Justice, 218 F. Supp. 2d 357 (W.D.N.Y. 2002). An alien convicted of rape with a sentence of two to six years imprisonment is convicted of an AF and therefore a PSC for both asylum and withholding of removal.

Rape, attempted

Gatalski v. INS, 72 F.3d 135 (9th Cir. 1995). Affirmed BIA decision that the crime of attempted rape is inherently a PSC.

PROPERTY OFFENSES

Crimes against property, generally

There is little case law concerning whether offenses against property may be considered PSCs; however, the BIA stated in Matter of Frenescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992), Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988), that crimes against property are less likely to be categorized as PSCs than crimes against persons.

CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a PSC. See Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Access device fraud, conspiracy to commit

Zhong Qin Yang v. Holder, 579 F. App'x 381 (5th Cir. Sept. 2, 2014). Upheld the IJ's determination that conspiracy to commit access device fraud and identity fraud constituted a PSC as Yang was involved in a large-scale scheme that resulted in losses to twenty-three different individuals and banking organizations, the theft of 419 identities, and a loss of \$54,329.44. "A crime need not involve violence or cause harm or physical danger to other persons in order to be considered a particularly serious crime."

Bank fraud, aiding and abetting

Alaka v. Att'y Gen. of the U.S., 456 F.3d 88 (3d Cir. 2006). The individual was indicted on three counts for conduct involving fraudulent checks, with intended loss of \$47,969. She was convicted only of one count for which the actual loss was less than \$10,000. Therefore, her conviction was not for an AF, and could not constitute a PSC.

Bank fraud, conspiracy

Leo Martinez, A44 407 236 (BIA May 15, 2007). A conviction for conspiracy in a bank fraud with the fund obtained exceeding \$10,000 constitutes an AF, even though the individual did not benefit from more than \$10,000 of the fund. (The court did not discuss whether the conviction constitutes a PSC for withholding of removal.)

Bank fraud, in general

Sopo v. Attorney General, No. 17-15426, 2018 WL 3115785 (11th Cir. June 25, 2018). Upheld BIA finding that four convictions of federal bank fraud with a thirty-three-month sentence was a PSC based on the nature of the fraud and the "harm that it caused victims, exploited accomplices, and the community."

Singh v. Att'y Gen., 677 F.3d 503 (3d Cir. 2012). The individual was convicted for knowingly making a false statement under penalty of perjury in a bankruptcy proceeding. Even though the funds exceeded \$10,000, the funds were transferred to a government informant. The Court vacated the BIA's removal order, because the crime did not create an actual loss exceeding \$10,000, given that (a) the government had custody of the money; (b) the individual could not benefit from this money; (c) neither the trustee nor the creditors were deprived of any property.

Ugochukwu v. Gonzales, 191 F. App'x 484 (7th Cir. 2006). Upheld IJ's decision that insurance fraud with the loss to victims exceeding \$10,000 (which constitutes an AF) is a PSC.

Burglary, aggravated

Matter of Garcia-Garrocho, 19 I&N Dec. 423 (BIA 1986), modified on other grounds, Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). Conviction under New York law for first degree burglary requires finding that applicant accomplished the crime with one or more aggravating circumstances that involve "physical injury or potentially life-threatening acts." Because of the potential for physical harm, the BIA found that the applicant's crime was a PSC on its face.

Burglary, attempted

Backoulas-Spring v. Mukasey, 290 F. App'x 590 (4th Cir. Aug. 29, 2008). Found no error in IJ's decision that the individual's attempted burglary conviction constituted a PSC.

Wonlah v. DHS, No. Civ.A.04-1832, 2005 WL 19447 (E.D.P.A. Jan. 3 2005). Sentence of eleven and a half to twenty-three months in county prison for which individual did not serve any time in prison constituted an AF and thus rendered individual ineligible for asylum. For withholding purposes, however, the conviction did not constitute a PSC.

Burglary, residential (burglary of a dwelling)

Cana-Coronado v. Holder, 547 F. App'x 463 (5th Cir. Nov. 13, 2013). Upheld the BIA's decision that a conviction for "burglary of a habitation" under Texas law constituted a PSC.

Lopez-Cardona v. Holder, 662 F.3d 1110 (9th Cir. 2011). A conviction for residential burglary under California law constitutes a "crime of violence," and is therefore a PSC.

Burglary of a building, non-aggravated

Mekenye v. Att'y Gen., 445 F. App'x 593 (3d Cir. Sept. 22, 2011). Held that burglary in the third degree under Delaware law, with a sentence of three years, was an AF, despite the fact his sentence was ultimately suspended.

Romanishyn v. Att'y Gen., 455 F.3d 175 (3d Cir. 2006) (Dicta) Two convictions for burglary in violation of Pennsylvania law with an aggregate sentence less than three years, were not PSCs, and the IJ allowed the individual to apply for withholding of removal. (*Withholding was denied on different grounds.*)

Burglary of a vehicle

Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000). Conviction for vehicle burglary under California law does not qualify as a "burglary" or a "crime of violence" as those terms are used in the definition of AF. Vehicle burglary is not a crime of violence because the risk of violence against a person or property is low.

Burglary with intent to commit theft

Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992), Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). Conviction of burglary with intent to commit theft, where sentence imposed was for three months, was not a PSC given the circumstances: "Although the applicant did enter a dwelling, there is no indication that the dwelling was occupied or that the applicant was armed; nor is there any indication of an aggravating circumstance. Further, the applicant received a suspended sentence after spending a relatively short period of time in prison (3 months). Such sentence . . . reflects upon the seriousness of the applicant's danger to the community."

Carjacking

Wolfgramm v. Mukasey, 277 F. App'x 676, 677 (9th Cir. May 5,, 2008). BIA erred in determining that a carjacking

conviction under a California statute with a three-year sentence constituted a PSC, because BIA did not sufficiently consider all Frentescu factors, especially the most important: "whether the type and circumstance of the crime indicate that the alien will be a danger to the community."

Counterfeit credit cards, conspiracy to traffic in

Tijani v. Holder, 628 F.3d 1071, 1074 (9th Cir. 2010). Court lacked jurisdiction to review the BIA's decision that credit card fraud with a nine-year sentence and an order to pay over \$10,000 in restitution constituted a PSC for asylum. Note that the case doesn't say on what grounds the crime was determined a PSC, merely that the crimes were "hurtful to the credit structure on which the economy of the United States exists." (*Case remanded to BIA on different grounds.*)

Unuakhaulu v. Gonzales, 416 F.3d 931, 936 (9th Cir. 2005). Conviction which carried with it an 18-month sentence was not a PSC for the purposes of withholding. Conviction was an AF making individual ineligible for asylum, though IJ found that it was also not a PSC in the asylum context, due to the eighteen month sentence, lack of restitution order, and absence of force in the crime.

Criminal trespass, with intent to commit crime

Novitskiy v. Ashcroft, 120 F. App'x 286 (10th Cir. 2005). Criminal trespass of a motor vehicle with intent to commit a crime therein, under Colorado law, is a theft offense that constitutes an AF. Later, in Novitskiy v. Holder, 514 F. App'x 724, 726 (10th Cir. 2013), the Tenth Circuit also upheld the IJ's determination that the conviction was a PSC.

Grand larceny in the fourth degree (felony)

Walter Alexander Landaverde Garcia, A094 050 616 (BIA Mar. 24, 2011). A grand larceny offense with five-year prison sentence is a *per se* PSC.

Bastien v. Dep't of Homeland Sec., No. 03-CV-611F, 2005 WL 1140709 at *8 (W.D.N.Y. Apr. 29 2005). While the crime of grand larceny in the fourth degree in violation of a New York law qualified as an AF, because the sentence was only one and a half to three years incarceration, it did not qualify as a particularly serious crime for withholding of removal. Individual was eligible for discretionary withholding of removal.

Grand theft, person

M.N., AXX XXX 094 (BIA Oct. 12, 2000). Grand theft person (under California law, which defines it as "property taken from the person of another"), held not to be a PSC due to a lack of evidence of violence or threat thereof and light sentence imposed.

Identity theft

Valerio-Ramirez v. Sessions, 882 F.3d 289 (1st Cir. 2018). Upheld the BIA's determination that aggravated identity theft offense at issue is a PSC, even though it is not an AF. Because the aggravated identity theft offense occurred in conjunction with another felony, PSC analysis should take into account the facts and circumstances of the other crime.

Doe v. Sessions, 709 F. App'x 63 (2d Cir. Sept. 27, 2017). Court upheld BIA decision that identity theft could be a PSC, even when the respondent's sentence was less than five years, after weighing the respondent's crime, the impact of the crime on the victims, and the length of the sentence the respondent received.

Zhong Qin Yang v. Holder, 570 F. App'x 381, 384-85 (5th Cir. June 3, 2014). Upheld the IJ's determination that conspiracy to commit access device fraud and identify fraud, with a loss to victims exceeding \$10,000, constituted a PSC.

Receipt of stolen property

Hernandez-Barrera v. Ashcroft, 373 F.3d 9, 15 (1st Cir. 2004). Conviction for receipt of stolen property for which individual received a suspended sentence of two and a half years constituted an AF but was not a PSC.

Securities fraud

Kaplun v. Att'y Gen. of U.S., 602 F.3d 260, 267 (3d Cir. 2010). Upheld the BIA's determination that a securities fraud with loss to victims exceeding \$10,000 constituted an AF and a PSC, even though the sentence was shorter than five years. (*Petition for review granted on other grounds.*)

Theft of services, generally

Ilichuk v. Att'y Gen. of U.S., 434 F.3d 618, 622-23 (3d Cir. 2006). Conviction for theft of services under Pennsylvania law, where sentence imposed (for aggregated charges) was six to twenty-three months of house arrest with electronic monitoring, constituted an AF. "Theft of services" charge originated from two days on which the individual, an ambulance driver, had responded to calls which had been diverted from the legally designated emergency service provider to the individual's employer.

Unauthorized access to a computer network

Tian v. Holder, 576 F.3d 890 (8th Cir. 2009). Upheld the IJ and BIA's determination that the individual's unauthorized access to a computer network, with the total loss to the victim exceeding \$10,000, constituted an AF and a PSC for withholding of removal.

FIREARM OFFENSES

Discharging a firearm into a dwelling

Granados v. Ashcroft, No. C 03-3704 MJJ, 2003 WL 22416147 (N.D. Cal. Oct. 15, 2003). Because crime involved a substantial risk of harm to persons or property and the use of a firearm, it is "difficult to imagine facts and circumstances that would ameliorate the particularly serious nature of his offense."

Firearm trafficking offenses, generally

Firearm trafficking offenses are likely to be PSCs. See, e.g., Matter of Q-T-M-T, 21 I&N Dec. 639, 655 (BIA 1996).

Pointing a firearm at another person

Cole v. Att'y Gen., 712 F.3d 517, 529 (11th Cir. 2013). The conviction for pointing a firearm at another person in violation of South Carolina law qualifies as a "crime of violence" under INA. The individual's indeterminate sentence of maximum five years under a state youthful offender statute was treated as a five-year sentence, thus rendering him ineligible for withholding of removal.

Possession of a firearm by a convicted felon, drug addict, or fugitive

Hill v. Att'y Gen., 542 F. App'x 127, 128 (3d Cir. Oct. 4, 2013). The IJ determined that the conviction for being a fugitive in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(2) constituted a PSC. (The individual appealed the IJ's decision on different grounds.)

Pagayon v. Holder, 675 F.3d 1182, 1187 (9th Cir. 2011). Denied the petition for review of the IJ's decision. The IJ had determined that the conviction for "possession of firearm by a felon or an addict," in violation of Cal. Penal Code § 12021(a)(1), repealed and recodified at § 29800(a)(1), was an AF rendering the individual ineligible for asylum, and the circumstances of the firearms offense and the length of sentence made it a PSC.

Pena-Esparza v. Att'y Gen., 421 F. App'x 223, 224 (3d Cir. Apr. 1, 2011). This case deals with the denial of an individual's application for relief under CAT. It notes in passing that the IJ informed him that possession of a firearm as a convicted felon was a PSC, though offers no analysis.

Possession of a firearm during the commission of another crime

Rangolan v. Mukasey, 302 F. App'x 133, 135 (4th Cir. Dec. 3, 2008). The IJ found the individual ineligible for withholding of removal because possession of a firearm during drug trafficking offense constituted a PSC.

Pjeter Juncaj, A90 316 467 (BIA Jan. 13, 2004). Court looked to record of conviction to determine that using a firearm to shoot another person in the back of the head and purposefully displaying a firearm constituted a PSC.

Hamama v. INS, 78 F. 3d 233, 240 (6th Cir. 1996). Upheld BIA decision that individual in a car who angrily waved gun at a man in another car and was convicted of 1) felonious assault, 2) possession of a firearm during a felony and 3) carrying a weapon in a vehicle under Michigan state law had committed a PSC, despite having been given the lowest possible sentence.

Matty v. INS, 21 F.3d 428 at *5 (6th Cir. 1994). Upheld the IJ's and the BIA's determination that the individual's crimes, including breaking and entering an occupied dwelling with the intent to commit larceny while carrying a concealed handgun, were particularly serious and constituted a danger to the community, because it "involved the potential for great bodily harm to the occupants of the dwelling." Note here that the charges were evaluated in the aggregate as one PSC.

Matter of K-L-, 20 I&N Dec. 654, 659 (BIA 1993). Upheld the IJ's determination that the use of a firearm during a drug trafficking crime constituted an AF. (The individual was barred from withholding of deportation because before 1996 an AF was a *per se* PSC.)

Simple possession of a firearm, generally

May depend on factors such as whether the offense is a felony or misdemeanor, evidence of actual or threatened use of the firearm against another, and the sentence imposed by the criminal court.

CONSIDER: Without unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." See Matter of Juarez, 19 I&N Dec. 664, 665 (BIA 1988).

OTHER OFFENSES

Alien smuggling

Kam Kwun Chow, A91 036 373 (BIA July 27, 2004). While upholding the IJ's denial of withholding of removal, the BIA noted that the individual's conviction for alien smuggling "may constitute" a PSC, although even if the crime was not a PSC the individual failed to establish that he has a fear of persecution upon return to China.

Zhang v. INS, 274 F.3d 103 (2d Cir. 2001). The individual was convicted of conspiracy to smuggle sixty-nine aliens, for which he was sentenced to less than five years imprisonment. Although the IJ granted withholding of removal, the BIA reversed the ruling, holding that although the individual had not assisted in organizing the smuggling (he had been a passenger who later piloted the boat), the conspiracy offense was a PSC because of the number of aliens involved and because "the trip took 47 days across the ocean, and was therefore necessarily a larger and more organized smuggling operation." The Second Circuit dismissed the case for lack of jurisdiction and did not address the merits.

Matter of L-S-, 22 I&N Dec. 645, 655-56 (BIA 1999), overruled in part, Matter of Y-L-, *supra*. Conviction of bringing an illegal alien into the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) is not a PSC in light of the nature of the offense, the length of the sentence imposed (time served, which was three-and-a-half months), and the circumstances under which this particular crime occurred.

Concealing and harboring illegal aliens

Zhen v. Gonzales, 175 F. App'x 222 (10th Cir. Apr. 6, 2006). Conviction for concealing and harboring illegal aliens, 8 U.S.C. § 1324(a)(1)(A)(iii), for which the sentence amounted to time served (233 days), constituted an AF and thus a PSC for purposes of asylum. The court did not analyze this conviction for the purposes of withholding.

Criminal contempt (under a crime of violence statute)

In re Aldabeshah, 22 I&N Dec. 983, 990 (BIA 1999). Criminal contempt in the first degree, in violation of New York law ("in violation of a duly served order of protection...intentionally places or attempts to place a person...in reasonable fear of physical injury...by displaying a deadly weapon."), constituted "crime of violence." Because the individual was sentenced to one to three years, the offense was an AF. The individual had been sentenced to an aggregate term of imprisonment of six years, for this and a forgery charge. Because the term of imprisonment for this charge was less than five years, the crime was not presumed a PSC for withholding of removal, and the BIA

remanded the case so that the IJ might separate the charges and apply the Frentescu factors.

Driving under the influence

Mau v. Holder, 518 F. App'x 595, 596 (9th Cir. May 20, 2013). The IJ properly applied the Frentescu analysis in determining that a conviction for DUI and causing bodily injury constitutes a PSC.

Delgado v. Holder, 563 F.3d 863 (9th Cir. 2009). The Ninth Circuit held that they were without jurisdiction to decide if the petitioner's DUI conviction was a PSC for the purposes of withholding, but ruled that it was not a PSC for asylum purposes. The petitioner's conviction for driving under the influence does not exceed the "capital or grave" standard of "serious" nonpolitical crimes, and Frentescu indicates that particularly serious crimes should exceed that standard. The court noted that driving under the influence can be dangerous, but there was no intent to injure. Driving under the influence is careless or even reckless, but requires no intent and is "most nearly comparable to crimes that impose strict liability." The court also discussed the relevance of international law when adjudicating whether a conviction is a PSC and concluded that under the international origins of the PSC exception, the IJ erred in holding that the petitioner's conviction was a PSC.

Delgado v. Holder, 648 F.3d 1095 (9th Cir. 2011) (en banc). The Delgado case above returned to the Ninth Circuit in 2011. This time, the court found jurisdiction to review a PSC determination for withholding of removal, in light of Kucana v. Holder, 558 U.S. 233 (2010). The case was again remanded because the BIA did not give an adequate explanation as to why Delgado's DUI offenses were PSCs. The court contrasted a DUI offense with those crimes designated by the AG as *per se* particularly serious. The concurrence noted that a DUI offense "has little in common with these sort of crimes . . . A DUI, while deemed worthy of punishment, is more a run-of-the-mill offense than a particularly serious one." The court also said, "[t]he BIA should also explain how it can consider a DUI conviction to qualify as a PSC, when it does not consider even a recidivist DUI offense to be a CIMT."

Anaya-Ortiz v. Holder, 594 F.3d 673 (9th Cir. 2010). The IJ and BIA properly applied Frentescu analysis in determining that the individual's conviction for DUI constituted a PSC because the offense involved "reckless disregard for persons or property." The BIA and IJ had relied on the individual's testimony in his removal hearing that while driving drunk, he ran into a stranger's home, causing the walls to collapse and injuring an elderly resident inside. The Ninth Circuit held it was appropriate to look outside the record of conviction (indeed, the BIA had relied solely on the removal hearing testimony) in analyzing the particular seriousness of a crime.

Koulijinski v. Keisler, 505 F.3d 534, 543 (6th Cir. 2007). The IJ determined that three convictions for DUI were sufficient for discretionary denial asylum, noting the "repetitive nature" of the individual's behavior. The Sixth Circuit deferred to the IJ's discretionary denial, without deciding whether DUI constituted a PSC.

Exploitation of an elderly person or disabled adult

Tamara Aleman, A073 110 365 (BIA June 18, 2013). Conviction for "exploitation of an elderly person or disabled adult" in violation of Florida law, with loss to victims exceeding \$10,000, constituted an AF because the statute categorically involved fraud or deceit. See 8 U.S.C. § 1101(a)(43)(M). Because the individual was sentenced to five years, it is considered a PSC.

Failure to appear before a court

Tamara Aleman, A073 110 365 (BIA June 18, 2013). Conviction for "failure of defendant on bail to appear," with a sentence of over two years, was an AF under 8 U.S.C. § 1101(a)(43)(T). Because the individual was sentenced to five years (concurrent with an additional charge), it is considered a PSC.

Harming a living animal, maliciously and intentionally

Madrid v. Holder, 541 F. App'x 789, 792 (9th Cir. Oct. 8, 2013). Upheld the BIA's determination that a conviction for "maliciously and intentionally" harming a poodle, in violation of California law with a sentence of two years in prison, constituted a PSC. The Ninth Circuit deferred to the BIA's reasoning that maliciously and intentionally committing an act of cruelty against a living animal is a "danger to the community."

Hostage taking

Acero v. INS, No. Civ.A.04-0223, 2005 WL 615744 at *8 (E.D.N.Y. Mar. 16, 2005). In reviewing habeas petition, the court found hostage taking, under New York state law, to be an AF, but did not review the IJ's determination that this instance (where petitioner and two others had held victim for two hours in a car) was not a PSC for withholding of removal purposes. However, the court held that hostage-taking was a crime of violence pursuant to § 16(b), which has since been held unconstitutionally vague by the Fifth Circuit.

Mail fraud

Arbid v. Holder, 700 F.3d 379 (9th Cir. 2012). Petitioner pleaded guilty to mail fraud under 8 U.S.C. § 1341, based on a scheme to defraud mortgage lenders, and was sentenced to sixteen months in prison and more than \$650,000 in restitution. The Ninth Circuit deferred to the IJ and BIA's finding that the "complex scheme" to defraud victims of nearly \$2 million constituted a PSC.

Maurice Wilson, A92 005 771 (BIA Apr. 16, 2004). BIA denied motion to reopen previous decision, which found that petitioner's conviction of mail fraud under 8 U.S.C. § 1341, carrying fifteen months' imprisonment and a \$25,000 fine, constituted a PSC.

Money laundering

Hakim v. Holder, 628 F.3d 151 (5th Cir. 2010). Petitioner argued that while the money involved in the crime exceeded \$10,000, the actual money laundered did not. The Fifth Circuit rejected this argument and upheld the IJ and BIA's determination that this was an AF and PSC. The BIA based this determination in part on the rationale that money laundering presented a danger to the community because it was related to drug trafficking.

Merlos v. INS, 203 F. App'x 863 (9th Cir. Nov. 1, 2006). The BIA overturned the IJ's finding that the individual's money laundering conviction was a PSC, but the grounds for that decision are not specified in this case denying a petition for review.

Bankhole v. INS, No. 3:02-CV-00702(EBB), 2002 WL 32002678 (D. Conn. Aug. 9, 2002). Petitioner was sentenced to sixty-three months in prison for (1) conspiracy to commit money laundering, (2) perjury, and (3) obstruction of justice. Because the petitioner was convicted of AFs and sentenced for longer than five years, she was barred from withholding of removal. The court did not analyze the charges individually.

Obstruction of justice

Flores v. Att'y Gen. of U.S., 856 F.3d 280 (3d Cir. 2017). Petitioner was sentenced to accessory-after-the-fact for witnessing, but failing to report, a murder. The Court reversed the BIA's determination that an accessory-after-the-fact conviction under South Carolina law is an AF. In determining what constituted an "obstruction of justice" under the INA, the BIA cannot use the federal statute for accessory-after-the-fact as part of its categorical approach analysis, and instead must use the federal law on obstruction of justice. Because the conviction did not fall within the federal definition of obstruction of justice, it was not deemed to be an AF or a PSC.

Bankhole v. INS, No. 3:02-CV-00702(EBB), 2002 WL 32002678 (D. Conn. Aug. 9, 2002). Petitioner was sentenced to sixty-three months in prison for (1) conspiracy to commit money laundering, (2) perjury, and (3) obstruction of justice. Because the petitioner was convicted of AFs and sentenced for longer than five years, she was barred from withholding of removal. The court did not analyze the charges individually.

Possession of child pornography

Matter of R-A-M-, 25 I&N Dec. 657, 660-62 (BIA 2012). The BIA remanded the case after DHS appealed the IJ's finding that possession of child pornography was not a PSC. Although possession of child pornography is not statutorily a *per se* PSC, the individual's possession in this case constituted a PSC, because "[c]hild pornography is, by its nature, a serious offense," and that while the individual had only possessed and not produced child pornography, "[t]he harm to child victims does not end with production."

Prostitution

Yuan v. Att'y Gen., 487 F. App'x 511, 513-14 (11th Cir. Aug. 20, 2012). Vacated the BIA's order to deny withholding of removal, because prostitution is not a *per se* PSC, and the BIA did not properly consider all the Frentescu factors, nor did the IJ properly establish conviction, rather than mere arrest. However, the Court did not decide on whether prostitution constitutes a PSC as a matter of law.

Prostitution, soliciting or engaging in while knowingly HIV-positive

Jose Luis Ramirez, A075 986 662 (BIA May 31, 2013). Citing the "unique circumstances of the case," DHS retracted their argument that soliciting or engaging in prostitution, while knowing of one's HIV-positive status, was not a PSC meriting termination of withholding of removal.

Racketeering

Steinhouse v. Ashcroft, 247 F. Supp. 2d 201, 208 (D. Conn. 2003). Individual suffering from bi-polar disorder was convicted of racketeering and selling drug samples. She received a three-year sentence, a downward departure from the sentencing guidelines due to her "significantly reduced mental capacity." The court remanded the case to the BIA to consider the four Frentescu factors in their totality, not simply "whether the type and circumstance of the crime indicate that the alien will be a danger to the community." By failing to apply the fourth factor in Frentescu, the BIA had neglected to consider whether the individual's mental impairment affected the determination whether she posed a danger to the community. "When a crime is neither per se particularly serious or per se not particularly serious, the IJ and BIA must consider whether the circumstances of the crime indicate that the alien will be a danger to the community."

Resisting arrest (resisting and obstructing officer)

Alphonsus v. Holder, 703 F.3d 1031 (9th Cir. 2013). Petitioner had stolen from a Rite-Aid and then run from a police officer, resulting in a conviction for "resisting an executive officer." The BIA found this to be a PSC on the ground that resisting an officer is "a crime against the orderly pursuit of justice," but no BIA precedent has ever used such a rationale for a PSC determination. The BIA also argued that the individual's actions "created a meaningful risk of harm to others," but failed to give a reasoned explanation for this conclusion. After considering the history and constitutionality of the PSC bar at length, the Ninth Circuit remanded to the BIA for further analysis.

Silevany v. Holder, 521 F. App'x 439 (6th Cir. Apr. 4, 2013). The IJ denied withholding of removal, because the conviction for resisting and obstructing an officer with an injury constituted a PSC. The IJ held that petitioner's mental illness was not a relevant factor, as he had been found competent for trial. The BIA affirmed. The Sixth Circuit denied petition for review on other grounds.

Stalking

Wassily v. Holder, 523 F. App'x 783, 785 (2d Cir. May 3, 2013). The IJ determined that petitioner's conviction for third degree stalking under New York law was a PSC. The Second Circuit remanded the case because the IJ based this conclusion on the factual narrative contained in a pre-sentence report, which is "inherently unreliable."

Ezike v. Holder, 383 F. App'x 470 (5th Cir. Jun. 23, 2010). Petitioner was convicted by an Arkansas state court of "internet stalking of a child." The IJ and BIA determined that this offense was a PSC, although no such analysis is included in this opinion. The Fifth Circuit denied motion to review based on lack of jurisdiction.

Tampering with physical evidence

Denis v. Att'y Gen., 633 F.3d 201 (3d Cir. 2011). Following the death of a customer in his office, the petitioner dismembered and hid her body. He was convicted of second degree manslaughter and tampering with physical evidence, with an indeterminate sentence of which he served seven years. The Third Circuit held that his conduct was close to the federal offense of "obstruction of justice," and the individual thus have committed an AF "relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S). While petitioner argued that he had not committed a crime against a person, the court upheld the BIA's finding that the crime was a PSC, considering the "gruesome brutality" of the individual's actions.

Telephoning a bomb threat

Abpikar v. Holder, 544 F. App'x 719, 723 (9th Cir. Nov. 5, 2013). Petitioner in 1980 had phoned in a bomb threat and received a suspended sentence. The BIA determined that telephoning a bomb threat in violation of Oklahoma law was a PSC on its face because the statute included "willful" and "malicious" requirements. The Ninth Circuit remanded the case, because under Blandino-Medina v. Holder [see above] the BIA may not create new categories of *per se* PSCs, and instead must consider the Frentescu factors.

Unlawful export of military technology

Zhan Gao v. Holder, 595 F.3d 549, 557-58 (4th Cir. 2010). The court determined that a crime does not have to be an AF to be a PSC. Even though it wasn't an AF, the court affirmed the BIA's determination that the crime's "national security implications" rendered it a PSC. It was "impossible," the BIA explained, "to quantify the number of lives the petitioner potentially imperiled by exporting military technology that is still presumably extant."