



*Immigrant Legal Resource Center*  
**QUICK REFERENCE CHART & NOTES FOR  
DETERMINING KEY IMMIGRATION CONSEQUENCES  
OF SELECTED CALIFORNIA OFFENSES**  
January 2013

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*How to Use the*  
**Quick Reference Chart for Determining Selected Immigration  
Consequences of Selected California Offenses, and the  
California Notes**

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**The Chart and Notes.** The *California Chart* analyzes some key adverse immigration consequences (deportability, inadmissibility, and aggravated felon status) that flow from conviction of over 150 California offenses. The Advice column on the right suggests how to avoid these consequences by working with the record or seeking an alternate plea.

The *California Notes* are a series of articles for criminal defenders that are organized by topic, e.g. how to plead to drug charges or theft charges, or what to do in response to an immigration hold. See Table of Contents at the end of this document. The Notes provide more detailed plea instructions, as well as basic information on applicable crim/imm law.

Most Notes are followed by Appendices, which are defender aids specifically geared to the topic of the Note. Check them out! They may include:

- **Topic-specific charts and checklists.** Some Notes provide a chart or checklist about the Note's topic, which is more detailed than the main California Chart. It may summarize information and plea instructions from the Note in a quick-access format. For example §N.9 *Domestic Violence, Child Abuse* has as an Appendix a detailed chart on dealing with charges that may flow from a domestic violence incident.
- **Legal Summaries for the Defendant.** Because the great majority of noncitizens are unrepresented in removal proceedings, and because many immigration judges are not intimately familiar with crim/imm issues, we face the risk that your good work will go to waste because no one in immigration court will recognize the defense you have created. For this reason, many Notes include an Appendix that sets out legal summaries of the defenses described in the Note. We ask you to identify the relevant summary (easy to do) and literally print the page, cut out the summary, and hand it to your client. Tell the person to give it to his or her immigration attorney if any, or else directly to the immigration judge. Further, because immigration detention center authorities often confiscate detainees' documents, if your client will be detained we ask you to mail or give a second copy to a friend or relative of the client. See each Appendix for further information and instructions.

**Navigating the Chart and Notes.** Two tools will help you to get around this large document. First, on the California Chart you will see directions to certain Notes printed in red, e.g. "See **Note: Drugs.**" These are hyperlinks; click on them to go to the Note.

## How to Use the California Chart and Notes

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Second, if you download the chart in PDF form you will see that there are booknote and table of contents functions that will take you around the document.

**To send comments or suggestions** about the Chart or Notes, write [chart@ilrc.org](mailto:chart@ilrc.org).

**Need for Individual Analysis.** The Chart and Notes can be consulted on-line or printed out and carried to courtrooms and client meetings for quick reference. However, competent defense advice requires an *individual* analysis of a defendant's immigration situation. For example, the defense goals for representing a permanent resident are different from those for an undocumented person; even within these categories, the goals will change based on the individual's priors and/or possible relief. See §N.1 Overview.

To capture the needed information, an attorney or paralegal should complete the form at §N.16 *Immigration Questionnaire* for each noncitizen defendant. (For a "write-on" PDF version of the form, go to [www.ilrc.org/crimes](http://www.ilrc.org/crimes).) See also §N.17 *Relief Toolkit*.

**Disclaimer, Additional Resources.** Using this guide and other works cited in §N.18 *Resources* 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 that is even more important than avoiding criminal penalties. However, these are quick-reference resources with real limits. While federal courts have specifically affirmed the analysis presented for some offenses, in other cases these materials represent only the authors' opinion as to how courts are likely to rule. In addition, this area of the law is volatile. Each month new decisions come out that may change immigration consequences. And in 2013, with immigration reform on the table, it is possible that Congress will put in additional crim/imm provisions and apply the change retroactively to past pleas.

Defender offices should check accuracy of pleas and obtain up-to-date information. Tell the defendant that while you will provide the best advice possible now, you cannot guarantee what may happen in the future. The best option is to use the Chart and Notes in consultation with an immigration expert, or if that is not possible with in-depth resource works such as Brady et al., *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)) or Tooby, *Criminal Defense of Immigrants* (and other works, see [www.nortontooby.com](http://www.nortontooby.com)). See especially [www.defendingimmigrants.org](http://www.defendingimmigrants.org) for defender resources, and see information on other books, websites, trainings, and consultation at §N.18 *Resources*.

Be sure that your defender office has a representative on the *free Cal-DIP listserve*, by which we circulate updates and announcements. Contact [suyon@ilrc.org](mailto:suyon@ilrc.org) for information.

**Important Note to Immigration Attorneys.** While these materials may provide a useful shortcut to current information, it is crucial to note that they are written for criminal defense counsel, not immigration counsel. They represent 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

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whether to pursue defense against removal. An offense may be listed as an aggravated felony or other adverse category here even if there are very strong arguments (or in some cases even precedent) to the contrary that ought to prevail in immigration proceedings.

Immigration attorneys should see *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013). This provides a detailed analysis of defense strategies and arguments for immigration proceedings. See also other ILRC publications there, and see resources at [www.nortontooby.com](http://www.nortontooby.com) and at §N.17 Resources.

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### *California Quick Reference Chart*

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**QUICK REFERENCE CHART**  
**For Determining Key Immigration Consequences**  
**Of Selected California Offenses<sup>1</sup>**

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<b>CALIF. CODE SECTION</b>	<b>OFFENSE</b>	<b>AGGRAVATED FELONY</b>	<b>CRIMES INVOLVING MORAL TURPITUDE ("CIMT")</b>	<b>OTHER DEPORTABLE, INADMISSIBLE GROUNDS</b>	<b>ADVICE AND COMMENTS</b>
Business & Prof C §4324	Forgery of prescription, possession of any drugs	Might be AF as: -Analogue to 21 USC 843(a)(3) -Forgery, <i>if</i> 1 yr. Avoid 1 yr imposed on any single count. See <b>Note: Sentence.</b> See Advice	Might be divisible: forgery is CIMT but poss of the drug might not be.	Deportable for CS conviction if the ROC ID's a specific CS. Inadmissible and barred from relief for CS conviction regardless of whether ROC ID's specific CS.	<u>AF:</u> To avoid CS AF, and deportability & inadmissibility under CS ground, plead to straight forgery, false personation, PC 32, or other non-CS alternative. To avoid AF, plead to straight poss plus straight forgery.  <u>Deportable, Inadmissible CS:</u> See other strategies in <b>Note: Drugs.</b>
Business & Prof C §25658(a)	Selling, giving liquor to a minor	Not AF.	Shd not be CIMT.	No.	If obtainable, great alternate to providing drugs to a minor. Keep ROC clear of mention of drugs
Business & Prof C §25662	Possession, purchase, or consumption of liquor by a minor	Not AF.	Not CIMT	No, except see Advice re inadmissible for alcoholism	Multiple convictions might be evidence of alcoholism, which is an inadmissibility grd and a bar to "good moral character."
Health & Safety C § 11173(a)	Prescription for CS by fraud	See B&P C §4324	CIMT, except maybe (b) false statement, if not material	See B&P C §4324	See B&P C §4324

<p>H&amp;S C §11350(a), (b)</p>	<p>Possession of controlled substance</p>	<p>Poss (with no drug prior) is not AF unless it's flunitrazepam. Poss of over 5 grams of crack, no longer is AF, regardless of date of conviction.</p> <p>If D has prior drug conviction, avoid AF by not letting prior be pled or proved for recidivism.<sup>2</sup> Instead take the time on another offense or plead to 11365 or 11550, which can take a recidivist sentence without being an agg felony.</p> <p>See Advice column for additional defense strategies</p>	<p>Not CIMT.</p>	<p>Not <i>deportable</i> if a specific CS is not ID'd on ROC. See Note: Drugs.</p> <p>But still <i>inadmissible and barred from relief</i> even with no specified CS.</p> <p>See Advice re: effect of DEJ, 1203.4, etc. on a FIRST simple poss. for conviction prior to 7/15/2011.</p>	<p>If this is first CS offense, and client could get lawful status, do everything possible to plead to a non-CS offense. This is highest priority. See <b>Note: Drugs</b> for further discussion of all strategies.</p> <p>If you must plead to this, then:</p> <ol style="list-style-type: none"> <li>1. <u>If a specific CS is not identified in the ROC</u> (poss of a "controlled substance" rather than cocaine) there is <u>no deportable CS conviction</u>,<sup>3</sup> i.e. an LPR who is not otherwise deportable won't become deportable. (H&amp;S 11377 might be a better option for this strategy). But conviction <u>is inadmissible CS and bar to relief as CS</u> even with no specified CS. If D will have to apply for lawful status or relief, use a different strategy.</li> <li>2. <u>Older plea and Lujan benefit</u>: If plea to a first conviction for simple poss, or poss of paraphernalia, occurred before 7/15/2011, conviction can be eliminated for immigration purposes by withdrawal of plea under DEJ, Prop 36, or PC 1203.4, as long as there was no (a) probation violation or (b) prior grant of pre-plea diversion. (Those two bars may not apply to a person who was under 21 during these events.) For convictions entered on or after 7/15/2011, withdrawing plea per DEJ, Prop 36 and 1203.4 will not work for imm purposes<sup>4</sup> (except see DEJ with suspended fine, below). This <i>Lujan</i> benefit does <i>not</i> work in imm proceedings outside the Ninth Circuit.</li> <li>3. <u>DEJ with suspended fine</u>. Ninth Circuit held that where fine was unconditionally suspended, withdrawal of plea under DEJ is not a conviction for imm purposes.<sup>5</sup></li> <li>4. <u>Consider other dispo that is not a conviction</u>, e.g. formal or informal deferred plea. See Note: Drugs</li> </ol>
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H&S C §11351	Possession for sale	Yes AF as CS trafficking; 11352 is much better option.  See Advice for other options.	Yes CIMT, like any CS trafficking offense, regardless of whether specific CS is identified on ROC.	Not <i>deportable</i> for CS conviction or CS AF if no specific CS is ID'd on ROC. This wd benefit an LPR who is not already deportable.  <i>Yes inadmissible and bar to relief</i> even if ROC does not ID a specific CS. See Advice for 11350.	<u>To avoid AF</u> try to plead down to simple poss (see H&S 11350), or H&S 11365, 11550; or plead up to transportation for personal use or offer to sell (see H&S 11352). Or plead to PC 32 with less than 1 yr or any other non-drug offense.  If the ROC does not specify the CS, it is not a <i>deportable</i> AF or CS conviction, but is a bar to relief  <u>To avoid CS conviction</u> , see 11350 Advice.  See <b>Note: Drugs</b> for further advice.
H&S C §11351.5	Possession for sale of cocaine base	Yes AF	Yes CIMT	Deportable, inadmissible for CS conviction	See Advice on H&S 11351 and <b>Note: Drugs</b> . 11351.5 is worse than 11351 in that a specific CS is ID'd. Far better to plead up to 11352.
H&S C §11352(a)	-Transport CS for personal use, -Sell, -Distribute, -Offer to do any of above	Divisible as AF:  -Not AF: transport for personal use or, in 9 <sup>th</sup> Cir only, offer to commit any 11352 offense  -Yes AF: Sell, distribute, but see Advice	Sale is CIMT. Transport for personal use, distribute, probably are not.	Yes, deportable and inadmissible CS, except see Advice on unspecified CS.	See <b>Note: Drugs</b> .  Not <i>deportable</i> AF or CS offense if specific CS is not ID'd on the ROC, i.e. an LPR who is not already deportable will not be.  This dispo still will be AF and CS conviction as a <i>bar to relief and inadmissible offense</i> , however. See 11350 Advice.
H&S C §11357(a)	Marijuana, possession	Not AF (unless a prior possession pled or proved.)	Not CIMT	<i>Deportable</i> for CS conviction, unless a 1 <sup>st</sup> poss. 30 gms or less mj or hash. See next box.  <i>Inadmissible</i> for CS in all cases, but 212(h) waiver might be available for 1 <sup>st</sup> poss 30 gm or less mj or hash.  If no drug priors bargain hard for non-drug offense, e.g. PC 32. See Advice.	If D is an LPR who is not already <i>deportable</i> , a <i>single</i> conviction for 11357(b), or for (a) where the record indicates 30 gms or less, will not create deportability. But if possible plead to non-drug offense, in case D violates again.  Any plea to 11357 is <i>inadmissible</i> offense (unless 11357(b) is held not a conviction; see below). If first drug conviction and ROC shows 30 gms or less, some D's can try for highly discretionary 212(h) waiver – but this is risky.  Where no drug priors, try to avoid this plea! Plead to non-CS offense or get a dispo that is not a conviction. See 11350, supra, and <b>Note: Drugs</b> .



H&S C §11357(b)	Marijuana, possession of 28.5 gms or less (Infraction)	Not AF.	Not CIMT	An 11357(b) conviction with no drug priors automatically gets the 30 gms mj benefits discussed in 11357(a).  Further, infraction may not be a conviction at all; see Advice.	See 11350 Advice for pre-7.11.15 pleas, and dispos that are not a conviction. Also, there is a strong argument that a Cal. infraction is not a "conviction" for imm purposes. See <b>Note: Drugs</b> . If this is not a conviction, 11357 will have no immigration effect.  Still, due to various risks, where no drug priors try to avoid any CS plea and get a non-drug conviction.
H&S C §11358	Marijuana, Cultivate	Yes, controlled substance AF. This is a bad plea; see Advice for other options.	CIMT if ROC shows, or IJ finds evidence of, intent to sell. If intent is for personal use, not CIMT.	Yes, deportable and inadmissible for CS conviction.  With or without a conviction, warn D she may be inadmissible for "reason to believe" trafficking if there is strong evidence of intent to sell.	<u>To avoid AF:</u> Plead down to simple possession (see 11350, 11377); up to transportation or offer to sell (see 11352(a), 11360(a) or (b), 11379(a)); or best option, a non-drug offense, including PC 32 w/ less than 1 yr imposed. If this would be 30 gms or less mj, try hard to get 11357; otherwise, state small amount in ROC.  See <b>Note: Drugs</b> .
H&S C §11359	Possession for sale marijuana	Yes, controlled substance AF. This is a bad plea; see Advice for other options.	Yes CIMT.	See 11359	Avoid this plea. Plead down or up per 11351, 11358 instructions.  See <b>Note: Drugs</b> .
H&S C §11360	Marijuana – (a) sell, transport, give away, offer to; (b) same for 28.5 gms or less	Divisible as AF: -Not AF: transport for personal use or, in 9 <sup>th</sup> Cir only, offer to commit an 11360 offense - Not AF if ROC shows give a small amount of mj away for free. <sup>6</sup> See Advice -Yes AF: Sell, or distribute more than a "small amount"	Yes CIMT as CS trafficking offense, except transport for personal use and giving away.	Yes, deportable & inadmissible CS.  A pre -7/15/2011 plea to giving away small amount of mj may qualify for <i>Lujan</i> benefit if plea withdrawn. See 11350, supra, and Note: Drugs.  Sale, offer to sell will make D inadmissible for "reason to believe" trafficking	See <b>Note: Drugs</b>  Best options: try to plead to -Non-drug offense -11357 if no drug priors -Transportation for personal use (not an AF) -Give away under (b) (not an AF) -Give away specified small amount (if possible, 30 grams) under (a) (very likely not AF) - Offer to do any 11360 (not AF in 9 <sup>th</sup> Cir)
H&S C §11364	Possession of drug paraphernalia	Not AF.  (Sale of drug paraphernalia may be AF, however.)	Not CIMT	Yes deportable, inadmissible as CS conviction, even if specific CS is not ID'd in the ROC. But see Advice re use with marijuana.	If no drug priors, and ROC shows paraph. was for use with 30 gms or less of mj, conviction is not deportable, is inadmissible, and 212(h) waiver might be available. <sup>7</sup> See H&S 11357.  Any poss paraph plea before 7/15/2011 eligible for <i>Lujan</i> benefit; see 11350. See <b>Note: Drugs</b> .



H&S C §11365	Presence where CS is used	Not AF	Not CIMT	Assume deportable, inadmissible for CS conviction even if specific CS is not ID'd on ROC. See Advice.	See Advice on H&S 11364 and 11350, and <b>Note: Drugs</b> .  Plea from before 7/15/11, with no drug priors, may be eligible for <i>Lujan</i> benefit; see 11350, supra.  Plea to presence where 30 gms or less of mj used might get those benefits; see 11357
H&S C §11366.5	Maintain place where drugs are sold	Yes AF	Yes CIMT	Assume deportable and inadmissible for CS conviction even if ROC does not ID specific CS	Avoid this plea. See H&S 11379, public nuisance offenses. See <b>Note: Drugs</b>
H&S C §11368	Forged prescription to obtain narcotic drug	Yes AF potential, see H&S 11173.	Yes CIMT except might not be if specific plea to no fraud. intent.	See H&S 11173	See Advice for H&S 11173.
H&S C §11377	Possession of controlled substance	Divisible; see H&S 11350	Not CIMT	Divisible; see 11350	See 11350 and see <b>Note: Drugs</b>
H&S C §11378	Possession for sale CS	Yes AF, but see Advice re unspecified CS, and see H&S 11351	Yes CIMT	Yes CS, but see Advice re unspecified CS and see H&S 11351	This is a bad plea; better to plead up to 11379. Unspecified CS gives some help to LPRs who are not already deportable. See 11351 Advice and see <b>Note: Drugs</b> .
H&S C §11379(a)	Sale, give, transport, offer to, CS	Divisible: see H&S 11352 and Advice.	Divisible, see H&S 11352	Divisible; see H&S 11352.	See 11350, 11352 Advice and see <b>Note: Drugs</b>
H&S C §11550	Under the influence controlled substance (CS)	Not AF, <i>except</i> : Felony 11550(e) 'with firearm' might be charged as COV, so avoid 1 yr on any on count, or plead to misdemeanor.	Not CIMT	Deportable, inadmissible as CS; See Advice for unspecified CS  H&S 11550(e) also deportable for firearms offense.	See <b>Note: Drugs</b> . 11550(a)-(c) is not AF even with a drug prior. No <i>Lujan</i> benefit even if pled prior to 7/15/2011. <sup>8</sup> Shd not be <i>deportable</i> CS if specific CS is not ID'd in ROC, <sup>9</sup> but gov't might oppose this. Unspecified CS will not prevent offense from being bar to relief.
P.C. §31	Aid and abet	Yes AF if underlying offense is.	Yes CIMT if underlying offense is	Yes if underlying offense is	No immigration benefit beyond principal offense. However see accessory after the fact, PC 32.
P.C. §32	Accessory after the fact	Yes AF <i>if</i> 1 yr imposed on any one count (as obstruction of justice). <sup>10</sup>	Yes CIMT if principal offense is, no CIMT if not. <sup>11</sup>	Good plea: PC 32 does not take on character of principal offense, e.g. CS, violence	Excellent plea to avoid e.g. CS, violence, firearms conviction if avoid 1 yr imposed on any single count. See <b>Note: Drugs</b> and <b>Note: Sentence</b>

P.C. §69	Resisting an executive officer	Yes AF as COV if 1 yr imposed on any one count, <i>unless</i> plea to offensive touching. <sup>12</sup>	Not CIMT if plead to offensive touching	No.	Plead specifically to de minimus violence ("offensive touching") in order to avoid COV and CIMT. See <b>Note: Violence, Child Abuse</b> . Avoid AF by avoiding 1 yr imposed; see <b>Note: Sentence</b>
P.C. §92	Bribery	Yes AF if 1-yr on any one count.	Yes CIMT.	No.	Avoid AF by avoiding 1 yr imposed; see <b>Note: Sentence</b> .
P.C. §118	Perjury	Yes AF if 1-yr on any one count.	Yes CIMT	No.	Avoid AF by avoiding 1 yr imposed; see <b>Note: Sentence</b> .
P.C. §136.1 (b)(1)	Nonviolently try to persuade a witness not to file police report, complaint	Shd not be AF as obstruction of justice, <sup>13</sup> but try hard to get less than 1 yr on any single count.  Not COV, but plead to no threat, force.	Shd not be CIMT; lacks knowing, malicious conduct <sup>14</sup> or specific intent If possible plead to good intent toward V or Witness	Deportable DV crime if it is COV and ROC shows DV-type victim.  Possible deportable crime of child abuse if minor V.	May be a good substitute plea with no imm consequences. Felony is a strike w/ high exposure; can substitute for more serious charges. While AF shd not be obstruction of justice, since there is no precedent decision try hard to avoid 1 yr on any single count. See also PC 32, 236, 243(e), not a strike.
P.C. §140	Threat against witness	Yes assume AF if 1-yr sentence imposed, as COV	Yes CIMT	Deportable crime of child abuse if ROC shows minor V. Deportable DV crime if it is COV and ROC shows DV-type victim.	To avoid AF avoid 1-yr sentence for any one count; see <b>Note: Sentence</b> . To avoid AF and DV deportability ground see PC 136.1(b)(1), 236, 241(a).
P.C. §148	Resisting arrest	Divisible as COV: 148(a)(1) is not, but felony 148 (b)-(d) might be. To avoid AF avoid 1-yr on any single count.  Consider PC 69	148(a)(1) is not CIMT, 148(b)-(c) are at least divisible ("reasonably should have known" police)	Sections involving removal of firearm from officer may incur deportability under firearms ground. See <b>Note: Firearms</b>	<u>AF</u> : Plead to 148(a)(1). If plea to (b)-(d), avoid possible AF as a crime of violence by obtaining sentence less than 1 yr; see <b>Note: Sentence</b> or plead to misdo (b) or (d) with the record sanitized of force. <sup>15</sup>
P.C. §148.9	False ID to peace officer	Not AF	Not CIMT, but see Advice.	No.	<u>CIMT</u> . 9th Cir. held 148.9 not CIMT because no intent to get benefit. <sup>16</sup> Even if BIA disagreed, a first conviction of 6 mo CIMT has no effect. See <b>Note: CMT</b> .
P.C. §166(a)(1) – (4)  (Note: 166 (b)-(c) is a bad plea)	Violation of court order	Shd not be AF, but get sentence of less than one yr and/or keep any mention of threat or violence out of ROC.	Unclear CIMT: (1)-(3) has no intent but court may find CIMT. (4) may depend on violative conduct.	Deportable if court finds vio is of section of DV protective order that prohibits use or threat of force, or repeat harass. See Advice.	Good alternative to 273.6 to avoid DV deport ground. <i>Do not let record show even minor vio of DV stay away order</i> . Keep record vague, or plead to vio related to custody, support, etc. See further discussion in <b>Note: Violence, Child Abuse</b> .

P.C. §182	Conspiracy	Yes AF if principal offense is AF.	CIMT if principal offense is CIMT	Conspiracy takes on character of principal offense, e.g. CS, firearm. Exception <i>might</i> be DV ground. See Advice	Imm counsel can argue that the DV deport ground does not include conspiracy to commit a misd COV, or child abuse, because neither 18 USC 16(a) nor the deportation ground (8 USC 1227(a)(2)(E)(i)) include attempt or conspiracy.
P.C. §186.22(a)	Gang member	Not AF	Assume will be charged as CIMT, but see Advice.	Not a basis for deportability or inadmissibility but Congress might add it in future.	Gang conviction is a basis to deny discretionary relief, release on bond. Shd not be CIMT but no guarantees.
P.C. §186.22(b)	Gang benefit enhancement	Assume will be charged as AF if underlying conduct is AF (e.g., a COV with 1 yr imposed)	See above.	Deportable DV if underlying conduct is COV and DV-type victim. Deportable child abuse if minor V.	See Advice above. Try to avoid this by instead pleading to underlying conduct, 136.1, etc.
P.C. §187	Murder (first or second degree)	Yes AF	Yes CIMT	Potential deportable crime of DV or crime of child abuse	See manslaughter.
P.C. §192(a)	Man-slaughter, Voluntary	Yes AF as COV, only if 1-yr or more imposed on single count.	Yes CIMT	Deportable crime of DV if committed against a victim protected under state DV laws.  Deportable crime of child abuse if ROC shows V under age 18	To avoid AF, avoid 1-yr sentence imposed; see <b>Note: Sentence</b> . To avoid CIMT see PC 192(b).
P.C. §192(b), (c)(1), (2)	Man-slaughter, Involuntary or vehicular	Not COV altho as always, if possible avoid of 1 yr on any single count.	Not CIMT. <sup>17</sup>	Deportable crime of child abuse if ROC shows V under age 18	<u>Not a COV</u> because can be committed by recklessness <sup>18</sup> and/or non-violent conduct.
P.C. §203	Mayhem	Yes AF as COV if 1-yr or more sentence imposed.  To avoid an AF as a COV, avoid 1-yr sentence on any single count. See <b>Note: Sentence</b> .	Yes CIMT	<u>Deportable crime of DV</u> is a COV committed against a V protected under state DV laws. (Assume law may change to let evidence from outside the ROC show this relationship.) See Advice for further information.  <u>Deportable crime of child abuse</u> if ROC shows a victim under 18.	To try to avoid <u>COV and deportable crime of DV</u> , see PC 69, 136.1(b), 236, 243(a), (d), (e), misd 243.4. Some of these offenses might be able to take a sentence of a year or more. See <b>Note: Violence, Child Abuse</b> for more on violent crimes.  <u>To avoid deportable crime of DV</u> where there is or may be a COV: don't let ROC show the domestic relationship. Best is to plead to specific non-DV-type victim (e.g., new boyfriend, neighbor, police officer); less secure is to keep the ROC clear of a victim who would be protected under state DV laws.

					If victim is under 18, this may block a citizen or LPR's ability to immigrate family members in the future. See <b>Note: Adam Walsh Act.</b>
P.C. §207	Kidnapping	Yes AF as COV if 1-yr or more imposed on any one count.	Ninth Circuit says divisible CIMT; it's possible BIA will disagree. See Advice	See PC 203 re deportable crime of domestic violence or child abuse	<b>CIMT:</b> Plea to moving the person with good intentions is not CIMT, says Ninth Circuit. <sup>19</sup> Plead to this specifically if other plea is not available, but warn client the law might change at some point.
P.C. §211	Robbery by means of force or fear	Yes AF as COV or Theft if 1-yr or more imposed on any one count	Yes CIMT	See PC 203 re deportable crime of DV or child abuse	See Advice for PC 203.
P.C. §220	Assault, with intent to commit rape, mayhem, etc.	Yes AF as COV if 1-yr or more on any one count See Advice re intent to rape	Yes CIMT	See PC 203 re deportable crime of domestic violence or child abuse	See Advice for PC 203 Note that assault to commit rape may be treated as attempted rape, which is an AF regardless of sentence.
P.C. §236, 237(a)	False imprisonment (felony)	Divisible: To avoid a COV, plead specifically to fraud or deceit, not threat or force. Even then, as always try to avoid 1 yr on any one count.	Yes CIMT, except possibly if committed by deceit.	See PC 203. In addition, a plea to fraud or deceit shd prevent a COV and therefore a crime of DV.	See Advice for PC 203 ROC showing deceit/fraud shd not be a COV. A vague ROC will prevent a COV for deportability purposes only: it will protect an LPR who is not already deportable from becoming deportable under the DV and AF grounds, but will not preserve eligibility for relief. Re CIMT: See misdo PC 236, or e.g. 243.
P.C. §236, 237(a)	False imprisonment (misdo)	Not an AF, but avoid 1 yr sentence and sanitize ROC of info re intent to use force or threat	Shd not be CIMT, <sup>20</sup> but sanitize ROC of info re intent to harm, defraud, etc.	Not a COV (but sanitize the record), therefore not a domestic violence offense. <i>Might</i> charge as deportable child abuse if ROC showed minor V.	This is a good substitute plea to avoid crime of violence in DV cases If victim is under 18, conviction may block a citizen or LPR's ability to immigrate family members, even if no violence. See <b>Note: Adam Walsh Act.</b>
P.C. §241(a)	Assault	Not an AF as COV because no 1-year sentence	CIMT divisible: To avoid CIMT, plead to attempted offensive touching. See Advice re 243.	To avoid COV and crime of DV, plead to offense involving offensive touching. See Advice re 243. Deportable crime of child abuse if ROC proves that V is a minor.	This is a good alternate plea, but because there is clear case law on it in immigration context, a better plea may be to battery or attempted battery, with an ROC that shows de minimus touching. See 243 and <b>Note: Violence, Child Abuse.</b> If V is under 18, see PC 203 re Adam Walsh Act.

P.C. §243(a)	Battery, Simple	Not an AF because no 1-year sentence	Shd not be CIMT, but ensure this w/ specific plea to offensive touching - or immigration judge may hold hrg on facts	To avoid COV and crime of DV, plead offensive touching. See Advice re vague ROC.  Deportable crime of child abuse if ROC proves that V is a minor.	Good plea for immigration.  A vague ROC will prevent a COV for deportability purposes only: it will protect an LPR who is not already deportable from becoming deportable under the DV grounds, but will not protect applicant for non-LPR cancellation. See <b>Note: Violence, Child Abuse</b> .  If V is under 18, see PC 203 re Adam Walsh Act.
P.C. §243(b), (c)	Battery on a peace officer, fireman etc.	Can avoid AF. To surely avoid AF as COV, avoid 1 yr or more on any one count, and/or plead to misdo (b) with offensive touching. See Advice.	243(b) not CIMT if specific plea to offensive touching. See Advice for 243(c)	No.	Possible that 243(c) (injury) wd be (wrongly) charged as COV, CIMT despite offensive touching plea. See 243(d) and its endnotes.  Plea to misdo might help.
P.C. §243(d)	Battery with serious bodily injury	Shd not be COV if specific plea to offensive touching – at least if offense is misdo. More secure: avoid 1 yr or more on any single count. <b>Note: Sentence.</b>  Generally, see <b>Note: Violence, Child Abuse</b>	Shd not be CIMT if plea to offensive touching. <sup>21</sup> But if ROC is vague, imm judge may hold hearing on underlying facts to determine CIMT.	If V has dom relationship, to avoid COV and crime of DV plead to offensive touching and try to designate misdo. See PC 203.  Deportable crime of child abuse if ROC proves that V is a minor.	This may be a good substitute plea for a more dangerous offense.  A vague ROC (not ID'ing offensive touching) may prevent offense from being a COV as an AF or crime of DV for deportability purposes, and so protect an LPR who is not already deportable. It will not prevent the conviction from serving as a bar to relief, however.  See also PC 236, 243(a), (e). If V is under 18, see PC 203 re Adam Walsh Act.
P.C. §243(e)(1)	Battery against spouse	To avoid AF as COV: -Plead to offensive touching, and/or -Avoid 1 yr on any single count. See <b>Note: Sentence.</b>  Generally, see <b>Note: Violence, Child Abuse</b>	To avoid CIMT, plead to offensive touching. With vague ROC, imm judge will look into underlying facts.	To avoid COV and crime of DV plead to offensive touching. See Advice re vague ROC.  Deportable crime of child abuse if ROC proves that V is a minor.	Excellent immigration plea, if specifically to offensive touching!  A vague ROC may prevent offense from being a COV as an AF or crime of DV for deportability purposes, and so protect an LPR who is not already deportable. It will not prevent the conviction from serving as an AF or crime of DV as a bar to relief, however.  If V is under 18, see PC 203 re Adam Walsh Act.

P.C. §243.4	Sexual battery	Felony is AF as COV if 1-yr imposed on any one count.  Misdo is divisible as COV; avoid 1 yr and/or plead to restraint not by use of force or threat. <sup>22</sup> See Advice.  If ROC shows penetration, might be held AF as rape regardless of sentence	Yes CIMT	See PC 203 re deportable crime of domestic violence or child abuse	See <b>Note: Sex Offenses</b> . This is good substitute plea to avoid AFs sexual abuse of a minor or rape, or deportable child abuse, but see better alternatives listed at 261.5.  Misdo is not COV with plea to restraint “not by use of force or threat.” A vague ROC may prevent it from being a COV as an AF or crime of DV for <i>deportability</i> purposes, to prevent an LPR who is not otherwise deportable from becoming deportable. It will not prevent the conviction from serving as an AF or crime of DV as a <i>bar to relief</i> . See <b>Note: Record of Conviction</b> . See also PC 243(d), (e), 136.1(b)(1), 236. 261.5.  If V is under 18, see PC 203 re Adam Walsh Act
P.C. §245(a)(1)-(4)  (Jan 1, 2012)	Assault with a deadly weapon (firearms or other) or with force likely to produce great bodily harm	Yes AF as COV if 1-yr or more on any one count.	Yes CIMT, unless perhaps if ROC states D intoxicated or otherwise mentally incapacitated, with no intent to harm. <sup>23</sup>	See PC 203 re deportable crime of domestic violence or of child abuse  Section 245(a)(2) and (3) are deportable firearms offenses.	<u>To avoid firearms grnd</u> , keep ROC of conviction clear of evidence that offense was 245(a)(2); see also PC 17500, 236, 243(d) and 136.1(b)(1) and <b>Note: Firearms</b> and see <b>Note: Violence, Child Abuse</b> .  If V is under 18, see PC 203 re Adam Walsh Act.
P.C. § 246	Willfully discharge firearm at inhabited building, etc w/ reckless disregard	Never shd be COV, but to be safe plead to reckless disregard <sup>24</sup> and better, avoid 1 yr or more on any single count. Try to get misdo. See Advice.	Yes CIMT. <sup>25</sup>	Deportable firearm offense.  See PC 203 re deportable crime of domestic violence or of child abuse, although not clear that 246 has “victims”.	<u>COV</u> : Keep ROC clear of any mention of threat or intent to harm. To surely avoid an AF, get 364 or less on any single count. See <b>Note: Sentence</b> . Reduction to misdo may help further, b/c more limited definition of COV applies.
P.C. §246.3(a), (b)	Willfully discharge firearm or BB device with gross negligence	Not AF as COV, <sup>26</sup> but see Advice re PC § 246	Shd not be CIMT because of gross negligence, but may be so charged	Divisible as firearm offense. See Advice.  See PC 203 re deportable crime of domestic violence or of child abuse.	<u>To avoid firearm offense</u> , plead to (b) (BB device). Or vague ROC with plea to “firearm or BB device” or to 246.3 in entirety will prevent offense serving as <i>deportation</i> ground, but will not prevent it from serving as bar to non-LPR cancellation. See <b>Note: Firearms</b> .
P.C. §§ 261, 262	Rape	Yes AF, regardless of sentence.	Yes CIMT	See PC 203 re deportable DV or child abuse crime.	See PC 243(d), 243.4, 236, 136.1(b)(1). See <b>Note: Violence</b> and <b>Note: Sex Crimes</b> .
P.C.	Sex with a minor under	Not AF as sexual abuse of a minor	Assume it is a CIMT, unless	It will be charged as deportable	See <b>Note (and Chart): Sex Crimes</b> .



§261.5(c)	age 18 and three years younger than Defendant	(SAM) in the 9 <sup>th</sup> Circuit, whether §261.5(c) or (d), if ROC shows minor was at least age 15 <sup>27</sup> (or <i>possibly</i> age 14, but avoid this if at all possible).  More secure is a plea to an age-neutral offense such as 236, 243, 314, 647, or for 14 or 15-yr-old specific non-explicit conduct in 288(c), or 647.6. See Advice.  Not COV if D is at least 14, but still try to avoid 1 yr, in case D is transferred to a Circuit where that is a COV. <sup>28</sup>	ROC shows that D reasonably believed the minor was at least age 16 (or perhaps 18). <sup>29</sup>	crime of child abuse. If minor was an older teen, imm counsel have arguments against this, but no guarantee of winning.	<u>To avoid SAM</u> under 9 <sup>th</sup> Cir law, <sup>30</sup> a plea to minor age 16-17 is better than age 15. If plea is to age 15, try not to let ROC show D is 4 years older (9 <sup>th</sup> Cir has held this is <i>not</i> SAM, but still good to avoid), or else see 288a(b)(1).  Note that if U.S. Supreme Court decides as expected in <i>Descamps v. U.S.</i> (expected before June 2013), <i>no</i> conviction under 261.5(c) or (d) shd held be SAM in Ninth Circuit states, because a prior conviction will be judged by its least adjudicated elements. If this wd greatly help the D, consider delaying plea hrg for some time, to get closer to Court's decision.  <u>If D will be removed</u> and is likely to return illegally, and minor is age 15, do the following to prevent creating a prior that would be a severe sentence enhancement: get any 261.5 misdo, or 261.5(c) where the ROC does not specify age of minor. If that is not possible, see felony 288a(b)(1) or (2). <sup>31</sup>
P.C. §261.5(d)	Sex where minor under age 16, D at least age 21	See §261.5(c)	See §261.5(c)	See §261.5(c).	See 261.5(c). See <b>Note (and Chart): Sex Crimes.</b>
P.C. §266	Pimping and pandering	To prevent AF, see Advice	Yes CIMT	Deportable child abuse if prostitute under age 18.	<u>AF</u> : To prevent AF, plead to activity with persons age 18 or over, and to offering lewd conduct, not intercourse, for a fee. <sup>32</sup>
P.C. §270	Failure to provide for child	Not AF.	Not CIMT, at least if ROC states child not destitute or harmed.	Appears not crime of child abuse, at least if child not destitute, harmed. See Advice	This conduct does not appear to come within child abuse/neglect ground as defined by BIA. Try to include in ROC that child was not at risk of being harmed/deprived.
P.C. §272	Contributing to the delinquency of a minor	Not AF as SAM, but keep ROC free of lewd act	Divisible: may be CIMT if lewdness, try to plead to specific, innocuous facts	Might be charged under DV ground for child abuse, especially if lewd act.	<u>Deportable child abuse.</u> Currently imm authorities are broadly charging child abuse. However, 272 requires only a possible, mild harm. See Advice 273a(b). Try to specify extremely low risk of harm, or seek age-neutral plea.



P.C. §273a(a), (b)	Child injury, endangerment	To avoid COV, plead specifically to negligently placing child where may be endangered, as opposed to inflicting pain.  To surely avoid AF, avoid 1 yr or more on any single count. See <b>Note: Sentence.</b>	Divisible CIMT: Assume (a) is CIMT. For (b), plead specifically to negligently risking child's health, as opposed to inflicting pain <sup>33</sup>	§ 273a(a) is deportable crime of child abuse.  Conservatively assume (b) is as well, altho plea that specifies exposure to mild risk may well not be. <sup>34</sup> See Advice.	See <b>Note: Violence, Child Abuse</b>  <u>To avoid CIMT and/or deportable child abuse</u> , plead to age-neutral offense, e.g. 243(a) where ROC does not specify minor age. If this arose from traffic situation (lack of seatbelts, child unattended etc.), seek traffic offense and take counseling and other requirements as probation condition.  <u>COV</u> : This plea will likely make an LPR deportable for child abuse. To keep the LPR eligible for relief, avoid AF by <i>specific</i> plea to not violent conduct, and/or avoid 1 yr or more on any single count.
P.C. §273d	Child, Corporal Punishment	Yes AF as COV if 1-yr sentence imposed. See <b>Note: Sentence.</b>	Yes CIMT	Deportable under child abuse. See Advice	To avoid child abuse, get age-neutral plea with no minor age in the ROC: 243, 245, 136.1(b)(1), etc. (with less than 1 yr as needed)
P.C. §273.5	Spousal Injury	Yes, AF as a COV if 1-yr or more sentence imposed.	Yes CIMT, unless plead to minor injury + attenuated relationship like past cohabitant. <sup>35</sup>	Deportable crime of DV.  If ROC shows V is a minor, deportable crime of child abuse.	See <b>Note: Violence, Child Abuse.</b>  <u>To avoid COV, DV and CIMT</u> see PC 243(d), (e), 236, 136.1(b)(1); can accept batterer's program probation conditions on these.
P.C. §273.6	Violation of protective order	Not AF, but get 364 days and/or keep violence out of ROC.	CIMT unclear; might depend upon the nature of the violative conduct	Deportable as a violation of a DV protection order, at least if pursuant to Cal Fam C 6320, 6389. <sup>36</sup> See Advice	See <b>Note: Violence, Child Abuse.</b> <u>DV</u> : Automatic deportable DV, unless pursuant to statute other than FC 6320, 6389. Instead, plead to new offense that is not DV (e.g., 243(e), 653m) or see 166.
P.C. §281	Bigamy	Not AF	Yes CIMT	No	Case law added element of guilty knowledge so it is a CIMT
P.C. §§ 286(b), 288a(b), 289(h), (i)	Sexual conduct with a minor	See 261.5(c), (d)	See 261.5	See 261.5	See 261.5. If D will be removed, felony 288a(b) with 15-yr-old is better than the same on 261.5.
P.C. §288(a)	Lewd act with minor under 14	Yes AF as sexual abuse of a minor regardless of sentence imposed	Yes CIMT unless IJ finds D reasonably believed V was age 16 or perhaps 18; see 261.5(c)	Deportable for crime of child abuse. To avoid, plead to age-neutral offense where ROC does not show minor V.	See <b>Note: Sex Offenses.</b> Very bad plea. See age-neutral offenses such as 32, 136.1(b), 236, 243, 243.4, 245, 314, 647, or else see 288(c), 647.6, or even 261.5, 288a -- with no reference to specific age under 15.

P.C. §288(c)	Lewd act with minor age 14-15 and 10 yrs younger than D	Divisible as AF as sexual abuse of a minor (SAM). <sup>37</sup> Plead to innocuous behavior. While 15 is better than 14, 14 shd be safe. See Advice.	Yes CIMT if IJ finds D knew or had reason to know V was under age 16; see 261.5(c)	Will be charged as deportable crime of child abuse, but create best record possible. This arguably does not fit the definition because can involve no harm or risk of harm and no explicit behavior.	<u>SAM</u> : Good alternative to more explicit sexual charge. 288 includes "innocuous" touching, "innocently and warmly received"; child need not be aware of lewd intent. <sup>38</sup> But warn D this could become AF as SAM in future, or if D is taken outside 9th Cir. Try instead for age-neutral offense, PC 32, 236, 243, 243.4, 136.1(b), 314, 647, etc. where ROC sanitized of V's age. See <b>Note: Sex Offenses</b>
P.C. §290	Failure to register as a sex offender	Not AF	May be charged as CIMT, but this appears incorrect and might change. See Advice	Can be charged with a new federal offense, 18 USC 2250, for state conviction for failing to register; 2250 conviction is basis for removal.	Avoid if possible. Deportable if convicted in federal court of 18 USC §2250 for failure to register as a sex offender under state law. <sup>39</sup> Re CIMT: there is a conflict between the Ninth Circuit, other Circuits (not CIMT) and BIA (CIMT) published opinions <sup>40</sup> . Ninth Circuit might refuse to defer.
P.C. §311.11(a)	Child Pornography	Yes, AF <sup>41</sup>	Yes CIMT. <sup>42</sup>	No.	Avoid this plea if at all possible. Plea to generic porn is not an AF. <sup>43</sup>
P.C. §313.1	Distributing obscene materials to minors	Not AF, unless conceivably if ROC shows young child.	Perhaps divisible as CIMT, see Advice.	Might be charged as deportable crime of child abuse, if ROC shows given to young child?	<u>To avoid CIMT</u> , plead to failure to exercise reasonable care to ascertain the minor's true age. If minor is older, put age in the ROC. Mild conduct such as giving a magazine to an older teen shd not be CMT, but no guarantees.
P.C. §314(1)	Indecent exposure	Not AF even if minor's age in ROC, <sup>44</sup> but as always keep age out if possible.	Yes CIMT, with possible exception of plea to erotic act for willing audience. <sup>45</sup>	Keep any reference to minor V out of ROC to avoid charge of deportable crime of child abuse	Good alternative to sexual abuse of a minor AF charges such as 288(a). To avoid CIMT, see disturb peace, trespass, loiter
P.C. §315	Keeping or living in a place of prostitution or lewdness	Divisible as the AF of owning or controlling a prostitution business. <sup>46</sup> Specific plea to <i>residing</i> in place of prostitution (or lewdness), or keeping a place of <i>lewdness</i> , shd not be AF. See Advice.	Assume CIMT, except specific plea to just living and paying rent in a place of prostitution or lewdness ought not to be. <sup>47</sup>	Deportable as child abuse if minor involved.  Importing noncitizens for prostitution or immoral purpose is deportable conviction.  See Advice for prostitution inadmissibility	<u>Prostitution is defined</u> as offering sexual intercourse for a fee, not lewd act for a fee. Thus a specific plea to lewd act will prevent the prostitution AF and inadmissibility ground. <sup>48</sup> Lewd act is sufficient for CIMT, deportable child abuse, or deportable for importing noncitizen prostitutes, however.  <u>Inadmissible for prostitution</u> if engaged in or received proceeds from prostitution; no conviction required.
P.C. §368(b), (c)	Elder abuse: Injure, Endanger	To avoid COV, See Advice.  To surely avoid AF, avoid 1 yr on	CIMT divisible; specific plea to negligent acts shd not	No	<u>To avoid AF as COV</u> : Plead specifically to negligent, reckless, or non-violent endangerment or infliction of injury. (Or, get less than 1 year on any single count)

		any single count.	be CIMT.		
P.C. § 368(d)	Elder abuse: Theft, Fraud, Forgery	Yes AF danger: see Advice.  Generally see <b>Note: Burglary, Theft, Fraud</b>	Yes CIMT	No	<b>To avoid AF:</b> Plead to fraud where loss to victim does not exceed \$10,000; can take a sentence of over a year. Plead to theft, forgery where loss to victim exceeds \$10,000; need to avoid 1 yr on any one count. See Note.
P.C. §403	Disturbance of public assembly	Not AF.	Not CIMT; see Advice	No.	This does not have CIMT elements, but keep ROC free of very bad conduct or violence.
P.C. §415	Disturbing the peace	Not AF.	Probably not CIMT	No.	
P.C. §416	Failure to disperse	Not AF	Not CIMT	No.	
P.C. §417(a)(1)(2)	Brandishing deadly weapon (firearm and other)	Not COV, but to be safe get 364 or less and plead to "rude."  See Advice, and see <b>Note: Firearms</b>	Not CIMT. <sup>49</sup>	Deportable firearms offense if 417(a)(2).  See Advice if V is a minor or has domestic relationship	To make sure not COV, and thus not DV offense if DV-type victim, plead to rude not threatening conduct  To make sure not deportable crime of child abuse, keep record free of minor victim.
P.C. §422	Criminal threats (formerly terrorist threats)	Yes AF as COV if 1-yr sentence imposed. <sup>50</sup> See <b>Note: Sentence.</b> See Advice.	Yes CIMT <sup>51</sup>	Deportable crime of child abuse if ROC shows minor victim.  Deportable DV crime if DV-type victim.  If conviction is for multiple threats, deportable for stalking.	To try to avoid COV and therefore avoid a deportable crime of DV, see PC 69, 136.1(b), 236, 243(a), (d), (e), misd 243.4. Some of these offenses might take a sentence of a year or more. See <b>Note: Violence, Child Abuse</b> for more on violent crimes.  If victim is under 18, this may block a citizen or LPR's ability to immigrate family members in the future. See <b>Note: Adam Walsh Act.</b>
P.C. §§ 451, 452	Arson, Burning: Malicious or Reckless	Assume both 451 and 452 are AF's regardless of sentence. <sup>52</sup> See Advice.	Yes, assume CIMT	No.	To maybe avoid AF, plead to PC 453 with less than 1 yr on any one count. If that is not possible, imm counsel at least will investigate grounds to argue that PC 452 w/ 364 days is not AF.
P.C. §453	Possess flammable material with intent to burn	Specific plea to "flammable material," with less than 1 yr or recklessness, may avoid AF; see Advice.	Yes CIMT	No	AF: Good alternative to 451, 452, if possession or disposal of flammable materials is not analogous to relevant federal offenses. <sup>53</sup> To avoid AF as COV, avoid 1 yr on any one count and/or plead to reckless. See <b>Note: Sentence.</b>

P.C. §460(a)	Burglary, Residential	Yes, as COV if 1 yr imposed for any single count.  See Advice and <b>Note: Burglary</b> for further instructions.	Yes CIMT – unless plead specifically to permissive entry & intent to commit a non-CIMT.	No (unless conceivably charged as a DV offense if it is the home of person protected under state DV laws)	<u>To avoid AF:</u> (1) Avoid 1 yr or more on any one count (see <b>Note: Sentence</b> ) and (2) Do not let ROC show admission of entry with intent to commit an offense that is an AF regardless of sentence (e.g., drug trafficking) and a substantial step toward commission, which could be an AF as “attempted” drug trafficking. <sup>54</sup> See Note.
P.C. §460(b)	Burglary, non-residential	Avoid AF by avoiding sentence of 1 yr or more on any one count and/or by carefully crafting plea.  See Advice and see <b>Note: Burglary</b> .	Yes CIMT – unless plead to intent to commit a specific offense that is not a CIMT.	No.	<u>To avoid AF:</u> if you have 1 yr imposed on a single burglary count, avoid pleading to any of the following: unlicensed entry into building or structure; entry by violent force; or intent to commit larceny (or other agg felony), where ROC shows substantial step. <sup>55</sup> See also Advice for 460(a) regarding intent to commit an offense that is an AF regardless of sentence.
P.C. §466	Poss burglar tools, intent to enter	Not AF (lacks the elements, and 6 mo max misd).	May not be CMT. B&E alone is not. See Advice	No.	Shd avoid CIMT with specific plea to “Poss of a ____ with intent to break and enter ____, but without intent to commit further crime.”
P.C. §470	Forgery	Yes AF as forgery or counterfeiting. <sup>56</sup> To avoid AF, avoid 1 yr or more on any one count. See <b>Note: Sentence</b> . Or, see § 529(3).  See Advice if this also is fraud with loss to victim/s of over \$10,000	Yes CIMT. See 529(3) to try to avoid CIMT.	No.	<u>AF:</u> A fraud/deceit offense is an AF if loss to victim/s exceeds \$10k. <sup>57</sup> Plead to one count with loss under \$10k, in which case can pay more than \$10k restitution; if possible add Harvey waiver. See <b>Note: Burglary, Theft, Fraud</b> .  If must plead to both fraud <i>and</i> forgery, counterfeit, or theft, then make sure no fraud plea exceeds \$10k loss, and no forgery etc. plea takes 1 yr or more on a single count.
P.C. §476(a)	Bad check with intent to defraud	Yes AF if loss to the victim/s was \$10,000 or more.  Yes AF if forgery, counterfeit with 1 yr imposed.	Yes CIMT. See 529(3) to try to avoid CIMT.	No	See <b>Note: Burglary, Theft, Fraud</b>  To avoid an AF, see Advice for §470
P.C. §§ 484 et seq., 487	Theft (petty or grand)	To avoid AF as theft: avoid 1 yr on any one count of property theft (taking without consent), <i>or</i> theft of labor, even if 1 yr or more, <i>or</i> embezzlement <i>or</i> fraud (taking with	Yes CIMT, all of § 484.  See Advice	No	<u>To avoid CIMT,</u> and if 1-yr sentence is not imposed on any single count, see PC 496(a) or VC 10851, with intent to temporarily deprive.  <u>If plea is to §484 and this is a first CIMT conviction:</u> Can qualify for petty offense exception to inadmissibility grd, with 1 yr maximum possible sentence

		deceit) with less than \$10,000 loss to victim/s. <sup>58</sup>  See <b>Note: Burglary, Theft, Fraud</b>			(wobbler misdo qualifies) and 6 mo or less imposed. To avoid being deportable for one CIMT committed within 5 yrs of admission, get a 6 month possible max: either petty theft or attempted misd grand theft; this also avoid a bar to non-LPR cancellation. See <b>Note: CIMT.</b>
P.C. §490.1	Petty theft (infraction)	Not AF.	Yes CIMT, but infraction might not be a conviction. See <b>Note: Definition of Conviction.</b>	No.	<b>CIMT:</b> Even if a conviction, if this is first CIMT then D will not be inadmissible or deportable for CIMT because of 6 month max. See <b>Note: CIMT.</b> Or to avoid a CIMT, see PC 496, VC 10851
P.C. §§ 496, 496d	Receiving stolen property, or receiving stolen vehicle	Yes AF if 1-yr on any single count.  If must take 1 yr consider a fraud offense. See <b>Note: Burglary, Theft</b>	To avoid CIMT: plead specifically to intent to temporarily deprive. See Advice.	No.	<b>CIMT:</b> Ninth Cir held 496(a) includes intent to deprive owner temporarily, which is not a CIMT. <sup>59</sup> See <b>Note: CIMT</b>  <u>To avoid 1 yr sentence on any single count and thus avoid AF,</u> see <b>Note: Sentence.</b>
P.C. §§ 499, 499b	Joyriding; Joyriding with Priors	Yes AF as theft if 1 yr-sentence imposed on any single count. See <b>Note: Sentence.</b>	Not CIMT (because temporary intent)	No.	Note that the AF “theft” includes intent to temporarily deprive, while CIMT does not. If 1 yr will be imposed, see suggestions to avoid AF at <b>Note: Burglary, Theft.</b>
P.C. §528.5	Impersonate by electronic means, to harm, intimidate, defraud	AF as fraud if loss exceeds \$10k. See <b>Note: Burglary, Theft Fraud.</b>  Possible COV if ROC shows violent threat; if so, avoid 1 yr on any one count.	Divisible as CIMT. “Harm” may not be CIMT and need not be by unlawful act (see 530.5). See Advice	If a COV could be a DV offense if V is protected under state laws. If ROC shows minor V, perhaps charged child abuse.	Substitute for ID theft or other, in sympathetic case?  <b>CIMT:</b> Plead to specific mild harm, e.g. can be committed by, e.g., impersonating a blogger, or sending an email purporting to be from another, to their embarrassment. <sup>60</sup> Does not require the person to have obtained a password or other private information.
P.C. §529(3)	False personation	AF depends.  -If conduct involved forgery, counterfeit, avoid 1 yr for any single count.  -If it involved deceit with loss to victim/s exceeding \$10,000, see Advice.  -Otherwise, not an agg felony.	Divisible as CIMT.  See Advice.	No.	<b>CIMT.</b> A plea to impersonation specifically without intent to gain a benefit or cause liability shd prevent a CIMT. <sup>61</sup> If that is not possible, in the future it <i>might</i> be that no conviction under 529(3) will cause <i>deportability</i> for CIMT, altho it cd cause inadmissibility or bar to relief. <sup>62</sup> See <b>Note: CIMT.</b>  <u>If \$10k loss,</u> see Advice for § 470 and see <b>Note: Burglary, Fraud.</b>  <u>Forgery or counterfeit with 1 yr imposed on a single count is an agg felony.</u> Plead to specific conduct that is not forgery

P.C. §532a(1)	False financial statements	Yes AF if fraud of more than \$10k; Yes AF if forgery with 1 yr on any one count	Yes CIMT because fraudulent intent. See 529(3)	No.	<u>If \$10k loss</u> , see Advice for § 470 and see <b>Note: Burglary, Fraud</b> . <u>Forgery, counterfeit</u> with 1 yr is an AF. Plead to specific conduct that is not forgery or get less than 1 yr
P.C. §550(a)	Insurance fraud	See §532a(1)	See §532a(1)	No.	See §532a(1)
P.C. §591	Tampering w/ phone lines, malicious	Not AF: Not COV. (But safer always to get 364 or less on any one count and keep ROC clear of any violent threat)	Shd not be CIMT. Plead to specific mild offense. See Advice	Not deportable DV offense, but keep ROC clear of any violence, threats. Keep ROC clear of V under age 18.	<u>Good DV alternative</u> because not COV, not stalking <u>CIMT</u> . "Obstruct" includes e.g. leaving phone off the hook to prevent incoming calls. <sup>63</sup> Malicious includes intent to annoy. Specific plea to mild behavior with intent to annoy shd avoid CIMT.
P.C. §591.5	Tamper w/ cell phone to prevent contact w/ law enforcement	Not AF: Not COV and has 6 month max. sentence	Assume CIMT, although unclear. See Advice.	Not deportable DV offense b/c not COV, but to be safe keep ROC clear of violence or threats. Keep ROC clear of minor age of V.	<u>Good DV alternative</u> because not COV, not stalking <u>CIMT</u> : If this is first CIMT it will have no immigration effect because 6 month max. If this is not a first CIMT, consider careful plea to 591; has a higher potential sentence but may not be CIMT
P.C. §594	Vandalism	Possible AF as COV if violence employed and 1 yr imposed on any single count. <b>See Note: Sentence</b>	Divisible as CIMT? Ninth Circuit held not CIMT, at least where damage not costly. <sup>64</sup> See Advice.	No. Even if a COV, deportable DV ground requires violence toward person not property.	<u>Re DV</u> . Good DV alternative because not COV to person. <u>Re CIMT</u> . Plead specifically to causing less than \$400 damage, even if greater amount in restitution, or paid before plea, or separate civil agreement. Plead to intent to annoy.
P.C. §602	Trespass (6 mo)	Not AF (for one thing, 6 mo max sentence)	Shd not be CIMT See Advice.	See PC 594. (l)(4) is deportable firearm offense.	See PC 602.5, below. Some malicious destruction of prop offenses might be CIMT; see cases in Advice to PC 594.
P.C. §602.5	Trespass (residence) (1 yr)	Not AF, but avoid conceivable burglary charge by avoiding 1 yr.	Not CIMT, but see Advice	No.	<u>CIMT</u> . Avoid admitting intent to commit other crime upon entry; if possible plead to, e.g., intent to shelter, sleep; or incapacitated.
P.C. §646.9	Stalking	Avoid AF as COV by avoiding 1 yr on any one count. If can't avoid 1 yr, see Advice.	Assume CIMT, and look to 236, 240, 243, 136.1(b)(1)	Always deportable under DV ground as "stalking." See pleas suggested in CIMT column.	<u>To avoid a COV</u> , plead to harassment from long-distance or jail, or to recklessness. See case cited in endnote. But outside 9 <sup>th</sup> Cir, § 646.9 is always COV. <sup>65</sup>



P.C. §647(a)	Disorderly: lewd or dissolute conduct in public	Not AF even if ROC shows minor involved <sup>66</sup> (but still, don't let ROC show this)	Yes held CIMT, altho imm counsel will argue against this. See Advice.	To avoid possible deportable child abuse charge, don't let ROC show minor involved.	<u>AF</u> : Good alternative to sexual conduct near/with minor <u>CIMT</u> Older BIA decisions finding CIMT were based on anti-gay bias and shd be discredited, <sup>67</sup> so at risk for CIMT. See 647(c), (e), (h).
P.C. §647(b)	Disorderly: Prostitution	Not AF.	Yes CIMT, whether prostitute or customer, lewd act or intercourse. <sup>68</sup>	Prostitution inadmissibility grd requires offer of intercourse for a fee; plead to offer of specific lewd act for a fee. Does not include johns. See Advice.	Inadmissibility for engaging in prost can be proved by conduct and does not require a conviction, but the specific plea described provides some protection. John included in CIMT offense, but not prostitution inadmissibility ground. See 647(c), (e) and (h). See <b>Note: Sex Offenses</b>
P.C. §647(c), (e), (h)	Disorderly: Begging, loitering	Not AF.	Not CIMT.	No.	Good alternate plea. Do not include extraneous admissions re, e.g., minors, prostitution, further intended crime, firearms, etc.
P.C. §647(f)	Disorderly: Under the influence of drug, alcohol	Not AF.	Not CIMT.	Possible CS offense; see Advice	Plead specifically to alcohol to avoid possible drug charge.
P.C. §647(i)	Disorderly: "Peeping Tom"	Not AF but keep ROC clear of minor target	CIMT danger, see Advice	Might be charged as child abuse if V is minor; keep age out of ROC	<u>CIMT</u> : Offense requires no intent to commit a crime; it is completed by peeping. <sup>69</sup> However, imm judge might make broad inquiry to see if any lewd intent for CIMT purposes. Specific plea to "peeking without lewd intent"?
P.C. §647.6(a)	Annoy, molest child	Divisible as SAM (sexual abuse of a minor). Plead to specific less onerous conduct; see examples at this endnote. <sup>70</sup>  See Advice, and See <b>Note: Sex Offenses</b>	Divisible as CIMT. See Advice and prior endnote.	Assume charged as deportable crime of child abuse, altho some conduct shd not be. ID in the ROC non-sexual, non-harmful conduct, or keep ROC vague.  See Advice	<u>CIMT</u> . If ROC states D's reasonable belief that minor was age 18 or perhaps 16, not CIMT. <i>Perhaps</i> same result if ROC specifically ID's non-egregious behavior and intent regardless of belief re age.  <u>AF and deportable Child Abuse</u> : The sure way to avoid SAM and child abuse is a plea to age-neutral offense like 243, 236, 314, 647 etc. with ROC clear of minor victim. A good Supreme Court decision in <i>Descamps</i> (due by June 2013) <sup>71</sup> wd mean that no conviction under 647.6(a) would be SAM in 9 <sup>th</sup> Cir. If you cannot create a good specific plea, consider delaying plea hearing; consult with imm atty.
P.C. §653f(a), (c)	Solicitation to commit variety of offenses	Divisible: 653f(a) and (c) are AF as COV's if one-year sentence is imposed;	Soliciting violence is a CIMT.	653f(a) and (c) are COV's, and therefore DV if DV-type victim.	653f(a) and (c) are COV. <sup>72</sup>



P.C. §653f(d)	Solicitation to commit drug offense	Solicitation to possess a drug is not AF as drug trafficking. (In the Ninth Circuit only, even solicitation to sell is not an AF.)	Not CIMT if D is buyer for personal use, yes CIMT if D is otherwise participating in distribution or sale.	Ninth Cir. stated in dicta this is not a deportable CS offense because it is generic solicitation. Statute. <sup>73</sup> See Advice.	<u>Deportable/Inadmissible.</u> This may be a better plea than possession, in that there is dicta and a strong argument that this is not a deportable/inadmissible CS offense in the Ninth Cir.
P.C. §653k (repealed)	Possession of illegal knife	Not AF	Not CIMT	Not deportable offense	Good plea
P.C. §653m(a), (b)	Electronic contact with (a) obscenity or threats of injury with intent to annoy; or (b) repeated annoying or harassing calls.	Not AF. (While (a) using threats of injury might be charged as COV, it has 6 month max sentence.)	To avoid CIMT plead to (a) an obscene call with intent to annoy, or (b) two calls with intent to annoy	<u>Deportable child abuse:</u> To avoid possible charge, do not let ROC show victim was a minor.  See Advice for how to avoid other DV deportation grounds.  For more info in general, see <b>Note: Violence, Child Abuse.</b>	Good plea in a DV or other context.  <u>Deportable DV crime:</u> If DV-type victim, plead under (a) to obscene call with intent to annoy, or (b) two phone calls intent to annoy. State on the record that calls did not involve any threat of injury. Or if possible plead to other victim, e.g. repeat calls to the new boyfriend, (no threats, intent to annoy).  <u>Deportable violation of DV protective order.</u> Do not admit to violating a stay-away order in this or any other manner; or see § 166. Try to plead to new 653m offense rather than vio of an order.  <u>Deportable stalking:</u> Stalking requires a threat, altho does not require a DV relationship. Plead to conduct described above.  See also PC 591
P.C. §666	Petty theft with a prior	AF as theft unless (a) avoid 1 yr on any one count and/or (b) ROC shows theft of labor	Yes CIMT. With the prior, this makes a dangerous two CIMTs. See <b>Note: CIMT.</b>	No.	See <b>Note: Burglary, Theft, Fraud.</b>  <u>CIMT:</u> Receipt stolen property 496(a) is divisible for CIMT (but is an AF w/ 1 yr imposed); plead to temporary intent. This cd prevent second CIMT.
P.C. §1320(a)	Failure to appear for misdemeanor	Not AF as obstruction because that requires 1 yr sentence	Unclear; Might be charged as CIMT. <sup>74</sup>	No	<u>AF:</u>

P.C. §§ 1320(b), 1320.5	Failure to appear for a felony	Dangerous plea; seek a different offense. Can be AF regardless of sentence imposed; see Advice  Always is AF if a 1-yr is imposed, as obstruction of justice. <sup>75</sup>	See 1320(a)	No.	1320(b), 1320.5 are AF as <u>obstruction of justice</u> , if a sentence of 1 yr or more is imposed. See endnote for 1320(a), supra.  Even without a 1 yr sentence, they may be the AF " <u>Failure to Appear</u> ." FTA to answer a felony charge with a potential 2-year sentence, or to serve a sentence if the offense is punishable by 5 years or more, is an AF regardless of the sentence imposed for the FTA itself. <sup>76</sup>
Former P.C. §12020 (pre-Jan. 1, 2012)	Possession, manufacture, sale of prohibited weapons; carrying concealed dagger	Trafficking in firearms or explosives is AF regardless of sentence;; see Advice	Weapon possession is not CIMT. <sup>77</sup>  Sale shd not be CIMT but not secure.	Offenses relating to firearms cause deportability under that grd unless ROC specifies antique firearm (see PC 25400). Plead to other weapons, e.g. brass knuckles dagger	With careful ROC, this was good alternate plea to avoid deportable or agg felony conviction relating to firearms and destructive devices (explosives).
P.C. §12021(a), (b) (Repealed 1/1/12)	Possession of firearm by drug addict or felon	Divisible as Firearms AF: Felon in poss is, but poss by misdemeanant is not, and felon who <i>owns</i> ammo or firearm shd not be AF.	Probably not CIMT.	Deportable under the firearms ground, except for offenses relating to ammo, e.g. felon owning ammo	See discussion at PC §§ 29800, 30305.  Can be a firearms AF as analogue to federal "felon in possession" offense. There is authority that owning firearm is different from possessing one such that owning is no AF. Felon who owns ammo is even better.
P.C. §12022 (a) (1), (b)(1)	Use firearm or other weapon during attempt or commission of a felony	Yes AF as COV (unless there is some unusual fact scenario that could escape being a COV). See Advice.	Likely to be held CIMT unless underlying felony is not.	Deportable under the firearms ground if (a), but not if (b) and record does not show firearm. Exception for antique firearms (see PC 25400).	<u>Avoid AF</u> : This enhancement creates a single COV count w/ 1 yr. Instead try to plead to poss or use of a firearm or weapon plus the other felony, in multiple counts, and spread time among counts. See <b>Note: Sentence</b> .
P.C. §§ 12025(a)1 12031(a)1 (Repealed 1/1/12)	Carrying firearm	Not AF.	Not CIMT.	Deportable under the firearms ground unless ROC specifies antique (see PC 25400).	To avoid deportable for firearms, see PC 12020 and <b>Note: Firearms</b> .

P.C. §17500	Possession of weapon with intent to assault	Not AF (6 month max sentence, plus arguably not COV)  For further discussion of this offense, see <b>Note: Firearms</b>	To probably avoid CIMT, plead to intent to commit offensive touching, and to possession but not use or threaten with a dangerous weapon.  If that is not possible, plead to statutory language and see Advice re <i>Descamps</i>	To avoid <u>deportable crime of child abuse</u> : keep minor age of victim out of ROC.  See Advice re other deportation grounds.	Good alternative plea; may have no consequences: <u>Deportable firearms</u> : Plead to a non-firearms weapon or antique firearm, or if deportability is all that is at stake (as opposed to eligibility for non-LPR cancellation), an ROC vague as to weapon will suffice. <sup>78</sup> <u>Deportable crime of DV</u> : Arguably not a COV with a plea to offensive touching, but to avoid DV plead to specific non-DV-type victim or keep domestic relationship out of ROC; see PC 203. <u>Effect of Descamps</u> : In spring 2013 S.Ct. may hold that a prior conviction can be evaluated only by its least adjudicated elements. In that case §17500 would not be a deportable firearms offense or a COV regardless of the plea, altho absent the “offensive touching” it might be a CIMT.
P.C. §§ 21310, 22210, 21710, etc.	Possession of weapon (not firearm), e.g. dagger, blackjack.	Not COV <sup>79</sup> or AF  But just to be safe, sanitize the ROC of any threat, violence.	Not CIMT.	No. (Not deportable firearms offense)	Good alternate plea to firearms charge, if D had an additional weapon or could plead to one.
P.C. §§ 25400(a), 26350	Possession of concealed or unloaded firearm	Not an AF, but as always try to avoid 1 yr on any one count.	Not CIMT.	Yes <u>deportable firearm offense</u> – unless the ROC specifies an antique firearm, in which case it is not a “firearm” for any immigration purpose. See Advice.	<u>Antique firearm exception</u> : Antique firearms are excluded from the federal definition of firearms used in imm law. 18 USC 921(a)(3). An antique is defined as a firearm manufactured before 1899, or certain replicas of such antiques. 18 USC 921(a)(16). Immigrant must prove the firearm was an antique, so need specific plea to this.
P.C. §27500	Sell, supply, deliver, give possession of firearm to prohibited person	Sale is AF (firearms trafficking), but give should not be AF as trafficking.	Unclear on CIMT. See Advice	Yes, deportable firearm offense, unless ROC specifies antique (see PC 25400).	<u>CIMT</u> : Don’t know. Might not be CIMT if mere “reason to know” person was in prohibited class, or if give rather than sell - or not.
P.C. §29800	Possession, ownership of firearm by felon, drug addict, etc.	<u>AF as a federal analogue unless careful pleading</u> . To avoid AF, plead to possession by misdemeanor. (See also 29805, 29815(a), 29825)  Or plead to felon or drug addict who <u>owns rather</u>	Shd not be CIMT but no guarantee.  Owning might be better than possessing	Yes <u>deportable firearms offense</u> unless ROC specifies antique (see PC 25400).  To avoid firearms deportation ground, plead to offense involving ammunition such as PC 30305, or offense involving a	<u>Avoid AF</u> : Felon in possession of a firearm is an AF. <sup>80</sup> Very strong support, altho no guarantee, that a felon who <i>owns</i> firearm is distinct from felon who possesses, such that the offense is not an AF. <sup>81</sup> Plead specifically to ownership and sanitize the ROC of facts showing control, access or possession. Plea cd be, e.g., “On December 12, 2012 I knowingly owned a firearm after a prior conviction for a felony,

		<u>than possesses</u> a firearm. See Advice and see <b>Note: Firearms.</b>		weapon other than a firearm. See Advice.	to wit: ___.” A better plea is PC 30305, felon who owns <i>ammunition</i> , for person who also need to avoid a deportable firearms offense.
P.C. §30305	Possession, ownership of ammunition by persons described in 29800	See 29800, supra. See Advice	See 29800	No. Firearms deport ground does not include ammunition. <sup>82</sup> Note that being an addict can be deportable, inadmissible. See <b>Note: Drugs</b>	<u>To avoid AF</u> , see Advice for 29800. <u>Why ammo?</u> Felon owning ammo may avoid an AF like 29800, <i>and</i> avoid the firearms deport grd. See <b>Note: Firearms</b>
P.C. §33215	Possess, give, lend, keep for sale short-barreled shotgun or rifle	Sale is an AF as trafficking. Avoid 1 yr on any one felony count. See <b>Note: Sentence</b> and see Advice.	Possession is not a CIMT. Sale might be, giving would not be.	Yes, deportable firearms offense unless ROC shows antique (see PC 25400).	Older decisions held felony possession of these weapons is a COV. While arguably these decisions were overturned by the Supreme Court, <sup>83</sup> try hard to avoid 1 yr on any one count. Try to avoid this conviction regardless of sentence imposed.
P.C. §§ 32625, 33410	Possession of silencer; possession or sale of machinegun	See 33215	See 33215	See 33215.	See 33215
Veh. C. Code §20	False statement to DMV	Not AF	Shd not be CIMT. See Advice	No.	To avoid CIMT plead to specific false fact (if possible, one that is not material), not to gain a benefit.
Veh. C. §31	False info to officer	Not AF	See VC § 20	No.	See VC § 20
Veh. C. §2800.1	Flight from peace officer	Not AF	Probably not CIMT	No.	
Veh. C. §2800.2	Flight from peace officer with wanton disregard for safety	Shd not be COV, but because of bad older caselaw, avoid 1 yr on any single count or see Advice.	Divisible as CIMT: 3 prior violations not necessarily CIMT, but other wanton disregard is CIMT. <sup>84</sup>	No.	<u>Avoid AF:</u> 1) Wanton by plea to 3 prior violations is not per se COV. <sup>85</sup> 2) Wanton/reckless disregard also is not COV because recklessness is not COV. There is older caselaw to the contrary but it shd be considered overruled. <sup>86</sup> Most secure is to avoid 1 yr on any single count, and/or plead or reduce to a misdemeanor.
Veh. C. §4462.5	Display improper reg w/ intent to avoid vehicle registration	No.	No.	No.	

Veh. C. §10801-10803	Operate Chop Shop; Traffic in vehicles with altered VINs,	To avoid AF, avoid 1 yr on any single count.  Otherwise, divisible as a theft AF and a vehicle with altered number offense AF. See Advice.	Yes CIMT	No.	<u>AF</u> : 10801 is divisible for theft because it can involve fraud rather than theft. <sup>87</sup> If must take a 1-yr sentence on a single count, but loss to victim/s less than \$10k, plead to fraud.  10801 appears divisible for VIN because activity is not limited to VIN. If must take a 1-yr sentence on a single count, plead to 10801 leaving open possibility that car obtained by fraud and that altering VIN was not the chop shop activity.  10802, 10803 may not be divisible for VIN; avoid 1 yr sentence.
Veh. C. §10851	Vehicle taking, temporary or permanent	To avoid AF, avoid 1 yr on any single count. <sup>88</sup> See <b>Note: Sentence.</b>	Divisible as CIMT. See Advice.	No.	<u>CIMT</u> : CIMT if permanent intent, not CIMT if temporary intent. <sup>89</sup> Plead specifically to temporary intent, or else imm judge may hold fact-finding hrg on actual intent.
Veh. C. §10852	Tampering with a vehicle	Not AF but see Advice.	Appears not CIMT.	No.	To avoid possible AF charge, don't let ROC show that tampering involved altering VIN.
Veh. C. §10853	Malicious mischief to a vehicle	Not AF (misdo with 6 months maximum)	May be divisible as CIMT. See Advice	No.	<u>CIMT</u> : To avoid possible CIMT, plead to intent to commit specific non-CIMT, e.g., intent to trespass, temporarily deprive owner, commit small non-costly vandalism
Veh. C. §12500	Driving without license	Not AF.	Not CIMT.	No.	
Veh. C. 14601.1 14601.2 14601.5	Driving on suspended license with knowledge	Not AF	Not CIMT - but see Advice if DUI involved and warn client it is conceivable that a CIMT would be charged.	No	<u>CIMT</u> : Neither DUI nor driving on a suspended license separately is a CIMT, but a single offense that contains both of those elements has been held a CIMT. <sup>90</sup> No single Cal offense combines DUI and driving on a suspended license, and the gov't may not combine two offenses to try to make a CIMT. <sup>91</sup> However to avoid any confusion, where possible do not plead to both DUI and driving on suspended license at same time, or if one must, keep the factual basis for both offenses separate. <sup>92</sup>
Veh. C. §15620	Leaving child in vehicle	No.	No.	Caution: May be charged as deportable crime of child abuse. See Advice	<u>Child abuse</u> : Arguably an infraction is not a "conviction" for imm purposes. See <b>Note: Definition of Conviction.</b> If a conviction, it may be charged as deportable offense.

Veh. C. §§20001, 20003	Hit and run (felony)	Not AF	Divisible as CIMT. See Advice	No.	To avoid CIMT, plead specifically to providing ID info but not registration info <sup>93</sup> or similar offense. See <b>Note: CIMTs.</b>
Veh. C. §20002(a)	Hit and run (misd)	Not AF.	See § 20001	No.	See Veh. C. 20001
Veh. C. §23103	Reckless driving	Not AF. (Recklessness is not a COV)	Not CIMT, but see Advice.	No.	<u>CIMT</u> : Best plea is recklessness re the safety of property. ROC shd set out relatively mild conduct. <sup>94</sup>
Veh. C. §23103.5	Reckless driving & use of alcohol or drugs	Not AF.	See 23103.5	Plead to alcohol or a non-CS, to avoid possible CS charge.	See 23103.5. Note voluntary intoxication is not a defense against a CIMT finding.
Veh. C. §23104	Reckless driving injury	Not AF	See Advice re CIMT		<u>CIMT</u> : Assume (b) is, and (a) shd not be, CIMT. See §23103 endnote.
Veh. C. §23110(a), (b)	Throw object into traffic	(a) not AF (b) assume is AF as COV if 1-yr on any single count	(a) is not CIMT; see Advice (b) is CIMT	No.	<u>CIMT</u> : Best plea to (a) is throwing something at a car parked on a street or similar mild conduct.
Veh. C. §23152	Driving under the influence (felony)	Not AF - but in future a third DUI with 1 yr or more might become an AF. Avoid 1 yr	Not CIMT, including multiple offenses. <sup>95</sup>	No, except see Advice for multiple DUI's	Multiple DUI's may demonstrate alcoholism, an inadmissibility ground. <sup>96</sup> Also 5-years or more aggregate sentence imposed for two or more convictions of any kind is an inadmissibility ground. <sup>97</sup>
Veh. C. §23153	DUI causing bodily injury	See VC 23152	See VC 23152	See VC 23152	See VC 23152
W & I §10980(c)	Welfare fraud	Yes AF if loss to gov't exceeds \$10,000.  See <b>Note: Burglary, Theft, Fraud</b> and see Advice.	Yes CIMT.	No.	<u>AF</u> : If possible, plead to offense that does not involve deceit along with this offense, and put loss on the second offense. Or plead to one count (e.g., one month) with loss less than \$10k, and make separate civil agreement to repay more. This offense is not theft and therefore OK to take 1 yr sentence, unless offense constituted perjury or counterfeit. To avoid CIMT, see possible PC 529(3).

## ENDNOTES

<sup>1</sup> This annotated chart is written by Katherine Brady of the Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org)). Many, many thanks to Su Yon Yi of ILRC, 2013 co-editor, Angie Junck and other ILRC attorneys, and Ann Benson, Holly Cooper, Raha Jorjani, Kara Hartzler, Dan Kesselbrenner, Chris Gauger, Graciela Martinez, Michael Mehr, Jonathan Moore, and Norton Tooby for their invaluable leadership and support. For a more comprehensive discussion, immigration and criminal defenders



should see Brady, Tooby, Mehr and Junck, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013). See also the *California Notes* that accompany this chart, which together make up a free on-line resource for criminal defenders who are shaping plea bargains; go to [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

This chart does not constitute legal advice and is not a substitute for individual case consultation and research. Please address comments to [chart@ilrc.org](mailto:chart@ilrc.org). The chart addresses only selected California offenses; the fact that the chart does not analyze an offense does not mean that the offense has no adverse immigration consequences. Immigration practitioners reading the chart should note that it represents a *conservative analysis* meant to warn criminal defenders away from pleas that *might* have adverse immigration consequences, or that might be wrongly charged with having these consequences. The fact that an offense is called out as, e.g., being an aggravated felony or crime involving moral turpitude on the chart, does not mean that this would be the result in a contested removal hearing.

<sup>2</sup> *Carachuri-Rosendo v. Holder*, 130 S.Ct 2577 (2010), *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).

<sup>3</sup> *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (H&S 11377); *Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9th Cir. 2010) (H&S 11350).

<sup>4</sup> See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*).

<sup>5</sup> *Retuta v. Holder*, 594 F.3d 1181 (9<sup>th</sup> Cir. 2010).

<sup>6</sup> Generally, 30 grams or less of marijuana is a guidepost to evaluate whether the amount is “small.” See *Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012). However, distribution in some contexts, such as in prison or perhaps near a school, 30 grams will not be considered a small amount. See *Id.* at 703 (citing Seventh Circuit case finding that 17.5 grams was not “small” when distributed in prison). The immigration court must look at the amount that was pled to in the record of conviction even if evidence outside the record shows that a different amount.

<sup>7</sup> *Matter of Martinez –Espinoza*, 25 I&N Dec. 118 (BIA 2009).

<sup>8</sup> See *Nunez-Reyes*, 646 F.3d 684 (9th Cir. 2011) (*en banc*).

<sup>9</sup> See *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (immigrant is not deportable because ICE failed to prove that Nevada conviction for under the influence did not involve marijuana). In 2013 the U.S. Supreme Court will consider burden of proof and evidence standards for the 30-gram exception in *Moncrieffe v. Holder*.

<sup>10</sup> *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012).

<sup>11</sup> *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

<sup>12</sup> See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012).

<sup>13</sup> PC 32 was held to be obstruction of justice because it includes a specific intent to prevent apprehension or punishment, while misprision of felony is not obstruction because it has no such specific intent. See discussion in, e.g., *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). Section 136.1(b) is more like misprision, and has no requirement of knowing or malicious conduct (see *Usher, supra*), or intent for the perpetrator to avoid justice. The motivation can be that the victim or witness avoids the rigors of the process, gang reprisals, or other. (Of course, it is best if the defendant can plead to trying to persuade the V or W not to call the police on a person other than the D. Under a good Supreme Court decision in *Descamps v. U.S.*, however, it may be that 136.1(b) categorically is not obstruction of justice. See discussion at § N.3 *Record of Conviction* and in endnote to § 647.6, *infra*.)

<sup>14</sup> While §136.1(a) and (c) require knowing and malicious action with specific intent, (b) does not. See, e.g., *People v. Upsher*, 115 Cal.App.4<sup>th</sup> 1311, 1320 (Cal. App. 4<sup>th</sup> Dist. 2007).

<sup>15</sup> See *People v. Matthew*, 70 Cal.App.4<sup>th</sup> 164, 173-74 (Ct App 4<sup>th</sup> Dist. 1999) (noting that removal of weapon from officer could include picking up the weapon after it has been dropped, which does not require violent force).

<sup>16</sup> *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008). Because the offense lacks specific intent to evade arrest or prosecution, it seems unlikely the BIA would assert that it is a CIMT, but that is always possible.

<sup>17</sup> Involuntary manslaughter under § 192(b) and (c)(1), (2) is not a CIMT because the underlying conduct that leads to death could result from the commission of misdemeanor offense or other lawful conduct that



poses high risk of death or great bodily injury, which would not necessarily be “reprehensible conduct” under *Silva-Trevino*. See CalJur § 8.45. It can be committed with criminal negligence (“without due caution and circumspection”) or less, and not with “the conscious disregard of a substantial and unjustifiable risk.” See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 870-71 (BIA 1994). California criminal negligence is similar to the statute at issue in *Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) that was found not to be a CIMT, in that it only requires an objective disregard by a showing that a reasonable person would have been aware of the risk.

<sup>18</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006)(en banc) (recklessness is not sufficient to find a crime of violence).

<sup>19</sup> See *Castrijon-Garcia v. Holder*, --F.3d--, 2013 WL 85971, No. 09-73756 (9th Cir. Jan. 9, 2013) (holding that a conviction for kidnapping under P.C. § 207 is not categorically a crime involving moral turpitude because it could be committed with good or innocent intent where the defendant uses verbal orders to move a person, who obeys for fear of harm or injury if he doesn’t comply). A risk is that if the BIA publishes an opinion to the contrary in the future, the Ninth Circuit may defer to the BIA and withdraw from this opinion.

<sup>20</sup> *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

<sup>21</sup> *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, [www.usdoj.gov/eoir/vll/intdec/indexnet.html](http://www.usdoj.gov/eoir/vll/intdec/indexnet.html) (P.C. § 243(d) is not a CIMT if committed with offensive touching); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (similar Canadian statute).

<sup>22</sup> *U.S. v. Espinoza-Morales*, 621 F.3d 1141 (9<sup>th</sup> Cir. 2010), *U.S. v. Lopez-Montanez*, 421 F.3d 926 (9th Cir. 2005).

<sup>23</sup> *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc) (noting that PC 245(a)(2) is not a crime involving moral turpitude). Section § 245(a) is a general intent crime that requires no intent to harm and reaches conduct committed while intoxicated or otherwise incapacitated. See, e.g., *People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971).

<sup>24</sup> *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011).

<sup>25</sup> See *Matter of Muceros*, (BIA 2000), Indexed Decision, *supra*.

<sup>26</sup> See *U.S. v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (negligent rather than violent, purposeful, aggressive act).

<sup>27</sup> See Note: Sex Crimes, and see *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9<sup>th</sup> Cir. 2009), holding that 261.5(d) is not categorically (automatically) sexual abuse of a minor (SAM) because consensual sex with a 15-year-old (“just under age 16”) is not necessarily abusive or harmful. The Ninth Circuit has not held specifically whether sex with a 14-year-old is necessarily abusive, but counsel should conservatively assume that it will be held SAM. See endnote below.

<sup>28</sup> The Ninth Circuit has held that consensual sex with a person age 15 or even age 14 is not a crime of violence (COV). See discussion in *United States v. Christensen*, 558 F.3d 1092 (9<sup>th</sup> Cir. 2009) (finding that the offense is not likely to involve aggressive, purposeful violent behavior, under a similar COV definition, and questioning *United States v. Asberry*, 394 F.3d 712 (9th Cir. 2005)); see also *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (sex with a 17-year-old is not a crime of violence under 18 USC § 16(b)). If the person is transferred outside the Ninth Circuit, however, a more stringent definition of crime of violence may apply, so it is far safer to get 364 days.

<sup>29</sup> See *Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (261.5 is a CIMT unless person reasonably believed that the minor was not under age 16), following *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). The Ninth Circuit has held otherwise, that regardless of knowledge of age, consensual sex with a person age 15 or older is not necessarily a CIMT because it is not necessarily harmful. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). But because Ninth Circuit might defer to BIA, conservatively assume the BIA’s standard will prevail.

<sup>30</sup> See discussion in Note: Sex Offenses, Part C ([www.ilrc.org/crimes](http://www.ilrc.org/crimes)). The Ninth Circuit held that a conviction for consensual sex will constitute sexual abuse of a minor (“SAM”) if it comes within either of the following two definitions: (1) “knowingly engaging in sexual conduct” with a minor under age 16 and at least four years younger than the defendant, as under 21 USC § 2243; or (2) sexual conduct or lewd

intent that is inherently harmful to the victim due to the victim's young age (certainly age 13, sometimes age 14, not age 15). The Ninth Circuit held that even with a 15-year-old minor and a 21-year-old defendant, a § 261.5(d) conviction never comes within the first definition as an analogue to § 2243, because § 261.5 lacks the element of "knowingly" (as in not being too drunk or otherwise incapacitated to understand) engaging in sexual conduct. *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9<sup>th</sup> Cir. 2009) (§ 261.5(d) with 15-year-old cannot be SAM under this definition). Therefore while a minor of at least age 16 is preferred, § 261.5 is a very reasonable plea even where the elements or the ROC show the minor was age 15 and the defendant is four years older.

Despite *Pelayo-Garcia* there is some risk to a plea to § 261.5(d), or to (c) where the ROC shows that the victim is age 15 and the defendant at least four years older. The Ninth Circuit or Supreme Court en banc might make a new rule, an immigration judge might not understand or might refuse to follow this rule, or the defendant could leave the Ninth Circuit (voluntarily or in immigration detention) and come into removal proceedings in a Circuit that has a more encompassing rule. If an age-neutral offense is not available, § 288(c) (lewd act with 14 or 15 year old) may be better, or even § 288a(b)(1). As opposed to § 261.5, § 288a(b)(1) and has no element relating to age differences or age of the defendant. It is clear that an immigration judge may not take notice of evidence in the record showing the defendant's age, and therefore the element of "four years younger than the defendant" cannot be established. Second, if the person will be removed, felony 288a is better than felony 261.5, with 15-year-old. See next endnote.

<sup>31</sup> In a federal prosecution for illegal re-entry, a prior felony conviction for "statutory rape" will result in a 16-level increase in sentence. Statutory rape has been defined as unlawful sexual intercourse with a person under age 16. *U.S. v. Gomez-Mendez*, 486 F.3d 599 (9<sup>th</sup> Cir. 2007). A misdo 261.5 conviction does not meet this definition because it is not a felony. Conviction of felony 261.5(c) with a record of conviction that is vague as to the age of the minor will not meet the definition, because the federal prosecutor cannot prove the victim was age 15 or younger. Section 288a(b) is safe to the extent that the definition of statutory rape would not be expanded to include oral sex, an issue that appears not to have been adjudicated yet. While conviction of sexual abuse of a minor results in a 16- or 8-level increase, 261.5, 288a(b) with a 15-year-old is not that under Ninth Circuit standards; see preceding endnote. For more information see 8 USC §1326, USSG § 2L1.2(b)(1)(C), and see Note: Sex Offenses.

<sup>32</sup> For immigration purposes prostitution is defined as "engaging in promiscuous sexual intercourse for hire," not lewd conduct for hire. 22 C.F.R. § 40.24(b). Courts have applied this restriction to the aggravated felony 8 USC § 1101(a)(43)(K)(i). See, e.g., *Depasquale v. Gonzales*, 196 Fed.Appx. 580, 582 (9<sup>th</sup> Cir. 2006) (unpublished) (prostitution under Hawaiian law); *Prus v. Holder*, 660 F.3d 144, 146-147 (2d Cir. 2011) (New York offense); see also *Familia Rosario v. Holder*, 655 F.3d 739, 745-46 (7<sup>th</sup> Cir. 2011)(government, IJ and BIA agree that importation of persons for purposes of prostitution is an aggravated felony under 8 USC § 1101(a)(43)(K)(i), while importation for other immoral purposes is not). California law defines prostitution as engaging in sexual intercourse or any lewd acts with another person for money or other consideration. See CalJIC 10.71, 16.420. Lewd acts includes touching of genitals, buttocks or female breast with the intent to sexually arouse or gratify. CalJIC 16.420.

<sup>33</sup> See discussion in *People v. Sanders* (1992) 10 Cal.App.4th 1268 (as state CIMT case, not controlling but informative).

<sup>34</sup> *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010); see also *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9<sup>th</sup> Cir. 2009).

<sup>35</sup> *Morales-Garcia v. Holder*, 567 F.3d 1058, 1064-1065 (9<sup>th</sup> Cir. 2009) ("Section 273.5(a) includes in its list of covered victims a 'former cohabitant.' This factor alone makes the offense virtually indistinguishable from the run-of-the-mill assault. Few would argue that former cohabitants -- however transitory that cohabitation -- are in a special relationship of trust such as to make an assault by one on the other a CIMT. Our past decisions make clear that assault and battery, without more, do not qualify as CIMTs.")

<sup>36</sup> A conviction under P.C. § 273.6 for violating a protective order issued pursuant to Calif. Family Code §§ 6320 and 6389 automatically causes deportability as a violation of a DV protective order. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9<sup>th</sup> Cir. 2009) amending with same result, 541 F.3d 966 (9<sup>th</sup> Cir. 2008). However, a conviction under P.C. § 273.6 for violating a protective order issued under Cal.Civ.Proc. Code § 527.6(c) (temporary restraining order against any person) would not be deportable as a violation of a DV protective order. *Id.* at 837.

<sup>37</sup> *United States v. Castro*, 607 F.3d 566 (9<sup>th</sup> Cir. 2010) (288(c) is not SAM because it is not necessarily physically or psychologically abusive). *Castro* stated that a court could look to the record of conviction to evaluate this behavior. However, a good decision in *Descamps* in 2013, to the effect that a prior conviction is considered to be for its least adjudicated elements, may mean that no offense under § 288(c) is SAM. Still, plead to specific, innocuous conduct, however. For more on *Descamps* see § N.3 *Record of Conviction*, and endnote to § 647.6, *infra*.

<sup>38</sup> See *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9<sup>th</sup> Cir. Cal. 1999) (examples of innocent-appearing behavior that is abusive solely because victim is under age 14, in the case of PC § 288(a)).

<sup>39</sup> See new deportation ground 8 USC §1227(a)(2)(A)(v) and Note: Adam Walsh Act. See also *Defending Immigrants in the Ninth Circuit*, Chapter 6, § 6.22 ([www.ilrc.org/crimes](http://www.ilrc.org/crimes)).

<sup>40</sup> E.g., compare *Pannu v. Holder*, 639 F.3d 1225 (9<sup>th</sup> Cir. 2011) with *Matter of Tobar-Lobo*, 24 I&N Dec. (BIA 2007).

<sup>41</sup> *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012) (Cal. P.C. 311.11 is aggravated felony and particularly serious crime). Immigration counsel may explore arguments that P.C. 311.11(a) is not categorically an aggravated felony under 8 USC § 1101(a)(43)(I), which references federal statutes, 18 USC §§ 2251, 2251A, and 2252. See discussion of federal elements in *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1040-41 (9<sup>th</sup> Cir. 2012).

<sup>42</sup> *Matter of Olquin-Rufino*, 23 I&N Dec. 896 (BIA 2006).

<sup>43</sup> Because this offense has no element relating to child pornography, the conviction would not be an aggravated felony even if that did appear in the record. See *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1038-39 (9<sup>th</sup> Cir. 2012). However, it should stay out of the record if possible.

<sup>44</sup> See discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) and see Note: Sex Offenses.

<sup>45</sup> In *Ocegueda-Nunez v. Holder*, 594 F.3d 1124 (9<sup>th</sup> Cir. 2010) the court held that because 314(1) can be used to prosecute exotic dance performances that the audience wishes to see, it is not necessarily a CIMT. In *Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013), the BIA countered that PC 314 no longer can be used to prosecute such performances. While Ninth Circuit held this offense includes erotic dance, which is not a CIMT, BIA held erotic dance no longer punishable under 314(1).

<sup>46</sup> See 8 USC 1101(a)(a)(43)(K)(i).

<sup>47</sup> In *Matter of P--*, 3 I&N Dec. 20 (BIA 1947), the BIA held that a conviction under PC 315 for keeping a house of ill fame is a CIMT. Immigration counsel may have arguments that a conviction for residing in a house of ill-fame and paying rental income is not a CIMT. See, e.g., *Cartwright v. Board of Chiropractic Examiners*, 16 Cal.3d 762, 768 (Cal. 1976)(although state case holding not moral turpitude is not controlling, it is informative).

<sup>48</sup> The State Department defines prostitution for the inadmissibility ground as “engaging in promiscuous sexual intercourse for hire.” 22 C.F.R. § 40.24(b), discussing 8 USC § 1182(a)(2)(D)(i). Courts have adopted that definition for the inadmissibility ground (see *Kepilino v. Gonzales*, 454 F.3d 1057 (9<sup>th</sup> Cir. 2006)), and also applied it to the aggravated felonies that involve prostitution, e.g. 8 USC § 1101(a)(43)(K)(i). See, e.g., *Depasquale v. Gonzales*, 196 Fed.Appx. 580, 582 (9<sup>th</sup> Cir. 2006) (unpublished) (prostitution under Hawaiian law divisible because includes lewd acts); *Prus v. Holder*, 660 F.3d 144, 146-147 (2d Cir. 2011) (same for New York offense of promoting prostitution in the third degree); see also *Familia Rosario v. Holder*, 655 F.3d 739, 745-46 (government, IJ and BIA agreeing that under 8 USC § 1328 importation of persons for the purposes of prostitution is an aggravated felony while importation for other immoral purposes is not under 8 USC § 1101(a)(43)(K)(i)). California law broadly defines prostitution as engaging in sexual intercourse or any lewd acts with another person for money or other consideration. Lewd acts includes touching of genitals, buttocks or female breast with the intent to sexually arouse or gratify. CalJIC 16.420.

<sup>49</sup> *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946), citing *People v. Sylva*, 143 Cal. 62, 76 P. 814 (1904).

<sup>50</sup> *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9<sup>th</sup> Cir. 2003)

<sup>51</sup> *Latter-Singh v. Holder*, 668 F.3d 1156 (9<sup>th</sup> Cir. 2012).

<sup>52</sup> In *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011) the BIA held that conviction for attempted arson under NY law that requires intentionally damaging property by fire or explosive is an aggravated felony as an offense described in 8 USC § 1101(a)(43)(E)(i). Under 8 USC § 1101(a)(43)(E)(i), offenses analogous to federal offenses described in 18 USC §§ 842(h), (i), or 844(d), (e), (f), (g), (h), (i) are aggravated felonies. The BIA held that malicious intent requirement under 844(i) was met if the statute requires intentional or willful disregard of the likelihood of damage or injury. This was based on the Third Circuit's definition of malicious in 844(f). Immigration counsel should explore whether the Ninth Circuit defines malicious to preclude recklessness. If so, immigration counsel can argue that PC 452 is not analogous to 844(i). Note that arson can constitute an aggravated felony under other grounds such as crime of violence if a sentence of one year or more is imposed.

<sup>53</sup> See 8 USC § 1101(a)(43)(E)(i), listing federal offenses related to explosive devices.

<sup>54</sup> See *Note: Burglary*. Burglary of a residence is a COV, regardless of manner of entry. *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011); *Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011). Therefore one must obtain a sentence of no more than 364 days on any single count. Under current law, burglary with intent to commit an offense that is an aggravated felony is itself an aggravated felony as attempt, if the ROC shows a substantial step toward committing the offense. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011). Therefore, in an unusual case such as e.g., entry into a house with intent to commit drug trafficking, with a 364 day sentence imposed, the conviction would not be an aggravated felony as a COV or burglary (because less than 1 yr), but might be one as "attempted" drug trafficking (because drug trafficking does not require a sentence to be an aggravated felony). This risk ought to end if the Supreme Court decides as expected in *Descamps v. U.S.* that a prior conviction should be evaluated solely on the least adjudicated elements, since it has no element of a substantial step to commit the attempted offense. See more discussion of *Descamps* in the endnote to § 647.6, *infra*, and in *Note: Record of Conviction*. Note that burglary of a residence with an unpermitted entry is a CIMT (*Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009)), as is *any* burglary with intent to commit an offense that is a CIMT, e.g. commercial burglary with intent to commit larceny. See *Note: Burglary*.

<sup>55</sup> Non-residential burglary may be "burglary" if it is an unlicensed entry or remaining in a building or structure with intent to commit a crime; attempted "theft" or attempted other aggravated felony if the ROC shows a substantial step toward completion; and perhaps a "crime of violence" if violent force was used to effect the burglary. In all cases you can avoid an aggravated felony by avoiding 1 yr or more imposed on any single count. See *Note: Burglary*.

<sup>56</sup> Conviction for forgery or for counterfeiting is an aggravated felony if a sentence of a year or more is imposed on any single count. See 8 USC § 1101(a)(43)(R), INA § 101(a)(43)(R) and see *Note: Aggravated Felonies*.

<sup>57</sup> See 8 USC § 1101(a)(43)(M), INA § 101(a)(43)(M) and see *Note: Burglary, Theft, Fraud*.

<sup>58</sup> See *U.S. v. Rivera*, 658 F.3d 1073, 1077 (9th Cir. 2011) (noting that PC 484(a) and 666 is not categorically a theft aggravated felony because it covers offenses that do not come within generic theft, such as theft of labor, false credit reporting, and theft by false pretenses).

<sup>59</sup> *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (PC 496(a)); *Alvarez-Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (PC 496d(a)).

<sup>60</sup> See discussion *In re Rolando S.*, 197 Cal. App. 4th 936 (Cal. App. 5th Dist. 2011).

<sup>61</sup> See *People v. Rathert* (2000) 24 Cal.4th 200, 206 (concluding that PC 529(3) does not require specific intent to gain a benefit, noting that "the 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... The impersonator's act, moreover, is criminal provided it might result in any such consequence; no higher degree of probability is required."). See also *Paulo v. Holder*, 669 F.3d 911 (9th Cir. 2011) (stating that PC 529(3) for false personation is not a crime involving moral turpitude).

<sup>62</sup> Currently a special rule applies in moral turpitude cases, in which an immigration judge confronted with a vague record of conviction (ROC) may hold a hearing on the facts to see if the underlying conduct involved moral turpitude. *Matter of Silva-Trevino, supra*. This is true regardless of whether the CIMT inadmissibility or deportability ground applies. If the Ninth Circuit overturns *Silva-Trevino, supra*, as some



other circuits have, then the regular rule will apply: a vague record is sufficient to prevent a conviction from causing deportability, but not inadmissibility.

<sup>63</sup> See *Krelling v. Field*, 431 F.2d 502, 504 (9th Cir. Cal. 1970).

<sup>64</sup> See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (malicious mischief, where malice involves wish or design to vex, annoy, or injure another person, was not a CIMT under Wash. Rev. Stat. 9A.48.080, which at the time required damage of at least \$250 and now requires damage of \$750.) and *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not COV).

<sup>65</sup> See *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007) (§ 646.9 is divisible as a COV); but see *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012) (in cases arising outside the Ninth Circuit, § 646.9 is categorically a COV).

<sup>66</sup> An age-neutral offense never is the aggravated felony sexual abuse of a minor. See, e.g., discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012), and see Note: Sex Offenses.

<sup>67</sup> However, *Nunez-Garcia*, 262 F. Supp. 2d 1073 (CD Cal 2003) re-affirmed these cases without comment; see cites in that opinion.

<sup>68</sup> *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

<sup>69</sup> *In re Joshua M.*, 91 Cal. App. 4th 743 (Cal. App. 4th Dist. 2001).

<sup>70</sup> See *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th 2004). The court noted that mild conduct held to violate § 647.6 that is not SAM includes urinating in public, offering minor females a ride home, driving in the opposite direction; repeatedly driving past a young girl, looking at her, and making hand and facial gestures at her (in that case, "although the conduct was not particularly lewd," the "behavior would place a normal person in a state of being unhesitatingly irritated, if not also fearful") and unsuccessfully soliciting a sex act. In another case the Ninth Circuit detailed mild behavior that violates § 647.6 that is not a CIMT, which also could provide plea guidance: brief touching of a child's shoulder, photographing children in public with no focus on sexual parts of the body so long as the manner of photographing is objectively "annoying"; hand and facial gestures or words alone; words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen; it is not necessary that the act[s or conduct] actually disturb or irritate the child (see *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9<sup>th</sup> Cir. 2008)).

<sup>71</sup> In *Descamps v. United States*, a case concerning Cal. P.C. § 459, the U.S. Supreme Court is likely to hold that in general a prior conviction should be evaluated based on its least adjudicated elements, and not on additional facts that do or do not appear in the individual's record. Under that rule P.C. §647.6 would likely be found not to be SAM, since the Ninth Circuit already has found that its least adjudicated elements are not SAM. Offenses such as P.C. §§ 243, 236, 261.5, and others may be similarly affected. After the *Descamps* holding there may be time-consuming legal fights about how and when to apply the rule, but it will be a much better landscape for immigrants and defendants. Delaying the plea hearing will in turn delay the start of the removal hearing, to get closer to the time when *Descamps* may provide this beneficial rule. Thus especially if there is not a downside – e.g., defendant is not in custody, or is in pre-hearing custody that will be credited toward completion of an expected sentence -- delaying the plea hearing might be a good strategy.

<sup>72</sup> *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009).

<sup>73</sup> See *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009), stating in discussion that because § 653f is a generic solicitation statute that pertains to different types of offenses, as opposed to a statute passed primarily to restrict controlled substances, it is not an offense "relating to" a controlled substance.

<sup>74</sup> See, e.g., *People v. McCaughey*, 261 Cal. App. 2d 131, 136 (Cal. App. 2d Dist. 1968), construing definition of willfully in this context.

<sup>75</sup> In *Renteria-Morales v. Mukasey*, 2008 U.S. App. LEXIS 27382 (9th Cir. Dec. 12, 2008), replacing 551 F.3d 1076 (9th Cir. 2008).

<sup>76</sup> See 8 USC 1101(a)(43)(Q), (T) and *Renteria-Morales*, *supra* regarding the aggravated felony, failure to appear.

<sup>77</sup> Possession of sawed-off shotgun has been held not to be a CIMT. See, e.g., *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979).

<sup>78</sup> ICE (immigration prosecution) has the burden of proving that a permanent resident is deportable; with a vague record of conviction, ICE cannot prove that the offense involved a firearm. The immigrant must prove that a conviction is not a bar to applications for lawful status or relief, and with a vague record he or she cannot do that. The only relief that a deportable firearms offense will serve as a bar to is the various kinds of non-LPR cancellation, e.g. for persons who have been here for ten years. A person who might apply for non-LPR cancellation needs a specific record of conviction showing a weapon that is not a firearm.

<sup>79</sup> *United States v. Medina-Anicacio*, 325 F.3d 638 (5<sup>th</sup> Cir. 2003).

<sup>80</sup> The definition of aggravated felony includes a state offense with the same elements (absent the federal jurisdictional element) of certain federal firearms offenses. See 8 USC § 1101(a)(43)(E)(ii), INA § 101(a)(43)(E)(ii), referencing federal offenses described in 18 USC § 922(g)(1)-(5), which prohibit among other things shipping, transporting, possessing or receiving a firearms or ammunition by felon (convicted of an offense with a potential sentence of more than one year), fugitive, persons adjudicated mentally defective or institutionalized, users and addicts of a federally listed controlled substance, and undocumented persons. Note that simply being an undocumented person at time of conviction for possessing a firearm is not an aggravated felony; the conviction must be under a statute that has as an element that the person is undocumented while possessing a firearm.

<sup>81</sup> *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because California is broader in that it covers mere ownership of guns by felons). *Pargas-Gonzalez* cites *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits owning a firearm.

<sup>82</sup> The deportation ground at 8 USC § 1226(a)(2)(C) includes possession, carrying, selling etc. “firearms or destructive devices” as defined at 18 USC 921(c), (d). Those sections do not include ammunition in the definition. In contrast, some offenses are aggravated felonies because they are analogous to certain federal felonies, some of which do include ammunition. That is why being a felon in possession of ammunition is an aggravated felony, although it would not be a deportable firearms offense.

<sup>83</sup> Some cases found possession of a sawed-off shotgun is a crime of violence under 18 USC § 16(b) because this kind of weapon could only be intended for use in a violent crime, even if years in the future. See, e.g., *United States v. Dunn*, 946 F.2d 615, 621 (9th Cir. Cal. 1991) (possession of a sawed-off shotgun comes within 18 USC § 16(b)). Arguably the U.S. Supreme Court overturned these cases when it held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) that the violence must occur in the course of committing the offense. See, e.g., discussion in *U.S. v. Reyes* 2012 WL 5389697, 8 (N.D.Cal.) (N.D.Cal.,2012) (opining that *Leocal* has overturned *Dunn*); see also *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011).

<sup>84</sup> See *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011).

<sup>85</sup> *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir 2008).

<sup>86</sup> Recklessness is not sufficient for COV. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-30 (9th Cir. 2006) (*en banc*). A prior decision held that 2800.2 is a COV because of the high degree of recklessness, but it relied on a case that was specifically overturned by *Fernandez-Ruiz*. See *United States v. Campos-Fuerte*, 357 F.3d 956, 960 (9th Cir. Cal. 2004), relying on *U.S. v. Ceron-Sanchez*, 222 F.3d 1169, 1171 (9th Cir. 2000), overturned by *Fernandez-Ruiz*, *supra*. Still, to avoid any litigation it is best to plead to less than one year for any single count.

<sup>87</sup> See *Carrillo-Jaime v. Holder*, 572 F.3d 747 (9th Cir. 2009)

<sup>88</sup> Earlier advice on § 10851 was to avoid an aggravated felony by pleading to accessory after the fact, which is included in § 10851. *US v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (*en banc*). However the BIA has held that accessory after the fact is an AF with a year’s sentence imposed, as obstruction of justice. See PC § 32.

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<sup>89</sup> Taking with intent to temporarily deprive is not a CIMT. See, e.g., discussion at *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160-61 (9<sup>th</sup> Cir. 2009), *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 33 (B.I.A. 2006).

<sup>90</sup> *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*).

<sup>91</sup> See, e.g., *Matter of Short*, 20 I&N Dec.136, 139 (BIA 1989) (“Moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude.”)

<sup>92</sup> The Ninth Circuit has held that the factual basis for one offense cannot be used to characterize a separate and distinct offense. See *Aguilar-Turcios v. Holder*, 691 F.3d 1025 (9<sup>th</sup> Cir. 2012), substituted for 582 F.3d 1093 (9<sup>th</sup> Cir. 2009).

<sup>93</sup> *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008).

<sup>94</sup> Section 23103 involves the “conscious disregard of a substantial and unjustifiable risk,” which is sufficient scienter for moral turpitude, if the conduct is sufficiently “reprehensible.” Moral turpitude has been found to inhere in this level of recklessness when it causes, or creates the “imminent risk” of causing, death or very serious bodily injury. See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 870-71 (BIA 1994) (conscious disregard resulting in manslaughter), *Matter of Leal*, 26 I&N Dec. 20, 24-26 (BIA 2012) (conscious disregard causing a “substantial risk of imminent death”). But this level of recklessness has been held insufficient when less serious bodily injury was involved. See *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996) (assault causing bodily injury by conscious disregard is not a CIMT). Section 23103 requires only a disregard for the safety of people or property. (A different offense, Veh. C. § 23104(b), involves serious bodily injury to a person; counsel should assume it is a CIMT.)

<sup>95</sup> *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

<sup>96</sup> Having a physical or mental disorder (including alcoholism) that poses a current risk to self or others is a basis for inadmissibility under the health grounds. 8 USC § 1182(a)(1)(A)(iii).

<sup>97</sup> 8 USC § 1182(a)(2), INA § 212(a)(2).



## § N.1 Overview

### **Establishing Defense Goals; Immigration Status; Deportability, Inadmissibility, and an Aggravated Felony; The Problem of Illegal Re-entry; and The Ten-Step Checklist for Defending a Non-Citizen**

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

By Katherine Brady, Ann Benson and Jonathan Moore<sup>1</sup>

- A. Introduction: Gathering Facts, Resources**
- B. Inadmissible, Deportable, and Aggravated Felony**
- C. How to Determine Your Client's Immigration Status and Create Defense Priorities**
  - 1. U.S. Citizen or U.S. National Defendant**
  - 2. Undocumented Defendant**
  - 3. Lawful Permanent Resident Defendant**
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  - 5. Defendant with Temporary Protected Status (TPS)**
  - 6. Defendant with a Nonimmigrant Visa**
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  - 10. Defendant who has previously received relief from removal**
- D. The Immigration "Strike": Illegal Re-entry Prosecutions and How to Avoid Creating a Dangerous Prior**
- E. Ten-Step Checklist for Representing a Non-Citizen**

#### **A. Introduction; Gathering Facts, Using Resources**

The Quick Reference Chart details which California offenses may make a noncitizen inadmissible, deportable or an aggravated felon. These three categories cover *most* of the ways that a conviction can hurt immigration status. (They don't cover all, however. For example, a TPS applicant must not be inadmissible and *also* cannot be convicted of two misdemeanors or one felony. See Part C.5 below.)

This section discusses how criminal defense counsel can use the analysis you get from the Chart, combined with information about the client's particular immigration status and history to

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<sup>1</sup> This Note has been re-organized and rewritten to provide more specific advice to defenders. Parts of the Note borrow liberally from the public defender manual *Immigration and Washington State Criminal Law*, found at [www.defensenet.org](http://www.defensenet.org). We are grateful to Ann Benson, Jonathan Moore and the Washington Defender Association Immigration Project for their kind permission to use the materials.

establish defense goals for individual noncitizen clients. The more information that you have about the client's immigration and criminal history, the better the advice you will be able to give.

**Gather the Client's Entire Criminal Record.** To correctly identify a noncitizen's defense goals in terms of immigration, defense counsel must have a complete record of all past convictions in the United States and sentences imposed. (Foreign convictions are relevant as well, but gathering information on these may be beyond your resources.)

**Copy Immigration Documents, Complete an Immigration Questionnaire.** If the client has any type of card, letter, or document pertaining to immigration status, photocopy it. This will provide immigration counsel with a treasure trove of information. Also, have the client complete an immigration intake form. See § N.16 *Client Immigration Questionnaire*. Assistance from paralegal staff or law clerks could expedite the fact gathering process. Even if the client is not able or willing to answer all of the questions, any information that you gain will be of help.

**Expert Assistance.** To complete the analysis, ideally defense counsel should look at more comprehensive works and/or consult with an expert on crimes and immigration. See § N.18 *Resources*. See especially consultation services offered by the Immigrant Legal Resource Center (on a contract basis), the U.C. Davis Law School Immigration Clinic (limited free consultation for public defenders), special free consultation for Los Angeles Public Defenders, and the National Immigration Project of the National Lawyers Guild. A comprehensive manual on this subject, *Defending Immigrants in the Ninth Circuit*, is published by the group that writes this Chart and Notes. It contains extensive discussion of California offenses, immigration status and applications for relief, and other topics. See [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

## **B. What is the Meaning of "Inadmissible," "Deportable," and "Aggravated Felony"?**

### **1. Overview**

The Immigration and Nationality Act (INA) contains three main lists of offenses that damage immigration status or potential status. These are:

- **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 her lawful status and be "removed" (deported), unless she can apply for some relief from removal.

Lawful permanent residents and others who have *secure lawful immigration status* that they might lose fear becoming deportable. In contrast, a deportable conviction usually<sup>2</sup> does not affect an undocumented person, who has no lawful status to lose.

**Example:** Lila is a lawful permanent resident and Uma is an undocumented person. Both are charged with possession of an unregistered firearm, which is a deportable offense under 8 USC § 1227(a)(2)(c), but is not an inadmissible offense (see definition of "inadmissibility" below).

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<sup>2</sup> The exception is that such a conviction will prevent an undocumented person from applying for some type of non-permanent resident "cancellation of removal," as under 8 USC § 1229b(b)(1). See § N. 17 *Relief*.

Lila wants to avoid this plea, because a deportable conviction like this could cause her to be put in removal proceedings, stripped of her LPR status, and removed. In contrast, this is not a bad plea for Uma, since she has no lawful status to lose.

- **Grounds of inadmissibility**, at 8 USC § 1182(a). A noncitizen who is **inadmissible** for crimes may be unable to get any *new* status, admission to the U.S., waiver of a crime, or other new benefit you apply for from the government. However, being inadmissible will not take away the lawful status that one already has. The only exception is if the person with lawful status *leaves* the United States after becoming inadmissible for crimes. In that case the person can be denied admission back into the U.S. for being inadmissible.

**Example:** Assume that instead of the firearms offense, Lila and Uma are charged with misdemeanor engaging in prostitution, a six-month maximum offense and the first criminal offense for each of them. This conviction would make them both inadmissible under the “engaging in prostitution” ground of inadmissibility, but would not make them deportable.

Uma wants to avoid this plea, because as an undocumented person she may want to apply for lawful status now or in the future, and for that she needs to avoid inadmissibility. In contrast, Lila could take the plea if necessary. The conviction would mean that she would have to delay any application for naturalization, and that she should not travel outside the U.S. until she became a citizen. But at least she would not be deportable, and therefore she is not at risk of being put in removal proceedings and removed from the U.S. so long as she remains in the U.S.

- The multi-part definition of **aggravated felony**, at 8 USC § 1101(a)(43). Aggravated felony convictions bring the most severe immigration consequences. Everyone wants to avoid this type of conviction. The conviction is a ground of deportability and also a bar to almost every application or relief. “Aggravated felony” is a misnomer; currently the category includes many misdemeanors and other offenses that are not particularly “aggravated.”

These three categories comprise the most common, but not all, of the adverse immigration consequences that flow from convictions. In particular, see Part C Asylee and Refugee Status, and Temporary Protected Status.

## 2. Offenses Listed in the Grounds of Inadmissibility and Deportability

The following chart shows the types of convictions or evidence of criminal activity that come up in state court proceedings that can make a noncitizen deportable or inadmissible. The third list of offenses, aggravated felonies, is discussed separately below.

<b>Grounds of Deportability Based on Crimes, 8 USC § 1227(a)(2)</b> (Conviction or conduct must be after admission to U.S.)	<b>Grounds of Inadmissibility Based on Crimes, 8 USC § 1182(a)(2)</b> (Offenses committed anytime)
Conviction of crime of domestic violence, child abuse/neglect, or stalking; judicial finding of a violation of certain DV protection orders. Conviction or violation must occur after 9/30/96	No per se domestic violence, child abuse, or stalking inadmissibility ground. (But check to see if the offense also constitutes a crime involving moral turpitude (“CIMT”), which can cause inadmissibility)
Firearms offense	No per se firearms ground (But see if offense is also a CIMT)
Conviction/s of a crime involving moral turpitude (CIMT): --Two convictions after admission, unless they were part of a single scheme; or --One conviction with maximum sentence of at least 1 yr, committed within 5 years after first admission	One conviction of a crime involving moral turpitude (CIMT), except automatically <i>not</i> inadmissible if it comes within: --Petty Offense Exception (only CIMT ever committed, has a maximum possible sentence of one year or less, sentence imposed was 6 months or less) or --Youthful Offender Exception (convicted as an adult of only one CIMT, committed while under 18, conviction or resulting imprisonment occurred at least five years ago)
N/A	Formally admit committing a CIMT, even with no conviction
Conviction of offense relating to a controlled substance, with automatic exception for single conviction 30 gms marijuana	Conviction of offense relating to a controlled substance, with possible discretionary waiver in certain cases for single conviction 30 gms marijuana, under INA § 212(h) (but do <i>not</i> rely on the client winning this waiver)
N/A	Formally admit committing a controlled substance offense, even with no conviction
Drug addict or abuser at any time after admission	Current drug addict or abuser (8 USC § 1182(a)(1))
N/A	Government has “reason to believe” person was or helped a trafficker; conviction not required
N/A	5 yr aggregate sentence for two or more convictions of any type
Conviction for running non-USC prostitution business	Engaging in prostitution (conviction not required)
Convicted of an aggravated felony	No per se aggravated felony bar (but many AF offenses also are a CIMT, drug offense, or other inadmissibility category)

**Comparing the offenses in grounds of deportability and inadmissibility.** The lists of offenses in the grounds of deportability and inadmissibility are not identical. Certain types of convictions appear on both lists, while others will make a noncitizen deportable but not inadmissible, or vice versa. In many cases it is crucial for counsel to understand the immigration situation and identify priorities. You don't want to use all your resources to avoid a plea to a deportable offense, when in fact that won't affect the defendant, whose key goal is to avoid conviction of an inadmissible offense. Here are some differences between the two lists:

- **There are different rules for when a moral turpitude conviction makes a noncitizen deportable versus inadmissible.** Check the person's entire criminal record against the formulae discussed above and in § N.7 *Crimes Involving Moral Turpitude*, and discussed in greater detail at *Defending Immigrants in the Ninth Circuit*, Chapter 4.
- **Key “conduct-based” grounds make a noncitizen inadmissible, but not deportable.** These include engaging in a pattern and practice of **prostitution**, and where the government has “**reason to believe**” (but no conviction) that the person aided in drug trafficking.
- **There is no inadmissibility ground based on conviction of a domestic violence, child abuse, or firearms offense, *per se*.** 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*, an unregistered firearm conviction is not harmful.

Note, however, that if the firearms or domestic violence offense *also* is a crime involving moral turpitude—e.g., if the firearms offense is not possession of an unregistered weapon, but assault with a firearm—counsel also must analyze whether the plea according to the moral turpitude grounds, where the conviction might cause inadmissibility.

**Example:** Sam, a noncitizen, is facing tough charges and is offered a chance to plead to possession of an unregistered firearm. His defender must understand his immigration status to competently deal with the offer. If Sam must avoid becoming deportable, he has to refuse this plea, which will make him deportable under the firearms ground. If instead he only must avoid becoming inadmissible, he can safely accept the firearm plea. This is because there is no “firearms” ground of inadmissibility. (Possessing a firearm is not a moral turpitude offense, so he doesn't have to worry about that ground of inadmissibility.)

- **Conviction of 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. Aggravated Felonies

Aggravated felonies are discussed in detail at § N.6, *infra*. Defense counsel must become very familiar with the list, which includes dozens of categories and is not limited to felonies or

aggravated offenses. *A few examples* of commonly charged offenses that are also aggravated felonies include:

- Misdemeanor theft with a sentence imposed of one year, even if the entire sentence is suspended; burglary or a crime of violence with a suspended one-year sentence;
- Any drug trafficking offense, e.g. possession for sale of a small amount of marijuana;
- “Sexual abuse of a minor,” which includes some convictions under P.C. § 261.5 and all convictions under § 288(a);
- Felon in possession of a firearm; failure to appear to face a felony charge or sentence.

*Conviction of an aggravated felony has three major immigration consequences.* First, it is a deportable offense, and therefore grounds to remove lawful status for those who have it.

Second, aggravated felonies are worse than other triggers of deportability because they bar most forms of relief from removal. An aggravated felony conviction therefore results in virtually **mandatory deportation** in the great majority of cases. If a person is “merely” deportable based on a ground of deportability that is not an aggravated felony, she might be able to seek a waiver of deportability and remain in the United States. If a person is convicted of an aggravated felony, however, almost all forms of relief are barred, including asylum and the waiver for long-time permanent residents, cancellation of removal. In some cases, some noncitizens with a non-drug aggravated felony will be able to adjust, or re-adjust, their status to lawful permanent residency with a § 212(h) waiver, or apply for a “U” or “T” visa as

Third, a noncitizen who is deported (“removed”) and who re-enters illegally has committed a federal offense. If the noncitizen was convicted of an aggravated felony before being removed, he or she is subject to a greatly enhanced sentence for the re-entry. 8 USC § 1326(b)(2). In northern California, a federal defendant with a prior aggravated felony conviction, but not of a highly serious crime, typically may serve 2 ½ years in federal prison just for the illegal re-entry. Federal officials troll the jails looking for aggravated felons who have illegally re-entered. Note, however, that conviction of certain offenses that are less serious than aggravated felonies can cause an even greater sentence enhancement. See discussion at Part D, below, “The Problem of Illegal Re-entry.”

### **C. Determining Your Client’s Immigration Status and Particular Defense Goals**

The term “immigration status” refers to a person’s classification under United States immigration laws. Criminal convictions affect noncitizens differently depending on their status, as noted in the above discussion of deportability versus inadmissibility. Therefore, to determine defense goals for a noncitizen, you must find out, if possible, the client’s immigration status. This section explains the possible classifications of immigration status under U.S. immigration law, and discusses defense priorities based on the classification.



A person who is not a U.S. citizen and falls within one of the categories listed below is a noncitizen. While a U.S. citizen never can be deported/removed, ***anyone who is not a U.S. citizen is always subject to the possibility of removal, regardless of her circumstances.*** This includes, for example, a person who is married to a U.S. citizen and has had a green card for twenty years.

For in-depth information about any of these categories, see resources such as Chapter 1, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)).

**Note: In choosing defense strategies, remember that a vague record of conviction will not help an immigrant who must apply for status or relief from removal. See *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*) discussed at § N.3 Record of Conviction**

## **1. The United States Citizen (“USC”) or United States National Defendant**

### **a. Who is a U.S. Citizen?**

***Citizenship by Birth in the United States or Other Areas.*** 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.

***Naturalization to U.S. Citizenship.*** A noncitizen may apply to become a U.S. citizen through naturalization. A naturalization applicant must establish that he or she has been of “good moral character” for a certain period; often the period is three or five years, but certain military personnel require less. In almost every case, except for certain Armed Services members, an applicant for naturalization must be a lawful permanent resident.

Most crimes that trigger the *inadmissibility grounds* also statutorily bar the person from establishing good moral character. This is not so dangerous: the noncitizen simply must wait for the, e.g., three or five years to pass since the conviction before filing the naturalization application, and take care not to travel outside the U.S. until she is a citizen. It is far more damaging for a noncitizen who is *deportable* for a crime to apply for naturalization. It is likely that the naturalization application will be denied and the person quickly will be referred to removal/deportation proceedings, and no passage of time will eliminate the deportability. For further discussion of naturalization, see books such as *Defending Immigrants in the Ninth Circuit*, Chapter 11 or *Naturalization: A Guide for Advocates* ([www.ilrc.org](http://www.ilrc.org)).

***Derivative or Acquired Citizenship.*** Your client might be a U.S. citizen and not know it. Many persons born in other countries unknowingly inherit U.S. citizenship from their parents under one of a few provisions of nationality law. In this case, criminal convictions are not a bar and good moral character is not a requirement; the person received the status automatically and is already a citizen.



There are two threshold questions. If the answer to either question is yes, more research needs to be done to determine whether the person actually is a U.S. citizen, based on date of birth and other factors. As the law of derivative and acquired citizenship is quite technical, it would be best to consult a non-profit agency or immigration lawyer. The threshold questions are:

- At the time of his or her birth in another country, did your client have a grandparent or parent who was a U.S. citizen? If so, your client might have inherited U.S. citizenship at birth, called “acquired citizenship.”
- Might your client have been under the age of 18 when, in either order, she became a permanent resident and a parent naturalized to U.S. citizenship? If so, your client might have automatically become a citizen at the moment the second condition was met, in a process called “derivative citizenship.”

Regarding the second question, 8 USC § 1431 provides that a person automatically acquires citizenship regardless of any criminal convictions (or other considerations) if the following four conditions are met:

- At least one parent becomes a U.S. citizen by naturalization;
- The child is under 18;
- The child is a lawful permanent resident; and
- The child is in the legal and physical custody of the citizen parent.

This version of the law only applies to those who were under 18 as of February 27, 2000.<sup>3</sup> Those who were over 18 as of that date are subject to a prior version of this provision<sup>4</sup> that required *both* parents to become U.S. citizens, or proof that the child was in the legal custody of the citizen parent if there had been divorce or separation

Because a person with derivative or acquired citizenship is already automatically a USC, there is no need to apply for naturalization. The derivative or acquired USC will benefit, however from obtaining *proof* that he or she is a citizen. The best, most efficient way to obtain proof of U.S. citizenship is to apply for a U.S. passport. See [http://travel.state.gov/passport/passport\\_1738.html](http://travel.state.gov/passport/passport_1738.html) for an application and information on how to do this.

#### **b. Who is a U.S. National?**

Persons born in an outlying possession of the United States, for example in American Samoa and Swains Islands, are U.S. nationals.<sup>5</sup> A national of the United States is not a U.S. citizen, but cannot be deported based upon a conviction.

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<sup>3</sup> *Hughes v. Ashcroft*, 255 F.3d 752 (9<sup>th</sup> Cir. 2001); *Matter of Rodrigues-Tejedor*, 23 I. & N. Dec. 153 (BIA 2001).

<sup>4</sup> 8 USC 1432; INA 321 [repealed].

<sup>5</sup> See INA §§ 308, 8 USC § 1408 and INA § 101(a)(29), 8 USC § 1101(a)(29). For a complete description of who can be non-citizen nationals, please see INA § 308, 8 USC § 1408 and Chapter 3, Noncitizen Nationals, Daniel Levy, *U.S. Citizenship and Naturalization Handbook* (West Group).

### c. Defense Goals for U.S. Citizens and Nationals

**Cannot be deported.** A U.S. citizen or national never can be legally deported or excluded (“removed”), held in immigration detention, or otherwise come under the jurisdiction of immigration enforcement procedures, regardless of their criminal history.

**However, U.S. citizens still can be hurt by a badly formed criminal plea: they can lose the ability to submit a family visa petition for an immigrant relative.** Part of the Adam Walsh Act passed in 2006 imposes immigration penalties on *U.S. citizens and permanent residents* who are convicted of certain crimes relating to minors, by preventing them from filing a visa petition on behalf of a close family member. The specified offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct, where the victim is a minor. See Note 11, *infra*.

**Example:** Harry is a U.S. citizen who is charged with soliciting a 17-year-old girl to engage in sexual conduct. If he pleads guilty, he may not be permitted to file a visa petition for an immigrant relative, unless he is able to obtain a waiver.

## 2. The Lawful Permanent Resident or “Green Card” Holder Defendant

### a. What is Lawful Permanent Residency?

A Lawful Permanent Resident (LPR) is not a U.S. citizen but is permitted to live and work legally in the U.S. permanently. However, LPRs are still subject to removal at any time if they violate the immigration laws. There are two types of permanent residents: Lawful Permanent Residents (LPR’s) and Conditional Permanent Residents (CPR’s).<sup>6</sup> Permanent residents are given “green cards” which state “Resident Alien” across the top of the card. Green cards actually are pink or white in color, not green. **LPR status does not expire, although the green card itself must be renewed.** LPR status can only be revoked by an immigration judge or by leaving the U.S. for such a long period of time that it is deemed abandoned.

### b. Defense Priorities for Lawful Permanent Residents

Consider the following five steps in determining defense priorities.

1. **Is my LPR client already deportable?** Obtain and analyze the LPR client’s entire criminal record to determine if the client is already deportable based on a past conviction. If so, investigate what waivers or relief, if any, are available. If the LPR is already deportable, the first priority is to avoid a conviction that would be a bar to eligibility for some waiver or relief from removal. See Step 3. If the LPR is not yet deportable for a conviction, counsel must attempt to avoid a plea that will make the LPR deportable.

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<sup>6</sup> A conditional permanent resident (CPR) is a lawful permanent resident who gains status through marriage to a U.S. citizen where the marriage is less than 24 months old at the time of adjudication of the application for residence. CPR status expires after two years and an additional petition must be filed to become a regular permanent resident. 8 USC § 1186a and INA § 216.

2. **Highest priority: avoid an aggravated felony conviction.** The highest defense goal for a lawful permanent resident is to avoid a conviction for an aggravated felony, because this will not only subject him/her to removal proceedings, but will eliminate eligibility for virtually all forms of relief from removal, resulting in virtually mandatory deportation for most clients.
3. **Next priority for non-deportable LPR: avoid deportability under any other ground.** After avoiding deportation for aggravated felony, an LPR's next highest priority is to avoid becoming deportable under some other ground (and, in particular, under a ground relating to controlled substances).
4. **Goals for LPR client who is or will become deportable.** If, due to the current charges or past convictions, the LPR will be deportable for a conviction, the LPR is in a very serious situation. A permanent resident who becomes deportable can be placed in 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 LPR has not been convicted of an aggravated felony, she might be able to apply for some relief that would allow her to keep her green card and remain in the United States.

Criminal defense counsel must understand what, if any defenses against removal exist for the individual, and how to preserve eligibility for the defense. This may require consultation with an immigration expert; see N. 17: Resources, and see Chapter 11, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)). A common form of relief for deportable permanent residents who have lived in the U.S. for several years and have not been convicted of an aggravated felony is "cancellation of removal."<sup>7</sup> Or, if not deportable for a drug offense, the resident might be able to "re-immigrate" through a U.S. citizen or LPR family member.

5. **Avoiding inadmissibility.** An LPR also has an interest in avoiding a conviction that would make him **inadmissible**. An LPR who is deportable might be able to apply for some waiver or relief – for example, to "re-immigrate" through a family member -- as long as he remains admissible. Also, if an LPR who is inadmissible for crimes leaves the U.S. even for a short period, he can be barred from re-entry into the U.S. Even if he manages to re-enter, he can be found deportable for having been inadmissible at his last admission. However, an LPR who is inadmissible but *not* deportable based on a conviction is safe, **as long as he does not leave the United States.** Inadmissible LPR clients need to be warned of the consequences of leaving the United States.
6. **The LPR client who appears to be mandatorily deportable should avoid custody time.** If the LPR is deportable and has no possible form of relief from removal at this time, her biggest priority is to avoid encountering immigration authorities, and that is best done by getting out of jail before an immigration hold is placed, or by avoiding jail time if the client is already out of custody. You should advise the person that once she is out of jail, she must avoid any contact with immigration authorities. She should not travel outside the U.S., apply to renew a

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<sup>7</sup> For more information, please see Part II, Section C of this manual – Quick Guide to Cancellation of Removal for Legal Permanent Residents.

10-year green card, apply for naturalization, or make other contact with authorities. See “The Absolutely Removable Defendant,” below.

7. Finally, certain convictions where the victim is a minor will bar a permanent resident (or U.S. citizen) from being able to file papers for an immigrant family member in the future. The specified offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. For more information see Note 11 on the Adam Walsh Act, *infra*.

### **3. The Undocumented or “Illegal Alien” Defendant**

#### **a. Who are undocumented persons?**

An undocumented person is someone who does not have legal status under the immigration laws to be present in the U.S. There are two<sup>8</sup> main categories of undocumented persons. The first is a “visa overstay,” meaning a nonimmigrant visa holder whose visa has expired or been terminated, e.g., a foreign student who drops out of school or a tourist who overstays a visa. The second is someone who “entered without inspection” (“EWI”), meaning a noncitizen who entered the United States without permission and has never had lawful immigration status.

There are technical legal differences between the two groups,<sup>9</sup> but they have important similarities. Both are in the United States unlawfully and can be removed on that basis even without a criminal conviction. Both will have to apply for some sort of relief or status if they are to remain in the United States. Note that millions of persons are presently undocumented but may be eligible to apply for lawful status, such as someone who is married to a U.S. citizen.<sup>10</sup> If the undocumented person has a U.S. citizen or permanent resident parent, spouse, and/or child over 21, see

#### **b. Defense Goals for an Undocumented Client**

***Undocumented person who may be eligible for relief now or in the near future.*** An undocumented person is already subject to removal because she has no lawful status. However, she might be able to acquire lawful status and remain in the U.S. if she is entitled to request immigration status through one of several legal avenues (e.g., marriage to a U.S. Citizen, asylum, non-permanent resident cancellation, or some other form of relief from removal).<sup>11</sup> Usually, to

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<sup>8</sup> People who used to have status, but who now have a final order of removal (and are not under an “order of supervision”) are also undocumented.

<sup>9</sup> Technically, a visa overstay is removed for being deportable, while an EWI is removed for being inadmissible. This makes a difference in the crimes analysis in only a few cases, however. More importantly, a visa overstay who will immigrate through a close U.S. citizen relative may “adjust status” in the United States, while an EWI must go to a U.S. consulate in the home country to do so.

<sup>10</sup> Marriage to a U.S. citizen does not automatically confer any lawful status on someone. It simply entitles a person to apply for lawful permanent resident status. This is a complex process involving numerous applications where in the noncitizen must prove, inter alia, that he is not subject to any of the grounds of inadmissibility at 8 USC § 1182, including the crime related grounds at 8 USC § 1182(a)(2).

<sup>11</sup> For a summary of avenues of “relief from removal” and avenues for obtaining lawful status, please see the section on “Relief from Removal” at the “online resources” link of the WDA’s Immigration Project website at [www.defensenet.org](http://www.defensenet.org).

qualify for such relief the applicant must not be **inadmissible**. Thus for undocumented noncitizens, avoiding a conviction that creates grounds of inadmissibility is the highest priority.

In the majority of cases, the grounds of **deportability** are irrelevant to an undocumented person. The main exception is if the person will apply for non-permanent resident cancellation of some kind, for example based upon 10-years residence in the U.S. and exceptional hardship to citizen or permanent resident relatives, or cancellation under the Violence Against Women Act. See 8 USC § 1229b(b).

The person will want to avoid conviction of an **aggravated felony**. Such a conviction is likely to bar him from applying for lawful status or relief. If he is deported/removed and then tries to re-enter the U.S. illegally, having an aggravated felony is one of the types of prior convictions that will trigger a severe sentence enhancement. Other kinds of priors will enhance this sentence as well; see important information the problem of illegal re-entry at Part D, below.

Staying or getting *out of jail* is also a priority to avoid detection by immigration authorities. However, counsel should be careful to advise this group of clients not to accept a plea to a conviction that would eliminate their options for lawful status just to get out of jail without clearly understanding the long-term consequences.

**Example:** Tamara is a Canadian citizen who entered the U.S. as a tourist and later married a U.S. citizen. They have not yet filed papers to apply for Tamara's lawful permanent resident (LPR) status based upon her marriage, but she is eligible to apply immediately. Because she is eligible for relief, her highest priority – even higher than avoiding immigration authorities -- is to avoid a conviction that is a ground of inadmissibility and thus will interfere with her application for LPR status.

***Undocumented with no current options for obtaining lawful immigration status, who are likely to be removed/deported.*** Undocumented persons who don't have any way to defend against removal or apply for lawful status have a priority that may at times compete with the defense of a criminal case: they may decide that they need *to avoid contact with immigration authorities at any cost* – even to the point of accepting any plea just to get out of jail immediately. This may be a complex decision that requires accurate immigration advice. See “The Absolutely Removable Defendant,” below.

Where a client has not yet been removed, but will or might be, counsel must consider the possibility that the person will attempt to re-enter illegally. Counsel must (a) warn about the severe federal penalties for illegal re-entry after removal; (b) attempt to avoid an aggravated felony, which would bar the person from voluntary departure which is an alternative to removal, and (c) attempt to avoid an aggravated felony or other conviction that would cause an enhanced sentence should the client be prosecuted for an illegal re-entry. See Part D, The Immigration “Strike,” below.

***Undocumented with a Prior Order of Deportation or Removal.*** A person who was deported/removed and then re-entered the United States illegally is in an extremely dangerous situation. The key goal is to avoid contact with immigration officials, or with federal criminal

officials. In immigration proceedings, the person's prior order of removal will be immediately reinstated without opportunity to apply for relief. Further, he faces the very real risk of being prosecuted for the federal crime of illegal reentry after deportation/removal.<sup>12</sup> Worse yet are the severe sentence enhancements for an illegal reentry conviction when the defendant has prior convictions of certain crimes.

Note that a person who accepted voluntary departure is not in the same situation with regard to illegal re-entry. It is a far less serious crime to illegally re-enter after a voluntary departure than after a deportation/removal. Sometimes it is difficult to discern from the client's memory whether he was deported or received voluntary departure, and consultation with an immigration expert is required.

#### **4. The Refugee or Asylee Defendant, or the Applicant for Asylum**

##### **a. Who is a Refugee or Asylee, or an Asylum Applicant?**

Refugees and asylees have been granted lawful immigration status because they have established that they would suffer or have suffered persecution in their country of origin.<sup>13</sup> Refugees receive refugee status abroad before relocating to the U.S. An asylee is someone who came to the U.S. and received a grant of asylum here.

An asylum *applicant* is a person who has entered the United States, whether admitted or not, and who has applied for asylum. With some exceptions for exigent or changed circumstances, an asylum applicant must file the application within one year of entering the United States. The person may apply affirmatively by filing an application, or apply as a defense to removal. If the one-year deadline is passed or the person has been convicted of an aggravated felony or certain other offenses (see below), the person instead may apply for *withholding of removal*, which requires a higher showing regarding persecution, and which does not lead to a green card.<sup>14</sup>

##### **b. What Are Defense Priorities?**

***Refugees and asylees who are not yet permanent residents.*** The law governing crimes and asylees and refugees is unstable. If the defendant is a refugee or asylee and the charge is potentially dangerous based on the criteria discussed below, we recommend that you consult with a local, expert immigration attorney or a resource center. See also § N.17 *Relief*, materials on asylees and refugees.

Refugees are directed, and asylees are permitted, to apply for lawful permanent resident status (LPR status, a green card) beginning one year after they were admitted as a refugee or granted asylum. But both are vulnerable to being placed in removal proceedings based on certain convictions.

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<sup>12</sup> 8 USC § 1326; INA § 276.

<sup>13</sup> INA § 101(a)(42)(A), 8 USC § 1101(a)(42)(A) requires a well-founded fear of persecution based upon race, religion, national origin, political opinion, or social group.

<sup>14</sup> INA § 241(b)(3), 8 USC § 1231(b)(3) requires a "clear probability" of persecution based on the above grounds.



**Avoiding removal proceedings.** An asylee can be placed in removal proceedings if convicted of a “*particularly serious crime*” (“PSC”). This includes any aggravated felony conviction, as well as any conviction for drug trafficking unless it was a very small transaction with which the defendant was only peripherally involved. (If that is the case, put these good facts in the record of conviction, but note that a plea to trafficking will mean that the person never will become an LPR. See next section.). Other offenses also will be classed as PSC’s on a case-by-case basis, based upon sentence, circumstances, whether the offense involves a threat to persons, etc.<sup>15</sup> For example, robbery is almost certain to be held a PSC, whereas theft usually is not. However, non-violent offenses such as mail fraud for two million dollars, and possession of child pornography, have been held PSC’s, and it is possible that a DUI would be. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a PSC.<sup>16</sup>

Under current law a refugee, but not an asylee, can be placed in removal proceedings if she becomes *deportable* for crimes.<sup>17</sup>

An asylee or refugee in removal proceedings can apply for adjustment of status to permanent residence as a defense to removal, if not barred by crimes. See next section. If the person is not granted adjustment or some other form of relief, he or she can be removed to the home country.

**Refugee and asylee adjustment to permanent residency.** In order to be granted LPR status, refugees and asylees must prove that they are not inadmissible, or if they are they must be granted a waiver of the inadmissibility ground. The available waiver is very liberal, but there is no guarantee of a grant. It can waive any inadmissibility ground, including convictions that are aggravated felonies, with two exceptions. First, it will not waive inadmissibility where the government has probative and substantial “reason to believe” that the person as participated in drug trafficking.<sup>18</sup> Second, if a conviction involves a “violent or dangerous” offense, the waiver will be denied absent “exceptional and extremely unusual hardship” or pressing foreign policy reasons.<sup>19</sup>

**Undocumented persons or others who have applied, or may want to apply, for asylum or withholding.** An applicant for asylum is barred if convicted of a “particularly serious crime” (“PSC”). See discussion of PSC definition, above. For asylum, a PSC includes any aggravated felony conviction. For withholding, it includes an aggravated felony for which a sentence of five years was imposed. It also includes drug trafficking, and other offenses on a case-by-case basis, as discussed in the asylee-refugee section above. In addition, an application for asylum will be denied as a matter of discretion if the applicant is convicted of a “violent or dangerous offense”<sup>20</sup>

**Alternatives: Withholding of Removal, the Convention Against Torture.** If the person cannot apply for asylum due to criminal record or the one-year deadline, she may want to apply for withholding of removal, a remedy that requires a higher level of proof that the person will be

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<sup>15</sup> See *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

<sup>16</sup> *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (misdemeanor assault with a deadly weapon).

<sup>17</sup> *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012).

<sup>18</sup> See waiver of inadmissibility in application for refugee or asylee adjustment at INA § 209(c), 8 USC § 1159(c). The “reason to believe” drug trafficking inadmissibility ground appears at 8 USC 1182(a)(2)(C), INA § 212(c).

<sup>19</sup> See *Matter of Jean*, *supra*.

<sup>20</sup> See *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

persecuted and does not lead to a green card, but which has a less strict criminal record requirement and no one-year deadline.<sup>21</sup> Or, the person can apply for protection under the Convention Against Torture, which has no criminal record bars. The person must prove that the government or a government-like group in the home country will torture her *for any reason*, or is unwilling or unable to intervene in another group torturing her.<sup>22</sup> See §§ 11.14, 11.15 in *Defending Immigrants in the Ninth Circuit*.

## 5. **The Defendant who has or will apply for Temporary Protected Status (TPS)**

### a. **What is Temporary Protected Status?**

The U.S. government may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood or other disasters, or other extraordinary and temporary conditions. Nationals of that country will not be forced to return there from the U.S. for a designated period of time, can travel outside the U.S. with special permission, and will receive employment authorization.<sup>23</sup>

The applicant must have been in the United States as of a designated date. TPS usually is granted for only a year at a time, but often with several renewals. Generally the national must have filed during the initial registration period in order to benefit from TPS.

**Example:** The Department of Homeland Security Secretary determined that an 18-month designation of TPS for Haiti is warranted because of the devastating earthquake which occurred on January 12, 2010. The TPS applicant must be a national of Haiti, or a person without nationality who last habitually resided in Haiti; must have continuously resided in the U.S. since January 12, 2010; and must meet criminal record and other requirements. The person must apply within a 180-day period beginning January 21, 2010.

Since TPS is a temporary designation, the list of countries granted TPS changes frequently. For up to date information about which countries currently are designated for TPS, and specific requirements for each country's nationals, go to [www.uscis.gov](http://www.uscis.gov), and click on Temporary Protected Status in the "Humanitarian" box. As of January 2010, the following countries have an ongoing TPS program: Haiti (where registration to join TPS is open at least through July 21, 2010), El Salvador, Nicaragua, Honduras, Somalia and Sudan.

### b. **What Are Defense Priorities for a person who already has, or hopes to apply for, Temporary Protected Status?**

An applicant will be denied a grant of TPS, or may lose the TPS status he or she already has,<sup>24</sup> if he or she has the following criminal record<sup>25</sup>:

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<sup>21</sup> INA § 241(b)(3), 8 USC § 1231(b)(3) requires a "clear probability" of persecution based on the above grounds. It is barred by conviction of a PSC, but for withholding, as opposed to asylum, purposes not every aggravated felony is a PSC.

<sup>22</sup> See, e.g., discussion in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

<sup>23</sup> INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

<sup>24</sup> See 8 CFR 244.14(a)(1), (b)(2).

- is *inadmissible* under the crimes grounds
- Has been convicted of *any two misdemeanors or one felony*.
- Has been convicted of a “particularly serious crime” (determined on a case by case basis depending on sentence, violence to persons, etc.; includes all drug trafficking offenses)

For further discussion see “Advisory for Haitian Nationals Considering Applying for TPS” (Jan. 20, 2010) at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

## **6. The Defendant with Close U.S. Citizen or Permanent Resident Relatives**

Some, but by no means all, noncitizens who have close U.S. citizen or permanent resident family members are able to get a green card based on the relationship, either by making an affirmative application or by asserting this as a defense to being removed. See Part a below, on family immigration. In addition, if a family member could submit such a petition, but refuses to do so and further has abused the immigrant, see Part b below regarding VAWA relief for victims of domestic abuse.

### **a. Regular Family Immigration**

Family immigration is a complex field, and the following is only basic information. However, help may be available, because many local immigration non-profit agencies or private attorneys have expertise in handling family visa petitions and adjustment of status. Or, an immigration attorney or a backup center like the Immigrant Legal Resource Center may be able to quickly evaluate a case to see if family immigration is a possibility. See resources and books on the subject at § N.18 *Resources*, and see materials on Family Immigration at § N.17 *Relief*.

There are two basic categories of family members who may be able to submit a family visa petition for the defendant.

- A U.S. citizen who is (a) the parent of an unmarried person under the age of 21, (b) the spouse, or (c) the child over the age of 21 of the person, can file an “immediate relative” family visa petition for their relative. This is the best type of petition, which has no legally mandated waiting period before the person can apply for a green card based upon it.
- A lawful permanent resident spouse or a parent of an unmarried child, or a U.S. citizen parent of a child over 21, can file a “preference” family visa petition for their relative. However, the relative can’t use this petition to get a green card until at least a few years after it was filed with the government, so unless it was filed years ago it is not useful as an immediate defense to removal.

If the defendant was admitted to the U.S. in any status -- even including, e.g., admission years ago on a tourist visa, followed by years of living here illegally – *and* if he or she has

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<sup>25</sup> In addition, an applicant for TPS may be denied based on actions in the home country (persecution of others, conviction of a “serious non-political offense”).

willing relatives who can submit an “immediate relative” visa petition, it is likely that the defendant could apply for adjustment of status to lawful permanent residency as a defense to removal. A permanent resident who is deportable for a crime but eligible to get an immediate relative visa petition also can file for adjustment as a defense to removal. In all cases, the defendant must be *admissible*, or if inadmissible, eligible to apply for a *waiver* of inadmissibility.

If instead the defendant entered the U.S. without inspection, *and/or* only has the possibility of someone filing a new “preference” family visa petition, with some exceptions the person will not be able to adjust status.

#### **b. Where the Citizen or Permanent Resident Family Member is Abusive: VAWA**

If the defendant or the defendant’s child has been subject to physical or emotional abuse by a U.S. citizen or lawful permanent resident parent or spouse, the defendant may be eligible to apply for status under the Violence Against Women Act (“VAWA”). This law was passed to address the situation where a citizen or permanent resident family member could file a visa petition for the noncitizen, but is an abuser and is essentially using immigration status as a weapon. For other requirements and information on VAWA see books and resources at § N.18 *Resources*, and basic info at [www.ilrc.org/info-on-immigration-law/vawa](http://www.ilrc.org/info-on-immigration-law/vawa).

Despite its name, this VAWA relief is available to men and women. Where abuse was by a parent, it must have taken place when the child was under 21. VAWA is better than regular family visa petitions, as it can work as a defense to removal regardless of whether the defendant was admitted or not, and regardless of whether the defendant would have qualified for a “preference” versus an “immediate relative” visa petition. There also is a VAWA cancellation of removal.

In terms of criminal record requirements, the applicant must be *admissible* or eligible for a *waiver of inadmissibility*, and must be able to show *good moral character*. Special provisions for VAWA applicants relax some of the rules pertaining to these requirements.

#### **7. The Defendant with a Nonimmigrant Visa**

A nonimmigrant visa holder is a person who obtained a temporary visa allowing them to enter and remain in the United States legally for a specific period of time under specific conditions. Some examples of nonimmigrant visas are: tourist visas, student visas, temporary work visas (e.g., H1-B) and diplomatic visas.

Nonimmigrant visa holders who violate the terms of their visa (e.g., students who drop out of school or visitors who stay longer than permitted) become “undocumented,” meaning they no longer have lawful status in the U.S. As such, they are subject to removal from the country. They also are subject to the criminal grounds of deportability.

#### **8. The Defendant with an Employment Authorization Document (Work Permit)**

Immigration authorities issue work permits, or employment authorization documents (EAD), of temporary duration to certain categories of noncitizens. Clients may be confused on this point, but a “work permit” is **not** an immigration status; work permits do not confer lawful status. They do mean that the government temporarily is not moving to remove the person. Some examples of noncitizen categories for which work permits are issued include: (1) persons who are in the process of applying for some status, for example adjustment through a family visa petition, or an asylum application, and (2) persons who have some lawful temporary status, such as certain nationals of countries designated for “temporary protected status” or TPS (e.g., persons from Haiti following the 2010 earthquake, or from Honduras following Hurricane Mitch).

A work permit means that the person may be in the process of acquiring status, and counsel must proceed carefully to try to avoid a plea that will destroy the application. *If a person has a work permit, photocopy it and immediately contact an expert immigration attorney or resource center.* Note that in many cases, no one has explained the meaning of the employment document to the immigrant. He or she may believe that it is a lawful permanent resident card or some other secure status instead of just a permit.

### **9. The Mystery Status Defendant**

Some clients may think that they have, or are in the process of getting, some kind of immigration status, but do not know what it is. In this case, photocopy any documentation they do have, and try to obtain as much immigration history as possible. See § N.16 Client Immigration Intake Questionnaire. Contact an immigration expert to assist in determining the client’s status. In some cases, unscrupulous immigration consultants (“notaries”) or attorneys have provided clients with “letters” and told them that this is an immigration document, when it is not.

Until you understand the immigration case you should continue the criminal case, or, if forced to plead, try to avoid a conviction that will trigger any of the grounds of inadmissibility, deportability, or constitute an aggravated felony. The most important of these three is to avoid a conviction for an aggravated felony offense.

### **10. The Absolutely Removable Defendant: Avoid Custody Time**

Some clients are deportable with no possibility of relief, for example an undocumented person with no possible application to stop removal, or a permanent resident with a conviction that bars any possible relief. If they come in contact with immigration authorities, these persons will be deported (“removed”), or at best, permitted to depart the U.S. voluntarily (see below).

If they wish to avoid this, their goal is to avoid contact with immigration authorities. The best way to do this is to avoid being in jail, where an immigration hold is likely to be placed on the person, who is then likely to be taken into immigration custody upon release from jail. After informed consideration, such a defendant with no defenses may decide that it is in her best interest to accept a plea that gets or keeps her out of jail before she encounters immigration officials, even if the plea has adverse immigration consequences. The defendant must make the decision after understanding the long and short-term life consequences (e.g., that such a conviction is likely to render her permanently ineligible to ever obtain lawful status).

A permanent resident who is removable must continue to avoid any contact with immigration authorities. The person must not travel outside the U.S., apply to renew a 10-year green card, apply for naturalization, submit a visa petition for a family member, or make any other contact with authorities.

An absolutely removable person may want to apply for immediate “**voluntary departure**” to avoid formal removal. For one thing, *illegal entry* into the U.S. following a voluntary departure is a far less serious offense than illegal re-entry following a removal. Federal regulation provides that an aggravated felony conviction will bar a request for pre-hearing voluntary departure.<sup>26</sup> Therefore *counsel should attempt to avoid a plea to an aggravated felony, and should advise the defendant to attempt to obtain voluntary departure rather than removal.* Unfortunately, immigration officers commonly offer detainees the opportunity to sign a paper agreeing to “voluntary removal,” while leaving detainees with the impression that this is a “voluntary departure.” The only sure ways for detainees to take voluntary departure is to read the paper very carefully, get assistance from a lawyer or other advocate, or wait to see an immigration judge for a master calendar hearing – which could take as long as a few weeks. Since you, the criminal defense attorney, are likely to be the last lawyer a detainee ever sees, if you can get this advice across you may prevent the detainee from spending a few years in federal prison later on. See below and Part D, *infra*.

*Many persons who are deported/removed re-enter the U.S. illegally.* This is especially true if they have close family here. Counsel must warn the defendant that this “illegal re-entry,” especially where there are prior convictions, is a very commonly prosecuted federal offense, which can result in years in federal prison. See Section D.

*The client with a prior deportation or removal order.* You may have a client who has already been ordered deported, or even already deported. A person who has previously departed the United States under a removal order is subject to *reinstatement of removal*, in which ICE reinstates the prior removal order and removes the person pursuant to that. In this process, the client does not have the right to appear before an immigration judge and contest deportation. Moreover, this client will be subject to federal prosecution for illegal reentry. As with other absolutely removable clients, the person wishes to avoid immigration authorities.

*Clients who have been ordered removed, but who cannot be removed.* Some clients who are deportable or even have prior removal orders cannot physically be removed, because United States and that client’s home country do not have a repatriation agreement in effect. For example, persons from Cuba, or from Vietnam if they entered the United States prior to July 12, 1995, cannot be removed. Several other countries, including Iran, Iraq, Somalia and Liberia,

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<sup>26</sup> 8 CFR 240.25. This is “voluntary departure prior to completion of hearing,” meaning that the noncitizen does not request any relief other than the departure. (In fact, under the statute a noncitizen who entered without inspection is eligible for this type of voluntary departure despite conviction of an aggravated felony, and the regulation appears to be *ultra vires*. 8 USC § 1229c(a) provides that a noncitizen who is *deportable* for an aggravated felony is barred from pre-hearing voluntary departure. A person who entered without inspection is not “deportable.” See discussion at Chapter 11, § 11.22, *Defending Immigrants in the Ninth Circuit*.)



either issue documents very slowly or impose requirements that often cannot be met at all.<sup>27</sup> Once ordered removed, these people may still be detained by ICE for up to 6 months, are subject to re-detention any time they have a new criminal case, and are on something akin to an indefinite probation with the Department of Homeland Security.

### ***11. The Defendant who has previously received relief from removal***

You may encounter a client who has been through removal proceedings in the past and received some form of relief from removal, such as Cancellation of Removal for Lawful Permanent Residents. While this person may be an LPR, the analysis of that person's immigration consequences will often differ from other LPRs. Some applications are no longer available, and the prior convictions will be considered waived for some immigration purposes but not for others. It is advisable to consult an immigration expert or a more in-depth resource such as *Defending Immigrants in the Ninth Circuit* or other treatises on immigration law and crimes.

#### **D. The Immigration Strike: Avoiding a conviction that will cause a severe sentence enhancement if the defendant re-enters the U.S. illegally after being deported/removed.**

Many persons who are deported/removed re-enter the U.S. illegally in order to join family members here or other connections. If the re-entrant is caught at the border, or picked up for any reason once inside, it is very likely that he or she will be prosecuted for a serious federal offense. ***Illegal re-entry following removal is the number one federal charge brought today, comprising roughly 30% of all new criminal charges brought in federal court nationally.***<sup>28</sup> Federal agents troll county jails looking for "foreigners" or persons with Spanish surnames, especially if the person was convicted of certain priors. To assist the defendant, counsel must do two things:

- ***Warn the defendant***, before he or she is removed, of the danger of illegal re-entry and the real possibility of doing federal prison time;
- Where possible ***avoid an aggravated felony conviction*** for a defendant who has not been deported before, so that the defendant may be able to obtain voluntary departure rather than removal (see discussion at Part C.9, *supra*); and
- ***Attempt to avoid conviction of one of the several particular offenses*** that will constitute priors causing a seriously enhanced sentence in any prosecution for a future illegal-re-entry. See below.

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<sup>27</sup> See, e.g., discussion from the Immigration Customs and Enforcement (ICE) point of view in Statement to House Judiciary Committee by Gary Meade of ICE, May 24, 2011, at [www.ice.gov/doclib/news/library/speeches/110524mead.pdf](http://www.ice.gov/doclib/news/library/speeches/110524mead.pdf)

<sup>28</sup> When other immigration-related charges are added in, such as simple illegal entry and alien smuggling, immigration crimes constitute over 50% of new criminal charges in federal court. See, e.g., statistics at <http://trac.syr.edu/tracreports/bulletins/overall/monthlynov09/fil/>.

Illegal re-entry after removal (deportation) is a more serious and more commonly prosecuted offense than illegal re-entry when there was no removal, for example when there was voluntary departure. As discussed in Part C.9, *supra*, a noncitizen who has not been convicted of an aggravated felony can apply for voluntary departure rather than removal, although this may require effort and sacrifice on the part of a detained noncitizen.

Assuming that there is a charge of illegal re-entry following removal, two types of prior convictions cause the most serious sentence enhancement: conviction of an aggravated felony, and conviction of certain other felony offenses.<sup>29</sup> Federal law employs a complex sentencing system under the “advisory” U.S. Sentencing Guidelines. Guidelines provide for an increase in the length of sentence as levels determined by prior convictions increase. To give a general idea of the seriousness of a prior conviction, consider that the base level for an illegal reentry sentence is eight. That will be increased between four and sixteen levels for prior convictions. In California prosecutions, a typical sentence for illegal re-entry plus a prior is around *30 months* in federal prison. See story of “Luis” at the end of this section.

### **Crimes That Mandate an Enhanced Sentence for Illegal Reentry**

#### **Certain Felonies: Increase by 16 levels:**

- Drug trafficking, and the sentence is more than 13 months;
- Crime of violence (see definition below);
- Firearms offense;
- Child pornography offense;
- National security of terrorism offense;
- Alien smuggling offense.<sup>30</sup>

A crime of violence is defined in the federal sentencing guidelines as including the following felony offenses:

Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.<sup>31</sup>

Note that the USSG “crime of violence” definition used here is different from the definition of “crime of violence” under 18 USC §16, used to define an aggravated felony. Note also that while a “crime of violence” under 18 USC § 16 is an aggravated felony (bringing an 8 level increase) only if a sentence of a year or more imposed, under this “crime of violence” definition (bringing a 16-level increase), there is ***no sentence requirement***; the only requirement is that the offense is a felony.

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<sup>29</sup> 8 USC § 1326; INA § 276. Section 1326(b)(1) penalizes re-entry after “any felony” conviction, which is the section under which the “felony crime of violence” and other offenses discussed here are charged. Section 1326(b)(2) penalizes re-entry after an aggravated felony.

<sup>30</sup> U.S. Sentencing Commission Guidelines Manual, USSG § 2L1.2(b)(1)(A)(2004).

<sup>31</sup> USSG § 2L1.2, comment (n.1)(B)(iii) (2004).

**Increase by 12 levels:** Drug trafficking if the sentence is less than 13 months.

**Increase by 8 levels:** Aggravated felony

**Increase by 4 levels:** Any other felony; or three or more misdemeanors that are crimes of violence (see definition above) or drug trafficking offenses.

The following example, based on a real case, shows how a conviction for a “violent offense” that is not an aggravated felony will affect a client later charged with illegal reentry.

**Example:** Luis is an undocumented worker who has lived in the U.S. for some years and has two U.S. citizen children. He has no current means of getting lawful immigration status. He has been convicted of his first offense, felony assault, and is sentenced to one month in jail and placed on three years’ probation. This is not an aggravated felony. Immigration authorities pick up Luis once his jail term is over, and he is removed to Mexico based on his unlawful status.

Luis immediately re-enters the United States to return to his family. He is detected by authorities and charged in federal proceedings with illegal re-entry after removal and a prior conviction, not of an aggravated felony, but of a separately defined “felony crime of violence.” While an aggravated felony (e.g., his assault if a one-year sentence *had* been imposed) would only have rated a sentence increase of 8 levels, under the felony “crime of violence” category he receives an increase of 16 levels. Luis is sentenced to *forty-one months of federal prison* for the illegal re-entry.<sup>32</sup>

#### **E. Checklist: Ten Steps in Representing a Non-Citizen Defendant, from Interview through Appeal**

- 1. *If there is no immigration hold, get the noncitizen out of jail.*** The first defense task is to try to get the defendant out of jail before an immigration detainer or hold is placed. Advise the defendant not to speak to anyone but defense counsel about any matter, whether the criminal case, or immigration status, the home country (even place of birth), or family history.
- 2. *If there is already a hold, stop and analyze whether or not you should obtain release from criminal custody.*** If an immigration hold has been placed, do not attempt to bond or O.R. the defendant out of jail without analyzing the situation. The defendant might end up in immigration detention, which could be worse. Consult §N.5 Immigration Holds and Detainers, *infra*, and Chapter 12, *Defending Immigrants in the Ninth Circuit*.

If your client has signed a “voluntary departure” request (agreement to leave the country without being removed) you can revoke it, but you should consult an immigration attorney before doing this. (For example, if the client has no relief and an aggravated felony conviction, voluntary departure instead of removal may be a very good option.)

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<sup>32</sup> See discussion of similar facts, *U.S. v. Pimentel-Flores*, 339 F.3d 959 (9<sup>th</sup> Cir. 2003).

3. **Gather facts about the defendant's criminal record history and immigration situation.** See if the defendant's family can retain expert immigration counsel with whom you can confer. Many immigration attorneys will set up monthly payment plans. Determine whether special translation is needed, and if competent translation is available.
4. **Analyze the immigration consequences of the criminal case and determine defense priorities,** using all resources available including consultation with experts. What is the defendant's immigration status now? What would cause her to lose her current status? What new status or application might she be eligible for? Is the biggest priority to get release from jail under any circumstances? What effect would the proposed plea have on the above, and what are better alternatives? Don't forget to warn a removable defendant about the dangers of illegal re-entry; try to avoid a plea that would serve as a severe sentence enhancement in the event of an illegal re-entry prosecution.
5. **Try to obtain a disposition that is not a conviction,** such as juvenile delinquency disposition, pre-plea disposition, and possibly infraction. See further discussion at § N.8 *Drug Charges*, Part II.A. A conviction that is on direct appeal of right is a final conviction for immigration purposes, at least in the Ninth Circuit.
6. **Thoroughly advise the defendant** of the specific criminal and immigration penalties involved in various defense options. Immigration penalties may include
  - extended detention (*even for persons accepting the deportation*, if they do not already have identifying documentation sufficient for travel to the home country),
  - loss of current lawful status (by becoming "deportable")
  - loss of ability to get lawful status in the future (by becoming "inadmissible," or coming within some other bar to status or relief)
  - extra penalties for an aggravated felony conviction (deportable and permanently barred from status, immigration detention until removal, extra penalty for illegal re-entry)
  - in some cases certain removal, in others being put into removal proceedings but with a possibility of obtaining a discretionary waiver or application
  - *federal prison sentence if after removal the person re-enters the U.S. illegally.* If the person *already* has re-entered illegally and remains in jail, he or she is likely to be detected by immigration authorities and transferred for federal prosecution.
7. **If trade-offs must be made between immigration and criminal case concerns, ascertain the defendant's priorities.** Is this a case where the defendant would sacrifice the criminal outcome to get a better immigration outcome? Is this a case where the defendant only is worried about amount of jail time? (But advise the client that immigration detention may follow criminal custody.) Once you and the client have identified the priorities and specific defense goals, defend the case accordingly.

- 8. If you obtain a good immigration outcome in criminal court, don't let it go to waste! Give the defendant or immigration counsel, if any, the "Legal Summaries for Defendant" that are provided in these materials. Check court documents to make sure that they accurately reflect the changes you made to create a safe record. If a court document proves something beneficial to the client, give him or her a copy of it.**

Most immigrants are unrepresented in removal proceedings, and many immigration judges are not expert in this area. Make sure that they realize that your client has a defense. If the defendant has an immigration hold, give the defendant, and either the defendant's attorney or a friend/relative, a statement of how the disposition avoids an immigration consequence. **Pre-written summaries of various defenses, which you can photocopy and give to defendants, can be found at the end of the relevant Note.**

If your client does *not* have an immigration hold and does not appear to be going into immigration custody, it may be better to mail such a statement to the defendant's address. Advise him to take it to an immigration lawyer at the first opportunity.

Review the *charging document including any written amendments, written plea agreement, the minute order (e.g., showing charge was amended) and the abstract of judgment*. Make sure that these records correctly reflect the disposition you worked out, and do not contain any inconsistent information. In particular, ensure that the plea to a Charge refers to the charge as amended, if applicable, and not to the original charge. If a document will be helpful in immigration proceedings, *give a copy to the client* and to the client's immigration counsel, or friend or relative.

Document in your file the advice given to the defendant. In particular, note that the defendant relied on a particular understanding of the law in taking the plea. This may provide evidence later on, if immigration laws change (which they often do), that your client justifiability relied on the law in agreeing to take the plea.

- 9. Give the defendant specific warning about future risks.** A noncitizen who is removed and returns illegally to the United States faces a significant federal prison sentence if apprehended (see Part D, *supra*). A noncitizen with a conviction who is not removed should not leave the U.S. without expert advice, because she might be inadmissible and may lose her status. A noncitizen who might be deportable should avoid any contact with the immigration authorities, including renewing a green card, applying for a citizenship, and pursuing a pending application, until an expert immigration practitioner advises him.

- 10. A conviction remains in existence for immigration purposes while on direct appeal, but is eliminated if the appeal is sustained.** Unfortunately, the Ninth Circuit held that a conviction remains a final "conviction" for immigration purposes while pending on direct appeal, unless or until that conviction is actually reversed.<sup>33</sup> Because of the possibility that this decision would be withdrawn in the future, and because of the possibility that the appeal

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<sup>33</sup> *Planes v. Holder*, 652 F.3d 991(9th Cir. 2011).

would be sustained, it still is important for immigration purposes to file a direct appeal of the conviction in appropriate cases.



## § N.2 Definition of Conviction; 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/crimes](http://www.ilrc.org/crimes))

**The 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 which dispositions constitute a conviction for immigration purposes, and how to avoid a conviction.

However, counsel also must be aware of the immigration penalties based on mere conduct, even absent a conviction. A noncitizen might be found inadmissible or deportable if immigration authorities have evidence that the person engaged in prostitution, made a false claim to citizenship, used false immigration or citizenship documents, smuggled aliens, is or was a drug addict or abuser, admits certain drug or moral turpitude offenses, and, especially, if the government has “reason to believe” the person ever has been or helped a drug trafficker. See relevant Notes; for a discussion of the controlled substance conduct grounds, see § N.8 *Controlled Substances*. Apart from that, however, a conviction is required.

**Give Defendants the Relevant Legal Summary from Appendix I.** If you are able to negotiate a disposition that is not a conviction or has other immigration benefit, give the defendant a summary of what happened and why it helps in immigration proceedings. See **Appendix I** following this Note for text that you can photocopy and hand to your client. Because the great majority of persons are unrepresented in removal proceedings, and some immigration judges are not aware of all of these rules, this is the way to make sure that your work actually will help the defendant.

**Note:** In choosing defense strategies, remember that a *vague record of conviction* will no longer help an immigrant who must apply for status or relief from removal, although it will prevent a permanent resident from becoming deportable. See *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*), discussed at § N.3 *Record of Conviction*

### A. Definition of Conviction

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 Deferred Entry of Judgment. 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. The statute provides that a conviction occurs:

- 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.”<sup>1</sup>

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.<sup>2</sup> The Board of Immigration Appeals (BIA) found that a guilty plea plus an order to pay court costs is a conviction.<sup>3</sup> A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces qualifies as a “conviction” for immigration purposes.<sup>4</sup> There is a grave risk that a not guilty by reason of insanity (NGI) disposition constitutes a conviction, at least under California procedure, since the defendant is required first to enter a guilty plea, and in effect be convicted, before entering a NGI plea and receiving treatment rather than a sentence. There is one exception for a first conviction of certain minor drug offenses for which the conviction was entered prior to July 15, 2011, described in Part B, below.

A conviction does not include an acquittal, a dismissal under a pre-plea diversion scheme, nor a deferred prosecution, verdict, or sentence. In addition, juvenile delinquency dispositions, judgments vacated for cause, and arguably California infractions are not convictions. Prior to 2011, cases on direct appeal did not constitute convictions, but now defense counsel must assume that filing a direct appeal will not prevent immigration consequences. The rest of this section discusses these dispositions.

## **B. With Two Exceptions, Conviction Exists for Immigration Purposes Even After Plea is Withdrawn Pursuant to Deferred Entry of Judgment, Prop. 36, or P.C. §1203.4**

### ***1. In General Withdrawal of Plea Pursuant to Rehabilitative Relief Has No Immigration Effect***

If there has been a plea or finding of guilt and the court has ordered any kind of penalty or restraint, including probation, 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.<sup>5</sup> See discussion in Part A.

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<sup>1</sup> INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

<sup>2</sup> *Murillo-Espinoza v. INS*, 261 F.3d 771 (9<sup>th</sup> Cir. 2001).

<sup>3</sup> *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

<sup>4</sup> *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).

<sup>5</sup> *Id.*

**Example:** Katrina is convicted of misdemeanor theft under P.C. § 484. She successfully completes probation and the plea is withdrawn under P.C. § 1203.4. For immigration purposes, the conviction still exists.

**Possible exception.** The Ninth Circuit held that in a DEJ disposition where the only consequence is an unconditionally suspended fine, the disposition was not a conviction because there was no real penalty or restraint. See Part E, *infra*, and *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010).

## ***2. The Lujan-Armendariz Exception for First Conviction of Certain Minor Drug Offenses, if Plea Was Before July 15, 2011.***

The other exception to the above rule is for a *first* conviction of certain minor drug offenses where the conviction occurred before July 15, 2011. In *Nunez-Reyes v. Holder*, the Ninth Circuit eliminated the *Lujan-Armendariz* rule, but did so only prospectively.<sup>6</sup> Convictions entered after July 14, 2011 will remain convictions for immigration purposes, even if later successfully expunged or withdrawn.

The *Lujan-Armendariz* benefit applies to a first conviction of certain offenses: simple possession of any controlled substance; an offense less serious than simple possession that does not have a federal analogue (possession of paraphernalia); and, arguably, giving away a small amount of marijuana. Under the influence convictions do *not* qualify.

In that case “rehabilitative relief” such as withdrawal of plea under 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*, 222F.3d 728 (9<sup>th</sup> Cir. 2000). Note, because technically a conviction exists for immigration prior to its expungement, there is some risk of being placed in deportation proceedings between the time of the plea and the expungement.

This *Lujan* benefit is not available if the court found that the person violated probation, even if he or she went on to successfully complete it.<sup>7</sup> It is not available if the person had a prior “pre-plea” diversion.<sup>8</sup> These two limits might not apply, however, to a person who committed the offense for which probation was violated, or the prior offense subject to pre-plea diversion, while younger than age 21.

**Example:** Yali pled guilty to a first drug offense, possession of cocaine, in January 2011. He completed DEJ conditions without any problem. He withdraws the plea in July 2012. He does not have a conviction for immigration purposes.

**NOTE:** The *Lujan* benefit *will only be recognized in immigration proceedings held in Ninth Circuit states*. If the immigrant is arrested in California, and transported to an immigration detention center in Texas where the proceeding will be held, that circuit’s law applies and the disposition will be treated as a conviction.

<sup>6</sup> *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9<sup>th</sup> Cir. 2011).

<sup>7</sup> *Estrada v. Holder*, 560 F.3d 1039 (9<sup>th</sup> Cir. 2009).

<sup>8</sup> *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9<sup>th</sup> Cir. 2007).

FOR FURTHER DISCUSSION of *Lujan-Armendariz* benefits see § N.8 *Controlled Substance Offenses*, and Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit*.

### **C. Not a Conviction: Pre-Plea Dispositions**

If through any formal or informal procedure the defendant avoids pleading guilty or *nolo contendere* before a judge, or being found guilty by a judge, there is no conviction for immigration purposes.

A disposition under the pre-plea drug diversion under former P.C. § 1000 in effect in California before January 1, 1997 is not a conviction. (Note that even after the law changed in 1997, for some years many criminal court judges did not actually take a guilty plea; this disposition also is not a conviction.)

A disposition in a drug court that does not require a plea is not a conviction. Note that a drug court disposition creates other immigration problems if the person must admit to being an abuser, which itself is a ground of inadmissibility or deportability. If at all possible, defense counsel should try to negotiate informal pre-plea diversion that does not carry this risk. Stress the very harsh consequences for the immigrant. However, if necessary, admitting to abuse generally is less dangerous than having a drug possession conviction.

### **D. Not a Conviction: Juvenile Delinquency Dispositions**

Most criminal grounds of removal require a conviction. Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose, regardless of the nature of the offense.<sup>9</sup> If the record of proceedings indicates that proceedings were in juvenile court, there was no conviction.

Juvenile court proceedings still can create problems for juvenile immigrants, however. 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. Undocumented juvenile defendants might be eligible to apply for lawful immigration status.

FOR A HANDOUT ON REPRESENTING JUVENILES in delinquency or dependency proceedings or family court proceedings, see § N.15 *Juveniles, infra*. See also free materials available at [www.ilrc.org](http://www.ilrc.org) (go to Remedies for Immigrant Children and Youth link) and Defending Immigrants Partnership website at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) (go to Library then consult folder on Representing Noncitizen Youth; membership is required, but is free). For an extensive discussion of representing non-citizens in delinquency, see ILRC's manual, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*.

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<sup>9</sup> *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *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 *Defending Immigrants in the Ninth Circuit*, Chapter 11, § 11.24) or to petitioning for a relative (see Note 11, *infra*, or *Defending Immigrants*, Chapter 6, § 6.22).

FOR FURTHER INFORMATION on the “reason to believe” drug trafficking ground and other drug conduct grounds, see § N.8 *Controlled Substances, infra*, and see *Defending Immigrants in the Ninth Circuit*, Chapter 3, § 3.10.

#### **E. Not a Conviction: DEJ with Unconditionally Suspended Fine?**

The Ninth Circuit held that a deferred entry of judgment was not a conviction when the only consequence to the person was an unconditionally suspended fine. The immigration definition of conviction requires some form of penalty or restraint to be imposed in order for this type of disposition to be a “conviction,” and the court reasoned that no penalty or restraint had been imposed. *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010). Some immigration advocates in California report success in making this argument to immigration judges.

If counsel can succeed in getting an unconditionally suspended fine, this may well work to avoid a conviction – although a plea to a non-drug offense is far more secure. Because this disposition is not well known, be sure to give the defendant a summary of the disposition and citation, found at **Appendix 8-II** following this Note.

#### **F. Infraction as a Conviction?**

While the law is not settled, there is at least a strong argument that a California infraction is not a “conviction” for immigration purposes. For more information see Yi, “Arguing that a California Infraction is Not a Conviction” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

In short, the Board of Immigration Appeals has held that when minor offenses are handled in non-conventional criminal proceedings that do not require the usual constitutional protections of a criminal trial, and the disposition does not have effect as a prior in subsequent prosecutions, the disposition is not a conviction for immigration purposes.<sup>10</sup> Under the BIA’s criteria it would appear that a plea to an infraction under California law should not constitute a conviction. Although the prosecution must prove guilt beyond a reasonable doubt, the defendant does not have a right to a jury trial at any stage of the proceedings, an infraction is a “noncriminal offense” for which imprisonment may not be imposed, and a prior infraction cannot be the basis of a sentence enhancement for a subsequent misdemeanor or felony offense.

Because there are no rulings on the issue, however, criminal defense counsel should assume conservatively that an infraction might be held a conviction and therefore seek another resolution if possible. If an infraction is the best that can be obtained, however, counsel should provide the defendant with the short legal summary in **Appendix I** to this Note that makes the argument that a California infraction is not a conviction for immigration purposes.

If possible, counsel should make this written material available to defendants who will not be represented because they were only charged with an infraction.

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<sup>10</sup> *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012), clarifying *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004).

### **G. A Conviction on Direct Appeal is a Conviction Unless and Until the Appeal is Sustained**

The Ninth Circuit has held that a conviction on direct appeal of right remains a conviction for immigration purposes.<sup>11</sup> Criminal defense counsel must assume that filing a timely appeal will *not* prevent a conviction from having immigration effect.

It still is worthwhile to file an appeal in appropriate cases, and to provide the defendant with the legal summary regarding appeals found in **Appendix I** following this Note. If the conviction is reversed on appeal it will not longer have immigration effect.<sup>12</sup> Also, it is possible that at some point the Ninth Circuit rule will change.

### **H. Not a Conviction: 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 exists for immigration purposes.<sup>13</sup>

The conviction must have been vacated *for cause*, not merely for hardship or rehabilitation, however. 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.”<sup>14</sup> However, an actual legal defect that has some relationship to immigration will be given effect, for example ineffective assistance of counsel based on a failure to adequately advise the defendant regarding immigration consequences. See Chapter 8, *Defending Immigrants in the Ninth Circuit* for further information on appeals. See also Tooby, *California Post-Conviction Relief for Immigrants* at [www.nortontooby.com](http://www.nortontooby.com).

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<sup>11</sup> *Planes v. Holder*, 652 F.3d 991, 995-96 (9th Cir. 2011) (petition for rehearing denied). The BIA had held that a timely filed appeal is not a conviction. See *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009) and Practice Advisory by Manuel Vargas, “Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*” at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

<sup>12</sup> *Planes* at 996.

<sup>13</sup> *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000). See also *Padilla v. Kentucky*, 129 S.Ct. 1317 (2009).

<sup>14</sup> *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).



**Appendix 2-I:  
LEGAL SUMMARIES TO HAND TO THE DEFENDANT**

***Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.***

***Please give or mail a second copy to the defendant's friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.***

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Adjudication in ***juvenile delinquency proceedings*** does not constitute a conviction for immigration purposes, regardless of the nature of the offense. See, e.g., *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

There is no conviction for immigration purposes where a noncitizen pled guilty and ***the judge deferred entry of judgment, imposed a fine, and suspended the fine unconditionally***, under California "DEJ" at P.C. § 1000. The Ninth Circuit held that a suspended non-incarceratory penalty such as this does not amount to the "punishment, penalty or restraint" required to meet the statutory definition of a conviction for immigration purposes. *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A California "infraction" should not be held a conviction for immigration purposes.*** In *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012) and *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) the BIA identified factors that determine when an infraction does not amount to a conviction. A California infraction comes within these factors. The defendant does not have a right to a jury trial at any stage of the proceedings. See Cal. P.C. §§ 19.6, 1042.5. An infraction is a "noncriminal offense" (*People v. Battle*, 50 Cal.App.3d Supp. 1, 6-8 (Cal.App. 1975)) for which no imprisonment may be imposed (Calif. P.C. §§ 19.6, 19.8). A prior infraction cannot be the basis of a sentence enhancement for a subsequent misdemeanor or felony offense.

## § N.3 The Record of Conviction

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

- A. Overview: Using the Record of Conviction (The Categorical Approach)
- B. Crucial New Rule as to When a Vague Record of Conviction *Won't* Help an Immigrant
- C. Upcoming Supreme Court Decision May Limit a Prior Conviction to its Least Adjudicated Elements (*Descamps v. United States*)
- D. What Documents Are in the Reviewable Record of Conviction?
- E. Creating a Specific Plea or a Vague Plea
- F. Immigration Effect of Charging Papers, Plea Agreements, Minute Orders, Abstracts, Unnecessary Admissions, Enhancements and Probation Requirements
- G. Creating a Safer Factual Basis for the Plea
- H. What Facts from the Reviewable Record Can Be Considered? What "Extra" Facts Must a Non-Citizen Defendant Always Avoid Admitting? *U.S. v. Aguila-Montes de Oca*
- I. When Does the Categorical Approach Not Apply to a Conviction? Moral Turpitude and "Circumstance Specific" Offenses

Appendix 3-I Legal Summaries to Give to the Defendant

Appendix 3-II List of Facts Not to Admit During Plea Colloquy

A comprehensive discussion of the categorical approach appears at Chapter 2, § 2.11, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013). The discussion here will focus mainly on one issue: how criminal defense counsel can construct an official record of conviction under a divisible statute so as to avoid harm to a noncitizen defendant's immigration status.

Part A is an overview of how the categorical and modified categorical approach work and what a divisible statute is. Parts B-G discuss strategies for how to manage documents in the record of conviction. Part H sets out certain kinds of facts that may be related to an offense but are not elements, and that a noncitizen defendant never should admit. Part I discusses two immigration categories to which the categorical approach will not apply: crimes involving moral turpitude and certain "circumstance specific" provisions such as a fraud offense where the loss to the victim/s exceeds \$10,000.

**Important Change: A Vague Record of Conviction Is Only of Limited Use.** Some criminal statutes are "divisible" in that they include some crimes that do and others that do not cause an immigration penalty. The best strategy is always to plead to the "good" offense that does not trigger the immigration penalty. Where that is not possible, however, another strategy is to create a vague (inconclusive) record that at least does not specify the "bad" offense. In fall of 2012 the Ninth Circuit sharply limited when a vague record is helpful. Before employing a vague record of conviction as a defense strategy, see discussion of *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc) at Part B, below.

## A. Overview: Divisible Statutes and the Record of Conviction, a/k/a The Categorical and Modified Categorical Approach

An immigration judge in most cases will use what federal law calls the “categorical approach” (including the “modified categorical approach”) to analyze the elements of an offense that was the subject of a prior conviction, in order to determine whether the conviction triggers a penalty, e.g. is an aggravated felony or a deportable firearms offense.<sup>1</sup>

While this discussion concerns the use of the categorical approach in immigration proceedings, the same approach and case law are used in federal criminal proceedings to evaluate prior convictions as bases for sentence enhancements. Thus, careful work with the categorical approach provides two benefits: it may protect your client in immigration proceedings as well as in any future federal prosecution, e.g. for illegal re-entry after removal.

### 1. Basic Rules and Concepts

- ***The plea, not the conduct, is what counts.*** To characterize the offense of conviction the categorical approach does not look at the defendant’s conduct, but rather at the *elements of the offense* as defined by statute and case law, and *in some cases additional information that appears in the reviewable record of conviction*. In most cases, it does not matter what happened that dark night; it matters how the plea and conviction record were constructed.
- ***Compare the criminal statute to the immigration term at issue (called the “generic definition”). Some statutes are an automatic (“categorical”) match, meaning an automatic loss for the defendant.*** A categorical match occurs when the “full range of conduct” covered by the criminal statute also comes within the generic definition of the immigration term at issue.<sup>2</sup> For example, courts have held that *all* conduct prohibited by § 273.5 also comes within the definition of a deportable “crime of domestic violence.” Every conviction under § 273.5 automatically is a deportable offense.<sup>3</sup>
- ***Other statutes are divisible, meaning the defendant could plead to the statute and still win, if you can create the right record of conviction.*** In many cases a statute will cover multiple offenses, only some of which trigger the immigration consequence. For example, offensive touching is not a “crime of violence,” but actual violence is. Spousal battery under Calif. P.C. § 243(e) reaches both mere offensive touching and actual violence. Currently courts hold that § 243(e) is *divisible* for purposes of being a deportable “crime of domestic violence” (although in 2013 we may get a better rule for § 243(e)).<sup>4</sup>

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<sup>1</sup> The U.S. Supreme Court has held that the categorical analysis applies to immigration proceedings in the same manner as it applies to federal criminal proceedings. *Nijhawan v. Holder*, 557 U.S. 29 (2009).

<sup>2</sup> See, e.g., discussion of categorical match in *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9<sup>th</sup> Cir. 1999).

<sup>3</sup> The domestic violence deportation ground is at 8 USC § 1227(a)(2)(E), INA § 237(a)(2)(E). See further discussion at § N.9 Domestic Violence and Child Abuse.

<sup>4</sup> *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (§ 243(e) is divisible) and see § N.9, *supra*. This may change after the Supreme Court decides *Descamps v. United States*. The better view is that 243(e) is not divisible because the statute sets out only one offense, and the least adjudicable elements of the offense do not amount to a crime of violence.

(If you look these statutes up in the *California Quick Reference Chart*, it will advise you that § 273.5 is categorically a deportable crime of domestic violence, and that § 243(e) is divisible, with offensive touching as the “good” plea for this purpose.)

- ***If the statute is divisible, the immigration judge may only consider the “reviewable record of conviction” to see which offense the defendant pled to.*** Faced with a conviction under § 243(e), a divisible statute, how does the immigration judge determine whether the conviction was for violent conduct versus offensive touching? Under the federal “modified categorical approach,” the immigration judge may consult certain facts required for guilt that are conclusively established in certain strictly limited documents from the defendant’s reviewable record of conviction. This Note will refer to these select documents as the “record of conviction” or the “reviewable record.”

The documents that make up the reviewable record are discussed in Parts D-H below, but generally they include the plea agreement, plea colloquy, information in a charge where there is sufficient proof that the defendant pled guilty to that charge, and some information from an abstract or minute order. In a conviction by jury the record includes certain jury instructions and findings required for guilt. The reviewable record does not include a police report, probation report, or preliminary hearing transcript – *unless such document was stipulated to as containing a factual basis for the plea*, in which case it can be used. The record does not include comments by the noncitizen to the immigration judge, or any other material that is not an official record of findings of the criminal court judge.

- ***When do you need a specific plea to the “good” offense, and when can you just leave the record of conviction vague?*** This depends upon whether the defendant’s concern is deportability versus an application for relief. If the defendant is a lawful permanent resident who is not yet deportable (e.g., doesn’t have a prior conviction that makes her deportable), and the defendant will plead to a criminal statute that is divisible for purposes of deportability, then a vague record of conviction can be enough. ICE (immigration prosecution) has the burden of proving deportability, and they can’t meet this burden with a vague record. This may also help some refugees.

A vague record is of almost no use to other immigrants, however. For example, an undocumented person, or a permanent resident who already is deportable based on a prior conviction, must apply for some type of relief or status in order to stay in the U.S. Under a new rule, they will have the burden of proving that the conviction is *not* a bar to relief. If the statute is divisible for that purpose, they cannot meet this burden using a vague record. See Part B. Note that different rules apply to crimes involving moral turpitude. See Part I.

- ***“Extra” bad facts a noncitizen defendant never should admit on the record.*** In a controversial opinion the Ninth Circuit held that an immigration judge may consider certain facts from an individual’s record of conviction, even if the facts do not constitute elements of the offense. See *United States v. Aguila-Montes de Oca*.<sup>5</sup> In 2013 the U.S. Supreme Court will consider the validity of this decision and may overturn it.<sup>6</sup> In the meantime, defense

<sup>5</sup> *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 946 (9<sup>th</sup> Cir. 2011) (*en banc*).

<sup>6</sup> The Court will consider the *Aguila-Montes de Oca* rule in *Descamps v. United States* (cert. granted 8/31/2012).

counsel must conservatively assume that immigration prosecutors might assert that almost any fact in the reviewable record can be used to characterize the offense. For this reason, counsel should avoid letting certain types of facts appear in a record of conviction *unless* the fact cannot be avoided because it literally is set out in the statutory definition. Examples of facts to be avoided are use of a firearm, minor age of a defendant, that an entry in a burglary was unprivileged, and others. See further discussion and suggestions in **Part H**, *infra*, and see **Appendix 3-II**, which is a **Checklist** of the facts defense counsel should guard against.

## B. New Rule for When a Vague (Inconclusive) Record of Conviction Won't Help an Immigrant

**Review: Deportability v. Inadmissibility.** See § N.1 Overview for further discussion.

The crimes grounds of deportability are a list of convictions and conduct at 8 USC § 1227(a)(2). Becoming deportable can cause an immigrant to *lose the lawful immigration status she already has*, e.g., lose her LPR status. The government must prove that the conviction or conduct makes the person deportable. A vague ("inconclusive") record of conviction makes this impossible.

The crimes grounds of inadmissibility are a slightly different list of crimes and conduct found at 8 USC § 1182(a)(2). Inadmissibility acts as a *bar to applying to get lawful status or relief from removal*. As of 2012, the immigrant must prove the conviction or conduct is *not* a bar. A vague ("inconclusive") record of conviction makes this impossible,

In September 2012 the Ninth Circuit published an important decision that will change (as in, make worse) the situation of immigrants who need to apply for relief from removal or for immigration status. *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc). It will decrease the contexts in which a vague record concerning a conviction under a "divisible" statute can help an immigrant.

A "divisible statute" for immigration purposes is a criminal statute that prohibits conduct that causes a particular immigration penalty, as well as conduct that does not. When the question is *whether a permanent resident is deportable*, ICE (immigration prosecution) has the burden of producing documents from the reviewable record of conviction to show that a conviction under a divisible statute comes within the deportation ground. If the record of conviction is vague as to the elements of the offense of conviction, ICE cannot meet its burden.

In contrast, in *Young* the Ninth Circuit held that in *applications for relief*, the immigrant has the burden of producing documents from the reviewable record to show that a conviction under a divisible statute is not a bar to eligibility. A vague record is not enough. As the court said, "A petitioner cannot carry the burden of demonstrating eligibility for [relief from removal] by establishing an inconclusive record of conviction." *Young, supra* at 990 (9<sup>th</sup> Cir. 2012). Before *Young*, the court had held that an applicant met her burden by producing an inconclusive record of conviction. Now, you should assume conservatively that for all types of applications for status or removal, the immigrant needs a specific plea to a "good" offense.



**Example:** Uma Undocumented wants to apply to become a lawful permanent resident through her U.S. citizen husband. She cannot do this if she is inadmissible based on conviction relating to a controlled substance that appears in federal drug schedules. Cal. H&S Code § 11377(a) is divisible as an inadmissible controlled substance offense, because it includes some substances that are and some that are not on the federal schedules.<sup>7</sup> Uma was charged with possession of meth (which is on the federal schedules), but she pled guilty to § 11377(a) for possessing an unspecified “controlled substance,” where the record was sanitized of any mention of meth and kept vague as to what the substance was.

Before *Young*, Uma could have produced her inconclusive record of conviction and would not have been inadmissible for having a drug conviction. She could have gotten a green card through her husband. But after *Young*, Uma has the burden to produce a record of conviction that specifically shows that the controlled substance was not on the federal schedule. She cannot meet this burden of proof with an inconclusive record. Uma will be found inadmissible and barred from getting lawful status through her husband. She will likely be deported and never permitted to enter the U.S. again.

(If instead Uma were a lawful permanent resident who was charged with being deportable based only upon this conviction, her inconclusive record would have saved her. ICE has the burden to prove deportability, and it cannot meet its burden with an inconclusive record.)

With the new *Young* rule, we can set out four basic guidelines as to when an inconclusive record of conviction will be an effective defense strategy for an immigrant.

**An inconclusive record will protect a lawful permanent resident (LPR) from becoming deportable** for a conviction under a divisible statute. Ask: Is this LPR already deportable, e.g. based on a prior conviction? Will a plea to the current charge make the LPR deportable now? Note that a vague record does not protect against conviction of a crime involving moral turpitude; would this plea make the person deportable under the moral turpitude ground?

If the answer to all these questions is no, a vague plea and record is a reasonable option (although a specific “good” plea always is preferable). If the answer to any of these questions is yes so that the LPR will be or is deportable, go to the next paragraph.

**Generally an inconclusive record will not help an undocumented person, an LPR who already is deportable, or any other immigrant, to apply for lawful status or relief from removal.** An undocumented person or deportable LPR *must* apply for some kind of relief or lawful status, to avoid being deported. Your job is to try to identify the potential relief (use a quick form<sup>8</sup>), and the criminal bars to eligibility for that relief. If the criminal statute contains *any* offense that would be a bar to this relief, then a vague record of conviction is no good. It will operate the same as if the person had pled to the “bad” offense. The person needs a defense strategy other than an inconclusive record of conviction.

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<sup>7</sup> See, e.g., *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (H&S C 11379), *Esquivel-Garcia v. Holder*, 594 F.3d 1025 (2010) (H&S C 11352), *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

<sup>8</sup> See § N.15 *Client Relief Questionnaire* and § N. 16 *Relief Toolkit*. For extensive information on immigration relief and crimes bars, see Chapter 11 in Brady et al., *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)).



Consider the example of Uma, above. She can immigrate through her husband and stay in the U.S., unless she becomes inadmissible for a drug conviction. A vague plea will result in denial of the application and removal. If you can get a plea to nearly any other class of offense - e.g. accessory after the fact, trespass, theft - Uma and her family will be saved.

Or, consider a person who has no other relief and will be sent home. This person still wants to avoid an aggravated felony, so that he or she can take voluntary departure instead of being removed (deported). Try to get a specific plea that is not an aggravated felony.

**A vague record may prevent the conviction from serving as a sentence enhancement to a subsequent federal offense – for example, illegal re-entry after removal.** If your client is removed from the United States and then re-enters illegally, he or she can be charged with illegal re-entry after removal under 8 USC §§ 1325, 1326 – a *very* commonly prosecuted federal felony. A prior conviction of an aggravated felony, or of certain specific “felony” offenses, is a serious sentence enhancement. See § N.1 Overview, Part D. The federal prosecutor has the burden of proving that a prior conviction meets this criterion. Therefore if a statute is divisible as an aggravated felony or other “felony” offense, a vague record should prevent the enhancement.

**Crimes involving moral turpitude (CIMTs) have their own standard regarding the effect of an inconclusive record.** Under current administrative caselaw, a vague record is no protection against a finding that the offense was a CIMT, whether the issue is *inadmissibility or deportability*. Instead, a vague record will permit an immigration judge to decide to do a fact-based hearing on the actual conduct underlying the offense – in some cases, going beyond the elements of the offense – to determine if the *conduct* involved moral turpitude. While ICE still has the burden to prove deportability, it can meet this burden far more easily if allowed to do a fact-finding search beyond the record. A specific plea to an offense under the statute that is not a crime involving moral turpitude will control, and prevent a fact-finding hearing. Therefore, if the defendant actually did commit a CIMT, you must plead specifically to a non-CIMT offense under the statute, plead to a different statute, or assume the offense will be a CIMT and plan and advise accordingly. Recall that a single CIMT does not always make an individual inadmissible or deportable. See § N.7 Crimes Involving Moral Turpitude.

If you can manage to resolve the case under the above five guidelines, that’s great. If this is not possible, consider two additional factors. First, there is some chance that the Supreme Court would reverse this rule. Second, for a limited number of commonly charged offenses, there is a very good chance that the Supreme Court will fix the problem in the spring of 2013, by finding that the criminal statute is not divisible at all and that the defendant automatically wins. See next section.

### C. *Descamps v. United States*: Will a Conviction Be Limited to the Statutory Elements of the Offense?

Just to make things more complex, by June 2013 the U.S. Supreme Court may change the law – this time for the better -- in its decision in *Descamps v. United States*. A good ruling in *Descamps* is very likely, but still not guaranteed, so the best defense strategy is to get a disposition that is safe under current law. But where that is not possible and the defendant would benefit from a good ruling in *Descamps*, counsel can use the *Descamps* possibility as a back-up

strategy. To do this, consider a plea to one of the offenses discussed below, and moreover consider whether to *delay the plea hearing* if needed.

**Issue in *Descamps*.**<sup>9</sup> In *Descamps v. United States* the Supreme Court is likely to clarify that the criminal (and immigration) penalties of a prior conviction must be decided based only upon the elements of the offense, as set out in the statute. The Court is likely to hold that a judge may rely on information from the record of conviction only if the statute itself sets out multiple distinct offenses.<sup>10</sup> In that case, the court may use facts from the record only to identify *which* statutory phrase/s made up the offense of conviction.<sup>11</sup> The least adjudicable elements of the statutory offense must trigger the penalty – e.g. cause the sentence enhancement or come within the deportation ground – for the conviction to have that effect.

In other words, a good *Descamps* decision would mean that an immigration judge may use facts from the individual’s record only if (a) the criminal statute sets out multiple offenses, separated by “or,” and (b) at least one of those offenses is a “categorical match” with the immigration category at issue, meaning that there is no way to commit the offense that does not come within the immigration category. If these conditions are satisfied, the judge may consult the record of conviction only to the extent that it identifies which statutory phrase or offense was the subject of conviction.

If instead the statute sets out just one offense, the judge must decide the case on the statutory elements alone.

**Example if *Descamps* holds for the defendant:** Assume an immigration judge needs to determine whether the prior conviction comes within the firearms deportation ground. If the statute of conviction prohibits illegal “use of a firearm *or* a knife,” a judge may look at the individual’s record of conviction only to see which statutory term – a firearm versus a knife – was the subject of the conviction. But if the criminal statute prohibits only “use of a weapon,” the judge may not look at the record to see if the weapon was a firearm. While “use of a weapon” may be *committed* in multiple ways, e.g. by using a knife, firearm, or blackjack, it still is a single crime, and a judge need not go to the record to see which statutory elements were the subject of the conviction.

**Example under the current *Aguila-Montes de Oca* rule:** The current rule is the same for the “firearm or a knife” statute. It is different for the “weapon” statute in that a judge may look to the record to see if, under the prosecution’s sole theory of the case, the “weapon” element was satisfied by use of a firearm. If so, the judge may characterize the offense as a firearms offense.

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<sup>9</sup> For a more thorough discussion of *Descamps* and these issues, see Brady, Yi, “The Categorical Approach in the Ninth Circuit: *Aguila-Montes de Oca*” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>10</sup> The modified categorical approach may be used only when there are “several different crimes, each described separately.” *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009).

<sup>11</sup> “When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes... the ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record ...” *Johnson v. U.S.*, 559 U.S. \_\_\_, 130 S.Ct. 1265, 1273 (2010).

A good ruling in *Descamps* also should help immigrants applying for relief. If an immigration judge may not look to the record of conviction, an immigrant applying for relief would not be required to produce a record of conviction, despite the decision in *Young v. Holder* discussed in Part B, above. If the minimum conduct required for elements of the statute does not trigger the immigration penalty at issue, the immigrant will win.

***Offenses that ought to change under a good Descamps ruling.*** Here are examples of California statutes that currently are treated as divisible and how treatment would change under a good *Descamps* ruling.

Spousal battery under P.C. § 243(e) currently is held a “crime of violence (and therefore potentially a deportable crime of domestic violence or a crime of violence aggravated felony) if it was committed using violent force, but not if it was committed using offensive touching.”<sup>12</sup> Under a good *Descamps* ruling, it would be held never to be a crime of violence. The same should apply to misdemeanor, and possibly felony, P.C. § 243(d). (Note that while § 243 defines battery as by “force *or* violence,” it does not set out separate crimes because force and violence are defined as meaning the same thing for § 243 purposes.)

Sex with a minor under § 261.5 currently is held to be the aggravated felony sexual abuse of a minor if the minor was age 13, but not if the minor was age 15.<sup>13</sup> This is because the Ninth Circuit has held that consensual sex with a fifteen-year-old is not necessarily abuse. Under a good *Descamps* ruling, a § 261.5 conviction would prove only that the victim was under either age 18 (parts (b)-(c)) or under age 16 (part (d)). Therefore a § 261.5 conviction *never* would be sexual abuse of a minor. This would also apply to § 288a(b) and similar offenses. In contrast, P.C. § 288(a), lewd conduct with a minor under the age of 14, will remain SAM after *Descamps* because it has as an element that the minor was under age 14.

Annoying or molesting a minor under § 647.6 currently is held to be the aggravated felony sexual abuse of a minor if the conduct was egregious, but not if it was innocuous. Under a good *Descamps* ruling, the conviction never would be an aggravated felony because the minimum conduct required to violate the statute is not.<sup>14</sup> (Note that while the offense is to “annoy *or* molest,” this does not set out separate crimes, because the two terms are held to mean the same thing for purposes of § 647.6<sup>15</sup>).

Burglary under § 459 currently is held to meet the definition of “burglary” for aggravated felony purposes if the record shows that the “entry” was unlicensed, but not if the entry was permissive. *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011)(*en banc*). This is the precise question the Supreme Court will address in *Descamps*, when it reviews the *Aguila-Montes de Oca* rule. A good ruling would mean that no conviction under § 459 can be an aggravated felony as “burglary,” because that definition requires an unlicensed entry as an

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<sup>12</sup> See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) and see § N.9 Domestic Violence.

<sup>13</sup> See *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9<sup>th</sup> Cir. 2009) and see § N.10 Sex Offenses.

<sup>14</sup> See *United States v. Pallares-Galan*, 359 F.3d 1088 (9<sup>th</sup> Cir. 2004) and see § N.10 Sex Offenses.

<sup>15</sup> See *People v. Kongs*, 30 Cal. App. 4th 1741, 1749 (Cal. App. 2d Dist. 1994).

element of the offense, while the California statute only says “entry.” (Note, however, that a burglary conviction can cause other bad consequences even if it is not “burglary.”).

Burglary under § 459 currently is held to be an aggravated felony as “attempted theft” if it is committed with intent to commit theft and a “substantial step” was taken towards committing the offense. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011). Under a good *Descamps* ruling, the conviction never ought to be held attempted theft because no element of attempt to commit the intended crime appears in P.C. § 459.

***What should defenders do?*** The Supreme Court is likely but not guaranteed to make a good decision. What should defense counsel do about this in the interim?

First, make every effort to resolve the case well under current law. For example, in a conviction for § 243(e), to avoid a crime of violence make every effort to obtain a record of conviction that indicates “offensive touching” rather than violent force. If that is not possible, look for another plea – e.g., 243(a) or 243(d) that designates the boyfriend as the victim and has a sentence of less than one year, § 136.1(b)(1) with a sentence less than a year, etc.

Second, if there truly is no other possibility, consider a plea that will lose under current law but would win under *Descamps*. If *Descamps* is a good decision, even a § 243(e) with a record that indicates violent force should be held not a crime of violence, because the statute sets out one offense that can be committed with offensive touching.

Third, consider timing and consider delaying the plea or sentence hearing. Even if we get a good decision in *Descamps* in spring of 2013, the Ninth Circuit and Board of Immigration Appeals will need time to react and reconsider old opinions. Delaying the plea and sentence hearing will delay when the person is put in removal proceedings and perhaps detention. Talk with an immigration expert about whether, and how much, delay is good in the individual case. Of course, delay is much easier if the person is out of custody, or if the pre-hearing custody will be credited toward service of a later expected sentence.

***Exceptions: Crimes involving moral turpitude and circumstance-specific factors.*** *Descamps* will address the “categorical approach,” which is the federal rule governing evaluation of a prior conviction. In a few areas of immigration law the categorical approach does not apply. Crimes involving moral turpitude are resolved under a different system, unless and until the Ninth Circuit decides to overturn BIA caselaw. A few other questions are treated as “circumstance specific” facts. See discussion in Part I, below.

#### **D. Under the Modified Categorical Approach, What Documents Can the Immigration Judge Consult to Determine the Elements of the Offense of Conviction?**

##### ***1. Overview***

This discussion will focus on what evidence may be used under the modified categorical approach. The effect of all of these documents is discussed in detail in Parts E and F.

An immigration judge who reviews a prior conviction under a divisible statute is guided by the “modified categorical approach.” This approach permits the authority to review only a limited number of documents to identify the offense of conviction. By controlling the information in these documents, counsel may be able to define the conviction to avoid the worst immigration consequences, while still pleading under a statute acceptable to the prosecution.

As discussed in Part B, *supra*, a vague record of conviction will be enough to prevent a conviction from making a permanent resident deportable, unless the issue is crimes involving moral turpitude. In other cases, however, it is much better to try to get a specific plea to an offense that does not have the adverse immigration consequence.

## **2. Sources of information that may be used under the modified categorical approach**

The Supreme Court<sup>16</sup> and other courts have held that the reviewable record in a conviction by plea is limited to:

- Statutory definition of the offense, as interpreted by caselaw;
- Charging document, if there is proof that the charge was pled to. Currently the Ninth Circuit holds that a notation in the minute order or abstract reflecting a plea to “Count 1” incorporates the facts of Count 1; see Part E, *infra*;
- Written plea agreement;
- Transcript of plea colloquy; and
- “Any explicit factual finding by the trial judge to which the defendant assented,”<sup>17</sup> which has been held to include:
  - Documents stipulated to by the defense as a factual basis for the plea (see Part G, *infra*, discussing how to create a safer factual basis for the plea)
  - Certain notations on an Abstract or Minute Order (See Part E, *infra*)

See further discussion of how these documents may be used in a conviction by plea, in Part E, *infra*. Where the conviction was by jury, the Supreme Court has held that the complaint, jury instructions, and verdict can be used.<sup>18</sup>

## **3. Sources of information that may not be used under the modified categorical approach**

The following documents are *not* part of the reviewable record that an immigration judge, or federal criminal court judge, may consider.

- Prosecutor’s remarks during the hearing,

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<sup>16</sup> The Court held that the reviewable record for a conviction by plea is limited to “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16 (2005).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Taylor v. United States*, 495 U.S. 575, 602 (1990).

- Police reports, probation or “pre-sentence” reports, *unless* defense counsel stipulates that they provide a factual basis for the plea.
- Statements by the noncitizen outside of the plea (e.g., statements to police, immigration authorities, or the immigration judge).
- Information from a criminal charge absent adequate evidence that the defendant pled to the charge as written
- Information from a dropped charge
- Information from a co-defendant’s case.<sup>19</sup>
- ***But some of the above can be used if they are stipulated to as containing a factual basis for the plea*** (see Part G, *infra*, discussing how to create a safer factual basis for the plea)
- A narrative description of the offense in an Abstract or Minute Order (e.g., “sale”) cannot be consulted, unless the description in the charge to which the defendant pled specifies only the part of the offense that triggers immigration consequences (e.g., “sale”) and the narrative in the abstract or minute order is the same. However the abstract or minute order can identify information such as which count the defendant pled to (“Count 1”), felony versus misdemeanor, or the statute and subsection pled to (“first degree burglary”).<sup>20</sup> See discussion in Part G, *infra*.

## E. How to Create a Specific or a Vague Record of Conviction

### 1. How to Create a Specific Record of a Plea to a “Good,” i.e. “Immigration-Neutral,” Offense under a Divisible Statute

A divisible statute is one that prohibits conduct that triggers a particular immigration penalty, as well as conduct that does not. In a plea to a divisible statute, the best immigration solution is to plead *specifically* to conduct that does not trigger the immigration consequences. A vague record of conviction no longer can prevent a conviction from being a bar to lawful status or relief – it will only protect a permanent resident from becoming deportable in the first instance. See Part B, *supra*.

This section will discuss how to create a record of a specific plea that is sufficient for immigration purposes. Assume that your permanent resident client is charged with sale of heroin under Calif. H&S § 11379(a). Section 11379(a) prohibits sale (an aggravated felony) as well as transportation for personal use (not an aggravated felony). The prosecution insists that your client plead to an offense relating to heroin under § 11379(a), but at least you can avoid an aggravated felony conviction with a specific plea to transportation, and your client can apply for

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<sup>19</sup> In general see, e.g., *Matter of Cassisi*, 120 I&N Dec. 136 (BIA 1963) (statement of state attorney at sentencing); *Abreu-Reyes v. INS*, 350 F.3d 966 (9<sup>th</sup> Cir. 2003) (probation report); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9<sup>th</sup> Cir. 2004) (testimony to immigration judge); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9<sup>th</sup> Cir. 2007), *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9<sup>th</sup> Cir. 2005) (dropped charge); *United States v. Vidal*, 426 F.3d 1011 (9<sup>th</sup> Cir. 2005) (requires proof of plea to complaint “as charged”); *Matter of Short*, Int. Dec. 3215 (BIA 1989) (co-defendant’s file). For further discussion see Brady et al., *Defending Immigrants in the Ninth Circuit*, § 2.11 ([www.ilrc.org](http://www.ilrc.org)).

<sup>20</sup> See *United States v. Navidad-Marco*, 367 F.3d 903 (9<sup>th</sup> Cir. 2004) (cannot use narrative) and discussion in Part F.



LPR cancellation (a discretionary waiver of deportation). The following are options for accomplishing this.

- Ask for a new Count charging transportation for personal use and plead to it.
- Ask to amend the existing Count in writing or, if that is not possible, orally, to charge transportation for personal use rather than sale.
- Make a written plea agreement, pleading guilty to transportation for personal use. Or write a statement on the plea/waiver form that the plea is to transportation for personal use. This is optimal because you can give the defendant a copy of this.
- State on the record during the plea colloquy that the client is pleading to transportation for personal use and not sale. If needed, do not plead to any Count, but just plea to transportation for personal use under Calif. H&S § 11379(a). Include non-harmful details such as date, time, and place in the plea, to provide specificity.
- Ask the judge to direct the clerk to note what you did (e.g., to note that the plea was to an amended count), on the judgment, minute order, abstract, etc. Check later to make sure that the clerk did this and that the notation is consistent with the plea.
- In all cases, do not stipulate to a factual basis for the plea that is inconsistent with transportation for personal use. Here, let's say that the court wants counsel to stipulate to a police report that only allows for the possibility that the offense was for sale or for transportation with intent to sell, and does not provide facts consistent with transportation for personal use. If this is combined with a plea simply to "transportation for personal use," ICE will argue that the specific factual basis for the plea more accurately describes the general plea. Legally ICE should lose and the specific plea should trump the specific factual basis, but because of the real risk that an immigration judge would rule for the government, counsel should seek another option for the factual basis.

If needed, create a specific written plea agreement or written amended count and stipulate to that as the factual basis for the plea. A factual basis is not legally required for misdemeanors, although many judges demand it. See Part G for strategies to create a safe factual basis for the plea.

- In all cases, avoid admitting to certain extraneous facts that could cause immigration consequences in unexpected ways. See discussion at Part H, below, and see Chart of what to avoid at Appendix II following this Note. In particular, do not plead to factual allegations that are not actually required for guilt and that involve use of a firearm, use or threat of violent force (versus offensive touching or rude or offensive conduct), a victim with a domestic relationship, or intent or attempt to commit an additional offense beyond the one pled to (e.g., admitting trespass was with intent to steal). In a burglary plea, plead to entry with intent to commit "a felony" or a designated offense, without admitting actions that constitute a substantial step toward committing the intended offense, and do not plead to an unprivileged entry.

***Give the client something in writing that describes the plea***, for example a letter from your office, and if possible a copy of the plea form. State that the plea was to transportation for personal use and indicate how this was done (amended Count, on the plea form, orally in the

colloquy, etc.). Give them the applicable “Summaries for the Defendant” that appear at the end of these notes.

***If the client has an immigration detainer, if possible mail or give the same document/s to a friend or family member of the client.*** This is needed because when a client is taken to immigration detention, the authorities often take away all papers including legal papers, and it can be difficult or impossible to get them back. (Yes, it’s true.) Simply mailing a copy of the document/s to an address that the client gives you may be what saves the day when the client goes through removal proceedings in detention.

## ***2. For Defendants with Solid Lawful Immigration Status: How to Avoid Deportability by Creating a Vague Plea and Record of Conviction***

Sometimes it is not possible to plead specifically to an immigration-neutral offense under a divisible statute. A vague or inconclusive record of conviction that does not indicate which offense under the statute was the offense of conviction will save the day, but only in certain instances. See discussion at Part B. An inconclusive record of conviction can accomplish the following:

- It ***can*** prevent a lawful permanent resident from becoming deportable, assuming that the person is not already deportable based upon a prior conviction or some other reason.
- It ***cannot*** prevent the conviction from becoming a bar to an application for immigration status or relief from removal.
- It is ***not guaranteed*** to help any immigrant to avoid a crime involving moral turpitude for any purpose including deportability, under current law. See Part I, below.

A vague record would be useful in the following case.

**Example:** Permanent resident Pema has no prior convictions and is not deportable at this time. She is charged in Count 1 with possession of methamphetamine under Calif. H&S C § 11377(a). The prosecution refuses to allow her to plead to any non-drug offense. Section 11377(a) is a divisible offense, because only controlled substances that appear on the federal drug schedules count for immigration purposes, and California law reaches some substances that don’t appear on the federal list, as well as many that do. For this reason, courts have held that if the reviewable record is not specific, for example indicates an unspecified “controlled substance” as opposed to “methamphetamine” – it is not a deportable drug conviction.<sup>21</sup> How can Pema’s lawyer create a sufficiently vague record of conviction and avoid her deportation?

(Note that while a vague record will protect Pema from becoming deportable today, if she ever becomes deportable for a conviction in the future and needs to apply for relief from removal, then this vague record will no longer protect her. At that point Pema will have the burden of proving that the controlled substance is not one from the federal drug schedules.

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<sup>21</sup> See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *Esquivel-Garcia v. Holder*, 594 F.3d 1025 (2010), *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

Since she can't do that with an inconclusive record of conviction, she will be found *inadmissible* for a drug conviction based on this § 11377 conviction. Technically, Pema should be able to travel outside the U.S. and return under certain circumstances,<sup>22</sup> but she should not try to do this without first consulting with expert immigration counsel.)

Making a vague record requires more care than making a specific plea. To create a vague record, *all* parts of the reviewable record must be sanitized of information that possibly would define the specific offense. Whereas a specific plea agreement ought to control over conflicting information elsewhere in the record of conviction, judges may feel that a vague plea is further described by specific information elsewhere in the record.

For example, if Pema pleads guilty to possession of a “controlled substance,” her lawyer must *not* stipulate that the factual basis for the plea is found in a police report that states that the substance was methamphetamine. A vague plea, coupled with a specific factual basis or other part of the record, may not protect the defendant.

Here we will discuss solutions for dealing with charging documents. Basically, counsel must *amend or deny* a charge that sets out adverse facts.

***Charging Papers Are Not Required to Be Specific.*** Pursuant to Cal. P.C. § 952, a charging paper that charges the offense using the language of the statute is proper.<sup>23</sup> (But note that one California appellate decision found that this kind of charge cannot serve as a factual basis for the plea.<sup>24</sup> See Part H, *infra*, for more information on creating a safer factual basis.)

***Amend the Count Orally and in Writing.*** Amend the count in writing by entirely blacking out (or if that is not possible, clearly crossing out) the adverse term and if needed substituting a general term, for example eliminating “methamphetamine” and substituting “a controlled substance.” Amend the count orally by stating “Defendant pleads to Count 1 as amended” or “Defendant pleads to Count 1 as it has been amended by deleting the term ‘methamphetamine’ and substituting the term ‘controlled substance.’” One should amend the count both orally and in writing, but if that is not possible just one clear amendment should suffice.

In addition, all other documents in the reviewable record, including the factual basis for the plea, must be sanitized to delete the specific adverse term.

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<sup>22</sup> A permanent resident who returns to the U.S. after a trip to another country is presumed not to be seeking a “new” admission, and therefore will not be barred from coming back inside the U.S., *unless* she comes within certain exceptions set out at 8 USC § 1101(a)(13)(C). One exception is being inadmissible under the crimes grounds. However, the government has the burden of proving that a returning LPR is inadmissible, and they cannot meet this burden with a vague record. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). This still is a risky undertaking that requires an immigration lawyer, because the LPR might come within one of the other exceptions, the border official or immigration judge might not follow the law, or other issues might arise.

<sup>23</sup> “[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.” P.C. § 952.

<sup>24</sup> *People v. Willard*, 154 Cal. App. 4th 1329 (Cal. Ct. App. 2007).

**Or, Plead to a New Count.** Add a new Count 2 that includes vague language, or charges a slightly different offense with vague language. Sanitize every other document that will be in the reviewable record, including the factual basis for the plea, to erase the specific offense.

**Or, Plead to the Statute Instead of a Count.** Defendant can ask to plead guilty to the statute without referencing any charge, for example stating and/or writing: “On May 4, 2011 at 2:30 p.m. at the corner of Mission and Van Ness in San Francisco, California, I did possess a controlled substance in violation of Calif. H&S Code § 11377(a).” Other examples of statements are:

**Examples:** “Defendant pleads guilty to transportation for personal use.”<sup>25</sup> “Defendant pleads guilty to possession of a controlled substance,” in place of the original charge which alleged a specific substance such as heroin.<sup>26</sup> “Defendant pleads guilty to battery.”<sup>27</sup>

As always, the defendant must sanitize the rest of the record, including the factual basis for the plea if any, so that it does not establish the specific adverse charge. A written plea agreement can be stipulated to as the document that provides the factual basis for the plea. See Part H, *infra*.

**Make a Written Plea Agreement.** A written plea agreement is an optimal way of memorializing the plea. It can be very specific, it ought to trump other evidence of a plea, it is a way the defendant can show the substance of the plea without having to request a transcript, and counsel can stipulate to the written plea agreement as containing the factual basis for the plea. Give the defendant and if possible the defendant’s family member or friend a copy of this document.

**If Nothing Else is Possible, Take a West Plea to “Count 1” and Specifically Avoid Pleading Guilty to Count 1 “As Charged.”** Known as the *U.S. v. Vidal* defense, this strategy is not entirely secure; it is often ignored. If other defense options are not available, however, counsel may submit a *West* plea, and ensure that the plea form and minute order record a plea to “Count 1” rather than plead guilty “*as charged* in Count 1.” The Ninth Circuit *en banc* held that without the crucial “as charged” language, the plea does not admit the specific allegations in Count 1.<sup>28</sup> Of course, the factual basis for the plea and other documents in the reviewable record also must not admit those allegations.

**Give the client something in writing that describes the plea,** for example a letter from your office, and if possible a copy of the plea form. State, e.g., that the plea was to “possession of a controlled substance” and that the controlled substance was not specified. State what documents show this, e.g. an amended Count, plea form, orally in the colloquy, etc. Give them the

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<sup>25</sup> This is not an aggravated felony, See discussion of *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*) in § N.7 *Controlled Substances*.

<sup>26</sup> See discussion of *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007) in Note 7: *Controlled Substances*. This is not a deportable drug offense.

<sup>27</sup> See discussion of Calif. P.C. § 243(e) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), in § N. 9 *Domestic Violence*. This is not a deportable crime of domestic violence.

<sup>28</sup> *United States v. Vidal*, 504 F.3d 1072, 1087 (9<sup>th</sup> Cir. 2007)(*en banc*).

applicable “Summaries for the Defendant” that appear at the end of these Notes. If the client will go into detention, give or mail a copy of these materials to a friend or relative of the client.

**F. Effect of Charging Papers, Plea Agreements, Minute Orders, Abstracts of Judgment, Substantive Sentence Enhancements and Probation Requirements<sup>29</sup>**

***1. Do not permit the defendant to admit facts that are not actually elements of the offense, and that might have adverse immigration consequences***

It is dangerous for a defendant to admit certain facts that are not literally elements of the offense. For example, a defendant pleading to § 261.5(c) should make every effort to admit only the bare elements of the statute, which are consensual sex with a person under the age of 18 and three years younger than the defendant, and not additional information, such as the fact that the victim was age 15. See Part H for further discussion, and see that Part and **Appendix 3-II** for a list of types of “extra” facts that are dangerous for immigrant defendants, such as minor age of the victim, use of a firearm, or unprivileged entry.

***2. Information from dismissed charges cannot be considered***

Using information from a dismissed charge would violate the fundamental rule in the categorical approach that there must be proof that the defendant actually admitted the allegations in the charge. In case of doubt, bargain for a new offense.

For 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.<sup>30</sup> See § N.8 *Controlled Substances*.

***3. Make sure that notations on the judgment, minute order, amended complaint or abstract do not contradict the plea, or supply specific adverse facts you must kept out of the record***

In removal proceedings, most of the time the immigration prosecutors (ICE) rely on written documents: the complaint, minute order, abstract of judgment, and written waiver form.

Check the minute orders, abstract of judgment, and any interlineations the clerk puts on any amended complaint to make sure that they conform to the plea. When making a vague plea, ***make sure that the clerk does not write text on one of these forms that provides a specific, adverse fact about the conviction, which is inconsistent with your agreement.***

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<sup>29</sup> Thanks to Norton Tooby, Rachael Keast, Holly Cooper, Graciela Martinez, Raha Jorjani and Michael K. Mehr for their continuing valuable input on this topic.

<sup>30</sup> *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).

**Example:** If a sentence of a year or more is imposed, theft of property is an aggravated felony, while theft of labor is not. Theft as defined under Calif. P.C. § 484 is divisible for this purpose because it reaches theft of labor or property.<sup>31</sup>

The Ninth Circuit held that a clerk's handwritten note "THEFT OF PERS PROP" on a California abstract of judgment, when combined with a complaint that specifically charged theft of property, was enough to prove that the plea to § 484 was for theft of property and therefore was an aggravated felony. *Ramirez-Villalpando v. Holder*, 601 F.3d 891 (9<sup>th</sup> Cir. 2010) (petition for rehearing denied).

While in many scenarios there are strong arguments that a clerk's narrative should not be part of the reviewable record, most low-income defendants will not have immigration counsel to make these arguments in removal proceedings. It is critical that you as defense counsel check these documents.

This is a difficult task when it comes to the abstract of judgment, which may be drawn up days or months after the plea. However, ICE frequently uses California abstracts. If nothing else, perhaps counsel can ask the clerk to make a note in the file that no extra narrative should be written on the abstract when it is drawn up.

Finally, assume that a notation on the abstract or minute order *can* be used to determine misdemeanor versus felony status, or to which count the defendant pled.

#### ***4. Substantive Sentence Enhancements Can Add Elements to an Offense***

If a substantive sentence enhancement increases the maximum penalty for a crime beyond what would otherwise be possible, the required elements of the enhancement will become elements of the offense.<sup>32</sup> Thus a firearms enhancement or gang enhancement may make the offense a deportable firearms ground, crime of violence or crime involving moral turpitude.

The Board of Immigration Appeals will not apply this rule where a sentence enhancement has been found true by a mere preponderance of the evidence, whether it was found by a court or jury. The Board stressed that "... [i]t is crucial that an examination of the specific statutory sentencing scheme be conducted in order to make the determination." *Id.* at 431. For further discussion see Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, § 2.11(B)(3)(c) ([www.ilrc.org](http://www.ilrc.org)).

#### ***5. Probation Requirements***

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<sup>31</sup> See, e.g., *Ramirez-Villalpando*, cited in text. For more information see § N.11 Theft, Burglary and Fraud.

<sup>32</sup> See *Matter of Martinez-Zapata*, 24 I&N Dec. 424, 426 (BIA 2007), following principles set out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).



In listing the elements of the reviewable record, the Supreme Court in *Shepard v. United States*<sup>33</sup> included neither sentence nor probation requirements. Statements at sentencing may not be used, although ICE may contest this.

The Ninth Circuit and BIA have considered probation requirements in certain contexts, as to whether they (a) prove that the victim of the offense was a minor or someone with a domestic relationship with the defendant, or (b) prove that restitution of more than \$10,000 was ordered, for purposes of the aggravated felony “fraud or deceit” where loss to the victim exceeds \$10,000.

**Categorical approach: Crime of Domestic Violence and Crime of Child Abuse.** Under the regular categorical approach, in general probation requirements have failed to prove that the victim was a child or had a domestic relationship with the defendant. Because a stay-away order can be imposed on behalf of a person who was not the actual victim of the offense, and because a requirement of anger management or domestic violence counseling can be imposed on offenses where the victim did not have a protected domestic relationship, these probation requirements standing alone do not identify the type of victim or prove the domestic relationship.<sup>34</sup> Further there are questions of standard of proof. The Board of Immigration Appeals found that a restitution order to the “child victim” of an age-neutral assault offense was not proof of a deportable “crime of child abuse,” because under Washington law restitution must be proved only by a preponderance of the evidence and so is not part of the “conviction.”<sup>35</sup>

In the future it is possible that the Ninth Circuit will hold that the domestic relationship is subject to a less stringent standard of proof, as a “circumstance specific” element. The truly safe way to avoid a deportable crime of domestic violence is to avoid a “crime of violence.” See § N.9 Crimes of Domestic Violence, Child Abuse.

**Circumstance-specific approach: Restitution order proving a loss to the victim of more than \$10,000.** Rarely, a “circumstance specific” evidence standard applies instead of the regular categorical approach. In considering the aggravated felony of an offense involving fraud or deceit where the loss to the victim/s exceeds \$10,000, the Supreme Court found that the amount of loss may be found under this lesser standard.<sup>36</sup> Therefore, a restitution order might or might not be sufficient to establish amount of loss, depending on various factors. See discussion in § N.11 Theft, Burglary and Fraud.

**Record of Conviction and Marijuana Offenses:** Immigration law provides several benefits if a drug conviction was for simple possession of 30 grams of marijuana or less, or for paraphernalia to be used with that amount of marijuana. Also, a conviction for giving away a small amount of marijuana is not an aggravated felony, although other “distribution without remuneration” offenses are. There are conflicting rules as to who must establish under what standard that the offense involved marijuana and how much, and whether the circumstance-specific standard applies. The U.S. Supreme Court is considering this in the context of a giving away a small amount of marijuana.

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<sup>33</sup> *Shepard v. United States*, 125 S.Ct. 1254 (2005).

<sup>34</sup> See, e.g., *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9<sup>th</sup> Cir. 2006).

<sup>35</sup> *Matter of Velazquez-Herrera*, *supra*.

<sup>36</sup> *Nijhawan v. Holder*, 557 U.S. 29 (2009), discussing 8 US § 1101(a)(43)(M)(ii).

The bottom line is, wherever possible, put in the record that the amount of marijuana was 30 grams or less (or an equivalently small amount of hashish), or that the paraphernalia was intended for use with that. In the case of distribution of marijuana, wherever possible state that it was giving away a small amount. If it is not possible to put this in the record, but such evidence exists, give the immigrant a letter describing evidence showing that the amount was 30 grams or less. See discussion in *Note: Controlled Substances*.

- 6. *If the charge is phrased in the conjunctive (“and”) while the statute is in the disjunctive (“or”), the plea should be in the disjunctive. However, this is now a lower priority because the Ninth Circuit clarified that the “and” does not prove that the defendant was convicted of all of the offenses in the statute.***

The Ninth Circuit recently resolved an ongoing dispute on this point, stating, “Under the modified categorical approach, a guilty plea to a conjunctively phrased charging document establishes only the minimal facts necessary to sustain a defendant’s conviction. In other words, when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes a conviction under at least one, but not necessarily all, of those theories.” *Young v. Holder*, 697 F.3d 976, 979 (9<sup>th</sup> Cir. 2012) (*en banc*) (considering Cal. H&S Code § 11379(a)). In case there are arguments about this or a change in the law it is best practice for the plea to read, e.g., “I admit to sale *or* transportation,” not to “sale *and* transportation.” However, other factors are more important now that we have a clear holding on the subject.

- 7. *Give a copy of beneficial documents – e.g., an amended complaint or written plea agreement – and a copy of Summary for the Defendant to the defendant.***

The odds are that you are the last lawyer the defendant will have. If you obtained a good record for him or her, please get a copy of the written complaint or amended complaint, the minute order, the written waiver form or plea agreement, and the abstract of judgment. If the good plea was made only orally, consider obtaining the transcript for the defendant, or at least obtaining contact information of the court reporter.

#### **G. Factual Basis for the Plea<sup>37</sup>**

For additional information on the factual basis for the plea and immigrant defendants, see Chapter 2, § 2.11(C)(6), *Defending Immigrants in the Ninth Circuit* at [www.ilrc.org](http://www.ilrc.org).

**Summary.** One of the many challenges facing criminal defense counsel who represent noncitizens is to meet two potentially conflicting mandates: to make the right kind of specific or vague record of conviction for immigration purposes, and to meet requirements pertaining to a factual basis for the plea under criminal law requirements.

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<sup>37</sup> Thanks to James F. Smith as well as Graciela Martinez for invaluable help. In addition, some of this section draws from an excellent article, “Penal Code section 1192.5: A Short Précis on The Factual Basis For A Guilty Plea,” by Chuck Denton of the Office of the Alameda County Public Defender.

The goal is to prevent the factual basis from subverting the immigration strategy. Where the plea for immigration purposes is specific, the factual basis should not contradict it. While a sufficiently specific plea should control over a factual basis, an immigrant wants to avoid that fight. Where the strategy is to keep the record of conviction vague, the factual basis is especially dangerous: it is part of the reviewable record and details in the factual basis will “fill in” the vague plea. (As discussed in Part B, *supra*, a vague plea is appropriate only in limited situations.) You may find yourself trying to persuade the judge and prosecutor to accept a factual basis that at first glance they do not think is sufficiently related to what actually happened. You also can argue that the court should forego a factual basis altogether. Note that where judges may require a factual basis in misdemeanor cases as a matter of practice, legally a factual basis is required only in a conditional felony plea; see Part 1, below.

*In general, defense counsel, not the noncitizen defendant, should provide the factual basis* – unless counsel is confident that the defendant can keep to a carefully worded and limited statement, perhaps one that you have written out. In California there are no statutory requirements for how the factual basis should be made,<sup>38</sup> but case law has established some rules. In *People v. Holmes*<sup>39</sup> the California Supreme Court found that either the defendant or defense counsel may provide the factual basis. Defense counsel will do so by stipulating 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*.<sup>40</sup> The last two are the best choices for the defense, because counsel can control the facts presented by drafting the plea agreement or obtaining an amended charge. See also the very general statement by defense counsel that the California Supreme Court upheld in *People v. French* (2008) 43 Cal.4th 36, discussed in Part 3, below.

***1. You can try to decline to give a factual basis where the plea is to a misdemeanor. The judge is required to inquire about a factual basis only in a “conditional” plea to a felony.***

Section 1192.5 of the California Penal Code provides in part: “Upon a plea of guilty or nolo contendere to an accusatory pleading charging a *felony* ... [the court shall] 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.” (Emphasis supplied)

There is no requirement under § 1192.5, or as a matter of due process, for a court to require a factual basis for a plea to a misdemeanor conviction.<sup>41</sup> Lack of a factual basis will not cause a misdemeanor conviction to be vacated, as long as the defendant “understood the charge, which was explained to him as to its nature, date and place...”<sup>42</sup>

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<sup>38</sup> 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.”

<sup>39</sup> *People v. Holmes*, 32 Cal. 4th 432 (2004).

<sup>40</sup> *Id.* at 436.

<sup>41</sup> *Ballard v. Municipal Court*, 84 Cal. App. 3d 885 (Cal. App. 1st Dist. 1978) (declining to vacate a misdemeanor plea for lack of inquiry into a factual basis, because neither due process nor P.C. § 1192.5 requires this in a plea to a misdemeanor).

<sup>42</sup> *Id.* at 892.

Therefore in a misdemeanor plea, counsel can argue that no factual basis is necessary. It might help to combine the request with a *West* plea; see Part 4, below. Or, argue that a document that describes the nature of the offense, the date and place is sufficient for the factual basis, and stipulate to a sparse written plea agreement or a complaint, amended if necessary.

Regarding felonies, the full text of § 1192.5 provides that the requirement of a factual basis depends upon the type of felony plea. California has two types of guilty or no contest pleas: (1) a negotiated or conditional plea, where the plea is conditioned upon receiving a particular disposition; and (2) an open or unconditional plea.<sup>43</sup> A factual basis is required when taking a negotiated/conditional plea of guilty or no contest to a felony charge, but not when taking an open or conditional plea.

**2. Carefully craft a written plea agreement or amended charge, and stipulate to that as the factual basis.**

Under *People v. Holmes*, defense counsel may stipulate to any of several listed documents.<sup>44</sup> Strategically, counsel should stipulate 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 may be able to 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 July 9, 2009 on p. 2 that reads “...” Here are several factors to consider.

***Where a vague record of conviction will help, provide details that will not be harmful to the defendant but that will provide some specificity***, such as exact details regarding place, time, chronology of events, others present, or other specifics. Rather than state the exact age of the victim, state “On the evening of May 8, 2010 at my home at 339 Oakdale Street, Los Angeles I did violate P.C. § 261.5(c) by having consensual sex with a person under the age of 18 and at least three years younger than myself.” Note that a California appellate court held that a complaint that named the defendant and victim and that stated the offense had occurred “on or about July 16” was not sufficient.<sup>45</sup>

In some cases you can try to add specific information that is useful for immigration purposes. For example, consensual sexual conduct with a minor is a crime involving moral turpitude only if the defendant knew or had reason to know the victim was under age 18; in a plea agreement the defendant may state “I reasonably believed that the victim was \_\_\_ years old.”

***Do not provide facts that could be harmful and that are not literally elements of the offense pled to.*** Based on the recent *Aguila-Montes de Oca* case, immigration prosecutors may try to use admissions of facts that are not literally in the statutory language of a crime to characterize the offense beyond its elements. See Part H for further discussion, and see **Appendix 3-II** for a Checklist of “extra” facts that a noncitizen defendant should not admit. These include use of a

<sup>43</sup> See, e.g., *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.

<sup>44</sup> *People v. Holmes*, 32 Cal. 4th at 436 lists documents such as a police report, a preliminary hearing transcript, a probation report, a grand jury transcript, a complaint or a written plea agreement.

<sup>45</sup> *People v. Willard*, 154 Cal. App. 4th 1329, 1335 (Cal. Ct. App. 2007).

firearm, precise age of a minor victim, an additional intended crime, and others. In case of doubt, consult with a crim/imm expert.

***Do not stipulate to a factual basis that establishes that the defendant committed the “bad” offense. If necessary, however, it is all right to stipulate to facts that could support both the bad and the good offense, where the defendant specifically pled to the good offense, or will benefit from a vague plea.*** If the charge states the entire statute in the disjunctive but the defendant pled to a specific “good” offense, the charge is an acceptable factual basis. If the permanent resident who is not already deportable is creating a vague record, an equally vague factual basis is acceptable.

***Where possible, stipulate to facts that show the defendant specifically committed the “good” immigration-neutral offense.*** This could change a vague record of conviction to a specific, good record. For example, a vague plea to the language of P.C. § 243(e), coupled with a written plea agreement stating that the defendant committed the battery by touching his wife’s arm in a rude and offensive manner, may create a specific record that proves the conviction is not a “crime of violence.”

- 3. As a factual basis for the plea, state your own belief that the prosecution has specific evidence to support its allegation of a factual basis and that it is prepared to present that evidence, citing People v. French (2008) 43 Cal.4th 36, 51.***

In *People v. French* the California Supreme Court approvingly cited language similar to the above and noted that “defense counsel’s stipulation to the factual basis cannot reasonably be construed as an admission by defendant.” Mr. French pled no contest to sex offenses, and the trial court imposed a higher term because the “defendant took advantage of a position of trust and confidence.” On appeal, defendant claimed that the court could not rely upon an aggravating fact that had neither been admitted nor found true by a jury. The government argued that when defense counsel stipulated to a factual basis for the plea, defendant effectively admitted the aggravating factor. The Supreme Court disagreed, at 43 Cal.4th 36, 51.

Nothing in the record indicates that defendant, either personally or through his counsel, admitted the truth of the facts as recited by the prosecutor. . . . when asked by the trial court whether she believed there was a sufficient factual basis for the no contest pleas, defense counsel stated, ‘I believe the People have witnesses lined up for this trial that will support what the D.A. read in terms of the factual basis, and that’s what they’ll testify to.’ Indeed, counsel was careful to state that she agreed that witnesses would testify to the facts as recited by the prosecutor; she did not stipulate that the prosecutor’s statements were correct. Under the circumstances of this case, defense counsel’s stipulation to the factual basis cannot reasonably be construed as an admission by defendant. . . .”

- 4. Plead pursuant to People v. West and decline to stipulate to a factual basis***

This may not be possible to obtain in many cases, but it is a good option. Since a *West* plea is entered without any factual admission of guilt, argue that the court should allow entry of the plea without establishing any factual basis for the plea. See, e.g., facts in *United States v. Vidal*,



504 F.3d 1072 (9th Cir. 2007) (en banc). In that case, the criminal defense counsel wrote “*People v. West*” on the waiver form when asked for a factual basis, and declined to admit to a factual basis or stipulate to any police reports or other documents. Making a *West* plea might strengthen a request not to stipulate to a factual basis for a misdemeanor, as discussed in Part 1, *supra*.

## H. What “Extra” Facts Should a Noncitizen Defendant Avoid Admitting?

In *United States v. Aguila-Montes de Oca* (“*Aguila*”)<sup>46</sup> the Ninth Circuit expanded the kinds of facts from a noncitizen defendant’s record of conviction that can be used against her in immigration proceedings. This section will briefly describe the holding and a list of what facts to watch out for; the list is replicated as **Appendix 3-II**. For further discussion see “Practice Advisory for Criminal Defenders on *Aguila-Montes de Oca*” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

**What did *Aguila* hold?** Before *Aguila*, the Ninth Circuit’s “missing element rule” provided that a criminal conviction may establish that the defendant was convicted of the elements of the offense only, and not of other conduct described in the record of conviction that goes beyond the elements (“non-element facts”).<sup>47</sup> Under *Aguila*, an immigration judge may use certain “non-element facts” from a defendant’s reviewable record of conviction to find that she is deportable, inadmissible, or convicted of an aggravated felony. The Supreme Court will consider the validity of the *Aguila* rule in 2013, in *Descamps v. United States* (cert. granted August 31, 2012). It is considered likely although not guaranteed that the Court will overturn *Aguila*.

**What is a “necessary non-element fact” under this rule?** *Aguila* permits use of a “non-element fact” from the record, i.e. a fact that is not an element of the offense, as long as it is “necessary” to the conviction in the particular case. According to *Aguila*, facts are only necessary to the conviction if “the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime...”<sup>48</sup> The court gave as an example an offense that has as an element “causation of harm,” where the only charge is causing harm by shooting a gun. The court found that the fact of the gun is “necessary” because under the prosecution’s only theory of the case, without the gun the element of harm would not be met and there would be no conviction. If the defendant pleads guilty to the charge, *Aguila* provides that she has a “gun” conviction.

**What should defenders do?** Try to keep certain extraneous “non-element facts” out of the record of conviction, where those facts might cause adverse immigration consequences. Note that while *Aguila* states and the Ninth Circuit has upheld<sup>49</sup> the rule that only facts “necessary” to the conviction can be used, *we must assume that ICE (immigration prosecution) may assert it*

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<sup>46</sup> *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (en banc).

<sup>47</sup> See, e.g. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9<sup>th</sup> Cir. 2007)(en banc), *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008) (en banc). *Aguila-Montes de Oca* partially reversed *Navarro-Lopez*, and by implication may have partially reversed *Estrada-Espinoza*.

<sup>48</sup> *Aguila-Montes de Oca*, *supra* at 937 (emphasis in original).

<sup>49</sup> See *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (conviction under P.C. § 243.4, an age-neutral statute, is not sexual abuse of a minor because immigration judge could not rely on evidence of victim’s minor age in the record where minor age was not required to prove an element of the offense). See also *Aguilar-Turcios v. Holder*, 691 F.3d 1025 (9<sup>th</sup> Cir. 2012) (similar ruling for child pornography versus pornography).



may use any facts in the reviewable record. Therefore, whether “necessary” or not, please try to sanitize the reviewable record to not include the following types of non-element facts:

- ✓ **Violence.** To avoid a possible “crime of violence,” in pleading to a battery charge do not admit to actual violence (more than offensive touching), causing injury, or intent to injure, where these are not elements of the offense. See § N.8 *Domestic Violence*.
- ✓ **Guns.** To avoid a deportable firearms offense, do not admit to carrying, using, etc. a firearm or bomb. Instead, admit to another weapon such as a knife, an unspecified “weapon,” or no weapon, depending on the elements of the offense. See § N.12 *Firearms*.
- ✓ **Guns.** If the defendant must admit to use of a firearm that is not an element of the offense, refer to it as generally as possible, e.g. “gun” or “bb gun.” See § N.12 *Firearms*.
- ✓ **Minor Victim.** In a plea to an age-neutral offense, do not admit that the victim was under age 18. In a plea to an age-specific offense, avoid admission of a crime against a younger victim (e.g., in a plea to Calif. P.C. § 261.5(c), do not admit to a victim aged 14). See § N.7 *Crime Involving Moral Turpitude*, § N. 9 *Crime of Child Abuse*, and § N. 10 *Sex Crimes*.
- ✓ **Domestic Relationship.** In a crime that does or could involve violence, avoid admission that the victim and defendant have any relationship that protected under California DV laws, to avoid a deportable crime of domestic violence. See discussion of this relationship and of what California offenses are “crimes of violence” at § N.9 *Domestic Violence*.
- ✓ **Drugs.** In a charge to H&S C §§ 11350 et seq. or 11377 et seq., try to plead to an unspecified “controlled substance” rather than, e.g., heroin. If the offense charged does not have an illegal drug as an element, do not mention one in the record. § N.8 *Controlled Substances*.
- ✓ **Sex.** Avoid admission of lewdness, prostitution, or sexual intent where those are not elements of the offense. Avoid mention of a minor victim or witness. See § N.10 *Sex Offenses*.
- ✓ **Sex.** In a plea to consensual sex with a minor, create a record that does not eliminate the possibility that the defendant was so deeply drunk that s/he failed to understand that sex occurred. Where the victim is 15 or older, this should prevent the government from (wrongly) arguing the offense is sexual abuse of a minor. Do not admit to knowing that the victim was under age 16, to avoid a moral turpitude offense. See § N.10 *Sex Offenses*.
- ✓ **Burglary.** With careful attention to the record, counsel can plead to P.C. § 459 with a sentence of a year or more imposed, without creating an aggravated felony conviction. See detailed instructions at § N.11 *Theft, Burglary, Fraud*. Facts that should be avoided, in various combinations, relate to taking a substantial step toward committing the intended offense, burglary of a residence, or of a building, unprivileged entry, and/or use of force.
- ✓ **Fraud versus Theft.** Sometimes it is important to distinguish between theft and fraud in the record, because theft (taking by stealth) is an aggravated felony only if a sentence of a year is

imposed, while fraud (taking by deceit) is an aggravated felony only if the loss to the victim/s exceeded \$10,000. Calif. P.C. § 484 includes both types of offenses. Keep the whole record consistent as to whether the offense was theft versus fraud. For a fraud offense, do not admit a loss to the victim/s exceeding \$10,000. See § N.11 *Theft, Burglary, Fraud*.

- ✓ **DUI.** In a DUI case, do not admit to knowingly driving on a suspended license; do not admit to a reckless rather than negligent state of mind; and do not admit to driving under the influence of a controlled substance as opposed to alcohol.

## I. When Does the Categorical Approach Not Apply to Analysis of a Conviction? Moral Turpitude and “Circumstance Specific” Offenses

### 1. “Circumstance-specific” Factors: \$10,000, Marijuana (Soon Domestic Relationship)?

In *Nijhawan v. Holder*, 557 U.S. 29 (2009) the Supreme Court held that for purposes of deciding whether a conviction is an aggravated felony, in just a few situations the categorical approach does not fully apply. The Court considered the aggravated felony defined as a *crime of “fraud or deceit” in which the loss to the victim/s exceeded \$10,000.*<sup>50</sup> The Court found that while the regular categorical approach applies to determine whether the offense was fraud or deceit, a different standard applies to determining whether the loss exceeded \$10,000. The amount of loss is “circumstance-specific,” meaning that it has to do with the circumstances of the particular incident of fraud or deceit. Therefore there is some loosening of evidentiary restrictions. For plea advice relating to this aggravated felony, including instructions for how to deal with the “circumstance-specific” approach, see § N.11 *Burglary, Theft, and Fraud*.

The Board of Immigration Appeals has stated that it will apply this test in some contexts involving *marijuana*. A first offense involving simple possession of 30 grams or less of marijuana is an exception to the deportation ground and eligible for a waiver of inadmissibility. Giving away a small amount of marijuana is not an aggravated felony, while other distribution without remuneration offenses are. The Board stated that the 30 grams or less can be proved under the circumstance-specific test. Counsel should put good, specific facts about marijuana into a plea statement or write them on the plea form. The U.S. Supreme Court will consider the burden of proof for giving away marijuana, in *Moncrieffe v. Holder*.

*Nijhawan* did not mention the *domestic violence deportation* ground, and did not apply its new “generic versus circumstance-specific” approach to that or any deportation ground apart from aggravated felonies. However, ICE (immigration prosecutors) may argue that the same bifurcated approach should be used there, and that while a “crime of violence” determination is subject to the categorical approach, the domestic relationship is circumstance-specific and can be proved by additional evidence. For discussion of defense strategies, see § N.9 *Domestic Violence*. For further discussion of circumstance specific, see Brady, “*Nijhawan v. Holder*: Analysis” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

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<sup>50</sup> 8 USC § 1101(a)(43)(M)(ii), INA § 101(a)(43)(M)(ii).

## **2. Currently the categorical approach does not fully apply to crimes involving moral turpitude, under Matter of Silva-Trevino**

In a controversial opinion, Attorney General Mukasey overturned decades of precedent to hold that the categorical approach does not strictly apply in determining whether an offense is a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). The opinion has made it difficult to predict what will or won't be held to be a crime involving moral turpitude. There is real hope that the Ninth Circuit finally will hear the issue and reject *Silva-Trevino*, as other Courts of Appeal have done – but no guarantee.

To make matters more unpredictable, the Ninth Circuit has held that it will defer to the BIA whenever the Board issues a reasonable, published decision finding that particular conduct involves moral turpitude. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9<sup>th</sup> Cir. 2009) (*en banc*). This decision means that prior Ninth Circuit decisions holding that certain actions or offenses are not crimes involving moral turpitude may no longer apply.

The hard truth is that criminal defense counsel cannot promise their clients that a particular offense will not be held to be a crime involving moral turpitude (CMT). Counsel should not rely on past case law in general, or on charts that have not been updated, to determine whether an offense will be a CMT. The exception is where an offense is clearly divisible and counsel pleads specifically to the section that does not involve moral turpitude. For example, a plea to taking a car with intent to temporarily deprive the owner under Calif. Veh. C. § 10851 is not a conviction of a CIMT. The written plea bargain should trump any other evidence. A plea to an offense that involves only negligence should not be held to be a CMT.

Unless and until *Silva-Trevino* is overturned, counsel should attempt to avoid a CIMT but also advise defendants that there are few guarantees in this area. Luckily, in some cases a single CIMT conviction will not make a noncitizen deportable or inadmissible. For rules on this and further discussion of CIMTs, see § N. 7 *Crimes Involving Moral Turpitude*. For an excellent discussion of *Silva-Trevino* see Tooby, Kesselbrenner, “Living Under Matter of *Silva-Trevino*” at [www.nortontooby.com](http://www.nortontooby.com).

## Appendix 3-I

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

*Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.*

*Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.*

\* \* \* \* \*

### Burden of Proof, Vague Record of Conviction, Moral Turpitude

\* \* \* \* \*

This paper was given to me by my criminal defense attorney and pertains to possible legal defenses. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A *vague record of conviction* will protect the defendant from being found *deportable* based on a conviction under a divisible statute, because the government has the burden of proving that a conviction is of a deportable offense. INA § 240(c)(3)(A). *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc).

\* \* \* \* \*

This paper was given to me by my criminal defense attorney and pertains to possible legal defenses. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Where a conviction is under a statute that is divisible for *moral turpitude* purposes, if the conviction record establishes that the offense of conviction was *not* for a crime involving moral turpitude, the inquiry will stop and the immigration judge will not go on to the *Silva-Trevino* "third step." Evidence outside of the noncitizen's record of conviction may properly be considered only where the conviction record itself does not conclusively demonstrate whether the noncitizen was convicted of engaging in conduct that constitutes a crime involving moral turpitude. *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468-69 (BIA 2011), following *Matter of Silva-Trevino*, 24 I&N Dec. 687, 704 (AG 2008).

\* \* \* \* \*

This paper was given to me by my criminal defense attorney and pertains to possible legal defenses. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

The Supreme Court in *Descamps v. United States* (cert. accepted Aug. 31, 2012) is reviewing the validity of the rule set out in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011)(*en banc*). Under *Aguila-Montes de Oca*, a judge may consider a non-element fact in the record of conviction, as long as that fact is necessary to prove an element of the offense in this particular case, under the prosecution's sole theory of the case. *Id.* at 936. In *Descamps* the Supreme Court will decide whether to overrule the *Aguila-Montes de Oca* standard, and instead reaffirm that a judge may *not* consult the record of conviction unless (a) the conviction was under a statute that sets out "different crimes, each described separately" and (b) the judge consults the record only to see "which statutory phrase was the subject of the conviction." See *Johnson v. U.S.*, 559 U.S. \_\_\_, 130 S.Ct. 1265, 1273 (2010). See further discussion in Brady and Yi, "The Categorical Approach in the Ninth Circuit: *Aguila-Montes de Oca*" at Bender's Immigr. Bull. December 15, 2011, Vol. 16; No. 24.

***I was convicted under a statute that sets out a single offense, and not "different crimes, each described separately." I wish to get advice about when the Supreme Court is expected to decide Descamps v. United States, and whether my removal case should be held in abeyance.*** In the alternative, I may wish to get advice as to whether to appeal any denial based upon *Aguila-Montes de Oca*. I ask the Court's assistance in locating counsel or obtaining pro bono counsel.

\* \* \* \* \*

This paper was given to me by my criminal defense attorney and pertains to possible legal defenses. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***The following documents are not part of the reviewable record*** that an immigration judge may consider: Prosecutor's remarks during the hearing; police reports, probation or "pre-sentence" reports; statements by the noncitizen outside of the plea (e.g., statements to police, immigration authorities, or the immigration judge); information from a criminal charge absent adequate evidence that the defendant pled to the charge as written; information from a dropped charge; information from a co-defendant's case.

See, e.g., *Matter of Cassissi*, 120 I&N Dec. 136 (BIA 1963) (statement of state attorney at sentencing); *Abreu-Reyes v. INS*, 350 F.3d 966 (9<sup>th</sup> Cir. 2003) (probation report); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9<sup>th</sup> Cir. 2004) (testimony to immigration judge); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9<sup>th</sup> Cir. 2007) (dropped charge); *United States v. Vidal*, 426 F.3d 1011 (9<sup>th</sup> Cir. 2005) (requires proof of plea to complaint "as charged"); *Matter of Short*, Int. Dec. 3215 (BIA 1989) (co-defendant's file).

**“Extra” Facts that are Not Elements of the Offense, *Aguila-Montes de Oca***

\* \* \* \* \*

This paper was given to me by my criminal defense attorney and pertains to possible legal defenses. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

In general, under the modified categorical approach a court may consult facts from the strictly limited “reviewable record of conviction” only to identify which *elements* (specific terms set out in the criminal statute) the defendant was convicted of, when the statute contains multiple possible elements. The record of conviction can be consulted only to identify *which* elements in the statute made up the offense of conviction. The reviewable record of conviction is comprised of judicially noticeable documents such as a plea agreement or transcript of plea colloquy, as set out in *Shepard v. United States*, 544 U.S. 13, 16 (2005) and its progeny.

The Ninth Circuit modified this rule in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (*en banc*). It held that an immigration judge may consider a fact from the reviewable record of conviction that is not literally an element (term in the criminal statute), as long as the fact was *necessary to prove an element of the offense* under the prosecution’s sole theory of the case. “If the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime, then the factfinder necessarily found the elements of the generic crime.... It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant.” *Aguila*, 655 F.3d at 937 (*emphases in original*).

Under the *Aguila-Montes de Oca* rule, the Ninth Circuit found that where a statute is “age-neutral,” with no element that relates to minor age of the victim, an immigration judge may not find that the offense is the aggravated felony sexual abuse of a minor. The judge may not use facts from the reviewable record that show minor age, because these facts never would be “necessary” to prove an element of the offense. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012); see also *Aguilar-Turcios v. Holder*, 691 F.3d 1025 (9<sup>th</sup> Cir. 2012).

The Supreme Court is considering whether the *Aguila-Montes de Oca* rule is acceptable, or whether the Ninth Circuit must return to the stricter “missing element” rule. See *Descamps v. United States* (cert. granted August 31, 2012).



## Appendix 3-II

### CHECKLIST FOR CRIMINAL DEFENDERS: “Extra” Facts That a Noncitizen Defendant Should Not Admit on the Record

Getting the right information into or out of the “record of conviction” can be critical to a noncitizen defendant who needs to avoid immigration penalties based on the conviction. Generally, the record of conviction consists of the following: the written plea agreement, plea colloquy, the charge as long as there is adequate evidence the defendant pled to it as written, factual findings by the judge and assented to by the defendant, certain notations on the minute order or abstract, and any document stipulated to as the *factual basis for the plea*.<sup>1</sup>

A recent Ninth Circuit decision, *United States v. Aguila-Montes de Oca*,<sup>2</sup> permits an immigration judge to consider certain facts found in an individual’s record of conviction, even if the facts do not constitute elements of the offense. While *Aguila* sets real limits as to what “extra” facts an immigration judge may consider, defense counsel must conservatively assume that immigration prosecutors might assert that almost any fact found in the reviewable record can be used to characterize the offense. Note that the Supreme Court is considering the validity of this rule in *Descamps v. United States* (cert. granted August 31, 2012)

For this reason, counsel should avoid letting certain types of facts appear in a record of conviction *unless* the fact literally is set out in the statutory definition of the offense. To eliminate adverse facts from a record, counsel may need to amend a complaint and/or carefully draft a written plea agreement, and designate one of those documents as the factual basis for the plea. (Note that in California a factual basis inquiry is legally required only in conditional pleas to felony charges, and not to any misdemeanor plea.<sup>3</sup>) While you may not always be successful, the effort is worthwhile. In some cases this will be a life or death issue for the immigrant defendant.

The following is a checklist of facts that, if possible, a noncitizen defendant should not admit *unless the fact literally is in the statutory definition*. Before pleading to any of the below offenses, please also consult the relevant cited Note (short article) in the *California Quick Reference Chart and Notes*, by going to [www.ilrc.org/](http://www.ilrc.org/) crimes and scrolling down. More information on creating a safer factual basis for the plea, and sanitizing a record of conviction, for immigrant defendants can be found there at § N.3 Record of Conviction.

- ✓ **Violence.** To avoid a possible “crime of violence,” in pleading to a battery charge do not admit to actual violence (more than offensive touching), causing injury, or intent to injure, where these are not elements of the offense. See § N.9 *Domestic Violence*.
- ✓ **Guns.** To avoid a deportable firearms offense, do not admit to carrying, using, etc. a firearm or bomb. Instead, admit to another weapon such as a knife, an unspecified “weapon,” or no weapon, depending on the elements of the offense. See § N.12 *Firearms*.
- ✓ **Guns.** If the defendant must admit to use of a firearm that is not an element of the offense, refer to it as generally as possible, e.g. “gun” or “bb gun.” See § N.12 *Firearms*.
- ✓ **Minor Victim.** In a plea to an age-neutral offense, do not admit that the victim was under age 18. In a plea to an age-specific offense, avoid admission of a crime against a younger victim (e.g., in a plea

to Calif. P.C. § 261.5(c), do not admit to a victim aged 14). See § N.7 *Crime Involving Moral Turpitude*, § N. 9 *Crime of Child Abuse*, and § N.10 *Sex Crimes*.

- ✓ **Domestic Relationship.** In a crime that does or could involve violence, avoid admission that the victim and defendant have any relationship that protected under California DV laws, to avoid a deportable crime of domestic violence. See discussion of this relationship and of what California offenses are “crimes of violence” at § N.9 *Domestic Violence*.
- ✓ **Drugs.** In a charge to H&S C §§ 11350 et seq. or 11377 et seq., try to plead to an unspecified “controlled substance” rather than, e.g., heroin. If the offense charged does not have an illegal drug as an element, do not mention one in the record. § N.8 *Controlled Substances*.
- ✓ **Sex.** Avoid admission of lewdness, prostitution, or sexual intent where those are not elements of the offense. Avoid mention of a minor victim or witness. See § N.10 *Sex Offenses*.
- ✓ **Sex.** In a plea to consensual sex with a minor, create a record that does not eliminate the possibility that the defendant was so deeply drunk that s/he failed to understand that sex occurred. Where the victim is 15 or older, this should prevent the government from (wrongly) arguing the offense is sexual abuse of a minor. Do not admit to knowing that the victim was under age 16, to avoid a moral turpitude offense. See § N.10 *Sex Offenses*.
- ✓ **Burglary.** With careful attention to the record, counsel can plead to P.C. § 459 with a sentence of a year or more imposed, without creating an aggravated felony conviction. See detailed instructions at § N.11 *Theft, Burglary, Fraud*. Facts that should be avoided, in various combinations, relate to taking a substantial step toward committing the intended offense, burglary of a residence, or of a building, unprivileged entry, and/or use of force.
- ✓ **Trespass.** On the risk that ICE would attempt to prove that a plea to trespass with intent to commit a crime is equivalent to “burglary,” do not admit to facts establishing intent to commit an offense beyond the trespass.
- ✓ **Fraud versus Theft.** Sometimes it is important to distinguish between theft and fraud in the record, because theft (taking by stealth) is an aggravated felony only if a sentence of a year is imposed, while fraud (taking by deceit) is an aggravated felony only if the loss to the victim/s exceeded \$10,000. Calif. P.C. § 484 includes both types of offenses. Keep the whole record consistent as to whether the offense was theft versus fraud. For a fraud offense, do not admit a loss to the victim/s exceeding \$10,000. See § N.11 *Theft, Burglary, Fraud*.
- ✓ **DUI.** In a DUI case, do not admit to knowingly driving on a suspended license; do not admit to a reckless rather than negligent state of mind; and do not admit to driving under the influence of any controlled substance as opposed to alcohol.

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<sup>1</sup> See further discussion at §N.3 Record of Conviction in the *California Quick Reference Chart and Notes*, at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) (scroll down), and at Brady, Tooby, Junck, Mehr, *Defending Immigrants in the Ninth Circuit*, § 2.11 ([www.ilrc.org](http://www.ilrc.org)).

<sup>2</sup> *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (*en banc*); see also “Practice Advisory for Criminal Defenders on *Aguila-Montes de Oca*” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes). In case of doubt, talk with an expert in the intersection of immigration and criminal law. See § N.18 Resources.

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<sup>3</sup> Calif. P.C. § 1192.5. See also *Ballard v. Municipal Court*, 84 Cal. App. 3d 885 (Cal. App. 1st Dist. 1978) and discussion of factual basis for the plea in § N.3 Record of Conviction.

## § N.4 Sentence

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

- A. The Immigration Definition of Sentence
- B. Aggravated Felonies and Sentence
- C. The Petty Offense Exception to the Moral Turpitude Inadmissibility Ground and Sentence

### A. The Immigration Definition of Sentenced to a Term of Imprisonment

The immigration statute defines the term of imprisonment of a sentence 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.”<sup>1</sup>

This concept comes up frequently because *several types of offenses only will become aggravated felonies if a sentence of a year or more has been imposed*. See Part B, *infra*. See also discussion of the moral turpitude inadmissibility ground, at Part C, *infra*.

The good news is that there are many strategies to create a sentence that meets the demands of the prosecution and is an acceptable immigration outcome, especially in avoiding the one-year cut-off for an aggravated felony. The following are characteristics of the immigration definition of a sentence to imprisonment.

- ✓ The definition refers to the sentence that was imposed, not to potential sentence or time actually served as a result of conviction.
- ✓ 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.

**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.

**Example:** The judge suspends imposition of sentence and orders three years probation, with eight months of custody ordered as a condition of probation. The immigration sentence imposed is eight months.

- ✓ For most immigration provisions the sentence only attaches to each individual count and is not added up through multiple counts. For example, many offenses will become an aggravated felony only if a sentence of a year or more is imposed. A sentence imposed of

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<sup>1</sup> Definition of “term of imprisonment” at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

less than a year on each of several counts, to be served consecutively, does not result in a single conviction with more than a one-year sentence imposed.

- ✓ Time imposed pursuant to a recidivist sentence enhancement (e.g., petty with a prior) is part of the total sentence imposed.<sup>2</sup>
- ✓ Time that is imposed on the original offense after a probation or parole violation will be added to the original time for that count.<sup>3</sup>

**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.

- ✓ 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.<sup>4</sup>

**Five ways 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 negotiate for significant jail time or even state prison time. It is important to remember that a state prison commitment will not automatically make the conviction an aggravated felony. If immigration concerns are important, counsel might:

1. Bargain for 364 days on a single count/conviction;
2. Plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
3. Plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail or even *state prison time* on that.

**Example:** Felipe is a longtime permanent resident who is charged with multiple violent crimes. There are also allegations that a knife was used in the commission of the crimes. The prosecution is demanding that Felipe plead guilty to a strike and that he be

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<sup>2</sup> The opposite rule was in force, until the Supreme Court overturned Ninth Circuit precedent. *U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008), overruling in part *United States v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(*en banc*).

<sup>3</sup> See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9<sup>th</sup> 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).

<sup>4</sup> *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

sentenced to state prison. In this situation you may still be able to negotiate a plea bargain that avoids an aggravated felony conviction.

First, identify an offense that will not become an aggravated felony even if a state prison sentence equal to or greater than 365 days is imposed. Here, P.C. § 12020(a)(1), possession of a deadly weapon, is not an aggravated felony even with such a sentence. The prosecution also is charging P.C. § 422, criminal threat, which will become an aggravated felony as a crime of violence if a sentence of a year or more is imposed. To avoid an aggravated felony, the court would have to designate § 12020(a)(1) as the base term and Felipe could be sentenced to the low, middle or high term. The punishment imposed pursuant to § 422 would have to be the subordinate term of one third the midterm, or eight months.

4. Waive credit for time already served, or if possible for prospective “good time” credits, and persuade the judge to take this into consideration in imposing a shorter official sentence. This “sentence” can result in the same amount of time actually incarcerated as under the originally proposed sentence (for example, waive credit for six months time served and bargain for an official sentence of nine months rather than 14 months);
5. 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.

#### **B. Which Offenses Become an Aggravated Felony Based on 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 an offense from being classed as an aggravated felony *under these categories*.<sup>5</sup> Counsel always should make sure the offense does not also come within a different aggravated felony category that does not require a sentence.

- 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
- 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)

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<sup>5</sup> See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).



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.*** Obtaining a sentence of 364 days or less will not prevent these offenses from being classed as aggravated felonies. This includes commonly prosecuted aggravated felony categories such as drug trafficking offenses, firearms offenses (which includes trafficking and felon in possession of a firearm), sexual abuse of a minor, rape, and a crime of fraud or deceit where the loss to the victim/s exceeds \$10,000.

**C. “Sentence Imposed” as Part of the Petty Offense Exception to the Moral Turpitude Ground of Inadmissibility.**

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*.<sup>6</sup> See Note: Crimes Involving Moral Turpitude, *infra*.

**Example:** Michelle is convicted of grand theft, reduced to a misdemeanor. This is her first conviction of a crime involving moral turpitude. She is sentenced to three years probation with 20 days jail as a condition of probation. She comes within the petty offense exception to the inadmissibility (not deportability) ground: the conviction has a potential sentence of not more than one year; her sentence imposed was 20 days, which is less than six months; and she has not committed another crime involving moral turpitude.

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<sup>6</sup> See 8 USC § 1182(a)(2)(A)(ii)(II).

## **§ N.5 Immigration Holds and Immigration Detention; When to Obtain Release from Criminal Incarceration, and When Not To**

By Michael K. Mehr and Katherine Brady

*For more information about immigration holds/detainers, and state enforcement of immigration laws, see [Defending Immigrants in the Ninth Circuit, Chapter 12](#)*

### **A. Immigration Hold**

Once ICE becomes aware of a suspected deportable alien, through notification by local authorities or through its own investigatory processes and periodic visits to local jails and prisons, it may file an immigration “hold” or “detainer” (which we will refer to as an immigration “hold”) with the local, state, or federal law enforcement agencies who have custody of the person. The regulation governing immigration holds/detainers is 8 CFR 287.7.

On December 4, 2012 California Attorney General Kamala Harris issued an Information Bulletin to local law enforcement agencies clarifying that immigration detainers are “requests, not commands,” and that local agencies are free to decide whether to honor them.<sup>1</sup> In fact, some jurisdictions in California have decided to wholly or partially ignore immigration detainers.

The Attorney General’s statement is consistent with the governing federal regulation, which provides that an immigration hold is a *request* that another Federal, State or local law enforcement agency notify DHS prior to release of an alien in order for DHS to arrange to assume custody for the purpose of arresting and removing the alien. The request is for a *limited time only*:

Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period of not to exceed 48 hours, excluding Saturday, Sundays, and holidays<sup>2</sup> in order to permit assumption of custody by the Service.

Some state and local governments across the U.S. have decided to wholly or partially refuse to cooperate with holds, and others are considering this strategy, due to community outcry against holds as well as the unreimbursed cost of detaining inmates for the federal government. For a toolbox on this issue see [http://nationalimmigrationproject.org/community/All\\_in\\_One\\_Guide\\_to\\_Defeating\\_ICE\\_Hold\\_Requests.pdf](http://nationalimmigrationproject.org/community/All_in_One_Guide_to_Defeating_ICE_Hold_Requests.pdf) .

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<sup>1</sup> See Harris, “Responsibilities of Local Law Enforcement Agencies under Secure Communities” (Dec. 4, 2012) at [https://www.aclunc.org/docs/immigration/ag\\_info\\_bulletin.pdf](https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf) and see discussion at <http://www.aclu-sc.org/california-attorney-general-immigration-detainers-are-voluntary/> .

<sup>2</sup> Form I-247 indicates that “holidays” means Federal holidays.

## **B. Who Should *Not* Be the Subject of a Detainer?**

On December 21, 2012 the Immigration & Customs Enforcement (ICE), issued a new, national policy memorandum on detainers, a/k/a holds.<sup>3</sup> Entitled “Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,” this memo is an improvement over past policy in that it limits detainers to persons with a relatively more serious criminal record. Regarding who should receive a detainer, the new memorandum states:

Consistent with ICE's civil enforcement priorities and absent extraordinary circumstances, ICE agents and officers should issue a detainer in the federal, state, local, or tribal criminal justice systems against an individual only where (1) they have reason to believe the individual is an alien subject to removal from the United States and (2) one or more of the following conditions apply:

- the individual has a prior felony conviction or has been charged with a felony offense;
- the individual has three or more prior misdemeanor convictions; n.2

[N. 2 provides: “Given limited enforcement resources, three or more convictions for minor traffic misdemeanors or other relatively minor misdemeanors alone should not trigger a detainer unless the convictions reflect a clear and continuing danger to others or disregard for the law.”]

- the individual has a prior misdemeanor conviction or has been charged with a misdemeanor offense if the misdemeanor conviction or pending charge involves no violence, threats, or assault;
- sexual abuse or exploitation;
- driving under the influence of alcohol or a controlled substance;
- unlawful flight from the scene of an accident;
- unlawful possession or use of a firearm or other deadly weapon;
- the distribution or trafficking of a controlled substance; or
- other significant threat to public safety; n. 3

[N. 3 provides: “A significant threat to public safety is one which poses a significant risk of harm or injury to a person or property.”]

- the individual has been convicted of illegal entry pursuant to 8 U.S.C. § 1325;
- the individual has illegally re-entered the country after a previous removal or return;
- the individual has an outstanding order of removal;

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<sup>3</sup> The memo was issued on Dec. 21, 2012 by John Morton, Director of ICE and is posted at <http://xa.yimg.com/kq/groups/6503708/1232930262/name/detainer-policy%2012-21-2012.pdf>.

- the individual has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud; or
- the individual otherwise poses a significant risk to national security, border security, or public safety.

[N. 4 provides: “For example, the individual is a suspected terrorist, a known gang member, or the subject of an outstanding felony arrest warrant; or the detainer is issued in furtherance of an ongoing felony criminal or national security investigation.”]

### **C. Strategies for Noncitizens Awaiting Trial**

#### ***1. Where there is not yet an immigration hold/detainer; Who is subject to a detainer***

*The first thing a criminal practitioner should do when he finds out that his client is an alien and is in custody is to attempt to have that person released on recognizance or bail before any hold or detainer is placed.* When a defense attorney speaks with the defendant in custody the defendant should also be advised that he or she has a right to remain silent in the face of any interrogation by ICE or border patrol and that he or she should particularly be advised not to answer any questions concerning place of birth. Once an alien discloses that he or she is born outside the United States, it is the alien’s burden under immigration law to prove that he or she has lawful immigrant or non-immigrant status in the United States.<sup>4</sup>

For a criminal defendant awaiting trial, usually a detainer will not be issued against a defendant unless the defendant is either undocumented or out of status, in which case the defendant is already subject to removal, or if the defendant has lawful status but has prior convictions rendering the defendant deportable. Defendants who have lawful permanent resident status or other lawful status with no prior convictions which make them removable, should not have a detainer issued against them.

#### ***2. What to do when there is an immigration hold/detainer; Mandatory detention***

If a detainer has been issued, counsel should obtain a copy of the detainer from the criminal justice agency to which it has been issued. Defense counsel should check which boxes on the detainer form have been checked. A detainer could be issued for several alternative reasons: Temporary Detention; a warrant of arrest by INS was issued; deportation or removal has previously been ordered; a Notice To Appear or other charging document initiating removal proceedings has been served; or, INS is only investigating the alien.

If INS issues a detainer and does not assume custody of the alien, either by taking the alien into actual INS custody or by issuing a warrant of arrest, within 48 hours after the alien would otherwise be released by a criminal justice agency, excluding Saturday, Sundays and

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<sup>4</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 82 L.Ed. 2d 778, 104 S.Ct. 3479 (1984). See also § 1.1, *supra*, regarding initial warnings.

Federal holidays, then the criminal defense attorney should demand the alien's immediate release from custody from the criminal justice agency holding the prisoner.<sup>5</sup>

If the defendant is not immediately released the criminal justice agency is subject to a suit for damages and injunctive relief can be obtained to prevent further violations.<sup>6</sup> A writ of habeas corpus can also be filed to obtain the defendant's immediate release from custody.<sup>7</sup> A copy of such a writ is included in *Defending Immigrants in the Ninth Circuit*, Appendix 12-A.

Counsel should make sure the defendant has not signed a voluntary departure under safeguards. If the defendant has signed this form (Form I-274) then ICE has custody of the person. However, the noncitizen or her attorney retains the right to revoke the request for voluntary departure. To revoke a request for voluntary departure the alien's attorney must present a G-28 Form to the INS or the border patrol showing that the attorney is authorized to represent the alien. Before doing this, however, analyze the situation and check with immigration counsel, if possible. If the only other possibility for the defendant is removal, it may be better to accept the voluntary departure.

***Where there is an immigration hold, it may well be in the client's best interests not to be released from criminal incarceration.*** Immigration detention is worse than criminal incarceration. Immigration bond is unavailable for most criminal grounds for deportation. Even if bond is possible, immigration bonds require real property collateral and 10% cash deposit or full cash deposit and are set at \$1,500 or more. While detained by immigration authorities, the detainee can be moved hundreds of miles away, to another state and outside the jurisdiction of the Ninth Circuit. Conditions in immigration detention generally are even worse than in jails.

If a hold has been issued, defense counsel should consult with an immigration attorney concerning the alien's chances of being released on an immigration bond and possible relief from removal. A criminal defendant with a detainer must first post bond or be granted O.R. before the defendant will be picked up by INS. If it is possible to obtain release pending removal proceedings on an immigration bond, the criminal attorney can assist the defendant in seeking release on bail or O.R. on the criminal charge. If bond on the immigration case is *not* available, the criminal defense attorney will probably *not* want the alien to be released on own recognizance or bond on the criminal charges because then the alien will be taken into immigration custody.

***Which defendants are subject to "mandatory" detention by ICE?*** Under the mandatory detention provisions of INA § 236(c)(1), 8 USC § 1226(c), immigration authorities must "take into custody," and thereafter not release, a noncitizen who is *inadmissible* under grounds relating to moral turpitude, drug conviction, drug trafficking, prostitution, miscellaneous convictions, diplomatic immunity, human trafficking, money laundering and terrorist activities.<sup>8</sup> The

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<sup>5</sup> Many local criminal justice agencies incorrectly assume that a detainer requesting Temporary Detention authorizes detention for 5 days after a prisoner would otherwise be released confusing an INS request for Temporary Detention with the statutory period allowed to hold prisoners with out-of-county warrants.

<sup>6</sup> See e.g., *Gates v. Superior Court*, *supra*, 193 Cal.App.3d at p. 219-221 (interpreting prior "24 hour rule" of 8 CFR 287.3); *Cervantez v. Whitfield*, *supra*, 776 F.2d at p. 557-559 (stipulation concerning prior "24 hour rule.")

<sup>7</sup> See Section 12.4, *infra*.

<sup>8</sup> INA § 236(c)(1)(A) and (D), 8 USC § 1226(c)(1)(A) and (D).

Attorney General must also “take into custody,” and thereafter not release, a noncitizen who is *deportable* under any of the following grounds: conviction of one crime of moral turpitude committed within five years of last entry *if a sentence of one year or more of imprisonment was imposed*, convictions for two crimes of moral turpitude, an aggravated felony, a drug offense, a firearms offense or miscellaneous crimes (sabotage, espionage), and drug abuse/addiction or terrorist activities (no conviction required).<sup>9</sup> Notably, a person who is deportable for conviction of a crime of domestic violence, stalking, child abuse and/or neglect, or conviction of one crime involving moral turpitude within five years of admission *with a sentence imposed of less than one year*, is not subject to mandatory detention.<sup>10</sup> To see further discussion of mandatory detention, see basic immigration materials or see *Defending Immigrants In the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)), § 11.28.

A defendant who is not subject to mandatory detention still may be detained, but the person has the right to ask ICE and an immigration judge for release from immigration detention. Release can be denied based on a finding that the person is a flight risk or danger to the community. Criminal record such as one or more DUI convictions, or adult or juvenile dispositions with gang enhancements, often are held a basis to deny release. Otherwise, generally release will be granted to a defendant who is removable but is eligible to apply for some relief from removal, such as cancellation of removal or adjustment of status. In the best scenario, in some cases ICE will release persons from custody and might not even put them in removal proceedings, as a matter of prosecutorial discretion, if the person *does not have any significant criminal record*, has strong ties in the U.S., and meets other criteria.

### **Summary of Strategy:**

- Attempt to obtain your client’s immediate release on O.R. or bail before any hold or detainer is place;
- If your client signed a voluntary departure request you can revoke it. You should consult an immigration attorney before doing this;
- If the hold appears to be in error because the person is not removable (e.g., a permanent resident who does not have a deportable conviction), you or the immigration attorney can call ICE to get the hold removed.
- If your client is held more than 48 hours, excluding Saturdays, Sundays and Federal Holidays, beyond the time the defendant should be released on the criminal charge and the client has not signed a voluntary departure request you should seek your client’s immediate release from custody by threatening a false imprisonment or civil rights violation suit against the custodial agency, city or country and/or file a writ of habeas corpus;

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<sup>9</sup> INA § 236(c)(1)(B) and (C), 8 USC § 1226(c)(1)(B) and (C).

<sup>10</sup> INA § 236(c); 8 USC § 1226(c).



- If a detainer is filed against your client and your client is eligible for immigration bond, attempt to obtain your client's release on O.R., or bond on the criminal charge and then on the immigration matter after INS picks up your client. You should plan and coordinate this with an immigration attorney. *However, most criminal removal grounds make the alien ineligible for release on bond from immigration detention.*
- If your client will be deportable by reason of the current charge, consider a jury or court trial or submitting the matter on a preliminary examination transcript or police report or pleading guilty after a suppression motion (1538.5 PC), and then filing an appeal. See Note 2: Definition of Conviction. If the matter is on direct appeal when the defendant finishes his jail or prison sentence, ICE cannot use the conviction as a basis for deportation.

#### **D. Prisoners with Detainers Serving Sentences**

Detainers are routinely lodged against aliens serving sentences in jails or prisons if they are subject to deportation. Strategies include:

- During the criminal case, if the defendant is removable (i.e., undocumented, or has lawful status but has a deportable conviction), it is important to try to obtain a sentence that would not require the defendant's incarceration, in order to avoid contact with immigration.
- A defendant sentenced for an offense is not subject to being taken into custody by ICE until after completion of the defendant's sentence to confinement. ICE can take custody of the individual even if the defendant is released on probation or parole or supervised release. In relatively rare cases, removal hearings are held in prison, before the noncitizen completes his or her sentence.
- Warn a defendant who will be deported about the risk of federal prosecution for illegal re-entry into the United States following a removal or deportation. The penalties are especially severe if there is a prior conviction of an aggravated felony or certain other felony convictions. See Note 1: Defense Goals, Part D. "The Immigration Strike" and 8 USC §§ 1325, 1326
- Avoid illegal re-entry prosecution by getting voluntary departure rather than removal. *If the defendant has not been convicted of an aggravated felony*, and will not be applying for other immigration relief, he or she can request an immigration judge for pre-hearing "voluntary departure" rather than removal. Among other advantages, illegal re-entry following a voluntary departure is not a federal felony under 8 USC § 1325; like any unlawful entry, it is a misdemeanor and might be far less likely to be prosecuted. The client should wait to apply for voluntary departure from an immigration judge in detention, which may take a few weeks. Some ICE officers have detainees sign papers that they believe are voluntary departure, but in fact are self-removals.

## § N.6 Aggravated Felonies

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

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. They are the most damaging type of conviction for a noncitizen.

### A. Penalties for an Aggravated Felony 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 in all likelihood 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. Asylees and refugees convicted of an aggravated felony still can apply for adjustment of status with a waiver; the waiver will be denied if the government has “reason to believe” the asylee or refugee trafficked in drugs, or if the conviction was of a “dangerous or violent” offense. See §N.17 Relief.
- 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 *Defending Immigrants in the Ninth Circuit*, § 11.1

## **B. Penalties for an Aggravated Felony 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. 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. He then is deported again.

This penalty also applies to various offenses that are *not* aggravated felonies. See important discussion see § *N.1 Overview*, Part 4 The Immigration “Strike,” *supra*, as well as extensive discussion at *Defending Immigrants in the Ninth Circuit*, Chapter 9, § 9.50.

## **C. The 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. Both federal and state offenses can be aggravated felonies. A foreign conviction may constitute an aggravated felony unless the conviction and resulting imprisonment ended more than 15 years in the past.

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.4 Sentencing*), others are regardless of sentence. Outside of some drug offenses, even misdemeanor offenses can be held to be aggravated felonies.

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. 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 in § N.11 *Burglary*, or Chapter 9 of *Defending Immigrants in the Ninth Circuit*.

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; statute subsection noted after category)*

- **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.7 Crimes Involving Moral Turpitude

(For more information, see *Defending Immigrants in the Ninth Circuit, Chapter 4, including Appendix 4-A, Annotations and Chart of Crimes Involving Moral Turpitude under California Law*)

### Overview Box

- A. Is the Offense a Crime Involving Moral Turpitude (“CIMT”)?
- B. Does the Conviction make the Defendant Deportable under the CIMT Ground?
- C. Does the Conviction make the Defendant Inadmissible under the CIMT Ground?

Appendix 7-I Legal Summaries to Give to the Defendant

Appendix 7-II Cheat Sheet: Rules for When a CIMT is an Inadmissible or Deportable Offense

**Overview: Crimes Involving Moral Turpitude.** Because many offenses come within the immigration category of crimes involving moral turpitude (“CIMT”), criminal defense counsel must always keep this category in mind. There are two steps to analyzing CIMTs.

First, determine whether an offense is or might be a CIMT. Generally this requires *intent* to cause great bodily harm, defraud, or permanently deprive an owner of property, or in some cases to act with lewd intent or recklessness. See Part A below.

Second, if the offense is or may be a CIMT, see if according to the immigration statute formulae for CIMTs - based on number of convictions, when committed, sentence - the conviction would actually make this defendant inadmissible and/or deportable under the CIMT grounds. In some cases a single CIMT conviction will *not* make a noncitizen inadmissible and/or deportable. See Parts B and C below for these rules.

An administrative decision, *Matter of Silva-Trevino*, has made it impossible to tell whether certain offenses will be held CIMT's. Often the best course is to conservatively assume that a borderline offense is a CIMT, do the analysis to see if it will make the noncitizen defendant deportable and/or inadmissible, and warn the defendant accordingly. A waiver or some other defense strategy might be available. Hopefully the Ninth Circuit will overturn *Silva-Trevino*.

As always, remember that a single conviction might come within multiple immigration categories. For example, a CIMT offense might or might not also be an aggravated felony. Look up the section in the *California Quick Reference Chart* to check all categories.



**A. Is the Offense a Crime Involving Moral Turpitude? (including *Matter of Silva-Trevino*)**

A crime involving moral turpitude (“CIMT”) has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a “reprehensible act” with a *mens rea* of at least recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). Traditionally a CIMT involves intent to commit fraud, commit theft with intent to permanently deprive the owner, or inflict great bodily harm, as well as some reckless or malicious offenses and some offenses with lewd intent.

For criminal defenders, the first step to see if an offense is a CIMT is to consult the *California Quick Reference Chart*. However, because this area of the law is in flux, you also *must* be aware of the points in this Note. Note also that whether a particular offense constitutes a CIMT for immigration purposes is determined by federal immigration caselaw, not state rulings for purposes of witness impeachment or license limitations.

***How Matter of Silva-Trevino makes it harder to guarantee a conviction will not be a CIMT.*** To make a long story short,<sup>1</sup> currently it can be hard to determine if a conviction will be held to be a CIMT because of the administrative case, *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Under *Silva-Trevino*, in some cases an immigration judge will be able to go beyond the record of conviction and hold a hearing on the *facts* about the defendant’s conduct, to see if the defendant committed a crime involving moral turpitude. The judge can take testimony from the defendant, review police reports, etc., and may even consider facts not required to prove an element of the offense. Therefore, while counsel should strive to protect the defendant from a CIMT conviction by choosing the right plea or controlling the record of conviction, as long as *Silva-Trevino* remains in effect, the defendant might end up with a CIMT conviction.

***How to protect a client despite Silva-Trevino.*** There are two defense strategies that will protect a client from a CIMT conviction despite *Silva-Trevino*. ***If you succeed in negotiating a disposition according to these strategies, give the client a copy of the legal summary that appears at Appendix I following this Note.***

*1. With a divisible statute, plead specifically to conduct that is not a CIMT*

A “divisible statute” reaches conduct that is and is not a CIMT. It is clear that if the record of conviction specifically identifies elements that do not involve CIMT, the immigration judge may not go beyond that and may not conduct a fact-based inquiry under *Silva-Trevino*.<sup>2</sup> Thus for CIMT purposes, instead of creating a vague record of conviction, where possible one should plead to a specific offense that does not involve moral turpitude.

**Example:** Calif. Veh. Code § 10851 is divisible as a CIMT, because it covers both auto theft with intent to permanently deprive the owner of property (a CIMT), and joyriding

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<sup>1</sup> For further discussion of *Silva-Trevino* see Brady et al, *Defending Immigrants in the Ninth Circuit* (2011, [www.ilrc.org](http://www.ilrc.org)) or see Tooby, Kesselbrenner, “Living with *Silva-Trevino*” at [www.nortontooby.com](http://www.nortontooby.com).

<sup>2</sup> *Matter of Alfaro*, 25 I&N Dec. 417 (BIA 2011); *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008).

with temporary intent (not a CIMT). If the defendant specifically pleads to taking with temporary intent, then the conviction is not a CIMT. But if the record is vague between temporary and permanent taking, the immigration judge may conduct to determine the intent. She might take testimony from the immigrant, examine the probation report, etc.

Another commonly charged divisible statute is P.C. § 243(e). The offense is a CIMT if it involved use of actual violent force, but not if it involved offensive touching or other *de minimus* force. A specific plea to the latter prevents the offense from being a CIMT, even under *Silva-Trevino*.

## 2. Plead to an offense that requires intent of negligence or less

An offense involving negligence or less is not a CIMT. For example, it has long been held that simple drunk driving, even with injury or as a repeat offense, is not a CIMT.<sup>3</sup> See other offenses in the Chart that also should not be held to involve moral turpitude under any circumstances. *Caveat*: Because there are reports that some immigration judges may blur this rule under *Silva-Trevino*, a conviction for drunk driving coupled with a conviction for driving on a suspended license in the same incident might be held to be a CIMT, if the immigration judge were to (wrongly) combine the two offenses.

***The adverse Silva-Trevino rule only applies to CIMT determinations.*** If the immigration court does conduct a broad factual inquiry under *Silva-Trevino*, it may use the information only to determine if the offense involves moral turpitude, and not to determine if the conviction comes within other grounds of inadmissibility or deportability.<sup>4</sup>

**Example:** Mike pleads guilty to P.C. § 243(e), spousal battery. If this offense is committed with “offensive touching,” it is neither a CIMT nor a deportable “crime of domestic violence.” If instead it is committed with actual violence, it will be held a CIMT and a deportable crime of domestic violence.<sup>5</sup> Mike’s defender creates a vague record of conviction in which Mike pleads to the language of the statute, which does not establish whether the offense involved actual violence or an offensive touching.

Under *Silva-Trevino*, for CIMT inquiries only, an immigration judge may make a factual inquiry into Mike’s conduct. Based on this inquiry she might find that real violence was involved and the offense is a CIMT.

The judge may *not* use this information to hold that the offense is a deportable crime of domestic violence. Here the regular evidentiary rules known as the categorical approach apply, and the judge must base her decision only upon the reviewable record of conviction. Since the vague record does not establish that the offense involved actual

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<sup>3</sup> *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

<sup>4</sup> “This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that ‘stands apart from the elements of the [underlying criminal] offense.’” *Matter of Silva-Trevino*, 24 I&N Dec. at 699.

<sup>5</sup> See discussion of Calif. P.C. § 243(e) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), in § N. 9 *Domestic Violence*. A crime of domestic violence is defined at 8 USC § 1227(a)(2)(E)(i).

violence, she must find that Mike is not deportable under the domestic violence ground. *Note, however, that best practice is to identify “minimum touching” rather than leave the record vague.* Not only will it avoid a CIMT, but some immigration judges might make a mistake and apply the *Silva-Trevino* rule outside of CIMTs.

***Even if the offense is a CIMT it may not be an immigration catastrophe, depending on the individual case!*** Many immigrants have survived conviction of one or more CIMTs. In some cases, conviction of a single CIMT will not cause the person to be deportable and/or inadmissible. See Parts B and C. In other cases, a discretionary pardon (“waiver”) for CIMT might be available. Finally, it is quite possible that the Ninth Circuit will overturn *Silva-Trevino*.

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

***Who needs to avoid a deportable conviction?*** Permanent residents, refugees, F-1 students and other noncitizens with lawful status want to avoid being deportable, because they could lose their status. In contrast, most undocumented persons are not harmed by a deportable (as opposed to inadmissible) conviction, with these exceptions: persons who will apply for any form of non-LPR cancellation, or who have or will apply for Temporary Protected Status, want to avoid a deportable conviction, because it is a bar to such status. See discussion in *Note 1: Overview*.

To make a noncitizen deportable under the CIMT ground, the conviction must come within at least one of the following two categories.

### ***1. Conviction of two CIMTs since admission***

A noncitizen is deportable for **two or more convictions** of crimes involving moral turpitude that occur anytime after admission to the U.S. on any visa, or after adjustment of status.

**Example:** Stan was admitted to the U.S. in 1991. He was convicted of petty theft in 2002 and fraud in 2012. He is deportable for conviction of two CIMTs since admission.

There are two very limited exceptions, for convictions that are “purely political” or that arise in a “single scheme of criminal misconduct” (often interpreted to mean that the charges had to arise from the very same incident).

### ***2. One conviction of a CIMT, 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 (“CIMT”) 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.

***Avoid Deportability for CIMT by Pleading to a Six-Month Misdemeanor.*** A single CIMT misdemeanor with a maximum possible sentence of six months will not trigger the CIMT deportation ground, regardless of when the offense was committed. Unfortunately, a CIMT misdemeanor that carries a maximum possible sentence of one year will trigger the CIMT deportation ground if the offense was committed within five years of admission. This includes “wobbler” misdemeanors.

**Practice Tip:** Plead to *attempt* in order to reduce the maximum possible sentence. For example, attempted grand theft, when designated as or reduced to a misdemeanor, has a potential sentence of six months. Immigration will accept a sentence reduction under P.C. § 17, even if the motion is filed after removal proceedings are begun.<sup>6</sup>

***Plead to an Offense Committed more than Five Years Since the “Date of Admission.”*** Consider two situations: a person who was admitted to the U.S. with any kind of visa, and a person who entered without inspection, i.e. surreptitiously crossed the border.

Generally, if a noncitizen was admitted into the U.S. under any lawful visa – with a green card, on a tourist visa, with a border crossing card, or other status – that is the admission date that starts the five-year clock. This is true even if the person fell out of lawful status after the admission.<sup>7</sup>

**Example:** Mabel was admitted to the U.S. as a tourist in 2003. Her permitted time ran out and she lived here unlawfully for a few years. She married a U.S. citizen and through him “adjusted status” to become a lawful permanent resident in 2007. She was convicted of a CIMT that has a potential sentence of a year, for an offense she committed in 2010. Is she deportable under the CIMT ground?

No, she is not. To avoid being deportable for CIMT, Mabel needs five years between her admission date and the date she committed the offense. Her admission was in 2003, and she committed the CIMT in 2010. The fact that she was out of lawful status for some time and then adjusted status does not affect this.<sup>8</sup>

Note: If the person took a trip outside the U.S. for more than six months, or left the U.S. after being convicted, the rules are not yet clear. Consult an immigration expert.

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<sup>6</sup> *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

<sup>7</sup> Until recently, there was conflict between federal courts and the Board of Immigration Appeals as to what date is the date of admission for this purpose. Fortunately, the Board of Immigration clarified this and adopted the federal court rule, to the benefit of the immigrant, in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). For further discussion see Brady, “Practice Advisory: Immigration Authorities Clarify When One Moral Turpitude Conviction Will Make a Lawful Permanent Resident Deportable,” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>8</sup> See *Matter of Alyazji*, *supra*.

In contrast, if the person *initially entered without inspection*, e.g. surreptitiously waded across the Rio Grande River, and later “adjusted status” to become a lawful permanent resident, the admission date is the date he or she was granted lawful permanent residency.<sup>9</sup>

**Example:** Bernard entered without inspection in 1999. In 2003 he adjusted status to lawful permanent residence.<sup>10</sup> He was convicted of a CIMT which he had committed in 2008, and which had a potential sentence of a year or more. Bernard is deportable. His “date of admission” is his 2003 adjustment of status date, because he has no prior admission. He committed the CIMT in 2007, within five years after that date.

**Practice Tip:** Avoid deportability for one CIMT by working with the five years. If there were ongoing offenses, attempt to plead to an offense that happened later in time, after the five years elapsed. For example, if Bernard had committed an ongoing fraud offense, try to plead to an incident that happened outside of the five-year period, in 2008 or later.

### C. The CIMT Ground of Inadmissibility, 8 USC § 1182(a)(2)(A)

***Who wants to avoid being inadmissible?*** An undocumented person who wants to apply for relief will want to avoid being inadmissible, because it is a bar to relief. A deportable permanent resident would like to avoid being inadmissible because that could be a bar to relief from removal. An asylee or refugee wants to be admissible in order to apply for LPR status. A permanent resident who is inadmissible for crimes and travel outside the U.S. can lose their status and be barred from returning. In some cases, a waiver of inadmissibility will be available for these persons.

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

***Petty offense exception.***<sup>11</sup> 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 under the CIMT ground.

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<sup>9</sup> *Ibid*, and see Practice Advisory, *supra*, for more information.

<sup>10</sup> How could that happen? It is harder because Bernard entered without inspection. He could have married a U.S. citizen and had a visa petition submitted in 2001 or earlier, so he could adjust specially under INA § 245(i). Or he may have qualified through asylum, cancellation, or other special application.

<sup>11</sup> 8 USC § 1182(a)(2)(A)(ii)(II).

**Example:** Freia is convicted of felony grand theft, the only CIMT offense she's ever committed. (She also has been convicted of drunk driving, but as a non-CIMT that does not affect this analysis.) 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. The grand theft is reduced to a misdemeanor under PC § 17.<sup>12</sup>

Freia comes within the petty offense exception. She has committed only one CIMT, it has a potential sentence of a year or less, and the sentence imposed was one month. (For more information on sentences, see § N.4 Sentencing.)

**Youthful offender exception.**<sup>13</sup> This comes up more rarely, but can be useful for young adults. 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 CIMT ever, and while under the age of 18, ceases to be inadmissible as soon as five years have passed since the conviction or the 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 eight months and was released from imprisonment when he was 19 years old. He now is 25 years old. This conviction does not make him 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 CIMT 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).<sup>14</sup> Counsel should avoid having clients formally admit to offenses that are not charged with.

**Resource:** If you wish to check other consequences of a CIMT besides being a deportable or inadmissible conviction - e.g. when a CIMT conviction triggers mandatory detention or is a bar to cancellation -- see "All Those Rules About Crimes Involving Moral Turpitude" at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>12</sup> Reducing a felony to a misdemeanor will give the offense a maximum possible sentence of one year for purposes of the petty offense exception. *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

<sup>13</sup> 8 USC § 1182(a)(2)(A)(ii)(I).

<sup>14</sup> See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in *Defending Immigrants in the Ninth Circuit*, § 4.4 ([www.ilrc.org](http://www.ilrc.org)).



## Appendix 7 - I

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

***Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.***

***Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.***

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***If the record of conviction specifically identifies elements of an offense that do not involve moral turpitude, the conviction is not of a crime involving moral turpitude*** and the immigration judge may not go beyond the record to conduct a fact-based inquiry under *Silva-Trevino*. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008); *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (evidence outside of the record of conviction may not be considered where the conviction record itself demonstrates whether the noncitizen was convicted of engaging in conduct that constitutes a crime involving moral turpitude).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A crime with a mens rea of negligence or less does not qualify as a crime involving moral turpitude.*** See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 697 (AG 2008) (a crime involving moral turpitude requires "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.").

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Matter of Silva-Trevino permits an immigration judge to go beyond the record of conviction only to determine if the offense of conviction is a crime involving moral turpitude, and not to determine if it is a crime of violence or other category. “This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that ‘stands apart from the elements of the [underlying criminal] offense.’” Matter of Silva-Trevino, 24 I&N Dec. 687, 699 (AG 2008).***

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***When a California felony is designated or reduced to a misdemeanor, the offense has a potential sentence of one year for immigration purposes and can come within the petty offense exception to the moral turpitude inadmissibility ground. This is true regardless of when the offense is reduced, including after initiation of removal proceedings. La Farga v. INS, 170 F.3d 1213 (9th Cir. 1999); Garcia-Lopez v. Ashcroft, 334 F.3d 840 (9<sup>th</sup> Cir. 2003).***

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Conviction of a crime involving moral turpitude will cause deportability if the offense has a potential sentence of a year or more and was committed within five years of the “date of admission.” ***Generally if a noncitizen was admitted into the U.S. under any status, that date is the admission date that begins the five years. This is true even if the person fell out of lawful status after the admission and/or later adjusted status to permanent residence. Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011) (overruling Matter of Shanu, 23 I&N Dec. 754, 759 (BIA 2005).***

## APPENDIX 7 - II

### CHEAT SHEET – DOES THIS CONVICTION MAKE THIS INDIVIDUAL DEPORTABLE OR INADMISSIBLE UNDER THE MORAL TURPITUDE GROUNDS?

#### I. DEPORTABLE FOR MORAL TURPITUDE, 8 USC § 1227(a)(2)(A)

##### Deportable for *One* Conviction of a Crime Involving Moral Turpitude (“CIMT”), if:

- a) Convicted
- b) Of one CIMT
- c) That has a potential sentence of one year or more
- d) And was committed within five years after date of admission

To prevent deportability for a single CIMT:

- a) Avoid a “conviction” by getting pre-plea diversion or treatment in juvenile proceedings; *or*
- b) Plead to an offense that is not a CIMT; *or*
- c) Avoid a potential one-year sentence by pleading to a misdo with a six-month maximum sentence. Or in California plead to *attempt* to commit either a one-year misdo or a felony that can be reduced to a misdo, for a maximum possible sentence of six months; *or*
- d) Plead to an incident that happened more than five years after the “date of admission.” This is usually the date the person was first admitted into the U.S. with any kind of visa or card. Or, *if* the person entered the U.S. without inspection – i.e., never was admitted on any visa – it is the date that the person became a permanent resident by “adjusting status” within the U.S. If the person left the U.S. after becoming inadmissible for crimes, or for more than six months, get more advice.

##### Deportable for Conviction of *Two* or More CIMTs After Admission

- a) Both convictions must be after the person was admitted to the U.S. in some status, or adjusted status
- b) The convictions may not spring from the same incident (“single scheme”)

#### II. INADMISSIBLE FOR MORAL TURPITUDE, 8 USC 1182(a)(2)(A)

##### Inadmissible for One or More Convictions of a CIMT

***Petty Offense Exception*** automatically means the person is not inadmissible for CIMT.

To qualify for the exception:

- a) Defendant must have *committed* only one CIMT ever
- b) The offense must have a potential sentence of one year or less. Here a one-year misdo, or a felony wobbled down to a misdemeanor, will qualify for the exception.
- c) Sentence imposed is six months or less. For example, suspended imposition of sentence, three years probation, six months jail ordered as a condition of probation will qualify.

***Youthful Offender Exception*** applies rarely, but benefits youth who were convicted as adults. Noncitizen is not inadmissible for CIMT if he or she committed only one CIMT ever, while under the age of 18, and the conviction or resulting imprisonment occurred at least five years ago.

## § N.8 Controlled Substances

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

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**PRACTICE AIDS.** It may be helpful to take the following aids to court, and/or check them as you read this chapter:

**Defense Strategy Checklist.** Appendix I is a two-page checklist of alternative pleas, for permanent resident and non-permanent resident defendants.

**Legal Summaries to Give to the Defendant:** Appendix II contains short paragraphs that you can hand to the defendant, which the defendant can hand to her immigration defense lawyer or to the immigration judge if she is unrepresented. If you have obtained a plea that avoids an immigration consequence, the paragraph will explain this to them.

**Chart on Immigration Consequences of Drug Pleas.** Appendix III is a Quick Reference Chart that summarizes the immigration consequences of common California drug offenses.

**WARNING:** Even a first conviction for simple possession can be fatal for many immigrants. There are very few easy answers, and the law has changed recently. Please carefully consider the information in this chapter, and get advice if needed, before pleading a noncitizen to any offense relating to illegal drugs. See Part II for strategies.

## I. Overview of Penalties for Drug Offenses

For further discussion of how deportability, inadmissibility, and aggravated felony status work, see Note 1, Overview.

Laura, a permanent resident, has been charged with sale of methamphetamines. Ursula, an undocumented person, has been charged with possession of cocaine. What effect might a conviction have on their immigration status, or their hope of getting lawful status?

**Aggravated Felony.** This is the worst. All noncitizens want to avoid conviction of an offense that is a drug trafficking aggravated felony. It is a ground of deportability as well as a bar to almost all forms of relief. See further discussion at § N.6 *Aggravated Felonies*.

*What is a controlled substance aggravated felony?* A controlled substance offense can be a “drug trafficking” aggravated felony<sup>1</sup> 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. In the Ninth Circuit only, *offering* to sell a controlled substance is not an aggravated felony under either test.
- 2) If it is a state offense that is analogous to certain *federal drug felonies*, even those that do not involve trafficking, such as cultivation, distribution for free, maintaining a place where drugs are sold, or obtaining a prescription by fraud. With two exceptions, a possession offense never is an aggravated felony. The exceptions are possession of flunitrazepam (a date-rape drug), and in some cases a possession conviction where a prior drug offense was pled or proved for recidivist purposes.

Offenses that are deportable and inadmissible offenses but not aggravated felonies include most possession offenses, being under the influence, possession of paraphernalia, transportation for personal use, being in a place where drugs are used, and in the Ninth Circuit only, “offering” to commit any drug offense. See Part II below.

**Controlled Substance Deportability Grounds.** A lawful permanent resident (LPR) who is deportable can be stripped of his or her lawful status and permanently removed from the United States. As long as the person was not convicted of an aggravated felony, however, it is possible that some discretionary waiver or relief might be available.

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<sup>1</sup> See 8 USC § 1101(a)(43)(B), INA § 101(a)(43)(A).

*What is a deportable drug conviction?* Conviction of any offense “relating to” a federally defined controlled substance causes deportability. There is an automatic exception for a first conviction for simple possession of 30 grams or less of marijuana.<sup>2</sup> See Part II.D.

*What is deportable drug conduct?* A noncitizen who has been a drug addict or abuser since admission to the United States is deportable, even without a conviction.<sup>3</sup> See Part III.

**Controlled Substance Inadmissibility Grounds.** An undocumented person who is inadmissible because of a drug conviction or the drug conduct grounds is barred from applying for most types of lawful status. For example, the person will not be permitted to immigrate through a family member (unless, in some cases, the offense involved 30 grams or less of marijuana), or apply for non-LPR cancellation.

A lawful permanent resident who is inadmissible but not deportable because of a drug conviction or drug conduct grounds can keep her lawful status, *unless* she travels outside the U.S. After some years she may apply for naturalization to U.S. citizenship.

*What is an inadmissible drug conviction?* A noncitizen is inadmissible based on a conviction of any offense “relating to” a federally defined controlled substance, or attempt or conspiracy to commit such an offense.<sup>4</sup> A discretionary waiver of inadmissibility is available to some persons, but only for a first conviction for simple possession of 30 grams or less of marijuana – and the waiver often is not granted.<sup>5</sup>

*What is inadmissible drug conduct?* See Part III. A noncitizen may be inadmissible under the “conduct grounds” even absent a conviction, if:

- The noncitizen is a current drug addict or abuser<sup>6</sup>
- The noncitizen formally admits all of the elements of a controlled substance conviction, when that offense was not charged in criminal court,<sup>7</sup> or
- Immigration authorities have probative and substantial “reason to believe” that the person has ever participated in drug trafficking, or if she is the spouse or child of a trafficker who benefited from the trafficking within the last five years<sup>8</sup>

While the first two grounds are rarely charged, the “reason to believe” trafficking ground is a serious problem. See further discussion of conduct grounds in Part III, *infra*.

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<sup>2</sup> 8 USC § 1227(a)(2)(B)(i).

<sup>3</sup> 8 USC § 1227(a)(2)(B)(ii).

<sup>4</sup> 8 USC § 1182(a)(2)(A)(i)(II).

<sup>5</sup> 8 USC § 1182(h). See also Brady, “Update on Waiver under INA § 212(h)” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>6</sup> 8 USC § 1182(a)(1)(A)(iv).

<sup>7</sup> 8 USC § 1182(a)(2)(A)(i) provides that admission of a drug offense creates inadmissibility. Case law provides that this does not apply, however, if the charge was brought up in criminal court and resulted in something less than a conviction. See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in § 4.4 of *Defending Immigrants in the Ninth Circuit*.

<sup>8</sup> 8 USC § 1182(a)(2)(C).



**REASON TO BELIEVE.** It's not a pop song, it is the worst inadmissibility ground in immigration. A noncitizen is inadmissible as of the moment that immigration authorities gain substantial and probative "reason to believe" she has ever participated in drug trafficking.<sup>9</sup> A conviction is not necessary, and ICE can use evidence outside the record of conviction.

Typically ICE gets "reason to believe" from a trafficking conviction; an admission by the immigrant to an immigration judge or official; a credible report of an incident that did not result in a conviction but where there was strong evidence, e.g. lots of drugs in the trunk of the car at the border; and potentially a plea to trafficking in delinquency proceedings. This Note provides strategies for how to try to avoid this. You can't block ICE's ability to locate factual evidence, but you can avoid pleading a defendant -- especially a non-permanent resident -- to any offense that would give ICE automatic "reason to believe."

**"Reason to believe" destroys eligibility for almost all relief or status**, including family immigration, VAWA relief for domestic abuse survivors, TPS, or an asylee or refugee's ability to become a permanent resident. The only forms of relief that it might not destroy are LPR cancellation (if there is no trafficking aggravated felony conviction, just the "reason to believe"), a T or U visa for victims of crime or alien trafficking, the Convention Against Torture, and possibly, asylum and withholding (if no trafficking conviction).

**"Reason to believe" is not ground of deportability**, so an LPR who stays within the U.S. cannot be put in removal proceedings based solely on this. But if the LPR leaves the U.S., she can be refused admission back in and permanently lose her green card -- unless she qualifies for one of the forms of relief that "reason to believe" does not block.

**Trafficking in a controlled substance is a crime involving moral turpitude (CIMT).**

Trafficking in a controlled substance, but not simple possession of a controlled substance, has been held to be a CIMT. Counsel should assume that trafficking includes sale, offer to sell, possession for sale, manufacture and the like, as long as there is a commercial element. Assume that sale of an unspecified "controlled substance" is a CIMT. While generally a drug trafficking conviction is far more harmful than a CIMT conviction, it still is important to do the analysis especially if there are prior CIMT convictions. For further discussion of crimes involving moral turpitude, see § N.7 *Crimes Involving Moral Turpitude*.

## II. Defense Strategies

### A. Obtain a Disposition That is not a "Conviction" for Immigration Purposes

Generally, a disposition is a conviction for immigration purposes if in (adult) criminal court, there is an admission or a judicial finding of guilt, and some form of penalty or restraint is

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<sup>9</sup> 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

imposed.<sup>10</sup> A resolution that lacks these elements is not a drug “conviction” for any noncitizen, or any immigration purposes. For further information see Note 2, Definition of Conviction.

***Even if I avoid a conviction, are there still potential immigration consequences?***

Avoiding a conviction is extremely valuable, but at least one very dangerous consequence remains possible. Even without a conviction, a noncitizen is inadmissible if the government has “reason to believe” that the person ever was or assisted a drug trafficker. See the box above. In addition, a noncitizen can be found inadmissible or deportable if he or she is a drug addict or abuser, although this is less serious and less commonly charged than the “reason to believe” ground. See discussion of drug court, below.

***1. Juvenile Delinquency Disposition***

A juvenile delinquency disposition is not a “conviction” for immigration purposes because it is a civil delinquency finding. Therefore it is not a deportable or inadmissible conviction or aggravated felony.<sup>11</sup> Excellent! The only concerns are the conduct grounds, which do not require a conviction.

*Alert on “reason to believe” trafficking.* Especially if the juvenile is undocumented, but in any case, make every effort to plead to possession rather than a trafficking offense such as possession for sale or sale. See Box above. It will prevent an undocumented juvenile from ever immigrating through family member or through the Special Immigrant Juvenile application.

If you must plead to a trafficking statute, help avoid the “reason to believe” ground by pleading to transportation for personal use - or even distribution of drugs for no remuneration. While this is an aggravated felony in adult court (except for giving away a small amount of marijuana; see Part II.G.4), it is not in juvenile proceedings, since there is no conviction.

***2. Formal or Informal Pre-Plea Diversion; Note on Drug Court.***

*Formal diversion.* To be a conviction there must be an admission or a finding of guilt. If a formal pre-plea program is available, this is not a conviction for immigration purposes and is an excellent disposition. The only complication would be if the defendant also is required to admit facts relating to addiction or abuse, e.g. to admit being in danger of becoming an addict in a drug court setting. Being an addict or abuser since admission makes a permanent resident deportable.<sup>12</sup> While in many cases ICE does not pursue this kind of charge, a notation of direction to drug court may alert them to the possibility. If there is no other possible plea, admission of addiction is better than a conviction, but it is a dangerous. Ironically this may be less dangerous for an undocumented person: he or she is inadmissible only if the addiction/abuse is “current.” See Part III for more on abuse/addiction.

*Informal diversion.* Some counsel have obtained informal pre-plea diversion, especially in light of the terrible immigration consequences that can flow from a minor drug offense. With

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<sup>10</sup> 8 USC § 1101(a)(48)(A), INA § 101(a)(48)(A).

<sup>11</sup> *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

<sup>12</sup> 8 USC § 1227(a)(2)(B)(ii).

the client out of custody, ask the prosecution to defer the plea hearing so that the defendant can meet set goals such as community service, drug counseling, restitution, etc. – including goals beyond what normally might be required. In exchange, ask the prosecution to agree to an alternate plea (e.g. to a non-drug offense) or to no plea when the defendant is successful.

*DEJ may be useless to protect an immigrant.* Because programs such as DEJ and Prop 36 require a guilty plea, they are held to be convictions for immigration purposes, just like a regular conviction. But see possible exceptions in next section (DEJ with only an unconditionally suspended fine) and Part F (pleas from before July 15, 2011), below.

### **3. DEJ with Unconditionally Suspended Fine**

The Ninth Circuit held that California DEJ is not a conviction when the only consequence was an unconditionally suspended fine. The immigration definition of conviction requires there to be imposition of some form of penalty or restraint, and the court reasoned that here no penalty or restraint had been imposed. *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010). Some immigration advocates in California report success in making this argument to immigration judges. If counsel can succeed in getting an unconditionally suspended fine, this may well work to avoid a conviction – although a plea to a non-drug offense is more secure. Because this disposition is not well known, be sure to give the defendant a summary of the disposition and citation, found at **Appendix 8-II** following this Note.

### **4. California Infraction?**

While the law is not settled, there is a strong argument that a California infraction is not a “conviction” for immigration purposes.<sup>13</sup> Therefore if there are no drug priors, Calif. H&S Code § 11357(b) has two potential benefits. First, it might be held not to be a conviction at all. Second, even if it is a conviction, important immigration benefits apply to a first drug incident, involving simple possession of 30 grams or less of marijuana. See Part D, below.

### **5. Reversal of the Conviction on Appeal**

The Ninth Circuit has held that just *filing* an appeal will not prevent a disposition from being a conviction. If the conviction actually is *reversed* on appeal, however, the conviction is erased for immigration purposes.<sup>14</sup> It still is worthwhile to file regular appeals or “slow pleas” in appropriate cases, because of the chance that (a) the appeal will be sustained or (b) the Ninth Circuit rule is reversed someday, so that a conviction pending on appeal is treated as not having sufficient finality to constitute a conviction for immigration purposes.

### **6. Vacation of Judgment, Only if Based on Legal Error**

Vacation of judgment based on legal defect will eliminate the conviction for immigration purposes. This includes vacation of judgment pursuant to motions arguing ineffective assistance of counsel for any reason, including failure to warn of immigration consequences (writ of habeas

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<sup>13</sup> For more information see Yi, “Arguing that a California Infraction is Not a Conviction” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>14</sup> *Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011).

corpus), failure to give the immigration warning required by P.C. § 1016.5, withdrawal of plea for good cause under P.C. § 1018, or other order in which the court states that the conviction is vacated for cause. Vacation of judgment based *solely* on sympathetic factors or completion of probation or counseling requirements does not eliminate the conviction for immigration purposes. As with reversal on appeal, if the original conviction was for trafficking the government still might seek evidence to give it “reason to believe” the person trafficked.

**7. Disposition under DEJ, Prop 36, or P.C. § 1203.4 Is a Conviction for Immigration Purposes, Unless the Plea Occurred Before July 15, 2011 (but see Part 3, supra)**

Until July 14, 2011, a withdrawal of plea pursuant to “rehabilitative relief” such as DEJ, Prop 36, or Calif. P.C. § 1203.4 would eliminate a first simple possession conviction for immigration purposes. The Ninth Circuit has held that this will no longer work to eliminate convictions received after July 14, 2011, although it will work on convictions for simple possession or possession of paraphernalia from before that date.<sup>15</sup> See further discussion, including what to do if your client already pled guilty after July 14, 2011, at Part F, *infra*.

**B. Plead to a Non-Drug Offense, Including P.C. §§ 32, 136.1(b)(1)**

A plea to a non-drug offense will avoid inadmissibility and deportability based on a drug conviction. Of course, you must analyze the consequences of a non-drug conviction, but these may be far less severe or automatic than the immigration penalties for a drug conviction. This is an individual analysis: one defendant may be able to take a substitute plea to a crime involving moral turpitude or even a crime of violence, while another needs to avoid this. Offenses with little or no immigration effect include loitering, trespass, driving under the influence of alcohol rather than drugs, public fighting, resisting arrest, and others. See the *California Quick Reference Chart* for suggestions.

Accessory under the fact, P.C. § 32, 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” even if the principal committed a drug offense.<sup>16</sup> Two caveats: First, counsel must avoid a sentence imposed of a year or more on any single count of § 32, or it will be held an aggravated felony as obstruction of justice. Second, § 32 will be held a crime involving moral turpitude (CIMT) depending upon whether the principal’s offense is. Note that possession of a controlled substance is not a CIMT, while sale or offer to sell is a CIMT. Even if § 32 is treated as a CIMT, however, a CIMT is likely to be far less harmful than a drug conviction.

A plea to P.C. § 136.1(b)(1), non-violent attempt to persuade a victim or witness not to call the police, is not a drug offense. Because a felony is a strike, a prosecutor might be willing to consider it in a more serious case. Try to get a sentence of less than a year on any single count, although there is a good argument that it is not an aggravated felony even with a sentence of one year, because it lacks specific intent to assist the principal. It might be held a CIMT.

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<sup>15</sup> *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (*en banc*), overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) as applied to convictions after July 14, 2012.

<sup>16</sup> *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997),

**Making the Case: Explain to Judge and Prosecutor What a First, Minor Drug Conviction Does to an Immigrant.** This box is about how to argue for a sympathetic client with no drug priors. Consider the situation: A permanent resident, undocumented person with close family here, person from a country with terrible conditions, or other sympathetic noncitizen is charged with a first drug offense. She might be offered DEJ (don't take it) and little or no jail time. The truth is, this minor conviction can destroy her life and the life of her family.

- She will become *automatically deportable and inadmissible*.<sup>17</sup>
- The conviction will subject her to *mandatory immigration detention*<sup>18</sup> (*jail*) *for several months, usually hundreds of miles from home*. Even if she is eligible to apply for some kind of discretionary relief from removal, waiting for the hearing in detention will take months, and she will remain detained during any appeals. Losing the job or house is just the beginning. Children may be put in foster care, and many parents have permanently lost parental rights due to immigration detention. California residents often are detained in isolated areas in Arizona or Texas, far from family or counsel.
- Many persons will not be eligible for relief. For example, the undocumented spouse or parent of a U.S. citizen never can get lawful status through family if she has a drug conviction. She will be *deported to the home country*. With this conviction, she *never will be permitted to enter the U.S. again*.

Your goal is simply to get a plea to a non-drug offense or some other safer option set out in these materials. This may require aggressive or unusual advocacy, but if you win you can save a family. In immigration court, it is common to bring church members or tearful relatives to a hearing, present petitions from neighbors, bring in the children's small school awards (or the U.S. citizen children themselves), and any other steps to illustrate the stakes. Would that help in persuading a D.A. or judge? The final argument: The defendant knows that if there ever is a second drug charge, she won't get this consideration again.

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<sup>17</sup> Conviction of any offense relating to a federally defined controlled substance is an automatic ground for deportability (8 USC § 1227(a)(2)(B)(ii)) or inadmissibility (8 USC § 1182(a)(2)(A)(i)(II)).

<sup>18</sup> See 8 USC § 1226(c)(1), proving that a drug conviction requires mandatory detention without bond.

**C. For Lawful Residents Only: Create a Record Relating to an Unspecified “Controlled Substance”**

**A plea to an unspecified “controlled substance” will help a permanent resident who is not already deportable (e.g., who doesn’t have a prior deportable conviction). ICE (immigration prosecution) must prove that a noncitizen is deportable, and a vague plea and record of conviction will prevent it from doing this. Great! But with a few exceptions discussed below, this type of plea will not help any other immigrants.**

Immigration law defines a “controlled substance” as a substance listed in federal drug schedules.<sup>19</sup> California statutes such as H&S Code §§ 11350-52 and 11377-79 include some substances that are not on the federal schedules. Therefore, if the entire record of a conviction under these California statutes reveals only that the person was convicted of an unspecified “controlled substance” (as opposed to, e.g., methamphetamines), this record does not establish that the conviction is of an offense relating to a federally defined controlled substance. Therefore ICE cannot use it as a *deportable* drug offense.

This strategy of creating a vague record of conviction involving an unspecified “controlled substance” is called the ***Paulus defense***.<sup>20</sup> The *Paulus* defense may either save the day or be useless, depending upon the immigration situation. In summary:

- ***The Paulus defense will prevent a permanent resident who is not already deportable (e.g., who does not have a deportable prior conviction) from becoming deportable.***
- ***The Paulus defense will not protect an immigrant who must apply for relief from removal, a green card, or other status.*** This includes undocumented persons, permanent residents who already have a deportable conviction, and other immigrants. (The person can try to plead to a specific substance that is not the federal list – but that also has risks. See Part D).
- ***The Paulus defense can help a person who is convicted of the federal offense of illegal re-entry into the U.S. after removal.*** See 8 USC 1326. A prior drug conviction is a sentence enhancement, but conviction of an unspecified “controlled substance” will not do this.
- ***Note: Drug trafficking, even in an unspecified “controlled substance,” is a crime involving moral turpitude.*** Therefore, any defendant convicted of trafficking needs an analysis of the plea in term of CIMT consequences as well as drugs.

<sup>19</sup> See, e.g., INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B) (controlled substance aggravated felony); INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II) (inadmissibility ground); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (deportability ground); providing that controlled substance is defined at 21 USC § 802.

<sup>20</sup> See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). The Ninth Circuit upheld this defense for Calif. H&S C §§ 11377-79 (*Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007)) and for H&S C §§ 11350-52 (*Esquivel-Garcia v. Holder*, 593 F.3d 1025 (2010) (11350) and *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) (§ 11351 is divisible, but a review of the record identified tar heroin which is on the federal list).



The next sections discuss application of these rules in more detail.

**1. For a permanent resident who is not already deportable for a conviction, the Paulus defense will prevent deportability**

ICE (immigration prosecution) has the burden of proving that an immigrant with lawful status is *deportable* based on a conviction. If a lawful permanent resident (LPR) pleads to possession of an unspecified “controlled substance” and the rest of the record of conviction does not reveal the specific substance, ICE cannot prove that the conviction was for a federally-defined controlled substance and the person is not deportable for a drug conviction.

**Exceptions:** This defense does not apply to possession of paraphernalia or to maintaining a place where drugs are sold; there ICE does not have to prove a specific substance.<sup>21</sup> Trafficking in a controlled substance is a crime involving moral turpitude,<sup>22</sup> even of a state-defined federal offense. In general it is far better to plead to transportation of an unspecified “controlled substance” than to sale or even offer to sell.

**Bar to future relief.** If in the future the LPR defendant becomes deportable for any reason, the *Paulus* defense will not prevent this plea from being a drug conviction. (See Part 3.)

**How to create a vague record of conviction.** This is discussed in more detail in § N.3 *Record of Conviction*. In short, say that your client is charged in Count 1 with possession of cocaine, and the police report states that she admitted the cocaine was hers. Count 1 must be amended by thoroughly blacking out “cocaine” and writing in “controlled substance,” or dropped and a new count added. Or, the defendant might plead to the statute rather than the count, and make an oral or written statement at the hearing. The plea can provide details, e.g., “On June 3, 2012 at 8 p.m., at 940 A Street in Fresno, I knowingly possessed a controlled substance.”

Make sure no other document in the record of conviction identifies the drug, such as the plea agreement, plea colloquy transcript, minute order, abstract, and *any documents stipulated to as a factual basis for the plea*. (See Box below.) Make sure that the court clerk records that the count was amended to “controlled substance,” does not write “cocaine” on the minute order, and does not do anything else inconsistent with the plea. Where feasible, check the abstract.

**Danger: Any document stipulated to as the factual basis for the plea becomes part of the record of conviction for immigration purposes!!** Do not stipulate to a police report, pre-sentence report, charging paper, or other document that identifies the controlled substance (or any adverse fact). Instead, stipulate to text you have sanitized, such as an amended charge or written plea agreement,<sup>23</sup> or ask not to submit a factual basis if the plea is not for a conditional felony.<sup>24</sup> See other suggestions at § N.3 *Record of Conviction*.

<sup>21</sup> *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

<sup>22</sup> See, e.g., *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

<sup>23</sup> See *Willard* (2007) 154 Cal.App.4<sup>th</sup> 1329; *Holmes* (2004) 32 Cal.4<sup>th</sup> 432.

<sup>24</sup> Cal. P.C. § 1192.5 is inapplicable to misdemeanors. *In re Gross* (1983) 33 Cal.3d 561, 567–568.

## **2. Asylees/Refugees: Possessing a “Controlled Substance” is OK, Trafficking is Terrible**

**Asylee and refugee status and goals.** For further discussion of asylee/refugee status, see §N.17 *Relief*. An asylee is a person who came to the U.S. and was granted asylum after proving that if returned to the home country, he or she is likely to suffer persecution based upon race, religion, or similar factors. A refugee is a person from certain countries designated by the U.S., who was admitted to the U.S. as a refugee after making this same showing.<sup>25</sup>

A year after the grant of asylum or admission as a refugee, the refugee or asylee can apply to adjust status to become a lawful permanent resident (LPR, a green card). If at that point the person is inadmissible because of crimes, he or she can apply for a fairly liberal, discretionary waiver under 8 USC § 1159(c). This waiver potentially can waive all crimes inadmissibility grounds, with two exceptions: it cannot be used if ICE has “reason to believe” the person is a drug trafficker,<sup>26</sup> and as a matter of discretion it will not be granted for a conviction that is a “dangerous or violent” offense, absent exceptional hardship.

Before becoming a permanent resident, an asylee can be put in removal proceedings if convicted of a “particularly serious crime,” while a refugee can be put in proceedings if convicted of a deportable offense. The person can apply for adjustment of status as a defense to removal, and if eligible can apply for the § 1159(c) waiver as part of the adjustment application.

**Effect of convictions.** A possession offense relating to an unspecified “controlled substance” offense may not hurt the asylee or refugee. It will not make the refugee deportable, and it is not a particularly serious crime. At adjustment, the person will be inadmissible for a drug offense but hopefully can waive the conviction using the liberal waiver.

In contrast, a trafficking offense relating to an unspecified “controlled substance” has severe consequences. A drug trafficking conviction is an automatic “particularly serious crime” that can bring an asylee into proceedings, and we must assume this is true even with a *Paulus* plea, because the immigration judge is not limited to the record in a particularly serious crime determination. This conviction also will block an asylee or refugee’s ability to adjust status. The person will be inadmissible for a controlled substance, and the waiver of inadmissibility is not an option if ICE has “reason to believe” that the person engaged in drug trafficking.

## **3. The Paulus defense will not prevent the conviction from being a bar to relief. In that way it is useless for undocumented persons, LPRs who are already deportable, and others who need to apply for some way to remain in the U.S.**

An undocumented person, or an LPR who has become deportable (e.g., due to a prior conviction), or an immigrant with temporary status, will have will have to apply for new status or relief from removal. At that point the *immigrant* will have the burden of proof. A record of conviction that does not identify the controlled substance will not help them, because they will

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<sup>25</sup> See generally 8 USC §§ 1101(a)(42), 1158, 8 CFR 1208.

<sup>26</sup> A noncitizen is inadmissible if immigration authorities have “reason to believe” that she is or has been involved with drug trafficking. 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

have the burden of proving that the offense does *not* involve a federal controlled substance, based on the record of conviction.

**Example: Permanent Resident:** In 2008, permanent resident Paul pled guilty to sale of an unspecified “controlled substance.” This did not make him deportable. In 2012 Paul pled guilty to possession of cocaine. The 2012 conviction makes him deportable, and he is placed in removal proceedings.

Paul needs to apply for “LPR cancellation” as relief from removal. Conviction of an aggravated felony like a drug sale destroys eligibility for LPR cancellation. As an applicant for relief, *Paul* has the burden to prove that his 2007 sale conviction did *not* involve a substance on the federal list. With the vague record of conviction, he cannot prove this. His conviction will bar him from eligibility for LPR cancellation, and he will be removed. (If instead in 2007 Paul had pled to transportation for personal use, or even offering to sell, a controlled substance, the conviction would not be an aggravated felony for any purpose and he would have been eligible for cancellation.)

**Example: Undocumented Person.** Evangelina is undocumented, but she is married to a U.S. citizen and they have a U.S. citizen child. She is applying for a green card through her husband. Years ago she pled guilty to possession of a “controlled substance,” with no mention of the substance in the record. At the adjustment interview she will be required to produce documents from the record of conviction to prove that the controlled substance was not one on the federal list. Because she cannot do this, the adjustment application will be denied and she will be referred to removal proceedings.

Until recently, Evangelina and Paul would have been all right. The Ninth Circuit rule was that an inconclusive record of conviction is enough to qualify for relief. On September 17, 2012, however, in *Young v. Holder*<sup>27</sup> the Ninth Circuit reversed this precedent and held that an applicant for relief has the burden of proving that a conviction under a divisible statute is not a bar to eligibility. The person may prove this only with documents from the record of conviction. This rule is being applied retroactively to convictions from before September 17, 2012.

Evangelina could try to plead to a specific substance that is on the California but not federal list – but that carries some risk as well. See Part D.

#### ***4. Paulus may prevent the conviction from serving as a sentence enhancement in a future prosecution for illegal re-entry after removal/deportation***

A plea to a “controlled substance” is useful in one way to a defendant who will be removed: if the person is prosecuted for illegally returning to the U.S. after removal, the vague plea can prevent the drug prior from being used as a sentence enhancement. Illegal re-entry after removal is the most commonly prosecuted federal offense in the U.S. Prior conviction of an aggravated felony or of certain drug felonies serves as a sentence enhancement to this offense. See USSG § 2L1.2(b)(1), and 8 USC § 1326(b). The prosecutor must prove that the prior conviction is of the

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<sup>27</sup> *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc), partially overruling *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9<sup>th</sup> Cir. 2007), *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9<sup>th</sup> Cir. 2011) and similar cases.

type to support a sentence enhancement, i.e. must prove that a prior drug conviction involved a federally defined controlled substance. The *Paulus* defense can prevent this.<sup>28</sup>

#### **D. Plead to a Specific Controlled Substance That Is Not on the Federal List**

As discussed in Part C above, immigration law defines a “controlled substance” as a substance listed in *federal* drug schedules.<sup>29</sup> California statutes such as H&S Code §§ 11350-52 and 11377-79 include some controlled substances that are not on the federal schedules. One strategy is the *Paulus* defense, making a vague plea to an unspecified “controlled substance.” As discussed in Part C, *supra*, this does not help an immigrant who is trying to apply for lawful status or relief from removal. For that person, a strategy may be to plead to a *specific* substance that is on the California drug list, but not the the federal drug schedules.

In some cases this is a very good strategy, but it presents two challenges. First, it may be difficult to get the prosecution and court to agree to the legal fiction that the offense involved one of these particular substances. Second, there is the risk that a plea that is safe today may become dangerous in the future. The problem is that the federal list continues to add new substances. A state substance that was not on the federal list when the plea was taken in 2008 may well be on the federal list in 2013, when the applicant finally applies for status or relief. However, a plea to a specific non-federal substance could be a good defense for an applicant who will apply for relief fairly soon, e.g. is about to be taken into custody and must apply for cancellation of removal or immigration through a family visa.

For defenders who wish to try this, to see what controlled substances are on state but not federal lists, compare California substances with substances on the federal lists at 21 CFR § 1308.11 (sch. I) – 21 CFR § 1308.15 (sch. V). For Cal. H&S C §§ 11377-11379, as of September 2012 the following California substances appeared not to be on the federal lists: androisoxazole, bolandiol, boldenone, oxymestron, norbolethone, stanozolol, and stebnolone.<sup>30</sup>

The Ninth Circuit has acknowledged that not every substance in Cal. H&S C §§ 11350-11352 is on the federal list.<sup>31</sup> Advocates have identified at least one non-federal substance on the California list as of September 2012: acetylfentanyl (CA-Schedule I; 11054(b)(46)).

Advise the defendant to get expert advice before any trip abroad or any contact with immigration officials, in order to check the federal lists to make sure the substance is not on it.

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<sup>28</sup> See, e.g., *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) (§ 11351 is divisible for sentence enhancement purposes because it includes non-federal substances, but here the record identified a federally-defined substance).

<sup>29</sup> See, e.g., INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B) (controlled substance aggravated felony); INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II) (inadmissibility ground); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (deportability ground); providing that controlled substance is defined at 21 USC § 802.

<sup>30</sup> In 2007 the Ninth Circuit included these in a list of non-federal, i.e. immigration-safe, substances, in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 and n. 6 (9th Cir. 2007). Another substance on that list (apomorphine), as well as many identified by advocates in 2008, have since been added to the federal list and thus are no longer safe

<sup>31</sup> *Esquivel-Garcia v. Holder*, 594 F.3d 1025 (2010).

### **E. Conviction/s “Relating To A Single Offense Involving Possession For One’s Own Use Of Thirty Grams Or Less Of Marijuana”**

***Lawful permanent resident, refugee who is not deportable; asylee.*** This is an excellent disposition because the person is not deportable at all, based on a statutory exception to the drug deportation ground.<sup>32</sup> This exception will not apply if the person has a prior drug conviction,<sup>33</sup> but it still may apply if conviction of more than one offense arises out of a single incident involving possession of 30 grams or less of marijuana.<sup>34</sup> While not deportable, the permanent resident will be inadmissible, and should not travel outside the United States. The conviction is not a statutory bar to establishing the good moral character<sup>35</sup> that is required for U.S. citizenship, so it will not necessarily delay a citizenship application. A refugee or asylee who applies for adjustment of status to permanent residence must obtain an inadmissibility waiver under 8 USC § 1159(c), but the waiver would not be very difficult to win.

***Undocumented persons, deportable LPRs, and others who must apply for status.*** This is more problematic. The conviction will make the person inadmissible, and therefore barred from immigration through a family member. Qualifying applicants may request a waiver of the inadmissibility ground under 8 USC § 1182(h); however, that waiver can be difficult to win. The conviction is not a bar establishing good moral character.<sup>36</sup>

***Similar offenses that get the same treatment.*** The advantages of the 30 grams of marijuana provision extend to possession or being under the influence of marijuana or hashish (amount of hashish equivalent of 30 grams of marijuana);<sup>37</sup> to attempting to be under the influence of THC under Nevada law;<sup>38</sup> and to possession of paraphernalia for use with 30 grams or less of marijuana.<sup>39</sup> Possession of thirty grams of marijuana with additional elements, such as possession near a school or in jail, will not qualify.<sup>40</sup>

***Two convictions from the same incident.*** Two or more convictions that arise from the same incident involving simple possession of 30 grams of marijuana should not cause deportability.<sup>41</sup> A waiver under INA § 212(h) may require just one conviction, however.

***Proving the amount.*** The immigrant must prove the amount and type of drug, hopefully with evidence from the record of conviction, but this might be required. Where possible counsel should plead to Calif. H&S § 11357(b), or in a plea to § 11357(a) make it clear that the plea is to, e.g., possession of 29 grams of marijuana.

<sup>32</sup> INA § 237(a)(2)(B)(i), 8 USC § 1227(a)(2)(B)(i). Note also that asylees are not subject to deportation grounds.

<sup>33</sup> *Rodriguez v. Holder*, 619 F.3d 1077 (9th Cir. 2010).

<sup>34</sup> *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).

<sup>35</sup> INA § 101(f)(3), 8 USC § 1101(f)(3).

<sup>36</sup> INA § 101(f)(3), 8 USC § 1101(f)(3).

<sup>37</sup> See *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (extends to under the influence). It extends to hashish, although for the § 1182(h) waiver purposes it may only be as much hashish as is equivalent to 30 grams or less marijuana. See INS General Counsel Legal Opinion 96-3 (April 23, 1996). See also 21 USC § 802(16), defining marijuana to include all parts of the Cannabis plant, including hashish.

<sup>38</sup> *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005).

<sup>39</sup> *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).



## F. Special Rules Apply to Drug Paraphernalia

A conviction for possession of drug paraphernalia is a deportable and inadmissible offense, even if no specific controlled substance is identified on the record.<sup>42</sup> In other words, the *Paulus* defense will not work, even for a permanent resident. See Part C, *supra*.

Conviction for possession of paraphernalia can receive the same benefits as conviction for possession of 30 grams or less of marijuana, if the immigrant can prove that the paraphernalia was intended for use with 30 grams or less of marijuana.<sup>43</sup> See Part D, *supra*.

A conviction from before July 15, 2012 for possession of paraphernalia can be eliminated for immigration purposes by withdrawal of plea under *Lujan-Armendariz*, if it otherwise qualifies.<sup>44</sup> See Part F, *infra*.

Sale, possession for sale, or offer to sell drug paraphernalia may be charged as an aggravated felony, while simple possession will not be.<sup>45</sup> See Part G, *infra*.

## G. Eliminating A First Simple Possession Entered Prior To July 15, 2011, Under *Lujan-Armendariz*

A first conviction for simple possession of any controlled substance entered prior to July 15, 2011 can be eliminated for immigration purposes by withdrawal of plea pursuant to DEJ, Prop 36, PC § 1203.4, or other vehicle, if the client meets the requirements set out below. This is known as the *Lujan-Armendariz* benefit. The benefit has a cut-off date in 2011 the Ninth Circuit overruled the longstanding and beneficial *Lujan-Armendariz* decision, but decided to apply its decision prospectively only to pleas entered after the July 14, 2011 publication of the opinion.<sup>46</sup> Therefore, a plea to possessing a controlled substance entered after July 14, 2011, even if later withdrawn or expunged, will make a noncitizen deportable or inadmissible.

The *Lujan-Armendariz* benefit is available to pre-July 15, 2011 pleas if the following requirements are met:

- **Plea to First Possession, Possession of Paraphernalia, Giving Away Marijuana, but not Use or Under the Influence.** The *Lujan-Armendariz* benefit works on possession of any controlled substance, possessing paraphernalia,<sup>47</sup> and arguably on a first conviction for giving away a small amount of marijuana for free,<sup>48</sup> e.g. P.C. § 11360(b) (or (a) where the record states a specific small amount). The benefit does not apply to a plea to being

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<sup>42</sup> *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009).

<sup>43</sup> *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

<sup>44</sup> *Ramirez-Altamirano*, *supra*.

<sup>45</sup> A state offense that is analogous to certain federal drug felonies is an aggravated felony. See 21 USC § 863(a) (sale, offer to sale, use of mails or interstate commerce to transport, or import or export drug paraphernalia). There is no federal offense for simple possession of paraphernalia.

<sup>46</sup> *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) prospectively overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

<sup>47</sup> *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Calif. H&S C § 11364(a)).

<sup>48</sup> This is because under federal law, giving away a small amount of marijuana under 21 USC § 841(b)(4), where the record establishes that the amount was small.



under the influence.<sup>49</sup> See “Practice Advisory: Immigrant Defendants with a First Minor Drug Offense” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

- **Plea must be entered before July 15, 2011.** The plea must have been taken Under *Lujan-Armendariz*, a single conviction received on or before July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense is eliminated for immigration purposes by later withdrawal of plea pursuant to DEJ, Prop 36, or Calif. P.C. § 1203.4. The withdrawal or expungement could be post-July 14, 2011. This will not work on conviction for being “under the influence” regardless of date of conviction.
- **No violation of probation.** The *Lujan-Armendariz* benefit is not available if the criminal court found that the defendant violated probation before ultimately getting the rehabilitative relief.<sup>50</sup>
- **No Prior pre-plea diversion.** The Ninth Circuit held that the existence of a prior pre-plea diversion prevents a first possession conviction from coming within *Lujan-Armendariz*.<sup>51</sup>

The above two limits regarding probation violation and prior pre-plea diversion may not apply if the **defendant was under 21** when he committed the offense for which he violated probation, or for which he received pre-plea diversion.<sup>52</sup>

There are two important limits to the *Lujan-Armendariz* benefit. First, **it only applies in immigration proceedings held in the jurisdiction of the Ninth Circuit.**<sup>53</sup> If your client is arrested within the Ninth Circuit, he or she might be detained elsewhere, likely in the Fifth Circuit, and immigration proceedings might be held there.

Second, the client may be vulnerable to **removal proceedings before the plea actually is withdrawn.** While immigration counsel have strong arguments that this should not be the case with California relief,<sup>54</sup> this is a risk.

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<sup>49</sup> *Nunez-Reyes, supra*.

<sup>50</sup> *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (expungement under P.C. § 1203.4 has no immigration effect where criminal court found two probation violations before ultimately granting the expungement.)

<sup>51</sup> *Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

<sup>52</sup> *Lujan-Armendariz* extends protections of the Federal First Offender Act, 18 USC § 3607, to state convictions that could have qualified for relief under that Act. Section 3607(c) provides special rules and protections in cases in which the defendant was under the age of 21 at the time of committing the offense. Therefore this should be available to similarly situated defendants in state proceedings. See discussion in *Nunez-Reyes* practice advisory, discussed *supra*.

<sup>53</sup> *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (en banc),

<sup>54</sup> See discussion in *Defending Immigrants in the Ninth Circuit*, § 3.6 of *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9<sup>th</sup> Cir. 2004).

## H. What is a Drug Aggravated Felony, and How to Avoid It

An offense can be a “drug trafficking” aggravated felony<sup>55</sup> in either of two ways:

- As an offense that meets the general definition of drug trafficking, such as sale, possession for sale, manufacture with intent to sell, *or*
- As a federal drug felony or a state offense that is analogous to a federal drug felony, even if the felony does not involve trafficking, e.g. distribution of a controlled substance for free, fraudulent prescriptions

### 1. Possession and Less Serious Offenses

With two exceptions, a conviction for simple possession is *not* an aggravated felony. Possession does not meet the general definition of trafficking, and usually possession is treated as a misdemeanor under federal law so that it is not analogous to a federal felony.<sup>56</sup>

**Exception: Flunitrazepam.** A single conviction for possession of flunitrazepam (a date-rape drug) is an aggravated felony, because it is a felony under federal law.

**Exception: Recidivist Possession.** If the criminal court judge in a possession case makes a finding regarding a prior drug offense, or bases the sentence upon recidivism, a conviction for possession of any substance may be an aggravated felony.<sup>57</sup> If the prosecution wants a drug recidivist plea, either find a different way to accept the desired jail time or negotiate a plea to recidivist “under the influence” rather than possession, which is not an aggravated felony. Or, plead to one of the following offenses which are not aggravated felonies even with a prior drug offense: possession of paraphernalia, being under the influence, being in a place where drugs are used, loitering for drugs, and other minor offenses.

**PRACTICE TIP: Solicitation to possess a controlled substance under P.C. § 653f(d) might** not be a conviction of a deportable and inadmissible drug offense at all, at least in the Ninth Circuit. A Ninth Circuit panel stated its belief that this was true.<sup>58</sup> It analogized that statute to “generic” solicitation statutes (solicitation to commit various crimes) in Washington and Arizona have been held not to be an aggravated felony or deportable drug conviction, even when the crime solicited was drug trafficking.<sup>59</sup>

### 2. “Hidden” Aggravated Felonies

A state offense that is analogous to a federal drug felony will be an aggravated felony, even if the state offense does not involve trafficking. See 8 USC § 1101(a)(43)(B). Besides the few

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<sup>55</sup> See 8 USC § 1101(a)(43)(B).

<sup>56</sup> See *Lopez v. Gonzales*, 549 U.S. 47 (2006).

<sup>57</sup> See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (June 14, 2010); see also *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007). For further discussion, see Vargas, “Practice Advisory: Multiple Drug Possession Cases after *Carachuri-Rosendo v. Holder*” (June 21, 2010) at [www.immigrantdefenseproject.org/webPages/practiceTips.htm](http://www.immigrantdefenseproject.org/webPages/practiceTips.htm).

<sup>58</sup> See discussion at *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

<sup>59</sup> *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999).

possession offenses that are aggravated felonies described above, the following are or potentially are aggravated felonies.

***Forged or fraudulent prescriptions.*** Obtaining a controlled substance by a forged or fraudulent prescription may be an aggravated felony to the extent it matches the elements of the federal felony 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge). A far better plea is simple possession, or a straight fraud or forgery offense. For any ***forgery*** conviction, avoid a sentence of a year or more on any single count so as to avoid a forgery aggravated felony under 8 USC § 1101(a)(43)(R).

***Cultivation.*** Cal. Health & Safety Code § 11358, cultivation of marijuana, is categorically an aggravated felony as an analogue to 21 USC § 841(a)(1), (b)(1)(D).<sup>60</sup>

***Distribution of a specified controlled substance for free*** is an aggravated felony as a federal analogue, unless it involves giving away a small amount of marijuana. See Part 4, below.

***Sale of paraphernalia*** is a federal drug felony under 21 USC § 863(a), which also prohibits offering to sell or transporting (in interstate commerce) paraphernalia. ICE may charge that a similar conviction under Calif. H&S Code § 11364.7 is an aggravated felony as a federal analogue. Section 11364.7 penalizes one who with guilty knowledge delivers, furnishes, or transfers paraphernalia, or who possesses or manufactures paraphernalia with intent to deliver, furnish or transfer it. In contrast, mere possession of paraphernalia is a deportable offense, but not an aggravated felony. A paraphernalia offense does not need to specify a controlled substance in order to have immigration penalties. See Part E, *supra*.

***Maintaining a place where drugs are sold*** under H&S § 11366.5 may be charged as an aggravated felony as an analogue to 21 USC § 856. In contrast, presence in a place where drugs are used, H&S § 11365, is a deportable offense but not an aggravated felony.

***Possession of listed chemical having reason to believe it will be used to manufacture a controlled substance*** is a federal felony under 21 USC § 841(c)(2).<sup>61</sup>

### 3. ***Not Possession for Sale: H&S Code §§ 11351, 11359, 11378***

Possession for sale of a specific controlled substance is a bad plea. It is a deportable and inadmissible conviction and an aggravated felony. A California appeals court found that it was ineffective assistance of counsel not to advise a noncitizen defendant that for immigration purposes, it would be better to “plead up” to transportation or offering to sell than plead to possession for sale.<sup>62</sup>

Possession for sale of an unspecified “controlled substance” is not a good plea, but it would prevent a permanent resident from becoming deportable. See discussion at Part C. It

<sup>60</sup> *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9<sup>th</sup> Cir. 2008).

<sup>61</sup> *Daas v. Holder*, 198 F.3d 1167 (9<sup>th</sup> Cir. 2010).

<sup>62</sup> See *People v. Bautista*, (2004) 115 Cal.App.4<sup>th</sup> 229, 8 Cal.Rptr. 3d 862).

would be far better to plead up to transportation of an unspecified controlled substance, however, because possession for sale gives ICE “reason to believe” the person is a trafficker, a dangerous inadmissibility ground.

#### **4. How to Plead to Trafficking Statutes, H&S C §§ 11352(a), 11360(a), 11379(a)**

Fortunately for immigrant defendants, California trafficking statutes contain some reasonable options. In particular, transportation for personal use is a deportable and inadmissible drug offense, but not an aggravated felony. Here are suggestions for possible pleas, organized by the immigration status of the defendant.

Note that based on a 2012 decision, you should NOT plead to “sale *or* transport,” or “sale *or* offer to sell,” or the whole statute in the disjunctive (“or”). This provides no benefit except perhaps in a subsequent prosecution for illegal re-entry.

##### **a. Lawful Permanent Resident (LPR) or who is not already deportable**

This group includes LPRs who are not already deportable, e.g. who don’t have a prior conviction that makes them deportable.

##### **i. Transportation for personal use of an unspecified “controlled substance” with a vague record of conviction.**

See Part C, *supra*, for how to create this plea, and why it works for permanent residents. This and the next option are the best pleas for an LPR under these statutes. It will not make the LPR deportable, although it will make her inadmissible. It is not an aggravated felony.

What happens to an LPR who is not deportable, is inadmissible, and does not have an aggravated felony conviction? The person has the legal right to continue living as an LPR in the United States. She may renew a 10-year green card, and after five years of good behavior (“good moral character”) the person can apply for naturalization to U.S. citizenship, despite the fact that she has an inadmissible conviction. Technically, with this conviction the LPR may be able to travel outside the U.S. and return<sup>63</sup> – but the person must not attempt this without retaining an expert immigration attorney in case of problems.

##### **ii. Transportation for personal use of a specific California substance that (currently) is not on the federal drug list, under § 11352 or 11379.**

See Part D, *supra*, for how to create this plea and why it works. On the good side, because immigration requires a substance defined under federal law, this plea means that the

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<sup>63</sup> Upon a return from a trip outside the U.S. a permanent resident is not considered to be making a new admission, unless she falls within certain exceptions. One exception is if immigration authorities can *prove* that she is inadmissible for a crime. See 8 USC § 1101(a)(13)(C). With a vague record, ICE cannot prove that this conviction relates to a federal substance and makes the person inadmissible. The problem is that ICE could go outside the record to find sufficient “reason to believe” that the LPR had engaged in trafficking in a federally defined controlled substance, and make her inadmissible for that reason. In that case, the person must qualify for relief such as LPR cancellation, or she will be denied re-admission, lose her green card and be “removed.”

person is neither deportable nor inadmissible for a drug conviction. On the bad side, ICE still could try to hold the person inadmissible if there is evidence outside the record that creates sufficient “reason to believe” the person was involved in trafficking. Moreover, *in the future the carefully selected non-federal substance may be added to the federal lists*. If that happens, the person will have a deportable and inadmissible drug conviction, retroactive to the date of plea. That will be equivalent to the next option, which is pleading to transportation of a “regular” controlled substance that is on the federal list. However, this plea is still well worth trying to get, for just the immediate benefit of avoiding deportability and mandatory immigration detention.

**iii. *Transportation for personal use of a controlled substance that is on the federal list – i.e., any common controlled substance.***

The LPR will be deportable and inadmissible, but at least will not have an aggravated felony conviction. If DHS identifies her, she will be put in immigration detention and removal proceedings. If otherwise eligible, this conviction will not bar the person from LPR cancellation, asylum, withholding or Convention Against Torture (relief based upon threat of persecution if the person is returned to home country), and the T and U visas (for victims of certain kinds of crimes or of severe alien trafficking). See §N.17 Relief.

**iv. *Offering to distribute or sell an unspecified controlled substance, a substance that is not on the federal list, or a “regular” controlled substance.***

In immigration proceedings arising within Ninth Circuit states, offering to sell or distribute is ***not an aggravated felony***, on the theory that solicitation is not included in the statutory definition of the drug trafficking aggravated felony.

Note that three drawbacks to “offering” make transportation for personal use by far the better plea. First, in immigration proceedings held *outside* Ninth Circuit states, offering to sell or distribute is an aggravated felony. Thus if the person is detained and transferred to Texas, or flies into New York, the defense is lost. Or, Congress could eliminate the offering defense. Second, a plea to offering to *sell* will bring the LPR within the nasty inadmissibility ground based on ICE having “reason to believe” that person is a drug trafficker. A plea to offering to distribute without remuneration may avoid this, because “reason to believe” requires a commercial element. Also, see next paragraph regarding distribution of marijuana. Third, trafficking in drugs is a crime involving moral turpitude.

**v. *Giving away a small amount of marijuana (or offering to do so)***

This is a deportable and inadmissible offense, but at least should not be held an aggravated felony. In general, distribution without remuneration of a drug is an aggravated felony for immigration purposes, because it is a felony under federal law. The exception is that distribution without remuneration of a small amount of marijuana is not an aggravated felony, because it is a misdemeanor under federal law. (Another advantage is that this plea alone does not provide ICE with “reason to believe” the person trafficked, because that inadmissibility ground requires a commercial element and does not include giving away.)

The U.S. Supreme Court will decide what kind of evidentiary requirements and burden of proof will apply to establish that the conviction was for giving away a small amount of marijuana.<sup>64</sup> A plea to Cal. H&S § 11360(b) specifically stating “giving away” is best. A plea to giving away a specific small amount of marijuana under § 11360(a) also should work.

**PRACTICE TIP:** For a first offense, instead of “giving away a small amount of marijuana,” which avoids an aggravated felony but has other consequences, consider fighting very hard for a plea to *simple possession of 30 grams or less of marijuana*, e.g. under § 11357(b) or § 11357(a) designating 29 or 30 grams. This will prevent an LPR client from being deportable at all, and from going into mandatory detention for months, with all the attendant risk and costs. It may enable an undocumented client to immigrate through family or qualify for other relief. Remind the judge and D.A. that this is a one-time-only deal just for immigrants with no drug priors, in recognition of the enormous stake they and their families have in the U.S.

*vi. Sale, or Distribution of, an Unspecified Controlled Substance.*

This will not make the LPR deportable, because ICE will not be able to prove that the offense involves a federally-defined substance. This is an enormous advantage. However, the plea will prevent an LPR from ever becoming a U.S. citizen and put her at enormous risk if she ever becomes deportable. A plea to transportation or even offering to sell is much better.

*vii. Sale, or Distribution of, a Controlled Substance that is on the California but Not the Federal List*

See discussion at Part D, *supra*. Unless and until the California substance is added onto the federal drug schedules, the conviction is not a deportable or inadmissible drug conviction or aggravated felony for any purpose. It is a gamble, however: if federal authorities ever add the substance to the list, the person will be deportable and have an aggravated felony.

*viii. All the Other Verbs: Sale, Give Away, “Sale or Transportation” of a Specific Substance That is On the Federal List*

If the plea is to a “regular” controlled substance, e.g. meth, cocaine or heroin, then any plea that includes sale or distribution is an automatic deportable and inadmissible conviction, and an aggravated felony conviction, for all purposes (with the exception of distribution of marijuana, as discussed at Part v, *supra*.) A plea to the language of the statute in the disjunctive provides no advantage here.

**b. Goals for Asylees and Refugees**

See discussion at Part C.2, *supra*. Note that this is a complex topic where the stakes are high: deportation to a country where the person is likely to be persecuted for race, religion, etc. This is a very good time to get expert immigration assistance. The most crucial advice is that an asylee or refugee needs to avoid any conviction, whether for a specified or unspecified substance, that involves trafficking. If possession is not possible, transportation for personal use

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<sup>64</sup> See *Moncrieffe v. Holder*, 132 S. Ct. 2791 (U.S. 2012) (certiorari).



is the best plea, and offering to give away drugs for free has some advantage even though it is an aggravated felony. Offering to sell is bad.

**c. Pleas For Undocumented Persons, Permanent Residents Who are Deportable, and Others Who Must Apply for Status or Relief**

We define this diverse group as being already deportable (“removable”<sup>65</sup>) for various reasons. It includes a lawful permanent resident (LPR) who is already deportable due to a prior conviction, an undocumented person who never had lawful status, and someone with temporary status who wishes to get more. If they are to stay in the United States this group eventually must apply for immigration status or relief from removal.

***Not inadmissible: Transportation for personal use of an offense listed on the California but not the federal drug schedules.*** This conviction will not make the person inadmissible. There is the risk that ICE will gather sufficient evidence from outside the record of conviction to establish “*reason to believe*” that the person participated in drug trafficking, which is a very bad ground of inadmissibility, but you cannot prevent that. Unless the government does that, the person can apply for most forms of relief for which they are otherwise qualified, e.g. adjustment of status based on asylee/refugee status or family immigration; non-LPR cancellation; LPR cancellation, etc.

***Any other offense will make the person inadmissible for a drug conviction – but some relief exists.*** At that point the question is, what relief is available to a person in that situation. In brief, LPR cancellation can waive any offense other than an aggravated felony. A person who is inadmissible for drugs, and at least technically who has a drug aggravated felony, can apply for a T or U visa as a victim of severe alien trafficking or certain crimes. Any drug trafficking offense is a bar to asylum and withholding, but transportation for personal use is not. The Convention Against Torture is not barred by any conviction. See Part IV, *infra*. See also § N.17 *Relief*, and for a full discussion see Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, Chapter 11 ([www.ilrc.org](http://www.ilrc.org)).

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<sup>65</sup> There is a more technical definition of removable that applies to persons who entered without inspection versus those who overstayed visas – but for our purposes, the point is that these people can be removed unless they qualify for relief or status.

**Review: Rules on the Burden of Proof in Immigration and Federal Criminal Proceedings.** If you create a vague record of conviction, e.g. a plea to an unspecified “controlled substance,” the party that has the burden of proof will *lose*.

- ✚ Immigration prosecutors (ICE) have the burden to prove by clear and convincing evidence that an LPR is deportable based on a conviction.<sup>66</sup>
- ✚ As of 2012 the immigrant has the burden to prove that a conviction is not a bar to relief from removal.<sup>67</sup> Assume he or she also has to prove that the conviction is not a bar to adjustment of status, naturalizing to U.S. citizenship, and all other applications.
- ✚ Immigration authorities must prove that an LPR who returns to the U.S. after a trip abroad is inadmissible based upon a conviction.<sup>68</sup> Or, they can prove that they have substantial “reason to believe” the person ever drug-trafficked, and they may use evidence from outside the record of conviction to prove this inadmissibility ground.
- ✚ In a federal prosecution for illegal re-entry after removal, the prosecutor must prove that a prior conviction involves a federal drug, to qualify as a sentence enhancement<sup>69</sup>

### **III. Conduct-Based Grounds: Government has “Reason to Believe” Involvement in Trafficking; Admission of a Drug Trafficking Offense; Drug Abuser/Addict**

In a few cases, a noncitizen will become inadmissible or deportable based on conduct, with no requirement of a conviction. As a criminal defense attorney you cannot control whether there is evidence of conduct, but you can avoid structuring pleas that admit the conduct and thereby reduce the chance of negative immigration consequences. Note that an aggravated felony is not a “conduct-based” ground; a conviction always is required.

#### **A. Inadmissible for “Reason to Believe” One Engaged in Drug 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 plea to sale or offer to sell a controlled substance is sufficient. 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 own statements.

*Immigration effect depends on status.* For undocumented persons this inadmissibility ground is quite severe: it is almost impossible ever to obtain permanent residency or any lawful

<sup>66</sup> 8 USC § 1229a(c)(3).

<sup>67</sup> *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc), partially overruling *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9<sup>th</sup> Cir. 2007), *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9<sup>th</sup> Cir. 2011) and similar cases.

<sup>68</sup> See 8 USC 1101(a)(13)(C) and *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

<sup>69</sup> *U.S. v. Leal-Vega*, 680 F.3d 1160 (9<sup>th</sup> Cir. 2012).

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).

*Defense strategies:* To avoid being inadmissible under this ground, follow instructions above for pleading to a non-drug related offense a disposition that is not a conviction. Any drug conviction will severely cut down a deportable person's potential to get relief, but for at least some purposes a conviction for possession is far better than for sale or offer to sell. A plea to distribution without remuneration of a small amount of marijuana is not an aggravated felony. 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.

## **B. Inadmissible or Deportable for Being a Drug Addict or Abuser**

A noncitizen is inadmissible if he or she currently is a drug addict or abuser, and is deportable if he or she has been an addict or abuser at any time after admission into the U.S.<sup>70</sup>

Criminal defenders should consider this ground where a defendant might have to admit, or be subject to a finding, about addiction or abuse in order to participate in a "drug court" or therapeutic placement like CRC. This might alert immigration authorities and provide a basis for a finding of addiction or abuse. Otherwise, in practice immigrants rarely are charged under this ground. The abuser/addict ground is not very commonly charged; if the choice is between a conviction for possessing a federally defined controlled substance versus admitting abuse or addiction, it is better to do the latter.

The statute provides that the abuse or addiction must relate to a federally defined controlled substance. In drug court, one option is for a person to admit he or she is in danger of becoming addicted to a substance that appears on the California schedule but not the federal. See Part B.4, *supra*. This ground is not triggered by an acceptance of drug counseling, e.g. as a condition of probation, where there is no admission or finding of addiction or abuse.

## **C. Formally Admitting Commission of a Controlled Substance Offense that was Not Charged in Criminal Proceedings**

A noncitizen "who admits having committed, or who admits committing acts which constitute the essential elements" of any offense relating to a federally defined controlled substances is inadmissible, even if there is no conviction.<sup>71</sup> This is a formal admission of all of

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<sup>70</sup> INA § 212(a)(1)(A)(iv), 8 USC § 1182(a)(1)(A)(iv) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

<sup>71</sup> INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II).

the elements of a crime under the jurisdiction where the act was committed. The Ninth Circuit stated that an admission at a visa medical appointment may qualify as an admission.<sup>72</sup>

Where a conviction by plea was eliminated for immigration purposes under *Lujan-Armendariz*, the old guilty plea may not serve as an “admission” for this purpose. Neither can a later admission, for example to an immigration judge. The Board of Immigration Appeals has held that if a criminal court judge has heard charges relating to an incident, immigration authorities will defer to the criminal court resolution and will not charge inadmissibility based on a formal admission of the underlying facts.<sup>73</sup> However, counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in criminal court.

#### **IV. Eligibility for Relief for a Non-Citizen with a Drug Conviction**

See also materials at § N. 17 *Relief*. For a comprehensive discussion of eligibility for relief and status, and criminal bars, see Chapter 11 of Brady, Tooby, Mehr and *Junck*, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)).

**Cancellation for Lawful Permanent Residents.** If the LPR has the required seven years and can meet other requirements, he or she can waive any offense other than an aggravated felony. Remember that a vague record will not prevent an offense from being an aggravated felony for purposes of relief. 8 USC § 1229b(a).

**Visas for victims of severe alien trafficking (T) or certain crimes (U).** The T or U visa is not barred by a drug conviction, and technically is not barred by an aggravated felony, although in practice it may be very hard to get a grant. 8 USC § 1101(a)(15)(T), (U). For more information go to <http://www.ilrc.org/info-on-immigration-law/u-visas> or [www.uscis.gov](http://www.uscis.gov).

**Asylum, Withholding, Convention Against Torture.** Asylum is barred by an aggravated felony conviction, but not by a non-trafficking drug conviction such as possession or transportation for personal use. Withholding of removal, which requires a higher burden of proving likely persecution, is barred by a drug trafficking conviction, but not by all other aggravated felonies. The Convention Against Torture, which requires proof that the if deported the person is likely to be tortured by the government or a group the government is unwilling or unable to control, is not barred by any conviction. See 8 USC §§ 1154, 1231(b)(3), and for Convention Against Torture, 8 CFR 208.16-208.18.

**Asylee and Refugee Adjustment.** A person who is an asylee or refugee can apply to adjust status to permanent resident, anytime starting a year after the asylum grant or admission to the U.S. as a refugee. At that time the person must be admissible or if inadmissible, eligible for a waiver of inadmissibility. The humanitarian waiver at 8 USC § 1159(c) will waive any ground of inadmissibility, including inadmissibility for conviction of a drug offense, *unless* the government has “reason to believe” that the person ever participated in trafficking.

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<sup>72</sup> *Pazcoquin v. Radcliffe*, 292 F.3d 1209, 1214-15 (9th Cir. 2002).

<sup>73</sup> See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (PC § 1203.4 expungement); *Matter of G*, 1 I&N Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute);

**Appendix 8-I Checklist: Controlled Substance Strategies For  
LAWFUL PERMANENT RESIDENTS (and some Asylees, Refugees)**

**A. No or Minor Consequences for LPR or Refugee Who is Not Deportable, or Asylee**

- Plead to a non-drug offense (check to see if this has other consequences)
- Poss of an unspecified “controlled substance” is not a deportable offense, but is an inadmissible offense. This defense does not work with poss of paraphernalia or being where drugs are used
- Not a conviction: Delinquency disposition for non-trafficking offense
- Not a conviction: Formal or informal pre-plea diversion for non-trafficking offense
- Not a conviction: Non-trafficking conviction reversed on appeal, or vacated for legal defect
- A single simple possession, or poss of paraphernalia, plea from before July 15, 2011 with successful DEJ, Prop 36, P.C. 1203.4; but see additional *Lujan* requirements and limitations
- First possession of a controlled substance under Calif. law that is not on federal drug schedules. Not deportable or inadmissible. (But if someday substance is added to federal schedules, then the conviction will be deportable and inadmissible)

**B. First Simple Possession of 30 grams or less marijuana or paraphernalia for use with mj**

- *Not a deportable offense, but is inadmissible and a § 212(h) waiver is hard to obtain.*

**C. Not Deportable – But Inadmissible for “Reason to Believe” Trafficking**

- *Might bar an LPR who already is deportable from getting relief*
- *Might cause an LPR who travels outside the U.S. to be refused admission upon return*
- *Will prevent an asylee or refugee from getting a green card*
- Trafficking Conviction with unspecified controlled substance (e.g. possession for sale of “a controlled substance”) where strong evidence of the substance exists
- Delinquency disposition for sale, possession for sale
- Trafficking conviction that is reversed on appeal or vacated for legal defect, or perhaps pre-plea diversion, where ICE could access strong evidence of trafficking

**D. Deportable & Inadmissible – But Not an Aggravated Felony or “Reason to Believe”**

- *LPR, Refugee can be put in removal proceedings, but might be eligible for relief*

- Conviction of any non-trafficking offense, e.g. possession of specified controlled substance under H&S 11350, 11357, 11377 (except, see Hidden Aggravated Felonies below)
- Conviction of transportation for personal use under H&S §§ 11352(a), 11360(a), 11379(a)
- Conviction of “offering” to commit any offense (only good in Ninth Circuit; and very bad for asylees, refugees) under §§ 11352, 11360, 11379
- Possession of paraphernalia even with unspecified controlled substance, i.e. H&S 11364
- Be in place where drugs are used
- Giving away a small amount of marijuana

**E. Obvious and Hidden Aggravated Felonies – Avoid them!**

- Sale, possession for sale, cultivation, manufacture, distribution without remuneration (except for small amount of marijuana) and, outside the Ninth Circuit, solicitation, offer to sell
- Sale of paraphernalia
- Possession of flunitrazepam (date-rape drug)
- Possession where a prior drug offense is pleaded and proved for recidivist sentence
- “Sale or offer to sell” “Sale or transportation for personal use” “We plead to the language of § 11379(a) in the disjunctive” where record identifies a specific controlled substance
- Obtain prescription controlled substance by fraud

- Maintain place where drugs are sold

**Checklist: Strategies For UNDOCUMENTED PERSONS,  
DEPORTABLE PERMANENT RESIDENTS, and Others Who Need Status**

**A. No Controlled Substance Consequences for This Group**

- Plead to a non-drug offense (check to see if this has other consequences)
- Not a conviction: Delinquency disposition for non-trafficking offense
- Not a conviction: Formal or informal pre-plea diversion for non-trafficking offense
- Not a conviction: Non-trafficking conviction reversed on appeal, or vacated for legal defect
- A single simple possession, or poss of paraphernalia, plea from before July 15, 2011 with successful DEJ, Prop 36, P.C. 1203.4; but see additional *Lujan* requirements and limitations
- Plea to non-specified “controlled substance” is **not a good option**; does not benefit this group
- Possess a controlled substance under Calif. law that is not on federal drug schedules. Not even inadmissible. (But if substance is added to federal schedules, conviction becomes inadmissible)

**B. First Simple Possession of 30 grams or less marijuana; paraphernalia for use with mj**

*- Inadmissible: may qualify for § 212(h) waiver, but it is hard to obtain.*

**C. Inadmissible/Deportable Drug Conviction, But Not an Agg Felony or “Reason to Believe”**

- *LPR might get cancellation; Asylee, Refugee still might be able to adjust status*
- *Undocumented person might qualify for T or U visa, or asylum-type relief*
- Any non-trafficking offense, e.g. possession of specified controlled substance under H&S C 11350, 11357, 11377 (but see Hidden Aggravated Felonies below)
- Transportation for personal use under H&S 11352(a), 11360(a), 11379(a)
- Possession of paraphernalia (including with unspecified controlled substance), H&S C 11364
- Being in a place where drugs are used
- Giving away a small amount of marijuana
- Conviction of “offering” under 11352, 11360, 11379 (While not an agg felony, it is the worst option: only helps certain deportable LPRs, even then only in Ninth Circuit, provides “reason to believe”)

**D. Inadmissible for “Reason to Believe” Trafficking – Bar to Almost All Status**

- *LPR-Cancellation, U or T visas, Convention Against Torture, and possibly Asylum and Withholding are only potential forms of relief*
- *Will prevent an asylee or refugee from getting a green card*
- Trafficking Conviction with unspecified controlled substance (e.g. possession for sale of “a controlled substance”) where strong evidence to identify the substance exists
- Delinquency disposition for sale, possession for sale
- Perhaps a trafficking conviction that is reversed on appeal or vacated for legal defect, or pre-plea diversion, where ICE could access strong evidence of trafficking

**E. Obvious and Hidden Aggravated Felonies – Avoid them!**

- Sale, possession for sale, cultivation, manufacture, distribution without remuneration (except for small amount of marijuana) and, outside the Ninth Circuit, solicitation/offer to sell
- Sale of paraphernalia
- Possession of flunitrazepam (date-rape drug)
- Possession where a prior drug offense is pleaded and proved for recidivist sentence
- “Sale or offer to sell” “Sale or transportation for personal use” “We plead to the language of § 11379(a) in the disjunctive” where record identifies a specific controlled substance
- Obtain prescription controlled substance by fraud
- Maintain place where drugs are sold



## Appendix 8-II:

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

***Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.***

***Please give or mail a second copy to the defendant's friend or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.***

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Being an ***accessory after the fact*** is not an offense "relating to controlled substances" and so does not make the noncitizen deportable or inadmissible for having a drug conviction. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

If the reviewable record of a California drug conviction ***does not specify a controlled substance***, the conviction is not a deportable controlled substance offense or a deportable drug trafficking aggravated felony. Information from a dropped charge or any other information outside of the reviewable record of conviction will not identify the substance. See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9<sup>th</sup> Cir. 2007) (Calif. H&S §11377); *Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9<sup>th</sup> Cir. 2010) (H&S §11350).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**California deferred entry of judgment** is not a “conviction” for immigration when the only consequence to the person is an **unconditionally suspended fine**. The immigration definition of conviction at INA § 101(a)(48)(A) requires some form of penalty or restraint to be imposed in order for a disposition to be a “conviction.” The Ninth Circuit held that an unconditionally suspended fine is not penalty or restraint. *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**A first conviction for certain minor drug offenses from on or before July 14, 2011** is eliminated for immigration purposes by rehabilitative relief, such as DEJ, Prop 36, or Calif. P.C. § 1203.4. This applies to possession, possession of paraphernalia, and other “less serious” offense that does not have a federal analogue, as well as giving away a small amount of marijuana. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9<sup>th</sup> Cir. 2011), overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) prospectively only

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Under 21-years old when first drug offense was committed; pled guilty before July 15, 2011.** A first conviction for certain minor offenses from before July 15, 2011 is eliminated for immigration purposes by rehabilitative relief, such as DEJ, Prop 36, or Calif. P.C. § 1203.4. This applies to possession, possession of paraphernalia, giving away a small amount of marijuana, and other “less serious” offense that does not have a federal analogue. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9<sup>th</sup> Cir. 2011), overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). If the person was under the age of 21 when the offense was committed, he or she should be eligible for this benefit even if probation was violated before it was successfully completed, or if he or she received a prior grant of pre-plea diversion. *Lujan-Armendariz* extends protections of the Federal First Offender Act, 18 USC § 3607, to state convictions that could have qualified for relief under that Act. Section 3607(c), not 3607(a), applies to cases in which the defendant was under the age of 21 at the time of committing the offense.

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Solicitation to possess a controlled substance under P.C. § 653f(d)*** is not a conviction of a deportable and inadmissible drug offense, nor of an aggravated felony. See discussion at *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Transportation for personal use of a specified controlled substance*** is not an aggravated felony. See, e.g. *U.S. v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9<sup>th</sup> Cir. 1999).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Offering to commit a trafficking offense involving a specified controlled substance*** is not an aggravated felony. See, e.g., *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001) (*en banc*) (offering to sell under H&S § 11379 is not an aggravated felony).

## Appendix 8-III: DRUG CHART<sup>1</sup>

### Effect of Selected Controlled Substance Convictions In Immigration Proceedings Arising in the Ninth Circuit

OFFENSE	DEPORTABLE & INADMISSIBLE	AGG FELONY	ELIMINATE BY REHABILITATIVE RELIEF, <i>only in 9<sup>th</sup> Circuit, and <u>only convictions from before July 15, 2011</u></i> <sup>2</sup>
<b>Plea to an unspecified “controlled substance” rather than, e.g., cocaine</b>	Can prevent a deportable, but not inadmissible, conviction <sup>3</sup> but see paraphernalia	Still an agg fel as a bar to eligibility for relief or status	
<b>First possession (of a specified controlled substance (“CS”))</b>	YES, <i>except</i> see note for 30 gm or less marijuana or hash <sup>4</sup>	NO <sup>5</sup>	YES if no probation violation, and no prior pre-plea diversion (better rule if under age 21) <sup>6</sup>
<b>First poss. flunitrazepam</b>	YES	YES flunitrazepam; see note on past crack convictions <sup>7</sup>	YES, see above
<b>Possession (specified CS) where a drug prior exists</b>	YES	NO, <i>unless</i> finding of the prior appears in the record. <sup>8</sup>	NO
<b>Transportation for personal use (specified CS)</b>	YES	NO	NO
<b>Paraphernalia possession (specified or unspecified CS)<sup>9</sup> or under the influence<sup>10</sup></b>	YES, <i>but see</i> note if use or paraph relates only to small amount marijuana or hash <sup>11</sup>	NO	YES for poss paraphernalia, NO for use/under the influence <sup>12</sup>
<b>Second such offense</b>	YES	NO	NO
<b>Sale of a specified CS; Sale of paraphernalia</b>	YES	YES	NO
<b>Offer to sell or to commit other drug offense (specified CS)</b>	YES unless “generic solicitation” <sup>13</sup>	NO <sup>14</sup> <i>but only in imm proceedings held in the Ninth Circuit</i>	NO
<b>Give away small amount of marijuana</b>	YES	MAYBE NOT; Case pending at S.Ct. <sup>15</sup>	MAYBE <sup>13</sup>
<b>Possession for Sale (of a specified CS)</b>	YES	YES	NO

## ENDNOTES -- Effect of Selected Drug Convictions in Ninth Circuit

<sup>1</sup> Prepared by Kathy Brady of the Immigrant Legal Resource Center. See further discussion in Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit* (2013) ([www.ilrc.org](http://www.ilrc.org)), Ch. 3 and *California Quick Reference Chart and Notes*, and *Note: Controlled Substances*, at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>2</sup> *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> Cir. July 14, 2011) (*en banc*) reversed *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000), prospectively only. See *Nunez-Reyes* Advisory at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>3</sup> This plea will help a permanent resident or refugee who is not already deportable (e.g., no prior deportable conviction) to avoid becoming deportable, because ICE cannot prove that the substance is one from the federal schedules. Seek a record of conviction that refers only to “a controlled substance” rather than “cocaine.” See *Ruiz-Vidal*, 473 F.3d 1072 (9<sup>th</sup> Cir. 2007) (where Cal. H&S C §11377 conviction record does not ID specific substance, offense is not a deportable drug conviction); *Esquivel-Garcia*, 594 F.3d 1025 (2010) (same for § 11350); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). A plea to an unspecified controlled substance will **not prevent the conviction from being a bar to status or relief**, however. See *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*).

<sup>4</sup> A single conviction for simple possession 30 grams or less, or under influence, of marijuana, is not a deportable conviction under 8 USC 1227(a)(2)(B), and might be subject to inadmissibility waiver under 8 USC 1182(h). Same goes for similar quantity of hash. See *Note: Controlled Substances, supra*.

<sup>5</sup> *Lopez v. Gonzales*, 549 U.S. 47 (2006) (first state possession offense is not an aggravated felony because it would not be punishable as a felony under federal law). *But see* note 8.

<sup>6</sup> *Estrada v. Holder*, 560 F.3d 1039 (9<sup>th</sup> Cir. 2009) (probation violation); *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9<sup>th</sup> Cir. 2007) (prior pre-plea diversion). This might not apply if under age 21 at commission of offense, per 18 USC 3607(c); see *Nunez-Reyes* Advisory at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>7</sup> Conviction for possession of flunitrazepam (date-rape drug) is an aggravated felony because it is a felony under federal law. Possessing 5 grams or more of crack is no longer an aggravated felony because it is a federal misdemeanor per the Fair Sentencing Act (August 3, 2010); pleas before 8/3/10 should not be held an aggravated felony. See FSA Advisory at [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).

<sup>8</sup> *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). But if there is a finding of a drug prior, possession can be an aggravated felony. See Advisories at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

<sup>9</sup> Proof of the specific controlled substance not required for possession of paraphernalia. *Luu-Le v. INS*, 224 F.3d 911 (9<sup>th</sup> Cir. 2000); *Estrada v. Holder*, 560 F.3d 1039 (9<sup>th</sup> Cir. 2009); see also *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009) (same for being where drugs are used?).

<sup>10</sup> Must ID specific substance for use. *Medina v. Ashcroft*, 393 F.3d 1063 (9<sup>th</sup> Cir. 2005).

<sup>11</sup> Use of marijuana/hash, or possession of paraphernalia for use of 30 gm or less marijuana or hash, can come within 30 gm marijuana rule discussed at n. 4, *supra*; see also *Martinez-Espinoza, supra* at n.11.

<sup>12</sup> *Cardenas-Urriarte v. INS*, 227 F.3d 1132 (9<sup>th</sup> Cir. 2000) (paraphernalia comes within *Lujan*); *Nunez-Reyes, supra* (under the influence doesn't come within *Lujan*).

<sup>13</sup> Ariz. Rev. Stat. §13-1002, a “generic” solicitation offense not linked to a specific crime, is not a deportable drug offense. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9<sup>th</sup> Cir. 1997). In contrast, “specific” solicitation to commit a drug offense such as under Calif. H&S § 11352(a) will be held a deportable drug offense. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9<sup>th</sup> Cir. 2009). The court opined that Calif. P.C. § 653f(d) is “generic solicitation” and therefore should not be treated as a deportable controlled substance offense. *Ibid*.

<sup>14</sup> *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001) (*en banc*) (Calif. H&S Code § 11352, 11360, 11379); *Leyva-Licea v. INS*, 187 F.3d 1147 (9<sup>th</sup> Cir. 1999) (ARS §13-1002).

<sup>15</sup> 21 USC 841(b)(4) makes this offense a misdemeanor (therefore not an aggravated felony) and subject to the FFOA (the test for *Lujan-Armendariz*). See *Defending Immigrants, supra*, at §3.6(C). Obtain a finding that a “small” amount of marijuana was given away for free.

## § N.9: Violence, Domestic Violence, and Child Abuse

(For more information, see *Defending Immigrants in the Ninth Circuit*, § 6.15)

- I. Conviction of a Crime of Domestic Violence, and a Crime of Violence
  - II. Civil or Criminal Court Finding of Violation of a Domestic Violence Protective Order
  - III. Conviction of a Crime of Child Abuse, Neglect or Abandonment
  - IV. Conviction of Stalking
- App. 9-I – Legal Summaries to Hand to Defendants  
App. 9-II – Chart: Immigration Consequences of DV Offenses

A noncitizen is deportable if he or she is convicted of a state or federal “crime of domestic violence,” a crime of child abuse, neglect or abandonment, or stalking. 8 USC § 1227(a)(2)(E), INA § 237(a)(2)(E). The person also is deportable if found in civil or criminal court to have violated certain sections of a domestic violence protective order. *Ibid.* There is an effective date: the conviction for the offense, or the behavior that is the subject of the finding of violation of the protective order, must occur after September 30, 1996 and after the noncitizen was admitted to the United States.

These deportability grounds will be of concern to those with secure legal status, such as lawful permanent residents and refugees (and to the extent the offense is a “particularly serious crime,” to asylees and asylum applicants; see § N.17 Relief). It also is important to undocumented persons who will apply for any type of non-LPR cancellation of removal.

**Don't Let Your Work Go To Waste – Photocopy the Legal Summary Provided and Hand it to the Defendant!** Most noncitizens have no defense counsel in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes and may not realize the good you have done. **Appendix 9-I** following this Note contains short legal summaries of defense arguments based on the strategies set out in these notes. *Please copy the paragraph/s from the Appendix that applies to the defendant and hand it to him or her, with instructions to give it to a defense attorney or to the immigration judge. This piece of paper is the next best thing to your client having counsel to assert these technical defenses.*

**The Reviewable Record of Conviction.** Sometimes your defense strategy will depend upon putting information into, or at least keeping information out of, the record of conviction that immigration authorities are permitted to consider. This reviewable record consists of the plea agreement, plea colloquy, judgment, the charging document where there is adequate evidence the defendant pled to the charge, some information from a minute order or abstract, and *any document that is stipulated to as the factual basis for the plea.* It does not include a police or pre-sentence report or preliminary hearing transcript (unless they are stipulated to as the factual basis for the plea), prosecutor's comments, etc. For more information see information below and § N.3 Record of Conviction.



**A Vague (Inconclusive) Record of Conviction Has Very Limited Use.** Some criminal statutes are "divisible" in that they include some crimes that do and others that do not cause an immigration penalty. For example, if committed with actual violence P.C. § 243(e) is a crime of violence, a deportable crime of domestic violence, and a crime involving moral turpitude. If committed with "offensive touching," it is none of these. (*The law on § 243 may change for the better in 2013* (see part B.3, below),<sup>1</sup> but use this standard for now.)

In creating a record of conviction it is *always* best to plead specifically to the "good" crime like offensive touching, rather than to create a vague record that merely avoids specifying the bad crime, e.g. "I committed battery." In fall 2012 *Young v Holder*<sup>2</sup> drastically limited the effectiveness of a vague record. Now, regardless of the date of conviction:

- If a permanent resident is not already deportable (e.g., does not have a prior conviction that makes her deportable), a vague record can prevent the new conviction from making her deportable. This might also help a refugee.
- In contrast, an undocumented person, a permanent resident who already is deportable, or any other immigrant who needs to apply for relief or status needs a specific plea to a "good" offense. A vague plea will just trigger the immigration consequence.
- A specific "good" plea is always necessary to avoid the conviction being a crime involving moral turpitude.

For more information, see § N.3 *Record of Conviction* and § N.7 *Moral Turpitude*.

## I. CONVICTION OF A CRIME OF DOMESTIC VIOLENCE

### A. Crime of Domestic Violence: Bottom Line Instructions

A defendant is deportable for conviction of a "crime of domestic violence" based on (a) a conviction of a "crime of violence" that is (b) against a victim with whom he or she has had a certain domestic relationship, defined in the deportation ground. The good news is that in many cases, criminal defense counsel can craft a plea that both satisfies the prosecution and avoids the deportation ground. This section will discuss the following options.

1. ***Plead to an offense that is not a "crime of violence."*** An offense that does not meet the technical definition of "crime of violence" is not a conviction of a "crime of domestic violence," even if it is clear that the defendant and victim had a domestic relationship. See discussion below and Chart for offenses that may not constitute a crime of violence, for

<sup>1</sup> The U.S. Supreme Court may issue a ruling in spring 2013 that would mean that § 243(e) never is a "crime of violence" or "crime of domestic violence," regardless of the record of conviction or burden of proof. See discussion of *Descamps v. U.S.* at Part B.3, below.

<sup>2</sup> See discussion of *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*) at § N.3 *Record of Conviction*, *supra*.

example P.C. §§ 240, 243(a), 243(e), 236, 136.1(b)(1), 591, 653m(a), 647, 415, 69, possibly 243(d). These require a carefully crafted record of conviction. See Part 2, *infra*, for further discussion.

2. ***Designate a non-DV victim, or plead to violence against property.*** Under its statutory definition, a plea to a crime of violence is not a “crime of domestic violence” if (1) the designated victim is someone not protected under the definition or the state’s DV laws (e.g., the new boyfriend, a neighbor), or (2) the crime involves violence against property as opposed to a person. See Parts 3, 4, *infra*.
3. ***To keep the plea safe, be sure that the entire record of conviction is consistent with the above instruction (1) and (2).*** Keep the record clean of any mention of violence or a DV-type victim. Do not stipulate to a document as a factual basis for the plea if it contains adverse information. Where possible plead specifically to conduct that did not involve the use or threat of violence. For information on how to create a safer record and safer factual basis for the plea, see § N.3 *Record of Conviction*.
4. ***If you must plead to a crime of violence that involved a DV-type victim, try to keep the domestic relationship out of the reviewable record of conviction.*** However, warn the client that this might not protect against being deportable for a crime of domestic violence. Although this would work under current law, in the future the law may change to permit the government to look beyond the record of conviction to establish the domestic relationship. So if possible try to use other strategies such as those listed her to avoid deportability under this ground. See Part 5, *infra*.
5. ***DV-related conditions may be safe for certain pleas.*** At least with the pleas described in (1) and (2) above, it is safe to accept domestic violence counseling, anger management courses, stay-away orders, etc. as conditions of probation.
6. ***If you must plead to an offense that is deportable as crime of domestic violence, at least avoid an aggravated felony by obtaining a sentence of 364 days or less.*** A conviction for a crime of violence with a sentence imposed of one year or more is an aggravated felony. By pleading to an offense that is deportable but not an aggravated felony, defense counsel can preserve eligibility for relief from removal, such as cancellation of removal.
7. ***Remember that conviction of a crime of violence is an aggravated felony if a sentence of a year or more is imposed on any one count.*** This is true whether or not the victim had a domestic relationship. An aggravated felony conviction has very severe immigration consequences. For instructions on how to avoid a one-year sentence for immigration purposes even while accepting more than a year in jail, see § N.4 *Sentence Solutions*.
8. ***While not good, it is not always fatal to immigration status to become deportable under the DV ground.*** Generally it does not adversely affect an undocumented person.<sup>3</sup> The

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<sup>3</sup> However, a DV offense might be inadmissible under another ground. For example, it would trigger inadmissibility if it is a crime involving moral turpitude that does not qualify for the petty offense exception. See § N.7, *Crimes Involving Moral Turpitude*.

exceptions are if the person will apply for “non-LPR cancellation”<sup>4</sup> or deferred action for childhood arrivals (“DACA”) for certain young persons (“DREAMers”).<sup>5</sup> While it will make an LPR deportable, as long as it is not an aggravated felony it is not a bar to some forms of relief such as “LPR cancellation.” The consequences change depending on an individual’s history in the U.S. If you have difficult choices about what to give up in exchange for a plea in a particular case, consult with a criminal/immigration law expert.

## **B. Deportable Crime of Domestic Violence: Discussion**

### ***1. Overview***

A “crime of domestic violence” is a violent crime against a person with whom the defendant has or had a certain kind of domestic relationship. Conviction after admission and after September 30, 1996 is a basis for deportation.<sup>6</sup> The deportation ground 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.

A conviction is not a deportable “crime of domestic violence” unless ICE (immigration prosecutors) proves both factors: that the offense is a crime of violence under 18 USC § 16, *and* that the victim and defendant had the domestic relationship described above. In other words, an offense that does not meet the technical definition of crime of violence under 18 USC § 16 will not be held to be a deportable crime of domestic violence even if there is proof that the victim and defendant share a domestic relationship. Likewise, conviction of a crime of violence is not a crime of domestic violence unless there is adequate proof of the domestic relationship. ICE must prove that the conviction is of a crime of violence, using the categorical approach.

***Overview of Defense Strategies.*** *The surest strategy to avoid a domestic violence conviction is to avoid conviction of a “crime of violence” (“COV”) as defined in 18 USC § 16. Defense counsel can do this by pleading to a statute that does not involve violence at all, with a record of conviction that does not identify violence. Or, plead to a statute that is divisible as a crime of violence, e.g., Calif. P.C. § 240, 243(a) & (e), 236, 591, 653m(a), 69, perhaps 243(d), with a record that indicates non-violent conduct. Section 243(a) or (e) is an excellent choice if*

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<sup>4</sup> Under 8 USC 1229b(b), the applicant must have been present in the U.S. for ten years or more, have a citizen or permanent resident spouse, parent or child who would suffer exceptionally unusual hardship. Conviction of any offense described in a deportation or inadmissibility ground is a bar.

<sup>5</sup> DACA provides “deferred action” (employment authorization and at least two years protection from removal) for certain persons who came to the U.S. while under 16 and for at least five years before June 15, 2012, resided in the U.S., and who are not over age 30 as of that date. Crimes provisions are strict. For more information go to <http://www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals>.

<sup>6</sup> INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

the record of conviction indicates that the offense involved de minimus touching, because authorities from the Supreme Court to the Board of Immigration Appeals agree that this is not a COV.

Even a vague record that does not resolve whether the offense involved violent force will prevent an LPR who is not already deportable based on a prior conviction from becoming deportable under the DV ground for this conviction. The vague record will not prevent the offense from being an aggravated felony as a crime of violence, or a crime involving moral turpitude, however. See Box “Vague Record of Conviction,” above.

Another approach is to plead to a crime of violence but against a victim with whom the defendant does not have a domestic relationship, e.g. a friend of the ex-wife, a neighbor, or a police officer. See discussion in Part A.4, *infra*.

As long as the noncitizen successfully pleads to an offense that either is not a crime of violence *or* is a crime of violence against a victim who 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.

Another strategy is to create a vague record of conviction to avoid *identification* of the victim as a person who has a qualifying domestic relationship with the defendant, even if the victim really does have the relationship. However, this strategy is riskier because the government will argue that under recent Supreme Court precedent it may use evidence outside the record of conviction to establish the domestic relationship.

**Example:** Abe, Barry and Carlos all are lawful permanent residents who are not deportable, and who have no prior convictions. They each are charged with domestic violence.

Abe pleads to misdemeanor criminal threat under P.C. § 422, which is a “crime of violence” for immigration purposes. He keeps any mention of his and the victim’s domestic relationship out of the record of conviction. He is safe now, but because in the future the Ninth Circuit may hold that ICE may go beyond the criminal record to prove the domestic relationship, Abe is in a risky position for the future.

Barry had threatened both his ex-wife and her new boyfriend. He pleads to P.C. § 422, a crime of violence, and specifically names the boyfriend as the victim. Because a new boyfriend is not protected under state DV laws or listed in the deportation ground there is no qualifying domestic relationship. Therefore this offense, although a crime of violence, is not a deportable crime of domestic violence.

Carlos pleads to misdemeanor spousal abuse under P.C. § 243(e). Courts have held that this is “divisible” as a crime of violence, because the offense can be committed by conduct ranging from actual violence to mere offensive touching. Carlos pleads specifically to offensive touching. Now the conviction is not a crime of violence, a crime of domestic violence, or a crime involving moral turpitude (CIMT), for any purpose. (If defense counsel

had not been able to do that, but was able to create a vague record of conviction with a plea to “battery,” that would have prevented Carlos from becoming *deportable* under the domestic violence ground, because a vague record can accomplish this. However it would not have prevented the offense from being a crime involving moral turpitude. See Part C below.)

Barry and Carlos can accept a stay-away order and assignment to domestic violence counseling as a condition of probation, without the offense being treated as a deportable crime of domestic violence. This is because their criminal records conclusively show that the offense is not a crime of domestic violence: in Barry’s it is clear that the victim does not have the domestic relationship, while in Carlos’ it is clear that there is no “crime of violence.” The situation is riskier in Abe’s case.

## 2. *Avoid a Plea to a “Crime of Violence”*

An offense that is not a “crime of violence” is not a “crime of domestic violence” regardless of who the victim is. One can accept counseling, anger-management class, stay-away orders, etc. as a condition of probation with this plea. Under 18 USC § 16, a crime of violence for immigration purposes includes:

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

A conviction for a crime of violence becomes an aggravated felony if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(G). There is no requirement of domestic relationship for the aggravated felony. To avoid a crime of violence aggravated felony, obtain a sentence of 364 days or less. See § N.4, *Sentencing Solutions*.

Conviction of *accessory after the fact* to a domestic violence offense is not itself a crime of domestic violence, and therefore is a good plea to avoid that ground. There are two caveats: First, counsel must obtain a sentence of 364 days or less on any single count of P.C. § 32, or it will be held an aggravated felony as obstruction of justice.<sup>7</sup> Second, currently P.C. § 32 will be held to be crime involving moral turpitude if the underlying offense was.<sup>8</sup> Wherever possible, specify an underlying offense that does not involve moral turpitude. Otherwise an immigration judge may conduct a factual inquiry to see if the actual conduct involved moral turpitude. Conviction for soliciting, attempting, or aiding a crime of domestic violence is itself a domestic violence offense. (The only value is that *attempt* to commit a misdemeanor CIMT has a

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<sup>7</sup> *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). While this might be challenged at the Ninth Circuit (see discussion in *Hoang v. Holder*, 641 F.3d 1157 (9<sup>th</sup> Cir. 2011) regarding Washington rendering criminal assistance offense), counsel should avoid 365 on any single count.

<sup>8</sup> *Matter of Rivens*, 25 I&N Dec. 263 (BIA 2011). Earlier the Ninth Circuit held that PC § 32 is not a CIMT. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9<sup>th</sup> Cir. 2007) (*en banc*) overruled on other grounds in *U.S. v. Aguila-Montes de Oca*, 655 F.3d. 915 (9<sup>th</sup> Cir. 2011) (*en banc*). ICE will assert that the BIA rule controls.

potential sentence of less than a year, which can help in some contexts where there is a single CIMT conviction. See *Note: Crimes Involving Moral Turpitude*).

Below is an analysis of some common offenses as crimes of violence. See Chart of additional offenses at **Appendix 9-II**, and see the *California Quick Reference Chart* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) for analyses of other offenses. See *Defending Immigrants in the Ninth Circuit*, § 9.13, for more extensive discussion of cases and the definition of a crime of violence.

**Be Specific in the Record of Conviction.** It is always best to plead specifically to an offense that is *not* a crime of violence, e.g. “spousal battery with offensive touching” or “false imprisonment with no use of violent force.” This type of record protects all immigrants from having a conviction for a crime of violence.

**But the Law Might Change for the Better.** In spring 2013 the U.S. Supreme Court is likely to make a ruling that should mean that, e.g., battery is not a divisible statute and not a “crime of violence” for any purpose. See discussion of *Descamps v. U.S.*<sup>9</sup> in Part a, below. Where a specific “offensive touching” plea to a § 243 offense is not possible, create a vague record of conviction, e.g. “I committed battery” or plead to the language of the statute. If possible, delay the plea hearing, to thus delay the removal hearing until closer to the time of the Supreme Court’s ruling. Consider this possible change in the law when you evaluate prior battery convictions, as well. See further discussion below.

#### a. California Misdemeanors as “Crimes of Violence”

It is harder for a misdemeanor conviction to qualify as a crime of violence than for a felony conviction. Under 18 USC § 16(a), a misdemeanor must have as an element of the offense the “use, attempted use, or threatened use of physical force” against the victim.

**Plead to an Offense That is Not Related to Violence.** Some offenses that may relate to traumatic domestic situations can be accomplished entirely without violence. To be safe, counsel should specify in the record of conviction that the attempt, threat or use of violent force was not involved. In the opinion of the authors, examples of safer misdemeanors include:

- **Trespass, theft, disturbing the peace** and other offenses with no relationship to violence
- **P.C. § 136.1(b)(1)** (misdemeanor nonviolent persuasion not to file a police report)
- **P.C. § 236** (misdemeanor false imprisonment)
- **P.C. § 591** (misdemeanor tampering with phone or TV line)
- **P.C. § 591.5** (tampering to prevent call to authorities)
- **P.C. § 653m(a)** (single annoying phone call)

<sup>9</sup> The U.S. Supreme Court may overturn *U.S. v. Aguila-Montes de Oca* and reinstate the “missing element rule,” which among other things will not permit a court to go to the record unless it is determining which of the multiple offenses set out in the statutory language was the offense of conviction. See discussion of *Descamps v. United States*, § 243(e), and defense strategies in § N.3 *Record of Conviction*, Part C, *supra*.



- **P.C. § 243.4** (misdemeanor sexual battery) is not a crime of violence if the record establishes that the restraint of the victim was accomplished without force.<sup>10</sup> *Felony § 243.4* always is a crime of violence.

**De Minimus or Offensive Touching.** Under current law, an offense that can be committed by *de minimus* touching is not a crime of violence under 18 USC § 16 unless the person used actual violence. (And the law may improve; see next section.) Neither battery nor battery against a spouse under **Calif. PC § 243(a), 243(e)** or resisting arrest under **PC § 69** are *deportable* crimes of violence if the record is vague as to whether violent force or offensive touching was used.<sup>11</sup> It is far better, however, to plead specifically to offensive touching, because that will prevent the offense from being a crime involving moral turpitude in any context, or becoming a bar to non-LPR cancellation. Because **PC § 243(d)** can be committed by an offensive touching that is not intended or even likely to cause injury,<sup>12</sup> immigration counsel have a strong argument that a misdemeanor – or even felony – conviction should be treated like § 243(e).

Note that misdemeanor or felony **§ 273.5** is categorically (automatically) a crime of violence and a crime of domestic violence, and **§ 245** is categorically a crime of violence.

**Change in the Law on “Offensive Touching” Crimes?** In 2013 the U.S. Supreme Court will decide a case that might lessen the adverse immigration consequences of convictions under P.C. §§ 69 and 243. In *Descamps v. United States* the Court will decide whether a judge must evaluate a prior conviction (of any type of offense) based upon only the *least adjudicable elements* of the offense as set out in the criminal statute, and not on additional factual details in the record. In *Descamps* the Court may hold that a judge may use facts in the record of conviction to determine *which* of multiple statutory elements made up the offense of conviction, but for no other reason. Under that rule, a judge could not take notice of a guilty plea to violent force rather than offensive touching, and a plea to facts showing actual violence would not turn battery into a “crime of violence.” The same would hold true for resisting arrest under P.C. § 69, and misdemeanor false imprisonment under § 236. Although *Descamps* will address this principle in a case involving Cal. P.C. § 459, and the rule set out in *U.S. v. Aguilar-Montes de Oca*, the principle would apply to all offenses. There is a very good chance that the Court will rule for the defendant in this case.

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<sup>10</sup> *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) includes the same standard as 18 USC 16(a).

<sup>11</sup> *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9<sup>th</sup> 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); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (P.C. § 69 is not categorically a crime of violence because it can be committed with *de minimus* force). See also cases holding that § 243(e) is not a crime involving moral turpitude, *Singh v. Ashcroft*, 386 F.3d 1228 (9<sup>th</sup> Cir. 2004). *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9<sup>th</sup> Cir. 2006). The California jury instruction defining “force and violence” for this purpose, CALJIC 16.141 (2005) defines “force” and “violence” as synonymous and states that it can include force that causes no pain and hurts only feelings; the slightest touching, if done in an insolent, rude or angry manner, is sufficient. See similar definition at CALCRIM 960.

<sup>12</sup> See discussion of *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) in the section on felonies, below.

How does this affect your strategy now, given that this beneficial decision – if it does come – might not arrive until June 2013? The best strategy is to obtain a win under current law by pleading specifically to “offensive touching.” But if that is not possible, or if the problem is a prior conviction that already has an adverse record, another option is to delay your plea hearing as long as possible in order to keep the defendant away from immigration detention and removal proceedings until good law develops. (Of course, this is an easier choice if the defendant is out of jail, or if pre-hearing jail time will be credited toward an expected sentence. If the decision is harder, consider consulting a resource center or immigration expert.)

**Negligence or recklessness is not a crime of violence.** A crime of violence requires a purposeful intent to use violent force. Courts have held that misdemeanor offenses involving negligence or recklessness are not “crimes of violence,” e.g. negligent infliction of injury, driving under the influence with injury.<sup>13</sup> (This is true for most felonies as well; see below.)

**Add “good” facts to the record where possible.** Besides deleting adverse facts such as use or threat of violent force, counsel should try to add beneficial facts where possible, e.g. that the incident only involved recklessness or a mere offensive touching should be included.

**A threat to commit actual violence is a crime of violence,** even as a misdemeanor. The threat of use of force may be considered a crime of violence under 18 USC § 16, even if no force is used. The Ninth Circuit held that the offense of making a criminal or terrorist threat under **Cal. P.C. § 422** is automatically a crime of violence.<sup>14</sup>

#### **b. California Felonies and Wobblers as “Crimes of Violence”**

**Wobblers.** A California “wobbler,” which can be punished as either a felony or misdemeanor, will be deemed a misdemeanor for immigration purposes if it is designated as or reduced to a misdemeanor under P.C. §§ 17, 19,<sup>15</sup> but will be deemed a felony if this does not occur. In some cases, e.g. sexual battery, commercial burglary, a misdemeanor designation will mean that the offense is not automatically a crime of violence. Be sure that the record of conviction does not describe violent or threatening behavior. If the wobbler is a felony, it will count as a felony for purposes of the crime of violence category.

**Felonies.** A felony conviction can be a crime of violence under either of two tests. First, like a misdemeanor, it will be held a crime of violence under 18 USC § 16(a) if it has as an element the use, or threatened or attempted use, of force.

Second, a felony conviction also will be held a crime of violence under the more broadly defined § 16(b), if “by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The “risk” presented by the offense must be that violent force will be used intentionally, and not just that an

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<sup>13</sup> *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (negligence, felony DUI); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*) (under *Leocal*, recklessness that injury may occur is insufficient intent to constitute a crime of violence; that requires being reckless that the crime will result in a violent encounter).

<sup>14</sup> *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) held that all of the behavior covered under California P.C. § 422 is a crime of violence.

<sup>15</sup> See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

injury might occur. Reckless infliction of injury, for example by felony reckless driving or child endangerment, is not a crime of violence.<sup>16</sup> However, a felony offense that recklessly creates a situation where the perpetrator is likely to use aggressive, violent force, is a crime of violence.

Criminal defense counsel should act conservatively and attempt to plead to a misdemeanor, or reduce a wobbler offense to a misdemeanor, where this is possible.

### **Felony offenses that will be held crimes of violence.**

- ***Residential felony burglary*** under §§ 459, 460(a) is a categorical (automatic) crime of violence under § 16(b). Courts have held that it carries the inherent risk that the perpetrator will use violence if he or she encounters the resident during commission of the offense.<sup>17</sup> The Ninth Circuit has held that this is inherently a crime of violence despite the fact that § 460(a) includes a permissive entry.
- ***Felony sexual battery under P.C. § 243.4*** is a categorical crime of violence under § 16(b), because the situation contains the inherent potential for violence.<sup>18</sup> If reduced to a misdemeanor, it would be a divisible statute.
- ***Felony or misdemeanor corporal injury under P.C. § 273.5*** is a crime of violence and a crime of domestic violence (although it may not be a categorical crime involving moral turpitude; see below).
- ***Felony or misdemeanor assault under P.C. § 245(a)*** is a crime of violence<sup>19</sup> (although it might not be a categorical a crime involving moral turpitude; see below).

### **Felony offenses that will not or might not be held crimes of violence.**

- ***Nonviolently persuading someone not to file a police report under Calif. PC § 136.1(b), a felony***, should not be held a crime of violence, although there is no case on point. This appears to be a good immigration plea, although a strike. It may be a useful option where immigration impact is paramount concern and counsel needs a substitute plea for a serious charge. Counsel should obtain no more than 364 days on any single count, or ICE might charge that it is an aggravated felony as obstruction of justice.<sup>20</sup>

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<sup>16</sup> See *Leocal, supra*; *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (*en banc*).

<sup>17</sup> See, e.g., *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011).

<sup>18</sup> *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)).

<sup>19</sup> *United States v. Grajeda*, 581 F.3d 1186, 1190 (9th Cir. Cal. 2009) (P.C. § 245 meets the definition in USSG § 2L1.2, which is identical to 18 USC § 16(a)).

<sup>20</sup> PC § 136.1 should not be held to be an aggravated felony as obstruction of justice because the offense lacks as an element a specific intent to prevent the apprehension or prosecution of the principal. See *Matter of Rivens*, 25 I&N Dec. 838 (BIA 2012) (holding that PC § 32 was obstruction of justice because it includes an intent that the principal avoid arrest, trial, etc.). But PC § 136.1(b)(1) only requires an intent to dissuade the witness from filing a police report. CALJIC 7.14. It is similar to misprision of felony, the offense of concealing or failing to report the commission of a felony, which has been held *not* to constitute obstruction of justice. See *Matter of Espinoza-*

- There is a strong argument that **felony false imprisonment** is not a crime of violence if it is accomplished by fraud or deceit as opposed to force or threat.<sup>21</sup>
- **Burglary of a vehicle** does not create an inherently violent situation against a person, unlike burglary of a dwelling.<sup>22</sup> Conservatively, the record of conviction should be kept clear of violence toward person or property, e.g. should not show the defendant smashed a car window to enter. (While violence against property is not a deportable DV offense, if a sentence of a year or more is imposed it will be an aggravated felony.)
- **Felony battery under P.C. § 243(d)** can be committed with force that is not intended or likely to cause injury, i.e. with de minimus touching.<sup>23</sup> While there is a danger that immigration judges simply will not accept this argument, § 243(d) still is a far better plea than §§ 245 or 273.5, if other options are not available. Plead specifically to offensive touching where possible; see also discussion of *Descamps* and the possibility that a vague record will suffice in the future, in Part xx above.

### **3. Plead to a crime of violence against a victim with whom the defendant does not have a protected domestic relationship**

The immigration statute provides that a deportable crime of domestic violence is a crime of violence that is committed against a person with whom the defendant shares a certain domestic relationship. If the victim was a person who does not have that relationship, a “crime of violence” cannot become a “crime of domestic violence.” In California a plea to a crime of violence against, **e.g., the ex-wife’s new boyfriend, a neighbor, or a police officer** would not be a crime of domestic violence, because these persons are not protected under state domestic violence laws. Counsel must obtain a sentence of less than one year on any single count, or the conviction will be an aggravated felony as a crime of violence.

A crime of violence against the following victims *will* be a deportable domestic violence offense. The deportation ground, quoted in full in Part 1, *supra*, includes a current or former spouse, co-parent of a child, a person who has cohabitated as a spouse or someone similarly

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*Gonzalez*, 22 I&N Dec. 889, 892-92 (BIA 1999), *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9<sup>th</sup> Cir. 2008) (federal misprision of felony, 18 USC § 4, is not obstruction of justice) and discussion in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012); see also *Hoang v. Holder*, 641 F.3d 1157 (9<sup>th</sup> Cir. 2011).

<sup>21</sup> The Supreme Court has recently reaffirmed that the generic crime of violence, even where the threat is only that injury might occur, rather than that force must be used, must itself involve purposeful, violent and aggressive conduct. *Chambers v. United States*, 555 U.S. 122 (2009) (failing to report for weekend confinement under 720 ILCS 5/31-6(a) (2008) is not a crime of violence) and *Begay v. United States*, 553 U.S. 137 (2008) (driving under the influence).

<sup>22</sup> *Ye v. INS*, 214 F.3d 1128, 1134 (9<sup>th</sup> Cir. 2000).

<sup>23</sup> Felony battery does not require intent to cause bodily injury. It can consist of a mere offensive touching, if that touching goes on to cause bodily injury. See, e.g., *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006). As the court stated in *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978), “The statute [§ 243] makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute.” This level of force does not rise to “violence.” Further because this act is listed in the statute, immigration counsel should not have to present evidence of actual charges based on de minimus touching in order to prove that the statute in fact is enforced in this manner.

situated under state domestic or family violence laws, as well as “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.”<sup>24</sup> California family violence statutes protect the following persons (a) a current or former spouse or cohabitant;<sup>25</sup> (b) a person with whom the other is having or has had a dating or engagement relationship (defined as a serious courtship); (c) a person with whom the other has had a child, when the presumption applies that the male parent is the father of the child of the female parent;<sup>26</sup> (d) a child of a party or a child who is the subject of an action under the Uniform Parentage Act, when the presumption applies that the male parent is the father of the child to be protected, or (e) any other person related by consanguinity or affinity within the second degree.”<sup>27</sup> The word co-habitant means “a person who resides regularly in the household.”<sup>28</sup> It does not include person who simply sublet different rooms in a common home, if they are not otherwise part of the same household or do not have some close interpersonal relationship.<sup>29</sup>

#### ***4. Plead to a crime of violence that is against property, not persons***

While the general definition of crime of violence at 18 USC § 16 includes force used against people or property, the definition of a “crime of domestic violence” in the domestic violence deportation ground only includes an offense against “a person.”<sup>30</sup> Thus immigration counsel has a very strong argument, although no published case law, that vandalism or other offenses against property will not support deportability under the domestic violence ground, even if the offense is a crime of violence.

#### ***5. Plead to a crime of violence but keep the domestic relationship out of the official record of conviction – Changing law?***

This section is for defense counsel who may be forced to plead to a crime of violence where the victim actually has the domestic relationship. It discusses why this is risky, and what steps may reduce the risk.

**The problem.** Immigration prosecutors (“ICE”) must prove by “clear and convincing evidence” that a noncitizen is deportable.<sup>31</sup> In general, ICE must prove that a conviction causes deportability using the “categorical approach,” which requires that certain contemporaneous criminal court documents conclusively establish that the offense of conviction comes within the deportation ground. (For more on the categorical approach, see § N.3 *Record of Conviction*)

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<sup>24</sup> 8 USC § 1227(a)(2)(E)(i).

<sup>25</sup> California Family Code § 6209.

<sup>26</sup> California Family Code § 7600 et seq. (Uniform Parentage Act).

<sup>27</sup> Matthew Bender, California Family Law § 96.03[02], p. 96-6.

<sup>28</sup> *Id.* at § 96.03[3]; California Family Code § 6209.

<sup>29</sup> *O’Kane v. Irvine*, 47 Cal.App.4<sup>th</sup> 207, 212 (1966). Thanks to the Law Office of Norton Tooby for this summary of California law.

<sup>30</sup> INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

<sup>31</sup> INA § 240(c)(3)(A), 8 USC § 1229a(c)(3)(A).



Regarding a crime of domestic violence, the Ninth Circuit has held that the strict categorical approach applies both in proving that the offense was a crime of violence *and* that the defendant and victim had the required domestic relationship.<sup>32</sup> However, ICE will argue that two 2009 Supreme Court decisions require that a wider range of evidence can be used to prove the domestic relationship.<sup>33</sup> Because criminal defense counsel must act conservatively, you should assume that the government will prevail and the Ninth Circuit will modify its stance. There is little certainty now as to what kind of evidence would be used if that occurred.

**Advice.** Again, the better strategy is to avoid pleading to a crime of violence at all, or to plead to a crime of violence against a victim with whom the defendant does not have a domestic relationship, or to a crime of violence against property.

If that is not possible, where the charge of a violent crime alleged the name of a victim with a domestic relationship, where possible plead to a slightly different offense in a newly crafted count naming Jane or John Doe. (ICE sometimes makes the distinction between a plea to a new offense and a re-crafted plea.) Even under the possible expanded evidentiary rules, information from dropped charges may not be considered. Also, keep the name and relationship outside of any sentencing requirements. If needed, plead to an unrelated offense, if possible against another victim (e.g. trespass against the next door neighbor, disturbing the peace) and take a stay-away order on that offense. Under California law a stay-away order does not need to relate to the named victim. See extensive discussion in *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006), and see also *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

### **C. Other Consequences: Domestic Violence Offenses as Crimes Involving Moral Turpitude, Aggravated Felonies**

**Aggravated felonies.** An offense that is a “crime of domestic violence” also is a “crime of violence.” A conviction of a crime of violence for which a sentence of a year has been imposed is an aggravated felony, under 8 USC § 1101(a)(43)(F). To avoid the aggravated felony consequence, counsel must obtain a sentence of 364 days or less for any single count of a crime of violence. For instructions on how to accept more than a year in jail while taking 364 days or less on any single count for immigration purposes, see § N.4 Sentences. No domestic relationship is required for the aggravated felony; only the crime of violence and the sentence.

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<sup>32</sup> See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (testimony before the immigration judge about the relationship may not be considered); *Cisneros-Perez v. Gonzales*, 465 F.3d 385 (9th Cir. 2006) (information from various documents, including a stay-away order imposed as a condition of probation for the conviction and a dropped charge, was not sufficiently conclusive proof of the domestic relationship).

<sup>33</sup> In *Nijhawan v. Holder*, 557 U.S. 29 (2009) the Supreme Court held that some aggravated felony definitions are bifurcated, in that they contain a “generic offense” which must be proved under the categorical approach, and “circumstance-specific” facts that may be proved by other evidence. *Nijhawan* held that in the aggravated felony of “fraud or theft with a loss to the victim/s exceeding \$10,000,” the categorical approach applies to proving the crime was of fraud or theft, but not to proving the amount of loss. The government may argue that this approach also applies to the deportable “crime of domestic violence.” In *United States v. Hayes*, 555 U.S. 415 (2009), the Supreme Court held that a similar bifurcated approach applied to a crime of domestic violence that is worded similarly to the deportation ground, and held that evidence outside the record can be used to prove the domestic relationship. For further discussion of *Nijhawan v. Holder*, see § N.3 Record of Conviction, § N.11 Burglary, Theft and Fraud, and see especially Brady, “*Nijhawan v. Holder*, Preliminary Defense Analysis” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).



Conviction of an offense that constitutes sexual abuse of a minor or rape is an aggravated felony regardless of sentence. See 8 USC § 1101(a)(43)(A) and § N.10 Sex Offenses.

**Crime involving moral turpitude.** Offenses that involve intent to cause significant injury, or many offenses with lewd intent, will be held to be a crime involving moral turpitude (CIMT). Misdemeanor and felony sexual battery under **P.C. § 243.4** is a CIMT.

Under *Matter of Silva-Trevino*, if a statute is divisible and the record of conviction does not specifically indicate that the conviction was for conduct that does not involve moral turpitude, the immigration judge may look beyond the record in order to determine whether the offense is a CIMT. In a divisible statute that contains non-CIMT's and CIMT's, therefore, counsel's goal is to plead specifically to the non-CIMT offense.

Felony false imprisonment under **P.C. § 236** is committed by force, threat, fraud or deceit. While counsel must assume conservatively that this involves moral turpitude, it is possible that false imprisonment by deceit rather than fraud is not a CIMT.<sup>34</sup> **Section § 243(e)**, spousal battery, is not a CIMT if it was committed by an offensive touching.<sup>35</sup> The record should state this specifically. The Ninth Circuit held that **P.C. § 273.5** is not categorically a CIMT because it contains one narrow exception: if the injury is minor and the defendant and victim have only a tenuous relationship, such as a former non-exclusive co-habitation.<sup>36</sup> Again, the record should reflect similar facts. Misdemeanor **P.C. § 236**, false imprisonment, which by definition excludes conduct involving violence, threat, fraud or deceit, should be held not to constitute a CIMT,<sup>37</sup> although an immigration judge might (wrongly) decide to undertake a factual inquiry if the record is vague. Defense counsel should conservatively assume that felony assault under **P.C. § 245(a)** will be charged to be a moral turpitude offense.<sup>38</sup> Immigration counsel have arguments against this since it is a general intent crime, with the intent required equal to that of battery, and incapacitation, mental illness or intoxication is not a defense,<sup>39</sup> but again this may not work unless the record states it specifically.

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<sup>34</sup> See, e.g., *People v. Rios*, 177 Cal. App. 3d 445 (Cal. App. 1st Dist. 1986) (felony false imprisonment found when father picked up baby during visitation, later reported him missing to police, and moved him to Mexico where he raised the child telling him he was his godfather).

<sup>35</sup> *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9<sup>th</sup> Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

<sup>36</sup> *Morales-Garcia v. Holder*, 567 F.3d 1058 (9<sup>th</sup> Cir. 2009).

<sup>37</sup> *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9<sup>th</sup> Cir. 2010) (holding that misdemeanor § 236 is not a CIMT because it lacks the element of intent to harm).

<sup>38</sup> *Matter of GR*, 2 I&N Dec. 733 (BIA 1946) (assault with deadly weapon is CIMT); *Gonzales v. Barber*, 207 F.2d 398, 400 (9<sup>th</sup> Cir. 1953) (assault with deadly weapon is CIMT).

<sup>39</sup> Section 245(a) of the California Penal Code is arguably divisible as a crime involving moral turpitude because it is a general intent crime, *Carr v. INS*, 86 F.3d 949, 951 (9<sup>th</sup> Cir. 1996), cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9<sup>th</sup> Cir. 2007) (en banc) (not categorically a crime involving moral turpitude). The requisite intent for assault with a deadly weapon is the intent to commit a battery. See, e.g., *People v. Jones*, 123 Cal. App. 3d 83, 95 (Cal. App. 2d Dist. 1981). Section 245(a) even reaches conduct while voluntarily intoxicated or otherwise incapacitated. See, e.g., *People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971) (holding that 245(a) is a general intent crime, that intent to cause injury is not required, and voluntary intoxication is not a defense); *People v. Windham* (1977) 19 Cal 3d 121; *People v. Velez*, 175 Cal.App.3d 785, 796, (3d Dist.1985) (defendant can be guilty of assault even if the defendant was drunk or otherwise disabled and did not intend to harm the person)

## II. COURT FINDING OF A VIOLATION OF A DOMESTIC VIOLENCE PROTECTIVE ORDER

- A. **Bottom Line Advice:** A finding in civil or criminal court that a noncitizen violated portions of a DV protection order that protect against violence or repeated harassment is a basis for deportation (even if the *actual violation* did not involve violence or repeated harassment). The conduct violating the order must occur after September 30, 1996.
- **Do not plead to P.C. § 273.6** for violating a protective order issued pursuant to Calif. Family Code §§ 6320 and/or 6389 – even if the conduct violating the order was innocuous. A finding of any violation of a stay-away order will be considered deportable. If you must plead to § 273.6 try to leave the record vague as to the type of order violated. See Part B.1.
  - **Avoid a plea to violating any stay-away order** or any court order not to commit an offense described in Family Code §§ 6320 or 6389 where the purpose of the order is to protect a DV-type victim. A plea to P.C. § 166(a)(4) can be safe if (a) the record of conviction does not show that the violation was of a DV protective order, or (b) the record indicate that the DV violation related to counseling or custody requirements. See Part B.2.
  - **Instead, plead to a new offense** that will not have immigration consequences, e.g., trespass, an annoying phone call, or an offense such as § 243(e). Or consider P.C. § 166(a)(1-3), especially (a)(3). See Part B.3 for suggested pleas.

### B. **Discussion: Avoiding a Deportable Finding of Violation of a DV Order**

A noncitizen is deportable if ICE proves that he or she was *found by a civil or criminal court judge to have violated certain portions of a domestic violence protective order*. The conduct that violated the court order must have occurred after September 30, 1996, and after the noncitizen was admitted to the United States. The statute describes 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.<sup>40</sup>

To be deportable under this ground, the record of conviction must establish that (1) the protective order was issued for the purposes of preventing abuse against a DV-victim; and (2) the prohibited conduct under the order relates to protecting the victim from violence, threats, or

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<sup>40</sup> INA § 237(a)(2)(E)(ii), 8 USC §1227(a)(2)(E)(ii).

harassment, e.g., stay-away order or no-contact provision. Conduct that does not come within the second criteria includes failing to pay child support, missing anger management classes, or violating orders related to child custody.

Even if the defendant's conduct that results in the violation of the order did not involve violence, threats, or harassment, if that portion of the order relates to this – e.g., a stay-away order – a violation will cause deportability.

**1. Conviction under P.C. § 273.6 for violating a protective order always triggers this deportation ground if it was issued pursuant to Calif. Family Code §§ 6320 and 6389.**

A conviction under Calif. Penal Code § 273.6 for violating a protective order issued “pursuant to” Calif. Family Code §§ 6320 and 6389 *automatically* causes deportability as a violation of a protection order.

The Ninth Circuit found that the focus of the deportation ground is the *purpose of the order violated*, not the individual's conduct. The court found that all activity described in §§ 6320 and 6389 has as its purpose “protection against credible threats of violence, repeated harassment, or bodily injury” of the named persons. Thus a conviction under this section will cause deportability even if the conduct that constituted the violation of the order did not actually threaten “violence, repeated harassment or bodily injury”-- for example a single non-threatening phone call.<sup>41</sup>

The court noted that Calif. P.C. § 273.6 also covers orders that had nothing to do with domestic violence protective orders.<sup>42</sup> A plea to violating P.C. § 273.6 with record that is not issued pursuant to §§ 6320 or 6389 and/or does not specify the type of court order violated should not be a deportable offense.

**2. Avoid a judicial finding of any violation of a DV stay-away order, or an order not to commit an offense that is described in Cal. Family C §§ 6320 or 6389.**

A criminal or civil finding of violation of a portion of any order prohibiting the conduct that is described in Calif. Family Code §§ 6320 and 6389 is a basis for deportation. The conduct that violated the protective order must have occurred on or after September 30, 1996.

This includes any violation that would come within § 6320 or 6389, no matter how innocuous. The court considered the case of a permanent resident who was found by an Oregon court to have violated a 100-yard stay-away order, when he walked his child up the driveway instead of dropping him off at the curb, after visitation. Because Calif. F.C. § 6320 includes

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<sup>41</sup> *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009), amending, with the same result, 541 F.3d 966 (9<sup>th</sup> Cir. 2008). A petition for rehearing and rehearing en banc was denied.

<sup>42</sup> *Id.* at 837 (noting that P.C. § 273.5 includes an order issued pursuant to Cal. Civ. Proc. Code 527.6(c) (temporary restraining order against any person) which would not be a domestic violence protective order).

stay-away orders, the court concluded that this violation was a deportable offense.<sup>43</sup> The BIA has extended this rule nationally.<sup>44</sup>

Section 6320(a) covers a wide range of behavior. It permits a judge in a domestic violence situation to enjoin a party from “molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.”

Section 6320(b) permits a judge in a domestic violence situation to enjoin a party from taking certain actions against the victim’s pet. Section 6389 prohibits a person from owning, possessing, purchasing or receiving a firearm by a person subject to a protective order. Note that conviction under this section also will be a deportable firearms offense.

### 3. *Suggested Pleas; Avoiding § 273.6*

Criminal defense counsel must make every effort to avoid a judicial finding that a defendant violated a portion of a domestic violence order involving conduct described in Calif. Family C. §§ 6320 and 6389, including minor violations involving stay-away orders or phone calls. Suggestions include:

- Plead to a new offense, rather than to a violation of a protective order. In doing so, make sure (a) that the plea is not to a “crime of domestic violence” or other deportable offense and (b) that the judge does not make a finding in the proceeding that the protective order was violated.
  - For example, a plea to spousal battery under P.C. § 243(e) is not a crime of domestic violence if the record of conviction does not indicate that actual violence was used. A plea to trespass rather than violation of a stay-away order should not cause deportability as a violation of a protective order, or as a conviction of a crime of domestic violence. Plead to making annoying phone calls under P.C. § 653m rather than to violating a protective order under § 273.6. (However, because of uncertainty of how the law will be interpreted, it would be best to plead to conduct that is not itself a violation of the court order, where that is possible.) These pleas can have as conditions of probation additional protective order provisions, requirements to go to anger management classes, etc. See Part A, *supra*, regarding safe pleas to avoid conviction of a crime of domestic violence.
- Plead to P.C. § 166(a) (contempt of court). Section 166(a)(3) sets out specific actions that do not cause deportability, and parts (a)(1) and (a)(2) also are good.
- Or plead to a violation of an order under 166(a)(4) and keep the record from specifying that the order related to domestic violence at all, or if it was, that it related to counseling or custody requirements. A violation of a domestic violence protective order that relates to custody, support

<sup>43</sup> *Szalai v. Holder*, 572 F.3d 975 (9<sup>th</sup> Cir. 2009).

<sup>44</sup> *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011).

payment, anger management class attendance, and similar matters does not come within this ground.

- If necessary, plead to P.C. 273.6 but not for violating a protective order issued “pursuant to” Calif. Family Code §§ 6320 and 6389.
  - If counsel must plead to P.C. § 273.6 pursuant to Family C. §§ 6320 and 6389, counsel should take a *West* plea to, e.g., “Count 2,” but refuse to plead specifically “as charged in” Count 2. This will give immigration counsel an argument that the record does not establish that the plea was pursuant to these Family Code sections.<sup>45</sup> The dissenting judge in *Alanis-Alvarado* was open to considering these arguments. Counsel can try pleading to P.C. § 273.6 pursuant to other provisions in the section (elder abuse, employee abuse, protective orders not specifically tied to domestic violence), or if permitted, simply to P.C. § 273.6.

A danger with this approach is that there is no case law defining which evidence ICE might be permitted to use to show that the offense in fact constituted a violation of a domestic violence protective order. The court in *Alanis-Alvarado* stated that the categorical approach applies to this question, but this might be re-thought if the categorical approach is found not to apply to a deportable crime of domestic violence, as discussed in Part A, *supra*. Almost all of the provisions in these orders relate to protection against violence and harassment. (However, a violation of these orders is not in itself a categorical crime of violence, so that the offense should not automatically be held a deportable crime of domestic violence.<sup>46</sup>)

- Make sure that an offense does not come within the definition of “stalking” -- a separate basis for deportability – because it involves an intent to place person or family member in fear of bodily injury or death. See Part IV, below.

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<sup>45</sup> Why is “as charged in” important? As discussed in § N. 3 *Record of Conviction*, in *United States v. Vidal*, 504 F.3d 1072, 1087 (9<sup>th</sup> Cir. 2007)(en banc) the court held that because a California criminal charge can be amended orally up until the plea is taken, a plea to, e.g., “Count I -- V.C. § 10851” is not an admission of the facts alleged in that Count unless the plea contains the critical phrase “as charged in” Count I. Instead, it is only a plea to § 10851 in general. Why is it important to take a *West* plea? It might not be legally necessary, but some immigration judges are holding that *Vidal* only applies to *West* pleas – so it helps avoid problems.

<sup>46</sup> See, e.g., discussion in *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9<sup>th</sup> Cir. 2007), holding that harassing or following, with threats, under Calif. PC § 646.9(b) is not a categorical “crime of violence” because the full range of conduct covered by the harassment portion of the statute includes crimes that can be committed at a distance by telephone or mail and where there is no substantial risk of violence.

### III. CRIME OF CHILD ABUSE, NEGLECT OR ABANDONMENT

**Warning for U.S. citizen and permanent resident defendants:** A U.S. citizen or permanent resident who is convicted of sexual conduct or solicitation, kidnapping, or false imprisonment where the victim is under the age of 18 faces a serious penalty: he or she may be barred from filing a family visa petition to get lawful immigration status for a close relative. See further discussion at § N.13 Adam Walsh Act.

#### A. Overview and Definitions of Child Abuse for Immigration

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.”<sup>47</sup>

**Age-Neutral Statutes: Best Plea.** An age-neutral statute (one that does not require the victim to be a minor) is not a deportable “crime of child abuse” *as long as* the record of conviction shows that the victim was under the age of 18. To avoid a deportable crime of child abuse, plead to an age-neutral offense (e.g., P.C. §§ 243, 316, 136.1(b)(1)) and keep the minor age of the victim, and the name of the victim of minor age, out of the reviewable record. If you do this, a stay-away order naming a minor victim will not cause the offense to become a crime of child abuse. See Part B, below.

**Definition of a Crime Of Child Abuse.** In *Matter of Velazquez-Herrera*,<sup>48</sup> the BIA defined a “crime of child abuse, neglect or abandonment” as follows:

[We] interpret the term “crime of child abuse” broadly to mean any offense involving an ***intentional, knowing, reckless, or criminally negligent act or omission*** that constitutes maltreatment of a child or that ***impairs a child’s physical or mental well-being***, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving ***the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse***, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking. Moreover, as in the “sexual abuse of a minor” context, we deem the term “crime of child abuse” to refer to an offense committed against an individual who had not yet reached ***the age of 18 years***. Cf. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). [W]e do ***not*** limit the term to those offenses that were ***necessarily committed by the child’s parent or by someone acting in loco parentis***.

<sup>47</sup> INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

<sup>48</sup> *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008), defining child abuse in 8 USC § 237(a)(2)(E)(i). The BIA subsequently clarified that this definition also serves as the definition of child neglect and abandonment. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010).



**Risk of Harm and P.C. § 273a(b).** Not just harm, but risk of harm, is sufficient to be a deportable crime of child abuse. Counsel must assume that all of Calif. P.C. § 273a(a) is deportable child abuse, but it is not yet clear whether all or some of § 273a(b) is. In *Matter of Soram*,<sup>49</sup> the BIA held that child endangerment falls within the “act or omission that constitutes maltreatment of a child” phrase of the generic definition set out in *Velazquez-Herrera*. The BIA found that a conviction for child endangerment under a Colorado statute that prohibits unreasonable action that creates a threat of injury to a child’s life or health, but no actual injury, is a deportable crime of child abuse.

Earlier the Ninth Circuit had interpreted the BIA’s definition in *Velazquez-Herrera* to mean that harm is a requirement, and therefore that § 273a(b) is not a deportable crime of child abuse.<sup>50</sup> In *Matter of Soram* the BIA stated that the Ninth Circuit was wrong when it said actual harm is required. However, the BIA did not specifically address § 273a(b), and it stated that it will decide on a case-by-case basis whether a state’s child endangerment statute is a “crime of child abuse.” In *Soram*, the BIA found that the act of unreasonably placing a child in a situation with a “reasonable probability” that the child’s health or life will be endangered was sufficient to make the Colorado statute categorically a deportable crime of child abuse.

#### **B. Plead to Age-Neutral Statute Where Record Does Not Show a Minor Victim**

The Board of Immigration Appeals held that a plea to an age-neutral offense can be a crime of child abuse, neglect or abandonment only if the fact that the victim was under the age of 18 is proved in the reviewable record of conviction.<sup>51</sup> The BIA held that the following evidence did not offer sufficient proof that the victim was a minor: a Washington state no-contact order involving a child (the birth certificate was provided), which does not necessarily identify the victim of the offense of conviction; and a restitution order to the “child victim,” since restitution in Washington is established by a preponderance of the evidence and so was not part of the “conviction.”<sup>52</sup>

*Counsel should keep the record of a plea to an age-neutral statute clear of evidence of the age of the victim.* (While this is by far the best course, immigration counsel may argue an age-neutral offense never can qualify as a crime of child abuse; someday that rule may be adopted. See “sexual abuse of a minor” discussion at § N.10 Sex Offenses.)

#### **C. Risk of Non-Serious Harm and Cal. P.C. §§ 273a(b)**

Any violation for P.C. § 273a(a) will be held a deportable crime of child abuse.

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<sup>49</sup> *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonable action that causes a threat of injury under Colorado Rev. Stat. 18-6-401(7)(b)(I) is a deportable crime of child abuse, even if no injury is actually caused; disapproves *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009) that under the BIA’s own test, actual harm must occur.)

<sup>50</sup> *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009).

<sup>51</sup> *Velazquez-Herrera*, *supra* at 516.

<sup>52</sup> *Id.* at 516-17.

Assume that any conviction for § 273a(b) will be *charged* as a deportable crime of child abuse, but it is possible that some conduct will be held not to be. In *Matter of Soram* the BIA held that a Colorado child endangerment statute that punishes a person who “permits a child to be *unreasonably* placed in a situation that poses a *threat of injury to the child’s life or health*” is a deportable crime of child abuse or neglect.<sup>53</sup> The statute required a “reasonable probability” that the child’s health or life will be endangered. Unfortunately, *Soram* did not say that any conduct that falls below this standard is *not* a crime of child abuse, and stated that it will continue to evaluate state statutes on a case-by-case basis. It is useful to note, however, that § 273a(b) does reach less serious conduct than the Colorado statute. Most importantly, it is limited to situations “other than those likely to produce great bodily harm or death,” and includes conduct where the person negligently<sup>54</sup> “causes or permits that child to be placed in a situation where his or her person or health may be endangered.”

*Defense counsel should conservatively assume that a conviction under P.C. § 273a(b) will be charged a crime of child abuse or neglect.* Here are some strategies to consider:

- If possible, plead to an age-neutral offense with a record that does not specify the age of the victim. This is the safest plea.
- If you must plead P.C. § 273a(b), include in the record of conviction negligent conduct involving a low or attenuated risk of minor harm to the child. For example, negligently failing to double-check that the child had put on her seatbelt during a brief trip. Warn the client that this may not work: ICE will charge this as a deportable crime of child abuse, and it is not clear what the immigration judge will do.
- If that is not possible, try to leave the record vague. Here too, warn the client of the high risk that immigration authorities will charge it as a deportable crime of child abuse or neglect.

#### **D. Conviction That Includes Sexual Intent Or Injury To Morals**

The definition includes “sexual abuse” and “mental or emotional harm, including acts injurious to morals.” Sexual abuse includes “direct acts of sexual contact, also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification.” Thus an omission that induces a child to engage in sexually explicit conduct, as well as an act that involves the use of a child as an object of sexual gratification is a crime of child abuse.

At this time, ICE appears to be liberally charging almost any offense that involves a child as a deportable crime of child abuse, including offenses that involve lewd or sexual intent in any way. The best plea is to an age-neutral offense in which the record of conviction does not identify the victim’s name, or age of the victim. The BIA acknowledged that the evidentiary

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<sup>53</sup> *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (mere risk of harm can amount to child abuse, disapproving the Ninth Circuit’s contrary finding in *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009) as a misinterpretation of the BIA’s own definition.) See Part A, *supra*.

<sup>54</sup> Although § 273a states “willfully,” courts have held that the mens rea for some of the offenses is criminal negligence. See, e.g., *People v. Valdez*, 27 Cal. 4th 778, 787-788 (Cal. 2002)

rules of the categorical approach apply to determining the age of the victim in a potential “crime of child abuse.” (Compare this to the possibility that this evidentiary standard will be relaxed in proving the “domestic relationship” required for a crime of domestic violence.)

Where possible to obtain, a plea to an age-neutral offense such as **P.C. § 314**, indecent exposure is best, as long as the record does not identify a minor victim. This will be held to be a CIMT, unless possibly if the record shows that the offense involved erotic performance for a willing audience.<sup>55</sup> It appears that ICE will charge **P.C. § 261.5** and other direct, consensual acts with a minor as “child abuse.” The Ninth Circuit might rule against this, based on past findings that this is not necessarily “sexual abuse” because consensual sexual activity with an older teenager does not automatically constitute harm. See further discussion in § N.10 *Sex Offenses*.

Counsel should assume that **P.C. § 272** may be charged as a crime of child abuse, although this should be fought. Like § **273a(b)**, the statute does not require that harm occurred, even to the child’s morals, but rather that the adult acted in a way that could tend to encourage this. Counsel should plead to this type of action, and not to actually causing harm.

#### **D. Other Consequences: Child Abuse Offenses as Crimes Involving Moral Turpitude, Aggravated Felonies**

**Aggravated felony.** An offense that is a “*crime of violence*” for which a sentence of a year has been imposed is an aggravated felony, under 8 USC § 1101(a)(43)(F). To avoid the aggravated felony consequence, counsel must obtain a sentence of 364 days or less for any single count of a crime of violence.

Conviction of an offense that constitutes “*sexual abuse of a minor*” is an aggravated felony regardless of sentence. 8 USC § 1101(a)(43)(A). This includes, for example, all convictions under Calif. P.C. § 288(a), and some convictions under P.C. §§ 261.5, 647.6. See discussion in § N.10 *Sex Offenses*.

**Crime involving moral turpitude.** Offenses that involve intent to cause significant injury, or many offenses with lewd intent, will be held to be a crime involving moral turpitude (CIMT). While at this time it is difficult to determine which offenses will be held to be a CIMT, assume that offenses that involve intentional serious injury to a child, or reckless actions that threaten such injury, will be held a CIMT. In contrast negligent action should not be held a CIMT. Assume that felony, but not misdemeanor, false imprisonment under P.C. § 236 is a CIMT, and that simple battery might not be a CIMT even committed against a person under the age of 18. All of these offenses may be held a deportable crime of child abuse.

Under *Matter of Silva-Trevino*, if a statute is divisible and the record of conviction does not specifically indicate that the conviction was for conduct that does not involve moral

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<sup>55</sup> See *Matter of Corte-Madera*, 26 I&N Dec. 79 (BIA 2013), disapproving *Nunez v. Holder*, 594 F.3d 1194 (9th Cir. 2010). *Nunez* held that § 314(1) is not automatically a CIMT because it had been used to prosecute erotic dancing in clubs, for an audience that clearly was not offended. *Corte-Madera* declined to follow this on the grounds that in practice § 314(1) is not used to prosecute erotic performance.

turpitude, the immigration judge may decide to look beyond the record in order to determine whether the offense is a CIMT. In a divisible statute that contains non-CIMT's and CIMT's, therefore, counsel's goal is to plead specifically to the non-CIMT offense.

See further discussion at § N.7 *Crimes Involving Moral Turpitude*, and see the *California Quick Reference Chart*.

#### IV. CONVICTION FOR STALKING

**Calif. P.C. § 646.9 is a deportable "stalking" offense.**<sup>56</sup> The Board of Immigration Appeals held that a deportable stalking offense requires repeated conduct directed at a specific person, with the intent to cause the person or his or her immediate family members to be placed in fear of bodily injury or death. The Board put off deciding whether to also require that the victim was actually placed in fear, and/or that a reasonable person in like circumstances would have been.<sup>57</sup> A conviction triggers deportability if received after admission and after September 30, 1996.

**Section 646.9 as a Crime of Violence Aggravated Felony.** A "crime of violence" is an aggravated felony if a sentence of a year or more has been imposed. To absolutely prevent a conviction under § 646.9 from being classed as an aggravated felony, counsel should obtain a sentence imposed of 364 days or less on any single count. See § N.4 *Sentence Solutions*. In that case, while the conviction still will be a deportable DV offense as "stalking," you will avoid the even greater penalty of having an aggravated felony conviction.

If 364 days or less on any single count truly is not possible, counsel may attempt to avoid a crime of violence aggravated felony by pleading to "harassing" from a distance under § 646.9. The Ninth Circuit held that § 646.9 is divisible as a crime of violence. The statute penalizes following *or* harassing, and harassing can be committed long-distance by mail, which the court held is not a crime of violence.<sup>58</sup> This defense only applies within the Ninth Circuit, however.<sup>59</sup> Counsel will need to make a specific plea to some action under the statute that is not a crime of violence. The Ninth Circuit gave a few examples of this:

It is true that the California stalking statute requires a credible threat, but "[i]t is not necessary to prove that the defendant had the intent to actually carry out the threat," and even "present incarceration of a person making the threat shall not be a bar to prosecution." § 646.9(g). Stalking under California law may be conducted entirely by sending letters and pictures. Indeed, a stalking conviction has been upheld even though the victim was out of the country at the time that the harassing conduct occurred ...

*Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1083-1084 (9th Cir. 2007).

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<sup>56</sup> *Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012).

<sup>57</sup> *Id.* at 73-74.

<sup>58</sup> *Malta-Espinoza v. Gonzales* 478 F.3d 1080, 1083 (9th Cir 2007).

<sup>59</sup> *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012).

## Appendix 9-I

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

***Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.***

***Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.***

This Appendix provides defense analyses of the following offenses: Cal. P.C. §§ 32, 136.1(b)(1), 236, 243(a), 243(d), 243(e), 243.4, 245, 594, 646.9

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Accessory after the fact under Cal. P.C. § 32*** should not be held a ***crime involving moral turpitude*** in immigration proceedings arising in the Ninth Circuit, because it lacks the requisite intent. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), partially overruled on other grounds by *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (en banc). The BIA stated that it has deferred deciding how to treat accessory in removal proceedings arising within the Ninth Circuit, in light of *Navarro-Lopez*. See *Matter of Rivens*, 25 I&N Dec. 623, 629 (BIA 2011). Until the BIA issues a precedent decision to the contrary, immigration judges should follow *Navarro-Lopez* in cases arising within the Ninth Circuit states. In the alternative, the BIA rule is that accessory after the fact is not a crime involving moral turpitude unless the underlying offense is one. *Rivens*, 25 I&N Dec. at 627.

Accessory after the fact does not take on the character of the underlying offense for other purposes, e.g. as a deportable *controlled substance offense* or *crime of violence*. See, e.g., *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (accessory after the fact to a drug crime is not itself a deportable controlled substance offense); *United States v. Innis*, 7 F.3d 840 (9th Cir. 1993) (accessory after the fact to a crime of violence is not a crime of violence); see generally *United States v. Vidal* 504 F.3d 1072, 1077-1080 (9th Cir. 2007) (en banc) (accessory after the fact to theft is not theft).

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**California P.C. § 136.1(b)(1)** by its terms includes an attempt to nonviolently dissuade a victim or witness from filing a police report. It does not require knowing and malicious action. See, e.g., *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (2007).

**The offense is not an aggravated felony** even if a sentence of a year or more is imposed. It is not a categorical “crime of violence” because it includes non-violent verbal persuasion. *Ibid.* It is not “obstruction of justice” because it does not include the specific intent to prevent the arrest, investigation or prosecution of a perpetrator. It is similar to misprision of felony, the offense of concealing or failing to report the commission of a felony, which has been held *not* to constitute obstruction of justice. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 892-92 (BIA 1999), *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9<sup>th</sup> Cir. 2008) (federal misprision of felony, 18 USC § 4, is not obstruction of justice) and discussion in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012); see also *Hoang v. Holder*, 641 F.3d 1157 (9<sup>th</sup> Cir. 2011). In essence, § 136.1(b)(1) consists of attempt to persuade a person to commit misprision of felony.

**It is not a crime involving moral turpitude**, because it does not require fraud or malicious intent, lacks specific intent to obstruct justice, and can be committed with humanitarian intentions, e.g. out of concern for the risk of reprisals to the reporting witness.

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Misdemeanor sexual battery, Calif. P.C. § 243.4**, is not a crime of violence under 18 USC §16(a) standard, since the restraint can be effected without force. *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9<sup>th</sup> Cir. 2005).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Felony false imprisonment** is an unlawful violation of personal liberty that may be committed by violence, menace, fraud or deceit. *Calif. P.C. §§ 236, 237(a)*. Because fraud and deceit do not involve use or threat of force or the inherent risk that violence will ensue, the offense is divisible as a crime of violence under 18 USC § 16. If the reviewable record is vague, or indicates fraud or deceit, the conviction is not a deportable aggravated felony as a crime of violence even if a sentence of a year is imposed, and is not of a deportable crime of domestic violence even if the victim and defendant share a domestic relationship. Felony false imprisonment is not categorically a crime involving moral turpitude because it can be committed by deceit that does not amount to fraud, with no intention to gain a benefit.

**Misdemeanor false imprisonment**, by definition, is an unlawful violation of personal liberty that is not committed by violence, menace, fraud or deceit. It is not a crime of violence because it does not have use or threat of force as an element as required by 18 USC § 16(a). Misdemeanor false imprisonment is not a crime involving moral turpitude because the statutory definition provides that it does not involve fraud, deceit, menace, or force. See e.g. *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir 2010).

**Even if the record of conviction identifies the victim as a minor**, false imprisonment is not categorically a crime of child abuse because it does not necessarily involve actual harm or a threat of serious harm to a child. See discussion of standard in *Matter of Soram*, 25 I&N Dec. 378, 380-381 (BIA 2010). If the record of conviction does not conclusively prove that the victim was a child, the offense is not a crime of child abuse in any case. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516-17 (BIA 2007). Further, under Ninth Circuit precedent, an immigration judge may not rely on a fact in the record of conviction, if that fact is not necessary to prove an element of the offense. *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011)(*en banc*). This offense is age-neutral. Specifically, it has no element pertaining to the minor age of a victim. Therefore the immigration judge may not rely on information in the record of conviction pertaining to the victim's minor age. See, e.g., *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (immigration judge may not use facts about minor age of the victim in the record of conviction to hold that conviction under an age-neutral statute is sexual abuse of a minor, because this fact never could be "necessary" to prove an element under the offense as required by *Aguila-Montes de Oca*, *supra*).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***An assault or battery that can be committed by de minimus touching (“offensive touching”)*** is not a crime of violence under 18 USC § 16 or a crime involving moral turpitude, unless there is evidence in the record of conviction that the defendant used actual violence. Battery against a spouse under **Cal. P.C. § 243(e)** is not a crime of violence, a deportable crime of domestic violence, or a crime involving moral turpitude unless the record of conviction shows that violent force was used. See, e.g., *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); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9<sup>th</sup> Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense).

**Calif. P.C. § 243(d)** prohibits any battery that results in injury. This section can be violated by a battery that is a mere offensive touching under the same definition as in §§ 242, 243(e), and that was not intended or even likely to cause the injury. See, e.g., *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) (Section 243(d) is “the act of battery which results in serious bodily harm to the victim no matter what means or force was used.”). Therefore § 243(d) is not categorically a crime of violence or a crime involving moral turpitude, under the same reasoning that § 243(e) is not. See, e.g., *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, [www.usdoj.gov/eoir/vll/intdec/indexnet.html](http://www.usdoj.gov/eoir/vll/intdec/indexnet.html) (Calif. P.C. § 243(d) is not a CIMT if committed with offensive touching); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (same result for similar Canadian statute).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Assault under Cal. P.C. § 245(a)*** is not categorically a crime involving moral turpitude. *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc). Section § 245(a) is a general intent crime that requires no intent to harm and reaches conduct committed while intoxicated or otherwise incapacitated. See, e.g., *People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Vandalism under Cal. P.C. § 594*** prohibits maliciously defacing, damaging or destroy property. Maliciously “imports a wish to vex, annoy, or injure” a person. Cal. P.C. § 7.

Vandalism is not categorically a crime involving moral turpitude. See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995). Nor is it categorically a crime of violence. See, e.g., *United States v Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not a CIMT). Even if vandalism were held a crime of violence, it cannot be held a deportable crime of domestic violence because it is a crime against property, while the definition of crime of domestic violence is a “crime of violence ... against a person...” INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Stalking or harassment under Cal. P.C. § 646.9*** is divisible as a “crime of violence” in immigration proceedings arising within the Ninth Circuit, because it can be committed by an offense such as harassment from a long distance or a reckless act. Therefore it is not categorically an aggravated felony as a crime of violence even if a sentence of one year or more is imposed. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).

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## Criminal Defenders in Ninth Circuit States: Immigration Effect of Selected California Offenses Relating to Domestic Violence<sup>1</sup>

This appears as App. 9-II in “Note: Domestic Violence” and see also *Defending Immigrants in the Ninth Circuit* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes)

<p><b>CALIF. PENAL CODE SECTION and OFFENSE</b></p> <p><i>Summary of Immigration Consequences</i></p>	<p><b>AGGRAVATED FELONY (AF)</b></p> <p>-Crime of Violence (COV) and Obstruction of Justice are AF only if sentence of at least 1 yr is imposed<sup>2</sup></p> <p>- Sexual Abuse of a Minor and Rape are AFs regardless of sentence<sup>3</sup></p>	<p><b>CRIME INVOLVING MORAL TURPITUDE (CIMT)<sup>4</sup></b></p> <p>(Note there are few guarantees in this area)</p>	<p><b>OTHER DEPORTATION GROUNDS or Consequences</b></p> <p>-Deportable Crime of Domestic Violence (DV)<sup>5</sup> or vio. of DV protective order<sup>6</sup></p> <p>-Deportable Crime of Child Abuse<sup>7</sup></p> <p>-Block a US Citizen or LPR from petitioning for family member, Adam Walsh Act<sup>8</sup></p>
<p><b>Any Felony or Misdemeanor Conviction</b></p>	<p>Might be an AF, with or without a one-year sentence imposed. See Note: Aggravated Felonies and Note: Sentence Solutions at <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a></p>	<p>Might be a CIMT. See Note: CIMT at <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a></p>	<p>One felony or two misds bars Temporary Protected Status (TPS).<sup>9</sup> One felony or three misds, or one “significant” misd, bars DACA status.<sup>10</sup></p>
<p><b>P.C. §32</b></p> <p><b>Accessory after fact</b></p> <p><i>Summary: Good plea to avoid deportable DV or drug offense, but get 364 days or less</i></p>	<p>To avoid AF as obstruction of justice, avoid 1 y or more sentence imposed on any single count.<sup>11</sup> See Note: Sentence for strategies.</p>	<p>Yes CIMT if principal offense is.<sup>12</sup> Have ROC identify underlying offense that is not a CIMT, or just plead to, e.g., 243(e) with offensive touching, 415, 591</p>	<p>Accessory does not take on character of the principal offense for, e.g. drugs or violence<sup>13</sup> (it only does for CIMTs), so it is excellent alternative plea to those charges.</p>
<p><b>P.C. § 69</b></p> <p><b>Resisting Arrest</b></p> <p><i>Summary: Potential good plea for DV</i></p>	<p>To avoid AF as COV, avoid 1 yr on any single count (preferable) and/or have ROC show offensive touching, or in some cases, a vague record.<sup>14</sup></p>	<p>To try to avoid a CIMT, let the ROC show offensive touching without intent to do violence; see footnote on crime of violence</p>	<p>Not a deportable DV offense if not a COV and/or if V was officer.</p>
<p><b>P.C. §136.1(b)(1)</b></p> <p><b>Nonviolently try to persuade a witness not to file police report or complaint</b></p> <p><i>Summary: Authors believe that with careful plea, there should be few or no imm consequences if less than 1 year.</i></p>	<p>Obtain sentence of 364 days or less for any single count.</p> <p>If 1 yr or more is imposed: -- ICE might (wrongly) charge AF as obstruction of justice; see plea instructions in endnote.<sup>15</sup> -- Not AF as COV as long as ROC states that there was no use or threat of violence.</p>	<p>Arguably not a CIMT if plea articulates a well-meaning intent, but no guarantee of this.<sup>16</sup> With vague ROC, imm judge may consider facts from testimony or other evidence outside the ROC, for CIMT purposes only.</p>	<p>Deportable DV crime if it is COV (i.e., if the ROC shows use, attempt, threat of violent force) and there is DV-type victim.</p> <p>To avoid possible deportable crime of child abuse, do not let ROC show person persuaded was under age 18</p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. §166(a)(1)-(4)</b> <b>Contempt of court or violation of court order (generic)</b></p> <p><i>Summary: Can be good plea, including as an alternative to 273.6 to avoid domestic violence deportation ground.</i></p> <p><i>If using 166(a)(4) to avoid 273.6, consider instead a plea to a new offense such as 243(e), 491, 653m</i></p> <p><i>Note 166(b) and (c) are bad immigration pleas.</i></p>	<p>A COV is an AF a 1 yr sentence is imposed on any single count. Because this has a maximum 6 months, even if it is a COV it will not be an AF.</p> <p>(To avoid conviction of a COV for DV ground purposes, do not let ROC show use or threat of violent force. See also advice in far right column on how to avoid a deportable finding of violation of a DV protection order.)</p>	<p>With no intent, (a)(1)-(3) is not automatic CIMT, but imm judge currently may look into the facts.</p> <p>Section (a)(4) might be a CIMT depending upon whether the conduct that violated the order is a CIMT. Plead specifically to conduct that does not use or threaten violence and otherwise is not egregious</p>	<p>Must avoid deportable <u>civil or crim court finding of violation of section of a DV order</u> that protects against violence, threat or repeat harassment.<sup>17</sup> Keep ROC clear of info that would prove the above. Sec (a)(1-3), esp (3), are good.</p> <p>For (a)(4), don't ID a violation of a DV order; or if DV order admitted, ID violation relating to custody, support, or perhaps counseling, or get vague ROC. <i>Any violation of DV stay-away order is deportable.</i> Better plea is to 243(e) or other new offense.</p> <p>To avoid <u>conviction of a deportable DV crime</u>, do not let ROC show attempt, threat or use of violent force against V with domestic relationship.</p>
<p><b>P.C. §§ 236, 237</b> <b>False imprisonment (felony)</b></p> <p><i>Summary: With careful plea, a felony may avoid immigration effect except for a CIMT.</i></p>	<p>To avoid possible AF as a COV, get 364 days or less for any single count.</p> <p>If sentence is 1 yr or more, plead to fraud or deceit, which shd not be held a COV. A plea to violence or threat will be COV.</p>	<p>CIMT with <i>possible</i> exception of specific plea to deceit. Felony 236 requires fraud, deceit, force, or threat.</p> <p>To avoid CIMT, plead to 243(e), 653m, or if needed misdemeanor 236, with specific record of conviction.</p>	<p>A COV (by threat or force) is deportable DV offense if committed against a DV-type victim.</p> <p>Depending on circumstances, may be deportable crime of child abuse if ROC shows V under 18 yrs.</p> <p>If V under 18, may block a U.S. citizen or permanent resident's future ability to immigrate family members, under Adam Walsh Act.<sup>7</sup></p>
<p><b>P.C. §236, 237</b> <b>False imprisonment (misdemeanor)</b></p> <p><i>Summary: With careful plea, misdemeanor may have no immigration effect.</i></p>	<p>Should not be AF as COV because by definition does not involve force or threat, and does not have this as element.</p> <p>But conservatively, obtain sentence of 364 or less and/or state the offense did not involve use or threat of violence</p>	<p>While misdo 236 shd not be held a CIMT,<sup>18</sup> an imm judge can take testimony on facts if ROC is vague. Plead specifically to no intent to harm and/or thought conduct was legal. To more surely avoid a CIMT, see 243(e), 240.</p>	<p>If not a COV, not a deportable DV offense.</p> <p>Depending on circumstances, may be deportable crime of child abuse if ROC shows V under 18 yrs. In addition, the conviction may block a citizen or LPR's future ability to immigrate family members, under Adam Walsh Act.<sup>7</sup></p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. §240(a)</b> <b>Assault, simple</b></p> <p><i>Summary: With careful plea shd have no immigration effect; see also battery</i></p>	<p>Not a COV if offensive touching, and not AF COV because has a six-month maximum.</p> <p>Plea to 243 may be preferable just because there is clear, recent imm case law.</p>	<p>Altho simple assault never shd be held a CIMT,<sup>19</sup> plead to assault by attempted offensive touching. Plea to 243 may be preferable because of clear, recent imm case law.</p>	<p>If offense is held a COV and victim has a domestic relationship, deportable DV offense.</p> <p>To avoid possible deportable crime of child abuse, do not let ROC show V under age 18</p>
<p><b>P.C. §243(a)</b> <b>Battery, Simple</b></p> <p><i>Summary: With careful plea, may have no immigration effect</i></p>	<p>Not an AF as COV because no 1-year sentence.</p> <p>Not COV if de minimus force (offensive touching) rather than actual violence involved. See 243(e).</p>	<p>Simple battery with no relationship of trust shd never be a CIMT, but a judge might hold it is divisible like 243(e). See 243(e) comments.</p>	<p>If offense is held a COV and victim has a domestic relationship, deportable DV offense.</p> <p>To avoid possible deportable crime of child abuse, do not let ROC show V under age 18</p>
<p><b>P.C. §243(d)</b> <b>Battery with serious bodily injury</b></p> <p><i>Summary: With careful plea, can avoid AF and deportable DV offense; might avoid even a CIMT.</i></p>	<p>To avoid AF as COV, get 364 days or less for any single count.</p> <p>If sentence of 1 yr or more is imposed, to avoid AF as COV: -Plead to de minimus force (offensive touching ) which shd prevent felony, and will prevent misdemeanor, from being COV. <sup>20</sup> Misdo includes wobbler reduced to misdo.</p>	<p>De minimus force shd not be held a CIMT,<sup>21</sup> but actual violence is a CIMT.</p> <p>To avoid a CIMT plead specifically to de minimus force; if not, immigration judge may inquire into underlying facts for CIMT purposes only under <i>Silva-Trevino</i>.</p>	<p>If offense is held a COV and victim has a domestic relationship, deportable DV offense.</p> <p>To avoid a deportable crime of child abuse, don't let ROC show V was under age 18.</p>
<p><b>P.C. §243(e)(1)</b> <b>Battery against spouse, date, etc.</b></p> <p><i>Summary: Excellent imm plea as long as the plea is to "offensive touching"; this avoids any immigration effect</i></p>	<p>To avoid possible AF as a COV, get 364 days or less for any single count.</p> <p>Even if 1 yr imposed, 243(e) is not a COV if ROC shows offense involved de minimus force (offensive touching) rather than actual violence.<sup>22</sup> A vague ROC will protect an LPR who is not otherwise deportable, and no one else.<sup>23</sup></p>	<p>Make specific plea to offensive touching to avoid a CIMT.<sup>24</sup> If instead ROC is vague, under <i>Silva-Trevino</i> the imm judge may inquire into underlying facts.</p>	<p>A deportable DV offense only if this is a COV. If ROC shows offensive touching, or is entirely vague on the point, it will not cause an LPR who is not otherwise deportable to become deportable, and the person can accept DV counseling, stay away order, etc. without it becoming one. But a vague record will be a bar to non-LPR cancellation.</p> <p>To avoid possible deportable crime of child abuse, do not let ROC show V under age 18</p>



OFFENSE	AGGRAVATED FELONY (AF) Crime of Violence (COV) Sex Abuse of a Minor (SAM)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. §243.4</b> <b>Sexual battery</b></p> <p><i>Summary: Can use to avoid an AF such as rape or sexual abuse of a minor. Might avoid deportable DV or child abuse offense.</i></p>	<p><u>To avoid AF as COV:</u> Get 364 days or less on any count.</p> <p>If 1 yr or more imposed: -Felony is AF as COV but -Misd is divisible as COV.<sup>25</sup> For misd let ROC show restraint not by use of force.</p> <p><u>To avoid AF as Sexual Abuse of a Minor or Rape</u> -To avoid rape, ROC must not show penetration. -To avoid sexual abuse of a minor, ROC must not show V under 18. - Note 364-day sentence does not protect here. Sexual abuse of a minor and rape are AFs regardless of sentence.</p>	<p>Yes CIMT</p>	<p>A COV is <u>deportable DV offense</u> if committed against DV type victim, which includes a dating relationship. Felony is COV while misdemeanor is divisible (see Agg Felony column)</p> <p>To avoid <u>deportable crime of child abuse</u> (and AF sexual abuse of a minor), don't let ROC show V was under 18.</p>
<p><b>P.C. §245(a)</b> <b>(effective 1/1/2012)</b> <b>Assault with a deadly weapon or with force likely to produce great bodily harm</b></p> <p><i>Summary: With careful plea can avoid Agg Felony or deportable DV offense. Probably will be a CIMT.</i></p>	<p>This is a COV. To avoid an AF, get 364 days or less on any single count</p> <p>245(a)(3) is an AF as a federal firearms analogue, even with a sentence of less than one year</p>	<p>Conservatively assume yes CIMT, despite case law to the contrary. To try to avoid CIMT for (1), (2), (4), have the ROC show intoxicated or incapacitated conduct with no intent to harm.<sup>26</sup></p>	<p>A COV is deportable <u>crime of DV</u> if committed against DV type victim, and <u>crime of child abuse</u> if ROC shows victim under 18. Keep ROC clear.</p> <p>To avoid <u>deportable firearms offense</u>,<sup>27</sup> keep ROC of conviction clear of evidence that offense was 245(a)(2) or (3); consider PC 17500, 236, 243(d) and 136.1(b)(1) and see Note: Firearms.</p>
<p><b>P.C. §261</b> <b>Rape</b></p> <p><i>Summary: Automatic aggravated felony, CIMT</i></p>	<p>Yes AF as rape, regardless of sentence imposed. Includes if V is incapacitated and other contexts not including force.</p> <p>Consider PC 243(d), 243.4, 236, 136.1(b)(1)</p>	<p>Yes CIMT</p>	<p>A <u>deportable crime of DV</u> if committed against DV type victim, e.g. date</p> <p>To avoid <u>deportable crime of child abuse</u>, don't let ROC show V was under 18.</p>
<p><b>P.C. §262</b> <b>Spousal Rape</b></p> <p><i>Summary: Automatic aggravated felony, CIMT</i></p>	<p>Yes AF, regardless of sentence imposed. See § 261 suggestions</p>	<p>Yes CIMT</p>	<p><u>Deportable crime of DV.</u></p> <p><u>Deportable crime of child abuse</u> if ROC shows V under 18 year</p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. § 273a Child Abuse</b></p> <p><i>Summary: Even 273a(b) may be deportable child abuse offense; to avoid this consider age-neutral statutes without minor age in ROC</i></p>	<p>To avoid an AF as a COV, get 364 days or less on any single count, and/or do not let ROC show use or threat of aggressive, intentional violent force – e.g., show negligently permitted to be in danger.</p> <p>Do not let ROC show intentional sexual conduct or intent, to avoid possible AF as sexual abuse of a minor.</p>	<p>Assume 273a(a) will be CIMT. For 273a(b), while negligence generally is not sufficient for CIMT, still a risk. ROC must ID specific facts re negligence and minor threat, or imm judge may conduct factual inquiry to make CIMT determination.</p>	<p>273a(a) will be, and 273a(b) might be, held a <u>deportable crime of child abuse</u>. To avoid this, plead to an age-neutral offense and do not put age in ROC. If must plead to 273a(b), to try to avoid deportable child abuse let ROC reflect attenuated risk and less serious harm, or leave ROC vague on these facts.</p>
<p><b>P.C. § 273ab(a), (b) Severe Child Assault</b></p> <p><i>Summary: This is a bad plea for immigration. Consider PC 243(d)?</i></p>	<p>Assume that this is an AF as a COV if a sentence of 1 year or more is imposed on any single count.</p> <p>Imm counsel may argue that because the offense involves recklessness it is not a COV.</p>	<p>Yes, CIMT</p>	<p><u>Deportable crime of child abuse</u>.</p> <p><u>Deportable crime of domestic violence</u> if child is protected under Cal. DV laws</p>
<p><b>P.C. § 273d Child Injury</b></p> <p><i>Summary: Deportable crime of child abuse, CIMT, but can avoid AF with a sentence of less than 1 yr</i></p>	<p>To avoid AF as COV, get 364 days or less on any single count.<sup>28</sup></p> <p>-If 1 yr is imposed, to avoid COV see 243(a), 243(e), 236, and perhaps 136.1(b)(1) and 243(d), keeping minor age out of ROC. This also would avoid deportable child abuse.</p> <p>If ROC shows sexual intent or conduct, AF as sex abuse of a minor regardless of sentence.</p>	<p>Yes, CIMT</p>	<p><u>Deportable crime of child abuse</u>.</p> <p>If offense is a COV and child is protected under Cal. DV laws, also a <u>deportable crime of DV</u>. Conviction must be on or after 9/30/1996</p>
<p><b>P.C. §273.5 Spousal Injury</b></p> <p><i>Summary: Deportable DV, CIMT, but can avoid AF with a sentence of less than 1 year</i></p>	<p>To avoid AF as COV, get 364 days or less on any single count.</p> <p>To avoid COV and deportable crime of DV, see PC 243(a), 243(e), 236, and perhaps 136.1(b)(1) and 243(d); can accept batterer's program probation conditions on these. "Note: Domestic Violence."</p>	<p>Yes, CIMT (unless, perhaps, can plead specifically to minor touching where V and D had an attenuated relationship, e.g. briefly co-habitated long ago.<sup>29</sup>)</p>	<p><u>Deportable crime of DV</u>.</p> <p>To avoid <u>deportable crime of child abuse</u>, don't let ROC show V was under 18.</p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. §273.6</b></p> <p><b>Violation of protective order</b></p> <p><i>Summary: Bad plea: Civil or criminal finding is a deportable DV offense. See last column for suggested pleas.</i></p>	<p>Get 364 days or less for any single count to be sure of avoiding AF as COV.</p> <p>If 1 yr sentence imposed, do not let ROC show violation was by threat or use of violent force; in that case shd not be an AF as COV.</p>	<p>Unclear. Might be CIMT based on what conduct was; plead specifically to non-violent, minor conduct. With vague plea, imm judge may do factual inquiry, for CIMT purposes only.</p>	<p>§ 273.6 "pursuant to" Cal. Family Code §§ 6320 and 6389 is <i>automatically</i> deportable as a <u>violation of a DV protection order</u>. Consider plea to 166(a) with a vague ROC, or to a new offense that is not deportable; see 243(e), 591, 653m</p>
<p><b>P.C. §281</b></p> <p><b>Bigamy</b></p>	<p>Not AF</p>	<p>Yes CIMT</p>	<p>No</p>
<p><b>P.C. §403</b></p> <p><b>Disturbing public assembly</b></p>	<p>Not AF</p>	<p>Not CIMT, but keep ROC clear</p>	<p>No. As always, keep the ROC clear of violent threats or conduct.</p>
<p><b>P.C. §415</b></p> <p><b>Disturbing the peace</b></p>	<p>Not AF</p>	<p>Probably not CIMT, but keep ROC clear of onerous conduct</p>	<p>No. As always, keep the ROC clear of violent threats or conduct</p>
<p><b>P.C. §422</b></p> <p><b>Criminal threats</b></p> <p><i>Summary: Can avoid an AF with 364 day sentence; might avoid deportable DV if DV-type victim not ID'd</i></p>	<p>Yes AF as COV if 1-yr sentence imposed.<sup>30</sup> Obtain 364 days or less on any single count.</p> <p>With 1 yr see PC 243(e), 236, 240, maybe 136.1(b)(1)</p>	<p>Yes CIMT</p>	<p>As a COV, it is a <u>deportable crime of DV</u> if ROC shows committed against DV type victim.</p> <p>To avoid <u>deportable crime of child abuse</u>, don't let ROC show V was under 18.</p>
<p><b>P.C. § 591</b></p> <p><b>Tampering with phone, TV lines</b></p> <p><i>Summary: Good plea; no immigration effect except possible CIMT</i></p>	<p>Not a COV.</p>	<p>Should not be CIMT, but no guarantees. To be safe, ID innocuous behavior on ROC.</p>	<p>Not deportable DV offense b/c not COV, but to be safe keep ROC clear of any violence or threats of force.</p>
<p><b>P.C. § 591.5</b></p> <p><b>Tampering w/ phone to prevent contact w/ law enforcement</b></p> <p><i>Summary: No immigration effect except may be CIMT</i></p>	<p>No because 6 month possible maximum.</p>	<p>Conservatively assume it is a CIMT, but might not be.</p>	<p>Not deportable DV offense b/c no element of intent to threaten or use violent force – but keep ROC clear of any violence or threats of force. To avoid possible deportable crime of child abuse, do not let ROC show V under age 18</p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<p><b>P.C. §594 Vandalism (Felony)</b></p> <p><i>Summary: May avoid any immigration effect except risk of CIMT</i></p>	<p>To be safe obtain 364 or less for any single count.</p> <p>To prevent COV, do not let ROC show property was “destroyed” or violence was used.</p>	<p>Might be held a CIMT if costly damage.<sup>31</sup></p>	<p>Even if a COV, shd not be a deportable DV offense because that includes only violence against persons, not property. Still, try to keep relationship out of ROC.</p>
<p><b>P.C. §594 Vandalism (Misdemeanor)</b></p> <p><i>Summary: With care, may avoid immigration effect; small risk of CIMT</i></p>	<p>To be safe obtain 364 or less for any single count.</p> <p>This shd not be held a COV, but conservatively if 1 yr sentence do not let ROC show property was “destroyed” or violence intentionally used.</p>	<p>While no guarantee, Ninth Cir held similar statute not a CIMT where damage less than \$250.<sup>32</sup></p> <p>(Note that pre-2000 §594 convictions carry six-month maximum sentence)</p>	<p>Even if a COV, shd not be a deportable DV offense because this is violence against property. Still, try to keep relationship out of ROC.</p>
<p><b>P.C. §602 Trespass misd (property damage, carrying away, etc.)</b></p> <p><i>Summary: May have little effect; see also 647</i></p>	<p>Not AF (even if it were a COV, it has a 6-month maximum sentence)</p>	<p>Might be divisible as CIMT. ROC shd state intent other than to steal or create very costly damage (see 594 discussion, above).</p>	<p>§602(l)(4) is deportable firearm offense.</p> <p>As always, do not let ROC reflect immigration-adverse facts such as theft, firearms, violence.</p>
<p><b>P.C. §602.5(a), (b) Trespass misdo(unauthorized entry to residence)</b></p> <p><i>Summary: See advice, get 364 days or less</i></p>	<p>Shd not be AF, but obtain 364 days or less on any single count</p>	<p>ROC shd state intent to enter with <i>no intent to commit a crime</i>, or else might be charged a CIMT as equivalent to residential burglary</p>	<p>No. As always, keep violent threat or conduct, and evidence of person under age of 18, out of the ROC</p>
<p><b>P.C. §646.9 Stalking</b></p> <p><i>Summary: Not a good imm plea because it is a deportable DV offense. Consider PC 243(e) and other offenses cited at last column</i></p>	<p>Avoid AF as a COV by avoiding 1 yr or more for any single count.</p> <p>If 1 yr is imposed: In the Ninth Circuit, not a COV if ROC indicates offense involved harassment from a long distance or reckless act, or is vague on these points,<sup>33</sup> but outside Ninth Circuit § 646.9 is an automatic COV.<sup>34</sup></p>	<p>Assume yes a CIMT. See alternate pleas in next column.</p>	<p><u>Yes, deportable under the DV ground</u> as “stalking” even if it is not a COV.</p> <p>To avoid CIMT, COV and DV deportable offense, see e.g. §§ 136.1(b)(1), 166, 243(a), (e), 236, 653m, or similar offenses. Indicate in ROC no use or threat of violence, or leave ROC vague.</p>

OFFENSE	AGGRAVATED FELONY (AF)	MORAL TURPITUDE (CIMT)	DEPORTATION GROUND
<b>P.C. §647(c), (e), (h)</b> <b>Disorderly conduct</b>	Not AF.	Not CIMT.	No, except as always do not let ROC show violent act or threat, guns, etc.
<b>P.C. §647(i)</b> <b>Disorderly conduct:</b> <b>"Peeping Tom"</b>	Not AF, although keep evidence of minor age of victim out of the ROC.	Assume yes CIMT, but maybe not if specific plea to peeking without lewd intent <sup>35</sup>	To avoid possible deportable crime of child abuse, do not let ROC show V under age 18
<b>P.C. § 653m(a), (b)</b> <b>Annoying, harassing phone calls</b>  <i>Summary: With careful plea shd have no immigration effect.</i>	Not AF as COV because no 1-year sentence.	To try to avoid CIMT, the ROC shd specify no threats to use violence, and an intent to annoy rather than harass.	To avoid deportable DV, keep threats of violence out of ROC  Multiple calls (b) possibly charged as deportable stalking; plead to annoy, and take (a) for one call if possible  To avoid possible deportable crime of child abuse, do not let ROC show V under age 18

## ENDNOTES

<sup>1</sup> By Katherine Brady, Immigrant Legal Resource Center. For additional information see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit* ("Defending Immigrants") at [www.ilrc.org](http://www.ilrc.org). See also *Notes in the California Quick Reference Chart and Notes on Immigration Consequences of Crimes* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>2</sup> If a sentence of a year or more is imposed, a "crime of violence" as defined at 8 USC § 16 is an aggravated felony under 8 USC § 1101(a)(43)(F), and obstruction of justice is an aggravated felony under § 1101(a)(43)(S).

<sup>3</sup> Sexual abuse of a minor and Rape are aggravated felonies under 8 USC § 1101(a)(43)(A), regardless of sentence.

<sup>4</sup> Depending on various factors, one or more convictions of a crime involving moral turpitude (CIMT) are a basis for deportability and inadmissibility. See 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(A)(i). Under the current "*Silva-Trevino* rule," unless the record of conviction specifically identifies a non-CIMT, an immigration judge may hold a broad inquiry into the underlying facts. See § N.7 *Crimes Involving Moral Turpitude*.

<sup>5</sup> Under 8 USC § 1227(a)(2)(E)(i), a noncitizen is deportable who is convicted of a statutorily defined crime of domestic violence, or of stalking. A crime of domestic violence (a) must be a crime of violence as defined by 18 USC 16 and (b) must be committed against a victim who is protected under the state's DV laws or is a current or past co-habitant, co-parent, or spouse. While only evidence in the record of conviction may establish the "crime of violence" elements, in the future courts may hold that the domestic relationship may be proved with evidence outside the record. The best defense is to plead to an offense that is not a "crime of violence," in which case the conviction will not be a deportable DV offense even if the domestic relationship can be proved. Or, plead to a crime of violence against a victim not protected under DV laws, e.g. the new boyfriend, a neighbor, an officer.

<sup>6</sup> Under § 1227(a)(2)(E)(ii), a noncitizen is deportable based upon a civil or criminal court finding of a violation of a portion of a domestic violence protection order that protects against violence, threats of violence, or repeated harassment. Because the focus is the purpose of the clause violated rather than the severity of the violation, even a finding of an innocuous violation of a stay-away order (walking a child up the driveway rather than dropping him off at the curb) triggers this ground. *Szalai v. Holder*, 572 F.3d 975 (9<sup>th</sup> Cir. 2009); *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835 (9<sup>th</sup> Cir. 2009); *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). The conviction, or the conduct that violated the protective order, must have occurred on or after September 30, 1996. See § N.9 *Domestic Violence*.



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<sup>7</sup> A noncitizen is deportable for conviction of a crime of child abuse, neglect, or abandonment, if the conviction occurred on or after September 30, 1996. 8 USC § 1227(a)(2)(E)(i). A conviction under an age-neutral statute is not a crime of child abuse as long as the record of conviction does not establish that the victim was under age 18. See § N.9 Domestic Violence and Child Abuse at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>8</sup> Under the Adam Walsh Act a conviction for certain offenses against a victim under the age of 18 will prevent a permanent resident or even a U.S. citizen from petitioning to get a green card for close family members in the future. The offenses include assault and false imprisonment. See § N.13 Adam Walsh Act at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>9</sup> Temporary Protected Status (TPS) is given to nationals of certain countries that have suffered recent natural disaster or civil unrest, for example post-earthquake Haiti, if the nationals were in the U.S. and registered for TPS as of certain dates. For more information on current TPS, see [www.uscis.gov](http://www.uscis.gov) under “Humanitarian.”

<sup>10</sup> Deferred Action for Childhood Arrivals (“DACA”) provides in this case employment authorization and at least two years protection from removal, for certain persons who came to the U.S. while under 16 years of age and for at least five years before June 15, 2012 resided in the U.S., and who were not over age 30 as of that date. Crimes provisions are very strict. Conviction of one felony (potential sentence of more than one year); of three misdemeanors of any type; or of one “significant misdemeanor” is a bar to DACA. DHS states that a “significant misdemeanor” is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales, burglary, driving under the influence of drugs or alcohol, or any other misdemeanor for which the jail sentence was more than 90 days. For more information go to [www.ilrc.org](http://www.ilrc.org), or [www.uscis.gov](http://www.uscis.gov) under “Humanitarian” (see FAQ’s).

<sup>11</sup> The Board of Immigration Appeals (BIA) held that P.C. § 32 is automatically obstruction of justice. *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). Avoid 1 year sentence imposed on any single count.

<sup>12</sup> *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). The Ninth Circuit had held that § 32 is never a CIMT, but unless and until it declines to apply the BIA’s rule, counsel must assume § 32 is a CIMT if the underlying offense is.

<sup>13</sup> P.C. § 32 does not take on the character of the underlying offense, other than for CIMT purposes. See, e.g., *United States v. Innis*, 7 F.3d 840 (9th Cir. 1993) (accessory after the fact to a crime of violence is not a crime of violence); *Matter of Batista-Hernandez*, *supra* (accessory after the fact to a drug offense is not a drug offense).

<sup>14</sup> See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (P.C. § 69 is divisible as a crime of violence because its definition of “force and violence” is the same as simple battery, in that it includes de minimus force). A sentence of 365 and a plea to “offensive touching” should not be an aggravated felony in any context. The same sentence and a *vague* record can prevent a lawful permanent resident who is not deportable under any other ground from becoming deportable based on the aggravated felony ground, but will not prevent the offense from being an aggravated felony for purposes of *bars to status or discretionary relief*. See § N.3 Record of Conviction on effect of vague record.

<sup>15</sup> As discussed at note 11, above, the BIA has held that accessory after the fact under P.C. § 32 is obstruction of justice, including where the defendant obstructed just the principal’s arrest. Based upon this, ICE might charge that § 136.1(b)(1) also is obstruction of justice and thus an aggravated felony if a sentence of a year or more is imposed. However, § 32 was held obstruction of justice because it requires specific intent to prevent the criminal from undergoing arrest, trial or punishment. Section 136.1(b)(1) lacks this intent. It simply prohibits nonviolently and without pecuniary gain attempting to persuade a victim of or witness to a crime not to file a police report. With its lack of specific intent, § 136.1(b)(1) is more akin to misprision of felony (concealing a felony), which has been held not to be obstruction of justice; see discussion in *Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011). Under § 136.1(b)(1) the defendant may wish for the criminal to be apprehended but still attempt to persuade a victim or witness not to file charges, for example to save the person from feared consequences of filing (e.g., reprisals by gang members, eviction if certain facts come out, emotional strain on an unhealthy person). The defendant may know that multiple reports in the matter already were filed, or think the witness may do the case more harm than good. Thus, while by far the best course is to get no more than 364 days on any single count (see Note: Sentences at [www.ilrc.org/crimes.com](http://www.ilrc.org/crimes.com)), if that is not possible try to fashion a *specific plea consistent with the above*.

<sup>16</sup> If the record shows an intent to protect or assist the witness rather than to help the criminal escape, this might avoid classification as a CIMT. See above note for fact examples.

<sup>17</sup> See note 6, discussing the deportation ground based on violation of DV-protective order.

<sup>18</sup> *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).



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<sup>19</sup> See, e.g., *Matter of B-*, 5 I&N 538 (BIA 1953) (simple assault is not a CIMT); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (assault is CIMT only with aggravating factors, such as serious assault against a police office).

<sup>20</sup> Like simple battery, § 243(d) can be committed with de minimus force, with no intent to cause injury or likelihood of doing so; §§ 243(a) and (d) differ only in the result. See *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978). A crime of violence involves purposeful, aggressive, violent conduct. Felony is riskier because gov't could assert that this force, while not itself violent, is likely to lead to violent fight; immigration counsel should fight that. A wobbler that is designated or reduced to a misdemeanor is a misdemeanor with a potential sentence of one year for immigration purposes. *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>21</sup> *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision, [www.usdoj.gov/eoir/vll/intdec/indexnet.html](http://www.usdoj.gov/eoir/vll/intdec/indexnet.html) (P.C. § 243(d) is not a CIMT if committed with offensive touching); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (similar Canadian statute).

<sup>22</sup> See, e.g., *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (Calif. P.C. § 242 is not a crime of violence if it involves offensive touching); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (same for § 243(e)).

<sup>23</sup> A vague ROC will prevent the offense from causing a noncitizen to be *deportable* (except under the CIMT grounds). Under a recent decision, it will not prevent the conviction from being a bar to eligibility for relief from removal or status. *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc) and Advisory at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>24</sup> *Matter of Sanudo*, *supra* (§ 243(e) is not a CIMT if it involves offensive touching).

<sup>25</sup> Compare *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (misdemeanor PC §243.4 is not categorically a crime of violence under 18 USC §16(a) standard since the restraint can be effected without force) with *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005)(felony Calif. PC §243.4(a) is a crime of violence under 18 USC §16(b) standard because it contains the inherent risk that force will be used).

<sup>26</sup> See *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc) (§ 245(a) is not categorically a CIMT). P.C. § 245(a) is a general intent crime that requires no intent to harm and reaches conduct while intoxicated or incapacitated. See, e.g., *People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971). The BIA is likely to rule against this, however. Note that §245(a) is a crime of violence.

<sup>27</sup> A noncitizen is deportable if convicted of almost any offense relating to a firearm. 8 USC §1227(a)(2)(C).

<sup>28</sup> Calif. P.C. § 273d has same elements re violence as § 273.5, which has been held an automatic crime of violence.

<sup>29</sup> *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009) (§ 273.5 is not automatic CIMT because relationship can be attenuated and the touching only battery). But § 273.5 is a crime of violence and deportable DV offense.

<sup>30</sup> *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

<sup>31</sup> See next footnote regarding misdemeanor vandalism.

<sup>32</sup> *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (Wash. statute not CIMT where damage is less than \$250, committed with intent to annoy) and *US v Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not a CIMT).

<sup>33</sup> *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007).

<sup>34</sup> *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012), declining to follow *Malta-Espinoza* outside Ninth Circuit.

<sup>35</sup> Although this is a general intent offense that is completed by peeking (*In re Joshua M.*, 91 Cal. App. 4th 743 (Cal. App. 4th Dist. 2001)), under *Silva-Trevino* an immigration judge might make factual inquiry for CIMT purposes to see if lewd intent actually was involved.

## § N.10 Sex Offenses

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

- I. Potential Immigration Consequences
  - II. Forcible Sex Offenses
  - III. Sexual or Lewd Conduct with a Minor
  - IV. Prostitution, Child Pornography, Lewd in Public, Failure to Register as Sex Offender
  - V. Immigration Relief for Defendants and for Victims of Sexual Crimes Including Forced Prostitution
- Appendix I Checklist of Safer Pleas  
Appendix II Legal Summaries to Hand to Immigrant Defendants  
Appendix III Annotated Chart: Immigration Consequences of Sex Offenses

### II. POTENTIAL IMMIGRATION CONSEQUENCES

Conviction of an offenses that involves sexual or lewd intent can have a range of immigration consequences, which include:

- A. **“Rape” Aggravated Felony:** Conviction of sexual intercourse by force, threat, intoxication, or other means. No requirement of a particular sentence.<sup>1</sup>
- B. **“Sexual Abuse of a Minor” Aggravated Felony:** Conviction of offenses involving certain sexual conduct or intent with persons under the age of 18. No sentence requirement.<sup>2</sup>
- C. **“Crime of Violence” Aggravated Felony:** Conviction of a technically defined “crime of violence,” if and only if a sentence of a year or more was imposed on any single count.<sup>3</sup> See additional information at § N.9 *Violence, Domestic Violence and Child Abuse*.
- D. **Deportable “Crime of Child Abuse”:** Includes conviction of almost any offense with sexual intent where the victim is under age 18. No sentence requirement.<sup>4</sup> See § N.9.
- E. **Deportable “Crime of Domestic Violence”:** Conviction of a “crime of violence” where the defendant and victim have a protected domestic relationship. No sentence requirement.<sup>5</sup> See § N.9
- F. **Prostitution.** A person is *inadmissible* for prostitution if he or she is in the business of offering sexual intercourse, but not other lewd conduct, for a fee.<sup>6</sup> Cal. P.C. § 647(b) is

<sup>1</sup> 8 USC § 1101(a)(43)(A), INA § 101(a)(43)(A).

<sup>2</sup> *Id.*

<sup>3</sup> 8 USC § 1101(a)(43)(F), INA § 101(a)(43)(F).

<sup>4</sup> 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

<sup>5</sup> *Id.*

divisible for this purpose because it includes lewd conduct, and includes customers. In addition, any § 647(b) conviction is a ***crime involving moral turpitude***, and some convictions relating to running a prostitution business come within the prostitution ***deportation grounds*** or ***aggravated felony***. See Part IV, *infra*.

- G. Crime Involving Moral Turpitude (CIMT):** Some offenses with sexual or lewd intent may be held to be a CIMT. See this material and § N.7 *Moral Turpitude*. Note that a single CIMT conviction does not always cause inadmissibility or deportability:
- A noncitizen is ***deportable*** if convicted of two CIMTs after admission unless they arose from the very same incident; or if convicted of one CIMT, committed within five years of admission, that has a maximum possible sentence of one year or more.<sup>7</sup>
  - A noncitizen is ***inadmissible*** if convicted of one CIMT, unless it comes within one of two exceptions: (1) the petty offense exception, where the person committed only one CIMT ever, the CIMT has a potential sentence of a year or less, and a sentence was imposed of six months or less; or (2) the youthful offender exception, where the person was convicted as an adult of a single CIMT committed while under age 18, and at least five years have passed since the conviction and release from jail.<sup>8</sup>
- H. Possession of Child Pornography:** Conviction is an aggravated felony.<sup>9</sup>
- I. Adam Walsh Act Penalties for U.S. Citizens and Permanent Residents.** A citizen or permanent resident who was convicted of sexual conduct or solicitation, kidnapping, or false imprisonment of a victim who is under the age of 18, may be barred in the future from filing a petition to help a close family member get a green card. See further discussion at § N.13 *Adam Walsh Act*.
- J. Criminal Penalties: Illegal Re-entry After Removal with Certain Priors.** Illegal re-entry after removal (deportation) is the most commonly prosecuted federal felony in the United States. A prior conviction of felony “statutory rape” (sexual intercourse with a person under the age of 16) increases the federal sentence by 12 levels. A prior conviction of an aggravated felony increases it by 6 levels.<sup>10</sup> For more information see Box in Part III.C, below, and see § N.1 *Overview*.

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<sup>6</sup> 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

<sup>7</sup> 8 USC § 1227(a)(2)(A), INA § 237(a)(2)(A).

<sup>8</sup> 8 USC § 1182(a)(2)(A), INA § 212(a)(2)(A).

<sup>9</sup> 8 USC § 1101(a)(43)(I), INA § 101(a)(43)(I).

<sup>10</sup> 8 USC § 1326, USSG § 2L1.2.

## II. **FORCIBLE SEX OFFENSES**: Calif. P.C. §§ 261, 262, 243.4

**Calif. P.C. §§ 261, 262** is an *aggravated felony* as rape regardless what sentence is imposed.<sup>11</sup> For immigration purposes rape is defined as sexual intercourse obtained by force, serious threat, incapacitation, or without consent. Any conviction under §§ 261, 262 is an aggravated felony.<sup>12</sup> The conviction also is a *crime involving moral turpitude*, a *crime of violence*, and if there was a domestic relationship, a *deportable crime of domestic violence*.

**Alternate Plea: Calif. P.C. § 243.4.** Section 243.4 can have serious immigration consequences, but it is not automatically an aggravated felony.

- ***Aggravated felony as a crime of violence, only if a sentence of a year or more is imposed.*** A “crime of violence” is an aggravated felony if and only if a sentence of a year or more is imposed on any single count.<sup>13</sup> A conviction of § 243.4 never is an aggravated felony as a crime of violence if the sentence imposed does not exceed 364 days. Even if a year’s sentence is imposed, misdemeanor § 243.4 is not be an aggravated felony as a crime of violence if the record shows that the restraint was not effected by force.<sup>14</sup> *Felony* § 243.4 always is a “crime of violence”<sup>15</sup> and therefore always is an aggravated felony if a sentence of a year or more is imposed on any one count.
- ***Aggravated felony rape.*** Because sexual battery requires only a touching and not penetration, it should not be held to be rape. However, counsel should not let evidence in the reviewable record show that penetration occurred. If possible, state in the record that the battery did not include penetration.
- ***Deportable crime of domestic violence, if the victim and defendant have a domestic relationship.*** A deportable crime of domestic violence is defined as (a) a “crime of violence” where (b) the defendant and victim share a certain domestic relationship.<sup>16</sup> Felony § 243.4 is a deportable crime of domestic violence regardless of sentence, if there is proof that the defendant and victim share a domestic relationship as defined under California law. The same is true for misdemeanor § 243.4, if the record establishes that it is a crime of violence. While currently the relationship must be established by facts in the record, courts might loosen this evidentiary restriction in the future. See § N.9 *Violence, Domestic Violence and Child Abuse*.
- ***Deportable conviction of child abuse, only if the record of conviction establishes victim was under age 18.*** See § N.9 (C).
- ***Crime involving moral turpitude (CIMT):*** Misdemeanor or felony § 243.4 is a CIMT.

<sup>11</sup> 8 USC § 1101(a)(43)(A) includes “rape” in the definition of aggravated felony.

<sup>12</sup> Also, third degree rape under a Washington statute that lacks a forcible compulsion requirement, where the victim made clear lack of consent, is “rape.” *U.S. v. Yanez-Saucedo*, 295 F.3d 991, 995-96 (9<sup>th</sup> Cir. 2002).

<sup>13</sup> 8 USC § 1101(a)(43)(F), INA § 1101(a)(43)(F).

<sup>14</sup> *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9<sup>th</sup> Cir. 2005) (misdemeanor PC §243.4 is not categorically a crime of violence under a standard identical to 18 USC §16(a); since the restraint is not required to be effected by force, it does not have use of force as an element).

<sup>15</sup> *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9<sup>th</sup> Cir. 2005)(holding felony Calif. PC §243.4(a) is a crime of violence under 18 USC §16(b) because it contains the inherent risk that violent force will be used).

<sup>16</sup> 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

### **III. LEWD INTENT OR SEXUAL CONDUCT WITH A MINOR**

- A. **Best Option is Age-Neutral Offense; Suggested Pleas**
- B. **Ninth Circuit Definitions: What to Avoid**
- C. **Crafting Pleas: §§ 261.5(c), 288a(b)(1) (Minor under age 18)**
- D. **Crafting Pleas: §§ 261.5(d), 288a(b)(2) (Minor under age 16)**
- E. **Crafting Pleas: § 288(a), (c) (Lewd Conduct with Younger Minor)**
- F. **Crafting Pleas: § 647.6(a) (Annoy/Molest)**

Without informed pleading, convictions of a consensual sex offense with a minor victim may constitute the aggravated felony “sexual abuse of a minor”<sup>17</sup> – even if it is a misdemeanor with no jail time was imposed. With informed pleading, in many cases all or most immigration consequences can be avoided. For a more in-depth discussion of this aggravated felony, see *Defending Immigrants in the Ninth Circuit*, § 9.38 ([www.ilrc.org/crimes](http://www.ilrc.org/crimes)).

Depending on the plea, the conviction also might be a deportable crime of child abuse, a crime involving moral turpitude and, if it is a crime of violence, a deportable crime of domestic violence or a crime of violence aggravated felony. If the defendant is deported and ever is prosecuted for illegal re-entry, the conviction may be a serious sentence enhancement.

#### **A. Why Counsel Should Try to Plead to an Age-Neutral Offense, with No Reference to Minor Age in the Reviewable Record**

A plea to an age-neutral offense with no mention of age in the reviewable record has two key advantages over even a careful plea to an offense that has a minor victim and lewd or sexual intent as elements.

First, the age-neutral disposition **will not constitute an aggravated felony as “sexual abuse of a minor” (“SAM”)** under any definition.<sup>18</sup> This Note describes how to prevent a plea to an age-specific offense from becoming a SAM conviction under the current law in the Ninth Circuit. However, the same conviction may constitute SAM if the client is put in removal proceedings in another Circuit, or if someday the Ninth Circuit or Supreme Court creates a different definition of SAM. See Box in Part B, below. In contrast, there is almost no risk that an age-neutral offense will be held SAM. This is true even if the minor’s age appears in the record of conviction (although this definitely should be kept out if possible.)

Second, conviction of an age-neutral offense with no reference to minor age in the record **will not constitute a deportable crime of child abuse**. In contrast, ICE will assert that virtually any offense is a deportable crime of child abuse if sexual conduct or lewd intent with a minor either is an element of the offense, or is established by facts in the record. Conviction of a deportable crime of child abuse will put a permanent resident in removal proceedings, and bar an undocumented person from non-LPR cancellation.

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<sup>17</sup> 8 USC § 1101(a)(43)(A), INA § 101(a)(43)(A).

<sup>18</sup> See *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012).

***Possible Age-Neutral Alternate Pleas and Their Immigration Consequences.***

Conviction of an age-neutral offense with no reference to age in the record of conviction is neither an aggravated felony as SAM, nor a deportable crime of child abuse. Age-neutral offenses such as misdemeanor or felony P.C. §§ 32, 69, 236, 243(a), (d), (e), 243.4, 245, 314, 647, or 136.1(b)(1) (attempt to non-violently persuade a victim not to contact the police) are not aggravated felonies unless a sentence of a year or more was imposed for any single count. In the case of felony § 236 by deceit, §§ 69 or 243 by offensive touching, or possibly § 136.1(b)(1), the conviction can take a year without becoming an aggravated felony. To avoid a deportable crime of child abuse, be sure that the record of conviction, including the factual basis for the plea, does not establish that the victim was under age 18. See Box, "Record of Conviction" in Part B below, and see § N.3 *Record of Conviction*. These age-neutral offenses may carry other adverse immigration consequences, e.g. moral turpitude; check the *California Quick Reference Chart*.

**B. Defining What to Avoid: When is an Offense Against a Minor an Aggravated Felony, Moral Turpitude, or Deportable Offense?**

It may be useful to refer back to these definitions as you consider the instructions for individual offenses. See additional information in the annotated *Chart of Sex Offenses* and the *Legal Summaries for Defendants* in the Appendices following this Note.

**Warning: A conviction that is not "SAM" in the Ninth Circuit may become SAM if your client leaves the Ninth Circuit.** These instructions are designed to prevent an offense from being an aggravated felony as sexual abuse of a minor (SAM) under *current law* in immigration proceedings that arise within the *Ninth Circuit*. If your client is put in immigration detention and transferred out of Ninth Circuit states, or travels voluntarily, he or she may be put into proceedings where a broader definition of SAM applies, e.g. one that includes consensual sex with a 15-year-old, or even a 16- or 17-year old.<sup>19</sup> Also, the Ninth Circuit rule that § 261.5(d) with a 15-year-old is not SAM is based on only one panel decision; the Ninth Circuit law could change, or the Supreme Court could create its own definition of SAM. In addition, a felony involving sex with a person under age 16 might be held a "crime of violence" outside the Ninth Circuit; to avoid an aggravated felony under that ground, avoid a sentence imposed of a year or more on any single count. This is why, if it is possible to get it, an age-neutral plea is the more secure option.

Warn the defendant that any offense that has as elements sexual or lewd conduct with a person under the age of 18 has the potential to be held an aggravated felony in these circumstances. *The defendant must get expert legal consultation before leaving the Ninth Circuit states, leaving the U.S., or having any contact with the immigration authorities* (for example, before renewing a 10-year green card, petitioning for a relative, or applying for immigration status or naturalization).

<sup>19</sup> Some Circuit Courts of Appeal may defer to the BIA, which held that consensual sex between a 17-year-old and 24-year-old is SAM. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006) (citing the age difference as a reason).



## 1. Definition of the “Sexual Abuse of a Minor” (“SAM”) Aggravated Felony

Under current Ninth Circuit law, a conviction will constitute sexual abuse of a minor (“SAM”) if it comes within either of the following two definitions:

- (1) “knowingly engaging in a sexual act” with a victim under age 16 and at least four years younger than the defendant; or
- (2) sexual conduct or lewd intent that is inherently harmful to the victim due to the victim’s young age (certainly age 13, and assume conservatively age 14)

An offense is SAM if it contains these elements, and in some cases if these factors simply are *established by facts in the reviewable record*. The good news is, in 2013 the Supreme Court might decide that only the statutory elements, and not additional non-element facts in the record, can be considered, which will be better for immigrants and defendants. See Box on *Descamps v. United States*, below.

### a. “Knowingly engaging in a sexual act” with a victim who is under the age of 16 and at least four years younger than the defendant.

The Ninth Circuit adopted as a definition of SAM the elements of 18 USC §§ 2243, which are knowingly engaging in a sexual act with a victim under the age of 16 and at least four years younger than the defendant.<sup>20</sup> “Sexual act” includes anal or genital penetration, or oral contact with genitals or anus, or touching genitals, not through clothing, with intent to arouse or harass.<sup>21</sup>

“Knowingly” means that the defendant knew s/he was engaging in sex (e.g., was not too inebriated or otherwise incapacitated to comprehend this), not that the defendant knew the age of the victim. The Ninth Circuit held that because § 261.5 does not have “knowing” conduct as an element, *no* conviction under § 261.5, including § 261.5(d), can meet this scienter requirement, and therefore no § 261.5 conviction is SAM under the federal analogue test.<sup>22</sup> But because of the risk that an immigration judge will ignore this decision or someday another standard might apply, we recommend that defenders take other precautions, as discussed in strategies below.

### b. Sexual or lewd conduct causing harm due to the young age of the victim

In a separate standard, courts have found that some conduct is *per se* sexual abuse of a minor due to the young age of the victim. Here no specific age difference or “knowing” action by the defendant is required. Under this test a violation of P.C. § 261.5 always is SAM if the victim was age 13 or under, but at least in the Ninth Circuit it is not necessarily SAM if the victim was

<sup>20</sup> *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008) (en banc).

<sup>21</sup> Sexual act is defined at 18 USC § 2246(2). See *Estrada-Espinoza*, *supra*.

<sup>22</sup> *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9<sup>th</sup> Cir. 2009) (P.C. § 261.5(d) lacks this element of “knowing”). Under the standard in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (en banc), because § 261.5 has no element of “knowing,” conduct, an immigration judge may not consider evidence from the record of conviction that would establish such conduct. See § N.3 *Record of Conviction* and see “Practice Advisory: The Categorical Approach in the Ninth Circuit and *Aguila-Montes de Oca*,” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

15 years or older.<sup>23</sup> The court has not addressed a case involving a 14-year-old under § 261.5, but counsel should conservatively assume that this is SAM. Under current law, the **record of conviction must specifically state that the victim was age 15 or older. Age 16 is better**, and it is conceivable that age 14 is not SAM. A record that is vague as to the minor's age is helpful in only limited situations. See Box on "Vague Record" below. Note that the law might change for the better in spring 2013, when the Supreme Court decides *Descamps v. United States*: that decision could mean that no conviction under § 261.5 is SAM. See Box, below.

The Ninth Circuit has held that all conduct prohibited by **P.C. § 288(a)** (victim under 14) is SAM, but *not* all conduct prohibited by **§ 288(c)(1)** (victim aged 14 or 15).<sup>24</sup>

## 2. Crime Involving Moral Turpitude ("CIMT")

**Definition 1.** *If the defendant knew or should have known the victim was under age 18, an offense involving sexual conduct is a CIMT.* The Board of Immigration Appeals applied this CIMT test to P.C. § 261.5(d), as well as to a Texas statute that penalized sexual conduct as mild as touching a breast through clothing with intent to arouse.<sup>25</sup>

Currently moral turpitude cases are adjudicated under an extraordinary rule set out in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). See § N.7 *Crimes Involving Moral Turpitude*. Where an offense such as P.C. § 261.5 does not have knowledge of the age of the victim as an element, and the record of conviction does not resolve the issue, an immigration judge may consider evidence from outside the record and even take testimony to determine if the defendant actually "knew or should have known" the victim was under age 16.

For this reason, where possible the defendant should specifically state on the record that s/he did not know or have reason to know that the victim was under-age. That might win the case even under *Silva-Trevino*. Note that if the Ninth Circuit overturns *Silva-Trevino* in the future, a vague record will be sufficient on this particular issue because belief about age is not an element of the offense.

**Definition 2.** It is *possible* that a second definition of CIMT will be applied. If the offense involves bad intent but no explicit sexual conduct, e.g. a less serious offense under § 647.6(a), the offense might be found to be a CIMT based upon the mildness of the contact, regardless of knowledge of age. Counsel should identify non-explicit, non-egregious conduct on the record, or at least leave the record clear of evidence of explicit or egregious conduct.

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<sup>23</sup> See *Pelayo-Garcia, supra* (P.C. § 261.5(d) is not categorically SAM under this test, because sexual conduct with a person just under sixteen is not *per se* abusive) and *U.S. v. Valencia-Barragan*, 600 F.3d 1132 (9th Cir. 2010) (sex with victim age 13 is categorically SAM); *U.S. v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999) (lewd act with victim under 14 under P.C. § 288(a) is categorically SAM). But see *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (P.C. § 288(c), lewd act with 14- or 15-year old victim, is not categorically SAM).

<sup>24</sup> See *Baron-Medina, supra* (§ 288(a) is categorically SAM); *Castro, supra* (§ 288(c) is not categorically SAM).

<sup>25</sup> See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 690-94 (AG 2008) (Texas P.C. 21.11(a)(1) prohibiting any touching, including touching breast through clothing, a person under the age of 17) and *Matter of Guevara-Alfaro*, 24 I&N Dec. 417 (BIA 2011) (sexual intercourse under P.C. § 261.5(d)) finding that these offenses are divisible for CIMT purposes based upon whether the person reasonably believed the victim was under-age).

*A single CIMT conviction does not always cause inadmissibility and deportability.* See Part I.G, *supra*, and see § N.7 Crimes Involving Moral Turpitude.

### 3. Definition of a Deportable Crime of Child Abuse

*Any offense involving lewd intent or conduct toward a person under the age of 18* will be charged as a deportable crime of child abuse. If the offense does not create the risk of serious harm to the minor – e.g. consensual conduct with an older teenager, mild offenses under § 647.6(a) - immigration advocates will argue that it does not meet the BIA’s definition of child abuse. There is no guarantee that the argument will win, however, because courts may defer to the broad definition used by immigration authorities.<sup>26</sup>

*An age-neutral offense* that involves harm or risk of serious harm to the victim is a deportable crime of child abuse *only if the reviewable record of conviction conclusively shows that the victim was under age 18.*<sup>27</sup> To avoid a deportable crime of child abuse, bargain for an age-neutral offense and cleanse the record of reference to a minor victim. A plea to an offense against a “John Doe” might safely be coupled with a stay-away order from a specific minor.<sup>28</sup>

### 4. Definition of a Deportable Crime of Domestic Violence; The “Crime of Violence” Aggravated Felony

A conviction may be a deportable crime of domestic violence if *the victim is protected under state domestic violence laws and the offense is a “crime of violence.”* Thus if there is evidence that the victim had a romantic relationship with the defendant or is otherwise protected by California domestic violence laws, and the offense meets the technical definition of “crime of violence” under 18 USC §16, it is a deportable offense.<sup>29</sup> Currently the relationship must be proved in the reviewable record of conviction, but in future it is possible that the evidentiary standard will be somewhat loosened.

For more on the definition of “crime of violence,” see *N.9 Domestic Violence*, and discussion in each section below. The Ninth Circuit has held that felony consensual sex with a minor age 14 is not a crime of violence, but other Circuits might have different rules. (Also, we must assume conservatively that this offense would be SAM in the Ninth Circuit.) For this deportation ground there is no requirement of a one-year sentence, just the domestic relationship.

Regardless of the relationship between victim and defendant, *conviction of a crime of violence is an aggravated felony if a sentence of one year or more is imposed.*

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<sup>26</sup> The Board of Immigration Appeals stated that the definition of a crime of child abuse includes “sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification...” *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008); see also § N.9 Domestic Violence and Child Abuse.

<sup>27</sup> *Id.* at 516-17.

<sup>28</sup> *Ibid.*

<sup>29</sup> See 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

### **C. Crafting Pleas: Consensual Sexual Conduct with a Person under the Age of 18 or of 16**

#### ***1. Make every effort to plead to an age-neutral offense and keep the victim's minor age out of the record of conviction.***

Fighting for a plea to an age-neutral offense is well worth it for any noncitizen who wants to remain in the U.S., and especially for a lawful permanent resident who is not already deportable. See suggestions for age-neutral pleas at Part III.A, *supra*. Counsel must analyze the immigration effect of a plea to these age-neutral offenses and try to avoid or ameliorate this effect, if any.

The advantages of a plea to an age-neutral statute, coupled with a record of conviction that does not establish the minor age of the victim, are the following:

- It will prevent a lawful permanent resident (LPR) from being automatically deportable for conviction of a “crime of child abuse.” This is tremendously important to an LPR who is not already deportable based on some prior conviction.
- It will prevent an undocumented person who may be eligible for the “ten year” non-LPR cancellation to avoid the automatic disqualifier of conviction of a “crime of child abuse.”
- It will not be held an aggravated felony as sexual abuse of a minor, for any purpose, in any jurisdiction. (This should be true even if the age of the minor were to appear in the record, although wherever possible counsel should cleanse the record of that.)
- While the age-neutral offense may have other immigration consequences – e.g., crime of domestic violence, crime involving moral turpitude -- it might be possible to avoid or ameliorate these consequences.

**When *Not* to Plead to an Age-Neutral Offense.** An age-neutral plea is one clear way to solve some critical problems. However, based on the defendant's individual circumstances, in some cases it may not make sense. If the age-neutral offense carries a significant criminal penalty - for example if it is a strike or requires registration as a sex offender - that the age-specific charge does not, consult with an immigration expert to see if the age-neutral plea really is necessary for this particular defendant. It might not be.

#### ***2. If an age-neutral offense is not possible, create a careful plea to an offense involving a minor under age 18: Cal. P.C. §§ 261.5(b) or (c), 286(b)(1), 288a(b)(1), or 289(h). Also consider §§ 288(c) or 646.7***

Please carefully review the instructions below, because the stakes are high and the law on sexual abuse of a minor (“SAM”) is unsettled and volatile. Note that instructions have changed since September 2012 (see Box on *Young v. Holder*, below).

***Instructions: To avoid conviction of the aggravated felony sexual abuse of a minor (SAM), the record of conviction under these statutes should specifically state that the minor was at least age 15, and hopefully at least 16.*** See further discussion and citations at Part B.1, *supra*. In short, the Ninth Circuit has held a plea to this offense with a minor age 15 does not meet either definition of SAM. It is not SAM as an analogue to 18 USC § 2243 (“knowingly” engaging in a sexual act where minor is under age 16 and at least four years younger than the defendant) because these statutes lack the element of “knowingly” engaging in a sexual act. It is not SAM as an offense that is inherently abusive due to the young age of the defendant as long as the minor was 15 years old. The Ninth Circuit has not specifically ruled on a case involving a 14-year-old, but counsel should conservatively assume that this would be SAM.

To prevent a finding of SAM, the record of conviction should *specifically* state that the minor was age 15 or older. Under current law a record that is vague as to the age of the minor has important benefits, but only in very limited situations. A vague record will prevent an LPR who is not already deportable from becoming deportable under the aggravated felony (but not the CIMT) ground. However, it will *not* help an undocumented person or deportable permanent resident remain eligible to apply for relief. See Box “*Young: Vague Record of Conviction*,” below. If the defendant cannot create a record showing that the minor was age 15 or older (e.g., if the minor was age 14), one options is to delay the plea hearing. A U.S. Supreme Court ruling due by June 2013 might improve the law so that *no* conviction under these statutes will be SAM. See discussion of *Descamps v. United States* in the Box below.

Warn the client that this conviction presents some risk even if the record of conviction indicates that the minor was age 15 or older. The client might come under proceedings outside the Ninth Circuit, or the law might change. See Box in Part B, above. Try to plead to an incident where the minor was age 16; this is a more common cut-off age for SAM, and tell the client to check with an expert in this area before leaving the U.S., leaving Ninth Circuit states, or making contact with immigration authorities, e.g. by renewing a 10-year green card.

***This is a deportable crime of child abuse.*** A lawful permanent resident (LPR) will become deportable and will need to apply for some form of relief from removal. For an LPR who is not yet deportable, this is a serious consequence, which can be prevented only by a plea to an age-neutral statute with a record of conviction that does not provide the age of the victim.

In contrast to LPRs, undocumented persons in general are not hurt by the deportation grounds. Because they have no lawful status that could be taken away. Therefore they are not hurt by the fact that the conviction is a deportable crime of child abuse. The exception is that this conviction destroys eligibility for *non-LPR* cancellation, a discretionary relief from removal for undocumented persons who have been in the U.S. for ten years and have qualifying family members. See Part V, *infra*, and see § N.17 Relief (Materials on Non-LPR Cancellation.)

***If the offense is a first CIMT conviction, try to obtain a plea to a single misdemeanor with a sentence of six months or less.*** If the person might be eligible to immigrate through a U.S. citizen family member, this disposition may preserve that eligibility. See discussion of family immigration at Part V Relief in this Note, *infra*, and in more detail at § N.17 Relief. A plea to



attempt to commit a misdemeanor, creating a maximum sentence of less than one year, also would be useful. See § N.10 *Crimes Involving Moral Turpitude*.

**If the offense is a felony, the record will identify a minor age 15, and the client is likely to be removed (deported),** plead to § 288a(b) rather than § 261.5. See Box below.

***Descamps*: The law on SAM and consensual sex offenses might get better in 2013!**

The U.S. Supreme Court is likely to hold that a prior conviction may be characterized only by its statutory elements, in *Descamps v. United States*. Under this test a § 261.5(c) conviction would be for sex with a 17-year-old who was three years younger than the defendant - even if the defendant had admitted a charge alleging a younger minor. This would prevent *any* § 261.5(c) or (d) conviction from being classed as SAM under Ninth Circuit definitions. It also would affect §§ 647.6, 243(e), misdemeanor 236, and some other offenses. See further discussion of *Descamps* at § N.3 *Record of Conviction*.

A "safe" specific plea is always better, to avoid your client being detained while a new ruling is further litigated. Under current law a specific plea is necessary in most cases. See Box, "Vague Record," below. However, if your client can't make a good specific plea and will have a SAM conviction under current law but not under a good *Descamps* decision (e.g., will plead to § 261.5 with a 14-year-old), consider delaying the plea, in order to delay when the defendant will go into removal proceedings. *Descamps* should be decided by June 2013. There still may be fights, but a good *Descamps* decision will vastly improve the odds. Assume for now that *Descamps* will not affect CIMTs or "crime of child abuse" decisions.<sup>30</sup>

**Client who is likely to be removed (deported) and re-enter illegally, convicted of sex with a minor of age 15 or less.** Illegal re-entry after removal is the number-one prosecuted federal felony in the U.S. See 8 USC § 1326. Advise your client of the risk of returning illegally. If your client is not convicted of an aggravated felony, advise her to ask to see an immigration judge and request "voluntary departure" rather than removal; there is a wait for the hearing, but illegal re-entry after that departure is a misdemeanor.

In addition, try to structure the instant plea to prevent or lessen its function as a sentence enhancement in a future illegal re-entry prosecution. Any § 261.5 *misdemeanor* conviction, or felony § 261.5(c) with no information as to age of the minor, should avoid conviction of felony "statutory rape," a prior that would support a 16-level increase in sentence for the illegal re-entry. If that is not possible, felony § 288a(b) (oral sex) with a victim age 15 also might avoid this.<sup>31</sup>

<sup>30</sup> Under a good *Descamps* ruling, an age-neutral statute would not be child abuse because it has no element of a minor victim. However the BIA may assert that the regular rules do not apply to this ground, as it currently does for CIMTs. See § N.9 *Domestic Violence and Child Abuse*.

<sup>31</sup> A prior *felony* conviction for "statutory rape" supports a 16-level increase in sentence. 8 USC § 1326, USSG § 2L1.2. Statutory rape has been defined as sexual intercourse with a person under age 16. *U.S. v. Zamorano-Ponce*,



**3. If the above pleas are not possible, craft a careful plea to an offense where the minor is under age 16: to Calif. P.C. §§ 288(c), or to 261.5(d), 286(b)(2), 288a(b)(2) or 289(i) with a specific plea to a minor age 15**

Under *current law in the Ninth Circuit*, all the advice in Part 2, *supra*, for offenses where the minor is under age 18, will apply to the above offenses where the minor is under age 16. This is true regarding the aggravated felony “sexual abuse of a minor” (“SAM”), a deportable crime of child abuse, crime involving moral turpitude, and advice for clients who will be removed.

Having said that, offenses involving younger minors are riskier in general. If the defendant is detained by immigration and transferred outside the Ninth Circuit – a real possibility – the applicable definition of SAM may include sexual conduct with a 15-year-old. See Box on this risk in Part B, above. On the other hand, if the Supreme Court makes a good decision in 2013 in *Descamps*, then under current Ninth Circuit standards *no* § 261.5(d) conviction will amount to SAM. If you must plead to a sexual act specifically with a 14-year-old minor, you may want to delay the plea to try to take advantage of it. See Box on *Descamps*, above.

In considering the below instructions, recall that under current Ninth Circuit law an offense is SAM if it involves either sex with a person age 13 (and we will assume age 14) or younger, or knowingly engaging in a sexual act with a person under age 16 and at least four years younger than the defendant, as defined under 18 USC § 2243. For § 2243, “sexual act” includes anal or genital penetration, oral contact with genitals or anus, or touching genitals not through clothing with intent to arouse or harass.<sup>32</sup> “Knowingly” means that the defendant knew s/he was engaging in a sexual (e.g., was not too drunk to understand this). See Part B.1, *supra*.

***Instructions.*** A plea to § 261.5(d) specifically with a 15-year-old is not SAM according to the Ninth Circuit, so this is a reasonable plea. Even a vague record has some uses: see Box below. If the victim is younger, consider delaying the plea to await the Supreme Court decision in *Descamps* (see Box, above), or consider alternatives below – which may be better in general.

A better plea might be to § 288(c) with a record showing innocuous, non-explicit behavior. This would be especially important for a minor age 14. This is not SAM under either Ninth Circuit test,<sup>33</sup> and might not be SAM outside the Ninth Circuit. See Part D, below.

A plea to § 288a(b) has a real advantage if the defendant will be removed and the alternative is *felony* § 261.5(d). A felony § 288(b)(1) or (2) conviction will be less damaging as a prior, if the person is ever prosecuted for illegal re-entry after removal. See Box, above.

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699 F.3d 1117, 1119 (9<sup>th</sup> Cir. 2012). Misdemeanor §261.5 avoids this because it is not a felony. Felony §261.5(c) with a vague record prevents the federal prosecutor from proving the minor was age 15 or younger. Felony §288a(b) avoids this to the extent that “statutory rape” will be held not to include oral sex, but only intercourse.

<sup>32</sup> Sexual act is defined at 18 USC § 2246(2). See *Estrada-Espinoza*, *supra*.

<sup>33</sup> It is not necessarily SAM under the “inherent abuse due to young age” test. *U.S. v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010), amending 599 F.3d 1050 (noting that § 288(c)(1) reaches conduct such as touching the 14- or 15-year-old through clothing, touching a part of the body that is not genitalia, or instructing a child to disrobe). See discussion in Part E, *supra*. It is not automatically SAM as an analogue to 18 USC § 2243 because “lewd conduct” in § 288(c) is broader than “sexual acts” in § 2243.

**Avoid a sentence of a year or more on any single count.** The conviction might be held a “crime of violence” in a removal proceeding held outside the Ninth Circuit. A crime of violence is an aggravated felony only if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(F).

**What is the reviewable “record of conviction”?** The record that an immigration judge may consult, and that defense counsel must control, includes documents that record the defendant’s admissions at plea: the transcript of plea colloquy, the count pled to along with adequate proof of plea, the judgment, any document stipulated to as factual basis for the plea, some notations on an abstract or minute order. In a trial the record includes certain findings and jury instructions. Not included in the record are the police, pre-trial, or pre-sentence reports, information from dropped charges, statements made at sentencing, and statements made outside the plea hearing (e.g. to an immigration judge). For more information, see § N.3 *Record of Conviction*.

**A Vague Record of Conviction Has Real, But Very Limited, Use.** Some criminal statutes are “divisible” in that they include some crimes that do and others that do not cause an immigration penalty. For example, at this writing (but see box on *Descamps*, above) a § 261.5 conviction for sex with a 15-year-old is not SAM, while the same conduct with 14-year-old probably is.

In creating a record of conviction it is *always* best to plead specifically to the “good” crime, e.g. a minor who is at least age 15, rather than to create a vague record that avoids specifying the bad crime, e.g. the language of § 261.5(d). In fall 2012 *Young v Holder*<sup>34</sup> drastically limited the effectiveness of a vague record. The Ninth Circuit rules are:

- If a permanent resident is not already deportable (e.g., does not have a prior conviction that makes her deportable), a vague record can prevent the new conviction from making her deportable under the ground at issue (e.g. the aggravated felony ground).
- In contrast, an undocumented person, a permanent resident who already is deportable, or any other immigrant who needs to apply for relief or status to stay in the U.S. needs a specific plea to a “good” offense. A vague plea will trigger the consequence.
- A specific “good” plea is always necessary to avoid a crime involving moral turpitude.
- How might a good *Descamps* decision affect this? A conviction could be characterized only by its statutory elements, regardless of information in the record. Thus a § 261.5(d) conviction would be for sex between a 15-year-old and a 21-year-old. See Box, *supra*. *Descamps* might not affect CIMTs or child abuse.

For more information, see § N.3 *Record of Conviction* and § N.7 *Moral Turpitude*.

<sup>34</sup> See discussion of *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*) at § N.3 *Record of Conviction*, *supra*.

#### **D. Crafting Pleas: Lewd Conduct with a Minor, Calif. P.C. §§ 288(a), (c)**

##### **1. P.C. § 288(a), lewd act with a child under the age of 14, is *always* SAM**

Any § 288(a) conviction is an aggravated felony as sexual abuse of a minor (“SAM”).<sup>35</sup>

Section 288(a) also is a crime involving moral turpitude and a deportable crime of child abuse. It is a crime of violence, so that if the child is a member of the household, it will be a deportable crime of domestic violence, and/or if a sentence of a year or more is imposed, it will be an aggravated felony as a crime of violence.

##### **2. P.C. § 288(c)(1), lewd act with a child who is 14 or 15 years old and at least 10 years younger than defendant, is *not always* SAM**

**Aggravated felony.** The Ninth Circuit held that § 288(c)(1) is divisible as sexual abuse of a minor (“SAM”), because it covers some conduct that is not physically or psychologically abusive to a minor of this age.<sup>36</sup> Section 288 includes “innocuous” touching, “innocently and warmly received”; the minor need not be aware of any lewd intent.<sup>37</sup> Plead to non-egregious conduct, such as touching an arm through clothing. If the minor was age 15, plead to that specifically.

Warn the client that the conviction remains dangerous. While the plea avoids a SAM and crime of violence conviction under current law in the Ninth Circuit, a different definition may apply in other Circuits, or the law might change. Try to get less than one year imposed on any single count. The client should check with an expert before leaving the U.S., leaving the Ninth Circuit states, or having any voluntary contact with immigration authorities, e.g. renewing a 10-year green card. See Box at Part II.A, *supra*

**Other consequences.** ICE will charge the offense as a deportable crime of child abuse. If the record shows conduct that is so mild that it does not pose a risk of harm, it is possible that the person can avoid this, but there are no guarantees.

The law is not clear regarding when this offense will be held to be a crime involving moral turpitude. The optimal plea would be (a) to admit a specific, non-explicit offense such as one outlined above, and (b) where possible, the defendant also should state or write on the form that he or she did not know the minor was underage. If only one of these two options is possible, do that; if neither is possible, plead to a vague record of conviction rather than sexually explicit behavior. Advise the defendant that there is a good chance, but no guarantee, that these instructions will avoid the conviction being a CIMT.

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<sup>35</sup> See *U.S. v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999), reaffirmed in *U.S. v. Medina-Villa*, 567 F.3d 507, 514 (9th Cir. 2009).

<sup>36</sup> *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010), amending 599 F.3d 1050 (noting that § 288(c)(1) reaches conduct such as touching the 14- or 15-year-old through clothing, touching a part of the body that is not genitalia, or instructing a child to disrobe). See also § 288(a) cases, e.g. analysis in *Baron-Medina*, *supra*, for other conduct.

<sup>37</sup> *Baron-Medina*, *supra* at 1147 (examples of innocent-appearing behavior that is abusive under § 288(a) solely because the victim is under age 14).

### **E. Crafting Pleas: Annoying or Molesting a Child, Calif. P.C. § 647.6(a)**

With careful pleading, this can be a very good alternative plea.

**Aggravated felony.** The Ninth Circuit held that § 647.6(a) is divisible as sexual abuse of a minor (SAM<sup>38</sup>) because it reaches both harmful and non-harmful conduct.<sup>38</sup> (The Ninth Circuit held that § 647.6(a) similarly is divisible as a CIMT; see next section.)

*Vague versus specific record:* Try hard to negotiate a plea to *specific* behavior that does not cause harm to the minor. If that is not possible but a vague record is, see limitations on usefulness discussed in Box “Vague Record” in Part C, *supra*. If the Supreme Court gives a good decision in *Descamps*, there will be a strong argument that no conviction under § 647.6(a) is SAM – but it is best to avoid that fight, which may take time and litigation. See Box “*Descamps*” in Part C, *supra*. The Ninth Circuit gave several examples of offenses that are punishable under § 647.6(a) but should not be held to involve SAM:

Section 647.6(a)'s actus reus requirement — "conduct a normal person would unhesitatingly be irritated by" — can be satisfied fairly easily. Without its mens rea requirement, § 647.6(a) would prohibit many acts that hardly shock the public conscience as gravely base or depraved. Even brief touching of a child's shoulder qualifies as annoying conduct under the actus reus requirement of § 647.6(a). See *In re Hudson*, 143 Cal. App. 4th 1, 5 (2006) (placing hand on child's shoulder while he played video game); see also *People v. McFarland*, 78 Cal. App. 4th 489, 492 (2000) (stroking child's arm and face in laundromat). In fact, no actual touching is required. See Cal. Jur. Instr. (Crim.) § 16.440. For example, photographing children in public places with no focus on sexual parts of the body satisfies the actus reus element of § 647.6(a), so long as the manner of photographing is objectively “annoying.” *People v. Dunford*, No. D039720, 2003 WL 1275417, at \*4 (Cal. Ct. App. Mar. 19, 2003) (rejecting argument that “the defendant's conduct” must “be sexual” in nature). “[H]and and facial gestures” or “[w]ords alone” also satisfy the actus reus of § 647.6(a). *Pallares-Galan*, 359 F.3d at 1101 (internal quotation marks and emphasis omitted). Words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen. *People v. Thompson*, 206 Cal. App. 3d 459, 465 (1988). Moreover, “[i]t is not necessary that the act[s or conduct] actually disturb or irritate the child . . . .” Cal. Jur. Instr. (Crim.) § 16.440. That is, the actus reus component of § 647.6(a) does “not necessarily require harm or injury, whether psychological or physical.” *U.S. v. Baza-Martinez*, 464 F.3d 1010, 1015 (9th Cir. 2006). In short, § 647.6(a) is an annoying photograph away from a thought crime.<sup>39</sup>

**Warn the client that the conviction remains dangerous.** Advise the defendant that while the plea avoids an aggravated felony conviction now, in the Ninth Circuit, it is not entirely safe. The client should check with an expert in this area before leaving the U.S., leaving the Ninth Circuit states, or having any voluntary contact with immigration authorities, e.g. renewing a 10-year

<sup>38</sup> *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9<sup>th</sup> Cir. 2004).

<sup>39</sup> *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9<sup>th</sup> Cir. 2008); see also *Pallares-Galan*, 359 F.3d at 1101.

green card. See Part II.A, *supra*

***Deportable crime of child abuse.*** As with all other offenses involving lewd intent and a minor under the age of 18, counsel should assume that this conviction will make a permanent resident deportable. With a benign record of conviction, immigration counsel (if the client has any) can argue that this is not “abuse,” but there is no guarantee of winning.

***Crime involving moral turpitude (CIMT).*** It is not clear what test will be used to determine whether § 647.6(a) is a CIMT. While the Ninth Circuit has held that the actions in the above quotation do not constitute a CIMT, the court must give defer to a published, on-point, and reasonable Board of Immigration Appeals as to what offense constitutes a CIMT.<sup>40</sup> The Board might or might not apply its “knew or should have known the victim was under age 16” test for moral turpitude.

While you cannot guarantee that the offense will not be held to be a CIMT, the optimal course is for counsel (a) to negotiate a plea specifically to non-harmful conduct similar to that described in the quotation above, and (b) also, where appropriate, have the defendant state or write on the plea form that he or she did not know that the victim was under 16 years of age. If (a) is not possible, create a vague record of conviction that leaves open the possibility the conduct was of the non-harmful type. A plea to (b) is insurance in case the Board would state that this is the definition of CIMT in this instance. It also is possible that the Board would state that any conviction for § 647.6(a) is a CIMT.

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<sup>40</sup> For § 647.6(a), the Ninth Circuit applies the very same test for CIMTs as it does for sexual abuse of a minor: the “harmful conduct” test, as discussed in the quotation above. The problem is that while the Ninth Circuit has the last word as to what constitutes sexual abuse of a minor, the Ninth Circuit would have to defer to a published Board of Immigration Appeals decision as to when § 647.6(a) is a CIMT, and the Board has not yet spoken on § 647.6(a). The issue is further confused by the Board’s *Silva-Trevino* evidence rules, which the Ninth Circuit may or may not overturn. In short, the issue is unclear.

## IV. OTHER OFFENSES: PROSTITUTION, PORNOGRAPHY, LEWD CONDUCT

### A. **Prostitution** (For more information see *Defending Immigrants in the Ninth Circuit*, § 6.2)

#### 1. “Engaging in Prostitution” Ground of Inadmissibility

A noncitizen is inadmissible, but not deportable, if he or she “engages in” a pattern and practice of prostitution.<sup>41</sup> A one-time experience is not sufficient to show this practice. While no conviction is required for this finding, a conviction for prostitution will serve as evidence. Hiring a prostitute under Calif. P.C. § 647(b) does not come within the “engaging in prostitution” ground of inadmissibility,<sup>42</sup> but it is a crime involving moral turpitude (CIMT).

For immigration purposes, the definition of prostitution is restricted to offering sexual intercourse, as opposed to other sexual conduct, for a fee.<sup>43</sup> Section 647(b) is a divisible statute under this definition, because it prohibits offering “any lewd act” for consideration. Counsel should plead to a specific lewd act other than intercourse, or to a “lewd act other than intercourse.” The conviction will be a CIMT.

Some immigrants are eligible for a discretionary waiver of the prostitution and moral turpitude inadmissibility grounds, under 8 USC § 1182(h).<sup>44</sup>

#### 2. Prostitution as a Crime Involving Moral Turpitude (“CIMT”)

Regardless of whether intercourse or mere lewd acts are offered for a fee, prostitution is a CIMT for both the prostitute and the customer. Recently the Ninth Circuit held that all conduct under P.C. § 647(b) is a CIMT.<sup>45</sup> Some immigrants are eligible for a discretionary waiver of the prostitution and moral turpitude inadmissibility grounds under 8 USC § 1182(h).<sup>46</sup>

#### 3. Conviction for Running a Prostitution Business as an Aggravated Felony or a Deportable Offense

**Deportable offense (other than the aggravated felony deportation ground).** Conviction for *importing noncitizens* for prostitution or any immoral purpose is a basis for deportability.<sup>47</sup>

**Moral Turpitude.** An older case held that conviction under Calif. P.C. § 315 for keeping or residing in a place of prostitution or lewdness is a crime involving moral turpitude.<sup>48</sup> It is possible that a conviction for *living in* a place of prostitution under § 315 would be held not a

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<sup>41</sup> 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

<sup>42</sup> *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008).

<sup>43</sup> *Kepilino v. Gonzales*, 454 F.3d 1057 (9<sup>th</sup> Cir. 2006).

<sup>44</sup> Among other resources see Brady, “Update on INA § 212(h) Relief” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) (scroll down).

<sup>45</sup> *Rohit v. Holder*, 670 F.3d 1085 (9<sup>th</sup> Cir. 2012).

<sup>46</sup> See Brady, “Update on INA § 212(h) Relief,” *supra*.

<sup>47</sup> 8 USC § 1227(a)(2)(D)(iv), INA § 237(a)(2)(D)(iv).

<sup>48</sup> *Matter of P*, 3 I&N Dec. 20 (BIA 1947) (Calif. P.C. § 315, keeping a house of ill fame involves moral turpitude).



CIMT.<sup>49</sup> If § 315 is unavoidable, try to plead to paying rent to live in such a place, or at least leave open that possibility by pleading to the language of the statute in the disjunctive.

**Aggravated felony.** Some federal offenses and state analogues that involve running prostitution or other sex-related businesses are aggravated felonies.<sup>50</sup> Because the federal definition of prostitution is limited to providing sexual intercourse for a fee, while Calif. P.C. § 315, keeping a place of prostitution or lewdness, includes providing other sexual conduct for a fee, § 315 should be held divisible as an aggravated felony offense under this section.<sup>51</sup> A plea to lewdness under P.C. § 315 should avoid the aggravated felony ground, but if that is not possible, plead to “prostitution *or* lewdness.”

## **B. Child Pornography**

A conviction of certain federal child pornography offenses (18 USC §§ 2251, 2251A, 2252) or analogous state offense is an aggravated felony. Possession of child pornography in violation of Calif. P.C. § 311.11(a) is an aggravated felony under this provision, and also is a “particularly serious crime” barring asylum and withholding of removal.<sup>52</sup> In addition it is likely to be held a deportable crime of child abuse and a crime involving moral turpitude.

## **C. Lewd in Public, Indecent Exposure**

### **1. Calif. P.C. § 647(a), Lewd in Public**

**Prevent Aggravated Felony, Deportable Crime of Child Abuse.** This should not be held an aggravated felony, but because of the risk that ICE would charge this offense as sexual abuse of a minor (“SAM”) or a crime of child abuse, counsel should state in the record that no minor was present or at risk of being offended, or at least exclude any statement that a minor was present. This is a good alternate plea to avoid sexual abuse of a minor.

**Crime Involving Moral Turpitude.** Although this is very broadly defined to include, e.g., a married couple who touch a breast or buttocks in a park, this is a dangerous plea for CIMT purposes. This type of offense has been held a CIMT in several older cases where the encounter was homosexual, but not where the encounter was heterosexual. Under today’s standards, this discriminatory interpretation of the law should not persist. However, recently a California Federal District Court held that § 647(a) is categorically a CIMT – citing the older cases that were based on homosexual activity, but not acknowledging or discussing this issue. *U.S. v.*

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<sup>49</sup> In *Cartwright v. Board of Chiropractic Examiners*, 16 Cal.3d 762, 768 (Cal. 1976), the court concluded that P.C. § 315 is not a CIMT where resident paid rental to owner with knowledge or intent that the income contributed to illicit operation. Although state case law does not determine a CIMT for immigration purposes, this case provides an example of the type of conduct not involving moral turpitude that is punishable under the statute.

<sup>50</sup> See 8 USC § 1101(a)(43)(K), INA § 101(a)(43)(K).

<sup>51</sup> While there is no Ninth Circuit published decision on this issue, see, e.g., *Depasquale v. Gonzales*, 196 Fed.Appx. 580, 582 (9th Cir. 2006) (unpublished) (prostitution under Hawaiian law covers more conduct than the federal definition under 8 USC § 1101(a)(43)(K)(i), which is limited to sexual intercourse for a fee) and *Prus v. Holder*, 660 F.3d 144, 146-147 (2d Cir. 2011) (same for New York offense of promoting prostitution in the third degree).

<sup>52</sup> *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012).

*Nunez-Garcia*, 262 F. Supp. 2d 1073 (C.D.Cal. 2003). If a plea is required, the best language is “I engaged in lewd conduct in reckless disregard of the fact that another person might become aware and be *offended*.”

## 2. Calif. P.C. § 314(1), Indecent Exposure

***Aggravated Felony; Deportable Crime of Child Abuse.*** If the record of conviction indicates that a minor was the victim, ICE will charge this as a deportable crime of child abuse. If the record does not so indicate, it is not.

Regardless of information in the record, this conviction of an age-neutral offense will not constitute SAM. See, e.g., *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (no conviction under an age-neutral statute is sexual abuse of a minor).

***Moral Turpitude.*** The Board of Immigration Appeals held that any conviction under P.C. § 314(1) is a CIMT, and counsel should assume this is the rule.<sup>53</sup> Note, however, that the Ninth Circuit earlier had held that § 314 is divisible as a CMT, because it reaches erotic dancers performing for customers who wish to be there.<sup>54</sup> The BIA disagreed with this ruling on the grounds that this conduct no longer is prosecuted under § 314(1). Therefore, if a plea to § 314 cannot be avoided, it might not be held a CMT if the plea is specifically to erotic dancing for an appreciative audience.

## D. Failure to Register as a Sex Offender

***Crime Involving Moral Turpitude.*** Under current law Calif. P.C. § 290(g)(1) will be held a CIMT in removal proceedings, and defense counsel must proceed with this assumption and attempt to plead to an alternate offense. However, given that the definition of a CIMT includes a scienter of at least recklessness, whereas § 290(g)(1) is a strict liability offense, this rule appears to be in error and it might change in the future.<sup>55</sup> Counsel should state in the record that the failure was due to a mistake or forgetfulness, where that is possible.

***Deportable for federal conviction for failing to register as a sex offender based on a state conviction.*** Effective July 27, 2006, a conviction under 18 USC § 2250 is a basis for deportability.<sup>56</sup> Section 2250 penalizes failure to register as a sex offender in any jurisdiction, including a state. It requires persons who have been convicted of any of a large number of sex offenses or false imprisonment involving minors to register in the jurisdictions of their conviction, incarceration, residence, or school within three business days after sentence or prior to release from custody, and within three days of changing address. Any noncitizen who violates

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<sup>53</sup> *Matter of Corte Medina*, 26 I&N Dec. 79 (BIA 2013).

<sup>54</sup> *Ocegueda-Nunez v. Holder*, 594 F.3d 1124 (9<sup>th</sup> Cir. 2010),

<sup>55</sup> The BIA held that § 290(g)(1) is a CIMT in *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 146 (BIA 2007). The Ninth Circuit asked it to reconsider the decision in *Pannu v. Holder*, 639 F.3d 1225 (9<sup>th</sup> Cir. 2011). See also *Efagene v. Holder*, 642 F.3d 918 (10<sup>th</sup> Cir. 2011); *Totimeh v. AG*, 666 F.3d 109 (3<sup>d</sup> Cir. 2012), refusing to apply *Tobar-Lobo*.

<sup>56</sup> 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).

this requirement may be convicted in federal court, and once convicted is deportable and disqualified from cancellation for non-LPRs. The conviction must occur on or after July 27, 2006. For more information see *Defending Immigrants in the Ninth Circuit*, § 6.22.

## V. IMMIGRATION RELIEF FOR DEFENDANTS AND VICTIMS

***Impact of aggravated felony conviction.*** An aggravated felony conviction is a bar to most forms of relief, including LPR cancellation, non-LPR cancellation, asylum, VAWA relief for persons abused by USC or LPR parents or spouse, and in some cases family immigration, especially if a permanent resident is re-applying for a new green card through family. See § N.17 Relief. Relief that might be available includes a T or U visa, withholding of removal (an asylum-like provision), Convention Against Torture, and in some cases family immigration.

***Spotting Relief.*** Besides reviewing the relief discussed below, complete the form at § N.16 Client Questionnaire, page 2, to identify possible relief. See also the Chart on Eligibility for Relief at § N.16 Relief.

***“T” or “U” Visa for Victims.*** Noncitizen victims of alien trafficking who were forced into prostitution while under the age of 18, or any noncitizens who are victims of serious crimes such as assault, rape, incest, and domestic violence and are willing to participate in investigation or prosecution of the offender, 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. 8 USC §§ 1101(a)(15)(T), (U). There is a broad waiver for criminal convictions, which technically extends even to an aggravated felony conviction. For resources and sources of more information see § N.17 Relief (Chart) and § N.18 Resources. See also Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, Chapter 11.

***VAWA for Victims of Abuse by U.S. Citizen or LPR Spouse or Parent.*** An undocumented person who was abused by certain relatives can apply for a green card through immigration provisions of “VAWA,” the Violence Against Women Act. The relief is available to men or women. The lawful permanent resident (LPR) or U.S. citizen (USC) must have committed abuse against a spouse or child. The spouse-victim’s child, or the child-victim’s other parent, may also qualify for relief. Abuse includes a broad definition of psychological as well as physical abuse. To qualify for VAWA the person must have good moral character and must not be inadmissible, or else qualify for a waiver. See § N.16 Relief (Chart) and see also *Defending Immigrants in the Ninth Circuit*, Chapter 11.

***Special Immigrant Juvenile (SIJ) Status for Children in Dependency and Delinquency.*** Some undocumented minors can apply for SIJ if a dependency, delinquency or probate court finds that they cannot be returned to a parent due to abuse, neglect or abandonment. They must not be inadmissible for crimes. Juvenile delinquency dispositions generally do not cause inadmissibility, unless they relate to prostitution or drug trafficking.

***LPR cancellation:*** This is a fairly lenient form of relief for long-time permanent residents, which can waive any ground of inadmissibility or deportability. Unfortunately, conviction of an

aggravated felony is an absolute bar. A complex “stop-clock” provision applies. See discussion of LPR cancellation at § N.17 *Relief* (Chart and “LPR Cancellation Materials”).

**Family immigration:** An undocumented person might be able to immigrate through a family visa petition filed by an “immediate relative,” which is defined as a U.S. citizen who is the person’s spouse, child age 21 or older, or – if the person is unmarried and under 21 -- parent. An LPR who has become deportable similarly might be able to “re-immigrate” through a family visa petition. Only certain undocumented persons can do this. Please see Quick Test for Eligibility and other materials on family immigration at § N.17 *Relief*.

In addition the person must be admissible, or if inadmissible eligible for a waiver. While an aggravated felony is not a ground of inadmissibility, a conviction of a crime involving moral turpitude (CIMT) can be one, and many offenses relating to sex are CIMTs. A single CIMT conviction causes inadmissibility unless the person comes within either of two exceptions. These are (a) the petty offense exception (first CIMT committed, maximum possible sentence of a year or less, which includes a wobbler misdemeanor, and sentence imposed was six months or less) or (b) the youthful offender exception (committed only one CIMT, the while under the age of 18, and conviction as an adult or resulting imprisonment ended at least five years before submitting the application). See § N.7 *Moral Turpitude*. If the defendant’s single CIMT conviction comes within one of these exceptions, the defendant can apply to adjust status on the family visa petition, and does not need to apply for a waiver of inadmissibility.

The applicant also can assert that the conviction is not a CIMT. Consensual sexual conduct with a minor is not a CIMT if the defendant reasonably believed that the victim was under age 18. See Part B.2, *supra*. If the defendant had such a reasonable belief, put a statement to that effect in the record of conviction; this is likely to mean that the offense will be held not a CIMT. Continue to evaluate any past convictions. If the defendant’s reasonable belief is not in the record of conviction, she also can ask for a chance to prove this reasonable belief to the immigration judge through testimony in removal proceedings.

If the person is inadmissible for CIMT, he or she might be able to apply for a discretionary “§ 212(h) waiver” of the CIMT inadmissibility ground, under 8 USC § 1182(h). See discussion of § 212(h) at § N.17 *Common Forms of Relief* (Chart and “212(h) Waiver”).

**Withholding of Removal, Convention Against Torture.** Even with an aggravated felony conviction, an undocumented person may be able to apply for withholding of removal if she can prove that it is probable that she will be persecuted on the basis of race, religion, social group, etc. if returned to the home country. She cannot apply if this is a “particularly serious crime,” however. Sex crimes that involve non-consensual sexual conduct, or any conduct with a very young victim, are likely to be held particularly serious crimes. A noncitizen may apply for protection under Convention Against Torture if she can show that for whatever reason, the government or a force the government cannot or will not control would torture her. If she already has been persecuted or tortured, this may suffice for these applications. For further information see *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)), Chapter 11.

## APPENDICES TO NOTE 10: SEX OFFENSES

### Appendix 10-I Checklist of Safer Pleas

#### I. Defense Strategies for Offenses related to Sexual Conduct with Minor

- a) **Plead to age-neutral offense**, e.g. §§ 136.1(b)(1), 236, 240, 243, 243.4, 245, 314, 647 with a sentence of less than 1 year on any single count; check for other immigration consequences.
- ✓ Sanitize record of minor victim's age or any domestic relationship.
  - ✓ Plea to § 243 by "offensive touching" may take a 1 yr sentence; see discussion of above offenses at § N.9 Domestic Violence
- b) **If pleading to child-specific statute, carefully craft the record of conviction** to avoid an aggravated felony as Sexual Abuse of a Minor ("SAM").
- *Additional threat to LPR: Offense also may be deportable crime of child abuse, or CIMT. Some but not all LPRs are eligible for relief such as LPR cancellation or family immigration*
  - *Additional threat to undocumented person: It may be CIMT, may bar eligibility for Non-LPR Cancellation or Temporary Protected Status.*
  - *In all cases: To try to avoid a CIMT, where possible state on the record that defendant reasonably believed the minor was age 18*
- ✓ **Plead to specific, non-sexually explicit conduct**, e.g., touching arm through clothing, under §§ 647.6(a) (state if older teenager) or 288(c), to avoid SAM. A vague record will protect only an LPR who would not be deportable under any ground *except* an aggravated felony, or a defendant in a prosecution for illegal re-entry after removal.
  - ✓ **Plead to § 288(b)(1)**, and
    - State on the record that victim ("V") was age 16 or 17
    - If necessary, state on the record that V was age 15. Try to avoid stating on record that D is four or more years older in case imm judge would wrongly hold this SAM
    - If record will show V age 14 or younger, this is a dangerous plea; see Note: Sex Offenses and/or get consultation.
  - ✓ **Plead to P.C. § 261.5(c) (V is under age 18, D at least three years older)**
    - Same advice as § 288a(b)(1), etc., above
    - If client will be deported and may return illegally, avoid a plea to felony "statutory rape," which is a severe sentence enhancement to illegal re-entry after removal. To do this, plead to 261.5 as misdo, or with V age 16 or older, or vague record as to V's age, or if nothing else to felony 288a(b). See 8 USC § 1326, USSG § 2L1.2.
  - ✓ **If pleading to offense that specifies victim's age as under age 16 and Defendant as over age 21** (e.g., P.C. §§ 261.5(d), 288a(b)(2)):
    - See advice to § 261.5(c), above. Ninth Circuit held § 261.5(d) where record shows V is age 15 is not SAM, altho this may not be true outside the Ninth Circuit (and as always, imm judge might rule wrongly)
    - See above regarding V age 14
  - ✓ **In all cases, avoid a sentence of a year or more imposed on any single count**, in case defendant is transferred outside the Ninth Circuit to a jurisdiction where this offense might be a "crime of violence."



### c) Avoid Automatic Aggravated Felonies

- X Sexual or lewd conduct with child under 14, P.C. § 288(a).
- X Consensual sexual act with minor who is age 14 (conservatively assume this is SAM, although there is not a specific Ninth Circuit ruling)
- X Offenses involving sexual intercourse obtained by use of force, threat, or incapacitation, regardless of sentence, e.g. rape under P.C. §§ 261, 262. Instead, to avoid an aggravated felony plead to felony or misdemeanor sexual battery, P.C. § 243.4 with record sanitized of any statement that battery involved penetration and obtain a sentence imposed of 364 days or less for any single count.
- X Crime of violence (e.g. sexual battery, sex with person age 13 or younger, PC 245) with a sentence of 1 year or more imposed for any single count
- X Possession of child pornography

**Warning: A conviction that is not "SAM" in the Ninth Circuit may become SAM if your client leaves the Ninth Circuit.** The instructions above and in this Note are designed to prevent an offense from being an aggravated felony as sexual abuse of a minor (SAM) under current law in immigration proceedings within the Ninth Circuit. In immigration cases arising outside of Ninth Circuit states, a broader definition of SAM may apply, e.g. one that includes consensual sex between a 17-year-old and 24-year-old. Or, the Supreme Court may decide to create its own definition of SAM in the future. Further, a felony involving sex with a minor might be held a "crime of violence" outside the Ninth Circuit, and thus be an aggravated felony if a sentence of a year or more is imposed.

Warn the defendant that any offense that involves sexual or lewd conduct or intent with a minor has the potential to be held an aggravated felony in these circumstances. The defendant must get expert legal consultation before leaving Ninth Circuit states, leaving the U.S., or having any contact with the government (e.g. renewing a 10-year green card or applying for status or naturalization).

## II. Prostitution Offenses

- X Engaging in pattern of prostitution (providing sexual intercourse, as opposed to lewd conduct, for fee) is inadmissible offense even without conviction. Plead to specific lewd conduct for a fee. A john is not included in the prostitution inadmissibility ground.
- X Any conviction under P.C. § 647(b), for being a prostitute or a john, involving intercourse or other lewd conduct, is a crime involving moral turpitude (CIMT). If possible, plead to non-CIMT offense, such as disturbing the peace, trespass, or loitering, with a record clear of any mention of prostitution.
- X Conviction for importing foreign prostitutes is deportable offense. Running prostitution business is aggravated felony



## Appendix 10-II:

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

***Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.***

***Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.***

\* \* \* \* \*

#### **Conviction of an Age-Neutral Offense**

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Regardless of evidence in the record of conviction, a conviction for ***an age-neutral offense never will constitute an aggravated felony as sexual abuse of a minor***, because a fact establishing minor age of the victim never is “necessary” to prove an element of an age-neutral offense. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (an age-neutral offense cannot constitute the aggravated felony sexual abuse of a minor even if the record contains evidence of the minor age of the victim), relying upon *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937 (9<sup>th</sup> Cir. 2011) (*en banc*) (“It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant.... If the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime, then the factfinder necessarily found the elements of the generic crime.”) (emphasis in original).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

The Board of Immigration Appeals held that an *age-neutral offense does not constitute a deportable crime of child abuse unless documents in the reviewable record of conviction conclusively establish that the victim was a minor*. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 507-10, 515-17 (BIA 2008) (finding the following evidence insufficient to establish the age-neutral, Washington state conviction involved a minor victim and therefore was a crime of child abuse: a no-contact order involving a minor (this does not establish that the minor was the victim), and a restitution order to the “child victim,” since restitution in Washington is established by a preponderance of the evidence and so was not part of the “conviction.”)). Further, the offense either must harm the child or pose a reasonable probability that the child’s life or health will be endangered. *Matter of Soram*, 25 I&N Dec. 378, 385 (BIA 2010).

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**Age-Specific Offense: P.C. §§ 261.5, 286(b)(1), 288a(b)(1), 289(h) as a Crime Involving Moral Turpitude**

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction for an offense that does not have knowledge of the age of the victim as an element is not a *crime involving moral turpitude*, where the defendant did not know or have reason to know the victim was under-age. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008); *Matter of Guevara-Alfaro*, 24 I&N Dec. 417, 423 (BIA 2011) (sexual intercourse under *Calif. P.C. § 261.5(d) is divisible* based upon whether the defendant knew or had reason to know the victim was under age 16). Where the record of conviction establishes that the defendant did *not* know or have reason to know that the victim was under-age, the conviction is not of a crime involving moral turpitude and the court may *not* go on to conduct a fact-based inquiry under *Silva-Trevino*. *Guevara-Alfaro* at 423; see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (immigration judge will not go to *Silva-Trevino* inquiry where information in the record of conviction resolves the question).

The Ninth Circuit found P.C. § 261.5(d) is divisible as a crime involving moral turpitude regardless of the defendant’s knowledge of the victim’s minor age, because the conduct required to violate § 261.5(d) does not necessarily cause harm or lead to moral outrage in today’s society. *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9<sup>th</sup> Cir. 2007). The Ninth Circuit has not yet ruled as to whether it will withdraw from *Quintero-Salazar* and defer to *Silva-Trevino* and *Guevara-Alfaro*, *supra*, on this issue.

*Defense counsel: Give this to a defendant who may have a prior age-neutral conviction, where the minor age of the defendant does appear in the record:*

\* \* \* \* \*

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The Board of Immigration Appeals held that an age-neutral offense does not constitute a deportable crime of child abuse unless documents in the reviewable record of conviction *conclusively* establish that the victim was a minor. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 507-10, 515-17 (BIA 2008) (finding the following evidence insufficient to establish the age-neutral, Washington state conviction involved a minor victim and therefore was a crime of child abuse: a no-contact order involving a minor (this does not establish that the minor was the victim), and a restitution order to the “child victim,” since restitution in Washington is established by a preponderance of the evidence and so was not part of the “conviction.”). Further, the offense either must harm the child or pose a reasonable probability that the child’s life or health will be endangered. *Matter of Soram*, 25 I&N Dec. 378, 385 (BIA 2010).

***In fact, in the Ninth Circuit an age-neutral offense never should be held a deportable crime of child abuse, regardless of information in the record.*** The BIA agreed that it is bound by the Ninth Circuit’s application of the categorical approach, in considering whether to follow Ninth Circuit law on applying the categorical approach to the crime of child abuse deportation ground. See *Velazquez-Herrera, supra* at 514 (“[T]he United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this proceeding arises, has found no such ambiguity and has held in a precedent decision that the ‘categorical approach is applicable to section 237(a)(2)(E)(i) in its entirety.’”) The Ninth Circuit has held that where minor age of the victim is not an element of the offense, an immigration judge may not rely upon evidence in the reviewable record indicating that the victim is a minor. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (an age-neutral offense cannot constitute the aggravated felony sexual abuse of a minor even if the record contains evidence of the minor age of the victim), relying upon *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937 (9<sup>th</sup> Cir. 2011) (*en banc*) (“It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant.... If the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime, then the factfinder necessarily found the elements of the generic crime.”). (emphasis in original)

**Age-Specific Offense: P.C. § 261.5 as Sexual Abuse of a Minor**

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction under *Calif. P.C. § 261.5, including § 261.5(d), is not categorically an aggravated felony as sexual abuse of a minor* under either test employed within the Ninth Circuit.

Section 261.5(d) is not a deportable aggravated felony as sexual abuse of a minor unless the reviewable record of conviction establishes the minor's very young age. *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009) (P.C. § 261.5(d), which requires the minor to be under the age of 16, is not *per se* abuse and is not categorically sexual abuse of a minor, because consensual sex with a 15-year-old is not inherently abusive); and compare *U.S. v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010) (holding that Calif. P.C. § 288(c), in which the minor is age 14 or 15, is not *per se* abuse and is not sexual abuse of a minor) with *U.S. v. Medina-Villa*, 567 F.3d 507, 511-512 (9<sup>th</sup> Cir. 2009) (holding that Calif. P.C. § 288(a), in which the minor is under age 14, is sexual abuse of a minor).

Further, a case is pending before the U.S. Supreme Court that may directly affect the outcome of my case. See *Descamps v. United States* (<http://www.supremecourt.gov/qp/11-09540qp.pdf>), which will review the holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*). The Court has been urged to clarify to the Ninth Circuit that under the Court's precedent decisions, a judge may evaluate a prior conviction based only upon the *minimum conduct required to violate the elements of the offense, as set out in the criminal statute*. If the Court so holds, then a conviction under Cal. P.C. § 261.5(d) will not constitute "sexual abuse of a minor" for any purpose, including as a bar to eligibility for relief, because the Ninth Circuit has held that the minimum conduct to violate the statute is not sexual abuse of a minor.

Second, the Ninth Circuit held that a conviction under § 261.5 never is an aggravated felony as an analogue to 18 USC § 2243(a), under the test established in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). See *Pelayo-Garcia v. Holder*, *supra* at 1015-1016. Section 2243(a) requires *knowingly engaging in a sexual act* (e.g., not being "extremely intoxicated or otherwise incapacitated") with an under-age victim, while § 261.5, including § 261.5(d), entirely lacks this scienter element. *Ibid*. Even if the reviewable record contains facts showing knowing conduct, these facts cannot be used to find that the conviction constitutes sexual abuse of a minor, because such facts are neither an element nor necessary to establish an element of the California offense. See *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937(9th Cir. 2011) (*en banc*) ("It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant.... If the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime, then the factfinder necessarily found the elements of the generic crime.") (emphasis in original). Because § 261.5 does not require knowingly engaging in a sexual act for a conviction, evidence of such knowledge never is "necessary" to the conviction and cannot be considered.

\* \* \* \* \*

**Age-Specific Offense: P.C. § 261.5 as a Crime of Violence**

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

*A felony conviction under P.C. § 261.5(c) or (d) for consensual sex with a person under age 18 or 16 is not categorically a crime of violence.* See *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (felony consensual sex with a person under the age of 18 is not a crime of violence); *United States v. Christensen*, 559 F.3d 1092 (9<sup>th</sup> Cir. 2009) (felony consensual sex with a minor age 14 or 15 is not a crime of violence because it does not inherently involve a substantial risk of “purposeful, violent and aggressive” conduct, citing *Begay v. United States*, 533 U.S. 137 (2008)). A misdemeanor conviction of § 261.5(c) or (d) is not a crime of violence because it does not have threat or use of violent force as an element. Therefore even if a sentence of a year or more is imposed, it is not an aggravated felony conviction under INA § 101(a)(43)(F).

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**Age-Specific Offense: P.C. §§ 286(b)(1), 288a(b)(1), or 289(h) as a Crime of Violence**

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

*A felony conviction under P.C. §§ 286(b)(1), 288a(b)(1), or 289(h) for sex with a person under age 18 or 16 is not categorically a crime of violence.* See *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (felony consensual sex with a person under the age of 18 is not a crime of violence); *United States v. Christensen*, 559 F.3d 1092 (9<sup>th</sup> Cir. 2009) (felony consensual sex with a minor age 14 or 15 is not a crime of violence because it does not inherently involve a substantial risk of “purposeful, violent and aggressive” conduct, citing *Begay v. United States*, 533 U.S. 137 (2008)). A misdemeanor conviction of the above offenses is not a crime of violence because it does not have threat or use of violent force as an element. Therefore even if a sentence of a year or more is imposed, it is not an aggravated felony conviction under INA § 101(a)(43)(F).

### Calif. P.C. §§ 286(b)(1), 288a(b)(1), 289(h) as Sexual Abuse of a Minor

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Calif. P.C. §§ 286(b)(1), 288a(b)(1), or 289(h) prohibit forms of sexual conduct, e.g. oral sex, with persons under the age of 18. They have no requirement of scienter or age of the defendant.

A conviction under *Calif. P.C. §§ 286(b)(1), 288a(b)(1), or 289(h)* is **not categorically an aggravated felony as sexual abuse of a minor** under either test in the Ninth Circuit. First, it is not sexual abuse of a minor if the reviewable record of conviction does not establish the victim's very young age. *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009) (finding that P.C. § 288(a), which requires as an element a victim under age 14, is *per se* abuse and is categorically sexual abuse of a minor, while P.C. § 261.5(d), which requires a victim under the age of 16, is not *per se* abuse and is not categorically sexual abuse of a minor); see also *United States v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010) (Calif. P.C. § 288(c), requiring a victim of age 14 or 15, is not *per se* abuse and not categorically sexual abuse of a minor).

Further, a case pending before the U.S. Supreme Court may directly affect the outcome of my case. See *Descamps v. United States* (<http://www.supremecourt.gov/qp/11-09540qp.pdf>), which will review the holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*). The Court has been urged to clarify to the Ninth Circuit that under the Court's precedent decision, a judge may evaluate a prior conviction based only upon *the elements of the offense, as set out in the criminal statute*. If the Court so holds, then a conviction under these offenses will not constitute "sexual abuse of a minor" for any purpose, including as a bar to eligibility for relief, because the Ninth Circuit has held that the minimum conduct to violate the statute is not sexual abuse of a minor.

Second, a conviction under these offenses never is an aggravated felony as an analogue to 18 USC § 2243(a), under the test established in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). See *Pelayo-Garcia v. Holder*, *supra* at 1015-1016. Section 2243(a) requires *knowingly engaging in a sexual act* (e.g., not being "extremely intoxicated or otherwise incapacitated") with a minor who is under age 16 and at least four years younger than the defendant. The above offenses entirely lack the "knowingly" scienter element. *Ibid*. They also lack any element relating to the defendant's age, or age difference between the defendant and victim. Even if the reviewable record were to contain facts showing scienter or the age difference, an immigration judge may not find that the conviction constitutes sexual abuse of a minor, because these facts are neither an element nor necessary to establish an element of the California offense. See *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012) (where age is not an element of the offense, evidence of age cannot be considered), relying on *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937 (9th Cir. 2011) (*en banc*) ("It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant). Because the above offenses do not require knowingly engaging in a sexual act, or a specific age difference, for a conviction, evidence of these factors is not "necessary" to the conviction and cannot be considered.



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**Calif. P.C. § 288(c)**. A conviction under § 288(c) for lewd conduct with a victim aged 14 or 15 is not categorically an aggravated felony as sexual abuse of a minor. *United States v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010).

A conviction for an offense that does not have knowledge of age of the victim as an element or defense is not a ***crime involving moral turpitude*** where the defendant did not know or have reason to know the person was under 16. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008); *Matter of Guevara-Alfaro*, 24 I&N Dec. 417, 423 (BIA 2011) (sexual intercourse with a person under age 16 under Calif. P.C. § 261.5(d) is divisible based upon whether the defendant knew or had reason to know the victim was under age 16). Where the record of conviction establishes that the defendant did *not* know or have reason to know that the victim was under-age, the conviction is not of a crime involving moral turpitude and the court may *not* go on to conduct a fact-based inquiry under *Silva-Trevino*. *Guevara-Alfaro* at 423; see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011).

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**Calif. P.C. § 647.6(a)**. The Ninth Circuit held that conviction under § 647.6(a) for annoying or molesting a child is not categorically an aggravated felony as sexual abuse of a minor, because it includes mild conduct that does not constitute harm or abuse. *United States v. Pallares-Galan*, 359 F.3d 1088, 1101 (9<sup>th</sup> Cir. 2004).

Further, a case pending before the U.S. Supreme Court may directly affect the outcome of my case. See *Descamps v. United States* (<http://www.supremecourt.gov/qp/11-09540qp.pdf>), which will review the holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (*en banc*). The Court has been urged to clarify to the Ninth Circuit that under the Court's precedent decisions, a judge may evaluate a prior conviction based only upon the *minimum conduct required to violate the elements of the offense, as set out in the criminal statute*. If the Court so holds, then a conviction under this offense will not constitute "sexual abuse of a minor" for any purpose, including as a bar to eligibility for relief, because the Ninth Circuit has held that the minimum conduct to violate the statute is not sexual abuse of a minor.

Section 647.6(a) is not categorically a crime involving moral turpitude for the same reason. *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9<sup>th</sup> Cir. 2008). The Ninth Circuit will accord *Chevron* deference to a published, on-point decision by the BIA that is "permissible" in its reasoning and conclusion, but the BIA has not published an opinion that addresses when an offense such as P.C. § 647.6, which can include mild, non-explicit behavior that merely annoys, constitutes a crime involving moral turpitude.

## App. 10-III – For Criminal Defenders in the Ninth Circuit: Immigration Effect of Selected Sex Offenses<sup>1</sup>

OFFENSE	AGGRAVATED FELONY -Sexual abuse of a minor (SAM) <sup>2</sup> -Crime of violence (COV) if 1 yr sentence imposed <sup>3</sup>	DEPORTABLE Conviction, or other penalty	Conviction of CIMT (Crime Involving Moral Turpitude)
<p><b>Sex with V under age of 18 and at least three years younger than D –</b></p> <p><b>Calif. P.C. § 261.5(c)</b></p>	<p>SAM: If plea to age-neutral offense is not possible,<sup>4</sup> plead 261.5(c) and: - Record shd show V age 16 or 17<sup>5</sup> - 9<sup>th</sup> Cir held 261.5 is not SAM even if record shows V age 15 and D four years older, but where possible a better plea is 288a(b)(1), 288(c), or else 261.5(c) with V age 15 and D “at least 3 yrs older.”<sup>6</sup> - If V is age 14, this is dangerous; get consult. Consider delaying plea, to benefit from expected good S.Ct. decision in 2013. Vague record re age has some use, but very limited. If possible, get 288(c) with specific, non-explicit conduct.<sup>7</sup></p> <p>Not COV in 9<sup>th</sup> Cir. if V is age 15 or more, but avoid 1 yr sentence on any single count.<sup>8</sup></p>	<p>YES, assume this is deportable crime of child abuse, although Defendant <i>might</i> successfully contest this if record shows an older teen.<sup>9</sup></p> <p>If offense is a COV, it will be a deportable crime of domestic violence, assuming encounter is protected under Cal. DV law e.g. as dating.<sup>10</sup></p>	<p>To try to avoid CIMT, put (truthful) statement in the record that Defendant reasonably believed V was at least age 18.<sup>11</sup></p> <p><b>If client will be removed (deported):</b> In a prosecution for illegal re-entry after removal, felony 261.5 with V under 16 is a bad prior. If V is 15 and client likely to re-enter illegally, plead to a misdo; to 261.5(c) with a vague record re age; or if age 15 must appear, or must get a felony, to 288a(b)(1) (which is a preferable plea in general).<sup>12</sup></p>
<p><b>Sexual conduct with V under age 18; no D age requirement</b></p> <p><b>P.C. §§ 286(b)(1); 288a(b)(1); 289(h)(1)</b></p>	<p>SAM: If plea to age-neutral offense is not possible, then record shd show V age 15 or hopefully older.<sup>13</sup> If V is age 14, see 261.5(c) comments<sup>14</sup></p> <p>Regarding COV, see 261.5(c)</p>	<p>See comment to § 261.5(c)</p>	<p>See comments to § 261.5(c)</p> <p>(In general § 288a(b)(1) is preferable to 261.5(c).)</p>
<p><b>Sexual conduct where V under age 16, D over age 21</b></p> <p><b>P.C. §§ 261.5(d), 286(b)(2), 288a(b)(2), 289(i)</b></p>	<p>Divisible as SAM. See 261.5(c) instructions. If possible, better plea is 288a(b)(1)-type offense with no requirement of age difference between V and D.<sup>15</sup></p> <p>Regarding COV, see 261.5(c)</p>	<p>See comment to § 261.5(c)</p>	<p>See comments to § 261.5(c)</p> <p><b>If client will be removed:</b> See 261.5 except: Need <i>misd</i> 261.5(d). If felony is required, get 288a(b)(2)</p>
<p><b>Consensual sex with V under age 14</b></p>	<p>YES as SAM.<sup>16</sup></p> <p>Assume COV</p>	<p>YES, deportable crime of child abuse, domestic violence</p>	<p>See comments to § 261.5(c)</p>
<p><b>Lewd, V 14 or 15</b></p> <p><b>P.C. § 288(c)</b></p>	<p>Divisible as SAM.<sup>17</sup></p> <p>Probably not COV.</p>	<p>YES, deportable crime of child abuse</p>	<p>Unclear what the standard is, but see comment to § 261.5(c).</p>

OFFENSE	AGGRAVATED FELONY Conviction: -SAM, COV or Rape	DEPORTABLE Conviction	Conviction of CRIME INVOLVING MORAL TURPITUDE
<b>Lewd, V under 14</b> P.C. § 288(a)	YES as SAM. <sup>18</sup> Assume COV.	YES, child abuse crime of child abuse.	YES
<b>Annoy/molest a child—</b> P.C. § 647.6(a)	Divisible as SAM; plead specifically to innocuous conduct <sup>19</sup>	ICE will charge as child abuse.	Might be divisible based on conduct, or on whether D reasonably believed V was at least age 18 <sup>20</sup>
<b>Sexual battery</b> P.C. § 243.4(a)	Not SAM, but keep minor age of V out of record. <sup>21</sup>  Felony is a COV; Misdo is not COV if record states committed without forcible restraint. <sup>22</sup>	If COV and domestic relationship, it is a deportable crime of DV  If record shows that V is a child, deportable crime of child abuse. <sup>23</sup>	YES
<b>Alternate Pleas: Age-Neutral Offenses</b> P.C. §§ 32, 236, 243, 245, 314, 647, 136.1(b)(1)	Some are agg felonies as COV, but only if a sentence of a year or more is imposed.  Age-neutral offense is <i>not</i> be SAM, but still, keep age out of the record	See comments to § 243.4(a), <i>supra</i>  For these offenses generally, see <i>Calif. Quick Reference Chart</i> and see <i>Note: Violence, Child Abuse</i>	§ 32 is CMT if principal offense is; felony 236 yes; 243 no if offensive touching; 245 yes; 314 yes; 647 depends; 136.1(b)(1) arguably is not.
<b>Rape</b> Calif. P.C. § 261; Wash. Rev. Code § 9A.44.060	-YES, as Rape. <sup>24</sup> Includes by force, threat, intoxication. -Rape is a COV.	See comments to § 243.4(a), <i>supra</i>	YES
<b>Indecent exposure</b> Calif. P.C. § 314	-Not a COV -Shd not be SAM, but keep minor age out of record. See n. 20.	To avoid deportable child abuse, keep minor age out of record	Assume that it is a CMT. Small chance that a plea to exotic dancing for willing audience would avoid <sup>25</sup>
<b>Lewd in public</b> Calif. P.C. § 647(a)	Not SAM, but keep minor age out of the record. See n. 20.	Shd not be child abuse, but keep minor age out of record	Will be charged as CIMT
<b>Working as a prostitute</b>	NO	<i>Inadmissible</i> if paid for intercourse; plead to other lewd conduct. <sup>26</sup>	YES
<b>Soliciting a prostitute</b>	NO (but if prostitute is a minor, keep age out of the record)	Not <i>inadmissible</i> for prostitution	YES; and all of § 647(b) is CIMT <sup>27</sup>
<b>Managing a prostitution business</b>	YES <sup>28</sup>	YES, if noncitizen prostitutes. <sup>29</sup>	YES
<b>Possession of Child Pornography</b> P.C. 311.11(a)	YES <sup>30</sup>	NO unless charged as child abuse	YES
<b>Failure to Register as Sex Offender</b>	NO	Yes if fed conviction based on state failure <sup>31</sup>	YES – (but Ninth Circuit may overturn in future <sup>32</sup> )

## ENDNOTES

<sup>1</sup> This chart was compiled by Katherine Brady, Senior Staff Attorney, Immigrant Legal Resource Center. For additional information see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit* (“*Defending Immigrants*”) and see free download *Calif. Chart and Notes, § N.10 Sex Offenses*, both at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>2</sup> A conviction of an offense that is “sexual abuse of a minor” (SAM) is an aggravated felony, regardless of sentence imposed. INA § 101(a)(43)(A), 8 USC § 1101(a)(43)(A).

<sup>3</sup> Conviction of a “crime of violence” (COV), as defined at 18 USC § 16, is an aggravated felony if and only if a sentence of a year or more is imposed. INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F).

<sup>4</sup> An age-neutral offense is best because it will not be held to be SAM in any immigration context, including in proceedings begun outside the Ninth Circuit. Further, if the record of conviction does not identify a victim of minor age, the conviction is not a deportable crime of child abuse.

<sup>5</sup> In the Ninth Circuit this is sure not to be SAM; see below. Immigration counsel also may argue it is not a deportable crime of child abuse, although you should assume that this will lose.

<sup>6</sup> The Ninth Circuit has two separate definitions of SAM. The court held that 261.5(c), (d) with a minor 15-years-old or older is not SAM under either test (see *Pelayo*, below).

**Young age of the victim.** One definition provides that sexual conduct is inherently abusive if the minor is very young. How young? The Ninth Circuit held that it is not abuse when the minor is age 15 (or “just under the age of 16”) (*Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9<sup>th</sup> Cir. 2009)) and is abuse if the minor is age 13 (*U.S. v. Valencia-Barragan*, 600 F.3d 1132, 1134 (9<sup>th</sup> Cir. 2010)). While the court has not published an opinion regarding a 14-year-old victim, counsel must assume conservatively that this will be held to be abuse. However, a good decision in the pending Supreme Court case *Descamps v United States* could clarify the law so that no conviction under § 261.5(c) or even (d) will be held SAM. See discussion of *Descamps*, below.

**Analogue to 18 USC § 2243.** The Ninth Circuit’s other definition of SAM is more complex. The court held that at least in consensual sex cases involving older teenagers, the definition of SAM is set out in 18 USC § 2243, which requires “knowingly” engaging in a sexual act with a person under the age of 16 and at least four years younger than the defendant. *Estrada-Espinoza v Mukasey*, 546 F.3d 1147, 1159 (9<sup>th</sup> Cir. 2008) (en banc).

**Summary.** The bottom line on current law is as follows: The Ninth Circuit specifically held that even if the statute (261.5(d)) or the record of conviction (for 261.5(c)) establishes requirements relating to age in § 2243, a 261.5 conviction cannot meet this test because 261.5 lacks the element of “knowing” conduct. See *Pelayo*, below. However, because we have some concern that immigration judges may be confused by or disagree with that analysis, where possible we recommend § 288a(b)(1), which has no element of age difference between minor and defendant. In addition, it is likely that in spring 2013 the U.S. Supreme Court will hold that a conviction may not be characterized by facts beyond its statutory elements, which would further support 261.5 not being SAM under this test. See discussion of *Descamps v. U.S.*, below.

**Discussion.** *Estrada-Espinoza* held that § 261.5(c), the statute at issue there, *never* is sexual abuse of a minor. The court found that under the categorical approach, which included the “missing element” rule, a conviction can prove no more than the statutory elements of the offense. Therefore, a conviction under § 261.5(c) only can prove that the defendant was convicted of having sex with a victim under the age of 18 and three years younger than the defendant. No evidence in the individual’s record that might show that the victim was under age 16 and at least four years younger than the defendant may be considered under this rule.

Subsequently the Ninth Circuit reversed the “missing element rule,” and held that an immigration judge may consider a non-element fact from the record of conviction, as long as the fact was *necessary to prove an element of the conviction* under the prosecution’s sole theory of the case; in other words, if without the fact there could have been no conviction in the particular case, the judge may consider the fact. *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9<sup>th</sup> Cir. 2011) (en banc) (considering California burglary). Under this rule, an immigration judge reviewing a prior conviction under § 261.5(c) might be permitted to consider information in the record that provides the victim’s age and the age difference between victim and defendant, since these are elements of the offense.

However, 18 USC § 2443 also requires *knowingly* engaging in a sexual act, which means that the person is not too inebriated or otherwise incapacitated to understand the nature of the act. Because § 261.5 entirely lacks this scienter requirement, the Ninth Circuit found that a conviction under § 261.5(d) never can be SAM under this test, as an analogue to § 2443. *Pelayo-Garcia*, 589 F.3d at 1016. While this decision was pre-*Aguila-Montes de Oca*, the result should not change. Because § 261.5 has no element of scienter, evidence in the record that establishes the

defendant “knowingly” engaged in sex cannot be “necessary” to the conviction. Therefore § 261.5, including § 261.5(d), still should be held never to be an aggravated felony under this definition.

Despite the holding in *Pelayo-Garcia* that no conviction under 261.5 can be SAM as an analogue to 18 USC 2443, we urge criminal defenders to act conservatively and try to avoid a § 261.5(c) conviction where facts in the record establish the minor was under age 16 and four years younger than the defendant. Because most people in removal proceedings are unrepresented and immigration judges are not always aware of (or willing to follow) a complex crim/imm analysis regarding scienter, it is best to make a record that is as clearly distinguishable as possible. A better plea is to P.C. § 288a(b)(1), oral sex with a minor under the age of 18. This offense has no element relating to age difference between defendant and victim, which makes it clear that the conviction could not be held an analogue to 18 USC § 2443. Or P.C. § 288(c), where the record of conviction does not document explicitly sexual conduct, that would avoid SAM. See *U.S. v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010).

Coming soon: *Descamps*. There is one last complication – but a good one. In the spring 2013 term, the U.S. Supreme Court appears likely to re-impose the “missing element” rule and reverse the *Aguila-Montes de Oca* rule. See discussion of *Descamps v. United States* (cert. granted Aug. 31, 2012) at § N.3 *Record of Conviction*. This should bring back the original rule in *Estrada-Espinoza* that no conviction under § 261.5(c) can be considered SAM, because regardless of facts in the individual’s record, a § 261.5(c) conviction can establish only that the victim was under age 18 and three years younger than the defendant. To take advantage of *Descamps*, for example in a case where the record would show the minor was age 14, is to *delay the plea hearing*, which will have the effect of delaying the removal hearing, closer to the time when *Descamps* is decided, other courts react, and the law becomes more settled.

<sup>7</sup> If the record shows that the victim is age 14, assume conservatively that authorities will hold that this is SAM based upon the young age of the victim (see “young age of the victim” test in n. 6, *supra*), although the Ninth Circuit has not specifically held this. If feasible, delay the plea hearing in order to keep the person out of removal proceedings and immigration detention for as long as possible, to take advantage of a Supreme Court decision in the *Descamps* case during spring 2013, which is expected to provide that a prior conviction must be evaluated only on the elements of the offense. See last paragraph in n. 6, *supra*. A plea to § 288(c), at least with specific, non-explicit conduct, is not SAM under current law (*U.S. v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010)) and a good *Descamps* decision might mean that no § 288(c) conviction is SAM. Finally, under current law there are two instances where leaving the record of conviction vague as to the age of the minor offers a benefit. First, if the defendant is a permanent resident who would only be deportable under the aggravated felony ground – i.e., who will not be deportable for CIMT or any other ground – a vague 261.5(c) or even (d) record will not cause deportability. Second, if the defendant is someone who will be removed (deported) and might come back illegally, a vague record will prevent 261.5(c) (but not (d)) from being held a prior as “statutory rape.”

<sup>8</sup> The Ninth Circuit held that 261.5(c), consensual sex with a person under the age of 18, is not categorically (i.e., not necessarily) a crime of violence. *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046, 1053 (9<sup>th</sup> Cir. 2006). Under a standard very similar to 18 USC § 16, the Ninth Circuit found that under recent Supreme Court precedent that requires a COV to involve “purposeful, violent and aggressive conduct,” consensual sex with a minor who is 14 or older is not a crime of violence. *U.S. v. Christensen*, 559 F.3d 1092 (9<sup>th</sup> Cir. 2009). To be safe, avoid a sentence of a year or more *on any single count*; this will avoid an aggravated felony as a COV.

<sup>9</sup> A noncitizen is deportable based upon conviction of a “crime of child abuse, child neglect, or child abandonment” that occurred after admission and after 9/30/96. 8 USC § 1227(a)(2)(E)(i). ICE will charge any offense is a deportable crime of child abuse if it has as elements, or as noticeable facts in the record, sexual conduct or lewd intent toward a person under the age of 18. While immigration counsel have arguments that, e.g., a 16 or 17 year old having consensual sex is not “child abuse,” ICE will fight this. See definition of child abuse at *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 507-10 (BIA 2008), *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) and at § N.9 *Domestic Violence and Child Abuse*. See extended discussion in *Defending Immigrants*, § 6.15.

<sup>10</sup> Like a “crime of child abuse,” conviction of a “crime of domestic violence” is a deportable offense under INA § 237(a)(2)(E)(i), 8 USC § 1229(a)(2)(E)(i). There must be proof of a domestic relationship as defined under state law. In California dating is such a relationship.

<sup>11</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) held that explicit sexual conduct with a minor is a crime involving moral turpitude (“CIMT”), if the perpetrator *knew or had reason to know that the victim was under age 18*. See also *Matter of Alfaro*, 24 I&N Dec. 417 (BIA 2011) (P.C. § 261.5(d) is a CIMT if defendant knew or had reason to know that the victim was under age 16). Where possible, have the defendant state s/he did not know or



have reason to know that the victim was under age 18 (or if not that, age 16). Otherwise, leave the record of conviction vague enough so that this is a possibility. Under a radical provision in *Silva-Trevino*, immigration judges confronted with a vague record may consider evidence outside the record of conviction to see if the defendant “knew or should have known,” for CIMT purposes only, so that a vague record is not protection. However, the Ninth Circuit might overrule *Silva-Trevino*, in which case a vague record will protect against such a finding, if the conviction is under a statute that does not have reasonable belief that the victim was of age as a defense. See discussion in *Defending Immigrants*, § 4.5.

<sup>12</sup> Illegal re-entry after removal (deportation), 8 USC 1326, is the most commonly prosecuted felony in the United States. A prior *felony* statutory rape conviction supports a 12-level increase in sentence, while a prior aggravated felony conviction supports a 6-level increase. See U.S. Sentencing Guidelines § 2L1.2. It is likely although not guaranteed that statutory rape includes only sexual intercourse, and not other conduct, with a person under age 16.

<sup>13</sup> See n. 6, *supra*.

<sup>14</sup> See n. 7, *supra*.

<sup>15</sup> See advice in n. 6, *supra*. Section 261.5(d) is different from 261.5(c) only in that (d) establishes the ages that are required under the SAM definition at 18 USC § 2443 (a minor under age 16 and at least four years younger than the defendant). The Ninth Circuit held that § 261.5(d) is never analogous to 18 USC § 2443, because it lacks the scienter requirement of “knowing” sexual conduct. See *Pelayo v. Holder*, *supra* at n. 6. While this is binding precedent, the conviction still presents some risk because it is possible that an immigration judge will not know it or will refuse to follow it, or the person will be transferred out of the Ninth Circuit.

<sup>16</sup> *U.S. v. Valencia-Barragan*, 600 F.3d 1132, 1134 (9<sup>th</sup> Cir. 2010) (Wash. Rev. Code § 9A.44.076(1), consensual sex with a victim under age 14 is categorically (automatically) SAM).

<sup>17</sup> The Ninth Circuit found that Calif. P.C. § 288(c)(1) is not categorically SAM. *U.S. v. Castro*, 607 F.3d 566, 567-58 (9<sup>th</sup> Cir. 2010). It appears unlikely that the offense would be held to be a crime of violence. See discussion in *U.S. v. Christensen*, 559 F.3d 1092 (9<sup>th</sup> Cir. 2009), discussed at n. 8, *supra*

<sup>18</sup> See *U.S. v. Medina-Villa*, 567 F.3d 507, 511-512 (9<sup>th</sup> Cir. 2009) (P.C. § 288(a) is categorically SAM)

<sup>19</sup> *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9<sup>th</sup> Cir. 2004). Non-egregious behavior that has been held to violate § 647.6 includes: brief touching of a child’s shoulder, photographing children in public with no focus on sexual parts of the body so long as the manner of photographing is objectively “annoying”; hand and facial gestures or words alone; words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen; it is not necessary that the act[s or conduct] actually disturb or irritate the child (see *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9<sup>th</sup> Cir. 2008)), as well as urinating in public, offering minor females a ride home, driving in the opposite direction; repeatedly driving past a young girl, looking at her, and making hand and facial gestures at her (in that case, “although the conduct was not particularly lewd,” the “behavior would place a normal person in a state of being unhesitatingly irritated, if not also fearful.”), unsuccessfully soliciting a sex act (see *Pallares-Galan*, 359 F.3d at 1101 for citations).

<sup>20</sup> See *Nicanor-Romero*, *supra* (some conduct is not egregious enough). The Ninth Circuit *en banc* partially overruled *Nicanor-Romero* to the extent that *Nicanor-Romero* stated *in general* that moral turpitude determinations are not governed by the traditional principles of administrative deference. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9<sup>th</sup> Cir. 2009) (*en banc*). It is not clear if this standard, or the “reasonable belief that the victim was 18” standard discussed in n. 11, *supra*, will apply.

<sup>21</sup> Conviction under an age-neutral statute never is SAM. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9<sup>th</sup> Cir. 2012). Keeping the minor’s age out of the record will prevent the conviction from being a deportable crime of child abuse.

<sup>22</sup> Compare *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9<sup>th</sup> Cir. 2005) (misdemeanor P.C. § 243.4(a) is not categorically a crime of violence under 18 USC § 16(a) standard) with *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9<sup>th</sup> Cir. 2005) (felony § 243.4(a) is categorically a crime of violence under 18 USC § 16(b)).

<sup>23</sup> *Matter of Velazquez-Herrera*, *supra*, provides that an age-neutral offense may be held a crime of child abuse if under the modified categorical approach the record of conviction establishes that the victim was a minor. Immigration counsel can argue that this is incorrect under *Aguila-Montes*, *supra*, but it is the current BIA rule.

<sup>24</sup> A conviction of “rape” is an aggravated felony, regardless of sentence imposed. INA § 101(a)(43)(A), 8 USC § 1101(a)(43)(A). See, e.g., *Castro-Baez v. Reno*, 217 F.3d 1057 (9<sup>th</sup> Cir. 2000) (Cal. P.C. § 261(a)); see also *U.S. v. Yanez-Saucedo*, 295 F.3d 991 (9<sup>th</sup> Cir. 2002) (Wash. Rev. Code § 9A.44.060 is rape where lack of consent is clear, despite no forcible component).



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<sup>25</sup> See discussion of *Matter of Corte-Medina*, 26 I&N Dec. 79 (BIA 2013) and *Nunez v. Holder*, 594 F.3d 1124, 1138 (9th Cir. 2010) in Note: Sex Offenses.

<sup>26</sup> See INA § 212(a)(2)(D), 8 USC § 1182(a)(2)(D). Prostitution is defined as the business of offering sexual intercourse for hire. Plead to some other specific lewd conduct to prevent this finding. Conviction is a CIMT.

<sup>27</sup> *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012). (9th Cir. 2012).

<sup>28</sup> Conviction of some offenses involving running prostitution or other sex-related businesses are aggravated felonies. See INA § 101(a)(43)(I), (K); 8 USC §§ 101(a)(43)(I), (K). These include child pornography, owning, controlling, etc. a prostitution business, or transporting prostitutes.

<sup>29</sup> Deportable under INA § 237(a)(2)(D)(iv), 8 USC § 1227(a)(2)(D)(iv) for conviction of 8 USC § 1328.

<sup>30</sup> Calif. P.C. § 311.11(a) is an aggravated felony under 8 USC § 1101(a)(43)(K), as well as a particularly serious crime barring asylum and withholding of removal. *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012).

<sup>31</sup> Conviction after admission and after July 27, 2006 of 18 USC § 2250 is a deportable offense under 8 USC 1227(a)(2)(A)(v). See further discussion in *Defending Immigrants in the Ninth Circuit*, § 6.22.

<sup>32</sup> *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007) (Calif. P.C. § 290(g)(1) is a CIMT); but see *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011), *Totimeh v. AG*, 666 F.3d 109 (3d Cir. 2012) (simple failure to register as a sex offender is not a CIMT; decline to defer to *Tobar-Lobo*); and see *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011) (remand case to BIA to reconsider *Tobar-Lobo*).

## § 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/crimes](http://www.ilrc.org/crimes))

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### I. OVERVIEW

Burglary, theft and fraud convictions have two potential immigration consequences. They could constitute an **aggravated felony** conviction, in the categories of burglary, theft, or a crime of violence with a year's sentence imposed, or fraud with a loss to the victim/s exceeding \$10,000.<sup>1</sup> In addition they can and frequently do constitute a conviction of a **crime involving moral turpitude** ("CIMT").<sup>2</sup> Including in felony cases, an informed criminal defender often can avoid conviction of an aggravated felony, the more serious immigration penalty, and sometimes can avoid a CIMT.

A single offense has the potential to come within multiple adverse immigration categories, e.g. be an aggravated felony as burglary *and* as attempted theft. Check the offense against all immigration categories in this Note.

The main defense strategies to avoid an aggravated felony in this area are:

- To avoid an aggravated felony for burglary or theft offenses, avoid a sentence imposed of one year or more on any single count. It is possible to accept more than one year of actual custody time while avoiding a one-year sentence for immigration purposes.
- To avoid an aggravated felony for an offense that involves fraud or deceit, avoid pleading to a single offense where the victim/s loss exceeded \$10,000.
- Even with a sentence of a year or more, or a loss exceeding \$10,000, counsel may be able to avoid an aggravated felony conviction through careful control of the elements of the offense in the record of conviction.

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<sup>1</sup> See 8 USC § 1101(a)(43)(F) (crime of violence), (G) (theft, burglary), and (M)(fraud or deceit).

<sup>2</sup> A CIMT may cause inadmissibility and/or deportability, depending on factors such as number of offenses, sentence, when offense was committed. See § N.7 *Crimes Involving Moral Turpitude*, and 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii).

**The Reviewable Record of Conviction.** Sometimes your defense strategy will depend upon putting information into, or at least keeping information out of, the record of conviction that immigration authorities are permitted to consider. This reviewable record consists of the plea agreement, plea colloquy, judgment, the charging document where there is adequate evidence the defendant pled to the charge, some information from a minute order or abstract, and any document that is stipulated to as the factual basis for the plea. It does not include a police or pre-sentence report (unless they are stipulated to as the factual basis for the plea), prosecutor's comments, etc. See Part V for a discussion of the effect of a vague versus specific record of conviction. For more information on using the record of conviction see § N.3 *Record of Conviction*.

**Don't Let Your Work Go To Waste - Photocopy the Legal Summary Provided and Hand it to the Defendant!** The **Appendix** following this Note contains short legal summaries of defense arguments based on the strategies set out in these notes. *Please copy the paragraph/s from the Appendix that applies to the defendant and hand it to him or her,* with instructions to give it to a defense attorney, or to the immigration judge if there is no defense attorney. The great majority of noncitizens have no counsel in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes. This piece of paper is the next best thing to your client having counsel to assert these technical defenses.

## II. BURGLARY

Part A provides instructions for how to plead to a burglary offense and avoid an aggravated felony conviction, which generally carries the worst immigration consequences. Part B provides instructions for how to avoid a conviction of a crime involving moral turpitude; this can be challenging with burglary.

Defenders interested in a more in-depth discussion of these instructions and the underlying law should see Yi, Brady, "How to Plead a Non-Citizen Defendant to a California Burglary Charge" at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) (scroll down).

### A. How to Avoid an Aggravated Felony Conviction on a Calif. P.C. §§ 459/460 charge

#### 1. *Avoid a sentence of a year or more imposed on any single count* of P.C. §§ 459/460

The most secure way to plead to burglary while avoiding an aggravated felony conviction of any type is to avoid a sentence imposed of one year or more, on any single count.

There is room for creative and effective defense work in negotiating sentence. A defendant can accept actual custody time far greater than one year, while negotiating a "sentence" that is

less than a year for immigration purposes. For example, the defendant can take 364 days on each of several counts, to be served consecutively; waive credit for time served in exchange for a lower official sentence; designate the burglary as a subordinate term and designate an offense that will not become an aggravated felony with a year's sentence as a base 16-month term. Note, however, that for immigration purposes "sentence" includes the full time of a sentence where execution is suspended. If imposition of sentence is suspended it includes any custody time ordered as a condition of probation. Thus, misdemeanor § 459 where imposition of sentence is suspended and 365 days jail are ordered as a condition of probation is an aggravated felony, if the conviction meets the definition of "burglary," a "crime of violence," or "attempted theft." See other strategies and discussion at § N.4 *Sentence Solutions*.

In an unusual case, a burglary offense could be an aggravated felony even without a one-year sentence imposed. For that the *intended* crime must be an aggravated felony regardless of sentence, e.g. entry with intent to sell cocaine, commit sexual abuse of a minor, or defraud someone of over \$10,000. If the record shows a substantial step – which includes any unlicensed entry – toward committing the intended aggravated felony, the offense will be held *attempt* to commit the aggravated felony, which itself is an aggravated felony. To prevent this, check the intended offense in the *California Quick Reference Chart* to see if it is an aggravated felony regardless of sentence. If it is, see defense strategies in the instructions below.

## **2. How to avoid an aggravated felony even if a sentence of a year or more is imposed**

Even if a sentence of a year or more is imposed, a plea to § 460(b) according to the below instructions should avoid an aggravated felony. The instructions may look complex, but about ten minutes of work should let you know if an immigration-neutral plea is possible in your case. *Any conviction of § 460(a), or of § 459 "residential burglary," with a sentence imposed of at least one year is an aggravated felony.*

This section provides a summary of the definitions one must avoid; instructions for how to avoid them; and examples of safer pleas that comport with these instructions.

***Definitions underlying the instructions.*** A burglary conviction with a sentence imposed of at least a year has the potential to be an aggravated felony in any of three ways: as burglary, as a crime of violence, or as attempted theft (or other attempted aggravated felony). To avoid this, the plea must avoid *all* of the following three definitions.

- "Burglary" is an entry that is unprivileged or without consent into a building or structure, with intent to commit a crime. If at all possible, state on the record that the entry was permitted, licensed or privileged. If that is not possible, leave the record vague, or if necessary state "unlawful" (but not "unlicensed," etc.) entry.<sup>3</sup>

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<sup>3</sup> *Taylor v. United States*, 494 U.S. 575 (1990) (definition of burglary); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 944-946 (9th Cir. 2011) (under California law an "unlawful" entry encompasses even an entry with consent or privilege, if there was felonious intent; therefore a California record showing "unlawful" entry does not prove unlicensed or unprivileged entry.)

- A “crime of violence” (in the context of burglary) is any burglary of a residence,<sup>4</sup> or potentially any felony burglary that actually uses violence, e.g. to destroy a window,<sup>5</sup> or involves intent to commit a crime of violence.
- An “attempted aggravated felony” (in the context of burglary) is burglary with intent to commit an offense that is an aggravated felony, e.g. theft, coupled with evidence in the reviewable record that the person took a substantial step toward committing the offense. Making an unlicensed entry always is a substantial step.<sup>6</sup>

**Instructions.** Follow these instructions to avoid an aggravated felony conviction despite a sentence of a year or more. Remember to give the defendant the Legal Summary (Burglary) from **Appendix I** that corresponds to the relevant instruction:

- Do not plead to residential burglary and do not specify that a burglary was of a dwelling or its curtilage (yard). This will be held an aggravated felony as a crime of violence.
- Do not admit facts that establish that the entry or any other aspect of the burglary was accomplished by violent force. This is likely to be held a crime of violence. Provide the defendant with the text of Burglary 4 from **Appendix I**.
- Avoid a plea to an entry that is “unprivileged” or “without consent,” including entry into a closed business. If possible, plead to a privileged/consented entry. If necessary, plead to an “unlawful” entry, because the Ninth Circuit held that an unlawful entry under California law is not necessarily unprivileged or without consent, and thus does not necessarily meet the generic definition of burglary. Provide Burglary 1, **Appendix I**.
- If the record must establish that the entry was unprivileged or without consent, then: (a) the entry must be into a non-building, e.g., car, commercial yard (provide Burglary 2, **Appendix I**) and (b) the intended offense must not be identified as theft or another offense that is an aggravated felony.<sup>7</sup>
- Try not to plead specifically to intent to commit larceny, or some other aggravated felony. If possible specify an intended offense that is not an aggravated felony; otherwise leave the record vague, e.g. intent to commit “larceny or any felony.”

If it is necessary to plead to larceny, then cleanse the record of facts establishing that the defendant took a “substantial step” towards committing the larceny, because the offense will be an aggravated felony as “attempted theft.” Provide Burglary 3, **Appendix I**.

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<sup>4</sup> See *James v. U.S.*, 127 S.Ct. 1586, 1600 (U.S. 2007); see also *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (§ 460(a) is a “crime of violence” even where entry is by consent) (petition for rehearing pending).

<sup>5</sup> *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

<sup>6</sup> *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) (entering an open commercial building does not constitute a substantial step), distinguishing *Ngaeth v. Mukasey*, 545 F.3d 796, 801 (9<sup>th</sup> Cir. 2008).

<sup>7</sup> This is because an unprivileged entry into a building or structure meets the generic definition of “burglary,” and an unprivileged entry also is the “substantial step” required to make the § 459 conviction equivalent to attempt to commit the intended offense, e.g. to amount to the aggravated felony “attempted theft.”

Assume that an unprivileged or nonconsensual entry will be held a substantial step, as will leaving with unpaid-for goods.

- Again, if you can avoid a sentence of a year or more imposed on any single count, a burglary is not an aggravated felony and you can ignore all of the above instructions. See § N.4 Sentence Solutions.

**Examples** of pleas that are not aggravated felonies under current law, despite a sentence of a year or more:

- A plea to “permissive entry into a [non-residence building or non-building] with intent to commit [theft or some other offense].” The record must not establish that the defendant took a “substantial step” toward committing a theft, which might establish the aggravated felony “attempted theft”; *or*
- An unlicensed entry into a non-building, non-residence with intent to commit [an offense that, unlike theft, is not itself an aggravated felony];
- A privileged entry into a building or non-building with intent to commit “theft,” where the record does not establish a substantial step toward committing the theft.

**NOTE: The law on burglary might change for the better.** In spring 2013 the U.S. Supreme Court will decide *Descamps v. United States*, a case involving Cal. P.C. § 459. The Court may hold that only the elements of a criminal statute - and not additional details admitted in the plea -- can be used to characterize a prior conviction. In that case, § 459 never would come within the federal definition of “burglary,” because it has no element relating to an unlicensed entry. This also might mean that California burglary cannot constitute an “attempt” to commit the intended crime, since the required “substantial step” also is not an element of § 459.

Until *Descamps* is decided, what should defense counsel do if a sentence of a year or more will be imposed for § 459? The best course is to get a judgment that is not “burglary” under current law, i.e. a record that specifically states the entry was permissive. If that is not possible, counsel might decide to delay the plea hearing, which would delay the defendant’s removal hearing, to give the Court time to make its decision. Note that residential burglary, P.C. § 460(a), will remain an aggravated felony as a “crime of violence” if a year’s sentence is imposed, regardless of the decision in *Descamps*.



**Note: A Vague (Inconclusive) Record of Conviction Has Very Limited Use.** Some criminal statutes are "divisible" in that they include some crimes that do and others that do not cause an immigration penalty. For example, at least until *Descamps* is decided (see box above), a § 459 conviction by an unlicensed entry can be burglary, while a conviction by a permissive entry cannot.<sup>8</sup>

In creating a record of conviction it is *always* best to plead specifically to the "good" crime like permissive entry, rather than to create a vague record that merely avoids specifying the bad crime, e.g. "entry" with no qualifier. In fall 2012 *Young v Holder*<sup>9</sup> drastically limited the effectiveness of a vague record. Now, regardless of the date of conviction:

- If a permanent resident is not already deportable (e.g., does not have a prior conviction that makes her deportable), a vague record *will* prevent the new conviction from making her deportable. This might also help a refugee.
- In contrast, an undocumented person, a permanent resident who already is deportable, or any other immigrant who needs to apply for relief or status needs a specific plea to a "good" offense. A vague plea will just trigger the immigration consequence.
- A specific "good" plea is always necessary to avoid the conviction being a crime involving moral turpitude. See Part B, below.

For more information, see § N.3 *Record of Conviction* and § N.7 *Moral Turpitude*.

## **B. How to Avoid a Crime Involving Moral Turpitude (CIMT) with a P.C. § 460 Charge**

***Test 1: Burglary is a CIMT if the intended crime is a CIMT.*** Since breaking and entering alone is not a CIMT, burglary is a CIMT only by virtue of the intended offense. Burglary is not a CIMT if the intended offense is not one, and is if the intended offense is.

Under current law, a vague record showing intent to commit an undesignated offense ("a felony" "larceny or any felony") will not avoid a CIMT. For CIMT purposes only, an immigration judge may look beyond the record of conviction to identify the conduct. If possible, counsel should review the *California Quick Reference Chart* to locate a specific offense that is not a CMT and plead to entry with intent to commit that. Finding an intentional felony that definitely is not a CIMT and that fits the fact scenario may be difficult. An example is theft or receipt of stolen property with intent to temporarily deprive, under Calif. Veh. Code § 10851 or Calif. P.C. § 496(a). Another is felony P.C. § 243(e) that involved offensive touching rather than actual violence. See § N.7 *Crimes Involving Moral Turpitude*.

If that is not possible, *if the defendant is an LPR who is not deportable, it still is important to create a vague record of conviction* such as intent to commit "larceny or any

<sup>8</sup> The U.S. Supreme Court may issue a ruling in spring 2013 that would mean that § 243(e) never is a "crime of violence" or "crime of domestic violence," regardless of the record of conviction or burden of proof. See discussion of *Descamps v. United States*, § 243(e), and possible strategies in § N.3 *Record of Conviction*, Part C, *supra*.

<sup>9</sup> See discussion of *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (*en banc*) at § N.3 *Record of Conviction*, *supra*.

felony.” There is a real possibility that the Ninth Circuit will overturn the *Silva-Trevino* evidentiary rules for CIMTs. In that case, a vague record of conviction would be sufficient to protect against deportability. A vague record would not preserve eligibility for relief, however; see Box above.

**Test 2: Residential burglary, entry without consent.** First, with any residential burglary, avoid a sentence imposed of a year or more on any single count in order to avoid a “crime of violence” aggravated felony. Regarding moral turpitude, an entry without consent or privilege into a dwelling with intent to commit a crime is an automatic CIMT, regardless of the intended offense.<sup>10</sup> Under the current rule in *Silva-Trevino*, in order to avoid the CIMT the plea would have to be specifically to entry *with* consent or privilege, in order to commit a specific offense that is *not* a CIMT. If that is not possible, and if the defendant is an LPR who is not yet deportable, create a vague record such as “entry” into a residence to commit “larceny or any felony.” If the Ninth Circuit overturns *Silva-Trevino*, that plea will protect the conviction from being used as a basis for deportation under the CIMT ground.

**Plea Instructions.** Where it is imperative to avoid a CIMT, try to plead to something other than burglary, such as trespass, loitering, or even possession of burglary tools under P.C. § 466. If you do this, eliminate any extraneous admissions that would indicate that these offenses were committed with intent to commit a CIMT. To prevent a burglary plea from being a CIMT:

- Avoid pleading to an unprivileged entry into a dwelling. Try to avoid pleading to an unlawful entry, but if that is not possible, at least avoid specifying entry without consent;
- Try to create a record that specifically identifies the intended offense as one that is not a CIMT. This will prevent the burglary from being a CIMT, even under the current *Silva-Trevino* evidentiary rules;
- If you cannot create a record that specifically identifies a non-CIMT, create a vague record such as burglary with intent to commit “larceny or any felony.” Be sure the entire record of conviction is sanitized in this way. This might help an LPR who is not already deportable: if the Ninth Circuit overturns *Silva-Trevino*, the conviction will not be a CIMT for purposes of deportability.
- Where applicable, provide the defendant with a copy of Burglary 5 at **Appendix I**.

**NOTE: Not every CIMT conviction will make an immigrant inadmissible or deportable. It depends upon potential and imposed sentence, number of CIMTs, and other factors. See discussion of the rules at Part V, *infra*, and at § N.7 Crimes Involving Moral Turpitude.**

### III. THEFT AND RECEIPT OF STOLEN PROPERTY

<sup>10</sup> *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

Part A provides instructions for how to plead to a theft offense without creating an aggravated felony conviction, which generally carries the worst immigration consequences. Part B provides instructions for alternative pleas to theft that may avoid a crime involving moral turpitude.

**A. How to Avoid an Aggravated Felony Conviction with a Theft or Receipt of Stolen Property Charge**

**1. Avoid a sentence of a year or more imposed on any single count**

The most secure way to plead to theft or receipt of stolen property charge and avoid an aggravated felony conviction is to avoid a sentence of one year or more imposed on any single count.<sup>11</sup> Sentence includes suspended sentences, or if imposition of sentence is suspended it includes any custody time ordered as a condition of probation. Even a misdemeanor grand theft or petty theft with a prior is an aggravated felony if a sentence of at least a year is imposed.<sup>12</sup>

Defense counsel can accomplish great things for immigration purposes in negotiating sentence. One can accept actual custody that far exceeds one year, while obtaining a “sentence” of less than a year for immigration purposes. Examples of strategies include: taking 364 days on multiple counts to be served consecutively; waiving credit for time served in exchange for a lower official sentence; designating the theft as a subordinate term and designating as the base term an offense that will not become an aggravated felony with a year sentence. See additional strategies and discussion at § N.4 Sentence Solutions.

**2. If a sentence of a year or more is imposed, plead to an offense that does not meet the federal definition of “theft”**

Even if a sentence of a year or more is imposed, with careful pleading counsel can avoid an aggravated felony by avoiding an offense that meets the federal generic definition of “theft.” That definition 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.”<sup>13</sup>

**Note: A Vague Plea and Record Has Limited Use.** See Box on vague pleas in Part I, *supra*. A vague record of conviction, e.g. to the language of § 484, will help in only two ways. First, if the only way that an LPR or refugee will become deportable is under the aggravated felony deportation ground, a vague record of conviction will prevent this, because ICE will not be able to prove that the conviction was for “theft.” But if the person already is deportable, or if the plea will make him or her deportable under the CIMT ground (see Part C, below), then the person must apply for some relief in order to stay in the country. At that point the person must

<sup>11</sup> INA § 101(a)(43)(G), 8 USC § 1101(a)(43)(G).

<sup>12</sup> *U.S. v. Rodriguez*, 553 U.S. 377 (2008), overturning in part *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> 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 *Rodriguez*.

<sup>13</sup> *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9<sup>th</sup> Cir. 2002)(*en banc*) (partially reversed on other grounds). The Supreme Court approved this definition. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007).

prove the conviction is *not* an aggravated felony, and the vague record will not support this. The second way that a vague record can help is that in a prosecution for illegal re-entry after removal, the federal prosecutor will not be able to prove that the offense is a sentence enhancement as an aggravated felony. See further discussion in § N.3 *Record of Conviction*.

If a vague plea will be beneficial, the entire record, including the factual basis for the plea, must be sanitized of mention of the “bad” offense. Note that Cal. P.C. § 952 permits a vague charge, noting that the charge “may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.”

The following *specific* pleas should prevent an aggravated felony for all purposes, despite a sentence imposed of a year or more.

***Fraud, embezzlement, or other offenses committed by deceit, as opposed to without consent.*** Immigration law acknowledges that theft is a taking accomplished without consent, while fraud is a taking accomplished by deceit.<sup>14</sup> Unlike theft offenses, fraud offenses do not become an aggravated felony by virtue of a one-year sentence. Instead, a crime of fraud or deceit is an aggravated felony if the loss to the victim/s exceeds \$10,000. See Part III, *infra*. If the sentence will be over a year, but the amount taken is less than \$10,000, try to negotiate a plea specifically to an offense involving fraud or deceit – including theft by fraud, embezzlement, or similar offenses within § 484 -- rather than theft. (Note that any fraud offense is a CIMT.)

**Example:** Jack is convicted of theft of \$11,000 and sentenced to 364 days. He does not have an aggravated felony. Jill is convicted of fraud involving \$9,000 and sentenced to 16 months. She does not have an aggravated felony. Under what circumstances would Jack or Jill have an aggravated felony?

(Answer: if Jack had a one-year sentence for the theft, or if Jill were convicted of fraud of more than \$10,000, the offense would be an aggravated felony.)

***Theft of services, not property.*** The definition of “theft” is limited to theft of property. Since P.C. § 484 also includes theft of labor, it is a divisible statute for aggravated felony purposes.<sup>15</sup> The plea should specifically state theft of labor or services; make sure the record of conviction is consistent. (Note that this is a CIMT.)

***Commercial burglary.*** A carefully constructed plea to commercial burglary under § 460(b) can avoid being an aggravated felony. See Part II.A.2, *supra*.

***Not good: Accessory after the fact.*** The Board of Immigration Appeals has held that accessory after the fact under Cal. P.C. § 32 always is an aggravated felony if a year’s sentence is imposed, under the obstruction of justice category.

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<sup>14</sup> *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

<sup>15</sup> *Corona-Sanchez*, *supra* at 1205.

**Not good: Receipt of Stolen Property.** A conviction for receipt of stolen property under P.C. § 496(a) categorically qualifies as a receipt of stolen property aggravated felony conviction, if a sentence of a year or more is imposed.<sup>16</sup> (Like V.C. § 10851, P.C. § 496(a) is divisible as a crime involving moral turpitude, because it includes intent to deprive the owner temporarily.)

**Theft as an Aggravated Felony and Crime Involving Moral Turpitude (CIMT).** The next section will discuss theft as a CIMT. Note that some theft convictions will be an aggravated felony but not a CIMT, and vice versa.

Theft as an Aggravated Felony	Theft as a CIMT (Moral Turpitude)
Any intent to deprive is aggravated felony theft	Intent to deprive permanently is a CIMT, while intent to deprive temporarily is not.
Theft is an aggravated felony only if a sentence of a year is imposed. Fraud is an aggravated felony only if loss to the victim/s exceeds \$10,000	Theft with intent to deprive permanently and fraud (material misrepresentation to gain a benefit) always are CIMTs
The theft must be of property not labor to be an aggravated felony in several circuits, including Ninth Circuit	Theft of either property or labor can be a CIMT.

### C. How to Try to Avoid a Crime Involving Moral Turpitude (“CIMT”) on a Charge of Theft or Receipt of Stolen Property

Theft with intent to permanently deprive the owner is a crime involving moral turpitude (“CIMT”), while taking with a temporary intent such as joyriding is not.<sup>17</sup> Note that while the aggravated felony definition turns on the difference between theft of services and property, this is not relevant to the CIMT determination. Intent to commit fraud always is a CIMT.

**NOTE: Not every CIMT conviction will make an immigrant inadmissible or deportable.** It depends upon potential and imposed sentence, number of CIMTs, and other factors. See discussion of the rules at Part V, *infra*, and at § N.7 Crimes Involving Moral Turpitude.

**California theft under P.C. 484, and any offense involving fraud, is a CIMT.** Courts are likely to hold that all offenses listed in P.C. § 484 offenses involve either a permanent taking or fraud. The fact that the offense involves theft of services is not relevant to moral turpitude, only to the aggravated felony “theft” definition.

<sup>16</sup> *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009), *Verduga-Gonzalez v. Holder*, 581 F.3d 1059 (9<sup>th</sup> Cir. 2009).

<sup>17</sup> See, e.g., discussion of cases in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9<sup>th</sup> Cir. 2009).

**California theft (appropriation of lost property) under P.C. § 485 ought to be held divisible as a CIMT** because it does not have the element of intent to permanently deprive. See discussion of § 485 in *Sheikh v. Holder*, 379 Fed.Appx. 697, 2010 WL 2003567 (9th Cir. May 20, 2010) (unpublished).

**California receipt of stolen property under P.C. § 496(a) has been held divisible as a CIMT.** The Ninth Circuit found that § 496(a) includes intent to *temporarily* deprive the owner of the property.<sup>18</sup> If counsel pleads specifically to temporary intent, a § 496(a) offense should not be held to involve moral turpitude for any purpose. If a that plea is not possible and if there is evidence of permanent intent, it is worthwhile to create a vague record of conviction as long as the defendant is an LPR, asylee or refugee who otherwise is not deportable. Under the current rule for CIMTs in *Silva-Trevino*, ICE may be able to present evidence from beyond the record of conviction to prove that the intent was permanent and the conviction can be a deportable CIMT. If *Silva-Trevino* is overturned in the future, however, ICE will not be able to use the vague record to prove that an LPR or other person with lawful status is deportable for a CIMT

**California auto taking under P.C. § 10851 is divisible as a CIMT**, because it includes intent to temporarily deprive the owner. It is best to plead specifically to a taking with intent to temporarily deprive the owner, but if that is not possible a vague record, or “temporary or permanent intent,” is worth it for the reasons stated above.

**It is possible, but not guaranteed, that a plea to an infraction under P.C. § 490.1 is not a “conviction”** for immigration purposes. See § N.2 *Definition of Conviction*, on infractions.

#### IV. FRAUD OR DECEIT

##### A. Summary: Defense Strategies to Avoid Immigration Consequences of an Offense Involving Fraud or Deceit

- The first priority is to avoid a conviction for an **aggravated felony**.
  - If the amount of loss to the victim/s does not exceed \$10,000, a fraud or deceit conviction is not an aggravated felony. Nor does a year’s sentence make it an aggravated felony.
  - If the amount of loss exceeds \$10,000, avoid pleading to an offense that has fraud or deceit as an element. Note that “deceit” is defined more broadly than fraud. Consider a straight theft offense, and take no more than a 364-day sentence on any single theft count.
  - If theft is not possible, plead to a divisible statute – including both theft and fraud/deceit element – in the disjunctive. For example, a plea to P.C. § 484 for feloniously taking *or* fraudulently obtaining another’s personal property with a restitution order of over \$10,000 is not a deportable aggravated felony if the sentence is under one year.

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<sup>18</sup> *Ibid.*



(However, the law is not clear as to whether it will be held an aggravated felony for purposes of being a bar to an application for relief or status). See next instruction.

- If it is necessary to plead to fraud/deceit where the loss exceeded \$10,000, create a written plea to one or more counts with an aggregate loss of *less than* \$10,000, even if at sentencing the defendant will be ordered to pay restitution of more than \$10,000. Do the same thing if creating a vague record of a plea to a divisible statute that includes fraud/deceit. See additional suggestions at Part B, *infra*.

➤ All fraud offenses are ***crimes involving moral turpitude***:

- Fraud is a false material statement knowingly made in order to receive a benefit. Offenses with fraud as an element or that are inherently fraudulent are automatically CIMTs. Some false statement crimes involve deceit but are divisible as CIMTs; consider P.C. § 529(3), false personation.<sup>19</sup>
- If you must plead to fraud/deceit offense, and this is the person's first CIMT conviction, apply the CIMT rules to see if it actually will make the person inadmissible or deportable. See Part V, *infra*, or § N.7 *Crimes Involving Moral Turpitude*.

## B. How to Avoid an Aggravated Felony Conviction

A crime involving fraud or deceit must have a loss to the victim/s exceeding \$10,000 in order to be an aggravated felony.<sup>20</sup> 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.<sup>21</sup>

In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) the Supreme Court loosened the evidentiary rules that govern how the government may prove that the amount of loss exceeded \$10,000. The Court held that the more expansive "circumstance specific" approach, rather than the categorical approach, applies to prove the amount.

Under *Nijhawan*, how can counsel protect a noncitizen defendant who, for example, committed credit card fraud or welfare fraud of over \$10,000? Be sure to ***give the defendant a copy of the legal summary that sets out the applicable defense, from Appendix I*** (Fraud Section) following this Note:

### 1. ***Plead specifically to theft or some other offense that does not involve fraud or deceit***

A plea to theft or another offense that does not involve "fraud or deceit" should protect the defendant from conviction of this particular aggravated felony, where restitution of over

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<sup>19</sup> In *People v. Rathert* (2000) 24 Cal.4<sup>th</sup> 200 the California Supreme Court noted that the offense did not require intent to cause liability or incur a benefit.

<sup>20</sup> 8 USC §§ 1101(a)(43) (M)(ii), INA § 101(a)(43) (M)(ii).

<sup>21</sup> 8 USC §§ 1101(a)(43)(D), (M)(i), INA § 101(a)(43)(D), (M)(i). See *Kawashima v. Holder* ("Kawashima IV"), 615 F.3d 1043 (9th Cir. 2010) (considering tax fraud under 26 USC § 7206(1), (2)), withdrawing prior opinions.

\$10,000 is ordered. The BIA has acknowledged that theft (taking property *without consent*) and fraud or deceit (taking property *with consent* that has been unlawfully obtained) “ordinarily involve distinct crimes.”<sup>22</sup> The Board left open the precise meaning of “consent,” and did not discount that certain offenses such as “theft by deception” might fit into both categories.<sup>23</sup>

A theft conviction is an aggravated felony if a sentence of a year or more was imposed,<sup>24</sup> but is not an aggravated felony based on the amount of loss to the victim. Therefore, if you can negotiate it, a theft plea with a sentence of 364 days or less should protect the defendant from an aggravated felony conviction, even if loss to the victim/s exceeded \$10,000.

**Example:** Maria was charged with credit card fraud of over \$14,000. If she pleads generally to theft under Calif. P.C. § 484 and is sentenced to 364 days or less, she will not be convicted of an aggravated felony, even if she is ordered to pay restitution of \$14,000.

Note that she should not plead guilty to theft by fraud, embezzlement, or other offenses listed in P.C. § 484 that could be held to involve fraud or deceit. She should plead to a “straight” theft or to the entire language of § 484 in the disjunctive.

To sum up:

- Where a sentence of less than a year will be imposed, but the loss to the victim/s exceeds \$10,000, a plea to a theft offense should prevent conviction of an aggravated felony. While it is best to designate straight theft, a plea to P.C. § 484 in the disjunctive will work. The plea must not be specifically to theft by fraud, embezzlement, or other theft offense that involves deceit or fraud. In addition, the record of convictions should be sanitized of such facts.
- Conversely, where the loss to the victim/s is less than \$10,000, but a sentence of more than a year will be imposed, a plea to an offense involving fraud or deceit should prevent conviction of an aggravated felony. If the plea is to P.C. § 484, while it is best to designate an offense involving fraud, a plea to the statute in the disjunctive should work.
  - ✓ Warning: A conviction for an offense involving forgery, perjury, or counterfeiting is an aggravated felony if a sentence of a year or more is imposed.<sup>25</sup> If the fraud or deceit offense also constitutes one of these offenses, a sentence of a year or more will make the conviction an aggravated felony.

If a plea to theft is not possible, counsel may attempt to plead to some other offense that is not fraud or deceit and pay restitution as a sentence requirement of this offense. Remember, however, that while fraud has a specific definition, authorities might define “deceit” broadly.

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<sup>22</sup> *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), substantially adopting the analysis in *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

<sup>23</sup> *Id.* at 440.

<sup>24</sup> 8 USC §1101(a)(43)(G); INA § 101(a)(43)(G).

<sup>25</sup> 8 USC §1101(a)(43)(R), (S); INA § 101(a)(43)(R), (S).

The **full categorical approach** applies to the question of whether the offense involves fraud, deceit, or theft. This gives counsel a great deal of control over defining the substantive offense. For example, if the complaint charges theft by fraud and there is a written plea agreement to straight theft by stealth, the immigration judge is not allowed to consider information from the original complaint. Where possible, amend the charge or add another Count, orally or in writing, with the language that you want; where that is not possible, make a very specific plea that makes it clear whether the theft is by stealth or fraud, and if possible plead to the statute rather than the Count.

## 2. ***Pleading to Fraud Or Deceit Where Loss To The Victim/s Exceeds \$10,000***

If you must plead to an offense involving fraud or deceit, defense strategies focus on creating a record that shows a loss to the victim/s of \$10,000 or less.

*Nijhawan* reversed some beneficial Ninth Circuit precedent, but it did not remove all procedural protection for how the \$10,000 must be established. In particular, the Court held that the loss must “be tied to the specific counts covered by the conviction,” and that the finding “cannot be based on acquitted or dismissed counts or general conduct.” *Nijhawan*, 129 S.Ct. at 2305-06. The following strategies may protect the client.

- In all cases, create a written plea agreement stating that the aggregate loss to the victim/s *for the count/s of conviction* was less than \$10,000. Do this even if the restitution amount at sentencing is more than \$10,000. This step is necessary, and it ought to protect the defendant: other payment amounts will be based on dropped charges, which *Nijhawan* stated may not be considered. However, in case ICE challenges this, include as many of the following additional protections as is possible.
- Arrange for the defendant to pay down the amount before the plea (not after plea and before sentencing), so that the restitution amount is less than \$10,000. If that is not possible, consider the following ways to further protect the defendant from a restitution requirement of over \$10,000.
- Include a *Harvey* waiver in order to establish that the particular restitution order is for conduct that did not result in a conviction and therefore is not directly tied to the conviction. *People v. Harvey* (1979) 25 Cal.3d 754.
- Distance repayment of any restitution above \$10,000 from the fraud/deceit conviction by ordering payment pursuant to a separate civil agreement or to a plea to an additional offense that does not involve fraud or deceit.
- Attempt to obtain a court statement or stipulation that restitution ordered on probation is for repayment of loss and other costs, with the calculation based upon a “rational and factual basis for the amount of restitution ordered.”<sup>26</sup> (Note that even without this statement, immigration attorneys will argue that restitution under P.C. § 1202.4 permits payment for collateral costs beyond direct loss (e.g., audit, travel, attorneys fees, etc.) and that the standard of proof for calculating the amount is less than the “clear and convincing evidence” required to prove deportability.)

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<sup>26</sup> *People v. Gemelli*, 161 Cal. App. 4th 1539, 1542-43 (Cal. Ct. App. 2008).

Counsel always should make a written plea agreement as described above. Before *Nijhawan* was published, the Ninth Circuit held in *United States v. Chang* that where a written guilty plea to a fraud offense states that the loss to the victim is less than \$10,000, the federal conviction is not of an aggravated felony under subparagraph (M)(i), even if a restitution order requires the defendant to pay more than \$10,000.<sup>27</sup> This is consistent with the statement in *Nijhawan* that the loss must “be tied to the specific counts covered by the conviction” and “cannot be based on acquitted or dismissed counts or general conduct.” *Nijhawan* at 2306.

### **3. Pleading to Welfare Fraud Exceeding \$10,000**

California welfare fraud presents challenges because Cal. Welf. & Inst. Code § 10980(c) provides that in setting restitution to the state agency, the agency’s “loss” should be calculated as the amount the government overpaid. If there is any means of pleading to a different fraud offense, or theft, perjury, forgery, etc. without a one-year sentence on any single count, or if there is a way to show that restitution under this statute is not equal to loss, counsel should do so.

If a plea must be taken to welfare fraud, counsel should write a written plea agreement to count/s of fraud where the government lost less than \$10,000 in the aggregate, while if necessary accepting restitution of more than \$10,000 at sentencing. Immigration counsel have a strong argument that the other funds were based on dropped charges and cannot be counted toward the \$10,000 under *Nijhawan*. If that is not possible, the defendant might avoid an aggravated felony by pleading to multiple counts, with no single count reflecting a loss of \$10,000. Note that in a pre-*Nijhawan* case, the Ninth Circuit found that welfare fraud was an aggravated felony when the defendant *stated in the guilty plea* that restitution exceeded \$10,000.<sup>28</sup>

## **V. WHEN DOES A MORAL TURPITUDE CONVICTION HURT AN IMMIGRANT?**

Because burglary, theft and fraud so often are crimes involving moral turpitude (CIMTs), this section briefly reviews when a CIMT will not cause adverse consequences. For more information on CIMTs see § N.7 *Crimes Involving Moral Turpitude*, or see Brady et. al, *Defending Immigrants in the Ninth Circuit*, Chapter 4 ([www.ilrc.org](http://www.ilrc.org)).

### **1. Two or more convictions of a CIMT: Inadmissible and Usually Deportable**

Two convictions of a CIMT always will make a noncitizen *inadmissible*.

Two convictions of a CIMT will make a noncitizen *deportable*, if both convictions occurred after the person was admitted to the U.S. There are two ways to be admitted for this purpose: the person was admitted at the border with any kind of visa or card, or the person adjusted status to lawful permanent residency (LPR) through processing within the U.S. There is an exception: multiple CIMT convictions that arose from a “single scheme of criminal misconduct” do not cause deportability as “two or more convictions” after admission. Assume that to meet the single scheme test they must have arisen from the very same incident.

<sup>27</sup> *Chang v. INS*, 307 F.3d 1185 (9<sup>th</sup> Cir. 2002).

<sup>28</sup> *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098 (9<sup>th</sup> Cir. 2004).

## **2. Single Conviction of a CIMT: Sometimes Deportable**

A single conviction of a CMT *committed within five years of admission* will make a noncitizen deportable only if the offense has a *maximum possible sentence of a year or more*. See 8 USC § 1227(a)(2)(A).

*Prevent a potential sentence of a year or more.* You can prevent a single conviction from causing deportability for CIMT by pleading to an offense with a potential sentence of less than a year. To do this, plead to a six-month misdemeanor, or to *attempt* to commit a wobbler which is designated or later reduced to a misdemeanor. Both have a six-month maximum sentence. The reduction to a misdemeanor will be given immigration effect regardless of when it occurs, even after initiation of removal proceedings.<sup>29</sup>

*Plead to an event outside the five years.* Or, plead to an offense that the person committed five years after his or her “date of admission.” This date is usually the date that the person was admitted to the U.S. in any status. For example, if Rhonda was admitted to the U.S. as a tourist in 2002, spent some years illegally here after her permitted time expired, adjusted status to permanent residence in 2007, and was convicted of a single CIMT that she committed in 2010, she is not deportable under the CIMT ground. Her date of admission was 2002, and she committed the offense eight years later. In contrast, if instead of being admitted Rhonda had entered the U.S. without inspection and later adjusted status to lawful permanent residency, the date of adjustment starts the five years.<sup>30</sup>

## **3. Single Conviction of a CIMT: Inadmissible Unless It Fits the Petty Offense or Youthful Offender Exceptions**

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.<sup>31</sup>

Under the “youthful offender” exception, a noncitizen is not inadmissible if convicted (as an adult) of just one CIMT, committed while under the age of 18, and the conviction and resulting imprisonment ended five years or more before the current application.

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<sup>29</sup> *LaFarga v. INS*, 170 F.3d 1213 (9<sup>th</sup> Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9<sup>th</sup> Cir. 2003).

<sup>30</sup> *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011). See Practice Advisory at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>31</sup> See *LaFarga*, *Garcia-Lopez*, *supra*.

**Appendix 13-I:**

**FOR THE DEFENDANT, WITH INSTRUCTIONS TO  
PRESENT THIS TO AN IMMIGRATION DEFENSE ATTORNEY,  
OR IF THERE IS NO ATTORNEY, TO THE IMMIGRATION JUDGE**

*The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes. Please copy the paragraph below that applies to the defendant and hand it to him or her, with instructions to give it to a defense attorney, or to the immigration judge if there is no defense attorney.*

**BURGLARY**

\* \* \* \* \*

**Burglary 1**

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary under Calif. P.C. § 459/460 is ***not the aggravated felony “burglary” if the record does not establish that the entry was unprivileged or without consent.*** If the record does not describe the type of entry, or states merely that the entry was “unlawful,” the conviction is not an aggravated felony as a burglary. *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 946 (9<sup>th</sup> Cir. 2011) (*en banc*) (under Calif. P.C. § 459/460 an “unlawful” burglary does not meet the generic definition of burglary, because it includes a privileged entry or one with consent; reverses prior cases to the extent they are inconsistent).

\* \* \* \* \*

**Burglary 2**

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary under Calif. P.C. § 459/460 is ***not the aggravated felony “burglary” if the record does not establish that the burglary was of a building or structure.*** *Taylor v. United States*, 495 U.S. 575, 598 (1990). Section 459/460 is divisible because the burglary can be of many other targets, e.g. car, commercial yard, etc. See, e.g., *Ye v. INS*, 214 F.3d 1128 (9<sup>th</sup> Cir. 2000) (car); *United States v. Wenner*, 351 F.3d 969, 972 (9<sup>th</sup> Cir. 2003) (commercial yard, train car is not burglary).

\* \* \* \* \*



### Burglary 3

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction of burglary with intent to commit larceny (or any other offense) is ***not an aggravated felony as “attempted theft” (or any other category) unless the record of conviction establishes that the defendant took a “substantial step”*** toward committing the offense. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011), distinguishing *Ngaeth v. Mukasey*, 545 F.3d 796, 801 (9th Cir. 2008).

\* \* \* \* \*

### Burglary 4

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A burglary conviction is not an aggravated felony as a crime of violence unless*** it is (a) burglary of a residence where the homeowner might surprise the burglary, or (b) the record of conviction shows that actual violence occurred. Simply moving objects, such as using a slim jim or other tool to open a locked door or window, is not a crime of violence. *Ye v. INS*, 214 F.3d 1128 (9<sup>th</sup> Cir. 2000).

\* \* \* \* \*

### Burglary 5

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Burglary has been held to be a crime involving moral turpitude only if*** (a) there is proof of intent to commit an offense that is itself a crime involving moral turpitude, or (b) it involves an unlawful entry into a dwelling. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). Under California law, an “unlawful” entry into a dwelling can refer to an entry with consent of the owner, with intent to commit a crime. To be an “unlawful” entry, a record of conviction for Calif. P.C. § 459/460 must show that the entry was unprivileged or without consent. See *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 946 (9<sup>th</sup> Cir. 2011) (*en banc*).

## **THEFT**

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***To be an aggravated felony, theft must involve a taking of property.*** *Matter of V-Z-S-*, 22 I&N Dec. 1362, 1346 (BIA 2000); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9<sup>th</sup> Cir. 2002) (partially overruled on other grounds); *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007). Because theft as defined under Calif. P.C. § 484 reaches taking of property *or labor*, it is divisible for purposes of the aggravated felony “theft.” *Corona-Sanchez, supra*. Section 484 also is divisible as a “theft” aggravated felony because it reaches taking by *deceit* (e.g., embezzlement, theft by fraud) as opposed to taking by stealth (theft). *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4<sup>th</sup> Cir. 2005).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***A theft offense is an aggravated felony only if a sentence of a year is imposed, while a fraud offense is an aggravated felony only if the loss exceeds \$10,000. Theft with a \$ 10,000 loss, or fraud with a one-year sentence imposed, is not an aggravated felony.*** “The offenses described in sections 101(a)(43)(G) and (M)(i) of the Act ordinarily involve distinct crimes. Whereas the taking of property without consent is required for a section 101(a)(43)(G) “theft offense,” a section 101(a)(43)(M)(i) “offense that involves fraud or deceit” ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained.” *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4<sup>th</sup> Cir. 2005), finding that a fraud offense is not “theft” and is not an aggravated felony based upon a one-year sentence imposed.

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

To be a crime involving moral turpitude, a taking must be made with intent to permanently, not temporarily, deprive the owner. ***Section 10851(a) of Calif. Vehicle Code is a divisible statute for moral turpitude purposes***, because it includes auto taking with an intent to temporarily deprive the owner. See, e.g., *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (§ 10851 predecessor); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9<sup>th</sup> Cir. 2009).

***Section 10851 also is a divisible statute as a “theft” aggravated felony***, because it includes the offense of accessory after the fact, which is not theft and not an aggravated felony even with a sentence imposed of a year or more. *U.S. v. Vidal*, 504 F.3d 1072, 1087 (9<sup>th</sup> Cir. 2007)(*en banc*).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Receipt of stolen property, P.C. § 496(a) is not categorically a crime involving moral turpitude*** because it includes intent to temporarily deprive the owner of the property. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9<sup>th</sup> Cir. 2009).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that reaches a taking with intent to deprive the owner temporarily as well as permanently, such as Calif. P.C. § 496(a) or Veh. C. § 10851, is divisible for moral turpitude purposes. ***Where the defendant pleads specifically to intent to temporarily deprive the owner, the offense is defined as not being a crime involving moral turpitude under the modified categorical approach***, and the immigration judge may not proceed to a fact-based inquiry beyond the record. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008); *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (evidence outside of the record of conviction may not be considered where the conviction record itself conclusively demonstrates whether the noncitizen was convicted of engaging in conduct that constitutes a crime involving moral turpitude.).

### **FRAUD**

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

A conviction for a fraud or deceit offense in which the loss to the victim or victims was over \$10,000 is an aggravated felony. ***A theft offense under P.C. § 484 is not an offense involving fraud or deceit.*** Therefore a theft offense where the loss to the victim/s exceeded \$10,000 is not an aggravated felony. A theft offense is an aggravated felony only if a sentence of a year was imposed. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that involves fraud or deceit is an aggravated felony only if evidence conclusively shows that the loss to the victim/s exceeded \$10,000. The Supreme Court stated that the loss exceeding \$10,000 must “be tied to the specific counts covered by the conviction.” ***The finding of the amount of loss by fraud or deceit “cannot be based on acquitted or dismissed counts or general conduct.”*** *Nijhawan v. Holder*, 129 S.Ct. 2295, 2305-06 (2009). Therefore a plea to one or more counts of a fraud or deceit crime where the loss is specified as less than \$10,000 is not an aggravated felony. This remains true even if additional restitution is ordered based on dismissed counts or other factors.

\* \* \* \* \*

I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

An offense that involves fraud or deceit is an aggravated felony only if evidence conclusively shows that the loss to the victim/s exceeded \$10,000. The Supreme Court stated that the loss exceeding \$10,000 must “be tied to the specific counts covered by the conviction.” ***The finding of the amount of loss by fraud or deceit “cannot be based on acquitted or dismissed counts or general conduct.”*** *Nijhawan v. Holder*, 129 S.Ct. 2295, 2305-06 (2009).

A “***Harvey waiver***” in a conviction explicitly establishes that a particular restitution order is for conduct that did not result in a conviction. *People v. Harvey* (1979) 25 Cal.3d 754. Therefore a plea to one or more counts of a fraud or deceit crime where the loss is specified as less than \$10,000 is not an aggravated felony. This remains true even if additional restitution is ordered based on dismissed counts or other factors.

## § N.12 Firearms Offenses

(For more information, see *Defending Immigrants in the Ninth Circuit*, §§ 6.1, 9.18, [www.ilrc.org/crimes](http://www.ilrc.org/crimes))

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  - C. Burden of Proof: Vague Record and *Young v Holder*
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App. I – Legal Summaries to Give to Defendant

App II – Annotated Chart of Immigration Consequences of Firearms

**Overview:** Almost any conviction relating to a firearm will cause a permanent resident to be deportable. In addition, certain offenses that relate to firearms or ammunition are aggravated felonies. However, in many cases counsel still can bargain for an immigration-neutral plea, or at least avoid an aggravated felony. Please read this Note carefully, as it reflects extensive changes to California weapons statutes effective January 1, 2012.

Be sure to look at **Appendix II**, which presents a lot of the material presented here in a Chart format.

### I. Immigration Consequences of Firearms Convictions

See § *N.1 Overview* for a further discussion of deportability, inadmissibility, and defense priorities depending upon the defendant's immigration status.

#### A. Deportable (Including Aggravated Felonies)

A *lawful permanent resident, refugee, or someone with a student, employment or other visa* can be put in removal proceedings if he or she is deportable. There ICE (immigration prosecution) has the burden to prove that a conviction really is a deportable offense, based only upon the statutory elements of the crime and official documents from the person's record of conviction. See § *N.3 Record of Conviction*.

A firearms conviction might cause deportability as follows:

1. Virtually every offense with a firearm as an element is a deportable firearms offense.<sup>1</sup> Under current law, the same is true of any offense where a firearm is not an element, but is identified in the record of conviction and was necessary to prove an element in that case, e.g. to prove the element of a “weapon.” (In 2013 the Supreme Court might change this rule, and permit only statutory elements to be considered.<sup>2</sup>)
2. Many violent offenses are crimes involving moral turpitude (“CIMT”). Either two CIMT convictions anytime after admission (which did not arise from the same incident), or one CIMT committed within five years after admission that has a potential sentence of at least one year, will cause deportability.<sup>3</sup>
3. Some firearms offenses are aggravated felonies, either under the firearms category (e.g. trafficking in firearms), or as a “crime of violence” with a sentence of a year or more imposed. See Part IV, *infra*.
4. A firearms offense could be a deportable crime of domestic violence,<sup>4</sup> defined as a “crime of violence” where it is established that the victim and defendant had a relationship protected under state DV laws. If the victim of an offense has such a relationship, and the offense may be a crime of violence, see §N.9 *Violence, Child Abuse* for strategies.
5. An offense can be held a deportable crime of child abuse if the record of conviction shows that the victim was under the age of 18, and if the offense poses a significant risk of causing the victim physical or emotional harm. To prevent this, keep a minor victim’s age out of the record of conviction.<sup>5</sup>

**Note on the firearms deportation ground.** The firearms deportation ground is dangerous, but the deportable person still might be eligible for some relief. If the firearms offense also is an aggravated felony or a CIMT, you must consider those consequences. But if the person is *only* deportable under the firearms ground, or is deportable for that plus one CIMT that comes within the petty offense exception to the CIMT ground of inadmissibility, there are some advantages. Being deportable under the firearms ground does not automatically “stop the clock” for the seven years required for LPR cancellation. See § N.17 *Relief*. There is no automatic “firearms” ground of inadmissibility, family immigration or other relief may be possible. See next section.

## **B. Inadmissibility Grounds and Bars to Relief**

### ***1. Inadmissible***

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<sup>1</sup> 8 USC § 1227(a)(2)(C), INA § 237(a)(2)(C). See this Note.

<sup>2</sup> See discussion in § N.3 *Record of Conviction* of the pending U.S. Supreme Court case *Descamps v. United States*. The Court is expected to hold that a prior conviction can be evaluated only by its statutory elements and not by additional information in the record.

<sup>3</sup> 8 USC § 1227(a)(2)(A), INA § 237(a)(2)(A). See § N.7 *Crimes Involving Moral Turpitude*.

<sup>4</sup> 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). See § N.9 *Violent Crimes, Child Abuse*.

<sup>5</sup> *Ibid*.



There is no “firearms,” or even “aggravated felony,” ground of inadmissibility. Therefore a firearms conviction *per se* will not, e.g., stop someone from immigrating with a family visa. Instead, the risk is that a firearms offense be a ***crime involving moral turpitude*** (“***CIMT***”) and cause inadmissibility under that ground. In some cases a waiver of CIMT inadmissibility may be available, although these can be hard to get.

A noncitizen is inadmissible based on just one conviction of a CIMT, *unless* the conviction comes within either the “petty offense” or “youthful offender” exception. If it does, the person is not inadmissible for CIMTs, and no waiver is needed.

- *The petty offense exception* applies if the person has committed just one CIMT, the sentence imposed was six months or less, and the maximum possible sentence is a year or less. Besides a “regular” misdemeanor, a felony reduced to a misdemeanor comes within this exception, if it is a first CIMT and no more than six months was imposed. See §N.4 *Sentence* for definition of sentence.
- *The youthful offender exception* applies if the person committed just one CIMT, was under the age of 18 at the time, was convicted in adult court, and the conviction and any resulting imprisonment took place more than five years before the current application. See §N.7 *Crimes Involving Moral Turpitude* for further discussion.

## 2. ***Other Bars to Various Forms of Relief***

Along with the grounds of inadmissibility, there are other bars to obtaining status or relief. See §N.17 *Relief*, Chart on Crimes Bars to Relief. Any ***aggravated felony*** conviction serves as a bar to many kinds of applications, including LPR and non-LPR cancellation, asylum, VAWA relief for victims of domestic violence, TPS, and others.

Although deportation grounds usually do not affect undocumented people, conviction of an offense described in any deportation ground is a bar to ***non-LPR cancellation***, e.g. for undocumented persons who have lived here for ten years or more. So is a conviction of one CIMT unless the maximum possible sentence is *less than* one year (note that this is different from the petty offense exception) and no more than six months was imposed.

Conviction of a “***particularly serious crime***” is a bar to winning asylum, as well as a basis to terminate status as an asylee, so that the person will go to removal proceedings. This includes any aggravated felony, and other offenses depending upon factors such as sentence imposed and threat of violence to persons.

Absent a showing of extraordinary hardship, conviction of a “***violent or dangerous***” offense is a bar to asylum, as well as a bar to a refugee, asylee or family immigrant who must get a waiver of inadmissibility in order to become a permanent resident.

See Chart at §N.17 *Relief* for discussion of other bars, e.g. one felony or two misdemeanors for TPS, or a “significant misdemeanor” for DACA for young people.

### C. Burden of Proof and Vague Record of Conviction: *Young v. Holder*

**Overview.** Just as in criminal proceedings, there are burdens of proof in immigration proceedings. In September 2012 the Ninth Circuit changed (as in, make worse) the burden for immigrants who need to apply for relief from removal or for immigration status. *Young v. Holder*, 697 F.3d 976 (9<sup>th</sup> Cir. 2012) (en banc). The upshot is that in many cases defenders must be careful to create a specific plea to a “good” offense, rather than creating a record that is vague on key points.

**Discussion.** Many criminal statutes are divisible, meaning that they include some offenses that have an immigration consequence and others that don’t. *Young* is being interpreted to mean that when an immigrant is applying for status or relief (as opposed to defending against having her status taken away based on a deportation ground) she must produce a specific record of conviction to show that the conviction is *not* a bar to relief. Before *Young*, a vague record of conviction preserved eligibility for relief.

**Example:** Lawful Permanent Resident (LPR) Lois was convicted under Cal. P.C. § 27500, which automatically makes her deportable under the firearms ground. She wants to apply for LPR Cancellation as a defense to removal. Conviction of any aggravated felony is a bar to this relief.

Section 27500 is divisible as an aggravated felony: it prohibits both selling (an aggravated felony) and giving (probably not an aggravated felony) a firearm to certain persons. If Lois pled guilty specifically to giving a firearm, the conviction will not be an aggravated felony. But if she pled vaguely to the language of § 27500, or to “selling or giving,” the conviction will be a bar as an aggravated felony, because she will not be able to prove that it was for giving the firearm. (Before *Young*, that vague record would have been sufficient.)

Note that the burden is reversed when it comes to whether a person is deportable. ICE (immigration prosecutors) must prove that a permanent resident, refugee, or other person with lawful status is **deportable** (should have their status taken away). ICE must produce documents from the reviewable record of conviction to show that a conviction under a divisible statute comes within the deportation ground. If the record of conviction is vague as to the elements of the offense of conviction, ICE cannot meet its burden.

**Example:** Let’s say that LPR Lois instead had pled to P.C. § 17500, assault while possessing a weapon. This is a divisible statute for purposes of the firearms deportation ground, because it includes firearms and other weapons. ICE charges Lois with being deportable under the firearms ground. If Lois pled specifically to a weapon that is not a firearm, *or* if she created a vague record that did simply not specify the weapon, ICE cannot prove she is deportable under the firearms ground.

For further discussion of *Young* and burdens of proof, and how to effectively create a “vague” record of conviction, see § N.3 *Record of Conviction*.

## II. Pleas that Avoid All or Most Immigration Consequences

The following offenses should not be held aggravated felonies (but as always, *try to get 364 days or less on any one count*). They should not be held deportable or inadmissible offenses, unless the record shows a victim under age 18, which may make the offense a deportable crime of child abuse.

- Possession of ammunition, P.C. § 30210<sup>6</sup>
- Possession of a non-firearm weapon, e.g., dagger, brass knuckles, blackjack P.C. §§ 21310, 21710, 22210.
- Possession of an antique firearm; state in the record that it is an antique. Identifying a firearm as an antique always will defeat the firearms deportation ground.<sup>7</sup>
- Brandishing/exhibiting a non-firearm weapon in a rude manner, §417(a)(1).<sup>8</sup> If (a)(1) is not possible, create a vague record with no mention of a firearm under § 417(a); this will prevent ICE from proving an LPR is deportable.
- Simple assault or battery where the record shows de minimus touching, e.g. P.C. § 243(a), 243(e)<sup>9</sup>
- Probably misdemeanor or felony battery with injury where the record shows de minimus touching, P.C. § 243(d).<sup>10</sup>
- Public fighting, P.C. § 415
- See P.C. § 17500, discussed in Part III, *infra*, which may have no immigration consequences.
- Section 246.3, negligent firing a BB gun or firearm, is not a firearms offense with a specific plea to a BB gun (and a vague plea will prevent ICE from proving a permanent resident is deportable for firearms).<sup>11</sup> Regardless of type of weapon, it should not be a COV or a CIMT because it is committed with negligence.<sup>12</sup>

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<sup>6</sup> Ammunition is not included in the definition of “firearm” under 18 USC § 921(a)(3), which is the definition that applies to the firearms deportation ground at 8 USC § 1227(a)(2)(C).

<sup>7</sup> Antique firearms are not included in the applicable definition of firearms at 18 USC § 921(a)(3). Section 921(a)(16) provides that antiques are firearms made in 1898 or before, plus certain replicas.

<sup>8</sup> See, e.g., *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946), *People v. Sylva*, 143 Cal. 62, 76 P. 814 (1904).

<sup>9</sup> Section 243(e) with de minimus touching is neither a crime of violence, a crime of domestic violence, nor a crime involving moral turpitude. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

<sup>10</sup> Section 243(d) can be committed with the same de minimus conduct as 243(e), discussed *supra*. For this reason the BIA, in a guiding but not precedential “index” decision, and the Ninth Circuit have found that P.C. § 243(d) is not necessarily a CIMT. See *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010); *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, <http://www.usdoj.gov/eoir/vll/intdec/indexnet.html>.

<sup>11</sup> A BB gun does not meet the federal definition of firearms because it does not expel by explosive.

<sup>12</sup> See *U.S. v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (negligence is not a crime of violence).

- Arguably being a felon or addict who owns (not possesses) ammunition, P.C. § 30305, has no immigration consequences, but be sure to analyze the prior felony<sup>13</sup>
- Non-violently attempting to persuade a victim or witness not to contact the police, P.C. § 136.1(b)(1), with a sentence imposed of less than one year is not an aggravated felony, firearms, or domestic violence offense, and should not be a crime involving moral turpitude, although there is no guarantee as to the latter
- For other immigration-neutral offenses see *California Quick Reference Chart*

Even if a firearms offense is originally charged, if it is fairly minor or there are strong equities, it might be possible to negotiate a more immigration-neutral plea such as the above. You may want to stress to the prosecutor that a permanent resident or refugee can face a horrific penalty for one firearms conviction, e.g. under P.C. §§ 25400(a) or 26350, even if the offense is not violent. The person will be deportable, and will be placed in removal proceedings and held in detention (usually hundreds of miles from home) throughout these proceedings. In many cases the person will not have any defense and will be deported, despite dependent U.S. citizen family.

**Keep the records of conviction for *any* offense clear of reference to a firearm – even if the offense does not have “weapon” as an element.** For example, in a plea to § 243(d), keep out of the record that a firearm may have been involved. If evidence in the reviewable record establishes that the defendant committed the offense with a firearm, ICE might charge a deportable firearms offense or aggravated felony.<sup>14</sup> The good news is that the Supreme Court appears likely to reverse this rule in spring 2013, and hold that a prior conviction is evaluate based only upon the statutory elements<sup>15</sup> – but best to be safe.

## II. Pleas That Avoid Some but Not All Immigration Consequences

If the pleas in Part II, *supra*, are not available, the below pleas will avoid serious immigration consequences for at least some immigrants.

### 1. *Plead to a Non-Firearms Offense Even if it may be a Crime Involving Moral Turpitude or Crime of Violence*

<sup>13</sup> While felon in possession of a firearm or ammunition is an aggravated felony, this should not apply to a felon who owns these items. See *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (citing *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) (reversing conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time)). Possession of ammunition is not a deportable firearms offense; that ground reaches only firearms and “destructive devices.” 8 USC 1227(a)(2)(C).

<sup>14</sup> ICE will assert that this is permitted under *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011). For further discussion see § N.3 *The Record of Conviction*, and for really extensive discussion see Practice Advisory: The Categorical Approach in the Ninth Circuit, available at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>15</sup> See discussion of *Descamps v. United States* in §N.3 *Record of Conviction*.

Plead to an offense that does not involve a firearm and that thus is not *automatically* a deportable offense. It may be possible to avoid other immigration consequences presented by the offense:

- If the offense is a first plea to a crime involving moral turpitude (CIMT), it may be possible to plead to the offense without becoming deportable or inadmissible. See Part I, *supra*.
- If it is a crime of violence, theft, or burglary offense, it is not an aggravated felony unless a sentence of a year or more is imposed on a single count.
- Do not let the record of conviction show that the victim was under the age of 18, to avoid a deportable crime of child abuse.
- If the offense might be held a crime of violence, do not let the record show that the victim had a domestic relationship with the defendant, to avoid a deportable crime of domestic violence. See §N.9 *Violence, Child Abuse*.

Consider the following offenses. See also additional Notes and the California Quick Reference Chart.

- ✓ ***Intent to assault while possessing a deadly weapon, Calif. P.C. § 17500.*** This is a potentially good alternate plea that may have no immigration consequences. To prevent this from being a deportable firearms offense, do not let the ROC show that the weapon was a firearm, or better yet plead to a specific weapon that is not a firearm. “Deadly weapon” can include, e.g., a brick.

As opposed to assault *with* a deadly weapon, assault *while possessing* a deadly weapon is not necessarily a CIMT<sup>16</sup> or even a crime of violence.<sup>17</sup> Try to plead to assault with intent to commit an offensive touching,<sup>18</sup> while possessing, but not threatening with or using, a deadly weapon. If that is not possible, plead to the language of the statute but do not allow any facts in the record of conviction to show threatening with or using the weapon, or to show hurt or injury.

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<sup>16</sup> Possessing a deadly weapon is not a crime involving moral turpitude (CIMT). See, e.g., *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (sawed-off shotgun). Simple assault is not a CIMT. See, e.g., *Matter of Sanudo*, *supra* (battery); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (assault with intent to commit a felony). Two non-CIMTs should not be combined to make a CIMT. See, e.g., *Matter of Short*, 20 I&N at 139 (“Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.”).

<sup>17</sup> To be a crime of violence, a misdemeanor must have as an element the intent to use or threaten actual violent force. 18 USC § 16(a).

<sup>18</sup> While § 240 provides that the offense involves a “violent injury,” it has long been established that “[t]he ‘violent injury’ here mentioned is not synonymous with ‘bodily harm,’ but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act.” *People v. Bradbury*, 151 Cal. 675, 676 (Cal. 1907).

Analyze what will happen if the conviction is held to be a CIMT and/or crime of violence. In some cases this will have no effect. Because §17500 has a six-month maximum sentence, if it is the defendant's *only* CIMT conviction it will not cause inadmissibility or deportability under the CIMT ground. If held a crime of violence, the only possible effect would be if the record adequately showed that the victim shared a domestic relationship with the defendant. See §N.9 *Violence, Child Abuse*. It cannot be an aggravated felony as a crime of violence, because that requires a one-year sentence. To prevent it from being a deportable crime of child abuse, don't let the record show a victim under age 18.

- ✓ ***Assault with a deadly weapon or with force likely to produce great bodily harm, Calif. P.C. § 245(a)(1), (4)***. See analysis in Appendix II to this Note, "Immigration Effect of Selected Firearms Offenses." While it can avoid a deportable firearms offense, it is a crime of violence; assume that it is also a CIMT unless, e.g., the defendant was so inebriated as to not form the intent.
- ✓ ***Burglary, Theft, Receipt of Stolen Property***. In almost every case these offenses will be an aggravated felony *if* a sentence of a year is imposed, and will be a CIMT, but see discussion in § N.13 *Burglary, Theft, Fraud*.
- ✓ ***Other offenses that may be a CIMT or crime of violence, but do not involve a firearm***.

### **III. Pleas That At Least Avoid Conviction of a Firearm Aggravated Felony**

For a summary of immigration consequences of more firearms convictions, organized by offense, see **Appendix II – Firearms Offense Chart**. A state firearms offense is an aggravated felony if it

- involves trafficking for commercial gain in firearms or destructive devices,
- is a crime of violence with a sentence imposed of one year or more on a single count; or
- is analogous to certain federal firearms offenses, including being a felon, addict, or undocumented person in possession of a firearm or ammunition<sup>19</sup>

The following strategies may result in a deportable firearms offense, but at least will not be a firearms aggravated felony:

1. Plead to ***possession***, e.g., P.C. §§ 25400(a) (carrying a concealed firearm) or 26350 (openly carrying unloaded firearm), ***rather than sale*** or any offense involving trafficking. ***Giving*** a firearm, i.e. without the commercial element, also should work.

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<sup>19</sup> 8 USC § 1101(a)(43)(C).



2. Avoid a **firearm sentence enhancement** under P.C. § 12022, which is likely to result in conviction of an aggravated felony as a crime of violence. Instead try to plead to possession of a firearm and/or the underlying felony offense, and use sentencing strategies to accept the required time while avoiding a sentence of one year or more on any single count. See §N.4 Sentence. Be sure to also analyze all offenses.
3. If charged with P.C. § 29800, **see these alternatives to felon or drug addict in possession of a firearm**, to avoid conviction of an aggravated. Be sure to analyze the immigration consequences of the prior offense/s. If one must plead to § 29800:
  - ✓ Plead to **misdemeanant** in possession under § 29800.<sup>20</sup> Or plead to §§ 29805 (person convicted of specified misdemeanor), 29815(a) (persons with probation conditions prohibiting firearm possession), or 29825 (possess, receive, purchase a firearm knowing that s/he is prohibited from doing so by TRO, PO, or injunction; but seek assistance if the order relates to domestic violence).
  - ✓ There is a strong argument that a plea to § 29800 as a **felon or drug addict who owns rather than possesses a firearm** will avoid an aggravated felony. Section 29800 is an aggravated felony only if it is analogous to certain federal firearms offenses; these include possession but not ownership.<sup>21</sup> Keep the record of conviction, including the factual basis for the plea, clear of information regarding the defendant's possession, access, or control over the firearm. A plea might read, "On December 13, 2012, I did own a firearm, having previously been convicted of a felony." Ammunition is even a better plea; see next paragraph.

A plea to being a **felon or addict who owns ammunition** under P.C. § 30305 has the added advantage of not being a deportable firearms offense.<sup>22</sup> Assuming that the "owns versus possesses" argument will succeed in preventing an aggravated felony, with this plea a permanent resident may not be deportable at all.

Note that being a **drug addict** can cause inadmissibility and deportability. See §N.8 Controlled Substances. Note that a state offense is an aggravated felony if it has as elements being an undocumented person who possesses a firearm. No California firearms offense has undocumented status as an element, however.

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<sup>20</sup> Section 29800 refers to persons convicted of a felony or convicted under P.C. § 23515(a), (b), or (d). These subsections cover "violent firearms offenses," some of which are felony/misdemeanor wobblers, including §§ 245(a)(2), 246, and 417(c). Therefore conviction as a misdemeanor is punishable under this section. See also *United States v. Castillo-Rivera*, 244 F.3d 1020, 1022 (9<sup>th</sup> Cir. 2001) (conviction under former P.C. § 12021(a)(1) is divisible as an aggravated felony as an analogue to 18 USC 922(g)(1), (3), because it includes possession of a firearm by a felon or a misdemeanor.)

<sup>21</sup> See 18 USC § 922(g)(1)-(5). While felon in possession of a firearm or ammunition is an aggravated felony, this should not apply to a felon who owns these items. *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because California is broader in that it covers mere ownership of guns by felons). *Pargas-Gonzalez* cites *U.S. v. Casterline*, 103 F.3d 76, 78 (9<sup>th</sup> Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits "owning" a firearm.

<sup>22</sup> Possession of ammunition is not a deportable firearms offense because that ground reaches only firearms and "destructive devices." 8 USC 1227(a)(2)(C).

- (Being convicted of a firearms offense, at a time when one is in fact undocumented, is not an aggravated felony if the undocumented status is not an element of the offense.) And to state the obvious, analyze the **prior felony or misdemeanor** for immigration consequences.
4. Try to avoid conviction for possessing, selling, converting a **short-barreled rifle or shotgun, machinegun, or silencer**, under P.C. §§ 33215, 32625 and 33410. It may be charged as a crime of violence, so make every effort to obtain 364 days or less on each count (although immigration lawyers have strong arguments against this classification). Possession with 364 days or less on all counts should not held be an aggravated felony, but still should be avoided. If possible instead plead to §§ 25400(a) or 26350 for carrying a firearm, or to P.C. § 17500 for a weapon.

## Appendix 12-I:

### LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

*Please give a copy of the applicable paragraph/s to the Defendant, with instructions to hand it to an Immigration Judge or defense attorney. Please include a copy of any official documents (e.g. plea form) that will support the defendant's argument.*

*Please give or mail a second copy to the defendant's friend or relative, or mail it to the defendant's home address. Because authorities at the immigration detention center may confiscate the defendant's documents, doing this will provide a back-up copy accessible to the defendant.*

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***An offense involving an antique firearm*** is not a deportable firearms offense. Antique firearms are excluded from the definition employed in the firearms deportation ground. See INA § 236(a)(2)(C) reference to 18 USC § 921(a)(3).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Simple assault or battery of a spouse, under P.C. § 243(a) or 243(e)*** is neither a crime involving moral turpitude, a crime of violence, nor a crime of domestic violence, unless the offense was committed with actual violence rather than offensive touching. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Calif. P.C. § 243(e) is neither a moral turpitude offense nor a crime of violence if it is not committed with actual violence); see also *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); *Johnson v. U.S.*, 130 S. Ct. 1265 (2010) (offensive touching is not a crime of violence).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Battery that results in serious bodily injury under Calif. P.C. § 243(d)** is not a crime involving moral turpitude, a crime of violence, nor a crime of domestic violence, unless the offense was committed with actual violence rather than offensive touching. Significantly, § 243(d) requires neither intent to cause an injury, nor use of force likely to cause an injury. It requires only general intent to make an offensive touching, with the result that an injury occurred.

Battery under § 243(d) has the same intent and conduct requirements as simple battery or spousal battery under P.C. § 243(a), (e). In finding that § 243(d) is not necessarily a crime involving moral turpitude for state purposes, a California appellate court held that “the state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different. It follows that because simple battery is not a crime involving moral turpitude, battery resulting in serious bodily injury necessarily cannot be a crime of moral turpitude because it also can arise from the ‘least touching.’” *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988).

**Regarding moral turpitude**, the Board of Immigration Appeals held that when battery offenses are committed with offensive or de minimus touching rather than violence, they are not crimes involving moral turpitude. *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (holding that Calif. P.C. § 243(e), spousal battery, does not involve moral turpitude unless committed with actual violence). For this reason the Ninth Circuit and the Board of Immigration Appeals (in an Index Decision) stated that P.C. § 243(d) also is not necessarily a crime involving moral turpitude. See *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, <http://www.usdoj.gov/eoir/vll/intdec/indexnet.html>, holding that because P.C. § 243(d) has the same intent as simple battery, it is not a crime involving moral turpitude. See also discussion in *Uppal v. Holder*, 605 F.3d 712, 718-719 (9th Cir. 2010).

**Regarding a crime of violence**, a misdemeanor will qualify as a crime of violence only under 18 USC § 16(a), if it has as an element intent to use or threaten violent force. Offenses such as §§ 243(a) or (e) are not crimes of violence under 18 USC § 16(a) unless the record proves that the offense was committed with actual violence or threat of actual violence, as opposed to offensive touching. See, e.g., *Matter of Sanudo, supra*; *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010).

The same finding applies to **misdemeanor § 243(d)**. California courts have held that § 243(d) requires only the same “least touching” as simple battery. Section 243(d) need not

involve force likely to cause injury. “[Section 243(d)] addresses the result of conduct rather than proscribing specific conduct... For example, a push that results in a fall and concomitant serious injury may not be sufficient deadly force to permit successful prosecution under section 245, subdivision (a). However, *it is triable as felony battery*... This analysis dictates the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force likely to cause serious injury.” *People v. Mansfield*, 200 Cal. App. 3d at 88 (citations omitted) (emphasis in original).

***Felony battery under § 243(d)*** also should not be found a crime of violence. A felony offense is a crime of violence under 18 USC § 16(b) if by its nature, the offense involves a substantial risk that violent force may be used against the person or property of another in the course of its commission. Section 243(d) is a “wobbler” offense that can be punished as a felony or as a misdemeanor. There is no difference between the elements of felony or misdemeanor § 243(d). As the *Mansfield* court stated above, a perpetrator may commit felony § 243(d) with no intent to cause injury or to use violence. Thus, the offense contains no inherent risk that the perpetrator will resort to force. See also discussion in *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) (felony reckless firing into an inhabited house is not a crime of violence under 18 USC § 16(b) based on a risk that a fight would break out; “there must be a limit to the speculation about what intentional acts could hypothetically occur in response to the crime of conviction”).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Brandishing/exhibiting a non-firearm weapon in a rude manner, P.C. § 417(a)(1)*** is not a crime involving moral turpitude. See, e.g., discussion in *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946).

Section 417(a) is not a crime of violence. As a misdemeanor, it does not come within 18 USC § 16(a), because it lacks the element of threat or use of force. See, e.g., *People v. McKinzie*, 179 Cal App 3d 789, 224 Cal Rptr 891 (Cal App 4th Dist 1986) (the victim of the act need not be aware that the brandishing is occurring; it is enough that the brandishing be in public).

Section 417(a) is divisible for purposes of a deportable firearms offense: § 417(a)(1) involves a non-firearm weapon, while § 417(a)(2) involves a firearm.

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Possession of a non-firearm weapon, e.g., dagger, brass knuckles, or blackjack, under current Calif. P.C. §§ 21310, 21710, or 22210, or former Calif. P.C. § 12020(a)(1)**, does not have adverse immigration consequences. Possessing a weapon is not a crime involving moral turpitude. See, e.g., *Matter of Hernandez Casillas*, 20 I&N Dec. 262, 277 (A.G. 1991, BIA 1990) (possessing a sawed-off shotgun is not a crime involving moral turpitude). These offenses do not come within the firearms deportation ground or the definition of aggravated felony relating to firearms, because these weapons are not firearms or destructive devices.

Neither is possession of any of these weapons a crime of violence under 18 USC § 16. See discussion in *United States v. Medina-Anicacio*, 325 F.3d 638, 647 (5th Cir. 2003) (possession of a weapon under former Calif. P.C. § 12020 is a general intent crime that does not contain an inherent risk that violence will be used in committing the offense);

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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Firing a weapon with reckless disregard under P.C. § 246** is not a crime of violence. See *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011).

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Negligently firing a firearm or BB gun under Cal. P.C. § 246.3** is not a crime of violence. See *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (finding felony § 246.3 is not a crime of violence, citing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. Ariz. 2006)).

Section 246.3 is divisible as a deportable firearms offense under INA § 237(a)(2)(C) because it can involve either a firearm or a BB gun. A BB gun does not meet the applicable definition of firearm, which requires the projectile to be expelled from the weapon by an explosive. See 18 USC § 921(a)(3). Instead, a BB gun is defined in Calif. P.C. § 16250 as a device that requires expulsion by force of air pressure.



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This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

***Intent to assault while possessing a deadly weapon, Cal. P.C. § 17500***, may have no immigration consequences. It is a misdemeanor with a maximum six-month sentence.

***Deportable firearms offense***. The offense is divisible because it includes weapons (or any object that can be used as a weapon) that are not firearms.

***Crime involving moral turpitude (CIMT)***. Section 17500 is not necessarily a crime involving moral turpitude. It requires an intent to commit a simple assault while possessing a weapon. The weapon is not used to threaten or harm the victim. (That would be a more serious offense, assault with a deadly weapon, Cal. P.C. § 245.)

Simple assault under California law is not a CIMT. It includes an intent to commit mere offensive touching. While § 240 states that an assault is an attempt to commit a “violent injury,” it has long been established that “[t]he ‘violent injury’ here mentioned is not synonymous with ‘bodily harm,’ but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act.” *People v. Bradbury*, 151 Cal. 675, 676 (Cal. 1907). Because the intended offense is not a CIMT, the assault is not a CIMT. See, e.g., *Matter of Sanudo, supra* (offensive touching is not a CIMT); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (assault with intent to commit a felony is a CIMT depending upon the felony). Possessing a deadly weapon is not a CIMT. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (possessing a sawed-off shotgun is not a CIMT). These two non-CIMTs cannot be combined to create a CIMT. See, e.g., *Matter of Short*, 20 I&N Dec. at 139 (“Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.”).

***Crime of Violence, Domestic Violence***. To be a crime of violence, a misdemeanor must have *as an element* the “use, attempted use, or threatened use” of physical force. 18 USC § 16(a). As discussed above, § 17500 lacks these elements.

***Effect of Descamps v. United States***. In spring 2013 the U.S. Supreme Court will decide *Descamps v. United States*. The court is expected to hold that that a prior conviction must be evaluated based upon its elements alone, i.e., its “least adjudicable elements” or “minimum conduct to violate the statute,” and not by additional information in the record of conviction. If that is made the rule, then as a matter of law §17500 will not be a crime of violence or firearms offense (or, if *Silva-Trevino* is overturned, a crime involving moral turpitude). This should be true whether the issue is deportability or eligibility for relief. If I would be removed under current law, but would not be removable or would be eligible for relief under a favorable decision *Descamps*, I request the court to hold my case in abeyance, and I ask for help in consulting with an immigration defense lawyer.

\* \* \* \* \*

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

**Conviction under current Cal. P.C. §§ 29800, 30305, or former 12021, is divisible as an aggravated felony.** Under INA §101(a)(43)(E), the definition of aggravated felony includes offenses described at 18 USC § 922(g)(1)-(5), notably being a felon or drug addict in possession of a firearm or ammunition. The above California statutes are divisible as aggravated felonies, because they prohibit some offenses not prohibited under § 922(g)(1)-(5).

First, the California statutes prohibit being a ***misdemeanant in possession of a firearm***. This offense is not prohibited under § 922(g).

Second, the California statutes prohibit being a felon or drug addict who ***owns (rather than possesses) a firearm or ammunition***. Section 922(g) prohibits a felon from possessing firearms or ammunition, but not from owning these items. Being a felon who owns a firearm is not an aggravated felony because it is a distinct offense from being a felon who possesses one. See *U.S. v. Pargas Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (unpublished) (holding that being a felon who owns a firearm in violation of Cal. P.C. §12021 is not an aggravated felony), citing *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) (reversing conviction under § 922(g)(1) where defendant, a felon, owned a firearm but was not in possession of it).

Being a felon who ***owns ammunition*** is not an aggravated felony for the above reasons, and further is not a deportable firearms offense under INA § 237(a)(2)(C). Ammunition is not included in the definition of “firearm” or “destructive device” used in the deportation ground, which is set out at 18 USC § 921(a)(3), (4).

\* \* \* \* \*

## Appendix 12-II: Selected Firearms Offenses Under Ninth Circuit Law: Deportable, Inadmissible, Aggravated Felony<sup>1</sup>

Su Yon Yi and Katherine Brady, Immigrant Legal Resource Center

<b>OFFENSE</b>  <b>Summary of Immigration Effect</b>	<b>AGGRAVATED FELONY (AF) CONVICTION</b>  -Firearms Trafficking <sup>2</sup> -State Analogue to Federal Firearms Offense <sup>3</sup> - Crime of Violence (COV), which is an AF only if sentence of at least one year is imposed <sup>4</sup>	<b>DEPORTABLE, INADMISSIBLE CONVICTION</b>  -Firearms Offense <sup>5</sup> -Crime of Domestic Violence (DV) <sup>6</sup> -Crime of Child Abuse <sup>7</sup>	<b>Conviction of CRIME INVOLVING MORAL TURPITUDE (CIMT)<sup>8</sup></b>
<p><b>Note: Effect on Asylees, Refugees</b></p> <p><i>Firearms offenses can affect asylees and refugees differently than they do other immigrants.</i></p> <p><i>This Chart does not discuss this area further, but for more information see §N.17 Relief. Try to get expert consultation when representing an asylee or refugee.</i></p>	<p>An AF conviction is basis for removal (deportation) for refugees.</p> <p>An AF conviction is a “particularly serious crime” that is a bar to getting asylum, and a basis to terminate asylee status and have the person put in removal proceedings.</p> <p>A non-aggravated felony also can be a particularly serious crime, depending upon whether there was a threat to people versus property, the sentence imposed, and factual circumstances.</p>	<p>A refugee who is deportable can be put in removal proceedings.</p> <p>A refugee or asylee, whether or not in removal proceedings, can apply to adjust status to become a lawful permanent resident. If the person is inadmissible s/he must obtain a special waiver in order to adjust. Absent extraordinary hardship, waiver will be denied for conviction of a “violent or dangerous” offense. (A violent or dangerous crime also is a basis to deny asylum in the first place.)</p>	<p>See column to left regarding effect of inadmissibility and deportability.</p>
<p><b>Exhibit weapon in rude or threatening manner; use</b></p> <p><b>Calif. P.C. § 417(a)</b> <b>(1) Non-firearm</b> <b>(2) Firearm</b></p> <p><i>Summary: With careful pleading, § 417(a) is not deportable, inadmissible or AF.</i></p>	<p><u>To avoid AF as COV, plead to:</u></p> <p>-A six-month misdo, and/or to                      -Rude rather than threatening conduct, and/or get 364 days or less on each count</p>	<p><u>To avoid a deportable firearm offense</u> plead to 417(a)(1) (or to 417(a) with a vague record, if avoiding becoming deportable is the only goal).</p> <p>- <u>Exception: Antique firearms.</u> If ROC shows the firearm was “an antique as defined at 18 USC 921(a)(16)” the offense is not a deportable firearms offense.<sup>9</sup></p> <p><u>To avoid a deportable crime of DV</u> plead to rude not threatening conduct (which should avoid a COV) and/or don’t let ROC show DV-type victim; see § 245.</p> <p><u>To avoid a deportable crime of child abuse</u> don’t let ROC show victim under age 18</p>	<p>Exhibiting a weapon in a rude manner ought not to be held a CIMT.<sup>10</sup></p> <p>Even if it is, a <i>first</i> single conviction of a 6-month or 1-yr CIMT misdo might not cause CIMT consequences. See <i>Note: CIMT</i></p>

<p><b>Battery -- Possible Alternative Plea</b></p> <p><b>Calif. P.C. §§ 243(d) (with serious bodily injury) 243(e) (spousal battery)</b></p> <p><i>Summary: With careful pleading § 243(e) and probably § 243(d) are not deportable, inadmissible or AF.</i></p>	<p><u>To avoid an AF as COV for 243(e) or misdemeanor 243(d)</u><sup>11</sup> -Have ROC show offensive touching and/or -Avoid sentence of 1 yr or more on any single count (this is always the most secure option).</p> <p><u>To avoid an AF as COV for felony 243(d)</u>, get 364 days or less on each count. While felony 243(d) shd not be held a COV if the record shows an offensive touching,<sup>12</sup> avoid any fight by avoiding 1 yr sentence.</p> <p>NOTE: Designating or reducing a wobbler offense to a misdemeanor per PC §§ 17, 19 creates a misdo for immigration purposes.<sup>13</sup></p>	<p><u>To avoid deportable firearms offense</u> do not let ROC show firearm involved, or show an antique firearm (see §417)</p> <p><u>To avoid deportable crime of child abuse</u> keep minor age of victim out of ROC.</p> <p><u>To avoid deportable crime of DV:</u> -Avoid a COV conviction by pleading to a misdemeanor where the ROC shows (or if DV deportability is the only issue, at least does not disprove) conduct was offensive touching, and/or -Create a record that does not show DV-type victim; see §245.</p>	<p><u>To avoid CIMT</u>, ROC shd show offense committed only by offensive touching.<sup>14</sup></p>
<p><b>Assault (2012 version)</b></p> <p><b>Calif. P.C. § 245(a)</b> <b>(1) Non-Firearm</b> <b>(2) Firearm</b> <b>(3) Machine gun</b> <b>(4) Force likely to cause great bodily harm</b></p> <p><i>Summary: With careful pleading a CIMT may be the only consequence.</i></p>	<p><u>To avoid firearms AF:</u> avoid plead to (3) which might be charged AF. See PC 32625.</p> <p><u>To avoid AF as COV</u>, obtain sentence of 364 days or less for each § 245 conviction</p>	<p><u>To avoid deportable firearms offense</u> plead to (1) or (4) with no firearm in ROC or (2) with ROC specifying antique (see §417).</p> <p><u>To avoid deportable crime of child abuse or of DV:</u> To avoid child abuse, keep minor age of victim out of ROC. To avoid deportable DV, (1) avoid a COV, or (2) don't let ROC show the domestic relationship: either designate a non-DV-type victim (e.g., new boyfriend, neighbor, even police officer) or, less secure, keep the ROC clear of all evidence of a victim with a domestic relationship. See endnote 6 and see <i>Note: Violence, Child Abuse</i>.</p>	<p><u>Assume yes CIMT</u>, with possible exception if ROC indicates person was intoxicated/incapacitated and intended no harm.<sup>15</sup></p>

<p><b>Willfully discharge firearm at inhabited building, etc. with reckless disregard</b></p> <p><b>P.C. § 246</b></p> <p><i>Summary: Can avoid AF, but deportable for firearms and a CIMT</i></p>	<p><u>COV</u>: While this has been held not to be a COV, to be safe: -Plead specifically to reckless disregard, -Where possible, plead or reduce to misdemeanor; -To be sure, get 364 days</p> <p>While the Ninth Circuit held that felony §246 is not necessarily an AF as a COV even with 1 yr or more imposed,<sup>16</sup> it is always best to get 364 days or less on each count. See <i>Note: Sentences</i> for strategies.</p>	<p><u>Deportable firearms offense</u> unless ROC shows firearm was antique (see §417).</p> <p>(To avoid deportable crime of DV or deportable crime of child abuse, see §245. However, absent an antique weapon, client is already deportable for firearms, so this is not key)</p>	<p>Yes CIMT<sup>17</sup></p>
<p><b>Discharge weapon with gross negligence that could kill or injure</b></p> <p><b>Calif. P.C. § 246.3</b></p> <p><b>(a) Firearm</b> <b>(b) BB gun</b></p> <p><i>Summary: Discharge of BB gun may have no consequence but possible CIMT.</i></p>	<p><u>To avoid a COV</u>: Felony reckless or negligent firing has been held not to be a COV,<sup>18</sup> but to be secure, try to obtain 364 days or less on each count. Also try to plead or reduce to a misdemeanor.</p>	<p>To probably avoid a <u>deportable firearm offense</u> plead to (b) (or if deportability is the only concern, keep record vague between (a) &amp; (b)), because bb gun shd not be a “firearm.”<sup>19</sup> Or specify antique firearm in ROC; see §417.</p> <p><u>To avoid deportable crime of DV</u>, avoid a COV (see AF column) or avoid an ROC with DV-type victim; see § 245.</p> <p><u>To avoid deportable crime of child abuse</u>, keep minor age of victim out of ROC</p>	<p>Should not be CIMT because gross negligence, but may be charged as CIMT.</p>
<p><b>Intent to Assault While Possessing Deadly Weapon</b></p> <p><b>Calif. P.C. § 17500</b></p> <p><i>Summary: With careful pleading, the conviction is at most a CIMT. Further, a single CIMT conviction with 6-month max will not make a noncitizen deportable or inadmissible under the CIMT grounds.<sup>20</sup></i></p>	<p><u>Not a COV aggravated felony</u> because 6-month maximum sentence (plus this is arguably not a COV; see next column)</p>	<p><u>To avoid a deportable firearms offense</u> ROC shd show non-firearm (or antique firearm; see §417). Or, if deportability is the only issue, ROC can be vague.</p> <p><u>Deportable crime of DV</u>: Might not be held COV if ROC does not show attempt or threat to use force or use weapon, i.e. a simple assault while possessing but not using or threatening to use the weapon. More secure: plead to a non-DV victim where possible, or keep the domestic relationship out of ROC (see §245).</p> <p>To avoid a <u>deportable crime of child abuse</u> do not let ROC show victim under age 18</p>	<p><u>Not necessarily CIMT, altho ICE might so charge.</u> Make specific plea to assault intending offensive touching (or intending no injury) with <i>possession but no intent to use a deadly weapon.</i><sup>21</sup></p> <p>Even if a CIMT: If this is a <i>first</i> CIMT it’s not inadmissible or deportable offense or bar to relief as a CIMT, because 6 mo max. See <i>Note: CIMT.</i></p>

<p><b>Possession of weapon (non-firearm), e.g.:</b> <b>Calif. P.C. §20010, etc.</b> <i>Summary: Appears to have no consequences.</i></p>	<p><u>Not an AF:</u> Offenses such as <b>Calif. P.C. §§ 20010 (blowgun), 21310 (dirk, dagger), 21710 (knuckles), 22210 (blackjack), and 22620(a) (stun gun)</b> at not AF's.</p>	<p>Not deportable firearms offense. (While a “gun,” stun gun does not meet the federal definition of firearm.<sup>22</sup>)</p>	<p>No, possession is not a CIMT.<sup>23</sup></p>
<p><b>Possession of a firearm</b> <b>Calif. P.C. §§ 25400(a) (concealed); 26350 (unloaded)</b> <i>Summary: Deportable firearms offense; see suggestions.</i></p>	<p><u>Not an AF,</u> although as always try to obtain 364 days or less on each count.</p>	<p>Yes, <u>deportable firearm offense</u> (unless ROC specifies antique; see §417). To avoid this, see possession of ammunition or non-firearms weapon; or see, e.g., P.C. §§ 243, 17500.</p>	<p>No, possession is not a CIMT.<sup>24</sup></p>
<p><b>Sell, Deliver, Give Firearm to Felon, etc.</b> <b>Calif. P.C. § 27500</b> <i>Summary: May be divisible AF; but see instructions.</i></p>	<p><u>May be divisible as firearm AF:</u> Sale is AF. Deliver or give possession/control avoids commercial element and thus might avoid AF.<sup>25</sup></p>	<p>Yes, <u>deportable firearm offense</u> (unless ROC specifies antique; see §417).</p>	<p>Assume yes CIMT. <i>Might</i> not be if give rather than sell, or perhaps where only had cause to believe was a felon, etc.<sup>26</sup></p>
<p><b>Possession, ownership of a firearm by a misdemeanor, felon, or addict</b> <b>Calif. P.C. § 29800 (firearm)</b> <i>Summary: Felon in possession of a firearm is an AF, but felon who owns a firearm should not be. See AF column. These both come within firearms deport ground. To avoid both AF and firearms deport ground, see PC 30305.</i></p>	<p><u>Firearms AF</u> includes <i>possession</i> of a firearm by a <i>felon or addict</i>, etc.<sup>27</sup> To avoid this AF do any of these: -Plead to misdemeanor in possession;<sup>28</sup> -Plead specifically to <i>owning</i> (rather than <i>possessing</i>) a firearm. Clear the ROC of facts showing possession, access or control of the firearm. (Plead, e.g., “On 9/24/12 in San Diego, CA I did own a firearm, having previously been convicted of a felony.”) Strong argument that this is not a federal analogue and therefore not an AF.<sup>29</sup> Even better plea is PC 30305. -Specify in ROC antique firearm.<sup>30</sup> -To surely avoid AF (altho still deportable for firearms) consider PC §§ 29805<sup>31</sup>, 29815(a)<sup>32</sup>, 29825<sup>33</sup> with a ROC consistent with instructions above.</p>	<p><u>Avoid deportable firearms offense.</u> The deportation ground reaches firearms and explosives, but not ammunition.<sup>34</sup> Therefore owning ammunition, including being a felon who owns ammunition, is not a deportable firearms offense, while owning a firearm is. See PC 30305. Not deportable if ROC shows antique; see §417.  Note that <u>being an addict</u> is inadmissibility grnd if current and deportability grnd if anytime since admission.</p>	<p>Owning or possessing a firearm is not a CIMT. See § 25400. ICE might attempt to charge it as such based on the additional 29800 elements, however.  <u>Be sure to analyze all prior conviction/s</u> for immigration consequences</p>



<p><b>Possession, ownership of ammunition by a misdemeanor, felon, or addict</b></p> <p><b>Calif. P.C. § 30305 (ammunition)</b></p> <p><i>Summary: Plea to felon who owns ammo may avoid immigration consequences.</i></p>	<p><u>Firearms AF</u> includes <i>possession</i> of ammunition by a <i>felon, addict</i>, etc. To avoid this, in state court:</p> <p>-Plead to misdemeanor in possession;</p> <p>-Plead specifically to <i>owning but not possessing</i> ammo, even if a felon, or drug addict</p> <p>-See additional instructions and endnotes at PC §29800, above.</p>	<p><u>Not deportable firearms offense.</u> The deportation ground reaches firearms and explosives, but not ammunition. Therefore owning ammunition, including being a felon who owns ammunition, is not a deportable firearms offense.</p> <p>Note that <u>being an addict</u> is grounds for removal. See §29800</p>	<p>See §29800 for CIMT.</p> <p><u>Be sure to analyze all prior conviction/s</u> for immigration consequences.</p>
<p><b>Possession of certain ammunition</b></p> <p><b>Calif. P.C. §§ 30210, 30315 (armor piercing bullets)</b></p> <p><i>Summary: Appears to have no consequences.</i></p>	<p>Possession of ammunition is not an aggravated felony unless it is stolen, is possessed by a felon, etc.<sup>35</sup>.</p>	<p>Possession of ammunition is not a deportable firearm offense,<sup>36</sup> but keep the record clear of evidence of firearm</p>	<p>Simply owning, possessing ammunition is not a CIMT (see §25400).</p>
<p><b>Possession, sale, conversion of short-barreled shotgun/rifle, silencer, machinegun</b></p> <p><b>Calif. P.C. §§ 33215, 33410, 32625,</b></p> <p><i>Summary: Avoid these pleas if possible, but see instructions to avoid consequences.</i></p>	<p><u>Sale or keeping for sale</u> is AF as firearms trafficking.<sup>37</sup></p> <p><u>Possession with 1 yr or more on any one count</u> might be charged as AF as COV, although imm counsel have good arguments against this.</p> <p><u>Possession with less than 1 yr</u> should not be held be an AF, but still shd be avoided.</p>	<p>Yes, <u>deportable firearm offense</u> (unless ROC specifies antique; see §417).</p>	<p>Carrying, possessing is not a CIMT.<sup>38</sup></p> <p>Unclear whether sale would be held CIMT.</p>

## ENDNOTES

<sup>1</sup> Thanks to Holly Cooper, Chris Gauger, Tally Kingsnorth, Graciela Martinez, Mike Mehr, Jonathan Moore, Norton Tooby, and ILRC attorneys for their help. For additional information see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit* (“*Defending Immigrants*”) at [www.ilrc.org](http://www.ilrc.org). See also §N.12 *Firearms Offenses*, in the *California Quick Reference Chart and Notes on Immigration Consequences of Crimes* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>2</sup> 8 USC § 1101(a)(43)(C), INA § 101(a)(43)(C).

<sup>3</sup> 8 USC § 1101(a)(43)(E)(ii), (iii), INA § 101(a)(43)(E)(ii), (iii). States offense that are analogous to federal firearms offenses described in 18 USC §§ 922(g)(1)–(5), (j), (n), (o), (p), (r) or 924(b), (h) are aggravated felonies. Also offenses described in 26 USC § 5861 related to “dangerous weapons” are aggravated felonies. See list of dangerous weapons in the first row of this chart.

<sup>4</sup> Conviction of a “crime of violence” (COV), as defined at 18 USC § 16, is an aggravated felony if and only if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(F), INA § 101(a)(43)(F).

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<sup>5</sup> An offense involving a firearm or destructive device as defined in 18 USC § 921(a) is deportable. 8 USC § 1227(a)(2)(E). There is not a similar “firearms” ground of inadmissibility. 8 USC § 1182(a)(2). Firearm is defined as any explosive-powered weapon except an antique firearm. 18 USC § 921(a)(3).

<sup>6</sup> A deportable “crime of domestic violence” is a “crime of violence” defined at 18 USC 16, which is committed against a victim with whom the defendant shares a relationship protected under state domestic violence laws. One to avoid this deportation ground is to plead to an offense that is not a COV. If that is not possible, the other way to avoid this is to be convicted of a COV, but not against a victim with the domestic relationship. Currently the offense is not a deportable DV offense if the domestic relationship is not conclusively proved in the record of conviction, and that is a reasonable plea. However, in the future the rule might change to permit ICE to go somewhat beyond the record of conviction to identify the victim’s relationship. Therefore, if one cannot avoid a crime of violence, a more secure way to avoid this deportation ground is to plead to an offense with a specific “non-DV type” victim, e.g. the new boyfriend, a neighbor, or even a police officer. See 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i), and see § N.9 *Crime of Domestic Violence, Crime of Child Abuse*.

<sup>7</sup> A deportable “crime of child abuse” is an offense that harms or risks serious harm to a victim under age 18. Under current law, this includes an offense that does not have age of the victim as an element, if the victim’s minor age is set out in the record of conviction. 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). See § N.9 *Crime of Domestic Violence, Crime of Child Abuse*.

<sup>8</sup> A conviction of a crime involving moral turpitude can cause inadmissibility or deportability depending upon how many convictions, when the offense was committed, and the actual or potential sentence. See § N.7 *Crimes Involving Moral Turpitude*. Note that simply possessing a firearm, even a short-barreled shotgun, is not a crime involving moral turpitude. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991, BIA 1990), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (possessing a sawed-off shotgun is not a crime involving moral turpitude).

<sup>9</sup> Antique firearms are specifically excluded from the federal definition of firearms, used in immigration proceedings. 18 USC § 921(a)(3). For this purpose an antique is defined as a firearm manufactured in or before 1898 or certain replicas of such antiques. 18 USC § 921(a)(16). The immigrant must prove that the weapon was an antique. *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010). Therefore it is very helpful if the plea can be specifically to this type of antique.

<sup>10</sup> P.C. § 417 is a general intent crime that does not require intent to harm. See *People v. Hall*, 83 Cal.App.4th 1084, 1091-92 (Ct.App.3d Dist. 2000). See *Defending Immigrants in the Ninth Circuit*, Ch. 4, Annotations.

<sup>11</sup> Section 243(e) (a misdemeanor) committed with offensive touching is not a crime of violence. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) and several federal cases, including *United States v. Johnson*, 130 S.Ct. 1265 (2010). Misdemeanor § 243(d) should be held to not be a crime of violence if committed by offensive touching, for the same reason. A misdemeanor can be a crime of violence only under 18 USC § 16(a), which is interpreted to require intent to use or threaten violent force. Section 243(d) can be committed by a de minimus touching that is not likely, and is not intended, to cause injury, but that still results in injury. See, e.g., discussion in *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988). Counsel still must make every effort to obtain a sentence of 364 days or less on any single count.

<sup>12</sup> Felony § 243(d) can be committed by a de minimus touching that is neither intended nor likely to cause injury, but that still results in injury. See, e.g., *People v. Mansfield, supra*. A felony is a COV under 18 USC § 16(b) if it is an offense that by its nature carries a substantial risk that the perpetrator will use violent force against the victim. Arguably it is not permissible to speculate that the victim will become angry, attack the perpetrator, and the perpetrator will respond with violent force. See, e.g., *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) (where reckless firing into an inhabited house may not be held a crime of violence under § 16(b) because of a possible fight in response to the act, because “there must be a limit to the speculation about what intentional acts could hypothetically occur in response to the crime of conviction”). However, counsel should make every effort to obtain 364 or less on any single count. If more time in jail is required, see strategies at § N.4 *Sentence Solutions*.

<sup>13</sup> See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>14</sup> The BIA and several courts have held that P.C. § 243(e) is not a CIMT if committed by offensive touching. See, e.g., *Matter of Sanudo, supra*. Because § 243(d) can be committed with the same de minimus conduct and intent as

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243(e), the Ninth Circuit and, in a guiding “Index” opinion, the Board of Immigration Appeals, have found that P.C. § 243(d) is not necessarily a CIMT. See *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010); *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, <http://www.usdoj.gov/eoir/vll/intdec/indexnet.html>; see also, e.g., *People v. Mansfield*, 200 Cal. App. 3d at 82, 88 (Cal. App. 5th Dist. 1988) (“[T]he state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different. It follows that because simple battery is not a crime involving moral turpitude, battery resulting in serious bodily injury necessarily cannot be a crime of moral turpitude because it also can arise from the “least touching.”)

<sup>15</sup> See *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc) (§ 245(a) is not categorically a CIMT). P.C. § 245(a) is a general intent crime that requires no intent to harm and reaches conduct while intoxicated or incapacitated. See, e.g., *People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971).

<sup>16</sup> *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011), finding that because P.C. § 246 is committed by recklessness it is not a crime of violence. The opinion by Judge Gould (with Judges O’Scannlain and Ikuta) reaffirmed that this offense is not a crime of violence, but also criticized the precedent that precludes all reckless offenses from being a COV. See also *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) finding that P.C. § 246.3 is not a COV.

<sup>17</sup> See *Matter of Muceros*, (BIA 2000), Indexed Decision, *supra*.

<sup>18</sup> See discussion of *Covarrubias-Teposte v. Holder* and *United States v. Coronado*, *supra*.

<sup>19</sup> To be a firearm under federal law, the projectile must be expelled from the weapon by an explosive. 18 USC § 921(a)(3). A BB gun is defined in Calif. P.C. § 16250 as a device that requires expulsion by force of air pressure and thus does not match the federal definition of firearm.

<sup>20</sup> A single CIMT is not a deportable offense unless it was committed within five years after admission and has a potential sentence of one year or less. 8 USC § 1227(a)(2). A single CIMT is not an inadmissible offense if it comes within the petty offense exception by being the only CIMT the person has committed, with a sentence imposed of six months or less and a potential sentence of one year or less. 8 USC § 1182(a)(2). Because § 17500 has a potential sentence of only six months, if it is the only CIMT it avoids inadmissibility and deportability.

<sup>21</sup> Simple possession of a deadly weapon is not a CIMT. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (possession of sawed-off shotgun is not a CIMT). Simple assault is not a CIMT. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (simple battery with offensive touching, even against a spouse, is not a CIMT); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). Two non-CIMTs cannot be combined to make a CIMT. See, e.g., *Matter of Short*, 20 I&N at 139 (“Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.”) However, ICE still might charge it as a CIMT.

<sup>22</sup> A stun gun does not meet the definition of firearm, which requires it to be explosive powered. A stun gun is defined as a weapon with an electrical charge. P.C. § 17230.

<sup>23</sup> Possessing a sawed-off shotgun is not a CIMT. *Matter of Hernandez-Casillas*, *supra*.

<sup>24</sup> *Ibid*.

<sup>25</sup> Generally a transaction requires a commercial element to be “trafficking.” See also discussion in *Matter of Kwateng*, 2006 WL 3088884 BIA (Sept. 29, 2006, Oakley) (unpublished)(finding that transfer of a firearm with no commercial element is not an aggravated felony as firearms trafficking).

<sup>26</sup> See, e.g., *Ali v. Mukasey*, 21 F.3d 737 (7th Cir. 2008) (noting that not all unlicensed trafficking of firearms is CIMT if merely failure to comply with licensing or documentation requirements).

<sup>27</sup> 8 USC § 1101(a)(43)(E)(ii), INA § 101(a)(43)(E)(ii) (listing offenses described in 18 USC § 922(g)(1)-(5)). These sections of § 922(g) prohibits shipping, transporting, possessing or receiving a firearms or ammunition by felon (convicted of an offense with a potential sentence of more than one year), fugitive, persons adjudicated mentally defective or institutionalized, users and addicts of a federally listed controlled substance, and undocumented persons.

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<sup>28</sup> *U.S. v. Castillo-Rivera*, 244 F.3d 1020, 1022 (9th Cir. 2001) (noting that former Calif. P.C. § 12021(a) is broader than the felon in possession aggravated felony because it also covers those convicted of specified misdemeanors).

<sup>29</sup> *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because California is broader in that it covers mere ownership of guns by felons). *Pargas-Gonzalez* cites *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits owning a firearm.

<sup>30</sup> 18 USC § 921(a)(3) defines firearms to exclude antique firearms (manufactured before Jan. 1, 1899 (18 USC § 921(a)(16))).

<sup>31</sup> P.C. § 29805 prohibits possession of a firearm by person convicted of specified misdemeanor. A conviction under this will avoid an aggravated felony but will be deportable as a firearms offense.

<sup>32</sup> P.C. § 29815(a) prohibits persons with probation conditions from possessing a firearm. Although a plea to this offense with a clear record avoids an aggravated felony, this will be a deportable firearms offense.

<sup>33</sup> P.C. § 29825 covers possessing, receiving, or purchasing a firearm knowing that s/he is prohibited from doing so by TRO, PO, or injunction. A conviction under this statute could avoid an aggravated felony with a clear record, but is a deportable firearms offense and could also be deportable under the violation of a DV-protective order ground.

<sup>34</sup> See definitions at 18 USC § 921(a)(3), (4).

<sup>35</sup> It is a federal offense to manufacture, import, sell, or deliver armor-piercing ammunition. 18 USC § 922(a)(7) & (8). However that federal offense is not one of the offenses included in the aggravated felony definition at 8 USC § 1101(a)(43)(E).

<sup>36</sup> Ammunition is not a firearm or destructive device for purposes of the firearms deportation ground at 8 USC § 1227(a)(2)(C), INA § 237(a)(2)(C), which references 18 USC § 921(a)(3), (4) (defining firearms and destructive device, and not including ammunition); see also *Malilia v. Holder*, 632 F.3d 598, 603 (9th Cir. 2011) (“Because only the improper delivery of a firearms would constitute a removable offense, a violation of § 922 is not categorically a removal [firearms] offense. For instance, improperly delivering ammunition would not render the alien removal under § 1227.”).

<sup>37</sup> See endnote 9, *supra*.

<sup>38</sup> *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991, BIA 1990), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (possessing a sawed-off shotgun is not a crime involving moral turpitude).

## § N.13 U.S. Citizens and Permanent Residents Cannot Petition for a Relative If Convicted of Certain Offenses Against Minors – The Adam Walsh Act

(For more information, see *Defending Immigrants in the Ninth Circuit*, § 6.22, [www.ilrc.org/criminal.php](http://www.ilrc.org/criminal.php))

Legislation entitled the Adam Walsh Act<sup>1</sup> which was passed in 2006 imposes immigration penalties on *U.S. citizens and permanent residents* who are convicted of certain crimes against minors. A U.S. citizen or permanent resident who is convicted of a “specified offense against a minor” may be prevented from filing a visa petition on behalf of a close family member. If the petitioner is a permanent resident rather than a citizen, the person will be referred to removal proceedings to see if he or she is deportable.

The law provides an exception only if the DHS adjudicator makes a discretionary decision, not subject to review, that the citizen or permanent resident petitioner does not pose a risk to the petitioned relative despite the conviction.

**Example:** Harry is a U.S. citizen who pled guilty in 2005 to soliciting a 17-year-old girl to engage in sexual conduct. In 2010 he submits a visa petition on behalf of his noncitizen wife. Immigration authorities will run an IBIS check on his name to discover the prior conviction. His visa petition will be denied, unless he is able to obtain a waiver based on proving that he is not a danger to his wife.

“Specified offense against a minor” includes offenses that are not extremely serious, such as false imprisonment. It is defined as an offense against a victim who has not attained the age of 18 years, which involves any of the following acts. A state offense must be substantially similar to the federal offenses in the definition.<sup>2</sup>

- (A) an offense involving kidnapping, unless committed by a parent or guardian;
- (B) an offense involving false imprisonment, unless committed by a parent or guardian;
- (C) solicitation to engage in sexual conduct;
- (D) use in sexual performance;
- (E) solicitation to practice prostitution;
- (F) video voyeurism as described in 18 USC § 1801;
- (G) possession, production, or distribution of child pornography;
- (H) criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt this conduct;
- (I) any conduct that by its nature is a sex offense against a minor. This section is

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<sup>1</sup> Section 402 of the Adam Walsh Act, effective July 27, 2006. See amended INA §§ 204(a)(1) and (b)(1) of the INA and 8 USC §§ 1154(a)(1) and (b)(i)(I). A minor is someone who is under the age of 18. See Title A, section 111(14), Adam Walsh Act.

<sup>2</sup> Title I, Subtitle A, section 111(7) of the Adam Walsh Act; see also “Guidance for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006,” issued by Michael Aytes and dated February 8, 2007, page 2.

further defined at section 111(5)(A).<sup>3</sup>

Criminal defense counsel should assume conservatively that conviction of an age-neutral offense (e.g., false imprisonment under P.C. § 36) will be come within the definition if there is evidence to show that the victim was a minor.

*Where the victim is a minor, counsel should attempt to plead to an offense that does not appear in the above list.* If that is not possible, counsel should keep the age of the victim out of the reviewable record. However, it is not clear that the inquiry will be limited to the reviewable record and the categorical approach.

***Juvenile Delinquency Dispositions.*** The definition of conviction for this purpose only involves certain juvenile delinquency dispositions, where the juvenile was at least 14 years old at the time of committing the offense. The offense must have been the same as or more severe than aggravated sexual abuse described in 18 USC § 2241, or attempt or conspiracy to commit such an offense. 18 USC § 2241 prohibits crossing a state border to engage in a sexual act with someone under the age of 12, or sexual conduct by force or threat with a person between the ages of 12 and 15.

***For further information*** see generally Michael Aytes, Associate Director, Domestic Operations, USCIS, “Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiance(e) under the Adam Walsh Child Protection and Safety Act of 2006” (Feb. 8, 2007). Search [www.uscis.gov](http://www.uscis.gov) or see 12 Bender’s Immigr. Bull. 414, 431 (App. F) (Apr. 1, 2007).

See also Sarah Bronstein, *The Adam Walsh Child Protection and Safety Act of 2006*, 12 Bender’s Immigr. Bull. 515 (May 1, 2007).

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<sup>3</sup> This includes a criminal offense that has an element involving a sexual act or sexual contact with another; a criminal offense that is a “specified offense against a minor” (therefore, any act described in A-H above is covered also by (I)); certain federal offenses -- 18 USC §§ 1152, 1153, 1591; chapters 109A, 110, or 117 of title 18 (but excluding sections 2257, 2257A, and 2258); a military offense specified by the Secretary of Defense in section 115(a)(8)(C)(i) of Public Law 105-119 (10 USC § 951 note); or attempt or conspiracy to commit an offense in the above four subsections.



## **§N.15 IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY**

### **Inadmissibility (8 USC § 1182(a)) and Deportability (8 USC § 1227(a))**

Although not a conviction for immigration purposes, a delinquency adjudication still can create problems for juvenile immigrants. Certain grounds of inadmissibility (bars to obtaining legal status) and deportability (loss of current legal status) do not depend upon conviction; mere “bad acts” or status can trigger the penalty. The following are commonly applied conduct-based grounds and the juvenile court dispositions that might provide the government with evidence that the person comes within the ground.

#### **Delinquency Disposition**

#### **Immigration Penalty & Waiver**

<b>Prostitution</b> (being the prostitute, not the customer)	Inadmissible for engaging in prostitution Waivers often available
<b>Drug Trafficking:</b> Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses. Does not include distribution without remuneration	Inadmissible where DHS/ICE has “reason to believe” participation in drug trafficking No waivers except for the S, T, or U visa.
<b>Drug Abuse or Addiction:</b> Repeated drug findings, finding of abuse (more than one time experimentation in last three years), addiction to drugs	Inadmissible and deportable for drug addict or abuser Waivers often available
<b>Behavior showing a mental condition that poses a current threat to self or others:</b> including suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or other Waivers may be available
<b>False Claim to U.S. Citizenship:</b> Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to U.S. citizenship Waivers may be available, e.g., SIJS and U Visa
<b>Violations of protective or “no-contact” orders</b> designed to prevent repeated harassment, credible threats of violence or bodily injury	Deportable where Court finds violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence or bodily injury  Some waivers

**WARNING!** Be aware that *gang membership, affiliation, and activity, violent offenses, and sex offenses* can cause also problems for noncitizen youth including secure detention and denial of immigration applications as a matter of discretion. Go to [www.defendingimmigrants.org](http://www.defendingimmigrants.org) for more information and resources on immigration consequences of delinquency.

## Diagnostic Questions For Noncitizen Youth: Determining Potential Avenues For Legal Status

1. Is the child a *U.S. citizen without knowing it*?
  - Anyone born in the United States, Puerto Rico, Guam, American Samoa, Swains Island or Northern Mariana Islands is a U.S. citizen or national, and cannot be deported.
  - If the person was born outside the U.S., ask two threshold questions to see might already be a U.S. citizen, or able to become one. If the answer to either might be yes, refer for immigration counseling.
    - a. Was there a USC parent or grandparent at time of person's birth? *Or:*
    - b. Before person's 18<sup>th</sup> birthday, did both of these events happen (in either order): child became a permanent resident, and at least one natural or adoptive (but not step-) parent having some form of custody of the child became a U.S. citizen. (Tip: Encourage the parent to naturalize!)
2. Is the child currently under delinquency court jurisdiction where the court has ruled that the child (a) *cannot be reunified with one or both parents* because of abuse, neglect, abandonment, or a similar basis under state law, and (b) that it would not be in the child's best interest to be returned to the home country? The child may qualify for *special immigrant juvenile status*.
  - IMPORTANT: if possible, the child should stay in the jurisdiction of the delinquency court until the entire SIJS application is adjudicated, so watch out for youth aging out of the system. If this is not possible, the court should explicitly state that termination of jurisdiction is based on age.
3. Has the child been abused by a *U.S. citizen or permanent resident* spouse or parent, including adoptive, natural or step-parent? Or, has the child's parent been a victim of domestic violence by his/her U.S. citizen or permanent resident spouse? Consider *VAWA relief*.
  - Child doesn't need to be under current court jurisdiction; may be reunited with the other parent.
  - Child will need to show "good moral character." Violent crimes will be a negative factor, but can be offset if there is a connection between the abuse and the bad conduct.
4. Has the child been a victim of serious crime, or of alien trafficking? Is the child willing to cooperate with authorities to investigate or prosecute the offense? Consider the *S, T, or U visas*.
  - This is one of the few forms of relief available even if the child has a drug trafficking delinquency disposition.
5. Does the child have a *U.S. citizen or permanent resident parent or spouse* who is willing to petition for her? Investigate *family immigration*.
  - To immigrate through an adoptive parent, adoption must be completed by child's 16<sup>th</sup> birthday.
6. Does the child come from a country that's recently experienced *civil war, natural disaster, or political persecution*? Investigate various forms of relief such as *asylum or Temporary Protective Status*.
7. Did the child come to the U.S. before age 16 and before June 15, 2007? Was he or she under age 31 as of June 15, 2012? Investigate *DACA (Deferred Action for Childhood Arrivals)*.
  - Strict crime requirements beyond what is listed on previous page; be sure to see that information before plea. See <http://www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals>

## § N.16 Defendant Immigration Questionnaire: Basic Information

*This information is confidential and protected by attorney-client privilege*

Interviewer's name	Phone number	Email address

Defendant's Name	A# (if possible)	Next hearing date
Def's Country of Birth	Def's Date of Birth	Immigration Hold:
		<input type="checkbox"/> Yes <input type="checkbox"/> No

### 1. ENTRY:

Date first entered U.S.	Visa Type (or 'none')	Significant Departures (approximate OK; append list)
		Dates: Length of departures:

### 2. IMMIGRATION STATUS:

Lawful permanent resident?	Other Current Immigration status? (check one)
<input type="checkbox"/> Yes <input type="checkbox"/> No Date Obtained? _____	<input type="checkbox"/> Undocumented
On what basis (e.g. family visa, refugee):	<input type="checkbox"/> Doesn't know
Screen for possible US citizenship if:	<input type="checkbox"/> Has work permit (is there a pending application for status or relief?)
<input type="checkbox"/> Grandparent or parents were US citizen at time of Def's birth; OR	<input type="checkbox"/> Refugee
<input type="checkbox"/> Parent(s) became naturalized US citizens while Def was under age 18; Def became LPR while under age 18	<input type="checkbox"/> Asylee
	<input type="checkbox"/> Temporary Protected Status
	<input type="checkbox"/> Deferred Action for Childhood Arrivals (DACA)
	Other: _____
<b>Photocopy <u>all</u> immigration documents!</b>	

### 3. PRIOR REMOVAL/DEPORTATION/VOLUNTARY DEPARTURE:

Was Defendant ever deported?	Describe what happened, to extent possible (e.g., saw an imm. judge, just signed form before leaving U.S., etc.)	Where? When?
<input type="checkbox"/> Yes <input type="checkbox"/> No		

### 4. DEFENSE GOALS & CRIMINAL HISTORY

Defendant's Goals Re: Immigration Consequences	Criminal History & Current Charges
<input type="checkbox"/> Avoid conviction that triggers deportation	<i>Append separate sheet to:</i>
<input type="checkbox"/> Preserve eligibility to apply for immigration status or relief from removal (see <i>Questionnaire</i> on next page for all undocumented or otherwise deportable defendants)	<b>List Criminal History</b> (include offense name and cite, date of conviction, sentence even if suspended for each conviction. Include expunged convictions, juvie, and other resolutions)
<input type="checkbox"/> Get out of jail ASAP	<b>List Current Charge/s, Plea Offer/s</b>
<input type="checkbox"/> Immigration consequences/deportation not a priority	
<input type="checkbox"/> Other goals re: imm consequences:	

**List Criminal History**

**List Current Charge(s), Plea Offer(s)**

## Defendant Immigration Questionnaire: Possible Relief

(If answer to any question is “yes,” the client might be eligible for the relief indicated.  
Circle the relief and **get more details**. Additional research will be needed to confirm eligibility.)

1. **Might client be a U.S. citizen?** If the answer to *either* question is yes, investigate whether client is a USC. (1) At time of birth, did client have a USC parent or grandparent? (2) Before age of 18, did client become an LPR, and did one of client’s parents naturalize to U.S. citizenship?
2. **LPR with seven years in U.S.** Client is an LPR now (has a green card) and has lived in the U.S. for at least seven years since he or she was admitted at the U.S. border in any status (e.g. as a tourist, LPR). No aggravated felony conviction. *Consider LPR cancellation of removal.*
3. **Close family member who is USC or LPR.** Client has a USC: spouse; child who is over 21; or parent if the client is unmarried and under age 21. *Consider “immediate relative” visa petition.*  
Client has an LPR spouse; an LPR parent if Client is unmarried; or a USC parent if the Client is age 21 or older and/or married. *Consider less beneficial “preference” visa petition.*
4. **Abused by USC or LPR spouse or parent.** Client, or his or her child or parent, has been battered or abused by a USC or LPR spouse or parent. *Consider VAWA relief.*
5. **Domestic Violence Waiver.** Client is LPR who is deportable for a DV conviction, but in fact client is the victim of DV in the relationship. *Consider Domestic Violence Waiver.*
6. **Ten years in U.S.** Client has lived in U.S. at least ten years since entry, and has a USC or LPR parent, spouse or child. Very minor criminal record. *Consider Non-LPR cancellation.*
7. **Terrible events in home country.** Client is from a country with recent significant human rights violations or natural disaster. *Consider asylum, withholding or the Convention Against Torture. Consider Temporary Protected Status.*
8. **Victim/witness of crime.** Client was victim of a crime and is or was willing to cooperate in the investigation or prosecution of the crime, if crime is, e.g., rape, incest, DV, assault, kidnapping, false imprisonment, extortion, obstruction of justice, or sexual assault, abuse. *Consider U Visa.*
9. **Victim of “severe” alien trafficking.** Client is victim of (a) sex trafficking of persons under age 18, or (b) trafficking persons by use of force, fraud, or coercion “for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” *Consider T Visa.*
10. **Juvenile victim of abuse, neglect, abandonment.** Client is under the jurisdiction of a delinquency, dependency, or probate court and can’t be returned to a parent (here or in home country) due to abuse, neglect or abandonment. *Consider Special Immigrant Juvenile.*
11. **DACA (DREAM) for young persons.** Client entered U.S. while under 16 and before 6.15.2007, and was under 31 as of 6.15.2012. Strict crime bars. *Consider Deferred Action for Childhood Arrivals.*
12. **Waiver under INA § 212(h).** Client is an LPR now, or is eligible to apply for LPR on a family or VAWA visa (see #3, 4 above) and is inadmissible for: CIMTs, prostitution, and/or possessing 30 gms or less marijuana – and no “dangerous or violent” crimes. *Consider the § 212(h) waiver. (Non-LPRs, and some LPRs, may qualify even with a non-drug aggravated felony.)*

## **§ N.17 Immigration Relief Toolkit For Criminal Defenders**

*How to quickly spot  
possible immigration relief  
for noncitizen defendants*

**Immigrant Legal Resource Center**  
**[www.ilrc.org](http://www.ilrc.org)**



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The Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org)) created this toolkit on behalf of the Defending Immigrants Partnership, a national consortium that supports criminal defenders in their task of competently representing noncitizen clients. Defenders can register for free additional resources at [www.defendingimmigrants.org](http://www.defendingimmigrants.org). Many thanks to the Defending Immigrant Partnership national partners, the Immigrant Defense Project ([www.immigrantdefense.org](http://www.immigrantdefense.org)) and National Immigration Project of the National Lawyers Guild ([www.nipnlg.org](http://www.nipnlg.org)), and national defender partners, the National Association of Criminal Defense Lawyers ([www.nacdl.org](http://www.nacdl.org)) and National Legal Aid and Defender Association ([www.nlada.org](http://www.nlada.org)). Thanks also to Allen Phou of the Santa Barbara Office of the Public Defender for formatting the write-on client questionnaire.

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## Immigration Relief Toolkit

### Why Should I Use This Toolkit?

Many of your immigrant clients are already deportable (“removable”). This includes all undocumented people, as well as lawful permanent residents (green card holders) who have become deportable because of a conviction. If immigration authorities find them, these people will be deported *unless* they can apply for some kind of immigration status or relief.

For these defendants, staying eligible to apply for lawful status or relief may be the most, if not the only, important immigration consideration. The Supreme Court has recognized that preserving eligibility for discretionary relief from removal is “one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010), citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

These materials should help defenders or paralegals to spot *possible* immigration relief *relatively quickly*. If you determine that your client might be eligible for specific relief, this will help inform your defense goals, and you can tell your client that it is especially important for him or her to get immigration counsel.

### How Should I Use This Toolkit?

These materials can be used in three steps. First, complete the *Client Immigration Questionnaire*. A paralegal or attorney can complete this form with the defendant. Page 1 of the form captures the information needed to analyze whether the person is deportable or inadmissible based on convictions. Page 2 asks twelve questions to identify *possible* relief. This will let you know if the client is even in the ballpark to make some immigration application.

Second, look at the *Annotated Chart*, entitled “Eligibility for Selected Immigration Relief Despite Criminal Convictions.” This will identify which convictions may bar eligibility for the type of relief that your client might apply for.

**Example:** Look in the Chart at the first row across, “LPR Cancellation.” You can see that an aggravated felony conviction is a bar to eligibility, but that no other conviction is. You also can see that it has a seven-year “clock-stop” requirement.

Third, the Toolkit contains two-page *Quick Test/Fact Sheets* that go into more detail about common forms of relief. In each case the first page (Quick Test) asks questions to determine real eligibility for the relief, while the second page (Fact Sheet) provides key facts about the relief.

## § N.16 Defendant Immigration Questionnaire: Basic Information

*This information is confidential and protected by attorney-client privilege*

Interviewer's name	Phone number	Email address

Defendant's Name	A# (if possible)	Next hearing date
Def's Country of Birth	Def's Date of Birth	Immigration Hold:
		__Yes __No

### 1. ENTRY:

Date first entered U.S.	Visa Type (or 'none')	Significant Departures (approximate OK; append list)
		Dates: Length of departures:

### 2. IMMIGRATION STATUS:

Lawful permanent resident?	Other Current Immigration status? (check one)
__Yes __No Date Obtained? _____  On what basis (e.g. family visa, refugee):  Screen for possible US citizenship if: ___ Grandparent or parents were US citizen at time of Def's birth; OR ___ Parent(s) became naturalized US citizens while Def was under age 18; Def became LPR while under age 18	__ Undocumented __ Doesn't know __ Has work permit (is there a pending application for status or relief?) __ Refugee __ Asylee __ Temporary Protected Status __ Deferred Action for Childhood Arrivals (DACA) Other: _____
<b>Photocopy <u>all</u> immigration documents!</b>	

### 3. PRIOR REMOVAL/DEPORTATION/VOLUNTARY DEPARTURE:

Was Defendant ever deported?	Describe what happened, to extent possible (e.g., saw an imm. judge, just signed form before leaving U.S., etc.)	Where? When?
__Yes __No		

### 4. DEFENSE GOALS & CRIMINAL HISTORY

Defendant's Goals Re: Immigration Consequences	Criminal History & Current Charges
___ Avoid conviction that triggers deportation ___ Preserve eligibility to apply for immigration status or relief from removal (see <i>Questionnaire</i> on next page for all undocumented or otherwise deportable defendants) ___ Get out of jail ASAP ___ Immigration consequences/deportation not a priority ___ Other goals re: imm consequences:	Append separate sheet to: <b>List Criminal History</b> (include offense name and cite, date of conviction, sentence even if suspended for each conviction. Include expunged convictions, juvie, and other resolutions)  <b>List Current Charge/s, Plea Offer/s</b>



## Defendant Immigration Questionnaire: Possible Relief

(If answer to any question is “yes,” the client might be eligible for the relief indicated. Circle the relief and **get more details**. Additional research will be needed to confirm eligibility.)

1. **Might client be a U.S. citizen?** If the answer to *either* question is yes, investigate whether client is a USC. (1) At time of birth, did client have a USC parent or grandparent? (2) Before age of 18, did client become an LPR, and did one of client’s parents naturalize to U.S. citizenship?
2. **LPR with seven years in U.S.** Client is an LPR now (has a green card) and has lived in the U.S. for at least seven years since he or she was admitted at the U.S. border in any status (e.g. as a tourist, LPR). No aggravated felony conviction. *Consider LPR cancellation of removal.*
3. **Close family member who is USC or LPR.** Client has a USC: spouse; child who is over 21; or parent if the client is unmarried and under age 21. *Consider “immediate relative” visa petition.*  
Client has an LPR spouse; an LPR parent if Client is unmarried; or a USC parent if the Client is age 21 or older and/or married. *Consider less beneficial “preference” visa petition.*
4. **Abused by USC or LPR spouse or parent.** Client, or his or her child or parent, has been battered or abused by a USC or LPR spouse or parent. *Consider VAWA relief.*
5. **Domestic Violence Waiver.** Client is LPR who is deportable for a DV conviction, but in fact client is the victim of DV in the relationship. *Consider Domestic Violence Waiver.*
6. **Ten years in U.S.** Client has lived in U.S. at least ten years since entry, and has a USC or LPR parent, spouse or child. Very minor criminal record. *Consider Non-LPR cancellation.*
7. **Terrible events in home country.** Client is from a country with recent significant human rights violations or natural disaster. *Consider asylum, withholding or the Convention Against Torture. Consider Temporary Protected Status.*
8. **Victim/witness of crime.** Client was victim of a crime and is or was willing to cooperate in the investigation or prosecution of the crime, if crime is, e.g., rape, incest, DV, assault, kidnapping, false imprisonment, extortion, obstruction of justice, or sexual assault, abuse. *Consider U Visa.*
9. **Victim of “severe” alien trafficking.** Client is victim of (a) sex trafficking of persons under age 18, or (b) trafficking persons by use of force, fraud, or coercion “for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” *Consider T Visa.*
10. **Juvenile victim of abuse, neglect, abandonment.** Client is under the jurisdiction of a delinquency, dependency, or probate court and can’t be returned to a parent (here or in home country) due to abuse, neglect or abandonment. *Consider Special Immigrant Juvenile.*
11. **DACA (DREAM) for young persons.** Client entered U.S. while under 16 and before 6.15.2007, and was under 31 as of 6.15.2012. Strict crime bars. *Consider Deferred Action for Childhood Arrivals.*
12. **Waiver under INA § 212(h).** Client is an LPR now, or is eligible to apply for LPR on a family or VAWA visa (see #3, 4 above) and is inadmissible for: CIMTs, prostitution, and/or possessing 30 gms or less marijuana – and no “dangerous or violent” crimes. *Consider the § 212(h) waiver. (Non-LPRs, and some LPRs, may qualify even with a non-drug aggravated felony.)*

## Eligibility for Immigration Relief Despite Criminal Record, Including Ninth Circuit-Only Rules<sup>1</sup>

RELIEF	AGG FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME RULE and OTHER TIME REQUIREMENTS
<p style="text-align: center;"><b>LPR CANCELLATION</b></p> <p style="text-align: center;"><b>For Long-Time Lawful Permanent Residents</b></p> <p style="text-align: center;"><b>INA § 240A(a), 8 USC § 1129b(a)</b></p>	<p style="text-align: center;">AUTOMATIC BAR</p>	<p style="text-align: center;">NOT A BAR</p>	<p>7 YRS RESIDENCE since admission in any status; periods of unlawful status count.<sup>2</sup> Clock stops at issuance of NTA, or a drug offense, CIMT (except first CIMT, misdo, six months or less sentence), prostitution, or 2 or more convictions with 5 yr aggregate sentence.<sup>3</sup></p> <p>9<sup>th</sup> Cir. only: Conviction before 4/1/97 does <i>not</i> stop clock.<sup>4</sup></p> <hr/> <p>5 YRS LPR STATUS. Clock stops only with final decision in removal case.<sup>5</sup></p>
<p style="text-align: center;"><b>FORMER § 212(c) RELIEF</b></p> <p style="text-align: center;"><b>For Long-Time Lawful Permanent Residents with pre- 1997 Convictions</b></p> <p style="text-align: center;"><b>Former INA § 212(c), 8 USC § 1182(c)</b></p>	<p>Pre-4/24/96 agg felony conviction is not a bar to waiving DEPORTATION charge if the conviction also would cause inadmissibility; see <i>Judulang v. Holder</i><sup>6</sup></p> <p>Pre-4/1/97 agg felony conviction is not a bar to waiving INADMISSIBILITY, e.g. in an application for adjustment or admission.<sup>7</sup></p> <p>An agg felony with 5 yrs served is a BAR to 212(c) unless the plea was before 11/29/90.<sup>8</sup></p>	<p>DEPORT. CHARGE Not a bar if convicted before 4/24/96, or in some cases before 4/1/97<sup>9</sup></p> <p>FIREARMS deport grnd shd be waivable if conviction also wd cause inadmissibility, under <i>Judulang</i><sup>10</sup></p> <p>INADMISSIBILITY (apply for adjustment or admission) Not a bar if convicted before 4/1/97</p>	<p>NEED 7 YEARS LPR STATUS AT TIME OF APPLICATION; But don't need 7 yrs before conviction or before 4/1/97</p> <p style="text-align: center;">WON'T WAIVE CONVICTIONS RECEIVED AFTER 4/1/97, or in many cases 4/24/96;</p> <p>Can be applied for with § 212(h) or an adjustment application, but not with cancellation</p>
<p style="text-align: center;"><b>§ 212(h) WAIVES INADMISSIBILITY<sup>11</sup> for:</b></p> <p style="text-align: center;"><b>Moral Turpitude; Prostitution; Possession of 30 Gms or Less Marijuana; &amp; 2 or More Convictions w/ 5 Yrs Aggregate Sentence Imposed</b></p> <p style="text-align: center;"><b>INA § 212(h), 8 USC § 1182(h)</b></p>	<p><i>IF</i> the 212(h)-type conviction (CMT, prostitution, etc.) <i>also</i> is an aggravated felony, can be waived unless LPR bar applies</p> <p>LPR Bar: § 212(h) is barred if the AF conviction occurred after applicant became LPR. But in 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 11<sup>th</sup> Circuits this bar applies only to persons admitted <i>at the border</i> as LPRs, not those who adjusted status to LPR. Watch for new cases in other Circuits.<sup>12</sup></p>	<p>§ 212(h) waives inadmiss. grnds listed to the left; in some contexts waives deport charges based on these convictions</p> <p>Very tough standard for discretionary grant of § 212(h) if a "dangerous or violent" offense.<sup>13</sup></p>	<p style="text-align: center;">NO STOP-TIME RULE EXCEPT FOR LPR BAR</p> <p style="text-align: center;"><i>IF</i> LPR BAR APPLIES: Must have acquired 7 years lawful continuous status before NTA was issued.</p> <p>But at least in the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 11<sup>th</sup> Circuits, the bar does not apply to persons who became LPRs thru adjustment of status and who were not admitted at US border as LPRs.<sup>14</sup></p>



RELIEF	AGGRAVATED FELONY (AF)	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME RULE and OTHER TIME REQUIREMENTS
<p><b>ADJUST or RE-ADJUST STATUS TO LPR</b>  <b>Based on family or employment visa</b>                      INA § 245(a), (i)                      8 USC § 1255(a), (i)</p>	<p>Not a <i>per se</i> bar, because there is no AF inadmissibility ground; but see agg felony bar to § 212(h) for LPR's</p>	<p>Must not be inadmissible, or if inadmissible must qualify for a waiver<sup>15</sup></p>	<p>NONE, but see 7 yr requirement for § 212(h) for LPR's</p>
<p><b>NON-LPR CANCELLATION</b>                      INA § 240A(b)(1)                      8 USC § 1229b(b)(1)</p>	<p>AUTOMATIC BAR</p>	<p>BARRED by conviction of offense described in crimes deportability or inadmissibility grounds.<sup>16</sup>                      Special rule CIMTs<sup>17</sup></p>	<p>Must have ten years physical presence and good moral character<sup>18</sup> immediately before filing; show extraordinary hardship to USC or LPR relative.</p>
<p><b>-Ninth Circuit only-</b>  <b>FORMER 10-YEAR SUSPENSION</b>                      Former                      INA § 244(a)(2),                      8 USC § 1254(a)(2)<sup>19</sup></p>	<p>AGG FELONY IS NOT A BAR IF CONVICTION WAS BEFORE 11/29/90<sup>20</sup></p>	<p>CONVICTION BEFORE 4/1/97 CAN BE WAIVED</p>	<p>Good for undocumented or documented persons. Only waives pleas from before 4/1/97; need 10 years good moral character immediately following conviction</p>
<p><b>ASYLUM</b>  <b>Based on fear of persecution</b>                      INA § 208                      8 USC § 1154</p>	<p>AUTOMATIC BAR</p>	<p>BARRED by "particularly serious crime."<sup>21</sup> Very tough to win if convicted of a "dangerous or violent" crime<sup>22</sup></p>	<p>Must show likelihood of persecution; Must apply within one year of reaching U.S., unless changed or exigent circumstances</p>
<p><b>ADJUST to LPR for ASYLEE OR REFUGEE</b>                      Waiver at                      INA § 209(c),                      8 USC § 1159(c)</p>	<p>Not a per se bar, because no agg fel ground of inadmissibility</p>	<p>§ 209(c) waives any inadmissibility ground except "reason to believe" trafficking, but see tough standard, <i>supra</i>, if "dangerous or violent" crime</p>	<p>Can apply within one year of admission as refugee or grant of asylee status, but in reality greater wait</p>
<p><b>WITHHOLDING</b>                      INA § 241(b)(3),                      8 USC § 1231(b)(3)</p>	<p>BARRED only if five year sentence imposed for one or more AF's</p>	<p>Barred by conviction of "particularly serious crime," includes almost any drug trafficking<sup>23</sup></p>	<p>Must show clear probability of persecution; No time requirement</p>
<p><b>CONVENTION AGAINST TORTURE</b><sup>24</sup></p>	<p>AGG FELONY NOT A BAR</p>	<p>OTHER GROUNDS NOT A BAR</p>	<p>Must show likely to be tortured by gov't or groups it will not control; No time requirements</p>

RELIEF	AGGRAVATED FELONY (AF)	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME RULE and OTHER TIME REQUIREMENTS
<p><b>TEMPORARY PROTECTED STATUS (TPS)</b></p> <p>INA § 244A, 8 USC § 1254a</p>	<p>AGG FELONY is not technically a bar</p>	<p>INADMISSIBLE; or convicted of two misdos or one felony or a particularly serious crime.</p>	<p>Must be national of a country declared TPS, and have been present in U.S. and registered for TPS as of specific dates. Go to <a href="http://www.uscis.gov">www.uscis.gov</a> to see what countries currently are TPS and what dates apply.</p>
<p><b>VOLUNTARY DEPARTURE</b></p> <p>INA § 240B(a)(1) 8 USC 1229c(a)(1)</p>	<p>AGG FELONY IS A BAR (but question whether AF conviction shd bar an EWI applicant for pre-hearing voluntary departure)<sup>25</sup></p>	<p>No other bars to <i>pre-hearing</i> voluntary departure</p> <p>Post-hearing VD requires 5 yrs good moral character</p>	<p>Post-hearing voluntary departure requires one year presence in U.S. and five years good moral character</p>
<p><b>NATURALIZATION</b> (Affirmative or with Request to Terminate Removal Proceedings)</p>	<p>AGG FELONY IS A BAR <i>UNLESS</i> CONVICTION IS BEFORE 11/29/90<sup>26</sup></p>	<p>DEPORTABLE applicants may be referred to removal proceedings</p>	<p>Requires certain period (e.g., three or five years) of good moral character. GMC bars includes several crimes-grounds of inadmissibility<sup>27</sup></p>
<p><b>IS THE PERSON A U.S. CITIZEN ALREADY?</b></p> <p><b>Derived or acquired citizenship</b></p>	<p>If the client answers yes to either of the following two threshold questions, investigate further. She <i>might</i> have become a U.S. citizen automatically, without knowing it.</p> <p>1. At the time of her birth, did she have a parent or grandparent who was a U.S. citizen? OR</p> <p>2. Did the following two events happen, in either order, before her 18<sup>th</sup> birthday? She became an LPR, and a parent with custody of her naturalized to U.S. citizenship.</p>		
<p><b>VAWA Cancellation</b><sup>28</sup></p>	<p>VAWA is for victims of abuse by a USC or LPR spouse or parent. VAWA cancellation is barred if inadmissible or deportable for crimes; also need 3 yrs good moral character.</p>		
<p><b>VAWA Self-Petition</b><sup>29</sup></p>	<p>Good moral character is required for I-360. Section 212(h) waiver can cure bar to GMC where offense is related to abuse. Adjustment requires admissibility or waiver to cure inadmissibility.</p>		
<p><b>DV Deportability Waiver for Victims</b><sup>30</sup></p>	<p>Waiver of deportability for persons convicted of DV offense who primarily are DV victims.</p>		
<p><b>Special Immigrant Juvenile</b><sup>31</sup></p>	<p>Minor in delinquency or dependency proceedings whom court won't return to parent/s due to abuse, neglect, or abandonment can apply to adjust to LPR. Adjustment requires admissibility; some waivers available, but none for "reason to believe" trafficking.</p>		
<p><b>T Visa</b><sup>32</sup></p>	<p>Victim/witness of "severe alien trafficking" (but not if person also becomes trafficker)</p>		
<p><b>U Visa</b><sup>33</sup></p>	<p>Victim/witness of certain types of crime (assault, DV-type offenses, etc). For T and U Visas, all convictions, including aggravated felonies, are potentially waivable.</p>		
<p><b>DACA – Deferred Action for Childhood Arrivals</b></p>	<p>Temporary work authorization and protection against removal. Must have arrived in U.S. while under age 16 and by June 15, 2007, and been under age 31 as of June 15, 2012. Have or be pursuing education or military. Crimes bars are one felony, three misdos, or one "significant" misdo. Several online sources provide more information and assistance.<sup>34</sup></p>		

## ENDNOTES

<sup>1</sup> This chart was prepared by Katherine Brady of the Immigrant Legal Resource Center. For additional free resources, defenders can register at [www.defendingimmigrants.org](http://www.defendingimmigrants.org). For extensive discussion of forms of relief affected by criminal convictions, see Kesselbrenner and Rosenberg, *Immigration Law and Crimes* ([www.thomsonreuters.com](http://www.thomsonreuters.com) 2012), and within the Ninth Circuit, see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit: Consequences of Crimes under California and Other State Laws* ([www.ilrc.org](http://www.ilrc.org) 2013). For discussion of all aspects of relief for permanent residents, see the national manual, see Privitera, Brady & Junck, *Remedies and Strategies for Permanent Resident Clients* ([www.ilrc.org](http://www.ilrc.org) 2012).

<sup>2</sup> This includes, e.g., admission on a tourist visa followed by years of unlawful residence. Where there was no actual admission at the border, the “admission” clock can start with adjustment of status. According to the Ninth Circuit it also can start with grant of Family Unity (*Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1015-16 (9<sup>th</sup> Cir. 2006)) but BIA disagrees and possible Ninth will reverse.

<sup>3</sup> Clock stops on date of commission if offense makes person inadmissible. This includes crimes involving moral turpitude, prostitution, drug convictions, “reason to believe” drug trafficking, and two convictions with an aggregate sentence imposed of at least five years. It does not, however, include several other grounds of inadmissibility or any grounds of deportability. Therefore offenses that trigger *only*, e.g., the domestic violence, firearms, drug addiction and abuse, or alien smuggling grounds do not stop the clock. *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

<sup>4</sup> *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9<sup>th</sup> Cir. 2006). The Fifth Circuit came to the opposite conclusion at about the same time in *Heaven v. Gonzales*, 473 F.3d 167 (5<sup>th</sup> Cir. 2006). The BIA will not apply the *Sinotes-Cruz* rule outside the Ninth Circuit. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).

<sup>5</sup> Time continues to accrue until the decision is administratively final (BIA appeal waived or exhausted) or, where deportability was contested, through federal court appeal.

<sup>6</sup> Section 212(c) was eliminated in the 1990’s, but it remains available in removal proceedings today to waive convictions from before operative dates in 1996 and 1997, under *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). In *Judulang v. Holder*, 132 S.Ct. 476 (2011) the Supreme Court further supported the present-day application of § 212(c) when it overruled *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and the several federal cases that had followed it. In *Matter of Blake* the BIA had held that while the former §212(c) can waive deportation grounds that have an analogous ground of inadmissibility, it will *not* waive a charge of deportability under the aggravated felony ground unless there is a very similar ground of inadmissibility. An offense such as sexual abuse of a minor was not similar enough to, e.g., crimes involving moral turpitude for § 212(c) to apply. In practice only the drug trafficking aggravated felony qualified. The Supreme Court rejected the Board’s reasoning, and that of the great majority of Circuit Courts of Appeal that had deferred to it, as an irrational reading of the law. It remanded the *Judulang* case to the Ninth Circuit to resolve. See Vargas et al, “Implications of *Judulang v. Holder*” at [www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Implications\\_%20of\\_Judalang\\_v\\_Holder.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Implications_%20of_Judalang_v_Holder.pdf). The aggravated felony conviction must have occurred before April 24, 1996 because as of that date Congress ruled that § 212(c) no longer can waive certain deportation grounds, including the aggravated felony ground. For a quick chart reviewing waivable inadmissibility and deportability grounds see Brady, Chart on § 212(c) at [www.ilrc.org/files/documents/chart\\_212c\\_judulang.pdf](http://www.ilrc.org/files/documents/chart_212c_judulang.pdf). For a comprehensive chart by M. Baldini-Poterman go to [http://nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Chart\\_on\\_212c\\_After\\_Judulang.pdf](http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Chart_on_212c_After_Judulang.pdf)

<sup>7</sup> Different and better rules apply where § 212(c) is used to waive an inadmissibility ground, as in an application for adjustment of status (affirmatively or as a defense to removal) or for admission. First, § 212(c) can waive *inadmissibility* for any type of conviction, including drug crimes and aggravated felonies, that was received up until April 1, 1997. In contrast, § 212(c) can waive only a few grounds of *deportability* if the conviction was received between April 24, 1996 and April 1, 1997. See next footnote. Second, the fact that an offense also is an aggravated felony or a firearms offense has no effect on waiving inadmissibility grounds with § 212(c). This was true even under *Matter of Blake*. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (aggravated felony conviction not related to drugs can be waived in the context of an application for adjustment). As discussed above, we hope that *Judulang* has taken care of this problem for deportation grounds – but in the inadmissibility context, the issue does not even come up.

<sup>8</sup> See discussion in *Toia v. Fasano*, 334 F.3d 917 (9<sup>th</sup> Cir. 2003).

<sup>9</sup> A charge of deportability based upon conviction by plea taken between April 24, 1996 and April 1, 1997 comes under the AEDPA rules governing § 212(c) for that period. Deportation grounds that cannot be waived under AEDPA §212(c) include conviction of an aggravated felony, conviction of controlled substance offense, and the “miscellaneous” deportation ground that includes conviction of espionage, sabotage, treason, certain military service problems, etc. In addition, AEDPA § 212(c) will not waive conviction of two moral turpitude offenses, *both* of which carry a potential sentence of a year or more. AEDPA did not limit *inadmissibility* grounds that can be waved under §212(c), however.

<sup>10</sup> The firearms deportation ground was treated like the aggravated felony deportation ground, and so the firearms ground may benefit under the reasoning of *Judulang*. Authorities had held that deportability based on the firearms ground cannot be waived under § 212(c), because there is no sufficiently analogous inadmissibility ground. Similar to *Blake*, this problem can be averted by applying for adjustment of status so that the applicant is attempting to waive a ground of inadmissibility (e.g., if the firearms offense also is a crime involving moral turpitude) and not deportability. See, e.g., *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). Now, a charge of deportability under the firearms ground also might be waived under § 212(c), if the conviction also would cause inadmissibility.

<sup>11</sup> For more information in general see Brady, “Update on § 212(h) Strategies” (2011) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) (scroll down) and *Bender Immigration Bulletin* (September 15, 2011). See also newer articles on 212(h) on that web-page.

<sup>12</sup> For more information see Brady, “LPR Bars to 212(h) – To Whom Do They Apply?” (Sept. 2012), and “Update on § 212(h)” (2011), *supra*, at [www.ilrc.org/crimes](http://www.ilrc.org/crimes). See *Hanif v. Holder*, --F.3d-- (3<sup>rd</sup> Cir. Sept. 14, 2012), *Bracamontes v. Holder*, 675 F.3d 380 (4<sup>th</sup> Cir. 2012), *Leiba v. Holder*, --F.3d-- (4<sup>th</sup> Cir. Nov. 9, 2012), *Martinez v. Mukasey*, 519 F.3d 592 (5<sup>th</sup> Cir. 2008), *Lanier v. United States AG*, 631 F.3d 1361, 1366-67 (11<sup>th</sup> Cir. 2011), finding that adjustment to LPR status does not trigger the LPR bars to eligibility for § 212(h). Arguably the Ninth Circuit made the same holding in *Sum v. Holder*, 602 F.3d 1092 (9<sup>th</sup> Cir. 2010), but the BIA failed to acknowledge that in *Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012).

<sup>13</sup> See requirement of extraordinary positive equities required for conviction of a dangerous or violent offense, at 8 CFR 212.7(d); see also *Matter of Jean*, 23 I&N 373 (BIA 2002), similar standard for asylum and asylee/refugee adjustment.

<sup>14</sup> See Brady, “LPR Bars to § 212(h),” *supra*.

<sup>15</sup> An applicant who is deportable still may apply for adjustment (or “re-adjustment”) of status if she or he is not inadmissible. *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). Or, a deportable *and* inadmissible applicant may apply if she or he is eligible for a waiver of inadmissibility. See, e.g., adjustment with a § 212(c) waiver discussed in *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (waiver of an offense that also is an aggravated felony in connection with adjustment does not conflict with the holding in *Matter of Blake*, *supra*); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); adjustment with a § 212(h) waiver discussed in *Martinez v. Mukasey*, 519 F.3d 532 (5<sup>th</sup> Cir. 2008) (§ 212(h) waiver).

<sup>16</sup> See 8 USC §§ 1182(a)(2), 1227(a)(2); INA §§ 212(a)(2), 237(a)(2). A person who entered without inspection (EWI), and therefore is not subject to the grounds of deportation because she has not been admitted, still is barred if convicted of an offense described in the deportation grounds. *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9<sup>th</sup> Cir. 2004). The effective date of a deportation ground applies, however, so that a person convicted of a domestic violence or child abuse offense from before 9/30/96 is not barred. *Matter of Gonzalez-Silva*, 24 I&N 218 (BIA 2007).

<sup>17</sup> The Board held that a single conviction of a crime involving moral turpitude that comes within the petty offense exception to the CMT ground of inadmissibility is a bar to non-LPR cancellation if it carries a potential sentence of a year or more, but is not a bar if it carries a potential sentence of less than one year. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). This will be appealed to circuit courts. It continues the controversy started with *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). See discussion of that case in Brady, “*Matter of Almanza-Arenas*: Defense Strategies” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>18</sup> See 8 USC § 1101(f), INA § 101(f) for statutory bars to establishing good moral character. These include the inadmissibility grounds relating to drugs, prostitution, moral turpitude (unless it comes within the petty offense or youthful offender exceptions), and two convictions of any type of offense with a sentence of five years or more imposed. They also include other bars, such as spending 180 days in jail for a conviction during the time for which good moral character must be shown.

<sup>19</sup> A documented or undocumented immigrant can apply in removal proceedings arising in Ninth Circuit states for the former 10-year suspension of deportation, in order to waive a conviction by plea from before 4/1/97, the date the former

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suspension was eliminated. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006). Because good moral character is required, the person cannot have an aggravated felony conviction from on or after 11/29/90. See discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 (2011, [www.ilrc.org](http://www.ilrc.org)).

<sup>20</sup> Suspension requires a showing of good moral character, and an aggravated felony conviction on or after 11/29/90 is a permanent bar to establishing good moral character. IMMACT 1990 § 509(a), and *Lopez-Castellanos, supra*.

<sup>21</sup> The general definition of a particularly serious crime appears in *Matter of Frenescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, [www.ilrc.org](http://www.ilrc.org)). In asylum, but not in withholding, an aggravated felony is automatically a particularly serious crime.

<sup>22</sup> See *Matter of Jean, supra*.

<sup>23</sup> The general definition of a particularly serious crime appears in *Matter of Frenescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, [www.ilrc.org](http://www.ilrc.org)). When the Attorney General held that virtually any drug trafficking offense is a “particularly serious crime,” the Ninth Circuit upheld his right to make the ruling, but found that it could not be applied retroactively to plea bargains before May 2, 2002. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-51 (9<sup>th</sup> Cir. 2007).

<sup>24</sup> See 8 CFR §§ 208.16 – 208.18.

<sup>25</sup> The statute states the pre-hearing voluntary departure is barred to persons who are “deportable” under the aggravated felony bar, meaning who were convicted of an aggravated felony after admission. But the regulation bars persons who merely were “convicted” of an aggravated felony, which also applies to persons who never were admitted. In a situation where it is beneficial to the client, immigration counsel may want to appeal this issue on the grounds that the regulation is *ultra vires*. Compare INA § 240B(a)(1), 8 USC § 1229c(a)(1) with 8 CFR § 1240.26(b)(1)(i)(E), and see discussion in *Defending Immigrants in the Ninth Circuit*, § 11.22 (2011 [www.ilrc.org](http://www.ilrc.org)).

<sup>26</sup> An aggravated felony conviction on or after 11/29/90 is a permanent bar to good moral character; see n. 17.

<sup>27</sup> See n. 18, *supra*.

<sup>28</sup> VAWA cancellation is at INA § 240A(b)(2), 8 USC § 1229b(b)(2). For further information on self-petitioning and cancellation, see [www.ilrc.org/immigration\\_law/vawa\\_and\\_u-visas.php](http://www.ilrc.org/immigration_law/vawa_and_u-visas.php) and see Abriel & Kinoshita, *The VAWA Manual: Immigration Relief for Abused Immigrants* ([www.ilrc.org](http://www.ilrc.org)).

<sup>29</sup> See VAWA information, *supra*.

<sup>30</sup> A person who essentially is the victim of domestic violence but was “cross-charged” and found guilty of domestic violence may qualify for a waiver of the domestic violence deportation ground under INA § 237(a)(7), 8 USC § 1227(a)(7).

<sup>31</sup> See information and resources on special immigrant juvenile status at [www.ilrc.org](http://www.ilrc.org) under remedies for children and youth, and see Kinoshita, Junck and Brady, *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* ([www.ilrc.org](http://www.ilrc.org)).

<sup>32</sup> INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T). For information on T visas, see Lee & Parker, *Representing Survivors of Human Trafficking* (ILRC 2011) at [www.ilrc.org](http://www.ilrc.org), and several websites including [www.uscis.gov](http://www.uscis.gov).

<sup>33</sup> INA § 101(a)(15)(U), 8 USC § 1101(a)(15)(U). For information on U visas, see free material at [www.ilrc.org/immigration\\_law/vawa\\_and\\_u-visas.php](http://www.ilrc.org/immigration_law/vawa_and_u-visas.php) and see Kinoshita, Bowyer & Ward-Seitz, *The U Visa: Obtaining Status for Victims of Crime* (ILRC).

<sup>34</sup> See, e.g., [www.unitedwedream.org](http://www.unitedwedream.org) and [www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals](http://www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals) and government information at [www.uscis.gov](http://www.uscis.gov) (Under “Humanitarian” see “Consideration of Deferred Action”). As of January 2013 DHS defines a “significant misdemeanor” as a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales, burglary, driving under the influence of drugs or alcohol or any other misdemeanor for which the jail sentence was more than 90 days.



## LPR CANCELLATION OF REMOVAL, 8 USC § 1229b(a)

### Quick Test: Is the Defendant Eligible?

1. **Has the lawful permanent resident (LPR) ever been convicted of an aggravated felony?**

YES NO. *If yes, she is not eligible for LPR cancellation.*

2. **Has the person been a lawful permanent resident (LPR, green card-holder) for five years, or close to it?** YES NO. When, or about when, did the person become an LPR? \_\_\_\_\_

*She will need five years as an LPR when she files the cancellation application. But because she will continue to accrue the five years while in jail and immigration detention, four years or even less time since becoming an LPR may be enough.*

**Seven years “lawful continuous residence.”** You need LPR’s entire criminal history.

3. **Start date for the seven years:** Before the person became an LPR, was she admitted to the U.S. on any kind of visa – e.g. tourist, student, refugee, permanent resident, worker, border-crossing card?

YES NO. If yes, what was the date of the admission? \_\_\_\_\_

*This date is the start of the seven-year period (even if the person soon becomes “illegal”).*

Or, did the person first enter the U.S. surreptitiously, i.e. without being inspected or admitted?

YES NO. *If so, the seven years started when the person became an LPR; see Question 2.*

4. **End date for the seven years:** Does the person come within any of these inadmissibility grounds? If so, circle it and note the date the defendant committed the offense.<sup>1</sup>

- a. Convicted of an offense relating to a controlled substance
- b. Convicted of a “crime involving moral turpitude” (CIMT) *unless* it comes within (a) petty offense exception (just one CIMT, max possible sentence is *one year* or less, and sentence imposed is *six months* or less; in California, misd. “wobbler” meets the one-year requirement<sup>2</sup>) or (b) youthful offender exception (convicted as an adult of one CIMT committed while under age 18, and conviction/jail ended 5 yrs before application.)
- c. Convicted of two or more offenses of any type with an aggregate sentence imposed of five years
- d. Evidence of or conviction for engaging in prostitution, meaning sexual intercourse for a fee
- e. Probative evidence of drug trafficking (this category might not apply; consult an expert)

*If yes to any of the above, the seven years stopped on the date that the LPR committed the offense. If LPR is not yet within an above category but pleads to one, the clock stops as of the date the LPR committed the offense pled to. If LPR can avoid these categories, the clock will not stop until removal proceedings are initiated (sometime after he or she completes jail). In the Ninth Circuit only: No conviction from before April 1, 1997 will stop the clock.<sup>3</sup>*

5. **Calculate the seven years.** Take the start date from Question 3 and the stop date, if any, from Question 4. Need at least seven years between the two dates. See also Case Example, next page.

<sup>1</sup> See 8 USC 1229b(d)(1)(B). While the statutory language is more convoluted, the above is the rule.

<sup>2</sup> See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>3</sup> *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006).



## More Information on Cancellation Of Removal For Permanent Residents

**What are the benefits of winning LPR Cancellation? Do many applicants actually win?** Winning a cancellation case allows a lawful permanent resident (LPR or “green card” holder) who is in removal proceedings to keep his LPR status and end the proceedings. 8 USC §1229b(a), INA § 245A(a).

If the LPR qualifies to apply for cancellation, there is a very reasonable chance that the immigration judge will grant the application based on factors such as the person’s remorse and rehabilitation or potential for it. Therefore it may well be worth applying even if the person must wait several months or more in immigration detention before the removal hearing or during appeals.

**What are the bars to eligibility for LPR Cancellation?** A lawful permanent resident is not eligible to apply for LPR Cancellation if she:

- Ever was convicted of an *aggravated felony*
- Received a prior grant of cancellation of removal, suspension of deportation, or § 212(c) relief
- Persecuted others or comes within the terrorism bars to immigration
- Fails to reach the required seven years of “lawful continuous residence” or five years of lawful permanent resident status. See “Is the Defendant Eligible?” on the other side of this page.

**Case example: Calculating the five and seven years.** To understand this example, refer to the eligibility rules on the other side of this page. John was admitted to the U.S. on a tourist visa in July 2004. He overstayed the permitted time and lived in the U.S. in unlawful status until 2007, when he was able to adjust status to permanent residence (get a green card) through family.

In 2008 he was convicted of possessing a revolver. This made him deportable under the firearms ground, but it is not a CIMT. Currently he is charged with domestic violence with injury under Cal. P.C. § 273.5, based on an incident in June 2011. That offense is a CIMT, a deportable crime of domestic violence, and, if a sentence of a year or more is imposed, an aggravated felony. The DA wants eight months jail time. Is John deportable? If so, can he qualify for LPR cancellation?

**Is John already deportable?** Yes, under the firearms ground for the 2008 conviction.

**Has he been convicted of an aggravated felony?** No. He would be if he got a sentence imposed of a year or more on the current domestic violence charge, but the DA is suggesting eight months.

**Has he had a green card for about five years?** If not yet he will soon, since it is 2012 and he got his green card in 2007. The five-year period keeps accruing even during jail and removal proceedings; see Question 2, previous page.

**Does he have the seven years lawful continuous residence?** See Questions # 3-5, previous page.

-- *When did John’s seven-year period start?* On the date of his admission as a tourist in July 2004.

-- *Did it end when he was convicted of the firearms offense?* No. While the offense made him deportable for firearms, it is not a CIMT and doesn’t otherwise come within the five categories that stop the clock. (See categories listed in Question # 4, previous page.)

-- *Will it end if he is convicted of the DV offense?* If the conviction brings John within one of the five “clock-stopping” grounds, his seven years will cease to accrue as of June 2011 -- a month short of the seven years he needs. We need to avoid this. The offense is a CIMT, and therefore to avoid stopping the seven years it must come within the petty offense exception. If he pleads to this offense, John needs a misdemeanor conviction with a sentence of six months or less imposed. One defense strategy would be to defer the plea until he has spent two or more months in jail, then waive credit for time served and bargain for a sentence of six months rather than the eight the DA request. Or, plead to a non-CIMT.

**“10 YEAR” CANCELLATION FOR NON-PERMANENT RESIDENTS  
(including undocumented persons), 8 USC § 1229b(b)(1).**

**Quick Test: Is the Defendant Eligible?**

1. *Has the defendant lived in the U.S. for ten years, or nearly that?* YES NO. Entry date \_\_\_\_\_.  
*See next page for more information on calculating the ten-year period.*
2. *Does defendant have a U.S. citizen or lawful permanent resident parent, spouse, or unmarried child under 21?* YES NO. If yes, what are name/s and relationship/s of qualifying relative/s:
3. *If time permits, get brief answers from the defendant to these questions regarding hardship; use additional sheet as needed. If you don't have much time, skip this question.*
  - Do these relative/s suffer from any medical or psychological condition; if so, what is it?
  - Is there any other reason that the defendant's deportation would cause these relative/s to suffer exceptional, unusual hardship if the defendant were deported?
4. *Crimes disqualifiers. The defendant will be barred if he or she comes within any of the following categories. Check any bars that apply and give date of conviction and code section. Be sure to indicate if the threat is based on a current charge that defense counsel could try to avoid.*

Convicted at any time of, or currently charged with:

- An aggravated felony
- An offense relating to a federally defined controlled substance
- A firearms offense
- A crime involving moral turpitude (CIMT), unless it has a maximum possible sentence of *less* than one year, sentence imposed is six months or less, and the person committed just one CIMT.
- Two or more offenses of any type with an aggregate sentence imposed of at least five years
- Prostitution (sexual intercourse for a fee)
- High speed flight from checkpoint, some federal immigration offenses, federal failure to file as a sex offender
- Stalking, a crime of domestic violence, violation of a DV protective order prohibiting violent threats or repeat harassment, or a crime of child abuse, neglect or abandonment, but not if the conviction occurred before September 30, 1996

Event within about the last ten years, including now (see next page regarding exact time):

- Defendant engaged in prostitution, regardless of conviction
- DHS has “reason to believe” that the person is or helped a drug trafficker
- Defendant spent or will spend more than 180 days physically in jail as a penalty for a conviction
- Defendant engaged in alien smuggling or lied under oath to get a visa or immigration benefit
- Defendant was a ‘habitual drunkard’ (e.g., multiple DUI’s) or convicted of gambling offenses

## Facts on Cancellation Of Removal For Non-Permanent Residents

**What status does the client get if she is granted non-LPR Cancellation?** An undocumented person (or an applicant of any status) who wins cancellation for non-LPRs can become a lawful permanent resident (LPR or “green card” holder). See 8 USC §1229b(b)(1), INA § 245A(b)(1).

**Do many applicants actually win?** Only a limited number do. An applicant must convince the immigration judge that a U.S. citizen or permanent resident parent, spouse, or unmarried child under age 21 will suffer “exceptional and extremely unusual hardship” if the applicant is deported. Hardship to the applicant him- or herself does not count. This is a high standard and most grants are based upon a qualifying relative’s significant physical or mental health problems, although other situations also can support a grant.<sup>4</sup> (Compare this to LPR cancellation, which generally is easier to win.)

**What if the person got cancellation or other relief before?** The applicant must not have received a prior grant of cancellation, suspension of deportation or § 212(c) relief, nor have a J-1 visa.

**When does the ten-year period run?** The required ten years of continuous residence and good moral character is counted backwards from the date that the person files the application. The exact ten-year periods can be complex in rare situations, so if there is any question criminal defense counsel should consult with immigration counsel or urge the family to do so. The most relevant rules are that the required ten-year period of physical presence starts when the person first enters the U.S. legally or illegally and stays in the U.S. without very significant interruption, and it ends when removal proceedings are started (generally, not until after the person is released from jail). The ten-year period of good moral character is counted backwards from when the person applies for cancellation.

**What are the crimes bars to eligibility for non-LPR Cancellation?** There are two. First, the applicant cannot have been convicted at any time of an offense that is described in the crimes inadmissibility or deportability grounds.<sup>5</sup> See list on the previous page, Question 4, under “Convicted at any time.” Note that a single conviction for a crime involving moral turpitude (CIMT) is a bar unless a sentence of no more than six months was imposed, and the offense carries a *maximum possible sentence of less than one year*, e.g. carries a maximum six-month sentence. (This is slightly different from the more common CIMT “petty offense exception.”<sup>6</sup>) In some states a plea to “attempt” to commit a one-year misdemeanor will result in a maximum possible sentence of less than a year.

If the applicant does not come within this first bar, she then must consider a second bar: within the ten years leading up to the date of filing the application, the person must not have come within any of the statutory bars to establishing good moral character. These bars are listed on the previous page, Question 4, under “Event within the last ten years.”

**Ninth Circuit relief for persons with pre-April 1, 1997 conviction/s.** In immigration proceedings arising within Ninth Circuit states, an undocumented person whose only convictions pre-date April 1, 1997 might qualify for a much better form of relief, suspension of deportation.<sup>7</sup> See “Suspension.”

<sup>4</sup> See, e.g., discussion of hardship in *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (2001).

<sup>5</sup> See 8 USC §§ 1182(a)(2), 1227(a)(2) [INA §§ 212(a)(2), 237(a)(2)]. Usually an undocumented person is not affected by the grounds of deportability, but under the specific language of the non-LPR cancellation bars even a person who entered without inspection will be barred if convicted of an offense in the deportation grounds.

<sup>6</sup> The petty offense exception to the crime involving moral turpitude (CIMT) inadmissibility ground applies if the person committed only one CIMT with a maximum possible sentence of *one year or less* (not less than one year, as in this cancellation bar) and the sentence imposed did not exceed six months. 8 USC § 1182(a)(2)(A).

<sup>7</sup> See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) and discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 ([www.ilrc.org](http://www.ilrc.org)).

## § 212(h) WAIVER OF INADMISSIBILITY, 8 USC § 1182(h) Quick Test: Is the Defendant Eligible?

### 1. Which immigrants can apply for a § 212(h) waiver?

First, the person must be a lawful permanent resident (LPR) already, or must be applying to become an LPR based on a family visa or by VAWA (see below). Second, the person must:

- a. Be the spouse, parent, or child of a U.S. citizen or lawful permanent resident (USC or LPR) who would suffer extreme hardship if the person was deported, *or*
- b. Have been convicted (or engaged in the conduct) at least 15 years ago, *or*
- c. Be inadmissible only for prostitution, *or*
- d. Be a VAWA self-petitioner (applying for a type of family visa, where the U.S. citizen or permanent resident spouse or parent battered or abused the applicant or applicant's child).

### 2. Which inadmissibility grounds (types of offenses) can be waived under § 212(h)?<sup>8</sup>

- a. Conviction/s of a crime involving moral turpitude (CIMT). But the person is not inadmissible and the waiver is not needed if there is only one CIMT conviction that comes within:
  - The petty offense exception. The person must have committed just one CIMT, which carries a maximum possible sentence of a year or less (including a misdemeanor wobbler in California), and the sentence imposed was six months or less); *or*
  - The youthful offender exception: The person was convicted as an adult for one CIMT, committed while under age 18, and conviction/jail ended at least 5 years ago
- b. Two convictions of any type of offense, with aggregate sentence imposed of at least five years
- c. Engaging in prostitution (sexual intercourse for a fee)
- d. No drug crimes can, except first offense "simple possession of 30 grams or less of marijuana"
  - This also includes first offense possession of an amount of hashish comparable to 30 gm or less marijuana, under the influence of mj or hash, possession of paraphernalia for use with 30 grams or less mj, and in the Ninth Circuit attempt to be under the influence of THC.<sup>9</sup>

### 3. What types of offenses are almost sure to be denied the waiver?

An immigration judge or officer grants the § 212(h) waiver as a matter of discretion. Many cases fail to win a discretionary grant. Further, federal regulation forbids a discretionary grant to waive conviction of a "violent or dangerous" offense except in cases involving national security or "exceptional and extremely unusual hardship."<sup>10</sup> Thus, e.g., even though robbery is a moral turpitude crime that could be waived under § 212(h), there is hardly any chance that the § 212(h) application actually will be granted. Fraud, theft, obstruction of justice, etc. are more likely to be granted.

<sup>8</sup> See 8 USC § 1182(h)(1) referring to certain grounds at 8 USC § 1182(a)(2), INA § 212(a)(2).

<sup>9</sup> See, e.g., *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (use); INS General Counsel Legal Opinion 96-3 (April 23, 1996) (comparable amount of hashish); *US v Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (attempted under the influence of THC).

<sup>10</sup> 8 CFR 1212.7(d).

## Facts, Examples of the § 212(h) Crimes Waiver

**Sometimes § 212(h) can waive an aggravated felony conviction.** Some crimes involving moral turpitude (CIMTs) also are aggravated felonies, e.g. fraud where the loss to the victim exceeds \$10,000, or theft with a sentence imposed of a year or more. In some cases the client can waive a CIMT with § 212(h) even though it also is an aggravated felony. Two caveats:

- Some LPRS are barred from waiving an aggravated felony with § 212(h); see below.
- Section 212(h) is granted as a matter of discretion. If the aggravated felony is a “violent or dangerous” crime, the waiver will almost certainly be denied (see #3, previous page). Even if it is not, authorities may be especially tough on an aggravated felony conviction.

**When is the § 212(h) waiver usually used?** Usually with an application for a family visa (including VAWA self-petition) or to help an inadmissible LPR get back into the U.S. after a trip.

**Example:** Erin was admitted to the U.S. on a tourist visa and overstayed. Now she wants to adjust status to become an LPR through her U.S. citizen husband – but she is inadmissible because of a fraud (CIMT) conviction. As a defense to removal, she can submit an application for adjustment of status, along with a § 212(h) application to waive the CIMT. (Because she is not a LPR, she can apply even if the fraud conviction also is an aggravated felony.)

**Example:** Lucia became an LPR in 2003 and later was convicted of some minor thefts that are CIMTs, so that she is inadmissible and deportable for CIMT. Returning from a trip abroad in 2012, she was stopped at the San Diego airport and charged with being inadmissible for CIMT. She can apply for a § 212(h) waiver; if she wins she can keep her green card.

**Special restrictions apply to some LPRs.** The statute (8 USC § 1182(h)) sets out two bars for LPRs. The LPR person cannot apply for § 212(h) if he or she (a) has been convicted of an aggravated felony since becoming an LPR, or (b) failed to complete seven years in some continuous lawful status (e.g., LPR, or student visa and then LPR) before removal proceedings are started against him or her.

At this writing in October 2012, two different rules apply as to *which* LPRs are potentially subject to these bars. In immigration cases arising within the Third, Fourth, Fifth, and Eleventh Circuits, the bars apply only if the person previously was *physically admitted into the U.S. as an LPR at a border or other port of entry*. The bars do not apply to persons who adjusted their status to LPR, at an office within the U.S. But in all other Circuits, the BIA will find that *all* LPRs are subject to these two bars, with no exception. See “Practice Advisory on § 212(h) LPR Bars” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes), and watch for new developments.

**Example:** Herman became a lawful permanent resident (LPR) when he was admitted into the U.S. on an LPR visa at the Miami Airport. Three years later he was convicted of theft with a one-year sentence imposed. This conviction makes him deportable under the aggravated felony and crime involving moral turpitude (CIMT) grounds. Herman is put in removal proceedings. As a defense to removal, he will apply to re-adjust status through his wife. He will need a § 212(h) waiver for this, since his conviction is an inadmissible CIMT.

Herman is out of luck. All courts agree that because he was admitted at the border as an LPR, the LPR bars to § 212(h) apply to him, and therefore the aggravated felony conviction bars him.

Sally adjusted status to LPR at her local CIS office. Like Herman, she later was convicted of theft with a one-year sentence imposed, which was an aggravated felony and CIMT. She also wants apply to re-adjust status with a § 212(h) waiver as a defense to removal. She can apply for § 212(h), *if* her case arises within the “right” Circuit; see above.

## IMMIGRATION THROUGH FAMILY

### Is the Defendant Eligible? Is it a Defense Against Deportation?

*Some noncitizens may be able to get a green card through a U.S. citizen or lawful permanent resident parent, spouse or child (or rarely, a USC sibling)*

Family visas are complex. The defendant will need immigration assistance, but if you can spot this potential relief and avoid pleading the defendant to a disqualifying offense, you will have provided a great benefit. If possible, give them further help by using the below material to see if they actually can immigrate through family, and if they can use it as a defense to removal.

#### 1. What kind of status do you obtain from immigrating through a family member?

Lawful permanent resident status (LPR, green card). To “immigrate” means to become an LPR.

#### 2. What crimes make you ineligible for family immigration?

To immigrate through family the person must be “admissible.” That means either she must not come within any of the grounds of inadmissibility at 8 USC § 1182(a), or *if* she comes within one or more inadmissibility grounds, she must qualify for and be granted a waiver of the ground/s. To determine whether your client is admissible, see the chart below and see other detailed materials.

If your client *might* be eligible for family immigration and you can avoid making her inadmissible, you have done a great job. If possible, use the following to further help her by determining if she really is eligible and if so, if she can use this to fight deportation (“removal”).

#### 3. In the best-case scenario, when can family immigration be used as a defense to removal?

To use a technical term, to fight removal the defendant must be eligible for family immigration through *adjustment of status*. “Adjustment of status” means that the person can process the whole application *without having to leave the U.S.* (A person who doesn’t qualify to adjust status still can apply for a family visa, but she must go back to the home country to process through a U.S. consulate there – and that trip alone can create other legal problems.) If the defendant can adjust status she will become an LPR and the removal proceedings will end.

A person who is undocumented or has almost any immigration status can apply for adjustment through a family visa as a defense to removal, if she meets the following requirements:

1. The defendant has a U.S. citizen (USC) spouse, or a USC child age 21 or older, or the defendant is an unmarried child under the age of 21 of a USC parent, including stepparent or adoptive parent, *and*

The defendant was inspected and admitted into the U.S. on any kind of visa, border-crossing card, lawful permanent resident card, or other document, even if later he was in unlawful status. This is called regular adjustment or “§ 245(a) adjustment.”

OR

2. The defendant entered the U.S. with or without inspection by December 21, 2000; a family visa petition for her was submitted before April 30, 2001; and the defendant is the subject of an approved visa petition that can be used immediately, based on any qualifying family relationship (see # 4, below.) This is called “§245(i) adjustment.” These two adjustment provisions are found at 8 USC § 1255(a), (i); INA § 245(a), (i).



Not only an undocumented person, but also a qualifying **lawful permanent resident (LPR) who has become deportable for crimes can apply for adjustment of status as a defense to removal**. The LPR must have the U.S. citizen relatives described in the first bullet point above, and must be admissible or granted a waiver of the inadmissibility ground. In this process the LPR loses her current green card and then applies for a new one in the same hearing, and never is removed.<sup>11</sup> Note that some LPRs are not eligible for a waiver of inadmissibility under § 212(h). See Quick Test/Fact Sheet on § 212(h).

### **3. If the client can't adjust status, is a family visa petition still worth anything?**

Yes! The person will have to leave the U.S., but might be able to come back as an LPR pursuant to the family visa. Depending on various factors, this could take a few weeks or some years; the person should consult with a community agency or immigration attorney. You have two defense goals. First, avoid conviction of an aggravated felony so that the person can request voluntary departure instead of removal. Second, avoid a conviction that makes the defendant inadmissible (or if inadmissible, at least not disqualified from requesting a waiver). See Question 5. If the defendant can *avoid being inadmissible and has an immediate relative visa petition*, he or she might qualify for a “provisional stateside waiver” of bars based on unlawful presence, which would cut down time spent abroad.<sup>12</sup>

### **4. What will happen to my client? How long will this all take?**

**What happens now.** If the client is subject to immigration detention, she will be detained. If she can adjust status through a family visa petition, her family must get help to get the papers filed. If she is eligible for adjustment and is not subject to “mandatory detention” (see discussion in § *N.I Overview*), she might be released from detention. Otherwise she will apply for adjustment in removal proceedings held in the detention facility.

If she is not eligible to adjust status, or the judge denies adjustment as a matter of discretion, she must request voluntary departure and go through consular processing in the home country. Before leaving she needs legal counseling about the consequences of leaving the U.S., and the waivers she will need to apply for if she is ever to return on the family visa.

**How long will it take to immigrate (get the green card)?** This depends upon the noncitizen’s country of birth, when the application for a family visa petition was first filed, and especially on the type of family member. There are two types of family visas: **immediate relative** visas, which have *no* legally mandated waiting period, and **preference visas**, which may require a wait of months or years before the person can immigrate, because only a certain number of these types of visas are made available to that country each year. The categories are:

1. Immediate relative: Noncitizen is the spouse, the parent of a child over 21, or the unmarried child under 21 years of age of a U.S. citizen.
2. First preference: Noncitizen is the unmarried son or daughter (over 21) of a U.S. citizen
3. Second preference: Noncitizen is the spouse or unmarried son or daughter (any age) of a lawful permanent resident
4. Third preference: Noncitizen is the married son or daughter of a U.S. citizen (any age)
5. Fourth preference: Noncitizen is the brother or sister of an adult U.S. citizen (may have a legally mandated waiting period of 15 years or more to immigrate)<sup>13</sup>

<sup>11</sup> *Matter of Rainford* 20 I&N Dec. 598 (BIA 1992); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

<sup>12</sup> See information at [www.uscis.gov](http://www.uscis.gov).

<sup>13</sup> See 8 USC §§ 1151(b), 1153(a) [INA §§ 201(b), 203(a)].

How can you or the client tell how long the wait is for a preference visa? The online “Visa Bulletin” provides some help. To use this you must know the client’s “priority date,” which is the date that their relative first filed the visa petition, as well as the preference category and country of origin. See the Visa Bulletin and instructions for use at <http://travel.state.gov> (select “Visas” and then “Visa Bulletin,” or [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html) ). Note, however, that the Bulletin categories do *not* progress on real time. The date for a particular category might advance slowly, leap ahead, or regress. Consult an immigration lawyer for a realistic approximation of time. When the person’s priority date comes up on the chart, the visa is available and she can apply for the green card.

**5. How can I keep my client from becoming inadmissible, or at least eligible for a waiver?**

This a complex question, and this section will just list the basic categories of inadmissibility. For more information, see materials on inadmissibility and on the § 212(h) waiver. Note that a “dangerous or violent” crime almost never can be waived under § 212(h), and that some permanent residents cannot submit a § 212(h) waiver at all. See Quick Test/Fact Sheet on § 212(h).

<b>Ground of inadmissibility – See 8 USC § 1182(a)(2)</b>	<b>Family Visa Waiver?</b>
Convicted/admitted first simple possession 30 gms or less marijuana	See “§ 212(h) waiver” at 8 USC § 1182(h)
Convicted or admitted any other controlled substance offense	No waiver
Immigration authorities have “reason to believe” person was involved in drug trafficking at any time (no conviction required)	No waiver
Conviction/admitted one crime involving moral turpitude (CIMT) Client is not inadmissible and no waiver is needed if: <ul style="list-style-type: none"> <li>✓ Petty offense exception (only one CIMT, maximum possible sentence = 1 yr or less, sentence imposed = 6 months or less)</li> <li>✓ Youthful Offender exception (convicted as adult of one CIMT committed while under age 18, conviction and any imprisonment ended at least 5 years ago)</li> </ul>	See § 212(h) waiver
Engaged in prostitution (no conviction required)	See § 212(h) waiver
Conviction of 2 or more offenses of any type with aggregate sentence imposed of at least 5 years	See § 212(h) waiver
An aggravated felony conviction is not a ground of inadmissibility <i>per se</i> , but the conviction might cause inadmissibility under the CIMT or drug grounds. Can bar some LPRs from 212(h).	Aggravated felony conviction bars some LPRs from § 212(h)
Prior deportation or removal. Emergency! Client probably <i>illegally re-entered</i> after being removed. This is the #1 prosecuted federal felony in the U.S. Client is at high risk for referral for federal prosecution and prison. If no ICE hold yet, get client out of jail. Family visa is not an option while client is in the U.S.	No waiver for illegal re-entry while in the U.S.; very limited waiver once outside the U.S.

## ASYLEES AND REFUGEES

### Quick Test: Can the Defendant Keep Status? Apply for Adjustment to LPR?

*Asylees and refugees were granted lawful status because they showed that they would be persecuted if returned to the home country. They want to keep their asylee or refugee status. More important, they want to apply to adjust their status to permanent residence*

**1. Is the defendant an asylee or refugee? YES NO**

Ask the person, and photocopy any document. If she has an Employment Authorization card, under “Category” see if it says A5 (asylee), A3 (refugee), or C8 (just an applicant). An asylum applicant may wrongly think that she already has won asylum; see #1 on next page for requirements for asylum applicants.

**→ KEEP DEFENDANT OUT OF REMOVAL PROCEEDINGS.** While the law is complex, assume that to stay out of removal proceedings refugees and asylees need to avoid a conviction of a “particularly serious crime,” and refugees also need to avoid a deportable conviction.

**2. Is the asylee already, or about to be, convicted of a “particularly serious crime”?**

YES NO If yes, the person can be put in removal proceedings.

A particularly serious crime (PSC) includes conviction of any aggravated felony, or of any drug trafficking offense, or other offenses on a case by case basis (usually those involving threat or force against persons, and not a single misdemeanor). See next page.

**3. Is a refugee already, or about to be, convicted of an offense that will make him or her deportable? YES NO** If yes, it appears that the person can be put in removal proceedings.

**4. List, or attach sheet with, prior convictions and current charges that may be deportable offenses or PSC’s. Include code section and sentence.**

**→ ADJUSTMENT OF STATUS.** A year after the person was admitted to the U.S. as a refugee or granted asylum in the U.S., she can apply for adjustment of status to a lawful permanent resident. To do this she must be admissible, or if inadmissible she must be eligible for a special waiver – meaning she must not come within Question 6 or 7, below. If needed she can apply for adjustment as a defense in removal proceedings, so qualifying for adjustment of status is a top priority. See next page.

**5. Is the person inadmissible? YES NO**

**6. Does ICE have “reason to believe” that she ever participated in drug trafficking? YES NO**

If yes, she cannot get the waiver and cannot adjust status to LPR as a refugee or asylee. However if she was not *convicted* for drug trafficking, and she is not otherwise convicted of a PSC (and, if a refugee, also is not deportable) she might be able to keep her asylee or refugee status.

**7. Was the person convicted of a “violent or dangerous” offense? YES NO**

If it is, the waiver of inadmissibility will not be granted *unless* she shows exceptional equities. See next page.

## **MORE FACTS ABOUT ASYLEE AND REFUGEE STATUS**

### **1. How does a person become an asylee or refugee?**

A refugee is a person from a country designated by the U.S. who was granted refugee status after showing a reasonable fear of persecution in the home country due to race, religion, national origin, political opinion or social group. She was admitted into the U.S. as a refugee.

An asylee is a person who entered the U.S. from any country, legally or illegally, and was granted asylee status here, after making this same showing of fear of persecution to an immigration officer or judge. An asylum application must be submitted within one year of entering the U.S., absent extenuating circumstances. The application is barred by conviction of a PSC, and nearly barred by a “violent or dangerous” crime. See below. An applicant barred from asylum by crimes might qualify for withholding or for the Convention Against Torture. See *Chart: Eligibility for Relief, supra*.

### **2. How long can the person remain in that status? What puts them in removal proceedings?**

Asylee or refugee status remains good until it is terminated; it can last for years. Conviction of a “particularly serious crime” is a basis for termination and institution of removal proceedings for an asylee, and a refugee can be placed in removal proceedings for a deportable offense.<sup>14</sup> In some cases a change in conditions in the home country is a basis for termination of status.

### **3. What is a particularly serious crime (PSC)?**

A PSC includes conviction of any aggravated felony, or of any drug trafficking offense (with the exception of a very small drug transaction in which the person was peripherally involved<sup>15</sup>). Other offenses are evaluated as PSC’s on a case-by-case basis depending on whether people were harmed/threatened, length of sentence, and other factors; in many, cases the adjudicator may look beyond the record of conviction.<sup>16</sup> Conviction of mail fraud and of possession of child pornography have been held PSCs. Generally, a misdemeanor that is not an aggravated felony is not a PSC.<sup>17</sup>

### **4. In an application to adjust status as an asylee/refugee, what convictions can be waived?**

A year after either admission as a refugee or a grant of asylum, the person can apply to adjust status to lawful permanent residence. Even an asylee or refugee who is in removal proceedings and subject to termination of status can apply for adjustment, as a defense to removal. The adjustment applicant must be “admissible,” or if inadmissible must be eligible for and granted a discretionary, humanitarian waiver. See 8 USC § 1159(c). This waiver can forgive *any* inadmissible crime, with two exceptions. First, it cannot waive inadmissibility based upon the government having “reason to believe” the person has participated in drug trafficking.<sup>18</sup> Second, the waiver will not be granted if the person was convicted of a “violent or dangerous” crime, unless the person shows “exceptional and extremely unusual hardship” or foreign policy concerns.<sup>19</sup> None of these terms has been specifically defined. In some cases medical hardship for family or applicant has been sufficient hardship for a waiver. Apart from those two exceptions, the waiver can forgive any offense, including an inadmissible conviction that also is an aggravated felony, for example for theft or fraud, or a non-trafficking drug offense.

<sup>14</sup> See 8 USC 1158(c)(2)(B) (asylee), *Matter of D-K-*, 25 I&N 761 (BIA 2012) (refugee).

<sup>15</sup> See *Matter of Y-L-*, 23 I&N Dec. 270 276-77 (AG 2002). Try to put such positive facts in the criminal record.

<sup>16</sup> *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).

<sup>17</sup> *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (absent extraordinary circumstances, misdemeanor is not PSC).

<sup>18</sup> 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

<sup>19</sup> See *Matter of Jean*, 23 I&N Dec. 373, 383-84 (BIA 2002).

## TEMPORARY PROTECTED STATUS (TPS)

### Quick Test: Is the Defendant Eligible?

*Noncitizens from certain countries that have experienced devastating natural disaster, civil war or other unstable circumstances may be able to obtain Temporary Protected Status (TPS). For more information, see online resources or see [A Guide for Immigration Advocates](#) ([www.ilrc.org](http://www.ilrc.org)).*

**1. Is the client a national of a country that the U.S. has designated for TPS? YES NO**

*In what country was the client born? \_\_\_\_\_*

*To see which countries currently are designated for TPS, go to [www.uscis.gov](http://www.uscis.gov). Under “Humanitarian,” click on “Temporary Protected Status.” If the person is not from one of those few designated countries, then TPS is not an option. This country list can change at any time, but see the list as of January 2013, next page.*

**2. If YES: Did, or can, the client meet the TPS requirements for nationals of his or her country, in terms of date of entry into the U.S. and date of registration for TPS? YES NO.**

Required date of entry into U.S.: \_\_\_\_\_ Client’s date of entry \_\_\_\_\_

Deadline for registration/re-registration: \_\_\_\_\_ Client’s reg. date, if any \_\_\_\_\_

*It may be difficult to tell what dates apply to the client by looking at the CIS on-line materials. A nonprofit immigration agency or an immigration attorney can help with this. See next page.*

**3. Can the client avoid convictions that are bars to eligibility for TPS?**

*Try to avoid the following automatic disqualifiers. Circle if client has a prior or is charged with:*

- ✓ Any felony conviction (an offense with a potential sentence of more than a year)<sup>20</sup>
- ✓ Any two misdemeanor convictions (offenses with a potential sentence of a year or less)<sup>21</sup>
- ✓ Conviction of an offense relating to a controlled substance
- ✓ Immigration authorities have substantial evidence that the person ever has been or helped a drug trafficker, even if no conviction
- ✓ Evidence that the person was a prostitute (sexual intercourse for a fee), even if no conviction
- ✓ Conviction of a crime involving moral turpitude (CIMT), *unless* it comes within the petty offense or youthful offender exceptions.
  - Petty offense exception: client committed only one CIMT, which carries a potential sentence of a year or less, and a sentence of no more than six months was imposed
  - Youthful offender exception: client committed only on CIMT while under age of 18 and conviction and resulting jail ended at least five years ago.

<sup>20</sup> In California, a “wobbler” felony/misdemeanor conviction will be a misdemeanor for this purpose if it is designated as or reduced to a misdemeanor. See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>21</sup> A conviction of an offense classed as an “infraction” or other offense that is less than a misdemeanor should not be considered not a misdemeanor for this purpose.

## Facts About Temporary Protected Status (TPS)

### **1. What is Temporary Protected Status? What benefits does the client get from it?**

The Secretary of Homeland Security may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood, drought, or other extraordinary and temporary conditions.

Nationals of that country who are granted TPS will be permitted to stay legally in the U.S. for a designated period of time, and will receive employment authorization.<sup>22</sup> TPS is usually granted for about a year, but it can be renewed multiple times. TPS is not permanent resident status (green card).

### **2. What are the requirements for Temporary Protected Status?**

- National of a country that was designated for TPS
- Continuous presence in U.S. since the date required for nationals of that country
- Registered and/or re-registered on time, or eligible to late-register
- Admissible (not inadmissible for crimes)
- Not convicted of a felony or two or more misdemeanors
- Not barred from “withholding of removal” (has not persecuted others, not convicted of “particularly serious crime”)

### **3. Which countries are designated for TPS?**

The list changes frequently. To see which countries currently are designated for TPS and special requirements for each country’s nationals, consult [www.uscis.gov](http://www.uscis.gov).<sup>23</sup> **As of January 1, 2013, El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan and Syria** were designated for TPS. Usually the designation is for just a year at a time, but several renewals are possible.

### **4. What are the “physical residence” and “registration” requirements?**

When it announces the TPS designation of a country, the U.S. will set a date by which the nationals of the country must have resided in the U.S. in order to qualify. The U.S. also will set a deadline for nationals of that country to “register” (apply for TPS). If TPS is extended again past the first period, the person must re-register by a certain date. In some cases late registration is permitted, for example where the person had a pending immigration case, or for some relatives of persons granted TPS. See discussion at [www.uscis.gov](http://www.uscis.gov). Lawsuits may provide more opportunity for late registration.

### **5. What is the downside and the upside to applying for TPS?**

The downside is that an applicant for TPS is giving DHS her contact information and telling them that she is here without lawful status. While we are not aware of cases where people were put in removal proceedings simply because TPS was ended for their country, it could happen.

The upside is that in some cases, TPS has resulted in lawful status for a few years to well over a decade, allowing the person to remain in the U.S. lawfully with employment authorization.

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<sup>22</sup> INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

<sup>23</sup> Go to [www.uscis.gov](http://www.uscis.gov) and click on “Humanitarian” and then “Temporary Protected Status.”



## § N.18 Other Resources

### *Books, Websites, Services*

#### **Books**

***Immigrant Legal Resource Center.*** Along with writing *Defending Immigrants in the Ninth Circuit*, 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/crimes](http://www.ilrc.org/crimes) 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](http://www.ilrc.org) or contact ILRC to ask for a brochure.

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

#### **Websites**

The government provides some good websites. Board of Immigration Appeals (BIA) decisions can be accessed from a government website, as from Westlaw, Lexis, etc. Go to <http://www.justice.gov/eoir/> and click on "Virtual Law Library" and look for "BIA/AG administrative decisions." Memos and policy statements can be accessed from two government websites, [www.uscis.gov](http://www.uscis.gov) (adjudicating applications) and [www.usice.com](http://www.usice.com) (enforcement).

The national Defending Immigrants Project provides written resources, training and consultation to criminal defenders across the country who represent indigent noncitizen defendants. It includes a free, online national manual, power points of trainings, and a library of state-specific charts and resources. Access to the website is free, but you must register. Go to [www.defendingimmigrants.org](http://www.defendingimmigrants.org). The Project is staffed by the Immigrant Legal Resource Center, the Defending Immigrants Project, and the National Immigration Project of the National Lawyers Guild; national defender partners are the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association.

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 extensive information about forms of relief such

as DACA (Deferred Entry of Childhood Arrivals), the U Visa for victims of crimes, applications for persons abused by U.S. citizen parent or spouse under the Violence Against Women Act (VAWA). Go to [www.ilrc.org](http://www.ilrc.org)

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

The Immigrant Defense Project in New York has excellent practice guides as well as a chart of immigration consequences of New York offenses. Go to [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org).

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.nortontooby.com](http://www.nortontooby.com).

### **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.nortontooby.com](http://www.nortontooby.com) and click on seminars. The ILRC presents seminars on a variety of immigration issues, including crimes, inadmissibility, enforcement, and policy. Go to [www.ilrc.org](http://www.ilrc.org) and click on seminars.

### **Consultation**

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

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

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

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