No. 09-72911

Decision of January 16, 2013
Before: McKeown, M., Watford, P., Circuit Judges, and Duffy, K., District Judge,

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCIANO AVALOS DIMAS
Agency No. A043 806 964

Petitioner,

v.

ERIC HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM THE FINAL
ORDER OF REMOVAL

PETITIONER'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

HOLLY S. COOPER
P.O. BOX 4358
DAVIS, CA 95617
Telephone: (530) 754-4833
Facsimile: (530) 752-0822

Attorney for Luciano Avalos Dimas

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Codes

U.S. Territory Codes

Miscellaneous

TABLE OF CONTENTS

Luciano Avalos Dimas ("Mr. Avalos Dimas" or "Petitioner"), by the undersigned counsel and pursuant to Fed. R. App. P. 40, petitions for panel rehearing from the panel opinion dated May 15, 2013, and in the alternative petitions for rehearing en banc under Fed. R. App. P. 35, in this Petition.

INTRODUCTION AND STATEMENT OF COUNSEL

Mr. Avalos Dimas, petitioner in *Avalos Dimas v. Holder,* 09-72911, seeks panel rehearing and rehearing en banc of the May 15, 2013, Panel decision (McKeown, M., Watford, P., Circuit Judges, and Duffy, K., District Judge). The panel held that (1) an affirmative defense is not relevant to the categorical approach and California's attempt was a categorical match to the generic definition of attempt; (2) upheld this Court's precedent that California Penal Code § 288(a) is a categorical match to the generic definition of sexual abuse of a minor. The panel did not reach the remaining issues in the petition, such as whether § 288(a) and § 288.2(b) are crimes of violence and whether § 288.2(b) constitutes sexual abuse of a minor.

The panel decision conflicts with two recent Supreme Court of the United States' cases, *Moncrieffe v. Holder,* 2013 U.S. LEXIS 3313 (April 23, 2013) and *Descamps v. United States,*11-9540, slip. op. (June 20, 2013,) – two cases that entirely change the scope of what is included in generic definitions and how courts employ the categorical approach.

A. *Moncrieffe* Overruled This Court's Precedents in *Gil*, *Charles*, and *Velasquez-Bosque* When It Held Affirmative Defenses Are Not Only Relevant to The Generic Definition, But Incorporated Into the Definition

The Supreme Court of the United States' decision in *Moncrieffe v. Holder* overruled *United States v. Velasquez-Bosque*, 601 F.3d 955, 963 (9th Cir. 2010), *Gil v. Holder*, 651 F.3d 1000, 1005–06 (9th Cir. 2011); *United States v. Charles*, 581 F.3d 927, 935 (9th Cir. 2009), that affirmative defenses are irrelevant to the categorical approach. *Moncrieffe, supra.* Here, the panel held that California attempt was a categorical match to the generic definition of attempt and failed to analyze whether the generic definition of attempt should include the affirmative defense of abandonment relying on this Court's precedent in *Velasquez-Bosque, Gil, and Charles.* In *Moncrieffe*, the Supreme Court, however, overruled these cases holding that affirmative defenses are not only relevant to the categorical approach, but can be incorporated into the elements of the generic offense. *Moncrieffe,**12-22.

This Court in *Gil v. Holder,* 651 F.3d 1000, 1005 (9th Cir.2011) held that under federal law the antique firearm exception was an affirmative defense and irrelevant to the categorical analysis. This affirmed the Board of Immigration Appeals' decision in *Matter of Mendez-Orellana,* 25 I.&N. Dec. 254, 256 (BIA 2010) that held that the antique firearm exception was an affirmative defense and the burden

to prove the defense shifted to the alien. This Court in *Gil* relied on *Velasquez-Bosque* and *Charles* that had similarly held that affirmative defenses were not relevant to the categorical inquiry. *Gil*, 651 F.3d at 1005–06; *Velasquez-Bosque*, 601 F.3d at 963; *Charles*, 581 F.3d at 935. In arriving at their conclusions that exceptions to criminal liability were irrelevant to the categorical approach, the cases equated immigration removal proceedings to criminal proceedings. *See Gil,* 651 F.3d at 1005 fn. 3 (citing criminal cases for the proposition that an affirmative defense is not an element of the crime); *Mendez-Orellana,* 25 I.&N. Dec. at 256 (citing to criminal cases regarding who must raise and prove the affirmative defense).

The Supreme Court in *Moncrieffe v. Holder* clarified, however, that exceptions to criminal liability can be included in the generic offense and went so far as to address the antique firearm exception analyzed by *Gil*. *Moncrieffe,* at *39. The Court clarified the categorical approach first annunciated in *Taylor*. *Id.* at 5. The Court stated that by "generic," it meant the offense must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as the point of comparison. *Id.* at *12. The Court went on to decide whether distribution of a small of marijuana was an aggravated felony where the federal felony offense described in the deportation statute permitted a misdemeanor exception for distributing a small amount of marijuana for no remuneration. *Id.* at

*17. The Court allowed for the "marijuana" exception to be considered in defining the federal generic crime and dismantled the Government's arguments one by one.

First, the Government argued that the misdemeanor exception for distributing small amounts of marijuana under 18 U.S.C. § 841(b)(4) was a mitigating exception and not an element of the offense and irrelevant to the categorical analysis. *Id.* at *20. The Court found that the categorical approach is not concerned only with elements of offenses. Because the deportation ground required a felony, the Court found it could look to sentencing factors to determine the generic nature of a crime. *Id.* at *21.

Second, the Government asserted that in criminal proceedings, the burden would be on the defendant to show he qualifies for the lesser misdemeanor sentence under § 841(b)(4). The Court found that the analogy to federal prosecution was misplaced because it considers the generic federal offense in the abstract, not an actual federal offense being prosecuted before a jury. *Id.* at *26. The Court stated it was not concerned with which facts must be found by a jury or who has the burden of proof. *Id.*

Third, the Court flatly rejected the Government's proposition that immigrants bear the burden of proving the marijuana exception in immigration court. *Id.* at *29. The Court found such a proposition was entirely inconsistent with the INA's text and the categorical approach. The Government's proposal would

lead to *post hoc* investigation of the facts and minitrials in immigration court which have long been deemed undesirable and judicially inefficient. *Id.* at *30. The Court concluded that a noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution. *Id.* at *32.

Finally, the Government suggested to the Court a parade of horribles that would happen if the Court permitted exceptions to be included in the generic crime. The Government argued such a result would frustrate enforcement of other aggravated felony provisions that refer to federal firearm statutes that contain an exception for "antique firearms." *Id.* at *39. The Government feared that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. In response, the Court, implying his categorical analysis on the antique firearm exception was correct, said that nonetheless immigrants still must prove that there is a realistic probability that antique firearms would be prosecuted.

Moreover, this Court's holding in *Gil*, 651 F.3d at 1005, that immigrants should bear the burden of proving the affirmative defense (ie. whether the offense was an antique firearm), was clearly rejected by the Court. It refused to provide the same criminal process for affirmative defenses or exceptions because immigrants were in an entirely different procedural posture than criminal defendants. *Id.* at *32. Further, this Court's holding in *Gil* would run afoul of the Court's caution to

avoid minitrials of criminal conduct. *Id.* at *30. The Court also seemed to implicitly find that the antique firearms exception, like the marijuana exception, should be part of the categorical inquiry. *Id.* at *39. The Court's only residual question on the antique firearm exception was not whether it should be included in the categorical analysis, but whether the state prosecutors were actually charging criminal defendants with possessing, etc. antique firearms.

Here, *Moncrieffe*'s new analysis of incorporating criminal "exceptions" into the generic crimes and the categorical analysis is relevant to Mr. Avalos Dimas' case. Here, the panel, on May 15, 2013, relied on this Court's past precedents in *Gil, Charles,* and *Velasquez-Bosque* and found affirmative defenses were irrelevant to the categorical approach. *Avalos Dimas v. Holder*, 09-72911 (9th Cir. May 15, 2013). In his arguments before the panel Mr. Avalos Dimas had argued that his conviction for attempted § 288(a) under the California Penal Code was not deportable because California's liability for the crime of attempt, was broader than the generic definition. Petitioner's Opening Brief ("Pet. O.B.") at 13-22. In particular, the majority of states permit the defense of abandonment for attempt, but no such affirmative defense is permitted under California law. Id.

For example, the Model Penal Code expressly adopts an affirmative defense of voluntary abandonment or "renunciation of criminal purpose." *See* Model Penal Code § 5.01(4). Specifically, "[w]hen the actor's conduct would otherwise

constitute an attempt ..., it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." *Id.*[2]

Consistent with the Model Penal Code, at least 31 jurisdictions have statutorily adopted the abandonment or renunciation defense.[3] Even where the defense of renunciation or voluntary abandonment is not expressly provided by statute, at least three states have recognized the defense. *See People v. Kimball*, 109 Mich. App. 273, 286, *modified and remanded without expressing opinion on the legal conclusions below*, 412 Mich. 890, 313 N.W.2d 285 (1981); *State v. Latraverse*, 443 A.2d 890, 893-94 (R.I. 1982); *Pruitt v. State*, 528 So.2d 828 (Miss

[2]The defense does not apply, however, when the individual "purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be." Id. § 501(1)(a) and (4).

[3]See Ala. Code § 13A-4-2(c); Alaska Stat. § 11.31.100(c); Ariz. Rev. Stat. § 13-1005; Ark. Stat. Ann. § 5-3-204; Colo. Rev. Stat. § 18-2-101(3); Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11,§ 541(b); Fla. Stat. Ann. § 777.04(5)(a); Ga. Code Ann. § 16-4-5; Haw. Rev. Stat. § 705-530(1); Ind. Code Ann. § 35-41-3-10; Ky. Rev. Stat. Ann. § 506.020; Me. Rev. Stat. Ann. tit. 17-A, § 154; Minn. Stat. Ann. § 609.17(3); Mont. Code Ann. § 45-4-103(4); N.H. Rev. Stat. Ann. § 629:1(III); N.J. Stat. Ann. § 2C:5-1(d); N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05(3); Ohio Rev. Code Ann. § 2923.02(D); Or. Rev. Stat. § 161.430; 18 Pa. Cons. Stat. Ann. § 901(c); Tenn. Code Ann. § 39-12-104; Tex. Penal Code Ann. § 15.04; Utah Code Ann. § 76-2-307; Wyo. Stat. § 6-1-301(b); Am. Samoa Code Ann. § 46.2303; Guam Code Ann. tit. 9, § 7.73(a), (c)-(d); P.R. Stat. tit. 33, § 3123; *Manual for Courts-Martial, United States*, Part IV, § 4(c)(4).

1988).[4] Thus, as 29 states, the U.S. military, Puerto Rico, American Samoa, and Guam all allow the defense of voluntary abandonment or renunciation to liability, the defense falls within the majority view. *See United States v. Esparza-Herrera*, 557 F.3d 1019, 1025 (9th Cir. 2009)(33 jurisdictions are sufficient to constitute the necessary majority); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008) (describing 35 states as "the vast majority of states").

In contrast, California is one of the few states to expressly reject the defense of voluntary abandonment or renunciation. *See People v. Dillon*, 34 Cal. 3d 441, 452-54 (1983). In *Dillon*, the defendant devised a plan to "rip off" some marijuana plants that were growing in a field near a farm. *Id.* at 451. The crop was guarded by two brothers armed with shotguns. To execute the plan, Dillon and the others equipped themselves with firearms and other items to assist in harvesting the marijuana, concealing their identity or restraining the guards if necessary. *Id.* When they arrived at the field and saw one of the guards, however, "discretion became much the better part of valor, and they made little or no progress for almost two hours." *Id.* at 452. During this time, two of Dillon's compatriots apparently abandoned the effort altogether, and two other were chased away by

[4]Absent an express statute only a few states, including California, have expressly rejected the voluntary abandonment defense. *See* Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 Temp. L. Rev. 1, 10 n.26 (1989) (collecting cases). In the remaining states and federal courts, the question appears still to be open. *Id.*

dogs. *Id.* Dillon, however, remained watching outside the field of marijuana. *Id.* While Dillon was watching the field, one of the companions returned to the farm, but accidentally twice discharged his shotgun. By this time, one of the guards had circled behind Dillon and was approaching up the trail. Dillon saw that the guard was armed and began firing his rifle at him. When the man fell, Dillon fled without taking any of the marijuana. The guard died from his wounds. *Id.*

On appeal, Dillon contended that the jury instructions supporting an attempted robbery charge were in error. One of the instructions provided:

If a person has once committed acts which constitute an attempt to commit crime, he cannot avoid responsibility by not proceeding further with his intent to commit the crime, either by reason of voluntary abandoning his purpose or because he was prevented or interfered with in completing the crime. *Id.* (quoting CALJIC 6.01).[5] The California Supreme Court rejected the claim, stating that the "instructions given here accurately state [the law of attempt]." *Id.* at 453. Thus, California attempt is inconsistent with -- and provides a broader range of liability than -- generic "attempt" because in California guilt is established even when an

[5]The current California jury instruction for attempted murder is in accord. See CALCRIM 600 ("A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.").

individual voluntarily abandons his goal, but in the majority of jurisdictions such an abandonment provides a complete defense to the attempt charges. Further, the case shows there is a realistic probability that California will prosecute the crime of attempt even when the defendant abandoned the crime. *Moncrieffe*, slip. op. at 21. Thus, because California's attempt does not match the generic definition of attempt, Mr. Avalos Dimas is not deportable for his conviction for an attempted § 288(a). Although Mr. Avalos Dimas has two convictions, § 288(a) and § 288.2(b), the BIA only addressed § 288(a), thus, discussion regarding § 288.2(b) is beyond the scope of this Court review. A.R. 3-5; *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)(in reviewing an administrative order, courts may only consider the rationale put forth by the administrative agency).

Interestingly, this Court found that Mr. Avalos Dimas waived any argument that his conviction for § 288(a) constituted an aggravated felony crime of violence under 8 U.S.C. § 1101(a)(43)(F). However, 8 U.S.C. § 1101(a)(43)(U) is not an independent ground of removal, it must be connected to one of the subsections (A)-(T) listed under 8 U.S.C. § 1101. Section 1101(a)(43)(U) (attempt) states that an aggravated felony conviction is "an attempt or conspiracy to commit an offense described in this paragraph." Thus, subsection (U) must be linked to another aggravated felony subsection by the mandate of its plain statutory language– here

the linked subsections were subsection (A), sexual abuse of a minor, and (F), a crime of violence.

Mr. Dimas Avalos did not waive the argument that he was deportable as an aggravated felony for a crime of violence because his argument was that if this Court found he the generic definition of attempt did not equate to California's crime of attempt, it was not an *attempted* crime of violence as 8 U.S.C. §§ 1101(a)(43)(F) and (U) are interdependent. If the conviction does not match the categorical definition under section (U), the inquiry ends. Thus, this Court's finding that Mr. Avalos Dimas waived any argument that his conviction for attempted § 288(a) was a crime of violence is misplaced. He fully argued that his attempted crime did not meet the generic definition of an *attempted* aggravated felony. For the same reasons, his crime does not constitute an aggravated felony under §1101(a)(43)(A) because it is interconnected to §1101(a)(43)(U). Thus, Mr. Dimas Avalos should not be removable for his conviction for § 288(a), as no categorical match exists when you include the affirmative defense of abandonment in the generic definition.

B. <u>The Minimum Conduct Proscribed By § 288(a) Is Not Violent or Abusive</u>

Moreover, even if this Court finds that Mr. Avalos Dimas must still show his conviction for attempted § 288(a) is not a crime of violence or sexual abuse of a minor, *Moncrieffe* and *Descamps* also render his conviction not deportable because

the minimum conduct of § 288(a) is neither abusive nor violence and is not a categorical match to the generic definition of sexual abuse of minor.

Pursuant to *Moncrieffe,* the modified categorical approach is only utilized when the statute of conviction describes different crimes separately (ie. manufacture, deliver, distribute, sell, etc.). Op. at 7. However, the Court did not utilize the modified categorical approach when Georgia state criminal law defined "possession with intent to distribute" in ways that did not always require the exchange of money for the drugs. Op. at 9.Where the statute is over broad, the Court reaffirmed the minimum conduct test and where the minimum conduct in an overbroad term does not meet the generic definition of an offense, the Court did not apply the modified categorical inquiry. *Id.* at 5. The Court stated, "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." Op. at 5. The Court dismissed government concerns that application of such a minimum conduct test would lead to noncitizens escaping aggravated felony treatment. Op. at 20. Moreover, *Descamps v. United States'* holding explicitly overruled the methodology of *Aguila-Montes de Oca v. Holder,* which effectively found that all overbroad

statutes should be subject to the modified categorical approach. 655 F.3d 915(9th Cir. 2011)(en banc). *Descamps*, slip. op. 10-23.

The Ninth Circuit has to some extent adopted 18 U.S.C. §§ 2243 and 2446 as the generic definition of "sexual abuse of a minor." *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). Under § 2243, "sexual abuse of a minor" requires 1) a mens rea of knowing, 2) a sexual act, 3) with a minor between 12 and 16 years of age, and 4) a four-year age difference between the minor and the defendant. A "sexual act," is defined in § 2246(2), which at a minimum requires contact with the minor. Section 2246(3) defines sexual contact as the intentional touching, "either directly or through the clothing," of another person's genitals or other specified body parts "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3). The statutory definition of a crime of violence under 18 U.S.C. § 16 requires : (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. Applying the "minimum conduct" test announced in *Moncrieffe* to § 288(a), there is no categorical match between the generic definition of sexual abuse of a minor and a crime of violence because no force or abuse is required in § 288(a).

Minimally, section 288(a) does not require a touching between the offender and the minor, or even that the offender be in the same room as the minor when the sexual conduct is being committed, allowing for many situations where a defendant may be convicted even when there has been no actual harm. *See People v. Lopez*, 111 Cal. Rptr. 3d 232. Moreover, *People v. Shockley*, 119 Cal. Rptr. 3d 5 (2010), supports Petitioner's position that § 288(a) is not categorically an aggravated felony because § 288(a) does not always include an element of abuse. *Shockley*, considered whether battery was a lesser included offense to California Penal Code § 288(a). *Shockley* held a person can commit a lewd act without touching the minor in a harmful or offensive manner. *Id.* at 11. Contrary to *U.S. v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), which held that § 288(a) always constitutes an abuse to a minor, *Shockley* holds that a § 288(a) conviction does not necessarily result in harmful conduct. 119 Cal. Rptr. 3d at 11. Thus, minimally, *Baron-Medina*'s "per se" rule violates the teachings of *Moncrieffe* that requires courts to look at the *minimum* conduct of § 288(a), and here, § 288(a) minimally proscribes neither abusive acts nor crimes of violence.

These arguments should not be deemed waived because doctrine has exceptions for pure issues of law and changes in the law. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (court may consider an issue regardless of waiver if the issue is purely one of law and the opposing party will suffer no

prejudice or if new issues have become relevant while the appeal was pending because of a change in the law). Here, *Moncrieffe* was decided on April 23, 2013 and *Deschamps* was decided on June 20, 2013. Both were decided while this petition was pending, and could not have been foreseen by Mr. Avalos Dimas and should qualify as a change in the law under *Huerta-Guevara*. Finally, the issue of deportability is a pure legal issue and the Government which had ample opportunity to submit evidence would not be prejudiced by augmentation of his claim to deportability, as he has always contested it.

CONCLUSION

Therefore, this Court should grant this Petition for Rehearing and remand to the BIA.

Dated: June 29, 2013

/s/ Holly S. Cooper
Attorney for Petitioner
Holly S. Cooper
Law Office of Holly S. Cooper
P.O. Box 4358
Davis, CA 95617

Circuit Form 8. Certificate of Compliance
Pursuant to Fed.R.App.P. 40 & 32(c)(2) and Circuit Rule 40-1
for Case Number No. 11-72931

Pursuant to the Federal Rule of Appellate Procedure 40 & 32(c)(2) and Ninth Circuit Rule 40-1, I certify that the text of the Petitioner's Reply Brief is double spaced, and consists of proportionately spaced 14 point type, in Times New Roman Font, and contains 2500 words and does not exceed 15 pages consistent with the requirement of Rule 40-1.

Date: June 29, 2013

/s/ Holly S. Cooper
Holly S. Cooper
Attorney for Petitioner

Holly S. Cooper
Law Office of Holly S. Cooper
P.O. Box 4358
Davis, CA 95617

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 29, 2013

/s/ Holly S. Cooper
Holly S. Cooper

Attorney for Petitioner
Holly S. Cooper
Law Office of Holly S. Cooper
P.O. Box 4358
Davis, CA 95617

FILED

MAY 17 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUCIANO AVALOS DIMAS, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 09-72911 Agency No. A43-806-964 MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted May 15, 2013**
San Francisco, California

Before: MCKEOWN and WATFORD, Circuit Judges, and DUFFY, District Judge.***

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

Luciano Avalos Dimas ("Petitioner"), a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") decision finding him removable and ineligible for cancellation of removal based on his conviction of an aggravated felony under the Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). We have jurisdiction to determine whether a particular offense constitutes a removable aggravated felony under the INA. *See Barragan-Lopez v. Holder*, 705 F.3d 1112, 1114 (9th Cir. 2013). For the reasons stated herein, Petitioner's conviction of attempting to commit a lewd act on a child less than fourteen years of age under section 288(a) of the California Penal Code constitutes a removable offense. We therefore deny the petition.

We review de novo questions of law, including "[w]hether a particular conviction is a [removable] offense." *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1072 (9th Cir. 2010) (second alteration in original) (quotation omitted). The court conducts the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575, 600 (1990), to determine whether a state law conviction is a removable offense under the INA. *See Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1125 (9th Cir. 2006) (en banc).

Here, Petitioner was convicted of attempting to commit a lewd act on a child less than fourteen years of age under California Penal Code § 288(a), and attempting to send harmful material to seduce a child in violation of § 288.2(b). Based on his § 288(a) conviction alone, the BIA ordered Petitioner's removal as an alien convicted of the aggravated felonies of attempted sexual abuse of a minor, INA §§ 101(a)(43)(A) and (U), 8 U.S.C. §§ 1101(a)(43)(A) and (U), and an attempted crime of violence, INA §§ 101(a)(43)(F) and (U), 8 U.S.C. §§ 1101(a)(43)(F) and (U). [1]

Petitioner's argument that, categorically, California "attempt" is broader than the generic common law definition is inapposite. We have expressly held that California "attempt" is coextensive with the common law meaning of the offense. *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1108 (9th Cir. 2009). Similarly, our holding in *United States v. Velasquez-Bosque*, 601 F.3d 955 (9th Cir. 2010), forecloses Petitioner's contention that California "attempt" is broader than the generic federal definition because California does not recognize the

[1] Petitioner failed to raise in his petition for review the issue of whether a § 288(a) conviction constitutes a crime of violence under INA § 101(a)(43)(F). He therefore waived any challenge to that determination. *See Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) ("Issues not raised in an appellant's opening brief are typically deemed waived." (citation omitted)). In any event, the issue has long been settled. *See United States v. Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009).

affirmative defenses of renunciation or abandonment. There, we held that "[t]he availability of an affirmative defense is not relevant to the categorical analysis." *Id.* at 963; *see also Gil v. Holder*, 651 F.3d 1000, 1005–06 (9th Cir. 2011); *United States v. Charles*, 581 F.3d 927, 935 (9th Cir. 2009).

Clearly established precedent is also dispositive of Petitioner's claim that § 288(a) is not coextensive with the generic federal definition of "sexual abuse of a minor." This court has "repeatedly held that California Penal Code § 288(a) categorically involves 'sexual abuse of a minor.'" *United States v. Farmer*, 627 F.3d 416, 420 (9th Cir. 2010) (citing *Medina-Villa*, 567 F.3d at 516; *United States v. Medina-Maella*, 351 F.3d 944, 947 (9th Cir. 2003); *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999)).

We decline to consider Petitioner's remaining arguments that California Penal Code § 288.2(b) is not the categorical equivalent of sexual abuse of a minor under INA § 237(a)(2)(A)(iii), and that it is not a crime of violence as defined in 18 U.S.C. § 16 (2012). Because Petitioner is removable and statutorily ineligible for cancellation of removal based on his conviction under § 288(a), remand to decide these remaining issues is unnecessary. *See Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam).

PETITION DENIED.