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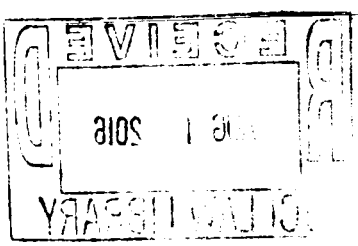

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52
REPRESENTING THE NONCITIZEN CRIMINAL DEFENDANT

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◇ §52.1 I. OVERVIEW

Immigration consequences of criminal conviction. Strategic decisions made by an immigrant's criminal defense attorney are crucial; strategic plea bargaining or amelioration of criminal convictions may soon be the only avenues that remain for many noncitizen defendants to avoid removal or permanent bars to immigration, which can be far worse than the criminal penalties.

▶ **Note:** The term "removal" now includes both deportability under 8 USC §1227 and inadmissibility under 8 USC §1182. The process of excluding someone from the United States now also occurs during a "removal" hearing. The term for "excludable" is "inadmissible." See Pub L 104–208, 110 Stat 3009.

Immigration consequences of a criminal conviction can include removal, permanent ineligibility for lawful immigration status, extended or even indefinite periods of immigration detention, and permanent separation from family members who are U.S. citizens. No matter how long one has lived in the United States, and regardless of whether that residence has been in accordance with the law, convicted noncitizens can be ordered deported and will sometimes be permanently ineligible to return. With proper planning, however, defense counsel representing a noncitizen in a pending criminal case may be able to obtain a disposition that avoids serious immigration consequences.

▶ **Note:** Practitioners should not rely exclusively on this chapter but should seek guidance from immigration attorneys experienced in crime-related issues or from the Immigrant Legal Resource Center, discussed in "Resources," below.

Reentering the United States. All noncitizens, even those legally admitted to the United States on a permanent basis, are subject to the grounds of inadmissibility when entering the United States. Any trip outside the United States has the potential of bringing the existence of one or more of these grounds to the attention of the Department of Homeland Security's Bureau of Citizenship and Immigration Services. This means that a lawful permanent resident who goes outside of the United States can be forever excluded and never allowed to return to home, job, and family if he or she is inadmissible. In addition, corollary (but not identical) grounds of deportability exist and can

make any noncitizen removable, regardless of the legality of his or her latest admission to the United States. As a rule, there are no statute of limitations or laches defenses applicable in immigration law.

Defense counsel's duty to noncitizen client. Because deportation is an integral part of the penalty that may be imposed on defendants who plead guilty to specified crimes, criminal defense counsel have an affirmative duty to give accurate advice to each defendant regarding whether the plea carries a risk of deportation, and the degree of that risk, and counsel's failure to do so is constitutionally deficient performance in violation of the Sixth Amendment. *Padilla v Kentucky* (2010) 559 US 356, 130 S Ct 1473. See *Chaidez v U.S.* (2013) ___ US ___, 133 S Ct 1103 (*Padilla* does not apply retroactively regarding "failure to advise" claims; *Chaidez* specifically does not apply to affirmative misrepresentation claims, so they are not barred by *Chaidez*).

Because of the structure of immigration law, a defense attorney's goal is always to seek a result that avoids creating a ground of inadmissibility or deportability, or an outcome that could result in a bar to potential future immigration relief or, for undocumented defendants, a bar to Deferred Action for Childhood Arrivals (DACA) or Deferred Action for Parental Accountability (DAPA) without any other form of immigration relief. Defense counsel must also make every effort to avoid and mitigate the potential immigration consequences of a plea while pursuing the traditional goals of shorter sentences and less serious dispositions. The first step in analyzing a case is to find out the defendant's current or potential immigration status. This information is necessary to identify the specific immigration effects of a disposition. Counsel must investigate the client's immigration status, research the immigration law, and inform the client very specifically about the actual, not merely the possible, consequences. In addition, counsel must actively attempt to avoid unfavorable consequences if possible. Failure to do so may constitute ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 241. See *Lafler v Cooper* (2012) ___ US ___, 132 S Ct 1376, 1385 (prejudice from IAC in plea bargaining may be shown by reasonable probability defendant would have accepted more favorable plea absent counsel's error).

Because even relatively minor offenses (*e.g.,* misdemeanor possession of a small amount of a controlled substance) can carry drastic immigration consequences, an especially vigorous defense may be required for a noncitizen. Defense counsel may need to arrange an unusual plea or sentencing agreement or take the case to trial. Some defendants are willing to risk or sacrifice all other considerations to avoid adverse immigration consequences. The defense may have to be conducted completely differently from the typical criminal defense of a U.S. citizen.

The court must advise a defendant pleading guilty or no contest that, if he or she is a noncitizen, the plea could result in deportation, denial of naturalization, or exclusion from reentry. Pen C §1016.5. Defense counsel must go beyond this general warning, however, and advise the client of the *actual,* specific immigration consequences the plea will trigger in the defendant's case, and attempt to defend against them. See, *e.g., Padilla v Kentucky, supra*; *People v Barocio* (1989) 216 CA3d 99; *People v Soriano* (1987) 194 CA3d 1470. (Note that the Judicial Recommendations Against Deportation (JRADs) discussed in *Barocio* and *Soriano* are no longer available; see discussion in §52.11.) In fact, defense counsel's failure to advise the defendant of immigration consequences, as well as incorrect advice to the client on the immigration

consequences of a criminal case, can constitute ineffective assistance of counsel, requiring reversal if prejudice is shown. *Padilla v Kentucky, supra; U.S. v Rodriguez-Vega* (9th Cir 2015) 797 F3d 781, 786 (when law is succinct, clear, and explicit that conviction renders removal virtual certainty, counsel must so advise client and failure to do so is ineffective assistance).

See discussion in §52.8.

Resources. This chapter is an overview rather than an exhaustive discussion. Counsel should obtain expert advice on individual cases. The Immigrant Legal Resource Center (http://www.ilrc.org) in San Francisco will provide consultation to attorneys and agencies on the immigration consequences of criminal cases, for a fee. For information, call (415) 255–9499. The address is 1663 Mission Street, Suite 602, San Francisco, CA 94103. For referrals to immigration attorneys, contact the American Immigration Lawyers Association, 918 F Street NW, Washington, DC 20004, (202) 216–2400 (http://www.aila.org); the local bar association; or the National Immigration Project of the National Lawyers Guild, 14 Beacon Street, Suite 602, Boston, MA 02108, (617) 227–9727 (http://www.nationalimmigrationproject.org). Although community agencies generally cannot advise criminal defense counsel on questions involving the adverse immigration consequences of convictions, they may be able to accept an indigent defendant's immigration case after the criminal issues have been resolved. See Immigration Advocates Network (http://www.immigrationadvocates.org).

A regularly updated chart detailing the immigration consequences of common California offenses, together with notes and practice advisories describing plea strategies in criminal court for immigrants, is available without charge from the Immigrant Legal Resource Center at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php. This chart is frequently updated. A federal chart is available at the website of the National Immigration Project of the National Lawyers Guild (http://www.nationalimmigrationproject.org).

Defense counsel should also consult an in-depth research guide, such as N. Tooby & K. Brady, California Criminal Defense of Immigrants (Cal CEB); Brady et al., Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (10th ed) (Defending Immigrants), which contains advice for criminal counsel tailored to California law and is available from the Immigrant Legal Resource Center in San Francisco at the above address; Kesselbrenner & Rosenberg, Immigration Law and Crimes, available from West Group, COP, 610 Opperman Drive, Eagan, MN 55123, (800) 344–5009 (http://west.thomson.com/store); or Tooby & Rollin, Criminal Defense of Immigrants; Tooby, California Post-Conviction Relief for Immigrants, available from Law Offices of Norton Tooby, 6333 Telegraph Avenue, Suite 200, Oakland, CA 94609, (510) 601–1300; and Tooby's Guide to Criminal Immigration Law, available without charge as a pdf file at http://www.NortonTooby.com.

II. UNIQUE ASPECTS OF NONCITIZEN DEFENDANT CASES

☑ §52.2 A. Checklist: Basic Procedure for Criminal Defense of Immigrants

❒ Ascertain client's nationality and immigration status.

The starting point for criminal defense of immigrants is always to ascertain and verify the client's nationality. This can be done by obtaining a reliable answer to the question, "Are you a citizen of the United States?" This must be done in every single criminal case, because the nationality of the defendant is often not obvious. He or she may be Canadian or may have immigrated to the United States as a child and grown up here and thus be superficially indistinguishable from a native-born "American." About 20 percent of the time, a California criminal defendant will not be a citizen of the United States and will need the special defense outlined in this chapter.

It is crucial to obtain reliable evidence of nationality. Many clients may give an incorrect answer to the citizenship question because they misunderstand it. For example, a client may believe the concept of "citizen" includes a lawful permanent resident with papers legalizing his or her immigration status in the United States (see *People v Castro-Vasquez* (2007) 148 CA4th 1240, 1246 n6), or a client may truly be unaware that he or she is not a U.S. citizen, having been brought here as an infant and never having been told of his or her noncitizen status. It is crucial to verify that the defendant's stated immigration status is accurate. Counsel should explain the importance of obtaining a correct answer and ask where the client was born and (if born abroad) how he or she obtained U.S. citizenship. If the defendant has any immigration documents, counsel should photocopy them and check with immigration counsel if necessary to verify immigration status.

It is also important to learn whether one or both of the defendant's parents (or the sole custodial parent) were naturalized while the defendant was an unmarried lawful permanent resident under 18. If so, the defendant may have automatically, by operation of law, become a U.S. citizen when the parent(s) naturalized, even without filing any application or any official government action. A child may also under certain circumstances acquire U.S. citizenship from his or her U.S. citizen parents, even if born abroad. See Brady et al., Defending Immigrants §11.20 (10th ed).

❒ **Obtain from the client the information necessary to formulate a strategy to avoid unnecessary immigration consequences.**

The client can provide initial information on his or her immigration status that counsel will need to assess what immigration effect various possible convictions and sentences will have. For a suggested "Basic Immigration Status Questionnaire," see §52.3. Counsel will also need the client's rap sheet and charge of conviction, plea, and sentence for prior convictions, as well as information on the current charges, likely plea bargains, and likely sentences.

❒ **Call an immigration expert or research the exact immigration consequences of any proposed plea or option.**

Calling an expert is the easiest way to obtain up-to-date information on the immigration consequences of the various possible alternative dispositions and sentences. Unless counsel has personally researched the specific immigration questions facing the individual client, using up-to-date resource material, expert immigration advice is absolutely necessary. It is very dangerous simply to send the client to an immigration lawyer, because the best strategy for the defense of the criminal case must be determined by criminal and immigration counsel conferring together. As a layperson, the client may be unable to understand and convey the complexities of immigration law from

the immigration lawyer to the criminal lawyer, and certainly cannot relay information in the back-and-forth discussion necessary to formulate a joint strategy. It is therefore necessary for criminal and immigration counsel to speak directly to one another after first assembling the necessary information.

Potential adverse immigration consequences may be eliminated or ameliorated through a variety of techniques, often without sacrificing traditional criminal defense goals. Criminal defense counsel should establish an ongoing relationship with an office such as the Immigrant Legal Resource Center (see §52.1) or a specific immigration attorney with experience of criminal problems of immigrants to receive consistent advice in this area as needed.

❒ **Explain the specific immigration consequences to the client.**

Counsel must discover the actual, specific immigration consequences—*e.g.*, disqualification from political asylum or naturalization, loss of lawful permanent resident status, deportation, permanent ineligibility for lawful status, disqualification from waivers—and explain them clearly to the client. A general or uninformed presentation is insufficient. See, *e.g., People v Barocio* (1989) 216 CA3d 99; *People v Soriano* (1987) 194 CA3d 1470 (client given general Pen C §1016.5 advice; conviction nonetheless vacated on grounds of ineffective counsel for failure to warn about *actual* consequences).

❒ **Ask the client how high a priority he or she places on the immigration consequences.**

Once the client understands what the actual immigration consequences will be, he or she may or may not make them a defense priority. Some clients are not willing to risk more time in jail in an effort to safeguard their immigration status. Others place the right to remain with their families in the United States as their highest priority and will sacrifice almost any other consideration. Such clients may be willing to plead to additional counts or serve extra time in custody, for example, to alter the conviction to one that will not trigger deportation. These difficult choices must be made by the client, once he or she is fully informed.

❒ **Attempt to avoid the adverse immigration consequences.**

It is not enough simply to tell the client the problem: it is necessary to attempt to achieve a solution. See *People v Bautista* (2004) 115 CA4th 229, 241. Placing a high priority on immigration consequences may cause a drastic change in defense strategy. First, counsel must determine precisely what disposition will minimize or eliminate immigration consequences. Doing so requires a good knowledge of the immigration law or expert advice. Some ideas for safe dispositions are discussed in this chapter. They can include diversion without a guilty plea (see §52.29), dismissal, acquittal, delay of a conviction, a carefully framed sentencing disposition, or a plea to another "safe" offense, even one only tenuously connected to the offense charged. For a frequently updated and comprehensive discussion of how to avoid adverse immigration consequences, see the chart, notes, and practice advisories at http://www.ilrc.org/crimes and N. Tooby & K. Brady, California Criminal Defense of Immigrants (Cal CEB). Second, counsel must try to negotiate an immigration-neutral disposition if possible. Several of the largest prosecution offices, including Santa Clara County, Ventura County, and Alameda County, have written policies in place that allow prosecutors to take immigra-

tion consequences into account in resolving cases. Other counties have not yet adopted such policies, although this practice has been approved by legislation, as well as the courts. See Pen C §1016.5(d). The Santa Clara County policy is available at http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf.

Vigorous criminal defense work—including strategies not normally used in defense of a minor charge—may be required. For example, clients may choose to take minor cases to trial, even if there is only a slim possibility of acquittal, if the alternative is certain deportation.

❒ **Advise client not to talk about noncitizen status.**

Counsel should advise the defendant, and his or her family, not to volunteer or admit to noncitizen status when speaking with anyone, particularly court personnel, law enforcement, and prosecutors. See *In re Adolfo M.* (1990) 225 CA3d 1225, 1230 (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

§52.3 B. Interviewing Noncitizen Criminal Defendants and Basic Immigration Status Questionnaire

Defense counsel should inform a noncitizen criminal defendant of the following rights:

• The right to refuse to speak with immigration officials or to answer any questions about country of birth, nationality, immigration status, or manner of entry into the United States. This right is based on the privilege against self-incrimination, because certain immigration violations also carry criminal penalties. See, *e.g., Bong Youn Choy v Barber* (9th Cir 1960) 279 F2d 642; *Estes v Potter* (5th Cir 1950) 183 F2d 865. Persons who have reentered the United States after deportation for criminal convictions should especially decline to speak with the DHS, which may interview them in jail if they are incarcerated for another offense. The DHS conducts interviews to identify detainees for federal criminal prosecution for unlawful reentry under 8 USC §1326(b)(2), which can carry a potential 20-year federal prison sentence (see §§52.8, 52.64), as well as to identify persons for removal.

• The right not to reveal or to be forced to disclose the defendant's immigration status to the court. Pen C §§1016.3(c), 1016.5(d).

BASIC IMMIGRATION STATUS QUESTIONNAIRE

Purpose: To obtain the facts necessary for an immigration lawyer to determine the exact immigration consequences of a criminal conviction.

Documents: Photocopy any immigration documents or passport. [See §52.2.]

Criminal History: Information on rap sheets; charge of conviction, plea, and sentence for significant prior conviction(s); current charges; police reports; and possible dispositions should be in hand before calling immigration counsel.

Client's name	Date of interview	Date of birth
Client's immigration attorney	Attorney's phone no.	

Immigration hold? YES ___ NO ___[See §5.6.]

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

Significant departures: Date: _____ Length: _____

Purpose: _____

Date last entered U.S.: _____ Visa Type: _____

2. *Nationality:* Country of birth: _____ Would client have any fear about returning? YES ___ NO ___ If yes, why?

_____

What language (and dialect) does client speak? _____

Is an interpreter needed? YES ___ NO ___[See §52.7.] (Often, defendants who do not need an interpreter for office or jail interviews will need one for formal court sessions.)

3. *Immigration Status:* Lawful permanent resident? YES ___ NO ___ If yes, date client obtained green card: _____

Other special immigration status: (refugee) (asylee) (temp. resident) (work permit) (TPS) (Family Unity) (ABC) (undocumented) (DACA) (DAPA) (visa type: _____). Date obtained: _____

Did anyone ever file a visa petition for client? YES ___ NO ___
Name and number: _____ Date: _____

Type of visa petition: _____ Was it granted? YES ___ NO ___ Date: ____

Has the INS or DHS been involved with client in this case or earlier? YES ___ NO ___

Does client have a pending immigration case or application? YES ___ NO ___

Is client eligible for DACA or DAPA? YES___ NO___ (see §§52.63–52.64)

4. *Deportations:* Has client ever been deported? YES ___ NO ___ Date: _____

Reason: _____

Has client ever been excluded? YES ___ NO ___ Date: _____

Reason: _____

Does client have an immigration court date pending? YES ___ NO ___

Reason: _____ Date: _____

(Call 800–898–7180 and provide client's immigration file number to obtain next immigration court date.)

5. *Prior Immigration Relief:* Has client ever before received a waiver of deportability (former INA §212(c) relief or cancellation of removal) or suspension of deportation?
YES ___ NO ___ Which: _____ Date: _____

6. *Relatives With Status:* Does client have a U.S. citizen: (parent) (spouse) (child(ren)) (DOB(s) _____), (brother) or (sister)? YES ___ NO ___

Does client have a lawful permanent resident (spouse) or (parent)? YES ___ NO ___

7. *Employment:* Would client's employer help client immigrate? YES ___ NO ___

Occupation: _____

Employer's name and number: _____

8. *Possible Unknown U.S. Citizenship:* Was client's or spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES ___ NO ___

Was client a permanent resident under age 18 when one or both parents (or the sole custodial parent) naturalized to U.S. citizenship? YES ___ NO ___
Date(s) of naturalization: _____

9. *Abuse:* Has client been abused by his or her spouse or parents? YES ___ NO ___

10. *Criminal Record:* What prior convictions does client have in California or in other jurisdictions or countries? Include all offenses to which a plea or verdict was entered, even if rehabilitative relief was later obtained.

Date Committed	Date of Plea	Exact Statute of Conviction	Date of Sentence

(Counsel should examine the wording of the exact statute and charge of each conviction, the plea transcript, and sentence to determine whether a prior conviction will affect client's immigration status. See §52.26.)

§52.4 C. Main Defense Goals in Representing Juveniles

Dispositions in juvenile proceedings do not constitute convictions for immigration purposes. *Matter of Ramirez-Rivero* (BIA 1981) 18 I&N Dec 135; *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. Thus, a finding of delinquency in juvenile court will not be considered a conviction to make a juvenile deportable or inadmissible, or for purposes of the three-misdemeanor/one-felony/"significant misdemeanor" bar to Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) (although they can be considered in the exercise of discretion for DACA and DAPA) and similar bars in other programs. For a detailed discussion of DACA and DAPA, see §§52.63–52.64. A conviction in adult court, however, of a person who was under 18 at the time of the offense will constitute a conviction for immigration purposes. *Vargas-Hernandez v Gonzales* (9th Cir 2007) 497 F3d 919. Counsel should also be aware that a juvenile court may conduct wardship proceedings on the basis of a finding that the juvenile committed a federal criminal offense, since wardship proceedings are not barred by preemption. *In re Jose C.* (2009) 45 C4th 534.

Family Unity benefits. In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, however, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Pub L 104–208, 110 Stat 3009) denies Family Unity benefits to persons who commit an act of juvenile delinquency that if committed by an adult would be a violent felony involving the use or attempted use of physical force against another or a felony involving a substantial risk that physical force against another will be used in its commission. IIRIRA §383.

The 1996 statute applies the new Family Unity rule to benefits "granted or extended" after September 30, 1996. See IIRIRA §383. Arguably, the new rule applies only to acts of juvenile delinquency *committed* after September 30, 1996, because there is a general presumption against retroactive application of laws. See *INS v St. Cyr* (2001) 533 US 289, 121 S Ct 2271.

In the future, Congress may well single out drug trafficking as a juvenile offense that triggers special immigration penalties and apply that provision retroactively. Consequently, whenever possible, juvenile defenders should, as with crimes involving violence, avoid dispositions involving drug trafficking.

Conduct-based grounds of inadmissibility or deportability. Juvenile dispositions might be held to bring a noncitizen within a *conduct-based* ground of inadmissibility or deportability, *i.e.,* one that does not depend on a conviction. See §52.50 for discussion of these grounds. For example, one ground for deportation and inadmissibility applies to persons who are or have been drug addicts or drug abusers. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). The definition of "drug abuser" has not been firmly established, but some U.S. consulates currently define it as anything more than a one-time experimentation with an illegal drug. In juvenile proceedings, the best course is not to admit to committing any drug offense. If an admission is inevitable, it is better to admit possession than sale or possession for sale. Admissions of drug addiction might be held to be a basis for inadmissibility or deportation.

A finding in juvenile court of a moral turpitude offense might bar the immigrant from later receiving the benefit of the petty offense exception to inadmissibility, on the basis of a later adult moral turpitude conviction, because the petty offense exception is available only to those who have *committed* only one crime involving moral turpitude (*i.e.,* the current adult conviction). 8 USC §1182(a)(2)(A)(ii)(II). See §§52.38–52.40.

Juveniles bound over to adult court after a hearing under Welf & I C §707 and tried or convicted by plea there will suffer convictions under immigration law. See Brady et al., Defending Immigrants, chap 2A (10th ed).

▶ **Note:** Review the defendant's entire criminal history before making a disposition.

It may be possible to avoid these immigration consequences by having the juvenile court record sealed, because the DHS is thereby precluded from seeing the record. See Welf & I C §826. The DHS may, however, have other sources of information, in which event sealing the record may be ineffective. Juveniles who are tried as adults may also be eligible for sealing of records under Pen C §1203.45 or Welf & I C §§1772 and 1179. An expungement, under Welf & I C §§1179, 1772, of a first-offense simple possession conviction may eliminate it for all immigration purposes. See §52.14. Sealing the records may eliminate evidence that the defendant has suffered a conviction of a drug offense as well as a crime involving moral turpitude. *Matter of Lima* (BIA 1976) 15 I&N Dec 661; *Matter of Andrade* (BIA 1974) 14 I&N Dec 651.

▶ **Note:** Juveniles in dependency proceedings and delinquency proceedings may be eligible for permanent residency as "special immigrant juveniles." 8 USC §1101(a)(27)(J); CCP §155(a) (superior court, including juvenile division, authorized to make special immigrant juvenile (SIJ) findings). See *In re Christian H.* (2015) 238 CA4th 1085, 1093 (having found that returning to mother in Honduras was not in minor's best interest, court was barred from ordering placement with mother as disposition); *In re Israel O.* (2015) 233 CA4th 279, 291 (on issue of first impression, holding that availability of safe and suitable parental home does not bar minor from establishing that reunification with one parent is not viable, because of abuse, neglect, or abandonment); *Eddie E. v Superior Court* (2015) 234 CA4th 319 (same, but finding statute not ambiguous

and death of one parent enough to satisfy requirement); *Leslie H. v Superior Court* (2014) 224 CA4th 340 (juvenile's delinquency adjudication did not disqualify her from special immigrant juvenile status); *Eddie E. v Superior Court* (2013) 223 CA4th 622 (trial court erred in denying SIJ status by failing to consider whether resident alien has been "legally committed to, or placed in the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States"); *B.F. v Superior Court* (2012) 207 CA4th 621 (probate court had authority to make "special immigrant juvenile" status findings in guardianship proceedings). For practice advisories and more thorough discussion, see http://www.ilrc.org/info-on-immigration-law/remedies-for-immigrant-children-and-youth. Juveniles who have been abused by a parent who is either a permanent resident or a U.S. citizen may be eligible for permanent residency under the Violence Against Women Act (see 8 USC §§1154(a)(1)(A)(iv), (B)(iii), 1229b(b)(2)), even if they are not in dependency proceedings. See §52.61.

Confidentiality of juvenile court records regardless of minor's immigration status. Welfare and Institutions Code §831 (added by Stats 2015, ch 267, §2 (AB 899), effective January 1, 2016) is a declaratory statute clarifying that juvenile court files should remain confidential regardless of the juvenile's immigration status. Section 831 reiterates the importance of protecting all minors: "Confidentiality is integral to the operation of the juvenile justice system in order to avoid stigma and promote rehabilitation for all youth, regardless of immigration status." Welf & I C §831(a).

Section 831 specifically forbids, absent a court order from the judge of the juvenile court after the filing of a petition under Welf & I C §827, the following:

- The disclosure of juvenile information to federal officials;
- The dissemination of juvenile information to federal officials;
- The attachment of juvenile information to any other documents given to federal officials;
- The dissemination of juvenile information by federal officials;
- The attachment of juvenile information to any other documents provided by federal officials.

"Juvenile information" includes the juvenile case file and information related to the juvenile, including but not limited to name, date or place of birth, and the immigration status of the juvenile that is obtained or created independent of, or in connection with, juvenile court proceedings about the juvenile and maintained by any government agency, including but not limited to a court, probation office, child welfare agency, or law enforcement agency. Welf & I C §831(e).

D. Noncitizen Status

§52.5 1. Noncitizen Status as Affecting Bail

The categorical denial of bail on the basis of noncitizen status is unconstitutional. *Lopez-Valenzuela v Arpaio* (9th Cir 2014) 770 F3d 772, 786 (en banc) (no evidence that undocumented status correlates closely with unmanageable flight risk; assumption ignores those undocumented immigrants who have strong ties to their community or

do not have a home abroad). And the existence of an ICE detainer and the probability of a defendant's immigration detention and removal before trial are not a proper basis for pretrial detention. *U.S. v Santos-Flores* (9th Cir 2015) 794 F3d 1088, 1092 (discussing Federal Bail Reform Act). However, admission to bail of a convicted felon is discretionary, and the ruling by a trial court on a motion for bail pending appeal is not to be disturbed absent a manifest abuse of discretion. *People v Marghzar* (1987) 192 CA3d 1129, 1141. Therefore, in a prosecution resulting in conviction for insurance fraud and grand theft, the court did not abuse discretion in setting high bail pending appeal when it considered relevant factors, including the fact that the defendant had prior felony convictions, was a defendant in a civil suit for fraud, was under investigation by the IRS, and was not a U.S. citizen. *People v Marghzar, supra.*

▶ **Note:** When there is a risk that ICE will detain an individual after he or she is released from criminal custody, defense counsel, before advising the posting of bail, should analyze whether the defendant is at risk of being placed in mandatory immigration detention, in which case the defendant may be transferred into immigration custody anywhere in the United States before the criminal case is resolved. This difficult question is worthy of detailed discussion with experienced immigration counsel. See Immigrant Legal Resource Center, *Organizer Alert: Life After "PEP-Comm,"* available at http://www.ilrc.org/files/documents/ilrc_organizers_advisory-2015–01_06.pdf. A plea to an offense triggering mandatory immigration detention can result in ICE detaining an individual when he or she is released from criminal custody and thereby sabotage all normal favorable sentence options targeted by counsel and client, such as release to alcohol or drug treatment, domestic violence programs, student or work furlough, or even probation or parole. Local law enforcement agencies, however, do not have unfettered authority to assist ICE with their immigration enforcement efforts. See Immigrant Legal Resource Center, *Immigration Authority of Local Law Enforcement,* available at http://www.ilrc.org/files/documents/lea_immig_faqs_post_announce.pdf.

§52.6 2. Noncitizen Status as Affecting Other Issues

Denial of probation. A trial court must consider the collateral effects of imprisonment on the defendant and the defendant's family in deciding whether to grant probation. Cal Rules of Ct 4.414(b)(5)–(6). The court may properly consider a defendant's status as an undocumented noncitizen when deciding whether to grant probation. *People v Sanchez* (1987) 190 CA3d 224 (probation denied).

Probation conditions. A probation condition requiring the defendant to leave the state is unconstitutional banishment. *Alhusainy v Superior Court* (2006) 143 CA4th 385. The failure to appear in court for a review hearing is not a probation violation if it is impossible for the undocumented noncitizen probationer to appear because he or she is in immigration custody. *People v Cervantes* (2009) 175 CA4th 291. See, *e.g., People v Galvan* (2007) 155 CA4th 978 (probationer's failure to report to probation within 24 hours of release from county jail did not constitute willful violation that justified revocation of probation, since federal government deported defendant to Mexico immediately on release from county jail, making it impossible to report).

Note that in a case where the trial court found the defendant in violation of his probation for illegally reentering the country after the original court-imposed period

of probation had expired, the California Supreme court held that the trial court could not find the defendant in violation of probation solely on the basis of conduct that occurred after the expiration of the probationary period. *People v Leiva* (2013) 56 C4th 498. See Pen C §1203.3.

Proposition 36. In *People v Espinoza* (2003) 107 CA4th 1069, the court of appeal held that Proposition 36 probation was not mandatory for a defendant who was an undocumented noncitizen with a substantial criminal history, because it was impossible to condition probation on completion of a drug treatment program in view of the substantial likelihood that the defendant would be deported.

Illegal detention. Border stops are deemed reasonable. *U.S. v Ramsey* (1977) 431 US 606, 619, 97 S Ct 1972. Stops by border agents at reasonably located, fixed checkpoints are deemed reasonable. *U.S. v Martinez-Fuerte* (1976) 428 US 543, 562, 96 S Ct 3074. Other immigration detentions, however, *e.g.,* stops by roving patrols of border patrol agents, must be supported by specific, articulable facts giving rise to a reasonable suspicion. *U.S. v Brignoni-Ponce* (1975) 422 US 873, 884, 95 S Ct 2574; *U.S. v Garcia-Camacho* (9th Cir 1995) 53 F3d 244; *People v Valenzuela* (1994) 28 CA4th 817 (stop at agricultural station must be supported by probable cause; single factor of Mexican appearance insufficient to support belief that person is illegal alien).

§52.6A 3. The California TRUST Act

The TRUST Act was signed into law by Governor Jerry Brown on October 5, 2013. See Govt C §§7282, 7282.5. The TRUST Act prohibits a law enforcement official or local law enforcement agency from detaining an individual in custody on the basis of an immigration hold or immigration detainer beyond the time the person is eligible for release from criminal custody, unless statutorily enumerated conditions are met, including that the individual has been convicted of a statutorily enumerated crime or a magistrate has made a probable cause finding that the individual committed a qualifying felony. Govt C §7282.5(a). Even assuming that a law enforcement agency is allowed to detain an individual beyond his or her release time, it cannot hold the person for more than 48 hours. See 8 CFR §287.7.

§52.6B a. Litigation

Since the enactment of the TRUST Act, significant litigation has ensued on the legality of detaining individuals for any amount of time on the sole basis of an "ICE Hold." Courts have held that any detention of an individual beyond his or her release from criminal custody violates an individual's Fourth Amendment rights.

In *Miranda-Olivares v Clackamas County* (Apr. 11, 2014, No. 3:12-cv-02317-ST) 2014 US Dist Lexis 50340, the federal district court in Portland, Oregon, held that Clackamas County violated Ms. Miranda-Olivares's constitutional rights when it continued to detain her solely on the basis of the issuance of an ICE detainer (Form I-247). The court held that Clackamas County was liable for damages under 42 USC §1983 because the prolonged detention based solely on the ICE hold after Ms. Miranda-Olivares

was eligible for release constituted a new arrest and necessitated a finding of probable cause independent of the initial finding for violating state law.

In *Galarza v Szalczyk* (3d Cir 2014) 745 F3d 634, 640, the court held that "immigration detainers are requests and not mandatory orders" and noted that "all federal agencies and departments having an interest in the matter have consistently described such detainers as requests." See *Immigration Law—Criminal Justice and Immigration Enforcement—California Limits Local Entities' Compliance with Immigration and Customs Enforcement Detainer Requests—TRUST Act,* 127 Harv L Rev 2593, 2596–2597 (2014) ("And even if ICE wanted to make detainer enforcement mandatory, prevailing Tenth Amendment jurisprudence—which prohibits 'command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program'—indicates that it could not do so. States are thus free to decide for themselves whether to limit—or even prohibit—the enforcement of detainers").

§52.6C b. Relevant Terms

The TRUST Act defines relevant terms accordingly (Govt C §7282):

"Conviction" has the same meaning as in Pen C §667(d).

"Eligible for release from custody" means that the individual may be released from custody because one of the following conditions has occurred:

- All criminal charges against the individual have been dropped or dismissed;
- The individual has been acquitted of all criminal charges filed against him or her;
- The individual has served all the time required for his or her sentence;
- The individual has posted a bond; or
- The individual is otherwise eligible for release under state or local law, or local policy.

"Immigration hold" means an immigration detainer issued by an authorized immigration officer under 8 CFR §287.7 that requests a law enforcement official to maintain custody of an individual for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, and to advise the authorized immigration officer before the release of that individual.

"Law enforcement official" means any local agency or officer of a local agency authorized to enforce criminal statutes, regulations, or local ordinances or to operate jails or to maintain custody of individuals in jails, and any person or local agency authorized to operate juvenile detention facilities or to maintain custody of individuals in juvenile detention facilities.

"Local agency" means any city, county, city and county, special district, or other political subdivision of the state.

"Serious felony" means any of the offenses listed in Pen C §1192.7(c) and any offense committed in another state that, if committed in California, would be punishable as a serious felony as defined by subdivision Pen C §1192.7(c).

"Violent felony" means any of the offenses listed in Pen C §667.5(c) and any offense committed in another state that, if committed in California, would be punishable as a violent felony as defined by Pen C §667.5(c).

§52.6D c. TRUST Act Disqualifiers

Government Code §7282.5 provides that a law enforcement agency has discretion to detain an individual on the basis of an immigration hold after that individual becomes eligible for release from criminal custody if the continued detention of the individual on an immigration hold does not violate any federal, state, or local law, or any local policy, and the individual has been held to answer for an enumerated state offense, has been convicted of an enumerated state or federal offense, is a current registrant on the California Sex and Arson Registry, or has been identified by the United States Department of Homeland Security's Immigration and Customs Enforcement as the subject of an outstanding federal felony arrest warrant.

The convictions that disqualify an individual for consideration under the TRUST Act include the following (Govt C §7282.5(a)):

- Serious or violent offenses listed in Pen C §1192.7(c) or §667.5(c);
- Felony offenses punishable by imprisonment in the state prison;
- Felony convictions for offenses enumerated in §7282.5(a)(3);

▶ **Note:** The list of categories of offenses and specific code provisions exempt from the TRUST Act in Govt C §7282.5(a)(3) is extensive.

- Misdemeanor convictions within the last 5 years for offenses punishable as either a misdemeanor or a felony (wobbler); and
- Federal offenses that meet the definition of aggravated felony in 8 USC §1101(a)(43)(A)–(P), inclusive.

§52.7 E. Interpreters

Criminal defendants who do not understand English are entitled to have an interpreter throughout the criminal proceedings. Cal Const art I, §14. The interpreter must be available exclusively for the defendant; the defendant cannot be required to share an interpreter with others, *e.g.,* defense witnesses. *People v Aguilar* (1984) 35 C3d 785 (conviction reversed; trial court "borrowed" interpreter to translate state witnesses' testimony); *People v Baez* (1987) 195 CA3d 1431 (conviction reversed because error not harmless beyond reasonable doubt). The court in *People v Rodriguez* (1986) 42 C3d 1005, 1013, held that it is best that each defendant have an interpreter assigned to him or her who remains with the defendant throughout the proceedings.

A mere request for an interpreter does not necessarily mean that the defendant is entitled to one. The defendant must show a lack of sufficient English. *In re Raymundo B.* (1988) 203 CA3d 1447.

There is no right to a certified interpreter, only to a competent one. *People v Estrada* (1986) 176 CA3d 410. See Evid C §§750–755.5 for special rules on interpreters and translators. See also Govt C §§68560.5, 68561–68562, 68565–68566 (requirements for court interpreters).

English-speaking defendants do not have the right to have their own interpreter, separate from the court interpreter, for witnesses who testify in another language. *People v Aranda* (1986) 186 CA3d 230. Counsel who believes that an interpreter has erred

or is not interpreting correctly should request an evidentiary hearing and request appropriate relief, *e.g.,* a motion for mistrial or replacement of the interpreter with a new interpreter, contemporaneous with the violation if possible, but at least with counsel's discovery of the violation. See *People v Cabrera* (1991) 230 CA3d 300. The trial court also has the option of appointing a "check interpreter" to verify the first interpreter's translation. See *People v Aranda, supra.*

See generally Ramirez, ed., Cultural Issues in Criminal Defense, chaps 2–3 (2d ed).

▶ **Note:** Defense counsel may need an interpreter to communicate effectively with his or her client outside of court. See Tooby's Guide to Criminal Immigration Law 19–27. Adequate interpretation outside of court may also raise important issues. See *U.S. v Botello-Rosales* (9th Cir 2013) 728 F3d 865, 867 (motion to suppress granted because Spanish-language warning given to defendant did not reasonably convey his *Miranda* rights, even if rights were properly read in English). For help finding an interpreter, see the website of the National Association of Judiciary Interpreters & Translators, http://www.najit.org.

§52.8 F. Requirements Concerning Immigration Status When Pleading Guilty or No Contest

Court advisement to defendant of immigration consequences of guilty plea. Before a defendant pleads guilty or no contest to a misdemeanor or felony offense, the court taking the plea must ensure that the defendant is warned that conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization. Pen C §1016.5(a). Failure to make a record that the required warning was given creates a presumption that it was not given. Pen C §1016.5(b). Failure to warn of any of the three required potential consequences requires the reviewing court to vacate the judgment if prejudice is shown and there exists, at the time of the motion to vacate, more than a remote possibility that the conviction will have one or more of those adverse immigration consequences. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 199; *People v Castro-Vasquez* (2007) 148 CA4th 1240. The exact language of the statute need not be used; substantial compliance is all that is required so long as the warning contains all three listed immigration consequences. *People v Superior Court (Zamudio), supra* (omitting even one of three required warnings is error and reversible if prejudice is shown). See *People v Gutierrez* (2003) 106 CA4th 169. See also *People v Ramirez* (1999) 71 CA4th 519 (warning need not be oral; signing of waiver form held sufficient); *People v Gari* (2011) 199 CA4th 510, 518 (court need not warn of possible revocation of U.S. citizenship). However, the advisement must occur during the actual taking of the plea; an advisement given on an earlier date is inadequate. *People v Akhile* (2008) 167 CA4th 558, 564.

The test for prejudice considers what the defendant would have done, not whether the defendant's decision would have led to a more favorable result, so the defendant can show prejudice by establishing a reasonable probability he or she would have entered a different plea with less serious immigration consequences. *People v Martinez* (2013) 57 C4th 555. See *People v Araujo* (2016) 243 CA4th 759 (defendant failed

to show prejudice); *People v Asghedom* (2016) 243 CA4th 718 (court abused discretion in not finding prejudice).

The proper way to raise a violation of this statute is by a statutory motion to vacate, rather than a petition for a writ of coram nobis. *People v Carty* (2003) 110 CA4th 1518. A direct appeal can be taken from the denial of such a motion. *People v Totari* (2002) 28 C4th 876. A certificate of probable cause is not required. *People v Arriaga* (2014) 58 C4th 950, 960. A defendant making the motion has the burden of establishing reasonable diligence in bringing it. *People v Kim* (2009) 45 C4th 1078; *People v Totari* (2003) 111 CA4th 1202. The trial court's denial of the motion is reviewed for abuse of discretion. *People v Superior Court (Zamudio)* (2000) 23 C4th 183, 200.

Counsel's advice to defendant concerning immigration consequences of guilty plea. A general warning of the possible consequences similar to what the court is required to give (see Pen C §1016.5(a)), however, is not sufficient advice by *defense counsel.* In October 2015, Governor Brown signed AB 1343 into law, effective January 1, 2016. See Pen C §§1016.2, 1016.3. Penal Code §1016.3 codifies the holding in *Padilla v Kentucky* (2010) 559 US 356, 130 S Ct 1473, that defense counsel must provide accurate and affirmative advice about the immigration consequences of a proposed disposition. Section 1016.3 also incorporates the holdings in *People v Bautista* (2004) 115 CA4th 229 1470, *People v Barocio* (1989) 216 CA3d 99, and *People v Soriano* (1987) 194 CA3d 1470 and requires defense counsel to defend against adverse immigration consequences when consistent with the goals of and informed consent of the defendant and with professional standards. Pen C §1016.3(a). (Note that the "judicial recommendation against deportation" (JRAD), discussed in *Barocio* and *Soriano,* is no longer available; see §52.11.) Defense counsel who fails to investigate and advise the defendant of the specific immigration consequences of a guilty plea, and who fails to try to avoid those consequences by obtaining an alternative disposition, may be found to have provided ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 237; *People v Soriano, supra.* Ineffective assistance of counsel claims must be raised either on appeal or while a defendant is still serving a sentence or on probation or parole. *People v Villa* (2009) 45 C4th 1063, 1069. See also *People v Kim* (2009) 45 C4th 1078, 1102 (writ of coram nobis not available to raise claim of lack of knowledge about immigration consequences); *People v Aguilar* (2014) 227 CA4th 60, 72 (defendant not entitled to vacate judgment for ineffective assistance of counsel by nonstatutory motion to vacate judgment); *People v Shokur* (2012) 205 CA4th 1398, 1406 (same).

Counsel renders ineffective assistance by either failing to advise the defendant or affirmatively misadvising the defendant of the immigration effects of a plea. *Padilla v Kentucky, supra.* To obtain a reversal of the conviction, prejudice must be shown, *i.e.,* a reasonable probability that the client would not have entered this plea if the client had been told the truth about its immigration consequences. *Padilla v Kentucky, supra; Castro-Vasquez,* 148 CA4th at 1240. Counsel must also identify and try to obtain an alternative disposition that will avoid adverse immigration consequences; failure to do so may result in a finding of ineffective assistance of counsel. *People v Bautista* (2004) 115 CA4th 229, 241.

Prosecutors' obligation to consider immigration consequences. Significantly, Pen C §1016.3 imposes a duty on the prosecution to consider adverse immigration conse-

quences during plea negotiations. "The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." Pen C §1016.3(b).

While the holding in *Padilla v Kentucky* does not mandate that prosecutors consider immigration consequences during plea negotiations, it sanctioned the consideration of immigration consequences by both parties. The Supreme Court stated that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." 559 US at 373.

▶ **Note:** There is still no requirement that judges advise defendants of the possible immigration consequences of a "slow plea" (see §26.19; *People v Limones* (1991) 233 CA3d 338, 343), but counsel must of course do so.

Illegal reentry. If the defendant pleads guilty or no contest to an "aggravated felony," the plea will trigger negative and possibly surprising consequences if the client is deported and thereafter reenters the country illegally. Illegal reentry after conviction and removal occurring after an aggravated felony conviction can trigger federal criminal prosecution carrying a sentence of up to 20 years in federal prison. 8 USC §1326(b)(2). See also 8 USC §1325(a).

▶ **Note:** It is likely that a criminal noncitizen will be detected and apprehended by the DHS after conviction and a sentence involving any incarceration, because the DHS now has extensive systems that support its efforts to identify the immigration status of every single person admitted to county jail or state prison.

§52.9 G. Availability of Noncitizen Witnesses

If "state action has made a material witness unavailable (by deportation), dismissal is mandated." *People v Mejia* (1976) 57 CA3d 574, 579. Today's courts generally hold that the *Mejia* standards for determining whether a witness was "material" have been superseded by the federal standards. *People v Valencia* (1990) 218 CA3d 808, 819; *People v Lopez* (1988) 198 CA3d 135; *People v Jenkins* (1987) 190 CA3d 200. See *People v Fauber* (1992) 2 C4th 792, 829 (assuming but not deciding that federal standard applies to destruction of evidence cases).

The prosecution must use due diligence not only to locate a witness who has gone missing, but also to prevent deportation by acting in advance to prevent the absence, and failure to do so may require reversal of a conviction. *People v Roldan* (2012) 205 CA4th 969.

Conflicting authority exists on which federal standard to apply. *People v Lopez, supra,* held that the standard to apply is that of *California v Trombetta* (1984) 467 US 479, 104 S Ct 2528. Under this standard, the lost evidence is material for purposes of sanctions if its exculpatory value was apparent before it was destroyed. But *Jenkins* (in what may be considered dictum) and *Valencia* said that the standard to apply is that of *U.S. v Valenzuela-Bernal* (1982) 458 US 858, 102 S Ct 3440. Under that standard, which specifically concerned deported witnesses, testimony is material for purposes

of sanctions if a "plausible" showing is made that it was material, was favorable to the defendant, and was not cumulative. The U.S. Supreme Court, however, now applies the *Trombetta* standard to the loss of both physical evidence and witnesses. See *Kyles v Whitley* (1995) 514 US 419, 433, 115 S Ct 1555.

The *Lopez* court declined to follow *Valenzuela-Bernal* because that case is older than *Trombetta* and, according to the *Lopez* court, because *Valenzuela-Bernal* did not intend to announce a separate standard for loss of testimonial evidence as distinguished from loss of other evidence. The *Jenkins* court did not discuss *Trombetta* at all. The Supreme Court has cited *Valenzuela-Bernal* with approval (see *People v Coffman* (2004) 34 C4th 1, 52), followed by a majority of the later cases on this question.

A person arrested along with undocumented persons may be given a form advising of the right to have the noncitizen witnesses detained. The form also advises that, if deported, it may be impossible to obtain the witness's presence at trial and that the person arrested has the right to consult with counsel before deciding whether detention of the noncitizen is desired. This form is based on *U.S. v Lujan-Castro* (9th Cir 1979) 602 F2d 877.

Mejia error is waived by a guilty plea. *People v McNabb* (1991) 228 CA3d 462.

Sanctions other than dismissal may be available. For example, a federal court may exclude the former testimony of a witness deported with insufficient notice to the defense or with insufficient effort to make the witness available at retrial. *U.S. v Yida* (9th Cir 2007) 498 F3d 945. When the government knowingly deports a witness it knows could give exculpatory evidence, acts in bad faith, and causes prejudice, it violates the defendant's right to a fair trial and the constitutional right to present a defense. *U.S. v Leal-Del Carmen* (9th Cir 2012) 697 F3d 964.

§52.9A H. The Immigrant Victims of Crime Equity Act

The Immigrant Victims of Crime Equity Act (SB 647), codified at Pen C §679.10, became effective January 1, 2016. This law protects undocumented immigrants who have reported being victims of a violent or serious crime and are applying for a U Nonimmigrant Visa (hereinafter "U Visa"). The U Visa allows individuals who were helpful, are being helpful, or are likely to be helpful to the prosecution of the crime to remain in the country without fear of deportation, and ultimately to secure permanent lawful status. Penal Code §679.10 requires California law enforcement agents and prosecutors to verify a witness's cooperation within 90 days, unless the certifying agency or official can demonstrate that the victim was uncooperative. If the cooperative witness is in the process of being deported, the certifying agency must issue the certification of helpfulness within 14 days. If law enforcement or prosecutors demonstrate that the person is "unhelpful" or "uncooperative," they can refuse to sign the certification. Without the certification, the victim or complaining witness is unable to apply for a U Visa, and the person is at risk of being deported.

Obtaining a U Visa. The process to gain U Visa status can be challenging, and the United States Citizen and Immigration Services (USCIS) maintains sole jurisdiction over all petitions for "U" nonimmigrant status. 8 CFR §214.14(c)(1). The threshold inquiry is whether the victim of a crime qualifies for a U Visa on the basis of the type of crime alleged to have been committed. The statute specifies the relevant crimes

that may be violations of federal, state, or local criminal law. See 8 CFR §214.14(a)(9). The list of qualifying crimes, or "any similar activit[ies]" is extensive and includes but is not limited to sex-related offenses, trafficking, kidnapping, false imprisonment and abduction, blackmail and extortion, murder, manslaughter, and felonious assault, conspiracy, and solicitation to commit any of the above-mentioned crimes. The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities. See 8 CFR §214.14(a)(9).

If a qualifying crime is alleged, then the complaining witness must meet four statutory requirements (8 CFR §214.14(b)):

- The person must have suffered substantial physical or mental abuse as a result of having been a victim of one of the statutorily enumerated offenses;
- The person (or in the case of a child under the age of 16, the parent, guardian, or "next friend" of the person) possesses information concerning an enumerated offense;
- The person (or in the case of a child under the age of 16, the parent, guardian, or "next friend") has been helpful, is being helpful, or is likely to be helpful to a federal, state, or local law enforcement official, to a federal, state, or local prosecutor, to a federal or state judge, to the Service, or to other federal, state, or local authorities investigating or prosecuting an enumerated offense; and
- The specified criminal activity violated the laws of the United States or occurred in the United States or the territories and possessions of the United States.

Definition of victim. As with many facets of immigration and criminal law, the meaning of the term "victim" for purposes of the U Visa statute is not entirely straightforward. The regulations define the term "victim" as the person "who is directly and proximately harmed by . . . criminal activity." 72 Fed Reg 53014, 53016 (Sept. 17, 2007). But "victim" is more broadly defined in the context of the U Visa. For example, the definition of a victim of murder or manslaughter can include, in addition to a living survivor of an attempted murder, certain immediate family members of the deceased victim. 8 CFR §214.14(a)(14)(i). Similarly, certain immediate family members of victims of crimes who are incompetent or incapacitated are also deemed victims under the U Visa federal regulations.

Penal Code §679.10 and U Visa certification. A victim must not only cooperate with the investigation or prosecution of the crime or criminal activity, but also must receive certification to that effect in order to be eligible for a U Visa. 8 CFR §214.14(c)(2)(i). When submitting a U Visa application, the applicant must provide supporting documentation of the facts surrounding the crime and the substantial harm suffered (police, court, and hospital records, supporting statements, etc.). Penal Code §679.10 states that when a "victim" of qualifying criminal activity has been helpful, is being helpful, or is likely to be helpful to the detection, investigation, or prosecution of that qualifying criminal activity, a certifying agency or official, which includes judges, law enforcement, and prosecuting agencies, must, on request, certify the "victim helpfulness" on an I-918 Supplement B Form. The certifying entity must process the Form I-918 Supplement B certification within 90 days of request, unless the victim or complaining witness is in removal proceedings, in which case the certification is required to be processed within 14 days of request.

Disclosure of information relating to U Visa petitioners to comply with discovery obligations. A certifying entity is prohibited from disclosing the immigration status of a victim or person requesting the Form I-918 Supplement B certification, *except to comply with federal law* or legal process, or if authorized by the victim or person requesting the Form I-918 Supplement B certification. Pen C §679.10(k). The Code of Federal Regulations, in 8 CFR §214.14(e)(1)(ix), explicitly allows for the disclosure of information to prosecutors so that prosecutors can "comply with constitutional obligation to provide statements by witnesses and certain other documents to defendants." Generally, however, the use or disclosure of information relating to the beneficiary of a pending or approved petition for a U Visa is prohibited.

▶ **Practice Tip:** The duty to disclose *Brady* material does not change in the context of U Visa certification. Due process mandates that "evidence favorable to an accused" that is "material either to guilt or to punishment" be turned over to the defense. *Brady v Maryland* (1963) 373 US 83, 87, 83 S Ct 1194. In the submission of an application for a U Visa or a request for victim helpfulness certification, details and facts are revealed that are arguably favorable to the accused and material to guilt or punishment. The information is material because it can lead not only to the discovery of bias and ulterior motives, but also to impeaching or inconsistent statements. See *Davis v Alaska* (1974) 415 US 308, 317, 94 S Ct 1105 (criminal defendant's Sixth Amendment right to confront accuser includes right to investigate potential biases and mandates disclosure of information that would expose any bias that would discredit prosecution witness and affect weight of witness's testimony). Penal Code §1054.1 also requires the prosecution to disclose all relevant statements of witnesses it intends to call at trial.

§52.10 I. Consequences of Sentence in Criminal Cases

The sentence received in a criminal case can have significant immigration consequences, and counsel can sometimes exert a great influence over the immigration process by controlling the length and nature of the sentence imposed. Obtaining a certain sentence may be sufficient to avoid adverse immigration results for the client. Counsel must determine whether the sentence is important, and, if so, exactly what the sentence requirements are in the client's particular situation. Sentences can be especially significant for aggravated felonies and crimes involving moral turpitude.

General definition of "sentence" for immigration purposes. For immigration purposes, "sentence" includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution . . . in whole or in part." 8 USC §1101(a)(48)(B).

Thus, "sentence" includes a state prison sentence that has been imposed even though execution of all or part of the sentence has been suspended. *Matter of Castro* (BIA 1988) 19 I&N Dec 692.

It also includes court-ordered confinement as a condition of probation.

It does *not* include potential state prison or county jail sentences when imposition of sentence has been suspended, because the court has not ordered any specific term of incarceration or confinement to be served. See *Matter of F.* (BIA 1942) 1 I&N Dec 343.

It does *not* include any noncustody period of probation, because that does not qualify

as "incarceration or confinement." 8 USC §1101(a)(48)(B). See discussion of suspending imposition and execution of sentence in §§36.5, 46.29–46.30.

▶ **Note:** For immigration purposes, all sentences refer to the nominal sentences ordered by the court, rather than the actual time spent incarcerated, except for (1) the 180-day bar to establishing good moral character referred to below, and (2) eligibility for former INA §212(c) waiver of deportability, which is lost if the person actually serves 5 years or more as a result of aggravated felony convictions. See *Matter of Ramirez-Somera* (BIA 1992) 20 I&N Dec 564. See §52.53 for discussion. Only these two latter bars refer to days actually spent in custody.

Presentence time in custody in a criminal case, which is credited as time served in a sentence imposed after conviction, is considered confinement as a result of a conviction for immigration purposes. *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229.

▶ **Examples:** If the client receives imposition of sentence suspended and no custody as a condition of probation, it counts as zero sentence for immigration purposes. If the client receives imposition of sentence suspended and 6 months' custody as a condition of probation, it counts as 6 months. If the client receives a 5-year sentence, execution of which is suspended, and is placed on probation with no custody time as a condition of probation, it counts as a 5-year sentence.

Concurrent sentences and indeterminate sentences (*e.g.,* 5 years to life) are evaluated as the length of the longest sentence. *Matter of Fernandez* (BIA 1972) 14 I&N Dec 24.

Treatment facility and term of imprisonment. A 1-year term of confinement in a substance abuse treatment facility imposed as a condition of probation constitutes a "term of confinement" under §101(a)(48)(B) of the Immigration and Nationality Act (8 USC §1101(a)(48)(B)) for purposes of determining whether a conviction for a crime of violence qualifies as an aggravated felony under 8 USC §1101(a)(43)(F). *Matter of Calvillo Garcia* (BIA 2015) 26 I&N Dec 697.

Recidivist sentence enhancements. A sentence includes any recidivist sentence enhancement that may be imposed on the defendant. *U.S. v Rodriguez* (2008) 553 US 377, 128 S Ct 1783 (determining maximum sentence under Armed Career Criminal Act); *U.S. v Rivera* (9th Cir 2011) 658 F3d 1073, 1075 (same).

Deportability for crimes punishable by term of confinement of 1 year or more. Beginning January 1, 2015, misdemeanor offenses, formerly punishable by imprisonment up to or not exceeding 1 year, are punishable by imprisonment in county jail not to exceed 364 days. Pen C §18.5. Therefore, after the effective date of Pen C §18.5, a defendant may not be sentenced to more than 364 days on a misdemeanor conviction. See §52.10.

▶ **Practice Tip:** Penal Code §18.5, effective January 1, 2015, is not expressly made retroactive. Generally, when a statute is amended to reduce a punishment, that amendment at least applies to all cases not yet final. *In re Estrada* (1965) 63 C2d 740. Advocates will argue that the reduction for misdemeanors formerly sentenced to a year that is set forth in Pen C §18.5 should be applied when a felony or wobbler

is reclassified or resentenced as a misdemeanor under Proposition 47, or when a wobbler is reduced to a misdemeanor under Pen C §17 after January 1st, and to all pre-January 1, 2015, sentences for misdemeanor convictions. If a pre-January 1, 2015, felony with a 365-day sentence or prison sentence is reclassified as a misdemeanor under Proposition 47 or Pen C §17, an immigration court or the U.S. Citizenship and Immigration Services will probably need an explicit order from the superior court that the sentence has been reduced to a maximum of 364 days or, for 6-month misdemeanors, a maximum of 6 months. See practice advisory Immigrant Legal Resource Center, *California Prop 47 and SB 1310: Representing Immigrants* (Nov. 2014), at http://www.ilrc.org/files/documents/ilrc_advisory_prop_47_s_1310_pdf.pdf and Immigrant Legal Resource Center, *Cheat Sheet on Prop 47 and PC § 18.5 for Immigration Advocates* at http://www.ilrc.org/files/documents/cheat_sheet_prop_47_and_pc_ss_18.pdf.

Common offenses that become aggravated felonies and trigger removal only if a court orders 1 year or more of custody, either as part of the judgment and sentence or as a condition of probation, include the following:

- A "crime of violence" as defined in 18 USC §16 (see §52.47);
- A theft offense (including receipt of stolen property) (see §52.46);
- Burglary;
- Offenses relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles that have had their identification numbers altered;
- Offenses relating to obstruction of justice (including accessory after the fact under Pen C §32), perjury or subornation of perjury, or bribery of a witness; and
- Using fraudulent documents to obtain an immigration benefit (except for a first offense solely to help a listed immediate family member).

8 USC §1101(a)(43)(F)–(G), (P), (R)–(S). All other aggravated felony convictions trigger deportation regardless of the sentence imposed.

Strategy. For offenses depending on sentence, a sentence of 364 days or less (either as part of a judgment or condition of probation) will prevent the conviction of a listed offense from becoming an aggravated felony, so long as imposition of sentence has been suspended. Conviction of three counts of theft, with a 364-day sentence for each to run consecutively, for example, would not be considered an aggravated felony conviction, because each count is assessed separately to see whether it carries a 1-year sentence. It is necessary to avoid a state prison sentence, even if execution of sentence is suspended, because a suspended sentence would still be considered a sentence imposed for immigration purposes. Counsel may be able to negotiate an official sentence of 364 days (and thus avoid an aggravated felony) by waiving past and future credits. Such a waiver could result in the defendant's spending an amount of time in custody that is equivalent to the amount of time he or she would serve on a 2-year sentence if custody credits were awarded; more, if before the 364-day sentence is imposed, extra time is served and credits for that time are also waived. Similarly, on a probation violation, any custody time imposed for a probation violation is added to the custody time imposed on the original sentence, and the total of the two is the cumulative "sentence imposed" for the conviction. *Matter of Ramirez* (BIA 2010) 25 I&N Dec 203. It is sometimes possible for the defendant to waive past credits, vacate the former

sentence, and receive a new sentence that falls short of a total of 1 year, thus avoiding an aggravated felony sentence. If the original sentence is not vacated before the probation violation sentence is imposed, the original sentence will be added to the probation violation sentence. A total sentence of 1 year or more (*e.g.,* an original sentence of 9 months and a probation violation sentence of 3 months) will be considered a sentence of 12 months and trigger deportation as an aggravated felony.

▶ **Practice Tip:** On a probation violation, offer to waive credits and agree to a new aggregate sentence totaling 364 days or less on the probation violation and vacate or modify the old sentence plus any time up to 364 days on any new charge. If residential treatment is needed, agree to that as part of the settlement of a probation violation if it will avoid a total sentence imposed of 1 year or more on a crime that would make the conviction an aggravated felony.

Inadmissibility. A client who is not here legally, or who is here legally but is already deportable, will wish to avoid becoming inadmissible, *i.e.,* becoming ineligible to immigrate lawfully through a U.S. citizen-spouse or otherwise. Two grounds of inadmissibility depend on the sentence:

- A noncitizen is inadmissible under 8 USC §1182(a)(2)(B) if he or she is convicted of two or more offenses of any kind for which the aggregate sentences imposed equal 5 or more years, regardless of the number of days actually served; and
- A noncitizen who would otherwise be inadmissible because of one conviction of a crime involving moral turpitude is *not* inadmissible if the offense qualifies under the "petty offense exception." To qualify, the sentence imposed must be 6 months or less, the maximum possible sentence for the offense must be no more than 1 year, and the person must not have committed a second crime of moral turpitude. 8 USC §1182(a)(2)(A)(ii)(II).

▶ **Note:** The petty offense exception to exclusion on grounds of moral turpitude is available only to noncitizens who have *committed* only one crime involving moral turpitude. A defendant who has *committed* a second moral turpitude offense is disqualified from receiving the petty offense exception, even if no second conviction occurred, because, for example, the charges were dismissed or no charges were filed in the second case. A previous conviction, even if expunged, will destroy eligibility for the benefit of this exception. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. A defendant charged with a felony may be found eligible for the petty offense exception if the felony is reduced to a misdemeanor under Pen C §17. See §52.39.

Bar to establishing good moral character. A noncitizen must establish "good moral character" to obtain many immigration benefits, including naturalized citizenship, voluntary departure, cancellation of removal for nonpermanent residents, suspension of deportation, and registry. The immigration law bars certain persons from establishing good moral character, and this concept sometimes depends on sentence:

- Physically serving 180 or more actual days in jail, as a total from all convictions, during the period for which good moral character must be shown precludes the defendant from establishing good moral character under 8 USC §1101(f)(7). *Matter of Valdovinos* (BIA 1982) 18 I&N Dec 343.

• If the person is held in custody for a few days and the charges are dismissed or the person is acquitted, the time in jail does not count as part of the 180 days, because it was not served "as a result of conviction." 8 USC §1101(f)(7). In fact, anyone trying to avoid the 180-day bar who has served significant pretrial time might waive credit for that time as time served in an attempt to lower the total below 180 days actual custody "as a result of conviction." See *Arreguin-Moreno v Mukasey* (9th Cir 2008) 511 F3d 1229. A pardon should erase the effect of time served for that conviction. *Matter of H.* (BIA 1956) 7 I&N Dec 249. Pardons are discussed in §§41.20–41.21. Expungements are discussed in §§41.13, 41.18. Their immigration effects are discussed in §§52.12, 52.14.

Bar to restriction of removal. Restriction of removal, like political asylum, is available to some noncitizens who face death threats and similar perils if deported to their home countries. However, an applicant who has been convicted of a particularly serious crime or who the DHS has reason to believe committed a serious nonpolitical crime outside the United States is ineligible. 8 USC §1231(b)(3)(B). An alien who has been convicted of an aggravated felony for which a sentence of at least 5 years of imprisonment was imposed has committed a particularly serious crime that bars this relief. 8 USC §1231(b)(3)(B); 8 CFR §208.16. Even if the sentence for an aggravated felony is less than 5 years, care must be taken to determine whether the crime is nonetheless particularly serious, by reviewing the nature of the conviction, the sentence imposed, and the individual facts and circumstances surrounding the actual offense. 8 CFR §208.16.

▶ **Warning:** A sentence of 91 days or more on a misdemeanor is a bar to Deferred Action for Childhood Arrivals ("DACA"), and a sentence of 90 days or more on a misdemeanor is a bar to Deferred Action for Parental Accountability ("DAPA"). For both DAPA and DACA, the sentence must be for time imposed and ordered served in custody. Therefore, any sentence, or any portion thereof, imposed but with the execution suspended would not count toward the 91 days for DACA or the 90 days for DAPA. See §§52.63–52.64.

Fees and restitution. Even when no confinement has been imposed, a conviction exists under 8 USC §1101(a)(48)(A) when restitution or court fees have been ordered. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459 (costs and surcharges imposed in Florida deferred adjudication proceeding constituted form of "punishment" or "penalty" for purposes of establishing that noncitizen had suffered "conviction" for immigration purposes; court sought to establish national standard rather than relying on Florida state law in including amounts paid in restitution as a cost constituting "punishment"). (*Cabrera* cited 8 USC §1101(a)(48)(A).) If the fee or fine has been suspended, however, and no other penalty is imposed, the disposition is not a conviction under the statute. *Retuta v Holder* (9th Cir 2010) 591 F3d 1181, 1188.

§52.11 J. Former Judicial Recommendation Against Deportation (JRAD)

Until 1990, the judicial recommendation against deportation (JRAD) offered protection to persons convicted of a crime of moral turpitude or an aggravated felony that

would ordinarily have resulted in deportation. See *Nguyen v Chertoff* (2d Cir 2007) 501 F3d 107. The JRAD was a discretionary order, signed by the sentencing judge, requiring the INS not to deport a noncitizen on the basis of conviction of a covered crime. The JRAD was eliminated by the Immigration Act of 1990 (IA 90) (Pub L 101–649, 104 Stat 4978). Although the repeal was intended to be retroactive (see *U.S. v Murphey* (9th Cir 1991) 931 F2d 606), the INS agreed to honor JRADs that were actually signed by a judge before November 29, 1990. Memorandum by INS Commissioner Gene McNary, Feb. 4, 1991, reprinted in Interpreter Releases, p 220 (Feb. 25, 1991). Now that JRADs have been abolished, it is an open question what the proper remedy would be for a defendant whose counsel rendered ineffective assistance by failing to request a JRAD at sentencing. One possibility is for the court to grant a JRAD nunc pro tunc dated before November 29, 1990. Another possibility would be to vacate the conviction or sentence entirely. See *People v Barocio* (1989) 216 CA3d 99 (vacating sentence). The constitutional right to effective assistance of counsel requires that the defendant should be placed in the same position he or she would have occupied if the error had not been committed. See *Castillo-Perez v INS* (9th Cir 2000) 212 F3d 518. Although the pre-1990 law required the JRAD to be issued within 30 days after sentence was imposed, acting outside of that time limit may not deprive the sentencing court of jurisdiction to grant the JRAD. See *Solis-Chavez v Holder* (7th Cir 2011) 662 F3d 462, 468, citing *Dolan v U.S.* (2010) 560 US 605, 130 S Ct 2533.

§52.12 K. Effect of Postconviction Relief on Immigration Status

California has several statutes providing postconviction relief in the form of pardons, certificates of rehabilitation, destruction or sealing of records, vacation of judgment, dismissal of accusation, and reduction of charge:

- Pen C §§4800–4854 (reprieves, pardons, commutations of sentence, certificates of rehabilitation);
- Pen C §1203.45 (sealing misdemeanor records for persons under age 18 when crime committed);
- Health & S C §11361.5 (automatic destruction of certain marijuana conviction records);
- Pen C §1203.4 (vacation of judgment and dismissal of accusation for felony or misdemeanor probationer who successfully completed probation, often called "expungement"; see §52.14);
- Pen C §1203.4a (vacation of judgment and dismissal of accusation for defendant convicted of infraction or convicted of misdemeanor and not granted probation, often called "expungement"; see §52.14);
- Pen C §1203.41(a)(2) (vacation of judgment and dismissal of accusation for defendant given realignment felony county jail sentence in excess of 1 year under Pen C §1170(h)(5) may be granted in exercise of discretion after expiration of 1 year following completion of "split sentence" or after expiration of 2 years following completion of full-term realignment sentence under Pen C §1170(h)(5)(A); see §52.14);
- Welf & I C §§1179, 1772 (dismissal of accusation for person honorably discharged from juvenile parole);

• Pen C §17 (reduction of felony to misdemeanor under various circumstances, including application of defendant at any time after probation granted);

• Proposition 47 (reclassification or resentencing of defendant; see §52.10);

• Welf & I C §828 (destruction of juvenile records or their release to the person); and

• Pen C §1385 (dismissal of charge in interest of justice); this may be granted if no judgment has been imposed (see *People v Kim* (2012) 212 CA4th 117), or imposition of sentence was suspended and the defendant placed on probation (see *People v Orabuena* (2004) 116 CA4th 84), or the defendant is still on probation at the time of the Pen C §1385 dismissal (see *People v Espinoza* (2014) 232 CA4th Supp 1, 6). This remedy is effective to eliminate immigration consequences if granted at least in part on a ground of legal invalidity. See *Matter of Pickering* (BIA 2003) 23 I&N Dec 621.

The effect of each type of postconviction relief on immigration status varies. (State relief is discussed in chap 41.)

An executive pardon will eliminate a conviction of one or more crimes involving moral turpitude, an aggravated felony conviction, or a conviction of high-speed flight from an immigration checkpoint as grounds of deportation, but probably not a controlled substances conviction, domestic violence conviction, firearms conviction, or any other conviction not listed in 8 USC §1227(a)(2)(A)(vi). *Matter of Suh* (BIA 2003) 23 I&N Dec 626 (pardon does not eliminate deportability of domestic violence conviction). Further, a pardon does not eliminate a listed conviction as a ground of inadmissibility. *Aguilera-Montero v Mukasey* (9th Cir 2008) 548 F3d 1248.

§52.13 1. Vacating Conviction

Vacating the conviction on a ground of legal invalidity will eliminate all immigration effects that flow from the conviction itself. See, *e.g., Nath v Gonzales* (9th Cir 2006) 467 F3d 1185; *Wiedersperg v INS* (9th Cir 1990) 896 F2d 1179 (postconviction writ vacating criminal conviction entitled alien to reopen deportation proceeding even after he had been deported). Direct appeal, habeas corpus, coram nobis, and motions to withdraw the plea or vacate the conviction will have this effect. *Matter of Kaneda* (BIA 1979) 16 I&N Dec 677; *Matter of Sirhan* (BIA 1970) 13 I&N Dec 592. See also *People v Vasilyan* (2009) 174 CA4th 443 (motion to vacate filed in 2007 for 1994 convictions that resulted in deportation in 2004).

Vacating the judgment will also eliminate the effect of any sentence or imprisonment resulting from the conviction. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849. Moreover, a petition for extraordinary writ may be brought simply for purposes of vacating the original sentencing and obtaining a fresh sentencing hearing. See *People v Barocio* (1989) 216 CA3d 99.

A new sentence imposed by the judge will be the one considered by the immigration authorities, even if the defendant has already completed serving the original sentence. *Matter of Cota-Vargas, supra; Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction of illegal sentence); *Matter of H.* (BIA 1961) 9 I&N Dec 380 (new trial and sentence); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation). A court order imposing a

state prison sentence, after which execution of sentence has been suspended, may be vacated when the defendant received a probationary sentence, is still on probation, and the prosecution consents to the modification or revocation of the suspended state prison sentence. A court also has the authority during the term of mandatory supervision (see Pen C §1170(h)(5)(B)) to revoke, modify, or change the conditions of the court's order suspending the execution of the concluding portion of the supervised person's term. Pen C §1203.3(a).

To be effective for immigration purposes, the court must vacate the conviction on some ground of legal invalidity—constitutional or statutory. If the court vacates the conviction purely on humanitarian or discretionary grounds, immigration officials will not regard the conviction as eliminated for immigration purposes. *Poblete Mendoza v Holder* (9th Cir 2010) 606 F3d 1137, 1141. See *Matter of Pickering* (BIA 2003) 23 I&N Dec 621, rev'd on other grounds, *Pickering v Gonzales* (6th Cir 2006) 465 F3d 263; *Beltran-Leon v INS* (9th Cir 1998) 134 F3d 1379. If it is not clear whether the conviction was vacated on a ground of legal invalidity or for rehabilitative reasons, the noncitizen cannot be deported, since the government bears the burden of proving deportability by clear and convincing evidence. *Nath v Gonzales* (9th Cir 2006) 467 F3d 1185. The BIA has held, however, that a noncitizen seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez* (BIA 2007) 24 I&N Dec 272. A *sentence* vacated on any ground at all, even on discretionary or immigration grounds, is eliminated for immigration purposes. *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849. See *People v Mbaabu* (2013) 213 CA4th 1139, 1146 (reviewing various forms of postconviction relief in immigration context).

§52.14 2. Expungement (Pen C §1203.4) and Other Forms of State Rehabilitative Relief

Under federal immigration law, when a plea of guilty or no contest is entered, a conviction results. 8 USC §1101(a)(48)(A). This remains true even when state rehabilitative relief later removes the conviction under state law. See *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284 (expunged conviction remains a basis for deportability until plea is withdrawn); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. Diversion programs in which no guilty plea is entered, however, do not constitute convictions under immigration law. This applies to preplea diversions under former law as well as to county preplea "drug court" programs under Pen C §1000.5. Counsel should always investigate to see whether the conviction at issue resulted from a preplea diversion under current or former law. See §52.29.

An effective expungement also prevents the facts underlying the conviction from serving as an admission of a drug offense that would bar a finding of good moral character under 8 USC §1101(f)(3). *Romero v Holder* (9th Cir 2009) 568 F3d 1054, 1062, overruled on other grounds in *Nunez-Reyes v Holder* (9th Cir 2011) 646 F3d 684, 690.

Effective date. Immigration consequences of qualifying first-time controlled substances convictions occurring on or before July 14, 2011, are eliminated by a rehabilita-

tive dismissal. This favorable treatment, however, was terminated for convictions occurring after July 14, 2011. *Nunez-Reyes v Holder* (9th Cir 2011) 646 F3d 684.

State drug convictions obtained after July 14, 2011. In *Nunez-Reyes v Holder,* the Ninth Circuit sitting en banc prospectively overruled *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 and its progeny, which had treated an expunged state conviction of certain drug crimes the same as a federal drug conviction that has been expunged under the Federal First Offender Act (18 USC §3607), *i.e.,* as completely eliminating the conviction for federal immigration purposes. For convictions occurring after July 14, 2011, therefore, expungements and other forms of rehabilitative relief under California law no longer eliminate immigration consequences. Because this new rule operates prospectively only, however, the former *Lujan* rule continues to operate for all convictions occurring on or before July 14, 2011. *Nunez-Reyes,* 646 F3d at 694.

State drug convictions obtained before July 15, 2011. A state drug conviction of the type that would be amenable to expungement under the Federal First Offender Act (FFOA) (18 USC §3607) if the case had been brought in federal court can be effectively expunged under a general state expungement statute, despite the fact that the state statute is not an exact counterpart of the FFOA. *Garberding v INS* (9th Cir 1994) 30 F3d 1187. Since various forms of state rehabilitative relief are basically similar to FFOA treatment under 18 USC §3607, any of the following types of postconviction relief will have the same beneficial effects as an expungement under Pen C §1203.4(a) in eliminating convictions of a limited list of minor first-offense controlled substances offenses: deferred entry of judgment dismissals under Pen C §1000; Proposition 36 dismissals under Pen C §1210.1(d); and expungements of youthful offenders' convictions for honorable DJJ completion under Welf & I C §§1179, 1772. The same is true of foreign expungements of qualifying offenses. *Dillingham v INS* (9th Cir 2001) 267 F3d 996. There is no reason why a realignment expungement under Pen C §1203.41 would not have the same effect on convictions of qualifying first-offense simple possession offenses.

▶ **Note:** The FFOA does not permit an expungement if the defendant has suffered, before the commission of the current offense, a controlled substances conviction under "federal or state" law; this provision does not include foreign convictions as a disqualification from relief. A conviction, however, is not considered a first conviction if it was preceded by a diversion dismissal of a prior case, even if no plea was ever entered in that case. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Two counts of possession, even of two different drugs, can amount to a single offense under FFOA if they "arose out of a single event, composed a single criminal case, and triggered a single, undivided sentence." *Villavicencio-Rojas v Lynch* (Feb. 2, 2016, No. 13-70620) 2016 US App Lexis 1732, *7.

If a dismissal would not have been available under the FFOA, relief from removal will not be available when a conviction was expunged under state law, because the person would not have qualified for FFOA treatment under 18 USC §3607(a). See, *e.g., Estrada v Holder* (9th Cir 2009) 560 F3d 1039 (relief from removal not available when person whose conviction was expunged under state law violated a condition of probation). *Estrada,* however, overlooked 18 USC §3607(c), which grants FFOA treatment with only two conditions—initial imposition of FFOA probation, and the

defendant's commission of the offense while under 21 years of age—but which has no requirement that the defendant not have violated probation. Defendants eligible for FFOA treatment under §3607(c) should therefore receive *Lujan* treatment despite violations of probation. See *Keene Corp. v U.S.* (1993) 508 US 200, 208, 113 S Ct 2035, quoting *Russello v U.S.* (1983) 464 US 16, 23, 104 S Ct 296 ("Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). See also *Bates v U.S.* (1997) 522 US 23, 29, 118 S Ct 285; *Bailey v U.S.* (1995) 516 US 137, 146, 116 S Ct 501.

Qualifying pre-July 15, 2011, convictions. A conviction of a first offense of simple possession of any controlled substance is not a "conviction" for immigration purposes if it has been subject to rehabilitative treatment, such as dismissal of charges under Pen C §1203.4 or Proposition 36 (Pen C §1210.1). *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728 (state offense that could have been treated under FFOA if the case had been brought in federal court does not trigger adverse immigration consequences if same kind of state relief was granted). In addition to possession convictions of any drug, this rule worked for certain convictions of a first controlled-substance offense less serious than simple possession of a drug. *Ramirez-Altamirano v Holder* (9th Cir 2009) 563 F3d 800 (conviction of possession of paraphernalia eliminated by expungement); *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (same). The court's reasoning in *Cardenas-Uriarte v INS, supra,* could be applied to any first drug conviction that is (1) more minor than simple possession and (2) not forbidden under federal law. This would include visiting a place where drugs are being used (Health & S C §11365), being in possession of a hypodermic needle (Bus & P C §4140), and violating various statutes regarding prescription drugs, as long as they do not involve trafficking or actual use of a controlled substance.

This rule also formerly applied to convictions for a first offense of using or being under the influence of a controlled substance (Pen C §647(f); Health & S C §11550). *Rice v Holder* (9th Cir 2010) 597 F3d 952, 957. *Nunez-Reyes,* 646 F3d at 695, however, held that under the influence convictions could not benefit from the *Lujan* rule. It is an open question whether this holding applies retroactively to a conviction entered after *Rice* was decided, but before *Nunez* was decided, when the defendant detrimentally relied on the favorable *Rice* rule in deciding to enter a plea. Cf. *Nunez-Reyes, supra,* at 695 n7. In *Nunez-Reyes,* Judge Graber reasoned that a misdemeanor under the influence conviction, with a 6-month maximum, was not "less serious" than a possession conviction, with a potential 3-year prison sentence, because the under the influence defendant had actually used the controlled substance, whereas it was possible that the possessor merely held drugs for a friend without using them. *Nunez-Reyes,* 646 F3d at 695.

A conviction of driving under the influence of a controlled substance (Veh C §23152) would presumably be treated the same as the offense of being under the influence. It is an open question whether a California conviction of possession of marijuana on school grounds (Health & S C §11357(d)) qualifies as an offense for which FFOA treatment would be appropriate. *Lopez-Vasquez v Holder* (9th Cir 2013) 706 F3d 1072, 1075. Postconviction relief altering the conviction from a drug-trafficking conviction (which would not qualify for FFOA treatment) to a possession conviction (which would)

was not effective in altering the nature of the conviction when a reduction from felony to misdemeanor was not authorized under California law. *Lopez-Vasquez v Holder, supra.*

Effective FFOA-type expungement will work for multiple simultaneous qualifying convictions, since there is no "prior" event to disqualify the defendant from this relief. *Rice v Holder* (9th Cir 2010) 597 F3d 952, overruled on other grounds by *Nunez-Reyes, supra.*

§52.15 3. Other Postconviction Relief

If all records of a marijuana conviction have been destroyed under Health & S C §11361.5, the conviction probably cannot be proved by the government. See, *e.g., Matter of Rodriguez-Perez* (Simonet, IJ, Dec. 12, 1989) No. 18–364–484, digested in Interpreter Releases p 67 (Jan. 12, 1990) (INS could not prove conviction, because records sealed under similar Florida statute). However, if the DHS obtains records of conviction before they are destroyed or obtains a transcript of court proceedings or an appellate opinion not subject to destruction (Health & S C §11361.5(d)), it may still be able to prove the conviction exists. See *Matter of Moeller* (BIA 1976) 16 I&N Dec 65. But see Health & S C §11361.7 (records subject to destruction under §11361.5 are not considered accurate after they should have been destroyed).

A successful motion to withdraw a plea of guilty for "good cause" before entry of judgment will eliminate any conviction. When entry of judgment is suspended and probation is granted, this motion must be made within 6 months after probation was granted. Pen C §1018. The defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea. *People v Superior Court (Giron)* (1974) 11 C3d 793; *People v Perez* (2015) 233 CA4th 736, 835 ("competent counsel would not have advised defendant he need not worry about the immigration consequences" of his plea, and this is grounds to withdraw plea). Withdrawal of a guilty plea is discussed in §26.21.

When a sentence is corrected (see chap 34, §§35.10, 35.30–35.34) or commuted by a judge (see §35.10), the reduced sentence is the one considered by immigration authorities. *Matter of Cota-Vargas* (BIA 2005) 23 I&N Dec 849; *Matter of Song* (BIA 2001) 23 I&N Dec 173; *Matter of Martin* (BIA 1982) 18 I&N Dec 226 (correction); *Matter of J.* (BIA 1956) 6 I&N Dec 562 (commutation). A motion to modify the custody condition of probation from 365 to 364 days is effective to eliminate the immigration consequences of the original sentence, but it must be made before the sentence has been served. *People v Mendoza* (2009) 171 CA4th 1142. Moreover, such a reduction must not violate the plea agreement or the court cannot order it without prosecution consent. *People v Segura* (2008) 44 C4th 921, 935.

Reduction of a felony to a misdemeanor under Pen C §17 (see §8.40) or reclassification or resentencing under Proposition 47 may aid a noncitizen who would be disqualified from relief by having a felony conviction, *e.g.,* an applicant for Temporary Protected Status. See §52.58. Also, a noncitizen is eligible for the petty offense exception to the moral turpitude ground of inadmissibility only if the conviction has a maximum possible sentence of 1 year or less, which means it must be a misdemeanor. See §52.39. Reduction of a felony to a misdemeanor can also protect a defendant against a conviction

for an aggravated felony crime of violence under 18 USC §16(b), which requires the conviction to be a felony before it can be an aggravated felony. A reduction can be obtained even after an expungement has been granted under Pen C §1203.4. *Meyers v Superior Court* (1966) 247 CA2d 133.

When judgment is vacated, *e.g.,* on a writ of error coram nobis (see §24.38) or habeas corpus (see §24.38), even a drug conviction has been held erased. See *Matter of Sirhan* (BIA 1970) 13 I&N Dec 592; Pen C §1016.5 (judgment vacated on defense motion when record does not reflect that judge advised defendant that guilty plea could result in deportation, exclusion, or denial of naturalization); *People v Superior Court (Zamudio)* (2000) 23 C4th 183 (failure to advise defendant of potential exclusion consequence requires vacation of plea when prejudice is shown); *Matter of Adamiak* (BIA 2006) 23 I&N Dec 878 (Ohio drug conviction vacated because trial court failed to advise defendant of potential immigration consequences of guilty plea). For extensive discussion of obtaining California postconviction relief for immigrants, see Tooby, California Post-Conviction Relief for Immigrants; Brady et al., Defending Immigrants, chap 8 (10th ed).

§52.16 4. Responsibilities of Original Counsel When Client Seeks Postconviction Relief

Original counsel is free to assist the client in obtaining postconviction relief absent an active conflict of interest. For example, counsel may assist the client to obtain an expungement, writ of coram nobis, order vacating the conviction, pardon, and similar relief as long as the grounds for relief do not include an allegation that the original counsel rendered ineffective assistance of counsel.

If a potential ineffective assistance claim is present, however, counsel should declare a conflict of interest and refer the client to independent counsel, *i.e.,* counsel who is not employed by the same law office as the original counsel. *Cuyler v Sullivan* (1980) 446 US 335, 100 S Ct 1708; *U.S. v Miskinis* (9th Cir 1992) 966 F2d 1263; *People v Bailey* (1992) 9 CA4th 1252.

New and old counsel share a common professional obligation to act in their mutual client's best interests. Original counsel has a legal duty to cooperate with successor counsel and promptly return the client's papers (*i.e.,* the entire case file) on termination of the representation. The original client file, including every piece of paper, investigative report, and item of work product, physically belongs to the client and must be turned over to the client on request. Cal Rules of Prof Cond 3–700(A)(2), (D); *Finch v State Bar* (1981) 28 C3d 659, 665 (duty to forward file to client or successor counsel); *Kallen v Delug* (1984) 157 CA3d 940, 950; California State Bar Formal Opinion No. 1992–127 (original counsel must turn over entire file (which belongs to client), including attorney's notes, and must answer all oral questions if failure to do so would prejudice client). Absent contrary instructions from the client, counsel must retain the file indefinitely. LA County Bar Ass'n Formal Opinion No. 420 (1983).

Although it is certainly difficult to balance the desire to protect oneself from a finding of ineffective assistance of counsel against the obligation to ensure that the client does not suffer from counsel's mistakes, the better view is that professional integrity and enlightened self-interest combine to motivate counsel to aid the client

as much as the truth will allow. Nothing counsel says to aid the client can be used against counsel in a malpractice action. *Smith v Lewis* (1975) 13 C3d 349, disapproved on other grounds in *Marriage of Brown* (1976) 15 C3d 838, 851 n14. It is also wise for counsel to attempt to mitigate any damage suffered by the client. It is impossible for a criminal defendant to win a malpractice action unless he or she is actually innocent. *Lynch v Warwick* (2002) 95 CA4th 267, 270. See *Khodayari v Mashburn* (2011) 200 CA4th 1184, 1196 (postconviction counsel is not liable in tort for malpractice unless plaintiff can show actual innocence and has obtained postconviction exoneration of offense concerning which malpractice liability is claimed). Finally, the State Bar has never taken, and presumably never will take, disciplinary action against counsel solely on the basis of a mistake. It is simply not an ethical violation. See Cal Rules of Prof Cond 3–110(A) (incompetence must be intentional, reckless, or repeated to warrant discipline). In fact, a single isolated negligent mistake is not grounds for discipline. See *Call v State Bar* (1955) 45 C2d 104, 109. A candid admission of a mistake, if one has been made, is professionally less damaging, and personally less distasteful, than being cross-examined and having one's credibility assailed by new counsel for a former client.

III. APPLICABLE IMMIGRATION LAW

§52.17 A. Effect of Criminal Record on Immigration

▶ **Note:** See the chart in §52.24 for grounds for deportation, inadmissibility, and preclusion from establishing good moral character.

American immigration law is based on the premise that certain individuals are "undesirables" and should therefore not be admitted to or should be expelled from the United States. Under the Immigration and Nationality Act (INA) (8 USC §§1101–1537), certain criminal convictions or criminal behavior result in immigration penalties by constituting a ground of inadmissibility, a ground of deportability, or a bar to establishing good moral character or other relief.

Aggravated felony. Conviction of an aggravated felony brings the harshest immigration penalties. See §§52.21, 52.41–52.47 for discussion of penalties. In almost all cases, the noncitizen will be removable from the United States and barred from eligibility for any discretionary waiver of removal regardless of the equities involved. 8 USC §1228(b)(5). See §52.44. The person is barred from ever returning legally to the United States, although a waiver is theoretically available. Illegal reentry into the United States following conviction of an aggravated felony and removal is a serious and commonly prosecuted federal felony under 8 USC §1326(b)(2) with a potential 20-year prison sentence. See §52.64. Aggravated felony offenses are listed in 8 USC §1101(a)(43) and are discussed in §§52.41–52.47.

An aggravated felony conviction will not trigger deportation unless it occurred on or after November 18, 1988. *Ledezma-Galicia v Holder* (9th Cir 2010) 636 F3d 1059. A conviction before that date will therefore not trigger mandatory detention under 8 USC §1226(c), or any other immigration consequence that depends on an aggravated felony triggering deportability or removability. See, *e.g.*, 8 USC §1226(c)(1)(B) (mandatory ICE detention).

§52.18 1. Grounds of Inadmissibility

Admission of a noncitizen means the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 USC §1101(a)(13). If a noncitizen is inadmissible, that person cannot enter the United States unless he or she is granted a waiver of the inadmissibility ground. See 8 USC §1182 for grounds of inadmissibility. The grounds for inadmissibility (called grounds of exclusion under pre-1996 law) create a bar to both initial and later admissions to the United States. Even a lawful permanent resident ("green card" holder) attempting to reenter after a trip abroad may be considered inadmissible in some circumstances, *e.g.,* commission of a listed criminal offense after September 30, 1996. 8 USC §1101(a)(13)(C)(v) (crime of moral turpitude or controlled substance offense). See *Vartelas v Holder* (2012) ___ US ___, 132 S Ct 1479 (effective date limitation); *Matter of Rivens* (BIA 2011) 25 I&N Dec 623, 625 (DHS bears burden of proof that returning lawful permanent resident is applicant for admission). A noncitizen who manages to enter the United States despite being inadmissible may be charged in removal proceedings as being deportable for having been inadmissible at his or her last admission. 8 USC §1227(a)(1). An alien who enters the United States by falsely claiming United States citizenship is not deemed to have been inspected by an immigration officer, so the entry is not an "admission." *Matter of Pinzon* (BIA 2013) 26 I&N Dec 189.

Moreover, a noncitizen who is inadmissible is not eligible for most means of immigration, *i.e.,* acquiring lawful permanent resident status. For example, a noncitizen who marries a U.S. citizen is normally able to become a permanent resident on the basis of the marriage. If the noncitizen is inadmissible, however, he or she is barred from permanent residency despite the marriage, unless a waiver of the ground of inadmissibility is legally available and is granted in the DHS's discretion. A noncitizen who is inadmissible because of a criminal problem is usually also ineligible to establish good moral character, which is a requirement for naturalized U.S. citizenship, cancellation of removal for nonpermanent residents, registry, or some forms of voluntary departure in lieu of deportation. See 8 USC §1101(f) and discussion in §§52.52–52.62.

In sum, one can view the grounds for inadmissibility as the standard for a person attempting to obtain some benefit from immigration authorities. An undocumented person who applies for permanent residency, a person with lawful immigration status who leaves the United States and needs to reenter, and a permanent resident who wishes to become a U.S. citizen can all be barred by being inadmissible on the crimes-related grounds. However, a noncitizen who has been lawfully admitted to the United States at some point cannot be deported merely for being inadmissible (unless he or she was inadmissible at the time of the last admission); to be deported, the person must come within a ground of deportability.

§52.19 2. Grounds of Deportability

The grounds for deportability are the legal basis to remove individuals after they have been admitted into the United States, *i.e.,* the noncitizen was inspected by immigration authorities at a border or border equivalent before entering the country. 8 USC §1101(a)(13) (admission defined). The grounds for deportation (8 USC §1227) are similar but not identical to those for admissibility (8 USC §1182). For example, a

noncitizen with one conviction for a crime involving moral turpitude is inadmissible if the sentence was more than 6 months or carried a potential sentence of more than a year, and is deportable if the maximum sentence was 1 year or more and the offense occurred within 5 years after the date of admission. See §52.39. Furthermore, if the noncitizen was not admissible at the time of entry or adjustment of status, on the grounds of inadmissibility applicable at the time of entry, that noncitizen is deportable. 8 USC §1227(a)(1)(A).

Once noncitizens have been lawfully admitted, they can be removed only if they come within one or more grounds of deportability. In contrast, a noncitizen who avoided checkpoints and surreptitiously crossed the border will be removed on the grounds of inadmissibility. "Admission" for this purpose includes entry based on fraudulent documents if the noncitizen was officially inspected and admitted, as well as the "adjustment of status to permanent residency" (obtaining a green card through processing at a DHS office in the United States). Thus noncitizens entering the United States on a valid document, someone else's border crossing card, or a tourist visa obtained through fraud, and noncitizens who became permanent residents through adjustment of status, have all been admitted.

3. Procedures for Determining Admissibility or Deportability

§52.20 a. Removal Proceedings

Removal is the procedure for determining whether an alien who has been admitted to the United States may be removed, or for contesting a denial of admission at the border. 8 USC §1229a. A noncitizen with a criminal record may be brought to a removal proceeding from jail after ICE is notified by the local enforcement agency that the defendant is being released from criminal custody. Others come under removal proceedings after being caught up in DHS raids or denied an affirmative application for lawful status. See §52.65. Once before an immigration judge, a noncitizen may accept removal, contest the charge of removability, or concede removability but apply for some form of relief from removal.

With two exceptions, only an immigration judge can order removal. The exceptions are as follows:

(1) A federal district court judge can, at a criminal sentencing hearing, order removal of a noncitizen convicted of certain crimes (8 USC §1228(c)(1); see discussion in §52.8); and

(2) The DHS can order removal of a nonpermanent resident who is convicted of an aggravated felony; most forms of relief from removal are not available in this procedure (8 USC §1228(b)).

Otherwise, a noncitizen who the DHS has cause to believe is removable may be brought before an immigration judge for removal proceedings. The DHS can, however, pressure the noncitizen to accept "voluntary departure" instead of removal from the United States before the institution of removal proceedings, or the judge may grant voluntary departure after proceedings begin. See 8 USC §1229c. Also, the DHS has prosecutorial discretion not to initiate removal proceedings under certain circumstances.

For example, there is Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA). See §§52.63–52.64.

▶ **Note:** Even a stipulation to deportation or removal as part of a plea bargain in federal or state court is a deportation or removal for purposes of federal prosecution for illegal reentry after conviction of an aggravated felony and deportation or removal. 8 USC §1326(b)(2). See discussion in §52.8.

§52.21 b. Expedited Proceedings for Aggravated Felonies

If convicted of an aggravated felony, a noncitizen who is not a lawful permanent resident is subject to administrative removal proceedings (8 USC §1228), is conclusively presumed to be deportable (8 USC §1228), and is presumed not to have good moral character (8 USC §1101(f)(8)). The procedures to remove a nonpermanent resident convicted of an aggravated felony are meant to be completed, including any administrative appeals, before the nonpermanent resident's release from incarceration for the underlying aggravated felony. 8 USC §1228(a)(3)(A).

§52.22 c. Waiver of Deportability and Inadmissibility

Some grounds of inadmissibility and deportability may be waived in certain circumstances at the discretion of an immigration judge or DHS officer. For example, a noncitizen immigrating through a relative's visa petition may be able to apply, under 8 USC §1182(h), for a discretionary waiver of the grounds of inadmissibility regarding moral turpitude and a minor's first marijuana offense. A noncitizen who has been a permanent resident for 5 years and who has continuously resided in the United States for at least 7 years following lawful admission may apply for the discretionary waiver "cancellation of removal" under 8 USC §1229b(a). This waiver can potentially cure any of the grounds of inadmissibility and deportability, but it is not available to a permanent resident convicted of an aggravated felony. See §52.53. A waiver of inadmissibility, under former INA §212(c), remains available to waive grants of deportation for pleas or plea agreements predating April 24, 1996. See *INS v St. Cyr* (2001) 533 US 289, 121 S Ct 2271. A §212(c) waiver is available to an alien who proceeded to trial and was convicted even without a showing of reliance on the availability of relief. *Cardenas-Delgado v Holder* (9th Cir 2013) 720 F3d 1111, 1119. This waiver is also available for convictions resulting from stipulated facts trials or "slow pleas." *Tyson v Holder* (9th Cir 2012) 670 F3d 1015. For a summary of eligibility for INA §212(c) relief, see *Matter of Abdelghany* (BIA 2014) 26 I&N Dec 254.

§52.23 4. Bar to Establishing Good Moral Character

A noncitizen's criminal record can result in statutory ineligibility to establish good moral character. See 8 USC §1101(f). A noncitizen who cannot establish good moral character is ineligible to apply for U.S. citizenship and is ineligible for some means of immigration or relief from removal, including cancellation of removal for certain nonpermanent residents, registry, and voluntary departure. See §§52.52–52.62. Good moral character need only be established for a specific amount of time for each benefit,

e.g., the 5 years preceding an application for naturalization to U.S. citizenship, 10 years preceding an application for cancellation of removal on a ground of inadmissibility, and a reasonable period of time for registry. Conviction of an aggravated felony on or after November 29, 1990, or of murder at any time, is a permanent bar to establishing good moral character. Immigration Act of 1990 (Pub L 101–649, §509, 104 Stat 4978).

The bar to establishing good moral character overlaps several grounds for inadmissibility. A noncitizen may not establish good moral character if he or she is inadmissible on grounds relating to crimes involving moral turpitude, controlled substances, prostitution, a 5-year sentence for two or more convictions, or smuggling of aliens. 8 USC §1101(f). A crime of moral turpitude conviction that falls within the petty offense exception to inadmissibility (8 USC §1182(a)(2)(A)(ii)(II)) does not create a bar to good moral character. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549.

Other grounds are unique to the good moral character bar and are not grounds of inadmissibility. To be able to establish good moral character, a noncitizen must not have been actually confined as a result of a conviction for 180 days or more during the period for which good moral character must be shown. The 180-day period is strictly calculated and depends on actual time in jail, not on suspended imposition or execution of sentence, or nominal sentence that includes good time or work time or other conduct credits that were not actually served. 8 USC §1101(f)(7). (Contrast this with measurement of "sentence imposed" for moral turpitude or some aggravated felony convictions, which depends on the nominal custody ordered by the court and not on time actually spent in jail. See §§52.10, 52.38–52.40, 52.42.)

Finally, a noncitizen who is a habitual drunkard, has been convicted of two or more gambling offenses, or has given false testimony under oath to receive immigration benefits is barred from showing good moral character. 8 USC §1101(f).

➪ §52.24 B. Chart: Comparing Grounds for Inadmissibility, Deportability, and Bar to Establishing Good Moral Character

The following chart, prepared by the Immigrant Legal Resource Center and reproduced with permission, has been updated by the authors.

For explanation of inadmissibility, see §52.18; for deportability, see §52.19; for the bar to establishing good moral character, see §52.23. See also provisions relating to visa fraud, diplomatic immunity, child abduction in violation of a custody decree, AIDS, mental or physical defects, Communist and subversive beliefs, and gambling, discussed in §52.50.

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
Controlled substances.	One conviction (except possession of 30 grams or less of marijuana). 8 USC §1227(a)(2)(B)(i). First conviction simple possession is not aggravated felony (unless drug was flunitrazepam), but second conviction may be so held. Under the influence, transportation for personal use, and offering to commit a drug crime are not aggravated felonies; any offense relating to trafficking is, including transportation after Jan. 1, 2014. 8 USC §1101(a)(43)(B).	One conviction or admission of elements of one offense (single offense involving 30 grams or less of marijuana for personal use can be waived). 8 USC §1182(a)(2)(A)(i). "Reason to believe" was or is drug trafficker. 8 USC §1182(a)(2)(C).	Same as Inadmissibility. 8 USC §1101(f)(3).
Moral turpitude.	Two convictions after admission to U.S., not single scheme; or 1 conviction within 5 years after admission with possible sentence of 1 year or more. 8 USC §1227(a)(2)(A)(i)–(ii).[1]	One conviction or admission; petty offense exception for 1 conviction, 6-month sentence or less, with 1-year maximum possible sentence, or admission of 1 offense with 1-year maximum possible sentence. 8 USC §1182(a)(2)(A)(i)(I)–(II).	Same as Inadmissibility. 8 USC §1101(f)(3).
Prostitution.	None.	Engaging in, procuring, supported by prostitution (not customers) within last 10 years. 8 USC §1182(a)(2)(D).	Same as Inadmissibility. 8 USC §1101(f)(3).

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
Firearms offenses.	One conviction of any listed offense related to firearm or destructive device. 8 USC §1227(a)(2)(C).[2] Sale of firearms or felon-in-possession offenses are aggravated felonies. 8 USC §1101(a)(43)(C), (E).	None (unless offense also is crime involving moral turpitude).	Some can be aggravated felonies.[2]
Sentences.	1-year sentence for violent crime, theft, receiving, burglary, document fraud, forgery, perjury, and a few less common offenses is aggravated felony.[1] See also moral turpitude.	5-year total sentence for 2 or more convictions of any kind. 8 USC §1182(a)(2)(B). See also moral turpitude.	Same 5-year total for 2 or more convictions as Inadmissibility, or physically confined 180 days. 8 USC §1101(f)(3).
Noncitizen smuggling.	Before, at time of, or within 5 years after admission, aiding or encouraging noncitizen to enter U.S. illegally; waiver for some noncitizens. 8 USC §1227(a)(1)(E).	At any time has encouraged or aided alien to enter illegally; waiver for some noncitizens. 8 USC §1182(a)(6)(E).	Same as Inadmissibility. 8 USC §1101(f)(3).
Drug addiction and abuse; alcoholism.	Is or has been after admission a drug addict or abuser. 8 USC §1227(a)(2)(B)(ii).	Is currently drug addict or abuser 8 USC §1182(a)(1)(A)(iv); is an alcoholic and therefore person with mental or physical defect who poses threat. 8 USC §1182(a)(1)(A)(iii). See requirements for waiver in 8 USC §1182(g).	Habitual drunkard ineligible. 8 USC §1101(f)(1).
Gambling.	Second gambling conviction with 1-year sentence of imprisonment is an aggravated felony. 8 USC §1101(a)(43)(J).	None.	Conviction of 2 or more gambling offenses or deriving income from gambling. 8 USC §1101(f)(4)–(5).

Offense	Deportability (8 USC §1227(a))	Inadmissibility (8 USC §1182(a))	Preclusion From Establishing Good Moral Character (8 USC §1101(f))
False testimony in immigration matter.	Falsification of documents or falsely claiming citizenship. 8 USC §1227(a)(3).	Misrepresentation of facts or falsely claiming citizenship. 8 USC §1182(a)(6)(C).	Giving false testimony to obtain benefits under Immigration Act of 1990. 8 USC §1101(f)(6).
Domestic violence, stalking, child abuse.	Conviction after admission and after 9/30/96. 8 USC §1227(a)(2)(E)(i). Limited waiver possible. 8 USC §1227(a)(7)(A).	None (but see if the DV offense also is a crime involving moral turpitude; if so, complete that analysis).	Same as Inadmissibility.
Court finds violation of domestic violence order.	Civil or criminal court finding that enjoined noncitizen who violated domestic violence protection order. 8 USC §1227(a)(2)(E)(ii). Limited waiver possible. 8 USC §1227(a)(7)(A).	None.	Same as Inadmissibility.
Aggravated felony.	Conviction. 8 USC §1101(a)(43) (definition of aggravated felony), §1227(a)(2)(A)(iii) (deportation ground). See §§52.10, 52.12–52.16, 52.41–52.47.	Aggravated felons who have been deported are inadmissible for 20 years; waiver available. 8 USC §1182(a)(9)(A)(ii).	Aggravated felony conviction after November 29, 1990, is permanent bar. 8 USC §1101(f)(8).

[1] Some moral turpitude offenses, such as murder and certain common offenses (*e.g.*, crimes of violence, burglary, theft with a 1-year sentence imposed), are also aggravated felonies. See 8 USC §1101(a)(43)(F)–(G), (P), (R)–(S).

[2] Conviction of trafficking in firearms and certain listed federal firearms offenses (*e.g.*, ex-felon in possession) are aggravated felonies. 8 USC §1101(a)(43)(C), (E).

C. Convictions and Sentences With Adverse Immigration Consequences

1. Definition of "Conviction" for Immigration Purposes; Record of Conviction

§52.25 a. Definition of Conviction

In many cases, a person must be convicted of an offense to suffer immigration penalties. Under the Immigration and Nationality Act (INA), a conviction occurs when (1) there is a formal judgment of guilt or (2) when an alien has been found or has pleaded guilty or no contest and some form of punishment or restraint has been imposed,

even though adjudication has been withheld. 8 USC §1101(a)(48)(A). See Brady et al., Defending Immigrants §2.1 (10th ed). Under (1) above, a "conviction" requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived. *Planes v Holder* (9th Cir 2011) 652 F3d 991, 996. Imposition of court fees or costs, or restitution, is a sufficient penalty to constitute a conviction. *Matter of Cabrera* (BIA 2008) 24 I&N Dec 459. This is not true if the fine is the only penalty and has been suspended. See §52.10. Some dispositions do not constitute convictions for immigration purposes and thereby avoid adverse immigration consequences that flow from convictions. Juvenile dispositions, convictions on direct appeal, and dispositions with a not guilty or no contest plea do not constitute convictions for immigration purposes. See §§52.27–52.29.

▶ **Warning:** No published decision addresses whether a California infraction under Pen C §19.6 is a "conviction" for immigration purposes. An Oregon infraction has been held not to be a "conviction" for immigration purposes because there was no right to counsel or jury trial, or requirement of proof beyond a reasonable doubt. *Matter of Eslamizar* (BIA 2004) 23 I&N Dec 684. On the other hand, an unpublished Ninth Circuit Court decision held that a California infraction is a "conviction" for immigration purposes because there is a requirement that each element of the conviction be proved beyond a reasonable doubt. *Afzal v Gonzales* (9th Cir 2006) 203 Fed Appx 830. See *Matter of Cuellar-Gomez* (BIA 2012) 25 I&N Dec 850, 855 (violation of Kansas municipal ordinance was a conviction because proof beyond reasonable doubt required). Until there is clarity in a published decision, it is preferable to avoid, if at all possible, California infractions, such as petty theft under Pen C §488, that could have adverse immigration consequences.

▶ **Note:** Some activities have adverse immigration consequences whether or not a conviction occurs, particularly prostitution, alien smuggling, using false documents (under state or federal law), and drug addiction, abuse, or trafficking. See §52.50. Avoiding or eliminating a conviction may not avert those immigration consequences that do not require a conviction. It merely deprives the DHS of using the conviction as a means of proof of the conduct-based grounds of removal.

§52.26 b. Divisible Statute and Record of Conviction

In *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678, the Supreme Court unequivocally reaffirmed the traditional categorical approach for determining whether a conviction falls within a ground of removal. It held that a Georgia conviction of possession of marijuana with intent to distribute is not a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) falling outside the definition of aggravated felony drug trafficking that is at issue. The court emphasized that if the minimum conduct sufficient to commit an offense does not satisfy the definition of a conviction-based ground of removal or bar to relief, no conviction of that offense will trigger that immigration consequence. This is true regardless of the actual conduct in the individual's case; the underlying facts are irrelevant to the immigration consequences of the conviction. The Court thus explicitly rejected the BIA's deviation from the traditional categorical

approach and significantly undermined the reasoning behind other retreats from the strict categorical approach. See also *U.S. v Lopez-Chavez* (9th Cir 2014) 757 F3d 1033, 1038. The BIA followed *Moncrieffe* in *Matter of Chairez-Castrejon* (BIA 2014) 26 I&N Dec 349. However, the Attorney General has referred decisions relating to the application of *Descamp* to herself and ordered that those cases be stayed and not regarded as precedential. See *Matter of Chairez-Castrejon* (Oct. 30, 2015) 26 I&N Dec 686.

A "divisible statute" is a code section with alternative elements whose terms encompass both offenses that have immigration consequences and offenses that do not. See *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276. There are three prongs that must be met before a statute can be correctly classified as a divisible statute: (1) The statute must contain multiple alternative elements of functionally separate crimes, worded in the disjunctive (using "or"); (2) at least one of the enumerated crimes must be a categorical match to the generic federal definition at issue; and (3) a jury must decide unanimously that the defendant committed one of these discretely enumerated crimes. *Rendon v Holder* (9th Cir 2014) 764 F3d 1077, 1083. For example, in *Rendon,* the Ninth Circuit held that a conviction for a California burglary under Pen C §459 is never an attempted theft, because the statute punishes a broader range of conduct than a generic attempted theft offense. A person can be found guilty of §459 if the person entered a building, vehicle, vessel, etc. with the intent to commit larceny or "any felony." Since a jury can find a defendant guilty of violating §459 without having to unanimously decide whether the person's intent was to commit "larceny" or whether the person's intent was to commit "any felony," and since the jury also does not have to unanimously agree about the specific nature of the "felony," the statute is not divisible with regard to the intended offense. *Rendon,* 764 F3d at 1084. See also *Lopez-Valencia v Lynch* (9th Cir 2015) 798 F3d 863, 871 (California's theft statute is both overbroad and indivisible). For a detailed analysis on *Rendon,* see http://www.ilrc.org/files/documents/rendon_cal_burglary_divisible.pdf.

▶ **Warning:** The U.S. Supreme Court has granted certiorari in a case to determine whether a court may resort to the "modified categorical approach" whenever a statute sets out in the disjunctive alternative forms of committing an offense ("the means"), or only when the alternative forms of the offense represent "elements" that a jury must unanimously decide the defendant committed. See *Mathis v U.S.* (Jan. 19, 2016, No. 15-6092) 2016 US Lexis 710. For this reason, criminal counsel should act conservatively and plead a client only to the specific alternative method of committing the crime that avoids or mitigates the adverse immigration consequence.

When a conviction under a divisible statute is ambiguous about whether the noncitizen was convicted of the offense with immigration consequences, immigration and other reviewing authorities must resolve the question of which offense was the offense of conviction using only information from the record of conviction. *Descamps v U.S., supra* (modified categorical approach does not authorize fact-based inquiry; court may use modified approach only to determine which alternative element in divisible statute formed basis of conviction). If that record does not indicate that the offense was one carrying immigration penalties, the authority must decide in the defendant's favor. For discussion of this principle, see *Taylor v U.S.* (1990) 495 US 575, 110 S Ct 2143

(burglary under federal definition may exclude certain state burglary convictions for federal sentence enhancement purposes; courts look only to record of conviction to determine elements of offense); *U.S. v Espinoza-Morales* (9th Cir 2010) 621 F3d 1141; *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080.

Once the specific offense of conviction has been identified, the minimum-conduct test is used to determine whether the conviction triggers removal or a bar to relief. *Descamps v U.S., supra.*

Record of conviction. In determining what offense within a divisible statute a defendant was convicted of, the Supreme Court has held that the record of conviction that may be considered includes only "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or ... some comparable judicial record of this information." *Shepard v U.S.* (2005) 544 US 13, 26, 125 S Ct 1254.

The record of conviction consists of the following:

- The minute order of the plea;
- The transcript of the plea colloquy (see *Alvardo v Holder* (9th Cir 2014) 759 F3d 1121, 1130 (written attachment incorporated into plea agreement as factual basis); and
- The abstract of judgment (*Cabantac v Holder* (9th Cir 2013) 736 F3d 787).

Sentencing documents can be considered only for the sentence imposed. For a jury trial, the record of conviction also includes the jury verdict and the jury instructions.

The record of conviction does not include these:

- Dismissed counts (*Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072);
- The trial record;
- The presentence report (*U.S. v Castillo-Marin* (9th Cir 2012) 684 F3d 914, 920; *Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 611);
- The petitioner's testimony at a removal hearing (*Esquivel-Garcia v Holder* (9th Cir 2010) 593 F3d 1025, 1029);
- The prosecutor's sentencing remarks; or
- The trial judge's opinion about immigration consequences.

See, *e.g., Matter of Milian-Dubon* (BIA 2010) 25 I&N Dec 197 (police report included if incorporated into guilty plea or admitted by defendant during criminal proceedings); *Matter of Teixeira* (BIA 1996) 21 I&N Dec 316 (police report not included); *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330; *Matter of Short* (BIA 1989) 20 I&N Dec 136; *Matter of Mena, supra; Matter of Goodalle* (BIA 1967) 12 I&N Dec 106; *Matter of Cassisi* (BIA 1963) 10 I&N Dec 136. Nor does the record of conviction include subsequent testimony by the noncitizen; *e.g.,* deportability on the firearms ground was not shown even when the noncitizen testified in immigration proceedings that the unnamed weapon he was convicted of possessing was a gun. *Matter of Pichardo-Sufren, supra.* See *Morales v Gonzales* (9th Cir 2007) 478 F3d 972.

Utility of vague record of conviction. Some statutes, such as Health & S C §11352, include both crimes that are aggravated felonies (*e.g.,* sale of marijuana) and crimes

that are not (*e.g.,* offering to commit a listed offense or transportation of a controlled substance committed before January 1, 2014).

When a California defendant pleaded to "sale or transportation of marijuana" or "sale and transportation of marijuana," committed before January 1, 2014, the Ninth Circuit has held that the record is inconclusive regarding whether the defendant committed an aggravated felony.

▶ **Warning:** Transportation offenses under Health & S C §§11352(a) and 11379(a) committed on or after January 1, 2014, are "transportation for sale," which is a drug trafficking aggravated felony.

An inconclusive record is sufficient to avoid deportation, since the government bears the burden of persuasion on that issue. *Young v Holder* (9th Cir 2012) 697 F3d 976 (en banc). See http://www.ilrc.org/criminal.

▶ **Practice Tip: When** dealing with a divisible statute, it is always best, and sometimes absolutely necessary, to plead to the specific offense in the statute that will not render the noncitizen ineligible for relief. For example, to avoid ineligibility for cancellation of removal, a defendant can plead to "offering to distribute" a specified controlled substance rather than a vague and inconclusive record. See other examples in §52.33.

Factual basis. A noncitizen's decision to incorporate the police report into his or her guilty plea makes the report an explicit statement "in which the factual basis for the plea was confirmed by the defendant," and in that circumstance, relying on the police report to establish the elements of the crime of conviction does not undermine the purposes of the court's limited modified categorical inquiry. *Suazo Perez v Mukasey* (9th Cir 2008) 512 F3d 1222, 1226. The record of conviction, including the factual basis for the plea, can only, however, be used to identify the elements of the offense of conviction. The underlying facts, even if contained within the record of conviction, remain irrelevant to the determination of whether the conviction falls within a ground of removal. *Moncrieffe v Holder, supra.*

Even so, immigration authorities may (improperly) continue to attempt to use facts contained within the factual basis to bring a conviction within a ground of removal. To counter this, counsel can ask to enter a "bare stipulation" that a factual basis exists, without identifying a document, when the defendant acknowledges in the plea colloquy that he or she discussed the elements of the crime and any defenses with counsel and was satisfied with counsel's advice. See *People v Palmer* (2013) 58 C4th 110, 114.

▶ **Practice Tip:** If the court insists on a factual basis, however, defense counsel should use a carefully worded factual admission by the defendant that does not admit a fact bringing the conviction within a ground of deportation, instead of stipulating to the police report, when the report contains facts that might bring a conviction within a ground of removal. Instead of stipulating to the police report or preliminary hearing transcript for the factual basis of the plea, use these alternatives:

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

• As a factual basis for the plea, counsel may state his or her 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 C4th 36, 51 (similar language was not admission by defendant).

• Plead pursuant to *People v West* (1970) 3 C3d 595 and decline to stipulate to a factual basis. A plea pursuant to *West* is helpful only in declining to state a factual basis for a plea, but it does not prevent a court from considering a fact contained within a charge to which a plea is entered. See *U.S. v Valdavinos-Torres* (9th Cir 2012) 704 F3d 679, 687.

▶ **Example:** A plea to count one of a complaint that charges a violation of Health & S C §11377(a) to possession of "methamphetamine" is a deportable controlled substance offense even if the defendant entered a plea pursuant to *West*. However, if the plea was to an amended count one that deleted the name of the drug and inserted that the defendant was pleading to Health & S C §11377(a), possession of "a controlled substance on the state list of controlled substances," and the defendant declined to stipulate to the police report for a factual basis and declined to identify the drug in the factual basis, the plea would not be to a deportable controlled substance offense. See, *e.g., Coronado v Holder* (9th Cir 2014) 759 F3d 977, 985. The use of a plea entered under *West* may prove helpful in declining to stipulate to the police report as a factual basis for the offense.

For further discussion of these options, see California Quick Reference Chart and Notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php; Brady et al., Defending Immigrants §N.3.E (10th ed).

Domestic violence cases. Some immigration authorities have asserted that they can go beyond the record of conviction to determine deportability under the domestic violence ground in 8 USC §1227(a)(2)(E)(i). They assert that, because of the unusual wording of the domestic violence deportation ground, the required relationship to the victim, *e.g.*, current or ex-spouse or cohabitant, can be proved by information outside the record. See §§52.48–52.49. The Ninth Circuit has held that the court may look only at the record of conviction to determine whether a crime is one of "domestic violence." See *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624 (testimonial evidence in immigration proceedings was outside record of conviction; therefore, inadmissible to show that convictions for burglary and kidnapping were convictions of crimes of domestic violence). The Supreme Court, however, held in a criminal context that the domestic violence nature of a conviction could be determined by evidence outside the elements of conviction. *U.S. v Hayes* (2009) 555 US 415, 129 S Ct 1079. This reasoning may be extended to the immigration context. In *Nijhawan v Holder* (2009) 557 US 29, 129 S Ct 2294, the Court held that the categorical approach does not apply to the loss amount in a fraud/deceit aggravated felony case.

The BIA held that immigration authorities may also conduct an evidentiary hearing to determine whether a "small amount" of marijuana was distributed without compensation to avoid a drug-trafficking aggravated felony conviction. *Matter of Castro-Rodriguez* (BIA 2012) 25 I&N Dec 698. They may also do so to determine whether a marijuana possession offense involved 30 grams or less, and whether a conviction falls within

this exception to the controlled substances deportation ground or qualifies for a possible waiver of controlled substances inadmissibility. *Matter of Davey* (BIA 2012) 26 I&N Dec 37.

The U.S. Supreme Court, however, has used the strict categorical analysis, ignoring the facts and focusing on the minimum conduct sufficient to commit elements of the offense, to conclude that the non-aggravated-felony offense of distribution without remuneration of a small amount of marijuana is not categorically a drug trafficking aggravated felony. *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678. It did so entirely on the basis of the elements of the offense, and the facts were irrelevant to its analysis. Therefore, *Castro-Rodriguez* has in effect been reversed sub silencio, and the analysis of the under-30-grams-of-marijuana exception to the controlled substances deportation ground is not based on the facts, but solely on the elements of the offense of conviction.

The U.S. Supreme Court has also held that immigration counsel must do more than apply "legal imagination" to a state statute's language and must show

> a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition [of the deportation ground]. To show that realistic probability, an offender . . . must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v Duenas-Alvarez (2007) 549 US 183, 193, 127 S Ct 815. The Ninth Circuit, however, has limited this doctrine, stating that when

> a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text.

U.S. v Grisel (9th Cir 2007) 488 F3d 844, 850 (en banc) (citation omitted).

A preponderance is insufficient to establish a fact by the "clear and convincing" evidence required for deportability. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503.

2. Dispositions That May Not Constitute Convictions

§52.27 a. Juvenile Court Dispositions

A disposition in juvenile proceedings does not constitute a conviction. *Matter of C.M.* (BIA 1953) 5 I&N Dec 327. However, when a minor is charged and convicted as an adult, that does constitute a conviction. *Rangel-Zuazo v Holder* (9th Cir 2012) 678 F3d 967; *Vargas-Hernandez v Gonzales* (9th Cir 2007) 497 F3d 919. On representing juveniles, see §52.4.

§52.28 b. Appeal of Conviction Not Exhausted

Under 8 USC §1101(a)(48)(A), a "conviction" requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived. *Planes v Holder* (9th Cir 2011) 652 F3d 991.

§52.29 c. Disposition Without Guilty Plea

Before a conviction exists for immigration purposes, a plea or finding of guilt must be made and some punishment or restraint imposed. 8 USC §1101(a)(48)(A). Diversions granted in 1996 and earlier did not involve a plea of guilty or no contest, and thus do not constitute "convictions" for immigration purposes. See *Matter of Grullon* (BIA 1989) 20 I&N Dec 12. After January 1, 1997, drug diversion via deferred entry of judgment under Pen C §1000 requires a guilty or no contest plea and therefore *does* constitute a conviction for immigration purposes even after dismissal. 8 USC §1101(a)(48)(A); *Matter of Punu* (BIA 1998) 22 I&N Dec 224. In most cases, expungement, *e.g.,* under Pen C §1203.4, will *not* eliminate the conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. However, there is a Ninth Circuit exception for a first conviction, entered on or before July 14, 2011, of simple possession and other minor drug offenses that are not forbidden under federal law; diversion dismissal or expungement *will* eliminate these convictions for immigration purposes so long as the defendant did not violate probation or was under 21 at the time of the offense. See §52.14.

Even after 1996, however, courts continued to grant diversions with no plea in four circumstances:

(1) When courts were slow to learn of or implement the new procedure;

(2) When the offense occurred in 1996 or earlier, the Ex Post Facto Clause requires granting old-style diversion with no guilty plea (see *Collins v Youngblood* (1990) 497 US 37, 110 S Ct 2715);

(3) When counties exercise their authority under the new diversion law to establish drug courts authorized to grant old-style diversions with no plea (Pen C §1000.5); and

(4) When diversion programs that pertain to other types of cases, *e.g.,* defendants with cognitive developmental disabilities under Pen C §1001.20, do not require a plea.

▶ **Note:** For diversions granted in 1997 and later, counsel should check the record. If there was a plea, the diversion is a conviction for immigration purposes, at least until dismissal (depending on the offense of conviction). But if there was no plea, it is not. Dispositions under diversion, deferred adjudication, or first-offender programs in other states must be carefully analyzed to ascertain whether a conviction has occurred. For further discussion of diversion and deferred entry of judgment, see chap 27.

A plea of guilty or no contest with imposition of sentence suspended constitutes a conviction under federal immigration law even though technically no judgment of conviction is entered under California law. *Gutierrez v INS* (9th Cir 1963) 323 F2d 593.

§52.30 3. Offenses Involving Controlled Substances

Sections 52.30–52.34 discuss *conviction* of controlled substance offenses. Drug addicts and abusers are deportable and inadmissible, even without a conviction. Likewise, those who the government has reason to believe are or were drug traffickers or their assistants are inadmissible, even without a conviction. See §52.50.

▶ **Note:** For advice in pleading drug cases, see Note titled "Drug Offenses" accompanying the California Chart on Immigration Consequences at the website http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

▶ **Note:** Arresting agencies must notify the appropriate U.S. agency whenever they arrest a suspected noncitizen of violating Health & S C §§11350–11351, 11351.5, 11352, 11353, 11355, 11357, 11359, 11360, 11361, 11363, 11366, 11368, or 11550. Health & S C §11369. See *Fonseca v Fong* (2008) 167 CA4th 922, 936 (Section 11369 is not preempted by federal law and "does not require any state or local law enforcement agency to independently determine whether an arrestee is a citizen of the United States, let alone whether he or she is present in the United States lawfully or unlawfully").

§52.31 a. Controlled Substances Grounds of Deportability and Inadmissibility, and Bar to Good Moral Character

With few exceptions, drug convictions render a noncitizen inadmissible and deportable. A noncitizen who is convicted of an offense "relating to" controlled substances, or of attempt or conspiracy to commit such an offense, is inadmissible under 8 USC §1182(a)(2)(A)(i)(II), deportable under 8 USC §1227(a)(2)(B), and barred from establishing good moral character under 8 USC §1101(f). Even conviction of the most minor drug offense, such as presence in a place where drugs are used, will make a person deportable and inadmissible. *Matter of Hernandez-Ponce* (BIA 1988) 19 I&N Dec 613. Convictions under state or federal law as well as laws of other countries incur these penalties.

Many drug offenses are classed as aggravated felonies under 8 USC §1101(a)(43)(B), although there are important exceptions. See §52.32. Conviction of an aggravated felony brings additional severe penalties beyond making the person deportable and inadmissible, including subjecting an aggravated felon who reenters the United States after deportation to severe federal criminal sanctions. See §52.33.

§52.32 b. Exceptions: Offenses That Are Not Classed as Controlled Substance Offenses for Immigration Purposes

Some dispositions either are not classed as controlled substance convictions at all for immigration purposes, or at least are not classed as aggravated felonies.

Specific controlled substance not identified. Controlled substances are defined in 21 USC §802 to include most illegal drugs as well as precursor and "essential" chemicals. The federal and state lists are not the same. California's list prohibits certain drugs that are not on the federal list. Unless the record of conviction specifies a drug that is prohibited by federal law, the conviction will not trigger deportation as a conviction relating to a controlled substance. For example, if the record of conviction (consisting of the charging papers, plea or judgment, sentence, and legally defined elements of the offense) refers only to "a controlled substance" without specifying which substance, the conviction does not come within the grounds of deportability relating to controlled substance convictions, and is not a controlled substance aggravated felony. *Matter of Paulus* (BIA 1965) 11 I&N Dec 274; *Ruiz-Vidal v Gonzales* (9th Cir 2007) 473 F3d 1072 (when record of conviction

under Health & S C §11377(a) does not identify substance, there is no controlled substance conviction for immigration purposes). See also *Mellouli v Lynch* (2015) ___ US ___, 135 S Ct 1980 (misdemeanor conviction for using drug paraphernalia to store or conceal a "controlled substance" that did not identify the substance did not subject the defendant to deportation for violation of a state law relating to a controlled substance as defined in 21 USC §802). On the record of conviction, see §52.26. Counsel frequently bargain to amend the charging papers to eliminate the identification of the controlled substance or to have the client plead to the exact language of the statute when the statute specifies drugs not on the federal list. But, in *Matter of Ferreira* (BIA 2014) 26 I&N Dec 415, the Board held that there must be a showing of a "realistic probability" that there has been a prosecution and conviction for a substance that appears on the state list but not on the federal list for the specific offense. Immigration advocates will argue that *Matter of Ferreira* should not be followed in the Ninth Circuit. See National Immigration Project of the National Lawyers Guild and Immigration Defense Project, *Practice Advisory, The Realistic Probability Standard: Fighting Government Efforts to Use It to Undermine the Categorical Approach* (Nov. 5, 2014), available at http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_realistic_probability_11–5-2014.pdf.

▶ **Practice Tip:** The Ninth Circuit identified two drugs that are not federally controlled substances: khat, prohibited under Health & S C §11055(d)(7), and chorionic gonadotropin, prohibited by Health & S C §11056(f). See *Coronado v Holder* (9th Cir 2014) 759 F3d 977, 983. There have been prosecutions and convictions for khat and a prosecution for chorionic gonadotropin in California. Therefore, *Matter of Ferreira* does not prevent trying to negotiate with the district attorney to amend the charge to delete the name of the drug for these offenses, to avoid inadmissibility and deportability for a controlled substance or to avoid an aggravated felony for drug trafficking under Health & S C §11351 or §11379.

▶ **Practice Tip:** Formerly, Health & S C §§11350–11352 covered certain substances that were not on the federal list. Practitioners have been unable to identify any substances covered under these sections that would meet the requirements of *Matter of Ferreira,* which are substances that are not federally controlled substances that have been prosecuted. For this reason, it is safer to use the other strategies suggested in this chapter for these offenses.

▶ **Warning:** As a result of *Young v Holder* (9th Cir 2012) 697 F3d 976 (en banc), the use of an unspecified controlled substance will benefit only a permanent resident who is not already deportable for a prior conviction. This strategy will not benefit an undocumented person who needs to apply for some relief to stay in the United States, a person on a nonimmigrant visa who needs to renew the visa or apply for adjustment of status, or a permanent resident who is already deportable for prior convictions and needs to apply for cancellation of removal. Under current law, those applying for relief or new immigration status bear the burden of proof that they are eligible for that relief or status, and proving that one was convicted of an offense involving an unspecified controlled substance does not prove that the conviction was for a controlled substance not on the federal list of controlled substances. Although immigration counsel has a good argument that *Moncrieffe v Holder* (2013) ___ US ___, 133 S

Ct 1678, and *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, overruled *Young v Holder,* criminal attorneys should act conservatively pending a court decision on this issue. See §52.26.

Driving under the influence of drugs, or alcohol and drugs, should not be ruled an offense "relating to a controlled substance" unless a specific controlled substance (that is on the federal list) is identified in the record of conviction, because the charge of driving while impaired may also arise as the result of legal or prescribed drugs as well as alcohol. Veh C §23152; *People v Keith* (1960) 184 CA2d Supp 884 (insulin). See Veh C §312 (definition of drug).

▶ **Note:** The Ninth Circuit has held that possession of paraphernalia was an offense relating to a controlled substance, despite the lack of proof of the specific substance. See *Luu-Le v INS* (9th Cir 2000) 224 F3d 911; *Ramirez-Altamirano v Holder* (9th Cir 2009) 563 F3d 800. This was overruled in *Mellouli v Lynch* (2015) ___ US ___, 135 S Ct 1980. Nonetheless, conviction for paraphernalia under Health & S C §11364 is not a safe immigration plea, because practitioners have been unable to identify any substance currently covered under this section that is not a federally controlled substance. For that reason, a plea to Pen C §32 (accessory after the fact) or another alternative is recommended.

Accessory after the fact. Being an "accessory after the fact" (see 18 USC §3) to a controlled substances offense does not itself constitute a controlled substances offense. *Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955. The federal offense consists of aiding a criminal to escape arrest, trial, or punishment, and is so similar to the California offense defined in Pen C §32 that the same result should follow for the California offense. In some cases, vigorous negotiation can result in a plea bargain to being an accessory even when the original charge did not involve this act.

A plea to accessory after the fact can have other adverse consequences, however. It must result in a sentence of no more than 364 days of custody to avoid being considered an aggravated felony under the obstruction of justice provision. 8 USC §1101(a)(43)(S); *Matter of Batista-Hernandez, supra* (18 USC §3). But the Board of Immigration Appeals (BIA) held that the federal crime of misprision of felony is not obstruction of justice and is not an aggravated felony even with a 1-year sentence. *Matter of Espinoza-Gonzalez* (BIA 1999) 22 I&N Dec 889. The Board of Immigration Appeals has held that accessory after the fact is a crime of moral turpitude only if the underlying offense is a crime involving moral turpitude. *Matter of Rivens* (BIA 2011) 25 I&N Dec 623 (interpreting federal accessory after the fact (18 USC §3)). However, the word "felony" in Pen C §32 is not a divisible offense under *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, so no matter what the record of conviction identifies as the underlying offense, this offense is probably not a crime of moral turpitude. But criminal counsel should act conservatively and try to identify an underlying offense that is not a crime of moral turpitude.

▶ **Practice Tip:** A plea to accessory after the fact to possession of a controlled substance (even one on the federal list) with a sentence of 364 days or less should not be a controlled substance offense or a crime of moral turpitude.

Withdrawal of plea after DEJ under Pen C §1203.43. A plea of no contest or guilty under Pen C §§1000–1000.6 after January 1, 1997, constitutes a conviction for immigration purposes despite the fact that the case is dismissed after successful completion of diversion (subject to the exception of possession and paraphernalia cases pleaded to before July 15, 2011). Because the legislature recognized that the promise in Pen C §1000.4 that DEJ could not be used to deny any benefit "constitutes misinformation about the actual consequences of making a plea," Pen C §1203.43, effective January 1, 2016, allows a defendant to request a withdrawal of plea if diversion was successfully completed and the case previously dismissed. See Pen C §1203.43(a)(1). A defendant does not have to show actual prejudice to obtain this relief, because the statute states "the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid." Pen C §1203.43(a)(2). The withdrawal of a plea under this section should eliminate any conviction based on a no contest or guilty plea to Pen C §1000 for immigration purposes. See, *e.g., Matter of Pickering* (BIA 2003) 23 I&N Dec 621, 624 (giving effect to vacation of judgment based on underlying defect in plea, but not for rehabilitative or humanitarian purposes). For more information, see http://www.ilrc.org/resources/New_California_Drug_Law_1203.43.

First-offense simple possession (or less serious offense) that has received any rehabilitative treatment for pleas entered on or before July 14, 2011. Conviction based on a plea entered on or before July 14, 2011, of a first offense of simple possession of any controlled substance for which the defendant has received any kind of rehabilitative treatment such as deferred adjudication under Pen C §1000 or dismissal of charges under Pen C §1203.4 is not a "conviction." *Nunez-Reyes v Holder* (9th Cir 2011) 646 F3d 684, 694 (en banc), overruling *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. Once a conviction is so treated, the original guilty plea should no longer constitute a formal "admission" of a drug offense that causes inadmissibility under 8 USC §1182(a)(2)(A)(i). See, *e.g., Matter of E.V.* (BIA 1953) 5 I&N Dec 194. For pleas entered on or before July 14, 2011, a first offense that is less serious than simple possession and that is not analogous to a federal felony also comes within this rule. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132 (expungement of conviction of possession of paraphernalia). However, conviction of being under the influence of a controlled substance, in violation of Health & S C §11550(a), is not eliminated as a conviction after rehabilitative relief even for pleas entered on or before July 14, 2011, since the Ninth Circuit treated this offense as more serious than possession. *Nunez-Reyes,* 646 F3d at 695.

For pleas entered on or before July 14, 2011, if there was a preplea diversion under Pen C §1000 before its amendment on January 1, 1997, then rehabilitative treatment under postplea diversion or Proposition 36, or dismissal under Pen C §1203.4 in a subsequent case, will still constitute a "conviction" for immigration purposes. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. See §52.34. Additionally, rehabilitative relief will not eliminate the conviction for immigration purposes if the defendant violated probation before obtaining the rehabilitative relief. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039. *Estrada,* however, covered only expungements analogous to those under 18 USC §3607(a) and should not prevent expungements from being effective

under *Lujan* if the defendant was under 21 at the time of the offense, since there is no probation-violation bar for those defendants under 18 USC §3607(c).

▶ **Practice Tip:** If the defendant pleaded to a simple possession offense or paraphernalia offense on or before July 14, 2011, it is still important after July 14, 2011, to try to expunge under Pen C §1203.4, to withdraw the plea under Proposition 36, or to get a dismissal under DEJ to eliminate the first-time drug offense for immigration purposes.

Soliciting or offering to commit any drug offense. In *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909, the Ninth Circuit held that *offering* to sell, transport, or deliver a drug is not an aggravated felony. Thus, a plea to offering to transport, or a plea to the statute that takes advantage of the disjunctive "or," is not a plea to an aggravated felony. However, if a noncitizen with a solicitation of drug offense is arrested or returns from a trip abroad outside the Ninth Circuit, the noncitizen can be removed, since no circuit other than the Ninth Circuit recognizes this defense. *Matter of Zorilla-Vidal* (BIA 2009) 24 I&N Dec 768. See additional advice at §52.33. Even in the Ninth Circuit, offering to commit a drug offense under Health & S C §11352(a), §11360(a), or §11379(a) is a deportable offense "relating to" controlled substances because these statutes are specifically aimed at controlled substances. *Mielewczyk v Holder* (9th Cir 2009) 575 F3d 992. See also *Guerrero-Silva v Holder* (9th Cir 2010) 599 F3d 1090 (Health & S C §11361(b) offense is deportable controlled-substance offense). But the *Mielewczyk* court stated that the generic solicitation statute in Pen C §653f(d) is not a deportable controlled-substance offense. 575 F3d at 998 (dictum). This plea will also make the person *inadmissible,* however, so that it is a bad option for an undocumented person or anyone who is applying for permanent residency, for example, through a family visa petition. Offering to sell drugs is also a crime of moral turpitude. For further discussion of pleas in drug cases, see Note "Drug Offenses" accompanying the Chart on Immigration Consequences for Selected California Offenses at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

▶ **Warning:** It is very possible that legislation will erase the use of "offering" as a defense, and there is a small possibility that any such legislation would be retroactive. Therefore, the best practice is for defense practitioners, when possible, to use another alternative, such as Pen C §32, with 364 days or less sentence imposed, or to delete the name of the drug, at least for cases involving Health & S C §§11377–11379. But if these alternatives are not available, a plea to "offering" is, for now, a safe plea in the Ninth Circuit for a permanent resident who is eligible for cancellation of removal, because it is not an aggravated felony, at least in the Ninth Circuit.

Exception for one conviction of simple possession of 30 grams or less of marijuana or hashish. Conviction of this offense is not a basis for deportability or a bar to establishing good moral character and is subject to discretionary waiver of inadmissibility under 8 USC §1182(h) if the person otherwise qualifies for the waiver. If there is a prior drug offense, this exception does not apply. *Rodriguez v Holder* (9th Cir 2010) 619 F3d 1077. But if the prior offense was a result of a plea to a first-offense simple possession and the offense was dismissed after DEJ, expunged pursuant to Pen

C §1203.4(a), or withdrawn after Proposition 36 treatment, and the conviction was on or before July 14, 2011, then it can be argued that there was no prior drug offense.

When a noncitizen is charged with deportability for conviction of a first-time offense of possession of marijuana, the government bears the burden of proof that the noncitizen is deportable, but the government can resort to evidence outside the record of conviction. *Matter of Davey* (BIA 2012) 26 I&N Dec 37; *Dominguez-Rodriguez* (BIA 2014) 26 I&N Dec 408 (*Matter of Davey* reaffirmed; statute calls for circumstance-specific inquiry, not categorical inquiry, distinguishing *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678). For this reason, it is recommended that the plea or sentence transcript should contain a stipulation or finding that the quantity was 30 grams or less. For example, a plea to Health & S C §11357(b) would fit within this exception because this crime punishes possession of not more than 28.5 grams of marijuana. However, Health & S C §11357(c) punishes more than 28.5 grams, so a stipulation or finding that the quantity was 30 grams or less would conclusively prove that the offense fit within this exception.

Matter of Davey also held that the exception's "single offense" language may cover a paraphernalia conviction if this was merely an adjunct to the possession or use of 30 grams or less of marijuana (26 I&N Dec 37 at 40) and stated that the 30-grams exception does not apply to being under the influence of marijuana, because this is a more dangerous offense (26 I&N Dec 37 at 40 n3). This casts doubt on prior Ninth Circuit cases because *Matter of Davey* may be given deference in future Ninth Circuit decisions. The Ninth Circuit had previously held that conviction of being under the influence of marijuana has the same benefit. See *Flores-Arellano v INS* (9th Cir 1993) 5 F3d 360. See also *Medina v Ashcroft* (9th Cir 2005) 393 F3d 1063 (Nevada conviction for attempting to be under influence of THC comes within this exception). If a paraphernalia offense, such as possession of a marijuana pipe, relates to an offense of simple possession of 30 grams or less of marijuana, the noncitizen will have the same benefit. *Matter of Martinez-Espinoza* (BIA 2009) 25 I&N Dec 118. For this reason, if a paraphernalia conviction is unavoidable and relates to a marijuana pipe, it is best to put that in the record of conviction. The BIA has ruled that the exception to deportability for simple possession of 30 grams or less of marijuana does not apply to a conviction under a state statute containing an element requiring that the offense occurred in a prison or other protected location, or when an enhancement increased the maximum punishment for possession, such as an enhancement for possession within a "drug-free zone." *Matter of Moncada-Servellon* (BIA 2007) 24 I&N Dec 62 (possession in prison); *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424 (enhancement for "drug-free zone").

The INS (now DHS) General Counsel ruled that conviction of simple possession of 30 grams or less of hashish or other cannabis products comes within the marijuana exception to the deportation ground and can be waived under INA §212(h) (8 USC §1182(h)). In the context of the §212(h) waiver, the General Counsel recommended that the INS deny a waiver to one who possessed an amount of hashish equivalent to more than 30 grams of marijuana leaves. See INS General Counsel Legal Opinion 96–3 (Apr. 23, 1996), withdrawing previous INS General Counsel Legal Opinion 92–47 (Aug. 9, 1992). See also 21 USC §802(16), defining "marihuana" to include all parts of the cannabis plant, including hashish.

In delinquency proceedings. As always, a delinquency disposition is not a "conviction" for immigration purposes. A plea to possession, under the influence, etc., is not a basis for deportation or inadmissibility, nor is it a plea to an aggravated felony. However, defense counsel should conservatively assume that a delinquency plea to sale, possession for sale, or other trafficking offenses will make the person inadmissible, because it will provide DHS with "reason to believe" that the minor has been or assisted a trafficker. See §52.33. This may not be such a serious result for a permanent resident, but if the minor is undocumented, this plea is likely to permanently bar him or her from ever getting lawful immigration status.

§52.33 c. Which Drug Offenses Are Aggravated Felonies

▶ **Note:** The strategies outlined in §§52.32 and 52.34 to prevent classification as a controlled substance offense also prevent classification as a controlled substance aggravated felony.

An aggravated felony subjects the person convicted of it to the penalties and restricted rights discussed in §52.44. The definition of aggravated felonies includes "illicit trafficking in a controlled substance ... including a drug trafficking crime [defined under federal statute]." 8 USC §1101(a)(43)(B). A state or federal drug offense, or an attempt or conspiracy to commit such an offense (8 USC §1101(a)(43)(U)), will be considered an aggravated felony in immigration proceedings in the Ninth Circuit in either of the following situations:

- It is generally considered to be a trafficking offense (*e.g.,* sale or possession for sale); or
- It is listed in 18 USC §924(c)(2) or, if a state crime, is analogous to one of the federal crimes listed in that section that carries a potential sentence of 1 year or more.

Offer to commit an offense: the *Rivera-Sanchez* rule. In a highly significant and unanimous en banc decision, the Ninth Circuit ruled that *offering* to commit a trafficking offense is not an aggravated felony, and that therefore parts of Health & S C §11360(a) and similar offenses do not constitute a controlled-substance aggravated felony under 8 USC §1101(a)(43)(B). *U.S. v Rivera-Sanchez* (9th Cir 2001) 247 F3d 905, 909. The court held that offering to commit an offense was not included in the statutory definition of aggravated felony, which cites only the principal offense, conspiracy, and attempt. 8 USC §1101(a)(48)(B). A noncitizen who is convicted of offering to sell, transport, or distribute a drug under Health & S C §11360(a), or who has a "record of conviction" (charging papers, plea or judgment, legally defined elements of the offense) that does not indicate whether the plea was to the principal act or to offering, has not been convicted of an aggravated felony. For further discussion of the record of conviction, see §52.26. The *Rivera-Sanchez* court's reasoning applies equally to Health & S C §11352(a); the court noted that the two statutes were nearly identical and overruled prior cases finding that conviction under §11352(a) necessarily constitutes an aggravated felony. See also Health & S C §11379(a). But "offering" to commit a drug offense has been held to be a deportable controlled-substance offense even

though it is not an aggravated felony. *Mielewczyk v Holder* (9th Cir 2009) 575 F3d 992.

▶ **Warning:** A plea to "transportation" for personal use is not an aggravated felony. However, operative January 1, 2014, "transportation" of a controlled substance in Health & S C §§11379(a) and 11352(a) is defined as "transportation for sale," transforming that plea into a drug trafficking aggravated felony. Note that the definition of transportation in Health & S C §§11360 and 11379.5 was amended effective January 1, 2016, also to provide that "transport" means to transport for sale.

Note that offenses such as possession for sale under Health & S C §11351 do not include offering and therefore do not come within the beneficial *Rivera-Sanchez* rule. For this reason, it has been held ineffective assistance of counsel not to advise a noncitizen defendant of the immigration benefit of declining a plea to possession for sale and instead pleading up to offering to sell. *People v Bautista* (2004) 115 CA4th 229, 239.

▶ **Note:** Offering to commit a solicitation offense in violation of a controlled-substance statute such as Health & S C §11360, §11352, or §11379 and transportation of controlled substances both before and after January 1, 2014, are deportable controlled-substance offenses. See §52.32. A conviction of offering to commit a drug transaction also will establish inadmissibility on the ground that the noncitizen is a person who authorities have reason to believe is or has assisted a drug trafficker. In contrast, offering to transport may not have this disadvantage. See 8 USC §1182(a)(2)(C) and discussion in §52.50.

First conviction for simple possession. The Supreme Court held that a first conviction for simple possession of a controlled substance is not an aggravated felony, even if the state classifies the offense as a felony. *Lopez v Gonzales* (2006) 549 US 47, 127 S Ct 625. The exception is that a first conviction for simple possession of any amount of flunitrazepam is an aggravated felony. See 21 USC §841(a). Simple possession of more than 5 grams of cocaine base used to be an aggravated felony but no longer is, at least if the conviction occurred on or after August 3, 2010. See 21 USC §844(a).

Two or more possession convictions. In contrast to a first conviction for simple possession, a *second* conviction for possession will be held to be an aggravated felony *if* the individual's status as a recidivist drug offender was charged in the second prosecution and admitted or found to be true. However, a second conviction of an offense of simple possession that has not been enhanced on the basis of the fact of a prior conviction is not a "conviction" of an aggravated felony for immigration purposes. *Carachuri-Rosendo v Holder* (2010) 560 US 563, 582, 130 S Ct 2577. A second conviction for possession also is dangerous because under *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728, it cannot be eliminated for immigration purposes by deferred entry of judgment or other rehabilitative relief. Moreover, if the second offense occurred during the probation period for the first offense, the first conviction also cannot be eliminated by expungement under *Lujan-Armendariz*. But see §52.14.

▶ **Practice Tip:** To avoid an aggravated felony for two or more possession convictions,

either plead to an offense other than a possession offense, or make sure that the prior possession offense(s) is not charged and admitted or found to be true in the second possession prosecution.

▶ **Note:** For pleas entered on or before July 14, 2011, a noncitizen defendant's first conviction of simple possession, even of more than five grams of cocaine base or any amount of flunitrazepam, will not have an immigration consequence if it is successfully eliminated by "rehabilitative relief," such as withdrawal of plea under deferred entry of judgment, Proposition 36, or Pen C §1203.4. See *Nunez-Reyes v Holder* (9th Cir 2011) 646 F3d 684 (en banc). However, a drug conviction is not eliminated for immigration purposes under Pen C §1203.4(a) until the expungement is actually granted; mere prospective eligibility for a later expungement does not remove the conviction. *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284. It has not yet been determined if the same rule applies to deferred entry of judgment or Proposition 36. One limitation on rehabilitative relief is that a preplea diversion under the diversion law before its amendment on January 1, 1997, will disqualify a defendant from the benefits of a *Lujan* expungement just as though it had been a first drug conviction. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Another limitation is that if there is a probation violation but the noncitizen ultimately receives rehabilitative relief, the conviction will not be eliminated for immigration purposes. *Estrada v Holder* (9th Cir 2009) 560 F3d 1039. See also §52.13. The second conviction of simple possession cannot be eliminated in this way for immigration purposes.

Minor drug offenses without federal analogues. Many minor drug offenses, *e.g.*, Health & S C §11550 (under the influence) and Pen C §647(f) (under the influence), do not involve trafficking and also have no federal analogue, and thus should not be held to be aggravated felonies. Further, for pleas entered on or before July 14, 2011, conviction of a first offense that is less serious than simple possession and is not a federal offense can be eliminated by any state rehabilitative relief. *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132. Transportation for personal use (*e.g.*, Health & S C §11360(a)) has no exact federal analogue and for that reason has been held not to be an aggravated felony. *U.S. v Almazan-Becerra* (9th Cir 2007) 482 F3d 1085, 1089. However, for crimes committed on or after January 1, 2014, transportation as defined in Health & S C §§11352(a) and 11379(a) is "transportation for sale," which is an aggravated felony, and for crimes committed on or after January 1, 2016, transportation as defined in Health & S C §§11360 and 11379.5 is "transportation for sale." Convictions for under the influence and transportation also will not be counted when calculating whether a noncitizen has a "first" possession conviction. However, transportation and the other minor drug offenses discussed here do subject the defendant to deportability and inadmissibility because they are offenses "relating to" drugs under 8 USC §1227(a)(2)(B). See §52.31. Offering to transport is not an aggravated felony under *U.S. v Rivera-Sanchez, supra.*

Cultivation of marijuana. Cultivation of marijuana (Health & S C §11358) is categorically an aggravated felony as a drug trafficking offense as an analogue to 21 USC §841(b)(1)(D). *U.S. v Reveles-Espinoza* (9th Cir 2008) 522 F3d 1044. But if the cultivation was for personal use, a defendant may be eligible for DEJ under Pen C §1203.43,

which will eliminate the plea as a conviction for immigration purposes after DEJ is completed.

Giving away a small amount of marijuana. A conviction of a marijuana distribution offense that by its elements could involve no remuneration and no more than a small amount of marijuana is not a conviction for an aggravated felony. *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678. While *Moncrieffe* did not reach the issue of the definition of "small," the Court noted that 30 grams of marijuana is used in other parts of the INA. Using this as a guide, a conviction for giving away up to 28.5 grams of marijuana under Health & S C §11360(b) is categorically not an aggravated felony, but it is a deportable controlled-substance offense.

Prescription offenses; maintaining a place where drugs are sold; sale of paraphernalia; possession for manufacture. A conviction of obtaining a controlled substance by means of a fraudulent or forged prescription under Bus & P C §4324 or Health & S C §11173 or §11368 might be held to be an aggravated felony, because the offense might be held analogous to 21 USC §843(a)(3). A safer plea would be to a forgery offense that does not contain the drug element. Note, however, that a conviction of any kind of forgery is an aggravated felony if a 1-year sentence is imposed. See §52.41. Maintaining a place where drugs are sold under Health & S C §11366.5 may be charged as an aggravated felony as an analogue to 21 USC §856. However, being in a place where drugs are used could not be (but still would be a deportable offense). Sale of paraphernalia under Health & S C §11364.7 may be charged as an aggravated felony as an analogue to 21 USC §863(a). A paraphernalia offense does not need to specify a controlled substance to have immigration penalties. Possession of a listed chemical having reason to believe it would be used to manufacture a controlled substances is a federal felony under 21 USC §841(c)(2). See *U.S. v Daas* (9th Cir 2010) 198 F3d 1167.

§52.34 d. Strategy

Defense counsel should try to prevent the client from being convicted of any offense—even a minor one—related to controlled substances. If that option is not possible, the following strategies provide some protection under current law, but this area of law changes rapidly and often against the interests of the noncitizen. For more detailed instructions about dealing with controlled substance charges, see Note "Drug Offenses" accompanying the Quick Reference Chart for Determining Immigration Consequences of Selected California Offenses (http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php), and extensive discussion in Brady et al., Defending Immigrants, chap 3 (10th ed). Note that some of the following strategies avoid aggravated felon status but still leave the person deportable and inadmissible for having a drug conviction.

For pleas entered into on or before July 14, 2011, "rehabilitative relief," such as withdrawal of a plea under deferred entry of judgment under Pen C §1000, §1203.4 or Proposition 36, will eliminate the immigration effect of a *first* conviction for certain minor drug offenses. See *Nunez-Reyes v Holder* (9th Cir 2011) 646 F3d 684 (en banc). These include a first offense, whether felony or misdemeanor, of simple possession of any controlled substance, or a first offense that is less serious than simple possession and that is not analogous to a federal felony, such as possession of paraphernalia (*Carde-*

nas-Uriarte v INS (9th Cir 2000) 227 F3d 1132, 1137 (expungement of conviction for possession of paraphernalia)), but not the offense of being under the influence. A first conviction of giving away a small amount of marijuana ought to receive the same treatment. See 21 USC §841(b)(4). However, rehabilitative relief will *not* eliminate the effect of a conviction for transportation for personal use, or for a second drug conviction of any kind, and will also not eliminate the effect of a conviction if there was a prior preplea diversion. *De Jesus Melendez v Gonzales* (9th Cir 2007) 503 F3d 1019. Nor will it eliminate the conviction if there was violation of probation (*Estrada v Holder* (9th Cir 2009) 560 F3d 1039), unless the defendant was under 21 at the time of the offense and would have qualified for FFOA treatment under 18 USC §3607(c) despite a probation violation. See §52.32. Counsel must make sure that the instant conviction is actually the defendant's first conviction *in any jurisdiction* and that there was no prior preplea diversion.

For pleas entered into on or before July 14, 2011, the conviction retains its immigration effect until it is actually eliminated under state law, *e.g.,* until probation or other requirements are completed and the plea is withdrawn. *Chavez-Perez v Ashcroft* (9th Cir 2004) 386 F3d 1284, 1290. Counsel can protect a noncitizen defendant by structuring a disposition that does not leave the defendant exposed. This could be accomplished, for example, through an informal arrangement for a deferred prosecution in which the case is continued without a plea while the defendant fulfills certain conditions, with the understanding that the prosecution will consider dropping the charges on the basis of good performance.

A first conviction for simple possession is a deportable offense, but not an aggravated felony unless it is for possession of flunitrazepam. Simple possession of more than 5 grams of cocaine base used to be an aggravated felony but no longer is, at least if the conviction occurred on or after August 3, 2010. See 21 USC §844(a). For pleas entered into on or before July 14, 2011, a first conviction for possession can be eliminated for immigration purposes by rehabilitative relief. A second conviction for possession will probably be deemed an aggravated felony if the prior conviction is pleaded as a specific-drug recidivist enhancement and proved or admitted; the second conviction then cannot be eliminated for immigration purposes except by vacation for cause. However, if the first conviction was or could be eliminated by rehabilitative relief, arguably the second conviction becomes the "first" for purposes of defining an aggravated felony. See §52.33.

A very good alternative is to negotiate a conviction of accessory after the fact for a controlled substance offense with less than a 1-year sentence imposed (*Matter of Batista-Hernandez* (BIA 1997) 21 I&N Dec 955). This is not a drug conviction involving deportability or inadmissibility, or an aggravated felony. There is, however, the danger that DHS will allege that accessory after the fact, when the record shows that the principal offense involved drug *trafficking,* makes the defendant inadmissible by providing "reason to believe" he or she assisted in trafficking; therefore this is not an optional plea for an undocumented person. See §52.50. Further, DHS may charge accessory after the fact as a crime of moral turpitude if the underlying offense is a crime of moral turpitude (even though there is a strong argument that Pen C §32 is categorically not a crime of moral turpitude, because the word "felony" in this statute is not divisible; see §53.32), which would be the case with trafficking offenses.

Matter of Rivens (BIA 2011) 25 I&N Dec 623, 629 (interpreting federal accessory after the fact (18 USC §3)).

Another very good alternative is to ensure that the record of conviction (charging papers, plea or judgment, sentence, definition of the offense) does not indicate the specific controlled substance involved under Health & S C §§11377 and 11378. The reason is that California statutes concerning "controlled substances," such as Health & S C §§11377–11379, cover substances that are not defined as controlled substances under the federal Controlled Substances Act and therefore are not included in the immigration definition. Thus, in evaluating a conviction under broadly defined statutes such as Health & S C §§11377–11379, DHS cannot prove that the offense involved a federally controlled substance unless the substance is identified on the record. See *Coronado v Holder* (9th Cir 2014) 759 F3d 977, 984. A plea to an original or amended charge striking the named drug and phrased in the language of the statute, or a plea to "a controlled substance on the state list of controlled substances," will avoid identification of the substance and avoid deportability and inadmissibility for a drug offense. But this defense will not help a noncitizen who seeks some form of immigration relief, or those applying for legal status or who are permanent residents if they are already deportable because of a prior conviction or for some other reason. See §52.32.

▶ **Warning:** If the defendant pleads guilty to a specific count of the complaint, the court can consider the facts alleged in that count when determining whether a covered controlled substance is involved, even if the defendant does not set forth a factual basis that includes the specific controlled substance. See, *e.g., Cabantac v Holder* (9th Cir 2012) 693 F3d 825 (defendant pleaded guilty to "count one," which stated that defendant possessed methamphetamine). For that reason, the complaint must be amended, orally on the record or in writing, to delete reference to the specific controlled substance for a *Paulus* defense to work. See *Medina-Lara v Holder* (9th Cir 2014) 771 F3d 1106, 1115 (erroneous reference to "Count 3A" in abstract of judgment did not refer to "Count 3" of amended complaint, which specified cocaine). But in *Ruiz-Vidal v Lynch* (9th Cir 2015) 803 F3d 1049, the court held that a plea to a lesser included offense of possession that specifically referenced the count that charged sale of methamphetamine was a plea to a removable offense.

Conviction under Health & S C §11352(a), §11360(a), or §11379(a) is not an aggravated felony if the conviction is for offering to commit the act. Transportation for personal use under these statutes is not an aggravated felony for crimes committed before January 1, 2014. For crimes committed after January 1, 2014, transportation under §§11352(a) and 11379(a) is defined as "transportation for sale" and is an aggravated felony. The legislation operative January 1, 2014, did not change the definition of "transportation" in §11360(a) or §11379.5; however, legislation effective January 1, 2016, amended these statutes to provide that "transport" means to transport for sale. But "offer to sell" and "transportation" for offenses committed before the effective date of the amendments that changed the definition to "transportation for sale" are still *deportable offenses* if the controlled substance is identified and it is on the federal list.

▶ **Practice Tip:** Possession for sale will be held to be an aggravated felony and should

always be avoided. When it will not be possible to plead to a lesser offense like simple possession, counsel should advise the noncitizen defendant of the option of pleading up to offering to sell under Health & S C §11352(a), §11360(a), or §11379(a), offenses that have more serious criminal consequences but are not aggravated felonies. See *People v Bautista* (2004) 115 CA4th 229, 237 (failure to try to negotiate agreement in which client pleaded guilty to offering to sell deemed ineffective assistance of counsel). Even better, when possible, counsel should make every attempt to plead to a drug offense without identifying the controlled substance, under Health & S C §§11378–11379(a), which is not a deportable offense at all.

▶ **Warning:** A fact contained in a sentence enhancement that serves to increase the maximum penalty for a crime and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, will be treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. For example, to avoid an aggravated felony drug trafficking offense, do not have a client admit an enhancement based on sale, manufacturing, or possession for sale, among other things. This BIA decision may be subject to challenge in immigration court, since a sentence enhancement "is not a 'crime' of which [a person] was 'convicted.'" *Ramirez v Lynch* (9th Cir, Jan. 20, 2016, No. 08-72896), 2016 US App Lexis 901, *16 n2. But criminal counsel should still act conservatively and avoid any sentence enhancement that could make an offense an aggravated felony under BIA precedent.

In juvenile court, counsel should seek to obtain a finding of possession only, not of sale, transportation for sale, or possession for sale, because sale or possession for sale might give rise to a "reason to believe" that the juvenile is or was a drug trafficker even though no conviction exists for immigration purpose, thereby making the juvenile inadmissible.

If a first offense involving simple possession of a small amount of marijuana or hashish is involved, counsel should obtain a stipulation on the record that it was less than 30 grams, to avoid removability and preserve eligibility for a waiver of inadmissibility. See 8 USC §§1227(a)(2)(B), 1182(h). See also §52.32.

4. Offenses Involving Firearms or Destructive Devices

§52.35 a. Firearms Ground of Deportability; Definition of Firearm and Destructive Device

Conviction of almost any offense containing an element relating to firearms is a basis for deportability. A noncitizen is deportable if convicted in the United States "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part, or accessory which is a firearm or destructive device" or for conspiracy or attempt to commit such an act. 8 USC §1227(a)(2)(C). There is no corresponding ground of inadmissibility.

Defined in 18 USC §921(a)(3)–(4), "firearm" includes all guns and other firearms, frames and receivers, mufflers and silencers; "destructive device" includes bombs, grenades, rockets, missiles, mines or similar items, and parts used to convert them. A BB gun and a pellet gun are not included in the definition of a "firearm" in 18 USC §921(a)(3)–(4).

▶ **Practice Tip:** Two notable items are not included in the definition of firearm: (1) ammunition, and (2) antique firearms and devices not intended to be used as weapons. A plea to possession of ammunition is not a deportable offense (unless it is a conviction for felon in possession of ammunition, in which case it is an aggravated felony). *Matter of Oppedisano* (BIA 2013) 26 I&N Dec 202. A plea to any California statute that has as an element a "firearm" that includes antique weapons or devices not intended to be used as weapons is not a deportable firearms offense, since the least criminalized act under these statutes is possession or use of an antique firearm. *U.S. v Aguilera-Rios* (9th Cir 2014) 769 F3d 626, 635 (conviction for former Pen C §12021(c)(1) not a deportable offense, since a defendant could be convicted for possessing an antique firearm); *U.S. v Hernandez* (9th Cir 2014) 769 F3d 1059 (conviction for former Pen C §12021(a) not an aggravated felony firearms offense, since a defendant could be convicted for possessing an antique firearm); *Medina-Lara v Holder* (9th Cir 2014) 771 F3d 1106, 1117 (Pen C §12022(c) enhancement for being armed with firearm in commission or attempted commission of offense is not deportable firearms offense, because antique firearms are included in definition of "firearm" for purposes of this enhancement).

While formerly the noncitizen had the burden of proving that he or she came within the antique-firearm exception (*Matter of Mendez-Orellana* (BIA 2010) 25 I&N Dec 254), this is no longer the case. Under *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678, if there is any way to commit the offense that does not come within the generic ground of deportability, the offense is not deportable, provided that the least criminalized act was prosecuted under the statute. See §52.37 for California firearms statutes that include antique firearms.

Conviction of conspiracy or attempt to commit a firearms offense triggers deportability under 8 USC §1227(a)(2), regardless of the date of the conviction. *Matter of Saint John* (BIA 1996) 21 I&N Dec 593.

Thus, conviction of even minor firearms offenses that do not involve violent behavior is a basis for deportability unless the offenses are subject to the antique-firearms exception. Firearms offenses that do involve violence may have immigration consequences beyond the firearms ground of deportability. For example, an assault with intent to commit great bodily harm is a crime involving moral turpitude. See discussion in §§52.38–52.40. A "crime of violence" with a 1-year sentence imposed is an aggravated felony. See discussion in §52.47. A deportable firearms offense destroys eligibility for 10-year cancellation of removal for nonpermanent residents. See §52.55. A firearms offense also destroys eligibility for Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability, and the antique firearms exception probably does not apply. See §§52.63–52.64.

Finally, some firearms offenses, notably "trafficking in firearms" and "ex-felon in possession of a firearm," are aggravated felonies, but the California "ex-felon in possession of a firearm" is subject to the antique firearm exception. See discussion in §52.36. Alternative pleas that avoid immigration consequences are discussed in §52.37.

§52.36 b. Firearms Offenses That Are Aggravated Felonies

Any state or federal offense involving trafficking in firearms or destructive devices is an aggravated felony under 8 USC §1101(a)(43)(C). Under 8 USC §1101(a)(43)(E),

a host of specific federal offenses involving firearms and destructive devices are aggravated felonies:

- 18 USC §842(h) (receiving stolen explosives);
- 18 USC §842(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, mental defective, or committee);
- 18 USC §844(d) (transporting or receiving explosives in interstate or foreign commerce with intent to injure, intimidate, or damage property);
- 18 USC §844(e) (communication of threat or false information about attempt to injure, intimidate, or damage property by fire or explosive);
- 18 USC §844(f) (malicious damage by fire or explosive of property of United States or organization receiving federal funds);
- 18 USC §844(g) (illegal possession of explosive in airport);
- 18 USC §844(h) (use or carrying of explosive in committing federal felony);
- 18 USC §844(i) (malicious destruction by fire or explosive of property used in or affecting commerce);
- 18 USC §922(g)(1)–(5) (possession of firearms or ammunition by felon, fugitive, addict, mental defective, committee, alien unlawfully in United States, dishonorable dischargee, or person who renounced U.S. citizenship);
- 18 USC §922(j) (receiving stolen arms or ammunition);
- 18 USC §922(n) (shipping or receiving arms or ammunition by felony indictee);
- 18 USC §922(o) (possession of machine gun);
- 18 USC §922(r) (assembly of illegal rifle or shotgun from imported parts);
- 18 USC §924(b) (shipping or receipt of firearm or ammunition with intent to use in commission of felony); and
- 18 USC §924(h) (transfer of firearm with knowledge it will be used to commit crime of violence or drug trafficking offense).

See also IRC §5861 (*e.g.,* failure to pay firearms tax, possession of unregistered firearm or one with altered serial number).

For a state offense to be held analogous to one of the listed federal offenses and therefore to be held to be an aggravated felony, the offense must have exactly the same substantive elements as the federal offense (or, if the state offense is broader, the official record of conviction must demonstrate that the conviction at issue was for an offense described in the federal law). *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853 (Washington state offense, possession of a firearm by a noncitizen, is not an aggravated felony, because it is broader than cited federal offense, possession of a firearm by noncitizen in unlawful status). See discussion of record of conviction in §52.26. The state offense, however, need not include federal jurisdictional elements in the analogous federal offense, *e.g.,* crossing state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, state statute sufficiently similar to aggravated felony offense to be aggravated felony under federal sentencing guidelines).

Dangerous weapons violations probably are not aggravated felonies on the aggravated-felony firearms ground, but might be on the "crime of violence" ground if a sentence

of 1 year or more is imposed. Possession, sale, and other conduct relating to a "dangerous weapon" is an aggravated felony if the weapon is not registered under federal law or has no serial or ID number. 26 USC §5861(d), (h)–(i). A dangerous weapon is defined as a short-barreled shotgun, short-barreled rifle, machinegun, silencer, destructive device (explosive), or "any other weapon" as defined in 26 USC §5845 that can be concealed, with the exception of smoothbore pistols or revolvers. Because Pen C §17500 and most California offenses have no element relating to lack of registration or serial number, a California conviction for a dangerous weapon should not be deemed an aggravated felony, even though it is a deportable firearms offense. See http://www.ilrc.org/crimes for a more detailed discussion.

▶ **Warning:** Felony possession of a dangerous weapon with a sentence of 1 year or more imposed was formerly considered an aggravated felony as a crime of violence under some circuit court of appeals decisions. See, *e.g., U.S. v Diaz-Diaz* (5th Cir 2003) 327 F3d 410 (felony possession of a sawed-off shotgun); *U.S. v Medina-Anicacio* (5th Cir) 325 F3d 638 (felony possession of dangerous weapon under former Pen C §12020(a)). But under *Johnson v U.S.* (2015) ___ US ___, 135 S Ct 2551, these cases have been effectively overruled.

Any offense relating to trafficking in firearms or destructive devices may be held to be an aggravated felony, even if it is not exactly analogous to a federal offense.

§52.37 c. Strategy

Conviction of any offense relating to firearms will make a noncitizen deportable, but not inadmissible. Undocumented persons may not have as a high priority avoiding the grounds of deportability, because they are already deportable for lack of lawful status. In contrast, a lawful permanent resident will face removal proceedings if convicted of even the most minor firearms offense if it excludes antique firearms from the definition of "firearm."

A plea to a statute prohibiting possession or use of a firearm that includes within the definition of "firearm" an antique firearm should not be a deportable firearms offense in view of the rule that the "minimum conduct criminalized by the statute" must come within the generic definition. *U.S. v Aguilera-Rios* (9th Cir 2014) 769 F3d 626, 633. California firearms offenses generally do not exclude antique firearms and include but are not limited to former Pen C §§245, 12021(a)–(b), 12022(a)(1), 12025(a)(1), 12031(a)(1), which now appear as current Pen C §245(a)(2) (assault with a firearm), §12022(a)(1) (armed with a firearm), §25400(a) (carrying a concealed firearm), §27500 (unlawful sale or delivery of firearm), §29800 (felon in possession of firearm), §33215 (sale of short-barreled rifle etc.). Some other sections specifically exclude antique firearms, such as current Pen C §26350 (openly carrying unloaded handgun) and §30600 (assault weapons). Additionally, Pen C §246 (discharging firearm) can be committed with an antique firearm. For a definitional section of "firearm" and statutes that exclude antique firearms, see Pen C §16520. See *Defense Strategy: Several California Firearms Offenses Don't Cause Immigration Penalties Based on "Firearms,"* at http://www.ilrc.org/files/documents/firearms_aguilera_rios_advisory.pdf.

Penal Code §246.3, negligent firing of 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).

A plea to possession of ammunition under Pen C §30210 should not be a deportable offense, since it is not included in the definition of a "firearm" in 18 USC §921(a)(3)–(4). A plea to possession of a deadly weapon with intent to assault another under Pen C §17500 (a misdemeanor) is not a deportable firearms conviction, because the weapon could be something other than a firearm, but it might be a crime of moral turpitude. Brandishing or exhibiting a nonfirearm weapon under Pen C §417(a)(1) would obviously not be a firearms offense. If a plea to Pen C §417(a)(1) is not possible, a plea to a vague record of violation of §417(a) with no mention of a firearm is another possible plea to avoid the firearms deportability ground. Brandishing is not a crime of moral turpitude under *Matter of G.R.* (BIA 1946) 2 I&N Dec 733, but, if possible, a plea to brandishing in a "rude" manner, rather than in an "angry" or "threatening" manner will lessen the chance that the conviction will be deemed one for a crime of moral turpitude. Conviction of accessory after the fact is not a firearms offense. However, if a sentence of 1 year or more is imposed, the conviction is an aggravated felony. See §52.34. Accessory after the fact is a crime of moral turpitude if the underlying offense is a crime of moral turpitude. See §52.32.

Although a well-constructed plea to former Pen C §12020(a) (*e.g.*, "an illegal weapon *or* firearm") could have avoided a conviction for a firearms offense, that Penal Code section was repealed, operative January 1, 2012, and superseded by separate statutes for illegal firearms and for other illegal nonfirearm weapons.

A more detailed analysis of these strategies and others to avoid the firearm deportability ground and the firearm aggravated felony ground is available at http://www.ilrc.org/files/documents/n.12-fireams.pdf, and http://www.ilrc.org/files/documents/firearms_chart.pdf, and http://www.ilrc.org/files/documents/firearms_aguilera_rios_advisory.pdf.

Conviction under a statute that has as an element use of a weapon, but not necessarily a firearm, is not a basis for deportation on the firearm ground. Previously, the Board held that if the record of conviction (charge, plea, or verdict) is cleared of any reference to firearm use, it would not be a deportable firearms offense. *Matter of Madrigal-Calvo* (BIA 1996) 21 I&N Dec 323; *Matter of Teixeira* (BIA 1996) 21 I&N Dec 316; *Matter of Pichardo-Sufren* (BIA 1996) 21 I&N Dec 330. Under *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, a broadly worded offense that is violated by use of a "weapon" would not be a deportable firearms offense if there is no element in the offense that the weapon must be a firearm (as opposed to a nonfirearm), even if the record of conviction mentioned that the weapon was a firearm.

▶ **Warning:** A fact contained in a sentencing enhancement that serves to increase the maximum penalty and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, is treated as an element of the underlying offense. *Matter of Martinez-Zapata* (BIA 2007) 24 I&N Dec 424. To avoid deportability for a firearms offense, avoid any sentence enhancement that has the element use or possession of a firearm or explosive device, unless the enhancement does not exclude antique firearms. This BIA decision may be subject to challenge in immigration court, since a sentence enhancement "is not a 'crime' of which [a person] was 'convicted.'" *Ramirez v Lynch* (9th Cir, Jan. 20, 2016, No. 08-72896), 2016 US App Lexis 901,

*16 n2. But criminal counsel should still act conservatively and avoid any sentence enhancement that could make an offense an aggravated felony under BIA precedent. See *Medina-Lara v Holder* (9th Cir 2014) 771 F3d 1106, 1117 (Pen C §12022(c) enhancement for being armed with a firearm in commission or attempted commission of offense is not a deportable firearms offense, because antique firearms are included in definition of "firearm" for purposes of this enhancement).

Expungement under Pen C §1203.4 does not eliminate a firearms conviction for immigration purposes. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause does.

Some relief from removal is available to qualified persons despite being deportable under the firearms ground. A person who could immigrate through a relative's or employer's visa petition is still eligible to apply for an adjustment of status or, possibly, immigration through consular processing. *Matter of Gabryelsky* (BIA 1993) 20 I&N Dec 750; *Matter of Rainford* (BIA 1992) 20 I&N Dec 598.

For removal proceedings filed on or after April 1, 1997, the immigration court has discretionary power to grant cancellation of removal to permanent residents under 8 USC §1229b if the conditions are met. See §52.55. Cancellation is barred if there is an aggravated felony conviction. Deportability on the firearms ground does not "stop the clock" for purposes of establishing residency for cancellation. For more information on firearms convictions and strategies, see Brady et al., Defending Immigrant §§6.1, 9.18, 11.10 (10th ed).

▶ **Warning:** A firearms offense also destroys eligibility for Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability, and the antique firearms exception probably does not apply. See §§52.63–52.64.

5. Crimes Involving Moral Turpitude

§52.38 a. Definition

Many offenses, both minor and serious, are held to be crimes involving moral turpitude and carry serious immigration consequences concerning inadmissibility (8 USC §1182(a)(2)(A)), deportability (8 USC §1227(a)(2)(A)(i)), and establishing good moral character (8 USC §1101(f)(3)). See §52.39. The term "crime of moral turpitude" (sometimes called a "turpitudinous" crime) is defined by federal immigration law, and is different from the same term as used in California criminal law to determine whether a witness may be impeached with a prior conviction.

▶ **Note:** This section discusses how to determine whether an offense involves moral turpitude. Whether a moral turpitude conviction will cause deportability or inadmissibility depends on the number of moral turpitude convictions, the actual and potential sentence, and the date of commission or conviction of the offense relative to the person's admission to the United States. See §52.39.

The term "crime involving moral turpitude" has been defined by the Attorney General as "a reprehensible act with some form of scienter." *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706. Most regulatory offenses and crimes with a mens rea of negligence usually will not be considered crimes of moral turpitude. In *Saavedra-Figueroa*

v Holder (9th Cir 2010) 625 F3d 621, 627, the court found that misdemeanor false imprisonment did not meet the definition of a crime of moral turpitude, because as a general intent crime there was no element of scienter.

The definition does not depend on whether the offense is classified as a misdemeanor or felony or on the severity of the punishment. (However, whether a particular moral turpitude conviction will bring immigration consequences may depend on such factors; see §52.39.) On one hand, murder, rape, most sexual offenses including sex with a minor knowing the minor was under the age of 16, drug trafficking offenses, voluntary manslaughter, robbery, burglary with intent to commit theft, burglary when there is unlawful entry, theft (grand or petty, when there is an intent to permanently deprive), arson, aggravated forms of assault, crimes that have a specific intent to defraud, and forgery have consistently been held to involve moral turpitude. On the other hand, involuntary manslaughter, simple assault or battery, driving under the influence (when no injury occurs), misdemeanor false imprisonment, and indecent exposure have not. A crime of moral turpitude includes a conviction that requires proof that the defendant willfully or knowingly committed an act that causes "significant societal harm" or reprehensible conduct that is committed intentionally or with willfulness or recklessness. *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687, 706 n5. For discussion of specific crimes, see chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants, App 4-A, Table: Crimes Involving Moral Turpitude Under the California Penal Code (10th ed) (annotated chart of 70 common violations of the California Penal Code); Tooby, Crimes of Moral Turpitude (federal and out-of-state convictions); Tooby, Criminal Defense of Immigrants, App C (comprehensive list including federal and out-of-state convictions); Kesselbrenner & Rosenberg, Immigration Law and Crimes, App E. See also Anno, 23 ALR Fed 480 (what constitutes "crime involving moral turpitude").

Conviction for "crime of moral turpitude" is generic crime subject to categorical approach. The Ninth Circuit has held that a "crime involving moral turpitude" is a generic crime that may also be an element of a particular crime and that to determine if a crime is a crime involving moral turpitude the categorical approach must be used. See, *e.g., Almanza-Arenas v Holder* (9th Cir 2015) 809 F3d 515. First, to determine if the generic crime matches the crime the defendant was convicted of, an immigration judge is confined to the formal "record of conviction" and cannot look to evidence outside that record. *Cervantes v Holder* (9th Cir 2014) 772 F3d 583, 588; *Olivas-Motta v Holder* (9th Cir 2013) 716 F3d 1199, overruling *Matter of Silva-Trevino, supra,* which reversed nearly a century of precedent and held that in making that determination, the immigration court may consider any facts, even those outside the elements of the statute of conviction and outside the record of conviction, to determine if an offense is a crime of moral turpitude.

The categorical approach looks to the minimum conduct criminalized by the statute and only allows resort to the "record of conviction" to determine which part of a divisible statute the defendant was convicted under. Under *Moncrieffe v Holder* (2013) ___ US ___, 133 S Ct 1678, the "minimum conduct criminalized by the statute" must come within the generic definition. If not, the immigrant prevails. Under *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, the "record of conviction" can only be

resorted to under the modified categorical approach if there is a divisible statute such as two crimes separated by an "or" or separate subsections. The sole purpose of the modified categorical approach is to determine which part of the statute the defendant was convicted under.

Ninth Circuit will defer to published BIA decisions on whether particular offense is crime of moral turpitude so long as decision is reasonable. A crime is decided to be one of moral turpitude by case law of the Board of Immigration Appeals (BIA) and the U.S. Courts of Appeals. The Ninth Circuit will defer to the BIA when it issues a published decision that an offense is a crime of moral turpitude, unless the decision is unreasonable. *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903 (en banc). On the other hand, when the BIA decision is unpublished and does not rely on prior precedential decisions, the Ninth Circuit will defer to it only to the extent that it has the "power to persuade." *Nunez v Holder* (9th Cir 2010) 594 F3d 1124, 1133 (rejecting BIA decision that indecent exposure was categorically a crime of moral turpitude).

Many Ninth Circuit decisions predating *Marmolejo-Campos* and holding that an offense is not a crime of moral turpitude may no longer apply. Ninth Circuit cases that may be affected by *Marmolejo-Campos* and that may no longer be good law are too numerous to list but include the following:

- *Quintero-Salazar v Keisler* (9th Cir 2007) 506 F3d 688 (consensual unlawful sexual intercourse between minor under 16 and adult at least 4 years older (Pen C §261.5(d)) is not categorically a crime of moral turpitude). The Ninth Circuit would now defer to *Matter of Guevara Alfaro* (BIA 2011) 25 I&N Dec 417, 424 (any intentional sexual conduct by adult with child involves moral turpitude, as long as perpetrator knew or should have known victim was under age 16). This does not necessarily mean it is safe to plead someone to sex with a minor under 18, which might still be charged as a crime of child abuse.

- *Plasencia-Ayala v Mukasey* (9th Cir 2008) 516 F3d 738, 747, overruled on other grounds in *Marmalejo-Campos v Holder* (9th Cir 2009) 558 F3d 903, 911 (failure to register as a sex offender under Nevada statute is not crime of moral turpitude). Compare with *Matter of Tobar-Lobo* (BIA 2007) 24 I&N Dec 143. See *Pannu v Holder* (9th Cir 2011) 639 F3d 1225, 1229 (remanding to BIA for reconsideration of whether California conviction for failing to register as sex offender was crime of moral turpitude).

- *Nicanor-Romero v Mukasey* (9th Cir 2008) 523 F3d 992, overruled on other grounds in *Marmolejo-Campos v Holder* (9th Cir 2009) 558 F3d 903, 911 (annoying or molesting a child under Pen C §647.6(a) not categorically crime of moral turpitude).

- *Nunez v Holder* (9th Cir 2010) 594 F3d 1124 (indecent exposure under Pen C §314(1) is not a crime of moral turpitude). But see *Matter of Cortes Medina* (BIA 2013) 26 I&N Dec 79 (Pen C §314(1) is a crime of moral turpitude).

▶ **Warning:** Counsel should not rely on a chart stating whether a crime is a crime of moral turpitude, because the chart may rely on Ninth Circuit law that may conflict with or be overruled by BIA decisions under *Marmelejo-Campos, supra.*

Notable cases on crimes of moral turpitude:

- *Hernandez-Gonzalez v Holder* (9th Cir 2015) 778 F3d 793 (possession of deadly

weapon with Pen C §186.22(b)(1) gang enhancement is not crime of moral turpitude, because predicate offense is not crime of moral turpitude and gang enhancement does not transform non-turpitudinous crime into turpitudinous crime; refusing to defer to BIA's decision in *Matter of E.E. Hernandez* (BIA 2014) 26 I&N Dec 397 that Pen C §594(a) with Pen C §186.22(b)(1) gang enhancement is crime of moral turpitude).

• *Matter of Coquico v Lynch* (9th Cir 2015) 789 F3d 1049 (pointing laser scope or pointer at officer in violation of Pen C §417.26 is not categorical crime of moral turpitude, because offense can be committed by conduct resembling nonturpitudinous simple assault).

• *Turijan v Holder* (9th Cir 2014) 744 F3d 617 (Pen C §236, felony false imprisonment, is not categorically crime of moral turpitude).

• *Vargas Cervantes v Holder* (9th Cir 2014) 772 F3d 583 (Pen C §273.5 is not categorically a crime of moral turpitude, because corporal injury against a former cohabitant is not a crime of moral turpitude, but it is a divisible statute so that a court can review the reviewable record of conviction to determine who the victim was).

• *Castrijon-Garcia v Holder* (9th Cir 2013) 704 F3d 1205 (Pen C §207(a), simple kidnapping, is not categorically crime of moral turpitude).

• *Matter of Ortega-Lopez* (BIA 2013) 26 I&N Dec 99 (knowingly sponsoring or exhibiting animal for fighting, such as cockfighting, is crime of moral turpitude).

§52.39 b. Consequences of Conviction or Admission of Crime Involving Moral Turpitude; Remedies

Deportability. A noncitizen is deportable under 8 USC §1227(a)(2)(A) if, after admission to the United States, he or she is convicted of the following:

• Two crimes involving moral turpitude (CMT) not arising from a single scheme of misconduct (8 USC §1227(a)(2)(A)(ii)); or

• One crime involving moral turpitude when the person committed the offense within 5 years after admission if the possible sentence was 1 year or more (8 USC §1227(a)(2)(A)(i)).

Example of two crimes of moral turpitude as ground for deportation. Jane obtained her "green card" in 1967. She then had two petty theft convictions, one in 1968 and one in 2008. Jane is deportable for two crimes of moral turpitude committed at any time after admission.

Single-scheme-of-misconduct exception. In *Matter of Islam* (BIA 2011) 25 I&N Dec 637, the BIA held that separate and distinct crimes, even if they follow closely in time (such as illegal use of a credit card on multiple occasions), do not come within the single-scheme-of-misconduct exception. This exception appears to be limited to cases in which one offense is a lesser included offense of another or in which two crimes follow from a single act and are a natural and probable consequence of that act, such as "where a person breaks into a store with the intent to commit larceny and, in connection with that criminal act, also commits an assault with a deadly weapon." 25 I&N Dec at 641.

Example of one crime of moral turpitude within 5 years of admission with

potential 1-year sentence as ground for deportation. John obtained his "green card" on January 20, 2003. He was charged with violation of Pen C §422, a felony, committed on January 20, 2008, and he was convicted the next day on January 21, 2008. Because his crime was one of moral turpitude *committed* within 5 years of admission with a *potential* sentence of 1 year or more, conviction of this offense makes John deportable even if he receives no actual jail time and even though his conviction occurred more than 5 years after admission.

▶ **Note:** Any misdemeanor crime of moral turpitude that is punishable after January 1, 2015, has a maximum potential sentence of 364 days. Pen C §18.5.

Reduction to a misdemeanor and deportability. Many offenses become aggravated felonies if a 1-year sentence is *imposed.* See §52.42. In contrast, convictions trigger consequences under the moral turpitude deportability and inadmissibility grounds partly on the basis of *potential* sentence. A first conviction for a moral turpitude offense that was committed within 5 years of admission will make a permanent resident deportable if it has a *potential sentence of 1 year or more.* Therefore, if a felony is redesignated or resentenced to a misdemeanor under Proposition 47 or Pen C §17(b), this should help a client avoid deportability, but to be effective in immigration court, the court order should state that the maximum punishment is either 6 months or 364 days under Pen C §18.5. On the possible retroactivity issues for Pen C §18.5, see §52.10. Also, conviction for attempt to commit a wobbler offense, which then is reduced to a misdemeanor, will have a potential sentence of only 6 months and will avoid deportability on the ground of one conviction of a crime of moral turpitude committed within 5 years of admission.

Adjustment of status following admission does not "restart" 5-year clock for purposes of moral turpitude ground. Whether an admission has occurred, or whether a new admission has possibly occurred for purposes of restarting the 5-year clock, can be a complex question; in case of doubt, consult with an immigration expert. "Admission" is defined as lawful entry into the United States with inspection. 8 USC §1101(a)(13)(A). A person who entered surreptitiously without inspection at a border point has not been admitted, but a person who entered with inspection by means of a tourist visa, permanent resident card, or other document has been admitted, even if fraud was committed. In some cases lawful permanent residents who return from a trip abroad do not make a new "admission" (8 USC §1101(a)(13)(C)), and in some cases a person who "adjusts status" to permanent residency at a government office within the United States is deemed to be making an admission (see *Shivaraman v Ashcroft* (9th Cir 2004) 360 F3d 1142; see also §52.19). The BIA held that adjustment of status following an admission does not "restart" the 5-year clock for purposes of the moral turpitude deportation ground. *Matter of Alyazi* (BIA 2005) 23 I&N Dec 754. See "Practice Advisory: Adjustment of Status Following an Admission Does Not 'Re-Start' the Five-Year Clock for Purposes of the Moral Turpitude Deportation Ground" at http://www.ilrc.org/crimes.

▶ **Example:** A is admitted on a tourist visa in 2001, overstays, adjusts status to lawful permanent residence in 2006, and commits the moral turpitude offense in 2007. The "date of admission" for purposes of the 5 years is the date of admission as a tourist

in 2001, and A is not deportable. But if A entered without inspection, then the date of admission would be the date of the adjustment, and A would be deportable.

▶ **Example:** B is admitted as a tourist in 1990 and then leaves. B enters without inspection in 1998, adjusts status in 2002, and commits a crime involving moral turpitude in 2004. The date of the 2002 adjustment of status is the "date of admission" for purposes of the 5 years, and the defendant is deportable.

Immigration counsel should be consulted when there is a question about when or whether a client has been "admitted" to the country.

Inadmissibility; exceptions. A noncitizen is inadmissible if convicted either before or after admission to the United States of one crime involving moral turpitude (8 USC §1182(a)(2)(A)(i)), unless the event comes within the petty-offense or youthful-offender exception. 8 USC §1182(a)(2)(A)(ii).

Under the important petty-offense exception, a noncitizen is not inadmissible if he or she committed only one crime involving moral turpitude, the sentence actually imposed was 6 months or less, and the maximum possible sentence for the offense was no more than 1 year. 8 USC §1182(a)(2)(A)(ii)(II). A previous moral turpitude conviction, even if vacated, may destroy eligibility for the exception, if the conviction is vacated on technical grounds. *Matter of S.R.* (BIA 1957) 7 I&N Dec 495. Because the offense cannot have a maximum penalty of more than 1 year, a person convicted of a felony, with imposition of sentence suspended, is *not* eligible for the petty-offense exception and will be found inadmissible. That person will be eligible for the exception if the felony is reduced to a misdemeanor under Pen C §17, because the offense then has a maximum sentence of only 364 days as of January 1, 2015. See *La Farga v INS* (9th Cir 1999) 170 F3d 1213. To qualify for the petty-offense exception, the sentence imposed must be no greater than 6 months' incarceration, either as part of a judgment (even if execution is suspended) or as a condition of probation. This refers to the nominal sentence ordered by the court, rather than the actual time incarcerated. See §52.10.

Example of petty offense exception: Juan, who is undocumented but applying to get a "green card" through his U.S. citizen wife, has no prior crimes of moral turpitude but is convicted in 2015 of Pen C §473(b) (forgery relating to a check when the value is $950 or less), a misdemeanor, with a potential sentence of 364 days under Proposition 47 and Pen C §18.5. Juan receives a sentence imposed of 180 days as a condition of probation. He is not inadmissible, because his offense has a potential sentence of 1 year or less and the sentence imposed is no more than 6 months. If Juan's sentence was 181 days, he would be inadmissible without a waiver.

The youthful-offender exception to the CMT ground of inadmissibility benefits youths who were tried as adults. (Because a juvenile delinquency disposition is not a conviction of a crime, youths in delinquency proceedings do not need this exception.) It provides that a person who committed one moral turpitude offense while under the age of 18 is not inadmissible if the act and release from resulting imprisonment took place more than 5 years before the current application. 8 USC §1182(a)(2)(A)(ii)(I).

Formal admission of a crime involving moral turpitude. A formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I). It might appear that a plea of guilty,

as an admission, would make a defendant inadmissible even if the conviction were eliminated. However, if a court has disposed of charges in a way that does not amount to a conviction (*e.g.,* dismissing the charges, vacating the conviction, delinquency disposition), the DHS must accept this order as binding on both the admission (plea) and the conviction. See *Matter of E.V.* (BIA 1953) 5 I&N Dec 194. Moreover, the DHS faces many technical difficulties in attempting to remove someone on the basis of an admission as opposed to a conviction. See Kesselbrenner & Rosenberg, Immigration Law and Crimes §3.2.

Postconviction relief. An expungement under Pen C §1203.4 will not eliminate the immigration effects of a conviction of a moral turpitude offense. *Murillo-Espinoza v INS* (9th Cir 2001) 261 F3d 771. Vacation of judgment for cause will. Neither a delinquency disposition nor infractions will constitute a basis for deportability.

§52.40 c. Strategy

Counsel should seek a plea to an offense with a scienter element less than "specific intent, deliberateness, willfulness, or recklessness." See *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687. Examples are mens rea of mere negligence or strict liability, as well as forms of "recklessness" that amount to no more than gross negligence, and nearly all "regulatory offenses" punishing conduct not itself reprehensible other than being unauthorized. 24 I&N Dec at 689 n1. The Ninth Circuit held that simple misdemeanor false imprisonment, a general-intent crime, lacked the "scienter" necessary under *Silva-Trevino* for a moral turpitude offence. *Saavedra-Figueroa v Holder* (9th Cir 2010) 625 F3d 621.

When a statute sets out multiple alternatives for conduct separated by "or," with one part defining conduct that is a crime of moral turpitude and the other part defining a crime that is not a crime of moral turpitude, it is always safer, and sometimes necessary, to have the client plead to the part of the statute that is not a crime of moral turpitude. But it may not be necessary if the alternatives are means of committing an offense rather than elements. The alternatives are means of committing the offense if a jury is not required to decide unanimously between the alternatives in order to find the defendant guilty. *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276; *Rendon v Holder* (9th Cir 2014) 764 F3d 1077.

▶ **Warning:** The U.S. Supreme Court has granted certiorari in a case to determine whether a court may resort to the "modified categorical approach" whenever a statute sets out in the disjunctive alternative forms of committing an offense ("the means"), or only when the alternative forms of the offense represent "elements" that a jury must unanimously decide the defendant committed. See *Mathis v U.S.* (Jan. 19, 2016, No. 15-6092) 2016 US Lexis 710. For this reason, criminal counsel should act conservatively and plead a client only to the specific alternative method of committing the crime that avoids or mitigates the adverse immigration consequence.

Examples. Vehicle Code §10851 (vehicle theft) can be violated with intent either to permanently or temporarily deprive the owner of the vehicle. While intent to permanently deprive would constitute moral turpitude, joyriding with intent only to temporarily deprive does not constitute moral turpitude. If the plea specifies that the conviction

is for intent only to temporarily deprive, that should be conclusive because it specifies that the conviction occurred under the non-moral-turpitude part of the statute, and the defendant is not removable. But *Almanza-Arenas v Lynch* (9th Cir 2015) 809 F3d 515 (en banc) held that Veh C §10851 is an indivisible statute because the jury does *not* have to decide whether the defendant took a vehicle with the intent to temporarily deprive or with the intent to permanently deprive to convict the defendant of Veh C §10851. Therefore, it is unnecessary to plead to the specific part of the statute that is not a crime of moral turpitude. But see Warning above.

Penal Code §459 (burglary) can be violated either with the intent to commit larceny (a crime of moral turpitude) or with the intent to commit a felony (not a crime of moral turpitude). Because a jury does not have to decide whether the defendant had the intent to commit "larceny" or a "felony" to convict the defendant of burglary, it is unnecessary to plead to the specific part of the statute that is not a crime of moral turpitude. See *Rendon v Holder* (9th Cir 2014) 764 F3d 1077, 1088. Penal Code §459 (burglary) is divisible as a crime of moral turpitude because unlawful entry to commit "larceny" is a crime of moral turpitude, but unlawful entry to commit a "felony" should not be a crime of moral turpitude, since there are some felonies that are not categorically crimes of moral turpitude. But see Warning above. For a more detailed discussion, see the practice advisory at http://www.ilrc.org/files/documents/rendon_cal_burglary_divisible.pdf.

Some offenses are overbroad without being divisible. Examples are violation of Pen C §496(a) (possession of stolen property), which may encompass possession with intent to temporarily deprive an owner, which is not a crime of moral turpitude (*Castillo-Cruz v Holder* (9th Cir 2009) 581 F3d 1154); violation of Pen C §496d(a) (possession of stolen motor vehicle), which can be committed with intent to temporarily deprive, which is not a crime of moral turpitude (*Alvarez-Reynaga v Holder* (9th Cir 2010) 596 F3d 534); and spousal or cohabitant battery under Pen C §243(e), which may be violated with mere offensive touching, which is not a crime of moral turpitude. If there is an overbroad statute, under *Moncrieffe v Holder,* and if the least of the acts criminalized is not a crime of moral turpitude, then it is not categorically a crime of moral turpitude. Under *Descamps v U.S.,* an immigration judge cannot look at the record of conviction, because it is an indivisible statute not separated by disjunctive clauses or subsections.

In *Moncrieffe v Holder,* the noncitizen was seeking cancellation of removal for a lawful permanent resident. The Court held that an inconclusive record of conviction, involving a divisible statute, satisfied petitioner's burden of establishing eligibility for relief. A different rule applied in the Ninth Circuit under a case decided before *Moncrieffe.* In *Young v Holder* (9th Cir 2012) 697 F3d 976, 982 (en banc), the Ninth Circuit held that an applicant seeking admission or relief has the burden of proof to show that he or she pleaded to that part of the divisible statute that did not make the noncitizen ineligible for relief. *Young v Holder* was overruled by a three-judge panel in *Almanza-Arenas* (9th Cir 2014) 771 F3d 1184; however, an en banc panel reheard the case and decided it on other grounds. See *Almanza-Arenas v Lynch* (9th Cir 2015) 809 F3d 515. For a comprehensive discussion on the categorical approach, see http://www.ilrc.org/files/documents/how_to_use_the_categorical_approach_template_.pdf.

Counsel must gather and review a defendant's entire criminal history in the United

States and other countries before setting a disposition goal. A prior conviction of a CMT from another jurisdiction will be joined with the instant conviction by immigration authorities in calculating whether the person is deportable or inadmissible. Counsel should gather and review information on the number of moral turpitude convictions, the actual and potential sentences, and the dates of commission or conviction of the offense.

Counsel should remember that a formal admission of a crime involving moral turpitude, even without a conviction, is a separate basis for inadmissibility. 8 USC §1182(a)(2)(A)(i)(I).

When considering a plea to a moral turpitude offense, counsel should carefully review 8 USC §1101(a)(43) and the discussion in §§52.41–52.47 to assess whether the offense might also be an aggravated felony. For example, conviction of theft, burglary, a crime of violence, perjury, bribery, or forgery is an aggravated felony *if* a 1-year sentence is imposed. See §52.46. Conviction of rape, murder, or sexual abuse of a minor is an aggravated felony regardless of the sentence.

6. Aggravated Felonies

§52.41 a. Definition of Aggravated Felony: Overview

The list of offenses that qualify as "aggravated felonies" includes some that are neither "aggravated" nor "felonies." The current definition consists of 21 paragraphs, some containing many offenses, in 8 USC §1101(a)(43). The statutory definition of aggravated felony includes these offenses:

- "Murder" (in the authors' opinion, this includes first and second degree murder, but not manslaughter) (8 USC §1101(a)(43)(A));
- Rape (8 USC §1101(a)(43)(A));
- Sexual abuse of a minor (8 USC §1101(a)(43)(A); see discussion in §52.45);
- Trafficking in drugs (any offense) plus certain federal drug felonies and violations of state statutes that punish exactly the same act (state "analogues") (8 USC §1101(a)(43)(B); see discussion in §§52.30–52.34);
- Trafficking in firearms, plus several federal crimes relating to firearms or destructive devices (*e.g.,* bombs, grenades), including felon in possession of a firearm (8 USC §1101(a)(43)(C), (E); see §§52.35–52.37);
- Money laundering (as defined in 18 USC §1956 or a state analogue) or monetary transactions in property derived from unlawful activity (as defined in 18 USC §1957 or a state analogue), if the amount of the funds exceeded $10,000 (8 USC §1101(a)(43)(D));
- Fraud or deceit, or certain tax offenses, when the loss to the victim or government exceeded $10,000 (8 USC §1101(a)(43)(M));
- A "crime of violence" resulting in a sentence imposed of 1 year or more (8 USC §1101(a)(43)(F); see §52.47);
- Theft, receipt of stolen property, or burglary if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(G); see §52.46);

- Alien smuggling, transporting, or harboring, except for immediate family (8 USC §1101(a)(43)(N));
- Certain false-document offenses if the sentence imposed is at least 1 year (8 USC §1101(a)(43)(P));
- Vehicle trafficking with altered identification numbers if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(R));
- Perjury, bribery, forgery, or obstruction of justice if the sentence imposed is 1 year or more (8 USC §1101(a)(43)(S)); see *Matter of Valenzuela Gallardo* (BIA 2012) 25 I&N Dec 838 (Pen C §32, accessory after the fact, with 1 year or more imposed is aggravated felony related to crime of obstruction of justice because of intentional attempt, motivated by specific intent, to interfere with process of justice, irrespective of existence of ongoing criminal investigation or proceeding);
- Failure to appear to serve a sentence if the underlying offense is punishable by a term of 5 years or more, or to face charges if the underlying sentence is punishable by a term of 2 years or more (8 USC §1101(a)(43)(Q), (T)); see *Renteria-Morales v Mukasey* (9th Cir 2008) 551 F3d 1076, 1079 (conviction for violation of 18 USC §3146 for bail jumping is not categorically an aggravated felony under 8 USC §1101(a)(43)(T), but it is categorically an aggravated felony for obstruction of justice if 1-year sentence is imposed);
- Various offenses, such as demand for ransom, child pornography (see *Chavez-Solis v Lynch* (9th Cir 2015) 803 F3d 1004 (Pen C §311.11(a) is categorically not aggravated felony)), and RICO offenses punishable with a 1-year sentence; running a prostitution business (see *Prus v Holder* (2d Cir 2011) 660 F3d 144); slavery; and offenses relating to national defense, sabotage, or treason; (see 8 USC §1101(a)(43)); and
- Attempt or conspiracy to commit any listed offense (see 8 USC §1101(a)(43)(U)).

These types of offenses are included in the list of aggravated felonies whether they are in violation of federal or state law (*Matter of Barrett* (BIA 1990) 20 I&N Dec 171), or are in violation of foreign law if release from the resulting imprisonment occurred within the previous 15 years. See 8 USC §1101(a)(43) (paragraph following (U)).

▶ **Practice Tip:** Solicitation to commit an aggravated felony has been held not to constitute an aggravated felony. However, it is possible that legislation will erase this defense, so the best practice is for defense practitioners to not rely upon it when there is an alternative. See §52.33.

▶ **Note:** Defining aggravated felonies is a complex and quickly changing area of the law with harsh consequences. For a more detailed discussion, see chart at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php, and Notes Accompanying Quick Reference Chart; Brady et al., Defending Immigrants, chap 9 (10th ed); Tooby, Criminal Defense of Immigrants; Tooby, Aggravated Felonies; Kesselbrenner & Rosenberg, Immigration Law and Crimes.

§52.42 b. Sentence Requirements for Some Aggravated Felonies

Many generic aggravated felony offenses require that a sentence of 1 year or more

be imposed before the offense will be considered an aggravated felony: a crime of violence (8 USC §1101(a)(43)(F)); theft, receiving stolen property, or burglary (8 USC §1101(a)(43)(G)); passport or document forgery (8 USC §1101(a)(43)(P)); commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered (8 USC §1101(a)(43)(R)); and obstruction of justice, perjury, subornation of perjury, or bribery of a witness (8 USC §1101(a)(43)(S)). For this purpose, the offense is an aggravated felony if (a) a sentence of 1 year or more is imposed, even if execution is suspended, or (b) the court ordered 365 days or more of custody as a condition of probation (8 USC §1101(a)(48)(B)). Note that other aggravated felonies, such as sexual abuse of a minor (8 USC §1101(a)(43)(A)) or drug trafficking (8 USC §1101(a)(43)(B)), have no sentence requirement. A term of imprisonment in a substance abuse treatment facility imposed as a condition of probation constitutes a "term of imprisonment" for purposes of the aggravated felony definition. *Matter of Calvillo Garcia* (BIA 2015) 26 I&N Dec 697 (citing *Ilchuk v Attorney Gen. of U.S.* (3d Cir 2006) 434 F3d 618, 623, and holding that house arrest with electronic monitoring was "term of imprisonment" under 8 USC §1101(a)(48)(B) even though under Sentencing Guidelines house arrest would not be "sentence of imprisonment").

Strategy. To avoid an aggravated felony in this context, counsel should obtain "imposition of sentence suspended" and a maximum custody, as a condition of probation, of no more than 364 days. Beginning January 1, 2015, maximum custody for a misdemeanor is 364 days. Pen C §18.5. Even if several consecutive 364-day terms of custody as a condition of probation are imposed, no single offense is punished by 1 year or more, and therefore none of the offenses constitutes an aggravated felony. A recidivist sentence enhancement constitutes part of the "maximum term of imprisonment prescribed by law." *U.S. v Rodriquez* (2008) 553 US 377, 128 S Ct 1783. See, *e.g., U.S. v Rivera* (9th Cir 2011) 658 F3d 1073 (felony petty theft with a prior under Pen C §§484(a) and 666 with sentence of 1 year or more is aggravated felony theft offense because of recidivist sentence enhancement). See further discussion of sentencing and strategy in §52.10.

§52.43 c. Analysis of State Offenses as Aggravated Felonies

The aggravated felony definition provides in the unnumbered paragraph immediately following 8 USC §1101(a)(43)(U) that "[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law." Courts employ federal definitions of aggravated felony offenses, and a state offense that does not sufficiently match the federal definition of the offense will not be held to be an aggravated felony.

▶ **Note:** Criminal counsel should stay as far away as possible from any offense that might be an aggravated felony. Failing that, counsel should consider that some state offenses might not constitute aggravated felonies under the federal definition. The aggravated felony analysis is best done in conjunction with expert immigration counsel.

The aggravated felony statute contains two classes of definition:

(1) Plain-language definitions (*e.g.,* 8 USC §1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor")), and

(2) Definitions framed in terms of specific federal statutes (*e.g.,* 8 USC

§1101(a)(43)(D) ("an offense described in section 1956 of title 18, United States Code" (money-laundering)).

Plain-language definitions. Courts will construct a "generic" or plain language federal definition of the offense, gleaned from sources such as common law, the Model Penal Code, the laws of several states, and federal statutes. If the state offense does not meet the generic federal definition (or if the state offense is broader than the federal, and the official record of conviction does not identify that the offense actually involved was one included in the federal definition), the state offense is not an aggravated felony. See, *e.g., Lopez-Valencia v Lynch* (9th Cir 2015) 798 F3d 863, 868 (California theft statute is overbroad and criminalizes conduct such as theft by false pretenses that does not satisfy federal generic definition); *Ye v INS* (9th Cir 2000) 214 F3d 1128 (burglary of automobile under California law is not "burglary" for aggravated felony purposes, because federal generic definition includes only burglary of building); *U.S. v Anderson* (9th Cir 1993) 989 F2d 310 (defining extortion under Armed Career Criminal Act sentence enhancement provision, 18 USC §924(e)). But see Warning in §52.40. See discussion in Brady et al., Defending Immigrants §9.5, pt A (10th ed).

Specific statute definitions. Regarding offenses defined in relation to specific federal statutes, the substantive elements of the state offense must match *exactly* in order for the state offense to be an aggravated felony. *U.S. v Sandoval-Barajas* (9th Cir 2000) 206 F3d 853. The offense, however, need not include the federal jurisdictional element in the listed federal offense, *e.g.,* a requirement that the offense was carried out across state lines. *U.S. v Castillo-Rivera* (9th Cir 2001) 244 F3d 1020 (despite lack of interstate commerce element, former Pen C §12021 was sufficiently similar to 18 USC §922(g)(1) to be aggravated felony under U.S. sentencing guidelines); *Matter of Vasquez-Muniz* (BIA 2002) 23 I&N Dec 207 (following *Castillo-Rivera*). See further discussion relating to firearms aggravated felonies in §52.36 and in Brady et al., Defending Immigrants §9.5, pt C.

§52.44 d. Consequences of Conviction of Aggravated Felony

Conviction of an aggravated felony under 8 USC §1101(a)(43) after the noncitizen is admitted to the United States is a basis for deportability. 8 USC §1227(a)(2)(A)(iii). The conviction must have occurred after November 18, 1988. *Ledezma-Galicia v Holder* (9th Cir 2010) 636 F3d 1059. Other penalties from this type of conviction, whether it occurs before or after admission to the United States, include the following:

- Ineligibility for political asylum. 8 USC §1158(b).
- Ineligibility for cancellation of removal. 8 USC §1229b.
- Permanent ineligibility to establish good moral character (8 USC §1101(f)), a requirement for cancellation of removal for certain nonpermanent residents, suspension of deportation, voluntary departure, and U.S. citizenship, if the conviction occurred after November 29, 1990.
- Permanent ineligibility for immigration after deportation. 8 USC §1182(a)(9)(A)(ii); discretionary waiver is available.
- Barring of permanent residents from applying for a waiver of inadmissibility for crimes involving moral turpitude and other offenses. 8 USC §1182(h).

• No eligibility for release on bond from immigration detention (8 USC §1226(c)), at least for noncitizens passing from criminal custody on or after October 9, 1998. If the conviction occurred before November 18, 1988, it should not trigger mandatory detention under 8 USC §1226(c)(1)(B), because it does not make the person "deportable" for an aggravated felony. See *Ledezma-Galicia v Holder* (9th Cir 2010) 636 F3d 1059. A person who cannot secure an immigration bond will remain in immigration jails during the pendency of the hearing and any appeals, with little access to counsel and almost no means of obtaining pro bono immigration counsel. The U.S. Supreme Court held that this requirement of mandatory detention for certain criminal aliens was constitutional as applied to a permanent resident alien. *Demore v Hyung Joon Kim* (2003) 538 US 510, 515, 123 S Ct 1708. Once the noncitizen has a final removal order, he or she will be detained at least for the period reasonably necessary to bring about removal. If removal appears impossible (*e.g.*, if it is to a country to which the United States is not currently deporting people), the individual has some right to release. See *Clark v Martinez* (2005) 543 US 371, 125 S Ct 716; *Zadvydas v Davis* (2001) 533 US 678, 121 S Ct 2491; *Ma v Ashcroft* (9th Cir 2001) 257 F3d 1095.

• Being subject to a speeded-up schedule for removal hearings and appeals. 8 USC §1228(a)(3).

▶ **Note:** Aggravated felons who reenter the United States illegally after removal face up to 20 years in prison if convicted under 8 USC §1326(b)(2). Counsel should advise defendants accordingly. This sentence can be enhanced if the defendant has prior felony convictions. See §52.64.

A nonpermanent resident can be removed by a DHS officer in an administrative procedure without a hearing before an immigration judge if, in the officer's opinion, the nonpermanent resident has been convicted of an aggravated felony and is not eligible for immigration relief. 8 USC §1228(b).

§52.44A e. Specific Aggravated Felonies and Exceptions

An offense may be an "aggravated felony" for immigration purposes even if it is a misdemeanor under California law. Ascertaining whether a particular California offense is an aggravated felony is not always easy, and there is not always a definitive answer. To determine whether a particular crime is likely to be considered an aggravated felony, counsel may consult the chart online at the website http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

§52.45 (1) Rape, Sexual Abuse of a Minor

The terms "rape" and "sexual abuse of a minor" are included in the aggravated felony definition under 8 USC §1101(a)(43)(A). In a major reversal of Ninth Circuit precedent, the court held en banc that the following offenses are categorically not aggravated felonies as "sexual abuse of a minor" since they are overbroad in comparison with the federal crime under 18 USC §2243: Pen C §261.5(c) (unlawful sexual intercourse with a minor more than 3 years younger), Pen C §286(b)(1) (consensual sodomy with minor), Pen C §288a(b)(1) (consensual oral copulation with minor), and Pen C

§289(h) (consensual sexual penetration by foreign object of person between ages 14 and 18). *Estrada-Espinoza v Mukasey* (9th Cir 2008) 546 F3d 1147. The Ninth Circuit found that the generic offense of "sexual abuse of a minor" under 18 USC §2243 requires (1) a mens rea level of knowing; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor. 546 F3d at 1152. The Ninth Circuit held that Pen C §261.5(d) (unlawful sexual intercourse with minor under age 16 with defendant over age 21) is not an aggravated felony for "sexual abuse of a minor," but it left open the possibility that if the record of conviction shows that the victim was especially young (under age 14, and possibly under age 15), the offense might be an aggravated felony; this ruling also should apply to offenses under Pen C §§286(b)(2), 288a(b), and 289(i). *Pelayo-Garcia v Holder* (9th Cir 2009) 589 F3d 1010.

▶ **Note:** *Pelayo-Garcia* should be considered partially overruled by *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, to the extent that it provides that a court may look to the record of conviction to determine the age of the minor.

In *U.S. v Medina-Villa* (9th Cir 2009) 567 F3d 507, 514, the court held that *Estrada-Espinoza* (characterized as applying only to consensual sex with older teenagers) did not overrule precedent holding that a broadly defined "lewd act" with a child under the age of 14 is categorically an aggravated felony under Pen C §288(a) (see, *e.g.*, *U.S. v Baron-Medina* (9th Cir 1999) 187 F3d 1144), nor did it overturn *U.S. v Pallares-Galan* (9th Cir 2004) 359 F3d 1088, which held that a statute punishing less serious behavior, such as Pen C §647.6 (annoying or molesting child), is a divisible statute encompassing both conduct that may be "sexual abuse of a minor" and conduct that is not abusive. But see *Sanchez-Avalos v Holder* (9th Cir 2012) 693 F3d 1011 (conviction for sexual battery under Pen C §243.4(a) was not categorically "sexual abuse of minor"; date-of-birth allegation in complaint that showed victim was 13 could not be considered under modified categorical approach, because age of victim was not fact on which defendant's conviction "necessarily rested"). Under *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, 2284, no conviction under Pen C §647.6(a) should be an aggravated felony for sexual abuse of a minor. While the statute is overbroad in that it may encompass a wide array of conduct, it is not truly a divisible statute that contains multiple crimes set forth as alternative elements, since "annoy" and "molest" are synonyms. See *People v Lopez* (1998) 19 C4th 282, 289.

A plea to Pen C §288(c)(1) (lewd act on 14- or 15-year-old and perpetrator is 10 or more years older than victim) is not categorically an aggravated felony, because there is no element requiring a "sexual act," which has been defined as touching the genitalia under the clothes. *U.S. v Castro* (9th Cir 2010) 607 F3d 566, 567. Note that a sentence of 1 year or more might make this an aggravated felony as a crime of violence.

▶ **Practice Tip:** A plea to an age-neutral offense can avoid a conviction for sexual abuse of a minor. Even if the age of the victim is included in the record of conviction at the insistence of the prosecution, it will not be an aggravated felony as a crime of sexual abuse of a minor if the age of the victim is not an element of the offense. See *Sanchez-Avalos v Holder* (9th Cir 2012) 693 F3d 1011 (conviction for sexual

battery under Pen C §243.4(a), which lacks age of victim as an element, was not categorically "sexual abuse of minor" even though record of conviction showed age of victim was 13).

▶ **Warning**: The definition of "sexual abuse of a minor" is not settled. The circuits differ widely in their definitions. Also, the BIA held that Pen C §261.5(c) is an aggravated felony for sexual abuse of a minor. *Matter of Esquivel-Quintana* (BIA 2015) 26 I&N Dec 469. The Ninth Circuit decisions on sexual abuse of a minor will trump the BIA decisions. But if a noncitizen moves outside the Ninth Circuit, a noncitizen defendant will be subject to the holdings of the other circuit, or the BIA. This issue could also someday go before the Supreme Court. See California Chart and Notes (Chart & Notes Combined) §N.14, at http://www.ilrc.org/crimes.

The Ninth Circuit has also held that "rape" includes rape by means of intoxication under Pen C §261 (*Castro-Baez v Reno* (9th Cir 2000) 217 F3d 1057).

Alternative pleas could include battery, sexual battery, false imprisonment under Pen C §§236–237, nonviolent attempt to dissuade a victim from filing a police report under Pen C §136.1(b), or less onerous pleas supported by the facts. Misdemeanor molest/annoy under Pen C §647.6(a) should not be deemed an aggravated felony post-*Descamps, supra.*

One recourse for a defendant in a case involving sex abuse of a minor is that there remain some possibilities for immigration relief and waivers, despite the fact that these offenses are aggravated felonies. Depending on the individual situation, this might include withholding of removal (an asylum-like relief), adjustment of status for a person already granted asylum, or a family visa petition, with or without a waiver of inadmissibility. In some cases it is very helpful to obtain a misdemeanor conviction, including a felony reduced to a misdemeanor under Pen C §17, rather than a straight felony. See Brady et al., Defending Immigrants §9.1 (10th ed).

§52.46 (2) Burglary, Theft, Receipt of Stolen Property, Forgery, Crime of Fraud or Deceit With Loss Exceeding $10,000

▶ **Note:** Beginning January 1, 2015, maximum custody for a misdemeanor is 364 days. Pen C §18.5.

Burglary, theft, or receipt of stolen property. Burglary, theft, or receipt of stolen property is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). Aggravated felon status can be prevented in all cases by obtaining a sentence of 364 days or less. See §§52.10, 52.42 for discussion of sentence.

Burglary with a 1-year sentence imposed has the potential to be an aggravated felony in three ways: as burglary, as a crime of violence (8 USC §1101(a)(43)(F), see §52.47 for discussion), or possibly as attempted theft. For this purpose, the Ninth Circuit adopted the Supreme Court's generic definition of burglary as unlawful entry into a building to commit a crime. *Ye v INS* (9th Cir 2000) 214 F3d 1128.

The Ninth Circuit held that burglary under Pen C §459 is not a theft-related aggravated felony. Because §459 is not a divisible statute, the court cannot consider record-of-conviction documents to determine whether the defendant entered with intent

to commit larceny or "any felony." *Rendon v Holder* (9th Cir 2014) 764 F3d 1077, 1084.

▶ **Note:** Although a Ninth Circuit case holds that burglary of an automobile under §459 is an aggravated felony as an attempted theft if a sentence of 1 year or more is imposed and the record of conviction shows that the defendant pleaded guilty to entering a locked motor vehicle with the intent to commit theft, rather than any felony (*Ngaeth v Mukasey* (9th Cir 2008) 545 F3d 796), it is probably overruled by *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, which prohibits use of facts in a record of conviction other than to show which part of a divisible statute a defendant was convicted under.

With respect to burglary of a dwelling, California's Pen C §460(a) is a divisible statute, including the offenses of burgling a building, car, and other structures. If the record of conviction (the charging documents, plea, or verdict) is vague regarding whether the §460(a) conviction is for entry into a building, the offense will not constitute "burglary" or a "crime of violence" for this purpose. Residential burglary under Pen C §460(a) with a sentence imposed of 1 year or more was previously deemed categorically a "crime of violence." *Lopez-Cardona v Holder* (9th Cir 2011) 662 F3d 1110. However, this ruling was overruled in *Dimaya v Lynch* (9th Cir 2015) 803 F3d 1110. Again, under *Descamps v U.S., supra,* a conviction for any Pen C §460(a) or (b) offense would categorically not be an aggravated felony as a "burglary" even with a sentence imposed of 1 year or more, because the generic definition of "burglary" requires unlawful entry.

With respect to burglary as attempted theft, the Ninth Circuit held that a California conviction of second degree commercial burglary, in violation of Pen C §459, did not categorically constitute an attempted-theft aggravated felony under 8 USC §1101(a)(43)(G), because "[s]imply entering a commercial building . . . is not in itself a 'substantial step' supporting attempted theft liability." *Hernandez-Cruz v Holder* (9th Cir 2011) 651 F3d 1094, 1097.

For further discussion of burglary, see "How to Plead a Non-Citizen Defendant to a California Burglary Charge" at http://www.ilrc.org/crimes; Brady et al., Defending Immigrants §9.10 (10th ed).

A "theft offense (including receipt of stolen property)" is an aggravated felony if a 1-year sentence is imposed. 8 USC §1101(a)(43)(G). The Ninth Circuit has held that Pen C §484 with a 1-year sentence or more imposed is categorically not an aggravated felony as a "theft offense," because §484 includes fraud offenses, and a jury does not have to unanimously decide which type of theft was committed in order to convict. Since the statute is not divisible, a court may not resort to the record of conviction to determine if a conviction was for theft as opposed to fraud. See *Lopez-Valencia v Lynch* (9th Cir 2015) 798 F3d 863 (plea to Pen C §666 with a year or more imposed categorically not an aggravated felony, because Pen C §484 categorically not an aggravated felony). The Ninth Circuit, en banc, upheld the jury unanimity rule in *Almanza-Arenas v Holder* (9th Cir 2015) 809 F3d 515, but the issue of whether a court can resort to the modified categorical analysis when a statute is set forth in the disjunctive and one clause matches the generic offense is presently pending before the Supreme Court. See *Mathis v U.S.* (Jan. 19, 2016, No. 15-6092) 2016 US Lexis 710. Therefore,

criminal defense counsel should act conservatively by specifying a plea to a fraud offense set forth in §484 if a 1-year sentence cannot be avoided. But defense counsel should be careful to avoid a conviction for a crime of fraud or deceit when the loss to a victim or victims tied to the count pleaded to is more than $10,000, because this would be an aggravated felony under 8 USC §1101(a)(43)(M)(i).

The Ninth Circuit held that an offense meets the aggravated felony definition of theft even if there is intent only to temporarily deprive the owner of property rights. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201, 1205 (en banc). Thus, possession of stolen property with intent to temporarily deprive an owner of possession is an aggravated felony if a 1-year sentence is imposed. *Verdugo-Gonzalez v Holder* (9th Cir 2009) 581 F3d 1059. But see *Castillo-Cruz v Holder* (9th Cir 2009) 581 F3d 1154 (possession of stolen property is divisible as crime of moral turpitude because it could encompass possession with intent to temporarily deprive an owner, which is not crime of moral turpitude).

An offense under Veh C §10851 is divisible as a "theft offense." It is categorically a theft offense if a 1-year sentence is imposed and if the record of conviction shows that the defendant personally took the vehicle regardless of whether the taking was temporary or permanent. *Gonzales v Duenas-Alvarez* (2007) 549 US 183, 127 S Ct 815. But a plea to Veh C §10851 (taking a vehicle) as an accessory, even with a sentence of 1 year or more imposed, will not be deemed an aggravated felony as a "theft offense" if the record of conviction does not establish that the defendant acted as the principal rather than as an accessory after the fact. *U.S. v Vidal* (9th Cir 2007) 504 F3d 1072 (en banc). See also *Duenas-Alvarez v Holder* (9th Cir 2013) 733 F3d 812, 814 (record established defendant acted as principal). Counsel should still act conservatively and try to obtain a sentence imposed of 364 days or less because accessory with a 1-year sentence imposed could be charged as an aggravated felony for obstruction of justice. See also *Carrillo-Jaime v Holder* (9th Cir 2009) 572 F3d 747 (owning and operating chop shop under Veh C §250 not aggravated felony as theft offense).

▶ **Practice Tip:** To avoid an aggravated felony for theft when a sentence of a year or more is unavoidable, plead to "theft of labor," which is not an aggravated felony as a theft offense. *U.S. v Corona-Sanchez* (9th Cir 2002) 291 F3d 1201 (en banc). A plea to one of the several discrete fraud offenses in Pen C §484 with a sentence imposed of a year or more will not be an aggravated felony, provided the loss to the victims is not more than $10,000.

▶ **Note:** Although a taking of property with the intent to temporarily deprive the owner can be an aggravated felony, it is not a crime involving moral turpitude. *Matter of D.* (1941) 1 I&N Dec. 143. For this reason, the Ninth Circuit held that a conviction for Veh C §10851(a) is categorically not an aggravated felony, because the minimum conduct to convict is to temporarily deprive an owner, and a jury does not have to unanimously decide whether the defendant intended to temporarily or permanently deprive the owner of possession of the vehicle. *Almanza-Arenas v Lynch* (9th Cir 2015) 809 F3d 515 (en banc). But because the defendant may move to another circuit or the Supreme Court may rule otherwise, it is best to specifically plead guilty to a taking with intent to temporarily deprive the owner of the vehicle, to avoid a crime of moral turpitude.

▶ **Warning:** The U.S. Supreme Court has granted certiorari in a case to determine whether a court may resort to the "modified categorical approach" whenever a statute sets out in the disjunctive alternative forms of committing an offense ("the means"), or only when the alternative forms of the offense represent "elements" that a jury must unanimously decide the defendant committed. See *Mathis v U.S.* (Jan. 19, 2016, No. 15-6092) 2016 US Lexis 710. For this reason, criminal counsel should act conservatively and plead a client only to the specific alternative method of committing the crime that avoids or mitigates the adverse immigration consequence.

▶ **Warning:** A sentence enhancement imposed for recidivist behavior will be counted as part of the "sentence." Thus, a conviction of petty theft with a prior under Pen C §§484 and 666 is an aggravated felony if the sentence, including enhancement, is 1 year or more. *U.S. v Rodriquez* (2008) 553 US 377, 128 S Ct 1783.

The BIA has held that attempted possession of stolen property is sufficiently like attempted receipt of stolen property to be an aggravated felony. *Matter of Bahta* (BIA 2000) 22 I&N Dec 1381.

Forgery. An offense relating to forgery is an aggravated felony if a sentence is imposed of 1 year or more. 8 USC §1101(a)(43)(R). Penal Code §476 was found categorically to correspond to the generic definition of forgery for purposes of 8 USC §1101(a)(43)(R) in that it requires "intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument." *Morales-Alegria v Gonzales* (9th Cir 2006) 449 F3d 1051, 1056. On the other hand, a conviction for violation of Pen C §475(c) was found not to be an offense relating to forgery because the generic definition of forgery requires the "falsification" of a document or instrument and §475(c) prohibits the use of certain documents which are "real" as well as "fictitious." *Vizcarra-Ayala v Mukasey* (9th Cir 2008) 514 F3d 870, 875.

▶ **Practice Tip:** To avoid an aggravated felony for a Pen C §475(c) offense, plead only to uttering a "real" document, or obtain a sentence of 364 days or less.

Fraud or deceit with loss exceeding $10,000. A crime involving fraud or deceit with loss to a victim or victims exceeding $10,000 is an aggravated felony under 8 USC §1101(a)(43)(M)(i). The offense need not include fraud or deceit as a formal element but rather must be an offense with elements that necessarily entail fraudulent or deceitful conduct. See *Kawashima v Holder* (2012) ___ US ___, 132 S Ct 1166 (tax crimes).

To avoid an aggravated felony for this offense, the defendant may plead to an offense in which there is no element or implied element of fraud or deceit. For example, a crime of theft for taking or carrying away property without consent will not be deemed a crime of fraud or deceit. *Matter of Garcia-Madruga* (BIA 2008) 24 I&N Dec 436 (distinction between crime involving fraud or deceit and theft is that "taking" of property must be "without consent" but certain offenses such as theft by deception might fit into both categories).

A theft offense, at least under Pen C §484, will not be an aggravated felony even with a sentence imposed of 1 year or more. *Lopez-Valencia v Lynch* (9th Cir 2015) 798 F3d 863 (§484 is not divisible, because it includes both theft and fraud offenses and jury does not have to unanimously decide whether defendant committed fraud

or committed theft to convict). Criminal defenders should still try to avoid a sentence of 365 days or more in case the defendant moves to a different circuit or the Supreme Court comes to a different conclusion.

If the conviction is to a crime with an element or implied element of fraud or deceit, an immigration court can take evidence outside the record of conviction to determine if the loss to a victim or victims exceeded $10,000. *Nijhawan v Holder* (2009) 557 US 29, 129 S Ct 2294. If the loss to the victim or victims exceeds $10,000, defense counsel should attempt to have a defendant plead to a theft offense, provided that the sentence is 364 days or less. If pleading to a crime involving fraud is unavoidable, defense counsel should try to establish in the record that the total loss to the victim(s) for the count(s) of conviction was $10,000 or less. The loss must "be tied to the specific counts covered by the conviction." *Nijhawan v Holder, supra.* The defendant can allow the court to set restitution in an amount exceeding $10,000 and still avoid an aggravated felony conviction under this section, so long as the restitution amount is not tied to specific counts covered by the conviction. The defendant could do this by use of a "*Harvey* waiver." See *People v Harvey* (1979) 25 C3d 754. If that cannot be done, then counsel should attempt to arrange for the defendant to pay down the amount before plea (before sentence is not sufficient), so that the restitution amount is less than $10,000, although this may not work because the BIA uses "intended loss" as the measure even if the actual loss is $10,000 or less. *Matter of Onyido* (BUA 1999) 22 I&N Dec 552. See chart and accompanying notes at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php; Brady et al., Defending Immigrants §9.10 (10th ed).

§52.47 (3) Crimes of Violence

▶ **Note:** Beginning January 1, 2015, maximum custody for a misdemeanor is 364 days. Pen C §18.5.

A person convicted of a crime of violence and sentenced to imprisonment of 1 year or more is an aggravated felon (8 USC §1101(a)(43)(F)), subject to the penalties and restricted rights discussed in §52.44. To avoid an aggravated felony conviction for his or her client, counsel must either avoid a sentence of 1 year or more or plead to an offense that is not a "crime of violence."

A crime of violence is broadly defined in 18 USC §16(a) as an offense that "has as an element the use, attempted use, or threatened use of physical force against" another person or person's property, or under 18 USC §16(b) as any felony that by its nature involves substantial risk of such force.

In a major decision, the Ninth Circuit held that the definition of a "crime of violence" under 8 USC §1101(a)(43)(F) as defined in 18 USC §16(b) is unconstitutionally vague. See *Dimaya v Lynch* (9th Cir 2015) 803 F3d 1110 (mandate pending), citing *Johnson v U.S.* (2015) ___ US ___, 135 S Ct 2551 (ACCA "crime of violence" based on 18 USC §16(b) is unconstitutionally vague). This decision effectively overrules any prior "crime of violence" ruling based on 18 USC §16(b), but not those that are or could be based on 18 USC §16(a).

The Supreme Court held that felony driving under the influence, as an offense involving negligent causation of harm, is not a "crime of violence." See *Leocal v Ashcroft*

(2004) 543 US 1, 125 S Ct 377. Misdemeanor or felony reckless infliction of injury also is not a crime of violence; thus, involuntary manslaughter under Pen C §192(b) is not a crime of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121. Gross vehicular manslaughter while intoxicated is not a crime of violence. See *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217. In addition, offenses such as battery or spousal battery under Pen C §243(a), (e), are not crimes of violence, because they can be committed by mere offensive touching. A Veh C §2800.2 conviction is not a crime of violence if the "wanton, reckless" intent was supplied by having prior traffic violations. *Penuliar v Mukasey* (9th Cir 2008) 528 F3d 603, 609.

Crimes of violence include the following:

- Battery against a peace officer in performance of his or her duty causing injury under Pen C §243(c)(2) (see *U.S. v Colon-Arreola* (9th Cir 2014) 753 F3d 841, 845).
- Brandishing a firearm in the presence of the occupant of a motor vehicle under Pen C §417.3 (see *Bolanos v Holder* (9th Cir 2013) 734 F3d 875).
- Lewd and lascivious acts on a 14- or 15-year-old child under Pen C §288(c)(1) (see *Rodriguez-Castellon v Holder* (9th Cir 2013) 733 F3d 847);
- False imprisonment under Pen C §210.5 (see *Barragan-Lopez v Holder* (9th Cir 2013) 705 F3d 1112);
- Attempted kidnapping under Pen C §207(a), because an ordinary case presents a substantial risk of force (see *Delgado-Hernandez v Holder* (9th Cir 2012) 697 F3d 1125);
- Carjacking under Pen C §215 (see *Nieves-Medrano v Holder* (9th Cir 2010) 590 F3d 1057);
- Making a terroristic threat under Pen C §422, even as a misdemeanor (see *Rosales-Rosales v Ashcroft* (9th Cir 2003) 347 F3d 714, 717);
- Exhibiting a deadly weapon with intent to resist arrest under Pen C §417.8 (see *Reyes-Alcaraz v Ashcroft* (9th Cir 2004) 363 F3d 937, 938);
- Mayhem under Pen C §203 (see *Ruiz-Morales v Ashcroft* (9th Cir 2004) 361 F3d 1219, 1222);
- Aiding and abetting assault with a deadly weapon under Pen C §245(a)(1) (see *Ortiz-Magana v Mukasey* (9th Cir 2008) 542 F3d 653, 659); and
- Assault with a firearm under Pen C §245(a)(2) (see *U.S. v Heron-Salinas* (9th Cir 2009) 566 F3d 898, 899) and assault with intent to commit a felony in violation of Pen C §220 (see *Matter of Ramon Martinez* (BIA 2011) 25 I&N Dec 571, 573 (all the enumerated felonies listed constitute crimes of violence)).

The following offenses have been held not to be crimes of violence, and therefore would not be aggravated felonies even if a sentence of 1 year or more were imposed:

- Residential burglary under Pen C §459 (see *Dimaya v Lynch* (9th Cir 2015) 803 F3d 1110 (mandate pending) ("crime of violence" aggravated felony based on 18 USC §16(b) unconstitutionally vague));
- Felony child abuse under Pen C §273a(a) (*Ramirez v Lynch* (9th Cir, Jan. 20, 2016, No. 08-72896) 2016 US App Lexis 901 (§273a(a) categorically not aggravated felony and not divisible statute); but see Warning in §52.46);

• Simple battery under Pen C §243(a), (e) (see *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010; see also *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968);

• Misdemeanor sexual battery under Pen C §243.4 (see *U.S. v. Lopez-Montanez* (9th Cir 2005) 421 F3d 926);

• A simple battery that can be committed by mere offensive touching, when the record of conviction does not establish that actual violence occurred (see, *e.g., Singh v Ashcroft* (9th Cir 2004) 386 F3d 1228, discussed in §52.49);

• Driving under the influence, when the offense does not have a mens rea component or requires only a showing of negligence (*Leocal v Ashcroft* (2004) 543 US 1, 125 S Ct 377; see *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140; *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217;

• Possession of a dangerous weapon (dirk or dagger) under Pen C §12020(a) (see *U.S. v Medina-Anicacio* (5th Cir 2003) 325 F3d 638);

• Stalking under Pen C §649.9, because "harassing" conduct does not necessarily create a risk that force may be used. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080. However, "stalking" is a deportable offense under 8 USC §1227(a)(2)(E); and

• Maliciously and willfully discharging a firearm at inhabited building or vehicle under Pen C §246 is not categorically a crime of violence. *Covarrubias Teposte v Holder* (9th Cir 2011) 632 F3d 1049.

▶ **Note:** Setting fire to a structure or forest land under Pen C §452(c) is not categorically an aggravated felony crime of violence because the defendant could have set fire to his own property (*Jordison v Gonzales* (9th Cir 2007) 501 F3d 1134) and 18 USC §16(a) defines a crime of violence as the use of force against another person or another's property. But this is not a safe plea, because arson may be charged by DHS as an aggravated felony under INA §101(a)(43)(E)(i), which incorporates 18 USC §841 (arson).

▶ **Note:** There is a strong argument, although no guaranty, that felony conviction under Pen C §236 or §237 is not a crime of violence if it is effected by deceit or fraud. A misdemeanor conviction under Pen C §§236 and 237 ought not to be held a moral turpitude offense.

See further discussion in "Note: Safer Alternatives" online at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php; Brady et al., Defending Immigrants §9.13 (10th ed).

▶ **Practice Tip:** When the client is charged with an offense that might be classified as a crime of violence, defense counsel should attempt to obtain a sentence of less than 1 year—meaning imposition of sentence suspended or a sentence of 364 days or less (either directly imposed or ordered as a condition of probation) to avoid aggravated felon status for the client.

7. Domestic Violence and Crimes Against Children

§52.48 a. Definition

Persons convicted of offenses related to domestic violence can suffer immigration consequences in several ways:

- If the crime is classified as a "crime of violence" and a 1-year sentence is imposed, the offense will be an aggravated felony under 8 USC §1101(a)(43)(F). See discussion in §52.47.
- A conviction for domestic violence may also be a crime of moral turpitude.
- Conviction of a domestic violence offense makes a noncitizen ineligible for Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability. See §§52.63–52.64.
- There is a broadly defined ground of deportability specifically based on domestic violence offenses. 8 USC §1227(a)(2)(E).

Ground for deportation. Conviction of a state or federal crime of domestic violence, stalking, or child abuse, neglect, or abandonment is a basis for deportation if the conviction occurred after the person was admitted and on or after September 30, 1996. 8 USC §1227(a)(2)(E)(i). A court finding of violation of certain portions of a domestic violence protection order, even absent a conviction, is a basis for deportability if the behavior that constituted the violation occurred on or after September 30, 1996. 8 USC §1227(a)(2)(E)(ii). There is no analogous basis for inadmissibility. However, these types of offenses may constitute crimes involving moral turpitude and must be analyzed independently regarding inadmissibility on that ground.

Conviction of crime against child. A crime of child abuse, child neglect, or child abandonment is a deportable offense if committed after admission. The BIA has defined "child abuse" very broadly as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." The injury may be slight, and emotional mistreatment or conduct injurious to morals is encompassed within this definition. *Matter of Velazquez-Herrera* (BIA 2008) 24 I&N Dec 503, 512. In *Matter of Soram* (BIA 2010) 25 I&N Dec 378, the BIA held that this definition applies to any act or omission of placing a child in danger even when a statute does not require that any actual harm or injury occur. The immigration court will look both at the elements of the statute and the admissible record of conviction to determine if the noncitizen's conviction included the necessary elements of this offense. 24 I&N Dec at 518.

▶ **Practice Tip:** To avoid deportability for a "crime of child abuse, child neglect, or child abandonment," plead to an offense that is age-neutral. The BIA, in *Matter of Velzaquez-Herrera, supra,* held that the categorical approach is used in deciding whether a conviction comes within the child abuse deportation ground, at least in the Ninth Circuit. But it found that an age-neutral statute could be a crime of child abuse if the reviewable record of conviction established that the victim was a minor. This holding should be deemed overruled by *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276,

which prohibits use of facts in the record of conviction to supply a missing element of the statute.

For purposes of this deportation ground, counsel should assume that any conviction under Pen C §273a(a) (endangering child or causing or permitting child to suffer physical pain, mental suffering, or injury) and Pen C §273a(b) will result in deportability. While the Ninth Circuit in *Fregozo v Holder* (9th Cir 2009) 576 F3d 1030, 1037, held that a conviction of Pen C §273a(b) (misdemeanor) is not categorically a crime of child abuse, because it includes placing a child in a situation that merely carries the risk of nonserious harm, the Ninth Circuit was deferring to and interpreting the decision of the BIA in *Matter of Velazquez-Herrera, supra*. Now that the BIA has held that no actual injury must occur (*Matter of Soram, supra*), the Ninth Circuit's holding in *Fregozo* is no longer good law, unless the court were to find that this was an unreasonable construction of the child abuse, neglect, and abandonment ground of deportability.

▶ **Practice Tip**: If a plea to Pen C §273a(b) cannot be avoided, plead only to the portion of the statute permitting a child "to be placed in a situation where his or her person or health may be endangered." There is a good argument and one unpublished immigration court decision that this is not a deportable child abuse offense, because this is distinguishable from the statute under review in *Matter of Soram, supra*. In *Soram,* the BIA was reviewing a statute that required "knowingly or recklessly" permitting a child to be placed in a situation that posed a threat of injury, and the BIA went out of its way to contrast this language with the "may endanger" language of a prior version of the same statute.

Counsel should also assume that Pen C §272, as well as any sex crime when the elements require that the victim be a minor, will be charged on this deportation ground.

Stalking. A conviction for stalking is a ground for removal. 8 USC §1227(a)(2)(E)(i). A conviction under Pen C §646.9 is a deportable stalking offense. *Matter of Sanchez-Lopez* (BIA 2012) 26 I&N Dec 71.

A conviction under Pen C §646.9 may be an aggravated felony as a "crime of violence" if a sentence of 1 year or more is imposed. The best way to avoid this outcome is to obtain a sentence of 364 days or less. However, the Ninth Circuit has held that stalking under Pen C §646.9 with a sentence imposed of 1 year or more is not categorically an aggravated felony as a crime of violence, because the offense can be committed by sending letters and following *or* harassing, and harassing can be committed by sending letters and pictures without proof that the defendant had the intent to actually carry out a threat. *Malta-Espinoza v Gonzales* (9th Cir 2007) 478 F3d 1080, 1083. This defense does not apply outside the Ninth Circuit. *Matter of U. Singh* (BIA 2012) 25 I&N Dec 670.

Conviction of "Crime of Domestic Violence." The term "crime of domestic violence" is specifically defined in 8 USC §1227(a)(2)(E)(i) to include

> any crime of violence (as defined in section 16 of title 18 [United States Code]) 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 cohabitating with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person

under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from 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.

Thus, to be a domestic violence offense, the offense must (1) be a crime of violence defined under 18 USC §16 and (2) be committed against a victim with a specified domestic relationship to the accused. If counsel can prevent either of these factors from being present, the conviction will not be a deportable "crime of domestic violence." Those two factors are the only considerations for the deportation ground: Neither felony/misdemeanor classification nor sentence is determinative. Because the definition incorporates state domestic violence law, the dating relationships that are included under California domestic violence law are also included in this definition. See §52.49 for alternative plea suggestions.

Although the Ninth Circuit held in *Tokatly v Ashcroft* (9th Cir 2004) 371 F3d 613, 624, that evidence outside the record of conviction was inadmissible to prove that the victim and perpetrator had a "domestic" relationship, defense counsel must assume that this is no longer good law, because the Supreme Court held that evidence outside the record of conviction can be used to prove the domestic relationship in a similarly worded sentencing guideline case. See *U.S. v Hayes* (2009) 555 US 415, 129 S Ct 1079. See §52.49.

Court finding of violation of certain portions of a protection order. A separate basis for deportability under this ground is a civil or criminal court finding, on or after September 30, 1996, that the individual has violated portions of a protection order relating to violence or stalking. Under 8 USC §1227(a)(2)(E)(ii),

> [a]ny 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.

§52.49 b. Strategy

When a charge of domestic violence is lodged against a noncitizen, the defense and the prosecution may have important interests in common. Depending on the specific situation, the victim may have urgent, objective reasons to avoid the defendant's deportation. For example, the defendant may provide needed child support; it may be against the children's interests to permanently lose a parent; or the victim may wish to attempt reconciliation after counseling. It is often possible to structure an alternative plea in which the same requirements, *e.g.*, jail time, protective orders, and counseling, are imposed, but the defendant does not become deportable. Domestic violence advocates may play an important role in deliberations between defense and prosecution.

Defense counsel can avoid a conviction of a crime of domestic violence by his

or her client by pleading to an offense that is not a crime of violence, or by pleading to an offense in which the victim is not a person protected under the definition of the state's domestic violence laws.

Avoid conviction of a crime of violence. Some offenses have no potential element of violence: for example, Pen C §591 (misdemeanor tampering with telephone or television line), Pen C §591.5 (tampering to prevent call to authorities), Pen C §653m(a) (single annoying telephone call). Other offenses are not categorically or necessarily crimes of violence, although a particular conviction may be held to be of a crime of violence if the record establishes that the offense involved intended or actual use of violent force. A plea to these offenses will avoid a conviction of a domestic violence offense as long as counsel keeps evidence of actual violence out of the record of conviction. See §52.47. For example, battery and spousal battery under Pen C §243(a), (e), are not necessarily crimes of violence, because the statute can be violated by mere offensive touching, and a misdemeanor under Pen C §236 is not necessarily a crime of violence, because it requires no violence. Likewise, dissuading (with no threats of violence) an individual from filing a complaint under Pen C §136.1(b) is a potentially very useful plea because it is not a crime of violence, although ICE may charge this as a crime of moral turpitude, and if a sentence of 1 year or more is imposed, it will be charged as an aggravated felony. Penal Code §136.1(b) can fulfill many requirements of the prosecution in that it is a potential strike (see Pen C §1192.7(c)(37)) and may be punished as a felony or as a misdemeanor. In contrast, infliction of injury on a spouse or other family member, as defined by Pen C §273.5, is categorically a crime of violence (see *Carrillo v Holder* (9th Cir 2015) 781 F3d 1155, 1158; *Banuelos-Ayon v Holder* (9th Cir 2010) 611 F3d 1080) and hence is a crime of domestic violence. Reckless infliction of harm is not a crime of violence, so that offenses such as involuntary manslaughter and felony involuntary manslaughter (Pen C §§191.5, 192(b)) are not crimes of violence. See *Fernandez-Ruiz v Gonzales* (9th Cir 2006) 466 F3d 1121 (en banc); *Lara-Cazares v Gonzales* (9th Cir 2005) 408 F3d 1217.

▶ **Practice Tip:** To avoid a deportable offense for a crime of "domestic violence," arrange a plea to Pen C §243(e)(1) (spousal or cohabitant battery), which is categorically not a "crime of domestic violence," because it can be committed without any use of *violent* physical force. A plea to Pen C §273.5, which is categorically a crime of violence and an aggravated felony if a sentence of 1 year or more is imposed, is to be avoided. See *Ortega-Mendez v Gonzales* (9th Cir 2006) 450 F3d 1010 (misdemeanor battery under Pen C §242 is not crime of violence or domestic violence offense); *Matter of Sanudo* (BIA 2006) 23 I&N Dec 968 (battery and spousal battery under Pen C §§242, 243(e) are not crimes of violence, domestic violence offenses, or crimes involving moral turpitude).

▶ **Note:** Cases cited before *Descamps v U.S.* (2013) ___ US ___, 133 S Ct 2276, held that Pen C §243(e)(1) (spousal or cohabitant battery) is divisible as a crime of domestic violence and as a crime of moral turpitude because it can be violated with mere offensive touching (not a crime of violence or a crime of moral turpitude) or by actual violent physical force (a crime of violence or a crime of moral turpitude). See, *e.g., In re Sanudo* (BIA 2006) 23 I&N Dec 968. *Descamps* should be deemed to have overruled

Sanudo on the issue of divisibility for §243(e) because California jury instructions and cases show that "force" and "violence" in Pen C §§242–243 mean the same thing and include the least offensive touching of another. See CALCRIM 841. But until there is a decision on point, it is still preferable to try to craft a plea that either amends the complaint to allege that the defendant committed "offensive touching" or "used force but not violent force," and give a copy to the defendant, or states this as the factual basis for the plea on the record, and obtain a copy of the transcript for the defendant. This should conclusively determine that the crime is not a crime of moral turpitude and conclusively establish that the offense is not an aggravated felony crime of violence if a sentence of 1 year or more is imposed. See §52.26 on divisible statutes, §52.40 on crimes of moral turpitude, and §52.47 on aggravated felonies.

If the plea is not to a crime of violence, it will not be considered a deportable domestic violence conviction even if domestic violence counseling or anger management is imposed as a condition of probation, or other evidence shows that the event was in fact a domestic violence incident. *Cisneros-Perez v Gonzales* (9th Cir 2006) 465 F3d 386.

Domestic relationship can probably be proved by evidence outside record of conviction. It is no longer good practice to try to avoid a crime of domestic violence by avoiding evidence of the domestic relationship in the record of conviction. It is very likely that the immigration court will permit evidence outside the record of conviction to establish this element in view of *U.S. v Hayes* (2009) 555 US 415, 129 S Ct 1079. This relationship includes current or ex-spouse, coparent of child, cohabitant living as spouse, or other relationship protected under the domestic violence laws of the state of conviction, such as California.

▶ **Practice Tip:** Pleading to a crime of violence against a victim not described in the statute (*e.g.,* the ex-wife's new boyfriend, not the ex-wife) will avoid a deportable domestic violence offense. In addition, immigration counsel have a good argument, although no published precedent, that a crime of violence against property is not included in the definition of domestic violence. The definition of crime of violence, and suggestions for alternate pleas, is discussed in more detail in §52.47. See also California Chart and Notes (Chart & Notes Combined) at http://www.ilrc.org/crimes; Brady et al., Defending Immigrants §6.15 (10th ed).

Judicial finding that protection order against domestic violence was violated. Deportability also can be caused by a civil or criminal court finding a violation of a protection order against domestic violence. Rather than plead to violating a protection order against domestic violence, the defendant should plead to an alternate offense that is not a crime of violence or stalking. A plea to Pen C §273.6(a) for violation of a protective order that was issued pursuant to Fam C §§6320 and 6389 is a deportable offense (*Alanis-Alvarado v Holder* (9th Cir 2009) 558 F3d 833), as is a plea to violating a stay-away order or any order not to commit an offense that is described in §6320 or §6389 (*Szalai v Holder* (9th Cir 2009) 572 F3d 975). Because this includes almost all conduct covered by protection orders, a plea to another offense is the best strategy. For further discussion, see California Chart and Notes (Chart & Notes Combined) at http://www.ilrc.org/crimes; Brady et al., Defending Immigrants §6.15 (10th ed).

Because this ground includes a civil court finding of violation, a finding that a juvenile has violated a domestic violence protection order might be a basis for the juvenile's deportation. On conduct-based immigration consequences, see §52.50.

▶ **Practice Tip:** A plea to violation of Pen C §166(a)(4) for willful disobedience of any process or court order with a vague record of conviction should avoid this ground of deportability if the record of conviction does not indicate that the defendant disobeyed a domestic protection order. Alternatively, a plea to a new offense, such as trespass, an annoying phone call, or an offense such as Pen C §243(e)(1) for offensive touching, rather than violation of a stay-away order, might avoid this ground of deportability. The best plea would be to plead to conduct that is not itself a violation of the court order in case the categorical approach is abandoned for this crime of deportability.

§52.50 D. Conduct-Based Immigration Consequences

Noncitizens may be held deportable, inadmissible, or barred from establishing good moral character for reasons other than convictions and sentences in criminal cases. See the chart in §52.24 for grounds for these actions. The most common forms of conduct that can trigger adverse immigration consequences without a conviction are prostitution, alien smuggling, document fraud, and drug trafficking, abuse, and addiction. This section discusses grounds not requiring a conviction or sentence.

▶ **Note:** When a ground for inadmissibility, deportation, or preclusion from establishing good moral character does not require a conviction, the conduct triggering it may be established by a juvenile court finding or by police reports or other evidence. See *Matter of Rico* (BIA 1979) 16 I&N Dec 181 (criminal charges dismissed, but other evidence demonstrated trafficking and triggered inadmissibility).

Drug traffickers. A noncitizen is inadmissible and barred from establishing good moral character if the DHS has "reason to believe" that he or she is or has ever been or has assisted a drug trafficker. The noncitizen's spouse and children are also inadmissible if they have benefited from the trafficking in the previous 5 years. 8 USC §§1101(f), 1182(a)(2)(C). No conviction is necessary, and one incident is sufficient. There is no analogous deportation ground. Trafficking includes not only sale or possession for sale, but also giving drugs away and maintaining a place where drugs are distributed. *Matter of Martinez-Gomez* (BIA 1972) 14 I&N Dec 104. Importation or possession for one's own use is not trafficking. See *Matter of McDonald & Brewster* (BIA 1975) 15 I&N Dec 203. Similarly, transportation for personal use should not be considered trafficking. See discussion in §52.33.

Even after a conviction is vacated, the DHS can use a guilty plea or any evidence or information from the event to attempt to establish its "reason to believe" drug trafficking occurred. See, *e.g., Chavez-Reyes v Holder* (9th Cir 2014) 741 F3d 1, 3. However, individuals who have plausibly asserted that they did not intend to traffic have overcome this.

Drug addicts and abusers. A noncitizen is inadmissible if he or she is currently a drug addict or abuser, and deportable if he or she has been a drug addict or abuser at any time since admission to the United States. 8 USC §§1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii). Drug "addiction" and "abuse" are medical determinations. See *Matter*

of F.S.C. (BIA 1958) 8 I&N Dec 108. The definition of "drug abuser" is a matter of controversy. Some government-licensed doctors use the definition that more than one-time experimentation within the past 3 years qualifies as "current" drug abuse. Certainly admission of addiction/abuse required in some instances to participate in "drug court" could be used to designate the person as an addict or abuser. The definition of drug abuser is particularly strictly applied by U.S. consulates abroad. Persons with consular appointments abroad should be warned of the interviews and, if necessary, should delay the application until 3 years after using any drugs. See http://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html.

▶ **Note:** The United States Citizenship and Immigration Services (USCIS) Policy Manual states that if a noncitizen is deemed a drug abuser or addict he or she may apply again at a later date if the condition is in remission. The applicant will then be examined again by a civil surgeon, and the Diagnostic and Statistical Manual of Mental Disorders (DSM) criteria of "remission" will apply.

Prostitutes. A noncitizen is inadmissible and barred from establishing good moral character if he or she has engaged in the business of prostitution within the previous 10 years. 8 USC §§1101(f), 1182(a)(2)(D). This definition includes prostitutes, procurers, and persons who receive proceeds, but not customers. No conviction is required. See *Matter of R.M.* (BIA 1957) 7 I&N Dec 392. In addition, persons who engage in prostitution and, conceivably, customers can be found to have committed a crime involving moral turpitude. See, *e.g., Matter of Lambert* (BIA 1965) 11 I&N Dec 340. Prostitution is defined for this purpose as providing sexual intercourse, as opposed to other sexual acts, for hire. *Kepilino v Gonzales* (9th Cir 2006) 454 F3d 1057. A conviction for violation of Pen C §647(b) is broader than the ground of inadmissibility because §647(b) can encompass a single, isolated sexual act other than sexual intercourse. *Matter of Gonzalez-Zoquiapan* (BIA 2008) 24 I&N Dec 549. For the same reason, a conviction of Pen C §647(b) does not bar a noncitizen from establishing good moral character under 8 USC §1101(f). However, the Ninth Circuit has held that a conviction under Pen C §647(b) is a crime of moral turpitude. *Rohit v Holder* (9th Cir 2012) 670 F3d 1085.

▶ **Practice Tip:** If a conviction for prostitution cannot be avoided, do not stipulate to the police report as the factual basis for the plea because the conduct described in the police report might establish more than an isolated act and might establish acts of sexual intercourse.

Persons arrested or convicted of drunk driving. Alcoholics can be found inadmissible under a ground relating to physical and mental disorders and associated behavior that poses a threat to property or persons. 8 USC §1182(a)(1)(A)(iii). At least one U.S. consulate has excluded persons on this ground, on the basis of a conviction of driving under the influence within the previous 2 years. Immigrant and nonimmigrant visa applicants applying outside the United States will be referred to a panel physician to determine possible inadmissibility for alcoholism if an applicant has (U.S. Department of State Foreign Affairs Manual, vol. 9, §40.11 n11.2)

- A single alcohol-related arrest or conviction within the last 5 years; or

- Two or more alcohol-related arrests or convictions within the last 10 years; or
- There is any other evidence to suggest an alcohol problem.

If a noncitizen attempts to obtain an immigrant or nonimmigrant visa in the United States, the applicant will be referred for reexamination by a civil surgeon if there is (USCIS Policy Manual, vol. 8, ch. 7 B.2)

- A single alcohol-related arrest or conviction for a driving incident within the last 5 years;
- Two or more alcohol-related arrests or convictions for a driving incident within the preceding 10 years;
- One or more arrests or convictions for alcohol-related driving incidents (DUI/DWI) while the driver's license was suspended, revoked, or restricted at the time of the arrest because of a previous alcohol-related driving incident;
- One or more arrests or convictions for alcohol-related driving incidents when personal injury or death resulted from the incident; or
- One or more convictions for alcohol-related driving incidents when the conviction was a felony in the jurisdiction in which it occurred or when a sentence of incarceration was actually imposed.

It is recommended that immigration counsel provide proof that the person is not drinking, that the arrest or conviction was an aberration or, if the client has a history of alcohol-related incidents, that there is proof of rehabilitation such as evaluation from a substance abuse center or therapist and proof of attendance at AA meetings. Driving under the influence is not, as was previously held, an aggravated felony as a crime of violence. *Leocal v Ashcroft* (2004) 543 US 1, 125 S Ct 377; *Montiel-Barraza v INS* (9th Cir 2002) 275 F3d 1178; *U.S. v Trinidad-Aquino* (9th Cir 2001) 259 F3d 1140. See §52.47 for discussion.

▶ **Warning:** A conviction for drunk driving (but not wet-reckless) is a ground of ineligibility for Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability. See §§52.63–52.64. DUIs are also in priority 2 for deportation enforcement. See DHS Memorandum, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 14, 2014), at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

Homosexuals. Homosexuality has not been a basis for inadmissibility since 1990.

Persons who test HIV-positive. Persons who test HIV-positive are no longer inadmissible, but HIV/AIDS remains on the list of communicable diseases that must be waived to enter the United States.

Gamblers. Persons who have been convicted of two or more gambling offenses or whose income is derived from illegal gambling are barred from establishing good moral character under 8 USC §1101(f)(5).

Communists, terrorists, Nazis, "other unlawful activity," and crimes relating to transfer of technology. Members of several groups are inadmissible under 8 USC §1182(a)(3) and deportable under 8 USC §1227(a)(4). The section relating to Communists and terrorists is extensive and includes a section on "any other unlawful activity." With new antiterrorism provisions in effect, persons—especially those of Middle Eastern

descent—arrested for participating in political demonstrations or suspected of having links with terrorists may need special immigration counseling. Others may simply have been arrested at airports, or come afoul of the special registration requirements for persons from several Moslem countries. For advice on such cases, see "Post-9/11 Resources" at http://www.nationalimmigrationproject.org, or contact the National Immigration Project for assistance.

Persons who intend to engage or who have engaged in illegal export of technology or sensitive information are inadmissible and deportable. 8 USC §§1182(a)(3)(A)(i), 1227(a)(4)(A)(i). Although a literal reading of the statute would include all such offenses, legislative history shows that it should apply only to acts that might compromise national security. See HR Conf Rep No. 101–955, 101st Cong, 2d Sess 131, 132 (1990), reprinted in 1990 US Code Cong & Ad News 6784, 6796.

Noncitizens smuggling, trafficking, or harboring other noncitizens. A noncitizen who at any time has encouraged or helped any other noncitizen to enter the United States illegally—even if the person helped was a family member and paid nothing for the help—is inadmissible. 8 USC §1182(a)(6)(E). A person who committed such an act within 5 years after his or her last entry into the United States is deportable. 8 USC §1227(a)(1)(E). Note that only smuggling, and not harboring or transporting, is punished under these grounds, and that no conviction is required to prove smuggling. Some waivers are available if the person smuggled was a parent, spouse, son, or daughter. 8 USC §§1182(d)(11), 1227(a)(1)(E)(iii). The waiver "cancellation of removal" under 8 USC §1229b (see §52.55) is available even if persons outside that group were smuggled, unless the offense constitutes an aggravated felony.

Conviction under 8 USC §1324(a)(1)(A) and (a)(2) for alien smuggling, trafficking, or harboring will be held to be an aggravated felony under 8 USC §1101(a)(43)(N), unless it is a first offense and the noncitizen shows that the conduct was for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent. A potentially safe alternative plea would be to plea to aiding and abetting another person's illegal entry under 8 USC §1325, because the aggravated felony definition specifically refers to §1324.

Document fraud. A noncitizen who is the subject of a civil administrative court finding that he or she has possessed, used, or sold false documents for immigration benefits is deportable and inadmissible. 8 USC §§1182(a)(6)(F), 1227(a)(3)(C). Although a conviction is not required for these immigration penalties, conviction under Pen C §113 or 18 USC §1546(a) can be a basis for the civil finding. Conviction also may be an aggravated felony. 8 USC §1101(a)(43)(P).

Civil court finding of violation of domestic violence temporary restraining order. Another ground of deportation, but not inadmissibility, is a civil court finding that the alien has violated a domestic violence temporary restraining order (on or after Sept. 30, 1996). See 8 USC §1227(a)(2)(E); §§52.48–52.49. This does not require a criminal conviction to trigger deportability. Cancellation of removal under 8 USC §1229b (INA §240A) may be available for long-term lawful permanent residents.

Serious nonpolitical crime. A noncitizen who the DHS has serious reason to believe committed a serious nonpolitical crime outside the United States is ineligible for restriction of removal under 8 USC §1231(b)(3)(B)(iii). *McMullen v INS* (9th Cir 1986) 788 F2d 591, overruled on other grounds in *Barapind v Enomoto* (9th Cir 2005) 400

F3d 744, 751. To be classified as a political offense, the common-law character must be outweighed by the political element. *Matter of McMullen* (BIA 1994) 19 I&N Dec 90.

☑ §52.51 E. Checklist: Defendant's Eligibility for Immigration Relief

To establish specific goals in defending a noncitizen criminal defendant, defense counsel first must ascertain the defendant's current immigration status and potential for a change of status through future application. The goals of an immigration-minded defense are to avoid the loss of the defendant's current status and to avoid forfeiting his or her eligibility for possible future immigration relief.

The following checklist may assist in analyzing counsel's case. It is intended as a brief overview of the most commonly encountered statuses and factual situations. This overview is far from exhaustive and should be used only as a guide and starting point for counsel's case analysis. Often, the defendant does not know his or her exact status. For example, many people mistakenly think that marriage to a U.S. citizen brings automatic citizenship or permanent residency status, without the need to file an application. Similarly, people who have received employment authorization based on filing an application of some kind with the DHS may mistakenly believe that their application has been granted and that they have permanent resident status or asylum. Counsel should photocopy all immigration documents and check with immigration counsel if necessary to verify status. Counsel should complete the immigration intake form provided in §52.3. For extensive information describing immigration applications and how to avoid convictions that would bar them, see http://www.ilrc.org/files/documents/17_relief_toolkit_jan_2015_final.pdf and Brady et al., Defending Immigrants, chap 11 (10th ed).

❒ Is the defendant a U.S. citizen without knowing it?

A U.S. citizen cannot be deported, excluded, or removed for any reason. Anyone born in the United States is a U.S. citizen, as are persons born in Puerto Rico, Guam, the U.S. Virgin Islands and, the Commonwealth of the Northern Mariana Islands. 8 USC §1101(a)(38). A national of the United States is not a U.S. citizen, but cannot be deported. Persons born in an outlying possession of the United States, such as American Samoa and the Swains Islands, are nationals.

Other persons may have automatically acquired U.S. citizenship without realizing it. The two threshold questions to ask a defendant:

- At the time of his or her birth, was a parent or grandparent of the defendant a U.S. citizen?
- Before the defendant's 18th birthday, did he or she become a permanent resident and did at least one parent become a naturalized U.S. citizen?

If the answer to either question might be yes, the defendant should be referred for immigration counseling to learn whether citizenship was passed on. See §52.54 for further discussion.

❒ Is the defendant a permanent resident or does he or she have current lawful immigration status of some kind?

Such persons include lawful permanent residents ("green card" holders) and persons holding lawful nonimmigrant visas, *e.g.,* students, tourists, temporary workers, or business visitors. For such clients, it is important to keep in mind the distinction between removal owing to deportability (expulsion from the United States as well as loss of any present lawful immigration status) and inadmissibility (which bars future admissions to the United States and acquisition of lawful immigration status). Noncitizens with lawful immigration status can lose that status and be removed from the United States if they become deportable. 8 USC §1227. Inadmissible noncitizens who leave the United States may be denied permission to reenter, even if they are lawful residents. Inadmissible noncitizens may also be ineligible to establish good moral character. See §52.23. See also California Quick Reference Chart and Notes online at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

Some persons who immigrate through a spouse are conditional permanent residents who must report to the DHS within 2 years after receiving residency. 8 USC §1186a(d)(2). Although there is at present no formal FBI check of criminal record at the time of the 2-year interview, the person might be asked questions under oath about grounds for deportation.

▶ **Note:** A lawful permanent resident who might be deportable should try to avoid contact with immigration authorities before obtaining expert immigration counseling. Applying for a 10-year "renewal" of a green card, applying for naturalization to U.S. citizenship, or traveling abroad and then reentering the United States all place the person at risk.

❒ **Has the defendant been a lawful permanent resident for 5 years, with a total of 7 years' continuous residence after any lawful admission?**

Lawful permanent residents who have held that status for at least 5 years and who have resided continuously in the United States for 7 years after having been admitted in any status are eligible to apply for a special waiver of most grounds of deportability and inadmissibility under 8 USC §1229a. This form of immigration relief is called "cancellation of removal." It will excuse any conviction except an aggravated felony. 8 USC §1229b. Cancellation cuts off the accrual of 7 years at the time of issuance of a Notice to Appear or commission of certain acts rendering a person deportable or inadmissible, but the accrual of 5 years as a permanent resident is not similarly cut off. Convictions from before April 1, 1997, ought not to "stop the clock" on accrual of the 7 years, although this may be further litigated. Cancellation of removal for lawful permanent residents is discussed in §52.53.

❒ **Has the defendant, not a permanent resident, lived in the United States for at least 10 years?**

A defendant without lawful immigration status may be eligible to apply for cancellation of removal for nonpermanent residents if he or she has 10 years' residence, good moral character (see §52.23), and can establish that removal would cause the defendant's U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship. See §52.55 on cancellation of removal for nonpermanent residents. In a controversial decision, the BIA held that a noncitizen who has been convicted of a crime involving moral turpitude with a potential 1-year sentence was ineligible for this form of relief regardless of whether he was an arriving alien or

was eligible for the petty-offense exception under 8 USC §1182(a)(2)(A)(ii)(II). *Matter of Almanza-Arenas* (BIA 2009) 24 I&N Dec 771. To be eligible for this form of relief, a noncitizen can have only a misdemeanor crime of moral turpitude with no more than a 364-day potential sentence, *i.e.,* a misdemeanor punishable as a 6-month misdemeanor under Pen C §18.5. *Matter of Cortez* (BIA 2010) 25 I&N Dec 301. A redesignation or resentencing of a felony to a misdemeanor under Proposition 47 or Pen C §17(b) should include specific language stating that the maximum is 6 months or 364 days or less to be effective in immigration court. See §52.10.

❒ **Has the defendant lived in the United States since January 1, 1972?**

The defendant may be eligible to apply for registry as a permanent resident (see §52.60). He or she must not be inadmissible and must establish good moral character (see §52.23).

❒ **Is the defendant a currently undocumented person?**

Undocumented persons include those who entered the United States surreptitiously or fraudulently, or who hold an expired visa; all are removable for lack of lawful immigration status. 8 USC §1227(a)(1). As long as they do not become inadmissible or barred from establishing good moral character because of a criminal record, they may be able to apply for relief from removal or permanent residency if they qualify for a particular benefit such as family immigration or cancellation for nonpermanent residents. Alternatively, they may qualify for voluntary departure.

▶ **Note:** Undocumented noncitizens may be granted deferred action status that will prevent them from being deported and give them a work permit if they qualify for Deferred Action for Childhood Arrivals or Deferred Action for Parental Accountability and do not have one felony, three misdemeanors not arising out of the same incident, and no "significant" misdemeanor. See §§52.63–52.64.

▶ **Note:** For an undocumented person with no immediate prospect of achieving lawful immigration status, the highest defense priority may be to minimize jail time to diminish the likelihood of encountering immigration officials.

❒ **Does the defendant have a U.S. citizen parent or spouse (of any age), a sibling or child (over age 21), or a permanent resident spouse or (if defendant is unmarried) parent?**

The defendant may be eligible to immigrate through a visa petition at some point (see §52.56). The defendant must not be inadmissible.

❒ **Does the defendant come from a country of civil war or human rights abuses or recent natural disaster?**

A defendant fearing persecution or torture may apply for political asylum, withholding of removal, or relief under the United Nations Convention Against Torture (CAT) (see §52.57). Conviction of an aggravated felony is a bar to asylum and a severe disadvantage to gaining withholding or relief under the CAT.

The United States designates some countries for Temporary Protected Status (TPS) due to recent civil strife or natural disaster. To qualify, the defendant must be a national of a TPS country and must meet other requirements, must be admissible, and must not have been convicted of two misdemeanors or one felony. See §52.58. Countries

designated for TPS are set forth on the U.S. Citizenship and Immigration Services website at http://www.USCIS.gov. Special relief under Nicaraguan Adjustment and Central American Relief Act (NACARA) legislation was extended to Salvadorans, Guatemalans, and nationals of the former Soviet bloc countries. See §52.55.

Alternatively, the defendant may wish to apply for voluntary departure. See §52.59.

❒ **Is the defendant under juvenile court jurisdiction or an abused spouse or child, whether or not under court jurisdiction?**

A child who is a dependent of a juvenile court, or who is in delinquency but cannot be returned to the parent due to abuse, neglect, or abandonment, may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(a)(27)(J). See §52.61.

A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under the Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without the cooperation of the abusing citizen or permanent resident. 8 USC §1154(a)(1)(A)(iv), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b(b)(2). See §52.61.

❒ **Can the defendant provide valuable information to law enforcement authorities about criminal or terrorist activity, or is the defendant a victim of crime or alien trafficking?**

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of, or have information about, certain crimes. An applicant's own criminal record is potentially waivable: Only persons inadmissible under the terrorist grounds cannot apply for these visas. These include visas under 8 USC §1101(a)(15)(S) for persons who have "critical reliable information" about terrorism or criminal activity (125 visas/year); under 8 USC §1101(a)(15)(T) for victims of severe forms of alien trafficking (10,000 visas/year); and under 8 USC §1101(a)(15)(U) for victims of serious crimes who assist in investigation or prosecution efforts (10,000 visas/year). See §52.62.

§52.52 F. Forms of Immigration Relief Available From Department of Homeland Security (DHS) and Federal Courts

Even a noncitizen who is undocumented or inadmissible or deportable (or all three) may nevertheless qualify for certain waivers or immigration benefits that will allow him or her to gain or retain legal status. To safeguard a defendant's opportunity to apply for such benefits, certain outcomes must be avoided. Criminal counsel's strategy will depend on the client's documented or undocumented status and the potential eligibility for affirmative immigration benefits. To assist counsel in prioritizing and setting goals, §§52.53–52.62 provide a general overview of the most commonly encountered forms of relief in removal proceedings and explain the most widely available immigration benefits. For a more detailed discussion, see http://www.ilrc.org/files/documents/17_relief_toolkit_jan_2015_final.pdf and Brady et al., Defending Immigrants, chap 11

(10th ed). Some information is available from the U.S. Citizenship and Immigration Services (USCIS) at http://www.uscis.gov. Ideally, criminal defense counsel advising defendants to make concessions in criminal court in order to obtain a disposition that may preserve eligibility for relief in immigration proceedings should consult with immigration counsel to confirm both statutory eligibility and whether, considering the individual facts and the pattern of discretionary decision making at local immigration courts, there is likelihood of success.

☑ §52.53 1. Lawful Permanent Residents: Cancellation of Removal

❒ Is the defendant a permanent resident of 5 years, with 7 years of continuous residence?

Cancellation of removal under 8 USC §1229b(a) permits certain permanent residents to apply for a discretionary waiver of any ground of deportability or inadmissibility. Conviction of an aggravated felony is a bar to this application (8 USC §1229b(a)(3)), and the applicant must not have been granted cancellation or similar relief in the past (8 USC §1229b(c)(6)).

The cancellation applicant must have been a permanent resident for 5 years (8 USC §1229b(a)(1)) and must have resided in the United States continuously for 7 years after having been admitted in any status (*e.g.,* as a permanent resident, tourist, or student) (8 USC §1229b(a)(2)). A parent's permanent resident status is not imputed to the unemancipated minor children residing with that parent for purposes of eligibility for the 5 years' residency status. *Holder v Martinez Gutierrez* (2012) ___ US ___, 132 S Ct 2011.

The 5 years will continue to accrue throughout the resident's removal proceedings and, if the resident contests deportability, into federal review of a removal order. The 7-year continuous residence requirement is deemed to have ended on the occurrence of either of the following events: (a) the issuance of the Notice to Appear, the charging paper beginning removal proceedings under 8 USC §1229 or (b) the applicant's commission of certain offenses listed in 8 USC §1182(a)(2) that render him or her inadmissible or deportable. 8 USC §1229b(d)(1). These offenses that "stop the clock" on the 7 years are crimes involving moral turpitude, prostitution, drug offenses, and conviction of two or more offenses with an aggregate 5-year sentence, if the person becomes deportable or inadmissible because of the offense. However, a conviction by plea from before April 1, 1997, may not stop this clock, and the person might remain eligible to apply for cancellation. See *Sinotes-Cruz v Gonzales* (9th Cir 2006) 468 F3d 1190.

▶ **Note:** An immigration attorney's assistance may be needed to assess whether charges would come within the "clock-stopping" category. A defendant who needs more time to accrue the 7 years should, if possible, plead to an offense that occurred later rather than earlier in time.

❒ Did the permanent resident defendant plead guilty to an offense (even an aggravated felony) with immigration consequences before April 24, 1996?

In *INS v St. Cyr* (2001) 533 US 289, 121 S Ct 2271, the Supreme Court held that the abolition of 8 USC §1182(c) on April 24, 1996, was not retroactive. Thus, a qualifying permanent resident may be able to avoid deportation by applying, under former 8 USC §1182(c), to waive a conviction received before that date. See, *e.g.,*

Gallegos-Vasquez v Holder (9th Cir 2011) 636 F3d 1181. This relief (formerly known as "section 212(c) relief") could waive even conviction of an aggravated felony, although it was not sufficient in *INS v St. Cyr, supra,* to waive a firearms conviction. Since the decision in *Matter of Blake* (BIA 2005) 23 I& N Dec 722, the BIA has barred this form of relief for noncitizens with convictions for sex offenses and crimes of violence. However, in *Judulang v Holder* (2011) ___ US ___, 132 S Ct 476, 479, the Supreme Court struck down these restrictions as arbitrary and capricious. For a detailed summary of when INA §212(c) relief is available, see *Matter of Abdelghany* (BIA 2014) 26 I&N Dec 254.

Counsel with any questions about former 8 USC §1182(c) should contact an immigration attorney. More information is available at the websites of the National Immigration Project of the National Lawyers Guild (http://www.nationalimmigrationproject.org), the American Immigration Council (http://www.americanimmigrationcouncil.org/), and the Immigrant Legal Resource Center (http://www.ilrc.org).

☑ §52.54 2. United States Citizenship

❒ Is the defendant a permanent resident of 5 years (or sometimes less) who wishes to apply for U.S. citizenship?

Lawful permanent residents may apply for citizenship after residing in the United States and demonstrating good moral character (see §52.23) for 5 years. 8 USC §1427. Special procedures apply to spouses and minor children of U.S. citizens (who need show only 3 years of permanent residency), military personnel (who may need 1 year or less, and in some cases do not need to be permanent residents, and who may accrue residency time even when residing with their spouse abroad during military duty), and religious workers. 8 USC §1430.

❒ Did the defendant have a parent or grandparent who was a U.S. citizen at the time of defendant's birth?

❒ Did the defendant become a permanent resident before age 18 *and* did one of the defendant's parents become a naturalized citizen before the defendant turned 18?

Some defendants may be unaware that they are U.S. citizens. If the answer to the first question is yes, or if the answer to both parts of the second question is yes, the defendant should be referred for immigration counseling.

▶ **Note:** When representing a permanent resident who is currently under the age of 18, counsel can advise the family that the minor will become a citizen—and therefore be immune to deportation—if one parent with lawful custody naturalizes to U.S. citizenship before the minor's 18th birthday. Special benefits exist for adopted children of U.S. citizens. See Benchbook and Fact Sheets at http://www.ilrc.org/sijs.php.

☑ §52.55 3. Certain Nonpermanent Residents: Suspension of Deportation or Cancellation of Removal; Special Rules for Nonpermanent Residents From Certain Countries

❒ Has the defendant lived in the United States for at least 10 continuous years?

❒ **Does the defendant meet the requirements for any of the special rules on adjustment of status found in the notes following 8 USC §1255?**

The attorney general may "cancel the removal" of certain aliens who have resided in the United States for at least 10 years. 8 USC §1229b(b)(1)(A). The grant of this relief bestows lawful permanent resident status. To be eligible, an applicant must have been physically present in the United States for a "continuous" period (which is not broken by statutorily specified brief absences) of at least 10 years immediately preceding the date of application; have been of good moral character during that period; not have been convicted of any crimes that would render him or her inadmissible or deportable; and not be deportable for failure to register as an alien, falsification of documents, or a false claim to U.S. citizenship. Finally, an extremely restrictive requirement is that the applicant must demonstrate that deportation would cause a U.S. citizen or lawful permanent resident spouse, parent, or child exceptional and extremely unusual hardship.

▶ **Note:** Any crime involving moral turpitude with a sentence imposed of more than 6 months with a potential sentence of 1 year or more will render a noncitizen ineligible for cancellation of removal. *Matter of Cortez* (BIA 2010) 25 I&N Dec 301. A misdemeanor punishable under Pen C §18.5 has a potential sentence of 364 days. Redesignation or resentencing of a felony under Proposition 47 or Pen C §17 to a misdemeanor should have language on the record that the maximum potential sentence is either 6 months or 364 days to be effective in immigration court. See §52.10.

▶ **Warning:** Confinement in a penal institution (including a jail) for 180 days during the 10-year period will preclude a noncitizen from proving good moral character, which is necessary to obtain non-LPR Cancellation of Removal. For further discussion, see §52.10.

Certain countries of origin. At various times, Congress has provided relief to nationals of several countries concerning the rules for adjustment of status and cancellation of removal. These special provisions are found as a note following 8 USC §1255 and cover nationals from El Salvador, Guatemala, the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Vietnam, Laos, Cambodia, Poland, Czechoslovakia, Romania, Haiti, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia and their spouses and children. Other countries have also received special treatment. These special rules contain authority for adjustment to lawful permanent resident status for nationals who, among other requirements, have been physically present in the United States on a certain date or for a certain amount of time. See, *e.g.*, 8 CFR §245.15 (Haitian). In most cases, the rules do not relax the good moral character requirement nor provide any amelioration of the criminal bars to eligibility for suspension of deportation or cancellation for unlawful residents. For updated information, consult an immigration practitioner or the Citizenship and Immigration Services' website at http://www.uscis.gov, which contains a section with answers to frequently asked questions.

▶ **Note:** Review the latest enactments concerning special treatment for certain nationals and obtain expert immigration advice concerning these issues. These special rules contain

deadlines for application for adjustment of status, cancellation of removal, and motions to reopen.

Older convictions may be a benefit. The criminal record requirements are very strict for cancellation for nonpermanent residents: The person cannot be deportable or inadmissible and must have good moral character. However, if the person was convicted by plea before April 1, 1997, of a disqualifying offense, the person still may be permitted to apply. Also, the 7-year period during which good moral character is required ends on the date of the filing of the application. See *Aragon-Salazar v Holder* (9th Cir 2014) 769 F3d 699, 704 (false testimony after application was filed did not prevent noncitizen from establishing good moral character during 7-year period required by NACARA).

Noncitizens who have been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a U.S. citizen or lawful permanent resident may apply for cancellation of removal under 8 USC §1229b(b)(2). See §52.61.

☑ §52.56 **4. Immigration Through Visa Petition Based on Relationship With Citizen or Permanent Resident Relative; Waiver of Certain Crimes-Based Grounds of Inadmissibility**

❒ **Does the defendant have a close relative who is a permanent resident or U.S. citizen?**

A noncitizen who is not inadmissible (see §52.1) may obtain permanent resident status through a visa petition based on a relationship with a qualifying U.S. citizen or permanent resident. 8 USC §1154.

Persons classified under 8 USC §1151(b) as immediate relatives of U.S. citizens (spouse, parent of a child over age 21, or unmarried child under age 21) may immigrate rapidly. Others, including adult or married children, siblings of citizens, and spouses and unmarried children of permanent residents, must immigrate through the preference system. 8 USC §1153(a). Depending on the relationship and country of origin, this system may involve a wait ranging from a few months to several years.

Adults who have spent time without lawful status in the United States and then leave the country, either through voluntary departure (see §52.59) or removal, face a 3-year or 10-year bar before they can reenter the United States on a family visa. A waiver of this inadmissibility ground based on hardship is available. 8 USC §1182(a)(9)(B).

▶ **Note:** Certain valued employees can immigrate through an employer's labor certification. See 8 USC §1153(b). Although this device is primarily available to professional workers, nonprofessionals such as health attendants, specialty chefs, and workers who must speak a foreign language may also qualify. The person must not be inadmissible but can apply for a waiver of certain crime-related grounds of inadmissibility under 8 USC §1182(h). Discussion of waiver under 8 USC §1182(h) follows.

❒ **Is the defendant inadmissible under certain crimes-based provisions?**

A defendant may become admissible by a discretionary waiver of inadmissibility under 8 USC §1182(h) for the following convictions:

• One or more convictions of crimes involving moral turpitude. 8 USC §1182(a)(2)(A)(i)(I).

• One conviction of simple possession of 30 grams or less of marijuana (or a smaller amount of hashish). 8 USC §1182(a)(2)(A)(i)(II). Note that this is the only drug offense that can be waived under this provision.

• Two or more convictions with an aggregate 5-year sentence. 8 USC §1182(a)(2)(B).

• Engaging in prostitution (8 USC §1182(a)(2)(D)).

This waiver is available only under the following conditions:

• Conviction occurred more than 15 years before applying for the immigration benefit, and the person has been rehabilitated and is not a threat to national security. 8 USC §1182(h)(1)(A).

• Conviction was for prostitution, and the person has been rehabilitated and is not a threat to national security. 8 USC §1182(h)(1)(A).

• The defendant has a U.S. citizen or lawful permanent resident spouse, parent, or son or daughter, and denial of benefit would result in extreme hardship. 8 USC §1182(h)(1)(B).

• The defendant is an abused spouse or child of a U.S. citizen or permanent resident who qualifies for classification under the Violence Against Women Act (8 USC §1154(a)(1)(A)(iii) or (iv) or 8 USC §1154(a)(1)(B)(ii) or (iii)). 8 USC §1182(h)(1)(C). See discussion in §52.61.

Permanent residents are barred from applying for this waiver if, after obtaining permanent resident status, they (a) were convicted of an aggravated felony or (b) have not accrued 7 years before the issuance of the Notice to Appear (the charging document beginning removal proceedings). 8 USC §1182(h)(2).

☑ §52.57 5. Political Asylum, Restricting/Withholding of Removal, and U.N. Convention Against Torture

❒ Does the defendant fear returning to his or her home country, or come from a country of human rights abuses or civil war?

Under current law, there are three immigration benefits that may provide relief to a noncitizen who asserts that he or she might be subjected to persecution or torture if returned to his or her home country:

(1) Asylum (8 USC §1158 (INA §208)) provides temporary and potentially permanent resident status to a noncitizen who establishes a possibility that he or she will be persecuted on account of, *e.g.,* race, religion, or political opinion, if removed to the home country. Unless there are special circumstances, the person must apply within 1 year after coming to the United States.

(2) Withholding of removal (also known as "restriction on removal" under 8 USC §1231(b)(3) (INA §241(b)(3)) provides protection from removal, but not permanent status, to a noncitizen who establishes a clear probability that he or she will be persecuted on account of the above grounds if removed.

(3) Relief under the United Nations Convention Against Torture and Other Cruel,

Inhuman, or Degrading Treatment or Punishment (CAT) provides protection from removal but no permanent status to noncitizens who can establish a probability that they will be subjected to torture by the government of their home country if removed there. It is not necessary to establish that the torture will be on account of the grounds described above. See 8 CFR §§208.16–208.17.

Bars to asylum and withholding of removal. Under 8 USC §1158(b)(2)(A) and §1231(b)(3)(B), the Attorney General may deny asylum or withholding to an applicant if the Attorney General decides any of the following:

- The applicant ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
- The applicant, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;
- There are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;
- There are reasonable grounds to believe that the alien is a danger to the security of the United States; or
- The applicant is inadmissible or removable for terrorist activities (8 USC §§1182(a)(3)(B)(i), 1227(a)(4)(B)).

▶ **Note:** The Attorney General has held that asylum is not normally granted to a person convicted of a "violent or dangerous" crime. *Matter of Jean* (AG 2002) 23 I&N Dec 373. See *Torres-Valdivias v Holder* (9th Cir 2015) 786 F3d 1147, 1155.

The Board has determined that once an alien's crime is determined to be "particularly serious," it necessarily follows that the alien "constitutes a danger to the community." *Matter of S-S-* (BIA 1999) 22 I&N Dec 458.

For purposes of withholding of removal, "a particularly serious crime" includes one or more aggravated felonies for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years (8 USC §1231(b)(3)). See also 8 CFR §§208.13, 208.16. Those are "per se" particularly serious crimes. See *Blandino-Medina v Holder* (9th Cir 2013) 712 F3d 1338. However, the Attorney General has discretionary authority to determine whether any offense, even a non-aggravated-felony conviction resulting in a sentence of less than 5 years, is a particularly serious crime for purposes of withholding. 8 USC §1158(b)(2). See *Alphonsus v Holder* (9th Cir 2013) 705 F3d 1031; *Delgado v Holder* (9th Cir 2011) 648 F3d 1095, 1102. A case-specific analysis is required to find that a conviction falling outside the per se category was for a particularly serious crime. *Blandino-Medina v Holder, supra.*

The Attorney General has also determined that, except in very rare instances, any conviction of drug trafficking will be a bar to withholding as a particularly serious crime. *Matter of Y-L-* (BIA 2002) 23 I&N Dec 270, overruled on other grounds in *Zheng v Ashcroft* (9th Cir 2003) 332 F3d 1186. But the Ninth Circuit held that this presumption is not retroactive to guilty pleas entered before March 5, 2002, for drug trafficking offenses. *Miguel-Miguel v Gonzales* (9th Cir 2007) 500 F3d 941. Absent unusual circumstances, a single conviction of a misdemeanor offense is not a "particularly serious crime." *Matter of Juarez* (BIA 1988) 19 I&N Dec 664.

▶ **Note:** For purposes of determining what is a "particularly serious offense," evidence outside the record of conviction, including police reports and the alien's testimony at an immigration hearing, may be considered. *Anaya-Ortiz v Holder* (9th Cir 2010) 594 F3d 673. See *Delgado v Holder* (9th Cir 2011) 648 F3d 1095 (even DUI offense *might* be "particularly serious offense"). The abuse-of-discretion standard applies on review of a determination that a crime was "particularly serious." *Arbid v Holder* (9th Cir 2012) 700 F3d 379.

The argument remains that not all serious offenses or aggravated felonies should be found to be particularly serious crimes. See, *e.g., Matter of L-S-* (BIA 1999) 22 I&N Dec 645 (conviction of smuggling in violation of 8 USC §1324(a)(2)(B)(iii) with 3½-month sentence was not particularly serious crime). Because of the high probability that an aggravated felony conviction will eliminate even the most compelling asylum applicant's claim for protection, criminal defense counsel should immediately involve immigration counsel and present the most vigorous case possible to avoid an aggravated felony conviction. Even a first-time sale of a small amount of drugs is an aggravated felony, which could result in ineligibility for asylum.

▶ **Note:** Conviction of a particularly serious crime does not bar relief under the Convention Against Torture. In *Avendano-Hernandez v Lynch* (9th Cir 2015) 800 F3d 1072, 1082, the court held that the petitioner, a transgender woman, had established grounds for a grant of CAT relief on remand. The BIA had conflated transgender and gay identity in denying CAT relief, and the record demonstrated a history of violence by law enforcement officers in her home country, targeting the petitioner and other transgender people.

☑ §52.58 6. Temporary Protected Status (TPS)

❒ **Does the defendant come from a country designated for special status because of ongoing catastrophe?**

The Attorney General may grant temporary protected status (TPS) for any national of a foreign country designated under 8 USC §1254a, countries encountering catastrophic events, *e.g.,* ongoing armed conflict, earthquake, flood, or other disasters, or other extraordinary and temporary conditions. Countries that are currently designated for TPS include El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. To check for the most accurate list of what countries are still listed and the requirements, go to the U.S. Citizenship and Immigration Services' website at http://www.uscis.gov, click "Services & Benefits," then click "Humanitarian Benefits," and then click "Temporary Protected Status." Persons from certain other countries are granted Deferred Enforced Departure (DED), which provides temporary protection from removal. Liberians are currently given this protection.

Persons are ineligible for TPS if they are inadmissible (see §52.1) or have been convicted of *two* misdemeanors (as opposed to the three-misdemeanor rule in the amnesty programs) or one felony. 8 USC §1254a(c)(2)(B)(i). In addition, the person must not come within the bars to asylum under 8 USC §1158(b)(2)(A), discussed in §52.57. 8 USC §1254a(c)(2)(B)(ii).

▶ **Practice Tip:** To preserve TPS eligibility, it is important to avoid two misdemeanors

or one felony. Counsel should consider whether a misdemeanor charge can be pleaded to an infraction or reduced to an infraction. See Pen C §§19.8 (offenses that can be charged either as misdemeanors or infractions), 490.1 (petty theft of property valued at $50 or less). Under Pen C §17(d), the infractions/misdemeanors listed in Pen C §19.8 constitute infractions if the prosecutor files the charge as an infraction (unless defendant objects) or if the court decides that the offense is an infraction. A postjudgment motion to reduce can be made at any time, since the code section does not specify any time limit. In addition, a felony may be reduced to a misdemeanor. See Pen C §17(b).

§52.59 7. Voluntary Departure

A noncitizen may apply to leave the United States voluntarily at his or her own expense in lieu of being subject to removal proceedings under 8 USC §1229a or before removal proceedings are completed if the alien is not deportable under 8 USC §1227(a)(2)(A)(iii) (aggravated felony) or 8 USC §1227(a)(4)(B) (terrorist activities). 8 USC §1229c(a). A person who has not been admitted because he or she entered without inspection should not be held "deportable" under the aggravated felony provision, and therefore should be eligible for voluntary departure before removal proceedings are completed. The noncitizen may be allowed to voluntarily depart *after* removal proceedings if he or she can demonstrate good moral character and is not being removed because of an aggravated felony conviction. 8 USC §1229c(b).

This relief is valuable because the period of voluntary departure allows the noncitizen to wrap up his or her personal affairs and leave the United States without the stigma of deportation. In contrast, persons who have been deported may not lawfully reenter the United States for 10 years unless a special waiver is obtained (8 USC §1182(a)(2)), and can be criminally charged for illegal reentry. Further, illegal reentry after being deported exposes the noncitizen to greater sentence enhancement than does reentry after voluntary departure.

☑ §52.60 8. Registry

❒ Has the defendant lived in the United States continuously since January 1, 1972?

A noncitizen who has resided continuously in the United States since January 1, 1972, can obtain permanent residence through registry. 8 USC §1259. Other requirements under 8 USC §1259 are the following:

- Good moral character (see §52.23) for a reasonable period;
- Not inadmissible (although this requirement is called into question by *Matter of Sanchez-Linn* (BIA 1991) 20 I&N Dec 362); and
- Not ineligible for U.S. citizenship (through convictions for draft evasion or desertion; see 8 USC §1425).

☑ §52.61 9. Relief for Abused Spouses and Children

❒ Is defendant a victim of spousal abuse or child abuse, neglect, or abandonment?

Special immigrant juvenile status. A child who is in dependency or delinquency court proceedings and cannot be returned to either parent owing to abuse, neglect, or abandonment may be eligible for permanent residency as a special immigrant juvenile under 8 USC §1101(a)(27)(J). The juvenile court judge must make a written finding that the noncitizen is under court jurisdiction and is "deemed eligible for long-term foster care" (meaning that the court has found that family reunification is not a viable option and that the child is in or will proceed to foster care, guardianship, or adoption) and that it would not be in the child's best interest to return to the home country. See 8 CFR §204.11. The parent's immigration status is irrelevant. Although this special status has been applied most often to children and young people in dependency proceedings, it also applies to youth in delinquency proceedings who meet the above criteria. For details about how to file a verified petition on behalf of a minor to be classified as a Special Immigrant Juvenile (SIJ) in a guardianship proceeding, see Cal Rules of Ct 7.1020. For more information, see Brady & Kinoshita, Immigration Benchbook for Juvenile and Family Courts; Kinoshita & Brady, Special Immigrant Juvenile Status; and Fact Sheets: Immigration Options for Undocumented Children. All can be downloaded free of charge at the Immigrant Legal Resource Center website (http://www.ilrc.org/sijs.php).

Violence Against Women Act (VAWA) immigration provisions. A noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent can apply for permanent residency under the Violence Against Women Act. The abused spouse or child can submit a family visa petition on his or her own behalf, without needing the cooperation of the abusing citizen or permanent resident. 8 USC §1154(a)(1)(A)(iv), (B). Alternatively, the abused spouse or child may be eligible for special cancellation of removal for nonpermanent residents, which requires only 3 years of good moral character and physical presence in the United States. 8 USC §1229b. Although most grounds of inadmissibility apply, special waivers for VAWA applicants are provided even without qualifying relatives if the act or conviction would have been waivable under 8 USC §1182(a) or §1227(a) and if the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty. 8 USC §1154(a)(1)(B). For fact sheets in several languages, or to order a manual, go to http://www.ilrc.org/info-on-immigration-law/vawa.

☑ §52.62 10. Status for Victims, Witnesses, and Informants Regarding Crime

❒ Is the defendant a victim of or does the defendant have information about a crime?

Congress has created temporary visas, which can lead to permanent residency, for persons who are victims of, or have information about, crime. An applicant's own criminal record is potentially waivable; only persons inadmissible under the terrorist grounds cannot apply for these visas. Even persons whom the government suspects of assisting in drug trafficking are potentially eligible for these visas.

Noncitizens who are victims of serious crime and are, have been, or may be helpful to authorities investigating or prosecuting the crime can apply for temporary, or perhaps permanent, status under a "U" visa. 8 USC §1101(a)(15)(U). A victim is a person

who has suffered direct harm or who is directly or proximately harmed as a result of the crime. The DHS has discretion to grant "U" visas for victim bystanders who suffer unusually direct injury as a result of a qualifying crime. Certain family members of murder and manslaughter victims and victims who are incompetent or incapacitated also are eligible. Examples of serious crimes are listed in the statute. The spouse, child, or in the case of a child, parent of the victim also can apply. A representative from the district attorney, police, or similar office must state that the person is helpful in prosecuting or investigating the crime. A total of 10,000 such visas can be awarded each year. Victims eligible for "U" visas may be able to terminate pending removal proceedings, and if the "U" visa is approved, either an order of removal, deportation, or exclusion will be canceled or, if the order was issued by an immigration judge, the case may be reopened and terminated. In addition, noncitizens who were victims of a "severe form of trafficking in persons" can apply for temporary and perhaps permanent lawful status under a "T" visa. 8 USC §1101(a)(15)(T). Severe trafficking includes sex trafficking of persons under age 18 and any persons subjected to involuntary servitude. A total of 5000 temporary "T" visas and 5000 adjustments to permanent residency can be granted each year. Further information on the "U" visa can be found at the following websites: National Immigration Project of the National Lawyers Guild, http://www.nationalimmigrationproject.org (click on "Immigrant Rights Resources"); Immigrant Legal Resource Center, http://www.ilrc.org/uvisa.php; and Citizenship and Immigration Services, http://www.uscis.gov. For assistance with "U" visas, see http://www.asistahelp.org; for "T" visas or in trafficking cases, see http://www.lafla.org/service.php?sect=immigrate&sub=traffic. See also regulations effective January 12, 2009, at http://edocket.access.gpo.gov/2008/E8–29277.htm.

The 1995 Crime Bill created the "S" nonimmigrant classification for certain witnesses who supply "critical reliable information" to law enforcement authorities relating to terrorism or criminal activity. 8 USC §1101(a)(15)(S). There is no requirement that the person be a crime victim. The person and his or her family may become eligible for permanent residency. Only 125 such visas are distributed nationally each year.

▶ **Note:** The Ninth Circuit held that the United States was not estopped from removing a noncitizen on the basis of the government's alleged agreement not to deport him in exchange for his cooperation in a federal drug prosecution when there was no claim that an official having the authority to do so made a specific promise of such relief. *Morgan v Gonzales* (9th Cir 2007) 495 F3d 1084.

§52.63 11. Deferred Action for Childhood Arrivals

In June 2012, DHS announced a program called Deferred Action for Childhood Arrivals ("DACA"), which grants work authorization and protection from removal to certain young people who came to the United States as children. On November 20, 2014, President Obama announced the expansion of the DACA program. Previously, to qualify for DACA the defendant had to be under the age of 31 years on June 15, 2012, born after June 15, 1981, and have lived in the United States since June 15, 2007. Under the new rules, the person can be any age, and if the person (1) came to the U.S. before turning age 16; (2) has continuously resided in the U.S. since January 1, 2010, to the present (previously June 15, 2007); (3) was physically present

in the U.S. on June 15, 2012, and at the time of making a request for DACA consideration with USCIS; (4) was not in any valid immigration status on June 15, 2012; and (5) is currently in school, or graduated from high school, obtained a GED, is enrolled in adult education to obtain a GED, or was honorably discharged from the military, he or she will be eligible for DACA benefits as long as he or she is not convicted of a felony, a "significant misdemeanor," or three or more other misdemeanors, and does not pose a threat to national security or public safety such as being a gang member. For detailed information on eligibility requirements, see http://www.uscis.gov/childhoodarrivals.

Defense counsel representing someone who may be eligible for DACA must try to avoid

- Any felony conviction;
- A conviction for a "significant misdemeanor," which includes driving under the influence of alcohol or drugs, domestic violence, burglary, drug sales, sexual abuse or exploitation, unlawful possession or use of firearm, or any other misdemeanor for which the person was sentenced to time in custody of more than 90 days;
- Three or more "nonsignificant" misdemeanors; unless it is clear that the offenses arose from the same act or scheme of misconduct, three or more such offenses will render the alien ineligible for DACA. For detailed information on the criminal bars, see http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#Criminal Convictions.

▶ **Note:** Some offenses, most notably simple possession of any controlled substance, may not render an alien ineligible for DACA but will make him or her inadmissible and ineligible to get permanent residency in the future, should that option become available. See §52.18.

Juvenile adjudications, expunged convictions, and state immigration-related felonies and misdemeanors will not lead to automatic disqualification but can be considered by DHS as a matter of discretion in approving or denying the application. Any offense can be considered by DHS under the discretionary "totality of the circumstances" or the "threat to public safety" analysis. Even arrests for dismissed charges may negatively affect the discretionary analysis, especially any allegations of gang membership. For detailed information on the criminal bars to DACA eligibility, see http://www.ilrc.org/files/documents/chart_dapa_daca_bars_jan_2015.pdf.

▶ **Warning:** At this writing, the legality of DACA and DAPA has not yet been resolved. On January 19, 2016, the United States Supreme Court agreed to hear the Obama administration's appeal of the Fifth Circuit decision that upheld United States District Court Judge Andrew S. Hanen's injunction enjoining the expansion of DACA (see *Texas v U.S.* (5th Cir, Nov. 25, 2015, No. 15-40238) 2015 US App Lexis 19725; http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15–674.htm), and the implementation of DAPA (see §52.64) is still in flux. The litigation does not affect the existing DACA, and individuals may continue to come forward to request an initial grant of DACA or renewal of DACA under the guidelines established in 2012. For updates, see http://www.uscis.gov/immigrationaction.

§52.64 12. Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)

On November 20, 2014, President Obama announced a program called Deferred Action for Parental Responsibility, subsequently renamed Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), which grants work authorization and protection from removal to certain parents of United States citizens and lawful permanent residents. To be considered for DAPA the individual must (1) have lived in the United States continuously since January 1, 2010, up to the present time; (2) have been physically present in the United States on November 20, 2014, and at the time of making a request for DAPA consideration with USCIS; (3) have had no lawful status on November 20, 2014; (4) have a son or daughter, of any age or marital status, who is a U.S. citizen or lawful permanent resident; (5) have not been convicted of a felony, an aggravated felony (can include state misdemeanors), a "significant misdemeanor," three or more other misdemeanors, or a gang-related offense (felony or misdemeanor); and (6) not otherwise pose a threat to national security, and is not an enforcement priority for removal. For detailed information on eligibility for DAPA, see www.uscis.gov/immigrationaction.

Defense counsel representing someone who may be eligible for DAPA must try to avoid the following:

- Any felony conviction, other than a state or local offense for which an essential element is the alien's immigration status;

▶ **Note:** The definition of a felony provided in the Enforcement Priorities Memo is different from the definition of a felony reflected in the DACA guidelines. In the DACA context, a felony is defined as an offense punishable by a term of imprisonment of more than 1 year, irrespective of how the convicting jurisdiction classifies the offense.

- An aggravated felony as defined in the Immigration and Nationality Act, 8 USC §1103(a)(3) (which can include state misdemeanors);
- A conviction for a "significant misdemeanor," which includes driving under the influence of alcohol or drugs, domestic violence, burglary, drug distribution or trafficking, sexual abuse or exploitation, unlawful possession or use of firearm, or any other misdemeanor for which the person was sentenced to time in custody of 90 days or more (not including a suspended sentence);
- Three or more "non-significant" misdemeanors, unless it is clear that the offenses arose from the same act or scheme of misconduct on the same day. Three or more misdemeanors will render the alien ineligible for DAPA. Minor traffic offenses or state or local offenses for which an essential element is the alien's immigration status will not count toward the three or more "non-significant" misdemeanors bar.
- A conviction of an offense for which an element was active participation in a criminal street gang, as defined in 18 USC §521(a).

▶ **Note:** "Gang Participation" describes aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of a gang.

For detailed information on the new priorities for immigration enforcement, which also serve as the crime-based bars to DAPA, see DHS Memorandum, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014), at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. See also §52.65.

▶ **Note:** Some offenses, most notably simple possession of any controlled substance, may not render an alien ineligible for DAPA but will make him or her inadmissible and ineligible to get permanent residency in the future, should that option become available. See §52.18.

Juvenile adjudications are not an automatic bar for DACA, but DAPA guidelines do not specifically mention how juvenile adjudications will be treated. However, given that under federal immigration laws the term "conviction" does not include juvenile adjudications, they should not automatically bar an individual from qualifying for DAPA.

Expunged convictions also do not automatically disqualify an individual for DACA, but DAPA guidelines are silent on how expunged convictions will affect eligibility.

▶ **Warning:** At this writing, the legality of DACA and DAPA has not yet been resolved. On January 19, 2016, the United States Supreme Court agreed to hear the Obama administration's appeal of the Fifth Circuit decision that upheld United States District Court Judge Andrew S. Hanen's injunction enjoining the expansion of DACA (see *Texas v U.S.* (5th Cir, Nov. 25, 2015, No. 15-40238) 2015 US App Lexis 19725; http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15–674.htm), and the implementation of DAPA (see §52.64) is still in flux. The litigation does not affect the existing DACA, and individuals may continue to come forward to request an initial grant of DACA or renewal of DACA under the guidelines established in 2012. For updates, see http://www.uscis.gov/immigrationaction.

§52.65 IV. IMMIGRATION ENFORCEMENT

Enforcement priorities. On November 20, 2014, the Secretary of the Department of Homeland Security announced new immigration enforcement and removal priorities. The new enforcement priorities are delineated in the Department of Homeland Security (DHS) memorandum Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (hereafter "Enforcement Priorities Memo"), at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. These enforcement priorities will apply to all DHS agencies, including U.S. Immigration and Customs Enforcement (ICE), when deciding which individuals should be arrested, detained, and removed from the United States, or afforded prosecutorial discretion (deferred action).

The Enforcement Priorities Memo provides for a three-tiered enforcement and removal policy. The top priority for enforcement and removal comprises individuals determined by DHS to be national security threats, anyone convicted of one felony, gang members, and those apprehended at the border while attempting to unlawfully enter the United States; in the second-tier priority are individuals convicted of "significant misdemeanors" or three or more misdemeanors, and those who are not apprehended at the border but who entered or reentered this country unlawfully after January 1,

2014; and in the third priority are individuals with no criminal convictions but who have failed to abide by a final order of removal issued on or after January 1, 2014. Individuals who entered illegally before January 1, 2014, who never disobeyed a prior order of removal and were never convicted of a serious offense will not be priorities for removal.

▶ **Note:** Individuals who are deemed to be enforcement priorities as reflected in the Enforcement Priorities Memo will not qualify for DAPA relief and will be targeted for removal. These individuals will be removed unless they qualify for asylum or another form of immigration relief, or in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations there are compelling and exceptional factors that clearly indicate the person is not a threat to national security, border security, or public safety.

Deferred action. On November 20, 2014, President Obama also announced the expansion of deferred action and new DHS guidelines that allow for the exercise of prosecutorial discretion for certain undocumented individuals who meet the guidelines enumerated in the DHS memorandum Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (hereafter "Deferred Action Memo"). See www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

Secure Communities Program replaces Priority Enforcement Program. The DHS Secretary issued a memo, Secure Communities (November 20, 2014), ordering ICE to discontinue the Secure Communities program and to stop issuing ICE holds or detainers. Secure Communities was replaced with the Priority Enforcement Program (PEP). PEP will continue to rely on fingerprint-based data transmitted during bookings by local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks. Before the termination of Secure Communities, ICE would routinely issue an ICE hold, requesting the local law enforcement to hold an individual in custody beyond the time they would otherwise be released. ICE has been directed to replace requests for detention (ICE holds) with "requests for notification" (requests that the local law enforcement agency notify ICE of the individual's pending release from criminal custody).

The Secure Communities memo cited the rising number of federal court opinions finding that detainer-based detentions by local law enforcement agencies violate the Fourth Amendment. See http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. Additional information on immigration enforcement is available at http://www.ilrc.org/enforcement. ICE holds are to be issued only if "special circumstances" exist. The term "special circumstances" has not yet been defined. Additionally, requests for notifications should be directed only to those individuals who fall within a priority enforcement category as reflected in the Priorities Enforcement memo. In many instances, an individual will not fall within an enforcement priority category until after he or she is convicted of one of the designated offenses. Therefore, an individual arrested for, but not convicted of, an enumerated offense should not be the subject of an ICE request for notification. See Immigrant Legal Resource Center,

Organizer Alert: Life After "PEP-Comm," which is available at http://www.ilrc.org/files/documents/ilrc_organizers_advisory-2015–01_06.pdf.

§52.66 V. ILLEGAL REENTRY AFTER DEPORTATION

Many noncitizen defendants tried and convicted for criminal offenses in state court are removed immediately after serving their sentence and then attempt to reenter the United States illegally. Illegal reentry is a commonly prosecuted federal crime, with steep sentence enhancements if the person was removed after being convicted of certain offenses. See 8 USC §1326(b); *U.S. v Pimentel-Flores* (9th Cir 2003) 339 F3d 959. A surprisingly high number of federal criminal cases involve this offense. Criminal defense counsel should advise deportable noncitizen defendants when a proposed plea can serve as a prior in an illegal re-entry case, and, when possible, should fashion a plea to avoid this consequence. Just as counsel would try to avoid conviction of an offense that can be used as a "strike" in a future prosecution, counsel representing a noncitizen defendant should try to avoid a conviction that can be used to enhance a sentence for illegal reentry if the client attempts to return illegally to the United States.

Two types of crimes cause the most serious sentence enhancements. Prior conviction of an aggravated felony triggers an 8-level increase under the federal sentencing guidelines. See 8 USC §1326(b)(2); 18 USC App USSG §2L1.2(b)(1)(C). Prior conviction of certain other felony offenses triggers a 16-level increase under the guidelines. See 8 USC §1326(b)(1); 18 USC App USSG §2L1.2(b)(1)(A).

▶ **Note:** In *U.S. v Booker* (2005) 543 US 220, 125 S Ct 738, the Supreme Court made sentencing under the guidelines voluntary in order to avoid constitutional problems entailed in judicial fact-finding with respect to "conduct" enhancements that increase a defendant's sentence beyond the statutory maximum. See *Blakely v Washington* (2004) 542 US 296, 124 S Ct 2531; *Apprendi v New Jersey* (2000) 530 US 466, 490, 120 S Ct 2348. It is expected, however, that many federal judges will continue to adhere to the guidelines, especially as they relate to enhancements for prior convictions, which were explicitly excluded from *Apprendi*'s Sixth Amendment jury trial requirement. 530 US at 476. Thus, when possible, counsel will want to avoid conviction of an offense that is considered an aggravated felony. See §§52.41–52.47.

Further, counsel will want to avoid the "other felony" category that gives rise to a more serious sentence enhancement than an aggravated felony. This section discusses the "other felony" category. In general, obtaining a misdemeanor rather than felony conviction will avoid the most serious problems. When that is not possible, federal public defenders are often willing to advise on the effect under the guidelines of proposed state court pleas. For further discussion, see Brady et al., Defending Immigrants §9.50 (10th ed).

"Felony offense" creating a 16-level enhancement under the federal sentencing guidelines. A 16-level increase will be imposed for felony conviction of many offenses, *regardless of whether any sentence was imposed and based only upon the fact that the offense is a state felony.* These offenses fall into two categories:

- Many nondrug offenses (including assault, burglary, statutory rape, and possession

of a firearm) trigger a 16-level increase in sentence solely by being classed as a state felony, regardless of the sentence imposed; and

- Felony drug trafficking offenses, such as sale or possession for sale, trigger a 16-level increase if the sentence imposed was more than 13 months, and a 12-level increase if the sentence was 13 months or less.

Nondrug felony offenses that can trigger the 16-level increase. Under the federal sentencing guidelines, any of the following prior convictions will result in a 16-level increase if the conviction receives criminal history points or a 12-level increase if the conviction does not receive criminal history points, regardless of what sentence was imposed (18 USC App USSG §2L1.2(b)(1)(A)):

- A "crime of violence";
- A firearms offense;
- A child pornography offense;
- A national security or terrorism offense;
- A human trafficking offense; or
- An alien smuggling offense.

A crime of violence includes 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, and any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against another person. 18 USC App USSG §2L1.2, Application Note 1(B)(iii).

Definition of felony; effect of reduction of felony to misdemeanor. The sentencing guidelines define a felony as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." 18 USC App USSG §2L1.2, Application Note 2. This definition of felony is the same in California law. Reduction of a felony to a misdemeanor under Pen C §17(b) or §19 is effective for immigration purposes (*Garcia-Lopez v Ashcroft* (9th Cir 2003) 334 F3d 840, overruled on other grounds in *Ceron v Holder* (9th Cir 2014) 747 F3d 773, 778) and should be effective here, as under the guidelines. The Ninth Circuit will follow state law in determining the maximum penalty available for an offense. See, *e.g., U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900. If possible, state defenders should plead to a misdemeanor or arrange to reduce a felony to a misdemeanor for these offenses, and advise the client of the penalties that a felony conviction would bring if the client was ever deported and attempted to return illegally.

"Drug trafficking" offenses that can trigger 16-level increase. A prior conviction of an offense charged as an aggravated felony under the drug trafficking category results in an 8-level increase under the guidelines. However, an offense charged as a "felony drug trafficking offense" can be punished more severely than this. Under the guidelines, a drug trafficking offense is "an offense under federal, state or local law that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." 18 USC App USSG §2L1.2, Application Note 1(B)(iv). Conviction of a

felony drug trafficking offense for which the sentence imposed exceeded 13 months results in a sentence increase of 16 levels if the conviction receives criminal history points or of 12 levels if the conviction does not receive criminal history points. Conviction of a felony drug trafficking offense for which the sentence imposed was 13 months or less results in a 12-level increase if the conviction receives criminal history points or an 8-level increase if the conviction does not receive criminal history points. 18 USC App USSG §2L1.2(b)(1)(A)–(B). A simple possession offense is not a "drug trafficking offense" under the guideline definition and so does not get the 16-level increase. However, felony simple possession is an aggravated felony that will cause an 8-level increase. See, *e.g., U.S. v Robles-Rodriguez* (9th Cir 2002) 281 F3d 900.

Offenses that trigger less serious guideline enhancements in prosecution for illegal reentry. A prior "conviction for any other felony" results in a 4-level increase, as do "three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses." 18 USC App USSG §2L1.2(b)(1)(D)–(E).