QUICK REFERENCE CHART FOR DETERMINING SELECTED IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES

Katherine Brady
Immigrant Legal Resource Center
National Defending Immigrants Partnership
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Introduction

Note to Immigration Attorneys: Using the Chart. This chart was written for criminal defense counsel, not immigration counsel. It represents a conservative view of the law, meant to guide criminal defense counsel away from potentially dangerous options and toward safer ones. Thus immigration counsel should not rely on the chart in deciding whether to pursue defense against removal. An offense may be listed as an aggravated felony or other adverse category here even if there are strong arguments to the contrary that might prevail in immigration proceedings. For a more detailed analysis of defense arguments, see cited sections of *California Criminal Law and Immigration* and other works in Note "Resources."
The Chart can provide guidance as to the risk of filing an affirmative application for a non-citizen with a criminal record. The Notes are concise and basic summaries of several key topics.

1. Using the Chart and Notes. The Chart analyzes adverse immigration consequences that flow from conviction of selected California offenses, and suggests how to avoid the consequences. The Chart appears organized numerically by code section. You can also see it organized alphabetically by **name of offense.**

Several short articles or **"Notes"** provide more explanation of selected topics. These include Notes that explain the Chart's immigration categories, such as aggravated felonies and crimes involving moral turpitude, as well as those that discuss certain kinds of offenses, such as domestic violence or controlled substances.

2. Sending comments about the Chart. Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate "safer" pleas, or want to say how the chart works for you or how it could be improved. Send email to chart@ilrc.org. This address will not answer legal questions;

for information about obtaining legal consults on cases see "contract services" at www.ilrc.org.

3. Need for Individual Analysis. This Chart and Notes are a summary of a complex body of law, to be consulted on-line or printed out and carried to courtrooms and client meetings for quick reference. However, more thorough individual analysis of a defendant's immigration situation is needed to give competent defense advice. For example, the defense goals for representing a permanent resident are different from those for an undocumented person, and analysis also changes depending upon past convictions and what type of immigration relief is potentially available. See Note "Establishing Defense Goals." The Chart and Notes are best used in conjunction with resource works such as Brady, *California Criminal Law and Immigration* (citations to specific sections are included throughout these materials) or Tooby, *Criminal Defense of Immigrants,* and/or along with consultation with an immigration expert. See Note "Resources."

Ideally each noncitizen defendant should complete a form such as the one found at Note "Immigrant Client Questionnaire," which provides captures the information needed to make an immigration analysis and is a diagnostic aid. Some offices print these forms on colored paper, so that defenders can immediately identify the file as involving a noncitizen client and have the client data needed to begin the immigration analysis.

4. Disclaimer, Additional Resources. While federal courts have specifically affirmed the immigration consequences listed for some of these offenses, in other cases the chart represents only the authors' opinion as to how courts are likely to rule. In addition there is the constant threat that Congress will amend the immigration laws and apply the change retroactively to past convictions. Defenders and noncitizen defendants need to be aware that the immigration consequences of crimes is a complex, unpredictable and constantly changing area of law where there are few guarantees. Defender offices should check accuracy of pleas and obtain up-to-date information. See books, websites, and services discussed in Note "Resources." But using this guide and other works cited in the "Resources" Note will help defenders to give noncitizen defendants a greater chance to preserve or obtain lawful status in the United States – for many defendants, a goal as or more important than avoiding criminal penalties.

Acknowledgements

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QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES

Oct-05

CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE
Business & Professions §4324	Forgery of prescription, possession of any drugs	Felony and misd conviction may be drug trafficking AF if it involves controlled substances (CS). Conviction of any forgery offense with 1-yr sentence imposed is AF.	Might be divisible: forgery is CMT but poss of forged drug possibly not.	Deportable, inadmissible for CS conviction if record of conviction identifies the CS.	To avoid CS and AF conviction, avoid info in ROC identifying CS. See also Advice for H&S 11173(a). See Notes "Safer Pleas" and "Drug Offenses"
Business & Professions §25658(a)	Selling liquor to a minor	Not AF.	Not CMT.	No.	
Business & Professions §25662	Possession, purchase, or consumption of liquor by a minor	Not AF.	Not CMT.	No, except multiple convictions could be evidence of alcoholism, an inadmissibility grnd	
Calif. Health & Safety §11173(a)	Prescription for controlled substance (CS) by fraud	Felony and misd conviction may be drug trafficking AF	May be divisible, e.g. 11173(b) not CMT	Deportable, inadmissible for CS conviction	To avoid an CS AF and deportability under CS ground, plead to straight forgery, false personation, etc. or other drug alternative; see Note: Safer Pleas. To avoid CS AF, plead to straight possession of the drug; see Advice at H&S 11350. To avoid forgery AF, avoid one-year sentence imposed.

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H&S §11350(a), (b)	Possession of controlled subsatnce	In imm prcdgs, it is not agg fel unless CS is flunitrazepan or more than 5 grams of cocaine base, if Oliveira stands. If Oliveira overturned, felony poss is AF and misd is not. In fed prosecutions under USSG, state felony poss is AF and misd is not.	No.	Deportable, inadmissible for CS conviction.	See discussion in Note "Drug Offense." Post-Con Relief: Where no CS priors, a 1st conviction for felony or misdo simple poss of any CS (or a less serious CS offense) is eliminated by withdrawal of plea as part of DEJ, Prop 36, PC 1203.4, etc. But 2nd conviction for simple poss cannot be so eliminated. Agg Felony: Under Oliveira-Ferrerira, no simple poss is an AF except poss of flunitrazepan or more than 5 gms cocaine base. If Oliveira overturned, felony poss is an AF but misd poss is not. Therefore try to avoid possible AF by reducing to a misdo where permitted, or seek an alternate plea: down to 11365, 11550, etc; plead to P.C. § 32 or offense where the CS not identified; even consider pleading up to offering to transport (see advice in H&S 11352). In fed prosecutions for re-entry under the USSG, felony poss is an AF and misd possession is not.
H&S §11351	Possession for sale	Yes AF as CS trafficking conviction	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction	To avoid AF attempt to plead down to first or at least misdo simple poss (see H&S 11350), or H&S 11365, 11550; or consider pleading up to offer to sell, see advice in H&S 11352. Or plead to PC 32 with less than 1 yr sentence to avoid AF, deportability and perhaps inadmissibility. See Note "Drug Offenses" and "Safer Pleas."
H&S §11351.5	Possession for sale of cocaine base	Yes AF as CS trafficking conviction	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction	See advice on H&S 11351 and Note "Drug Offenses."

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H&S §11352(a)	Sale of controlled substances	Divisible: "offering" to sell, distribute is not AF while sell, distribute is AF. Transport for personal use is not AF.	Yes CMT as CS trafficking offense (except transport for personal use)	Deportable, inadmissible for CS conviction, except that imm atty can argue against "offering" being a deportable CS offense. Offering to transport may not be inadmissible CS offense. Transporting for personal use is deportable, inadmissible CS offense.	See discussion in Note "Drug Offense." In sum, offering to commit any drug offense, including sale, is not an AF, and imm atty can argue not deportable CS offense. Best plea is to whole statute in the disjunctive so ROC does not preclude that plea was to offer to transport/transport personal use. This will avoid AF, plus will allow imm attorney to argue it is not a deportable or inadmissible CS conviction. PC 32 with less than 1 yr prevents agg felony and deportability.
H&S §11357	Marijuana, possesion	See H&S 11350	Not CMT	Deportable, inadmissible for CS conviction	See H&S 11350
H&S §11358	Marijuana, Cultivate	Felony conviction is controlled substance (CS) AF	Might be held CMT if ROC shows intent to sell.	Deportable and inadmissible for CS conviction	Plead to a 1st offense simple possession (see H&S 11350); plead up to offer to sell (see H&S 11360); to accessory with less than 1-yr imposed (see PC 32); to non-drug offense. See Notes "Safer Pleas" and "Drug Offenses"
H&S §11360(a)	Marijuana - sale, give, transport, offer to	Divisible: offering to sell if not AF while sale is. Transport personal use not AF	Yes CMT as CS trafficking offense (except transport for personal use)	See H&S 11352.	Sale is divisible statute, see advice in H&S 11352 and Note "Drug Offenses."
H&S §11364	Possession of drug paraphernalia	Not AF.	Not CMT	Deportable, inadmissible for CS conviction	Because this is an offense "less serious" than simple possession, a first conviction is eliminated through withdrawal o plea under DEJ, Prop 36, PC 1203.4 etc. See advice on H&S 11350 and Notes "Drug Offenses" and "Safer Pleas."
H&S §11365	Presence where CS is used	Not AF.	Not CMT	Deportable, inadmissible for CS conviction	See advice on H&S 11364 and 11350, and Notes "Drug Offenses" and "Safer Pleas"

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H&S §11368	Forged prescription to obtain narcotic drug	Felony or misdo conviction might be CS AF. Any forgery offense with 1-yr sentence is AF.	Maybe not CMT; fraud intent not element of forged prescription	Deportable and inadmissible for CS conviction	See advice for H&S 11173. Avoid 1-yr sentece for forgery; see Note "Sentence."
H&S §11377	Possession of controlled substance	See H&S 11350	Not CMT	Deportable, inadmissible for CS conviction	See advice in H&S 11350 and Note "Drug Offenses".
H&S §11378	Possession for sale CS	Yes	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction	See advice on H&S 11351 and Note "Drug Offenses"
H&S §11379	Sale, give, transport, offer to, controlled substance	Divisible: offering to sell is not AF while sale is. Transport personal use not AF	Yes CMT as CS trafficking offense (except transport for personal use)	See H&S 11352	Sale is divisible statute, see advice in H&S 11352 and Note "Drug Offenses."
H&S §11550	Under the influence controlled substance (CS)	Under influence not AF. Felony conviction of under influence with gun 11550(e) might be AF as COV under 18 USC 16(b) if 1-yr sentence imposed.	Not CMT	Deportable, inadmissible for CS conviction. H&S 11550(e) also deportable for firearms offense.	For 11550(a)-(c) see advice on H&S 11364 and 11350, and Notes "Drug Offenses" and "Safer Pleas." To avoid firearms offense avoid ROC showing 11550(e) is conviction. To avoid threat of 11550(e) as Agg Felony, reduce to misd under PC 17 and avoid 1-yr sentence.
Penal §21a	Attempt	Yes AF if principal offense is. If principal needs 1-yr sentence imposed to be AF, attempt also needs 1 yr imposed.	CMT if principal offense is. See Advice re advantage of hal sentence for CMT deport ground	Takes on character of principal offense.	Attempt takes on the character of the principal offense. Because attempt has half the potential sentence (PC 644(b)) it is useful to prevent CMT wobbler misdemeanor from being an offense with a potentia sentence of 1 yr. See Note "Crimes Involving Moral Turpitude."

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Penal §32	Accessory after the fact	Only if 1 yr sentence imposed	Might be held CMT	Accessory does not take on character of principal offense so e.g. accessory to drug/violent offense is not a deportable conviction. But if principal offense involves drug trafficking, govt may assert conviction is "reason to believe" person inadmissible for aiding drug trafficker.	To avoid agg felony avoid 1 yr sentence imposed; see Note "sentence" (in contrast, misprision of felony can take 1 yr sentence). Good plea to avoid e.g. drug, violence, firearms conviction. For further discussion of accessory see Note "Safer Pleas"
Penal §92	Bribery	Yes AF if a sentence of 1-yr or more is imposed.	Yes CMT.	No.	
Penal §118	Perjury	Yes AF if a sentence of 1-yr or more is imposed.	Yes CMT	No.	
Penal §136.1(b)(2)	Persuade a witness not to file complaint	Appears not to be an AF as COV, since no force required.	Not CMT	If not COV, then not a DV offense even if DV-type victim.	Appears to be a good substitute plea with no imm consequences, but a strike w/ high exposure. For that reason can use for serious charges. See Note "Safer Pleas." See also PC 236, not a strike.
Penal §140	Threat against witness	AF if 1-yr sentence imposed	Yes CMT	If COV, a domestic violence offense if committed against DV type victim	To avoid AF avoid 1-yr sentence; see Note "Sentence." To avoid AF and DV deportability ground see PC 136.1(b)(1), 236, 241(a).
Penal §148	Resisting arrest	148(a)(1) is not AF. Felony conviction of 148(b)-(d) w/ 1-yr or more imposed might be AF as COV under 18 USC 16(b)	148(a)(1) is not CMT, 148(b)-(c) ought not to be ("reasonably should have known" other was peace officer)	Sections involving removal of firearm from officer may incur deportability under firearms ground. See Note "DV, Firearms Grounds"	Plead to 148(a)(1). If plea to (b) (d), avoid possible AF by obtaining misdo conviction, reducing felony to misdo, and/o obtaining sentence less than 1 yr; see Note "Sentence."

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Penal §182, 184	Conspiracy	If principal offense is AF-type offense, conspiracy is. If offense requires 1-yr or more sentence to be AF, conspiracy also does.	If principal offense is CMT, conspiracy is	Conspiracy takes on consequences of principal offense, e.g. controlled substance, firearm.	Same consequence as principa offense. If 1yr sentence needed for AF, avoid the 1-yr.
Penal §187	Murder (first or second degree)	Yes AF	Yes CMT	COV is domestic violence offense if committed against DV type victim	See manslaughter
Penal §192(a)	Manslaughter, voluntary	Yes AF as COV, only if 1-yr or more sentence imposed	Yes CMT	COV is domestic violence offense if committed against DV type victim	To avoid AF, avoid 1-yr sentence imposed; see Note "Sentence." To avoid CMT see PC 192(b).
Penal §192(b)	Manslaughter, involuntary	Yes AF as COV, only if 1-yr or more sentence imposed; but see Advice	Not CMT	COV is domestic violence offense if committed against DV type victim	To avoid AF, avoid 1-yr sentence imposed; see Note "Sentence." Under Leocal (S.Ct.) and Lara-Cazarez (9th Cir) this offense probably is not a COV. However Leocal is in danger of being legislatively overturned, so conservative view is regard it as COV. See Note: Safer Pleas (C)
Penal §203	Mayhem	Yes AF only if 1-yr or more sentence imposed	Yes CMT	COV is domestic violence offense if committed against DV type victim	Avoid 1-yr sentence to avoid AF; see Note "Sentence." See also PC 236 and 136.1(b) and Note "Safer Pleas"
Penal §207	Kidnapping	Yes AF only if 1-yr or more sentence imposed. (But see Advice re force and fear.)	Yes CMT	COV is domestic violence offense if committed against DV type victim	See advice for PC 203. If 1-yr sentence imposed, keep ROC vague between force or other fear so imm counsel can attempt to argue that fear is not necessarily a COV.
Penal §211	Robbery (first or second degree) by means of force or fear	Yes AF if 1-yr or more sentence imposed (But see Advice re force and fear.)	Yes CMT	COV is domestic violence offense if committed against DV type victim	See advice for PC 203. If 1-yr sentence imposed, keep ROC vague between force or fear so imm counsel can attempt to argue that fear is not necessarily a COV.

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Penal §220	Assault, with intent to commit rape, mayhem, etc.	Assault to commit rape may be AF as attempted rape regardless of sentence. Other offenses are AF (as COV) only if 1-yr or more sentence imposed	Yes CMT	COV is domestic violence offense if committed against DV type victim	Intent to commit rape may be treated as attempted rape, which is an AF regardless of sentence. See PC 243.4 w/ less than 1 yr. For other offenses avoid 1-yr sentence to avoid AF see Note "Sentence." See also PC 236 and 136.1(b); to avoid CMT see 243(d) (with less than 1 yr sentence), and see Note "Safer Pleas."
Penal §236, 237	False imprisonment (felony)	Divisible: a COV if it involves violence or menace, but ought not to be so held if involves fraud or deceit. A COV with a 1-yr or more sentence imposed is an AF.	Yes CMT	A COV (here with violence or menace) is domestic violence offense if committed against DV type victim	Should not be held COV if record of conviction does not identify violence/menace. If COV, avoid AF by avoiding 1-yr sentence for any one count. To avoid CMT, see misdemeanor false imprisonment
Penal §236, 237	False imprison (misdo)	Appears not to be an AF as COV, since no force required.	Appears not to be a CMT	No	Appears to be good substitute plea to avoid crime of violence in DV cases. See discussion in Note: "Safer Pleas." It is not clear that reducing felony 236 to a misdemeanor will avoid CMT status.
Penal § 240, 241(a)	Assault, simple	Not AF. (COV requires 1-yr sentence to be AF; 6 month maximum here)	Not CMT	COV is domestic violence offense if committed against DV type victim, but simple assault may not be COV absent info in record of conviction.	To avoid COV for DV purposes, see advice in PC 243(a).
Penal §241(b)	Assault on peace officer etc.	If found to be COV, is an AF if 1-yr sentence imposed	Probably not CMT	No	Avoid 1-yr sentence to avoid AF; see Note "Sentence."
Penal §243(a)	Battery, Simple	Not AF (COV requires 1-yr sentence to be AF, 6 month maximum here)	Not CMT	COV is domestic violence offense if committed against DV type victim, but simple battery may not be COV absent info in record of conviction.	To avoid COV for DV purposes, keep ROC clear of info showing more than a mere touching. See Note "Domestic Violence." See also PC 236 (misdo), 602.5

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Penal §243(b), (c)	Battery on a peace officer, fireman etc.	Yes AF as COV only if 1-yr or more sentence imposed	243(b) not CMT, 243(c) (with injury) may be.	No.	Avoid 1-yr sentence to avoid AF; see Note "Sentence." ?Keep ROC vague between (b) and (c) to avoid record of conviction.
Penal §243(d)	Battery with serious bodily injury	Yes AF as COV only if 1-yr or more sentence imposed	Not CMT; good substitute for avoiding CMT.	COV is domestic violence offense if committed against DV type victim	See discussion in Note "Safer Pleas." Avoid 1-yr sentence to avoid AF; see Note "Sentence." See also PC 236, 136.1(b), potentially 243(a) to avoid COV
Penal §243(e)(1)	Battery against spouse, former date, etc.	COV only if 1-yr or more sentece imposed and ROC shows violence beyond mere offensive touching	Maybe not CMT if (a) ROC does not prove more than "mere offensive touching" and/or (b) victim was date or ex-date	Deportable under DV ground if ROC establishes battery went beyond mere touching. Note: court finding of violation of DV protective order also causes deportability; see Note "DV"	See "Note: DV." To probably avoid DV, keep record clear of info that battery was beyond mere touching. See Note Domestic Violence and advice for PC 243(a). (Imm atty at least can argue not CMT if ROC permits possibility that victim was date/ex-date, because less violation of familial trust. See Matter of Tran, 21 I&N 291 (BIA 1996)).
Penal §243.4	Sexual battery	Yes AF as COV only if 1-yr or more sentence imposed	Yes CMT	COV is domestic violence offense if committed against DV type victim	Avoid 1-yr sentence to avoid AF; see Note "Sentence." See PC 243(d) to avoid CMT. See PC 136.1(b), 236 to avoid CMT and COV.
Penal §245	Assault, with a deadly weapon (firearms or other) or force likely to produce great bodily harm	Yes AF as COV only if 1-yr or more sentence imposed.	Yes CMT	COV is domestic violence offense if committed against DV type victim. Section 245(a)(2) and others involving firearms bring deportability under firearms ground.	Avoid 1-yr sentence to avoid AF; see Note "Sentence." To avoid firearms grnd, keep record of conviction clear of evidence that offense was 245(a)(2); see also PC 12020, 236, 243(d) and 136.1(b) and Notes "Safer Pleas" and "DV, Firearms Grounds."
Penal §261	Rape	Yes AF, regardless of sentence imposed.	Yes CMT	COV is domestic violence if committed against DV type victim.	See PC 243(d) (not CMT) and 243.4 (both not Agg Felonies if less than 1 yr sentence), 236, 136.1(b)(1) (can support 1 yr sentence) and Note "Safer Pleas".
Penal §261.5	Unlawful sexual intercourse (statutory rape)	Even misd. with no jail is "sexual abuse of a minor" AF. Possible future relief at 9th Cir. if ROC does not reveal V's age or shows older teen	Yes CMT	COV is domestic violence if committed against DV type victim. This also might be charged under DV deport ground as child abuse.	Unless 9th Cir reverses BIA, even a misd is an Agg Felony. See PC 243(a), 243(d), 243.4, 236, 136.1(b)(1) and Note "Safer Pleas." More possibility of evenutally winning at 9th Cir. if victim is 16, 17 or ROC doesn't ID age.

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Penal §262	Spousal Rape	Yes AF, regardless of sentence imposed.	Yes CMT	Deportable under DV ground.	See PC 243(d), 243.4, 236, 136.1(b)(1) and Note "Safer Pleas."
Penal §270	Failure to provide for child	Not AF.	Not CMT.	May be deportable under DV ground for child neglect.	
Penal §272	Contributing to the delinquency of a minor	Not AF, except possibly as sexual abuse of a minor if record of conviction shows lewd act.	Divisible: may be CMT if record of conviction shows lewdness	With lewdness, possibly deportable under DV for child abuse.	Keep record of conviction clear of reference to lewd act.
Penal §273a(a)	Child injury, endangerment	Divisible as a COV: infliction of physical pain may involve use of force but other actions, including placing a child where health is endangered, do not. A COV with 1-yr sentence imposed is an AF.	Divisible: inflicting pain is CMT, but unreasonably risking child's health is not. See disc. in P v. Sanders (1992) 10 Cal.App.4th 1268 (as state CMT case, not controlling but informative).	Even minor offenses probably deportable under DV ground as child abuse or neglect.	To avoid agg felony, avoid 1-yr sentence; see Note "Sentence." To avoid Agg Felony keep record of conviction clear of info establishing use of force; to avoid CMT keep record open to possibility that it was merely unreasonable action; see Note "Record of Conviction." If this arose from traffic situation (lack of seatbelts, child unattended etc.), defendant can alternatively plead to traffic etc. offense without element involving minors and take counseling and other requirements as a condition of probation, without the offense acquiring immigration consequences. See Note: DV/Child Abuse
Penal §273d	Child, Corporal Punishment	Yes AF as COV if 1-yr sentence imposed	Yes CMT	Deportable under DV ground for child abuse	To avoid agg felony, avoid 1-yr sentence; see Note "Sentence." See 243(d) with less than 1-yr sentence to avoid CMT.
Penal §273.5	Spousal Injury	Yes, AF as a COV only if 1-yr or more sentece imposed	Yes, CMT.	Deportable under DV ground regardless of sentence. Note: Court finding of violation of DV protective order also is DV deportable offense.	To avoid AF avoid 1-yr sentence imposed. To avoid AF and DV plead to non-COV such as PC 236, 136.1(b)(1); can accept batterer's program probation conditions on these. See 243(e)(1) and "Note: Domestic Violence." To avoid CMT see PC 243(d).
Penal §281	Bigamy	Not AF	Yes CMT	No	

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Penal §288	Lewd act with child	Yes AF as sexual abuse of a minor, regardless of sentence.	Yes CMT	Deportable under the DV ground for child abuse	See PC 243.4 with less than 1-yr, 136.1(b), 236, 647.6(a). See Notes "Sex Offenses" and "Safer Pleas."
Penal §314(1)	Indecent exposure	Not AF	Probably CMT	No	See disturb peace, trespass, loiter.
Penal §403	Disturbance of public assembly or meeting	Not AF.	Not CMT.	No.	
Penal §415	Disturbing the peace	Not AF.	Probably not CMT	No.	
Penal § 416	Failure to disperse	Not AF	Not CMT	No.	
Penal §422	Criminal threats (formerly terrorist threats)	Yes AF as COV only if 1-yr or more sentence imposed. Rosales-Rosales v Ashcroft, 347 F.3d 714 (9th Cir. 2003)	Yes CMT	As COV, is a deportable domestic violence offense if committed against DV type victim	Avoid AF by avoiding 1-yr sentence. See Note "Sentence." To avoid COV see PC 236 or 136.1(b)(1), or 241(a) with no info regarding violence. See Note "Safer Pleas."
Penal § 451	Arson	Yes AF as COV only if 1-yr or more sentence imposed	Yes CMT	As COV, can be domestic violence offense if committed against DV type victim	Avoid AF by avoiding 1-yr sentence; see Note "Sentence." See vandalism.
Penal §459, 460	Burglary	Burglary of a structure is AF with 1-yr sentence imposed. Burglary of a car (PC 460(b)) is not AF if record of conviction shows "intent to commit larceny OR any felony," or if less than 1-yr sentence imposed.	Divisible between entry with intent to commit theft (CMT) or any felony (not a CMT as long as 'felony' is not defined as an offense that involves moral turpitude).	Where felony burglary is a COV and there is DV type victim, may be DV offense (but imm counsel will argue crime against property).	Keep record of conviction vague between structure, non-structure; and/or intent to commit theft, any felony. See Notes "Burglary and Theft" and "Record of Conviction." See PC 466.

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Penal § 466	Poss burglary tools with intent to enter, altering keys, making or repairing instrument	Not AF.	Probably not CMT, unless ROC shows intent to commit CMT (felonious entry alone is not CMT) Altering, repairing instruments are not CMT.	No.	To avoid possibility of CMT, avoid specific intent on ROC other than felonious entry, or better keep record clear between intent and non-intent sections.
Penal §470	Forgery	Yes AF if 1-yr sentence imposed	Yes CMT.	No.	Avoid AF by avoiding 1-yr sentence; see Note: Sentence. See P.C. 529(3) and Note "Safer Pleas." If $10,000 loss to victim to fraud, see advice for PC 476(a).
Penal §476(a)	Bad check with intent to defraud	Yes AF if the loss to the victim was $10,000 or more; also perhaps if 1-yr sentence imposed, as theft.	Yes CMT	No	Avoid AF by avoiding $10k loss in ROC, see Note "Burglary, Theft and Fraud." See PC 529(c) to avoid AF, CMT. Avoid 1-yr sentence to avoid possible AF as theft.
Penal §484 et seq., §487	Theft (petty or grand)	Divisible: theft of labor not "theft" for AF purposes. Other subsections are theft AF if 1-yr sentence imposed.	Yes CMT.	No	See Notes "Theft, Fraud" and "CMT." In sum, to avoid AF, avoid 1 yr sent and see also PC 666; see Note "Sentence." If fraud involved, see PC. 529(3) and avoid $10,000 loss to victim. In minor offense try for 602.5. If first CMT, to qualify for petty offense exception to inadmissibility grnd reduce felony to misdo and/or plead petty theft; to avoid deportability plead petty theft or attempted misd grand theft to keep maximum possible sentence under 1 yr.
Penal §490.1	Petty theft (infraction)	Not AF.	Yes CMT.	No.	An infraction counts as a CMT offense. To avoid CMT see trespass PC 602.5.
Penal §496	Receiving stolen property	Yes AF if 1-yr sentence imposed	Yes CMT	No	To avoid AF avoid 1-yr sentence; see Note "Sentence."
Penal Code §529(3)	False personation	Appears not to be an AF.	Appears not to be CMT.	No	Possible alternate plea for fraud forgery, counterfeit. See discussion in "Note: Safer Pleas"

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CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE
Penal §550(a)	Insurance fraud	Yes AF if offense involves fraud where victim lost $10,000 or more; perhaps AF as theft if 1-yr sentence imposed.	Yes CMT because fraudulent intent.	No.	See Note "Burglary, Theft, Fraud." To avoid AF, avoid $10,00 in ROC. See PC 529(3) to avoid AF, CMT. Avoid 1-yr sentence to avoid possible AF as theft; see Note "Sentence."
Penal §594	Vandalism	Possible AF as COV if 1 yr sentence imposed.	Not CMT, except perhaps in case of severe costly damage.	If COV, domestic violence offense if committed against DV type victim. Immigration counsel will argue deportable DV offense must be force agnst person not property.	Relatively minor cases should have no consequences except possibly DV. See e.g. Rodriguez-Herrera v INS, 52 F3d 238 (9th Cir. 1995) (Wash. statute not CMT) and US v Landeros-Gonzalez, 262 F.3d 424 (5th Cir 2001) (graffiti not COV). Avoid 1-yr sentence; see Note "Sentence."
Penal §602	Trespass misd (property damage, unlawful presence, etc.)	Not AF (even if COV, 1-yr sentence not possible)	Perhaps divisible. Some malicious destruction of prop offenses might be CMT; see cases in Advice to PC 594.	A COV is domestic violence offense if committed against DV type victim. Imm. counsel will argue must be force agnst person not property.	Keep record of conviction clear to avoid possible CMT. See PC 602.5.
Penal §602.5	Trespass (unauthorized entry)	Not AF.	Not CMT.	No.	
Penal §646.9	Stalking	AF as COV if 1 yr sentence imposed. Matter of Malta, 23 I&N Dec 656 (BIA 2004)	Yes CMT	Deportable under the DV ground. Note that a court finding of violation of protective order also is DV deportable even absent conviction; see Note "DV"	Avoid AF by avoiding 1-yr sentence. See PC 236, 136.1(b)(1), 241(a) with no info regarding violence. See Notes "Safer Pleas" and "Is Battery a Crime of Violence?"
Penal §647(a)	Disorderly: lewd or dissolute conduct in public	Not AF.	Older cases found CMT in homosexual behavior.	No.	Keep record of conviction clear of info that lewd intent was involved. See "Note Record of Conviction." See 647(e)
Penal §647(b)	Disorderly: Prostitution	Not AF.	Yes CMT for a prostitute. Probably not for a customer.	Prostitute, not customer, is inadmissible for "engaging in" prostitution.	To try to prevent CMT keep record of conviction vague between prostitute and customer. See 647(e)
Penal §647(c), (e), (h)	Disorderly: Begging, loitering	Not AF.	Not CMT.	No.	

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Penal §647(f)	Disorderly: Under the influence of drugs or alcohol	Not AF.	Not CMT.	Deportable and inadmissible for CS offense if ROC establishes specific CS	Keep record of conviction vague re whether a specific CS, as opposed to alcohol or other drug (or even unspecified CS), is involved.
Penal §647(i)	Disorderly: "Peeping Tom"	Not AF.	Not CMT.	No.	
Penal §647.6(a)	Annoy, molest child	Divisible, with less serious acts not AF as 'sexual abuse of a minor.' US v Pallares-Galan, 359 F.3d 1088 (9th 2004).	Yes CMT.	Might be deportable under DV for child abuse.	To avoid AF keep record of conviction clear of details, or have it ID less serious conduct; or plead to offense that doesn't combine age and sex like 243(a), 243.4.
Penal §666	Petty theft with a prior	Not AF even if enhanced sentence of more than 1 yr is imposed.	Yes CMT.	No.	See Note on "Burglary and Theft." Since this is not AF, it's a possible substitute for grand theft with 1-yr sentence or more imposed.
Penal §§1320(b), 1320.5	Failure to appear for felony	Yes AF if original felony's potential sentence is 2 yrs or more.	Probably not CMT	No.	Avoid AF by pleading to substantive offense not FTA
Penal §12020	Possesion, manufacture, sale of prohibited weapons; carrying concealed dagger	Divisible: trafficking in firearms or explosives is AF; other offenses are not	Not CMT.	Offenses relating to firearms cause deportability under that grnd. Others (e.g. brass knuckes(a)(1), dagger (a)(4)) don't.	With careful record of conviction, this is an alternate plea to avoid firearms offense. Keep record of conviction vague re whether weapon is firearm or other (to avoid firearms deportability grnd) or involves trafficking in firearms or destructive devices (to avoid AF). See Notes "Safer Pleas" and "DV, Firearms"
Penal §12021	Possession of firearm by drug addict or felon	Yes AF regardless of sentence	Not CMT.	Deportable under the firearms ground.	See PC 12020, 245(a), 243(d), Note "Safer Pleas."
Penal §§12025(a)(1), 12031(a)(1)	Carrying firearm	Not AF.	Not CMT.	Deportable under the firearms ground.	To avoid deportable for firearms, see PC 12020 and Note "DV, Firearms."
Vehicle §20	False statement to DMV	Not AF	Possibly divisible, with knowingly conceal material fact a CMT	No.	To avoid CMT, keep record of conviction vague as to knowing concealment of material fact
Vehicle §2800.1	Flight from peace officer	Not AF	Probably not CMT	No.	

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Vehicle §2800.2	Flight from peace officer with wanton disregard for safety	AF if felony conviction with 1-yr sentence imposed, as a COV under 18 USC 16(b). US v Campose-Fuerte, 357 F.3d 956 (9th 2004)	May be divisible: wanton disregard only by prior traffic violations not CMT, other wanton disregard may be CMT.	No.	Avoid an agg felony by reducing to a misdemeanor or obtaining sentence less than a year. May avoid CMT if ROC leaves open possibility wanton disregard finding based on prior traffic violations, or plea to 2800.1.
Vehicle §10801-10803	Vehicles with altered ID numbers	Offense relating to trafficking in vehicles with altered VIN is AF if 1-yr or more sentence imposed.	Might be CMT	No.	Plead to PC 10852?
Vehicle §10851	Vehicle taking, temporary or permanent	Yes, AF as theft if one-year sentence is imposed.	Yes CMT if permanent intent, no if temporary intent.	No.	To avoid agg felony, avoid 1-yr sentence. To avoid CMT, keep record of conviction vague re permanent or temporary intent.
Vehicle §10852	Tampering with a vehicle	Not AF.	Appears not CMT.	No.	To avoid posssible AF, don't let ROC show that tampering F96involved altering VIN.
Vehicle §12500	Driving without license	Not AF.	Not CMT.	No.	
Vehicle §§20001, 20003	Hit and run (felony)	Not AF	Probably not CMT	No.	Despite lack of intent requirement it's conceivable reviewing authority would find CMT in failure to aid badly injured victim; keep record of conviction clear of info.
Vehicle §20002(a)	Hit and run (misd)	Not AF.	Not CMT	No.	
Vehicle §23110(b)	Throw object into traffic	Yes AF as COV if 1-yr sentence imposed	Yes CMT.	No.	Avoid AF by avoiding 1-yr sentence imposed.
Vehicle §23152	Driving under the influence (felony)	Not AF now but CAUTION: Legislation could change. Obtain 364 or less.	Not CMT.	No except multiple convictions can show evidence of alcoholism, a ground of inadmissibility.	Current Supreme Court establishes not COV, but Congress could change. See Note: Safe Pleas, DUI.
Vehicle §23153	Driving under the influence causing bodily injury	See Vehicle 23152	Not CMT.	See Vehicle 23152	See Vehicle 23152
W & I §10980(c)(2)	Welfare fraud	Yes AF if loss to gov't is $10,000 or more; also perhaps as theft if 1-yr or more sentence imposed.	Yes CMT.	No.	See Note "Burglary, Theft, Fraud." To avoid AF, avoid $10,00 in ROC. See PC 529(3) to avoid AF, CMT. Avoid 1-yr sentence to avoid possible AF as theft; see Note "Sentence."

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Immigrant Legal Resource Center
October 2005

NOTES ACCOMPANYING THE QUICK REFERENCE CHART FOR DETERMINING THE IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES

Katherine Brady
Immigrant Legal Resource Center
Defending Immigrants Partnership

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Note: Record of Conviction And Divisible Statutes

See also Calif. Criminal Law and Immigration (2004, 2005 Update) § 2.11 and Note "Resources."

When an immigration authority or a judge in a federal prosecution reviews a prior conviction, she will consult only a limited number of documents to identify the elements of the offense of conviction. *If criminal defense counsel keeps the record of conviction vague* as to whether the noncitizen defendant was convicted of an offense carrying an adverse immigration consequence, the consequence does not attach. Because so many criminal statutes include multiple offenses, only some of which have immigration consequences, this is one of the very most important defense strategies left to criminal and immigration defense counsel. In many situations an informed use of this analysis will permit a noncitizen to plead to an offense that is acceptable to the prosecution but does not cause adverse immigration consequences.

A. Overview: The Categorical and Modified Categorical Analysis

An immigration judge or other reviewing authority will use the "categorical analysis" (including the "modified" categorical analysis) in examining a prior conviction. Among other things, the categorical analysis is used to determine whether the prior conviction triggers an immigration law-related penalty, e.g. is an aggravated felony, firearms offense, or crime involving moral turpitude. This is used in immigration proceedings and in federal prosecutions for illegal re-entry into the United States after being convicted of certain offenses.[1]

The categorical analysis employs the following key concepts in evaluating the immigration penalties that attach to a conviction.

- The elements of the offense as defined by statute and case law, and not the actual conduct of the defendant, is the standard used to evaluate whether an offense carries immigration penalties such as being an aggravated felony, crime involving moral turpitude, etc.;

- The most minimal conduct that could still be held to constitute the offense must carry the immigration penalty in order for the offense to do so;

- Where the statute includes multiple offenses, only some of which carry immigration consequences, the immigration judge or other reviewing authority

[1] See discussion of 8 USC §1326(b) prosecutions in Note "Aggravated Felony" and *Calif. Criminal Law and Immigration* §9.50.

may look only to a strictly limited official record of conviction to determine the elements of the offense of conviction; and

- If the above principles are employed and the conviction has not been conclusively proved to carry adverse immigration penalties, the noncitizen will be held not to suffer the penalties. Lack of information or ambiguity is always resolved in favor of the noncitizen.[2]

B. The Categorical Analysis: The Elements of the Offense

To identify the elements of an offense that was the subject of a prior conviction, the categorical analysis looks only to the statutory definition of the offense and not to the underlying circumstances. If the person actually committed assault but was able to plead to trespass, the analysis will focus on the elements of the offense of trespass. Beginning by looking only at the elements of the crime as set forth in the statute and the case law of the jurisdiction applying the statute (i.e., not information in the record of conviction), the *minimum or least offensive conduct that can violate the statute* must involve the adverse immigration consequence – e.g., be a moral turpitude offense or aggravated felony -- in order for a conviction under the statute to have that consequence. In other words, the offense qualifies as an aggravated felony, etc. "if and only if the 'full range of conduct' covered by [the criminal statute] falls within the meaning of that term."[3]

> **Example:** Mr. Ye was convicted of burglarizing a car under Calif. P.C. §460(b). To determine whether the conviction was of an aggravated felony as a "crime of violence," the court considered the most minimal conduct that could violate the statute. Because the statute could be violated by simply reaching into a car through an open window and removing an article, the court found that the offense was not a crime of violence. See *Ye v INS*, 214 F.3d 1128 (9th Cir. 2000).

C. The Modified Categorical Analysis: Divisible Statutes and the Record of Conviction.

1. Identifying a Divisible Statute

The discussion in Part A centered on the "pure" categorical analysis for determining whether a specific offense has adverse immigration consequences based on the minimum behavior required to be guilty of the offense. Where a statute is broad enough to include various offenses, some of which carry immigration penalties while

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[2] See, e.g., discussion in *United States v Rivera-Sanchez*, 247 F.3d 905, 907-8 (9th Cir. 2001)(en banc); *United States v Corona-Sanchez*, 291 F.3d 1201, 1203-4 (9th Cir. 2002) (en banc). See also *Shepard v U.S.*, 125 S.Ct. 1254 (2005); *Martinez-Perez v Gonzales*, 417 F.3d 1022 (9th Cir. 2005).

[3] U.S. v Baron-Medina, 187 F.3d 1144, 1146 (9th Cir. 1999)(citation omitted). The BIA has long followed this rule in determining what constitutes a crime involving moral turpitude and also applies to aggravated felonies and other areas. See, e.g., Matter of Palacios-, Int. Dec. 3373 (BIA 1998); Matter of Alcantar, 20 I&N 801 (BIA 1994); Matter of Magallanes-Garcia, Int. Dec. 3341 (BIA 1998); and cases cited below.

others do not (referred to in immigration proceedings as a "divisible" statute), the "modified" categorical analysis permits the reviewing authority to examine a limited set of documents that clearly establish that the conviction was of an offense that would trigger the immigration penalty. If this limited review of documents fails to unequivocally identify the offense of conviction as one that carries an immigration penalty, then the penalty does not apply.[4]

There are several ways that a single criminal code section can be divisible in terms of immigration consequences. For example, a code section may contain multiple subsections, some of which involve firearms and therefore trigger the firearms deportation ground and some of which do not. See e.g. Calif. P.C. §§ 245(a)(1) and (2). It may define the crime in the disjunctive, such as sale (an aggravated felony) or offer to sell (not an aggravated felony) a controlled substance under Calif. H&S §11352(a). Or a section may be so broadly or vaguely drawn that it could include different kinds of offenses, such as contributing to the delinquency of a minor under Calif. P.C. §272.

2. What Documents Can Be Consulted to Determine the Elements of the Offense of Conviction?

The Supreme Court has stated that the permissible documents for review in a conviction by plea are only "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*, 125 S.Ct. 1254, 1257 (2005); *Martinez-Perez v Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (applying Shepard to immigration proceedings).

The Ninth Circuit and Board of Immigration Appeals have long imposed similar restrictions on what an immigration judge can review. The reviewing authority may only consult information in the charging papers (and then only the Count that has been pled to or proved), the judgment of conviction, jury instructions, a signed guilty plea; the transcript from the plea proceedings; and the sentence and transcript from sentence hearing. Sources such as prosecutor's remarks during the hearing, police reports, probation or "pre-sentence" report, or statements by the noncitizen outside of the judgment and sentence transcript (e.g., to police or immigration authorities or the immigration judge) may not be consulted.[5] A narrative description in a California

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[4] U.S. v Rivera-Sanchez, 247 F.3d 905, 908 (9th Cir. 2001) (en banc), quoting from Taylor v. United States, 495 U.S. 575 (1990). See also, e.g., Chang v INS, 307 F.3d 1185 (9th Cir. 2002); Matter of Sweetser, Int. Dec. 3390 (BIA 1999); Matter of Short, Int. Dec. 3125 (BIA 1989).

[5] See, e.g., Taylor v U.S., supra. This doctrine applies across the board in immigration cases and has been upheld regarding moral turpitude (see e.g., Matter of Mena, 7 I&N 38 (BIA 1979), Matter of Short, Int. Dec. 3125 (BIA 1989)(co-defendant's conviction is not included in reviewable record of conviction); Matter of Y, 1 I& N 137 (BIA 1941) (report of a probation officer is not included), Matter of Cassissi, 120 I&N 136 (BIA 1963) (statement of state' attorney at sentencing is not included)); firearms (see e.g., Matter of Madrigal-Calvoi, Int. Dec. 3274 (BIA 1996) (transcript of plea and sentence hearing is included), Matter of Teixeira, Int. Dec. 3273 (BIA 1996)(police report is not included), Matter of Pichardo, Int. Dec. 3275 (BIA 1996)(admission by respondent in immigration court is not included). See also Abreu-Reyes v INS, 350 F.3d 966 (9th Cir. 2003) withdrawing and reversing 292 F.3d 1029 (9th Cir. 2002) to reaffirm that

Abstract of Judgment cannot be consulted.[6] Information from a co-defendant's case similarly cannot be consulted. Thus where a wife was convicted of assault with intent to commit "any felony," the immigration authorities could not look to her husband's record of conviction to define the felony.[7] In immigration proceedings this group of permitted documents often is referred to as "the record of conviction."

If there is insufficient information in the record of conviction to identify the offense of conviction in a divisible statute, the reviewing authority must rule in favor of the immigrant.

> **Example:** Mr. Rivera-Sanchez was convicted of Calif. H&S §11360(a), which punishes both selling and offering to sell controlled substances. Sale is an aggravated felony, but offering to sell is not. A court reviewing his prior record can look only to limited documents in the record of conviction to determine whether he was convicted of sale or offer to sell. If information in the record of conviction fails to establish that he was convicted of sale, the reviewing authority is required to find that he was not convicted of an aggravated felony. *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc).

3. Defense Strategy: Charging Papers and Plea Agreements

For information in a criminal charge to be considered in a modified categorical analysis, there must be proof that the defendant pled to or was convicted of the specific charge. Information alleged in a Count is not part of the record of conviction absent proof that the defendant specifically pled guilty to that Count. A charge coupled with only general proof of conviction under the statute is not sufficient.[8]

While the Ninth Circuit held that an Abstract of Judgment plus original charging papers were sufficient to indicate which Count was pled to, this rule ought to be changed under Shepard and other precedent. It does not allow for the common situation where the charge is amended to change facts, or even the offense charged, before the plea.[9] But where possible, defense counsel should have an Abstract of Judgment include an "as amended" note next to the Count notation, if the charge was amended.

A charging paper charging the California offense in the language of the statute is proper and often beneficial to the noncitizen. An original or amended charging paper quoting only the language of the statute can prevent consequences under a

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probation report is not part of the record of conviction for this purpose, in accord with ruling in United States v. Corona-Sanchez, supra

[6] U.S. v Navidad-Marco, 367 F.3d 903 (9th Cir. 2004)
[7] Matter of Short, Int. Dec. 3215 (BIA 1989).
[8] See, e.g., U.S. v Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc); U.S. v. Velasco-Medina, 305 F.3d 839, 852.
[9] See, e.g., Martinez-Perez v Gonzales, 474 F.3d 1022 (9th Cir. 2005) (Abstract insufficient under Shepard where charge was robbery and plea was to theft).

divisible statute. (But see discussion below of BIA's treatment of dropped charges.) The California Penal Code expressly permits this vague practice.[10]

Plea Agreements. A plea agreement is a definitive source of information about the "offense of conviction," i.e. the elements of the offense for which the defendant actually was convicted. Drafting a plea agreement gives criminal defense counsel the opportunity to create the record of conviction that will be determinative in immigration proceedings. Important information should be affirmatively set out in the plea agreement or colloquy. For example, the Ninth Circuit held that where a plea agreement specified the loss to the victim in the count of conviction was $600, the fact that restitution of over $10,000 was ordered (based on losses alleged in dismissed counts) did not establish the offense as one in which the "loss to the victim" was $10,000. [11]

The plea agreement can also be used to delete damaging information that was in the Count. Where a charging paper alleges an offense within a divisible statute that carries an immigration penalty, criminal defense counsel should not plead to the Count. Counsel can bargain for a substitute charging paper or, more easily, correct the record as part of a plea agreement (e.g., "Defendant pleads guilty to fraud of $600" or "Defendant pleads guilty to offering to transport"). Counsel can specifically plead to the language of a divisible statute in its entirety, if that is the most beneficial or only possible alternative.[12]

If the charge is wrongly phrased in the conjunctive ("and") while the statute is in the disjunctive ("or"), the defendant should specifically make a plea agreement in the disjunctive, for example "I admit to entry with intent to commit larceny or any felony." (However, if the defendant did not do this, a plea to a charge in the conjunctive does not necessarily prove the multiple acts.[13])

Information from the record of conviction should not be used to add in elements that are not part of the offense. Thus the BIA held that a defendant convicted of an assault offense that had no element of use of a firearm was not deportable under the firearms ground, even though he plead guilty to an indictment that alleged he assaulted the victim with a gun.[14] However, some courts outside the Ninth Circuit have decided otherwise, especially by considering the age of a victim of a sexual crime, even where age was not an element of the offense. In general, criminal defense counsel should keep the record of conviction as empty of potentially damaging information as is possible.

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10 "[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Penal Code § 952.

11 Chang v INS, 307 F.3d 1185 (9th Cir. 2002). Conviction of fraud with a loss to the victim of more than $10,000 is an aggravated felony. See Note "Aggravated Felonies."

12 See P.C. §952 permitting this in charging papers, discussed *supra.*

13 *Matter of Espinosa*, 10 I&N 90, 98 (BIA 1962); *U.S. v Hirsch*, 308 F.2d 562, 567 (9th Cir. 1962); *In re Bushman*, 1 Cal.3d 767, 775 (overruled on other grounds).

14 *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)

Dropped Charges. Information from dismissed charges should never be considered in this inquiry, since this would violate the fundamental rule that for information in a charge to be evidence of the elements of the offense of conviction, there must be proof that the person specifically pled guilty to or was found guilty by a jury of the charge. The BIA, however, occasionally has used dropped charges in its decisions, including recently.[15] In a case where a dropped charge would identify a defendant's plea as being to a section of a divisible statute with adverse immigration consequences, criminal defense counsel where possible should protect the defendant by creating a specific plea agreement showing conviction of a section that does not carry those consequences. The plea agreement will trump other information. Immigration counsel also will aggressively assert the conclusive Ninth Circuit precedent establishing that information in a criminal charge cannot be considered absent proof that the defendant was found guilty of the particular charge.

[15] *Matter of Vargas-Sarmiento*, 23 I&N 651 (BIA 2004). See also *Matter of Ghunaim*, 15 I&N 269 (BIA 1975); *Matter of Sanchez-Marin*, 11 I&N 264 (BIA 1965).

Note: Sentence Solutions

For more information see Calif. Criminal Law and Immigration (2004), Chapter 5 and § 9.7 and Note "Resources".

I. Definition of Sentence, Getting to 364 Days
II. The Effect of Sentence Enhancements

I. Definition of Sentence; Getting to 364 Days

Offenses that are aggravated felonies based on a one-year sentence. The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year was imposed. Obtaining a sentence of 364 days or less will prevent them from being aggravated felonies.[16]

- Crime of violence, defined under 18USC § 16
- Theft (including receipt of stolen property)
- Burglary
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice
- Perjury, subornation of perjury
- Falsifying documents or trafficking in false documents (with an exception for a first offense for which the alien affirmatively shows that the offense was committed for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent)

Even a *misdemeanor* offense with a suspended one-year sentence imposed is an aggravated felony.

Note that many other offenses are aggravated felonies regardless of sentence imposed, such as offenses relating to drug trafficking, firearms, sexual abuse of a minor, or rape. For example, conviction of possession for sale is an aggravated felony regardless of sentence.

Definition of "sentence imposed" for immigration purposes. The immigration statute defines sentence imposed as the "period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part."[17]

- This language refers to the sentence actually imposed, not to potential sentence.

[16] See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

[17] Definition of "term of imprisonment" at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

- It does not include the period of probation or parole.

- It includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended. Where *imposition* of suspension is suspended, it includes any period of jail time ordered by a judge as a condition of probation.

- Time imposed by recidivist sentence enhancements (e.g., petty with a prior) are not counted as part of the sentence imposed; see Part B below.

- The time served after a probation or parole violation is included within the "sentence imposed."[18]

Example: The judge suspends imposition of sentence, orders three years probation, and requires jail time of four months as a condition of probation. The defendant is released from jail after three months with time off for good behavior. For immigration purposes the "sentence imposed" was four months. However, if this defendant then violates probation and an additional 10 months is added to the sentence, she will have a total "sentence imposed" of 14 months. If this is the kind of offense that will be made an aggravated felony by a one-year sentence imposed, she would do better to take a new conviction instead of the P.V. and have the time imposed for that.

Example: The judge imposes a sentence of two years but suspends execution of all but 13 months. For immigration purposes the "sentence imposed" was two years.

How to get to 364 days or less. Often counsel can avoid having an offense classed as an aggravated felony by creative plea bargaining. The key is to *avoid any one count from being punished by a one-year sentence*, if the offense is the type that will be made an aggravated felony by sentence. If needed, counsel can still require significant jail time for the defendant. If immigration concerns are important, counsel might:

- bargain for 364 days on a single conviction;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
- plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail time on that;
- waive credit for time already served or prospective "good time" credits and persuade the judge to take this into consideration in imposing a shorter official

[18] See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence;

- rather than take a probation violation that adds time to the sentence for the original conviction, ask for a new conviction and take the time on the new count.

Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent the conviction from being considered an aggravated felony.[19]

The petty offense exception. The above definition of "sentence imposed" also applies to persons attempting to qualify for the petty offense exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible one-year sentence and a sentence imposed of *six months or less*.[20] See Note "Crime Involving Moral Turpitude."

II. The Effect of Recidivist and Other Sentence Enhancements

The Ninth Circuit held that where a sentence enhancement is imposed for recidivist behavior, only the maximum possible sentence for the original unenhanced offense will count in calculating whether a one-year sentence has been imposed to create an aggravated felony. In the case of the recidivist sentence enhancement under P.C. §§ 484, 666 ("petty theft with a prior"), the maximum possible sentence for the core offense of petty theft is six months. The Court therefore found that even though the defendant had been sentenced to two years under the § 666 enhancement provisions, he was not convicted of the aggravated felony offenses of theft with a one-year sentence imposed. *United States v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002)(*en banc*).

While we have secure law on sentence enhancements based on prior conviction for the same act, it is not known to what extent this rule also might apply to non-recidivist enhancements. Also there is no ruling at this writing as to whether the rules of *Blakely v. Washington,* 124 S.Ct. 2351 (2004) or *United States v Booker*, 125 S. Ct. 738 (2005) are applicable in immigration proceedings.

[19] *Matter of Song,* 23 I & N Dec. 173 (BIA 2001).

[20] See 8 USC § 1182(a)(2)(A)(ii)(II).

Using the Chart to Establish Defense Goals: Aggravated Felonies, Deportability, Inadmissibility, and Waivers

A. Overview of Immigration Consequences, Getting Expert Advice

The Quick Reference Chart details which California offenses may make a non-citizen inadmissible, deportable or an aggravated felon. This Note discusses how criminal defense counsel can use this information to establish defense goals for individual noncitizen clients.

Defense counsel might consult three different lists of offenses to determine what convictions must be avoided in order to minimize immigration penalties for noncitizen clients. These are:

- the grounds of *deportability*, at 8 USC § 1227(a). A noncitizen who has been admitted to the United States but is convicted of an offense that makes her **deportable** can lose lawful status and be deported ("removed") (see Part B);

- the grounds of *inadmissibility*, at 8 USC § 1182(a). A noncitizen who is **inadmissible** for crimes may be unable to obtain lawful status such as permanent residency, and may be barred from entry into the United States if outside the country. The crimes-based grounds of inadmissibility also are incorporated as a bar to establishing "good moral character" under 8 USC § 1101(f), which is a requirement for naturalization to U.S. citizenship, relief for abused spouses and children under VAWA, and some other relief (see Part B); and

- the definition of *aggravated felony*, at 8 USC § 1101(a)(43). Aggravated felony convictions bring the most severe immigration consequences. See Part C.

These three categories comprise the most common, but not all, of the adverse immigration consequences that flow from convictions.[21]

To make an adequate analysis of a noncitizen's defense priorities, defense counsel must have a complete record of all past convictions as well as key information about immigration status and possibilities. Counsel should photocopy all immigration documents. In some cases a deportable or inadmissible noncitizen will be eligible to apply for a waiver of a particular ground, or a general waiver. A full discussion of

[21] Other consequences beyond being deportable, inadmissible or an aggravated felon can adversely affect persons applying for asylum (if convicted of a "particularly serious crime"), temporary protected status (if convicted of two misdemeanors or a felony), or a few other types of immigration status. See discussion in *Calif. Criminal Law and Immigration*, Chapter 11.

waivers and relief is beyond the scope of this note, but see discussion of cancellation of removal for permanent residents and the "section 212(h) waiver" in Part B.3. below.

Defense counsel need to understand exactly what waivers or other forms of relief may be available to an individual client who is deportable or inadmissible. Completing the form found in Note "Client Immigration Questionnaire" is a start. Ultimately defense counsel should look at other works or consult with an expert immigration attorney; see Note "Resources." See especially consultation services offered by the Immigrant Legal Resource Center (on a contract basis), the U.C. Davis Immigration Clinic (for greater Sacramento area defenders), special consultation for Los Angeles Public Defenders, and the National Immigration Project of the National Lawyers Guild.

B. Establishing Defense Goals: Is Avoiding Deportability or Inadmissibility the Highest Priority?

All noncitizens need to avoid conviction of an aggravated felony. See Part C below. But noncitizen defendants differ in whether it is more important for them to avoid a conviction that makes them deportable versus one that makes them inadmissible.

1. Who needs primarily to avoid deportability, and who needs primarily to avoid inadmissibility?

As discussed below, some convictions will make a noncitizen deportable but not inadmissible, or vice versa. While it is best to avoid both of these categories, this is not always realistic. Through informed and aggressive pleading, however, counsel may be able to avoid *either* deportability or inadmissibility. How does one prioritize which goal is more important? While an individual determination must be made for each defendant, understanding the following rules of thumb is a good first step toward that analysis.

- A permanent resident's highest defense goal is to avoid deportability for an aggravated felony; then to avoid deportability for any other reason; and only then to avoid inadmissibility.

- An undocumented person (a noncitizen with no lawful status) usually is more concerned with avoiding the grounds of inadmissibility than the grounds of deportability. (In the majority of cases, the grounds of deportability are irrelevant to an undocumented person.) She also wants to avoid conviction of an aggravated felony. To establish precise defense goals for an undocumented person, criminal defense counsel must understand what immigration relief, waivers or defenses the person might be eligible for and try to obtain a criminal court disposition that does not destroy eligibility.

- If a permanent resident already is deportable or is about to become deportable, once again criminal defense counsel must understand what defenses to removal the person might be able to assert, and try not to destroy eligibility for the defense. In some cases this may mean avoiding the grounds of inadmissibility.

Or, cancellation of removal is an important defense for some permanent residents who do not have an aggravated felony conviction; see Part 3 below.

- In the worst-case scenario, a deportable noncitizen (e.g., an undocumented person or a deportable permanent resident) who could be put in removal proceedings *with no hope of applying for any defense* might decide that his biggest priority is to get out of jail before immigration authorities discover him, even if this means the person must accept a quick plea that carries adverse immigration consequences.

The following is further discussion of these rules of thumb.

The Effect of Becoming Deportable

Generally, the highest priority for permanent residents and others with on-going status is to avoid the crimes-based grounds of deportability. Becoming deportable for crimes mainly hurts persons who already have secure status that they could lose, such as lawful permanent residents and others with ongoing lawful status (e.g., asylees or refugees waiting to become lawful permanent residents, persons with secure temporary status such as Temporary Protected Status, or persons on professional worker or scholar visas). A lawful permanent resident's highest defense goal is to avoid becoming deportable for an aggravated felony. This will not only subject them to removal proceedings, but probably eliminate any defense they could mount. Their second highest priority is to avoid becoming deportable under some other ground (and in particular under a ground relating to controlled substances). A permanent resident who becomes deportable can be brought under removal proceedings, where an immigration judge can take away the person's status and order her deported ("removed") from the United States. If the deportable permanent resident has not been convicted of an aggravated felony, however, she might be able to apply for some relief. A common form of relief for deportable permanent residents who have not been convicted of an aggravated felony is "cancellation of removal." See Part 3 below. Or, if not deportable for a drug offense, the resident might be able to "re-immigrate" through a close citizen or permanent resident family member.

In contrast, **undocumented persons usually are not hurt by coming within the grounds of deportability.** Undocumented persons are those who entered the United States without inspection (i.e., slipped surreptitiously across the border) or entered with a visa and overstayed. They already are deportable, because they have no current documents, and to become deportable for crimes would just make them twice as deportable. Instead, the undocumented person's immigration strategy will be to mount a defense against being removed by asserting eligibility to apply for immigration status or get some form of relief. This often will require him to be **admissible** (see below).

There is an exception to the rule that undocumented persons are not affected by the grounds of deportability. All varieties of cancellation of removal for *non-permanent residents* are barred by conviction of an offense referred to in the grounds of deportability. See 8 USC § 1229b(b). This includes "regular" cancellation and

cancellation under VAWA and NACARA. Undocumented persons who might apply for that relief want to avoid conviction of offenses listed in the grounds of deportability. See discussion in *Calif. Criminal Law and Immigration* §§ 11.3, 11.19 and 11.22. (Note: Cancellation of removal for permanent residents has very different bars and requirements, and is discussed in Part 3 below.)

The Effect of Becoming Inadmissible

Becoming inadmissible for crimes most severely hurts people who need to apply for some status or benefit from the government, e.g. undocumented persons. A person who currently is undocumented but hopes to apply for lawful permanent residency or other status will confront the grounds of inadmissibility in almost any application. Perhaps the person is married to a U.S. citizen, or might get married someday, or has an asylum claim, or is eligible for some special program: at some point he or she either must be admissible, or if inadmissible must be eligible for some discretionary waiver of the inadmissibility ground. The need to remain admissible may also apply to persons with status who are deportable, for example **a permanent resident who is deportable for a conviction but could defend against deportation by "re-immigrating"** through a family member, if he can remain admissible.

> **Example:** Maurice overstayed his tourist visa years ago and so is undocumented. However he is married to a U.S. citizen who can file a family visa petition for him. He does not care about convictions that make him deportable – he's already deportable. He cares about avoiding the grounds of inadmissibility, because he intends to assert his family visa as a defense to removal and a way to become a permanent resident. Cecile, a permanent resident who became deportable because of a conviction, is in the same situation. Unless she becomes inadmissible she can defend against being removed by "re-immigrating" through her lawful permanent resident father. (Or perhaps she can apply for cancellation of removal even if she is deportable or inadmissible; see Part 3.)

Some forms of relief for undocumented persons have requirements beyond being admissible. For example, an applicant for Temporary Protected Status must not be convicted of two misdemeanors, and an applicant for asylum must not be convicted of a "particularly serious crime." An individual analysis must be done in each case. See Notes "Resources" and "Client Immigration Questionnaire."

A **permanent resident who becomes inadmissible but not deportable is safe, as long as she does not leave the United States.** If a permanent resident who is inadmissible for crimes leaves the U.S. even for a short period, she can be barred from re-entry into the U.S. Even if she manages to re-enter, she can be found deportable for having been inadmissible at last admission. Also, an inadmissible permanent resident must delay applying for naturalization to U.S. citizenship for five years, or less in some cases. See *Calif. Criminal Law and Immigration,* § 1.5.

The Absolutely Removable Client

Finally, undocumented persons and persons with status who have become deportable, and who don't have any way to defend against removal or apply for lawful status, have a second and sometimes competing defense priority: *to avoid contact with immigration authorities at any cost.* The way to avoid contact with immigration authorities is to avoid being in jail, where an immigration hold is likely to be placed on the person. After informed consideration, a deportable defendant with no defenses may decide that it is in her best interest to accept a plea that gets her out of jail before she encounters immigration officials, even if the plea has adverse immigration consequences. This is a decision that the person must make after understanding the long- and short-term life consequences.

> **Example:** Esteban is an undocumented person who has no defense against being removed. If immigration authorities locate him they will place him in removal proceedings. Esteban may decide to accept a guilty plea that will make him inadmissible if that is the only way to get out of jail quickly to avoid an immigration hold or detainer. (In the best of all worlds, however, Esteban would plead to an offense that both got him out of jail quickly and that did not make him inadmissible – because it always is possible that he would become eligible to apply for status someday in the future.)

> **Example:** Emma is an undocumented person who may be eligible to immigrate through a family member within a year or so. Although she has no immediate defense or application, it still might well be worth risking exposure to immigration authorities if that is what's needed to get to a plea that preserves her eligibility for family immigration. Counsel should discuss the case with an immigration expert to weigh competing interests.

Client who will be removed must be warned of the serious federal criminal penalties for illegal re-entry into the United States! Over 25% of federal defender's caseloads in California involves charges of illegal re-entry following a conviction. A prior aggravated felony conviction will result in an 8-level increase in sentence under the U.S. Sentencing Guidelines. Even worse, simple conviction of certain felonies, even if they are not "aggravated felonies" under immigration laws, will result in a 16-level increase. See 8 USC §1326(b) and discussion at *California Criminal Law and Immigration,* §9.50.

2. Comparing the grounds of deportability and inadmissibility

The lists of offenses in the grounds of deportability and inadmissibility are not identical. Certain convictions will make a noncitizen deportable but not inadmissible, or vice versa. As stated above, in general a permanent resident defendant most wants to avoid a deportable conviction, while an undocumented defendant most wants to avoid an inadmissible conviction. The following is a comparison of the types of convictions or

evidence of criminal activity that come up in state court proceedings that make a noncitizen deportable or inadmissible.

***Deportability Grounds* (8 USC § 1227(a)(2))**

1. Conviction of any offense "relating to" controlled substances;
2. Conviction of a crime involving moral turpitude (CMT) if
   - There are two CMT convictions after admission (exception for a "single scheme" of criminal misconduct" or "purely political" offense), or
   - There is one CMT conviction if the offense carries a potential sentence or a year or more and the defendant committed it within five years of last admission;
3. Conviction of an aggravated felony since admission;
4. Conviction of a firearms offense since admission;
5. Conviction since admission and since 9/30/96 of a domestic violence offense, stalking, or child abuse, abandonment or neglect (or a civil or criminal court finding of a violation of a domestic violence protection order);
6. Conviction of managing a prostitution business;

Person was a drug abuser or addict at any time since admission.

***Inadmissibility Grounds* (8 USC § 1182(a)(2), or (a)(1) for drug abuse)**

1. Conviction of any offense "relating to" controlled substances
2. Conviction of a single moral turpitude offense unless the offense comes within an exception:
   - Petty offense exception applies if the noncitizen committed only one CMT that carries a potential sentence of a year or less and a sentence of six months or less was actually imposed; or
   - Youthful offender exception applies if the noncitizen committed only one CMT while under the age of 18, and five years has passed since conviction (in adult court) or release from resulting imprisonment;
3. Formal admission of controlled substance or moral turpitude offense (no conviction is required, but where the charge was resolved in criminal court as less than a conviction the ground does not apply; this ground does not often come up);
4. Person is a current drug abuser or addict (conviction not required);
5. Government has "reason to believe" the person has ever been or assisted a drug trafficker (conviction not required);
6. Person has engaged in prostitution or commercialized vice (conviction not required);
7. Two or more convictions of any kind where an aggregate sentence of five years or more was imposed.

Some of the differences between the two lists are especially worth noting.

First, there is no inadmissibility ground relating to domestic violence or firearms. If a defendant's primary goal is to avoid *deportability*, she must avoid conviction even for minor offenses that come within these grounds, such as possession of an unregistered firearm, or a misdemeanor battery conviction (P.C. § 242(a)) where the

spouse was the victim. In contrast, if a defendant only needs to avoid *inadmissibility*, these convictions are not harmful. (Note, however, that if the firearms or domestic violence offense also is a crime involving moral turpitude – e.g., if it is assault with a firearm or spousal abuse under P.C. § 273.5 – the defendant also must analyze the offense according to the moral turpitude grounds).

> **Example:** Sam is offered a choice between pleading to possessing an unregistered firearm or to theft. If he must avoid becoming deportable, he has to refuse the firearm plea. If he only must avoid becoming inadmissible, he can safely accept the firearm plea. This is because there is no "firearms" ground of inadmissibility. Also, possessing a firearm is not a moral turpitude offense, so he doesn't have to worry about that ground of inadmissibility.

Second, **there are different rules for when a moral turpitude conviction makes a noncitizen deportable or inadmissible.** Check the person's entire criminal record against the formulae discussed above and in Note "Crimes Involving Moral Turpitude."

Third, key "conduct-based" grounds make a noncitizen inadmissible, but not deportable. These include engaging in **prostitution**, and where the government has **"reason to believe"** (but no conviction) that the person aided in drug trafficking. Finally, an **aggravated felony is not a per se ground of inadmissibility.** In limited situations, and where the conviction also does not come within the controlled substance or perhaps moral turpitude grounds, this can aid a defendant who is eligible to immigrate through a relative. See *Calif. Criminal Law and Immigration* § 9.2.

3. Cancellation of Removal and the "Section 212(h) Waiver"

Cancellation of Removal. A key defense for deportable permanent residents is "cancellation of removal" under 8 USC § 1229b(a). Any ground of inadmissibility or deportability can be waived, but conviction of an aggravated felony is a bar. To be eligible the person (a) must have resided in the U.S. for seven years after admission in any status (e.g., even on a tourist visa that expired before the person became a permanent resident); (b) must have been a permanent resident for five years; and (c) must not have been convicted of an aggravated felony. The requirement of seven years residence since admission in any status has a clock-stopping provision. Time ceases to accrue as soon as either of the following occurs: (a) a Notice to Appear for removal proceedings is served or (b) the person commits certain offenses listed in the grounds of inadmissibility, that actually make him or her deportable or inadmissible. Conviction of an offense that only incurs deportability under the firearms or domestic violence ground will not "stop the clock" on the seven years. 8 USC § 1229b(d). A permanent resident who previously had received cancellation of removal or relief under the former "suspension of deportation" or "section 212(c) relief" is ineligible for cancellation. (Note: Do not confuse this cancellation with cancellation for *non-permanent residents,* for which a person is disqualified if found inadmissible or deportable for crimes. See 8 USC § 1229b(b).)

Section 212(h) Waiver. Some grounds of deportability and inadmissibility can be "waived" or forgiven at the discretion of an immigration judge or official. A frequently used general waiver for certain crimes is the so-called "section 212(h) waiver," found at 8 USC § 1182(h), INA § 212(h). This will waive crimes involving moral turpitude, prostitution, and a few other grounds only; *it will not waive conviction of a drug offense* other than first possession of 30 grams or less of marijuana or hashish. To apply, the person must have or be applying for permanent residency, and must do one of the following: show hardship to a qualifying citizen or permanent resident relative; be an applicant for relief under VAWA as an abused spouse or child of a citizen or permanent resident; only be inadmissible for prostitution; or have 15 years since becoming inadmissible. Special restrictions apply to permanent residents that do not apply to other noncitizens: they must have seven years between becoming a permanent resident and the issuance of a Notice to Appear for removal proceedings, and conviction of an aggravated felony is an absolute bar. In contrast, the § 212(h) waiver is one of the few forms of relief open to non-permanent residents who have an aggravated felony conviction (as long as it does not involve drugs). However, it is very difficult to get a §212(h) waiver for a "violent or dangerous" offense. See 8 CFR 212.7(d).

> **Example:** Martina is undocumented and immigrating through her U.S. citizen stepmother. She is convicted of grand theft with a one-year sentence imposed, which makes her inadmissible under the moral turpitude ground and also is an aggravated felony. She can file an application for the "212(h) waiver" along with her application to immigrate. If she had been a permanent resident when she was convicted, the aggravated felony conviction would have barred her from applying for the waiver. If the offense had been a drug conviction, the waiver would not be available because it is only for the moral turpitude and prostitution grounds. (And, if Martina had been brought under the administrative "expedited removal proceedings" instead of regular removal proceedings, the officer in charge would have denied her right to file the waiver inside the United States.)

See *Calif. Criminal Law and Immigration* § 11.1 for more information on cancellation, and § 11.2 for information on the § 212(h) waiver. For defenses to removal and relief in general see Chapter 11.

C. Aggravated felonies

Conviction of an aggravated felony is terrible for any noncitizen, regardless of status. Conviction of an aggravated felony after admission is a ground of deportability, but that is just the beginning. With a few important exceptions the conviction ensures deportation, bars obtaining new lawful status, and blocks any hope of waiver or defense. In contrast, a person who is "merely" inadmissible or deportable still might be able at least to apply for some discretionary waivers, application or defense that will let them continue in status. In addition a noncitizen who is convicted of an aggravated felony and then deported ("removed") is subject to a greatly enhanced federal sentence if she attempts to re-enter the U.S. illegally. See 18 USC § 1326(b)(2) and Note "Aggravated Felonies."

Note: Aggravated Felonies

For more information see Calif. Criminal Law and Immigration (2004) Chapter 9, Tooby, Aggravated Felonies, and Note "Resources"

A. Definition of Aggravated Felony.

Aggravated felonies are defined at 8 USC § 1101(a)(43), which is a list of dozens of common-law terms and references to federal statutes. Federal and state offenses can be aggravated felonies, as can foreign offenses unless the resulting imprisonment ended more than 15 years earlier. See alphabetical listing of aggravated felonies and citations at Part D of this Note.

Where a federal criminal statute is cited in the aggravated felony definition, a state offense is an aggravated felony only if all of the elements of the state offense are included in the federal offense. It is not necessary for the state offense to contain the federal jurisdictional element of the federal statute (crossing state lines, affecting inter-state commerce) to be a sufficient match. See, e.g., *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001)(Calif. P.C. § 12021(a)(1) is an aggravated felony as an analogue 18 USC § 922(b)(1)). Where the aggravated felony is identified by a general or common law terms -- such as theft, burglary, sexual abuse of a minor – courts will create a standard "generic" definition setting out the elements of the offense. To be an aggravated felony, a state offense must be entirely covered by the generic definition. See, e.g., discussion of burglary and theft in Note "Burglary, Theft and Fraud." It is especially difficult to determine whether a specific state offense will be held an aggravated felony when a court has not yet created the "generic" standard.

B. Penalties for Conviction: Barred from Immigration Applications.

Conviction of an aggravated felony brings the most severe punishments possible under immigration laws. The conviction causes deportability and moreover bars eligibility for almost any kind of relief or waiver that would stop the deportation. In contrast, a noncitizen who is "merely" deportable or inadmissible might qualify for a waiver or application that would preserve current lawful status or permit the person to obtain new status.

> **Example:** Marco has been a permanent resident for 20 years and has six U.S. citizen children. He is convicted of an aggravated felony, possession for sale of marijuana. He will be deported. The aggravated felony conviction bars him from applying for the basic waiver "cancellation of removal" for long-time permanent residents who are merely deportable.

There are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility is highly complex. See discussion in *Calif. Criminal Law and Immigration* at § 9.2. The following are some important options. Persons convicted of an aggravated felony who have the equivalent of a very strong

asylum claim can apply to stop a deportation under 8 USC § 1231(b)(3) and the U.N. Convention Against Torture. Persons who were not permanent residents at the time of conviction, and whose aggravated felony does not involve controlled substances, might be able to adjust status (become a permanent resident) through a close U.S. citizen or permanent resident family member with a waiver under 8 USC § 1182(h). An aggravated felony conviction is not a bar to applying for the "T" or "U" visas for persons who are victims of alien smuggling or a serious crime and who cooperate with authorities in prosecuting the crime. See 8 USC § 1101(a)(15)(T) and (U). Permanent residents who before April 24, 1996 pled guilty to an aggravated felony that didn't involve firearms may be able to obtain a waiver under the former § 212(c) relief, but may be unable to waive any ground of deportability that has arisen since that time. See *INS v St. Cyr*, 121 S.Ct. 2271 (2001) and practice guides at www.ailf.org. For immigration relief generally see *Calif. Criminal Law and Immigration*, Chapter 11.

C. Penalties for Conviction: Federal Offense of Illegal Re-entry.

A noncitizen who is convicted of an aggravated felony, deported or removed, and then returns to the U.S. without permission faces a tough federal prison sentence under 8 USC § 1326(b)(2). This applies even to persons whose aggravated felonies were relatively minor offenses, such as possession for sale of marijuana. In California, illegal re-entry cases represent more than 25% of federal public defenders' caseloads. Criminal defense counsel must warn their clients of the severe penalty for re-entry.

> **Example:** After his removal to Mexico, Marco illegally re-enters the U.S. to join his family and maintain his business. One night he is picked up for drunk driving and immigration authorities identify him in a routine check for persons with Hispanic last names in county jails. Marco is transferred to federal custody and eventually pleads to illegal re-entry and receives a three-year federal prison sentence.

Note, however, that persons convicted of certain felonies face – whether or not they are aggravated felonies – face even more severe sentence enhancements for illegal re-entry. See 8 USC §1326(b)(1) and discussion in Calif. Criminal Law and Immigration §9.50.

D. List of Aggravated Felonies

Every offense should be suspiciously examined until it is determined that it is not an aggravated felony. While some offenses only become aggravated felonies by virtue of a sentence imposed of a year or more (see Note "Sentences"), others are regardless of sentence. Outside of some drug offenses, even misdemeanor offenses can be held to be aggravated felonies.

The following is a list of the offenses referenced in 8 USC § 1101(a)(43) arranged in aphabetical order. The capital letter following the offense refers to the subsection of § 1101(a)(43) where the offense appears.

Aggravated Felonies under 8 USC § 1101(a)(43)
(displayed alphabetically)

- **alien smuggling**- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child. (N)

- **attempt** to commit an aggravated felony (U)

- **bribery** of a witness- if the term of imprisonment is at least one year. (S)

- **burglary**- if the term of imprisonment is at least one year. (G)

- **child pornography**- (I)

- **commercial bribery**- if the term of imprisonment is at least one year. (R)

- **conspiracy** to commit an aggravated felony (U)

- **counterfeiting**- if the term of imprisonment is at least one year. (R)

- **crime of violence** as defined under 18 USC 16 resulting in a term of at least one year imprisonment, if it was not a "purely political offense." (F)

- **destructive devices**- trafficking in destructive devices such as bombs or grenades. (C)

- **drug offenses**- any offense generally considered to be "drug trafficking," plus cited federal drug offenses and analogous felony state offenses. (B)

- **failure to appear**- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years. (Q and T)

- **false documents-** using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person's spouse, child or parent. (P)

- **firearms**- trafficking in firearms, plus several federal crimes relating tofirearms and state analogues. (C)

- **forgery-** if the term of imprisonment is at least one year. (R)

- **fraud or deceit** offense if the loss to the victim exceeds $10,000. (M)

- **illegal re-entry** after deportation or removal for conviction of an aggravated felony (O)

- **money laundering**- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds $10,000, and offenses such as fraud and tax evasion if the amount exceeds $10,000. (D)

- **murder**- (A)

- **national defense**- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information. (L)(i)

- **obstruction of justice** if the term of imprisonment is at least one year. (S)

- **perjury or subornation of perjury**- if the term of imprisonment is at least one year. (S)

- **prostitution**- offenses such as running a prostitution business. (K)

- **ransom demand**- offense relating tothe demand for or receipt of ransom. (H)

- **rape**- (A)

- **receipt of stolen property** if the term of imprisonment is at least one year (G)

- **revealing identity of undercover agent**- (L)(ii)

- **RICO** offenses- if the offense is punishable with a one-year sentence. (J)

- **sabotage**- (L)(i)

- **sexual abuse of a minor**- (A)

- **slavery**- offenses relating to peonage, slavery and involuntary servitude. (K)(iii)

- tax evasion if the loss to the government exceeds $10,000 (M)

- **theft**- if the term of imprisonment is at least one year. (G)

- **trafficking in vehicles** with altered identification numbers if the term of imprisonment is at least one year. (R)

- **treason**- federal offenses relating to national defense, treason (L)

Note: Crimes Involving Moral Turpitude

For more information see Calif. Criminal Law and Immigration (2004) Chapter 4 and Annotated Chart, and Tooby, Crimes Involving Moral Turpitude

Overview. Classification as a crime involving moral turpitude ("CMT") is based on the elements of the offense, not the facts of the case. Generally an offense involves moral turpitude if it contains elements of fraud, theft, intent to cause great bodily harm, and sometimes lewdness, recklessness or malice. Felony/misdemeanor classification is not determinative unless the felony and misdemeanor have different elements. State court rulings on moral turpitude for impeachment purposes are not controlling for immigration. Because the definition of moral turpitude is nebulous there often is uncertainty as to whether an offense will be held to be a CMT. For more discussion of specific offenses, see the annotated chart of California offenses in Brady, *Calif. Criminal Law and Immigration*, see Tooby, *Crimes Involving Moral Turpitude;* and other works in Note "Resources." If a statute is divisible for moral turpitude – meaning it punishes some offenses that are CMT's and others that are not -- the reviewing authority can look only to the record of conviction to determine whether the conviction was for the turpitudinous section. See Note "Record of Conviction."

Whether a noncitizen becomes deportable or inadmissible under the CMT grounds depends on the number of CMT convictions, potential or imposed sentence, and date offense was committed. Convictions of offenses that do not involve moral turpitude – e.g. drunk driving, simple assault – do not affect this analysis.

Deportation Ground, 8 USC § 1227(a)(2)(A)(i), (ii)

A noncitizen is deportable for **one conviction** of a crime involving moral turpitude ("CMT") if she committed the offense within five years of her last "admission" to the United States, and if the offense carries a potential sentence of one year.

A felony/misdemeanor that is reduced to a misdemeanor under P.C. § 17 retains a potential one-year sentence and can be a basis for deportability. If counsel can bargain to a six-month misdemeanor, or to **attempt** of a wobbler that is then reduced to a misdemeanor, the offense will have only a six-month maximum penalty. See Note "Sentences" on how to provide for the maximum possible jail time, if that is required, even under a reduced potential sentence.

> **Example:** Marta was last admitted to the United States in 2000. In 2003 she committed a theft, her first CMT. If she is convicted of misdemeanor grand theft she will be deportable: she'll have been convicted of a CMT committed within five years of her last admission that has a potential sentence of a year. If she is convicted of petty theft or *attempted* misdemeanor grand theft she will not be deportable, because both have a maximum possible sentence of six months. If Marta had waited until 2006 to commit the offense she would not be deportable regardless of potential sentence, because it would be outside the five years.

A noncitizen is deportable for **two or more convictions** of crimes involving moral turpitude that occur anytime after admission, unless the convictions are "purely political" or arise in a "single scheme of criminal misconduct" (often interpreted to exclude almost anything but two charges from the same incident).

> **Example:** Stan was admitted to the U.S. in 1992. He was convicted of assault with a deadly weapon in 1998 and passing a bad check in 2003. Regardless of the potential or actual imposed sentences, he is deportable for conviction of two moral turpitude offenses since his admission.

Ground of Inadmissibility, 8 USC § 1182(a)(2)(A)

A noncitizen is inadmissible who is convicted of one crime involving moral turpitude, whether before or after admission. There are two important exceptions to the rule.

Petty offense exception.[22] If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a potential sentence of a year or less, and (c) the "sentence imposed" was less than six months, the person is automatically not inadmissible for moral turpitude.

> **Example:** Freia is convicted of felony grand theft, the only CMT offense she's ever committed. (She also has been convicted of drunk driving, but as a non-CMT that does not affect this analysis.) The conviction is reduced to a misdemeanor under P.C. § 17.[23] The judge gives her three years probation, suspends imposition of sentence, and orders her to spend one month in jail as a condition of probation. She is released after 15 days. Freia comes within the petty offense exception. She has committed only one CMT, it has a potential sentence of a year or less, and the sentence imposed was one month. (For more information about calculating sentence imposed, see Note "Sentence.")

Youthful Offender exception.[24] A disposition in juvenile delinquency proceedings is not a conviction and has no relevance to moral turpitude determinations. But persons who were convicted as adults for acts they committed while under the age of 18 can benefit from the youthful offender exception. A noncitizen who committed only one CMT ever, and while under the age of 18, ceases to be inadmissible as soon as five years have passed since the conviction or release from resulting imprisonment.

> **Example:** Raoul was convicted as an adult for felony assault with a deadly weapon, based on an incident that took place when he was 17. He was sentenced to a year and was released from imprisonment when he was 19 years old. He now

[22] 8 USC § 1182(a)(2)(A)(ii)(II).
[23] Reducing a felony to a misdemeanor will give the offense a maximum possible sentence of one year for purposes of the petty offense exception. *LaFarga v INS*, 170 F.3d 1213 (9th Cir 1999).
[24] 8 USC § 1182(a)(2)(A)(ii)(I).

is 24 years old. Unless and until he is convicted of another moral turpitude offense, he is not inadmissible for moral turpitude.

Inadmissible for making a formal admission of a crime involving moral turpitude. This ground does not often come up in practice. A noncitizen who makes a formal admission to officials of all of the elements of a CMT is inadmissible even if there is no conviction. This does not apply if the case was brought to criminal court but resolved in a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).[25] Counsel should avoid having clients formally admit to offenses that are not charged with.

[25] See, e.g., *Matter of CYC*, 3 I&N 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in *Calif. Criminal Law and Immigration* § 4.4.

Note: Drug Offenses

For further discussion see Calif. Criminal Law and Immigration (2004), Chapter 3

Part I: Overview of Penalties for Drug Offenses
Part II: Simple Possession or Less
Part II: Sale and Other Offenses Beyond Possession; Safe Havens

Part I: Overview of Penalties for Drug Offenses

Aggravated felony. Note that the rules governing which simple possession offenses constitute an aggravated felony are complex, and have recently changed. See discussion and case examples in Part II below.

Under 8 USC § 1101(a)(43)(B), a controlled substance offense can be an aggravated felony in either of two ways: (1) if it is an offense that meets the general definition of trafficking, such as sale or possession for sale (see Part III), or (2) for immigration purposes, if it is a California non-trafficking offense that is analogous to certain federal *felony* drug offenses, such as simple possession, cultivation, or some prescription offenses. For purposes of the U.S. Sentencing Guidelines used in federal prosecutions for illegal-re-entry, a conviction described in section 2 also will be an aggravated felony if it is a felony under *California* law. In practice, this means that California felony simple possession is not an aggravated felony in immigration proceedings, but is an aggravated felony for purposes of triggering a severe sentence enhancement in prosecutions for illegal re-entry after conviction of an aggravated felony. See Part II.

Deportability grounds. Conviction of any offense "relating to" controlled substances, or attempt or conspiracy to commit such an offense, causes deportability under 8 USC § 1227(a)(2)(B)(i). A noncitizen who has been a drug addict or abuser since admission to the United States is deportable under 8 USC § 1227(a)(2)(B)(ii), regardless of whether there is a conviction.

Inadmissibility grounds. Conviction of any offense "relating to" controlled substances or attempt or conspiracy to commit such an offense causes inadmissibility under 8 USC § 1182(a)(2)(A)(i)(II). In addition conduct can cause inadmissibility even absent a conviction. A noncitizen who is a "current" drug addict or abuser is inadmissible. 8 USC § 1182(a)(1)(A)(iv). A noncitizen is inadmissible if immigration authorities have probative and substantial "reason to believe" that she ever has been or assisted a drug trafficker in trafficking activities, or if she is the spouse or child of a trafficker who benefited from the trafficking within the last five years. 8 USC § 1182(a)(2)(C). A less frequently used section provides that a noncitizen is inadmissible if she formally admits all of the elements of a controlled substance conviction. 8 USC § 1182(a)(2)(A)(i). The latter does not apply, however, if the charge was brought up in criminal court and

resulted in something less than a conviction[26] (e.g., if the person pled guilty to simple possession but the conviction was effectively eliminated according to *Lujan-Armendariz*, discussed below.)

Part II: Simple Possession or Less

Important Warning About Felony Simple Possession. The Ninth Circuit recently held that a state felony conviction for simple possession of a controlled substance is not an aggravated felony for immigration purposes. *Oliveira-Ferreira v Ashcroft*, 382 F.3d 1045 (9th Cir. 2004). This means that while it would cause a noncitizen to be deportable, it would not necessarily bar him or her from relief such as cancellation of removal or asylum. However, because of the possibility that this rule could change, ***criminal defense counsel should act conservatively and try to avoid a felony conviction for simple possession***, by postponing a plea or pleading to an alternate offense. Moreover, even with the *Oliveira-Ferreira* rule, a state felony simple possession conviction has serious legal liabilities. It is an aggravated felony for purposes of federal prosecution for illegal re-entry into the U.S. after conviction and deportation. In particular ***undocumented defendants*** who may be likely to be removed and then return illegally to the United States will be penalized by a felony possession conviction if they ever are prosecuted for the illegal re-entry. The offense also would be held an aggravated felony in immigration proceedings outside the Second, Third and Ninth Circuits. Criminal defense counsel should attempt to avoid this by obtaining a misdemeanor simple possession or an offense with no federal analogue such as under the influence or possession of paraphernalia.

Current rules. The following is the standard regarding when a conviction for simple possession of a controlled substance is an aggravated felony in immigration and federal criminal proceedings in the Ninth Circuit, under *Oliveira-Ferreira* and other precedent.

1. **A conviction for even a minor offense relating to controlled substances -- such as simple possession, under the influence, or possession of paraphernalia -- will make a noncitizen deportable and inadmissible, even if it is not an aggravated felony.** See 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(B)(ii). There is an exception for one conviction of simple possession of less than 30 gms of marijuana or hashish, or being under the influence of those drugs: the person is not deportable and a waiver of inadmissibility under 8 USC § 1182(h) might be available.

2. **Almost no state simple possession offense, whether first or second, felony or misdemeanor, is an aggravated felony in immigration proceedings** under the jurisdiction of the Ninth Circuit. The only exception is if the substance possessed was more than five grams of cocaine base (crack) or any amount of flunitrazepam

[26] See, e.g., *Matter of CYC*, 3 I&N 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in *Calif. Criminal Law and Immigration* § 4.4.

(a date-rape drug). In that case a state felony or misdemeanor conviction is an aggravated felony.[27]

3. **Federal prosecutions for illegal re-entry** carry a harsh sentence enhancement for a prior conviction of an aggravated felony under 8 USC §1326(b)(2). There a **state *felony* conviction for simple possession is an aggravated felony, but one or more state *misdemeanor* convictions are not.**[28] Felony is defined as an offense carrying a potential sentence of more than a year. Felonies handled under Proposition 36 remain felonies for this purpose. The exception to this rule is that even a state misdemeanor conviction for more than five grams of cocaine base or any amount of flunitrazepam is an aggravated felony.

4. **If there are no prior controlled substance convictions, a *first conviction for simple possession* (felony or misdemeanor) that is eliminated under rehabilitative provisions such as DEJ, Prop 36, or P.C. § 1203.4, also is eliminated for immigration purposes.** *Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000). This also works if the first conviction is for an **offense less serious** than simple possession that does not have a federal analogue, such as being under the influence or possessing paraphernalia (*Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000)), or a first conviction for **giving away a small amount of marijuana** for free (see 21 USC §841(b)(4)). The conviction remains in effect for immigration purposes, however, until it actually is eliminated under state law. *Chavez-Perez v Ashcroft*, 386 F.3d 12894 (9th Cir. 2004).

   Except for these offenses, any "rehabilitative relief" (i.e., withdrawal of the plea after probation not based on legal error such as DEJ, Prop 36 or P.C. § 1203.4) has no effect for immigration purposes, even though state law may consider the conviction to be utterly eliminated.

5. **Drug addiction and abuse.** A person is inadmissible if she is a "current" drug addict or abuser, and deportable if she has been one at any time since admission to the United States. Dispositions such as drug court or CRC placement that require admission of drug abuse or addiction will trigger these grounds. While in various

[27] *Oliveira-Ferreira* held that a second conviction for simple possession is not an aggravated felony in immigration proceedings. In immigration proceedings, whether a state simple possession conviction is a "felony" and therefore an aggravated felony depends upon whether the analogous federal conviction would be. First offense simple possession is a misdemeanor under federal law, unless the substance was flunitrazepam or more than 5 grams of crack. A second conviction for simple possession is punishable as a felony under federal law, because a sentence enhancement is imposed for recidivism. However the court in *Oliveira-Ferreira* noted that the Ninth Circuit en banc in *U.S. v Corona-Sanchez* 29 F.3d 1201 (9th Cir. 2002) held that a recidivist sentence enhancement will not be considered in calculating the maximum possible sentence for a prior conviction in a categorical analysis. Rather, the unenhanced maximum potential sentence for the core offense – here simple possession, carrying a maximum possible sentence of a year – is the measure. The Ninth Circuit applied this rule to drug cases and specifically held that *Corona-Sanchez* overruled prior Ninth Circuit decisions holding that a second federal, and therefore state, possession conviction is an aggravated felony. *Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002); *U.S. Ballesteros-Ruiz*, 319 F.3 1101, 1103 (9th Cir. 2003).

[28] See, e.g., *Arellano-Torres, Ballesteros-Ruiz, id.*

immigration contexts more relief might be available to someone deportable for this than for a straight conviction, this still can have serious consequences and each case should be analyzed separately.

Examples of drug pleas. These examples illustrate the rules under *Oliveira-Ferreira,* and assume that the proceedings described take place within states under the jurisdiction of the Ninth Circuit.

Example 1: Sam is convicted of simple possession of heroin in state court, a felony offense carrying a potential sentence of more than a year.

Aggravated felony? This is not an aggravated felony in immigration proceedings under *Oliveira-Ferreira.* (No simple possession offense is, other than possession of crack or flunitrazepam.) As a state felony, it is an aggravated felony for purposes of a federal prosecution for illegal re-entry into the U.S. after removal and conviction of an aggravated felony. ***Deportable?*** As a conviction of an offense relating to a controlled substance, it makes Sam deportable and inadmissible. ***Rehabilitative Relief?*** If it was a very first offense of simple possession, Sam can eliminate the conviction for immigration purposes by "rehabilitative relief" such as withdrawing the plea under a deferred entry of judgment, Proposition 36 or P.C. §1203.4 provision.

Example 2: Sam receives a second California felony conviction for simple possession of heroin.

Aggravated felony*?** This is not an aggravated felony for immigration purposes.[29] As a state felony possession conviction it is an aggravated felony in a federal prosecution for illegal re-entry. ***Deportable? This conviction, like his first one, makes Sam inadmissible and deportable. ***Rehabilitative relief?*** Because it is the second conviction, it will not be eliminated by "rehabilitative relief."

Example 3: Esteban is convicted of a state misdemeanor offense, simple possession of methamphetamines.

Aggravated felony? This is not an aggravated felony in a federal prosecution for illegal re-entry (because the offense is not a felony under the law of the convicting jurisdiction or by analogy to federal law) or for immigration purposes. ***Deportable?*** It would make him deportable and inadmissible because it is a drug conviction. ***Rehabilitative relief?*** If it is his first-ever drug conviction it can be eliminated for immigration purposes by "rehabilitative relief."

Example 4: Lani is convicted of simple possession of more than 5 grams of crack cocaine in state court.

[29] See discussion of *Oliveira-Ferreira*, *Corona-Sanchez* and *Arrellano-Torres* in footnote, *supra*.

> ***Aggravated felony?*** Because this would be prosecuted as a felony in federal court, it is an aggravated felony for immigration purposes regardless of how the state characterizes it. It also is an aggravated felony in federal prosecution for illegal re-entry. ***Deportable?*** It would make her deportable and inadmissible for a drug conviction. ***Rehabilitative relief?*** If it was a very first conviction of simple possession, Lani can eliminate it for immigration purposes by "rehabilitative relief."

Example 5: Linda is convicted of being in a place where drugs are used, her first drug conviction ever.

> ***Aggravated felony?*** No. This does not involve trafficking (see Part II) and there is no federal analogous offense. ***Deportable?*** Yes if the government proves that a federally recognized controlled substance was involved. ***Rehabilitative relief?*** As her first conviction of an offense "less serious" than simple possession and with no federal analogue, this will be eliminated for immigration purposes by rehabilitative relief.

Example 6: Francois is convicted of possession for sale. This is an aggravated felony, and if immigration issues are paramount he may want to consider pleading up to offer to sell. See Part III.

Part III: Sale and Other Offenses Beyond Possession

1. **Sale/Transport/Offering**
2. **Other Safe Havens: Accessory and Unidentified Controlled Substance**
3. **Prescription Forgeries**
4. **Post-Conviction Relief**
5. **Inadmissible for "reason to believe" trafficking**
6. **Case Examples**

1. Sale/Transport/Offering.

Offering to sell a controlled substance is not an aggravated felony drug trafficking offense, while sale is. Therefore California offenses such as H&S §§ 11352(a), 11360(a), and 11379(a) are divisible statutes, containing some offenses that are and some that are not a drug trafficking aggravated felony. If the "record of conviction" leaves open the possibility that the conviction was for offering, then the conviction is not an aggravated felony. *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001)(en banc). This means that with aggressive defense work it may be possible for the defendant to escape an aggravated felony (and possibly escape becoming deportable or even inadmissible for a drug conviction), while pleading guilty under these sections.

The record of conviction consists of the charging papers, transcript of judgment or plea colloquy and sentence, but does not include prosecutor's remarks, police reports, or pre-sentence/probation reports. See Note "Record of Conviction."

Defense goal: A very good plea would be to the entire statute phrased in the disjunctive so that it includes offer to sell, distribute, transport. That prevents the conviction from being an aggravated felony. *Rivera-Sanchez, supra.* Further, immigration counsel would have a good argument (but not one guaranteed to win) that the offense also does not even make the person deportable or inadmissible. (See discussion of *Rivera-Sanchez* and *Coronado-Durazo v INS*, 123 F.3d 1322 (9th Cir 1997) in *Calif. Criminal Law and Immigration* 2004 §3.6(G).

If the record of conviction only leaves open the possibility that the offense was offering to sell, then the conviction is not an aggravated felony, and immigration counsel still can argue that it is not a deportable or inadmissible conviction. However, a conviction of offering to sell still leaves the defendant inadmissible by giving the government "reason to believe" the person has been a drug trafficker. See part 5 below. This is why it is best to leave open the additional possibility that the person was convicted of transportation for personal use or offering to transport, which is not a trafficking offense or aggravated felony (see discussion next part).

> **Example:** The charging paper tracks the language of § 11360, charging sale, distribute, transport, or offer to sell, distribute, transport. If needed, defense counsel bargains for a substitute complaint containing this vague language, or clarifies this during the plea colloquy. Defendant simply pleads guilty and is sentenced. The record of conviction here does not prove that the defendant was convicted of sale or transport as opposed to offer to sell or transport. Therefore the offense is not an aggravated felony (and arguably not a deportable or even inadmissible offense).

Transportation. Transportation for personal use also is included in H&S §§ 11352(a), 11360(a) and 1379(a). It should not be held an aggravated felony since it does not involve trafficking and is not analogous to a listed federal offense. See discussion in *U.S. v Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) and *Calif. Criminal Law and Immigration* §3.5(A). It is, however, a drug conviction that will make the person inadmissible and deportable. Arguably conviction for offering to transport has no immigration consequences: it is not trafficking, and as discussed above immigration counsel can argue that offering to commit a drug offense is not a conviction relating to controlled substances making the person deportable or inadmissible. This is why the best plea to the § 11352(a)-type offense is to the entire section in the disjunctive.

Possession for Sale. Possession for sale under California law has none of the advantages of the sale offenses discussed above, in that it does not include "offering." It is an aggravated felony and a deportable and inadmissible offense. Counsel should seek an alternate plea: attempt to plead down to a first offense or at least misdemeanor simple possession or to under the influence or presence in a place where drugs are used; plead to a "safe haven" such as P.C. § 32 or an offense where the drug is not named; or consider pleading up to a sale/offering statute such as H&S §11360(a), in order to avoid the aggravated felony. A California Court of Appeals has directed hearings as to whether it

was ineffective assistance of counsel to fail to advise a noncitizen to plead up to an "offering" or transportation offense rather than accept a possession for sale conviction.[30]

2. Other Safe Havens: Accessory and Unidentified Controlled Substance

Accessory after the Fact is a good alternate plea to a drug offense. Being an accessory to a drug offense is not considered an offense "relating to controlled substances" and so does not make the non-citizen deportable or inadmissible for having a drug conviction. Neither is it an aggravated felony, as long as a sentence of a year or more is not imposed. *Matter of Batista-Hernandez*, 21 I&N 955 (BIA 1997). There is some chance, however, that the government will assert that the act of hiding a drug trafficker after he has completed the trafficking is aiding or colluding in the trafficking, and will assert that the conviction gives them "reason to believe" the person is inadmissible under that ground. See "reason to believe trafficking" below.

Where the Controlled Substance is Not Identified. If the controlled substance in the case is not specifically identified – either in the record of conviction or the terms of the statute – then the government is deemed unable to prove that the offense involved controlled substances and there are no immigration consequences. *Matter of Paulus*, 11 I&N 274 (BIA 1965).

> **Example:** The defender bargains for a substitute complaint that does not identify the controlled substance involved, which is not identified under the terms of the statute. Even if the offense involved sale, it would not be an aggravated felony or a deportable or inadmissible offense or give the government "reason to believe" trafficking in controlled substances.

3. Forged or fraudulent prescriptions

Although it does not involve trafficking, a California conviction for obtaining a controlled substance by a forged or fraudulent prescription may be an aggravated felony because it is analogous to the federal felony offense of obtaining a controlled substance by fraud under 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge). See discussion of federal analogues and the felony/misdemeanor rule at Part II. A far better plea is simple possession or a straight fraud or forgery offense. A conviction for any forgery offense where a one-year sentence is imposed is an aggravated felony under 8 USC § 1101(a)(43)(R).

4. Post-conviction Relief.

Relief that eliminates a conviction not based on legal error – such as "rehabilitative" withdrawal of plea under DEJ, Prop 36 (P.C. § 1210.1) or P.C. § 1203.4 -- will not eliminate any of the above convictions for immigration purposes. It will only work on a

[30] People v. Bautista, 115 Cal.App.4th 229 (Cal. App. 6th Dist. 2004).

first conviction for simple possession or a less serious offense. See discussion of *Lujan-Armendariz v INS* in Part II, *supra.* Vacation of judgment for cause will eliminate these convictions so that the person no longer will have an aggravated felony or be deportable based on the conviction. See writings by Norton Tooby on obtaining post-conviction relief in Note "Resources." The person still might remain inadmissible, however, if the record in the case gives immigration authorities "reason to believe" that the person may ever have been or assisted a drug trafficker. See "Inadmissible" below.

5. Inadmissible for "reason to believe" trafficking.

A noncitizen is inadmissible if immigration authorities have "reason to believe" that she ever has been or assisted a drug trafficker. 8 USC § 1182(a)(2)(C). A conviction is not necessary, but a conviction or substantial underlying evidence showing sale or offer to sell will alert immigration officials and serve as reason to believe. Because "reason to believe" does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports or use defendant's out-of-court statements.

Who is hurt by being inadmissible? Being inadmissible affects permanent residents and undocumented persons differently. For undocumented persons the penalty is quite severe: it is almost impossible ever to obtain permanent residency or any lawful status once inadmissible under this ground, even if the person has strong equities such as being married to a U.S. citizen or a strong asylum case. A permanent resident who becomes inadmissible faces less severe penalties: the person cannot travel outside the United States, and will have to delay applying to become a U.S. citizen for some years, but will not lose the green card based solely on being inadmissible (as opposed to deportable, which does cause loss of the green card).

To avoid being inadmissible under this ground, a noncitizen needs to plead to some non-drug-related offense. If that is not possible, accessory after the fact is better than a drug offense, but the government may argue that this provides "reason to believe." The person also should know that when applying for immigration status she will be questioned by authorities about whether she has been a participant in drug trafficking. She can remain silent but this may be used as a factor to deny the application.

Conviction of straight possession, under the influence, possession of paraphernalia etc. does not necessarily give the government "reason to believe" trafficking (unless it involved a suspiciously large amount).

6. Case Examples

- Dan is arrested after a hand-to-hand sale. His defender bargains to have the charging papers read "sale/offer to sell/transport" and has him plead guilty and accept the sentence with no further comments or admissions. He has avoided an aggravated felony and perhaps even avoided becoming deportable or inadmissible for a drug conviction. (See "Note: Record of Conviction" for more information.)

- Fred is charged with possession for sale. This conviction will be an aggravated felony. If immigration is important he should attempt to plead up to offering to sell, plead to accessory after the fact, or to some non-drug related offense.

- Nicole is undocumented and charged with sale. Because she is undocumented her first concern is to avoid being inadmissible. To do that she must plead to an offense not related to trafficking. A first conviction of simple possession would not make her inadmissible or deportable once the plea is withdrawn under Prop 36, etc. It is possible but not at all guaranteed that she can avoid inadmissibility if she pleads to a sale-type statute with a record of conviction that allows the possibility of offer to transport for personal use. It will at least avoid conviction of an aggravated felony. It would be far better if she could plead to an offense not related to controlled substances. She should know that if she ever does apply for lawful status, immigration authorities will ask her if she has participated in drug trafficking and will consider all evidence that comes to their attention, including police reports.

Note: Domestic Violence, Child Abuse, Prostitution

For more information see Calif. Criminal Law and Immigration (2004) Chapters 6 and 9 and Note "Resources"

A. Domestic Violence and Child Abuse Deportability Ground
- **1. Conviction of a Crime of Domestic Violence**
- **2. Finding of Violation of a Domestic Violence Protective Order**
- **3. Conviction of a Crime of Child Abuse, Neglect or Abandonment**
- **4. Stalking**

B. Prostitution

A. Domestic Violence and Child Abuse Deportability Ground

A noncitizen is deportable if, after admission to the United States, he or she is convicted of a state or federal "crime of domestic violence," stalking, or child abuse, neglect or abandonment. The person also is deportable if found in civil or criminal court to have violated certain sections of a domestic violence protective order. 8 USC § 1227(a)(2)(E). The convictions, or the behavior that is the subject of the finding of violation of protective order, must occur on or after September 30, 1996.

1. Conviction of a Crime of Domestic Violence

A "crime of domestic violence" is a violent crime against a person with whom the defendant has a certain kind of domestic relationship. Conviction after admission and after September 30, 1996 is a basis for deportation. Specifically, 8 USC § 1227(a)(2)(E)(i) defines "crime of domestic violence" to include any crime of violence, as defined in 18 USC § 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 violence or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the 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

This includes offenses such as P.C. § 273.5 where the domestic relationship is an element of the offense, as well as offenses such as straight assault or battery where the record of conviction establishes that the victim and defendant had the required domestic relationship.

The surest strategies to avoid a domestic violence conviction are (a) to avoid conviction of a "crime of violence" and/or (b) to avoid identification of the victim as a person who has a qualifying domestic relationship. As long as the noncitizen pleads to an offense that is not a crime of violence *or* to a victim that does not have the required domestic

relationship, the offense cannot be termed a domestic violence offense and it is safe to accept probation conditions such as anger management counseling.

Avoid a crime of violence. See Chart and Note "Safer Pleas" for suggestions of offenses that may not be classed as crimes of violence, such as false imprisonment (felony or misdemeanor) under P.C. §236, and nonviolent persuasion not to file a police report under P.C. 236.1(b).

The Ninth Circuit held that a statute that can be violated by "mere offensive touching" is not a crime of violence under 18 USC §16, at least absent evidence in the record of conviction that actual violence was involved. *Singh v Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) (Oregon harassment law that can be violated by mere offensive touching is not a crime of violence and therefore not a deportable domestic violence offense). Misdemeanor simple battery, as well as battery of a spouse under Calif. P.C. §243(e), should not be held a domestic violence offense under this theory. While battery of a spouse has a domestic relationship as an element, if the offense is not a crime of violence it cannot be a deportable "crime of domestic violence." The same is not true for P.C. § 273.5 (spousal injury), which will be held a crime of violence categorically.

Criminal defense counsel must keep the record of conviction clear of information establishing that actual violence, beyond mere offensive touching, was involved.[31]

Prevent Creation of Proof of Domestic Relationship. The Ninth Circuit held that where the domestic relationship is not an element of the offense, information outside of the record of conviction (in that case, testimony before the immigration judge) cannot be used to prove the domestic relationship. *Tokalty v Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

Thus criminal defense counsel can protect their client from this ground by keeping information describing the domestic relationship out of the record of conviction. Even better would be a plea to a crime against a specific victim who does not have the kind of relationship required for a deportable "crime of domestic violence," for example a neighbor or the ex-wife's new boyfriend.

A domestic violence counseling requirement as a condition of probation is information in the record of conviction that could be used as evidence that a domestic relationship exists, if it were sufficiently specific. But an offense that is not a "crime of violence" can carry a counseling requirement without incurring deportability, because it cannot possibly be a "crime of domestic violence."

Plead to Violence Against Property, Not People. A plea to a crime of violence against property rather than a person *might* avoid deportability as a "crime of domestic violence." Although 18 USC §16 includes crimes against people and property as part of

[31] In both *Belless* and *Nobriga, supra*, the court consulted the record of conviction to determine the level of violence. In *Singh, supra*, there did not appear to be a record.

the definition of crime of violence, the domestic violence deportation ground refers only to crimes again a "person."

Ancillary Offenses. Conviction of aiding and abetting [32] or soliciting[33] a domestic violence offense should avoid the deportation ground, since these offenses are not listed in the ground. Conviction of accessory after the fact should avoid deportability, as long as the sentence imposed is 364 days or less. See Part A of "Note: Safer Pleas."

2. Finding of Violation of a Domestic Violence Protective Order

A noncitizen is deportable who is found by a civil or criminal court judge to have violated certain portions of a domestic violence protective order. The action violating the court order must have occurred on or after September 30, 1996, and after admission to the United States. The statute describes in detail the type of violation that must occur:

> Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated, harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.[34]

A noncitizen is deportable if a state court determines that he or she has violated "*the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury* to the person or persons for whom the protection order was issued." A noncitizen who is found to have violated a different portion of the protection order, not related to the designated acts, should not be found deportable. Where a protection order is broad, advocates should attempt to structure findings of violation of the order to exclude the above types of acts. The government has the burden of proving all elements of deportability by clear and convincing evidence.

3. Crime of Child Abuse, Neglect or Abandonment

A noncitizen is deportable if, after admission and after September 30, 1996, he or she is convicted of a "crime of child abuse, child neglect, or child abandonment."[35] There do not appear to be published opinions defining a crime of child abuse, neglect or abandonment in this context. ***Criminal defense counsel should assume that conviction of any offense under P.C. § 273a(a) for offenses against children will trigger deportability as a crime of abuse, neglect or abandonment***. In criminal cases where a

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[32] See discussion regarding aggravated felonies in Martinez-Perez v Gonzales, 417 F.3d 1022 (9th 2005).
[33] See discussion at U.S. v Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001 en banc); see "Note: Drug Offenses."
[34] INA § 237(a)(2)(E)(ii), 8 USC §1227(a)(2)(E)(ii).
[35] 8 USC § 1227(a)(2)(E)(i).

child was a victim and the accused is a noncitizen, defense counsel should use all forms of persuasion possible (e.g., demonstrating to the prosecution that deportation of the parent will harm the family) to plead to some appropriate alternate offense that does not have the element of a child victim.

In a situation involving violence against a child, if it is possible to plead to a simple battery this has a good chance of not causing deportability because it is not a crime of child abuse, and arguably not a "crime of violence" in a domestic violence case. See discussion in section 1 above. If the offense involved a traffic violation (e.g., child without seatbelts or left alone in a car), criminal defense counsel must attempt to plead to the straight traffic violation or any other offense, if deportability under this ground will have serious consequences. While P.C. §273d will be held a crime involving moral turpitude, §273a(a) should be held divisible for moral turpitude purposes.

It is possible that conviction of aiding and abetting, [36] soliciting[37] or attempting[38] to commit these crimes will avoid the deportation ground, since these offenses are not listed in the ground. Conviction of accessory after the fact should avoid deportability, as long as the sentence imposed is 364 days or less. See "Note: Safer Pleas."

4. Conviction for stalking

This triggers deportability if received after admission and after September 30, 1996. California P.C. §646.9 will be a deportable offense, and is a crime of violence.

B. Prostitution

A noncitizen is inadmissible, but not deportable, if he or she "engages in" prostitution. 8 USC §1182(a)(2)(D). While no conviction is required for this finding, one or more convictions for prostitution will serve as evidence. Customers are not penalized under this ground.

Prostitution is a crime involving moral turpitude. There are no decisions holding that a customer also commits a crime involving moral turpitude, but that is a small possibility.

Conviction of some offenses involving running prostitution or other sex-related businesses are aggravated felonies. See 8 USC § 1101(a)(43)(I), (K). A non-citizen is deportable who has been convicted of importing noncitizens for prostitution or any immoral purpose. 8 USC § 1227(a)(2)(D)(iv).

Victims of alien smuggling who were forced into prostitution, or victims of any serious crimes, may be able to apply for temporary and ultimately permanent status if they cooperate with authorities in an investigation. See 8 USC § 1101(a)(15)(T), (U).

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[36] See discussion regarding aggravated felonies in Martinez-Perez v Gonzales, 417 F.3d 1022 (9th 2005).
[37] See discussion at U.S. v Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001 en banc); see "Note: Drug Offenses."
[38] It is possible that attempt would be treated like solicitation

Note: Sex Offenses

For more information see Calif. Criminal Law and Immigration (2004) Chapter 9 and Note "Resources"

Conviction of rape or of "sexual abuse of a minor" is an aggravated felony. No particular sentence is required. These offenses also are crimes involving moral turpitude. Conviction of any "crime of violence" is an aggravated felony if a sentence of a year or more is imposed.

Warning: Misdemeanor statutory rape under P.C. §261.5 currently is held to be an aggravated felony as "sexual abuse of a minor." Counsel should do everything possible to plead to an alternate offense, if immigration consequences are important to the defendant. If that is not possible, counsel should attempt to keep the record of conviction clear of information about the victim's age because there is some hope that the Ninth Circuit will find that consensual sex with an older teenager is not sexual abuse of a minor. See Part B.

A. Rape

Conviction of committing sexual intercourse obtained by force or serious threat will be held to be an aggravated felony as rape, regardless of sentence imposed. This includes conviction of rape while the victim was intoxicated, under California Penal Code § 261.[39] The Ninth Circuit found that third degree rape under a Washington statute that lacks a forcible compulsion requirement, where the victim made clear lack of consent, comes within the generic, contemporary meaning of "rape" and is an aggravated felony.[40] In an unpublished opinion with extensive discussion of various laws, the BIA found that a Texas offense of digital penetration did not constitute rape.[41]

A conviction for sexual battery will not be held to constitute rape. It will be a moral turpitude offense and a crime of violence, and will be an aggravated felony if a sentence of a year or more was imposed.

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[39] California Penal Code § 261 and 262 define rape as sexual intercourse obtained by force, threat, intoxication, or other circumstances.

[40] U.S. v. Yanez-Saucedo, 295 F.3d 991(9th Cir. 2002).

[41] Matter of Gutierrez-Martínez, A17-945-476, available at www.lexisnexis.com/practiceareas/immigration/immigration_cases.asp

B. Sexual Abuse of a Minor

Any conviction under P.C. §288(a), lewd act with a person under the age of 14, will be held to be an aggravated felony as sexual abuse of a minor, even if there was no physical contact between defendant and victim. *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999).

At this writing, even a misdemeanor conviction for statutory rape under P.C. §261.5 will be considered an aggravated felony as sexual abuse of a minor. There is some hope that litigation will result in rulings that this is not the case where the victim was 16 or 17 years old. For that reason, if counsel cannot otherwise avoid a conviction under this section, counsel should attempt to keep the record of conviction clear of information about the victim's age if the victim is younger than 17.

Possible alternate pleas are discussed at "Note: Safer Pleas." These include false imprisonment, battery, sexual battery, annoying or molesting a child, and nonviolent persuasion not to file a police report.

A conviction under P.C. §647.6, annoying or molesting a child, is *not* an aggravated felony as sexual abuse of a minor, unless the record of conviction indicates that abusive behavior occurred. In other words, the statute is divisible and the defendant will not suffer if the record of conviction is sufficiently vague, identifies only minor misbehavior, or recites the language of the statute. See discussion at *United States v. Pallares-Galan,* 359 F.3d 1088 (9th Cir. 2004). See also *Parilla v Gonzalez,* 414 F.3d 1038 (9th Cir. 2005) (communicating with a child for an immoral purpose under Washington Rev. Code § 9.68A.090 (2000) is divisible similar to P.C. §647.6, but here the record indicated that the offense involved sexual touching that did constitute "sexual abuse of a minor").

Note: Firearms Offenses

For more information see Calif. Criminal Law and Immigration (2004) Chapters 6 and 9 and Note "Resources"

A. The Firearms Deportability Ground

A noncitizen is deportable if at any time after admission into the United States he is "convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying or of attempting or conspiring to [commit these acts] in violation of any law, any weapon, part or accessory which is a firearm or destructive device (as defined in [18 USC § 921(a)]…" 8 USC § 1227(a)(C).

An offense as minor as possession of an unregistered weapon can trigger deportability. For suggestions on alternate pleas to avoid deportability under the firearms ground see discussion of P.C. §§ 245(a), 245(d) and 12020(a) in Note "Safer Pleas."

There is no firearms ground of inadmissibility. A noncitizen – including a deportable permanent resident -- who is deportable but not inadmissible can apply for "adjustment of status" (to become a permanent resident, for example based on a family visa petition) if she is otherwise eligible. This applies to non-permanent residents as well as deportable permanent residents who wish to "re-adjust" as a defense to deportation. If adjustment is granted the person will no longer be deportable based on the conviction.[42] In addition, if the person is deportable and also is inadmissible under a ground that can be waived, a waiver can be submitted with the adjustment application.[43] Adjustment of status is discretionary relief, and the applicant must be able to persuade the DHS or immigration judge to grant it. See further discussion at §6.1 of *California Criminal Law and Immigration*, and at Note: Using the Chart to Establish Defense Goals.

B. Firearms Offenses as Aggravated Felonies

Any offense involving trafficking in firearms and destructive devices (bombs and explosives) is an aggravated felony. So are state analogues to designated federal firearms offenses. See 8 USC § 1101(a)(43)(C), (E). Significantly, conviction of being a felon or addict in possession of a firearm under P.C. § 12021(a)(1) is an aggravated felony. *US v Castillo-Rivera*, 244 F.3d 1020 (9th Cir 2001).

A firearms offense that involves violence, or the threat or risk of violence, may be classed as a crime involving moral turpitude. If a sentence of a year or more is imposed, it may be an aggravated felony as a crime of violence.

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42 Matter of Rainford, Int. Dec. 3191 (BIA 1992).

43 See Matter of Gabryelsky, Int. Dec. 3213 (BIA 1993) (a person deportable under the firearms ground and inadmissible for a drug offense can apply for adjustment coupled with a a waiver under former INA § 212(c) to waive the drug offense). Likewise adjustment should be permitted in conjunction with a waiver of inadmissibility for moral turpitude, prostitution, etc. under 8 USC §1182(h). See §11.2.

Note: Burglary, Theft and Fraud

For more information see Calif. Criminal Law and Immigration (2004) Chapter 4 and §§ 9.10, 9.35 and Note "Resources"

Part I. Burglary

Burglary as an aggravated felony. A California burglary conviction with a one-year sentence imposed can potentially qualify as an aggravated felony in any of three ways: as "burglary," as a "crime of violence," or, if it involves intent to commit theft, perhaps as "attempted theft." See 8 USC §1101(a)(43)(F), (G). With careful pleading counsel may be able to avoid immigration penalties for this offense.

Burglary is not an aggravated felony unless a one-year sentence has been imposed. A sentence of 364 days or less avoids an aggravated felony, and avoids the necessity for using the following analysis. For suggestions on how to avoid a one-year sentence even in a somewhat serious case see Note "Sentence."

If a one-year sentence is imposed, the only burglary conviction that is not an aggravated felony is

- burglary of an automobile or other non-structure under P.C. § 460(b), or in the alternative to P.C. § 460 where the record of conviction does not indicate whether (a) or (b) was the subject of the conviction, and

- with intent to commit "any felony," or in the alternative "larceny or any felony" where the record of conviction does not identify the felony (or identifies a felony that does not involve moral turpitude). For more information on fashioning such pleas, see Note "Record of Conviction."

The "generic"definition of burglary for this purpose is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 494 U.S. 575 (1990). Auto burglary under P.C. § 460(b) does not come within this definition of burglary and thus is not an aggravated felony as burglary. Neither is it a crime of violence. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). However, conviction under § 460(b) might be held an aggravated felony as attempted theft if the record of conviction establishes that the offense was committed "with intent to commit larceny." To prevent this, counsel should create a record of conviction where the client is guilty only of "larceny *or* any felony" or "a felony."

Burglary as a Crime Involving Moral Turpitude. Burglary is a crime involving moral turpitude ("CMT") only if the intended offense involved moral turpitude. Entry with intent to commit larceny is a CMT, while entry with intent to commit an undesignated offense ("a felony") or an offense that does not involve moral turpitude is not.

Possession of burglary tools (P.C. § 466) may lack any adverse immigration consequences; see Chart.

Part II. Theft

The aggravated felony definition of theft includes a permanent or temporary taking. (Compare to the moral turpitude definition of theft, below, which only includes a permanent taking). Thus joyriding with a one-year sentence imposed is an aggravated felony.

The definition, however, is limited to theft of property. Since P.C. § 484 includes theft of labor, it is a divisible statute. *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc*). If the record of conviction somehow is kept vague between theft of labor and other theft, the offense is not an aggravated felony as theft. California law expressly permits the prosecution to charge California offenses in the language of the statute. Section 952 of the California Penal Code provides that "[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. *In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another*." (emphasis supplied)

One-year sentence must be imposed. Theft is not an aggravated felony if a sentence of 364 days or less is imposed. 8 USC § 1101(a)(43)(G). But even a misdemeanor theft with a one-year sentence imposed will be an aggravated felony. See Note "Sentence."

Petty with a prior is not an aggravated felony. The Ninth Circuit en banc held that a conviction for petty theft with a prior under P.C. §§ 484, 666 is not an aggravated felony, regardless of sentence imposed. *Corona-Sanchez, supra.* The Court held that a conviction with a two-year sentence imposed was not an aggravated felony, since petty theft itself has a maximum sentence of six months and the rest of the sentence was merely a recidivist sentence enhancement. Thus conviction of P.C. § 666 with a year or more sentence imposed is not an aggravated felony and where possible should be substituted for, e.g., conviction of felony grand theft with that sentence.

Theft as a moral turpitude conviction. Theft with intent to permanently deprive the owner is a crime involving moral turpitude ("CMT"), while temporary intent such as joyriding is not.

A single theft conviction and the CMT deportability/inadmissibility grounds. A single conviction of a CMT committed within five years of last admission will make a noncitizen **deportable** only if the offense has a *maximum possible sentence of a year or more*. 8 USC § 1227(a)(2)(A). Conviction for petty theft or *attempted* grand theft reduced to a misdemeanor (both with a six-month maximum sentence) as opposed to misdemeanor grand theft (with a one-year maximum) will avoid deportability.

A single conviction of a CMT will make a noncitizen **inadmissible** for moral turpitude, unless he or she comes within an exception. Under the "petty offense" exception, the

noncitizen is not inadmissible if (a) she has committed only one CMT in her life and (b) the offense has a maximum sentence of a year and a sentence of six months or less was imposed. 8 USC § 1182(a)(2)(A). To create eligibility for the exception, reduce felony grand theft to a misdemeanor under P.C. § 17. Immigration authorities will consider the conviction to have a potential sentence of one year for purposes of the petty offense exception. *LaFarga v INS*, 170 F.3d 1213 (9th Cir. 1999). See also Note "Crimes Involving Moral Turpitude."

Theft by Fraud. A conviction of theft by fraud under P.C. § 484 where the loss to the victim was $10,000 or more might be charged as an aggravated felony even if a sentence of a year or more was not imposed. See next section.

Aiding and Abetting Theft. The Ninth Circuit held that conviction for aiding and abetting grand theft or vehicle theft is not an aggravated felony, and that a plea to a charge alleging that the defendant directly committed the act does not eliminate the possibility that the person was convicted as an aider and abettor. See *Martinez-Perez v Gonzales*, 417 F.3d 1022 (9th Cir. 2005), *Penuliar v Ashcroft*, 395 F.3d 1037 (9th Cir. 2005). See further discussion in "Note: Safer Pleas," Part A.

Part III. Fraud

Overview. An "offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony regardless of sentence imposed. Tax fraud where the loss to the government exceeds $10,000 and money laundering or illegal monetary transactions involving $10,000 also are aggravated felonies.[44] So is a theft conviction if a sentence of a year or more was imposed.[45] Any offense containing fraud as an element is a crime involving moral turpitude. See *California Criminal Law and Immigration*, §§ 9.20, 9.35. There are ways to avoid these consequences, but the issue has become more complex.

The Problem: A defendant may need to avoid an aggravated felony conviction while at the same time paying more than $10,000 restitution for a fraud crime. *Chang v INS*, 307 F.3d 1185, 1190 (9th Cir. 2002) provided a good blueprint for avoiding a *federal* conviction for fraud with "loss to the victim" of $10,000, even if more than $10,000 was ordered to be paid in restitution. The defendant simply had to write into the plea agreement a stipulation that the loss to the victim was less than $10,000. However, because under California law the restitution amount can be held equal to the loss to the victim, we must look for additional defense strategies in cases such as welfare or credit card fraud with restitution ordered of more than $10,000.

Discussion. An offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony.[46] In *Chang v INS*, Mr. Chang presented a written plea agreement from his prior single conviction for bank fraud under

[44] 8 USC §§ 1101(a)(43)(D), (M).
[45] 8 USC §1101(a)(43)(G).
[46] 8 USC §§ 1101(a)(43)(M)(i).

18 USC §1344. It showed that he and the government had stipulated that the "loss to the victim" in the count of conviction was $605.30. Elsewhere in the plea agreement he agreed to pay total restitution of over $30,000 for the entire scheme. His sentence agreement also reflected the $30,000 restitution amount. While the INS charged that the restitution amount was the loss to the victim, the Ninth Circuit held that under a categorical analysis the INS had to "take the plea agreement as the agency finds it." The detailed information in the plea agreement trumped the restitution amount ordered, and the conviction was held not to be an aggravated felony.

Under *Chang*, we hoped that California defenders could avoid an aggravated felony conviction by specifying in a written plea agreement that the loss to the victim from the offense of conviction was less than $10,000, even if a total restitution of more than $10,000 was ordered. However, the Ninth Circuit recently held a California welfare fraud conviction to be an aggravated felony, and here is the complication.

In *Ferreira v. Ashcroft*, the defendant was convicted under Calif. W&I §10980(c)(2). His plea agreement did *not* specify a loss of less than $10,000 to the victim, and restitution of $23,000 was ordered. The Ninth Circuit found that this case was distinguishable from *Chang*, and therefore was an aggravated felony, for two reasons. First, the defendant lacked the *Chang* statement in the plea agreement that the loss to the victim was less than $10,000. Second, the Court noted that "California law provides that a restitution order in favor of a government agency shall be calculated based on the actual loss to the agency." The Court cited P.C. §1202.4(f) (providing that a victim of crime shall receive restitution directly from a defendant "in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court") and *People v. Crow*, 6 Cal.4th 952, 954-55, 26 Cal.Rptr.2d 1, 864 P.2d 80 (1993) for the proposition that under California law, a restitution order must equal the loss to the victim.[47]

To be sure of avoiding an aggravated felony conviction, counsel should get a *Chang* written plea agreement to plead guilty to a count (say, one month of welfare) in which the loss to the victim is set at $10,000 or less. This distinguishes *Ferreira* so it is not completely on point, but leaves open the possibility that immigration or federal court would feel the second distinguishing feature identified by *Ferreira* – the assertion that under California law restitution equals loss to the victim -- would be sufficient to distinguish *Chang*'s result and find that the conviction is an aggravated felony. The following are initial suggestions from practitioners. Creative defense counsel are welcome to suggest other ideas or comments.

- If a plea can be put off until the person pays back enough of the money so that the plea agreement can reflect a loss to the victim and restitution payment of under $10,000, the conviction is not an aggravated felony as fraud.

- Sometimes judges order restitution "in an amount as determined by probation." See 1202.4(f)("If the amount of loss cannot be ascertained at the time of sentencing, the

[47] *Ferreira v Ashcroft*, 390 F.3d 1091, 1099-1100 (9th Cir. 2004).

restitution order shall include a provision that the amount shall be determined at the direction of the court." See also *People v. Lunsford* (1997) 67 Cal.App.4th 901 (1998) (restitution order directing agency to determine amount of restitution was enforceable, where proper amount of restitution could not be ascertained at time of sentencing.) Defense counsel can insist that in return for a plea, the amount of restitution shall be determined by the probation officer. It is at least arguable that the subsequent determination by the probation officer would not be part of the "record of conviction" and not be reviewable in a subsequent immigration or federal proceeding.

- Except for something like "welfare fraud" which has a specific statute covering a specific type of fraud, many crimes involving fraud or deceit can also be considered crimes of theft in that someone is deprived of property. A plea to the first clause of P.C. 484 "...who shall feloniously steal, take, carry, lead, or drive away the personal property of another" does not have fraud or deceit as an element. If restitution was ordered in an amount exceeding $10,000 for a count based on the first clause of P.C. §484, there would be no aggravated felony, provided there was no sentence of one year or more. (Conviction of a theft offense is an aggravated felony if a sentence of a year or more is imposed. See "Note: Theft" at www.ilrc.org/criminal.html. and discussion in section 2, *infra*.)

    - To avoid an aggravated felony for crimes of theft with a sentence of one year or more a defendant can plead to P.C. 484 "in the exact language of the statute" or simply add a new count to the complaint to state merely "violation of P.C. 484" without any other verbiage. Under *U.S. v Corona-Sanchez*, this would not be an aggravated felony even with a sentence of one year or more because it is overbroad. To the extent that the separate clauses in the statute are set forth in the disjunctive, a defendant could even be ordered to pay restitution of $10,000 or more, and this would not be an aggravated felony.

- If a civil suit had been brought, an order could reflect that restitution would be paid according to the civil suit settlement.

Avoiding an Aggravated Felony Conviction under the Theft Category.
Immigration authorities are likely to charge that a crime such as welfare or credit card fraud also constitutes "theft." A theft offense is an aggravated felony if a sentence of a year or more is imposed – there is not requirement about "loss to the victim." Immigration defense counsel can argue that fraud is not theft and does not fit within the definition of an aggravated felony offense because the elements are distinct.[48] Still, criminal defense counsel should avoid a year's sentence imposed on any single count of

[48] See, e.g., discussion in Soliman v. Gonzales, 419 F.3d 276 (4th Cir. 2005) (Virginia's credit card fraud offense, § 18.2-195, did not substantially correspond to a theft offense under 8 U.S.C.S. § 1101(a)(43)(G). Thus, the Virginia offense for which the alien was convicted was not a "categorical" match for an § 1101(a)(43)(G) offense).

an offense that can be construed as theft. For a discussion of avoiding a one-year sentence for immigration purposes see Chapter 5 on sentences or §13.3. See also suggestions for avoiding the aggravated felony theft in section 1, supra.

Note: Safer Alternatives

Alternate Pleas with Less Severe Immigration Consequences[49]

Introduction. This Note offers a brief explanation of proposed safer offenses. For further discussion see works listed in Note "Resources." Some of these analyses have been affirmed in published opinions, while others are merely the opinion of the authors as to how courts might be likely to rule. A plea to the offenses below will give immigrant defendants a greater chance to preserve or obtain lawful status in the United States. However, almost no criminal conviction is entirely safe from immigration consequences, which is why this Note is entitled "safer" not "safe" alternatives.

Divisible statute and the record of conviction. Many of the offenses discussed below are safer only because they are divisible statutes. For the defendant to gain an advantage from a divisible statute, the defense counsel must keep careful control over what information appears in the "record of conviction." A divisible statute is one that includes offenses that carry adverse immigration consequences as well as those that do not. Faced with a divisible statute, immigration authorities will look only to the record of conviction (the charging papers, plea colloquy or judgment, and sentence) to determine which offense actually was the subject of the conviction. If the record of conviction is vague enough so that it is possible that the noncitizen was convicted under a part of the statute without immigration consequences, the immigration consequences do not apply and the noncitizen wins. For further discussion see Note "Record of Conviction."

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I. Is your client a U.S. citizen without knowing it?

[49] Special thanks to Norton Tooby, who has identified several potential safer offenses.

A. All-purpose Substitute Pleas: Accessory After the Fact, Aiding and Abetting, and Solicitation

1. Accessory After the Fact

Accessory after the fact under P.C. § 32 is useful because it does not take on the character of the principal's offense. Conviction of accessory will not be held to be a conviction relating to violence, controlled substances, firearms, domestic violence, fraud, etc. For example, the Ninth Circuit held that accessory is not a crime of violence under 18 USC § 16, where the principal offense was murder for hire. *US v Innie*, 7 F.3d 840 (9th Cir. 1993). The Board of Immigration Appeals (BIA, the national administrative appeals board for deportation cases) held that accessory after a drug trafficking offense is not a deportable drug conviction or an aggravated felony drug conviction. *Matter of Batista-Hernandez*, 21 I&N 955 (BIA 1997). Through hard bargaining, some noncitizen defendants who might have been convicted as principals have pled to accessory after the fact in order to avoid becoming deportable.

Accessory after the fact carries some significant immigration consequences.

- The BIA held that accessory with a one-year sentence imposed is an aggravated felony as "obstruction of justice." *Matter of Batista-Hernandez, supra.* It is possible that the Ninth Circuit someday will overturn this decision, which is flawed. See *Batista-Hernandez* dissents and *Matter of Espinoza*, 22 I&N 889 (BIA 1999)(subsequent BIA decision holding that the similar offense misprision of felony is not obstruction of justice).

- The BIA held, in an older decision that also could be challenged, that accessory is a crime involving moral turpitude under a kind of obstruction of justice theory. *Matter of Sanchez-Marin*, 11 I&N 264 (BIA 1965). See discussion of accessory as a moral turpitude offense in *Calif. Criminal Law and Immigration*, § 4.11.

- As stated above, accessory after the fact to a drug trafficking offense is not a conviction "relating to controlled substances" and will not cause deportability under that ground or, absent a one-year sentence imposed, be an aggravated felony. But the government may argue that the person is **inadmissible** because the conviction gives them "reason to believe" the noncitizen assisted a trafficker in the enterprise. See 8 USC § 1182(a)(2)(C) and Note "Drug Offenses."

2. Aiding and Abetting

The Ninth Circuit has held that a California conviction for aiding and abetting an aggravated felony is not itself an aggravated felony, at least as theft. The Court cited the breadth and vagueness of California's aiding and abetting statute as a basis for this ruling,

noting that the California offense includes "promotion and instigation."[50] California P.C. §31 includes "advised and encouraged."

Further, the Ninth Circuit has recognized that under California law, an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against the person alleged to have committed the offense. Therefore a plea of guilty to a charge alleging that a defendant directly committed, e.g., a theft does not mean necessarily prove that he was *not* found guilty under an aiding or abetting theory. *See United States v Corona-Sanchez*, 291 F.3d at 1207-08; Cal. Penal Code §§ 971, 31; *see also People v. Greenberg*, 111 Cal. App. 3d 181, 188, 168 Cal. Rptr. 416 (Ct. App. 1980). For this reason the Ninth Circuit held that a noncitizen's plea to a charge alleging that he unlawfully took a vehicle did not make him deportable as an aggravated felon, because it did not eliminate the possibility that he was convicted as an aider and abettor. *Penuliar v Ashcroft,* 395 F.3d at 1045-46; see also *Martinez-Perez v Gonzales*, 417 F.3d 1022 (grand theft under P.C. §487(c)).[51]

This decision creates an enormous opportunity for defense against removal. Aiding and abetting should be a potential safe plea for many purposes beyond the aggravated felony theft. Absent some language in a specific aggravated felony or deportation ground, it should apply to other aggravated felonies as well as conviction-based grounds of deportability and inadmissibility. Criminal defense counsel either can plead directly to aiding and abetting, or leave the record of conviction sufficiently vague that a plea to a charging document that alleged direct commission of the offense also would suffice for a plea to aiding and abetting. Many past records of conviction that were not created with this goal in mind may be sufficient to take advantage of this defense.

A conviction for aiding and abetting may not avoid consequences based on a crime involving moral turpitude, however. Traditionally, aiding and abetting is held to involve moral turpitude if the underlying offense does.

3. Solicitation

In the context of drug offenses, the Ninth Circuit has held that offering to commit an offense, or solicitation, is not an aggravated felony even if the offense solicited is. See discussion of cases such as *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001)(en banc) in Part E "Safer Pleas for Offenses Relating to Drugs," below. Solicitation also may be a safer plea for other aggravated felonies, and for most grounds of deportability, including those that do not involve drugs. It will not work to avoid deportability under the firearms deportation ground (which includes "offer to sell" a firearm).

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[50] The Court en banc noted that aiding and abetting liability in California "is quite broad, extending even to promotion and instigation." *United States v. Corona-Sanchez,* 291 F.3d at 1208; *see also Martinez-Perez v Gonzales*, 417 F.3d at 1027 (9th Cir. 2005) and *Penuliar v Ashcroft*, 395 F.3d 1037 (9th Cir. 2005) (aiding and abetting grand theft or vehicle theft is not "theft" for purposes of aggravated felony definition).

[51] Note that the original decision, *Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2004), was withdrawn in light of *Shepard* and republished as the above.

B. Safer pleas for violent or sexual offenses

Overview of consequences. Conviction of an offense that comes within the definition of a "crime of violence" under 18 USC § 16 can cause two types of adverse immigration consequences. If a sentence of a year or more is imposed it is an aggravated felony under 8 USC § 1101(a)(43)(F). Regardless of sentence, if the defendant had a domestic relationship with the victim it is a deportable offense as a "crime of domestic violence" under 8 USC § 1227(a)(2)(E). Under 18 USC § 16(a), an offense is a crime of violence if it has as an element intent to use or threaten force against a person or property. Under 18 USC § 16(b) a *felony* offense is a crime of violence even without intent to use force, if it is an offense that by its nature involves a substantial risk that force will be used.

Offenses that involve an intent to use great force or sexual intent also commonly are held to be crimes involving moral turpitude.

1. Persuading a witness not to file a complaint, P.C. § 136.1(b).

The authors believe that conviction of this offense has no immigration consequences. It is not a crime of violence because it can involve non-violent verbal persuasion. It is not a moral turpitude offense because it does not require evil intent. It is a strike and can carry high prison exposure, which means that it might be accepted as an alternate plea to a serious offense where a one-year or more sentence would be imposed. Defendants who are not compelled to accept a strike may consider less serious substitute pleas such as false imprisonment.

2. False imprisonment, P.C. § 236.

Felony false imprisonment. The authors believe that felony false imprisonment can avoid being an aggravated felony even with a one-year sentence imposed, although it is a crime involving moral turpitude. Felony false imprisonment involves violence, menace, fraud or deceit. P.C. § 237(a). Because only violence and menace are crimes of violence, the offense is divisible: it is not a crime of violence and hence not an aggravated felony even if a one-year sentence is imposed, as long as the record of conviction does not indicate that violence or menace was involved. (A fraud offense is an aggravated felony but only if the victim lost at least $10,000. See Note "Burglary, Theft and Fraud.") If the record of conviction either directly indicates fraud or deceit, or at least does not indicate that violence or menace was involved, the offense is not an aggravated felony. Any felony conviction of false imprisonment will be held a crime involving moral turpitude.

Misdemeanor false imprisonment. The authors believe that misdemeanor false imprisonment can avoid aggravated felony or moral turpitude classification, because by implication it does not involve fraud, deceit, violence or menace. It can be violated by mistaken false arrest or acts involving moral intimidation that do not arise to a threat of force. See, e.g., *Schanafelt v. Seaboard Finance Co* (1951) 108 Cal. App. 2d 420.

Counsel should attempt to ensure that the record of conviction does not reveal intent or actions involving violence, fraud, etc.

3. Simple assault and simple battery, P.C. §§ 241(a), 243(a)

Avoids Moral Turpitude. Simple battery and simple assault are not crimes involving moral turpitude. See e.g. *Matter of B*, 5 I&N 538 (BIA 1953).

Crime of Violence, Domestic Violence. The Ninth Circuit held that an offense that can be committed by "mere offensive touching" is not a crime of violence under 18 USC §16, at least absent evidence in the record of conviction that actual violence was involved. *Singh v Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) (Oregon harassment law that can be violated by mere offensive touching is not a crime of violence and therefore not a deportable domestic violence offense).[52] Misdemeanor simple battery, as well as battery of a spouse under Calif. P.C. §243(e), should not be held to be a crime of violence under this ruling.

Note that if a conviction under Cal. P.C. §243(e) is not a crime of violence, it cannot be a basis for deportation under the domestic violence ground, even though the domestic relationship with the victim is an element of the statute. See 8 USC § 1227(a)(2)(E) and discussion in Note "Domestic Violence." It therefore is a safer plea in a domestic violence situation. It also might be held not to involve moral turpitude. The same is not true for P.C. § 273.5 (spousal injury), which by definition involves actual violence and has been held to involve moral turpitude.

Counsel must keep the record of conviction clear of information establishing that actual violence, beyond offensive touching, was involved.[53]

4. Battery with serious bodily injury, P.C. § 243(d)

Avoids moral turpitude. Because battery has no intent requirement, the offense ought not to be held not to involve moral turpitude despite the injury requirement. It is a strict liability crime in which the person might have used little force, but unknowingly on an "eggshell skull" victim. The BIA has so held in an unpublished but indexed decision (having some precedential value).[54]

Although the immigration authorities ought not to consult the record of conviction in this case, to be safe counsel should attempt to keep the record of conviction clear of information regarding intent or amount of force.

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[52] See also *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003) *U.S. v Nobriga*, 408 F.3d 1178 (9th Cir. 2005) (mere offensive touching is not a crime of violence under 18 USC §921(a)(33)(A)(ii); the court may consult the record to determine whether the offense of conviction involved actual violence).

[53] In both *Belless* and *Nobriga, supra*, the court consulted the record of conviction to determine the level of violence. In *Singh, supra*, there did not appear to be a record.

[54] See *Matter of Muceros*, A42 998 610 (BIA 5/11/00), citing *People v. Campbell* (1994) 28 Cal. Rptr. 2d 716.

Other consequences. This is a "crime of violence" and will become an aggravated felony if a one-year sentence is imposed. It will trigger deportability under the domestic violence ground if the victim has a domestic relationship; see Note "Domestic Violence and Other Grounds."

C. Safer Pleas for DUI and Negligence/Recklessness that Risks Injury

The Supreme Court and the Ninth Circuit have held that driving under the influence, and other offenses where injury may be caused through negligence, do not come within the definition of crime of violence under 18 USC §16. Under these rulings, the offense will not be an aggravated felony even a sentence of a 365 days or more is imposed. *Leocal v Ashcroft*, 125 S.Ct. 377 (2004); *Montiel-Barraza v INS*, 275 F.3d 1178 (9th Cir. 2002).

However, some members of Congress are engaging in a concerted effort to legislatively overrule *Leocal* and make DUI a crime of violence. In case they succeed, criminal defense counsel should act conservatively and do everything possible to obtain a sentence of 364 days or less for any single count of DUI. For suggestions on sentence strategies to get to 364 days in felony cases, see "Note: Sentence."

Advocates are fighting to keep the *Leocal* rule, but we need to be prepared. If *Leocal* is legislatively overruled, the penalties may apply to past convictions as well.

In addition, if *Leocal* is legislatively overruled**,** any felony that involves a negligent or reckless creation of a risk of injury, including child endangerment**,** might be termed a crime of violence and become an aggravated felony with a sentence of 365 days. Where there is any risk, counsel must try to avoid a sentence of 365 days or more (including suspended sentence). Also, consider ancillary offenses such as aiding and abetting or accessory after the fact (see Part A) and alternatives to violent crimes (see part B).

D. Safer pleas for offenses related to firearms or explosives

See also Note "Firearms"

1. Manufacture, possession of firearm, other weapon, P.C. § 12020(a)

Avoiding deportability under the firearms ground. A noncitizen who has been admitted to the U.S. is deportable if convicted of almost any offense relating to firearms, including possession or use. See 8 USC § 1227(a)(2)(C) and Note "Firearms." Section 12020(a) is a divisible statute that includes offenses that do not relate to firearms, for example possession of a blackjack in § 12020(a)(1) or carrying a concealed dirk or dagger under § 12020(a)(4). If the record of conviction does not indicate that a firearm was involved in the offense, the conviction does not trigger deportability under the firearms ground. Thus a defendant could plead guilty to possessing a specific weapon that was not a firearm, or generally to possession of a weapon listed in § 12020(a) or (a)(1) as long as the record of conviction (charging papers, judgment or plea colloquy and sentence) does not indicate that the weapon was a gun or explosive.

Other consequences. There are no other immigration consequences to the plea as outlined above; possession of a weapon without intent to use it is not a moral turpitude offense or a crime of violence. Section 12020 as a whole does contain several dangerous offenses, including trafficking in firearms or explosive devices which is an aggravated felony under 8 USC § 1101(a)(43)(C).

2. Assault with a firearm or other weapon, P.C. § 245(a)

Avoiding deportability under the firearms ground. For purposes of the firearms deportation ground, P.C. § 245(a) is a divisible statute. Part (a)(1) penalizes assault with weapons other than a firearm and part (a)(2) penalizes assault with a firearm. If the defendant pleads to § 245(a)(1), or if the record of conviction does not reveal whether the offense involved was (a)(1) or (a)(2), the conviction does not make the defendant deportable under the firearms ground.

Other consequences. This is a crime involving moral turpitude, so it is useful only when the defendant can afford to have a conviction of a crime involving moral turpitude, but cannot afford to be deportable under the firearms ground. That can happen. For example, a single conviction of a crime involving moral turpitude will make a permanent resident deportable only if the offense was committed within five years of the person's last admission to the U.S. See Note "Crimes Involving Moral Turpitude." If the person committed the offense outside the five-year period, he could accept this plea in order to avoid the firearms ground and still escape becoming deportable for moral turpitude. To avoid a moral turpitude offense see P.C. §§ 241(a) or 243(d). Each of these offenses is a crime of violence and will be an aggravated felony if a one-year sentence is imposed, and a domestic violence deportable offense if the victim had the domestic relationship. See Note "Domestic Violence."

E. Safer pleas for offenses relating to fraud, theft or burglary

For also Note "Burglary, Theft and Fraud"

1. False personation, P.C. § 529(3)

The authors believe that conviction under P.C. § 529(3) may have no immigration consequences. It is a possible alternative to offenses such as forgery, misstatement, fraud, etc. Such offenses usually constitute moral turpitude offenses or may become aggravated felonies.

Section 529(3) reaches "[e]very person who falsely personates another in either his private or official capacity, and in such assumed character . … 3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person." It is a felony/misdemeanor offense.

This offense does not amount to fraud according to the California Supreme Court. In *People v. Rathert* (2000) 24 Cal.4th 200, the Court held that § 529(3) is violated without any requirement that the defendant have specific intent to cause any liability to the person impersonated, or to secure a benefit to any person. The statute "requires the existence of no state of mind or criminal intent beyond that plainly expressed on the face of the statute." Id. at 202. "[T]he Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, *whether or not such a consequence was intended or even forseen*." Id. at 206. (emphasis added) Moral turpitude generally requires an evil motive. Here the Court noted "One does not violate paragraph 3 merely by happening to resemble another person. Rather, one must intentionally engage in a deception that may fairly be described as noninnocent behavior, even if, in some instances, it might not stem from an evil motive." Id. at 209.

2. Petty theft with a prior, P.C. §§ 484, 666

Avoids aggravated felony theft. The Ninth Circuit has held that petty theft with a prior is not an aggravated felony as a theft offense with a one-year sentence imposed, even if a sentence of more than a year is imposed as an enhancement under § 666. *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc*). In contrast, misdemeanor or felony grand theft with a one-year sentence imposed will be held to be an aggravated felony.

Other immigration consequences. Theft with intent to permanently deprive the owner is a crime involving moral turpitude.

3. Joyriding, Veh.C. § 10851(a)

Alternative to auto theft for moral turpitude. Because joyriding requires only an intent to temporarily deprive the owner, it is not a crime involving moral turpitude. Section 10851(a) is a divisible statute including intent to permanently or temporarily deprive the owner. If the record of conviction does not indicate which intent was involved the conviction does not involve moral turpitude. *Matter of M*, 2 I&N 686 (BIA 1946) (former P.C. § 499(b)).

Other immigration consequences. Joyriding with a one-year sentence imposed will be an aggravated felony as theft; that definition of theft does encompasses a temporary taking. *Corona-Sanchez, supra*.

4. Auto Burglary, P.C. § 460(b)

Not an aggravated felony. Auto burglary under §460(b) with a one-year sentence imposed is not an aggravated felony as 'burglary' or a "crime of violence." *Ye v. INS,* 214 F.3d 1128 (9th Cir. 2000). A plea generally to § 460 where the record of conviction does not identify whether it was to subsection (a) or (b) will have the same effect. To make sure that the offense is not held an aggravated felony as attempted theft, the record of conviction should be kept clear of evidence that it was done with intent to commit larceny, i.e. it should read "intent to commit any felony" or "larceny *or* any felony,"

where the felony is not identified. Of course no burglary, of a car or a dwelling, is an aggravated felony if a sentence of 364 days or less is imposed. See Note "Sentence."

Other consequences. Auto burglary is a crime involving moral turpitude to the extent of the underlying intent. Entry with intent to commit larceny involves moral turpitude, while entry with intent to a felony that is not turpitudinous, or to commit "any felony" where the felony is not identified on the record of conviction, does not.

5. A plea agreement that specifies less than a $10,000 loss to the victim – plus other measures

A fraud or tax fraud offense in which the loss to the victim/government is more than $10,000 is an aggravated felony under 8 USC § 1101(a)(43)(M). A *federal* conviction is not an aggravated felony as long as a plea agreement specifically provides that the loss to the victim was less than $10,000, even if restitution of more than $10,000 is ordered based on dropped pleas. *Chang v INS*, 307 F.3d 1185 (9th Cir. 2002). The Ninth Circuit, however, found that under California law restitution equals the amount of loss to the victim. *Ferreira v Ashcroft, 390 F.3d 1091, 1099-1100 (9th Cir. 2004).* Therefore counsel should obtain the *Chang* statement in the plea agreement, but may have to take additional measures. See further discussion in Note "Burglary, Theft and Fraud."

6. Aiding and Abetting. Aiding and abetting is suggested as an alternate plea for almost any offense. See Part A, supra. The Ninth Circuit has found specifically that aiding and abetting a theft is not an aggravated felony as grand theft or vehicle theft. *See Penuliar v Ashcroft, Martinez-Perez v Gonzales, supra.*

F. Safer pleas for offenses related to drugs

See further discussion in Note "Drug Offenses"

1. Accessory after the fact to a drug offense is not a deportable drug conviction or aggravated felony. See Part A above.

2. Offering to sell is not an aggravated felony (and arguably not a deportable offense) while sale is. Therefore sections such as H&S §§ 11352(a), 11360(a) and 11377(a) are divisible statutes between sale, distribution and transport and offering to do those acts. *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc). Transportation for personal use also should not be held an aggravated felony, making these offenses further divisible. The best resolution would be to plead to the entire section in the disjunctive.

3. Avoid possession for sale, which is an aggravated felony. If needed, plead up to offering to sell as described above.

4. A *first conviction* for simple possession (felony or misdemeanor); for a lesser offense such as possession of paraphernalia or under the influence; or for giving away a small amount of marijuana for free is eliminated for immigration purposes by "rehabilitative

relief" such as under Prop 36, DEJ or P.C. § 1203.4. *Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000), *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

5. Under current law, simple possession of a drug, whether felony or misdemeanor, single or multiple counts, is not an aggravated felony. *Oliveira-Ferreira v Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) The exception is possession of flunitrazepan or more than five grams of crack cocaine. However, it is best to obtain misdemeanor simple possession whenever possible.

6. If the controlled substance in the case is not identified either in the record of conviction or under the terms of the statute then the government is deemed unable to prove that the offense involved a federally defined controlled substance and there are no drug immigration consequences. *Matter of Paulus*, 11 I&N 274 (BIA 1965).

7. Be aware of conduct-based immigration consequences. See Note "Drug Offenses" for a discussion of the grounds of deportability and inadmissibility that may apply even absent a drug conviction. If there is evidence that the defendant is or has been a drug addict or abuser, or has ever been or aided a drug trafficker, immigration penalties may attach even if there is no conviction or one that is not an aggravated felony. Admission of addiction at a CRC disposition or in "drug court," or conviction of "offering to sell," may bring designation as an addict, abuser or trafficker.

G. Sentence of 364 Days or Less

Many offenses become aggravated felonies only if a sentence of a year or more is imposed. These include crime of violence, theft, receipt of stolen property, burglary, bribery of a witness, commercial bribery, counterfeiting, forgery, trafficking in vehicles that have had their VIN numbers altered, obstruction of justice, perjury, subornation of perjury, and with some exceptions false immigration documents. See 8 USC § 1101(a)(43). Often defense counsel has more leeway in avoiding a one-year sentence for a particular count than in pleading to an alternate offenses. For creative suggestions about how to arrive at less than a one-year sentence even in somewhat serious cases, see Note "Sentence."

Many other offenses are aggravated felonies regardless of sentence imposed, for example, sexual abuse of a minor, rape, and firearms and drug offenses. Fraud and money laundering offenses depend on whether $10,000 was lost or involved, not on sentence. Avoiding a one-year sentence in these cases will not prevent an aggravated felony. See Note "Aggravated Felonies."

H. Attempt, P.C. § 21a

Attempt takes on the character of the principal offense for immigration purposes so that, e.g., attempt to commit a drug offense has the same adverse immigration consequences as the drug offense. But attempt does offer a particular benefit in avoiding the deportability

ground for conviction of one crime involving moral turpitude, because for most offenses attempt carries half the potential sentence of the principal offense, under P.C. § 644(b).

A noncitizen is deportable if convicted of a single crime involving moral turpitude, committed within five years of last admission, if the offense *carries a potential sentence of one year or more*. A noncitizen who is convicted of a wobbler that involves moral turpitude and who has the conviction reduced to a misdemeanor under P.C. § 17 remains deportable, because the misdemeanor carries a potential sentence of one year. But if the reduced offense was attempt, the misdemeanor conviction has a potential sentence of only six months, and a single offense cannot cause deportation under the moral turpitude ground. See 8 USC § 1227(a)(2)(A)(i), (ii) and Note "Crimes Involving Moral Turpitude."

I. Is your client a U.S. citizen without knowing it?

A United States citizen faces no immigration consequences for any conviction. A citizen cannot be prosecuted for any offense for which alienage is an element (such as illegal re-entry).

All persons born in the United States and Puerto Rico are U.S. citizens. Many people who were born in other countries also are U.S. citizens and may not know it. Many people born abroad inherited U.S. citizenship at birth from a parent without being aware of it. Others who were permanent residents here as children may have automatically become citizens when a parent naturalized. To begin the inquiry, ask the defendant the following two threshold questions.

- When you were born did you have a parent or a grandparent who was a U.S. citizen? and
- At any time before your 18th birthday did the following take place (in any order): you were a permanent resident, and one or both parents naturalized to U.S. citizenship?

If the answer to either threshold question might be yes, additional information needs to be collected, after which the case may be analyzed according to a citizenship chart. For assistance contact an immigration attorney or resource center; local non-profit immigration organizations also have expertise in this area, and if your local U.S. Passport office is not overburdened it might offer assistance. Note that if the client is a U.S. citizen, generally it is faster and better to apply for an American passport at a U.S. passport agency as proof of citizenship than to ask the INS for a citizenship certificate. However, the defendant can assert citizenship as a defense in removal proceedings and have the immigration judge decide the case (unfortunately often while the person remains detained by immigration authorities).

Note: Client Immigration Questionnaire

For all non-citizen defendants

Purpose: To obtain the facts necessary for an immigration expert to determine current immigration status, possible immigration relief, and immigration consequences of a conviction and. For more information on immigration relief see referenced sections of *Calif. Criminal Law and Immigration* ("CCLI").

Documents: Photocopy any immigration documents/passport.

Criminal History: Rap sheets and possible current plea-bargain offenses needed before calling.

Note: While completing this questionnaire, on a separate sheet of paper create one chronology showing dates of criminal acts and convictions as well as the immigration events discussed in the questionnaire.

_____ _____
Client's Name Date of Interview
Immigration Hold: YES NO

_____ ( )_____ _____
Client's Immigration Lawyer Telephone Number Def's DOBirth

1. Entry: Date first entered U.S.? _____ Visa Type:_____

Significant departures: Date:_____ Length: _____ Purpose: _____

Date last entered U.S.? _____ Visa Type: _____
Relief: Undocumented persons here for 10 yrs with citizen or LPR family might be eligible for non-LPR cancellation. See CCLI § 11.3.

2. Immigration Status: Lawful permanent resident? YES NO

If so, date client obtained green card? _____
Relief: Consider cancellation of removal for long-time residents; See CCLI § 11.10.

Other special immigration status: (refugee), (asylee), (temp. resident), (work permit), (TPS), (Family Unity), (ABC), (undocumented),

(visa - type:_____) Date obtained? _____
Did anyone ever file a visa petition for you? YES NO

Name and #:_____ Date? _____.

Type of visa petition? _____ Was it granted? YES NO

3. Prior Deportations: Ever been deported or gone before an immigration judge? YES

NO Date? _____

Reason? _____

Do you have an immigration court date pending? YES NO

Date? _____

Reason?_____

4. Prior Immigration Relief: Ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?

YES NO Which:_____ Date: _____

5. Relatives with Status: Do you have a U.S. citizen (parent), (spouse),

(child -- DOB(s) _____), (brother) or (sister)?
Do you have a lawful permanent resident (spouse) or (parent)?
_____
Relief: Consider family immigration, see CCLI § 11.13.

6. Employment: Would your employer help you immigrate (only a potential benefit to professionals)? YES NO

Occupation:_____ Employer's name/number:_____

7. Possible Unknown U.S. Citizenship: Were your or your spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES NO Were you a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship? YES NO

8. Have you been abused by your spouse or parents? YES NO
Relief: Consider VAWA application, see CCLI § 11.19.

9. In what country were you born? _____ Would you have any fear about returning? YES NO Why?
_____
Relief: Consider asylum/withholding, or if recent civil war or natural disaster, see if entire country has been designated for "TPS." See CCLI §§ 11.4-5, 7.

10. Are you a victim of serious crime or alien trafficking and helpful in investigation or prosecution of the offense? YES NO
Relief: Consider "T" or "U" visa; see CCLI §§ 11.28-29.

Note: Other Resources
Books, Websites, Services

Books

Immigrant Legal Resource Center. The ILRC publishes *California Criminal Law and Immigration,* by Katherine Brady, author of this chart and notes and an immigration attorney for the last twenty years. A comprehensive and in-depth analysis of California criminal laws and immigration, it discusses eligibility for immigration relief, categories of immigration penalties, and plea strategies. The 2004 edition is available in May 2004. To order go to publications at www.ilrc.org or contact the Immigrant Legal Resource Center, 1663 Mission St., Suite 602, San Francisco CA 94103, tel. 415/255-9499, fax 415/255-9792.

The Immigrant Legal Resource Center publishes several other books and materials on immigration law, all written to include audiences of non-immigration attorneys. See list of publications at www.ilrc.org or contact ILRC to ask for a brochure.

Law Offices of Norton Tooby. A criminal practitioner of thirty years experience who has become an expert in immigration law as well, Norton Tooby has written several books that are national in scope. *Criminal Defense of Non-Citizens* includes an in-depth analysis of immigration consequences and moves chronologically through a criminal case. *Safe Havens, Aggravated Felonies* and *Crimes Involving Moral Turpitude* provide general discussion of these areas, and also discuss and digest in chart form all federal and administrative immigration opinions relating to these categories. Other books include studies of means of obtaining post-conviction relief under California law, and nationally. Go to www.criminalandimimgrationlaw.com or call 510/601-1300, fax 510/601-7976.

National Immigration Project, National Lawyers Guild. The National Immigration Project publishes the comprehensive and encyclopedic national book, Kesselbrenner and Rosenberg, *Immigration Law and Crimes*. Contact West Group at 1-800-328-4880.

Websites

Board of Immigration Appeals (BIA) decisions can be accessed from a good government website. Go to www.usdoj.gov/eoir. Click on "virtual law library" and look for "BIA/AG administrative decisions."

The website of the law offices of Norton Tooby offers a very valuable collection of archived articles and a free newsletter. Other services, including constant updating of Mr. Tooby's books, are offered for a small fee. Go to www.criminalandimmigrationlaw.com.

The website of the Immigrant Legal Resource Center offers material on a range of immigration issues, including a free downloadable manual on immigration law affecting

children in delinquency, dependency and family court, and information about immigration applications for persons abused by U.S. citizen parent or spouse under the Violence Against Women Act (VAWA). Go to www.ilrc.org

The National Immigration Project of the National Lawyers Guild offers practice guides and updates on various issues that can affect criminal defendants. The National Immigration Project provides information and a brief bank on immigration and criminal issues, on VAWA applications for persons abused by citizen or permanent resident spouse or parent, and applications under the former § 212(c) relief. The Project also will post a chart of immigration consequences of federal offenses. Go to www.nationalimmigrationproject.org.

The New York State Defenders Association has excellent practice guides as well as a chart of immigration consequences of New York offenses. Go to www.nysda.org.

The national Defending Immigrants Project, located at the National Legal Aid and Defender Association, posts information about criminal defense of immigrants. Among other resources the NLADA website provides links to charts similar to this one, showing immigration consequences of offenses under New York, New Jersey, Florida, Texas and Illinois law. Go to www.nlada.org

Seminars

The ILRC and the Law Offices of Norton Tooby jointly present full-day seminars on the immigration consequences of California convictions, and are beginning a tele-seminar program. Go to www.criminalandimmigrationlaw.com and click on seminars. The ILRC presents seminars on a variety of immigration issues. Go to www.ilrc.org and click on seminars.

Consultation

The Immigration Clinic at U.C. Davis law school offers free consultation on immigration consequences of crimes to defenders in the greater Sacramento area.

The Immigrant Legal Resource Center provides consultation for a fee on individual questions about immigration law through its regular attorney of the day services. Questions are answered within 48 hours or sooner as needed. The ILRC has contracts with several private and Public Defender offices. For information go to "contract services" at www.ilrc.org or call 415.255.9499.

Staff of the Los Angeles Public Defender office can consult with Graciela Martinez of the appellate division by contacting her at gamartin@co.la.ca.us.

The National Immigration Project of the National Lawyers Guild (Boston) offers consultation. Contact Dan Kesselbrenner at dan@nationalimmigrationproject.org. The Project is a membership organization but also will consult with non-members.