



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

This resource\* is meant to assist<sup>1</sup> in the legal representation of (1) noncitizens in criminal proceedings facing a criminal charge that, upon conviction, could bar asylum or withholding of removal and (2) non-citizens with a past criminal conviction seeking such fear-based relief in immigration proceedings.

Asylum and withholding of removal may be barred by conviction that qualifies as a “particularly serious crime” (“PSC”).<sup>2</sup> This resource is intended to help evaluate whether a specific conviction will be deemed a PSC. First, it provides a general overview of the current PSC-related legal standards. Next, it features a chart documenting specific offenses that adjudicators have determined are or are not PSCs, based on case law from the Board of Immigration Appeals (“BIA”) and federal circuit courts. The last section summarizes those cases.

**Note:** The legal standards on PSCs in the United States often fail to comply with the nation’s obligations under international refugee law conventions. For arguments challenging adverse PSC determinations under these standards, consult the IDP-Harvard report [United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened \(2018\)](#). Even operating within flawed standards, adjudicators sometimes misapply legal tests to the detriment of noncitizens. While this resource prioritizes summarizing the law as it works in practice, please consult footnotes for further advocacy opportunities.

## Aggravated Felonies as “Particularly Serious Crimes”

In determining if a conviction qualifies as a “particularly serious crime,” advocates should first analyze whether it qualifies as an “aggravated felony” (“AF”) as defined in the Immigration and Nationality Act of 1952 (INA). *See* 8 USC § 1101(a)(43)(A)–(U). Under U.S. law, aggravated felonies have a specific but varied relationship to the PSC bars for asylum and withholding of removal:

**Asylum:** For asylum, a conviction that qualifies as an AF automatically qualifies as a PSC as well. *See* 8 U.S.C. § 1158(b)(2)(B)(i).

**Withholding of Removal:** For withholding of removal, one or more convictions that qualifies as aggravated felonies for which the individual was sentenced to an aggregate term of imprisonment of at least 5 years (for all AF convictions) will trigger the PSC bar to withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B).

For guidance on AF case law and arguments to defeat AF charges, see IDP resource [Key Removal Defenses in Criminal Charge Cases - Section III\(E\) \(“Deny Aggravated Felony Removability”\)](#).

\*This resource was first published by IDP in 1998. The current version of the chart has been updated through May 2024 by Wesley Neal, Linh Tang, and intern Alexis Farmer of the Harvard Immigration and Refugee Clinical Program (HIRCP) under the supervision of Assistant Clinical Professor of Law Philip L. Torrey. IDP Senior Counsel Manuel D. Vargas directed this project.

<sup>1</sup> This resource is not meant to replace independent legal advice provided by an attorney familiar with a client’s case. It should thus be relied upon only as a first step to further individualized legal research and fact investigation.

<sup>2</sup> *See* 8 U.S.C. § 1158(b)(2)(B)(i) (PSC bar to asylum); 8 USC § 1231(b)(3)(B)(ii) (PSC bar to withholding of removal).

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

When an offense does not automatically qualify as a PSC as noted above, further analysis is required.<sup>3</sup> Some general guiding principles derived from case law include the following:

**Misdemeanor:** Absent unusual circumstances, a single misdemeanor conviction, under either state or federal law, typically does not qualify as a PSC.<sup>4</sup>

**If there are multiple convictions, examine each offense separately:** Adjudicators cannot combine the circumstances of multiple criminal convictions to determine that they collectively qualify as a PSC.<sup>5</sup>

**Frentescu test:** If a conviction is not a *per se* PSC, then an adjudicator must conduct the factor balancing test articulated by the BIA in *Matter of Frentescu*. That test requires an adjudicator to consider: (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.<sup>6</sup> Although the fourth factor is still listed independently, the BIA and courts have since held that no separate dangerousness analysis is required.<sup>7</sup>

**Nature of the conviction:** First, the adjudicator looks solely at the elements of the offense.<sup>8</sup> If the elements demonstrate that the offense is outside the boundaries of what could be considered a PSC, then the circumstances of a conviction “are of no consequence.”<sup>9</sup> The analysis should end here because the conviction does not qualify as a PSC, but unfortunately in practice, adjudicators often still evaluate the

<sup>3</sup> See *Matter of N-A-M-*, 24 I&N Dec. 336, 339 (BIA 2007), *aff'd*, in *N-A-M- v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009) (holding that Congress did not intend to limit what offenses may be PSCs to those classified as aggravated felonies); see also *Vetcher v. Barr*, 953 F.3d 361, 368–69 (5th Cir. 2020); *Bastardo-Vale v. Att’y Gen.*, 934 F.3d 255, 258 (3rd Cir. 2019); *Zhan Gao v. Holder*, 595 F.3d 549, 554–555 (4th Cir. 2010); *Delgado v. Holder*, 563 F.3d 863, 867–869 (9th Cir. 2009); *Nethagani v. Mukasey*, 532 F.3d 150, 155–157 (2d Cir. 2008); *Ali v. Achim*, 468 F.3d 462, 469 (7th Cir. 2006).

<sup>4</sup> See *Matter of Juarez*, 19 I&N Dec. 664, 665 (BIA 1988); see also *Matter of J-O-R-*, ID# 04766557, 2019 WL 2408706, at \*3 (AAO May 20, 2019) (holding that single misdemeanor conviction of hit-and-run did not qualify as PSC); *Davis v. Att’y Gen.*, No. 20-2937, 2021 WL 4145114, at \*4 (3d Cir. Sept. 13, 2021) (holding federal misdemeanor conviction cannot be presumed to qualify as a PSC).

<sup>5</sup> See *Dor v. Garland*, 46 F.4th 38, 46 (1st Cir. 2022).

<sup>6</sup> See *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), modified, *Matter of C-*, 20 I&N Dec. 529, 534–35 (BIA 1992).

<sup>7</sup> See, e.g., *Matter of Carballé*, 19 I & N Dec. 357, 360 (BIA 1986) (“[A]liens who have been finally convicted of particularly serious crimes are presumptively dangers to this country’s community.”); *Ojo v. Garland*, 25 F.4th 152, 165 (2d Cir. 2022) (holding that a PSC determination no longer requires a separate danger-to-the-community analysis); *Velerio-Ramirez v. Lynch*, 808 F.3d 111, 115 n.7 (1st Cir. 2015) (“The BIA has [ ] interpreted the [PSC] exception to require only one determination, that is, [a noncitizen] found to be convicted of a particularly serious crime is necessarily found to be a danger to the community” (internal citations and quotation marks omitted)).

Failing to do a separate dangerousness analysis violates the United States’ obligations under the Refugee Convention. See generally United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened, pp. 8-9.

<sup>8</sup> *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007).

<sup>9</sup> *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); see also *Annor v. Garland*, 95 F.4th 820, 827 (4th Cir. 2024) (“[A]djudicators must begin their analysis by evaluating the elements of the noncitizen’s offense as a threshold matter.”); *Mendoza-Garcia v. Garland*, 36 F.4th 989, 999 (9th Cir. 2022); *Ojo v. Garland*, 25 F.4th 152, 165 (2d Cir. 2022); *Luziga v. Att’y Gen.*, 937 F.3d 244, 253 (3rd Cir. 2019) (remanding where the BIA considered circumstances of the offense, the actual loss amount, without first conducting an evaluation based solely on the elements); *Cazares-Zandre v. Att’y Gen.*, 791 F. App’x 96, 102 (11th Cir. 2019) (referring to two separate discretionary decisions: one referring to “whether a crime’s elements render it potentially particularly serious” and another referring to “whether [ ] all reliable information about the circumstances of the crime leads the agency to conclude it is *actually* particularly serious”).

remaining *Frentescu* factors.<sup>10</sup>

Elements that are likely to bring an offense within the ambit of a PSC include: “a serious threat to others,” making an offense a crime against persons,<sup>11</sup> and unlawful trafficking in a controlled substance.<sup>12</sup> For more detailed examples, see the table below.

If the elements of the offense are found to fall within the boundaries of a PSC, depending on the circuit, adjudicators must<sup>13</sup> or may<sup>14</sup> then examine case-specific circumstances underlying the conviction before concluding that the conviction qualifies as a PSC.

**Remaining *Frentescu* factors:** Once it is determined that the nature of the offense could bring the conviction within the ambit of a PSC, adjudicators may consider all reliable information to evaluate case-specific factors and circumstances to determine whether the conviction qualifies as a PSC. Relevant information includes, but is not limited to, the record of conviction and sentencing information.<sup>15</sup>

Adjudicators may not engage in a mere cursory analysis: they must explicitly analyze each *Frentescu* factor in light of specific underlying facts.<sup>16</sup>

Once an analysis has been conducted using the *Frentescu* factors, the final PSC determination is an “inherently discretionary” one.<sup>17</sup>

**Mitigating circumstances:** In the PSC analysis, adjudicators generally are not required to consider mitigating circumstances underlying the offense.<sup>18</sup> However, mental health conditions at the time of the commission of the offense may be considered.<sup>19</sup>

<sup>10</sup> See, e.g., *Lapaix v. Att’y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010) (holding that adjudicators may look at underlying facts even when elements are outside the boundaries contemplated by the PSC category).

<sup>11</sup> See *Matter of N-A-M-*, 24 I&N Dec. 336, 343 (BIA 2007).

<sup>12</sup> *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 274–75 (A.G. 2002); see also *Nelson v. Att’y Gen.*, 852 F. App’x 67, 73 (3rd Cir. 2021) (stating that the presumption in *Matter of Y-L* satisfies first step of the two-step PSC test); but see *Decarvalho v. Garland*, 18 F.4th 66, 71 (1st Cir. 2021) (questioning whether *Matter of Y-L* “over[shot] the mark” by effectively categorizing all drug trafficking convictions as PSCs).

<sup>13</sup> See, e.g., *Blandino-Medina v. Holder*, 712 F.3d 1338, 1348 (9th Cir. 2013) (rejecting the view that the BIA can claim an offense is a PSC solely based on elements of the offense).

<sup>14</sup> See, e.g., *Matter of N-A-M*, 24 I&N Dec. 336, 343 (BIA 2007) (“We find that the respondent’s offense is a particularly serious crime based solely on its elements.”); see also *Lapaix v. Att’y Gen.*, 605 F. 3d 1138, 1143 (11th Cir. 2010) (holding that in making the PSC determination, the IJ is “free to rely solely on the elements of the offense”).

<sup>15</sup> See *Matter of N-A-M-*, 24 I&N Dec. 336, 342–44 (BIA 2007).

<sup>16</sup> *Dor v. Garland*, 46 F.4th 38, 47 (1st Cir. 2022).

<sup>17</sup> *Ojo v. Garland*, 25 F.4th 152, 165 (2nd Cir. 2022); see also *Shuti v. Barr*, 835 F. App’x 825, 830 (6th Cir. 2020) (citing *Matter of N-A-M-*, 24 I&N Dec. 336, 344 (BIA 2007)).

<sup>18</sup> *Matter of N-A-M-*, 24 I&N Dec. 336, 343 (BIA 2007) (deeming “offender characteristics” irrelevant because they “do not diminish the gravity of a crime”).

<sup>19</sup> *Matter of B-Z-R-*, 28 I&N Dec. 563, 7–9 (BIA 2022) (holding adjudicators may consider the offender’s mental health condition when determining if a conviction qualifies as a PSC); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018) (holding that courts may consider mental health evidence when determining if a conviction qualifies as a “particularly serious crime”); see also *Kemokai v. Att’y Gen.*, 83 F.4th 886, 895 (11th Cir. 2023) (remanding for IJ to consider impact of *Matter of B-Z-R-* holding on PSC determination where noncitizen had mental health conditions); *Aguirre-Urbina v. Barr*, 765 F. App’x 238, 239 (9th Cir. 2019) (remanding for failure to consider petitioner’s mental health during PSC determination). Notably, at least two circuits have held that *Matter of B-Z-R-* does not apply retroactively. See *Yousif v. Garland*, 53 F.4th 928, 939 (6th Cir. 2022); *W.R.R. v. Att’y Gen.*, No. 22-3346, 2024 WL 243321, at \*2 (3d Cir. Jan. 23, 2024).

**Foreign convictions:** A foreign conviction can be considered an aggravated felony as well as a PSC,<sup>20</sup> even if the foreign conviction involved lesser due process than is provided for by U.S. law.<sup>21</sup> However, a noncitizen convicted under a foreign law for conduct that would not be criminalized under U.S. law is not "convicted" for U.S. immigration purposes.<sup>22</sup> Furthermore, a foreign record of conviction that reflects fraud, racism, or otherwise violates U.S. public policy should arguably be excluded from consideration.<sup>23</sup>

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<sup>20</sup> *Andrade-Prado v. Garland*, 64 F.4th 386, 392 (1st Cir. 2023) (holding that a rape conviction in Brazil was an aggravated felony and a PSC).

<sup>21</sup> *Abdulahad v. Barr*, 838 F. App'x 126, 132 (6th Cir. 2020) (deferring to the "BIA's reasonable interpretation of the INA that the foreign conviction satisfied due process issues" where the Petitioner raised "he [had] lacked counsel and the rights to a jury, to question witnesses, to challenge evidence, and to present a defense" when convicted *in absentia*).

<sup>22</sup> *See Lennon v. INS*, 527 F.2d 187, 191 (2d Cir. 1975).

<sup>23</sup> *See Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) (discussing in nonimmigration context that a person may raise a challenge to a foreign judgment that reflects fraud or racism for being "repugnant to fundamental notions of what is decent and just"); *see also Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 479 (2d Cir. 2007) (recognizing that, though a very high standard, a U.S. court may choose not to enforce a foreign judgment that is "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense" (internal citation omitted)). For more information on the treatment of foreign convictions under U.S. immigration law, *see* Dan Kesselbrenner & Lory D. Rosenberg, *Immigr. Law & Crimes* § 2:8 (Dec. 2023).

## 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 DETERMINATION	NOTES
<b>DRUG OFFENSES</b>			
<b>Drug trafficking offenses</b>	<p><b>Keep in Mind:</b> 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 unless the individual can demonstrate extenuating circumstances that are both extraordinary and compelling. See <a href="#">Matter of Y-L-, A-G-, R-S-R-</a>, 23 I&amp;N Dec. 270 (A.G. 2002). Whether the circumstances are both extraordinary and compelling is relevant only after a noncitizen has demonstrated the six minimum requirements are met:</p> <ol style="list-style-type: none"> <li>(1) a very small quantity of controlled substance;<sup>24</sup></li> <li>(2) a very modest amount of money paid for the drugs in the offending transaction;</li> <li>(3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy;<sup>25</sup></li> <li>(4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense;</li> <li>(5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; [] and</li> <li>(6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.</li> </ol> <p><a href="#">Id.</a>; see <a href="#">Park v. Garland</a>, 72 F.4th 965, 975 (9th Cir. 2023).</p>		
	Possession for sale of marijuana Cal. Health & Safety Code § 11359	PSC based on the circumstances of the case	See <a href="#">Calvillo v. Sessions</a> , page 20.
	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 <a href="#">Delgado-Artega v. Sessions</a> , page 20.
	Marijuana possession with intent to distribute ( <a href="#">Francisco Rodriguez-Trinidad</a> )  Cocaine possession with intent to distribute/deliver ( <a href="#">Music</a> ; <a href="#">Gelaneh</a> )  35 Pa. Stat. and Cons. Stat. Ann. § 780–113(a)(30)	Not an AF because the law is overbroad ( <a href="#">Francisco Rodriguez-Trinidad</a> ); PSC based on the circumstances of the case ( <a href="#">Music</a> ; <a href="#">Gelaneh</a> )	See <a href="#">Francisco Rodriguez-Trinidad</a> ; <a href="#">Music v. Att’y Gen.</a> ; <a href="#">Gelaneh v. Ashcroft</a> , pages 20-21.
	<p><sup>24</sup> While there is no established definition of “small quantity,” case law has suggested it may align with the 30g threshold utilized in other portions of the INA. See <a href="#">Sannoh v. Att’y Gen.</a>, 837 F. App’x 858, 859 (3rd Cir. 2021) (referencing <a href="#">Sambare v. Att’y Gen.</a>, 925 F.3d 124, 128 (3d Cir. 2019)).</p> <p><sup>25</sup> The requirement that involvement be peripheral cannot be satisfied by conviction of mere conspiracy, see <a href="#">Diaz v. Barr</a>, 789 F. App’x 620, 621 (9th Cir. 2020), or the fact that a conviction was solely for the act of purchase for personal use, see <a href="#">Martinez-Nieto v. Att’y Gen.</a>, 805 F. App’x 131, 136–37 (3rd Cir. 2020) (affirming Immigration Judge’s conclusion that because Martinez-Nieto “purchased cocaine from a third party,” he was a “direct participant in the drug transaction”).</p>		



Attempted possession for sale of marijuana [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Usher v. Lynch</a> , page 20.
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 <a href="#">Baboolall v. Att'y Gen.</a> , page 20.
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 <a href="#">Matter of L-G-H-</a> , page 20.
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 <a href="#">Lezama v. Holder</a> , page 20.
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 <a href="#">Luambano v. Holder</a> , page 20.
Sale of cocaine N.H. Rev. Stat. Ann. § 318-B:2	PSC based on the circumstances of the case	See <a href="#">Infante v. Att'y Gen.</a> , page 20.
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 <a href="#">Matter of G-K-</a> , page 21.
Delivery of a controlled substance Wyo. Stat. Ann. § 35-7-1031(a)(ii)	PSC based on the circumstances of the case	See <a href="#">Diaz v. Holder</a> , page 21.
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 ( <a href="#">Santos-Melitante</a> )	See <a href="#">Garcia Tellez v. Holder</a> ; <a href="#">Santos-Melitante</a> , page 21.
Selling and transporting methamphetamine [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Castillo v. Holder</a> , page 21.
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 <a href="#">Tunis v. Gonzalez</a> , page 21.
Importing heroin 21 U.S.C. § 952	PSC as an AF; PSC based on the circumstances of the case	See <a href="#">Perez v. Loy</a> , page 21.

Selling drug samples 21 U.S.C. §§ 353(c)(1) and 333(b)(1)(B)	Unclear, remanded	See <a href="#">Steinhouse v. Ashcroft</a> , page 21.
Trafficking in cocaine Fla. Stat. Ann. § 893.135 (West 2000 & Supp. 2002)	PSC based on the circumstances of the case	See <a href="#">Matter of Y-L-, A-G-, R-S-R-</a> , page 20.
Cultivation of marijuana Cal. Health and Safety Code § 11358	AF; PSC based on circumstances of the case	See <a href="#">Min Chang Chen v. Sessions</a> , page 21.

### 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982); *see also* pages 2-3. A smaller quantity of drugs involved, a lower sentence length, and the absence of other criminal activity in connection with the possession offense will decrease the chance the conviction will be adjudicated a PSC.

Drug possession [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Vaskovska v. Lynch</a> , page 22.
Possession of cocaine [Citation not specified]	Not a PSC based on the circumstances of the case	See <a href="#">Matter of Toboso- Alfonso</a> , page 22.

## OFFENSES AGAINST PERSONS

**Keep in Mind: Depending on the term of imprisonment imposed**, an offense against a person may qualify as a "crime of violence" and so long as the term of imprisonment imposed is at least one year will then qualify as an AF. AFs 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982); *see also* pages 2-3.

<b>Accessory to murder</b>	Accessory after the fact to murder Cal. Penal Code § 32	PSC based on circumstances of the case	See <a href="#">Chavez-Gonzalez v. Barr</a> , page 22.
<b>Assault, aggravated</b>	Aggravated assault N.J. Stat. Ann. § 2C:12-1(b) (1)	PSC based on circumstances of the case	See <a href="#">Reyes-Romero v. Barr</a> ; <a href="#">Aguilar v. Att'y Gen.</a> , page 22.
<b>Assault with a dangerous or deadly weapon</b>	Aggravated assault [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Flores v. Holder</a> , page 22.
	Assault in the third degree [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Guangzu Zheng v. Lynch</a> , page 22.
	Assault with a deadly weapon other than a firearm [California offense; citation not specified]	PSC based on the circumstances of the case	See <a href="#">Konou v. Holder</a> , page 22.
	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 <a href="#">Hernandez v. Att'y Gen.</a> , page 22.

	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 <a href="#">Cole v. Att’y Gen.</a> , page 22.
	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 <a href="#">Ali v. Achim</a> , page 22-23.
	Felony firearm and felonious assault Mich. Comp. Laws §§ 750.227b-a and 750.82	PSC based on the circumstances of the case	See <a href="#">In re Pjeter Juncaj</a> , page 23.
	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 <a href="#">Singh v. Ashcroft</a> , page 23.
	Assault with a dangerous weapon D.C. Code Ann. § 22–502	Unclear, remanded to BIA for further analysis.	See <a href="#">Yousefi v. INS</a> , page 23.
<b>Battery, aggravated</b>	Battery with serious bodily injury [California offense; citation not specified]	PSC based on the circumstances of the case	See <a href="#">Konou v. Holder</a> , page 23.
	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 <a href="#">Matter of B-</a> , page 23.
<b>Dismembering</b>	Dismembering a human body 720 Ill. Comp. Stat. Ann. 5/12-20.5	PSC based on circumstances of the case	See <a href="#">Gutierrez-Vargas v. Garland</a> , page 23.
<b>Kidnapping and battery</b>	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 <a href="#">Choeum v. INS</a> , page 23.
<b>Manslaughter</b>	Second degree manslaughter N.Y. Penal Law § 125.15(1)	PSC based on the circumstances of the case	See <a href="#">Denis v. Att’y Gen.</a> ; <a href="#">Matter of Jean</a> , page 23-24.
	First-degree manslaughter N.Y. Penal Law § 125.20	<i>Per se</i> PSC (though not an AF); no consideration of mitigating factors	See <a href="#">Ahmetovic v. INS</a> , page 24.
<b>Manslaughter, involuntary</b>	DUI/Manslaughter Fla. Stat. § 316.193(3)	PSC based on the circumstances of the case	See <a href="#">Ursu v. INS</a> , page 24.
	DUI/Homicide by negligent operation of a vehicle Wis. State §940.10(1)	PSC based on the circumstances of the case	See <a href="#">Ruderman v. Whitaker</a> , page 24.



	Involuntary manslaughter by unlawful practice of medicine [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">De La Luz Ramos v. Garland</a> , page 24.
<b>Menacing</b>	Felony menacing Colo. Rev. Stat. §§ 18-3-206(1)(a)-(b)	PSC based on the nature of the elements of the offense	See <a href="#">Matter of N-A-M-</a> , page 24.
<b>Murder</b>	Murder [Citation not specified]	PSC based on the nature of the elements of the offense	See <a href="#">Castro-Aguilar v. Garland</a> , page 24.
<b>Reckless endangerment</b>	First degree reckless endangerment [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Nethagani v. Mukasey</a> , page 24.
<b>Robbery</b>	Second degree robbery Cal. Penal Code § 211	PSC based on the circumstances of the case	See <a href="#">Wai Kwong Ng v. Holder</a> ; <a href="#">Castillo-Interiano v. Holder</a> ; <a href="#">Villegas v. Mukasey</a> , pages 24.
	Robbery Fla. Stat. Ann. §§ 812.13(1), 812.13(2)(c) (West 1998)	PSC based on the circumstances of the case	See <a href="#">Matter of S-V-</a> , page 24.
<b>Robbery with a firearm or deadly weapon</b>	Attempted robbery in the third degree N.Y. Penal Law §§ 110.00, 160.05	PSC based on the circumstances of the case	See <a href="#">Salazar Quiceno v. Att'y Gen.</a> , page 24.
	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 <a href="#">Gweh v. U.S. Dep't of Just.</a> , page 25.
	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 <a href="#">Matter of S-S-</a> , page 25.
	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 <a href="#">Matter of L-S-J-</a> , page 25.
	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 <a href="#">Matter of Carballe</a> , page 25.
<b>Shooting with intent to kill</b>	Shooting with intent to kill [Oklahoma offense; citation not specified]	Would likely be considered a PSC (in dicta)	See <a href="#">Nguyen v. INS</a> , page 25.
<b>Strangulation</b>	First degree strangulation 18 Pa. Cons. Stat. § 2718(a)	AF for asylum, PSC for withholding based on the circumstances of the case	See <a href="#">Sunuwar v. Att'y Gen.</a> , page 25.

<b>Terroristic Threats</b>	Making terroristic threats Minn. Stat. § 609.713	PSC based on the circumstances of the case	See <a href="#">Shazi v. Wilkinson</a> , page 25.
<b>Threats with intent to terrorize</b>	Threat with intent to terrorize Cal. Penal Code § 422	PSC based on the circumstances of the case	See <a href="#">Latter-Singh v. Holder</a> , page 25.
<b>Wounding</b>	Unlawful wounding Va. Code § 18.2-51	AF and <i>per se</i> PSC	See <a href="#">Moreno-Osorio v. Garland</a> , page 25.

## 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), will look to the circumstances of the offense to determine if the offense constitutes a PSC. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982); see also pages 2-3.

<b>Child molestation</b>	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 <a href="#">Lazovic v. Ashcroft</a> , page 25.
	Court characterizes the offense as sexual abuse of a minor Cal. Penal Code § 288(a)	Deems the offense an AF	See <a href="#">United States v. Baron-Medina</a> , page 25.
	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 <a href="#">Pablo v. INS</a> , page 25.
<b>Communication with a minor for immoral purposes</b>	Communication with a minor for immoral purposes Wash. Rev. Code § 9.68A.090	Unclear	See <a href="#">Morales v. Gonzales</a> , page 26.
<b>Criminal sexual abuse</b>	Attempted sexual abuse in the first degree Or. Rev. Stat. § 163.427	PSC as an AF for the purposes of asylum	See <a href="#">Diego v. Sessions</a> , page 26.
	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 <a href="#">Espinoza-Franco v. Ashcroft</a> , page 26.
	First degree sexual abuse N.Y. Penal Law § 130.65	Not an AF, but a PSC based on the circumstances of the case	See <a href="#">Flores v. Holder</a> , page 26.
	Lewd and lascivious acts Cal. Penal Code § 288(a)	PSC based on the circumstances of the case	See <a href="#">Landaverde v. Lynch</a> ; <a href="#">Gomez-R v. Holder</a> , page 26.
	Sexual abuse of a minor in the first degree [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Obdalla v. Holder</a> , page 26.
Sexual abuse in the second degree Or. Rev. Stat. § 163.425	PSC based on the circumstances of the case	See <a href="#">Hernandez-Mendoza v. Garland</a> , page 26.	

<b>Criminal sexual assault, attempted</b>	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 <a href="#">Fuller v. Lynch</a> , page 26.
<b>Criminal sexual conduct</b>	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 <a href="#">Remoi v. Att'y Gen.</a> , page 26.
<b>Criminal sexual intercourse with a person under 18</b>	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 <a href="#">Estrada-Espinoza; United States v. Medina-Villa</a> , page 26.
<b>Endangerment of welfare of child</b>	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 <a href="#">Uzoka v. Att'y Gen.</a> , page 26-27.
<b>Lascivious acts against a dependent person</b>	Lascivious acts against a dependent person Cal. Penal Code § 288(c)(2)	PSCs based on the circumstances of the case	See <a href="#">Corleto v. Lynch</a> , page 27.
<b>Lewd and lascivious act with a child</b>	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 <a href="#">Sandoval-Lemus v. Sessions</a> , page 27.
	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 <a href="#">Blandino-Medina v. Holder</a> , page 27.
	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 <a href="#">Pervez v. Holder</a> , page 27.
	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 <a href="#">Bogle-Martinez v. INS</a> , page 27.
<b>Pimping</b>	Conspiracy to commit pimping; pimping [Citation not specified]	PSC based on circumstances of the case	See <a href="#">Velasquez v. Garland</a> , page 27.
<b>Rape</b>	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 <a href="#">Sosa v. Holder</a> , page 27.
	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 <a href="#">Smith v. U.S. Dep't of Just.</a> , page 27.

<b>Rape, attempted</b>	Attempted rape [Citation not specified]	“Inherent” PSC	See <a href="#">Gatalski v. INS</a> , page 27.
<b>Sex Trafficking</b>	Conspiracy to commit sex trafficking 18 U.S.C. § 1594(c)	PSC based on the circumstances of the case	See <a href="#">Luamseejun v. Garland</a> , page 27.

## 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 29. 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982); *see also* pages 2-3.

<b>Access device fraud, conspiracy to commit</b>	Access device theft and identity fraud 18 U.S.C. §§ 1028A, 1029	PSC based on the circumstances of the case	See <a href="#">Zhong Qin Yang v. Holder</a> , page 28.
<b>Bank fraud, conspiracy</b>	Conspiracy to commit bank fraud 18 U.S.C. §§ 371, 1344	PSC as an AF for asylum	See <a href="#">Leo Martinez</a> , page 28.
<b>Bank fraud, in general</b>	Federal bank fraud 18 U.S.C. § 1344	PSC based on the circumstances of the case	See <a href="#">Sopo v. Att’y Gen.</a> , page 28.
	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 <a href="#">Singh v. Att’y Gen.</a> , page 28.
	Insurance fraud 18 U.S.C. §§ 1033(b)	PSC as an AF for asylum; PSC for withholding based on the circumstances	See <a href="#">Ugochukwu v. Gonzales</a> , page 28.
<b>Burglary, aggravated</b>	Burglary in the first degree N.Y. Penal Code § 140.30	PSC “on its face”	See <a href="#">Matter of Garcia-Garrocho</a> , page 28.
<b>Burglary, attempted</b>	Attempted burglary [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Backoulas-Spring v. Mukasey</a> , page 28.
	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 <a href="#">Wonlah v. DHS</a> , page 28.
<b>Burglary, residential (burglary of a dwelling)</b>	Burglary of a habitation Tex. Penal Code § 30.02(a)(1)	PSC based on the circumstances of the case	See <a href="#">Cana-Coronado v. Holder</a> , page 28.
	Felony burglary Wis. Statutes § 943.10(1m)(a)	PSC based on the circumstances of the case	See <a href="#">Salim v. Barr</a> , page 28-29.

<b>Burglary of a building, non-aggravated</b>	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 <a href="#">Mekenye v. Att'y Gen.</a> , page 29.
	Burglary 18 Pa. Cons. Stat. Ann. § 3502(a)	Not a PSC for withholding (where sentence did not amount to 5 years or more)	See <a href="#">Romanishyn v. Att'y Gen.</a> , page 29.
<b>Burglary of a vehicle</b>	Vehicle burglary Cal. Penal Code § 459	Not an AF (but may be a PSC based on the circumstances of the case)	See <a href="#">Sareang Ye v. INS</a> , page 29.
<b>Burglary with intent to commit theft</b>	Burglary with intent to commit theft Ill. Rev. Stat., ch. 38, ¶ 19-1	Not a PSC based on the circumstances of the case	See <a href="#">Matter of Frentescu</a> , page 29.
<b>Carjacking</b>	Carjacking Cal. Penal Code § 215(a)	Unclear whether offense is a PSC based on the circumstances of the case	See <a href="#">Wolfgramm v. Mukasey</a> , page 29.
	Carjacking [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Aviles-Urquidez v. Garland</a> , page 29.
<b>Counterfeit credit cards, conspiracy to traffic in</b>	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 <a href="#">Tijani v. Holder</a> , page 29.
	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 <a href="#">Unuakhaulu v. Gonzales</a> , page 29.
<b>Criminal trespass, with intent to commit crime</b>	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 <a href="#">Novitskiy v. Ashcroft</a> , page 29.
<b>Grand larceny in the fourth degree</b>	"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 <a href="#">In re Walter Alexander Landaverde Garcia</a> , page 29.
	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 <a href="#">Bastien v. Dep't of Homeland Sec.</a> , page 30.
<b>Grand theft, person</b>	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 <a href="#">M.N.</a> , page 30.



<b>Identity theft</b>	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 <a href="#">Valerio-Ramirez v. Sessions</a> , page 30.
	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 <a href="#">Doe v. Sessions</a> , page 30.
	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 <a href="#">Zhong Qin Yang v. Holder</a> , page 30.
<b>Receipt of stolen property</b>	Receipt of stolen property [Citation not specified]	While an AF, not a PSC for withholding based on the circumstances of the case	See <a href="#">Hernandez-Barrera v. Ashcroft</a> , page 30.
	Receipt of stolen property in interstate commerce 18 U.S.C. § 2315	PSC based on the circumstances of the case	See <a href="#">Nasrallah v. Att'y Gen.</a> , page 30.
<b>Securities fraud</b>	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 <a href="#">Kaplun v. Att'y Gen.</a> , page 30.
<b>Tax fraud</b>	Fraudulently requesting tax refund 18 U.S.C. § 287	PSC based on the circumstances of the case	See <a href="#">Hammerschmidt v. Garland</a> , page 30.
<b>Theft of services, generally</b>	Theft of services Pa. Stat. and Cons. Stat. § 3926(b) (West 1983)	AF	See <a href="#">Ilchuk v. Att'y Gen.</a> , page 30.
<b>Unauthorized access to a computer network</b>	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 <a href="#">Tian v. Holder</a> , page 30.

## FIREARM OFFENSES

**Keep in Mind:** Firearm trafficking offenses are likely to be found PSCs if they qualify as firearm trafficking AF, 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See [Matter of Frentescu](#), 18 I&N Dec. 244 (BIA 1982); see also pages 2-3.

<b>Discharging a firearm into a dwelling</b>	Illegal discharge of a firearm Cal. Penal Code § 246	PSC based on the circumstances of the case	See <a href="#">Granados v. Ashcroft</a> , page 31.
<b>Firearm trafficking offenses, generally</b>	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 <a href="#">Matter of Q-T-M-T</a> , page 31.
<b>Pointing a firearm at another person</b>	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 <a href="#">Cole v. Att'y Gen.</a> , page 31.

<b>Possession of a firearm by a convicted felon, drug addict, or fugitive</b>	Possession of a firearm and ammunition 18 U.S.C. § 922(g)(2)	PSC based on the circumstances of the case (IJ determination)	See <a href="#">Hill v. Att’y Gen.</a> , page 31.
	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 <a href="#">Pagayon v. Holder</a> , page 31.
	Possession of a firearm by a convicted felon [Citation not specified]	PSC (no analysis provided)	See <a href="#">Pena-Esparza v. Att’y Gen.</a> , page 31.
<b>Possession of a firearm during the commission of another crime</b>	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 <a href="#">Rangolan v. Mukasey</a> , page 31.
	Felony firearm and felonious assault Mich. Comp. Laws §§ 750.227b-a, 750.82	PSC based on the circumstances of the case for withholding	See <a href="#">In re Pjeter Juncai; Matty v. INS</a> , page 31.
	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 <a href="#">Hamama v. INS</a> , page 31.
	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 <a href="#">Matty v. INS</a> , page 31.
	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 <a href="#">Matter of K-L-</a> , page 31.
<b>Simple possession of a firearm, generally</b>	<b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <a href="#">Matter of Frentescu</a> , 18 I&N Dec. 244 (BIA 1982); see also pages 2-3. 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 <a href="#">Matter of Juarez</a> , page 32.	

## OTHER OFFENSES

<b>Alien smuggling</b>	<p><b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <u>Matter of Frentescu</u>, 18 I&amp;N Dec. 244 (BIA 1982); see also pages 2-3. 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 <u>In re Kam Kwun Chow</u> , page 32.
	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 <u>Zhang v. INS</u> , page 32.
	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 <u>Matter of L-S-</u> , page 32.
<b>Child abuse</b>	Criminal mistreatment of a child [Citation not specified]	PSC based on the circumstances of case	See <u>Ruiz-Matias v. Garland</u> , page 32.
	Negligent child abuse resulting in serious bodily injury Neb. Rev. Stat. § 28-707(1), (5)	PSC based on the circumstances of the case	See <u>Al-Masaudi v. Garland</u> , page 32.
<b>Concealing and harboring illegal aliens</b>	Concealing and harboring illegal aliens 8 U.S.C. § 1324(a)(1)(A)(iii)	PSC based on the circumstances of the case	See <u>Zhen v. Gonzales</u> , page 32.
<b>Criminal contempt (under a crime of violence statute)</b>	<p><b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <u>Matter of Frentescu</u>, 18 I&amp;N Dec. 244 (BIA 1982); see also pages 2-3.</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 <u>In re Aldabesheh</u> , page 32.
<b>Driving under the influence</b>	<p><b>Keep in Mind:</b> 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 <u>Mau v. Holder</u> ; <u>Anaya-Ortiz v. Holder</u> , pages 32-33.
	Driving under the influence [Citation not specified]	Not a PSC for asylum; likely not a PSC for withholding	See <u>Delgado v. Holder (2009)</u> ; <u>Delgado v. Holder (2011)</u> , page 32-33.

	Driving under the influence (3 convictions) [Michigan offense; citation not specified]	Discretionary denial of asylum without determining whether offense was a PSC.	See <a href="#">Kouljinski v. Keisler</a> , page 33.
<b>Exploitation of an elderly person or disabled adult</b>	<b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <a href="#">Matter of Frentescu</a> , 18 I&N Dec. 244 (BIA 1982); <u>see also</u> pages 2-3.		
	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 <a href="#">In re Tamara Aleman</a> , page 33.
<b>Failure to appear before a court</b>	<b>Keep in Mind:</b> 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), will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <a href="#">Matter of Frentescu</a> , 18 I&N Dec. 244 (BIA 1982); <u>see also</u> pages 2-3.		
	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 <a href="#">In re Tamara Aleman</a> , page 33.
<b>Harming a living animal, maliciously and intentionally</b>	Maliciously and intentionally maiming, mutilating, torturing, or wounding a living animal, or maliciously and intentionally killing an animal Cal. Penal Code § 597(a)	PSC based on the circumstances of the case	See <a href="#">Madrid v. Holder</a> , page 33.
<b>Hostage taking</b>	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 <a href="#">Acero v. INS</a> , page 33.
<b>Immigration Fraud</b>	Conspiracy to defraud the United States [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Mbenkeke v. Garland</a> , page 33.
<b>Mail fraud</b>	<b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <a href="#">Matter of Frentescu</a> , 18 I&N Dec. 244 (BIA 1982); <u>see also</u> pages 2-3.		
	Mail fraud 8 U.S.C. § 1341	PSC based on the circumstances of the case	See <a href="#">In re Maurice Wilson</a> ; <a href="#">Arbid v. Holder</a> , page 34.

<b>Money laundering</b>	<b>Keep in Mind:</b> 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <u>Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982); see also pages 2-3.		
	Tax fraud and money laundering [Citation not specified]	PSC for withholding based on the circumstances of the case	See <u>Hakim v. Holder</u> , page 34.
	Money laundering 18 U.S.C. § 1956(h)	Conflicting determinations: Not a PSC (no analysis) ( <u>Merlos</u> ); PSC as AF for asylum and withholding (sentence longer than 5 years) ( <u>Bankhole</u> ); PSC based on the circumstances ( <u>Williams</u> ).	See <u>Merlos v. INS</u> ; <u>Bankhole v. INS</u> ; <u>Williams v. Att'y Gen.</u> , page 34.
<b>Obstruction of justice</b>	<b>Keep in Mind:</b> 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), will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <u>Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982); see also pages 2-3.		
	Accessory after the fact S.C. Code Ann. § 16-1-55	Not an AF or PSC	See <u>Flores v. Att'y Gen.</u> , page 34.
	Obstruction of justice 18 U.S.C. § 1503	PSC as AF for asylum and withholding (sentence longer than 5 years)	See <u>Bankhole v. INS</u> , page 34.
<b>Possession of child pornography</b>	<b>Keep in Mind:</b> 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 five 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 will look to the circumstances of the offense to determine if the offense constitutes a PSC. See <u>Matter of Frentescu</u> , 18 I&N Dec. 244 (BIA 1982); see also pages 2-3.		
	Possession of child pornography Cal. Penal Code § 311.11(a)	PSC based on the harm caused by the offense	See <u>Matter of R-A-M</u> , page 34.
<b>Prostitution</b>	Prostitution [Citation not specified]	Unclear; but prostitution is not a <i>per se</i> PSC for withholding	See <u>Yuan v. Att'y Gen.</u> , page 34-35.
	Hiring, offering to hire, or agreeing to hire a prostitute between the ages of thirteen and sixteen [Citation not specified]	PSC based on the circumstances of the case	See <u>Donaire-Alvarado v. Garland</u> , page 35.



<b>Prostitution, soliciting or engaging while knowingly HIV+</b>	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 <a href="#">Jose Luis Ramirez</a> , page 35.
<b>Racketeering</b>	Racketeering 18 U.S.C. § 1962	AF for asylum; PSC for withholding based on the circumstances of the case	See <a href="#">Bent v. Att'y Gen.</a> , page 35.
<b>Resisting arrest (resisting and obstructing officer)</b>	<b>Keep in Mind:</b> 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.		
	Evading arrest in a vehicle Tex. Penal Code § 38.04(a), (b)(2)(A)	PSC based on the circumstances of the case	See <a href="#">Quedraogo v. Garland</a> , page 35.
	Resisting an executive officer Cal. Penal Code § 69	Unclear (remanded to BIA for further analysis)	See <a href="#">Alphonsus v. Holder</a> , page 35.
	Resisting and obstructing an officer with an injury [Citation not specified]	PSC based on the circumstances of the case	See <a href="#">Silevany v. Holder</a> , page 35.
<b>Stalking</b>	Third degree stalking N.Y. Penal Law § 120.50(3)	Unclear (remanded); ruled PSC by IJ based on the circumstances of the case	See <a href="#">Wassily v. Holder</a> , page 35.
	Internet stalking of a child [Arkansas offense; Citation not specified]	PSC (no analysis provided)	See <a href="#">Ezike v. Holder</a> , page 35.
	Stalking Cal. Penal Code § 646.9(b)	PSC based on the circumstances of the case	See <a href="#">Ceren v. Barr</a> , page 35.
<b>Smuggling goods</b>	Smuggling goods from the U.S. 18 U.S.C. § 554	PSC (unclear analysis)	See <a href="#">Yong Guo v. Barr</a> , page 35.
	Using false information on postal documents 18 U.S.C. § 1342	PSC (unclear analysis)	See <a href="#">Yong Guo v. Barr</a> , page 35.
<b>Tampering with physical evidence</b>	Tampering with physical evidence N.Y. Penal Law § 215.40(2)	PSC based on the circumstances of the case	See <a href="#">Denis v. Att'y Gen.</a> , page 35-36.
<b>Telephoning a bomb threat</b>	Telephoning a bomb threat Okla. Stat. Ann. tit. 21, § 1767.1(A)(7)	Unclear (remanded to the BIA for further analysis)a	See <a href="#">Abpikar v. Holder</a> , page 36.
<b>Unlawful export of military technology</b>	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 <a href="#">Zhan Gao v. Holder</a> , page 36.

## 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 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. 2015). Affirmed the BIA and found that trafficking in marijuana was a PSC despite "evolving societal standards" concerning marijuana.

Baboolall v. Att'y Gen., 606 F. App'x 649 (3d Cir. 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. 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. 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 the Convention Against Torture (CAT) because his conviction for "delivering, manufacturing, or possessing with intent to deliver" between five and forty-five kilograms of marijuana in violation

Infante v. Att'y Gen., 574 F. App'x 142 (3d Cir. 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., 591 F. App’x 97 (3d Cir. 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 co-conspirators did not provide independent basis for relief from removal.

Singh v. Holder, 516 F. App’x 387 (5th Cir. 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. 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. 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. 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. 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. 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.

Min Chang Chen v. Sessions, 736 F. App’x 706, 707 (9th Cir. 2018). Conviction for cultivation of marijuana qualified as an AF and also a PSC under a totality of circumstances analysis. The BIA did not err in considering the seriousness and recency of the offense and the large amount of marijuana involved.

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.”

## 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&N819 (BIA 1990) (Simple possession of cocaine is not a PSC).

Vaskoska v. Lynch, 655 F. App'x 880 (2d Cir. 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.

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## OFFENSES AGAINST PERSONS

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### Accessory to murder

Chavez-Gonzalez v. Barr, 826 F. App'x 660, 660–61 (9th Cir. 2020). No error in the BIA's upholding the IJ's decision that defendant's conviction for accessory to murder after the fact, Cal. Penal Code, § 32, qualified as a PSC. The IJ evaluated Frentescu factors in finding the offense grave: "three people were shot in cold blood, while the respondent did nothing but help the murderer escape justice."

### Assault, aggravated

Reyes-Romero v. Barr, 832 F. App'x 426, (6th Cir. 2020), overturning United States v. Reyes-Romero, 2:17-cr-292, 2018 WL 3218658, at \*24–25 (W.D. Pa. 2018). No abuse of discretion in the BIA upholding IJ determination that offense constitutes a PSC (determination is not precluded by the District Court decision, which was based on then controlling precedent where the decision the District Court relied on had been expressly overturned).

Aguilar v. Att'y Gen., 665 F. App'x 184 (3d Cir. 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. 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 (2nd Cir. 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.

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. 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. 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. 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.

In re: Pjeter Juncaj, No.: AXX XXX 467, 2004 WL 1059706, at \*1 (BIA Jan. 13, 2004) (unpublished). 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. See also Perez-Garcia v. Garland, No. 20-72706, 2021 WL 5860896, at \*4 (9th Cir. Dec. 10, 2021) (PSC based on the circumstances where defendant testified to hitting victim ten times in face and was sentenced to 2 years in prison).

Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001). Where neither BIA nor IJ considered the several factors set forth in 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.

### **Dismembering**

Gutierrez-Vargas v. Garland, 42 F.4th 877, 882 (8th Cir. 2022). No abuse of discretion in the BIA's adoption of the IJ's determination that defendant's conviction for dismembering a human body qualified as a PSC where the IJ “noted the elements of the offense, [defendant's] role in dismembering and concealing the victim's body, his lengthy prison sentence, and the state courts' characterization of [his] actions.”

### **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 the Illegal Immigration Reform and Immigrant Responsibilities Act (IIRIRA) did not apply. Instead, the Court found kidnapping to be a particularly serious crime under the Antiterrorism and Effective Death Penalty Act (AEDPA), and the petitioner was not entitled to a separate dangerousness inquiry.

### **Manslaughter**

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 two-and-two-thirds to eight years. The individual argued that since the victim was deceased when the tampering occurred, it could not constitute a crime against a person. The Attorney General, 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. 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.

Ruderman v. Whitaker, 914 F.3d 567 (7th Cir. 2019). Conviction under Wis. State §940.10(1) for homicide by negligent operation of a vehicle qualified as a PSC despite it being a crime of negligence; the BIA's discretion in the PSC determination was not cabined by a *mens rea* of negligence requirement.

De La Luz Ramos v. Garland, 861 F. App'x 145, 147 (9th Cir. 2021). Conviction of involuntary manslaughter for giving friend medication without a license qualified as a PSC based on the circumstances of the case.

### **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."

### **Murder**

Castro-Aguilar v. Garland, No. 22-2070, 2023 WL 8798088, at \*2-3 (9th Cir. Dec. 20, 2023). The BIA correctly found that petitioner's murder conviction qualified as a PSC. The BIA properly evaluated the Frentescu factors, including considering his "immediate lack of remorse." The BIA also did not err in refusing to consider the defendant's Post-Traumatic Stress Disorder at the time of the crime commission, which had not been raised below.

### **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. 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. 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. 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 Just., 218 F. App'x 195 (3d Cir. 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.

### Strangulation

Sunuwar v. Att'y Gen., 989 F.3d 239, 244, 249–250 (3rd Cir. 2021). Conviction for first degree strangulation under 18 Pa. Cons. Stat. § 2718(a) was an AF (as a crime of violence with a sentence of over one year) and thus a *per se* PSC for asylum. The BIA did not abuse its discretion by adopting the IJ's finding that the offense required someone to knowingly or intentionally apply pressure to the neck or throat and imposed a “rather significant period of incarceration” (11.5–23 months). The IJ also considered reliable facts from the affidavit of probable cause in making the PSC determination. See also Flores-Vega v. Barr, 932 F.3d 878, 884–89 (9th Cir. 2019) (similar holding for Oregon's strangulation statute, Or. Rev. Stat. § 163.187(1)).

### Terroristic threats

Shazi v. Wilkinson, 988 F.3d 441, 445 (8th Cir. 2021). Conviction for making terroristic threats in violation of Minn. Stat. § 609.713 qualified as a PSC. There is no requirement that the BIA consider the noncitizen's likelihood of future misconduct as part of the PSC determination.

### 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.

### Wounding

Moreno-Osorio v. Garland, 2 F.4th 245, 250 (4th Cir. 2021). Conviction for unlawful wounding in violation of Virginia Code § 18.2-51 qualified as an AF (qualifying as a crime of violence coupled with a one-year term of imprisonment) and was therefore a *per se* PSC.

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## SEX OFFENSES

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### 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 United States 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. 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.

Hernandez-Mendoza v. Garland, No. 20-71390, 2022 WL 822926, at \*3 (9th Cir. 2022). Defendant's conviction of sexual abuse in the second degree in violation of Or. Rev. Stat. § 163.425 qualified as a PSC. No abuse of discretion when the BIA conducted a case-specific analysis referencing that Petitioner had pled guilty to subjecting his victim to non-consensual sex and compelled her to act by fear of physical injury.

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. 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., 175 F. App'x 580 (3d Cir. 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.

United States 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. 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. 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. 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. 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. 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 Just., 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.

### **Sex trafficking**

Luamseejun v. Garland, No. 21-70496, 2022 WL 1403680, at \*3 (9th Cir. 2022). No abuse of discretion in the BIA's decision that defendant's conviction for conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c). The PSC finding was supported by facts included in plea agreement: defendant "sought out a leadership role in a trafficking ring, became a high-level participant as a 'house boss,' purchased a stake in the operations of the smuggling ring, advertised and ran the day-to-day operation of a house of prostitution, and engaged in trafficking herself by purchasing the bondage debts of women who had been trafficked into the country."

### **Pimping**

Velasquez v. Garland, No. 22-71, 2023 WL 3479559, at \*2–3 (9th Cir. 2023). No abuse of discretion in BIA's decision that convictions for pimping qualified as a PSC where they considered that the convictions involved crimes against persons (exploiting for profit through prostitution), the lengthy sentence (four years), and circumstances and facts underlying conviction (\$61,554 in profit). Where there was nothing in the record to suggest that Petitioner was forced into the activity, the BIA did not abuse its discretion in refusing to consider mitigating evidence of abuse against the defendant and her children by her husband.

## 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, 570 F. App'x 381 (5th Cir. 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, conspiracy

Leo Martinez, A44 407 236 (BIA 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. Att'y Gen., No. 17-15426, 2018 WL 3115785 (11th Cir. 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. 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. 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. 2013). Upheld the BIA's decision that a conviction for "burglary of a habitation" under Texas law constituted a PSC.

Salim v. Barr, 803 F. App'x 938, 942 (7th Cir. 2020). While sentence was insufficient to render the offense as *per se*



PSC for withholding, the IJ concluded that the defendant's conviction for burglary under Wisconsin law qualified as a PSC based on additional facts. The IJ and BIA considered that the defendant was charged for "entering his then-wife's house, stealing her underwear, and poisoning his son's fish, all while she and their son were present."

### **Burglary of a building, non-aggravated**

Mekenye v. Att'y Gen., 445 F. App'x 593 (3d Cir. 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. 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."

Aviles-Urquidez v. Garland, No. 20-71790, 2022 WL 16731978, at \*1 (9th Cir. 2022). The BIA did not err in adjudicating carjacking a PSC based on the circumstances where the Board applied the correct Frentescu test (considering (1) the nature of the carjacking crime had elements of possible violence and force; (2) defendant's age, gang involvement, lack of a good family life, and (3) his three-year sentence, which showed the seriousness of the offence).

### **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 eighteen-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)**

In re: Walter Alexander Landaverde Garcia, No.: AXXX XX0 616, 2011 WL 1373690, at \*2 (BIA 2011) (unpublished). 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. 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 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. 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. 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.

Nasrallah v. Att'y Gen., 762 F. App'x 638, 641 (11th Cir. 2019), *rev'd on other grounds*, Nasrallah v. Barr, 590 U.S. 573 (2020). Defendant's conviction for receipt of stolen property in interstate commerce under 18 U.S.C. § 2315 qualified as a PSC. Decision notes that Petitioner "knowingly purchased the cigarettes in question believing that they were obtained from violent thefts in which individuals hijacked trucks and robbed guarded storage facilities," that he "procured \$249,500 in cash to purchase the cigarettes," and that the IJ notes "cigarette trafficking is connected to organized crime and terrorist groups."

### Securities fraud

Kaplun v. Att'y Gen., 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.*)

### Tax fraud

Hammerschmidt v. Garland, 54 F.4th 282 (5th Cir. 2022). Affirming BIA's determination that a conviction for fraudulently requesting a tax refund in violation of 18 U.S.C. § 287 qualifies as a PSC.

### Theft of services, generally

Ilchuk v. Att'y Gen., 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. *See also Smatsorabudh v. Barr*, 812 F. App'x 432, 434 (9th Cir. 2020) (wire fraud conviction under 18 U.S.C. § 1343 qualified as PSC under circumstances).

### Discharging a firearm into a dwelling

Granados v. Ashcroft, No. C 03–3704 MJJ, 2003 WL 22416147 (N.D. Cal. 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.” See also Cardenas v. Barr, 830 F. App’x 890, 891 (9th Cir. 2020) (conviction for grossly negligent discharge of firearm under Cal. Penal Code 246.3(a) qualified as a PSC under the circumstances of the case).

### 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. 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. 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. 2008). The IJ found the individual ineligible for withholding of removal because possession of a firearm during drug trafficking offense constituted a PSC.

In re: Pjeter Juncaj, No.: AXX XXX 467, 2004 WL 1059706, at \*1 (BIA 2004) (unpublished). 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).

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## OTHER OFFENSES

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### Alien smuggling

In re: Kam Kwun Chow, No.: AXX XX6 373, 2004 WL 2374456, at \*1 (BIA 2004) (unpublished). 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.

### Child abuse

Ruiz-Matias v. Garland, No. 20-73028, 2023 WL 4785505, at \*1–2 (9th Cir. 2023). No discretion to review at Circuit Court level due to Petitioner failing to raise a legal question. In adjudication below, conviction of criminal mistreatment of a child for not reporting a former partner’s sexual abuse of her daughter to police was adjudicated a PSC.

Al-Masaudi v. Garland, 44 F.4th 1079, 1084 (8th Cir. 2022). No abuse of discretion in BIA determination. The Board considered that the charge was against a person and therefore more likely to be PSC, then considered the facts and circumstances of the offense, noting the seriousness of the injury sustained by Petitioner’s son (bleeding in the brain and eyes). That charge is for negligence “did not diminish the gravity of the crime to the point where an offense involving serious bodily injury to a six-month-old was not particularly serious.”

### Concealing and harboring illegal aliens

Zhen v. Gonzales, 175 F. App’x 222 (10th Cir. 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 Aldabesheh, 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. 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**

In re: Tamara Jackeline Aleman A.K.A. Tamara Aleman, No.: AXXX XX0 365, 2013 WL 4041217, at \*1 (BIA Jun. 18, 2013) (unpublished). 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**

In re: Tamara Jackeline Aleman A.K.A. Tamara Aleman, No.: AXXX XX0 365, 2013 WL 4041217, at \*1 (BIA Jun. 18, 2013) (unpublished). 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.

### **Harming a living animal, maliciously and intentionally**

Madrid v. Holder, 541 F. App’x 789, 792 (9th Cir. 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**

Acerro v. INS, No. Civ.A.04-0223, 2005 WL 615744, at \*8 (E.D.N.Y. 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.

### **Immigration fraud**

Mbendeke v. Garland, 860 F. App’x 191, 194 (2nd Cir. 2021). No abuse of discretion in the BIA’s determination that conviction for immigration fraud qualified as a PSC when they “properly considered (1) the scope of the conspiracy, which included at least eight fraudulent marriages and four fraudulent visa petitions over the course of three years and involved fraudulent efforts to obtain benefits for people who were not family members; (2) [Petitioner]’s leadership role in the scheme; (3) her cooperation and sentence; and (4) the potential risk the offense posed to national security by undermining immigration procedures.”



## 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.

In re: Maurice Wilson, No.: AXN XX5 771, 2004 WL 1398694, at \*1-2 (BIA 2004) (unpublished). 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. 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. 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.

Williams v. Att'y Gen., No. 22-2468, 2023 WL 4014467, at \*7 (3d Cir. June 15, 2023). No abuse of discretion in BIA upholding the IJ determination that the offense constituted a PSC where "the IJ properly considered the length of Williams's 4-year sentence, noting that it was below the statutory maximum... the nature of Williams's conviction, noting that William's crime involved 16 victims and spanned 12 states... [and] the circumstances underlying Williams's conviction, noting that Williams accepted responsibility for his crime."

## Obstruction of justice

Flores v. Att'y Gen., 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 requiring interference with a judicial proceeding, it was not deemed to be an AF or a PSC. But consider, Pugin v. Garland, 143 S. Ct. 1833, 1838-1843 (2023) (majority opinion reviewing the federal Chapter 73 listing of obstruction of justice offenses to find that an offense may be deemed an "obstruction of justice" AF even if the offense does not require that an investigation or proceeding be *pending*) and, *id.*, 1843-1845 (concurring opinion of Justice Jackson observing that in addition Chapter 73 might limit in substance the universe of offenses that may relate to obstruction of justice and noting that the Court did not need to reach this more general Chapter 73 comparison issue with respect to petitioner Pugin, who was convicted of an accessory-after-the-fact offense not included in Chapter 73).

Bankhole v. INS, No. 3:02-CV-00702(EBB), 2002 WL 32002678 (D. Conn. 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.

Donaire-Alvarado v. Garland, No. 22-271, 2024 WL 466748 (9th Cir. Feb. 7, 2024), at \*3. The IJ properly considered Frentescu factors where they “reviewed the facts and circumstances of the crime described in a probable cause report, recognized that Donaire pleaded guilty, and emphasized the ‘scourge’ of underage prostitution.”

### **Prostitution, soliciting or engaging in while knowingly HIV-positive**

Jose Luis Ramirez, A075 986 662 (BIA 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**

Bent v. Att’y Gen., 852 F. App’x 55, 58–59 (3rd Cir. 2021). Offense is an AF for asylum. No abuse of discretion in BIA upholding IJ decision where the IJ “properly considered the illicit enterprise’s full scope, which included “narcotics trafficking, robbery, attempted murder, and murder,” not only Petitioner’s “role within it, which involved distribution of marijuana.”

### **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. 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.

Ouedraogo v. Garland, 844 F. App’x 756, 758 (5th Cir. 2021). Conviction for evading arrest qualified as a PSC on case-specific analysis: the offense “involves conduct that is purposeful, aggressive, and violent,” defendant was sentenced to a “substantial sentence” of two years imprisonment, and the incident report provided “that [he] fled from the police for over two miles, that the pursuit lasted long enough for another officer to join, that he attempted to evade police by driving through a gas station parking lot, and that he only stopped the vehicle when his progress was impeded by a tow truck.”

### **Stalking**

Wassily v. Holder, 523 F. App’x 783, 785 (2d Cir. 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. 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.

Ceren v. Barr, 803 F. App’x 114, 115–16 (9th Cir. 2020). No abuse of discretion in the BIA’s determination that conviction for stalking qualified as a PSC where the IJ considered (1) the nature of the crime, including that it involved threats against a person rather than property; (2) the fact that defendant was given a “three-year prison sentence”; and (3) the underlying circumstances of the offense using court records detailing serious actions in threatening to kill his ex-wife, the many messages he sent to harass her, and his repeated violation of a judicial restraining order.

### **Smuggling goods**

Yong Guo v. Barr, 793 F. App’x 599, 600 (9th Cir. 2020). No error in the BIA’s determination that conviction for smuggling goods from the United States and using false information on postal documents, in violation of 18 U.S.C. § 554 and 18 U.S.C. § 1342, qualified as a PSC.

## 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. 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."