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

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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. 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.

This Chart and Notes are excerpted from Chapter 13 of *Defending Immigrants in the Ninth Circuit: Impact of Criminal Convictions under California and Other States Laws* (www.ilrc.org, 2008). For a more detailed analysis of defense arguments, see cited sections of *Defending Immigrants* and other works in Note: "Resources." See additional on-line resources at www.ilrc.org/criminal.php (Immigrant Legal Resource Center), at www.criminalandimmigrationlaw.com (Law Offices of Norton Tooby), and other sites noted at Resources.

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.

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, *Defending Immigrants in the Ninth Circuit* (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.

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Business & Professions §4324	Forgery of prescription, possession of any drugs	May be AF if it ID's specific CS on ROC. Also, 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 ROC of conviction identifies the CS.	To avoid CS and AF conviction, avoid ID'ing specific CS in ROC. 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 and bar to "good moral character."	
Health & Safety Code § 11173(a)	Prescription for controlled substance (CS) by fraud	May be drug trafficking AF, if ROC ID's specific CS. Might be held forgery AF, if 1-yr sentence imposed and ROC shows forgery. If $10k loss to victim/s (insurance?), is AF as fraud or deceit crime.	May be divisible, e.g. 11173(b) not CMT	Deportable, inadmissible for CS conviction if ROC ID's specific CS.	To avoid CS AF and deportability under CS ground, plead to straight forgery, false personation, etc. or other non-CS alternative; see Note: Safer Pleas. To avoid CS AF, plead to straight possession. Avoid CS consequences by failing to specify on record; see H&S 11350 Advice. To avoid forgery AF, avoid one-year sentence imposed.

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H&S §11350(a), (b)	Possession of controlled substance	Poss with no prior drug convictions is not AF unless the CS is flunitrazepam or more than 5 grams of cocaine base. Lopez v. Gonzales (S.Ct. 2006). See advice column re poss with a drug prior as AF, and for the effect of DEJ, 1203.4 etc. on a FIRST simple poss. Also, if the specific CS is not ID'd on ROC, this shd prevent AF because there is no proof that it is one from the federal CS list. See Ruiz-Vidal, 473 F3d 1072 (9th 2007) (re H&S 11377).	No.	Deportable, inadmissible for CS conviction. Wherever possible, do not let ROC identify a specific CS, this shd protect under Ruiz-Vidal, see AF column. See advice column re effect of DEJ, 1203.4, etc. on a FIRST simple poss.	1. Re post-con relief: First poss, with no drug priors and no prior pre-plea diversion, is eliminated by withdrawal of plea under, e.g., DEJ, 1203.4, Prop 13; see Lujan-Armendariz (9th 2002). 2.Re poss with drug prior as an AF: Bd of Imm Appeals (Matter of Carachuri 2007) says it is not an AF unless the prior was pleaded and proved. However, there is small possibility that 9th Cir. or Supreme Ct. might drop the requirement of the prior being pleaded or proved. Thus do not let prior be pleaded or proved, and where possible avoid poss conviction with drug prior. Seek alternate plea: down to 11365, 11550, etc; plead to P.C. § 32. 3. Re drug not ID'd in ROC: Ruiz-Vidal held that because 11377 has CS's not on fed CS list, conviction not a CS offense at all for imm purposes unless ROC proves a fed listed CS. It appears that 11350-52 also contains CS not on fed list, and shd be treated like 11377-79, but pleas to the latter are preferable b/c Ruiz-Vidal is on point. See Note: Drug Offenses
H&S §11351	Possession for sale	Yes AF as CS trafficking conviction if controlled substance ID'd on ROC. See 11350 Advice Column and Note: Drug Offenses	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction if CS ID'd on ROC of conviction. (Inadmissible even without conviction if police report gives DHS "reason to believe" involved in trafficking a CS). See 11350 Advice.	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. To avoid having a drug conviction do not create ROC that ID's specific controlled substance. See 11350 Advice, see also Notes "Record of Conviction," "Drug Offenses" and "Safer Pleas."

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H&S §11351.5	Possession for sale of cocaine base	Yes AF	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction	See advice on H&S 11351 and Note "Drug Offenses." Try to plead to 11351, 11378 with no CS ID'd on ROC
H&S §11352(a)	Sell/Transport or Offer to Sell/Transport controlled substances	Divisible: "Offering" to sell, distribute is not AF, while sell, distribute is AF. Transport for personal use is not AF. Also offense shd not be AF if specific CS is not ID'd on the ROC. See 11350 Advice column and Note: Drug Offenses	Yes CMT as CS trafficking offense (except transport for personal use)	Shd avoid imm consequences if specific CS is not ID'd on ROC; see 11350 and Note: Drug Offenses. Otherwise, conviction makes the person deportable, inadmissible for CS conviction, except that imm atty can argue that "offering" is not a deportable CS offense	See discussion in Note "Drug Offense." Offering to commit any drug offense, including sale, is not an AF. Imm atty can argue that offering is not a deportable CS offense, but no guarantee. 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. In addition, imm consequences shd be avoided if ROC does not ID a specific CS. See discussion at 11350 Advice.
H&S §11357	Marijuana, possession	See H&S 11350	Not CMT	Deportable, inadmissible for CS conviction, except see discussion first poss. 30 gms or less mj or hash, next box	See H&S 11377 as alternate plea (if can obtain ROC where no CS is specified). Or, single simple poss of less than 30 gms mj or hash is not a deportable CS conviction, and may be eligible for inadmissibility waiver under INA 212(h)
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. Give away small amt mj for free is not AF; let ROC show small amount.	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." First offense giving away "small amount" mj arguably is not AF and can be erased under Lujan. See 11360(b).

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H&S §11360(b)	Marijuana - give, transport, offer to, 28.5 gms or less	Transport, or offer to give or transport, is not AF. Giving away a CS usually is an AF; however giving away a small amount of mj arguably is not. First offense give or offer to give may qualify for Lujan benefit. See Note: Drug Offenses	No	Deportable and inadmissible for CS. First offense give or offer to give may qualify for Lujan benefit.	First conviction for poss or under influence of mj is better plea; see H&S 11357. But 11360(b) is better than 11360(a) in that it may qualify for Lujan, so that withdrawal of plea wd eliminate conviction for giving or offering to give small amount of mj for imm purposes. See Note "Drug Offenses"
H&S §11364	Possession of drug paraphernalia	Not AF.	Not CMT	Assume deportable, inadmissible for CS conviction (but imm atty has argument, but no guarantee, that this is not so where specific CS not ID'd on the ROC)	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, if specific CS is ID'd on the ROC	See advice on H&S 11364 and 11350, and Notes "Drug Offenses" and "Safer Pleas"
H&S 11366.5	Maintain place where drugs are sold	May be AF, avoid. Avoid specifying CS on ROC.	Might be CMT	Deportable, inadmissible for CS conviction if substance is identified on the ROC	See Note: Drug Offenses
H&S §11368	Forged prescription to obtain narcotic drug	Assume it is CS AF. Also, any forgery offense with 1-yr sentence is AF.	May be divisible as CMT; fraud intent not element of forged prescription	Deportable and inadmissible for CS conviction	See advice for H&S 11173. Avoid 1-yr sentence for forgery; see Note "Sentence."
H&S §11377	Possession of controlled substance	See Advice Column here and H&S 11350.	Not CMT	Deportable, inadmissible for CS conviction. If specific drug is not ID'd on the ROC, the conviction is not a deportable or inadmissible drug conviction under Ruiz-Vidal, 473 F.3d 1072 (9th 2007).	See advice in H&S 11350 re when poss is an AF and when withdrawal of plea eliminates poss conviction. If specific CS is not ID'd on ROC, no proof that CS was one on federal list, and conviction is not a drug trafficking AF and is not a deportable or inadmissible conviction. Ruiz-Vidal.

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H&S §11378	Possession for sale CS	Yes, unless specific drug not ID'd on ROC. See Ruiz-Vidal and 11377, supra.	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction, unless specific drug not ID'd on ROC; see 11377 and Ruiz-Vidal, supra	See advice on H&S 11351 and Note "Drug Offenses." Avoid consequences by not identifying specific CS on the ROC.
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. Not a drug AF if specific drug not ID'd drug on ROC, see Advice.	Yes CMT as CS trafficking offense (except transport for personal use)	See H&S 11352. This is not a CS conviction if specific drug is not ID'd on ROC, see Ruiz Vidal supra	Sale is divisible statute, see advice in H&S 11352 and Note "Drug Offenses." Avoid consequences by not identifying specific CS on the ROC; see 11350 Advice.
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. Avoid 1 yr or 'with gun.'	Not CMT	Deportable, inadmissible for CS conviction, if the particular substance is ID'd on the ROC. 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 §31	Aid and abet	AF if underlying offense is. S.Ct. eliminated prior good aid/abet exception in 2007.	Yes if underlying offense is	Yes if underlying offense is	No immigration benefit. However see accessory after the fact PC 32.
Penal §32	Accessory after the fact	Only if 1 yr sentence imposed. If so, leave ROC open to offense involving assistance to avoid apprehension, so imm counsel can argue not AF depiste 1 yr sentence	Not in imm prcdgs held within the Ninth Circuit; see Navarro-Lopez (2007).	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.	

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Penal §118	Perjury	Yes AF if a sentence of 1-yr or more is imposed.	Yes CMT	No.	
Penal §136.1(b)(1)	Persuade a witness not to file complaint	Because DHS might charge as the AF obstruction of justice (altho imm counsel have strong argument against this), try to avoid 1 yr sentence. Let ROC reflect no violence or threat of violence, in order to avoid a COV, also an AF w/ 1 yr sentence.	Not CMT	Let ROC reflect no violence or threat of violence to avoid COV 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 substitute for more serious charges. Good for non-recidivist client, e.g. stat rape charge where def doesn't show other tendency to crime. See Note "Safer Pleas." See also PC 236, not a strike.
Penal §140	Threat against witness	Assume AF if 1-yr sentence imposed; obstruction of justice and COV potential	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."
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. Exception is DV ground does not include conspiracy.	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	A 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	A 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).

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Penal §192(b)	Manslaughter, involuntary	Not a COV if ROC shows no more than reckless intent; still, avoid 1 yr where possible. See Advice.	Not CMT	A COV is domestic violence offense if committed against DV type victim; this is not a COV unless ROC shows more than recklessness	Not a crime of violence under Fernandez-Ruiz (9th Cir. 2006)(en banc) if reckless intent. However, because legislation might change this, where possible obtain sentence of less than a year.
Penal §203	Mayhem	Yes AF only if 1-yr or more sentence imposed	Yes CMT	A 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	A 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	A 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.
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	A 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)	May be divisible: a COV if it involves violence or menace, but should not be so held if involves fraud or deceit. Because a COV w/ 1 yr imposed is an AF, to be safe try to avoid a sentence of a year or more.	Yes CMT	A COV (e.g., with violence or menace) is domestic violence offense if committed against DV type victim	Should not be held COV if ROC of conviction does not identify violence/menace. But because no case on point, avoid AF by avoiding 1-yr sentence for any one count. To avoid CMT, see misdemeanor false imprisonment

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Penal §236, 237	False imprison (misdo)	Not an AF as COV, since is a misdo with no element of use of force.	Not a categorical CMT, but keep record free of fraud, force	No.	Appears to be good substitute plea to avoid crime of violence in DV cases. See discussion in Note: "Safer Pleas."
Penal 240(a)	Assault	Not an AF because no 1-year sentence	Not a categorical CMT, but keep record free of particular violence	Assault is attempted battery, despite language of statute, and so shd not be COV. However, battery is safer plea because there is good immigration case law on it, and "violent injury" language is suspicious.	Keep ROC free of info of attempted use of violent force as opposed to any touching. If a choice, plead to attempted battery or battery, with an ROC that does not show more than offensive touching. See 243(a), (e)
Penal §243(a)	Battery, Simple	Not AF because no 1-year sentence. Also not COV unless ROC shows more than mere offensive touching.	Not categorical CMT, but keep record clear of violent force	A COV is domestic violence offense if committed against DV type victim, but simple battery is not COV absent info in ROC showing more than offensive touching.	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
Penal §243(b), (c)	Battery on a peace officer, fireman etc.	(b) should not be held COV absent info in the ROC showing more than offensive touching. But to be safe, obtain sentence less than 1 yr. (c) might be held a COV; obtain less than 1 yr	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 COV. Reduce (c) to a misdo to help avoid COV.
Penal §243(d)	Battery with serious bodily injury	Yes AF as COV if 1-yr or more sentence imposed, altho imm atty have argument against this	Probably not CMT; good substitute for avoiding CMT.	A 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)(1), potentially 243(a) to avoid COV.

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Penal §243(e)(1)	Battery against spouse, former date, etc.	COV only if ROC shows more than offensive touching, but to be safe obtain 364.	Not CMT if ROC does not prove more than offensive touching	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 avoid COV and therefore AF and DV, keep ROC clear of info that battery was beyond mere touching. In that case, can accept DV counseling requirement, stay-away order, etc. without becoming deportable under DV ground. See Note Domestic Violence, advice for PC 243(a).
Penal §243.4	Sexual battery	Felony is AF as COV only if 1-yr or more sentence imposed. Misdo is not a COV unless ROC shows restraint by force, but get 364 on misdo to be safe. Don't let ROC show victim was minor.	Yes CMT	A COV is domestic violence offense if committed against DV type victim. Here felony is COV; misdo only if ROC shows restraint by force	Misdo is not a COV if ROC does not show restraint was by force. Thus not a DV offense even if domestic victim named, and not an agg fel (but get 364 on misdo in any case). See PC 243(d) to avoid CMT. See PC 136.1(b)(1), 236, 243(e) 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 if 1-yr or more sentence imposed.	Yes CMT	A COV is domestic violence offense if committed against DV type victim. Section 245(a)(2) and others involving firearms bring deportability under firearms ground.	To avoid firearms grnd, keep ROC 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	A 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); misdo 243.4 is not COV and therefore not AF even with 1 yr sentence; see Note "Safer Pleas".

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Penal §261.5	Consensual sex with a minor (statutory rape)	Currently even misd. 261.5(c) with no jail imposed is "sexual abuse of a minor" AF. 9th Cir. will consider en banc this holding in Estrada-Espinoza. Avoid this plea pending the en banc decision.	261.5(d) is not necessarily a CMT. Quintero-Salazar, 506 F.3d 688, 9th Cir 2007. Keep onerous facts from ROC	Conceivably it would be charged under DV deport ground as child abuse.	Avoid this plea pending en banc review of Estrada-Espinoza, 498 F.3d 933 (9th 2007), which held it is an AF as sexual abuse of a minor. See PC 243(a), 243(d), 243.4, 236, 136.1(b)(1) and Note "Sex Offenses." Leave ROC vague on age if V is under 16. While this is an AF, the fact that it is not a CMT leaves open some imm options. See Note: Sex Offenses.
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.	Until courts define deportable "crime of child abuse, neglect," it is hard to predict if this offense causes deportability under that ground; assume that it does for now
Penal §272	Contributing to the delinquency of a minor	Not AF, except possibly as sexual abuse of a minor if ROC of conviction shows lewd act.	Divisible: may be CMT if ROC of conviction shows lewdness	With lewdness, possibly deportable under DV ground for child abuse.	Keep ROC of conviction clear o 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 still informative).	Even minor offenses probably deportable under DV ground as child abuse or neglect.	To avoid agg felony, avoid 1-yr sentence, and/or keep ROC clear of info establishing use of force. To avoid CMT keep ROC 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

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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 if 1-yr or more sentence 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 243(e), 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	
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 §290	Failure to register as a sex offender	Not AF	Not CMT in imm cases arising in the 9th Cir., under Plasencia-Ayala, 516 F.3d 738 (9th Cir. 2008); BIA disagrees.	Deportable for federal conviction for failure to register under state law, if convicted under 18 USC 2250	Avoid the plea if possible. New deport ground at 8 USC §1227(a)(2)(A)(v) based on conviction under 18 USC §2250 for failure to reg under state law. See Chapter 6, § 6.22 discussion.
Penal §314(1)	Indecent exposure	Not AF, except keep any reference to minor out of ROC to avoid possible charge of sexual abuse of a minor.	Probably CMT	No, except keep any reference to minor out of ROC to avoid possible charge of child abuse	See disturb peace, trespass, loiter.
Penal §403	Disturbance of public assembly	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.	

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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 ROC shows 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, 452	Arson, Burning	Divisible: AF as COV if 1-yr or more sentence imposed, unless ROC leaves open possibility that only burned own property.	Yes CMT	Gov't might charge as DV, if ROC shows person hurt; avoid issue by avoiding ROC showing DV victim	Avoid AF by avoiding 1-yr sentence; see Note "Sentence." See vandalism. May avoid COV if ROC leaves open possibility that only own property intended and affected. See Jordison, 501 F.3d 1134 (9th Cir. 2007)(452(c) not COV). If own property burned for insurance fraud, don't show $10,000 loss to insurance co. See Note: Fraud.
Penal §459, 460	Burglary	Burglary of a structure is AF with 1-yr sentence imposed. Burglary of a car or other non-structure (PC 460(b)) is not "burglary," but could be charged as attempted theft AF if ROC shows "intent to commit larceny" and there is 1-yr sentence imposed. See advice.	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, might possibly be charged as DV offense.	Keep ROC 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. To avoid AF, avoid 1-yr sentence imposed. If that is not possible, plead to auto burglary with ROC showing 'intent to commit [non-AF, non-CMT offense]", or else "intent to commit any felony" or intent to commit larceny OR any felony."
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 ROC clear between intent and non-intent sections.

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Penal §470	Forgery	Yes AF if 1-yr sentence imposed. If this also constitutes fraud, may be AF if $10,000 loss to victim	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 of 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 if offense was forgery, AF if 1-yr sentence imposed.	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 forgery.
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. If ROC ID's fraud or deceit offense, avoid ROC showing loss to victim of $10,000 to avoid AF.	Yes CMT.	No	See Notes "Theft, Fraud" and "CMT." To avoid "theft" AF, avoid 1-yr sent; see Note "Sentence." If 1-yr, ID theft of services in ROC or leave vague between property and services, in order to avoid AF as theft. If a minor offense try for 602.5 or for infraction 490.1 (infraction is not a conviction). If fraud involved, avoid $10,000 loss to victim in ROC and/or designate theft as opposed to fraud in ROC. 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. Petty with a prior has had important advantages but at this time is not secure; see PC 666.
Penal §490.1	Petty theft (infraction)	Not AF.	Yes CMT, but ought to be held not a conviction.	No.	This should be held not to be a "conviction" at all for imm purposes, because infractions lack normal const'l safeguards in crim prosecutions. See Note: Def of Conviction. But since no case on point, use this as a better plea than theft, but avoid if necessary to not have CMT.

CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE
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	Not categorical forgery, counterfeit, so can take 1 yr sentence. Possibly will not be an AF as a fraud/deceit offense with a loss to victim/s of $10,000, but PC 484 is much better.	Appears not to be CMT.	No	Shd avoid CMT with a clear ROC. Possible alternate plea for forgery, counterfeit. For $10k fraud and deceit, however better plea is PC 484 b/c 529 may meet broad deceit definition. See Note: Safer Pleas and P. v. Rathert (2000) 24 Cal.4th 200.
Penal §550(a)	Insurance fraud	Yes AF if offense involves fraud where victim lost $10,000 or more; or AF if forgery and 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. If forgery involved, avoid 1-yr sentence to avoid possible charge of AF as forgery.
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 not be held COV and therefore not have consequences. See e.g. Rodriguez-Herrera, 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 a deportable DV offense if committed against DV type victim. Imm. counsel will argue must be force agnst person not property.	Keep ROC of conviction clear to avoid possible CMT. See PC 602.5.
Penal §602.5	Trespass (unauthorized entry)	Not AF.	Not CMT.	No.	

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Penal §646.9	Stalking	Divisible because harassing from a long distance not necessarily COV; also, reckless action not COV. See Malta, Advice Column. Keep ROC from eliminating these possibilities; try to avoid 1 yr sentence in any event.	May be divisible	Deportable under the DV ground as "stalking" even tho not a COV. 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, by permitting inferences discussed in AF column; see Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th 2007). For alternate plea to avoid CMT and DV deportation ground for stalking, see PC 243(e), 243(a), 236, 136.1(b)(1), 241(a) with no info regarding violence. See Notes "Safer Pleas."
Penal §647(a)	Disorderly: lewd or dissolute conduct in public	Not AF, but don't let ROC show involvement with minor because of danger gov't would charge as sexual abuse of a minor.	Held CMT, altho imm counsel will argue against. See Advice. Avoid ROC showing homosexual actions.	No, unless possibly if a minor is involved and it is construed as child abuse.	Keep ROC of conviction clear o info that person under 18 was participant or observor. See "Note Record of Conviction." See 647(c), (e), (h). For CMT, older decisions based on anti-gay bias shd be discredited. However, Nunez-Garcia, 262 F. Supp. 2d 1073 (CD Cal 2003) affirmed these cases wout comment, so may be held CMT
Penal §647(b)	Disorderly: Prostitution	Not AF.	Yes CMT for a prostitute. DHS might also charge customer as CMT.	Prostitute is inadmissible for "engaging in" prostitution, but only if intercourse, not mere lewd act, involved. Customer not at risk here	See 647(c), (e) and (h)
Penal §647(c), (e), (h)	Disorderly: Begging, loitering	Not AF.	Not CMT.	No.	
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 ROC 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.	

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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).	Divisible; keep ROC as vague as possible, do not plead to sexually explicit behavior. Nicanor-Romero (9th Cir 4/24/08)	Some actions might cause deportability under DV for child abuse? Prevent by keeping record clear.	To avoid consequences keep ROC of conviction clear of details, or have it ID less serious, less explicit conduct. Or plead to offense that doesn't combine age and sex like 243(a) with minimal touching.
Penal §666	Petty theft with a prior	Sentence of 1-yr or more pursuant to recidivist enhancement makes this AF, under recent Supreme Court ruling.	Yes CMT.	No.	9th Cir had held not an AF because it will not count recidivist engancement, but S.Ct. overruled. U.S. v Rodriquez, 128 S. Ct. 1783 (2008). Therefore seek other way to keep sentence under 1 year, or another plea, or keep record vague re theft of services. See PC 484 and Note on Burglary and Theft; Note on
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	Possession, 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 tha grnd. Others (e.g. brass knuckes(a)(1), dagger (a)(4)) don't.	With careful ROC, this is an alternate plea to avoid firearms offense. Keep ROC 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	Probably 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 ROC of conviction vague as to knowing concealment of material fact

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Vehicle 14601.1 14601.2	Driving on suspended license with knowledge	Not AF	Not CMT	No	
Vehicle §2800.1	Flight from peace officer	Not AF	Probably not CMT	No.	
Vehicle §2800.2	Flight from peace officer with wanton disregard for safety	May be divisible for COV. Intent by 3 prior violations is not categorical COV. 9th Cir has held other wanton intent is COV, but this is open to challenge. Sentence under 1 yr prevents AF.	May be divisible: wanton disregard only by prior traffic violations not CMT, other wanton disregard may be CMT.	No.	Avoid AF by reducing to a misdemeanor OR obtaining sentence less than a year OR plea to 2800.1 OR have ROC prove or leave open the possibility that intent based on 3 prior traffic violations (Penuliar, 9th Cir 4/22/08).
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.	Avoid 1 yr sentence. Otherwise, plead to PC 10852?
Vehicle §10851	Vehicle taking, temporary or permanent	Divisible as AF if one-year sentence is imposed, because offense includes accessory after the fact which is not AF. US v Vidal (9th Cir en banc 2007).	Yes CMT if permanent intent, no if temporary intent or if accessory after the fact.	No.	To be sure to avoid agg felony, avoid 1-yr sentence. This may go to Supreme Court again on Agg Fel question. To avoid CMT, keep ROC of conviction vague re permanent or temporary intent.
Vehicle §10852	Tampering with a vehicle	Not AF.	Appears not CMT.	No.	To avoid possible AF, don't let ROC show that tampering involved altering VIN.
Vehicle §12500	Driving without license	Not AF.	Not CMT.	No.	
Vehicle §§20001, 20003	Hit and run (felony)	Not AF	Divisible, see Advice	No.	9th Cir found divisible for CMT b/c can be violated be, e.g., by providing ID info but not registration info. Cerezo, 512 F.3d 1163. Keep ROC clear of bad facts to prevent CMT.
Vehicle §20002(a)	Hit and run (misd)	Not AF.	Not CMT	No.	

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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 and make 3rd DUI a COV. 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 gov't might charge 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 charge of AF as theft; see Note "Sentence."

Notes Accompanying Quick Reference Chart for Determining Immigration Consequences of California Offenses

§ N.1 Definition of Conviction and How to Avoid A Conviction for Immigration Purposes

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 2, §§ 2.1-2.5, www.ilrc.org/criminal.php)

Big Picture: Most, although not all, immigration consequences require a conviction. If counsel can obtain a disposition that is not a conviction, the immigration case might be saved. This Note discusses what a conviction is under immigration law and how to avoid a conviction.

However, counsel also must be aware of the immigration penalties based on mere conduct, even absent a conviction. Engaging in prostitution, making a false claim to citizenship, using false documents, smuggling aliens, being a drug addict or abuser, admitting certain drug or moral turpitude offenses, being found in civil or criminal court to be in violation of a domestic violence protective order, or, especially, if the government has "reason to believe" the person ever has been or helped a drug trafficker, all can be damaging. See relevant Notes; for a discussion of the controlled substance conduct grounds, see § N.7 Note: Controlled Substances.

A. Overview

In almost all cases, once a defendant in adult criminal court enters a plea of guilty, a conviction has occurred for immigration purposes. This is true even if under state law there is not a conviction for some purposes, for example under California DEJ. That is because the immigration statute contains its own standard for when a conviction has occurred, which it will apply to evaluate state dispositions regardless of how state law characterizes them.

Under the immigration statute[1] a conviction occurs:

[1] INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

- Where there is "a formal judgment of guilt of the alien entered by a court" or,

- "if adjudication of guilt has been withheld, where … a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or *nolo contendere*, or has admitted sufficient facts to warrant a finding of guilt, and … the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Thus a guilty plea plus imposition of probation, fee, jail or counseling requirement will equal a conviction for immigration purposes, even if the plea is later withdrawn upon successful completion of these requirements.[2] The one exception is for a first conviction of certain minor drug offenses, described in Part B, below.

An acquittal, a deferred prosecution, verdict, or sentence, and dismissal under a pre-plea diversion scheme are not convictions. In addition, juvenile delinquency dispositions, infractions, cases on direct appeal, and judgments vacated for cause are not convictions.

B. Rehabilitative Relief such as Deferred Entry of Judgment, Prop. 36, Expungements; First Minor Drug Offenses and Rehabilitative Relief

If there has been a plea or finding of guilt and the court has ordered any kind of penalty or restraint, immigration authorities will recognize the disposition as a conviction even if the state regards the conviction as eliminated by some kind of rehabilitative relief leading to withdrawal of judgment or charges.[3] See discussion in Part A. Thus, although California does not characterize a disposition under DEJ as a conviction for many purposes, it is a conviction in immigration proceedings.

The one exception is for a *first* conviction of certain drug offenses: simple possession, an offense less serious than simple possession that does not have a federal analogue (e.g., possession of paraphernalia or being under the influence), or arguably giving away a small amount of marijuana. In that case 'rehabilitative relief" such as withdrawal of plea under PC § 1000 deferred entry of judgment or Prop. 36, or expungement under PC § 1203.4, will eliminate the conviction entirely for immigration purposes. *Lujan-Armendariz v. INS.*[4] This benefit *will only be recognized in immigration proceedings held in Ninth Circuit states.* If the immigrant is arrested in, e.g., New York, the disposition will be treated as a conviction.

This applies only to eliminate a first controlled substance conviction. If there was a prior conviction, or even prior pre-plea diversion grant, the *Lujan-Armendariz* benefit is not available. See § N.7, Note: Controlled Substance Offenses, and Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit*.

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[2] *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

[3] *Id*.

[4] See discussion of *Lujan-Armendariz v. INS*, 222F.3d 728 (9th Cir. 2000) and other cases in Note: Controlled Substances.

Example: Maeve is convicted of misdemeanor grand theft. The conviction is expunged under Calif. PC § 1203.4. For immigration purposes, the conviction still exists.

Example: Yali receives a deferred entry of judgment for a first drug offense, possession of cocaine. In immigration proceedings arising within Ninth Circuit states the disposition is not a conviction, under *Lujan-Armendariz.*

Some years later she is convicted again for possession of cocaine and the conviction is expunged under PC § 1203.4. She has already used up her *Lujan-Armendariz* benefit, so this becomes her "first" conviction for a controlled substance offense. She is deportable and inadmissible based on the conviction.

C. Pre-Plea Dispositions

If through any formal or informal procedure the defendant avoids pleading guilty, or being found guilty by a judge, there is no conviction. A disposition under the pre-plea drug diversion under former PC § 1000 in effect in California before January 1, 1997 is not a conviction. Nor is a disposition in a drug court that does not require a plea. Note that a drug court disposition creates other immigration problems in that the person must admit to being an abuser, which itself is a ground of inadmissibility or deportability. In some cases it may be better for immigration purposes to go through Prop. 36.

The Ninth Circuit held that receipt of pre-plea diversion under the former Calif. PC § 1000 will count as the noncitizen's one-time *Lujan-Armendariz* benefit, so that a subsequent DEJ or expungement will not be given effect in immigration proceedings.[5]

D. Juvenile Delinquency Dispositions

Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose, regardless of the nature of the offense.[6] If the record of proceedings indicates that proceedings were in juvenile court, counsel can be assured that there is no conviction.

Because delinquency proceedings offer the tremendous advantage of not resulting in a conviction for immigration purposes, it is even more crucial for noncitizens than for other minors that their case be held in delinquency rather than adult proceedings. Counsel should do everything possible to ensure this. (Immigration counsel at least can argue, however, that an adult conviction for certain offenses that were committed while a minor should not have immigration effect, if the charge would not have been permitted to be brought in adult court in federal proceedings. See Chapter 2A, § 2A.3, *Defending Immigrants in the Ninth Circuit*.)

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[5] *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).
[6] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). The exceptions are that certain delinquency dispositions may form a bar to applying for Family Unity (see Chapter 11, § 11.24) or to petitioning for a relative (see Chapter 6, § 6.22).

Juvenile court proceedings still can create problems for juvenile immigrants under the so-called "conduct grounds." A juvenile delinquency disposition that establishes that the youth has engaged in prostitution, is or has been a drug addict or abuser, or has been or helped a drug trafficker, will cause immigration problems. See discussion of delinquency and the conduct grounds at Chapter 2A, § 2A.2. The particularly onerous inadmissibility ground based on the government having "reason to believe" the person was or helped a drug trafficker is discussed at Chapter 3, § 3.10, *Defending Immigrants in the Ninth Circuit*.

Undocumented youth in delinquency proceedings may be able to immigrate through special provisions, based on their having been subjects of parental abuse, neglect or abandonment, or being crime victims. Also, defenders should know that they can help a permanent resident youth automatically become a U.S. citizen, regardless of juvenile record. If one parent having custody of a permanent resident youth becomes a U.S. citizen before the youth's 18th birthday, the youth automatically becomes a citizen. See Chapter 2A, and see extensive materials about children and youth issues at www.ilrc.org/sijs.php.

E. Infractions

Under some state laws certain minor offenses—sometimes called infractions—are handled in non-conventional criminal proceedings that do not require the usual constitutional protections of a criminal trial, such as access to counsel, right to jury trial, etc. In *Matter of Eslamizar*[7] the BIA has held that this type of disposition will not be considered a conviction for immigration purposes. This applies to both foreign and national dispositions. It is likely that a conviction of a California infraction, in a proceeding that lacks the constitutional safeguards available in a misdemeanor prosecution, will be held not to be a conviction for immigration purposes, and thus is a good strategy for a noncitizen.

In *Eslamizar* the BIA held a conviction for immigration purposes is "a judgment in a proceeding which provides the constitutional safeguards normally attendant upon a criminal adjudication." It found that a finding of guilt under an Oregon statute did not qualify based on several factors. The Oregon "violation" is not considered a crime since it does not result in any legal disability or disadvantage under Oregon law; there is no right to jury or counsel; and the prosecution only has to prove guilt by a preponderance of the evidence instead of beyond a reasonable doubt. Therefore, Mr. Eslamizar's Oregon "conviction" for third degree theft as a violation was not considered a conviction of a second moral turpitude offense, and he was held not deportable.

It is likely, although not guaranteed, that conviction of an infraction under California law also will be held not to be a conviction for immigration purposes under *Eslamizar*. As in Oregon, infractions in California are not considered "crimes." The procedure in California for prosecuting an infraction confers no right to jury or defense counsel and it is not punishable by imprisonment.[8] One difference, however, is the burden of proof. Whereas Oregon only requires the prosecutor to prove a preponderance of the evidence, in California the prosecutor must prove

[7] *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).
[8] Calif. PC §19.6.

guilt beyond a reasonable doubt.[9] This difference ought not to be enough to distinguish a California infraction from an Oregon violation under *Eslamizar*.[10]

If a misdemeanor/infraction "wobbler" is prosecuted as a misdemeanor, with the attendant constitutional protections, and then reduced to an infraction, it is likely that the disposition will be found to be a conviction.

F. Appeal and Issues of Finality

It has been long held that a conviction currently on direct appeal of right does not have sufficient finality to constitute a "conviction" for any immigration purpose.[11] While some circuits have found that 1996 legislation subverted this rule, in the Ninth Circuit it is clear that a conviction on direct appeal of right will not be held to constitute a conviction for immigration purposes.

Counsel should file appeals, and late appeals, to criminal convictions where appropriate. In practice a date-stamped copy of the appeal may suffice to get a noncitizen who is being detained solely on the basis of the conviction. A "slow plea" should be held to constitute a direct appeal of right that results in the disposition not being a conviction. See Chapter 8, *Defending Immigrants in the Ninth Circuit* for further information on appeals.

G. Vacation of Judgment for Cause

The BIA will not question the validity of a state order vacating a conviction for cause. When a court acting within its jurisdiction vacates a judgment of conviction, the conviction no longer constitutes a valid basis for deportation or exclusion.[12]

The conviction must have been vacated for cause, not merely for hardship or rehabilitation, however. In *Matter of Pickering* the BIA held that a conviction is *not* eliminated for immigration purposes if the court vacated it for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[13]

§ N.2 Record of Conviction and Divisible Statutes

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 2, § 2.11, www.ilrc.org/criminal.php)

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[9] Calif .P. C. § 19.7 ("all provisions of law relating to misdemeanors shall apply to infractions including … burden of proof.").

[10] For more discussion on infractions, see *Safe Havens*, by Norton Tooby and J.J. Rollin, Chapter 4, § 4.11.

[11] *Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576 (1955) (holding that an "on file" system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act).

[12] *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000).

[13] *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

A comprehensive discussion of the federal "categorical analysis" appears at Chapter 2, § 2.11, *Defending Immigrants in the Ninth Circuit*. The discussion here will focus on one issue: how criminal defense counsel can construct a record of conviction under a divisible statute, so as not to harm a noncitizen defendant's immigration status.

Part A will present an overview of how the categorical and modified categorical analysis works and what a divisible statute is. Part B is a series of practice tips about how to manage charging documents, pleas, and stipulating to a factual basis.

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 discussion focuses on the use of this approach in immigration proceedings. However, the same approach and case law are used throughout federal criminal proceedings to evaluate prior convictions as sentence enhancements.

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.;

- Where the statute includes multiple offenses, only some of which carry immigration consequences, the immigration judge or other reviewing authority 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.[14]

1. The Categorical Analysis

The first step is to compare the elements of the offense as defined by the statute and interpretive case law, and compare it to the immigration provision at issue. The offense does not

[14] 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. United States*, 125 S.Ct. 1254 (2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005).

categorically, i.e., necessarily, match unless "the 'full range of conduct' covered by [the criminal statute] falls within the meaning of that term."[15]

> **Example:** Mr. Malta-Espinoza was convicted of stalking under Calif. PC § 646.9. To determine under the categorical approach whether the conviction was of a "crime of violence" and therefore an aggravated felony, the court considered whether there was any way to violate the statute that does not meet the definition of a crime of violence. Because the statute could be violated by harassing a person by mail from hundreds of miles away, the court found that the offense was not "categorically" a crime of violence. See *Malta-Espinoza v. Gonzales.*[16]

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

In the *Malta-Espinoza* case above, the court found that there were some ways in which PC § 646.9 does not match the definition of a crime of violence, and therefore the offense was not a "categorical" match and the conviction was not necessarily an aggravated felony

However, some conduct that violates § 646.9 *does* constitute a crime of violence. Therefore the statute is "divisible" for purposes of being a crime of violence. In *Malta-Espinoza* the court looked to the reviewable record of conviction to see whether it established unequivocally that Mr. Malta had been convicted of an offense that was a crime of violence. Because the record was ambiguous, the court found that the conviction was not of a crime of violence.

This case illustrates the "modified categorical analysis." Where a statute is broad enough to include various offenses, some of which carry immigration penalties while 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.[17]

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. PC §§ 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. PC § 272.

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[15] See, e.g., *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)(citation omitted); *Matter of Palacios*, Int. Dec. 3373 (BIA 1998).
[16] *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).
[17] *United States v. Rivera-Sanchez, supra* at 908, 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).

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

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.

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).

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. See discussion of how to manage charging papers, pleas and stipulating to a factual document in Part B, below.

Sources of information that are not allowed include: **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.**[18] **A narrative description in a California Abstract of Judgment cannot be consulted.**[19] **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.** [20] **In immigration proceedings this group of permitted documents often is referred to as "the record of conviction."**

However, if counsel **stipulates that a document provides a factual basis for the plea, the contents may well become part of the reviewable record.** See discussion in Part B, below.

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[18] See, e.g., *Taylor v. United States*, *supra; 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 Dec. 137 (BIA 1941) (report of a probation officer is not included), *Matter of Cassissi*, 120 I&N Dec. 136 (BIA 1963) (statement of state' attorney at sentencing is not included)); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *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 probation report is not part of the record of conviction for this purpose.

[19] *United States v. Navidad-Marco*, 367 F.3d 903 (9th Cir. 2004).

[20] *Matter of Short*, Int. Dec. 3215 (BIA 1989), *Kawashima v. Gonzales*, 503 F.3d 997, 1001 (9th Cir. 2007).

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. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(*en banc*).

B. Handling Charging Papers, Plea Agreements and Stipulations to a Factual Basis[21]

1. Goals

For allegations in a criminal charge to be considered by immigration authorities 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, as worded. A charge coupled with only general proof of conviction under the statute is not sufficient.[22]

As defense counsel, your first step is to understand what you can and cannot permit the record to reveal. To take a straightforward example, assume that your client is a permanent resident who is charged with possession of a firearm under Calif. PC § 12020(a)(1). You look the offense up in the California Quick Reference Chart (and/or this book, or consult with an immigration attorney) and see that the offense is "divisible" for purposes of the firearms offense deportation ground. The advice is either (a) plead to possession of a specific non-firearm weapon (e.g., brass knuckles), or (b) keep the record vague as to what type of weapon was possessed, so as to avoid establishing that the offense was a firearm.

Between these two options, a plea to the "good" section of a statute—here, possession of brass knuckles—always is the best solution, but often is not possible. A solution that is nearly as good is to keep the record vague so as to avoid establishing that the person pled guilty to the "bad" section of the statute, e.g., to possession of a firearm.

This section presents suggestions for keeping the record vague regarding "bad" facts, while still meeting the demands of the court and prosecution.

Again, the obvious first step is to understand as specifically as possible what the record can and cannot establish if protecting immigration goals is a priority. You may be able to offer certain facts that will satisfy the court's desire for specificity but not hurt immigration status. To

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[21] Thanks to Norton Tooby, Rachael Keast and especially Michael K. Mehr for their valuable input on this topic.

[22] See, e.g., *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (*en banc*); *United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002).

get these specific evidentiary goals counsel may use the chart, more in-depth resources like this book, or consultation with immigration attorneys. See Note: Resources at the end of these Notes.

2. Strategies: Charging Papers and Pleas, Avoiding Stipulation to a Factual Basis

The following are tips for creating a vague record for immigration purposes, by working with the charge and the requirement of a factual basis. It may be useful to consider a case example in reviewing these suggestions.

> **Example:** Pema, a permanent resident, will become deportable under the firearms ground if she is convicted of using, possessing or carrying a firearm.[23] She is charged in Count 1 with possession of a handgun under Calif. PC § 12020(a)(1). This is a divisible statute for this purpose, since it includes offenses that involve firearms as well as offenses that involve knives, brass knuckles, etc. How might you structure a plea to § 12020(a)(1) to avoid making her deportable?

Dealing with the Substantive Charge

1) ***The best strategy is to make a record of pleading to the statute, not to the facts in the complaint.*** A charging paper charging the California offense in the language of the statute is proper[24] and often beneficial to the noncitizen. A plea to an original or amended charging paper quoting only the language of the statute can prevent immigration consequences under a divisible statute. (But note that one California appellate decision found that this kind of charge cannot serve as a factual basis for the plea.[25])

   To do this, plead to an orally amended complaint to "the exact language of the statute." Or, plead to an amended complaint that tracks the language of the statute. Because the statute is so wordy, the defendant can plead to, e.g., "possession of an illegal weapon." Or, plead to, e.g., PC § 12020(a)(1)—not the complaint. Or plead to a written plea agreement in the language of the statute.

2) If the above are not possible, and as a last resort, plead to "Count 1 PC 12020(a)(1)," specifically **avoiding pleading guilty *"as charged"* in Count 1**. In *United States v. Vidal*[26] the Ninth Circuit *en banc* held that a plea and waiver form showing the notation "Count 1 *10851* Veh. Code" did not admit the allegations in the complaint because it did not include the words "as charged" in the complaint. Under *United States v. Vidal*, immigration and federal criminal authorities will hold that the plea is not to the allegations that appear in the written Count 1, but to the elements of the statute. If the waiver form had included the words "plead as charged to Count 1," it would have established the allegations in the count.

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[23] INA § 237(a)(2)(C), 8 USC § 1227(a)(2)(C).
[24] "[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.
[25] *People v. Willard*, 154 Cal. App. 4th 1329 (Cal. Ct. App. 2007).
[26] *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*).

Warning: Where possible counsel should directly plead to the statute or language that tracks the statute as discussed above, because of the possibility that courts will create exceptions to *Vidal*. In a recent decision, which may be open to challenge, a court held that where a *signed magistrate's certificate stated that the charge had been read aloud* to the defendant before plea, the critical phrase "as charged" was not needed for the record to establish a plea to the allegations in the count.[27]

3) ***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. Damaging information from the charge can be deleted.

   Examples: "Defendant pleads guilty to following *or* harassing,"[28] "Defendant pleads guilty to offering to transport,"[29] "Defendant pleads guilty to possession of a controlled substance on the state list of controlled substances" where the charging paper alleged a specific substance such as heroin.[30]

4) If the charge is 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, in immigration proceedings a plea to a charge in the conjunctive does not necessarily prove the multiple acts.[31])

5) ***Do not permit the defendant to admit extraneous facts that might have a negative immigration effect, and that are not required for conviction.*** Immigration authorities sometimes consider admission of facts not required for a conviction, even though this appears to violate rules governing the categorical analysis. [32] Counsel should assume conservatively that *any* fact admitted by the defendant may be considered by immigration authorities or a court. For example, if you arrange a plea to sexual battery, which has no element of age, do not plead to a charge that indicates the age of the victim if the victim is a minor. If the age of a minor victim is included in the complaint ICE will charge the offense as the aggravated felony of ***sexual abuse of a minor***.

6) ***Information from dismissed charges cannot be considered in this inquiry***, since this would violate the fundamental rule that there must be proof that the allegations in the charge were pled to. In case of doubt, bargain for a new count.

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[27] *United States v. Aguila-Montes de Oca*, __ F.3d __ (9th Cir. April 28, 2008).
[28] This is not a crime of violence under *Malta-Espinoza, supra*. See § 9.13.
[29] This is not an aggravated felony, and arguably not a deportable drug offense. See § N.7, Controlled Substances.
[30] See discussion of *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007). This is not a deportable drug offense. See § N.7.
[31] *Malta-Espinoza v. Gonzales, supra;* see also *In re Bushman*, (1970) 1 Cal.3d 767, 775 (overruled on other grounds).
[32] See discussion of *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990) at Chapter 2, § 2.11(C); see also *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (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 pleaded guilty to an indictment that alleged he assaulted the victim with a gun).

Examples: The Ninth Circuit held that although a dropped charge to PC § 273.5 identified the wife as a victim, this information could not be used to hold that the new straight battery charge, with an unnamed victim, was a crime of domestic violence. (This was held true even though the court ordered anger management and issued a stay-away order in relation to the person named in the § 273.5 charge.) See discussion in § N.8, Domestic Violence.

Example: The Ninth Circuit held that although a dropped charge to H&S § 11378(a) identified methamphetamine as the controlled substance, this information could not be used to hold that the new charge of possession of a "controlled substance" under H&S § 11377(a) involved methamphetamine. Since the substance could not be identified, it was not possible to prove that it appeared on federal controlled substance lists, and the noncitizen was held not deportable.[33] See § N.7, Controlled Substance Offenses.

Stipulating to a Factual Basis

1) ***The optimal strategy is to arrange to plead pursuant to People v. West and decline to stipulate to a factual basis.*** Since a *West* plea is entered without any factual admission of guilt, the court and prosecution may allow entry of the plea without establishing any factual basis for the plea. This occurred in the California conviction considered in *Vidal, supra.*

   It is a very good idea to ***put "People v. West" on the waiver form*** and try not to admit to a factual basis or stipulate to any police reports or other documents.

2) If the court requires a factual basis, defense counsel can ask to enter the ***specific disclaimer:*** "We are not admitting the truth of the facts contained in the police report, but simply allowing the court to review it to determine whether the prosecution could present some evidence of every element of the offense."

3) If the court will not accept the disclaimer, counsel generally should see other suggestions in the following section for controlling the factual basis, such as by creating a carefully crafted written plea agreement.

Practice Pointer: After crafting a plea geared to immigration defense, obtain certified copies of the written complaint or amended complaint, the minute orders of the plea, the written waiver form or plea agreement, and, if helpful, obtain the transcript of the plea colloquy. Tell the defendant to keep a copy of these documents and give them to his immigration attorney if he is ever put in removal proceedings or has an immigration problem.

Practice Pointer: If the defendant is put in removal proceedings, most of the time the government relies on written documents (the complaint, minute orders, abstract of judgment, and written waiver form). Check the minute orders and any interlineations the clerk puts on any amended complaint to see if they conform to the plea. If not, have them corrected before you leave court. If the plea colloquy is helpful, assist the defendant to obtain a copy of the plea

[33] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007). See generally *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005).

transcript. If the plea colloquy is not helpful, do not obtain a copy of this because the original will be available for the government in the court file.

3. Additional Strategies for Meeting the Factual Basis Requirement; Stipulation to a Police Report or Other Documents[34]

a. Overview

One of the many challenges facing criminal defense counsel who represent noncitizens is to meet two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to state a factual basis for the plea under criminal law requirements. Because DHS bears the burden of proving deportability based on a conviction record, a crucial criminal defense strategy to avoid immigration consequences is first, to direct a plea to a divisible statute that covers at least one offense that would not trigger the feared immigration consequence. The problem is that providing a factual basis for the plea, if not done with great care, may make the record so specific that it identifies the adverse section as the offense of conviction and destroys the immigration benefit.

As discussed above in Part 2, the optimal solution is to plead pursuant to *People v. West*, in an effort to avoid or ameliorate the factual basis requirement. Since a *West* plea is entered without any factual admission of guilt, the court and prosecution may allow entry of the plea without establishing any factual basis for the plea. This occurred in the conviction considered by the Ninth Circuit *en banc* in *United States v. Vidal*, *supra*. If the court requires a factual basis for the *West* plea, defense counsel can ask to enter a specific disclaimer: "We are not admitting the truth of the facts contained in the [document], but simply allowing the court to review it to determine whether the prosecution could present some evidence of every element of the offense." This ought to prevent a finding that the defendant admitted to the facts. However, a *West* plea coupled with admissions of fact *will* establish the admissions of immigration purposes.

If the court will not allow a *West* plea with the above conditions, counsel must provide a factual basis of the plea without identifying immigration-adverse elements. This is quite possible, although it may take some creative and aggressive defense work. Counsel should try to provide a minimal factual basis, should retain as much control as possible over the contents of the factual basis, and should assume conservatively that if the defense stipulates to a police report or some other document as providing a factual basis, its contents will become part of the record of conviction for immigration purposes. Therefore if the police report contains factual details that would establish that the client was convicted of, e.g., an aggravated felony, do not stipulate to it—or at least warn the defendant of the likely consequences.

Immigration counsel face the challenge of dealing with whatever record the defense has created, and arguing that the elements of an offense carrying adverse immigration consequences were not conclusively identified. While we ask criminal defense counsel to act conservatively and avoid stipulating to police reports, in fact the Ninth Circuit has established limits on when such a stipulated document can be considered part of the record. See discussion at Chapter 2, § 2.11(C), *Defending Immigrants in the Ninth Circuit*.

[34] Thanks to James F. Smith for this analysis.

In California there are no statutory requirements for creating the factual basis, [35] but case law has established some rules. The California Supreme Court discussed the requirements in *People v. Holmes.*[36] The court concluded that either the defendant or the defense counsel can provide the information that serves as the factual basis. If the defendant is examined, the trial court has wide latitude to interview the defendant. If instead defense counsel is examined, counsel must stipulate to a particular document that provides an adequate factual basis such as a police report, a preliminary hearing transcript, a probation report, a grand jury transcript, or, significantly, a complaint or a written plea agreement.[37]

Counsel representing noncitizen clients should *avoid having the defendant provide the factual basis*, because it surrenders control of the record of conviction. Defense counsel should always provide the factual basis, and should try to negotiate a factual basis for a plea that minimizes or avoids the adverse immigration consequences of a conviction. In general, criminal defense counsel should author or limit any document to which counsel stipulates.

Under *People v. Holmes*, defense counsel is not required to stipulate to a document that contain damaging facts. The only requirement is that counsel must stipulate to one of the documents described above. Defense counsel should stipulate only to the *complaint* (which counsel may move to amend) or a *written plea agreement*, because these documents give counsel the necessary control over the record of conviction to avoid immigration consequences. Defense counsel also can stipulate to a specific portion of a given document that does not contain damaging facts against the defendant, e.g. the concluding paragraph of the police report dated "x" on p. 2 that reads "……" This would meet the *Holmes* requirement and could also satisfy the record sanitation goals.

As a last resort defense counsel can avoid including information on the record that specifically identifies the police report involved, for example include a reference to "the police report" without providing the date, etc. Because there can be more than one police report involved in a charge, this will permit immigration defense attorneys at least to argue that the report is not sufficiently identified.

Recently a California appellate court held that a valid conviction did not exist where trial counsel generally stipulated that there was a factual basis for the plea, but included no reference to any document containing factual allegations to support the charge. It also held inadequate a stipulation to a charge that repeated the language of the statute, with no additional information

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[35] Calif. PC § 1192.5 provides only that "[t]he court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea."

[36] *People v. Holmes*, 32 Cal. 4th 432 (2004).

[37] "We conclude that in order for a court to accept a conditional plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge, or question the defendant regarding the factual basis described in the complaint or written plea agreement. If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. Under either approach, a bare statement by the judge that a factual basis exists, without the above inquiry, is inadequate." *Id.* at 436 (internal citations omitted).

beyond the names of the defendant and victim.[38] A charge phrased in the language of the statute is beneficial for immigration purposes, where the statute is divisible. See discussion at Part 2, *supra*. If there is an objection to using a charge that tracks the statute as the factual basis for the plea, counsel either can ask to amend the charge to provide additional detail of the kind that will not adversely affect the immigration case (i.e. that will not make specific those particular elements that need to be left vague), or else draft another document for the factual basis.

State the factual basis for the plea in the disjunctive. Where a statute is divisible, counsel should only plead the defendant to the statute in the disjunctive (using "or" rather than "and"). Counsel should ensure that the factual basis for the plea also is in the disjunctive, or otherwise vaguely stated, for example "On x date I did sell or transport …" (to avoid an aggravated felony drug conviction) or "On x date I used a dangerous weapon" (without identifying the weapon as a firearm, if that is what must be avoided).

For additional information, see discussion at Chapter 2, § 2.11(C)(6), *Defending Immigrants in the Ninth Circuit*.

§ N.3 Sentence Solutions

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 5, www.ilrc.org/criminal.php)

A. 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.[39]

- Crime of violence, defined under 18 USC § 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

[38] *People v. Willard*, 154 Cal. App. 4th 1329, 1335 (Cal. Ct. App. 2007). The court noted, "The complaint alleged the date of the conduct and the names of defendant and the victim. The remainder of the complaint was in the language of the statute. The statutory language set forth the elements of the offense, not facts. This was not enough to satisfy the purpose of the factual basis inquiry, to corroborate what defendant had already admitted by his plea."
[39] See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

- 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."[40]

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

- 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.

- The Supreme Court overturned the Ninth Circuit and held that time imposed by recidivist sentence enhancements (e.g., petty with a prior) will count in analyzing sentence imposed. See Part B below.

- The time served after a probation or parole violation is included within the "sentence imposed."[41]

  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.

[40] Definition of "term of imprisonment" at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).
[41] 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).

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 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.[42]

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*.[43] See § 4.2, *supra* and N.6, *infra.*

B. The Effect of Recidivist and Other Sentence Enhancements

The Supreme Court recently overturned Ninth Circuit precedent to hold that a sentencing enhancement imposed as a result of a recidivist offense shall count towards the length of sentence imposed. *U.S. v. Rodriquez,* 128 S. Ct. 1783 (2008), overruling in part *United States v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir. 2002)(*en banc*).

In *Corona-Sanchez* the Ninth Circuit had 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 PC §§ 484, 666 ("petty theft with a prior"), the maximum possible sentence for the core offense of petty theft is six months. The Ninth Circuit 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

[42] *Matter of Song,* 23 I&N Dec. 173 (BIA 2001).
[43] See 8 USC § 1182(a)(2)(A)(ii)(II).

felony offenses of theft with a one-year sentence imposed. The Supreme Court disapproved this approach in *Rodriquez.*

§ N.4 Using the Chart to Establish Defense Goals: Aggravated Felonies, Deportability, Inadmissibility, and Waivers

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 1, www.ilrc.org/criminal.php)

A. Overview of Immigration Consequences, Getting Expert Advice

The Quick Reference Chart details which California offenses may make a noncitizen inadmissible, deportable or an aggravated felon. This section 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.[44]

To make an correctly identify a noncitizen's defense goals in terms of immigration, 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 waivers and relief is

[44] 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 Chapter 11, *supra*.

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 "Client Immigration Questionnaire" at § N.13 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 Law School 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.

a. The effect of becoming deportable

Generally, the highest priority for permanent residents and others with on-going status is to avoid conviction of an aggravated felony, and avoid coming within 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. The lowest priority, although still a worthwhile goal, is to avoid the grounds of inadmissibility. A permanent resident who is merely inadmissible cannot be deported. However, being inadmissible will prevent a permanent resident from safely traveling abroad and being readmitted to the U.S., and may delay her ability to apply to naturalize to U.S. citizenship. See section b, *infra*.

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 Chapter 11, §§ 11.3, 11.19 and 11.22,

Defending Immigrants in the Ninth Circuit. (Note: Cancellation of removal for permanent residents has very different bars and requirements, and is discussed in Part 3 below.)

b. 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 §§ N.13, N.14, "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 Chapter 1, § 1.5, *Defending Immigrants in the Ninth Circuit*.

c. 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 involve 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 Chapter 9, § 9.50, *Defending Immigrants in the Ninth Circuit*.

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.

<u>Deportability Grounds</u> (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 of a crime of domestic violence," stalking, or child abuse, abandonment or neglect," since admission and since 9/30/96

6. Civil or criminal court finding of a violation of a domestic violence protection order, relating to repeated harassment or threats, where the behavior that is the subject of the violation occurred after 9/30/96;
7. Conviction of managing a prostitution business;
8. Being a drug abuser or addict at any time since admission.
9. Conviction of a federal offense, 18 USC § 2250, that penalizes failure to register as a sex offender under applicable state law.[45]

***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. In contrast, if a defendant only needs to avoid *inadmissibility*, this conviction is not harmful. (Note, however, that if the firearms offense also is a crime involving moral turpitude—e.g., if it is assault with a firearm—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.

[45] INA § 237(a)(2)(A)(v), 8 USC 1227(a)(2)(A)(v), added by Adam Walsh Child Protection and Safety Act of 2006, HR 4472, PL 109-248, § 401 (July 27, 2006).

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 § N.6 or Chapter 4.

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 Chapter 9, § 9.2, *Defending Immigrants in the Ninth Circuit*.

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

Cancellation of removal for permanent residents. 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 years ago); (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. Convictions from before April 1, 1997 may not stop the clock in some situations; see discussion at Chapter 11, § 11.1(A). 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.

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). However, if all of the convictions were before April 1, 1997, there may still be a possibility of relief even for an undocumented person; see discussion of *Castellanos-Lopez v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) at Chapter 11, § 11.4(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 Chapter 11, § 11.1, *Defending Immigrants in the Ninth Circuit*, 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 § N.5 or Chapter 9.

§ N.5 Aggravated Felonies

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 9, www.ilrc.org/criminal.php and see Tooby, Aggravated Felonies, www.criminalandimmigrationlaw.com)

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 section.

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., *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001)(Calif. PC § 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 § N.11 or Chapter 9. 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 Chapter 9, § 9.2, and see discussion of each form of relief and criminal record bars in Chapter 11, *Defending Immigrants in the Ninth Circuit*. The following are some important options. Persons convicted of an aggravated felony can apply for withholding of removal under 8 USC § 1231(b)(3) if they have the equivalent of a very strong asylum claim, or for relief under the Convention Against Torture if they fear 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.

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 Chapter 9, § 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 § N.3 or Chapter 5 on sentencing), 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 alphabetical 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 to firearms 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 to the 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)

§ N.6 Crimes Involving Moral Turpitude

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 4, www.ilrc.org/criminal.php and see Tooby, Rollin, Crimes Involving Moral Turpitude at www.criminalandimmigrationlaw.com)

A. Overview

Classification as a crime involving moral turpitude ("CMT") is based on the elements of the offense, not the facts of the case. An offense involves moral turpitude if it either involves fraud or is of a morally offensive character, for being vile, based, or depraved and violating societal moral standards. In general, offenses with containing one of the following elements have been held to involve moral turpitude: fraud, theft with an intent to permanently deprive, 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 following Chapter 4; see Tooby, *Crimes Involving Moral Turpitude;* and other works in § N.14. 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 materials on record of conviction at § N.2 or, for a more extensive discussion, § 2.11.

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 or battery—do not affect this analysis.

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

1. Deportable for one conviction of a CMT, committed within five years of admission, that carries a maximum sentence of one year or more

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 PC § 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 § N.3 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 with an intent to permanently deprive, her first CMT. If she is convicted of misdemeanor grand theft and the record of conviction shows that she had the intent to permanently deprive 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.

Depending on individual circumstances, the "admission" that starts the five years might be the person's first lawful entry into the United States, the date he or she adjusted status to permanent residency, or a return from a subsequent trip outside the country. See discussion in Chapter 1, § 1.3(B), *Defending Immigrants in the Ninth Circuit.*

2. Conviction of two crimes involving moral turpitude after admission, that are not part of a single scheme

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.

C. 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.[46] 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 with an intent to permanently deprive, 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 PC § 17.[47] 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 § N.3.)

Youthful offender exception.[48] 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 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).[49] Counsel should avoid having clients formally admit to offenses that are not charged with.

§ N.7 Drug Offenses

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[46] 8 USC § 1182(a)(2)(A)(ii)(II).

[47] 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).

[48] 8 USC § 1182(a)(2)(A)(ii)(I).

[49] See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in § 4.4, *supra*.

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 3, www.ilrc.org/criminal.php)

A. Overview of Penalties for Drug Offenses

Aggravated felony. 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) if it is a state offense that is analogous to certain federal *felony* drug offenses, even those that do not involve trafficking, such as simple possession, cultivation, or some prescription offenses. Case law has established that a state possession conviction with no prior drug convictions is not an aggravated felony, unless it is possession of flunitrazepam or 5 grams or more of crack cocaine. It is less clear whether a state possession conviction with a drug prior will be held 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[50] (e.g., if the person pled guilty to simple possession but the conviction was effectively eliminated according to *Lujan-Armendariz*, discussed below.)

B. Key Defense Strategies: Create a Record that Does Not Specify the Controlled Substance; Plead to Accessory After the Fact

1. Create a Record that Does Not Specify the Controlled Substance

If state law covers controlled substances that are not on federal lists, and if the controlled substance in the conviction is not specifically identified—either in the record of conviction or the terms of the statute—then immigration authorities cannot prove that the offense involved a controlled substance as defined by federal law, which is required for immigration consequences. The conviction will not be an aggravated felony or basis for deportability or inadmissibility. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007). This might not apply to conviction for possession of paraphernalia; see discussion at Chapter 3, § 3.3(B), *Defending Immigrants in the Ninth Circuit.*

In *Ruiz-Vidal*, the Ninth Circuit found that a conviction for possession of a "controlled substance" under Calif. H&S § 11377(a) is not a deportable offense relating to a controlled substance, where the record of conviction does not conclusively establish what the specific controlled substance is. The court noted that several substances appear in the California definition of controlled substance that do not appear in the federal definition.[51] Although the court has not considered the somewhat different list of substances cited in H&S § 11350 *et seq*, it appears that these also include substances not found in the federal list, for example apomorphine.

In *Ruiz-Vidal* the court refused to consult a dropped plea to § 11378(a) that identified the substance as methamphetamine, when the defendant pled to a new charge of § 11377(a) with no substance specified. Therefore the court held that Mr. Ruiz-Vidal was not deportable for having a controlled substance conviction. This should also work to prevent other convictions involving a "controlled substance," such as H&S §§ 11378 and 11379, from being held an aggravated felony or controlled substance.

This strategy obviously does not work where the statute identifies the substance, e.g. possession for sale of marijuana.

See § N.2 concerning creating a record that does not identify a controlled substance, and further discussion in Chapter 2, § 2.11, *Defending Immigrants in the Ninth Circuit.*

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

[51] The court in *Ruiz-Vidal* identified apomorphine, geometrical isomers, androisoxazole, bolandiol, boldenone, oxymestrone, norbolethone, stanozolol, and stebnolone as being in H&S § 11377(a) but not the federal schedule. *Id*. at p. 1078 and note 6. Practitioners have suggested that the following additional substances also are listed on the California schedule but not the federal: Difenoxin (CA- Schedule I; 11054(b)(15)), Propiram (CA-Schedule I; 11054(b)(41)), Tilidine (CA-Schedule I; 11054(b)(43)), Drotebanol (CA-Schedule I; 11054(c)(9)), Alfentany (CA-Schedule II; 11055(c)(1)), Bulk dextropropoxyphene (CA- Schedule II; 11055(c)(5)), and Sufentanyl (CA-Schedule II; 11055(c)(25)).

2. Plead to Accessory after the Fact

Accessory 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 noncitizen deportable or inadmissible for having a drug conviction.

Accessory after the fact is not an **aggravated felony**, as long as a sentence of a year or more is not imposed. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997); see also *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007). If a sentence of a year or more will be imposed, immigration attorneys at least will have a strong argument that it is not an aggravated felony, despite *Batista-Hernandez*, as long as the record of conviction leaves open the possibility that the assistance was to escape apprehension by the police, as opposed to escaping an ongoing prosecution. See discussion at Chapter 9, § 9.24.

Depending on the facts, there is some chance 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.

The Ninth Circuit *en banc* held that Calif. PC § 32 is not a **crime involving moral turpitude**, but the BIA may hold otherwise in immigration proceedings originating outside Ninth Circuit states.[52] See further discussion of accessory at Note: Safer Pleas.

C. Simple Possession or Less

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 the U.S. Supreme Court's 2006 ruling in *Lopez v. Gonzales*[53] and Ninth Circuit 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. **A first simple possession conviction, whether felony or misdemeanor, is not an aggravated felony in immigration or federal criminal proceedings**, under the U.S. Supreme Court decision in *Lopez v. Gonzales*. The only exception is if the substance possessed was more than five grams of cocaine base (crack) or any amount of

[52] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(*en banc*). For the BIA view, see *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (misprision of felony under 8 USC §4).
[53] *Lopez v. Gonzales* 127 S. Ct. 625 (2006).

flunitrazepam (a date-rape drug). In that case a state felony or misdemeanor conviction is an aggravated felony.[54]

3. **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 PC § 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 arguably for a first conviction for **giving away a small amount of marijuana** for free (see 21 USC § 841(b)(4)), where the record establishes that the amount was small.

   The Ninth Circuit held that the existence of a prior pre-plea diversion prevented a first possession conviction from benefiting from *Lujan. Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007). [55]

4. Except for a first conviction for the minor offenses discussed above, any "rehabilitative relief" (i.e., withdrawal of the plea after probation not based on legal error such as DEJ, Prop 36 or PC § 1203.4) has no effect for immigration purposes, even though state law may consider the conviction to be utterly eliminated. And to get the special benefit the defendant must actually complete the process and have the plea withdrawn.

5. **If there is a prior drug conviction, counsel must assume that a subsequent conviction for possession will be held an aggravated felony, at least if the prior was pleaded and proved at the possession prosecution.** The current Ninth Circuit rule is that a second possession conviction cannot be an aggravated felony in immigration proceedings,[56] but the case upon which this ruling was based has been overruled by the Supreme Court[57] and it is likely that the Ninth Circuit will change this rule and apply the change retroactively to past convictions.

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[54] In *Lopez* the court held that a possession offense would be considered a felony, and therefore an aggravated felony, only if it would be so held if charged in federal court (the "federal felony" rule). First offense simple possession is a misdemeanor under federal law, unless the substance was flunitrazepam or more than 5 grams of crack.

[55] *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

[56] See *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004), which like *Lopez* applied the "federal felony" rule. A second conviction for simple possession is punishable as a felony under federal law, because a sentence enhancement is imposed for recidivism. But following its rule in *United States v. Corona-Sanchez*, 29 F.3d 1201 (9th Cir. 2002)(*en banc*) that a recidivist sentence enhancement will not be considered in calculating the maximum possible sentence for a prior conviction in a categorical analysis, the Ninth Circuit in *Oliveira-Ferreira* held generally that a second possession conviction is not a "felony" under federal standards – because it is only the recidivist enhancement that brings the potential sentence to over a year -- and therefore is not an aggravated felony. Now, however, the Supreme Court has reversed *Corona-Sanchez* (see next footnote), so that this part of *Oliveira-Ferreira* also could be viewed as reversed.

[57] *United States v. Rodriquez*, 128 S.Ct. 1783 (US 2008), reversing the rule on recidivist enhancements in *Corona-Sanchez, supra*.

If you must plead to possession where there is a drug prior, do not formally concede the prior. It is very possible that the Supreme Court or Ninth Circuit will hold that a possession conviction following a drug prior is an aggravated felony only if the prior conviction was pleaded and proved at the possession prosecution. Significantly, this is the Board of Immigration Appeals' position, so this provides current protection in immigration proceedings.[58] A plea to being under the influence rather than possession will avoid these issues, because being under the influence is not an aggravated felony even if a prior drug conviction is pleaded or proved.

If a first conviction for simple possession is eliminated by rehabilitative relief under *Lujan-Armendariz*, then the second possession should become the "first" and will not be an aggravated felony. A third conviction should become the worrisome "second," and will be classed as an aggravated felony only if the Ninth Circuit decides to change its rule.

6. Remember that if the **record of conviction does not identify the specific controlled substance**, a conviction for simple possession under Calif. H&S § 11377 (and apparently § 11350) is not a controlled substance offense for immigration purposes and is neither an aggravated felony nor a deportable or inadmissible drug conviction. See Part B, *supra.*

7. **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 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.

Case examples. These examples illustrate the rules under *Lopez v. Gonzales* and *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 felony simple possession of heroin in state court, his first controlled substance offense.

Aggravated felony? This is not an aggravated felony in immigration or federal criminal proceedings under *Lopez v. Gonzales*. No simple possession conviction without drug priors is an aggravated felony, other than possession of flunitrazepam or more than 5 grams of crack. ***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

[58] See *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007) (where the prior drug conviction was not pleaded and proved in the subsequent possession prosecution, the possession conviction was not an aggravated felony).

purposes by "rehabilitative relief" such as withdrawing the plea under a deferred entry of judgment, Proposition 36 or PC § 1203.4 provision.

Example 2: Sam receives a second California felony conviction for simple possession of heroin. The prior possession conviction is not pleaded or proved at his prosecution.

Aggravated felony*?** Under current Board of Immigration Appeals rulings the conviction is not an aggravated felony unless the prior drug conviction was pleaded and proved in the possession prosecution, so Sam will not be held to have an aggravated felony in removal proceedings in the Ninth Circuit. However, it is possible, although somewhat unlikely, that in the future the Ninth Circuit or Supreme Court will rule that the offense is an aggravated felony even if the prior was not pleaded or proved.[59] Therefore this is not an optimal plea, and counsel should consider other defense strategies such as creating a record where the substance is unidentified, pleading to under the influence, etc. See discussion at Chapter 3, § 3.5(B), *supra*. It appears that however this issue is resolved, if his first simple possession were eliminated for rehabilitative relief, this second conviction would become the "first" simple possession conviction and would not trigger the aggravated felony ground. ***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 participated in a pre-plea diversion program in California in 1995, where he did not admit any guilt but did accept counseling, after which the charges were dropped.

Aggravated felony? No. Because there was no plea or finding of guilt, this is not a conviction at all for immigration purposes. ***Deportable?*** This is not a conviction, and so would not be a deportable drug conviction. ***Rehabilitative relief?*** No relief is required, because this is not a conviction. However, see next question for its effect on Esteban's ability to eliminate the immigration consequences of a future conviction by "rehabilitative relief."

Example 4: Esteban pleads guilty to simple possession of methamphetamine in 2008.

Aggravated felony? It should not be so held. A simple possession conviction where there are no prior controlled substance convictions is not an aggravated felony, unless it involves flunitrazepam or more than 5 grams of crack cocaine. Because the prior pre-plea diversion was not a conviction, this conviction should not be an aggravated felony. ***Deportable?*** Yes, he is deportable based on a conviction relating to a controlled substance. ***Rehabilitative relief?*** No. While normally rehabilitative relief withdrawing a plea would eliminate a first conviction under *Lujan-Armendariz*, the Ninth Circuit has held that receipt of a prior pre-plea diversion bars this benefit – even though the pre-plea diversion was not a conviction. Therefore an expungement, DEJ or other treatment withdrawing this plea will not be given immigration effect.

[59] See discussion of *Oliveira-Ferreira, Rodriquez,* and *Carachuri* in footnotes, *supra*.

Example 5: Lani is convicted of simple possession of more than 5 grams of crack cocaine in state court, her first-ever drug conviction.

> ***Aggravated felony?*** This will be held an aggravated felony. A first conviction for possession of flunitrazepam or more than 5 grams of crack cocaine is an aggravated felony. ***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 6: Linda is convicted of being under the influence of a drug, 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 7: Francois is convicted of possession for sale. As long as a specific controlled substance that matches a substance on the federal list is identified, this is an aggravated felony in all contexts and cannot be eliminated under rehabilitative relief. If immigration issues are paramount, he may want to consider pleading up to offer to sell. See Part III.

D. Sale and Other Offenses beyond Possession

Legislative Alert on Solicitation/Offering Defense. In 2006 the Senate passed a provision that would specifically make solicitation an aggravated felony, if the offense solicited was. While this provision did not become law, it is likely to be re-introduced in the future, and if passed there is a small possibility that it would be applied retroactively to past convictions. Where possible, criminal defense counsel should fashion a plea that includes some other defense strategy along with, or instead of, solicitation. A good plea to an offense such as Calif. H&S §§ 11352(a), 11360(a) or 11379(a) is one that leaves open the possibility that transportation as well as offering may be the offense of conviction. (Transportation for personal use is not an aggravated felony.) A plea to "offering to transport" or to the entire statute in the disjunctive accomplishes this. Then if the solicitation defense ever is lost, the person at least will not be an aggravated felon, although transportation will be held a deportable drug offense. It is likely, but not guaranteed, that even if such a legislative change comes about it will not be applied retroactively to past convictions.

Remember that a ***conviction of a "controlled substance" where the specific substance is not established*** by the record of conviction is not an aggravated felony or a deportable or inadmissible drug conviction. See discussion in Part B, *supra.*

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. *United States 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 Chapter 2, § 2.11, *Defending Immigrants in the Ninth Circuit.*

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) at § 3.4(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).

Warning: "Offering to sell" is a bad plea for an undocumented person in one crucial way: it will provide the government with 'reason to believe' that the person is or has helped a drug trafficker, which in turn will make it almost impossible for the person ever to obtain lawful immigration status. A plea to the entire offense in the disjunctive, which includes transportation, does not necessarily establish this. A very few immigration options remain available to a person inadmissible based on 'reason to believe;' see discussion below at part 5, and at § 3.10**.**

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 *United States v.*

Casarez-Bravo, 181 F.3d 1074, 1077 (9th Cir. 1999) and § 3.5(A), *supra*. 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 PC § 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.[60]

2. 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).

3. Post-conviction Relief

Relief that eliminates a conviction not based on legal error—such as "rehabilitative" withdrawal of plea under DEJ, Prop 36 (PC § 1210.1) or PC § 1203.4—will not eliminate any of the above convictions for immigration purposes. It will only work on a 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 at § N.14. 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.

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[60] *People v. Bautista*, 115 Cal.App.4th 229 (Cal. App. 6th Dist. 2004). The court directed the parties to a referee hearing to determine whether an attorney's failure to properly advise, investigate and defend him by offering to "plead up" from possession for sale of marijuana to offering to sell, etc. or transportation, which are not aggravated felonies, constituted ineffective assistance. The court held that if defendant could prove this and prove prejudice that he would have a persuasive case that his attorney's failures constituted ineffective assistance of counsel. The referee found for the defendant and the writ was granted. See *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005).

4. 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 depending on the facts the government may argue that this provides "reason to believe" the person aided a drug trafficker in doing the trafficking. 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. See further discussion at § 3.10, *supra.*

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).

5. 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 § N.2, or for more discussion § 2.11, for further information.)

- Dave is arrested after a hand-to-hand sale of methamphetamine. His defender works with rules governing the reviewable record of conviction and creates a record that does not identify the specific substance, e.g. he pleads to the language of H&S § 11379(a), or to sale or offer to sell a "controlled substance." He has avoided an aggravated felony and avoided becoming deportable or inadmissible for a drug conviction. Also, there is not the danger that legislation will remove this defense, as there is with solicitation.

- Fred is charged with possession for sale of heroin. This conviction will be an aggravated felony. He should attempt to plead to an unspecified controlled substance, or otherwise to a vague record of conviction. If that is not possible and 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.

§ N.8 Domestic Violence, Child Abuse, Prostitution

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 6, §§ 6.2 and 6.15, www.ilrc.org/criminal.php)

A. Domestic Violence and Child Abuse Deportability Ground (see § 6.15)

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 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 PC § 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 both that the underlying act went beyond a mere offensive touching and 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 domestic violence or anger management counseling or stay away orders.

Avoid a crime of violence. See Chart and § N.12 "Safer Pleas" for suggestions of offenses that may not be classed as crimes of violence, such as false imprisonment under PC § 236, battery under PC §§ 242, 243 and 243(e), and nonviolent persuasion not to file a police report under PC 136.1(b). See further discussion in Chapter 9, § 9.13, *Defending Immigrants in the Ninth Circuit*.

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. Neither battery nor battery against a spouse under Calif. PC § 243, 243(e) are crimes of violence or moral turpitude offenses, absent a record showing force amounting to actual violence.[61] The same is not true for PC § 273.5 (spousal injury), which will be held a crime of violence, a crime of domestic violence, and a crime involving moral turpitude.

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

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. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

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[61] *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (misdemeanor battery and spousal battery under Calif. PC §§ 242, 243(e) is not a crime of violence, domestic violence offense or crime involving moral turpitude. See also cases holding that § 243(e) is not a crime involving moral turpitude, *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004). *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006)..

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.

In *Cisneros-Perez v. Gonzales*[62] the Ninth Circuit held that the following record did not prove the domestic record, and therefore the offense was not a crime of domestic violence. The initial complaint charged violations of two California statutes that had domestic relationship as an element (Calif. PC §§ 273.5 and 243(e)(1)), had stated that the victim of the crime was Cisneros-Perez's wife, and recited language stating that she had a qualified domestic relationship to the defendant under the laws of California. These charges were dismissed, and Cisneros-Perez pled no contest to an offense the court deemed a crime of violence, but where no victim was named.[63] He was sentenced to 52 weeks of domestic violence counseling and ordered to stay away from the person who had been named in the original charges.

The court refused to consult information in the dropped charges that identified the wife as a victim. The court held that a domestic violence sentence in California in the form of domestic violence counseling requirement and a stay away order from the person named in the dropped charge also did not conclusively establish that the offense of conviction involved domestic violence, because domestic violence counseling could be ordered as a condition of probation for any offense.[64] The court did not discuss the stay-away order, except to point out that the order concerned the person who was named in the dropped charges but not in the charge to which the defendant pled. The fact that Mr. Cisneros-Perez admitted in immigration proceedings that that person was his wife was not sufficient information, either, because a subsequent statement in administrative proceedings cannot be used in a modified categorical analysis.[65]

An even simpler solution is to plead to an offense that is not a "crime of violence" and accept a counseling requirement on that offense.

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 the definition of

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[62] *Cisneros-Perez v. Gonzales*, 465 F.3d 385 (9th Cir. 2006)

[63] The offense at issue was simple battery under PC §242, but the petitioner had not argued below that this offense was not a crime of violence, so the court went forward assuming that it was. Subsequently in *Ortega-Mendez v. Gonzales*, *supra*, it was established that this is not a crime of violence, at least absent a record of conviction showing actual violence in the offense.

[64] "Although California mandates domestic violence counseling for those convicted of domestic battery who are sentenced to probation, it does not forbid domestic violence counseling for those convicted of other crimes.… California law, like federal law, lodges broad discretion in sentencing judges with regard to probation conditions and does not require that the conditions be directly connected to the crime of conviction." *Id.* at 1060.

[65] This is well-established in immigration cases. See, e.g., discussion in *Matter of Pichardo*, Int. Dec. 3275 (BIA 1996)(admission by respondent in immigration court is not considered in analyzing a divisible statute; thus admission that weapon from prior offense was a firearm did not establish deportability under the firearms ground).

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

Ancillary offenses. Conviction of soliciting[66] 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 § N.12, "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 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.[67]

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."[68] There do not appear to be published opinions defining a crime of child abuse, neglect or abandonment in this context, and recently the Ninth Circuit remanded a case to the Board of Immigration Appeals directing it to devise such a definition.[69] ***Criminal defense counsel should assume that conviction of any offense under PC § 273a(a) for offenses against children will trigger***

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[66] See discussion at *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001 *en banc*); see "Note: Drug Offenses."
[67] INA § 237(a)(2)(E)(ii), 8 USC §1227(a)(2)(E)(ii).
[68] INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).
[69] *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 783 (9th Cir. 2006).

deportability as a crime of abuse, neglect or abandonment. In criminal cases where a 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 PC § 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 soliciting[70] or attempting[71] 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 § N.12, "Safer Pleas."

4. Conviction for stalking

This triggers deportability if received after admission and after September 30, 1996. Assume that Calif. PC § 646.9 will be a deportable offense under this ground.

B. Prostitution (see § 6.2)

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. The Ninth Circuit held that prostitution for immigration purposes requires offering sexual intercourse for a fee, as opposed to other sexual conduct.[72] Section 647(b) should be held a divisible statute under this definition, because it prohibits "any lewd act" for consideration. To avoid providing proof that the person is inadmissible as a prostitute, counsel should plead to "lewd acts" rather than sexual intercourse in § 647(b) cases.

Prostitution is a crime involving moral turpitude, whether lewd acts or intercourse is involved. There are no decisions holding that a the offense of being a customer also is a crime involving moral turpitude, but in some areas DHS is charging this.

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

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[70] See discussion at *United States v. Rivera-Sanchez, supra*; see "Note: Drug Offenses."

[71] It is possible that attempt would be treated like solicitation

[72] *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006).

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

§ N.9 Sex Offenses

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 9, §§ 9.28, 9.32, www.ilrc.org/criminal.php)

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: A statutory rape offense, such as a misdemeanor or felony conviction under PC § 261.5, will be held to be an aggravated felony as "sexual abuse of a minor." Where possible, counsel should seek an alternate plea. However, this area of the law is in flux. *Depending on the defendant's individual immigration situation*, a plea to statutory rape can be considered for an immigrant if necessary to avoid an onerous other plea, for example one that requires registration as a sex offender. This is a good situation in which to seek expert consultation. The Ninth Circuit found that PC § 261.5(d) does not necessarily involve moral turpitude, absent adverse evidence on the record.[73] This will help *some* noncitizens who would be able to immigrate through family, even despite the fact that the offense is designated an aggravated felony. Further, it is likely that in 2008 the Ninth Circuit will consider *en banc* its prior panel decisions holding that this offense is an aggravated felony, especially where the victim is or might be an older teenager, e.g. 17 or 16. Counsel might try to defer a plea until this issue is resolved. See www.ilrc.org/criminal.php for updates. If a plea to § 261.5 is taken, counsel should keep the record of conviction clear of information about the victim's age or designate the victim as an older teenager, to avoid having the crime declared to involve moral turpitude, and to position the defendant to take advantage of a possible future beneficial *en banc* decision on aggravated felony. See Part B and see alternate plea suggestions at § N.12; see extensive discussion at § 9.32.

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.[74] The Ninth Circuit found that third degree rape under a Washington statute that lacks a forcible compulsion

[73] *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007).
[74] California Penal Code § 261 and 262 define rape as sexual intercourse obtained by force, threat, intoxication, or other circumstances.

requirement, where the victim made clear lack of consent, comes within the generic, contemporary meaning of "rape" and is an aggravated felony.[75] In an unpublished opinion with extensive discussion of various laws, the BIA found that a Texas offense of digital penetration did not constitute rape.[76]

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.

While the Ninth Circuit held that consensual sexual intercourse with a person under the age of 16 is "rape," this questionable opinion was withdrawn on other grounds so that there is no published decision making this holding.[77] Still, statutory rape is potentially a very dangerous plea because it will be charged as an aggravated felony in the sexual abuse of a minor category, and might be charged in the rape category.

B. Sexual Abuse of a Minor

Any conviction under PC § 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).

A conviction for consensual sex with a minor under PC § 261.5(c) will be held to be sexual abuse of a minor in immigration proceedings. It is likely that the Ninth Circuit will consider this issue *en banc* in 2008, and possible that they will reverse this finding.[78] Until that time, however, counsel should consider this an aggravated felony. The court has held that it is not a crime involving moral turpitude, which opens up some key opportunities for defense in immigration court. See discussion in Chapter 9, § 9.32, *Defending Immigrants in the Ninth Circuit*.

A conviction under PC § 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). This offense also was held not to be a categorical crime involving moral turpitude.[79]

C. Alternate Pleas

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[75] *United States v. Yanez-Saucedo*, 295 F.3d 991(9th Cir. 2002).

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

[77] See *Rivas-Gomez v. Gonzales*, 2007 U.S. App. LEXIS 6606 (9th Cir. Mar. 22, 2007) withdrawing 441 F.3d 1072 (9th Cir. 2006) and providing amended unpublished opinion that does not address the issue of whether sexual abuse of a minor is rape. See discussion at §9.32, *infra.*

[78] See *Estrada-Espinoza v. Gonzales*, 498 F.3d 933 (9th Cir. 2007) (petition for rehearing granted, oral argument June 25, 2008); see also *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006).

[79] *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008).

Defense strategies and alternative plea goals are discussed in more detail at § N.12, *infra* and especially at § 9.32, *supra.* In general some safer pleas include: a conviction for annoying or molesting a child under PC § 647.6(a), false imprisonment under PC § 236, simple assault and simple battery under PC §§ 241(a), 243(a), battery with serious injury under PC § 243(d), or even to persuading a witness not to file a complaint under PC § 136.1(b). Section 136.1(b) is a strike, but appears to have no immigration consequences except possibly if a sentence of a year or more is imposed. A strike may not be so dangerous if the defendant does not appear likely to commit crimes apart from having had an underage relationship. If all possible alternatives to a plea to § 261.5 are too onerous, counsel should seek expert immigration advice to see whether in the defendant's particular situation, a conviction for consensual sex with a minor might be an acceptable course.

The beneficial decisions all find that the offenses are *divisible* for purposes of being an aggravated felony or moral turpitude offense. Counsel must keep the record clear of details, or at least free of onerous facts (e.g. a younger child, coercion, explicit behavior).

§ N.10 Firearms Offenses

(for more information, see Defending Immigrants in the Ninth Circuit, §§ 6.1, 9.18, www.ilrc.org/criminal.php)

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 PC §§ 245(a), 245(d) and 12020(a) in § N.12, "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.[80] 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.[81] 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 and § N.4.

[80] *Matter of Rainford*, Int. Dec. 3191 (BIA 1992).
[81] 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 waiver under former INA § 212(c)

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 PC § 12021(a)(1) is an aggravated felony. *United States 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.

§ N.11 Burglary, Theft and Fraud

(For more information, see Defending Immigrants in the Ninth Circuit, Chapter 9, §§ 9.10, 9.13 and 9.35, www.ilrc.org/criminal.php)

A. Burglary

With careful attention to creating a vague record of conviction, a conviction for burglary can have no immigration consequences. Without careful pleading and with a sentence of a year or more, it is easy for burglary to become an aggravated felony. Note that possession of burglary tools (PC § 466) may lack any adverse immigration consequences; see Chart.

1. 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 under any theory, unless a one-year sentence has been imposed. A sentence of 364 days or less avoids an aggravated felony as burglary, theft or a crime of violence, 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 § N.3.

We'll first provide a summary of the rules, and then the legal rationale. If a one-year sentence is imposed in a burglary conviction, the only pleas that will not constitute an aggravated felony under some category are to:

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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.

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

- burglary of anything other than a dwelling, as long as the record of conviction does not indicate that the entry or remaining was unprivileged, *and*

- in all cases, the record of conviction must not establish intent to commit "larceny" (theft) or any other offense that itself is an aggravated felony. The danger is that this will be held an aggravated felony as, e.g., attempted theft. Instead, the burglary plea can be with intent to commit "any felony," or "larceny or any felony," or a specified offense that is not an aggravated felony, e.g. that is not theft, a crime of violence, sexual abuse of a minor, etc. The person further can avoid conviction of a crime involving moral turpitude if the record does not show intent to commit a CMT. For more information on fashioning such pleas, see § N.2 (Record of Conviction) or a more thorough discussion at § 2.11

The legal rationale underlying the above instructions is as follows. 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."[82] Auto burglary or burglary of any non-structure under PC § 460(b) does not come within this definition, 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). Even a burglary of a structure can escape the "burglary" definition as long as the record does not establish the entry was *unprivileged*. The Ninth Circuit has held that information in a California record of conviction showing that the entry was unprivileged is sufficient to establish burglary under the generic definition, despite the fact that the California statute does not require an unprivileged entry.

Any burglary of a dwelling will be held an aggravated felony as a crime of violence, regardless of whether the entry was unprivileged.

Even burglary of a vehicle or other non-structure 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." The statutory definition of aggravated felony includes attempt to commit an aggravated felony.[83] To prevent this, counsel should create a record of conviction establishing guilt only of "larceny *or* any felony" or other options described above. This danger extends to intent to commit any aggravated felony. (A similar rule applies to moral turpitude determinations; see next section.)

2. Burglary as a Crime Involving Moral Turpitude.

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

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[82] *Taylor v. United States*, 494 U.S. 575 (1990).
[83] INA §101(a)(43)(U), 8 USC §1101(a)(43)(U). Some courts have held burglary with intent to commit larceny is the aggravated felony attempted theft.

B. Theft

Current law pertaining to the "theft" aggravated felony category. A "theft offense (including receipt of stolen property)" is an aggravated felony if a sentence of a year or more has been imposed.[84] For further discussion of theft as an aggravated felony see Chapter 9, § 9.35; for receipt of stolen property, see § 9.29.

The definition of theft for aggravated felony purposes is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership even if such deprivation is less than total or permanent." [85]

Temporary taking, Veh. Code § 10851 and accessory after the fact. 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 the act of taking a vehicle as described in Calif. Veh. Code § 10851 is a "theft" for this purposes, despite the fact that it does not require intent to permanently deprive the owner.[86] Note, however that in *United States v. Vidal* the Ninth Circuit *en banc* held that § 10851 still is divisible as "theft." Because being an accessory after the fact is not a theft, and because the court found that § 10851 includes accessory, § 10851 is divisible as "theft" as long as the record does not establish that the defendant acted as the principal rather than as an accessory after the fact.[87]

Thus a plea to § 10851, even with a sentence of a year imposed, will not be held to be a an aggravated felony if the record of conviction does not establish that the defendant was found guilty as principal rather than accessory after the fact. However, counsel still should do everything possible to avoid a one-year sentence. Several judges dissented from the *en banc* ruling in *Vidal* on the grounds that accessory after the fact cannot reasonably be held to be an offense described in § 10851, and it is possible that the Supreme Court would review the issue Early in 2007 the Supreme Court dismissed a similar but much weaker argument concerning aiding and abetting.[88]

Theft of services and PC § 484. The definition of "theft" is limited to theft of property. Since PC § 484 includes theft of labor, it is a divisible statute for aggravated felony purposes.[89] 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

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[84] INA § 101(a)(43)(G), 8 USC § 1101(a)(43)(G).
[85] *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002)(*en banc*). The Supreme Court approved this definition. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007).
[86] *Gonzales v. Duenas-Alvarez*, *id.*; *Matter of V-Z-S-*, Int. Dec. 3434 (BIA 2000).
[87] *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*), holding that Calif. Veh. Code §10851 is a divisible statute as a "theft" aggravated felony because it includes the offense of accessory after the fact, and the record did not establish that the conviction at issue was not for accessory after the fact.
[88] *Duenas-Alvarez, supra*.
[89] *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc*). See also *Duenas-Alvarez, supra* at 820, acknowledging widespread use of definition of theft as exerting control over property.

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 § N.3.

A sentence imposed pursuant to a recidivist enhancement, for example for petty theft with a prior, will be counted toward the sentence of a year or more required for a theft aggravated felony. The Supreme Court recently overturned Ninth Circuit precedent to hold that a sentencing enhancement imposed as a result of a recidivist offense shall count towards the length of sentence imposed. *U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008), overturning in part *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc).* In *Corona-Sanchez* the Ninth Circuit had held that a conviction for petty theft with a prior under P.C. §§ 484, 666 is not an aggravated felony, regardless of sentence imposed, because it would not consider sentence imposed pursuant to a recidivist enhancement. The Supreme Court disapproved this approach in *Rodriquez.*

Theft by fraud. A conviction of theft by fraud under PC § 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.

1. 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. See discussion of the immigration impact of conviction of one or more crimes involving moral turpitude at § N.6, and at Chapter 4, *Defending Immigrants in the Ninth Circuit*. Counsel should assume that any conviction under PC § 484 is a moral turpitude offense.

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 (c) 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 PC § 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 § N.6 or Chapter 4.

C. 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.[90] So is a theft conviction if a sentence of a year or more was imposed.[91] See §§ 9.20, 9.35. There are ways to avoid these consequences, but the issue has become more complex. (Note also that an offense that contains fraud as an element or that is inherently fraudulent is a crime involving moral turpitude. See Chapter 4.)

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, counsel must look for additional defense strategies in cases such as welfare or credit card fraud with restitution ordered of more than $10,000.

Even worse, the Board of Immigration Appeals held that it can consider information from outside the record of conviction to determine the $10,000 loss.[92] There is reason to think that the Ninth Circuit will not adopt this rule in immigration proceedings originating within its states, but even if that is true there is the threat that noncitizens will travel of their own accord, or be detained by immigration authorities and transferred, outside the Ninth Circuit. This is another reason that counsel should attempt to plead to an offense that does not involve fraud or deceit, such as theft, in order to avoid this ground where there is evidence of an intended or actualized loss of $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.[93] In *Chang v. INS*, Mr. Chang presented a written plea agreement from his prior single conviction for bank fraud under 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.

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[90] 8 USC §§ 1101(a)(43)(D), (M).
[91] 8 USC §1101(a)(43)(G).
[92] *Matter of Babaisokov*, 24 I&N Dec. 306 (BIA 2007).
[93] 8 USC §§ 1101(a)(43)(M)(i).

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 PC § 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.[94]

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 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 PC 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 PC § 484, there would be no aggravated

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

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 material on theft at § N.11 or Chapter 9, and discussion in section 2, *infra*.)

- To avoid an aggravated felony for a theft offense with a sentence of one year or more a defendant can plead to PC 484 "in the exact language of the statute" or simply add a new count to the complaint to state merely "violation of PC 484" without any other verbiage. Under *United States 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.

- Beware of leas to attempt or conspiracy in this kind of case. Such a plea may result in the aggregate hoped-for profits of even an unsuccessful fraudulent scheme being counted toward the $10,000.

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 no requirement about "loss to the victim." The Board of Immigration Appeals has acknowledged that theft and fraud are distinct offenses, such that a conviction for theft, i.e. a taking without consent, with a loss to the victim exceeding $10,000 is not an aggravated felony under the fraud and deceit category.[95] Counsel must remember, however, to avoid a sentence of a year or more imposed on any single count of a theft offense. For a discussion of avoiding a one-year sentence for immigration purposes see Chapter 5 on sentences or § N.3. See also suggestions for avoiding the aggravated felony theft in section 1, *supra*.

§ N.12 Analysis of Safer Alternatives: Alternate Pleas with Less Severe Immigration Consequences[96]

(See also Tooby, Rollin, Safe Havens at www.criminalandimmigrationlaw.com)

A. All-Purpose Substitute Pleas: Accessory after the Fact, Solicitation (but Not Aiding and Abetting)

1. Accessory after the Fact

[95] *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (welfare fraud offense in violation of § 40-6-15 of the General Laws of Rhode Island is not a "theft offense"), citing with approval *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 USCS § 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).

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

Introduction. This section offers a brief explanation of proposed safer offenses. For further discussion see works listed at § N.14, "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 section 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 § 113.2.

A. All-Purpose Substitute Pleas: Accessory after the Fact, Solicitation (but Not Aiding and Abetting)

1. Accessory after the Fact

Accessory after the fact under PC § 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, and is not an aggravated felony where theft is the principal offense.[97] 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 Dec. 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 significant adverse immigration consequences that counsel should take into account, however.

- The BIA held that accessory with a one-year sentence imposed is an aggravated felony as "obstruction of justice." *Matter of Batista-Hernandez, supra.* To provide immigration counsel with a strong argument against this holding, if a plea to PC § 32 with a one year sentence is taken, let the record of conviction indicate or leave open the possibility that the assistance was to avoid apprehension by the police before charges were filed, as opposed to avoiding something relating to an ongoing prosecution. See discussion at Chapter 9, § 9.24, *Defending Immigrants in the Ninth Circuit.*

- The Ninth Circuit *en banc* held that Calif. PC § 32 is not categorically a crime involving moral turpitude. However, in immigration proceedings originating outside the Ninth Circuit, the BIA is likely to hold that it is.[98] See further discussion at Chapter 2, § 2.12.

- 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 trafficking. For this reason, accessory after the fact to a drug transaction is not a recommended plea for an undocumented person who hopes to obtain lawful status. See 8 USC § 1182(a)(2)(C) and discussion at §§ 3.10, N.7.

- Where a statute includes the possibility of conviction as an accessory after the fact, the statute is divisible. In *United States v. Vidal*[99] the court held that a felony conviction under Calif. PC § 10851(a) was not an aggravated felony as theft, because the statute covers both theft principals and accessories after the fact. However, the Supreme Court might consider this issue in the future.

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[97] *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993) (crime of violence); *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007)(*en banc*) (theft).
[98] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(*en banc*). For the BIA view, which it is expected to apply in immigration cases arising outside the Ninth Circuit, see *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (misprision of felony under 8 USC §4).
[99] *United States v. Vidal, supra.*

2. 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 *United States v. Rivera-Sanchez*[100] in Part F "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).

However, while immigration counsel should argue the excellent solicitation cases that govern, criminal defense counsel should not rely entirely on the solicitation defense. In 2006 legislation passed in the House and Senate that would have eliminated the solicitation defense. While this did not become law, the legislation may be re-introduced and may become law at some point. For that reason, in dealing with an offense such as Calif. H&S § 11360(a), counsel should plead to the entire statute in the disjunctive, including transportation. Since transportation, while a deportable offense, is not an aggravated felony, that will protect the noncitizen in case the solicitation defense ever is lost.

3. Aiding and Abetting is not a safe plea

The Ninth Circuit had held that a California conviction for aiding and abetting an aggravated felony is not itself an aggravated felony, at least as theft. This, coupled with the fact that under California law a record establishing a plea to aiding and abetting could look identical to a plea to the principal offense, created a key defense argument in immigration proceedings.[101]

This defense was destroyed when the Supreme Court, held that aiding and abetting is included in the aggravated felony theft. *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (U.S. 2007).

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.

An offense that is held to be sexual abuse of a minor or rape is an aggravated felony, regardless of sentence imposed.

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[100] *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(*en banc*).

[101] See *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).

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, PC § 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. The authors think that it would not be held an aggravated felony even if a sentence of a year or more were imposed, but it is possible that the government would assert that it constitutes obstruction of justice, an aggravated felony with a sentence of year. Defendants who are not compelled to accept a strike may consider less serious substitute pleas such as false imprisonment.

2. False imprisonment, PC § 236.

Felony false imprisonment. The authors believe that felony false imprisonment probably can avoid being classed as 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. PC § 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. Only violence and menace have use of force as potential elements. It is possible that the government would charge that false imprisonment by fraud and deceit carries an inherent risk that force will ensue and therefore is a crime of violence under 18 USC § 16(b), but this should not be upheld.

Any felony conviction of false imprisonment will be held a crime involving moral turpitude, however.

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. Annoying or Molesting a Child

The Ninth Circuit found that this offense does not 'categorically" constitute sexual abuse of a minor.[102] This means that as long as the record of conviction does not give details about the offense, or the details are about relatively mild behavior, the offense will not be held to be an aggravated felony. Therefore it is a good alternate plea to avoid a plea to statutory rape, PC §

[102] *United States v. Pallares-Galan,* 359 F.3d 1088 (9th Cir. 2004).

288(a), or other more serious offenses, if it is possible to obtain it. The offense is not categorically a crime involving moral turpitude.[103]

4. Simple battery, spousal battery, PC §§ 243(a), 243(e)

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. Neither battery nor battery against a spouse under Calif. PC §§ 243, 243(e) will be held to be a crime of violence (with a clear record of conviction) or moral turpitude offense.[104] The same is not true for PC § 273.5 (spousal injury), which will be held a crime of violence, a crime of domestic violence, and a crime involving moral turpitude. Simple battery is not a crime involving moral turpitude. See e.g. *Matter of B,* 5 I&N Dec. 538 (BIA 1953).

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

5. Battery with serious bodily injury, PC § 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).[105]

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 beyond mere offensive touching.

Other consequences. Immigration counsel can argue that this is not a "crime of violence" because it does not necessarily involve intent to use force; it is not clear whether this would succeed. In case it is held to be a crime of violence, counsel must attempt to avoid imposition of a sentence of a year or more to avoid an aggravated felony conviction. It also would cause deportability under the domestic violence ground if the victim has a domestic relationship; see §§ 6.15, N.8, *supra.*

6. Consensual Sex with a Minor, PC § 261.5?

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[103] *Nicanor-Romero v. Mukasey*, __ F.3d __ No. 03-73564 (9th Cir. April 24, 2008).
[104] *Ortega-Mendez v. Gonzales,* 450 F.3d 1010 (9th Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense); *Matter of Sanudo,* 23 I&N Dec. 968 (BIA 2006) (misdemeanor battery and spousal battery under Calif. PC §§ 242, 243(e) is not a crime of violence, domestic violence offense or crime involving moral turpitude. See also *Singh v. Ashcroft,* 386 F.3d 1228 (9th Cir. 2004).
[105] See *Matter of Muceros,* A42 998 610 (BIA 5/11/00), citing *People v. Campbell* (1994) 28 Cal. Rptr. 2d 716.

Where possible counsel should not plead to statutory rape, because the Ninth Circuit and BIA have held that it is an aggravated felony as sexual abuse of a minor. However, because some immigration options still exist, and because the Ninth Circuit en banc is reconsidering the ruling that the offense is an aggravated felony, this plea may be better than a plea to, e.g., sexual battery or another offense that requires registration as a sex offender. Try to obtain expert advice keyed to the defendant's particular immigration situation in order to evaluate this kind of choice.

For defenders interested in a summary of the current landscape: the Ninth Circuit recently held that PC § 261.5(d) is not categorically a crime involving moral turpitude.[106] This decision opens up defense strategies that permit a qualifying noncitizen to apply for admission or adjustment of status, for example based on a family relationship, despite the fact that under current precedent a statutory rape conviction is treated as an aggravated felony. This is because there is no ground of inadmissibility based on conviction of an aggravated felony per se, so the only way that a statutory rape conviction causes inadmissibility is under the moral turpitude ground. Now that the offense is held not to involve moral turpitude, and therefore does not cause inadmissibility, the conviction is not a statutory bar. This will only help immigrants who are eligible to apply for these forms of relief.

Further, the Ninth Circuit *en banc* will consider whether statutory rape is an aggravated felony as sexual abuse of a minor, by reviewing *Estrada-Espinoza v. Gonzales*.[107] Counsel can attempt to defer a plea until this case is resolved.

7. Sexual battery under PC § 243.4

While this plea requires registration as a sex offender, it has some advantages in terms of immigration consequences, although it carries some serious immigration risks.

For immigration purposes, the offense involves moral turpitude but otherwise may escape major consequences depending on the record of conviction. The Ninth Circuit found that *misdemeanor* sexual battery is not a crime of violence.[108] Therefore, absent information in the record establishing that violence was used, the person will not be deportable under the domestic violence ground even if the record established a domestic relationship, and a sentence imposed of a year will not be held an aggravated felony. *If the victim is a minor, counsel must be careful to keep evidence of age from the record of conviction*, because of the danger that the BIA or Ninth Circuit would take notice of age even for sexual offenses that do not have age as an element of the offense. Even worse, if the defendant's immigration case is handled outside the Ninth Circuit, authorities may consult even evidence outside of the record. The danger that immigrant residents of the Ninth Circuit may be detained, and their immigration cases held, outside the Ninth Circuit makes this a significant risk where the victim is a minor.

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[106] *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2006).
[107] *Estrada-Espinoza v. Gonzales*, 498 F.3d 933 (9th Cir. 2007).
[108] *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (conviction under Cal PC § 243.4(a) is not a crime of violence under USSG § 2L1.2(b)(1)(A) because it does not have use of force as an element). Section 2L1.2(b)(1)(A) uses the same standard as 18 USC 16(a).

Felony sexual battery is a crime of violence,[109] so it will be an aggravated felony if a sentence of a year or more is imposed, and will be a deportable crime of domestic violence if the record shows that the victim had that relationship. Again, if the victim is a minor it is imperative that age be kept out of the record of conviction.

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

The Supreme Court held that driving under the influence, and other offenses where injury may be caused through negligence, does not come within the definition of crime of violence under 18 USC § 16. *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002). The Ninth Circuit *en banc* held that this also extends to injury cause by criminal recklessness, *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*), as have other circuits Under these rulings, the offense will not be an aggravated felony even a sentence of a 365 days or more is imposed.

However, in 2006 bills passed the House and Senate that would make a third drunk driving conviction a "crime of violence," and hence an aggravated felony if a sentence of a year or more is imposed. It is possible that this will be reintroduced, made law, and even applied retroactively. (*Ex post facto* principles do not apply in immigration proceedings.) Therefore criminal defense counsel should act conservatively and attempt to obtain a sentence of less than a year, in particular for a third DUI conviction. For suggestions on sentence strategies to get to 364 days in felony cases, see § N.3.

Even repeated convictions for driving under the influence is not a crime involving moral turpitude. [110] The Ninth Circuit is considering *en banc* whether an offense that contains the elements of driving under the influence while knowingly on a suspended license, Ariz. Rev. Stat. § 28-1381/1383, involves moral turpitude.[111] California does not have a single offense that includes both DUI and knowingly driving on a suspended license. There is a threat that a conviction for DUI with a *sentence enhancement* based on no license, suspended license, etc. could be held to involve moral turpitude.

Evidence of repeated arrests or convictions for DUI may trigger a charge that the person is inadmissible as an alcoholic, which is classed as a medical disorder that poses a threat to self or others. 8 USC § 1182(a)(2). The person also might be held barred from establishing good moral character as a "habitual drunkard." See 8 USC § 1101(f).

D. Safer Pleas for Offenses Related to Firearms or Explosives

See also § N.10, "Firearms"

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[109] *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9th Cir. 2005) (felony conviction of Cal. Penal Code, § 243.4(a) is categorically a crime of violence under 18 USC §16(b)).

[110] *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

[111] *Marmolejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007), reh'rg *en banc* granted Mar. 14, 2007 (actual driving on a suspended license while under the influence is a crime involving moral turpitude). The panel distinguished *Hernandez-Martinez v. Ashcrof*t, 329 F.3d 1117 (9th Cir. 2003), which held that merely exerting control over a vehicle (e.g., "sitting in one's own car in one's own driveway with the key in the ignition and a bottle of beer in one's hand") does not involve moral turpitude.

1. Manufacture, possession of firearm, other weapon, PC § 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 § N.10. 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, PC § 245(a)

Avoiding deportability under the firearms ground. For purposes of the firearms deportation ground, PC § 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 § N.6. 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 PC §§ 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 § N.8 on domestic violence.

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

See also § N.11, "Burglary, Theft and Fraud"

1. False personation, PC § 529(3)

The authors believe that conviction under PC § 529(3) is not necessarily a crime involving moral turpitude, or an aggravated felony as forgery or counterfeit offense. 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 foreseen*." *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 no innocent behavior, even if, in some instances, it might not stem from an evil motive." *Id*. at 209.

This may not be a safe alternative to avoid the aggravated felony of a fraud or deceit offense with a loss to the victim/s exceeding $10,000,[112] however, because deceit is defined so broadly. Where the record will reflect that loss, it is safer to plead to a theft offense as defined in PC § 484 and let the record of conviction designate, or leave open, theft as opposed to fraud, while not taking a one-year sentence.

2. Joyriding, Veh. Code § 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 Dec. 686 (BIA 1946) (former PC § 499(b)).

Alternative to auto theft for aggravated felony purposes. The act of taking a vehicle as described in Calif. Veh. Code § 10851 meets the definition of the aggravated felony "theft" for this purposes, despite the fact that it does not require intent to permanently deprive the owner.[113] However, in *United States v. Vidal* the Ninth Circuit *en banc* held that § 10851 still is divisible as theft, because it includes the offense of accessory after the fact, which is not an aggravated felony.[114] Early in 2007 the Supreme Court dismissed a similar argument concerning aiding and abetting, because it held that aiding and abetting a theft such as § 10851 also is a theft.[115]

Thus a plea to § 10851, even with a sentence of a year imposed, will not be held to be a an aggravated felony if the record of conviction does not establish that the defendant was found

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[112] 8 USC § 1101(a)(43)(M)(i).
[113] *Duenas-Alvarez v. Gonzales*, 127 S.Ct. 815 (2007), *Matter of V-Z-S-*, Int. Dec. 3434 (BIA 2000).
[114] *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*) holding that Calif. Veh. Code §10851 is a divisible statute as a "theft" aggravated felony because it includes the offense of accessory after the fact, and the record did not establish that the conviction at issue was not for accessory after the fact.
[115] *Duenas-Alvarez, supra*.

guilty as principal rather than accessory after the fact. However, counsel still should do everything possible to avoid a one-year sentence. Several judges dissented from the *en banc* ruling in *Vidal* on the grounds that accessory after the fact cannot reasonably be held to be an offense described in § 10851, and it is possible that the Supreme Court would review the issue.

3. Burglary of a Car or Other Non-Structure, PC § 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 § N.3.

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.

4. 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). In this case the plea agreement did not provide that loss was less than $10,000, so it is possible that that would overcome the $10,000 restitution order, but counsel should not rely on that. Counsel should obtain the *Chang* statement in the plea agreement, and try to take additional measures. The most secure is to plead to an offense that does not involve fraud or deceit, such as a straight theft. See discussion at §§ 9.20 and N. 11.

F. Safer Pleas for Offenses Related to Drugs

See further discussion in § N.7 Controlled Substances

1. If the controlled substance in the offense is not identified either in the record of conviction or under the terms of the statute, the government is unable to prove that the offense involved a federally defined controlled substance and there are no immigration consequences based on a drug conviction. For example, where the record showed only possession of a "controlled substance" under Calif. H&S § 11377-79 with specifying the substance, the Ninth Circuit found that the person was not deportable *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). Although there is not a case on point, this also should work with H&S § 11350-52.

2. Accessory after the fact to a drug offense is not a deportable drug conviction or aggravated felony, or a crime involving moral turpitude. Counsel must obtain a sentence of 364 days or less. See Part A above.

3. Offering to sell or transport 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 11379(a) are divisible statutes between sale, distribution and transport and offering to do those acts. *United States 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.

4. Avoid possession for sale of a specified substance, which is an aggravated felony. If needed, plead up to offering to sell as described above.

5. 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 PC § 1203.4. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

6. A first conviction, felony or misdemeanor, for simple possession is not an aggravated felony under the Supreme Court decision in *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006). This already was the rule in the Ninth Circuit, under *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004). An exception is that possession of flunitrazepam or more than five grams of crack cocaine is an aggravated felony.

7. Criminal defense counsel should act conservatively and assume that a possession conviction is an aggravated felony if there is a prior drug conviction, while we wait for the Supreme Court to determine this issue. If such a plea is unavoidable, avoid having the prior conviction pleaded or proved at the possession case. The current rule of the Board of Immigration appeals is that this will prevent the possession from being treated as an aggravated felony.[116] Once the first conviction is eliminated under *Lujan-Armendariz*, *supra*, it should no longer count for purposes of calculating which is the "second" conviction.

8. Be aware of conduct-based immigration consequences. See §§ 3.8-10 or the summary at § N.7 for a description 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

[116] *Matter of Carachuri*, 24 I&N 382 (BIA 2007).

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 § N.3.

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 § N.5 on aggravated felonies.

H. Attempt, PC § 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 PC § 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 PC § 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 § N.6.

Beware of two possible disadvantages to an attempt (or conspiracy) plea. First, if the offense involved fraud and there was a potential loss to the victim or government of $10,000 or more (an aggravated felony), a plea to attempt or conspiracy may result in the aggregate hoped-for profits of even an unsuccessful fraudulent scheme being counted toward the $10,000. See Note: Burglary, Fraud. Second, where the noncitizen needs the record to leave open the possibility that the criminal intent amounted to recklessness, for example to avoid a crime of violence under 18 USC § 16, a conviction for attempt may by logic preclude that possibility. See Note: Crimes of Violence.

I. Consider What You Can Do By Controlling the Record of Conviction

Wherever a charge threatens adverse immigration consequences, investigate the possibility that the statute charged is divisible for purposes of the immigration consequence, and see if it may be possible to avoid creating a record that will prove that the noncitizen was convicted under the adverse section. If this can't be done, see if there is a reasonable substitute plea that is divisible. See discussion at § N.2 *supra*, and in more depth at Chapter 2, § 2.11(C).

J. Is your client a U.S. citizen or national 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). Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam and U.S. Virgin Islands, as well as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens. 8 USC § 1101(a)(38), INA § 101(a)(38).

The best evidence of birth in the U.S. or a territory is a certified copy of the birth certificate. If this is not available, substitute documents adequate for immigration authorities are listed in 8 CFR § 204.1(f), (g)(2). These include baptismal certificate with the seal of the church, showing date and place of birth and date of baptism; affidavits of people who are personally aware of the birth; early school records; and other material.

A national of the United States is not a U.S. citizen, but cannot be deported. Persons born in an outlying possession of the United States, for example in American Samoa and Swains Islands, are nationals.[117]

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 that military personnel may be able to naturalize (apply to become a U.S. citizen) despite being deportable for a conviction. See discussion of advantages for current and ex-service personnel at Chapter 11, § 11.21, *Defending Immigrants in the Ninth Circuit.*

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[117] *See* INA §§ 308, 8 USC §1408 and INA §101(a)(29), 8 USC §1101(a)(29). For a complete description of who can be noncitizen nationals, please *see* INA § 308 and Chapter 3, Noncitizen Nationals, Daniel Levy, *United States Citizenship and Naturalization Handbook* (20022004 ed., West Group).

§ N.13 Client Immigration Questionnaire

For all noncitizen 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 *Defending Immigrants in the Ninth Circuit (DINC); go to www.ilrc.org/criminal.php*.

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 DINC § 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 DINC § 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 DINC § 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 DINC § 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 DINC §§ 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 DINC §§ 11.28-29.

§ N.14 Other Resources: Books, Websites, Services

Books

Immigrant Legal Resource Center. Along with writing *Defending Immigrants in the Ninth Circuit*, formerly *California Criminal Law and Immigration*, the Immigrant Legal Resource Center creates extensive on-line materials for criminal defense attorneys, and works with communities and media to obtain fair treatment and a reasonable view of noncitizens convicted of crimes. Go to www.ilrc.org/criminal.php for additional information.

The Immigrant Legal Resource Center publishes several other books and materials on immigration law, all written to include audiences of non-immigration attorneys. It also is a center for community organizing for immigrants' rights. See list of publications, trainings and projects 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 Noncitizens* 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 national Defending Immigrants Partnership is a national effort to assist criminal defense counsel who defend indigent immigrants. See the website at www.defendingimmigrants.org, which among other resources provides links to charts similar to this one that show immigration consequences of offenses under many other states' laws. The principal partners are the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild; the Immigrant Defense Project of the New York State Defender Association; and the National Legal Aid and Defender Organization. Each of these partners maintains their own websites which include materials beyond those found at www.defendingimmigrants.org.

The Immigration Advocates' Network (IAN) is a collaboration of immigration non-profits throughout the country whose goal is to provide on-line immigration resources to pro bono immigration practitioners. The Immigrant Legal Resource Center heads the Immigration and Crimes resource library, which provides resources such as overviews, practitioner guides, and sample pleadings for those representing noncitizens with criminal records, as well as copies of the state and federal charts on immigration consequences. This library is appropriate for defenders looking for more in-depth resources on the immigration consequences of crimes. Go to www.immigrationadvocates.org.

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 and other general immigration issues. The 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. Go to www.nationalimmigrationproject.org.

The New York State Defenders Association Immigrant Defense Project has excellent practice guides that can be used nationally, as well as a wealth of information about immigration consequences of New York and nearby state law. Go to www.nysda.org.

The National Legal Aid and Defender Association provides seminars and many services to its thousands of members. 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. For national seminars on immigration and crimes, see listings at www.defendingimmigrants.org and member websites.

Consultation

The Immigration Clinic at King Hall School of Law at U.C. Davis 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 gmartinez@pubdef.lacounty.gov.

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.