



NOVEMBER 2020
**TIPS FOR CALIFORNIA PUBLIC DEFENDERS
TO DEFEND IMMIGRANT COMMUNITIES***

As many people consider exercising their right to protest, it's important to note the unique harm certain convictions can cause for noncitizen protestors. Immigration consequences are highly specific and can typically only be determined by a thorough, case-by-case analysis. See [Noncitizen Defendant Questionnaire here](#). Nevertheless, the below recommendations provide key red flags and suggestions for California defenders representing noncitizen protestors:

Charge/Offense	Is it an Aggravated Felony (AF)?	Is it a Crime Involving Moral Turpitude (CIMT)?	Notes
PC 69, Resisting/ Obstructing with Threats, Force, or Violence	MAYBE. Could be deemed an AF as obstruction of justice; best practice is to avoid a sentence of greater than 364 days.	NO. The minimum conduct is an offensive touching. Still, do not stipulate to a factual basis that describes the use or the threatened use of force or violence, in, for example, a police report, preliminary hearing transcript, or pre-conviction probation report.	OTHER CONSIDERATIONS: Other Considerations: This charge does not trigger other removal grounds but is likely to offend immigration judges and immigration officials such that a conviction will seriously prejudice discretionary decisions.
PC 148(a)(1), Resisting, Obstructing a Peace Officer	NO. The maximum custody is 364 days jail.	PROBABLY NOT. The minimum conduct to violate this statute includes inaction, passive resistance, going limp. Do not stipulate to a factual basis that describes the use of force or violence, in, for example, a police report, preliminary hearing transcript, or pre-conviction probation report.	OTHER CONSIDERATIONS: A conviction of this crime does not trigger any other removal grounds or cause inadmissibility but does look bad. In making discretionary decisions, law and order immigration judges and immigration officials will factor a conviction of resisting a peace officer heavily against a non-citizen.
PC 236/237, Felony False Imprisonment (an alternative charge to any crime of violence (COV))	NO. This offense should not be deemed to be a COV, but avoid a sentence greater than 364CJ, to prevent an AF in the unlikely event of a decision to the contrary. To obtain an additional margin of protection, plead specifically to false imprisonment "by menace or deceit."	NO. This should not be deemed a CIMT, but to help avoid the risk of legal error in immigration proceedings, in which non-citizens are often unrepresented, plead to false imprisonment "by menace."	OTHER CONSIDERATIONS: For a non-citizen, false imprisonment is a preferred charge for crimes involving the use of significant force because it proscribes a wide range of conduct, making it overbroad of the federal immigration definitions. However, there are no cases on point, so creating a record of the most minimal conduct possible will accord the client a margin of safety. If you obtain this charge via negotiation, do not stipulate to a factual basis based on the police report, preliminary hearing transcript, pre-conviction probation report, or any other source that contains evidence the threatened or actual use of force. NOTE: Misdemeanor False Imprisonment is not an AF and not a CIMT and therefore a great immigration neutral alternative. If you find yourself in a bargaining position of power or need an alternative to a misdemeanor charge involving force or violence, keep in mind misdemeanor PC 236.

Charge/Offense	Is it an Aggravated Felony (AF)?	Is it a Crime Involving Moral Turpitude (CIMT)?	Notes
PC 243(b), Battery on a Peace Officer	NO. The minimum conduct required to violate this statute is an offensive touching, and the maximum penalty is 364 days in jail.	NO. The minimum conduct is an offensive touching.	<p>OTHER CONSIDERATIONS: This charge should not trigger any other removal ground, but in making discretionary decisions, immigration judges and immigration officials probably will factor a conviction heavily against a non-citizen.</p> <p>NOTE: If there is injury and client is charged with PC 243(c), the charge could be considered a crime of violence and therefore an AF with a sentence greater than 364CJ. If the victim actually is injured, then a conviction of a violation of section 243(b) might be categorized as a CIMT. Although this would be erroneous, there is bad case law on this issue in the context of PC 243(d), battery with serious bodily injury. Therefore, if your client is charged with felony violation of PC 243(c), a violation of PC 243(b) is <i>not</i> a desirable alternative. Instead, consider seeking disposition under PC 236/237, false imprisonment, discussed above.</p>
PC 245(c), Assault on a Peace Officer	YES. This is a crime of violence, any sentence greater than 364CJ is in an AF. Remember, execution of sentence suspended (ESS or "joint suspended"), and jail or prison time imposed because of a violation of probation constitute an imposed sentence for immigration purposes. So, e.g., if low term is suspended on this offense, then the client has incurred an AF.	YES.	<p>OTHER CONSIDERATIONS: This charge should not trigger any other removal grounds.</p> <p>ALTERNATIVE DISPOSITIONS: PC 236 / 237 is a preferable charge alternative. If the offense occurred in a structure (or if the prosecutor is flexible), PC 459, burglary, is another preferable disposition.</p>
PC 404/405, Participating in a Riot	NO. The maximum penalty is 364 CJ; so, this offense cannot constitute an AF as a crime of violence or obstruction of justice.	PROBABLY. The definition of riot under PC 404 requires the use of force or violence, which probably makes participation in a riot a CIMT.	<p>NOTE: There is an argument, however, that PC 405 defines a general intent crime. A person is guilty if he or she willfully participated in the riot; any participation suffices. Therefore, a person could be guilty without using, or intending to use, force or violence. Conceivably, a person could be guilty if he or she marched peacefully, disapproving of the use of force or violence, but near others who were using force to disturb the peace. Such peaceful marching and non-violent intent, if sufficient to violate PC 405, might be insufficient to amount to conduct that is base, vile, and depraved, the touchstones for classification as a CIMT.</p> <p>OTHER CONSIDERATIONS: The concern in the immigration community is that immigration courts in the era of Trump will look unfavorably on any arrests/convictions from this time period and these protests. The expectation is that any discretionary application for relief will be denied if a person is convicted of this offense, even if the conviction itself fell within an exception and did not trigger deportability or inadmissibility for the applicant. Therefore, the recommendation is to try and obtain an alternative charge.</p> <p>ALTERNATIVE DISPOSITIONS: The below alternative charges are not AFs and not CIMTs. If you can negotiate an alternative charge, be sure to protect the record of conviction and DO NOT stipulate to the facts in the police report, preliminary hearing transcript, preconviction probation report or any other document that states unfavorable facts.</p> <ul style="list-style-type: none"> • § PC 372 – Public Nuisance • § PC 415 – Disturbing the Peace • § PC 602 – Trespassing • § PC 647(h) – Loitering with Criminal Intent

Charge/Offense	Is it an Aggravated Felony (AF)?	Is it a Crime Involving Moral Turpitude (CIMT)?	Notes
<p>404.6 (a), Inciting a Riot</p>	<p>NO. The maximum penalty is 364CJ; so, this offense cannot constitute an AF as a crime of violence or obstruction of justice.</p> <ul style="list-style-type: none"> The AF category of arson is a concern and is an AF independent of the length of sentence. But PC 404.6(a) probably (1) is not divisible with respect to arson, and (2) probably is not a categorical match to the applicable federal arson definition. 	<p>YES. This offense requires the intent to cause acts of force or violence, directly or through others. An immigration lawyer could argue that the minimum force or violence that is required is only that necessary to disturb the peace, not to cause physical injury. Defense counsel should conservatively assume that this argument would be rejected, that the force or violence language in PC 404 and 404.6 would be construed to mean force or violence that can harm a person, and that the conviction would be held to be a CIMT.</p> <ul style="list-style-type: none"> There are a handful of Board of Immigration Appeals (BIA) decisions from other jurisdictions that have held riot convictions to be CIMTs. 	<p>OTHER CONSIDERATIONS: The fear in the immigration community is that immigration courts in the era of Trump will look unfavorably on any arrests/convictions from this time period and these protests. The expectation is that any discretionary application for relief will be denied if a person is convicted of this offense, even if the conviction itself fell within an exception and did not trigger deportability/inadmissibility for the applicant. Therefore, the recommendation is to try and obtain an alternative charge.</p> <p>ALTERNATIVE DISPOSITIONS: The below alternative charges are not AFs and not CIMTs. If you can negotiate an alternative charge, be sure to protect the record of conviction and DO NOT stipulate to the facts in the police report, preliminary hearing transcript, preconviction probation report or any other document that states unfavorable facts.</p> <ul style="list-style-type: none"> PC 372 – Public Nuisance PC 415 – Disturbing the Peace PC 602 – Trespassing PC 647(h) – Loitering with Criminal Intent
<p>PC 408, Punishment for Rout and Unlawful Assembly</p>	<p>NO. The maximum exposure is 180CJ, and the broad definition of unlawful assembly makes it less likely to be considered a crime of violence.</p>	<ul style="list-style-type: none"> Rout Defined, PC 406: Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such an assembly is a rout. (Essentially an attempted riot). <ul style="list-style-type: none"> Likely to be considered a CIMT, if painted as an attempted riot. Unlawful Assembly Defined, PC 407: Whenever two or more persons assemble together to do any unlawful act, or to do a lawful act in a violent or boisterous or tumultuous manner, such assembly is an unlawful assembly. <ul style="list-style-type: none"> The use of the general language “assemble together to do any unlawful act” should prevent this from being considered a CIMT. 	<p>OTHER CONSIDERATIONS: Just like with Inciting a Riot, the fear in the immigration community is that immigration courts will look unfavorably on any arrests/convictions from this time period and these protests. The expectation is that any discretionary application for relief will be denied if a person is convicted of this offense, even if the conviction itself fell within an exception and did not trigger deportability/inadmissibility for the applicant. Therefore, the recommendation is to try and obtain an alternative charge.</p> <p>ALTERNATIVE DISPOSITIONS: The below recommended charges are not AFs and not CIMTs. If you can negotiate an alternative charge, be sure to protect the record of conviction and DO NOT stipulate to the facts in the police report or any other unfavorable document.</p> <ul style="list-style-type: none"> PC 372 – Public Nuisance PC 415 – Disturbing the Peace PC 602 – Trespassing PC 647(h) – Loitering with Criminal Intent
<p>PC 409, Failure to Disperse</p>	<p>NO. Maximum jail time is 180CJ. Therefore, even if mere presence at a riot, rout, or unlawful assembly, could constitute a COV, a conviction of this sentence would not constitute an AF.</p>	<p>PROBABLY NOT. The only conduct required for conviction under this section is nonfeasance - failing to disperse; and there is no specific intent element.</p>	<p>OTHER CONSIDERATIONS: Many prosecutorial agencies have issued statements promising that they will not file these charges. Still, some agencies with misdemeanor jurisdiction might, and it might be offered as an ostensible reduction of more serious charges. Either way, <i>avoid pleading to this charge</i>. An application for relief or benefit that has an element of discretion will be denied or delayed if a person is convicted of this offense, even though this charge should not trigger inadmissibility or deportability. See the recommended alternatives listed above.</p>

Charge/Offense	Is it an Aggravated Felony (AF)?	Is it a Crime Involving Moral Turpitude (CIMT)?	Notes
PC 415, Disturbing the Peace	NO.	NO.	OTHER CONSIDERATIONS: Does not trigger any removal ground
Failure to Disperse when Disturbing the Peace	NO.	NO.	OTHER CONSIDERATIONS: Does not trigger any other removal ground. This crime probably is not divisible between disturbing the peace and “any unlawful act,” and the latter is vague in any case. Still, for a margin of safety against erroneous immigration court filing or rulings, if there is evidence of theft, attempt to plead to, and only to, “disturbing the peace,” and do not stipulate to a factual basis that evidences theft, burning, or any violence.
PC 451/PC 452, Arson and Unlawful Burning	YES. California arson matches the federal definition of arson; so, assume all arson convictions, whether misdemeanor or felony, are AFs – <i>irrespective of the time imposed</i> . If an arson charge cannot be negotiated away, then the best record of conviction is the reckless burning of one’s own property.	YES.	OTHER CONSIDERATIONS: Arson is a devastating charge for a non-citizen. Consider a plea to vandalism (see below) if in a strong bargaining position, or, if not, to burglary, even first degree.
463(a), a second-degree burglary committed during a state emergency	NO.	NO. Burglary is not a CIMT, and this crime adds no additional intent element, nor does this offense resolve the definitional mismatch between California burglary and federal burglary.	OTHER CONSIDERATIONS: Similar to the riot charges, a conviction of this charge will severely prejudice the exercise of discretion against a non-citizen. The term “looting” sounds and looks worse than burglary, theft, etc. Accordingly, a plea to the underlying burglary is preferable unless your client has DACA. A conviction of burglary is a “significant misdemeanor” and hence ends DACA status.
463(b), Grand Theft During a State of Emergency	PROBABLY NOT. Even with a sentence of greater than one year, or a loss of over \$10k, California grand theft is not an AF. CAVEAT: a sentence greater than a year <i>and</i> a loss of \$10K or greater <i>is</i> an AF.	YES.	OTHER CONSIDERATIONS: A conviction of this charge will severely prejudice the exercise of discretion against a non-citizen, even if the conviction itself falls within an exception and does not trigger deportability or inadmissibility. This section’s title, “looting,” carries connotations worse than burglary, theft, etc. Accordingly, a plea to the underlying, simple theft is preferable. The best alternative disposition, however (except for DACA holders, see above) is burglary under section 459, because it is neither a CIMT, nor an AF. WARNING FOR DACA HOLDERS: Any misdemeanor conviction with a sentence greater than 90 CJ is a “significant misdemeanor,” which would terminate DACA status. This charge carries a minimum sentence of 180 CJ, which can be reduced or eliminated by the court in the interests of justice.
463(c), Petty Theft during State of Emergency	NO.	YES.	OTHER CONSIDERATIONS: A conviction of this charge will severely prejudice the exercise of discretion against a non-citizen, even if the conviction itself falls within an exception and does not trigger deportability or inadmissibility. This section’s title, “looting,” connotes worse than burglary, theft, etc. Accordingly, a plea to the underlying, simple theft is preferable to a conviction under any of the subdivisions of section 463, looting. The best alternative disposition, however, is burglary under section 459, because it is neither a CIMT, nor AF – except for DACA holders, see above.

Charge/Offense	Is it an Aggravated Felony (AF)?	Is it a Crime Involving Moral Turpitude (CIMT)?	Notes
PC 496(a), Receiving Stolen Property	FELONY: YES; MISDEMEANOR: NO. If a sentence of greater than 364 days is imposed, then receiving stolen property is an AF. Imposed, for immigration purposes, includes execution of sentence suspended (aka ESS or "joint suspended"), and additional time imposed on probation violation counts. As a <i>misdemeanor</i> , this wobbler, can never constitute an AF because the maximum sentence is 364 days.	PROBABLY NOT. Receiving stolen property includes the intent to deprive temporarily, which has been held in closely analogous offenses not to be turpitudinous.	OTHER CONSIDERATIONS: (1) As a misdemeanor, 496, subdivision (a), is a good alternative to theft, because, unlike theft, receiving stolen property is not a CIMT. BUT as a felony, see the AF discussion immediately above. (2) Plead to, and only to, "intent to deprive temporarily" if possible. This will provide a margin of safety against an error by an immigration official or judge, and against the unlikely event of a future decision that 496(a) can be a CIMT.
PC 594, Vandalism	NO. Highly probably is not a COV because the requisite damage is to only property, not to persons. Still, for a margin of protection against an erroneous reading of section 594 in immigration proceedings, avoid a sentence greater than 364 CJ. <ul style="list-style-type: none"> A plea limited to paragraph (a)(1), graffiti, might afford some protection relative to a plea to a violation of the other subdivisions. 	PROBABLY NOT. There is some concern that felony vandalism involving a high value of damage could be deemed a CIMT. The favorable existing case law is from a time when the statute defining misdemeanor and felony conduct was damage valued at \$250, but as an alternative to arson, this charge is far superior.	OTHER CONSIDERATIONS: This is one of the few felonies within the protections of SB54.
Municipal Code Violations Highly probably is not a COV because the requisite damage is to only property, not to persons. Still, for a margin of protection against an erroneous reading of section 594 in immigration proceedings, avoid a sentence greater than 364 CJ.	AN INDIVIDUALIZED ANALYSIS IS REQUIRED. Municipalities may enact only misdemeanors, and the maximum punishment for a misdemeanor is 364 days in jail, but watch for any violation that describes any sort of fire setting or unlawful burning. See Note.	PROBABLY NOT. There is some concern that felony vandalism involving a high value of damage could be deemed a CIMT. The favorable existing case law is from a time when the statute defining misdemeanor and felony conduct was damage valued at \$250, but as an alternative to arson, this charge is far superior.	OTHER CONSIDERATIONS: Remember any misdemeanor conviction, even some innocuous sounding municipal code, can be a problem for a client with DACA or TPS. FIRE SETTING/UNLAWFUL BURNING: Arson is an aggravated felony irrespective of the custody time imposed. Also, beware of any fireworks-related charges; they might fall within the AF category of explosives-related offenses, which does not depend on the imposition of any time in custody. Please contact a criminal/immigration specialist for a consultation.

INFRACTIONS

A conviction of an infraction is a conviction for purposes of immigration proceedings. Accordingly, a reduction of a misdemeanor by negotiation or by the court under PC 17(d) (2), or a negotiated amended complaint to add an infraction in lieu of a misdemeanor does not per se protect a non-citizen from immigration consequences

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