

# RIAC<sup>2</sup>



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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HAPPY NEW YEAR!

In This Issue:

Crimes of Domestic  
Violence

UPCOMING EVENTS

**January 23, 2018:**  
Jefferson County Bar  
Association Mtg. CLE:  
Representing Non-citizens in  
Criminal and Family Court:  
Basic Concepts in  
"Crimmigration"

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*The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.*

*\*RIAC<sup>2</sup> is administered by the Criminal Division of the Oneida County Public Defender.*

## ***ANATOMY OF AN ADVISAL: CRIMES OF DOMESTIC VIOLENCE***

As we begin 2018, many of you are probably defending, in criminal and family court, individuals who have succumbed to the stresses of the holidays in usually unlawful ways, e.g. lashing out at significant others, children, siblings, and even parents. If your client is a noncitizen, there is a separate ground of criminal deportability for those convicted of a "crime of domestic violence" (CODV).

A CODV is a "crime of violence" (as defined in 18 U.S.C. §16) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government. See INA §237(a)(2)(E).

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or  
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. §16.

The two determinations to be made are (1) is the offense a "crime of violence" and (2) is the complainant a person protected under NY laws pertaining to domestic violence?



In the Next Issue:  
Other Grounds for  
Deportation under INA  
§237(a)(2)(E): Stalking  
and Violating an Order  
of Protection.

**Chief Defenders & Assigned  
Counsel Administrators:**

Contact the RIAC2 to  
schedule a training, lunch  
hour or other session in  
your office/county. We will  
provide CLE credit!

While it is fairly easy to determine whether the complainant falls into the DV category, it is not as easy to determine whether an offense is a COV. In fact, the Supreme Court of the United States (SCOTUS) will be issuing a decision as to whether §16(b) is unconstitutionally vague. See *Dimaya v. Sessions*, Docket No. 15-1498. Oral argument was held in October 2017. The SCOTUS has issued previous decisions interpreting the term “physical force” in other contexts. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (FL DUI statute not a “crime of violence”).

It is safe to say that any time the complainant is a “protected person” under NY domestic violence laws, there is the potential for a CODV conviction, and each offense must be analyzed to determine whether it constitutes a “crime of violence.” (In case you have not been reading our newsletters or attending trainings, at the outset of each case, call the RIAC!)

Strategies to avoid a CODV conviction:

1. Plead to an offense that is not a “crime of violence.” An offense that does not meet the technical definition of “crime of violence” is never a “crime of domestic violence” even if it is clear that the defendant and victim had a domestic relationship. Again, this area of the law is changing and the *Dimayo* decision will have an impact.
2. Designate a victim not protected under state DV laws or enter a plea to violence against property.
3. Be sure that the entire “record of conviction” is consistent with the above instruction (1) and (2).
4. Keep the domestic relationship out of the reviewable “record of conviction,” i.e. keep it off the record!
5. **Remember:** A “crime of violence” with a sentence of one year or longer is an “aggravated felony,” so make sure sentence is 364 days or less to avoid an AF conviction.
6. **Remember:** A conviction could also be a CIMT which can mean deportability under certain circumstances (e.g. client less than 5 years in US, multiple CIMTs, etc.).
7. Watch for special cases: asylum applicants, asylees or refugees, and those who need to apply for waivers. A conviction may destroy eligibility for this relief *even if* the offense is not technically a deportable CODV. (This is dependent on the unique circumstances of your client, so make sure to do a proper intake so that the RIAC can watch for these issues.)

NOTE on “Record of Conviction” (ROC): The ROC consists of “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16, 20 (2005).

Pre-sentence reports, preliminary hearing transcripts, and police reports are not part of the ROC -- unless the defense explicitly stipulates that they contain the factual basis for the plea. Therefore, do NOT incorporate any documents in the plea agreement that contain information about the relationship between the complainant and your client or any reference to your client’s alleged or admitted conduct.