

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

*Katherine Brady
Immigrant Legal Resource Center
Defending Immigrants Partnership*

--Table of Contents--

I. Introduction and Instructions

II. Quick Reference Chart

III. Notes Accompanying Quick Reference Chart

	<i>Page</i>
Introduction: Why Bother? What to Do?	N-5
§ N.1 Using the Chart to Establish Defense Goals	N-9
§ N.2 Definition of Conviction and How to Avoid a Conviction for Immigration Purposes	N-30
§ N.3 Record of Conviction and Divisible Statutes (The Categorical Approach)	N-36
§ N.4 Sentence Solutions	N-52
§ N. 5 Immigration Holds and Detention	N-56
§ N.6 Aggravated Felonies	N-60
§ N.7 Crimes Involving Moral Turpitude	N-63
§ N.8 Controlled Substance Offenses	N-70
§ N.9 Domestic Violence, Child Abuse, Stalking	N-86
§ N.10 Sex Offenses	N-102
§ N.11 U.S. Citizens and Permanent Residents Cannot Petition for a Relative if Convicted of Certain Offenses Against a Minor	N-108
§ N.12 Firearms Offenses	N-110
§ N.13 Burglary, Theft and Fraud	N-111

§ N.14 Summary of Safer Pleas; Information for Clients	N-120
§ N.15 Client Immigration Questionnaires: Short and Long Versions	N-145
§ N.16 Handout on Representing Noncitizens in Juvenile Proceedings	N-148
§ N.17 Other Resources: Books, Websites, Trainings, Services	N-150

I. Introduction and Instructions

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

This Chart and Notes are excerpted from Chapter 13 of *Defending Immigrants in the Ninth Circuit: Impact of Criminal Convictions under California and Other States Laws* (www.ilrc.org). For a more detailed analysis of defense arguments, see cited sections of *Defending Immigrants* and other works in Note: “Resources.” See additional on-line resources at www.ilrc.org/criminal.php (Immigrant Legal Resource Center), www.criminalandimmigrationlaw.com (Law Offices of Norton Tooby), www.defendingimmigrants.org (Defending Immigrants Partnership) and other sites noted at § N.17 Resources.

1. Using the Chart and Notes. The Chart analyzes adverse immigration consequences that flow from conviction of selected California offenses, and suggests how to avoid the consequences. The Chart appears organized numerically by code section.

Several short articles or “Notes” provide more explanation of selected topics. These include Notes that explain the Chart’s immigration categories, such as aggravated

felonies and crimes involving moral turpitude, as well as those that discuss certain kinds of commonly charged offenses, such as domestic violence or controlled substances.

The 2010 Notes include several new practice aids. See § N.1 Identifying Defense Goals, which includes three new guides: a description of several types of immigration status and relevant criminal record bars, a description of what we call the immigration “strike” -- convictions that will cause a greatly enhanced sentence if the person later is prosecuted for illegal re-entry into the U.S. – and a summary of defense procedure, beginning with initial interview, in Ten Steps in Representing a Noncitizen Defendant.

In addition, § N.14 Safer Pleas includes a summary of immigration-friendly pleas as well as a new aid: sample statements of the defense arguments relevant to the pleas, in “For the Defendant” boxes, which can be handed to the defendant or his or her immigration counsel, if any, for use in removal proceedings.

2. Sending comments about the Chart. Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate “safer” pleas, or want to say how well the chart works for you or how it could be improved. Send email to chart@ilrc.org. This address will not answer legal questions; for information about obtaining legal consults on cases see “contract services” at www.ilrc.org and other resources at § N.17.

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

Ideally each noncitizen defendant should complete a form such as the two (a short form and, where resources permit, long form) found at Note “Immigrant Client Questionnaire.” These forms capture the information needed to make an immigration analysis. Some offices print these forms on colored paper, so that defenders can immediately identify the file as involving a noncitizen client and have the client data needed to begin the immigration analysis.

4. Disclaimer, Additional Resources. While federal courts have specifically affirmed the immigration consequences listed for some of these offenses, in other cases the chart represents only the authors’ opinion as to how courts are likely to rule. In addition there

is the constant threat that Congress will amend the immigration laws and apply the change retroactively to past convictions. Defenders and noncitizen defendants need to be aware that the immigration consequences of crimes is a complex, unpredictable and constantly changing area of law where there are few guarantees. Defender offices should check accuracy of pleas and obtain up-to-date information. See books, websites, and services discussed in Note “Resources.” But using this guide and other works cited in the “Resources” Note will help defenders to give noncitizen defendants a greater chance to preserve or obtain lawful status in the United States – for many defendants, a goal as or more important than avoiding criminal penalties.

Acknowledgements

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QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES

Feb-10

CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE-- These findings are questionable	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE AND COMMENTS
Business & Professions §4324	Forgery of prescription, possession of any drugs	May be divisible as CS or forgery AF; see Advice.	Might be divisible: forgery is CMT but poss of forged drug possibly not.	Deportable, inadmissible for CS conviction if ROC of conviction identifies the CS.	To avoid CS and AF conviction, avoid ID'ing specific CS in ROC. See also Advice for H&S 11173(a). To avoid AF conviction as forgery, avoid sentence of 1 yr or more. See Notes "Safer Pleas" and "Drug Offenses"
Business & Professions §25658(a)	Selling liquor to a minor	Not AF.	Shdn't be CMT.	No.	
Business & Professions §25662	Possession, purchase, or consumption of liquor by a minor	Not AF.	Shdn't be CMT.	No, except multiple convictions could be evidence of alcoholism, which is an inadmissibility grnd and bar to "good moral character."	
Health & Safety Code § 11173(a)	Prescription for controlled substance (CS) by fraud	Might be drug AF, forgery AF, or possibly fraud with \$10k loss to victim/s (insurance?). See Advice.	May be divisible, e.g. 11173(b) not CMT	Deportable, inadmissible for CS conviction if ROC ID's specific CS.	To avoid CS AF and deportability under CS ground, plead to straight forgery, false personation, etc. or other non-CS alternative. Or, to avoid CS AF, plead to straight possession. Or, to avoid all CS consequences, do not plead to specific CS on record; see H&S 11350 Advice. To avoid forgery AF, avoid one-year sentence imposed. If insurance lost \$10,000 consult Notes.

AF = Aggravated Felony
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H&S §11350(a), (b)	Possession of controlled substance	Possession (with no drug prior) is not AF unless the CS is flunitrazepam or more than 5 grams of cocaine base. See Advice re poss <i>with</i> a prior as an AF, and re effect of DEJ, 1203.4 etc. on a FIRST simple poss. Also, avoid CS consequences entirely by not ID'ing specific CS on ROC.	No.	Deportable, inadmissible for CS conviction. Wherever possible, do not let ROC identify a specific CS. See Advice. See advice column re effect of DEJ, 1203.4, etc. on a FIRST simple poss.	1. <u>DEJ and Post-con relief</u> : First simple possession, with no drug priors and no prior pre-plea diversion, is eliminated by withdrawal of plea under, e.g., DEJ, 1203.4, Prop 36; this is not available if probation was violated. See Lujan-Armendariz (9th 2002). 2. <u>Poss with drug prior as an AF</u> : Bd of Imm Appeals (Matter of Carachuri 2007) says poss is not an AF unless a prior drug conviction was pleaded and proved. Supreme Court has accepted cert on Carachuri. Do not let a drug prior be pleaded or proved, and where possible avoid poss conviction where there is a drug prior. Seek alternate plea: P.C. 32 will avoid drug conviction, or plea down to PC 11365, 11550, etc will avoid AF. 3. <u>Controlled substance not identified in the ROC</u> : Ruiz-Vidal, 473 F3d 1072 (9th 2007) held that because 11377 has CS's not on the federal CS list, the conviction is not a CS offense for imm purposes unless ROC specifies a federally listed CS. See also Esquivel v. Holder (9th Cir. Jan 2010) same holding on H&S 11350. Potential issues with inadmissibility: Gov't may argue that when the question is inadmissibility or eligibility for relief, immigrant has burden of proving a federal CS was involved; strong arguments against this. Second, immigrant shd not admit to immigration judge what the substance was, to avoid a possible inadmissible "formal admission" of a CS offense. See Notes: Drug Offenses, Safer Pleas.
H&S §11351	Possession for sale	Yes AF as CS trafficking conviction; see Advice Column. This is not the case if controlled substance not ID'd on ROC. See 11350 Advice Column. See Note: Drug Offenses	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction if CS ID'd on ROC of conviction. (Inadmissible even without conviction if police report gives DHS "reason to believe" involved in trafficking a CS). See 11350 Advice.	To avoid AF attempt to plead down to simple poss (see H&S 11350), or H&S 11365, 11550; or consider pleading up to offer to sell, see advice in H&S 11352. Or plead to PC 32 with less than 1 yr sentence to avoid AF, deportability and perhaps inadmissibility. To avoid having a drug conviction do not create ROC that ID's specific controlled substance. See 11350 Advice, see also Notes "Record of Conviction," "Drug Offenses" and "Safer Pleas."

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H&S §11351.5	Possession for sale of cocaine base	Yes AF	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction	See advice on H&S 11351 and Note "Drug Offenses." Try to plead to 11351 or 11378 with no CS ID'd on ROC to avoid any CS consequences, or to 11379 or 11352 solicitation or transportation to at least avoid CS AF. Note first simple poss of 5 gram or more cocaine base is an agg felony; see Note: Drug Offenses.
H&S §11352(a)	Sell/Transport or Offer to Sell/Transport controlled substances	Divisible: A plea to transportation for personal use, and plea to offering to commit any offense is not AF; but plea to sell, distribute is AF. May avoid all issues if specific CS is not ID'd on the ROC (11379 might be better for this). See Advice	Yes CMT as CS trafficking offense (except transport for personal use)	This is deportable and inadmissible CS conviction, unless the specific CS is not ID'd on the reviewable record; in that case see H&S 11350 Advice. Transportation plea will not give "reason to believe" trafficking inadmissibility, but other pleas will.	See discussion in Note "Drug Offense." Transportation for personal use is not an AF but is a deportable and inadmissible drug conviction. Same results with offering to commit a drug offense, but this has a key disadvantage: it may give the gov't "reason to believe" the person trafficked and therefore is inadmissible regardless of conviction, plus this defense is not accepted outside the 9th Cir. To avoid all consequences: PC 32 with less than 1 yr prevents agg felony and deportability. An ROC that does not ID a specific CS may avoid all consequences; see H&S 11350 Advice.
H&S §11357	Marijuana, possession	See H&S 11350. (But mj is a federally listed CS, so it is not possible to make the Ruiz-Vidal defense with an unspecified CS).	Not CMT	Deportable, inadmissible for CS conviction, except see discussion first poss. 30 gms or less mj or hash, next box	See H&S 11377 as alternate plea -- if can obtain ROC where no CS is specified). Or, single simple possession of less than 30 gms mj or hash is not a deportable CS conviction, and may be eligible for inadmissibility waiver under INA 212(h). See Note: Drug Offenses
H&S §11358	Marijuana, Cultivate	Yes, controlled substance AF	Might be held CMT if ROC shows intent to sell; see Advice	Deportable and inadmissible for CS conviction	Plead to a simple possession (see H&S 11350); plead up to offer to sell (see H&S 11360); to accessory with less than 1-yr imposed (see PC 32); to non-drug offense. See Notes "Safer Pleas" and "Drug Offenses." Under Silva-Trevino, imm judge may ask D whether intended to sell for CMT purposes.
H&S §11359	Possession for sale marijuana	Yes	Yes	Deportable and inadmissible as CS offense	See advice at 11351. Do not plead to this if immigration concerns are important. Plead down to 11357, up to 11360, or plead to another offense in which the controlled substance is not specified.

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H&S §11360	Marijuana - (a) sell, transport, give away, offer to; (b) same for 28.5 gms or less	Divisible: Transport, or offer to commit drug offense is not AF. Giving away a CS usually is an AF; however giving away a small amount of mj arguably is not and a first offense to do this might qualify for Lujan benefit. See Note: Drug Offenses	Yes CMT as CS trafficking offense (except transport for personal use, and probably giving away a small amount). See Advice re Silva-Trevino	Deportable and inadmissible for CS. First offense give away small amount or offer to give may qualify for Lujan benefit.	See Note "Drug Offense." Transportation for personal use is not an AF but is a deportable and inadmissible drug conviction. Same with offering to commit a drug offense. Sale or offering to sell also makes the person inadmissible by giving gov't "reason to believe" person has been drug trafficker. PC 32 with less than 1 yr prevents agg felony and CS deportability. Giving away a small amount of marijuana <i>might</i> have advantages: may not be an AF, and a first conviction may be treatable under Lujan-Armendariz. Best plea: 1st poss of less than 30 gms marijuana under H&S 11357(b); or any offense relating to an unspecified controlled substance e.g. 11377, because that is not a controlled substance offense. Under Silva-Trevino for CMT purposes only, imm judge may take testimony on transport v. sale.
H&S §11364	Possession of drug paraphernalia	Not AF (sale of paraphernalia might be).	Not CMT	Deportable, inadmissible for CS conviction	A first conviction is eliminated through withdrawal of plea under DEJ, Prop 36, PC 1203.4 by Lujan-Armendariz. See H&S 11350 and Notes "Drug Offenses" and "Safer Pleas"
H&S §11365	Presence where CS is used	Not AF.	Not CMT	Deportable, inadmissible for CS conviction	See advice on H&S 11364 and 11350, and Notes "Drug Offenses." Assume that this will be a CS conviction even if specific CS is not ID'd on ROC. First offense might be eliminated by DEJ, 1203.4, etc. under Lujan-Armendariz
H&S 11366.5	Maintain place where drugs are sold	Assume this is an AF	Assume it is CMT	Deportable, inadmissible for CS conviction	Try to avoid this plea. See H&S 11379, public nuisance offenses. Assume that this will be a CS conviction even if specific CS is not ID'd on ROC. See Note: Drug Offenses
H&S §11368	Forged prescription to obtain narcotic drug	Assume it is CS AF. Also, forgery with 1-yr sentence is AF.	May be divisible as CMT	Deportable and inadmissible for CS conviction	See advice for H&S 11173. Assume this is AF; better Might be divisible as a CMT since fraud intent not element of forged prescription. Better to plead to poss of a drug plus a separate straight forgery with 364 days or less. In any event, avoid 1-yr sentence for forgery; see Note "Sentence."

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H&S §11377	Possession of controlled substance	See Advice Column here and H&S 11350.	Not CMT	Deportable, inadmissible for CS conviction -- but see Advice re having no specific CS ID'd on the ROC.	See Advice in H&S 11350 re when possession with a drug prior is an AF, and when withdrawal of plea eliminates a first poss conviction. See 11350 Advice for the effect when a specific CS is not ID'd on the record, which is a disposition that will avoid all or most consequences.
H&S §11378	Possession for sale CS	Yes, unless specific drug not ID'd on ROC. See Ruiz-Vidal and 11377, supra.	Yes CMT as CS trafficking offense	Deportable, inadmissible for CS conviction, unless specific drug not ID'd on ROC; see 11377 and Ruiz-	See advice on H&S 11351 and Note "Drug Offenses." Avoid consequences by not identifying specific CS on the ROC, or better by pleading to transportation or offering in 11379 and not ID'ing specific CS.
H&S §11379	Sale, give, transport, offer to, controlled substance	Divisible: see H&S 11352 and Advice.	Divisible, see H&S 11352 and Advice.	See H&S 11352. See benefits if specific drug is not ID'd, discussed at 11350 Advice.	Divisible statute in that transportation and offering to commit an offense is not an AF, while sale or distribute is. Avoid consequences by not identifying specific CS on the ROC; see 11350, 11352 Advice and Note "Drug Offenses."
H&S §11550	Under the influence controlled substance (CS)	Under influence not AF. Felony 11550(e) 'with gun' with 1 yr might be AF as COV. Avoid 1 yr or 'with gun.'	Not CMT	Deportable, inadmissible for CS conviction, at least if specific CS is ID'd on the ROC. H&S 11550(e) also deportable for firearms offense.	For 11550(a)-(c). Not an AF, even with a drug prior. While no case on point, it ought to get Lujan-Armendariz benefit and be eliminated by DEJ, 1203.4, Prop 36. Imm counsel will argue that it is not a CS offense if specific CS is not ID'd in ROC, but gov't may oppose. To avoid firearms offense avoid ROC showing 11550(e) is conviction. To avoid threat of felony 11550(e) as Agg Felony, reduce to misd under PC 17 and/or avoid 1-yr sentence.
Penal §31	Aid and abet	AF if underlying offense is.	Yes if underlying offense is	Yes if underlying offense is	No immigration benefit. However see accessory after the fact PC 32.
Penal §32	Accessory after the fact	Only if 1 yr sentence imposed. See Advice for preparing ROC.	Unclear; currently being litigated. See Note: Safer Pleas	Accessory does not take on character of principal offense, so avoids consequences	To avoid agg felony, avoid 1 yr sentence imposed. If that is not possible, have record indicate conduct was to help the principal avoid initial arrest, rather than ongoing proceeding; if that is not possible, leave the record open to that possibility. Except for that and the possible CMT, this is an excellent plea to avoid e.g. drug, violence, firearms conviction. For further discussion see Note "Safer Pleas"

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Penal §92	Bribery	Yes AF if a sentence of 1-yr or more is imposed.	Yes CMT.	No.	
Penal §118	Perjury	Yes AF if a sentence of 1-yr or more is imposed.	Yes CMT	No.	
Penal §136.1(b)(1)	Nonviolently try to persuade a witness not to file police report, complaint	Shd not be AF, but because DHS might charge as obstruction of justice, try to obtain sentence of 364 or less for any single count. See Advice.	If plea as directed, shd not be CMT. IJ may interview person under Silva-Trevino, however.	Let ROC reflect no violence or threat of violence to avoid COV. If not COV, then not a DV offense even if DV-type victim.	Appears to be a good substitute plea with no imm consequences, but a strike w/ high exposure. For that reason can substitute for more serious charges. If sentence of 1 yr or more is imposed, have ROC show persuasion was not to file police report, as opposed to interfere with ongoing proceeding, so it is not obstruction of justice. See Note "Safer Pleas." See also PC 32, 236, not a strike. Note for CMT purposes only imm judge may consider testimony under Silva-Trevino.
Penal §140	Threat against witness	Assume AF if 1-yr sentence imposed	Yes CMT	If COV, a domestic violence offense if committed against DV type victim	To avoid AF avoid 1-yr sentence for any one count; see Note "Sentence." To avoid AF and DV deportability ground see PC 136.1(b)(1), 236, 241(a).
Penal §148	Resisting arrest	Divisible: 148(a)(1) is not AF, but felony 148(b)-(d) w/ 1-yr or more imposed might be.	148(a)(1) is not CMT, 148(b)-(c) are at least divisible ("reasonably should have known" police)	Sections involving removal of firearm from officer may incur deportability under firearms ground. See Note "DV, Firearms Grounds"	Plead to 148(a)(1). If plea to (b)-(d), avoid possible AF as a crime of violence by obtaining misdo conviction, reducing felony to misdo, and/or obtaining sentence less than 1 yr; see Note "Sentence."
Penal §182	Conspiracy	If principal offense is AF, conspiracy is. If principal requires 1-yr sentence to be AF, conspiracy does.	If principal offense is CMT, conspiracy is	Conspiracy takes on character of principal offense, e.g. CS, firearm. Exception may be DV ground.	Same consequence as principal offense. Imm counsel will argue that the domestic violence deport ground does not include conspiracy to commit a misdemeanor crime of violence, or conspiracy to commit child abuse, because neither 18 USC 16(a) nor the deportation ground include attempt or conspiracy.
Penal §187	Murder (first or second degree)	Yes AF	Yes CMT	A COV is domestic violence offense if committed against DV type victim	See manslaughter

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Penal §192(a)	Manslaughter, voluntary	Yes AF as COV, only if 1-yr or more sentence imposed	Yes CMT	A COV is domestic violence offense if committed against DV type victim	To avoid AF, avoid 1-yr sentence imposed; see Note "Sentence." To avoid CMT see PC 192(b).
Penal §192(b)	Manslaughter, involuntary	Divisible: a COV if ROC shows more than reckless intent. Avoid 1 yr where possible.	Traditionally held not to be a CMT	If a COV, it is DV offense if committed against DV type victim	Not a crime of violence under Fernandez-Ruiz (9th Cir. 2006)(en banc) if ROC shows only reckless intent. However, where possible obtain sentence of less than a year for any single count.
Penal §203	Mayhem	Yes AF only if 1-yr or more sentence imposed	Yes CMT	A COV is domestic violence offense if committed against DV type victim	Avoid 1-yr sentence to avoid AF; see Note "Sentence." See also PC 236, 243(a) and (e), 136.1(b) and Note "Safer Pleas"
Penal §207	Kidnapping	Yes AF only if 1-yr or more sentence imposed.	Yes CMT	A COV is domestic violence offense if committed against DV type victim	See advice for PC 203. If victim is under 18, conviction may block a citizen or permanent resident's ability to immigrate family members, under Adam Walsh Act. See Note 11.
Penal §211	Robbery (first or second degree) by means of force or fear	Yes AF if 1-yr or more sentence imposed	Yes CMT	A COV is domestic violence offense if committed against DV type victim	See advice for PC 203.
Penal §220	Assault, with intent to commit rape, mayhem, etc.	Assault to commit rape may be AF regardless of sentence; other offenses are AF only if 1-yr or more sentence imposed	Yes CMT	A COV is domestic violence offense if committed against DV type victim	Intent to commit rape may be treated as attempted rape, which is an AF regardless of sentence. To avoid an AF, see PC 243.4 w/ less than 1 yr on any single count. For other offenses avoid 1-yr sentence to avoid AF; see Note "Sentence." See also PC 236 and 136.1(b); to possibly avoid CMT see 243(d) (with less than 1 yr sentence), and see Note "Safer Pleas."

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Penal §236, 237	False imprisonment (felony)	May be divisible as a COV. Try to avoid 1 yr sentence; see Advice.	Yes CMT, except possibly if committed by deceit.	A COV is domestic violence offense if committed against DV type victim	Committed with fraud or deceit, this shd not be held a COV; with violence or menace it will. Attempt to have ROC identify deceit; if that is not possible, at least leave ROC vague. To avoid CMT, see misdemeanor false imprisonment. Note that if victim is under 18, conviction may block a citizen or permanent resident's ability to immigrate family members, under Adam Walsh Act. See Note 11.
Penal §236, 237	False imprison (misdo)	Not an AF	Shdn't be held CMT, but keep record vague; see Advice	Not a COV, therefore not a domestic violence offense.	Appears to be good substitute plea to avoid crime of violence in DV cases. See discussion in Note: "Safer Pleas." Possibly gov't wd charge as crime of child abuse if ROC showed minor victim. Re COV, currently Silva-Trevino permits wide-ranging questioning about offense so it's conceivable would be CMT if fraud, force involved. If victim is under 18, conviction may block a citizen or permanent resident's ability to immigrate family members, under Adam Walsh Act. See Note 11.
Penal 240(a)	Assault	Not an AF because no 1-year sentence	Divisible because can be committed with de minimus violence, but see Advice and see Notes: Domestic Violence, Safer Pleas	Assault is not a COV unless committed with actual rather than de minimus violence.	Re COV, Plead to attempted de minimus touching, or to the language of the statute and do not let ROC show attempted use of violent force. Simply because there is clear case law on it in immigration context, a better plea may be to battery or attempted battery, with an ROC that shows de minimus touching or is vague. See 243(a), (e) . Re CMT, unless the ROC specifies that only de minimus violence used, under Silva-Trevino the immigration judge may take evidence to see if actual violence was used. See Notes: Domestic Violence, Safer Pleas
Penal §243(a)	Battery, Simple	Not an AF because no 1-year sentence	Divisible because can be committed with de minimus violence, but see Advice at 240(a) and see Note: Safer Pleas.	See Advice to ensure conviction is not a crime of domestic violence or crime of child abuse.	Re COV, Plead to de minimus touching, or to the language of the statute and do not let ROC show use of violent force. Re CMT, unless the ROC specifies that only de minimus violence used, under Silva-Trevino the immigration judge may take evidence to see if actual violence was used. See Notes: Domestic Violence, Safer Pleas. Re crime of child abuse, keep ROC clear of evidence that victim was under 18.

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CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE-- These findings are questionable	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE AND COMMENTS
Penal §243(b), (c)	Battery on a peace officer, fireman etc.	To be safe obtain sentence of less than one year. See Advice re plea content.	243(b) not CMT if offensive touching, 243(c) (with injury) may be.	No.	Avoid 1-yr sentence to avoid AF; see Note "Sentence." Even with 1 yr sentence, avoid AF by avoiding a COV. Section (b) is not COV if ROC indicates de minimus touching, or at least does not indicate actual violence. Keep ROC vague between (b) and (c) to avoid COV. Reduce (c) to a misdo to help avoid COV.
Penal §243(d)	Battery with serious bodily injury	Yes AF as COV if it is a felony and 1-yr or more sentence imposed. If it is a misdo with 1 yr sentence, see Advice.	See Advice. May be held divisible, as not a CMT if ROC indicates that only de minimus force used. If instead ROC is vague, imm judge may take testimony re underlying facts under Silva-Trevino.	A COV is domestic violence offense if committed against DV type victim	See further discussion in Notes: Safer Pleas, Domestic Violence. To avoid agg fel get less than 365 days for any one count. If that's not possible, imm counsel can argue <i>misdo</i> 243(d) is not a COV if the ROC indicates only de minimus touching, or at least does not indicate actual violence (e.g., eggshell plaintiff situation). To try to avoid CMT, make specific record of de minimus touching w/out intent to harm. If instead record is left vague, under Silva Trevino imm judge might make broad inquiry re underlying facts). There's no guarantee the de minimus arguments will win. See also PC 236, 136.1(b)(1), misdo 243(a), (e).
Penal §243(e)(1)	Battery against spouse, former date, etc.	Obtain 364 days or less. This is not a COV if done with de minimus touching; see Advice.	See Advice. Has been held divisible with de minimus force not CMT.	A DV offense only if this is a COV. A vague ROC, or better a plea specifically to de minimus touching, is not a COV.	See Notes: Domestic Violence, Safer Pleas. <u>To avoid COV</u> , and therefore AF and DV, plead specifically to de minimus force or at least keep ROC clear of info that battery was beyond de minimus touching. In that case, can accept DV counseling requirement, stay-away order, etc. without becoming deportable under DV ground. <u>To avoid CMT</u> , plead specifically to de minimus force; this might prevent broad inquiry into facts under Silva-Trevino. See Advice PC 243(a).
Penal §243.4	Sexual battery	Felony is AF as COV if 1-yr sentence. Misdo is divisible; for misdo, obtain less than 1 yr sentence or see Advice.	Yes CMT	A COV is domestic violence offense if committed against DV type victim. Felony is COV; see Advice for misdo	See cites and discussion in Note: Safer Pleas. Misdo is divisible because restraint need not be by force. If ROC indicates restraint was not by force, or at least does not indicate it was by force, shd not be COV. See PC 243(d), (e) to try to avoid CMT, but under Silva-Trevino testimony may be taken for CMT purposes only. See PC 136.1(b)(1), 236, 243(e) to avoid CMT and COV.

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Penal §245	Assault with a deadly weapon (firearms or other) or force likely to produce great bodily harm	Yes AF as COV if 1-yr or more sentence imposed.	Shd be divisible as CMT because includes intoxicated, incapacitated, having no intent to harm. See Advice.	A COV is domestic violence offense if committed against DV type victim. Section 245(a)(2) and others involving firearms bring deportability under firearms ground.	<u>To avoid firearms grnd</u> , keep ROC of conviction clear of evidence that offense was 245(a)(2); see also PC 12020, 236, 243(d) and 136.1(b) and Notes Safer Pleas, Firearms, DV. <u>Re CMT</u> : The 9th Cir has held 245 divisible for CMT because it can be committed with general intent, e.g. while drunk. Under Silva-Trevino the immigration judge may go into actual circumstances, however. See additional discussion in Note: Safer Pleas
Penal §261	Rape	Yes AF, regardless of sentence imposed.	Yes CMT	A COV is domestic violence if committed against DV type victim.	See PC 243(d) (not CMT) and 243.4 (both not Agg Felonies if less than 1 yr sentence), 236, 136.1(b)(1) (can support 1 yr sentence); misdo 243.4 is divisible as COV. See Note "Safer Pleas".
Penal §261.5 (c) and (d)	Consensual sex with a minor	261.5(c) is not AF. Estrada-Espinoza (9th Cir. 2008) 261.5(d) is divisible based on age of victim, egregious factors. See Advice	Law developing; see Advice	Likely to be charged under DV deport ground as child abuse; imm counsel have arguments against this for older teens.	<u>Re agg felony as sexual abuse of minor</u> : No conviction of 261.5(c) is AF as sexual abuse of a minor. Same applies to 286(b)(1), 288a(b)(1), and 289(h). Section 261.5(d) may be AF if ROC shows victim is 'younger child' which may mean less than 15. Same applies to 286(b)(2), 288a(b)(2), 289(i). <u>Re CMT</u> , current BIA rule is that immigration judge may take evidence to see if D knew or should have known V was under-age. Silva-Trevino. Ninth Circuit rule was 261.5(d) is divisible; Court has not considered BIA rule yet. See also PC 243(a), 243(d), 243.4, 236, 136.1(b)(1) and Note: Sex Offenses.
Penal §262	Spousal Rape	Yes AF, regardless of sentence imposed.	Yes CMT	Deportable under DV ground.	See PC 243(d), 243.4, 236, 136.1(b)(1) and Note "Safer Pleas."
Penal §270	Failure to provide for child	Not AF.	Unknown	Assume this is deportable under DV ground for child neglect.	Until courts define deportable "crime of child neglect," it is hard to predict if this offense causes deportability under that ground; counsel shd assume conservatively that it does.

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Penal §272	Contributing to the delinquency of a minor	Not AF, but to be conservative keep ROC free of lewd act	Divisible: may be CMT if lewdness	Might be charged under DV ground for child abuse, especially if lewd act.	Keep ROC clear of reference to lewd act. <u>Deportable child abuse</u> . Currently imm authorities are broadly charging child abuse. However, 272 does not require actual harm, just possible minor harm. See Advice 273a(b). Counsel should plead to, e.g., omission that caused possible harm rather than actual harm. <u>CMT</u> . To try to restrict a broad factual inquiry under Silva-Trevino, plead to specific innocuous facts.
Penal §273a(a), (b)	Child injury, endangerment	Divisible as a COV: infliction of physical pain may involve use of force but other actions, including placing a child where health is endangered, do not. A COV with 1-yr sentence imposed is an AF.	Divisible: inflicting pain is CMT, but unreasonably risking child's health under (b) is not. See disc. in P v. Sanders (1992) 10 Cal.App.4th 1268 (as state CMT case, not controlling but informative).	Divisible as crime of child abuse: Exposing child to non-serious risk under (b) is not crime of child abuse; (a) may be categorical crime of child abuse. Fregozo v. Holder, 576 F.3d 1030, 1037-38 (9th Cir. 2009).	To avoid agg felony, avoid 1-yr sentence, and/or indicate in ROC that only negligence or recklessness used, or at least leave open the possibility. To avoid CMT indicate in ROC of (b) that it was merely unreasonable action; see Note "Record of Conviction." If this arose from traffic situation (lack of seatbelts, child unattended etc.), defendant can plead to unreasonable behavior under (b) or seek alternatively plead to traffic etc. offense without element involving minors and take counseling and other requirements as a condition of probation, without the offense acquiring immigration consequences. See Note: DV/Child Abuse
Penal §273d	Child, Corporal Punishment	Yes AF as COV if 1-yr sentence imposed	Yes CMT	Deportable under DV ground for child abuse	To avoid agg felony, avoid 1-yr sentence on any single count; see Note "Sentence."
Penal §273.5	Spousal Injury	Yes, AF as a COV if 1-yr or more sentence imposed	Assume it is CMT, unless can plead specifically to de minimus touching where the victim and defendant had an attenuated relationship.	Deportable under DV ground regardless of sentence.	To avoid AF avoid 1-yr sentence imposed. To avoid AF and DV plead to non-COV such as PC 243(e), 236, 136.1(b)(1); can accept batterer's program probation conditions on these. See 243(e)(1) and "Note: Domestic Violence." These also may avoid CMT; it is possible that PC 243(d) will do the same. Further, Morales-Garcia, 567 F.3d 1058 (9th Cir) held 273.5 not automatic CMT because relationship can be attenuated and touching only battery, but unless you plead specifically to this, under Silva-Trevino imm judge may conduct factual inquiry for CMT purposes.

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Penal §273.6	Violation of protective order	Not AF	Unclear	273.6 "pursuant to" Calif. Family Code §§ 6320 and 6389 is deportable as a violation of DV protection order.	See instructions in Note: Domestic Violence and ways to deal with the record for 273.6 conviction. Plead to new offense that is not DV (e.g., 243(e) with good ROC) instead of pleading to 273.6, or possibly 166(a) with a vague ROC;
Penal §281	Bigamy	Not AF	Yes CMT	No	Case law added element of guilty knowledge so it is a CMT
Penal §§ 286(b), 288a, 289	Sexual conduct with a minor	See Advice. Some behavior never is AF, some depends on ROC	CMT under Matter of Silva-Trevino, only if IJ finds D knew or should have known V was under-age	Will be charged as crime of child abuse; imm counsel has defenses	<u>Agg Felony.</u> 286(b)(1), 288a(b)(1), and 289(h) (consensual conduct with D under age 18) have same consequences as 261.5(c): they are never AF as sexual abuse of a minor. In contrast 286(b)(2), 288a(b)(2), 289(i) are same as 261.5(d): can be AF if ROC shows that V was "younger" child (probably under 15, perhaps under 14) or that harm occurred. Test for <u>crime of child abuse</u> is harm; ID V as older teen/child in the ROC where possible, do not ID age if younger V. See Advice column for 288(a) for other possible pleas.
Penal §288(a)	Lewd act with child	Yes AF as sexual abuse of a minor, regardless of sentence.	Yes CMT	Deportable under the DV ground for child abuse	This is an automatic AF, no physical contact is required. Consider PC 243.4 with less than 1-yr, 314, 136.1(b) (a strike), felony 236 by deceit or fraud, all without age of victim in ROC if that is possible (to avoid child abuse charge and further CMT problems), 647.6(a) with clear record of conviction. See 286, 288a, 289 offenses without further defining age of the V in the ROC. See Notes "Sex Offenses" and "Safer Pleas."
Penal §290	Failure to register as a sex offender	Not AF	Will be charged as CMT, see Advice	Can be charged with a new federal offense, 18 USC 2250, for failing to register as required under state law; will become deportable if convicted under 2250.	Avoid the plea if possible. New deport ground, at 8 USC §1227(a)(2)(A)(v), is based on conviction under 18 USC §2250 for failure to register as a sex offender under state law. See Defending Immigrants in the Ninth Circuit, Chapter 6, § 6.22. Re CMT: there is a conflict between the Ninth Circuit (not CMT) and BIA (CMT) published opinions, but Ninth has said in general it will defer on CMT issues to published BIA decisions, so it might reverse itself in future.

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Penal §314(1)	Indecent exposure	Not AF, even if V is a minor, because this is age-neutral offense -- but to avoid confusion, keep age of a minor victim out of ROC).	See Advice; conservatively assume it is CMT.	Keep any reference to minor V out of ROC to avoid charge of child abuse	Ninth Circuit held this is not categorically CMT; see Ocegueda-Nunez v. Holder (9th Cir. 2/10/2010) but there still is risk of expanded Silva-Trevino inquiry into CMT. See disturb peace, trespass, loiter. If the victim was a minor, keep evidence of age out of the ROC or ICE will charge it as a crime of child abuse. Despite exposure to CMT (or if minor's age is in ROC, to a DV charge), this is useful to avoid agg felony offenses such as 288(a).
Penal §403	Disturbance of public assembly	Not AF.	Not CMT.	No.	
Penal §415	Disturbing the peace	Not AF.	Probably not CMT	No.	
Penal § 416	Failure to disperse	Not AF	Not CMT	No.	
Penal §422	Criminal threats (formerly terrorist threats)	Yes AF as COV if 1-yr sentence imposed. Rosales-Rosales, 347 F.3d 714 (9th Cir. 2003)	Yes CMT	As COV, is a deportable domestic violence offense if ROC shows committed against DV type victim	Avoid AF by avoiding 1-yr sentence. See Note "Sentence." To avoid COV see PC 243(e), 236 or 136.1(b)(1), or 241(a) with no info regarding violence. See Note "Safer Pleas." See Note: DV for possible expanded rules on what evidence gov't can use to prove domestic relationship for deportable DV offense.
Penal § 451, 452	Arson, Burning	Divisible: This is a COV unless ROC indicates, or leaves open, that D only burned own property. COV is AF if 1-yr or more sentence imposed	Yes CMT	Gov't might charge as DV, if ROC shows person hurt;	Avoid AF by avoiding 1-yr sentence; see Note "Sentence." See vandalism. May avoid COV if ROC leaves open possibility that only own property intended and affected. See Jordison, 501 F.3d 1134 (9th Cir. 2007)(452(c) not COV). If own property burned for insurance fraud, don't show \$10,000 loss to insurance co. See Note: Fraud.

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Penal §459, 460	Burglary	Avoid AF by avoiding sentence of 1 yr or more. Otherwise see Advice.	Divisible; see Advice.	Where felony burglary is a COV (if it is of a dwelling or its yard) and there is DV type victim, likely charged as DV offense.	<u>Agg Felony</u> : If sentence is less than 1 yr, it is not an AF. If sentence of 1 yr or more is imposed, see detailed instructions for pleading to 460(b) at Note: Burglary. <u>Re CMT</u> : Unlawful entry into a dwelling is a CMT, entry with intent to commit a CMT is a CMT; at least plead to a vague offense ("larceny or any felony"), and if possible, to avoid expanded inquiry under Silva-Trevino, plead specifically to non-CMT (see Chart for non-CMT's that may fit fact situation).
Penal § 466	Poss burglary tools with intent to enter, altering keys, making or repairing instrument	Not AF.	Probably not CMT, unless ROC shows intent to commit CMT (felonious entry alone is not CMT) Altering, repairing instruments are not CMT, but see Advice	No.	Because Silva-Trevino permits wide range of evidence on CMT, best course is to plead specifically to something other than CMT (e.g., repairing instruments), which may cut off the inquiry.
Penal §470	Forgery	Yes AF if 1-yr sentence imposed. If this also constitutes fraud, may be AF if \$10,000 loss to victim	Yes CMT.	No.	Avoid AF by avoiding 1-yr sentence; see Note: Sentence. See P.C. 529(3) and Note "Safer Pleas." If \$10,000 loss to victim of fraud, see advice for PC 476(a).
Penal §476(a)	Bad check with intent to defraud	Yes if loss to the victim/s was \$10,000 or more; if offense also is forgery, AF if 1-yr sentence imposed.	Yes CMT	No	If there was \$10k loss to the victim/s, but sentence can be 364 or less for any single count, plead to theft to avoid an AF. Supreme Court has expanded evidence gov't permitted to use to prove \$10k loss; be sure to read Note "Burglary, Theft and Fraud." See PC 529(c) to possibly avoid a CMT. Avoid 1-yr sentence to avoid possible AF as forgery.

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Penal §484 et seq., §487	Theft (petty or grand)	Divisible: Theft w/ 1 yr sentence is AF, but theft of labor is not "theft" for AF purposes. See Advice re theft by fraud or deceit.	Yes CMT.	No	See Notes "Theft, Fraud" and "CMT." <u>To avoid Agg Felony as "theft,"</u> avoid 1-yr sent; see Note "Sentence." If 1-yr or more imposed, identify theft of services rather than property in the ROC, or leave vague between property and services. <u>To avoid Agg Felony as "fraud":</u> If loss to victim/s exceeded \$10,000, a plea to theft by fraud, embezzlement, etc. is an agg felony. Gov't can use wide range of evidence to prove \$10k loss. Avoid the problem by ID'ing straight theft (or if that is not possible, leaving ROC vague) and avoiding 1 yr sentence on any one count. <u>Re CMT:</u> To avoid CMT, and if 1-yr sentence not imposed, consider plea to PC 496(a) specifically with intent to temporarily deprive. If you must plead to 484, which is a CMT: to qualify for petty offense exception to inadmissibility grd, reduce felony to misdo and/or plead petty theft. To avoid deportability plead petty theft or <i>attempted</i> misd grand theft to keep maximum possible sentence under 1 yr. Petty with a prior is an AF if 1 yr sentence imposed.
Penal §490.1	Petty theft (infraction)	Not AF.	Yes CMT, but might be held not to be a "conviction."	No.	There is a good argument, but no guarantee, that a Calif. infraction is not a "conviction" at all for imm purposes. See Note: Def of Conviction. Since there's no guarantee, this is a better plea than theft, but avoid if necessary to not have CMT.
Penal §496	Receiving stolen property	Yes AF if 1-yr sentence imposed	Divisible: plead to intent to temporarily deprive to avoid CMT, see Advice	No	<u>To avoid AF</u> avoid 1-yr sentence; see Note "Sentence." If will receive 1-yr sentence, consider plea to PC 484 and plead to, or leave ROC open to, theft of services. See Note: Theft. <u>Re CMT:</u> PC 496(a) is not CMT if with only temporary intent to deprive owner. Castillo-Cruz 581 F.3d 1154 (9th Cir. 2009). Plead to that specifically to try to forestall Silva Trevino factual inquiry on CMT. See Note: CMT

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Penal Code §529(3)	False personation	Can take 1 yr sentence with good ROC, but do not use if loss to victim/s exceeds \$10,000. See Advice	See Advice.	No	<u>Agg Felony</u> . Not categorical forgery, counterfeit, so can take 1 yr sentence if ROC does not show these. However, if there is a loss to the victim/s exceeding \$10,000, assume it will be AF as a fraud/deceit offense; plead to PC 484 straight theft instead. <u>CMT</u> . While under categorical approach this shd avoid CMT with a clear ROC, under Silva-Trevino imm judge may conduct broad inquiry into facts for CMT purposes; try to forestall this with a very specific plea, but this may not work. See Note: Safer Pleas and P. v. Rathert (2000) 24 Cal.4th 200.
Penal §550(a)	Insurance fraud	Yes AF if offense involves fraud where victim lost \$10,000 or more; or AF if forgery and 1-yr sentence imposed.	Yes CMT because fraudulent intent.	No.	See Note "Burglary, Theft, Fraud." If \$10k loss, try to plead to grand theft with a sentence less than a year. See PC 529(3) to possibly avoid CMT. If forgery involved, avoid 1-yr sentence to avoid charge of AF as forgery.
Penal §594	Vandalism	Possible AF as COV if violence employed and 1 yr sentence imposed.	Not CMT, except perhaps in case of severe costly damage.	If COV, possible DV if property belonged to DV type victim, but imm counsel will argue this applies only to COV against persons not property.	Relatively minor cases should not be held COV and therefore not have consequences. See e.g. Rodriguez-Herrera, 52 F3d 238 (9th Cir. 1995) (Wash. statute not CMT) and US v Landeros-Gonzalez, 262 F.3d 424 (5th Cir 2001) (graffiti not COV). Avoid 1-yr sentence; see Note "Sentence."
Penal §602	Trespass misd (property damage, unlawful presence, etc.)	Not AF (even if COV, 1-yr sentence not possible)	Perhaps divisible. See Advice.	See PC 594	Keep ROC of conviction clear to avoid possible CMT. See PC 602.5. Some malicious destruction of prop offenses might be CMT; see cases in Advice to PC 594.
Penal §602.5	Trespass (unauthorized entry)	Not AF.	Not CMT.	No.	

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Penal §646.9	Stalking	Avoid AF by avoiding 1 yr sentence. Divisible as COV because harassing from a long distance, recklessness, not COV. See Malta, Advice Column.	May be divisible	Deportable under the DV ground as "stalking" even if it is not a COV. Note that a court finding of violation of protective order also is DV deportable even absent conviction; see Note "DV"	Avoid AF by avoiding 1-yr sentence. If that's not possible, indicate, or leave open, in the ROC that offense involved harassment from a long distance, or reckless act. Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th 2007). For alternate plea to avoid CMT and DV deportation ground for stalking, see PC 243(e), 243(a), 236, 136.1(b)(1), 241(a) with no info regarding violence. See Notes "Safer Pleas."
Penal §647(a)	Disorderly: lewd or dissolute conduct in public	Not AF, but to avoid possible wrongful charge as sexual abuse of minor don't let ROC show involvement with minor	Held CMT, although imm counsel will argue against. See Advice. Avoid ROC showing homosexual actions.	No, unless possibly if a minor is involved and it is construed as child abuse.	Keep ROC of conviction clear of info that person under 18 was participant or observer. See "Note Record of Conviction." See 647(c), (e), (h). For CMT, older decisions based on anti-gay bias shd be discredited. However, Nunez-Garcia, 262 F. Supp. 2d 1073 (CD Cal 2003) affirmed these cases w/out comment, so may be held CMT. See 314.
Penal §647(b)	Disorderly: Prostitution	Not AF.	Yes CMT for a prostitute. DHS might also charge customer as CMT; no case on point yet.	Yes, prostitution inadmissibility ground (based on conduct), see Advice.	"Engaging in prostitution" is inadmissibility ground; requires sexual intercourse, not lewd conduct, for money; does not require conviction but conviction can serve as evidence. Customer not at risk under prostitution ground, but BIA has put off deciding if customer is CMT. See 647(c), (e) and (h). See Note: Sex Offenses
Penal §647(c), (e), (h)	Disorderly: Begging, loitering	Not AF.	Not CMT.	No.	
Penal §647(f)	Disorderly: Under the influence of drugs or alcohol	Not AF.	Not CMT.	May be deportable and inadmissible for CS offense; see Advice	Best plea is to alcohol, or if necessary "alcohol or CS." If these are not possible, plead to a non-controlled substance; in any case do not plead to a specific CS.
Penal §647(i)	Disorderly: "Peeping Tom"	Not AF.	See Advice.	Might be charged as child abuse if V is minor; keep age out of ROC	This should not be held a CMT because the offense requires no intent to commit a crime; it is completed by peeping. In re Joshua M., 91 Cal. App. 4th 743 (Cal. App. 4th Dist. 2001). However, under Matter of Silva-Trevino imm judge might make broad inquiry to see if any lewd intent for CMT purposes.

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Penal §647.6(a)	Annoy, molest child	Divisible, with less serious acts not AF as 'sexual abuse of a minor.' US v Pallaes-Galan, 359 F.3d 1088 (9th 2004).	Divisible, see Advice.	Some actions might not constitute child abuse. ID most minor action, or keep record vague.	<u>Re CMT.</u> This should be divisible, especially if ROC specifically ID's non-egregious behavior and intent, but might be charged as CMT. Under Silva-Trevino broad factual inquiry might focus on whether D knew or shd have known V was under-age. <u>Agg fel:</u> Plead specifically to non-egregious (not explicitly sexual) behavior or at least leave ROC vague. Best option: Plead to offense that doesn't combine age and sex like 243(a) with minimal touching, 236, etc. See further discussion and plea suggestions in Notes: Sex Offenses and Safer Pleas.
Penal 653f	Solicitation to commit variety of offenses	Divisible: 653f(a) and (c) are AF as COV's if one-year sentence is imposed; but 653f(d) is not drug trafficking AF	Soliciting violence is a CMT; soliciting possession of drugs pursuant to 653f(d) is not to the extent D is buyer, not seller.	653f(a) and (c) are COV's, and therefore DV if V is DV. 653f(d) is not a deportable conviction "relating to" a CS	653f(a) and (c) are COV, per Prakash v. Holder, 579 F.3d 1033 (9th Cir. 2009). But 653f(d), soliciting possession per commission of H&S C 11352, 11379, 11379.5, 11379.6, or 11391, a 6 month misdo, is valuable: it is not an agg felony, and unlike solicitation pursuant to 11353, etc., it does not cause deportability as a drug offense. Mielewczyk v. Holder, 575 F.3d 992, 998 (9th Cir. 2009).
Penal §666	Petty theft with a prior	AF as theft if sentence of 1-yr or more, unless ROC shows theft of labor or is vague; see Advice.	Yes CMT.	No.	<u>Re 1-yr sentence.</u> Prior beneficial Ninth Circuit case was overruled, and recidivist penalty counts as 1-yr sentence. <u>Re agg felony as theft.</u> Theft of property is theft, theft of labor is not. See 484 and Note: Theft. <u>Re: CMT:</u> Receipt stolen property is divisible for CMT (but an agg felony w/ 1 yr imposed); see PC 496(a).
Penal §§1320(a)	Failure to appear for misdemeanor	This is obstruction of justice, but requires 1 yr sentence to be AF	Shd not be CMT, but unclear.	No	While this appears to constitute obstruction of justice (see Renteria-Morales v. Mukasey, 2008 U.S. App. LEXIS 27382 (9th Cir. Dec. 12, 2008)), replacing 551 F.3d 1076 (9th Cir. 2008)), it requires a one-year sentence imposed. 8 USC 1101(a)(43)(S). Might be held CMT on obstruction theory.

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 ROC = Record of Conviction

CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE-- These findings are questionable	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE AND COMMENTS
Penal §§1320(b), 1320.5	Failure to appear for felony	Divisible. With a 1-yr sentence imposed, this is AF as obstruction of justice. Without 1-yr sentence it's divisible, see Advice.	Shd not be CMT, but unclear.	No.	1320(b), 1320.5 is an agg felony as obstruction of justice, if a sentence of 1 yr or more is imposed. See Renteria-Morales, supra. Even without a 1 yr sentence, 1320(b) and 1320.5 are divisible as the agg felony "Failure to Appear." Failure to appear to answer a felony charge with a potential 2-year sentence, or to serve a sentence if the offense is punishable by 5 years or more, is an agg felony, regardless of the sentence imposed for the FTA itself. See 8 USC 1101(a)(43)(Q), (T) and Renteria-Morales, supra.
Penal §12020	Possession, manufacture, sale of prohibited weapons; carrying concealed dagger	Divisible: trafficking in firearms or explosives is AF; other offenses are not	Not CMT except maybe illegal trafficking in weapons.	Offenses relating to firearms cause deportability under that grd. Other weapons, e.g. brass knuckles (a)(1), dagger (a)(4), don't.	With careful ROC, this is an alternate plea to avoid deportable or agg felony conviction relating to firearms and destructive devices (explosives). To avoid deportability designate a non-firearms weapon, or at least keep ROC of conviction vague re whether weapon is firearm or other. To avoid agg fel designate an offense that does not involve non-trafficking in firearms, or keep the ROC vague. See Notes "Safer Pleas" and "DV, Firearms"
Penal §12021(a), (b)	Possession of firearm by drug addict or felon	12021(a)(1) appears divisible as AF because includes possession of firearm by a misdemeanor	Probably not CMT.	Deportable under the firearms ground.	See PC 12020, 245(a), 243(d), Note "Safer Pleas."
Penal §§12025(a)(1), 12031(a)(1)	Carrying firearm	Not AF.	Not CMT.	Deportable under the firearms ground.	To avoid deportable for firearms, see PC 12020 and Note "DV, Firearms."
Vehicle §20	False statement to DMV	Not AF	Possibly divisible, with knowingly conceal material fact a CMT	No.	To avoid CMT, keep ROC of conviction vague as to knowing concealment of material fact
Vehicle 14601.1 14601.2	Driving on suspended license with knowledge	Not AF	Not CMT	No	

AF = Aggravated Felony
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CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE-- These findings are questionable	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE AND COMMENTS
Vehicle §2800.1	Flight from peace officer	Not AF	Probably not CMT	No.	
Vehicle §2800.2	Flight from peace officer with wanton disregard for safety	May be divisible for COV. See Advice.	May be divisible: wanton disregard only by prior traffic violations not CMT, other wanton disregard may be CMT.	No.	Re Agg Felony as COV. Intent by 3 prior violations is not categorical COV. 9th Cir held other wanton intent is COV, but this is open to challenge. Avoid AF by doing any of the following: reducing to a misdemeanor; obtaining sentence less than a year; pleading to 2800.1; or having ROC prove or leave open the possibility that intent based on 3 prior traffic violations (Penuliar, 9th Cir 2008).
Vehicle §10801-10803	Operate Chop Shop; Traffic in vehicles with altered VINs,	Divisible as a theft offense and as a vehicle with altered number offense. Avoid 1-yr sentence and will not have AF; see Advice for plea with 1 yr	Yes CMT	No.	An offense relating to trafficking in vehicles with altered VIN's is an AF with a 1 yr sentence, as is an offense relating to theft or receipt of stolen property with 1 yr sentence. 10801 is divisible for theft because cd involve fraud rather than theft, see Carrillo-Jaime, 572 F3d 747 (9th Cir. 2009). 10801 appears divisible for VIN because activity is not limited to VIN. If cannot avoid 1-yr sentence, plead to 10801 leaving open possibility that car obtained by fraud and that altering VIN was not the chop shop activity. 10802, 10803 may not be divisible for VIN; avoid 1 yr sentence. Consider plea to 10851 with vague record re accessory after the fact, or 10852.
Vehicle §10851	Vehicle taking, temporary or permanent	Divisible as AF theft if one-year sentence is imposed, because offense includes accessory after the fact which is not AF. US v Vidal (9th Cir en banc 2007).	Divisible: CMT if permanent intent, not CMT if temporary intent.	No.	To be sure to avoid agg felony, avoid 1-yr sentence. Otherwise indicate or at least leave open the possibility offense was accessory after the fact, but this issue may go to Supreme Court again on Agg Fel question. To avoid CMT, plead to temporary intent; if that is not possible keep ROC vague, but imm judge can make factual inquiry for CMT purposes under Silva-Trevino.
Vehicle §10852	Tampering with a vehicle	Not AF but see Advice.	Appears not CMT.	No.	To avoid possible AF charge, don't let ROC show that tampering involved altering VIN.
Vehicle §12500	Driving without license	Not AF.	Not CMT.	No.	

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CALIFORNIA CODE SECTION	OFFENSE	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE-- These findings are questionable	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE AND COMMENTS
Vehicle §§20001, 20003	Hit and run (felony)	Not AF	Divisible, but see Advice	No.	9th Cir found divisible for CMT b/c can be violated be, e.g., by providing ID info but not registration info. Cerezo, 512 F.3d 1163. Best to plea to that or similar level offense; if instead ROC is kept vague, under Silva-Trevino imm judge might make factual inquiry for CMT purposes. See Note: Safer Pleas.
Vehicle §20002(a)	Hit and run (misd)	Not AF.	Not CMT	No.	See Vehicle 20001
Vehicle §23110(b)	Throw object into traffic	Yes AF as COV if 1-yr sentence imposed	Yes CMT.	No.	Avoid AF by avoiding 1-yr sentence imposed.
Vehicle §23152	Driving under the influence (felony)	Not AF now but CAUTION: Legislation could change. Obtain 364 or less.	Not CMT.	No except multiple convictions can show evidence of alcoholism, a ground of inadmissibility.	See Note: Safe Pleas, DUI
Vehicle §23153	Driving under the influence causing bodily injury	See Vehicle 23152	Not CMT.	See Vehicle 23152	See Vehicle 23152
W & I §10980(c)	Welfare fraud	Yes AF if loss to gov't is \$10,000 or more. Note critical new law; see Advice.	Yes CMT.	No.	See Note "Burglary, Theft, Fraud." Fraud or deceit where loss to the victim/s exceeds \$10,000 is agg felony. Nijhawan (S.Ct. 2009) expands evidence permissible to prove \$10,000. See instructions in Note: Theft, Fraud, Burglary. If possible, plead to offense that does not involve deceit along with this offense, and put loss on the second offense. This offense probably is not theft and therefore OK to take 1 yr sentence, unless offense constituted perjury or counterfeit. To avoid CMT, see possibly PC 529(3).

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

--Table of Contents--

	<i>Page</i>
Introduction: Why Bother? What to Do?	N-5
§ N.1 Using the Chart to Establish Defense Goals	N-9
§ N.2 Definition of Conviction and How to Avoid a Conviction for Immigration Purposes	N-30
§ N.3 Record of Conviction and Divisible Statutes	N-36
§ N.4 Sentence Solutions	N-52
§ N. 5 Immigration Holds and Detention	N-56
§ N.6 Aggravated Felonies	N-60
§ N.7 Crimes Involving Moral Turpitude	N-63
§ N.8 Controlled Substance Offenses	N-70
§ N.9 Domestic Violence, Child Abuse, Stalking	N-86
§ N.10 Sex Offenses	N-102
§ N.11 U.S. Citizens and Permanent Residents Cannot Petition for a Relative if Convicted of Certain Offenses Against a Minor	N-108
§ N.12 Firearms Offenses	N-110
§ N.13 Burglary, Theft and Fraud	N-111
§ N.14 Summary of Safer Pleas; Information for Clients	N-120
§ N.15 Client Immigration Questionnaires: Short and Long Versions	N-145
§ N.16 Handout on Representing Noncitizens in Juvenile Proceedings	N-148
§ N.17 Other Resources: Books, Websites, Services	N-150

Notes Accompanying Quick Reference Chart -Detailed Table of Contents-

By Katherine Brady
Immigrant Legal Resource Center¹

Introduction: Why Bother? What to Do?

- § N.1 Using the Chart to Establish Defense Goals Based on Immigration Status;
What is Deportability, Inadmissibility, and an Aggravated Felony
- A. Introduction, Gathering Facts, Resources
 - B. What is the Meaning of “Inadmissible,” “Deportable” and “Aggravated Felony”?
 - C. How to Determine Your Client’s Immigration Status and Create Defense Priorities
 - 1. The U.S. Citizen or U.S. National Defendant
 - 2. The Undocumented Defendant
 - 3. The Lawful Permanent Resident Defendant
 - 4. The Asylee and Refugee Defendant
 - 5. The Defendant with or Applying for Temporary Protected Status (TPS)
 - 6. The Defendant with a Nonimmigrant Visa
 - 7. The Defendant with Employment Authorization
 - 8. The Mystery Status Defendant
 - 9. The Absolutely Removable Defendant
 - D. Caution: The Immigration “Strike” – How to Avoid a Plea that will result in a Severely Enhanced Sentence for a Noncitizen who May Re-enter the U.S. Illegally After Being Removed/Deported
 - E. Checklist of Ten Steps in Representing a Noncitizen, from Interview Through Appeal
- § N.2 Definition of Conviction and How to Avoid a Conviction for Immigration Purposes
- A. Overview
 - B. Rehabilitative Relief such as Deferred Entry of Judgment, Prop. 36, Expungements; First Minor Drug Offenses and Rehabilitative Relief
 - C. Pre-Plea Dispositions
 - D. Juvenile Delinquency Dispositions
 - E. Guilty Plea Plus Suspended Fine or Other Non-Incarceratory Sanction
 - F. Infractions
 - G. Appeal, Including Slow Plea
 - H. Vacation of Judgment Based on Legal Defect

¹ These Notes were written by ILRC Staff Attorney Katherine Brady, with invaluable help from Ann Benson, Holly Cooper, Chris Gauger, Kara Hartzler, Angie Junck, Dan Kesselbrenner, Graciela Martinez, Michael K. Merhr, Jonathan Moore and Norton Tooby.

- § N.3 Record of Conviction and Divisible Statutes
 - A. Overview: The Categorical and Modified Categorical Analysis
 - B. When Does the Categorical Approach Not Apply to a Conviction? Moral Turpitude and “Circumstance Specific” Offenses
 - C. What Documents Can the Immigration Judge Consult (“Reviewable Record of Conviction”)?
 - D. Charging Papers, Plea Agreements, Minute Orders and Abstracts of Judgment
 - E. Identify a Safer “Factual Basis for the Plea”

- § N.4 Sentence Solutions
 - A. Definition of Sentence, Defense Strategies
 - B. Offenses that Become an Aggravated Felony Based upon a Sentence of One Year or More
 - C. “Sentence Imposed” and the Petty Offense Exception to the Moral Turpitude Inadmissibility Ground

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

- § N.6 Aggravated Felonies
 - A. Definition of Aggravated Felony
 - B. Penalties for Conviction: Barred from Immigration Applications.
 - C. Penalties for Conviction: Federal Offense of Illegal Re-entry
 - D. List of Aggravated Felonies

- § N.7 Crimes Involving Moral Turpitude
 - A. Overview
 - B. Deportation Ground
 - C. Ground of Inadmissibility

- § N.8 Drug Offenses
 - A. Overview of Penalties for Drug Offenses
 - B. Key Defense Strategies: Create a Record that Does Not Specify the Controlled Substance; Plead to Accessory After the Fact
 - C. Simple Possession or Less
 - D. Sale and Other Offenses beyond Possession
 - E. Conduct-Based Grounds: Government has “Reason to Believe” Involvement in Trafficking; Formal Admission of a Drug Trafficking Offense; Drug Abuser/Addict
 - F. Chart for Pleading to a Drug Offense: Ninth Circuit Law and *Lopez-Gonzalez*

- § N.9 Domestic Violence, Child Abuse, Stalking
 - A. Conviction of a Crime of Domestic Violence
 - B. Finding of Violation of a Domestic Violence Protective Order
 - C. Conviction of a Crime of Child Abuse, Neglect or Abandonment
 - D. Conviction for stalking

§ N.10 Sex Offenses

- A. Rape
- B. Sexual Abuse of a Minor
- C. Prostitution

§ N.11 U.S. Citizens and Permanent Residents Cannot Petition for a Relative if Convicted of Certain Offenses against a Minor

§ N.12 Firearms Offenses

- A. The Firearms Deportability Ground
- B. Firearms Offenses as Aggravated Felonies

§ N.13 Burglary, Theft and Fraud

- A. Burglary
- B. Theft
- C. Fraud

§ N.14 Analysis of Safer Alternatives: Alternate Pleas with Less Severe Immigration Consequences; Written Summaries to Provide to the Defendant or Immigration Counsel

- A. All-Purpose Substitute Pleas: Accessory after the Fact, Solicitation, *Not Aiding and Abetting*
- B. Safer Pleas for Violent or Sexual Offenses
- C. Safer Pleas for DUI and Negligence/Recklessness that Risks Injury
- D. Safer Pleas for Offenses Related to Firearms or Explosives
- E. Safer pleas for offenses relating to fraud, theft, receipt of stolen property, or burglary
- F. Safer Pleas for Offenses Related to Drugs
- G. Safer Pleas for Obstruction of Justice (Defenses Relating to P.C. §§ 32 and 136.1(b) with a One-Year Sentence Imposed)
- H. Moral Turpitude and *Matter of Silva-Trevino*: Defense Strategies
- I. Dispositions that Avoid a “Conviction”
- J. Sentence of 364 Days or Less
- K. Is your client a U.S. citizen or national without knowing it?

§ N.15 Handout: Representing Noncitizens in Juvenile Proceedings

§ N.16 Client Immigration Questionnaire: Short and Expanded Versions

§ N.17 Other Resources: Books, Websites, Services

Introduction: Why Bother? What to Do?²

[T]he procession moved on, three of the soldiers remaining behind to execute the unfortunate gardeners, who ran to Alice for protection. 'You shan't be beheaded!' said Alice, and she put them into a large flower-pot that stood near. The three soldiers wandered about for a minute or two, looking for them, and then quietly marched off after the others.

--- *Alice in Wonderland*, Lewis Carroll

The immigration consequences of a criminal conviction can be barbaric, and the procedure would make Alice (or Kafka) feel at home. In the majority of the cases, the one person who can stand between the immigrant and these consequences is you, the criminal defense practitioner.

How bad could it be? Approximately one in six California criminal defendants is a noncitizen.³ Any noncitizen, including a lawful permanent resident (“green card” holder) is vulnerable to “removal” (deportation), if he or she is convicted of the wrong offense.

Once there is an adverse conviction, the immigration system works to force the person to accept removal. If a noncitizen attempts to contest being removed based on a conviction, in most cases she or he will be detained for the duration of the removal proceedings including through federal appeals -- from several months to a few years. Typically the person will be transferred to an isolated immigration detention facility hundreds of miles from the person’s home (from California, often to Arizona or outside the Ninth Circuit).⁴ Documented conditions at these facilities include insufficient food, exposure to extreme heat or cold, and lack of medical attention in some cases leading to preventable fatalities. The removal case may be conducted by video before a judge in another city or state, often using incompetent translators. The effect is to coerce many detainees to abandon valid legal appeals and request their own deportation.

Unfortunately, this is the good scenario. In “administrative removal proceedings,” any noncitizen who is not a lawful permanent resident and who is charged with having been convicted of an aggravated felony will be ordered removed in a proceeding that has less due

² Some of this introduction draws from the writings of Jonathan Moore of the Washington Defender Association, a tireless and poetic advocate.

³ This is an approximation. The 2000 and 2005 census reports estimate that one in four persons residing in California is foreign-born. See, e.g., See “Profile of the Foreign-Born Population of the United States, 2000,” from the U.S. Census Bureau’s reports. www.census.gov. Up to one third of these may have become U.S. citizens, which leaves approximately one in six residents as noncitizens. The non-citizen population is proportionally represented as criminal defendants. See Rumbaugh and Ewing, “The Myth of Immigrant Criminality,” <http://www.americanimmigrationcouncil.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>.

⁴ In 2009 over 50% of detainees were transferred to a new facility, over 25% were transferred multiple times. For more statistics on immigration detention go to <http://www.hrw.org/en/node/86789> and <http://trac.syr.edu/immigration/reports/220/>.

process than traffic court. The complex legal decision on the aggravated felony charge is made by a non-attorney immigration officer, signed off on by a second officer, with no recourse to review by an immigration judge or other authority. At this time the *majority* of noncitizens who are formally deported as aggravated felons never see a judge.⁵

In both types of removal proceedings there is *no court-appointed counsel to assist the immigrant*. The vast majority of noncitizens in removal proceedings are unrepresented and face the government trial attorney and Immigration Judge (or in administrative proceedings, the government officer as judge) with no advice or support.

What is so bad about being “removed”? For some defendants, not so much. They care much more about the possible criminal penalties than immigration consequences, and the defense should be conducted accordingly. However, many other immigrant defendants are desperate to remain in the U.S. and would sacrifice almost any other consideration to avoid removal. Consider that:

- Noncitizens are deeply integrated into the families and population of the United States, and California in particular. For example, the 2000 census found that *47% of the children residing in California live in a household headed by at least one foreign-born person*.⁶ A 2006 study found that on average, over 50% of noncitizens charged with being deportable for a so-called aggravated felony conviction (which can include a single non-violent misdemeanor) have resided in the United States for more than fifteen years. Twenty-five percent of these noncitizens have resided here for more than twenty years.⁷
- Regardless of family, some clients desperately want to avoid being deported back to countries where it is likely that they will be persecuted based on race, religion, or social group. Others fear returning to countries where there is generalized violence, civil war, or little or no functioning government. A great number face return to countries where there is economic devastation, and/or where they know no one and in many cases do not speak the language.
- Why should they care, when they’ll just come right back? Whether they know it or not, many deported noncitizens will face significant U.S. prison terms. Some noncitizens,

⁵ See study by the Immigration Project at the Transactional Access Records Clearinghouse (TRAC) report showing that the majority of noncitizens charged and removed as aggravated felons have no court hearing whatsoever, pursuant to a decision of an immigration officer. See “New Data on the Processing of So-Called Aggravated Felons” (2006), available at <http://trac.syr.edu/immigration/reports/175/>. In 2005, over 25,000 persons were ordered removed as aggravated felons, over half of them with no hearing before a judge or appellate review. The aggravated felony ground is only one of several crimes-based grounds for deportation, and it is the only charge under which a noncitizen may be ordered removed by an officer rather than a judge.

⁶ See “Profile of the Foreign-Born Population of the United States, 2000,” from the U.S. Census Bureau’s reports, www.census.gov.

⁷ See “How Often is the Aggravated Felony Statute Used?” (2006), a study by the TRAC Immigration Project, of how many persons were ordered removed by immigration judges, available at <http://trac.syr.edu/immigration/reports/158/>. The aggravated felony ground is only one of several crimes-based grounds for deportation.

especially those with close family in the U.S., will attempt to re-enter the U.S. illegally after removal. Illegal re-entry is a federal offense that carries severe sentence enhancements if the person had certain prior convictions. *Illegal re-entry following removal is the leading federal criminal charge brought today, comprising roughly 30% of all new federal charges brought nationally.*⁸ See important information at § N.1, Part D: Avoiding an Immigration “Strike.”

I don’t have time, there’s nothing to be done, and how would I know what to do? Just correctly analyzing the immigration consequences and defense goals in a case can be a daunting task to hand to already overworked criminal defense counsel. It isn’t fair, and it isn’t always workable. However, it is the reality. You are the one conducting the all-important criminal case. Further, because no representation is provided in immigration proceedings, you may be the last chance the non-citizen has to be represented, or to ever talk to a lawyer.

You can make life-saving changes. *A criminal practitioner who can get a basic grasp on the immigration situation, obtain a disposition that lessens or avoids the potential immigration consequences, and communicate this in writing or orally to the defendant or to immigration counsel, can make all the difference in the world.* In some cases, you will prevent the client from spending months or years in immigration jails, and you will prevent deportation and permit the client to remain with family. You will make an incalculable difference in the life of the client and her family, often an impact greater than by competent handling of the criminal penalty.

Fortunately there are a growing number of materials and consulting experts who are ready to help you to accurately advise clients and advocate for a disposition that includes immigration concerns. In the Ninth Circuit at least, there also is some very good case law to guide your choices. The purpose of the Chart and accompanying Notes is to make the task of analysis and advocacy easier, and help you to take advantage of good law. Further, you can obtain individual consultation from immigration experts, additional and more in-depth materials, access to list serves, and training. See § N. 17: Resources.

In many cases it is possible to identify a plea -- to a felony or misdemeanor offense -- that is roughly equivalent to the one charged but is safer for immigration purposes. This sort of plea may permit the person to prove she should not be in removal proceedings at all, or to avoid mandatory immigration detention, or to preserve eligibility for lawful status or some relief from removal. Alternate pleas are detailed in the Chart and accompanying “Notes” (short articles on various topics). Just a few examples of the many successful immigration plea strategies are:

- ✓ Some offenses become aggravated felonies only if a sentence of a year or more is imposed.
 - Where defense counsel negotiated a sentence of 364 days rather than 365, the conviction for a crime of violence was not of an “aggravated felony.”
 - Where defense counsel declined to accept a 16-month sentence with credit for six months time served, and instead bargained for a sentence of 11 months with no credit for time

⁸ See, e.g., statistics at <http://trac.syr.edu/tracreports/bulletins/overall/monthlynov09/fil/>.

served, the conviction for theft had less than a year's sentence and was not of an "aggravated felony."

- Where defense counsel handling a probation violation pled to a new offense, rather than adding time to the original offense that would cause the sentence to exceed 364 days, the residential burglary conviction was not of an aggravated felony. See additional strategies at § N.4 Sentence Solutions.
- ✓ Where defense counsel negotiated a plea to possession for sale of a "controlled substance" rather than of methamphetamine, the conviction did not cause deportability and was not an aggravated felony as a drug trafficking offense. See § N.8 Controlled Substances.
- ✓ Where defense counsel pled to transportation rather than sale of heroin under H&S § 11379(a), the conviction was not of an aggravated felony. See § N.8 Controlled Substances.
- ✓ Where counsel pled to P.C. § 243(e) (spousal battery) and kept the conviction record clear of evidence that more than offensive touching had occurred, the offense did not cause deportability as a crime of domestic violence – but the defendant still was able to accept anger management class, a stay-away order and jail as a condition of probation. See § N.9 Domestic Violence.

Of Particular Note: Practice Tools in these Materials. Along with detailed instructions for pleas, these materials contain some new user-friendly sections.

§ N.1 contains:

- Defense goals spelled out according to immigration status (Part C)
- How to Avoid an Immigration "Strike" – a conviction that will cause an enhanced sentence for illegal re-entry after removal with a prior (Part D)
- Ten Crucial Steps to Defending a Noncitizen: From Interview through Appeal (Part E)

§ N.2 contains a discussion of the critical defense tool, the categorical and modified categorical approach, i.e. dealing with the reviewable record of conviction and divisible statutes.

§ N.7 contains a discussion of how to deal with the fact that currently immigration authorities do not use the full categorical approach to determine whether an offense is a crime involving moral turpitude, under *Matter of Silva-Trevino*.

§ N. 14 contains:

- A summary of ideas for alternate pleas, arranged by charge (e.g., violent offenses)
- One-paragraph summaries of common immigration defenses, with citations, which counsel can give to noncitizen defendants who will go to removal proceedings; these summaries may be simply handed to the immigration judge by unrepresented persons.

§ N.1 Using the Chart to Establish Defense Goals Based on Immigration Status; What are Deportability, Inadmissibility, and an Aggravated Felony; The Immigration “Strike”; and the Ten-Step Checklist

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

By Katherine Brady, Ann Benson and Jonathan Moore⁹

- A. Introduction: Gathering Facts and Resources
- B. What is the Meaning of “Inadmissible,” “Deportable” and “Aggravated Felony”?
- C. How to Determine Your Client’s Immigration Status and Create Defense Priorities
 - 1. The U.S. Citizen or U.S. National Defendant (and what convictions can hurt them for immigration purposes)
 - 2. The Undocumented Defendant
 - 3. The Lawful Permanent Resident Defendant
 - 4. The Asylee and Refugee Defendant
 - 5. The Defendant with or Applying for Temporary Protected Status (TPS)
 - 6. The Defendant with a Nonimmigrant Visa
 - 7. The Defendant with Employment Authorization
 - 8. The Mystery Status Defendant
 - 9. The Absolutely Removable Defendant
- D. Caution: The Immigration “Strike” – How to Avoid a Plea that will result in a Severely Enhanced Sentence for a Noncitizen who May Re-enter the U.S. Illegally After Being Removed/Deported
- E. Checklist of Ten Steps in Representing a Non-citizen, from Interview through Appeal

A. Introduction; Gathering Facts, Using Resources

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

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

⁹ This Note has been re-organized and rewritten to provide more specific advice to defenders. Parts of the Note borrow liberally from the public defender manual *Immigration and Washington State Criminal Law*, found at www.defensenet.org. We are grateful to Ann Benson, Jonathan Moore and the Washington Defender Association Immigration Project for their kind permission to use the materials.

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

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

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

Expert Assistance. To complete the analysis, ideally defense counsel should look at more comprehensive works and/or consult with an expert on crimes and immigration. See § N.17 "Resources." See especially consultation services offered by the Immigrant Legal Resource Center (on a contract basis), the U.C. Davis Law School Immigration Clinic (limited free consultation for public defenders), special free consultation for Los Angeles Public Defenders, and the National Immigration Project of the National Lawyers Guild. A comprehensive manual on this subject, *Defending Immigrants in the Ninth Circuit*, is published by the group that writes this Chart and Notes. It contains extensive discussion of California offenses, immigration status and applications for relief, and other topics. See www.ilrc.org.

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

1. Overview

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

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

Conviction of a deportable offense poses a threat to lawful permanent residents and others who have *secure status that they might lose*. In contrast, a deportable conviction usually does not affect an undocumented immigrant, who does not have lawful status that can be taken away. The only exception is if the undocumented person might apply for some type of cancellation of removal.

- **Grounds of inadmissibility**, at 8 USC § 1182(a). A noncitizen who is **inadmissible** for crimes may be unable to obtain lawful status such as permanent residency; may be barred

from admission into the United States if outside the country; and may be barred from applying for some waivers as a defense to being removed. The crimes-based grounds of inadmissibility also are incorporated as a bar to establishing “good moral character” under 8 USC § 1101(f), which is a requirement for other relief, such as naturalization to U.S. citizenship and relief for abused spouses and children under VAWA.

Undocumented immigrants and others applying for some relief need to avoid becoming inadmissible. In addition, some permanent residents who are deportable will “re-immigrate” through a new family visa petition as a defense to removal, and they too will need to avoid being inadmissible. Permanent residents who travel outside the U.S. must not be inadmissible.

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

These three categories comprise the most common, but not all, of the adverse immigration consequences that flow from convictions.¹⁰ In particular, see Part C Asylee and Refugee Status, and Temporary Protected Status.

2. Offenses Listed in the Grounds of Inadmissibility and Deportability

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

¹⁰ Other consequences beyond being deportable, inadmissible or an aggravated felon can adversely affect persons applying for asylum (if convicted of a “particularly serious crime”), temporary protected status (if convicted of two misdemeanors or a felony), or a few other types of immigration status. See discussion in Chapter 11, *supra*.

Grounds of Deportability Based on Crimes, 8 USC § 1227(a)(2) (Conviction or conduct must be after admission to U.S.)	Grounds of Inadmissibility Based on Crimes, 8 USC § 1182(a)(2) (Offenses committed anytime)
Conviction of crime of domestic violence, child abuse, or stalking; judicial finding of a violation of DV protection order; all after 9/30/96	No per se domestic violence, child abuse, or stalking grounds (But check to see if the offense also constitutes a crime involving moral turpitude (“CMT”), which can cause inadmissibility)
Firearms offense	No per se firearms ground (Unless the offense is also a CMT)
Conviction/s of a crime involving moral turpitude (CMT): --Two convictions after admission, unless they were part of a single scheme; or --One conviction with maximum sentence of at least 1 yr, committed within 5 years of admission	One conviction of a crime involving moral turpitude (CMT), but <i>not</i> inadmissible if it comes within --Petty Offense Exception (first CMT ever committed, has a maximum possible sentence of one year or less, sentence imposed was 6 months or less) or the --Youthful Offender Exception (convicted as an adult of only one CMT, committed while under 18, conviction or resulting imprisonment occurred at least five years ago)
None	Formally admit committing a CMT, even with no conviction
Conviction of offense relating to a controlled substance, with automatic exception for single conviction 30 gms marijuana	Conviction of offense relating to a controlled substance, with possible discretionary waiver in certain cases for single conviction 30 gms marijuana, under INA § 212(h) (but do <i>not</i> rely on the client winning this waiver)
None	Formally admit committing a controlled substance offense, even with no conviction
Drug addict or abuser at any time after admission	Current drug addict or abuser (see § 1182(a)(1))
None	Government has “reason to believe” person was or helped a trafficker; conviction not required
None	5 yr aggregate sentence for two or more convictions of any type
Conviction for running non-USC prostitution business	Engaging in prostitution (conviction not required)
Convicted of an aggravated felony	No per se aggravated felony bar (but many AF offenses also are a CMT, drug offense, or other inadmissibility category)

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

There are different rules for when a moral turpitude conviction makes a noncitizen deportable or inadmissible. Check the person's entire criminal record against the formulae discussed above and in § N.7, and discussed in greater detail at *Defending Immigrants in the Ninth Circuit*, Chapter 4.

Key "conduct-based" grounds make a noncitizen inadmissible, but not deportable. These include engaging in a pattern and practice of **prostitution**, and where the government has **"reason to believe"** (but no conviction) that the person aided in drug trafficking.

There is no inadmissibility ground based on conviction of a domestic violence, child abuse, or firearms offense, *per se*. If a defendant's primary goal is to avoid *deportability*, she must avoid conviction even for minor offenses that come within these grounds, such as possession of an unregistered firearm. In contrast, if a defendant only needs to avoid *inadmissibility*, an unregistered firearm conviction is not harmful.

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

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

Conviction of an aggravated felony is not a *per se* ground of inadmissibility. In limited situations, and where the conviction also does not come within the controlled substance or perhaps moral turpitude grounds, this can aid a defendant who is eligible to immigrate through a relative. See Chapter 9, § 9.2, *Defending Immigrants in the Ninth Circuit*.

3. Aggravated Felonies

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

felonies or aggravated offenses. *A few examples* of commonly charged aggravated felonies include:

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

Conviction of an aggravated felony has three major immigration consequences. First, it is a deportable offense. Second, it is a bar to most forms of relief from removal. If a person is “merely” deportable, she might be able to apply for some waiver or application despite being deportable. If a person is convicted of an aggravated felony, almost all forms of relief are barred, including asylum and the waiver for long-time permanent residents, cancellation of removal.

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

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

The term “immigration status” refers to a person’s classification under United States immigration laws. To determine defense goals for a noncitizen, you must find out, if possible, the client's immigration status. This section explains the possible classifications of immigration status under U.S. immigration law, and discusses defense priorities based on the classification.

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

For in-depth information about any of these categories, see resources such as Chapter 11, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org).

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

a. Who is a U.S. Citizen?

Citizenship by Birth in the United States or Other Areas. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam and U.S. Virgin Islands, as well as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens.

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

Most crimes that trigger the *inadmissibility grounds* also statutorily bar the person from establishing good moral character. This is not so dangerous: the noncitizen simply must wait for the, e.g., three or five years to pass since the conviction before filing the naturalization application, and take care not to travel outside the U.S. until she is a citizen. It is far more damaging for a noncitizen who is *deportable* for a crime to apply for naturalization. It is likely that the naturalization application will be denied and the person quickly will be referred to removal/deportation proceedings. For further discussion of naturalization, see books such as *Defending Immigrants in the Ninth Circuit*, Chapter 11 or *Naturalization: A Guide for Advocates* (www.ilrc.org).

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

There are two threshold questions. If the answer to either question is yes, more research needs to be done to determine whether the person actually is a U.S. citizen, based on date of birth and other factors. A non-profit agency or immigration lawyer may be able to help you. The questions are:

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

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

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

A prior version of this provision¹¹ required *both* parents to become U.S. citizens, or proof that the child was in the legal custody of the citizen parent if there had been divorce or separation. The beneficial new version of the law became effective on February 27, 2000. The courts have determined that it is not retroactive and that the person must have been under 18 on the effective date to benefit from the new provisions of 8 USC 1431.¹²

The best, most efficient way to obtain proof of acquired citizenship is to apply for a U.S. passport. See http://travel.state.gov/passport/passport_1738.html for an application and information on how to do this.

b. Who is a U.S. National?

Persons born in an outlying possession of the United States, for example in American Samoa and Swains Islands, are U.S. nationals.¹³ A national of the United States is not a U.S. citizen, but cannot be deported based upon a conviction.

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

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

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

¹¹ 8 USC 1432; INA 321 [repealed].

¹² *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001); *Matter of Rodrigues-Tejedor*, 23 I. & N. Dec. 153 (BIA 2001).

¹³ See INA §§ 308, 8 USC § 1408 and INA § 101(a)(29), 8 USC § 1101(a)(29). For a complete description of who can be non-citizen nationals, please see INA § 308 and Chapter 3, Noncitizen Nationals, Daniel Levy, *U.S. Citizenship and Naturalization Handbook* (West Group).

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

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

a. What is Lawful Permanent Residency?

A Lawful Permanent Resident (LPR) is not a U.S. citizen but is permitted to live and work legally in the U.S. permanently. It is the most secure immigration status, short of being a U.S. citizen. However, LPR's are still subject to removal at any time if they violate the immigration laws. There are two types of permanent residents: Lawful Permanent Residents (LPR's) and Conditional Permanent Residents (CPR's).¹⁴ Permanent residents are given “green cards” which state “Resident Alien” across the top of the card. Green cards actually are pink or white in color, not green. LPR status does not expire, although the green card itself must be renewed. LPR status can only be revoked by an immigration judge or by leaving the U.S. for such a long period of time that it is deemed abandoned.

b. Defense Priorities for Lawful Permanent Residents

Consider the following five steps in determining defense priorities.

1. Counsel must obtain and analyze the defendant's entire criminal record and determine if the Lawful Permanent Resident (LPR) already has become deportable based on a past conviction. If so, counsel must investigate what waivers or relief, if any, is available. If possible, counsel should avoid pleading to a second deportable offense – but in case of conflict, the first priority is to not destroy eligibility for some waiver or relief. See Step 3.
2. If the LPR is not yet deportable for a conviction, counsel must attempt to avoid a plea that will make the LPR deportable. The highest defense goal for a lawful permanent resident is to avoid becoming deportable for an aggravated felony, because this will not only subject him/her to removal proceedings, but will eliminate eligibility for virtually all forms of relief from removal.

After avoiding deportation for aggravated felony, a LPR's next highest priority is to avoid becoming deportable under some other ground (and in particular under a ground relating to controlled substances).

¹⁴ A conditional permanent resident (CPR) is a lawful permanent resident who gains status through marriage to a U.S. citizen where the marriage is less than 24 months old at the time of adjudication of the application for residence. CPR status expires after two years and an additional petition must be filed to become a regular permanent resident. 8 USC § 1186a and INA § 216.

3. If due to the current charges or past convictions the LPR will be deportable for a conviction, the LPR is in a serious situation. A permanent resident who becomes deportable can be placed in removal proceedings, where an immigration judge can take away the person's status and order her deported ("removed") from the United States. If the deportable LPR has not been convicted of an aggravated felony, she might be able to apply for some relief.

Criminal defense counsel must understand what if any defenses against removal exist for the individual, and how to preserve eligibility for the defense. This may require consultation with an immigration expert; see N. 17: Resources, and see Chapter 11, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org). A common form of relief for deportable permanent residents who have lived in the U.S. for several years and have not been convicted of an aggravated felony is "cancellation of removal."¹⁵ Or, if not deportable for a drug offense, the resident might be able to "re-immigrate" through a U.S. citizen or LPR family member.

4. An LPR also has an interest in avoiding a conviction that would make him inadmissible. An LPR who is deportable might be able to apply for some waiver or relief – for example, to "re-immigrate" through a family member -- as long as he remains inadmissible. Also, if an LPR who is inadmissible for crimes leaves the U.S. even for a short period, he can be barred from re-entry into the U.S. Even if he manages to re-enter, he can be found deportable for having been inadmissible at his last admission. However, an LPR who is inadmissible but *not* deportable based on a conviction is safe, as long as he does not leave the United States.
5. If the LPR is deportable and has no possible form of relief from removal at this time, her biggest priority is to avoid encountering immigration authorities, and that is best done by getting out of jail before an immigration hold is placed. You should advise the person that once she is out of jail, she must avoid any contact with immigration authorities. She should not travel outside the U.S., apply to renew a 10-year green card, apply for naturalization, or make other contact with authorities. See "The Absolutely Removable Defendant," below.
6. Finally, certain convictions will bar a permanent resident (or U.S. citizen) from being able to file papers for an immigrant family member in the future. The specified offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct, where the victim is a minor. For more information see Note 11, *infra*.

3. The Undocumented or "Illegal Alien" Defendant

a. Who are undocumented persons?

An undocumented person is someone who does not have legal status under the immigration laws to be present in the U.S. There are two¹⁶ main categories of undocumented

¹⁵ For more information, please see Part II, Section C of this manual – Quick Guide to Cancellation of Removal for Legal Permanent Residents.

¹⁶ People who used to have status, but who now have a final order of removal (and are not under an "order of supervision") are also undocumented.

persons. The first is a “visa overstay,” meaning a nonimmigrant visa holder whose visa has expired or been terminated, e.g., a foreign student who drops out of school or a tourist who overstays a visa. The second is someone who “entered without inspection” (“EWI”), meaning a noncitizen who entered the United States without admission and has never had lawful immigration status, e.g. a person who wades across the Rio Grande to enter surreptitiously.

There are technical legal differences between the two groups,¹⁷ but they have important similarities. Both are in the United States unlawfully and can be removed on that basis even without a criminal conviction. Both will have to apply for some sort of relief or status if they are to remain in the United States. Note that millions of persons are presently undocumented but may be eligible to apply for lawful status, such as someone who is married to a U.S. citizen.¹⁸

b. Defense Goals for an Undocumented Client

Undocumented person who may be eligible for relief now or in the near future. An undocumented person is already subject to removal because she has no lawful status. However, she might be able to acquire lawful status and remain in the U.S. if she is entitled to request immigration status through one of several legal avenues (e.g., marriage to a U.S. Citizen, asylum, non-permanent resident cancellation, or some other form of relief from removal).¹⁹ Usually, to qualify for such relief the applicant must not be **inadmissible**. Thus for undocumented noncitizens, avoiding a conviction that creates grounds of inadmissibility is the highest priority.

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

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

¹⁷ Technically, a visa overstay is removed for being deportable, while an EWI is removed for being inadmissible. This makes a difference in the crimes analysis in only a few cases, however. More importantly, a visa overstay who will immigrate through a close U.S. citizen relative may “adjust status” in the United States, while an EWI must go to a U.S. consulate in the home country to do so.

¹⁸ Marriage to a U.S. citizen does not automatically confer any lawful status on someone. It simply entitles a person to apply for lawful permanent resident status. This is a complex process involving numerous applications where in the noncitizen must prove, inter alia, that he is not subject to any of the grounds of inadmissibility at 8 USC § 1182, including the crime related grounds at 8 USC § 1182(a)(2).

¹⁹ For a summary of avenues of “relief from removal” and avenues for obtaining lawful status, please see the section on “Relief from Removal” at the “online resources” link of the WDA’s Immigration Project website at www.defensenet.org.

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

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

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

Where a client has not yet been removed, but will or might be, counsel must consider the possibility that the person will attempt to re-enter illegally. Counsel must (a) warn about the severe federal penalties for illegal re-entry, especially with certain prior convictions, and (b) attempt to avoid a conviction that would cause an enhanced sentence should the client be prosecuted for an illegal re-entry. See Part D, The Immigration “Strike,” below.

Undocumented with a Prior Order of Deportation or Removal. A person who was deported/removed and then re-entered the United States illegally is in an extremely dangerous situation. The key goal is to avoid contact with immigration officials, or with federal criminal officials. In immigration proceedings, the person's prior order of removal will be immediately reinstated without opportunity to apply for relief. Further, he faces the very real risk of being prosecuted for the federal crime of illegal reentry after deportation/removal.²⁰ Worse yet are the severe sentence enhancements for an illegal reentry conviction when the defendant has prior convictions of certain crimes.

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

²⁰ 8 USC § 1326; INA § 276.

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

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

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

An asylum applicant is a person who has entered the United States, whether admitted or not, and who has applied for asylum. With some exceptions, an asylum applicant must file the application within one year of entering the United States. The person may apply affirmatively by filing an application, or assert an asylum application as a defense to removal.

b. What Are Defense Priorities?

Persons who have applied, or may want to apply, for asylum. Counsel may encounter a noncitizen defendant who has applied for asylum, or who is planning to apply. An applicant for asylum is barred if convicted of a “particularly serious crime,” which for asylum purposes includes any aggravated felony. “Particularly serious crime” also includes other offenses considered on a case-by-case basis, based upon sentence, circumstances, whether it involves a threat to persons, etc.,²¹ and a drug-trafficking offense always will be held a particularly serious crime. In addition, an application for asylum will almost certainly be denied as a matter of discretion if the applicant is convicted of a “violent or dangerous offense”²² (for which there is not specific definition, at this time). For further discussion of these terms, see Chapter 11, § 11.14 in *Defending Immigrants in the Ninth Circuit*.

Persons who have refugee and asylee status, but are not yet permanent residents. Refugees and asylees are entitled to apply for lawful permanent resident (LPR) status beginning one year after they have had that status within the United States. In practice, however, they often must wait longer than one year to apply.

While the law is complex, in practice during this waiting period ICE is charging refugees and asylees with removal if they come within a criminal ground of *deportability*. ICE also may charge refugees with removal if they come within a crimes ground of *inadmissibility*.

Refugee and asylee adjustment to permanent residency. In order to be granted LPR status, refugees and asylees must prove that they are not subject to any of the grounds of inadmissibility, or if they are, they must be granted a waiver of the inadmissibility ground. The only ground that cannot be waived is where the government has probative and substantial “reason to believe” that the person is or ever was a drug trafficker.²³ Even for waivable grounds,

²¹ *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

²² See *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

²³ See waiver of inadmissibility in application for refugee or asylee adjustment at INA § 209(c), 8 USC § 1159(c). The “reason to believe” drug trafficking inadmissibility ground appears at 8 USC 1182(a)(2)(C), INA § 212(c).

there is no guarantee that the government will grant the waiver. If an inadmissible conviction involves a “violent or dangerous” offense, the waiver is virtually certain to be denied.²⁴

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

a. What is Temporary Protected Status?

The U.S. government may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood or other disasters, or other extraordinary and temporary conditions. Nationals of that country will not be forced to return there from the U.S. for a designated period of time, can travel outside the U.S. with special permission, and will receive employment authorization.²⁵

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

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

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

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

An applicant will be denied a grant of TPS, or may lose the TPS status he or she already has,²⁶ if he or she has the following criminal record²⁷:

- is *inadmissible* under the crimes grounds
- Has been convicted of *two misdemeanors or one felony*.

²⁴ See *Matter of Jean*, *supra*.

²⁵ INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

²⁶ See 8 CFR 244.14(a)(1), (b)(2).

²⁷ In addition, an applicant for TPS may be denied based on actions in the home country (persecution of others, conviction of a “serious non-political offense”).

- Has been convicted of a “particularly serious crime” (determined on a case by case basis depending on sentence, violence to persons, etc.; includes all drug trafficking offenses)

For further discussion see “Advisory for Haitian Nationals Considering Applying for TPS: Past Criminal Dispositions/Conduct Could Bar TPS” at www.immigrantdefenseproject.org.

6. The Defendant with a Nonimmigrant Visa

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

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

7. The Defendant with an Employment Authorization Document (Work Permit)

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

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

8. The Mystery Status Defendant

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

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

9. The Absolutely Removable Defendant

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

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

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

An absolutely removable person may want to apply for immediate “**voluntary departure**” to avoid formal removal. For one thing, illegal re-entry following a voluntary departure is a far less serious offense than following a removal. Federal regulations state that an aggravated felony conviction will bar a request for pre-hearing voluntary departure.²⁸ (In fact, under the statute a noncitizen who entered without inspection is eligible for this type of voluntary departure despite conviction of an aggravated felony, and the regulation appears to be *ultra vires*.²⁹)

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

²⁸ 8 CFR 240.25. This is “voluntary departure prior to completion of hearing,” meaning that the noncitizen does not request any relief other than the departure.

²⁹ 8 USC § 1229c(a) provides that a noncitizen who is *deportable* for an aggravated felony is barred from pre-hearing voluntary departure. A person who entered without inspection is not “deportable.” See discussion at Chapter 11, § 11.22, *Defending Immigrants in the Ninth Circuit*.

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

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

- ***Warn the defendant***, before he or she is removed, of the danger of illegal re-entry and the real possibility of doing federal prison time, and
- ***Attempt to avoid conviction of one of the several particular offenses*** that cause a seriously enhanced sentence for the crime of illegal-re-entry. See below.

Two types of prior convictions cause the most serious sentence enhancement for an illegal re-entry charge: conviction of an aggravated felony, and conviction of certain other felony offenses.³¹ Federal law employs a complex sentencing system under the “advisory” U.S. Sentencing Guidelines. Guidelines provide for an increase in the length of sentence as levels determined by prior convictions increase. To give a general idea of the seriousness of a prior conviction, consider that the base level for an illegal reentry sentence is eight. That level will be increased between four and sixteen levels for prior convictions. In California prosecutions, a typical sentence for illegal re-entry plus prior is around *30 months* in federal prison. See story of “Luis” at the end of this section.

Crimes That Mandate an Enhanced Sentence for Illegal Reentry

Increase by 16 levels:

- Drug trafficking, and the sentence is more than 13 months;
- Crime of violence (see definition below);
- Firearms offense;
- Child pornography offense;
- National security of terrorism offense;
- Alien smuggling offense.³²

³⁰ When other immigration-related charges are added in, such as simple illegal entry and alien smuggling, immigration crimes constitute over 50% of new criminal charges in federal court. See, e.g., statistics at <http://trac.syr.edu/tracreports/bulletins/overall/monthlynov09/fil/>.

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

³² U.S. Sentencing Commission Guidelines Manual, USSG § 2L1.2(b)(1)(A)(2004).

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

Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.³³

Note that the USSG “crime of violence” definition used here is not precisely the same as the definition of “crime of violence” under 18 USC §16, used in determining an aggravated felony. Note also that the definition of firearms offense includes felony possession of a firearm and “crime of violence” includes felony statutory rape.

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

Increase by 8 levels: Aggravated felony

Increase by 4 levels:

- Any other felony;
- Three or more misdemeanors that are crimes of violence (see definition above) or drug trafficking offenses.

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

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

Luis immediately re-enters the United States to return to his family. He is detected by authorities and charged in federal proceedings with illegal re-entry after removal and a prior conviction, not of an aggravated felony, but of a separately defined “felony crime of violence.” While an aggravated felony (e.g., his assault if a one-year sentence *had* been imposed) would only have rated a sentence increase of 8 levels, under the felony “crime of violence” category he receives an increase of 16 levels. Luis is sentenced to *forty-one months of federal prison* for the illegal re-entry.³⁴

³³ USSG § 2L1.2, comment (n.1)(B)(iii) (2004).

³⁴ See discussion of similar facts, *U.S. v. Pimentel-Flores*, 339 F.3d 959 (9th Cir. 2003).

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

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

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

3. ***Gather facts about the defendant’s criminal record history and immigration situation.*** See if the defendant’s family can retain expert immigration counsel with whom you can confer. Many immigration attorneys will set up monthly payment plans. Determine whether special translation is needed, and if competent translation is available.
4. ***Analyze the immigration consequences of the criminal case and determine defense priorities,*** using all resources available including consultation with experts. What is the defendant’s immigration status now? What would cause her to lose her current status? What new status or application might she be eligible for? Is the biggest priority to get release from jail under any circumstances? What effect would the proposed plea have on the above, and what are better alternatives? Don’t forget to warn a removable defendant about the dangers of illegal re-entry; try to avoid a plea that would serve as a severe sentence enhancement in the event of an illegal re-entry prosecution.
5. ***Always consider the possibility of obtaining a disposition that is not a conviction,*** such as juvenile delinquency disposition, pre-plea disposition, and possibly infraction. A conviction on direct appeal of right is not a final conviction for immigration purposes, at least in the Ninth Circuit. In particular, ***submitting the matter on a preliminary examination transcript or police report or pleading guilty after a suppression motion (P.C. § 1538.5), and then filing an appeal*** does not result in a “conviction” for immigration purposes, while it affords some of the benefits of plea bargaining rather than trial. This can be a good course for noncitizen defendants.
6. ***Thoroughly advise the defendant*** of the criminal and immigration penalties involved in various defense options. Immigration penalties may include

- extended detention (*even for persons accepting the deportation*, if they do not already have identifying documentation sufficient for travel to the home country),
- loss of current lawful status (by becoming “deportable”),
- loss of ability to get lawful status in the future (by becoming “inadmissible,” or coming within some other bar to status or relief)
- extra penalties for an aggravated felony conviction (with few exceptions, deportable and permanently barred from status, immigration detention until removal, extra penalty for illegal re-entry)
- in some cases certain removal, in others being put into removal proceedings but with a possibility of obtaining a discretionary waiver or application
- *federal prison sentence if after removal the person re-enters the U.S. illegally*. If the person *already* has re-entered illegally and remains in jail, he or she is likely to be detected by immigration authorities and transferred for federal prosecution.

7. ***If trade-offs must be made between immigration and criminal case concerns, ascertain the defendant’s priorities.*** Is this a case where the defendant would sacrifice the criminal outcome to get a better immigration outcome? Is this a case where the defendant only is worried about amount of jail time? Once you and the client have identified the priorities and specific defense goals, defend the case accordingly.

8. ***If you obtain a good immigration outcome in criminal court, don’t let it go to waste! Give written confirmation to the defendant or immigration counsel. Check court documents to make sure that they accurately reflect the desired outcome. If a court document proves something beneficial to the client, give him or her a copy of it.***

Most immigrants are unrepresented in removal proceedings, and many immigration judges are not expert in this area. Make sure that they realize that your client has a defense. If the defendant has an immigration hold, give him (or immigration counsel, if any) a statement of how the disposition avoids an immigration consequence. ***Pre-written summaries of various defenses, which you can give to defendants or their immigration counsel, can be found at § N. 14 Safer Plea Options.*** This is especially important if your client does not have immigration counsel: he literally may need to hand this piece of paper to the immigration judge. An example of a statement is:

Mr. Cazares pled guilty to H&S § 11379(a), specifically to transportation of an unspecified controlled substance. Transportation for personal use is not an aggravated felony. An offense involving an unspecified California controlled substance is not a deportable or inadmissible offense or an aggravated felony. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007).

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

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

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

- 9. Give the defendant specific warning about future potential immigration risks.** A noncitizen who is removed and returns illegally to the United States faces a significant federal prison sentence if apprehended (see Part D, *supra*). A noncitizen with a conviction who is not removed should not leave the U.S. without expert advice, because she might be inadmissible and may lose her status. A noncitizen who might be deportable should avoid any contact with the immigration authorities, including renewing a green card, applying for a citizenship, and pursuing a pending application, until an expert immigration practitioner advises him.
- 10. If there is an appeal, give the defendant a copy of the date-stamped notice of appeal.** This includes an appeal by a slow plea, as described in Step 5, *supra*. In the Ninth Circuit, an appeal means that there is no “conviction” to serve as a basis for immigration detention, removal, or other consequence.

§ N.2 Definition of Conviction and How to Avoid A Conviction for Immigration Purposes

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

The Big Picture: Most, although not all, immigration consequences require a conviction. If counsel can obtain a disposition that is not a conviction, the immigration case might be saved. This Note discusses which dispositions constitute a conviction for immigration purposes, and how to avoid a conviction.

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

A. Overview

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

- Where there is “a formal judgment of guilt of the alien entered by a court” *or*,
- “if adjudication of guilt has been withheld, where ... a judge or jury has found the alien guilty, or the alien has entered a plea of guilty *or nolo contendere*, or has admitted sufficient facts to warrant a finding of guilt, and ... the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”³⁵

Thus a guilty plea plus imposition of probation, fee, jail or counseling requirement will equal a conviction for immigration purposes, even if the plea is later withdrawn upon successful completion of these requirements.³⁶ The Board of Immigration Appeals (BIA) found that a

³⁵ INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

³⁶ *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).

guilty plea plus an order to pay court costs is a conviction.³⁷ A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces qualifies as a “conviction” for immigration purposes.³⁸ The one exception is for a first conviction of certain minor drug offenses, described in Part B, below.

An acquittal; a deferred prosecution, verdict, or sentence; and dismissal under a pre-plea diversion scheme are not convictions. In addition, juvenile delinquency dispositions, cases on direct appeal, judgments vacated for cause, and arguably California infractions are not convictions. The rest of this section discusses these dispositions.

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

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

If there has been a plea or finding of guilt and the court has ordered any kind of penalty or restraint, including probation, immigration authorities will recognize the disposition as a conviction even if the state regards the conviction as eliminated by some kind of rehabilitative relief leading to withdrawal of judgment or charges.³⁹ See discussion in Part A.

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

2. The Lujan-Armendariz Exception for First Conviction of Certain Minor Drug Offenses

The one exception to the above rule is for a *first* conviction of certain minor drug offenses. The offenses are: simple possession of any controlled substance; an offense less serious than simple possession that does not have a federal analogue (e.g., possession of paraphernalia); and, arguably, giving away a small amount of marijuana.

In that case “rehabilitative relief” such as withdrawal of plea under deferred entry of judgment or Prop. 36, or expungement under PC § 1203.4, will eliminate the conviction entirely for immigration purposes. *Lujan-Armendariz v. INS*, 222F.3d 728 (9th Cir. 2000).

³⁷ *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

³⁸ *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).

³⁹ *Id.*

This *Lujan* benefit is not available if the court found that the person violated probation, even if he or she went on to successfully complete it.⁴⁰ It is not available if the person had a prior “pre-plea” diversion.⁴¹ It applies only to eliminate a *first* controlled substance conviction.

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

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

NOTE: The *Lujan* benefit *will only be recognized in immigration proceedings held in Ninth Circuit states*. If the immigrant is arrested in, e.g., New York, the disposition will be treated as a conviction. FOR FURTHER DISCUSSION of *Lujan-Armendariz* benefits see § N.8 Controlled Substance Offenses, and Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit*.

C. Pre-Plea Dispositions

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

A disposition under the pre-plea drug diversion under former PC § 1000 in effect in California before January 1, 1997 is not a conviction. (Note that even after the law changed in 1997, for some years many criminal court judges did not actually take a guilty plea; this disposition also is not a conviction.) A disposition in a drug court that does not require a plea is not a conviction. Note that a drug court disposition creates other immigration problems if the person must admit to being an abuser, which itself is a ground of inadmissibility or deportability. In some cases it may be better for immigration purposes to go through Prop. 36; this is an individual determination.

The Ninth Circuit held that receipt of pre-plea diversion under the former Calif. PC § 1000 will count as the noncitizen’s one-time *Lujan-Armendariz* benefit, so that a subsequent DEJ or expungement will not be given effect in immigration proceedings.⁴²

D. Juvenile Delinquency Dispositions

Most criminal grounds of removal require a conviction. Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose,

⁴⁰ *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

⁴¹ *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

⁴² *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).

regardless of the nature of the offense.⁴³ If the record of proceedings indicates that proceedings were in juvenile court, there was no conviction.

Juvenile court proceedings still can create problems for juvenile immigrants under the so-called “conduct grounds” and for immigration relief discretionary purposes, however. A juvenile delinquency disposition that establishes that the youth has engaged in prostitution, is or has been a drug addict or abuser, or has been or helped a drug trafficker, will cause immigration problems. Undocumented juvenile defendants might be eligible to apply for lawful immigration status.

FOR A HANDOUT ON REPRESENTING JUVENILES in delinquency or dependency proceedings or family court proceedings, see § N. 16, *infra*. See also free materials, including *Immigration Benchbook for Juvenile and Family Courts*, available at www.ilrc.org (go to Immigrant Youth tab) and Defending Immigrants Partnership website at www.defendingimmigrants.org (go to Library then consult folder on Representing Noncitizen Youth; membership is required, but is free). For an extensive discussion of representing non-citizens in delinquency, see *Defending Immigrants in the Ninth Circuit*, Chapter 2A and ILRC’s forthcoming 2010 manual on Immigrant Youth.

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

F. Where Adjudication is Withheld, a Guilty Plea Plus Unconditionally Suspended Fine (or Other Suspended Non-Incarceratory Sanction) is Not a Conviction

In *Retuta v. Holder*⁴⁴ the Ninth Circuit found that there was no conviction for immigration purposes where a noncitizen pled guilty and the judge deferred entry of judgment, imposed a small fine, and immediately suspended the fine with no conditions attached. The Court ruled that the suspended fine did not amount to the “punishment, penalty or restraint” required to meet the statutory definition of a conviction for immigration purposes.

This appears to have been an unusual record, since probation is an element of deferred entry of judgment under P.C. § 1000. While this case involved a DEJ drug possession disposition, there is no requirement that the offense involve a controlled substance, or be a first offense of any kind, to come within this rule. The only requirements are that (a) “adjudication of guilt has been withheld” and (b) the only penalty is a small fine or other non-incarceratory sanction is imposed but suspended without condition. If that scenario arises in any type of proceedings that do not result in final adjudication, this may not amount to a conviction.

⁴³ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). The exceptions are that certain delinquency dispositions may form a bar to applying for Family Unity (see *Defending Immigrants in the Ninth Circuit*, Chapter 11, § 11.24) or to petitioning for a relative (see Note 11, *infra*, or *Defending Immigrants*, Chapter 6, § 6.22).

⁴⁴ *Retuta v. Holder*, ___ F.3d ___ (9th Cir. January 7, 2010).

G. Infractions

Under some state laws certain minor offenses—sometimes called infractions—are handled in non-conventional criminal proceedings that do not require the usual constitutional protections of a criminal trial, such as access to counsel, right to jury trial, etc. In *Matter of Eslamizar*⁴⁵ the BIA has held that this type of disposition will not be considered a conviction for immigration purposes. This applies to both foreign and national dispositions. It appears that conviction of a California infraction, in a proceeding that lacks the constitutional safeguards available in a misdemeanor prosecution, ought to be held not to be a conviction for immigration purposes. However, there is no ruling yet on this issue, so this is *not a guaranteed defense*.

In *Eslamizar* the BIA held that a conviction for immigration purposes is “a judgment in a proceeding which provides the constitutional safeguards normally attendant upon a criminal adjudication.” It found that a finding of guilt under an Oregon statute did not qualify based on several factors. The Oregon “violation” is not considered a crime since it does not result in any legal disability or disadvantage under Oregon law; there is no right to jury or counsel; and the prosecution only has to prove guilt by a preponderance of the evidence instead of beyond a reasonable doubt.

In California, as in Oregon, infractions are not considered “crimes.” The procedure in California for prosecuting an infraction confers no right to jury or defense counsel and it is not punishable by imprisonment.⁴⁶ However, whereas Oregon only requires the prosecutor to prove a preponderance of the evidence, in California the prosecutor must prove guilt beyond a reasonable doubt.⁴⁷ While immigration counsel have a strong argument that this difference ought not to be enough to distinguish a California infraction from an Oregon violation under *Eslamizar*,⁴⁸ there is no guarantee that the courts or consulates will so rule. Therefore while this is a reasonably good disposition, it is not guaranteed not to be a conviction.

H. Appeal, Including Appeal after a Suppression Motion (“Slow Plea”)

It has long been held that a conviction currently on direct appeal of right does not have sufficient finality to constitute a “conviction” for any immigration purpose.⁴⁹ While some circuits have found that 1996 legislation subverted this rule, in the Ninth Circuit it is clear that a conviction on direct appeal of right will not be held to constitute a conviction for immigration purposes.

⁴⁵ *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).

⁴⁶ Calif. PC §19.6.

⁴⁷ Calif .P. C. § 19.7 (“all provisions of law relating to misdemeanors shall apply to infractions including ... burden of proof.”).

⁴⁸ For more discussion on infractions, see *Safe Havens*, by Norton Tooby and J.J. Rollin, Chapter 4, § 4.11.

⁴⁹ *Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576 (1955) (holding that an “on file” system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act).

To prevent a “conviction,” counsel should try to set up a disposition so that a notice of appeal can be filed. If an appeal is pending and if the conviction is the only basis for deportation – e.g., if your client is a lawful permanent resident who does not have a deportable conviction, except for the conviction on direct appeal – then either your client will not be picked up by immigration at the conclusion of the sentence, or an immigration attorney can file a motion to terminate deportation proceedings if the client is picked up and put in removal proceedings.

The defendant has the right to file a notice of appeal after a jury or court trial, a submission on a preliminary examination transcript or police report, or after a plea of guilty or no contest after a suppression motion per Penal Code Section 1538.5. This “slow plea” is a particularly potent strategy, especially for a defendant likely to receive either a jail sentence or, perhaps, a short prison sentence because an appeal can be still pending at the time of the defendant’s release from jail or prison in such cases. In practice a date-stamped copy of the appeal may suffice to get a noncitizen who is being detained solely on the basis of the conviction.

The BIA recently held that a *late-filed* appeal will not prevent a conviction from having immigration effect. Nevertheless, as a general matter the traditional requirement that a conviction must be final still applies.⁵⁰ The Ninth Circuit has not considered the late-filed appeal issue. See Chapter 8, *Defending Immigrants in the Ninth Circuit* for further information.

I. Vacation of Judgment for Cause

The BIA will not question the validity of a state order vacating a conviction for cause. When a court acting within its jurisdiction vacates a judgment of conviction, the conviction no longer constitutes a valid basis for deportation or exclusion.⁵¹

The conviction must have been vacated *for cause*, not merely for hardship or rehabilitation, however. In *Matter of Pickering* the BIA held that a conviction is *not* eliminated for immigration purposes if the court vacated it for reasons “solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings.”⁵² However, an actual legal defect that has some relationship to immigration will be given effect, for example ineffective assistance of counsel based on a failure to adequately advise the defendant regarding immigration consequences. See Chapter 8, *Defending Immigrants in the Ninth Circuit* for further information on appeals. See also Tooby, *California Post-Conviction Relief for Immigrants* at www.nortontooby.com.

⁵⁰ See *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009) and Practice Advisory by Manuel Vargas, “Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*” at www.immigrantdefenseproject.org.

⁵¹ *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000).

⁵² *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

§ N.3 The Categorical Approach, including Divisible Statutes and the Record of Conviction

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

- A. Overview: The Categorical and Modified Categorical Analysis
- B. When Does the Categorical Approach Not Apply to a Conviction? Moral Turpitude and “Circumstance Specific” Offenses
- C. For a Divisible Statute, What Documents Can the Immigration Judge Consult to Determine the Elements of the Offense of Conviction?
- D. Charging Papers, Plea Agreements, Minute Orders and Abstracts of Judgment
- E. Factual Basis for the Plea

A comprehensive discussion of the “categorical analysis” appears at Chapter 2, § 2.11, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org). The discussion here will focus on one issue: how criminal defense counsel can construct a record of conviction under a divisible statute so as to avoid harm a noncitizen defendant’s immigration status.

Part A is an overview of how the categorical and modified categorical analysis work and what a divisible statute is. Part B discusses the two immigration categories to which the categorical approach will not to apply to characterize an offense of conviction. Parts C – E discuss strategies for how to manage documents in the record of conviction

A. Overview: The Categorical and Modified Categorical Analysis

An immigration judge in most cases will use the “categorical approach” to analyze the elements of an offense that was the subject of a prior conviction, in order to determine whether the conviction triggers a penalty, e.g. is an aggravated felony, deportable firearms offense, or crime involving moral turpitude.⁵³ While this discussion focuses on the use of this approach in immigration proceedings, the same approach and case law are used throughout federal criminal proceedings to evaluate prior convictions as bases for sentence enhancements.

1. *The Categorical Approach: Concepts and Burden of Proof*

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

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

⁵³ The U.S. Supreme Court has held that the categorical analysis applies to immigration proceedings in the same manner as it applies to federal criminal proceedings. *Nijhawan v. Holder*, 129 S.Ct. 2294 (June 15, 2009).

not matter what happened that dark night. It only matters what happened that day in criminal court.

Example: Harvey committed a violent offense, but he pled guilty to accessory after the fact. He is not deportable for having a conviction relating to violence. He is deportable based only on consequences that attach to a conviction for accessory after the fact.

- In many cases a statute will cover multiple offenses, only some of which carry the immigration consequence. For example, P.C. § 12020 covers possession of firearms and of weapons that are not firearms, but only a conviction of a firearms offense would cause deportability under the firearms ground.⁵⁴ Section 12020(a) is a divisible statute for purposes of the firearms deportability ground.

Faced with a conviction under § 12020(a), how does the immigration judge (“IJ”) determine whether it was for possession of a firearm versus another weapon? Under the “modified categorical approach” the IJ may consult only information from certain strictly limited documents from the record of conviction, which go to an element required for guilt. These documents are discussed in Parts C-E below, but generally they include the plea agreement, plea colloquy, information in a charge if there is sufficient proof that the defendant pled guilty to that charge, jury instructions and findings under certain circumstances, and similar documents. They do not include a police report or probation report – *unless such document was stipulated to as containing a factual basis for the plea*. They do not include comments by the noncitizen later to the IJ, or other information that does not directly record the official findings of the criminal court judge.

Example: Tensin signed a plea agreement admitting that he possessed an unspecified “controlled substance” under H&S Code § 11377(a). That section is “divisible” for purposes of immigration penalties for controlled substance convictions. Immigration law recognizes controlled substances listed in the federal drug schedules, and California law includes some substances that are, and some that are not, contained in the federal schedules.⁵⁵

In Tensin’s case the police report states that the controlled substance was heroin. Counsel did not stipulate that the police report contained a factual basis for the plea; instead he stipulated to the carefully amended charge and the plea agreement, which only reference an unspecified “controlled substance.” Under the modified categorical approach the immigration judge may use information from the plea agreement, but not from the police report, to determine the nature of the controlled substance.

⁵⁴ The firearms deportability ground is at 8 USC § 1227(a)(2)(C), INA § 237(a)(2)(C). See further discussion at Note 10: Firearms Offenses.

⁵⁵ See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), and discussion in § N.7.

- **Burden of proof: Deportability.** The government has the burden to prove by clear and convincing evidence that a permanent resident (or other admitted noncitizen) is *deportable*.⁵⁶ If a criminal statute is divisible for purposes of a deportation ground, and the record of conviction is sufficiently vague, the government cannot meet its burden and the person is not deportable.⁵⁷

Example: In the above example, assume that Tensin is a lawful permanent resident and the government is arguing that he should be removed because he is deportable for a controlled substance conviction. With this vague record of conviction, the government cannot meet its burden of proof, and Tensin is not deportable.

- **Burden of proof: Admissibility and Applications for Relief.** The Ninth Circuit held that the government also has the burden to prove that a conviction under a divisible statute will make a noncitizen inadmissible or eligible for status or relief. A vague record of conviction means that the noncitizen wins, just as it does in proving deportability. However, the BIA ruled against this, and the Ninth Circuit has not yet reconsidered the issue.⁵⁸

Until this is finally resolved, criminal defense counsel cannot assume that a vague record of conviction will be sufficient for defendants who need to apply for relief or status. This would include defendants who are undocumented, or deportable permanent residents who will have to apply for some relief to stop removal, or any other noncitizen who must apply for benefit or relief. Counsel should attempt to plead specifically to an offense under the divisible statute that does not carry the adverse immigration consequence. If that is not possible, however, counsel should attempt to create a vague record of conviction.

Example: This time assume that Tensin is an undocumented man who is applying to get a green card through his citizen wife. Immigration authorities will assert that Tensin has the burden of producing documents to prove that the unspecified controlled substance of his conviction was *not* one on the federal lists. Criminal defense counsel should plead specifically to such a substance (examples are listed in § N.8 Controlled Substances, *infra*). If that is not possible, counsel should create a vague record and plead to “a controlled substance.” If possible, counsel should have a back-up strategy, just in case the Ninth Circuit ultimately does not reaffirm its beneficial rule.

2. Analyzing Criminal Statutes and Reading the Chart: What immigration provision is a threat? Is there any way to violate the criminal statute that does not come within the immigration provision?

⁵⁶ INA § 240(c)(3)(A), 8 USC § 1229a(c)(3)(A).

⁵⁷ See, e.g., discussion in *United States v. Rivera-Sanchez*, 247 F.3d 905, 907-8 (9th Cir. 2001)(*en banc*); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1203-4 (9th Cir. 2002) (*en banc*). See also *Shepard v. United States*, 125 S.Ct. 1254 (2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005).

⁵⁸ See *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) and further discussion in Brady, “Defense Arguments: *Matter of Almanza-Arenas*” at www.ilrc.org/crim.php.

This discussion describes the steps criminal defense counsel may take to do this analysis. The first step is to identify what are the immigration risks of a potential plea. While the best option is to discuss the case with an immigration and crimes expert, you can make a very good start by looking the offense up in the California Quick Reference Chart.

An offense does not *categorically*, i.e., necessarily, come within a term in an immigration provision unless “the ‘full range of conduct’ covered by [the criminal statute] falls within the meaning of that term.”⁵⁹ The Chart will indicate if this is the case with a simple yes or no.

Example: Look up P.C. § 288(a) in the Chart. You can see that every conviction will be held to be an aggravated felony as sexual abuse of a minor, or in this lingo, means that § 288(a) is “categorically” an aggravated felony. It also is categorically a crime involving moral turpitude and a crime of child abuse. Criminal defense counsel must assume that there is no way to plead to § 288(a) and avoid these consequences.

An offense is divisible for purposes of an immigration provision if it contains multiple offenses, only some of which come within the provision.

Example: Look up H&S § 11352(a) in the Chart. You can see that a plea to sale of a controlled substance is an aggravated felony, while a plea to transportation or to offering to commit an offense is not an aggravated felony. Thus, P.C. § 11352 is divisible for purposes of being an aggravated felony. Your goal will be to plead to a part of the statute that is not an aggravated felony (or if that is not possible, at least keep the plea vague enough so that it does not rule out that possibility).

(Note that this offense is divisible in another way, in that § 11352 includes some controlled substances that are not on the federal list at all. See the example of Tensin, *supra*.)

A criminal code section can be divisible in terms of immigration consequences because it contains multiple subsections, e.g. Calif. P.C. § 245(a)(1) and (2) is divisible for purposes of the firearms deportation ground. The statute may define the crime in the disjunctive, such as sale (an aggravated felony) or offer to sell (not an aggravated felony) a controlled substance under Calif. H&S § 11352(a). Courts have held that a broadly or vaguely written section can be held divisible, such as annoying or molesting a child under P.C. § 647.6(a) (divisible as “sexual abuse of a minor”).

An offense is categorically *not* a match with an immigration provision if the statute entirely lacks an element required by the provision. In that case *no* conviction under the statute will come within the immigration provision.

⁵⁹ See, e.g., *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)(citation omitted); *Matter of Palacios*, Int. Dec. 3373 (BIA 1998).

Example: Look up Calif. Vehicle C. § 23152 in the Chart. The Supreme Court held that a “crime of violence” requires more than negligent intent, and circuit courts have held that it requires more than recklessness. Since this DUI requires only negligent intent, it is categorically *not* a crime of violence, and no conviction may come within that definition.

3. Working with the Record of Conviction in a Divisible Statute

A criminal statute that includes various offenses, some of which carry an immigration penalty while others do not, is referred to in immigration proceedings as a “divisible statute.” Under the modified categorical approach, in order to ascertain which of the various offenses was the offense of conviction, an immigration judge may consider only certain limited documents from the individual’s criminal record of conviction.

Example: Lois is charged with having been convicted of a drug trafficking aggravated felony and a deportable controlled substance offense, based on her conviction under H&S § 11379(a). This section is a divisible statute for both purposes because the California drug list includes substances that both are and are not on the federal list.

The government has the burden of proof. The government presents a police report that charges that Lois possessed methamphetamines, a probation report stating that Lois was convicted of possession of a methamphetamine, and an Abstract of Judgment showing that Lois pled guilty to § 11379. Lois’ defense attorney did *not* stipulate that the police report or probation report provide a factual basis for the plea. Can the immigration judge find that Lois is deportable and convicted of an aggravated felony?

Under the modified categorical approach, the judge may not use information from the police or probation report. The Abstract is inconclusive. The government did not meet its burden of proof and she is not deportable.

A more detailed discussion of how to work with various court documents to control the reviewable record of conviction appears in Parts C-E, *infra*.

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

Currently the modified categorical approach does not apply in two important situations. In each situation, the law is still developing and it is not possible to predict all results.

1. *The categorical approach does not fully apply to immigration provisions with “circumstance-specific” factors, including the aggravated felony “fraud or deceit offense with a loss exceeding \$10,000,” and perhaps a deportable “crime of domestic violence.”*

In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) the Supreme Court held that for purposes of deciding whether a conviction is an aggravated felony, in some cases the categorical approach does not fully apply. The Court considered the aggravated felony defined as a crime of “fraud or deceit” in which the loss to the victim/s exceeded \$10,000. 8 USC § 1101(a)(43)(M)(ii).⁶⁰ The Court found that “fraud” and “deceit” are “generic crimes,” and the categorical approach must be used to determine whether the offense of conviction constitutes these offenses. It found that the loss exceeding \$10,000, however, is “circumstance-specific,” meaning that it has to do with the circumstances of the particular incident of fraud or deceit. The Court stated that the strict limitations of the categorical approach need not apply to establish the \$10,000 loss.

It is not clear at this time exactly what evidence the government may use to define the \$10,000 loss. The best strategy may be to nail down the aspect of the offense that is subject to the limits of the categorical approach, by pleading to an offense that does not constitute “fraud or deceit.” Where possible, if there was a loss exceeding \$10,000 counsel should attempt to plead to theft under P.C. § 484 (not theft by fraud) and avoid a sentence of one year or more. See further instructions and discussion at §N.13 Burglary, Theft, and Fraud.

Nijhawan did not mention the *domestic violence deportation* ground, and did not apply its new “generic versus circumstance-specific” approach to that or any deportation ground apart from aggravated felonies. However, the government is likely to argue that the same bifurcated approach should be used there: while a “crime of violence” is a generic crime that is subject to the categorical approach, the domestic relationship is circumstance-specific and can be proved by additional evidence.

Again, a good strategy is to obtain a plea to an offense that is not a crime of violence, because in that case the categorical approach applies and counsel can control the situation by controlling the record of conviction. See further discussion of defense strategies at §N.12 Domestic Violence.

FOR FURTHER DISCUSSION see Brady, “*Nijhawan v. Holder*: Preliminary Analysis” at www.ilrc.org/criminal.php.

⁶⁰ 8 USC § 1101(a)(43)(M)(ii), INA § 101(a)(43)(M)(ii).

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

In a controversial opinion outgoing Attorney General Mukasey abruptly overturned 100 years of caselaw and held that the categorical approach does not strictly apply in determining whether an offense is a crime involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). As opposed to the more measured approach in *Nijhawan, supra*, the opinion in *Silva-Trevino* is broadly worded and self-contradictory, and it has made it difficult to predict what will or won't be held to be a crime involving moral turpitude. To make matters more unpredictable, the Ninth Circuit en banc held that it will defer to the BIA when the Board issues a reasonable, published decision finding that a particular offense involves moral turpitude. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*). This decision means that prior Ninth Circuit decisions holding that certain offenses are not crimes involving moral turpitude may no longer apply.

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

Note that in *Marmolejo-Campos* the Ninth Circuit did not decide whether it will accept the radical evidentiary holding in *Silva-Trevino*, which is that the categorical approach no longer applies to moral turpitude determinations. The decision concerned the BIA's substantive determinations about whether an offense involves moral turpitude. The Third Circuit has rejected *Silva-Trevino*, and the Ninth Circuit has not ruled on it.

For further discussion, see § N. 7 Crimes Involving Moral Turpitude, and see Tooby, Kesselbrenner, “Living Under *Matter of Silva-Trevino*” at www.nortontooby.com.

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

1. Overview

This discussion will focus on what evidence may be used under the modified categorical approach. (As stated in B.4 above, in two areas the government can depart from this approach.)

An immigration authority who reviews a prior conviction under a divisible statute is guided by the “modified categorical approach.” This approach permits the authority to review only a limited number of documents to identify the elements of the offense of conviction. By

controlling the information in these documents, counsel may be able to define the conviction to avoid the worst immigration consequences, while still pleading under a statute acceptable to the prosecution.

As discussed in Part B.1, *supra*, in some cases it is enough for counsel to keep the reviewable record of conviction vague, but in other cases not. Where the issue is whether a conviction will make a permanent resident deportable, it is sufficient to keep the reviewable record of conviction vague as to the offense of conviction. Where the issue is eligibility for relief, until the law is clarified counsel should attempt to plead specifically to an offense with fewer immigration consequences (although if that is not possible, counsel at least should keep the record vague).

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

The Supreme Court has stated that under this approach, the reviewable record in a conviction by plea is limited to

the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.⁶¹

There is a controversy in the case law as to ***what constitutes proof that the defendant admitted all of the elements in the charging document.*** See Part D, *infra*. Also, counsel must assume that if a ***document is stipulated to as containing a factual basis for the plea***, the immigration judge may consider the contents of the document. See Part E, *infra*, on how to construct a safer factual basis for the plea.

Where the conviction was by jury, the Supreme Court has held that the complaint, jury instructions, and verdict can be used to the extent that they clearly establish that the defendant was convicted of an offense containing the elements of the generic definition (here, of the immigration provisions). See *Taylor v. United States*, 495 U.S. 575, 602 (1990).

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

In immigration proceedings, the group of documents that the immigration judge is permitted to review often is referred to as “the reviewable record of conviction.” The following documents are not part of the reviewable record.

- Prosecutor’s remarks during the hearing,
- Police reports, probation or “pre-sentence” reports, *unless* defense counsel stipulates that they provide a factual basis for the plea.

⁶¹ *Shepard v. United States*, 125 S.Ct. 1254, 1257 (2005).

- Statements by the noncitizen outside of the criminal judgment (e.g., statements to police, immigration authorities or the immigration judge).
- Information from a criminal charge, unless there is evidence that the defendant pled to the charge
- Information from a dropped charge
- Information from a co-defendant's case.⁶²
- Courts have long held that a narrative description in a California Abstract of Judgment (e.g., "sale") cannot be consulted.⁶³

If counsel *stipulates that a document provides a factual basis for the plea, the contents may well become part of the reviewable record.* See Part D, below.

Reminder: The categorical approach, and this discussion, currently does not apply to questions relating to crimes involving moral turpitude. The controversial case *Matter of Silva-Trevino* holds that the categorical approach does not fully apply to a determination of whether an offense is a crime involving moral turpitude. Therefore, if the threat is that the offense will be classed as a CMT, a vague record of conviction is not useful, and a specific record of conviction might or might not control the case. The Ninth Circuit probably is expected to issue a decision on *Silva-Trevino* issues in 2010, but unless and until the *Silva-Trevino* holding is overruled, the suggestions in Parts C, D, and E of this section do not apply to CMT's. See § N. 7 Crimes Involving Moral Turpitude.

In addition, this discussion does not apply to the government's proof that an offense is an aggravated felony because a victim lost more than \$10,000 in a fraud offense, and in the future it might be held not to apply to proof of the domestic relationship in a deportable "crime of domestic violence." See discussion at Part B.4, *supra*.

⁶² See, e.g., *Taylor v. United States*, *supra*; *Matter of Cassisi*, 120 I&N Dec. 136 (BIA 1963) (statement of state attorney at sentencing is not included); *Matter of Y*, 1 I&N Dec. 137 (BIA 1941) (report of a probation officer is not included); *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003) withdrawing and reversing 292 F.3d 1029 (9th Cir. 2002) to reaffirm that probation report is not part of the record of conviction for this purpose; *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004) (testimony to immigration judge not included); *Matter of Pichardo*, Int. Dec. 3275 (BIA 1996)(admission by respondent in immigration court is not included); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (dropped charge); *United States v. Vidal*, 426 F.3d 1011 (9th Cir. 2005) (proof pled to complaint "as charged"); *Matter of Short*, Int. Dec. 3215 (BIA 1989) (where a wife was convicted of assault with intent to commit "any felony," the immigration authorities could not look to her husband's record of conviction to define the felony).

⁶³ *United States v. Navidad-Marco*, 367 F.3d 903 (9th Cir. 2004). A recent Ninth Circuit opinion mistakenly contradicted this holding, but then was amended to withdraw that section. See *Anaya-Ortiz v. Holder* __ F.3d __ (9th Cir. January 25, 2010), amending *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266 (9th Cir. 2009).

D. Charging Papers, Plea Agreements, Minute Orders and Abstracts of Judgment⁶⁴

1. Goals

For allegations in a criminal charge to be considered by immigration authorities in a modified categorical analysis, there must be proof that the defendant pled to or was convicted of the specific charge as worded. A charge coupled with only proof of conviction under the statute is not sufficient.⁶⁵

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

Between these two options, a plea to the “good” section of a statute—here, possession of brass knuckles—always is the best solution, but sometimes is not possible. In this case, where your goal is to prevent the government from meeting its burden to prove that a permanent resident is deportable, it is adequate to simply keep the record *vague*, so as to avoid establishing that the person pled guilty to the “bad” section of the statute, e.g., to possession of a firearm.

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

2. Strategies: Charging Papers and Pleas

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

Example: Pema, a permanent resident, will become deportable under the firearms ground if she is convicted of using, possessing or carrying a firearm.⁶⁶ She is charged in Count 1 with possession of a handgun under Calif. PC § 12020(a)(1). This is a divisible statute for purposes of the firearms deportation ground, since it includes offenses that involve firearms as well as offenses that involve knives, brass knuckles, etc. How might you structure a plea to § 12020(a)(1) to avoid making her deportable?

⁶⁴ Thanks to Norton Tooby, Rachael Keast, Holly Cooper and especially Michael K. Mehr for their continuing valuable input on this topic.

⁶⁵ See, e.g., *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (*en banc*); *United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002).

⁶⁶ INA § 237(a)(2)(C), 8 USC § 1227(a)(2)(C).

a. The best strategy is to plead specifically to the safer part of the statute.

While this is not needed in most cases to prevent deportation, it might be held necessary to help noncitizens qualify for some application for a waiver of the deportation, or a way of getting status. In the firearms example, the best possible plea would be to possession of some specific weapon other than a handgun.

b. If that is not possible, and the plea must be to this offense, plead to the language of the statute in the disjunctive (using “or”), not to the facts in the complaint.

Again, a vague record of conviction (including a vague factual basis for the plea) will prevent the conviction from making an LPR deportable, and may or may not be held to prevent the conviction from being a bar to relief.

A charging paper charging the California offense in the language of the statute is proper⁶⁷ and often beneficial to the noncitizen. A plea to an original or amended charging paper quoting only the language of the statute can prevent immigration consequences under a divisible statute. (But note that one California appellate decision found that this kind of charge cannot serve as a factual basis for the plea.⁶⁸)

To amend a plea to erase adverse information, plead to a “Count I” that is ***amended orally and in writing***. If the original complaint is amended in writing by striking certain harmful language, defense counsel should ensure that the writing is completely blacked out and not merely crossed out.

In Pema’s case, because the statute is wordy she could plead to, e.g., “possession of an illegal weapon.” Or, plead to, e.g., PC § 12020(a)(1)—but not to the complaint. Or plead to a written plea agreement in the language of all or part of the statute *stated in the disjunctive* (“or”). To particularize the charge, information that is not pertinent to immigration consequences may be added. In this case, an amended complaint can recite the time, place, name of the victim, and other information that does not identify a firearm.

If Pema were to plead to the statute in the disjunctive, and no other evidence that is reviewable under the modified categorical approach establishes that she was convicted of a firearms offense, she could not be held deportable based on the firearms ground.

However, if for some reason she had to make an application that was barred by being convicted of a firearms offense, it is not clear that this record would be sufficient to protect her eligibility for that relief. (The Ninth Circuit has held that a noncitizen in this position would

⁶⁷ “[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.” Penal Code § 952.

⁶⁸ *People v. Willard*, 154 Cal. App. 4th 1329 (Cal. Ct. App. 2007).

remain eligible for relief, but the BIA subsequently held otherwise and the Ninth Circuit has not yet reconsidered the issue.⁶⁹)

c. If the above are not possible, take a *West* plea to, e.g., “Count 1,” specifically avoiding pleading guilty to Count 1 “as charged”.

This strategy might protect the immigrant defendant, but unfortunately there has been some confusion in the cases. In *United States v. Vidal*⁷⁰ the Ninth Circuit *en banc* held that a plea and waiver form showing the notation “Count 1 10851 Veh. Code” did *not* admit the factual allegations in the complaint, because the form did not include the “crucial” words plead “*as charged*” to Count 1. Without the “as charged language, such a plea is only to the elements of the statute – and if the statute is divisible, this is a reasonably good plea for immigration purposes. The Court noted that this specificity is needed because of the fact that a complaint can, and frequently is, amended orally before the plea.

In *Vidal* the defendant had taken a *West* plea and declined to specify a factual basis for the plea. Because of a subsequent *en banc* opinion that failed to cite or consider *Vidal*,⁷¹ the government is arguing that *Vidal* is limited only to *West* pleas. Although this does not appear to be the case, some immigration judges are accepting this argument. Therefore, it is important for defense counsel to take a *West* plea, as well as not plead to a count “as charged,” to support a *Vidal* defense. If possible, decline to state a factual basis for the *West* plea; if that is not possible, state a careful factual basis per the advice in Part E.

d. Drafting a plea agreement gives criminal defense counsel the opportunity to create the record of conviction that will be determinative in immigration proceedings.

Important and beneficial information should be affirmatively set out in the plea agreement or colloquy. Damaging information from the charge can be deleted.

Examples: “Defendant pleads guilty to harassing” or to “following *or* harassing,”⁷² “Defendant pleads guilty to offering to transport,”⁷³ “Defendant pleads guilty to possession of a controlled substance,” in place of the original charge which alleged a specific substance such as heroin,⁷⁴ “Defendant pleads guilty to an offensive touching in which no pain was caused” or “pleads guilty to battery”⁷⁵

⁶⁹ See further discussion in Brady, “Defense Arguments: *Matter of Almanza-Arenas*” at www.ilrc.org/criminal.php.

⁷⁰ *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*).

⁷¹ See *United States v. Snellenberger*, 548 F.3d 699, 700 (9th Cir. 2008) (*en banc*).

⁷² This plea to Calif. P.C. § 646.9 is not a crime of violence under *Malta-Espinoza, supra*. See § 9.13.

⁷³ This is not an aggravated felony, and arguably not a deportable drug offense. See discussion of *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*) in Note 7.; Controlled Substances.

⁷⁴ See discussion of *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007) in Note 7: Controlled Substances. This is not a deportable drug offense.

⁷⁵ See discussion of Calif. P.C. § 243(e) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), in § N. 9 Domestic Violence. This is not a deportable crime of domestic violence.

- e. If the charge is phrased in the conjunctive (“and”) while the statute is in the disjunctive (“or”), the defendant should specifically make a plea agreement in the disjunctive.**

An example is, “I admit to entry with intent to commit larceny or any felony.” (However, if the defendant did not do this, immigration counsel will argue, in the context of conflicting case law, that a plea to a charge in the conjunctive does not necessarily prove the multiple acts.⁷⁶)

- f. Do not permit the defendant to admit extraneous facts that might have a negative immigration effect, and that are not required for conviction.**

Immigration authorities sometimes consider admission of facts not required for a conviction, even though this appears to violate rules governing the categorical analysis.⁷⁷ Counsel should assume conservatively that *any* fact admitted by the defendant may be considered by immigration authorities or a court, although immigration counsel may have strong arguments against this. (Generally, adding additional facts is fine, especially as needed to provide specificity as a factual basis, as long as the facts do not have immigration implications.)

- g. Information from dismissed charges cannot be considered**

This would violate the fundamental rule that there must be proof that the allegations in the charge were pled to. In case of doubt, bargain for a new count.

Example: The Ninth Circuit held that although a dropped charge to H&S § 11378(a) identified methamphetamine as the controlled substance, this information could not be used to hold that the new charge of possession of a “controlled substance” under H&S § 11377(a) involved methamphetamine. Since the substance could not be identified, it was not possible to prove that it appeared on federal controlled substance lists, and the noncitizen was held not deportable.⁷⁸ See § N.8 Controlled Substances.

- h. Practice Pointer: Be sure to check the court documents for accuracy. Get a copy of any beneficial documents for the defendant**

If the defendant is put in removal proceedings, most of the time the government relies on written documents (the complaint, minute order, abstract of judgment, and written waiver form). Check the minute orders, Abstract of Judgment, and any interlineations the clerk puts on any

⁷⁶ *Malta-Espinoza v. Gonzales*, *supra*; see also *In re Bushman*, (1970) 1 Cal.3d 767, 775 (overruled on other grounds). However, with no discussion the Ninth Circuit en banc held the opposite in *Snellenberger*, *supra* at 701.

⁷⁷ See discussion of *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990) at Chapter 2, § 2.11(C); see also *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (defendant convicted of an assault offense that had no element of use of a firearm was not deportable under the firearms ground, even though he pleaded guilty to an indictment that alleged he assaulted the victim with a gun).

⁷⁸ *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007). See generally *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005).

amended complaint to make sure that they conform to the plea. If not, have them corrected before you leave court. If the plea colloquy is helpful, assist the defendant to obtain a copy of the plea transcript. If the plea colloquy is not helpful, do not obtain a copy of this because the original will be available for ICE to get from the court file.

Give a copy to the defendant of any of the above documents that can be beneficial to his case, including a certified copy of the written complaint or amended complaint, the minute orders of the plea, the written waiver form or plea agreement, the Abstract of Judgment, and, if helpful, obtain the transcript of the plea colloquy. Tell the defendant to keep a copy of these documents and give them to his immigration attorney if he is ever put in removal proceedings or has an immigration problem. If he is headed for removal proceedings and will be unrepresented, tell him to keep them to show to the judge. In addition, *give the defendant a short statement describing how the disposition prevents an immigration consequence*. See discussion and draft statements at § N.14 Safer Pleas, *infra*.

E. Factual Basis for the Plea⁷⁹

Introduction. One of the many challenges facing criminal defense counsel who represent noncitizens is to meet two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to meet requirements pertaining to a factual basis for the plea under criminal law requirements. Taking care with stipulation to the factual basis for the plea is of course beneficial from a criminal law perspective as well as immigration law. It may enable the defendant to avoid admitting facts that will support an enhanced sentence in the instant offense, or avoid causing the conviction to be counted as a “strike” in a future prosecution.

In California there are no statutory requirements for creating the factual basis,⁸⁰ but case law has established some rules. The California Supreme Court discussed the requirements in *People v. Holmes*.⁸¹ The court concluded that either the defendant or the defense counsel can provide the information that serves as the factual basis. If the defendant is examined, the trial court has wide latitude to interview the defendant. If instead defense counsel is examined, counsel may stipulate to a particular document that provides an adequate factual basis such as a police report, a preliminary hearing transcript, a probation report, a grand jury transcript, or, significantly, a complaint or a written plea agreement.⁸² See also *People v. French* (2008) 43 Cal.4th 36, discussed in Part 1, below.

⁷⁹ Thanks to James F. Smith for much of this analysis. In addition, some of this section draws from an excellent article, “Penal Code section 1192.5: A Short Précis on The Factual Basis For A Guilty Plea,” by Chuck Denton of the Office of the Alameda County Public Defender.

⁸⁰ Calif. PC § 1192.5 provides only that “[t]he court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”

⁸¹ *People v. Holmes*, 32 Cal. 4th 432 (2004).

⁸² “We conclude that in order for a court to accept a conditional plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge, or question the defendant regarding the factual basis described in the complaint or written plea agreement. If the trial

Counsel representing noncitizen clients should *avoid having the defendant provide the factual basis*. Defense counsel should always provide the factual basis, and should try to negotiate a factual basis for a plea that minimizes or avoids the adverse immigration consequences of a conviction. The following are suggested strategies

- 1. As a factual basis for the plea, state your 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 to People v. French (2008) 43 Cal.4th 36, 51.**

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

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

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

This may not be possible to obtain in many cases, but it is a good option. Since a *West* plea is entered without any factual admission of guilt, argue that the court should allow entry of the plea without establishing any factual basis for the plea. See, e.g., facts in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). In that case, the criminal defense counsel wrote “*People v. West*” on the waiver form when asked for a factual basis, and declined to admit to a factual basis or stipulate to any police reports or other documents.

court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. Under either approach, a bare statement by the judge that a factual basis exists, without the above inquiry, is inadequate.” *Id.* at 436 (internal citations omitted).

3. If the above suggestions are not possible, counsel should carefully craft a written plea agreement or amended charge, and stipulate to that as the factual basis.

Under *People v. Holmes*, defense counsel may stipulate to any of several listed documents.⁸³ Strategically, counsel should stipulate only to the *complaint* (which counsel may move to amend) or a *written plea agreement*, because these documents give counsel the necessary control over the record of conviction to avoid immigration consequences. Defense counsel also can stipulate to a specific portion of a given document that does not contain damaging facts against the defendant, e.g. the concluding paragraph of the police report dated “x” on p. 2 that reads “...”

Counsel may have to negotiate exactly how much and what kind of detail is provided. Recently a California appellate court held inadequate a stipulation to a charge that repeated the language of the statute, with no additional information beyond the names of the defendant and victim.⁸⁴ If there is an objection to using a charge or plea agreement that tracks the statute as the factual basis for the plea, counsel can amend the document to provide additional details of the kind that will not adversely affect the immigration case; it may be possible to highlight specific facts that are beneficial to the case. It is a good idea to work closely with an immigration expert on this wording.

Where a statute is divisible, counsel may plead the defendant to the safer option under the statute, or if that is not possible to the statute in the disjunctive (using “or” rather than “and”). Counsel should ensure that the factual basis for the plea also follows this course: either the safer option under the statute, or at least in the disjunctive, or otherwise vaguely stated. For example, a statement that “On x date I did sell or transport ...” (to avoid an aggravated felony drug conviction) or “On x date I used a dangerous weapon” (without identifying the weapon as a firearm, if that is what must be avoided).” Note that a factual basis for the plea can be stipulated to at sentencing rather than plea. See *People v. Coulter*, 163 Cal. App. 4th 1117, 1122 (Cal. App. 2d Dist. 2008).

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

⁸³ *People v. Holmes*, 32 Cal. 4th at 436.

⁸⁴ *People v. Willard*, 154 Cal. App. 4th 1329, 1335 (Cal. Ct. App. 2007). The court noted, “The complaint alleged the date of the conduct and the names of defendant and the victim. The remainder of the complaint was in the language of the statute. The statutory language set forth the elements of the offense, not facts. This was not enough to satisfy the purpose of the factual basis inquiry, to corroborate what defendant had already admitted by his plea.”

§ N.4 Sentence Solutions

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

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

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

The immigration statute defines the term of imprisonment of a sentence as the “period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.”⁸⁵

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

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

- This definition refers to the sentence actually imposed, not to potential sentence or to time served.
- It does not include the period of probation or parole.
- It includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended. Where *imposition* of suspension is suspended, it includes any period of jail time ordered by a judge as a condition of probation.

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

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

⁸⁵ Definition of “term of imprisonment” at INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

- For most immigration provisions the sentence only attaches to each individual count and is not added up through multiple counts. For example, many offenses will become an aggravated felony only if a sentence of a year or more is imposed. A sentence imposed of less than a year on each of several counts, to be served consecutively, does not result in a single conviction with more than a one-year sentence imposed.
- Time imposed pursuant to a recidivist sentence enhancements (e.g., petty with a prior) will count in analyzing sentence imposed.⁸⁶
- The time that is imposed on the original offense after a probation or parole violation will be added to the original time for that count.⁸⁷

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

- Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent the conviction from being considered an aggravated felony.⁸⁸

How to get to 364 days or less. Often counsel can avoid having an offense classed as an aggravated felony by creative plea bargaining. The key is to *avoid any one count from being punished by a one-year sentence*, if the offense is the type that will be made an aggravated felony by sentence. If needed, counsel can negotiate for significant jail time or even state prison time. It is important to remember that a state prison commitment will not automatically make the conviction an aggravated felony. If immigration concerns are important, counsel might:

- bargain for 364 days on a single count/conviction;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;

⁸⁶ The opposite rule was in force, until the Supreme Court overturned Ninth Circuit precedent to hold that a sentencing enhancement imposed as a result of a recidivist offense shall count towards the length of sentence imposed. *U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008), overruling in part *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc*).

⁸⁷ See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

⁸⁸ *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

- plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail or even *state prison time* on that.

Example: Felipe is a longtime permanent resident who is charged with multiple violent crimes. There are also allegations that a knife was used in the commission of the crimes. The prosecution is demanding that Felipe plead guilty to a strike and that he be sentenced to state prison. In this situation you may still be able to negotiate a plea bargain that avoids an aggravated felony conviction.

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

- waive credit for time already served or prospective “good time” credits and persuade the judge to take this into consideration in imposing a shorter official sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence (for example, waive credit for six months time served and bargain for an official sentence of nine months rather than 14 months);
- rather than take a probation violation that adds time to the sentence for the original conviction, ask for a new conviction and take the time on the new count.

B. Which Offenses Become an Aggravated Felony Based on One-Year Sentence?

The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year was imposed. Obtaining a sentence of 364 days or less will prevent an offense from being classed as an aggravated felony *under these categories*.⁸⁹ Counsel always should make sure the offense does not also come within a different aggravated felony category that does not require a sentence.

- Crime of violence, defined under 18 USC § 16
- Theft (including receipt of stolen property)
- Burglary
- Bribery of a witness
- Commercial bribery

⁸⁹ See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice
- Perjury, subornation of perjury
- Falsifying documents or trafficking in false documents (with an exception for a first offense for which the alien affirmatively shows that the offense was committed for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent)

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

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

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

The above definition of “sentence imposed” also applies to persons attempting to qualify for the petty offense exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible one-year sentence and a sentence imposed of *six months or less*.⁹⁰ See Note: Crimes Involving Moral Turpitude, *infra*.

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

⁹⁰ See 8 USC § 1182(a)(2)(A)(ii)(II).

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

By Michael K. Mehr and Katherine Brady

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

A. Immigration Hold

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

The regulation provides that an immigration hold is a *request* that another Federal, State or local law enforcement agency notify INS prior to release of an alien in order for INS to arrange to assume custody for the purpose of arresting and removing the alien. The request is for a *limited time only*:

Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period of not to exceed 48 hours, excluding Saturday, Sundays, and holidays⁹¹ in order to permit assumption of custody by the Service.

B. Strategies for Aliens Awaiting Trial

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

The first thing a criminal practitioner should do when he finds out that his client is an alien and is in custody is to attempt to have that person released on recognizance or bail before any hold or detainer is placed. When a defense attorney speaks with the defendant in custody the defendant should also be advised that he or she has a right to remain silent in the face of any interrogation by ICE or border patrol and that he or she should particularly be advised not to answer any questions concerning place of birth. Once an alien discloses that he or she is born outside the United States, it is the alien’s burden under immigration law to prove that he or she has lawful immigrant or non-immigrant status in the United States.⁹²

⁹¹ Form I-247 indicates that “holidays” means Federal holidays.

⁹² *INS v. Lopez-Mendoza*, 468 U.S. 1032, 82 L.Ed. 2d 778, 104 S.Ct. 3479 (1984). See also § 1.1, *supra*, regarding initial warnings.

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

2. Where there is an immigration hold/detainer

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

If INS issues a detainer and does not assume custody of the alien, either by taking the alien into actual INS custody or by issuing a warrant of arrest, within 48 hours after the alien would otherwise be released by a criminal justice agency, excluding Saturday, Sundays and Federal holidays, then the criminal defense attorney should demand the alien's immediate release from custody from the criminal justice agency holding the prisoner.⁹³

If the defendant is not immediately released the criminal justice agency is subject to a suit for damages and injunctive relief can be obtained to prevent further violations.⁹⁴ A writ of habeas corpus can also be filed to obtain the defendant's immediate release from custody.⁹⁵ A copy of such a writ is included in *Defending Immigrants in the Ninth Circuit*, Appendix 12-A.

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

Where there is an immigration hold, it may well be in the client's best interests not to be released from criminal incarceration. Immigration detention is worse than criminal

⁹³ Many local criminal justice agencies incorrectly assume that a detainer requesting Temporary Detention authorizes detention for 5 days after a prisoner would otherwise be released confusing an INS request for Temporary Detention with the statutory period allowed to hold prisoners with out-of-county warrants.

⁹⁴ See e.g., *Gates v. Superior Court*, *supra*, 193 Cal.App.3d at p. 219-221 (interpreting prior "24 hour rule" of 8 CFR 287.3); *Cervantez v. Whitfield*, *supra*, 776 F.2d at p. 557-559 (stipulation concerning prior "24 hour rule.")

⁹⁵ See Section 12.4, *infra*.

incarceration. Immigration bond is unavailable for most criminal grounds for deportation. Even if bond is possible, immigration bonds require real property collateral and 10% cash deposit or full cash deposit and are set at \$1,500 or more. While detained by immigration authorities, the detainee can be moved hundreds of miles away, to another state and outside the jurisdiction of the Ninth Circuit. Conditions in immigration detention generally are even worse than in jails.

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

Summary of Strategy:

- Attempt to obtain your client's immediate release on O.R. or bail before any hold or detainer is place;
- If your client signed a voluntary departure request you can revoke it. You should consult an immigration attorney before doing this;
- If your client is held more than 48 hours, excluding Saturdays, Sundays and Federal Holidays, beyond the time the defendant should be released on the criminal charge and the client has not signed a voluntary departure request you should seek your client's immediate release from custody by threatening a false imprisonment or civil rights violation suit against the custodial agency, city or country and/or file a writ of habeas corpus;
- If a detainer is filed against your client and your client is eligible for immigration bond, attempt to obtain your client's release on O.R., or bond on the criminal charge and then on the immigration matter after INS picks up your client. You should plan and coordinate this with an immigration attorney. *However, most criminal removal grounds make the alien ineligible for release on bond from immigration detention.*
- If your client will be deportable by reason of the current charge, consider a jury or court trial or submitting the matter on a preliminary examination transcript or police report or pleading guilty after a suppression motion (1538.5 PC), and then filing an appeal. See Note 2: Definition of Conviction. If the matter is on direct appeal when the defendant finishes his jail or prison sentence, ICE cannot use the conviction as a basis for deportation.

C. Prisoners with Detainers Serving Sentences

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

- If an alien is convicted of a crime and the alien is either undocumented, out of status, or the conviction renders the alien deportable, it is important to try to obtain a sentence which would not require the defendant's incarceration, in order to avoid contact with immigration.
- Consider an appeal, including a slow plea, if it is not too late. See Note 2: Definition of Conviction.
- A defendant sentenced for an offense is not subject to being taken into custody by ICE until after completion of the defendant's sentence to confinement. ICE can take custody of the individual even if the defendant is released on probation or parole or supervised release. In relatively rare cases, removal hearings are held in prison, before the noncitizen completes his or her sentence.
- Warn an alien who will be deported about the risk of federal prosecution for illegal re-entry into the United States. The penalties are especially severe if there is a prior conviction of an aggravated felony or certain other felony convictions. See Note 1: Defense Goals, Part D. "The Immigration Strike"

§ N.6 Aggravated Felonies

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

Aggravated felonies are defined at 8 USC § 1101(a)(43), which is a list of dozens of common-law terms and references to federal statutes. They are the most damaging type of conviction for a noncitizen.

A. Penalties for an Aggravated Felony Conviction: Barred from Immigration Applications.

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

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

There are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility is highly complex. See discussion in Chapter 9, § 9.2, and see discussion of each form of relief and criminal record bars in Chapter 11, *Defending Immigrants in the Ninth Circuit*. The following are some important options.

- Persons convicted of an aggravated felony can apply for withholding of removal under 8 USC § 1231(b)(3) if they have the equivalent of a very strong asylum claim, or for relief under the Convention Against Torture if they fear torture.
- Persons who were not permanent residents at the time of conviction, and whose aggravated felony does not involve controlled substances, might be able to adjust status (become a permanent resident) through a close U.S. citizen or permanent resident family member with a waiver under 8 USC § 1182(h).
- An aggravated felony conviction is not a bar to applying for the “T” or “U” visas for persons who are victims of alien smuggling or a serious crime and who cooperate with authorities in prosecuting the crime. See 8 USC § 1101(a)(15)(T) and (U).

Permanent residents who before April 24, 1996 pled guilty to an aggravated felony that didn't involve firearms may be able to obtain a waiver under the former § 212(c) relief, but may be unable to waive any ground of deportability that has arisen since that time. See *Defending Immigrants in the Ninth Circuit*, § 11.1

B. Penalties for an Aggravated Felony Conviction: Federal Offense of Illegal Re-entry

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

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

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

C. The Definition of Aggravated Felony

Aggravated felonies are defined at 8 USC § 1101(a)(43), which is a list of dozens of common-law terms and references to federal statutes. Both federal and state offenses can be aggravated felonies. A foreign conviction may constitute an aggravated felony unless the conviction and resulting imprisonment ended more than 15 years in the past.

Every offense should be suspiciously examined until it is determined that it is *not* an aggravated felony. While some offenses only become aggravated felonies by virtue of a sentence imposed of a year or more (see § N.4 or Chapter 5 on sentencing), others are regardless of sentence. Outside of some drug offenses, even misdemeanor offenses can be held to be aggravated felonies.

Where a federal criminal statute is cited in the aggravated felony definition, a state offense is an aggravated felony only if all of the elements of the state offense are included in the federal offense. It is not necessary for the state offense to contain the federal jurisdictional element of the federal statute (crossing state lines, affecting inter-state commerce) to be a sufficient match. Where the aggravated felony is identified by a general or common law terms—such as theft, burglary, sexual abuse of a minor—courts will create a standard “generic” definition setting out the elements of the offense. To be an aggravated felony, a state offense must be entirely covered by the generic definition. See, e.g., discussion in Note: Burglary, or Chapter 9 of *Defending Immigrants in the Ninth Circuit*.

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

Aggravated Felonies under 8 USC § 1101(a)(43)
(displayed alphabetically; statute subsection noted after category)

- **alien smuggling**- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child. (N)
- **attempt** to commit an aggravated felony (U)
- **bribery** of a witness- if the term of imprisonment is at least one year. (S)
- **burglary**- if the term of imprisonment is at least one year. (G)
- **child pornography**- (I)
- **commercial bribery**- if the term of imprisonment is at least one year. (R)
- **conspiracy** to commit an aggravated felony (U)
- **counterfeiting**- if the term of imprisonment is at least one year. (R)
- **crime of violence** as defined under 18 USC 16 resulting in a term of at least one year imprisonment, if it was not a “purely political offense.” (F)
- **destructive devices**- trafficking in destructive devices such as bombs or grenades. (C)
- **drug offenses**- any offense generally considered to be “drug trafficking,” plus cited federal drug offenses and analogous felony state offenses. (B)
- **failure to appear**- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years. (Q and T)
- **false documents**- using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person’s spouse, child or parent. (P)
- **firearms**- trafficking in firearms, plus several federal crimes relating to firearms and state analogues. (C)
- **forgery**- if the term of imprisonment is at least one year. (R)

- **fraud or deceit** offense if the loss to the victim exceeds \$10,000. (M)
- **illegal re-entry** after deportation or removal for conviction of an aggravated felony (O)
- **money laundering**- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds \$10,000, and offenses such as fraud and tax evasion if the amount exceeds \$10,000. (D)
- **murder**- (A)
- **national defense**- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information. (L)(i)
- **obstruction of justice** if the term of imprisonment is at least one year. (S)
- **perjury or subornation of perjury**- if the term of imprisonment is at least one year. (S)
- **prostitution**- offenses such as running a prostitution business. (K)
- **ransom demand**- offense relating to the demand for or receipt of ransom. (H)
- **rape**- (A)
- **receipt of stolen property** if the term of imprisonment is at least one year (G)
- **revealing identity of undercover agent**- (L)(ii)
- **RICO** offenses- if the offense is punishable with a one-year sentence. (J)
- **sabotage**- (L)(i)
- **sexual abuse of a minor**- (A)
- **slavery**- offenses relating to peonage, slavery and involuntary servitude. (K)(iii)
- **tax evasion** if the loss to the government exceeds \$10,000 (M)
- **theft**- if the term of imprisonment is at least one year. (G)
- **trafficking in vehicles** with altered identification numbers if the term of imprisonment is at least one year. (R)
- **treason**- federal offenses relating to national defense, treason (L)

§ N.7 Crimes Involving Moral Turpitude

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

IMPORTANT DEVELOPMENT: At the end of 2008, outgoing Attorney General Mukasey drastically changed the law, holding that an immigration judge may decide to hold a fact-based inquiry, rather than an inquiry under the categorical approach, to determine whether a conviction is of a “crime involving moral turpitude” (“CMT”). *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). But see strategies for preventing this inquiry at Part A.

Further, without ruling on the validity of *Silva-Trevino*, the Ninth Circuit has decided to increase the level of deference it accords to Board of Immigration Appeals decisions on whether an offense is a CMT.

These decisions make it hard to predict precisely which offenses will be held a crime involving moral turpitude. While important rules remain, until the law becomes more settled criminal defense counsel must conservatively assume that many offenses involve moral turpitude. Fortunately, not every conviction of a CMT is fatal to immigration status. To analyze the effect of a conviction, counsel needs the client’s entire criminal history and some key facts about his or her immigration status and history. See Parts B and C.

A. Definition of a Crime Involving Moral Turpitude (including *Matter of Silva-Trevino*)

Because of recent legal developments, at this point it is very difficult to state with certainty that an offense of conviction will not be classified as a crime involving moral turpitude. In late 2008 outgoing Attorney General published *Matter of Silva-Trevino, supra*, which drastically changed how immigration authorities determine whether an offense of conviction is a crime involving moral turpitude. Under *Silva-Trevino*, immigration judges in some cases have the discretion to delve into the *actual conduct* of the defendant, rather than concentrating on the *elements of the offense and reviewable record of conviction*, as is required under the categorical approach. If an immigration judge elects to make this kind of inquiry in a case, she might take testimony from the defendant (now called the “respondent”) in immigration proceedings, as well as other evidence.

In *Silva-Trevino* the AG also defined a crime involving moral turpitude as a reprehensible act with a *mens rea* of at least recklessness.

For further discussion of the impact of this case in immigration proceedings, see Tooby and Kesselbrenner, “Living with *Silva-Trevino*” at www.nortontooby.com. *Silva-Trevino* will be challenged in federal courts. The Third Circuit has rejected it.⁹⁶

To make matters more unsettled, in 2009 the Ninth Circuit held that it would extend *Chevron* deference to published BIA or AG determinations of whether an offense constitutes a CMT. This means that the court will defer in all cases except where the BIA determination is so unreasonable as to be “impermissible.” *Marmolejo Campos v. Holder*, 558 F.3d 903 (9th Cir. 2007) (en banc). This also means that the Court might reverse some of its own prior decisions on CMT in the future, if it finds that they conflict with a reasonable published AG or BIA opinion. (At this writing the Court has not yet decided whether it will defer to the AG on the key *Silva-Trevino* question of whether the categorical approach applies fully to a CMT determination.)

There are still some strong defense options, despite *Silva-Trevino*.

- It is well-established that an offense that requires only *criminal negligence* does not constitute a CMT. For example, it has long been held that simple drunk driving, even as a repeat offense, is not a CMT. See other offenses in the Chart that also should not be held to involve moral turpitude under any circumstances.
- The Board has held that *mere offensive touching*, enough to violate P.C. § 243(a) or 243(e), is not a CMT. Under *Silva-Trevino* the immigration judge may decide to consider evidence such as police reports and testimony from the noncitizen or victim to decide whether the offense involved actual violence rather than mere touching. However, where the guilty plea is *specifically* to offensive touching, the judge might not be permitted to go beyond the record; see next point.
- *Where there is a divisible statute, a specific plea to conduct that is not a CMT ought to resolve the question and protect the defendant.* *Silva-Trevino* stated that if an offense as described in the statute is categorically not moral turpitude – e.g., if it is entirely lacking an element of immoral behavior or fraud – then it cannot be held a CMT. Also, if the record of conviction *decisively* identifies elements that do not involve CMT, the immigration judge should not go on to a fact-based inquiry.⁹⁷ Thus for moral turpitude purposes, creating a vague record of conviction is not the best strategy. To the extent possible, it is far better to plead to a specific offense that clearly does not involve moral turpitude.

Example: Section § 10851 of the Vehicle Code is divisible as a crime involving moral turpitude. Taking with permanent intent is a CMT, while taking with temporary intent is not. Victor and Samuel, two permanent residents, both are charged with § 10851.

⁹⁶ See *Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009).

⁹⁷ “In my view, *when the record of conviction fails to show* whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act’s moral turpitude provisions.” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008) (emphasis supplied).

Victor pleads to § 10851 with a vague record of conviction, reciting the language of the statute in the disjunctive. Samuel pleads specifically to a temporary taking.

When Victor gets to immigration court, the judge decides that since the vague record of conviction does not establish whether the taking was temporary or permanent, he is permitted to go beyond the record under *Silva-Trevino*, just for purposes of determining whether the offense is a CMT. The judge may examine the probation report, or take testimony from Victor. Based on evidence there, he can hold that Victor intended a permanent taking and that his conviction is a CMT.

When Samuel and his specific record get to the same immigration judge, the judge decides that the moral turpitude question *is* resolved by the record of conviction: the plea bargain clearly establishes that Samuel pled guilty to a temporary taking. Therefore *Silva-Trevino* does not permit the judge to go beyond the record, and she must end the inquiry and find that Samuel does not have a moral turpitude conviction.

- If the immigration court does conduct a broad factual inquiry under *Silva-Trevino*, it may use the information only to determine if the offense involves moral turpitude, and not to determine if the conviction comes within other grounds of inadmissibility or deportability.⁹⁸

Example: Mike pleads guilty to P.C. § 243(e), spousal battery. If this offense is committed with mere “offensive touching,” it is neither a crime involving moral turpitude (CMT), nor a deportable crime of domestic violence. If instead it is committed with actual violence, it may be held a CMT and a deportable crime of domestic violence.⁹⁹ Mike’s defender creates a vague record of conviction in which Mike pleads to the language of the statute, which does not establish whether the offense involved actual violence or an offensive touching.

Under *Silva-Trevino*, the judge may decide to go beyond the vague record that is reviewable under the modified categorical approach, and make a factual inquiry into Mike’s conduct. The inquiry might lead her to find that real violence was involved and the offense is a CMT. However, the judge may *not* go beyond the reviewable record to determine whether the conviction comes within another deportability or inadmissibility ground. For example, the judge must only consider the reviewable record of conviction when she determines whether the government has met its burden of proving that the offense is a deportable crime of domestic violence. Since the vague record does not establish that the offense involved actual violence, she will find that Mike is not deportable under the domestic violence ground.

⁹⁸ “This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that ‘stands apart from the elements of the [underlying criminal] offense.’” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699, 704 (AG 2008).

⁹⁹ See discussion of Calif. P.C. § 243(e) and *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), in § N. 9 Domestic Violence.

(Note that in this example Mike might not be deportable at all, despite conviction of a CMT. As is discussed in Part B, a single conviction of a CMT causes deportability only if it has a potential sentence of a year or more and was committed *within five years after admission*. If Mike committed this offense more than five years after admission, he is not deportable for a CMT. He also is not deportable for a crime of domestic violence – so in this case, he wins. However, by far the best option would have been for his defender to bargain for Mike to plead specifically to an offensive touching.)

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

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

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

A felony/misdemeanor that is reduced to a misdemeanor under PC § 17 retains a potential one-year sentence and can be a basis for deportability. If counsel can bargain to a six-month misdemeanor, or to **attempt** of a wobbler that is then reduced to a misdemeanor, the offense will have only a six-month maximum penalty. See § N.4 Sentence Solutions on how to provide for the maximum possible jail time, if that is required, even under a reduced potential sentence.

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

Depending on individual circumstances, the “admission” that starts the five years might be the person’s first lawful entry into the United States, the date he or she adjusted status to permanent residency, or a return from a subsequent trip outside the country. See discussion in Chapter 1, § 1.3(B), *Defending Immigrants in the Ninth Circuit*.¹⁰⁰

¹⁰⁰ To summarize: if the person enters the U.S. without inspection (e.g., surreptitiously crosses the Rio Grande from Mexico) and later goes through a process inside the U.S. to become a permanent resident (adjustment of status), the adjustment of status is the admission that starts the five years. *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133 (9th Cir. 2001); *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999). If instead the person is admitted to the U.S., for example on a student visa, and stays in lawful status until they day she adjusts status to permanent residency, the date of her original admission is the start of the five years; the clock does not re-start at adjustment. *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004).. Finally, if a noncitizen is admitted to the U.S., for example as a tourist, and

Plead to attempt in order to lower the potential sentence to under one year. Attempt does not prevent an offense from being classified as a crime involving moral turpitude. In general, attempt takes on the character of the principal offense for immigration purposes so that, e.g., attempt to commit theft is a crime involving moral turpitude. In fact, attempt is inconsistent with reckless or negligent intent, and in some cases might make it more likely for an offense to be held a CMT.

However, attempt does offer a way to avoid becoming deportable for conviction of one crime involving moral turpitude *for which the potential sentence is one year or more*. For most offenses, attempt carries half the potential sentence of the principal offense, under P.C. § 644(b). Attempt to commit a one-year misdemeanor, or a felony wobbler that is reduced to a misdemeanor, carries a potential sentence of six months. By using creative sentencing strategies, e.g. waiving credit for time served, counsel may be able to meet the prosecution's demands for sentence while still pleading to attempt. See § N.4 Sentence Solutions, *supra*.

Do not plead to attempt to commit an offense involving fraud or deceit where there was a potential loss to the victim or government of \$10,000 or more. This might make it more likely for the offense to be held an aggravated felony. See Note: Burglary, Fraud.

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

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

Example: Stan was admitted to the U.S. in 1998. He was convicted of assault with a deadly weapon in 2002 and passing a bad check in 2006. Regardless of the potential or actual imposed sentences, he is deportable for conviction of two moral turpitude offenses since his admission.

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

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

Petty offense exception.¹⁰¹ If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a potential sentence of a year or less, and (c) the “sentence

then falls out of lawful status for some years, and then adjusts status, the Ninth Circuit has not held as to whether the adjustment re-starts the five year period. See discussion in *Defending Immigrants in the Ninth Circuit*, § 4.5.

¹⁰¹ 8 USC § 1182(a)(2)(A)(ii)(II).

imposed” was less than six months, the person is automatically not inadmissible for moral turpitude.

Example: Freia is convicted of felony grand theft, the only CMT offense she’s ever committed. (She also has been convicted of drunk driving, but as a non-CMT that does not affect this analysis.) The conviction is reduced to a misdemeanor under PC § 17.¹⁰² The judge gives her three years probation, suspends imposition of sentence, and orders her to spend one month in jail as a condition of probation. She is released after 15 days. Freia comes within the petty offense exception. She has committed only one CMT, it has a potential sentence of a year or less, and the sentence imposed was one month. (For more information on sentences, see § N.4.)

Youthful offender exception.¹⁰³ A disposition in juvenile delinquency proceedings is not a conviction and has no relevance to moral turpitude determinations. But persons who were convicted as adults for acts they committed while under the age of 18 can benefit from the youthful offender exception. A noncitizen who committed only one CMT ever, and while under the age of 18, ceases to be inadmissible as soon as five years have passed since the conviction or release from resulting imprisonment.

Example: Raoul was convicted as an adult for felony assault with a deadly weapon, based on an incident that took place when he was 17. He was sentenced to eight months and was released from imprisonment when he was 19 years old. He now is 24 years old. Unless and until he is convicted of another moral turpitude offense, he is not inadmissible for moral turpitude.

Inadmissible for making a formal admission of a crime involving moral turpitude. This ground does not often come up in practice. A noncitizen who makes a formal¹⁰⁴ admission to officials of all of the elements of a CMT is inadmissible even if there is no conviction. This does not apply if the case was brought to criminal court but resolved in a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).¹⁰⁵ Counsel should avoid having clients formally admit to offenses that are not charged with.

¹⁰² Reducing a felony to a misdemeanor will give the offense a maximum possible sentence of one year for purposes of the petty offense exception. *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

¹⁰³ 8 USC § 1182(a)(2)(A)(ii)(I).

¹⁰⁴

¹⁰⁵ See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in § 4.4, *supra*.

§ N.8 Controlled Substances

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

- A. Overview of Penalties for Drug Offenses
- B. Key Defense Strategies: Create a Record that Does Not Specify the Controlled Substance; Plead to Accessory After the Fact
 - 1. Create a Record that Does Not Specify the Controlled Substance
 - 2. Plead to Accessory after the Fact
- C. Simple Possession or Less
- D. Sale and Other Offenses beyond Possession
- E. “Conduct-Based Grounds: Formal admission of an Offense, Being an Addict or Abuser, and the Government has “Reason to Believe” the Noncitizen was involved with Trafficking
- F. Quick Reference Chart for Effect of Pleas: Ninth Circuit Law under *Lopez v. Gonzalez*

Chart on Immigration Consequences of Drug Pleas. Following this Note is a one-page Chart that summarizes advice for pleading to California drug offenses. It may be helpful to take the Chart to court or check it as you read this chapter.

A. Overview of Penalties for Drug Offenses

Aggravated felony. Under 8 USC § 1101(a)(43)(B), a controlled substance offense can be a “drug trafficking” aggravated felony in either of two ways: (1) if it is an offense that meets the general definition of trafficking, such as sale or possession for sale, or (2) if it is a state offense that is analogous to certain federal *felony* drug offenses, even those that do not involve trafficking, such as simple possession, cultivation, or some prescription offenses. Case law has established that a state possession conviction with no prior drug convictions is not an aggravated felony, unless it is possession of flunitrazepam or 5 grams or more of crack cocaine. For information as to when a state possession conviction with a drug prior might be held an aggravated felony, see Part C.

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

Inadmissibility grounds. Conviction of any offense “relating to” controlled substances or attempt or conspiracy to commit such an offense causes inadmissibility under 8 USC § 1182(a)(2)(A)(i)(II).

In addition conduct can cause inadmissibility even absent a conviction. First, a noncitizen who is a “current” drug addict or abuser is inadmissible. 8 USC § 1182(a)(1)(A)(iv). Second, a noncitizen is inadmissible if immigration authorities have probative and substantial “reason to believe” that she ever has been or assisted a drug trafficker in trafficking activities, or if she is the spouse or child of a trafficker who benefited from the trafficking within the last five years. 8 USC § 1182(a)(2)(C). Third, an infrequently used section provides that a noncitizen is inadmissible if she formally admits all of the elements of a controlled substance conviction. 8 USC § 1182(a)(2)(A)(i). The latter does not apply, however, if the charge was brought up in criminal court and resulted in something less than a conviction.¹⁰⁶ See further discussion of conduct grounds in Part E, *infra*.

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

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

The immigration Act, including the definition of aggravated felony, consistently defines “controlled substance” as a substance listed in *federal* drug schedules.¹⁰⁷ If state law covers controlled substances that are not on federal lists, and if the specific controlled substance in a particular state conviction is not identified (either in the record of conviction or the terms of the statute) as one on the federal list, then immigration authorities cannot prove that the offense involved a controlled substance as defined by federal law. The conviction will not be an aggravated felony or basis for deportability or inadmissibility as a controlled substance conviction. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (H&S § 11379); *Esquivel-Garcia v. Holder*, __ 9th Cir. __ (January 29, 2010) (Calif. H&S § 11350). A court may not consult information in a dropped charge in an attempt to identify the substance.

Example: Mr. Ruiz-Vidal was charged with violating Calif. H&S § 11378(a) by possessing methamphetamine for sale. Methamphetamine is included in federal drug schedules. Mr. Ruiz-Vidal bargained for that charge to be dropped, and instead pled guilty to possession of a “controlled substance” under Calif. H&S Code § 11377(a). The record of conviction did not establish the specific controlled substance. The Court held that § 11377(a) is a divisible statute, because it names some substances that do and some that do not appear in the federal schedules. Therefore a plea to § 11377 with no reference to a specific substance is not proven to be a deportable offense “relating to” a federally defined controlled substance. Under the categorical approach the Court was not permitted to use information from the dropped § 11378(a) charge to establish that methamphetamine was the controlled substance involved in the plea to Calif. H&S § 11378(a).

¹⁰⁶ See, e.g., *Matter of CYC*, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission) and discussion in § 4.4.

¹⁰⁷ See, e.g., INA § 101(a)(43)(B), 8 USC § 1101(a)(43)(B) (controlled substance aggravated felony); INA § 212(a)(2)(A)(i)(II), 8 USC 1182(a)(2)(A)(i)(II) (inadmissibility ground); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (deportability ground); providing that controlled substance is defined at 21 USC § 802.

Ruiz Vidal should work to prevent other convictions involving a “controlled substance,” such as H&S §§ 11378 and 11379, from being held an aggravated felony or controlled substance. Several substances listed in Calif. Health & Safety Code § 11378 *et seq.* do not appear on the federal schedule.¹⁰⁸ See also *Esquivel-Garcia v. Holder*, __ 9th Cir. __ (January 29, 2010), holding the same for Calif. H&S § 11350. This strategy obviously does not work where the statute identifies the substance, e.g. possession for sale of marijuana.

A conviction for any trafficking activity that relates even to an unspecified state controlled substance will be held to be a crime involving moral turpitude offense.¹⁰⁹ Simple possession is not a crime involving moral turpitude.

See § N.3 Categorical Approach, Record of Conviction concerning how to create a record that does not identify a controlled substance.

The Paulus defense does not apply to possession of paraphernalia and certain other offenses. The BIA and the Ninth Circuit have held that the *Paulus* defense does not apply to a conviction for possession of paraphernalia including Calif. Health & Safety Code § 11364(a).¹¹⁰ This is a deportable controlled substance conviction even if a specific substance is not identified on the reviewable record. The BIA stated that the defense also will not apply to a conviction for, e.g., maintaining a place where drugs are used, or sale of a non-controlled substance as a “look-alike” controlled substance.¹¹¹

A first conviction for possession for paraphernalia can be eliminated for immigration purposes by state rehabilitative relief, e.g. deferred entry of judgment, Prop 36, P.C. § 1203.4.¹¹²

Paraphernalia and the 30 grams marijuana benefit. Where a paraphernalia offense relates to a single offense of simple possession of 30 grams or less of marijuana – e.g., possession of a marijuana pipe – it will receive the same benefits as the simple possession offense.¹¹³ A single conviction for simple possession of 30 grams or less of marijuana is an exception to the controlled substance conviction deportation ground, and is eligible for treatment

¹⁰⁸ The court in *Ruiz-Vidal* identified apomorphine, geometrical isomers, androisoxazole, bolandiol, boldenone, oxymestron, norbolethone, stanozolol, and stebnolone as being in H&S § 11377(a) but not the federal schedule. *Id.* at p. 1078 and note 6. Practitioners have suggested that the following additional substances also are listed on the California schedule but not the federal: Difenoxin (CA- Schedule I; 11054(b)(15)), Propiram (CA-Schedule I; 11054(b)(41)), Tilidine (CA-Schedule I; 11054(b)(43)), Drotebanol (CA-Schedule I; 11054(c)(9)), Alfentany (CA-Schedule II; 11055(c)(1)), Bulk dextropropoxyphene (CA- Schedule II; 11055(c)(5)), and Sufentanyl (CA-Schedule II; 11055(c)(25)).

¹⁰⁹ *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997 (drug trafficking is a CMT)).

¹¹⁰ *Luu-Le.v I.N.S.*, 224 F.3d 911 (9th Cir. 2000) (Arizona paraphernalia conviction held to be an offense “relating to” a federally defined controlled substance despite the fact that an offense was not defined on the record; *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Calif. Health & Safety Code § 11364(a) is an offense relating to a controlled substance, but was eliminated for immigration purposes by expungement under Calif. P.C. § 1203.4 pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000)).

¹¹¹ *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

¹¹² *Ramirez-Altamirano*, *supra*.

¹¹³ *Matter of Martinez-Espinoza*, *supra*.

under the § 212(h) waiver for inadmissibility based on conviction of a controlled substance. See further discussion in Part C.2, *infra*.

2. *Plead to Accessory after the Fact*

Accessory is a good alternate plea to a **drug offense**. Being an accessory to a drug offense is not considered an offense “relating to controlled substances” and so does not make the noncitizen deportable or inadmissible for having a drug conviction.

The BIA held that federal accessory after the fact is an aggravated felony as obstruction of justice, if a sentence of a year or more is imposed. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). Counsel should avoid a sentence of a year or more for any one count. If that is not possible, counsel should plead specifically to conduct that impeded the *initial apprehension* of the principal, before criminal proceedings were brought in court (or at least, leave the record open to that possibility). This will give immigration counsel a strong argument that the offense is not an aggravated felony. See discussion at § N.14 Safer Pleas, Part G, *infra*.

Criminal defense counsel should assume conservatively that accessory after the fact will be held a crime involving moral turpitude. However, there is a good chance that the Ninth Circuit will stick to its position that this is not the case, and immigration counsel should *not* concede the point.¹¹⁴ See discussion in Note: Crimes Involving Moral Turpitude and further discussion of accessory at Note: Safer Pleas.

C. **Simple Possession or Less, as an Aggravated Felony and Under *Lujan-Armendariz***

Current rules. The following is the standard regarding when a conviction for simple possession of a controlled substance is an aggravated felony in immigration and federal criminal proceedings in the Ninth Circuit. These rules are summarized in the drug plea Chart following this Note, at Part F.

1. **A conviction for even a minor offense relating to controlled substances—such as simple possession, under the influence, or possession of paraphernalia—will make a noncitizen deportable and inadmissible, even if it is not an aggravated felony.** See 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(B)(ii).
2. Conviction of “**a single offense involving possession for one’s own use of thirty grams or less of marijuana**” has several advantages. The person is not deportable; it is possible that the conviction will qualify for a waiver of inadmissibility under 8 USC § 1182(h); and the

¹¹⁴ *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(*en banc*) held that accessory after the fact categorically cannot be a crime involving moral turpitude. The BIA held that the similar misprision of felony is a CIMT. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (misprision of felony under 8 USC §4) (Ninth Circuit appeal pending). Recently, however, the Ninth Circuit *en banc* held that it will defer to the BIA’s holding that an offense involves moral turpitude, if the holding is reasonable. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*) (petition for certiorari pending at the Supreme Court).

conviction is not a bar to naturalization or other relief that requires good moral character.¹¹⁵ This extends to possession or being under the influence of marijuana or hashish,¹¹⁶ and to attempting to be under the influence of THC.¹¹⁷ Counsel should put in the record that the amount of marijuana was less than 30 grams,¹¹⁸ although the law is unsettled.

3. **A first simple possession conviction, whether felony or misdemeanor, is not an aggravated felony in immigration or federal criminal proceedings,** under the U.S. Supreme Court decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006). The only exception is if the substance possessed was more than five grams of cocaine base (crack) or any amount of flunitrazepam (a date-rape drug), in which case the conviction is an aggravated felony.¹¹⁹
4. **If there are no prior controlled substance convictions, a first conviction for simple possession that is eliminated under rehabilitative provisions such as DEJ, Prop 36, or PC § 1203.4, also is eliminated for immigration purposes.** *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

This also works if the first conviction is for an offense less serious than simple possession that does not have a federal analogue, such as possessing paraphernalia (*Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Calif. H&S C § 11364(a)). This ought to work for a first conviction for **giving away a small amount of marijuana** for free (see 21 USC § 841(b)(4)), where the record establishes that the amount was small.

¹¹⁵ INA § 237(a)(2)(B)(i), 8 USC § 1227(a)(2)(B)(i) [deportation ground and exception]; INA § 212(h), 8 USC § 1182(h) [waiver of inadmissibility]. The § 212(h) waiver is available to the spouse, parent, son or daughter of a United States citizen or permanent resident, a VAWA applicant, or to anyone if the conviction occurred at least fifteen years before the waiver application. See also INA § 101(f)(3), 8 USC § 1101(f)(3) (it is not contained in the bar to establishing good moral character, a requirement for naturalization and certain forms of relief).

¹¹⁶ See *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (extends to under the influence). It extends to hashish, although for the § 1182(h) waiver purposes it may only be as much hashish as is equivalent to 30 grams or less marijuana. “So long as the facts of a case satisfy the other requirements of section 212(h), you may properly interpret section 212(h) as giving you the authority to grant a waiver to an alien whose conviction was for the simple possession of 30 grams or less of any cannabis product that is within the definition found in 21 USC § 802(16). Absent some unusual circumstances, however, we recommend that you limit your discretion in section 212(h) cases so that a section 212(h) waiver will be denied in most cases in which the alien possessed an amount of marijuana, other than leaves, that is the equivalent of more than 30 grams of marijuana leaves under the Federal Sentencing Guidelines, 18 USC App. 4.” See INS General Counsel Legal Opinion 96-3 (April 23, 1996), withdrawing previous INS General Counsel Legal Opinion 92-47 (August 9, 1992). See also 21 USC § 802(16), defining marijuana to include all parts of the Cannabis plant, including hashish.

¹¹⁷ *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005)(conviction for having attempted to be under the influence of (THC)-carboxylic acid in violation of Nev. Rev. Stat. §§ 193.330, 453.411 is not a deportable offense, where the government failed to establish that the conviction was for “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.”)

¹¹⁸ *Ibid.*

¹¹⁹ In *Lopez* the court held that a possession offense would be considered a felony, and therefore an aggravated felony, only if it would be so held if charged in federal court (the “federal felony” rule). First offense simple possession is a misdemeanor under federal law, unless the substance was flunitrazepam or more than 5 grams of crack.

Limitations on the Lujan-Armendariz benefit:

Probation violation. The *Lujan-Armendariz* benefit (that a first minor drug conviction is eliminated for immigration purposes by state rehabilitative relief) is *not* available if the criminal court found that the defendant *violated probation* before ultimately getting the rehabilitative relief. *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (expungement under P.C. § 1203.4 has no immigration effect where criminal court found two probation violations before ultimately granting the expungement.)

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

Removal proceedings before the plea actually is withdrawn. The Ninth Circuit held that a respondent's drug conviction continued to exist for immigration purposes, and therefore served as a basis for the man's deportation, until the date that it is withdrawn. *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004). Therefore counsel should make every effort to keep the defendant away from immigration authorities until after the plea is withdrawn (e.g., attempt to plead to a very short period of probation under P.C. § 1203.4.) However, immigration counsel have strong arguments that *Chavez* should not apply to California relief such as withdrawal of plea under DEJ or Prop 36, or even under P.C. § 1203.4. *Chavez* considered a purely discretionary expungement statute with no connection to the controlled substance statutes. See discussion in *Defending Immigrants in the Ninth Circuit*, § 3.6(H).

5. Except for a first conviction for the minor drug offenses discussed above, any **“rehabilitative relief”** (i.e., withdrawal of the plea after probation such as DEJ, Prop 36 or PC § 1203.4) has no effect for immigration purposes, even though state law may consider the conviction to be utterly eliminated.
6. **For now, where there is a prior drug conviction, assume that a subsequent conviction for possession will be held an aggravated felony.** The Supreme Court has agreed to hear this issue in *Carachuri v. Holder*.¹²⁰

This is especially true if the prior was pleaded and proved at the possession prosecution. If you must plead to possession where there is a drug prior, do not formally concede the prior. It is very possible that the Supreme Court will hold that a possession conviction following a drug prior is an aggravated felony only if the prior conviction was pleaded and proved at the possession prosecution. Significantly, this is the Board of Immigration Appeals' position, so this provides current protection in immigration proceedings.¹²¹ A plea to being under the influence rather than possession will avoid these issues, because being

¹²⁰ *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60).

¹²¹ See *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007) (where the prior drug conviction was not pleaded and proved in the subsequent possession prosecution, the possession conviction was not an aggravated felony).

under the influence is not an aggravated felony even if a prior drug conviction is pleaded or proved.

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

7. Remember that if the **record of conviction does not identify the specific controlled substance**, a conviction for offenses under Calif. H&S §§ 11377-11379 and 11350- 11352 is not a controlled substance offense for immigration purposes, and is neither an aggravated felony nor a deportable or inadmissible drug conviction. This will not work for offenses such as possession of paraphernalia, maintaining a place where drugs are used or sold, or sale of a false “look-alike” controlled substance. See Part B, *supra*.
8. **Drug addiction and abuse.** A person is inadmissible if she is a “current” drug addict or abuser, and deportable if she has been one at any time since admission to the United States. Dispositions such as drug court or CRC placement that require admission of drug abuse or addiction will trigger these grounds. While in various immigration contexts more relief might be available to someone deportable for this than for a straight conviction, this still can have serious consequences and each case should be analyzed separately.

Case examples. These examples illustrate the rules under current law, and assumes that the proceedings described take place within states under the jurisdiction of the Ninth Circuit. You may want to use the drug plea Chart that follows this Note.

Example 1: Sam is convicted of felony simple possession of heroin in state court, his first controlled substance offense.

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

Deportable? As a conviction of an offense relating to a federally recognized controlled substance, it makes Sam deportable and inadmissible. **Rehabilitative Relief?** If it was a very first drug offense, Sam can eliminate a simple possession conviction for immigration purposes by “rehabilitative relief” such as withdrawing the plea under a deferred entry of judgment, Proposition 36 or PC § 1203.4 provision.

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

Aggravated felony? The Board of Immigration Appeals states that absent circuit law to the contrary, a simple possession conviction (other than flunitrazepam or more than 5 grams of cocaine base) is not an aggravated felony unless a prior drug conviction was pleaded and proved. Thus Sam’s plea has at least a good chance of not being held an aggravated felony. However,

the circuits split on this issue and the Supreme Court has accepted certiorari, in *Carachuri v. Holder*. It is possible, although unlikely, that the Supreme Court would adopt a worse rule than the BIA's.

To sum up, where there is a drug prior, the first priority is not to plead to simple possession in a prosecution in which the prior is pleaded and proved. A more secure strategy is to plead to certain minor offenses other than possession, for example use, driving while under the influence, or possession of paraphernalia. These offenses will not become an aggravated felony regardless of drug priors. Or, plead to possession of an unspecified controlled substance.

If the drug prior was eliminated pursuant to DEJ or other rehabilitative relief, and so has no immigration effect under *Lujan-Armendariz*, then immigration counsel have a very strong argument then a subsequent conviction will be counted as the "first" simple possession conviction, and will not be held to be an aggravated felony.

Deportable? This conviction, like his first one, makes Sam inadmissible and deportable.
Rehabilitative relief? Because it is the second conviction, it will not be eliminated by "rehabilitative relief."

Example 3: Esteban participated in a pre-plea diversion program in California in 1995, where he did not admit any guilt but did accept counseling, after which the charges were dropped.

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

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

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

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

Aggravated felony? This will be held an aggravated felony. A first conviction for possession of flunitrazepam or more than 5 grams of crack cocaine is an aggravated felony. **Deportable?** It would make her deportable and inadmissible for a drug conviction. **Rehabilitative relief?** If it was a very first conviction of simple possession, Lani can eliminate it for immigration purposes by “rehabilitative relief.”

Example 6: Linda is convicted of being under the influence of cocaine, her first drug conviction ever. She violates probation, but finally completes probation and the conviction is withdrawn under P.C. § 1203.4.

Aggravated felony? No. This does not involve trafficking (see Part II) and there is no federal analogous offense. **Deportable?** Yes if the government proves that a federally recognized controlled substance was involved. **Rehabilitative relief?** As her first conviction of an offense “less serious” than simple possession and with no federal analogue, this could have been eliminated for immigration purposes by rehabilitative relief. However, the Ninth Circuit has held that a probation violation will disqualify a conviction from treatment under *Lujan-Armendariz*, so she cannot eliminate the conviction for immigration purposes (other than by vacation of judgment for cause).

Example 7: Francois is convicted of possession for sale.

As long as a specific controlled substance that matches a substance on the federal list is identified, this is an aggravated felony in all contexts and cannot be eliminated under rehabilitative relief. If immigration issues are paramount, he may want to consider pleading up to offering to transport or sell.

D. Sale and Other Offenses beyond Possession

1. Sale/Transport/Offering

Note on Transportation versus Offering. In avoiding an aggravated felony conviction, the best plea to H&S §§ 11352(a), 11360(a), and 11379(a) is transportation for personal use, or offering to do this. This offense is not an aggravated felony, although it is a deportable and inadmissible drug offense if the specific controlled substance involved is identified in the reviewable record. “Offering” to commit a drug offense has the same effect, but it also has some limitations and consequences that do not apply to transportation. See discussion below.

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

Offering to sell a controlled substance, or commit any drug crime, is not an aggravated felony drug trafficking offense, while sale or distribution is. Therefore California

offenses such as **H&S §§ 11352(a), 11360(a), and 11379(a)** are divisible statutes, containing some offenses that are and some that are not a drug trafficking aggravated felony. If the “record of conviction” leaves open the possibility that the conviction was for offering, then the conviction is not an aggravated felony. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*).

Offering to commit a drug offense under the above provisions is a deportable and inadmissible drug conviction. *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009).

Solicitation to possess a CS, under P.C. § 653f(d), is not a conviction of a deportable and inadmissible drug offense, nor of an aggravated felony. *Mielewczyk*, *supra* at 998. Similarly, some states such as Arizona and Washington have a “generic” solicitation statute (solicitation to commit various crimes), and conviction is neither an aggravated felony nor a deportable drug conviction, even if the crime solicited was drug trafficking.¹²²

The solicitation offense is not recognized outside of immigration proceedings held in the Ninth Circuit. *Matter of Zorilla-Vidal*, 24 I&N Dec. 768 (BIA 2009). If your client is arrested within the Ninth Circuit, he or she might be detained elsewhere, likely in the Fifth Circuit, and immigration proceedings might be held there. The same might happen if the client takes a trip abroad and flies in to a city outside the Ninth Circuit. This is why it is good to have a back-up strategy.

A better plea for the above offenses is transportation or offering to transport. See H&S §§ 11352(a), 11360(a), and 11379(a). Transportation for personal use is a deportable and inadmissible offense but not an aggravated felony. *U.S. v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999). Unlike solicitation, it could not be held to give the government “reason to believe” that the person ever had been involved in trafficking, and it should be accepted outside of the Ninth Circuit. Or, plead to the entire offense in the disjunctive (using “or”).

A plea that does not identify the specific controlled substance involved usually will have no immigration consequences at all. A plea to § 11379(a) where the specific controlled substance is not identified is optimal, but a plea to § 11352(a) also should work. See discussion at C.2, *supra*.

Consider **accessory after the fact** and other general safer pleas. See B.2, *supra*.

Possession for sale of a specific controlled substance is a very bad plea, because this is a deportable and inadmissible offense and an automatic aggravated felony. Counsel should seek an alternate plea, including pleading up to an “offering” statute such as H&S § 11379(a). A California Court of Appeals found that it was ineffective assistance of counsel to fail to advise a

¹²² *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999).

noncitizen to plead up to an “offering” or transportation offense rather than accept a possession for sale conviction.¹²³

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

2. Forged or fraudulent prescriptions; Cultivation

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

Likewise, California Health & Safety Code § 11358, cultivation of marijuana, is categorically an aggravated felony under 8 USC § 1101(a)(43)(B) as an analogue to 21 USC § 841(b)(1)(D).¹²⁴

3. Post-conviction Relief

Relief that eliminates a conviction not based on legal error—such as “rehabilitative” withdrawal of plea under DEJ, Prop 36 (PC § 1210.1) or PC § 1203.4—will not eliminate any of the above convictions for immigration purposes. It will only work on a first conviction for simple possession, or a less serious offense with no federal analogue. See discussion of *Lujan-Armendariz v. INS* in Part II, *supra*.

Vacation of judgment for cause will eliminate these convictions so that the person no longer will have an aggravated felony or be deportable based on the conviction. See writings by Norton Tooby on obtaining post-conviction relief at § N.17, at www.nortontooby.com. The person still might remain inadmissible, however, if the record in the case gives immigration

¹²³ *People v. Bautista*, 115 Cal.App.4th 229 (Cal. App. 6th Dist. 2004). The court directed the parties to a referee hearing to determine whether an attorney's failure to properly advise, investigate and defend him by offering to “plead up” from possession for sale of marijuana to offering to sell, etc. or transportation, which are not aggravated felonies, constituted ineffective assistance. The court held that if defendant could prove this and prove prejudice that he would have a persuasive case that his attorney's failures constituted ineffective assistance of counsel. The referee found for the defendant and the writ was granted. See *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005).

¹²⁴ *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008).

authorities “reason to believe” that the person may ever have been or assisted a drug trafficker. See “Inadmissible” below.

4. Case Examples

- Dan is arrested after a hand-to-hand sale. His defender bargains to plead to “offer to transport.” He has avoided an aggravated felony conviction, although he is still deportable or inadmissible for a drug conviction. (For information on creating a record, see § N.3, *supra*, or in more depth § 2.11 of *Defending Immigrants in the Ninth Circuit*.)
- Dave is arrested after a hand-to-hand sale of methamphetamine. His defender creates a record that does not identify the specific substance, e.g. he pleads to committing an offense involving a “controlled substance.” He has avoided an aggravated felony and avoided becoming deportable or inadmissible for a drug conviction. Also, there is not the danger that legislation will remove this defense, as there is with solicitation.
- Fred is charged with possession for sale of heroin. This conviction will be an aggravated felony. He should attempt to plead to an unspecified controlled substance, or a specific controlled substance that is not on the federal schedules. If that is not possible and if immigration is important he should attempt to plead up to offering to transport or even offering to sell, plead to accessory after the fact, or to some non-drug related offense.
- Nicole is undocumented and charged with sale. Because she is undocumented her first concern is to avoid being inadmissible. To do that she must plead to an offense not related to trafficking. A first conviction of simple possession would not make her inadmissible or deportable once the plea is withdrawn under DEJ, Prop 36, or P.C. § 1203.4 as long as she has no probation violations. It would be far better if she could plead to an offense not related to controlled substances. She should know that if she ever does apply for lawful status, immigration authorities will ask her if she has participated in drug trafficking and will consider all evidence that comes to their attention, including police reports.

E. Conduct-Based Grounds: Government has “Reason to Believe” Involvement in Trafficking; Admission of a Drug Trafficking Offense; Drug Abuser/Addict

In a few cases, a noncitizen will become inadmissible or deportable based on conduct, with not requirement of a conviction. As a criminal defense attorney you cannot control whether there is evidence of conduct, but you can avoid structuring pleas that admit the conduct and therefore eliminate any chance of avoiding the consequence. Note that an aggravated felony is not a “conduct-based” ground; a conviction always is required.

1. Inadmissible for “reason to believe” trafficking

A noncitizen is inadmissible if immigration authorities have “reason to believe” that she ever has been or assisted a drug trafficker. 8 USC § 1182(a)(2)(C). A conviction is not

necessary, but a plea to sale or offer to sell will alert immigration officials and be sufficient to establish inadmissibility. (The conviction is not required, however. Because “reason to believe” does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports or use defendant’s out-of-court statements.)

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

To avoid being inadmissible under this ground, a noncitizen needs to plead to some non-drug-related offense. If that is not possible, accessory after the fact is better than a drug offense, but depending on the facts the government may argue that this provides “reason to believe” the person aided a drug trafficker in doing the trafficking. The person also should know that when applying for immigration status she will be questioned by authorities about whether she has been a participant in drug trafficking. She can remain silent but this may be used as a factor to deny the application. See further discussion at § 3.10, *supra*.

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

2. *Inadmissible or Deportable for Being a Drug Addict or Abuser*

A noncitizen is inadmissible if he or she currently is a drug addict or abuser, and is deportable if he or she has been an addict or abuser at any time after admission into the U.S.¹²⁵

Criminal defenders should consider this ground where a defendant might have to admit, or be subject to a finding, about addiction or abuse in order to participate in a “drug court” or therapeutic placement like CRC. This might alert immigration authorities and provide a basis for the finding. Otherwise, in practice immigrants rarely are charged under this ground.

Strategically, in some cases, it would be better not to go to drug court even if this will avoid a drug conviction, if the conviction would be a first offense that can be eliminated for immigration purposes under *Lujan-Armendariz*. This may be an individual case decision that requires input from an immigration expert. Note that like other immigration drug provisions, drug abuse or addiction refers only to federally defined controlled substances. One possible

¹²⁵ INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

drug court option is for a person to admit he or she is in danger of becoming addicted to a substance that appears on the California schedule but not the federal. The ground is not triggered by an acceptance of drug counseling where there is no admission or finding of addiction or abuse, for example pursuant to Proposition 36 laws.

3. Formally Admitting Commission of a Controlled Substance Offense that was Not Charged in Criminal Proceedings

A noncitizen “who admits having committed, or who admits committing acts which constitute the essential elements” of any offense relating to a federally defined controlled substances is inadmissible, even if there is no conviction.¹²⁶ This is a formal admission of all of the elements of a crime under the jurisdiction where the act was committed. The Ninth Circuit stated that an admission at a visa medical appointment may qualify as an admission.¹²⁷

Where a conviction by plea was eliminated for immigration purposes by rehabilitative relief, under *Lujan-Armendariz*, the old guilty plea may not serve as an “admission” for this purpose. Neither can a later admission, for example to an immigration judge. The Board of Immigration Appeals has held that if a criminal court judge has heard charges relating to an incident, immigration authorities will defer to the criminal court resolution and will not charge inadmissibility based on a formal admission of the underlying facts.¹²⁸ However, counsel should guard against formal admissions to a judge or other official of a crime that is not resolved in criminal court.

¹²⁶ INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II) .

¹²⁷ *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1214-15 (9th Cir. 2002).

¹²⁸ See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953) (PC § 1203.4 expungement); *Matter of G*, 1 I&N Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute);

Chart for Criminal Defenders in the Ninth Circuit: Effect of Selected Drug Pleas Under *Lopez v. Gonzales*ⁱ

OFFENSE	DEPORTABLE	AGG FELONY	ELIMINATE BY REHABILITATIVE RELIEF
First possession (of a specified controlled substanceⁱⁱ)	YES	NO	YES ⁱⁱⁱ
First poss. flunitrazepam or more than 5 gms crack	YES	YES	YES
Possession (of a specified CS) where there is a drug prior	YES	Supreme Ct will consider; currently not AF if prior is not pleaded or proved ^{iv}	NO
Transportation for personal use (of a specified CS)	YES	NO	NO
First offense less serious than poss, e.g. poss paraphernalia^v	YES	NO	YES ^{vi}
Second less serious offense	YES	NO	NO
Sale (of a specified CS)	YES	YES	NO
Offer to commit sale or other drug offense (involving a specified CS) under Cal. H&S §§ 11352(a), 11360(a), 11379(a)	YES; but not if “generic” solicitation statute or maybe C.P.C. § 653f(d) ^{vii}	NO ^{viii}	NO
Give away small amount of marijuana	YES	MAYBE NOT ^{ix}	MAYBE
Possession for Sale (of a specified CS)	YES	YES	NO

For Criminal Defenders in the Ninth Circuit: Effect of Selected Drug Pleas Under *Lopez v. Gonzales*

ENDNOTES

- i. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). This chart was prepared by Katherine Brady of the Immigrant Legal Resource Center. For further information and resources, go to www.ilrc.org/criminal.php.
- ii. Where possible, have the record of conviction refer only to “a controlled substance” rather than a specific identified substance such as cocaine. Bargain for an amended complaint or make a written plea agreement to this effect; do not stipulate to a factual basis that identifies the substance. Without specific identification, immigration authorities may not be able to prove that the offense involved a controlled substance as defined under federal law, which has a somewhat different definition than under California and many other state laws. See *Ruiz-Vidal v. Gonzales* 473 F.3d 1072 (9th Cir. 2007) (because record of conviction under Calif. H&S §11377 does not ID specific substance, there is no controlled substance conviction for immigration purposes); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).
- iii. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).
- iv. The law is fluid because the Board of Immigration Appeals (BIA) has ruled on this issue, but the Ninth Circuit and Supreme Court have not. The BIA held that a possession conviction where there is a prior drug conviction is not an aggravated felony unless the prior was pleaded and proved at the possession prosecution. *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007). It is likely but not guaranteed that federal courts will adopt the same analysis. The Supreme Court accepted certiorari in the *Carachuri* case on December 14, 2009.
- v. The Ninth Circuit has found that possession of drug paraphernalia is a deportable controlled substance offense even without a specific controlled substance identified on the record. See, e.g., *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (Arizona offense); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (California offense).
- vi. *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).
- vii. *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009), holding that Calif. H&S § 11379(a) and similar “specific” solicitation offenses are a basis for deportation under the controlled substance ground. Ariz. Rev. Stat. §13-1002, a “generic” solicitation offense not linked to a specific crime, is not an aggravated felony. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997). Further, if the record refers only to “a controlled substance,” this permits an additional argument.
- viii. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (California law); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Ariz. Rev. Stat. §13-1002).
- ix. See 21 USC §841(b)(4), making this offense a misdemeanor and subject to the FFOA, which is the basis for *Lujan*; see discussion at *Defending Immigrants in the Ninth Circuit*, §3.6(C), *supra*. Counsel should arrange for a finding in the criminal record that the amount of marijuana was small.

§ N.9: Domestic Violence; Child Abuse; Stalking

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

- A. Conviction of a Crime of Domestic Violence
- B. Civil or Criminal Court Finding of Violation of a Domestic Violence Protective Order
- C. Conviction of a Crime of Child Abuse, Neglect or Abandonment
- D. Conviction of Stalking

A noncitizen is deportable under the domestic violence ground if he or she is convicted of (a) a state or federal “crime of domestic violence,” (b) a crime of child abuse, neglect or abandonment, or (c) stalking. The person also is deportable if found in civil or criminal court to have violated certain sections of a domestic violence protective order. 8 USC § 1227(a)(2)(E), INA § 237(a)(2)(E). This deportability ground has an effective date: the convictions or the behavior that is the subject of the finding of violation of the protective order must occur after September 30, 1996 and after the noncitizen was admitted to the United States.

A. Conviction of a Crime of Domestic Violence

Alert on Domestic Violence Cases: Because of 2009 Supreme Court rulings, it is possible that Ninth Circuit will reconsider past precedent and create a new rule that makes it easier for immigration authorities to prove the “domestic relationship” element in a deportable crime of domestic violence. Please read these materials carefully for advice on how to handle domestic violence cases in light of this possible change.

Bottom Line Instructions:

A defendant is deportable for conviction of a “crime of domestic violence” based on (a) a conviction of a “crime of violence” that is (b) against a victim with whom he or she has had a certain domestic relationship, defined in the deportation ground. The good news is that in many cases, criminal defense counsel can craft a plea that both satisfies the prosecution and avoids the deportation ground. This section will discuss the following options.

- a. A plea to an offense that does not meet the technical definition of “crime of violence” is not a conviction of a “crime of domestic violence,” even if it is clear that the defendant and victim had a domestic relationship. See discussion below and Chart for offenses that may not constitute a crime of violence, for example P.C. §§ 243(a), 243(e), 236, and 136.1(b). These require a carefully crafted record of conviction. See Part 2, *infra*, for further discussion.
- b. A plea to a “crime of violence” is not a “crime of domestic violence” if (a) the designated victim is someone not protected under the state’s DV laws (e.g., the new boyfriend, a

- neighbor), or (b) most probably, the crime involves violence against property as opposed to a person. See Parts 3, 4, *infra*.
- c. If you can't avoid a plea to a crime of violence in which the victim actually had the required domestic relationship, make every effort to keep the domestic relationship from being described in the reviewable record of conviction. This would protect under current law. However, current law may change to permit the government to look beyond the record of conviction to establish the domestic relationship, so this is not a secure strategy and should be avoided where possible. See Part 5, *infra*.
 - d. At least with the pleas described in (a) and (b) above, it is safe to accept domestic violence counseling, anger management courses, stay-away orders, etc. as conditions of probation.
 - e. While not good, it is not always fatal to immigration status to become deportable under the DV ground. It often is less bad for an undocumented person than a permanent resident, and in all cases the consequences change depending on an individual's history in the U.S. If you have difficult choices about what to give up in exchange for a plea in a particular case, consult with an immigration law expert.

Deportable Crime of Domestic Violence: Discussion

1. Overview

A "crime of domestic violence" is a violent crime against a person with whom the defendant has or had a certain kind of domestic relationship. Conviction after admission and after September 30, 1996 is a basis for deportation.¹²⁹ The deportation ground defines "crime of domestic violence" to include any crime of violence, as defined in 18 USC § 16,

against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic violence or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the individual's acts under the domestic or family violence laws of the United States or any State, Indian Tribal government, or unit of local government

A conviction is not a deportable "crime of domestic violence" unless ICE (immigration prosecutors) proves both factors: that the offense is a crime of violence under 18 USC § 16, *and* that the victim and defendant had the domestic relationship described above. In other words, an offense that does not meet the technical definition of crime of violence under 18 USC § 16 will not be held to be a deportable crime of domestic violence even if there is proof that the victim

¹²⁹ INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

and defendant share a domestic relationship. Likewise, conviction of a crime of violence is not a crime of domestic violence unless there is adequate proof of the domestic relationship.

The surest strategy to avoid a domestic violence conviction is to avoid conviction of a “crime of violence” as defined under 18 USC § 16. ICE must prove that the conviction is of a crime of violence, using the categorical approach. Another approach is to plead to a crime of violence but against a victim with whom the defendant does not have a domestic relationship, e.g. a friend of the ex-wife, a neighbor, the police officer.

As long as the noncitizen successfully pleads to an offense that either is not a crime of violence *or* is a crime of violence against a victim who does not have the required domestic relationship, the offense cannot be termed a domestic violence offense and it is safe to accept probation conditions such as domestic violence or anger management counseling or stay away orders.

Another strategy is to avoid *identification* of the victim as a person who has a qualifying domestic relationship with the defendant, even if the victim really does have the relationship. However, this strategy is riskier because the government will argue that under recent Supreme Court precedent it may use an expanded class of evidence, beyond what is allowed under the categorical approach, to establish the domestic relationship.

Example: Abe, Barry and Carlos all are charged with domestic violence. Abe pleads to misdemeanor criminal threat under P.C. § 422, which is a crime of violence, but he keeps any mention of his and the victim’s domestic relationship out of the record of conviction. However, at this time it is not clear whether the law may change to permit ICE to go beyond the criminal record to prove the domestic relationship, so Abe is in a risky position.

Barry had threatened both his ex-wife and her new boyfriend. He pleads to criminal threat under P.C. § 422, specifically naming the boyfriend as the victim. Because a new boyfriend is not protected under state DV laws or listed in the deportation ground, there is no qualifying domestic relationship, and the crime of violence is not a crime of domestic violence.

Carlos pleads to misdemeanor spousal abuse under P.C. § 243(e). Courts have held that this is “divisible” as a crime of violence, because the offense can be committed by conduct ranging from actual violence to mere offensive touching. If defense counsel ensures that the reviewable record of conviction does not contain proof that actual violence was involved, the offense will not be held to be a crime of violence and therefore is not a “crime of domestic violence” – even though the domestic relationship is established as an element of the offense.

Barry and Carlos can be given a stay-away order and assignment to domestic violence counseling as a condition of probation, without the offense being treated as a crime of domestic violence. This is because their criminal records conclusively show that the offense is not a crime of domestic violence: in Barry’s it is clear that the victim does not have the domestic relationship, in Carlos’ it is clear that there is no “crime of violence.” The situation is less clear in Abe’s case.

2. Avoid a Plea to a “Crime of Violence”

If counsel can arrange a plea to an offense that is not a “crime of violence,” the offense is not a “crime of domestic violence” regardless of who the victim is. It is safe to accept domestic violence counseling, anger-management, stay-away orders, etc. as a condition of probation. Criminal defense counsel should note that the definition of crime of violence here is much broader than the violent felony definition for a strike under California law. Under 18 USC § 16, a crime of violence includes:

- (a) “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or
- (b) “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

A conviction for a crime of violence becomes an aggravated felony if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(G). There is no requirement of domestic relationship for the aggravated felony.

Conviction of *soliciting, attempting, or aiding* a crime of violence is itself a domestic violence offense. Conviction of *accessory after the fact* to a domestic violence offense is not a crime of violence; however, counsel must secure a sentence of 364 days or less or accessory will be charged as an aggravated felony. See Parts A, G of § N.14, “Safer Pleas.”

Below is an analysis of some common offenses as crimes of violence. See the California quick Reference Chart for analyses of other offenses. See *Defending Immigrants in the Ninth Circuit*, § 9.13, for more extensive discussion of cases and the definition of a crimes of violence.

a. California misdemeanors as “crimes of violence”

It is harder for a misdemeanor conviction to qualify as a crime of violence than for a felony conviction. Under 18 USC § 16(a), *a misdemeanor must have as an element of the offense the “use, attempted use, or threatened use of physical force” against the victim.*

- Some offense that may relate to traumatic domestic situations can be accomplished *entirely without violence*. Examples include:
- Trespass, theft, disturbing the peace, and other offenses with no relationship to violence
 - **Misdemeanor P.C. § 36** (false imprisonment), in the opinion of the authors
 - **Misdemeanor P.C. § 136.1(b)** (nonviolent persuasion not to file a police report), in the opinion of the authors
 - The Ninth Circuit found that **misdemeanor sexual battery under PC § 243.4**, which is sexual touching without the victim’s consent while the victim is restrained, is divisible as

a crime of violence under the 18 USC § 16(a) standard, because the restraint of the victim can be accomplished without force.¹³⁰

- A statute that can be violated by *de minimus touching* (“*mere offensive touching*”) is not a crime of violence under 18 USC § 16, unless there is evidence in the record of conviction that actual violence was involved. Neither battery nor battery against a spouse under **Calif. PC § 243(a), 243(e)** are crimes of violence, unless the record of conviction shows that force amounting to actual violence was used.¹³¹ Counsel should assume that **P.C. § 273.5** will be held a crime of domestic violence.
- A crime of violence requires an intent to commit active violence, and a misdemeanor that involves *negligence or recklessness* is not a “crime of violence,” e.g. negligent infliction of injury, driving under the influence with injury.¹³²

In all of these cases, *counsel should be sure that the reviewable record of conviction does not establish that the defendant intentionally used actual violent force in committing the offense and where possible, beneficial facts/statements that the incident only involved a mere offensive touching or should be included.*

- *A threat to commit actual violence is a crime of violence*, even as a misdemeanor. The threat of use of force may be considered a crime of violence under 18 USC § 16, even if no force is used. The Ninth Circuit held that the offense of making a criminal or terrorist threat under **Calif. PC § 422** is a crime of violence.”¹³³ Counsel must assume that **misdemeanor P.C. §§ 273.5(a) and 245(a)** are crimes of violence.

b. California felonies as “crimes of violence”

A felony conviction can be a crime of violence under either of two tests. First, like a misdemeanor, it will be held a crime of violence under 18 USC § 16(a) if it has as an element the use, or threatened or attempted use, of force.

¹³⁰ *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (conviction under Cal PC § 243.4(a) is not a crime of violence under USSG § 2L1.2(b)(1)(A) because it does not have use of force as an element). Section 2L1.2(b)(1) includes the same standard as 18 USC 16(a).

¹³¹ *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (misdemeanor battery and spousal battery under Calif. PC §§ 242, 243(e) is not a crime of violence, domestic violence offense or crime involving moral turpitude. See also cases holding that § 243(e) is not a crime involving moral turpitude, *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004). *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006). The California jury instruction defining “force and violence” for this purpose, CALJIC 16.141 (2005) defines “force” and “violence” as synonymous and states that it can include force that causes no pain and hurts only feelings; the slightest touching, if done in an insolent, rude or angry manner, is sufficient. See similar definition at 1-800 CALCRIM 960.

¹³² *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (negligence, felony DUI); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006)(en banc) (under *Leocal*, recklessness that injury may occur is insufficient intent to constitute a crime of violence; that requires being reckless that the crime will result in a violent encounter).

¹³³ *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) held that all of the behavior covered under California PC § 422 is a crime of violence.

Second, a felony conviction also will be held a crime of violence under the more broadly defined § 16(b), if “by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Note that the “risk” presented by the offense must be that violent force will be used intentionally, and not just that an injury might occur. Reckless infliction of injury, for example by reckless driving or child endangerment, is not a crime of violence.¹³⁴ The test is whether it involves recklessly creating a situation where it is likely that violence will ensue.

Criminal defense counsel should act conservatively and certainly attempt to plead to a misdemeanor, or reduce a wobbler offense to a misdemeanor, where this is possible.

Offenses that will or might be held crimes of violence. *Felony burglary of a dwelling* is held a crime of violence under § 16(b). The offense does not have as an element the intent to use force—it can be committed by a person walking through an unlocked door and removing articles—but it carries the inherent risk that violence will ensue if the resident and the burglar meet during commission of the offense.¹³⁵ *Felony sexual battery under P.C. § 243.4* is a categorical crime of violence under § 16(b), because the situation contains the inherent potential for violence.¹³⁶ *Felony or misdemeanor corporal injury under P.C. § 273.5* is a crime of violence and a crime of domestic violence (although it is not categorically a crime involving moral turpitude; see below). *Felony or misdemeanor assault under P.C. § 245(a)* is a crime of violence¹³⁷ (although it is not categorically a crime involving moral turpitude; see below).

Offenses that will or might not be held crimes of violence. *Nonviolently persuading someone not to file a police report under Calif. PC § 136.1(b), a felony, should not be held a crime of violence.* This is a good immigration plea, although a dangerous plea in terms of criminal consequences. This is a strike, and may be a useful option where immigration impact is paramount concern and counsel needs a substitute plea for a serious charge. There is a strong argument that *felony false imprisonment is not a crime of violence* if it is accomplished by fraud or deceit as opposed to force or threat.¹³⁸ *Burglary of a vehicle* does not create an inherently violent situation like that of burglary of a dwelling, since it lacks the possibility that the owner will surprise the burglar.¹³⁹

¹³⁴ See *Leocal, supra*; *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (*en banc*).

¹³⁵ See, e.g., *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990).

¹³⁶ *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9th Cir. 2005) (felony conviction of Cal. Penal Code, § 243.4(a) is categorically a crime of violence under 18 USC § 16(b)).

¹³⁷ *United States v. Grajeda*, 581 F.3d 1186, 1190 (9th Cir. Cal. 2009) (P.C. § 245 meets the definition in USSG § 2L1.2, which is identical to 18 USC § 16(a)).

¹³⁸ The Supreme Court has recently reaffirmed that the generic crime of violence, even where the threat is only that injury might occur, rather than that force must be used, must itself involve purposeful, violent and aggressive conduct. *Chambers v. United States*, 129 S. Ct. 687 (2009) (failing to report for weekend confinement under 720 ILCS 5/31-6(a) (2008) is not a crime of violence) and *Begay v. United States*, 128 S. Ct. 1581 (2008) (driving under the influence).

¹³⁹ *Ye v. INS*, 214 F.3d 1128, 1134 (9th Cir. 2000).

Counsel should assume conservatively that felony battery under P.C. § 243(d) is a crime of violence, but immigration counsel may have strong arguments that it is divisible for this purpose,¹⁴⁰ and it is a better plea than § 273.5, for example.

3. Plead to a crime of violence against a victim with whom the defendant does not have a protected domestic relationship

The immigration statute provides that a deportable crime of domestic violence is a crime of violence that is committed against a person with whom the defendant shares a certain domestic relationship. If the victim was a person who does not have that relationship, a “crime of violence” cannot become a “crime of domestic violence.”

The deportation ground, quoted in full in Part 1, *supra*, includes a current or former spouse, co-parent of a child, a person who has cohabitated as a spouse or someone similarly situated under state domestic or family violence laws, as well as “any other individual against a person who is protected from the individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.”¹⁴¹

California family violence statutes protect the following persons (a) a current or former spouse or cohabitant;¹⁴² (b) a person with whom the other is having or has had a dating or engagement relationship (defined as a serious courtship); (c) a person with whom the other has had a child, when the presumption applies that the male parent is the father of the child of the female parent;¹⁴³ (d) a child of a party or a child who is the subject of an action under the Uniform Parentage Act, when the presumption applies that the male parent is the father of the child to be protected, or (e) any other person related by consanguinity or affinity within the second degree.”¹⁴⁴ The word co-habitant means “a person who resides regularly in the household.”¹⁴⁵ It does not include person who simply sublet different rooms in a common home, if they are not otherwise part of the same household or do not have some close interpersonal relationship.¹⁴⁶

In California a plea to a crime of violence against the ex-wife’s new boyfriend or a neighbor, if they also were involved in the incident, should not be a crime of domestic violence, because these persons are not covered under state laws.

¹⁴⁰ Felony battery does not require intent to cause bodily injury. It can consist of a mere offensive touching, if that touching goes on to cause bodily injury. See, e.g., *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006). “The statute (§ 243) makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute.” *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978). This level of force does not rise to “violence.”

¹⁴¹ 8 USC § 1227(a)(2)(E)(i).

¹⁴² California Family Code § 6209.

¹⁴³ California Family Code § 7600 et seq. (Uniform Parentage Act).

¹⁴⁴ Matthew Bender, California Family Law § 96.03[02], p. 96-6.

¹⁴⁵ *Id.* at § 96.03[3]; California Family Code § 6209.

¹⁴⁶ *O’Kane v. Irvine*, 47 Cal.App.4th 207, 212 (1966). Thanks to the Law Office of Norton Tooby for this summary of California law.

4. Plead to a crime of violence that is against property, not persons

While the general definition of crime of violence at 18 USC § 16 includes force used against people or property, the definition of a “crime of domestic violence” in the domestic violence deportation ground only includes an offense against “a person.”¹⁴⁷ Thus Immigration counsel has a very strong argument, although no published case law, that vandalism or other offenses against property will not support deportability under the domestic violence ground, even if the offense is a crime of violence.

5. Plead to a crime of violence but keep the domestic relationship out of the official record of conviction – Changing law?

This section is for defense counsel who may be forced to plead to a crime of violence where the victim actually has the domestic relationship. It discusses why this is risky, and what steps may reduce the risk.

The problem. Immigration prosecutors (“ICE”) must prove by “clear and convincing evidence” that a noncitizen is deportable.¹⁴⁸ In general, ICE must prove that a conviction causes deportability using the “categorical approach,” in which certain contemporaneous criminal court documents must conclusively establish that the offense of conviction comes within the deportation ground. (For more on the categorical approach, see § N.3, *supra*.)

Regarding a crime of domestic violence, the Ninth Circuit has held that the strict categorical approach applies both in proving that the offense was a crime of violence *and* that the defendant and victim had the required domestic relationship.¹⁴⁹ However, ICE will argue that two 2009 Supreme Court decisions require that a wider range of evidence can be used to prove the domestic relationship.¹⁵⁰ Because criminal defense counsel must act conservatively, you should assume that the government will prevail and the Ninth Circuit will modify its stance. There is little certainty now as to what kind of evidence would be used if that occurred.

¹⁴⁷ INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

¹⁴⁸ INA § 240(c)(3)(A), 8 USC § 1229a(c)(3)(A).

¹⁴⁹ See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (testimony before the immigration judge about the relationship may not be considered); *Cisneros-Perez v. Gonzales*, 465 F.3d 385 (9th Cir. 2006) (information from various documents, including a stay-away order imposed as a condition of probation for the conviction and a dropped charge, was not sufficiently conclusive proof of the domestic relationship).

¹⁵⁰ In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) the Supreme Court held that some aggravated felony definitions are bifurcated, in that they contain a “generic offense” which must be proved under the categorical approach, and “circumstance-specific” facts that may be proved by other evidence. *Nijhawan* held that in the aggravated felony of “fraud or theft with a loss to the victim/s exceeding \$10,000,” the categorical approach applies to proving the crime was of fraud or theft, but not to proving the amount of loss. The government may argue that this approach also applies to the deportable “crime of domestic violence.” In *United States v. Hayes*, 129 S.Ct. 1079 (2009), the Supreme Court held that this bifurcated approach does apply to a crime of domestic violence that is worded similarly to the deportation ground, and held that evidence outside the record can be used to prove the domestic relationship. *Hayes* was cited by *Nijhawan*. For further discussion of *Nijhawan v. Holder*, see § N.2 The Categorical Approach and Record of Conviction, and § N.11 Burglary, Theft and Fraud, and see especially Brady, “*Nijhawan v. Holder*, Preliminary Defense Analysis” at www.ilrc.org/criminal.php.

Advice. Again, by far the better strategy is to avoid pleading to a crime of violence at all, or to plead to a crime of violence against a victim with whom the defendant does not have a domestic relationship, or to a crime of violence against property.

If that is not possible, where the charge of a violent crime alleged the name of a victim with a domestic relationship, where possible plead to a slightly different offense in a newly crafted count naming Jane or John Doe. (ICE sometimes makes the distinction between a plea to a new offense and a recrafted plea.) Even under the possible expanded evidentiary rules, information from dropped charges may not be considered. Also, keep the name and relationship outside of any sentencing requirements. If needed, plead to an unrelated offense, if possible against another victim (e.g. trespass against the next door neighbor, disturbing the peace) and take a stay-away order on that offense. Under California law a stay-away order does not need to relate to the named victim. See extensive discussion in *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006), and see also *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

6. Other Consequences: Domestic Violence Offenses as Crimes Involving Moral Turpitude, Aggravated Felonies

Aggravated felony. An offense that is a “crime of domestic violence” also is a “crime of violence.” A conviction of a crime of violence for which a sentence of a year has been imposed is an aggravated felony, under 8 USC § 1101(a)(43)(G). To avoid the aggravated felony consequence, counsel must obtain a sentence of 364 days or less for any single count of a crime of violence.

Conviction of an offense that constitutes rape or sexual abuse of a minor is an aggravated felony regardless of sentence. See 8 USC § 1101(a)(43)(A) and § N.10 Sex Offenses, *infra*.

Crime involving moral turpitude. Offenses that involve intent to cause significant injury, or many offenses with lewd intent, will be held to be a crime involving moral turpitude (CMT). Sexual battery under P.C. § 243.4, whether misdemeanor or felony, is a CMT.

Under *Matter of Silva-Trevino*, if a statute is divisible and the record of conviction does not specifically indicate that the conviction was for conduct that does not involve moral turpitude, the immigration judge may decide to look beyond the record in order to determine whether the offense is a CMT. In a divisible statute that contains non-CMT’s and CMT’s, therefore, counsel’s goal is to plead specifically to the non-CMT offense.

Felony false imprisonment under P.C. § 236 is committed by force, threat, fraud or deceit. While counsel must assume conservatively that this involves moral turpitude, it is possible that this is *not* a categorical crime involving moral turpitude if the offense is based on

deceit as opposed to fraud or menace.¹⁵¹ **Section § 243(e)**, spousal battery, is *not* categorically (in every case) a CMT because, like other batteries, it can be committed by an offensive touching.¹⁵² The Ninth Circuit held that **P.C. § 273.5** is not categorically a CMT. The statute requires only a minor injury, and the defendant and victim need have only a tenuous relationship, such as a former non-exclusive co-habitation.¹⁵³ Misdemeanor **P.C. § 36**, false imprisonment, appears very unlikely to be found a CMT, because by definition an offense that involves force, threat, fraud or deceit is a felony. Felony assault under **P.C. § 245(a)** is divisible as a moral turpitude offense; it is a general intent crime, with the intent required equal to that of battery, and incapacitation, mental illness or intoxication is not a defense.¹⁵⁴

B. Finding in Civil or Criminal Court of a Violation of a Domestic Violence Protective Order

Bottom Line Advice: *A plea to P.C. § 273.6 for violating a protective order that was issued pursuant to Calif. Family Code §§ 6320 and 6389 is always a deportable offense. So is a plea to violating a stay-away order, or any order not to commit an offense that is described in §§ 6320 or 6389. The best option may be to plead to a new offense that will not have immigration consequences, rather than to violating the protective order. Or, a plea to P.C. § 166(a) with a vague record of conviction might protect the defendant. See Part 3 for suggested pleas.*

A noncitizen is deportable if ICE proves that he or she was *found by a civil or criminal court judge to have violated certain portions of a domestic violence protective order*. The conduct that violated the court order must have occurred after September 30, 1996, and after the noncitizen was admitted to the United States. The statute describes in detail the type of violation that must occur:

Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated, harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than

¹⁵¹ See, e.g., *People v. Rios*, 177 Cal. App. 3d 445 (Cal. App. 1st Dist. 1986) (felony false imprisonment found when father picked up baby during visitation, later reported him missing to police, and moved him to Mexico where he raised the child telling him he was his godfather).

¹⁵² *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

¹⁵³ *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009).

¹⁵⁴ Section 245(a) of the California Penal Code is divisible as a crime involving moral turpitude because it is a general intent crime, *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996), cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007) (en banc) (not categorically a crime involving moral turpitude). The requisite intent for assault with a deadly weapon is the intent to commit a battery. See, e.g., *People v. Jones*, 123 Cal. App. 3d 83, 95 (Cal. App. 2d Dist. 1981). Section 245(a) even reaches conduct while voluntarily intoxicated or otherwise incapacitated. See, e.g., *People v. Windham* (1977) 19 Cal 3d 121; *People v. Velez*, 175 Cal.App.3d 785, 796, (3d Dist.1985) (defendant can be guilty of assault even if the defendant was drunk or otherwise disabled and did not intend to harm the person).

support or child custody orders or provisions) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding.¹⁵⁵

1. Conviction under P.C. § 273.6 for violating a protective order that was issued pursuant to Calif. Family Code §§ 6320 and 6389 always triggers this deportation ground.

A conviction under Calif. Penal Code § 273.6 for violating a protective order issued “pursuant to” Calif. Family Code §§ 6320 and 6389 *automatically* causes deportability as a violation of a protection order. In *Alanis-Alvarado v. Holder*¹⁵⁶ the court found that the focus of the deportation ground is the *purpose of the order violated*, not the individual’s conduct. The court found that all activity described in §§ 6320 and 6389 has as its purpose “protection against credible threats of violence, repeated harassment, or bodily injury” of the named persons. Thus a conviction under this section will cause deportability even if the conduct that constituted the violation of the order did not actually threaten “violence, repeated harassment or bodily injury”--for example a single non-threatening phone call.¹⁵⁷

The Court held that the categorical approach applies in this context. However, for procedural reasons, the majority of the panel declined to consider Petitioner’s argument that the record only established that he pled guilty to Calif. P.C. § 273.6, and not to P.C. § 273.6 “pursuant to” Calif. Family Code §§ 6320 and 6389. A record that does not establish this *might* avoid deportability. See next section.

2. Avoid a judicial finding of violating a stay-away order, or any order not to commit an offense that is described in Calif. Family C §§ 6320 or 6389.

Another Ninth Circuit panel held that violation of *a portion of any order prohibiting the conduct that is described in Calif. Family C. §§ 6320 and 6389* is a basis for deportation. *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009).

In *Szalai* the Court considered a finding by an Oregon court that the defendant had violated a 100 yard stay-away order (walking a child up the driveway instead of dropping him off at the curb, after visitation). The court held that the case was controlled by *Alanis-Alvarado, supra*. *Alanis-Alvarado* had found that “every portion” of a protective order issued under Calif. Family C. § 6320 “involves protection against credible threats of violence, repeated harassment, or bodily injury.” Because § 6320 includes stay-away orders, the *Szalai* court concluded that a violation of the Oregon stay-away order also is a deportable offense.

Section 6320(a) covers a wide range of behavior. It permits a judge in a domestic violence situation to enjoin a party from “molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying

¹⁵⁵ INA § 237(a)(2)(E)(ii), 8 USC § 1227(a)(2)(E)(ii).

¹⁵⁶ *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835 (9th Cir. 2009), amending, with the same result, 541 F.3d 966 (9th Cir. 2008). A petition for rehearing and rehearing en banc was denied with the amended opinion.

¹⁵⁷ *Id.* at 839-40.

telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.”

Section 6320(b) permits a judge in a domestic violence situation to enjoin a party from taking certain actions against the victim’s pet. Section 6389 permits injunction of possession and use of a firearm.

a. Suggested Pleas

Criminal defense counsel must make every effort to avoid a judicial finding that a defendant violated a portion of a domestic violence order involving conduct described in Calif. Family C. §§ 6320 and 6389, including minor violations involving stay-away orders or phone calls. Suggestions include:

- Plead to a new offense, rather than to a violation of a protective order. In doing so, make sure (a) that the plea is not to a “crime of domestic violence” or other deportable offense and (b) that the judge does not make a finding in the proceeding that the protective order was violated.
 - For example, a plea to spousal battery under P.C. § 243(e) is not a crime of domestic violence if the record of conviction does not indicate that actual violence was used. A plea to trespass rather than violation of a stay-away order should not cause deportability as a violation of a protective order, or as a conviction of a crime of domestic violence. (However, because of uncertainty of how the law will be interpreted, it would be best to plead to conduct that is not itself a violation of the court order, where that is possible.) These pleas can have as conditions of probation additional protective order provisions, requirements to go to anger management classes, etc. See Part A, *supra*, regarding safe pleas to avoid conviction of a crime of domestic violence.
- Plead to P.C. § 166(a) (contempt of court), and keep the record vague. Among other actions, this offense includes violating any order made by the court.
- A violation of a domestic violence protective order that relates to custody, support payment, anger management class attendance, and similar matters does not come within this ground.
- Far more risky, attempt to plead to P.C. 273.6 but not for violating a protective order issued “pursuant to” Calif. Family Code §§ 6320 and 6389.
 - If counsel must plead to P.C. § 273.6 pursuant to Family C. §§ 6320 and 6389, counsel should take a *West* plea to, e.g., “Count 2,” but refuse to plead specifically “as charged in” Count 2. This will give immigration counsel an argument that the record does not

establish that the plea was pursuant to these Family Code sections.¹⁵⁸ The dissenting judge in *Alanis-Alvarado* was open to considering these arguments. Counsel can try pleading to P.C. § 273.6 pursuant to other provisions in the section (elder abuse, employee abuse, protective orders not specifically tied to domestic violence), or if permitted, simply to P.C. § 273.6.

A danger with this approach is that there is no case law defining which evidence ICE might be permitted to use to show that the offense in fact constituted a violation of a domestic violence protective order. The Court in *Alanis-Alvarado* stated that the categorical approach applies to this question, but this might be re-thought if the categorical approach is found not to apply to a deportable crime of domestic violence, as discussed in Part A, *supra*. Almost all of the possible means of violating these court orders relate to protection against violence and harassment. (However, a violation of these orders is not in itself a categorical crime of violence, so that the offense should not automatically be held a deportable crime of domestic violence.¹⁵⁹).

There is also the danger that the offense could be held to constitute stalking, a separate basis for deportability. See Part D.

C. Crime of Child Abuse, Neglect or Abandonment

Warning for U.S. citizen or permanent resident defendants: A U.S. citizen or permanent resident who is convicted of sexual conduct or solicitation, kidnapping, or false imprisonment where the victim is under the age of 18 faces a serious penalty: he or she may be barred from filing a family visa petition to get lawful immigration status for a close relative in the future. See further discussion of the Adam Walsh Act at Note 11, *infra*.

1. *The Board of Immigration Appeals' Definition of a Crime of Child Abuse or Neglect*

A noncitizen is deportable if, after admission and after September 30, 1996, he or she is convicted of a “crime of child abuse, child neglect, or child abandonment.”¹⁶⁰

¹⁵⁸ Why is “as charged in” important? As discussed in § N. 3, *supra*, in *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(en banc) the court held that because a California criminal charge can be amended orally up until the plea is taken, a plea to, e.g., “Count I -- V.C. § 10851” is not an admission of the facts alleged in that Count unless the plea contains the critical phrase “as charged in” Count I. Instead, it is only a plea to § 10851 in general. Why is it important to take a *West* plea? After *Vidal* was published, another en banc opinion appeared to contradict the holding, without explanation. *Vidal* concerned a *West* plea, and while this did not appear to be a basis for the “as charged in” rule, some immigration judges are holding that *Vidal* only applies to *West* pleas. Therefore a *West* plea, although perhaps legally unnecessary, is helpful in immigration court.

¹⁵⁹ See, e.g., discussion in *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007), holding that harassing or following, with threats, under Calif. PC § 646.9(b) is not a categorical “crime of violence” because the full range of conduct covered by the harassment portion of the statute includes crimes that can be committed at a distance by telephone or mail and where there is no substantial risk of violence.

¹⁶⁰ INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

The BIA defined a “crime of child abuse” in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008) as follows:

[We] interpret the term “crime of child abuse” broadly to mean any offense involving an ***intentional, knowing, reckless, or criminally negligent act or omission*** that constitutes maltreatment of a child or that ***impairs a child’s physical or mental well-being***, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving ***the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse***, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking. Moreover, as in the “sexual abuse of a minor” context, we deem the term “crime of child abuse” to refer to an offense committed against an individual who had not yet reached ***the age of 18 years***. Cf. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). [W]e do ***not*** limit the term to those offenses that were ***necessarily committed by the child’s parent or by someone acting in loco parentis***.

The BIA held that this definition also includes “most, if not all” crimes of “child neglect.” It has not yet defined a crime of child abandonment. *Id.* at 512.

2. Conviction under an Age-Neutral Statute

The Board of Immigration Appeals held that a plea to an age-neutral offense can be a crime of child abuse, neglect or abandonment, but only if the fact that the victim was under the age of 18 is proved in the reviewable record of conviction. *Velazquez-Herrera, supra* at 516. The BIA held that the following evidence did not offer sufficient proof that the victim was a minor: a Washington state no-contact order involving a child (the birth certificate was provided), which does not necessarily define the victim of the offense of conviction; and a restitution order to the “child victim,” since restitution in Washington is established by a preponderance of the evidence and so was not part of the “conviction.” *Id.* at 516-17.

Counsel should keep the record of a plea to an age-neutral statute clear of evidence of the age of the victim. (While this is by far the best course, even if the reviewable record identifies the victim as a minor, immigration counsel will argue that an age-neutral offense never can qualify as a crime of child abuse. See “sexual abuse of a minor” discussion at § N.10, *infra*.)

3. Child Abuse, Actual Harm versus Risk of Non-Serious Harm, and P.C. §§ 273a

In *Matter of Velazquez, supra*, the concurrence noted that the opinion did not make clear whether child abuse applies to “crimes in which a child is merely placed or allowed to remain in a dangerous situation, without any element in the statute requiring ensuing harm, such as a general child endangerment statute, or selling liquor to an underage minor, or failing to secure a child with a seatbelt.” *Id.* at 518.

The Ninth Circuit held that a misdemeanor conviction under **Calif. P.C. § 273a(b)** is divisible as a crime of child abuse, because the BIA definition requires actual harm, while § 273a(b) covers both causing actual harm as well as placing a child in a situation that merely carries the risk of non-serious harm to a child. A § 273a(b) conviction could be a crime of child abuse if the record of conviction establishes actual harm to the child. The Court implied that a felony conviction under **P.C. § 273a(a)** could be held to be a categorical crime of child abuse. *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009).

Unfortunately, it is possible that the Ninth Circuit will change the *Fregozo* rule if the BIA, in a published, precedent decision, amends or “clarifies” its definition of child abuse to be inconsistent with the requirement of harm set out in *Fregozo*. The Court stated that it was deferring to and interpreting the BIA’s own definition. (However, it also is possible that the Court would find that a definition that does not require harm as inconsistent with the statutory term child “abuse.”) Because of this possibility, a better plea than P.C. § 273(b) is to an age-neutral statute that in which the record does not reveal the age of the victim.

4. Conviction that includes sexual intent or injury to morals

The definition includes “sexual abuse” and “mental or emotional harm, including acts injurious to morals.” Sexual abuse includes “direct acts of sexual contact, also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification.” Thus an omission that induces a child to engage in sexually explicit conduct, as well as an act that involves the use of a child as an object of sexual gratification is a crime of child abuse.

At this time, ICE appears to be liberally charging almost any offense that involves a child as a deportable crime of child abuse, including offenses that involve lewd or sexual intent in any way. The best plea is to an age-neutral offense in which the record of conviction does not identify the victim. The BIA acknowledged that the evidentiary rules of the categorical approach apply to determining the age of the victim in a potential “crime of child abuse.” (Compare this to the possibility that this evidentiary standard will be relaxed in proving the “domestic relationship” required for a crime of domestic violence.)

Where possible to obtain, a plea to an offense such as **P.C. § 314**, indecent exposure appears to be a safer plea (with any named victim not identified on the record as a minor). In addition, the Ninth Circuit recently held that this offense is not categorically a crime involving moral turpitude (*Ocegueda-Nunez v. Holder* (9th Cir. February 10, 2010)), although an immigration judge might decide to make a fact-based inquiry for moral turpitude purposes, under *Silva-Trevino*. It appears that ICE will charge **P.C. § 261.5** and other direct, consensual acts with a minor as “child abuse.” The Ninth Circuit might rule against this, based on past findings that this is not necessarily “sexual abuse” because consensual sexual activity with an older teenager does not automatically constitute harm. See further discussion in § N.10 Sex Offenses.

Counsel should assume that **P.C. § 272** may be charged as a crime of child abuse, although this should be fought. Like **§ 273a(b)**, the statute does not require that harm occurred, even to the child's morals, but rather that the adult acted in a way that could tend to encourage this. Counsel should plead to this type of action, and not to actually causing harm.

5. Conviction of certain offenses against a victim under the age of 18 will act as a bar to a U.S. citizen or permanent resident being able to file a family visa petition for an immigrant family member.

A U.S. citizen or permanent resident who is convicted of sexual conduct or solicitation, kidnapping, or false imprisonment where the victim is under age 18 faces a serious penalty: he or she may be barred from filing a family visa petition to get lawful immigration status for a close relative in the future. See further discussion of the Adam Walsh Act at Note 11, *infra*.

D. Conviction for Stalking

Assume Calif. P.C. § 646.9 is a deportable "stalking" offense. A conviction for the undefined term "stalking" triggers deportability if received after admission and after September 30, 1996. Defense counsel should conservatively assume that Calif. P.C. § 646.9 is a deportable offense under this ground.

Section 646.9 as an aggravated felony. A "crime of violence" is an aggravated felony if a sentence of a year or more has been imposed. To absolutely prevent a conviction under § 646.9 from being classed as an aggravated felony, counsel should obtain a sentence imposed of 364 days or less, for any one count. See §N.4 Sentence Solutions.

If that is not possible, counsel still may be able to avoid an aggravated felony by pleading to "harassing" under § 646.9 with a vague record of conviction, or if this is the only offense that would cause deportability, by pleading to harassing or following. The Ninth Circuit found that § 646.9 is divisible as a crime of violence. The statute penalizes following *or* harassing, and harassing can be committed, e.g., through the mail from hundreds of miles away, which is not a crime of violence.¹⁶¹ If the information in the record of conviction shows that the harassing conduct does come within 18 USC § 16, however, the offense will be held a crime of violence, and will be an aggravated felony if a sentence of at least a year is imposed. (It also will be held a deportable crime of domestic violence, but since one must assume that any § 646.9 conviction already would be held a deportable stalking offense, that is not strategically important.)

¹⁶¹ *Malta-Espinoza v. Gonzales* 478 F.3d 1080, 1083 (9th Cir 2007) ("Harassing can involve conduct of which it is impossible to say that there is a substantial risk of applying physical force to the person or property of another, as § 16(b) requires.") The IJ's finding below that the offense was deportable as "stalking" under 8 USC § 1227(a)(2)(E)(i) did not go up on appeal. *Id.* at 1081. This decision reversed *Matter of Malta*, 23 I&N Dec. 656 (BIA 2004).

§ N.10 Sex Offenses: Rape, Sexual Conduct with a Minor, Prostitution

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

- A. The Aggravated Felony “Rape”
- B. The Aggravated Felony “Sexual Abuse of a Minor” and Other Immigration Consequences of Sexual Conduct with a Minor
- C. Prostitution Offenses

Warning for U.S. citizen or permanent resident defendants: A citizen or permanent resident faces a serious penalty for conviction of sexual conduct or solicitation, kidnapping, or false imprisonment of a victim who is under the age of 18. The citizen or resident may be barred from filing a family visa petition to get lawful immigration status for a close relative in the future. See further discussion of the Adam Walsh Act at Note 11, *infra*.

A. The Aggravated Felony “Rape”

Conviction of committing sexual intercourse obtained by force or serious threat will be held to be an aggravated felony as rape, regardless of sentence imposed. This includes conviction of rape while the victim was intoxicated, under Calif. P.C. § 261.¹⁶² The Ninth Circuit found that third degree rape under a Washington statute that lacks a forcible compulsion requirement, where the victim made clear lack of consent, comes within the generic, contemporary meaning of “rape” and is an aggravated felony.¹⁶³

A conviction for sexual battery under P.C. § 243.4 should not be held to constitute rape, but it has other immigration consequences. It is a crime involving moral turpitude. As a felony, it is an automatic crime of violence¹⁶⁴ and therefore is an aggravated felony if a sentence of a year or more is imposed, and a crime of domestic violence regardless of sentence if the defendant and victim share a specially defined domestic relationship. As a misdemeanor it is divisible as a crime of violence.¹⁶⁵

¹⁶² California Penal Code § 261 and 262 define rape as sexual intercourse obtained by force, threat, intoxication, or other circumstances.

¹⁶³ *United States v. Yanez-Saucedo*, 295 F.3d 991(9th Cir. 2002).

¹⁶⁴ *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005)(holding felony Calif. PC §243.4(a) is a crime of violence under 18 USC §16(b) because it contains the inherent risk that force will be used).

¹⁶⁵ *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (misdemeanor PC §243.4 is not a crime of violence under a standard identical to 18 USC §16(a); since the restraint is not required to be effected by force, it does not have use of force as an element).

B. The Aggravated Felony “Sexual Abuse of a Minor” and Other Immigration Consequences of Conviction of Sexual Conduct

Conviction of an offense that is held to constitute “sexual abuse of a minor” is an aggravated felony.¹⁶⁶ There is no requirement that a sentence of a year or more be imposed to be an aggravated felony under this category. For further discussion, see *Defending Immigrants in the Ninth Circuit*, § 9.38 (www.ilrc.org).

1. Immigration Consequences of California Offenses Involving Sex with a Minor -- Aggravated Felony, Crime Involving Moral Turpitude, Crime of Child Abuse

a. Calif. P.C. §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h), sexual conduct with a person under the age of 18

In the Ninth Circuit, a conviction under these sections *never* constitutes an aggravated felony as sexual abuse of a minor. The Ninth Circuit en banc held that the definition of sexual abuse of a minor, at least in this context, requires the victim to be under the age of 16 and at least four years younger than the defendant. None of these sections require the victim to be under 16 years of age, and while § 261.5(c) requires an age difference between victim and defendant, it is three years, not four. Information in individual’s reviewable record of conviction, e.g. that the victim was 15 and the perpetrator was 19, cannot be used to meet the age requirements. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc), cited with approval in *Nijhawan v. Holder*, 129 S.Ct. 2294, 2300 (2009).

Example: Martin pleads guilty under **P.C. § 261.5(c)** to having consensual sex with his girlfriend at a time when he was 20 years old and she was 15 years old. Despite the fact that there is evidence in the reviewable record to the effect that the victim was under 16 and at least four years younger than the defendant, the conviction is not an aggravated felony as “sexual abuse of a minor.”

However, counsel still should keep the age of the victim out of the reviewable record wherever possible. It is possible that this will be important in the future, if the legal definition of a crime of child abuse and a crime involving moral turpitude continue to evolve.

Under current law, ICE (immigration prosecutors) will assert that these offenses are crimes involving moral turpitude, if they can obtain evidence, including testimony, that the defendant knew or should have known that the victim was under-age. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). ICE is very likely to charge the offense as a categorical deportable crime of child abuse. While it is possible that the Ninth Circuit will not defer to the BIA’s view on either of these issues, counsel should conservatively assume that they will and advise of the risk.

¹⁶⁶ INA § 101(a)(43)(A), 8 USC § 1101(a)(43)(A).

b. P.C. § 261.5(d), §§ 286(b)(2), 288a(b)(2), 289(i), sexual conduct with a person under the age of 15

The Ninth Circuit recently held that a conviction under § 261.5(d) does not automatically constitute “sexual abuse of a minor.” The Court left open the possibility, however, that if the record of conviction shows that the victim was especially young (certainly under age 14, and counsel should assume conservatively under age 15), the offense might be considered sexual abuse. This ruling also should apply to §§ 286(b)(2), 288a(b)(2), 289(i). *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009).

At this writing *Pelayo-Garcia* is still subject to petition for reconsideration and rehearing en banc. Therefore, criminal defense counsel should (a) plead to another offense where that is possible, at least until the law is settled, and (b) in all cases, avoid creating a record of conviction that establishes that the victim was younger than age 15.

Under current law, ICE (immigration prosecutors) will assert that these offenses are crimes involving moral turpitude, if they can obtain evidence, including testimony, that the defendant knew or should have known that the victim was under-age. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). ICE is very likely to charge the offense as a categorical deportable crime of child abuse. While it is possible that the Ninth Circuit will not defer to the BIA’s view on either of these issues, counsel should conservatively assume that they will and advise of the risk.

c. P.C. § 288(a), lewd act with a child under the age of 14

Any conviction will be held to be an aggravated felony as sexual abuse of a minor, even if there was no physical contact between defendant and victim. *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999). A Ninth Circuit panel recently found that this rule was not overturned by *Estrada-Espinoza*, which it characterized as applying only to consensual sex with older teenagers. Counsel must assume that any plea to § 288(a) is an automatic aggravated felony. *United States v. Medina-Villa*, 567 F.3d 507, 514 (9th Cir. 2009).

In addition, this is a crime involving moral turpitude and a deportable crime of child abuse. If a sentence of a year is imposed, it will be found an aggravated felony as a “crime of violence.”

d. P.C. § 647.6(a), annoying or molesting a child

This offense is divisible as the aggravated felony sexual abuse of a minor, because it reaches conduct that is and that is not serious enough to be harmful to the victim. *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004). Therefore a plea to a specific, non-egregious means of violating the statute, or if that is not possible at least a plea with a vague record of conviction, will not cause deportability as an aggravated felony. See *Pallares-Galan* for discussion of conduct covered under § 647.6(a) that is not necessarily sexual abuse of a minor, e.g. conduct such as repeatedly driving past someone and making gestures, or unsuccessfully soliciting sex from a person under the age of 14. *Id.* at 1101.

The Ninth Circuit held that this offense is divisible as a crime involving moral turpitude. *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008). (Note that the Court *en banc* later partially overruled *Nicanor-Romero* to the extent that *Nicanor-Romero* stated *in general* that moral turpitude determinations are not governed by the traditional principles of administrative deference, including *Chevron*.¹⁶⁷ However, the application of *Chevron* deference not affect the holding of *Nicanor-Romero*, because no administrative precedential decision addresses P.C. § 647.6(a).)

Under *Matter of Silva-Trevino*, if the record of conviction does not establish whether the offense involves moral turpitude, the immigration judge may take evidence as to the actual conduct of the defendant rather than relying on the record of conviction. The best way to prevent this is for counsel to plead guilty specifically to violating § 647.6(a) by committing mild and non-sexually explicit behavior, if possible without knowledge that the victim was underage. For suggestions, see *Nicanor-Romero*, *supra* at 1000-1002. The offense involves an *actus reus* that can be quite mild, including touching a shoulder,¹⁶⁸ combined with a broadly defined *mens rea* of “abnormal sexual interest,” defined as sexual interest that would be “normal” except that it is directed at a person under the age of 18. *Ibid*.

This is likely to be held divisible as a deportable crime of child abuse, depending upon whether the record of conviction establishes that the offense actually was harmful. See discussion of *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009) at § N.9 Crimes of Child Abuse, *supra*.

e. Safer Plea: an age-neutral, non-consensual sex offense where the record does not indicate that the victim is a minor (or even where it does)

Aggravated felony. The Ninth Circuit held that a sex offense must have age as an element of the offense in order to constitute sexual abuse of a minor. The Supreme Court indicated

¹⁶⁷ *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*), discussing deference under *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). This provides that a federal court should defer to an agency interpretation of an ambiguous section of a statute that it administers in the interpretation is reasonable and appears in an on-point, precedent opinion.

¹⁶⁸ See *Nicanor-Romero*, *supra* at 1000-1001. “Even brief touching of a child’s shoulder qualifies as annoying conduct under the *actus reus* requirement of § 647.6(a). See *In re Hudson*, 143 Cal. App. 4th 1, 5 (2006) (placing hand on child’s shoulder while he played video game); see also *People v. McFarland*, 78 Cal. App. 4th 489, 492 (2000) (stroking child’s arm and face in laundromat). In fact, no actual touching is required. See Cal. Jur. Instr. (Crim.) § 16.440. For example, photographing children in public places with no focus on sexual parts of the body satisfies the *actus reus* element of § 647.6(a), so long as the manner of photographing is objectively “annoying.” *People v. Dunford*, No. 039720, 2003 WL 1275417, at *4 (Cal. Ct. App. Mar. 19, 2003) (rejecting argument that “the defendant’s conduct” must “be sexual” in nature). “[H]and and facial gestures” or “[w]ords alone” also satisfy the *actus reus* of § 647.6(a). *Pallares-Galan*, 359 F.3d at 1101 (internal quotation marks and emphasis omitted). Words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen. *People v. Thompson*, 206 Cal. App. 3d 459, 465 (1988). Moreover, “[i]t is not necessary that the act[s or conduct] actually disturb or irritate the child . . .” Cal. Jur. Instr. (Crim.) § 16.440. That is, the *actus reus* component of § 647.6(a) does “not necessarily require harm or injury, whether psychological or physical.” *United States v. Baza-Martinez*, 464 F.3d 1010, 1015 (9th Cir. 2006). In short, § 647.6(a) is an annoying photograph away from a thought crime.”

approval of this approach.¹⁶⁹ However, counsel should make every effort to keep a minor's age out of the record of conviction of an age-neutral sex offense. For one thing, this would prevent the offense from being charged as a deportable "crime of child abuse."

A non-consensual sex offense may be held a crime of violence. For example, sexual battery under **P.C. § 243.4** is a "crime of violence" as a felony but not necessarily as a misdemeanor.¹⁷⁰ A crime of violence is an aggravated felony if a sentence of a year or more is imposed. Because a crime of violence becomes an aggravated felony if a sentence of a year or more is imposed, counsel must bargain for a sentence of 364 days or less for any one Count. See § N.2 Sentence Solutions.

Crime involving moral turpitude. Aggressive nonconsensual sexual conduct such as sexual battery will be held a crime involving moral turpitude, regardless of whether the victim is a minor.

Crime of child abuse, neglect or abandonment. The BIA held that an age-neutral offense that involves harm will be a deportable crime of child abuse if the reviewable record of conviction shows that the victim was under age 18. *Matter of Velazquez, supra*. For this reason counsel should ensure that information in the record of conviction does not indicate that the victim was under 18. However, immigration counsel will argue that this holding should be considered overturned.

Conviction of an offense involving negligent or reckless public behavior, such as **P.C. § 647(a)**, lewd conduct in public in disregard of possible witnesses, ought not to have immigration consequences. Older cases held that it is a crime involving moral turpitude, but can hopefully be distinguished based on the fact that virtually all of them involved homosexual behavior, and may have been based on prejudice against LGBT persons. But see *Nunez-Garcia*, 262 F. Supp. 2d 1073 (CD Cal 2003), reaffirming older cases without comment.

Conviction of **P.C. § 314**, indecent exposure where witnesses can be annoyed or offended, is a good possible plea. The Ninth Circuit held that it is not categorically a crime involving moral turpitude. *Ocegueda-Nunez v. Holder* (9th Cir. February 10, 2010). For both §§ 314 and 647(a) however, it is possible that an immigration judge would hold a broad factual inquiry for moral turpitude purposes only, under *Silva-Trevino*. See other options below.

¹⁶⁹ *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc), cited with approval in *Nijhawan v. Holder*, 129 S.Ct. 2294, 2300 (2009). In *Nijhawan* the Court held that "sexual abuse of a minor" is a "generic offense." This means that the criminal statute must contain the entire definition as elements of the offense, rather than supplying part of the definition through facts found in the record of conviction. It cited with approval *Estrada-Espinoza, supra*, which made that finding specifically about sexual abuse of a minor.

¹⁷⁰ Compare *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005) (holding felony Calif. PC §243.4(a) is a crime of violence under 18 USC §16(b) because it contains the inherent risk that force will be used) with *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (misdemeanor PC §243.4 is not a crime of violence under a standard identical to 18 USC §16(a); since the restraint is not required to be effected by force, it does not have use of force as an element).

2. Alternate Pleas to Avoid or Lessen Consequences

Defense strategies and alternative plea goals are discussed in more detail at § N.14 Safer Pleas, *infra*. In general some safer pleas include: a conviction for annoying or molesting a child under PC § 647.6(a), false imprisonment under PC § 236, simple assault and simple battery under PC §§ 241(a), 243(a), possibly battery with serious injury under PC § 243(d), or even persuading a witness not to file a complaint under PC § 136.1(b). Section 136.1(b) is a strike, but appears to have no immigration consequences except conceivably if a sentence of a year or more is imposed. A strike may not be so dangerous if the defendant does not appear likely to commit crimes apart from having had an underage relationship.

The Ninth Circuit held that a conviction under P.C. § 261.5(d) may be divisible as sexual abuse of a minor, so that counsel should keep information that the victim was a younger child, or other egregious factors, out of the record of conviction. This also applies to §§ 286(b)(2), 288a(b)(2), 289(i).

All of the above alternate pleas are divisible for purposes of being an aggravated felony or moral turpitude offense. Counsel must keep the record clear of details, or at least free of onerous facts (e.g. a younger child, coercion, explicit behavior).

A conviction for consensual sexual conduct with a minor under P.C. §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h) is not an aggravated felony, but might be held to be a crime involving moral turpitude or a deportable crime of child abuse. As always, counsel should attempt to keep information out of the record of conviction showing that the victim was a minor.

C. Prostitution

For more information see Defending Immigrants in the Ninth Circuit, § 6.2

A noncitizen is inadmissible, but not deportable, if he or she “engages in” a pattern and practice of prostitution. 8 USC § 1182(a)(2)(D). While no conviction is required for this finding, one or more convictions for prostitution will serve as evidence. Hiring a prostitute under Calif. P.C. § 646(b) does not come within the “engaging in prostitution” ground of inadmissibility. *Matter of Gonzalez-Zoquiapan*, 24 I. & N. Dec. 549 (BIA 2008).

The definition of prostitution for immigration purposes requires offering sexual intercourse for a fee, as opposed to other sexual conduct. *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006). Section 647(b) is a divisible statute under this definition, because it prohibits “any lewd act” for consideration. To avoid providing proof that the person is inadmissible as a prostitute, counsel should plead to “lewd acts” rather than sexual intercourse in § 647(b) cases.

Crime involving moral turpitude. Prostitution is a crime involving moral turpitude, whether lewd acts or intercourse is involved. See Note: Crimes Involving Moral Turpitude for the effect of conviction of a crime involving moral turpitude, depending upon the individual’s immigration history and criminal record.

The BIA has not ruled upon whether or not attempting to hire a prostitute is a crime involving moral turpitude. *Gonzalez-Zoquiapan, supra*. However, in some areas DHS is charging this.

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

Relief for sex workers and victims of crime. Noncitizen victims of alien smuggling who were forced into prostitution, or noncitizens who are victims of serious crimes, may be able to apply for temporary and ultimately permanent status if they cooperate with authorities in an investigation, under the “T” or “U” visas. See 8 USC § 1101(a)(15)(T), (U), and § N.13 Resources for sources of more information about these visas.

§ N.11 Adam Walsh Act: U.S. Citizens and Permanent Residents Cannot Petition for a Relative If Convicted of Certain Offenses Against Minors

(For more information, see *Defending Immigrants in the Ninth Circuit*, § 6.22,
www.ilrc.org/criminal.php)

Legislation entitled the Adam Walsh Act¹⁷¹ which was passed in 2006 imposes immigration penalties on *U.S. citizens and permanent residents* who are convicted of certain crimes against minors. A U.S. citizen or permanent resident who is convicted of a “specified offense against a minor” may be prevented from filing a visa petition on behalf of a close family member. If the petitioner is a permanent resident rather than a citizen, the person will be referred to removal proceedings to see if he or she is deportable.

The law provides an exception only if the DHS adjudicator makes a discretionary decision, not subject to review, that the citizen or permanent resident petitioner does not pose a risk to the petitioned relative despite the conviction.

Example: Harry is a U.S. citizen who pled guilty in 2005 to soliciting a 17-year-old girl to engage in sexual conduct. In 2010 he submits a visa petition on behalf of his noncitizen wife. Immigration authorities will run an IBIS check on his name to discover the prior conviction. His visa petition will be denied, unless he is able to obtain a waiver based on proving that he is not a danger to his wife.

¹⁷¹ Section 402 of the Adam Walsh Act, effective July 27, 2006. See amended INA §§ 204(a)(1) and (b)(1) of the INA and 8 USC §§ 1154(a)(1) and (b)(i)(I). A minor is someone who is under the age of 18. See Title A, section 111(14), Adam Walsh Act.

“Specified offense against a minor” includes offenses that are not extremely serious, such as false imprisonment. It is defined as an offense against a victim who has not attained the age of 18 years, which involves any of the following acts. A state offense must be substantially similar to the federal offenses in the definition.¹⁷²

- (A) an offense involving kidnapping, unless committed by a parent or guardian;
- (B) an offense involving false imprisonment, unless committed by a parent or guardian;
- (C) solicitation to engage in sexual conduct;
- (D) use in sexual performance;
- (E) solicitation to practice prostitution;
- (F) video voyeurism as described in 18 USC § 1801;
- (G) possession, production, or distribution of child pornography;
- (H) criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt this conduct;
- (I) any conduct that by its nature is a sex offense against a minor. This section is further defined at section 111(5)(A).¹⁷³

Criminal defense counsel should assume conservatively that conviction of an age-neutral offense (e.g., false imprisonment under P.C. § 36) will be come within the definition if there is evidence to show that the victim was a minor.

Where the victim is a minor, counsel should attempt to plead to an offense that does not appear in the above list. If that is not possible, counsel should keep the age of the victim out of the reviewable record. However, it is not clear that the inquiry will be limited to the reviewable record and the categorical approach.

Juvenile Delinquency Dispositions. The definition of conviction for this purpose only involves certain juvenile delinquency dispositions, where the juvenile was at least 14 years old at the time of committing the offense. The offense must have been the same as or more severe than aggravated sexual abuse described in 18 USC § 2241, or attempt or conspiracy to commit such an offense. 18 USC § 2241 prohibits crossing a state border to engage in a sexual act with someone under the age of 12, or sexual conduct by force or threat with a person between the ages of 12 and 15.

¹⁷² Title I, Subtitle A, section 111(7) of the Adam Walsh Act; see also “Guidance for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006,” issued by Michael Aytes and dated February 8, 2007, page 2.

¹⁷³ This includes a criminal offense that has an element involving a sexual act or sexual contact with another; a criminal offense that is a “specified offense against a minor” (therefore, any act described in A-H above is covered also by (I)); certain federal offenses -- 18 USC §§ 1152, 1153, 1591; chapters 109A, 110, or 117 of title 18 (but excluding sections 2257, 2257A, and 2258); a military offense specified by the Secretary of Defense in section 115(a)(8)(C)(i) of Public Law 105-119 (10 USC § 951 note); or attempt or conspiracy to commit an offense in the above four subsections.

§ N.12 Firearms Offenses

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

A. The Firearms Deportability Ground

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

Sections 245(a), 245(d) and 12020(a) are divisible, in that they reach weapons that are and are not firearms. Counsel should designate a non-firearm, or at least leave the record vague as to whether the offense was a firearm. For further discussion see § N.14, “Safer Pleas.”

There is no firearms ground of inadmissibility. A noncitizen—including a deportable permanent resident—who is deportable but not inadmissible can apply for “adjustment of status” (to become a permanent resident, for example based on a family visa petition) if she is otherwise eligible. This applies to non-permanent residents as well as deportable permanent residents who wish to “re-adjust” as a defense to deportation. If adjustment is granted the person will no longer be deportable based on the conviction.¹⁷⁴ Adjustment of status is discretionary relief, and the applicant must be able to persuade the DHS or immigration judge to grant it.

B. Firearms Offenses as Aggravated Felonies

Any offense involving *trafficking* in firearms and destructive devices (bombs and explosives) is an aggravated felony. For example, sale of a firearm under P.C. § 12020(a) is an aggravated felony. State statutes that are analogous to designated federal firearms offenses are aggravated felonies.¹⁷⁵ Significantly, conviction of being a *felon or addict in possession of a firearm* under P.C. § 12021(a)(1) is an aggravated felony.¹⁷⁶

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

¹⁷⁴ *Matter of Rainford*, Int. Dec. 3191 (BIA 1992). If the person also is inadmissible under a ground that can be waived, a waiver can be submitted with the adjustment application. *Matter of Gabryelsky*, Int. Dec. 3213 (BIA 1993).

¹⁷⁵ 8 USC § 1101(a)(43)(C), (E), INA § 101(a)(43)(C), (E).

¹⁷⁶ *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001).

§ N.13 Burglary, Theft and Fraud

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

A. Burglary

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

1. *Burglary as an aggravated felony*

A California burglary conviction *with a sentence imposed of at least one year* can potentially qualify as an aggravated felony in any of three ways: as “burglary,” as a “crime of violence,” or, if it involves intent to commit theft, as “attempted theft.” See 8 USC § 1101(a)(43)(F), (G). (It also can constitute a crime involving moral turpitude; see next section.) With careful pleading counsel may be able to avoid immigration penalties for this offense.

Burglary is not an aggravated felony under any theory, unless a one-year sentence has been imposed. A sentence of 364 days or less for each count avoids an aggravated felony as burglary, theft or a crime of violence, and avoids the necessity for using the following analysis. For suggestions on how to avoid a one-year sentence even in a somewhat serious case see § N.3: Sentence Solutions.

If it is not possible to avoid a one-year sentence on a count, one still can avoid conviction of an aggravated felony by pleading to § 460(b) and following a complicated, but doable, set of instructions. Where a sentence of a year or more is imposed, the three threats are:

Aggravated Felony as Burglary. The Supreme Court has held that “burglary” requires an *unlawful or unprivileged entry into a building or structure*.¹⁷⁷ Counsel should have the record reflect a lawful entry, or at least not reflect an unlawful entry.¹⁷⁸ Or, even with an unlawful entry, an offense is not burglary unless it is of a “building or structure.” Burglary of a car, boat, yard, boxcar, etc. is not of a structure. So, the plea must involve a lawful entry or a non-structure, or both. If you can’t arrange a plea specifically to this, leave the record vague so as to be open to this possibility, i.e. don’t specify both an unlawful entry and a building or structure.

¹⁷⁷ *Taylor v. United States*, 494 U.S. 575 (1990). The complete definition of burglary is an unlawful or unprivileged entry into a building or structure with intent to commit a crime.

¹⁷⁸ A panel had held that no conviction under § 459 is “burglary” because unlawful entry is not an element of the offense, but the Court is going to consider this question en banc, rehearing *United States v. Aguila-Montes de Oca* (“*Aguila-Montes II*”), 553 F.3d 1229 (9th Cir. 2009), superseding 523 F.3d 1071 (9th Cir. 2008).

Aggravated Felony as a Crime of Violence. Felony burglary of a *dwelling or its curtilage (yard)* is categorically a crime of violence.¹⁷⁹ A plea to P.C. § 460(a) will be held a crime of violence. In addition, counsel should keep from the record indications that *actual violence*, e.g. smashing a lock, was used in the commission of the offense. Simply opening a door or window, or using an instrument such as a slim jim, is not actual violence for this purpose.¹⁸⁰

Aggravated Felony as Attempted Theft, or Attempted Other Aggravated Felony. The statutory definition of aggravated felony includes *attempt* to commit an aggravated felony.¹⁸¹ A plea to entry with “intent to commit larceny” where a sentence of a year or more is imposed is an aggravated felony as an “attempted theft.”¹⁸² Intent to commit specific acts that are not aggravated felonies will avoid this; otherwise a general plea to intent to commit “larceny or any felony” will prevent deportability. See Chart for suggestions of felony offenses that do not constitute an aggravated felony, including when a sentence of a year or more is imposed.

Instructions for plea. Where a plea to § 460(b) will involve a sentence of a year or more, the goal is to fashion a specific plea that avoids all of the above, or if that is not possible, a plea that leaves the record vague and does not establish the above.

The record should establish, or at least leave open, that:

- The burglary was not of any kind of dwelling or its yard (because this would be the aggravated felony a “crime of violence”). The conviction cannot be pursuant to P.C. 460(a), but may be pursuant to § 460(b), or if that is not possible to § 460 where the record of conviction does not indicate whether (a) or (b) was the subject of the conviction, *and*
- The burglary was not of a building or structure, *or* that the entry was lawful, or both (because “burglary” is an unlawful entry of a building or structure), *and*
- The entry or any part of the burglary was not effected by violent force (because this might be held a “crime of violence”). Entry by opening a door or window, or using a tool such as a slim jim to open a window, is not violent force, *and*
- The intent was not to commit “larceny” (theft) or any other offense that itself is an aggravated felony (because this would be an attempted aggravated felony). Intent should be to commit “any felony,” or “larceny or any felony,” or better yet to a specified offense that is not an aggravated felony, e.g. not theft, a crime of violence, sexual abuse of a minor, etc.

¹⁷⁹ See *James v. United States*, 127 S.Ct. 1586, 1600 (U.S. 2007) holding that felony burglary of a fenced-in yard around a house, while it is not a “burglary” under *Taylor*, is a “crime of violence” because it presents the inherent risk that violence will ensue.

¹⁸⁰ See, e.g., *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

¹⁸¹ INA §101(a)(43)(U), 8 USC §1101(a)(43)(U).

¹⁸² *Ngaeth v. Mukasey*, 545 F.3d 796 (9th Cir. 2008) (burglary with intent to commit larceny is an aggravated felony as attempted theft).

For example, a good plea would be *lawful* entry into a building that is not a dwelling, with intent to commit fraud (where the intended loss was less than \$10,000),¹⁸³ § 261.5(c), or some other specific offense that is not an aggravated felony. Another good specific plea to commit burglary would be *unlawful* entry into a *vehicle* with intent to commit such an offense.

If a specific plea is not possible, a good vague plea is entry (hopefully designate a lawful entry; at least do not designate an unlawful entry) into a car, building, etc. with intent to commit “larceny or any felony” or “any felony.” This will prevent the conviction from making an LPR deportable under the aggravated felony ground, and it might prevent the conviction from being considered an aggravated felony for purposes of barring an application for admission, new status or other relief (the latter question is being litigated). For more information on how to control the record of conviction to reflect these pleas, see § N.3 “Record of Conviction,” *supra*, or a more thorough discussion at *Defending Immigrants in the Ninth Circuit*, § 2.11

The conviction may avoid being classed as a crime involving moral turpitude if the record establishes that the burglary was not done with intent to commit a crime involving moral turpitude, and was not unlawful entry of a dwelling. See next section.

2. Burglary as a Crime Involving Moral Turpitude.

Traditionally, burglary has been held a crime involving moral turpitude only if the intended offense involved moral turpitude. Entry with intent to commit larceny is a crime involving moral turpitude, while entry with intent to commit a specified offense that does not involve moral turpitude is not. Intent to commit an undesignated offense (“a felony”) has been held not to involve moral turpitude in the past, but under *Matter of Silva-Trevino* this may not be enough to protect the client. Where possible, counsel should review the Chart for an offense that is not a CMT and plead specifically to this, which may forestall a broader inquiry into the facts under *Silva-Trevino*. See § N.6 Crimes Involving Moral Turpitude.

In addition, an unlawful entry into a dwelling is categorically a crime involving moral turpitude, regardless of the intended offense.¹⁸⁴

B. Theft and Receipt of Stolen Property

1. Aggravated Felony

A “theft offense (including receipt of stolen property)” is an aggravated felony if a sentence of a year or more has been imposed.¹⁸⁵ No offense will be an aggravated felony under this category if a sentence of not more than 364 days is imposed on each Count. See § N.3 Sentence Solutions.

¹⁸³ A fraud or attempted fraud is not an aggravated felony unless the loss to the victim/s exceeds \$10,000. Therefore a fraud without that element, but with a sentence of a year imposed, is not an aggravated felony. In contrast, a theft or attempted theft becomes an aggravated felony if a sentence of a year or more is imposed.

¹⁸⁴ *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

¹⁸⁵ INA § 101(a)(43)(G), 8 USC § 1101(a)(43)(G).

The definition of theft for aggravated felony purposes is “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership even if such deprivation is less than total or permanent.”¹⁸⁶ This definition does not include fraud, embezzlement, or other offenses committed by deceit as opposed to stealth.

Temporary taking, Veh. Code § 10851 and accessory after the fact. The aggravated felony definition of theft includes a permanent *or* temporary taking. (Compare to the moral turpitude definition of theft, below, which only includes a permanent taking). Thus the act of taking a vehicle as described in Calif. Veh. Code § 10851 is a “theft” for this purposes, despite the fact that it does not require intent to permanently deprive the owner.¹⁸⁷ Note, however that in *United States v. Vidal* the Ninth Circuit *en banc* held that § 10851 still is divisible as “theft.” Because the court found that § 10851 includes accessory after the fact, and because that offense is not a theft, the court found that § 10851 is divisible as “theft” as long as the record does not establish that the defendant acted as the principal rather than as an accessory after the fact.¹⁸⁸

Thus a plea to § 10851, even with a sentence of a year imposed, will not be held to be an aggravated felony if the record of conviction does not establish that the defendant was found guilty as principal rather than accessory after the fact. However, counsel still should do everything possible to avoid a one-year sentence. Several judges dissented from the *en banc* ruling in *Vidal* on the grounds that accessory after the fact cannot reasonably be held to be an offense described in § 10851, and it is possible that the Supreme Court would review the issue. Early in 2007 the Supreme Court dismissed a similar but much weaker argument concerning aiding and abetting.¹⁸⁹

Theft of services and P.C. § 484. The definition of “theft” is limited to theft of property. Since P.C. § 484 includes theft of labor, it is a divisible statute for aggravated felony purposes.¹⁹⁰ If the record of conviction somehow is kept vague between theft of labor and other theft, the offense is not an aggravated felony as theft. California law expressly permits the prosecution to charge California offenses in the language of the statute. Section 952 of the California Penal Code provides that “[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. *In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.*” (emphasis supplied)

¹⁸⁶ *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002)(*en banc*). The Supreme Court approved this definition. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 820 (2007).

¹⁸⁷ *Gonzales v. Duenas-Alvarez*, *id.*; *Matter of V-Z-S-*, Int. Dec. 3434 (BIA 2000).

¹⁸⁸ *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*), holding that Calif. Veh. Code §10851 is a divisible statute as a “theft” aggravated felony because it includes the offense of accessory after the fact, and the record did not establish that the conviction at issue was not for accessory after the fact.

¹⁸⁹ *Duenas-Alvarez*, *supra*.

¹⁹⁰ *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002)(*en banc*). See also *Duenas-Alvarez*, *supra* at 820, acknowledging widespread use of definition of theft as exerting control over property.

One-year sentence must be imposed. Theft is not an aggravated felony if a sentence of 364 days or less is imposed. 8 USC § 1101(a)(43)(G). Even a misdemeanor theft with a one-year sentence imposed will be an aggravated felony. See § N.3.

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

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

Receipt of Stolen Property. A conviction for receipt of stolen property under P.C. § 496(a) categorically qualifies as a receipt of stolen property aggravated felony conviction, if a sentence of a year or more is imposed.¹⁹¹ (As discussed below, this offense is divisible for moral turpitude purposes.)

2. *Theft and Receipt of Stolen Property as crimes involving moral turpitude*

Theft with intent to permanently deprive the owner is a crime involving moral turpitude (“CMT”), while temporary intent such as joyriding is not.¹⁹² See discussion of the immigration impact of conviction of one or more crimes involving moral turpitude at § N.6, and at Chapter 4, *Defending Immigrants in the Ninth Circuit*.

California theft. Counsel should assume that any conviction under P.C. § 484 is a moral turpitude offense, because courts are likely to hold that it includes offenses that involve neither intent to temporarily deprive nor fraud. The fact that the offense involves theft of services is not relevant to moral turpitude, only to the aggravated felony “theft” definition.

California receipt of stolen property under P.C. § 496(a), however, is divisible for moral turpitude purposes because it includes intent to *temporarily* deprive the owner of the property.¹⁹³ If counsel pleads specifically to temporary intent, a § 496(a) offense should not be

¹⁹¹ *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009), *Verduga-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009).

¹⁹² See, e.g., discussion of cases in *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

¹⁹³ *Ibid*.

held to involve moral turpitude even under the expanded evidentiary rules in *Matter of Silva-Trevino*. See § N.7 Crimes Involving Moral Turpitude.

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

A single conviction of a CMT will make a noncitizen **inadmissible** for moral turpitude, unless he or she comes within an exception. Under the “petty offense” exception, the noncitizen is not inadmissible if (a) she has committed only one CMT in her life and (b) the offense has a maximum sentence of a year and (c) a sentence of six months or less was imposed. 8 USC § 1182(a)(2)(A). To create eligibility for the exception, reduce felony grand theft to a misdemeanor under PC § 17. Immigration authorities will consider the conviction to have a potential sentence of one year for purposes of the petty offense exception. *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999). See also § N.7, *supra*, or *Defending Immigrants in the Ninth Circuit*, Chapter 4.

C. Fraud

An offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000 is an aggravated felony, regardless of sentence imposed.¹⁹⁴ Tax fraud where the loss to the government exceeds \$10,000, and money laundering or illegal monetary transactions involving \$10,000, also are aggravated felonies.¹⁹⁵

In *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) the Supreme Court loosened the restrictions on how the government may prove that the amount of loss exceeded \$10,000. The Court held that the categorical approach does not apply to this part of the definition. Therefore, financial loss to the victim need not be an element of the fraud or deceit offense, and the government may prove the amount of the loss using evidence that is not permitted under the categorical approach. This decision reverses Ninth Circuit precedent which had held that only evidence under the categorical approach may be used, and that only an offense with financial loss as an element.¹⁹⁶ The categorical approach *does* apply to proof that the offense involved fraud or deceit.

Under *Nijhawan*, how can counsel protect a noncitizen defendant who, for example, committed credit card fraud or welfare fraud of over \$10,000?

¹⁹⁴ 8 USC §§ 1101(a)(43) (M)(ii), INA § 101(a)(43) (M)(ii).

¹⁹⁵ 8 USC §§ 1101(a)(43)(D), (M)(i), INA § 101(a)(43)(D), (M)(i).

¹⁹⁶ *Nijhawan v. Holder* reversed the approach taken in cases such as *Kawashima v. Mukasey* (“*Kawashima II*”), 530 F.3d 1111 (9th Cir. 2008) (offense must have financial loss as an element); *Kawashima v. Gonzales* (*Kawashima I*), 503 F.3d 997 (9th Cir. 2007) (offense need not have financial loss as an element, but categorical approach applies to evidence; overturned by *Kawashima II*); *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004) (similar to *Kawashima I*).

1. Plead to theft or some other offense that does not involve fraud or deceit

A plea to theft or another offense that does not involve “fraud or deceit” should protect the defendant from conviction of this particular aggravated felony, even where restitution of over \$10,000 is ordered. The BIA has acknowledged that theft (taking property without consent) and fraud or deceit (taking property by deceit) “ordinarily involve distinct crimes.”¹⁹⁷ That Board left open the precise meaning of “consent,” and did not discount that certain offenses such as “theft by deception” might fit into both categories.¹⁹⁸

A theft conviction is an aggravated felony if a sentence of a year or more was imposed,¹⁹⁹ but is not an aggravated felony based on the amount of loss to the victim. Therefore, if you can negotiate it, a theft plea with a sentence of 364 days or less should protect the defendant from an aggravated felony conviction, even if loss to the victim/s exceeded \$10,000.

Example: Maria was charged with credit card fraud of over \$14,000. If she pleads generally to theft under Calif. P.C. § 484 and is sentenced to 364 days or less, she will not be convicted of an aggravated felony, even if she is ordered to pay restitution of \$14,000.

Note that she should not plead guilty to theft by fraud, embezzlement, or other offenses listed in P.C. § 484 that could be held to involve fraud or deceit. She should plead to a “straight” theft or to the entire language of § 484 in the disjunctive.

To sum up:

- Where a sentence of less than a year will be imposed, but the loss to the victim/s exceeds \$10,000, a plea to a theft offense should prevent conviction of an aggravated felony. While it is best to designate straight theft, a plea to P.C. § 484 in the disjunctive will work. The plea must not be specifically to theft by fraud, embezzlement, or other theft offense that involves deceit or fraud.
- Conversely, where the loss to the victim/s is less than \$10,000, but a sentence of more than a year will be imposed, a plea to an offense involving fraud or deceit should prevent conviction of an aggravated felony. If the plea is to P.C. § 484, while it is best to designate an offense involving fraud, a plea to the statute in the disjunctive should work.
 - ✓ **Warning:** A conviction for an offense involving forgery, perjury, or counterfeiting is an aggravated felony if a sentence of a year or more is imposed.²⁰⁰ If the fraud or deceit offense also constitutes one of these offenses, a sentence of a year or more will make the conviction an aggravated felony.

¹⁹⁷ *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), substantially adopting the analysis in *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005).

¹⁹⁸ *Id.* at 440.

¹⁹⁹ 8 USC § 1101(a)(43)(G); INA § 101(a)(43)(G).

²⁰⁰ 8 USC § 1101(a)(43)(R), (S); INA § 101(a)(43)(R), (S).

If a plea to theft is not possible, counsel may attempt to plead to some other offense that is not fraud or deceit and pay restitution as a sentence requirement of this offense. Remember, however, that while fraud has a specific definition, authorities might define “deceit” broadly.

The **full categorical approach** applies to the question of whether the offense involves fraud, deceit, or theft. This gives counsel a great deal of control over defining the substantive offense. For example, if the complaint charges theft by fraud and there is a written plea agreement to straight theft by stealth, the immigration judge is not allowed to consider information from the original complaint.

In contrast, under *Nijhawan* the full categorical approach does not apply to a determination of the amount of loss to the victim, meaning that the government has more leeway in what it can use to prove that the loss exceeded \$10,000. At this point it is not clear what documentation the government is permitted to use, as discussed in the next section.

2. Where The Plea Is To A Crime Involving Fraud Or Deceit: Dealing with a Loss To The Victim Exceeding \$10,000

In some cases counsel will have no alternative to pleading to an offense involving fraud or deceit where the loss to the victim/s or government exceeds \$10,000. In that case, defense strategies focus on attempting to create a record that shows a loss of \$10,000 or less.

Nijhawan reversed some beneficial Ninth Circuit precedent, but it did not remove all procedural protection for how the \$10,000 must be established. The Court held that “the statute foresees the use of fundamentally fair procedures.” 129 S.Ct. at 2305. The court listed some requirements for fair procedures, in particular that the loss must “be tied to the specific counts covered by the conviction.” The finding “cannot be based on acquitted or dismissed counts or general conduct.” The evidence that the Government offers must meet a ‘clear and convincing’ standard, and the government noted that less stringent standards may apply in setting amounts in sentencing proceedings. The sole purpose of the ‘aggravated felony’ inquiry ‘is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself. *Id.* at 2305-2306.

While the law is not yet settled, the following strategies may protect the client. These are listed in descending order of preference.

- 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.
- Whenever possible, include a *Harvey* waiver in order to establish that the particular restitution order is for conduct that did not result in a conviction and therefore is not directly tied to the conviction. *People v. Harvey* (1979) 25 Cal.3d 754. Combine this with the following strategies.

- Create a written plea agreement stating that the aggregate loss to the victim/s *for the count/s of conviction* was less than \$10,000. Agree to an order of restitution of this amount as a condition of probation. Distance repayment of any additional restitution from the fraud/deceit conviction by ordering payment pursuant to a separate civil agreement or to a plea to an additional offense that does not involve fraud or deceit.
- Create a written plea agreement stating that the aggregate loss to the victim/s for the counts of conviction was less than \$10,000. If the court orders more than \$10,000 restitution, attempt to obtain a court statement or stipulation that this is for repayment of loss and other costs, with the calculation based upon a “rational and factual basis for the amount of restitution ordered.”²⁰¹ (Even without this statement, immigration attorneys will argue that restitution under P.C. § 1202.4 permits payment for collateral costs beyond direct loss (e.g., audit, travel, attorneys fees, etc.) and that the standard of proof for calculating the amount is less than the “clear and convincing evidence” required to prove deportability.)

Counsel always should make a written plea agreement as described above. Before *Nijhawan* was published, the Ninth Circuit held in *United States v. Chang* that where a written guilty plea to a fraud offense states that the loss to the victim is less than \$10,000, the federal conviction is not of an aggravated felony under subparagraph (M)(i), even if a restitution order requires the defendant to pay more than \$10,000.²⁰² This is consistent with the statement in *Nijhawan* that the loss must “be tied to the specific counts covered by the conviction” and “cannot be based on acquitted or dismissed counts or general conduct.” *Nijhawan* at 2306.

3. Where the Plea is to Welfare Fraud of More than \$10,000

California welfare fraud presents a more difficult situation than with a private victim, because fraud under Cal. Welf. & Inst. Code § 10980(c) is subject to a specific rule for setting restitution to the state agency: “the defrauded agency’s ‘loss’ should be calculated by subtracting the amount the government would have paid had no acts of fraud occurred from the amount the government actually paid.” 390 F.3d at 1099 (quoting *People v. Crow*, 6 Cal. 4th 952, 961-62 (Cal. 1993)). If there is any means of pleading to a different fraud or theft offense, or if there is a way to show that restitution under this statute is not equal to loss, counsel should do so.

In *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098 (9th Cir. 2004), the defendant *pled guilty* to committing welfare fraud of more than \$10,000, and the restitution order was for more than \$10,000. While it is not yet clear whether the following strategies will succeed, if a plea must be taken to welfare fraud, counsel should arrange to plead to just one count of fraud of less than \$10,000, while accepting restitution of more than \$10,000. Immigration counsel will argue that the other funds were based on dropped charges and cannot be counted. If that is not possible, it might be possible for the client to plead to multiple counts, with no single count reflecting a loss of \$10,000. It is not clear what effect this will have.

²⁰¹ *People v. Gemelli*, 161 Cal. App. 4th 1539, 1542-43 (Cal. Ct. App. 2008).

²⁰² *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002).

§ N.14 Safer Pleas: A Summary of Better Pleas and Why They Work Legal Summaries to Provide to Defendants²⁰³

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

- A. **All-Purpose Substitute Pleas: Accessory after the Fact, Solicitation, *Not Aiding and Abetting***
 - 1. *Accessory after the Fact*
 - 2. *Solicitation and its Limits*
 - 3. *Aiding and Abetting is Not a Safe Plea*
- B. **Safer Pleas for Violent or Sexual Offenses**
 - 1. *Persuading a witness not to file a complaint, PC § 136.1(b)*
 - 2. *False imprisonment, PC § 236*
 - 3. *Annoying or Molesting a Child*
 - 4. *Simple battery, spousal battery, PC §§ 243(a), 243(e)*
 - 5. *Consensual Sex with a Minor, PC § 261.5(c), to some extent § 261.5(d), and similar offenses*
 - 6. *Misdemeanor sexual battery under PC § 243.4*
 - 7. *Assault with a Deadly Weapon under PC § 245*
 - 8. *Battery with serious bodily injury, PC § 243(d)*
- C. **Safer Pleas for DUI and Negligence/Recklessness that Risks Injury**
- D. **Safer Pleas for Offenses Related to Firearms or Explosives**
 - 1. *Manufacture, possession of firearm, other weapon, PC § 12020(a)*
 - 2. *Assault with a firearm or other weapon, PC § 245(a)*
- E. **Safer pleas for offenses relating to fraud, theft, receipt of stolen property, or burglary**
 - 1. *False personation, PC § 529(3)*
 - 2. *Joyriding, Veh. Code § 10851(a)*
 - 3. *Burglary of a Non-Dwelling with Intent to Commit Certain Offenses, PC § 460(b)*
 - 4. *Plead to theft instead of fraud, or create a plea agreement that specifies less than a \$10,000 loss to the victim—plus other measures*
 - 5. *Receipt of Stolen Property is not categorically a CMT*
- F. **Safer Pleas for Offenses Related to Drugs**
- G. **Safer Pleas for Obstruction of Justice (Defenses Relating to P.C. §§ 32 and 136.1(b) with a One-Year Sentence Imposed)**
- H. **Moral Turpitude and *Matter of Silva-Trevino*: Defense Strategies**
- I. **Dispositions that Avoid a “Conviction”**
- J. **Sentence of 364 Days or Less**
- K. **Is your client a U.S. citizen or national without knowing it?**

Introduction. This section offers a brief explanation of proposed safer offenses. For further discussion see works listed at § N.17 Resources. Some of the analyses below have been affirmed in published opinions, while others are the opinion of the authors as to how courts might be likely to rule. A plea to the offenses below will give immigrant defendants a greater chance to preserve or obtain lawful status in the United States. However, almost no criminal conviction is entirely safe from immigration consequences, which is why this section is entitled “safer” not “safe” alternatives.

²⁰³ Special thanks to Norton Tooby and Michael Mehr, who have identified several potential safer offenses.

Give defense tools in writing to the Defendant. Look for “*For the Defendant*” boxes.

The vast majority of immigrants are unrepresented in deportation (“removal”) proceedings. They face an opposing government attorney with no legal advice or support. Many immigration judges are not expert in the specialized area of immigration consequences of crimes, and moreover they deal with enormously high caseloads. If you negotiate a safer plea for immigration purposes, make sure it doesn’t go to waste. Give your client (or her immigration counsel, if any) a written statement describing the available arguments as to why the criminal disposition avoids an immigration consequence.

This Note provides you with a summary of strategic information and ideas for alternate pleas, as well as **written summaries of defense arguments, which can be copied or photocopied and handed to the noncitizen defendant.** See information in boxes marked “For the Defendant.” These sections summarize available defense arguments and provide citations. Giving this information to your client is especially important if he or she does not have immigration counsel: your client literally will hand this piece of paper to the immigration judge. For example, if Mr. Cazares pled guilty to H&S § 11379(a), specifically to transportation of an unspecified controlled substance, you may give him a written statement such as:

Transportation for personal use is not an aggravated felony. An offense involving an unspecified California controlled substance is not a deportable or inadmissible offense or an aggravated felony. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007).

Besides providing this information, **give the defendant copies of any documents that establish beneficial aspects of the plea.** These may include the charging document including any written amendments, a written plea agreement, the minute order (e.g., showing charge was amended) and the abstract of judgment (same). Make sure that these records correctly reflect the disposition you worked out (especially indicating if the original charge was amended), and that they do not contain any notations or information that is inconsistent with your bargain.

Make sure papers are not used against the client. A lawful permanent resident should show these materials to immigration counsel or, if there is none, the judge, but **should not show them to government interviewers or the ICE attorney.** (A non-LPR may find herself with an ICE officer acting as “judge,” so she may need to show the officer.) **Do not hand the defendant documents that are detrimental to the case.** ICE has the burden of obtaining documents to prove that a conviction exists and is a basis for removal. Finally, if the defendant does *not* have an immigration hold and is not going directly to proceedings, mail the materials to him or her.

You can assure your client that he or she does not have to make the argument to the immigration judge. That is the advantage of having a written summary. However, the best result will come when your client understands as much as possible about the immigration defense. This understanding may be the thing that gives your client the courage and tenacity to withstand railroading and the pressure of detention, and to make his or her voice heard.

Divisible statute and the record of conviction. Many of the offenses discussed below are safer only because they are divisible statutes. A divisible statute is one that includes offenses that carry adverse immigration consequences as well as those that do not. Working with divisible statutes is perhaps the most effective way that criminal defenders can help noncitizen defendants. For the defendant to gain an advantage from a divisible statute, the defense counsel must keep careful control over what information appears in the “record of conviction.”

Please carefully consult § N.3 Record of Conviction and Divisible Statutes for information on how to create safer pleas, safer factual bases for the plea, and the current state of the law. While it is best to specifically plead to the safer offense in a divisible statute, a vague record of conviction is sufficient to prevent deportability, and may be enough to prevent the offense from being a bar to an application for lawful status or other relief. Note also that the rules governing the record of conviction currently do not apply fully to crimes involving moral turpitude and some other areas. For further discussion see Note 3, *supra*.

A. All-Purpose Substitute Pleas: Accessory after the Fact, Solicitation in Limited Cases; Not Aiding and Abetting)

1. Accessory after the Fact

Accessory after the fact under PC § 32 is useful because it does not take on the character of the principal’s offense, and so is not a drug offense, crime of violence, etc. The Ninth Circuit held that it is not a crime involving moral turpitude, although ICE may contest this. Give the below to the client. *If you are not able to avoid a sentence imposed of a year or more, see instructions below and see the discussion and “For the Defendant” box at Part G, infra.*

For the Defendant: Accessory after the fact under P.C. § 32 does not take on the character of the principal’s offense. Conviction of accessory after the fact is not a conviction relating to violence, controlled substances, firearms, domestic violence, fraud, etc. See, e.g., *United States v. Innis*, 7 F.3d 840 (9th Cir. 1993) (not a crime of violence under 18 USC § 16 where the principal offense was murder for hire); *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (*en banc*) (not an aggravated felony as theft); *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (not a deportable drug conviction or an aggravated felony drug conviction). The Ninth Circuit *en banc* held that Calif. P.C. § 32 is categorically *not* a crime involving moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*).

However, counsel also should take the following limitations into account.

- ICE might charge this as a crime involving moral turpitude. The Ninth Circuit *en banc* held that Calif. PC § 32 is categorically *not* a crime involving moral turpitude. However it since ruled to give *Chevron* deference to BIA determinations of moral turpitude, and the BIA has

held that the similar offense misprision of felony is a CMT.²⁰⁴ The issue is pending at the Ninth Circuit at this writing. While based on the reasoning in the en banc decision it appears unlikely that the Court would defer in this instance, ICE may so charge it and the defendant should be warned.

- The BIA held that accessory **with a one-year sentence imposed** is an aggravated felony as “obstruction of justice.” *Matter of Batista-Hernandez, supra*. To provide immigration counsel with a strong argument against this holding, if a plea to P.C. § 32 with a one year sentence is taken, let the record of conviction indicate or leave open the possibility that the assistance was to *avoid apprehension by the police before charges were filed*, as opposed to avoiding something relating to an ongoing prosecution. If a sentence of a year or more is imposed, see discussion and “For the Defendant” box at Part G, Obstruction of Justice, *infra*. See further discussion at Chapter 9, § 9.24, *Defending Immigrants in the Ninth Circuit*.
- Where a statute includes the possibility of conviction as an accessory after the fact, the statute is divisible. In *United States v. Vidal*²⁰⁵ the court en banc held that a felony conviction under Calif. PC § 10851(a) was not an aggravated felony as theft, because the statute covers both theft principals and accessories after the fact. However, the Supreme Court might consider this issue in the future.

2. Solicitation

For the Defendant: A plea to transportation or to “offering” to commit an offense set out in Calif. H&S §§ 11352(a), 11360(a) or 11379(a) is not a drug trafficking aggravated felony offense. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*).

Soliciting possession of a drug under P.C. § 653f(d) per commission of Health & Safety Code §§ 11352, 11379, 11379.5, 11379.6, or 11391, is not is an aggravated felony or a deportable and inadmissible drug offense. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

Limitations. The usefulness of the solicitation plea is increasingly limited. While a plea to “offering” to commit a drug offense under H&S § 11352(a) and similar statutes is *not* an aggravated felony (see below), it has been held to be a deportable drug offense.²⁰⁶ The solicitation defense is not accepted outside the Ninth Circuit, and Congress might someday erase it legislatively. A better plea to avoid an aggravated felony in § 11352-type statutes is transportation, which does not have these limitations. See further discussion at Safer Pleas to Controlled Substances, *infra*.

²⁰⁴ See *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(*en banc*) (Calif. P.C. § 32 never is a CMT because it lacks the element of depravity); *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (misprision of felony under 8 USC §4 always is a CMT, because it obstructs justice); and *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009). (Court will defer to on-point, published BIA decisions on CMT’s that are not unreasonable) .

²⁰⁵ *United States v. Vidal, supra*.

²⁰⁶ *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009).

The Ninth Circuit held that felony solicitation to commit a crime of violence under P.C. § 653f(a) and (c) is an aggravated felony as a crime of violence. *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009).

3. *Aiding and Abetting is not a safe plea*

While earlier the Ninth Circuit held that a California conviction for aiding and abetting an aggravated felony is not itself an aggravated felony, the Supreme Court overruled this, and the defense no longer works.²⁰⁷ This defense was destroyed when the Supreme Court, held that aiding and abetting is included in the aggravated felony theft.

B. Safer Pleas for Violent or Sexual Offenses

Warning for U.S. citizen or permanent resident defendants: A citizen or permanent resident who is convicted of sexual conduct or solicitation, kidnapping, or false imprisonment, where the victim is under the age of 18 faces a serious penalty: he or she may be barred from filing a family visa petition to get lawful immigration status for a close relative in the future. See further discussion of the Adam Walsh Act at Note 11, *supra*.

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

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

Offenses that involve an intent to use great force or sexual intent also commonly are held to be crimes involving moral turpitude. Further, under *Matter of Silva-Trevino*, unless counsel pleads to an offense that cannot be held a crime involving moral turpitude, the immigration judge may elect to take evidence on the defendant’s conduct, as opposed to the contents of the criminal record, and decide the moral turpitude question based on that.

²⁰⁷ *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (U.S. 2007) overruled the defense, which was discussed in *Martinez-Perez v. Gonzales*, 417 F.3d at 1027 (9th Cir. 2005) and *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005).

1. Non-violently attempting to persuade a witness not to file a police complaint, P.C. § 136.1(b)

While there is no immigration case on point, for the reasons set out in the box the authors believe that this offense does not have automatic immigration consequences. *If a sentence of a year or more is imposed*, it is possible that ICE would charge it as an aggravated felony; see additional discussion at Part G, Obstruction of Justice, *infra*. In that case, plead specifically to dissuading filing a police report, or leave the record vague.

For the Defendant: California P.C. § 136.1(b) by its terms includes an attempt to dissuade a victim or witness from filing a police report. It does not require knowing and malicious action. See, e.g., *People v. Upsher*, 155 Cal. App. 4th 1311, 1320 (2007).

The offense is not a categorical crime of violence, because it includes non-violent verbal persuasion. *Ibid*. Because it includes attempting to persuade someone not to file an initial police report, it is not a categorical crime of obstruction of justice, which requires interference with a pending judicial proceeding. See *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 892-92 (BIA 1999); *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9th Cir. 2008); see also *Renteria-Morales v. Mukasey*, 2008 U.S. App. LEXIS 27382 (9th Cir. Dec. 12, 2008), replacing 532 F.3d 949 (9th Cir. 2008). The offense is not a categorical crime involving moral turpitude, because it does not require knowing or malicious action.

Note that felony § 136.1(b) is a strike, which means that it might be accepted as an alternate plea to a serious offense. Defendants who are not compelled to accept a strike may consider less serious substitute pleas such as false imprisonment. Although persuading someone not to file a police report should not be held to be “obstruction of justice,” as always counsel should make every possible effort to obtain a sentence of 364 days or less for any single count.

2. False imprisonment, PC § 236.

Warning: False imprisonment and Adam Walsh Act bar to filing a petition for immigrant family members in the future. If the victim is under the age of 18, conviction of this offense may bar a *U.S. citizen or permanent resident* from being able to file a family visa petition to get lawful immigration status for a close relative in the future. Thus while this is often a useful plea, counsel should consider an alternative, e.g. battery, if the defendant may someday wish to file a family visa petition for a family member. A waiver of this bar is available, but there is no review of a denial. See further discussion at Note 11, *supra*.

Felony false imprisonment. For the reasons set out below the authors believe that felony false imprisonment should be held divisible as a crime of violence, as long as the record of conviction is vague, or indicates fraud or deceit. Defense counsel must conservatively assume that the offense will be held to be a crime involving moral turpitude. (However, there are strong arguments against this: false imprisonment by mere deceit might be held not to be a CMT; see, e.g., *Rios* case, below.)

For the Defendant: Felony false imprisonment may be committed by violence, menace, fraud or deceit. P.C. § 237(a). Because fraud and deceit do not involve use or threat of force or the inherent risk that violence will ensue, the offense is divisible as a “crime of violence” under 18 USC § 16. See, e.g., *People v. Rios*, 177 Cal. App. 3d 445 (Cal. App. 1st Dist. 1986) (felony false imprisonment found when father picked up baby during visitation, later reported him missing to police, and moved him to Mexico where he raised the child telling him he was his godfather). If the reviewable record is vague, or indicates fraud or deceit, the conviction is not of an aggravated felony as a crime of violence even if a sentence of a year is imposed, and is not of a crime of domestic violence even if the victim and defendant share a domestic relationship. Section 237(a) is not categorically a crime of child abuse because it does not necessarily involve actual harm, or a threat of serious harm, to a child. See discussion of standard in *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009).

Misdemeanor false imprisonment. The authors believe that misdemeanor false imprisonment does not have immigration consequences for the below reasons.

For the Defendant: Misdemeanor false imprisonment is not a crime involving moral turpitude or a crime of violence. By definition, it does not involve fraud, deceit, violence or menace. The statute specifically states that when these factors are present the offense is felony, not misdemeanor, false imprisonment. See P.C. § 237(a). See, e.g., *Schanafelt v. Seaboard Finance Co* (1951) 108 Cal. App. 2d 420.

3. *Annoying or Molesting a Child*

Aggravated felony. The Ninth Circuit found that P.C. § 647.6(a) does not “categorically” constitute sexual abuse of a minor. See below. This means that as long as the record of conviction does not give details about the offense, or the details describe relatively mild behavior, the offense will not be held to be an aggravated felony. Therefore it is a good alternate plea to a charge of P.C. § 288(a) or other serious offenses, if it is possible to obtain it.

Crime Involving Moral Turpitude. The Ninth Circuit held that the offense is not categorically a crime involving moral turpitude, *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008) (partially overruled; see box below). Under *Matter of Silva-Trevino*, if the record of conviction does not establish whether the offense involves moral turpitude, the immigration judge may take evidence as to the actual conduct of the defendant rather than relying on the record of conviction. The best way to prevent this is for counsel to plead guilty specifically to committing mild and non-sexually explicit behavior, if possible without knowledge that the victim was underage. For suggestions, see summary of cases at *Nicanor-Romero*, *supra* at pp. 1000-1003 (partially reproduced at § N.10 Sex Offenses, *supra*).

For the Defendant: Annoying or molesting a child under P.C. § 647.6(a) is not categorically an aggravated felony as sexual abuse of a minor. *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004).

The Ninth Circuit found that § 647.6(a) is not categorically a crime involving moral turpitude, because it encompasses mild and non-harmful behavior coupled with a broad *mens rea* requirement. *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1003 (9th Cir. 2008). The Court *en banc* partially overruled *Nicanor-Romero*, but only to the extent that *Nicanor-Romero* stated *in general* that the BIA's moral turpitude determinations are not governed by the traditional principles of administrative deference; it did not overturn the *Nicanor-Romero* holding regarding § 647.6(a). *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*). There is no published administrative decision regarding § 647.6(a).

Adam Walsh Act bar to immigrating family members. While this offense may involve very mild misconduct, it is possible that conviction will bar a U.S. citizen or permanent resident from being able to file a family visa petition to get lawful immigration status for a close relative in the future. See further discussion at Note 11, *supra*.

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

A statute that can be violated by “mere offensive touching” is not a crime of violence under 18 USC § 16, at least absent evidence in the record of conviction that actual violence was involved. *Counsel should identify “mere offensive touching” in the record, or if that is not possible leave the record vague as to level of violence.*

For the Defendant: Misdemeanor California battery, including battery against a spouse, under Calif. PC §§ 242, 243(a), 243(e) is not categorically a crime of violence, nor a crime involving moral turpitude. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (P.C. § 242 is not a crime of violence or a domestic violence offense); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Calif. PC §§ 242, 243(e) is not categorically a crime of violence, a crime of domestic violence or a crime involving moral turpitude).

The BIA has held that simple battery and spousal battery are not crimes involving moral turpitude where the offense is committed with mere offensive touching. Under *Matter of Silva-Trevino*, an immigration judge may go beyond the record of conviction if the record does not establish whether the offense involves moral turpitude. The best strategy to prevent this is to plead specifically to conduct that does not constitute a CMT, which here is a mere offensive touching. See § N.7 Crimes Involving Moral Turpitude.

In contrast, counsel should assume that P.C. § 273.5 will be held a crime of violence and a crime of domestic violence. The Ninth Circuit held that it is not categorically a crime involving

moral turpitude because it could involve an act with battery-like intent against a former co-habitant with an attenuated relationship. *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). Unless the plea is specifically to this, however, it is likely that a *Silva-Trevino* factual inquiry will be taken and a determination made that the conviction is of a CMT.

5. *Consensual Sex with a Minor, PC § 261.5(c) and (d)*

Section 261.5(c) is an excellent plea in that it avoids an aggravated felony. However, the law is unsettled as to whether it may have other, less serious immigration consequences. ICE is very likely to charge it as a deportable crime of child abuse.

For the Defendant: A conviction under Calif. P.C. §§ 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) (sexual conduct with a person under the age of 18) never is an aggravated felony as sexual abuse of a minor. Sexual abuse of a minor requires conviction under a statute that has *as an element* that the victim was under the age of 16 and at least four years younger than the defendant. These offenses have as an element that the victim is under the age of 18 (and, for § 261.5(c), that the victim was three years younger than the defendant). Information from an individual's reviewable record of conviction cannot be used to meet the element of age requirements. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc), cited with approval in *Nijhawan v. Holder*, 129 S.Ct. 2294, 2300 (2009).

A conviction under P.C. § 261.5(d) is not categorically "sexual abuse of a minor." This ruling also should apply to §§ 286(b)(2), 288a(b)(2), 289(i). *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009).

A conviction under P.C. § 261.5(d) is not categorically a crime involving moral turpitude. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). Therefore, neither is a conviction under the less serious P.C. § 261.5(c) a categorical crime involving moral turpitude.

Note on P.C. § 261.5(d). The aggravated felony sexual abuse of a minor. In *Pelayo-Garcia, supra*, the Court left open the possibility that if the record of conviction shows that the victim was especially young (certainly under age 14, and counsel should assume conservatively under age 15), the offense might be considered sexual abuse. Counsel should leave the record blank or indicate a higher age. Also, at this writing *Pelayo-Garcia* is not yet a secure decision, since immigration authorities will likely file a petition for reconsideration and rehearing en banc. Criminal defense counsel should (a) plead to another offense where that is possible, at least until the law is settled, and (b) in all cases, avoid creating a record of conviction that establishes that the victim was younger than age 15.

The aggravated felony a "crime of violence" with a sentence imposed of a year or more. The Ninth Circuit has *not* found that consensual sex with a 15-year-old is categorically a crime of violence, but damaging information in the reviewable record might cause an individual conviction to be so considered. Therefore counsel should avoid a sentence imposed of a year or more for *any single count* of any of the above offenses, especially if the record of conviction

shows that the victim is under 15 years of age or other adverse factors. See § N. 3 Sentence Solutions.

Moral turpitude. While the Ninth Circuit held that § 261.5(d) is not categorically a crime involving moral turpitude (*Quintero-Salazar, supra*), ICE will assert that all of the above offenses are crimes involving moral turpitude, if they make a finding that the defendant knew or should have known that the victim was under-age. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). See § N.7: Crime Involving Moral Turpitude.

Crime of Child Abuse. ICE is likely to charge the offense as a deportable crime of child abuse. It is not clear whether the Ninth Circuit will defer to the BIA's view on these issues. See § N.9: Domestic Violence, Child Abuse.

Adam Walsh Act bar to immigrating family members. It appears that these convictions bar a U.S. citizen or permanent resident from being able to file a family visa petition to get lawful immigration status for a close relative in the future. See further discussion at Note 11, *supra*.

6. *Sexual battery under PC § 243.4*

While this plea requires registration as a sex offender, it has some advantages in terms of immigration consequences. It will be held to be a crime involving moral turpitude but otherwise may avoid major consequences depending on the record of conviction.

Aggravated felony, crime of domestic violence. Sexual battery does not constitute the aggravated felony rape, at least as long as the record of conviction does not describe a rape. The offense should not constitute sexual abuse of a minor even if the record of conviction shows that the victim was under the age of 18. See discussion *Estrada-Espinoza, supra*, at § N.10: Sex Offenses (age of the victim must be an element of the offense, required for guilt, and not just a fact obtained from the reviewable record). However, as always counsel should act conservatively and keep the age of a minor victim out of the reviewable record.

The Ninth Circuit found that *misdemeanor* sexual battery is not categorically a crime of violence because use of force is not necessarily an element.²⁰⁸ Therefore, absent information in the record establishing that violence was used, a misdemeanor conviction will not be a deportable domestic violence offense even if the record established a domestic relationship, and will not be an aggravated felony as a crime of violence even if a sentence of a year is imposed. In contrast, *felony* sexual battery is a crime of violence,²⁰⁹ and will carry these consequences.

²⁰⁸ *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (conviction under Cal PC § 243.4(a) is not a crime of violence under USSG § 2L1.2(b)(1)(A) because it does not have use of force as an element). Section 2L1.2(b)(1)(A) uses the same standard as 18 USC 16(a).

²⁰⁹ *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9th Cir. 2005) (felony conviction of Cal. Penal Code, § 243.4(a) is categorically a crime of violence under 18 USC §16(b)).

Child abuse. The BIA has held that an age-neutral offense can be a deportable crime of child abuse if the record of conviction shows that the victim was under the age of 18. Although this holding should be considered disapproved under recent Supreme Court preference, counsel should avoid the fight for the noncitizen by keeping the age of the victim out of the record.

Moral turpitude. Counsel should assume that any sexual battery offense will be considered a crime involving moral turpitude.

For the Defendant: Misdemeanor sexual battery under P.C. § 243.4 is not categorically a crime of violence. *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005). Sexual battery cannot be held to constitute the aggravated felony “sexual abuse of a minor” even if the record of conviction establishes that the victim was under the age of 18. For an offense to constitute “sexual abuse of a minor,” it must have *as an element* that the victim is a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc).

Adam Walsh Act bar to immigrating family members. If the victim is under the age of 18, conviction of this offense may bar a U.S. citizen or permanent resident from being able to file a family visa petition to get lawful immigration status for a close relative in the future. See further discussion at Note 11, *supra*.

7. *Assault with a Deadly Weapon under P.C. § 245(a) and Moral Turpitude*

For the Defendant: Section 245(a) of the California Penal Code is divisible as a crime involving moral turpitude because it is a general intent crime, *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996), cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007) (en banc) (not categorically a crime involving moral turpitude). The requisite intent for assault with a deadly weapon is the intent to commit a battery. See, e.g., *People v. Jones*, 123 Cal. App. 3d 83, 95 (Cal. App. 2d Dist. 1981). The intent “to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary.” *People v. Rocha*, 479 P.2d 372, 377 (Cal. 1971). It is not a defense to conviction that the defendant was voluntarily intoxicated or otherwise incapacitated. See, e.g., *People v. Windham* (1977) 19 Cal 3d 121; *People v. Velez*, 175 Cal.App.3d 785, 796, (3d Dist.1985) (defendant can be guilty of assault even if the defendant was drunk or otherwise disabled and did not intend to harm the person).

In addition, § 245(a) is divisible for purposes of the firearms deportation ground, because § 245(a)(1) prohibits use of a weapon other than a firearm.

As discussed in the box above, P.C. § 245(a) is divisible for moral turpitude purposes because assault with a deadly weapon is a general intent crime, equivalent to the intent of battery, that reaches even intoxicated behavior. However, under the current rule in *Matter of Silva-Trevino*, an immigration judge may decide to accept evidence including testimony from the former defendant about the circumstances of the offense. Unless and until *Silva-Trevino* is

overruled, the IJ might decide to go beyond the record of conviction and question the defendant regarding intent. A specific statement in the plea that the defendant meant no harm and/or was incapacitated ought to prevent this.

Section 245 has another advantage, which is that it is divisible for purposes of being a firearms offense; see discussion in Part C, *infra*. Section 245 has been held to constitute a crime of violence, however. *United States v. Grajeda*, 581 F.3d 1186, 1190 (9th Cir. Cal. 2009)

8. Battery with serious bodily injury, PC § 243(d)

For the Defendant: Battery under P.C. § 243(d) has the same intent requirement as simple battery. Therefore the offense does not necessarily involve moral turpitude despite the injury requirement. See discussion in Indexed Decision *Matter of Muceros*, A42 998 610 (BIA 5/11/00) <http://www.justice.gov/eoir/vll/intdec/indexnet00/muceros.pdf>, citing *People v. Campbell* (1994) 28 Cal. Rptr. 2d 716. Section 243(d) is not categorically a crime of violence. It includes a mere offensive touching that does not include the intent to harm or use violent force, if that touching goes on to cause bodily injury. *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006). “The statute (§ 243) makes a felony of the act of battery which results in serious bodily harm to the victim no matter what means or force was used. This is clear from the plain meaning of the statute.” *People v. Hopkins*, 78 Cal. App. 3d 316, 321 (Cal. App. 2d Dist. 1978).

Note: Crime Involving Moral Turpitude. Because § 243(d) carries the same intent as simple battery, it should not be held to be a categorical CMT. (See discussion in immigration effect box above.) Under *Silva-Trevino*, however, the immigration judge may investigate the actual conduct of the defendant and if it involves actual violence, find that the offense is a crime involving moral turpitude. This might be forestalled by a specific plea to an “offensive touching.”

Crime of violence. Since there is not case on point, despite the good arguments criminal defense counsel should act conservatively and try to plead to an offense other than P.C. § 243(d) to avoid a crime of violence. Counsel should plead to a misdemeanor, or reduce the conviction to a misdemeanor.

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

Crime of Violence. Driving under the influence, along with other offenses where injury may be caused through negligence or recklessness, does not come within the definition of crime of violence under 18 USC § 16. See below.

Crime Involving Moral Turpitude. Even repeated convictions for driving under the influence is not a crime involving moral turpitude.²¹⁰ The Ninth Circuit held that an Arizona

²¹⁰ *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

offense that contains the elements of driving under the influence while knowingly on a suspended license does involve moral turpitude.²¹¹ California does not have a single offense that includes both DUI and knowingly driving on a suspended license. There is a threat that a conviction for DUI with a *sentence enhancement* based on no license, suspended license, etc. could be held to involve moral turpitude. *Matter of Silva-Trevino* defined a crime involving moral turpitude as a reprehensible act with a mens rea of at least recklessness. Therefore reckless DUI might be held a crime involving moral turpitude.

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

For the Defendant: Driving under the influence, along with other offenses where injury may be caused through negligence or recklessness, does not come within the definition of “crime of violence” and is not an aggravated felony even if a sentence of a year or more is imposed. *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*). A DUI is not a crime involving moral turpitude, including if there are multiple convictions. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

D. Safer Pleas for Offenses Related to Firearms or Explosives

See also § N.12 Firearms Offense

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

Avoiding deportability under the firearms ground. A noncitizen who has been admitted to the U.S. is deportable if convicted of almost any offense relating to firearms, including possession or use. See 8 USC § 1227(a)(2)(C) and § N.12 Firearms Offenses. To avoid this, the best plea is specifically to an offense that does not involve firearms, but a vague record of conviction also will prevent deportability. There are no other immigration consequences to the plea as outlined above; possession of a weapon without intent to use it is not a moral turpitude offense or a crime of violence. Section 12020 as a whole does contain several dangerous offenses, including trafficking in firearms or explosive devices which is an aggravated felony under 8 USC § 1101(a)(43)(C).

²¹¹ *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009). (knowingly driving on a suspended license while under the influence in violation of Ariz. Rev. Stat. § 28-1381/1383 is a crime involving moral turpitude). The panel distinguished *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), which held that merely exerting control over a vehicle (e.g., “sitting in one’s own car in one’s own driveway with the key in the ignition and a bottle of beer in one’s hand”) does not involve moral turpitude.

For the Defendant: Sections 12020(a) of the California Penal Code is divisible for purposes of the firearms deportation ground because it includes offenses that do not relate to firearms, for example possession of a blackjack in § 12020(a)(1) or carrying a concealed dirk or dagger under § 12020(a)(4). Simple possession of a weapon is not a crime of violence or a crime involving moral turpitude.

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

For purposes of the firearms deportation ground, PC § 245(a) is a divisible statute. There also is an argument that this offense is divisible for moral turpitude purposes. It has been held to be a crime of violence. See discussion and “To the Noncitizen Defendant” box on P.C. § 245(a) at Part B.7, *supra*.

E. Safer pleas for offenses relating to fraud, theft, receipt of stolen property, or burglary

See also § N.11, “Burglary, Theft and Fraud”

1. False personation, PC § 529(3)

For the Defendant: Conviction under PC § 529(3) is not a categorical aggravated felony as forgery or a counterfeit offense even if a sentence of a year or more is imposed, and is not a categorical crime involving moral turpitude. The offense does not amount to fraud and need not have specific intent other than to take a false identity. In *People v. Rathert* (2000) 24 Cal.4th 200, the California Supreme Court held that § 529(3) is violated without any requirement that the defendant have specific intent to cause any liability to the person impersonated, or to secure a benefit to any person. The statute “requires the existence of no state of mind or criminal intent beyond that plainly expressed on the face of the statute.” *Id.* at 202. “[T]he Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen.” *Id.* at 206. Moral turpitude generally requires an evil motive. Here the Court noted “One does not violate paragraph 3 merely by happening to resemble another person. Rather, one must intentionally engage in a deception that may fairly be described as no innocent behavior, even if, in some instances, it might not stem from an evil motive.” *Id.* at 209.

The authors believe that conviction under PC § 529(3) is not necessarily an aggravated felony as forgery or counterfeit offense, even if a sentence of a year or more is imposed. Neither is it categorically a crime involving moral turpitude. See discussion in Defendant box of *People v. Rathert*. This offense can be held to have the above consequences, however, if the record of

conviction reveals intent to forge, counterfeit, or defraud. Further, under *Matter of Silva-Trevino* the immigration judge may elect to consult evidence from outside the reviewable record of conviction, to determine if the offense involved moral turpitude (which here would probably require fraud). A statement in a written plea bargain that states that the defendant did not intend to commit fraud, or that tracks the *Rathert* opinion language, might prevent that.

This should not be used as a safer alternative to avoid the aggravated felony of a fraud or deceit offense with a loss to the victim/s exceeding \$10,000,²¹² however, because deceit is defined more broadly than fraud. Where the record will reflect that loss, it is safer to plead to a theft offense as defined in PC § 484 and let the record of conviction designate, or leave open, theft as opposed to fraud, while not taking a one-year sentence.

2. Joyriding, Veh. Code § 10851(a)

For the Defendant: A conviction under Calif. H&S § 10851(a) is a divisible statute for moral turpitude purposes, because it includes auto taking with an intent to temporarily deprive the owner. See, e.g., *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (§ 10851 predecessor); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009). Section 10851 is a divisible statute as a “theft” aggravated felony, because it includes the offense of accessory after the fact, which is not theft and not an aggravated felony. *U.S. v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (*en banc*).

Warning on aggravated felony. Even a temporary taking under § 10851 meets the definition of the aggravated felony “theft,” so that a conviction for auto taking is an aggravated felony if a sentence of a year or more is imposed.²¹³ However, in *United States v. Vidal, supra* the Ninth Circuit held that § 10851 is divisible as an aggravated felony because it also includes the offense of accessory after the fact, which is not an aggravated felony. Counsel still should make every effort to avoid a one-year sentence on a single count of § 10851, however, in case the U.S. or California Supreme Court disagree with the finding that § 10851 actually includes accessory after the fact.

Warning on crime involving moral turpitude. Because joyriding requires only an intent to temporarily deprive the owner, and moral turpitude requires intent to permanently deprive, § 10851(a) is a divisible statute for moral turpitude purposes. Under *Matter of Silva-Trevino*, the immigration judge may decide to take evidence on the underlying facts for CMT purposes -- unless criminal defense counsel can plead explicitly to a temporary taking, rather than simply creating a vague record of conviction. An explicit plea to a temporary taking ought to prevent an immigration judge from finding a CMT even under *Silva-Trevino*.

²¹² 8 USC § 1101(a)(43)(M)(i).

²¹³ *Duenas-Alvarez v. Gonzales*, 127 S.Ct. 815 (2007), *Matter of V-Z-S-*, Int. Dec. 3434 (BIA 2000).

3. *Burglary of a non-Dwelling with Intent to Commit Certain Offenses, P.C. § 460(b)*

For the Defendant. An offense is not a “burglary” unless the record establishes that it is an *unlawful* entry or remaining in a *building or structure* (as opposed to car, yard, or boxcar) with intent to commit a crime. A burglary offense is not a “crime of violence” unless the record establishes that it is of a dwelling. *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). A burglary offense is not an aggravated felony as “attempted theft” unless the record establishes that the entry or remaining was with intent to commit theft/larceny, as opposed to “larceny or any felony.”

Burglary has been held to be a crime involving moral turpitude only if (a) it involves intent to commit an offense that is a crime involving moral turpitude, or (b) it involves an unlawful entry into a dwelling. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

Aggravated felony. To avoid an aggravated felony conviction in a burglary plea, counsel should obtain a sentence of 364 days or less for any single count. If a sentence of a year or more is not avoidable, see instructions below and further discussion at § N. 13 Burglary, *supra*. Counsel must avoid a plea to entry into a dwelling, but if needed can accept a plea to entry into a building as long as the entry was not *unlawful*. The offense must not have been with intent to commit theft or some other aggravated felony, but “larceny or any felony” is sufficient.

Even if a one-year sentence is imposed in a burglary conviction, the following offenses will not constitute an aggravated felony:

- The burglary is not of a dwelling or its yard.²¹⁴ The conviction cannot be pursuant to P.C. 460(a), but may be pursuant to § 460(b), or if that is not possible to § 460 where the record of conviction does not indicate whether (a) or (b) was the subject of the conviction, *and*
- The record of conviction does not establish intent to commit “larceny” (theft) or any other offense that itself is an aggravated felony. Instead, the burglary plea can be with intent to commit “any felony,” “larceny or any felony,” or a specified offense that is not an aggravated felony, *and*
- Counsel should keep indications from the record that the entry or any part of the burglary was effected by violent force. Gaining entry by opening a door or window or using a tool such as a slim jim to open a window, is not violent force.²¹⁵
- The record should indicate that the entry or remaining was lawful, or was of a non-building (e.g. car, yard), or both. Or, leave the record vague on these points.

²¹⁴ See *James v. United States*, 127 S.Ct. 1586, 1600 (U.S. 2007) holding that felony burglary of a fenced-in yard around a house, while it is not a “burglary” under *Taylor*, is a “crime of violence” because it presents the inherent risk that violence will ensue.

²¹⁵ See, e.g., discussion in *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

Crime involving moral turpitude. Burglary is a crime involving moral turpitude to the extent of the underlying intent. Entry with intent to commit larceny involves moral turpitude, while entry with intent to a specified offense that does not involve moral turpitude (or, assuming the government has the burden of proof, an unspecified offense) is not. Under *Matter of Silva-Trevino*, however, it may be difficult to ensure that a given offense does not involve moral turpitude. In addition, burglary will be held a crime involving moral turpitude if it involves an unlawful entry into a dwelling.

4. Theft instead of fraud, and other measures to avoid the aggravated felony of an offense involving fraud or deceit in which the loss to the victim exceeds \$10,000.

A fraud or tax fraud offense in which the loss to the victims/government is more than \$10,000 is an aggravated felony under 8 USC § 1101(a)(43)(M). In 2009 the Supreme Court expanded the kind of evidence that can be used to establish the amount of loss to the victim, although it found that the categorical approach must be used to establish that the offense involved fraud or deceit. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). The most secure plea option is to an offense that does not involve fraud or deceit, for example, to theft under P.C. § 484. This means specifically to a theft offense, or at least to § 484 in general; not to embezzlement, fraud or other theft by deceit in § 484.

A theft offense will become an aggravated felony if a sentence of a year or more is imposed, but not based upon a loss to the victim of over \$10,000. Therefore a plea to a theft offense under § 484 can include restitution to the victim of over \$10,000, but the sentence imposed must be 364 days or less for any single count.

If you must plead to an offense involving fraud or deceit (and deceit is broadly defined), or to welfare fraud, see additional advice at N. 13 Fraud, *supra*. See also Brady, “Preliminary Advisory: *Nijhawan v. Holder*” at www.ilrc.org/criminal.php.

For the Defendant: A conviction for a fraud or deceit offense in which the loss to the victim or victims was over \$10,000 is an aggravated felony. A theft offense under P.C. § 484 is *not* an offense involving fraud or deceit. Therefore proof of a loss to the victim/s exceeding \$10,000 does not make the offense an aggravated felony. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008).

5. Receipt of Stolen Property is not categorically a crimes involving moral turpitude

A conviction for receipt of stolen property under P.C. § 496(a) is a categorical aggravated felony conviction if a sentence of a year or more is imposed.²¹⁶ However, the offense is divisible as a crime involving moral turpitude.

²¹⁶ *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009), *Verduga-Gonzalez v. Holder*, 581 F.3d 1059 (9th Cir. 2009).

Receipt of stolen property, P.C. § 496(a) is not categorically a crime involving moral turpitude because it includes intent to *temporarily* deprive the owner of the property. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). Where a plea is specifically taken to intent to deprive temporarily, the question is resolved under the modified categorical approach and the immigration judge may not proceed beyond the record under *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699 (AG 2008).

F. Safer Pleas for Offenses Related to Drugs

See further discussion in § N.7 Controlled Substances

Basic defenses are summarized here, to provide to noncitizen defendants whom you have represented. However, the best course is to return to § N.8 Controlled Substances, and read all the commentary and warnings about pleas in this complex area. See also the Chart for drug pleas that appears at the end of § N.8.

For the Defendant: If a specific controlled substance is not identified in the record of conviction or under the terms of the statute, there is no proof that the offense involved a federally defined controlled substance and there are no immigration consequences based on a controlled substance conviction. For example, where the record showed only possession of a “controlled substance” under Calif. H&S § 11377 with specifying the substance, the Ninth Circuit found that the person was not deportable. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Esquivel-Garcia v. Holder*, __ 9th Cir. __ (January 29, 2010) (same for Calif. H&S § 11350). The government has the burden of proving that a specific offense is a controlled substance offense that bars eligibility for relief. *Esquivel-Garcia*.

Note on unspecified substance. Advise the defendant that he or she should not admit the name of the controlled substance to the immigration judge, or to anyone else. This might be termed a formal “admission” of a drug offense, which would make the person inadmissible.

For the Defendant: Accessory after the fact to a drug offense is not a deportable drug conviction or aggravated felony. *Matter of Batista*, 21 I&N Dec. 955 (BIA 1997). It is categorically not a crime involving moral turpitude, meaning that it will not be held to involve moral turpitude regardless of the fact situation. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*).

Note on accessory: ICE might argue that the moral turpitude finding should be challenged under *Silva-Trevino*, or under the Ninth Circuit statement that it will defer to the BIA in moral turpitude determinations, in *Marmolejo-Campos*, *supra*.

Also, counsel should *obtain a sentence of 364 days or less*, and/or make sure that the record of conviction indicates, or leaves open the possibility, that the accessory assisted the person in escaping from police, not avoiding an ongoing judicial proceeding. *Batista-Hernandez, supra*, also held that federal accessory after the fact is an aggravated felony as obstruction of justice if a sentence of a year or more is imposed, although under subsequent precedent that would not be true unless the offense impedes an ongoing judicial proceeding. See Part G, *infra*.

For the Defendant: Offering to commit a drug offense under Calif. H&S §§ 11352(a), 11360(a) and 11379(a) is not an aggravated felony because it constitutes solicitation. Therefore, these statutes are divisible for this purpose. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(*en banc*). Transportation for personal use is not a drug trafficking aggravated felony; therefore the statutes also are divisible in this manner.

Note on offering and transportation: Transportation for personal use is a better plea than offering, for one thing because it will be recognized outside the Ninth Circuit. A conviction for transportation or solicitation (of a specifically identified controlled substance) under these statutes is a deportable and inadmissible offense relating to a controlled substance. *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009) (solicitation).

For the Defendant: A conviction under P.C. § 653f(d) for soliciting possession of a drug per commission of Health & Safety Code §§ 11352, 11379, 11379.5, 11379.6, or 11391 is not a conviction of a deportable and inadmissible drug offense, nor of an aggravated felony. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

Note on § 653f: The government might charge that this is dicta.

Note on possession for sale: Avoid possession for sale of a specified substance, which is an aggravated felony. If needed, plead up to offering to sell as described above. Possession for sale of an unspecified substance is a good plea.

For the Defendant: A *first conviction* for simple possession (felony or misdemeanor); for a lesser offense such as possession of paraphernalia eliminated for immigration purposes by “rehabilitative relief” such as under Prop 36, DEJ or PC § 1203.4. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *Cardenas-Urriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

Note on Lujan-Armendariz. This will not work if the person violates probation, even if she later completes probation. It will not work if there was a prior pre-plea diversion. The *Lujan* defense will not be accepted outside of the Ninth Circuit. See § N.8, *supra*.

For the Defendant: A first conviction for giving away a small amount of marijuana for free should not be considered an aggravated felony, because it is treated as a misdemeanor under federal law. *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006) (a non-trafficking state offense that is the analogue of a federal misdemeanor is not an aggravated felony). Because the offense explicitly is eligible for relief under the Federal First Offender Act, it receives the benefit of *Lujan-Armendariz* so that withdrawal of plea under rehabilitative relief of a first drug offense will eliminate the conviction for immigration purposes. See 21 USC § 841(b)(4), providing that this offense is punishable as a misdemeanor under federal law (see 21 USC § 844), and that it is amenable to treatment under the Federal First Offender Act, 18 USC § 3607.

Warning on giving away a small amount of marijuana. Counsel must document the “small amount.” The government is likely to charge this conviction as aggravated felony. Compare *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008) (there the defender did not document the “small,” but this probably would not have been enough for the Board) with *Jeune v. Att’y Gen. of U.S.*, 476 F.3d 199, 205 (3d Cir. 2007). To avoid an aggravated felony, plead to simple possession, transportation, or *offering* to give away a small amount of marijuana for free.

For the Defendant: A first conviction, felony or misdemeanor, for simple possession is not a drug trafficking aggravated felony. *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006).

Warning on first possession: The only exception is that possession of flunitrazepam or more than five grams of crack cocaine will be charged as aggravated felonies, because these are punishable as felonies under federal law.

For the Defendant: Absent circuit law to the contrary (which does not exist in the Ninth Circuit), a plea to simple possession where there is a prior drug conviction is not an aggravated felony, unless the prior conviction was pleaded or proved at the subsequent possession prosecution. *Matter of Carachuri*, 24 I&N 382 (BIA 2007). The Supreme Court is considering the issue, but *Matter of Carachuri* remains in effect.

Note on possession with a prior: Because the case is pending before the Supreme Court, try to avoid pleading to simple possession where there is a drug prior, and instead plead to under the influence, possession of paraphernalia, or another non-trafficking offense with no federal analogue. If you must plead to possession, be sure to avoid having the prior conviction pleaded or proved at the possession case.

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

G. Safer Pleas Relating to Obstruction of Justice or Interference with Law Enforcement (Defenses Where a Sentence of a Year or More is Imposed for Conviction of P.C. §§ 32 or 136.1(b))

An “offense relating to obstruction of justice” is an aggravated felony if a sentence of a year is imposed. 8 USC § 1101(a)(43)(S). A clear-cut defense strategy, therefore, is to *avoid imposition of a sentence of a year or more* for any single count where the offense might be charged as obstruction of justice. See § N.4 Sentence Solutions. However, if it is not possible to avoid a year’s sentence for P.C. §§ 32 or 136.1(b), the following section discusses why they should be held divisible for obstruction of justice purposes and how to plead.

For the Defendant. An offense does not constitute the aggravated felony “obstruction of justice” unless it matches an offense described in 18 USC §§ 1501-1508, or comes within the catch-all provision in 18 USC § 1503(a) which requires specific intent to impede an *ongoing judicial proceeding*. *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999); *United States v. Aguilar*, 115 S.Ct. 2357, 515 U.S. 593, 598-99 (1995). Conduct that impedes an arrest or the filing of a police report before judicial proceedings start is not “obstruction of justice.” *Salazar-Luviano v. Mukasey*, 551 F.3d 857 (9th Cir. 2008) (aiding escape from custody under 18 USC § 751 is not categorically “obstruction of justice” because the petitioner’s conviction did not come within 18 USC § 1503(a) where the record of conviction failed to show that judicial proceedings had been initiated against the escapees).

Calif. P.C. § 32 is not categorically an obstruction of justice offense because by its terms it includes impeding the *arrest* of a suspect who is not yet the subject of a judicial proceeding. See also *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)(*en banc*), holding that Calif. Veh. Code §10851 is a divisible statute as an aggravated felony because it includes the offense of accessory after the fact, which is not an aggravated felony. Calif. P.C. § 136.1(b) is not categorically obstruction of justice because by its terms it includes non-violently attempting to persuade a person not to *file a police report*, before any judicial proceeding has begun.

For further discussion and boxes, see Part A for P.C. § 32 and Part B for P.C. § 137.1(b).

Warning on P.C. § 32. The Board of Immigration Appeals and the Ninth Circuit have adopted a definition of obstruction of justice that tracks federal statutes, 18 USC §§ 1501-1508.

The BIA and Court noted that the Supreme Court construed the “catch-all” provision in 18 USC § 1503(a) to require that the defendant specifically intended to impede *an ongoing judicial or grand jury proceedings*.²¹⁷ Thus, to avoid conviction of obstruction of justice, counsel should plead to conduct that did not impede an ongoing judicial proceeding (or if that is not possible, to leave the record vague). An example is a plea to interference with arrest or other process that occurs before charges are brought in criminal court or a grand jury. A plea to conduct that does not show specific intent to impede the tribunal is sufficient.

Unfortunately, before the Board adopted this definition, it held with almost no analysis that federal accessory after the fact (18 USC § 3) is obstruction of justice and therefore is an aggravated felony if a sentence of a year or more is imposed. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). ICE will likely charge P.C. § 32 as obstruction of justice. ICE conceivably also would charge that P.C. § 136.1(b), which includes non-violently trying to persuade someone not to file a police report, is categorically an obstruction of justice offense. In fact, both §§ 32 and 136.1(b) reach conduct that takes place before judicial proceedings have begun, and thus both are at least divisible as obstruction of justice offenses.

H. Moral Turpitude and *Matter of Silva-Trevino*: Defense Strategies

For the Defendant. An immigration judge may go beyond the reviewable record of conviction to determine whether an offense causes inadmissibility as a crime involving moral turpitude, *but only after* finding that the categorical and modified categorical approaches fail to answer this question. “In my view, *when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude*, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act’s moral turpitude provisions... In short, to determine whether an alien’s prior conviction triggers application of the Act’s moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry ... (2) if the categorical inquiry does not resolve the question, look to the alien’s record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) *if the record of conviction does not resolve the inquiry*, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699, 704 (AG 2008) (emphasis supplied). Where the reviewable record establishes that the plea is specifically to conduct that does not involve moral turpitude, the inquiry stops.

Matter of Silva-Trevino has caused great uncertainty because in some instances it permits an immigration judge to go beyond the reviewable record permitted under the modified categorical approach, and into a broad inquiry about the facts of the case to see if a conviction involved conduct that “involves moral turpitude.” Immigration judges sometimes forget that *Silva-*

²¹⁷ *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999) (misprision of felony is not obstruction of justice), citing *United States v. Aguilar*, 115 S.Ct. 2357, 515 U.S. 593, 598-99 (1995).

Trevino permits this only *if* the statute is divisible, and *if* the reviewable record of conviction does not establish whether the offense involves moral turpitude. To attempt to protect the defendant from a broad inquiry, criminal defense counsel should plead specifically to conduct under the statute that does not involve moral turpitude, and put this in the reviewable record of conviction. For example, counsel should arrange a guilty plea to a temporary taking under Veh. Code § 10851, or a mere offensive touching under P.C. § 243(e). See discussion of crimes involving moral turpitude in Note 7, *supra*.

Give the above summary to the defendant *if* you were successful in creating a specific record of a plea to an offense that does not involve moral turpitude, under a divisible statute. See discussion of offenses in the Chart and Notes to see what conduct that is covered by various offenses does not involve moral turpitude.

As the below box states, even if an immigration judge may go beyond the record of conviction to determine if the offense of conviction is a crime involving moral turpitude, they may *not* do this to determine if it comes within other immigration provisions, e.g. is a deportable conviction of a firearms offense, a controlled substance offense.

For the Defendant: *Silva-Trevino* applies only to the moral turpitude grounds and does not permit an inquiry beyond the categorical approach to determine whether an offense comes within any other ground of inadmissibility or deportability. “This opinion does not, of course, extend beyond the moral turpitude issue--an issue that justifies a departure from the Taylor/Shepard framework because moral turpitude is a non-element aggravating factor that ‘stands apart from the elements of the [underlying criminal] offense.’” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 699, 704 (AG 2008).

I. Find a Disposition That Is Not a Conviction

Most, although not all, immigration consequences can be avoided if the offense is not a “conviction.” See discussion in § N.3, *supra*.

For the Defendant: The following is not a “conviction” for immigration purposes in proceedings arising in the Ninth Circuit.

A first conviction for simple possession (felony or misdemeanor) that is eliminated under rehabilitative provisions such as Deferred Entry of Judgment, Prop 36, or PC § 1203.4 is eliminated for all immigration purposes. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). This also works if the first conviction is for an offense less serious than simple possession that does not have a federal analogue, such as possessing paraphernalia or under the influence (*Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009) (Calif. H&S C § 11364(a)) and should work for a first conviction for giving away a small amount of marijuana for free (see 21 USC § 841(b)(4)).

Adjudication in juvenile delinquency proceedings does not constitute a conviction, regardless of the nature of the offense. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

An infraction is not a conviction where it is handled in non-conventional criminal proceedings that do not require the usual constitutional protections of a criminal trial, such as access to counsel, right to jury trial, etc. *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).

A conviction currently on direct appeal of right does not have sufficient finality to constitute a “conviction” for any immigration purpose. *Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576 (1955); see also discussion in *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009) and Practice Advisory by Manuel Vargas, “Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*” at www.immigrantdefenseproject.org.

When a court acting within its jurisdiction vacates a judgment of conviction for cause, the conviction no longer constitutes a valid basis for deportation or exclusion. *Matter of Rodriguez-Ruiz*, Int. Dec. 3436 (BIA 2000); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

Additional comments: Note that although there are strong arguments that a California **infraction** is not a conviction under *Matter of Eslamizar*, discussed above, this is *not* a guaranteed defense, because no decision has specifically ruled on California infractions. Note also the **limitations on the Lujan-Armenaderiz** benefit for eliminating a controlled substance conviction. It is not available if the defendant violated probation, even if he or she ultimately completed probation and withdrew the plea, and it is not available if there was a prior pre-plea diversion. A conviction on direct appeal of right is not a conviction for immigration purposes. Remember that **appeal includes a “slow plea,”** meaning appeal after a submission on a preliminary examination transcript or police report, or after a plea of guilty or no contest after a suppression motion per Penal Code Section 1538.5. Note also that the BIA has held that it will not accept a late-filed appeal (the Ninth Circuit has not yet ruled on this). See § N.2, *supra*.

J. Sentence of 364 Days or Less

Many offenses become aggravated felonies only if a sentence of a year or more is imposed. These include crime of violence, theft, receipt of stolen property, burglary, bribery of a witness, commercial bribery, counterfeiting, forgery, trafficking in vehicles that have had their VIN numbers altered, obstruction of justice, perjury, subornation of perjury, and with some exceptions false immigration documents. See 8 USC § 1101(a)(43). Often defense counsel has more leeway in avoiding a one-year sentence for a particular count than in pleading to an alternate offenses. For creative suggestions about how to arrive at less than a one-year sentence even in somewhat serious cases, see § N.3.

Many other offenses are aggravated felonies regardless of sentence imposed, for example, sexual abuse of a minor, rape, and firearms and drug offenses. Fraud and money laundering offenses depend on whether \$10,000 was lost or involved, not on sentence. Avoiding

a one-year sentence in these cases will not prevent an aggravated felony. See § N.5 on aggravated felonies.

K. Is your client a U.S. citizen or national without knowing it?

A United States citizen or national cannot be deported. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam and U.S. Virgin Islands, as well as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens. 8 USC § 1101(a)(38), INA § 101(a)(38). A national of the United States is not a U.S. citizen, but cannot be deported. Persons born in an outlying possession of the United States, for example in American Samoa and Swains Islands, are nationals.²¹⁸ See additional discussion in § N.1, Part C.

Many people who were born in other countries also are U.S. citizens and may not know it. Many people born abroad inherited U.S. citizenship at birth from a parent without being aware of it. Others who were permanent residents here as children may have automatically become citizens when a parent naturalized. To begin the inquiry, ask the defendant the following two threshold questions. If the answer to either one is yes, get immigration counsel to see if citizenship indeed was conveyed.

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

²¹⁸ See INA §§ 308, 8 USC §1408 and INA §101(a)(29), 8 USC §1101(a)(29). For a complete description of who can be noncitizen nationals, please see INA § 308 and books such as Cohen et al, *Naturalization: An Advocates Guide* at www.ilrc.org.

§ N.15, Part I: Client Immigration Questionnaire – Short Form

This information is confidential and protected by attorney-client privilege.

Information About You

Your Name: _____ Date of Inquiry: _____

Agency or Firm: _____ County: _____

Telephone: _____ Email address: _____

Information About the Noncitizen Defendant

1. Client's name _____ Country of origin _____.

2. Client's current immigration status _____.

NOTE: some possibilities are: US citizen; Undocumented; Lawful Permanent Resident (LPR) (this means s/he has a greencard); Refugee/Asylee; TPS. If client has lawful status, how and when did s/he get it? (*E.g.*, Client entered the U.S. in 1981 as a refugee from Cambodia; client got her greencard through her U.S. citizen spouse in 1993; client entered on a tourist visa.)

3. Starting with client's first entry into the United States, how many times, and for how long each time, has s/he departed and returned to the US – approximate if necessary

Entry Date: _____

Departure Date/s: _____

Length of Departure/s: _____

4. Client's current charge and criminal history (include all arrests and dispositions, sentences and juvenile offenses; append sheet as needed).

5. List client's immediate relatives (spouse, parent(s) and/or child(ren)) who are U.S. citizens or lawful permanent residents (greencard holders).

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

NO Date? _____

Reason? _____

Do you have an immigration court date pending? YES NO

Date? _____

Reason? _____

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

YES NO Which: _____ Date: _____

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

(child -- DOB(s) _____), (brother) or (sister)?

Do you have a lawful permanent resident (spouse) or (parent)?

Relief: Consider family immigration, see DINC § 11.13.

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

Occupation: _____ Employer's name/number: _____

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

8. Have you been abused by your spouse or parents? YES NO

Relief: Consider VAWA application, see DINC § 11.19.

9. In what country were you born? _____ Would you have any fear about returning? YES
NO Why?

Relief: Consider asylum/withholding, or if recent civil war or natural disaster, see if entire country has been designated for "TPS." See DINC §§ 11.4-5, 7.

10. Are you a victim of serious crime or alien trafficking and helpful in investigation or prosecution of the offense? YES NO

Relief: Consider "T" or "U" visa; see DINC §§ 11.28-29.

§N.16 IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY
Inadmissibility (8 USC § 1182(a)) and Deportability (8 USC § 1227(a))

Although not a conviction for immigration purposes, a delinquency adjudication still can create problems for juvenile immigrants. Certain grounds of inadmissibility (bars to obtaining legal status) and deportability (loss of current legal status) do not depend upon conviction; mere “bad acts” or status can trigger the penalty. The following are commonly applied conduct-based grounds and the juvenile court dispositions that might provide the government with evidence that the person comes within the ground.

Delinquency Disposition

Immigration Penalty & Waiver

Prostitution (being the prostitute, not the customer)	Inadmissible for engaging in prostitution Waivers often available
Drug Trafficking: Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible where DHS/ICE has “reason to believe” participation in drug trafficking No waivers except for the S, T, or U visa.
Drug Abuse or Addiction: Repeated drug findings, finding of abuse (more than one time experimentation in last three years), addiction to drugs	Inadmissible and deportable for drug addict or abuser Waivers often available
Behavior showing a mental condition that poses a current threat to self or others: including suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or other Waivers may be available
False Claim to U.S. Citizenship: Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to U.S. citizenship Waivers may be available, e.g., SIJS and U Visa
Violations of protective or “no-contact” orders designed to prevent repeated harassment, credible threats of violence or bodily injury	Deportable where Court finds violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence or bodily injury Some waivers

WARNING! Be aware that gang membership, affiliation, and activity, violent offenses, and sex offenses can cause also problems for noncitizen youth including secure detention and denial of immigration applications as a matter of discretion. Go to www.defendingimmigrants.org for more information and resources on immigration consequences of delinquency.

Diagnostic Questions For Noncitizen Youth: Determining Potential Avenues For Legal Status

1. Is the child a U.S. citizen without knowing it?
 - A. Anyone born in the U.S. or Puerto Rico is a citizen, and born in Guam, American Samoa or Swains Island is a national who can't be deported.
 - B. If person born outside the U.S., ask two threshold questions to see if the person automatically is a U.S. citizen. If the answer to either might be yes, refer for immigration counseling.
 - Was there a USC parent or grandparent at time of person's birth? Or,
 - Before person's 18th birthday, did both of these events happen (in either order): child became a permanent resident, and at least one natural or adoptive (but not step-) parent having some form of custody over the child is or becomes a U.S. citizen. (Tip: Encourage the parent to naturalize!)
2. Is the child currently under delinquency court jurisdiction where the court has ruled that the child (a) *cannot be reunified with one or both parents* parent because of abuse, neglect or abandonment or a similar basis under state law and (b) that it would not be in the child's best interest to be returned to the home country? The child may qualify for **special immigrant juvenile status**.
 - **IMPORTANT:** if possible, the child should stay in the jurisdiction of the delinquency court until the entire SIJS application is adjudicated, so watch out for youth aging out of the system. If this is not possible, the court should explicitly state that termination of jurisdiction is being done based on age.
3. Has the child been abused by a *U.S. citizen or permanent resident* spouse or parent, including adoptive, natural or step-parent? Has the child's parent been a victim of domestic violence by his/her U.S. citizen or permanent resident spouse? Consider **VAWA relief**.
 - Child doesn't need to be under current court jurisdiction, and may be reunited with the other parent.
 - Child will need to show "good moral character." Violent crimes will be a negative factor, but can be offset if there is a connection between the abuse and the bad conduct.
4. Has the child been a victim of serious crime, or of alien trafficking? Is the child willing to cooperate with authorities to investigate or prosecute the offense? Consider the **S, T, or U visas**.
 - This is one of the few forms of relief available even if the child has a drug trafficking delinquency disposition.
5. Does the child have a *U.S citizen or permanent resident parent or spouse* who is willing to petition for her? Investigate **family immigration**.
 - To immigrate through an adoptive parent the adoption must be completed by the child's 16th birthday.
6. Does the child come from a country that's recently experienced *civil war, natural disaster, or political persecution*? Investigate various forms of relief such as **asylum and temporary protective status**.

§ N.17 Other Resources: Books, Websites, Services

Books

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

The Immigrant Legal Resource Center publishes several other books and materials on immigration law, all written to include audiences of non-immigration attorneys. It also is a center for community organizing for immigrants' rights. See list of publications, trainings and projects at www.ilrc.org or contact ILRC to ask for a brochure.

Law Offices of Norton Tooby. A criminal practitioner with over thirty years experience who has become an expert in immigration law as well, Norton Tooby has written several books that are national in scope. Recently he offered for free *Tooby's Guide to Criminal and Immigration Law*, which handles critical topics such as interview, working with immigration counsel, translators, and other issues. *Criminal Defense of Noncitizens* includes an in-depth analysis of immigration consequences and moves chronologically through a criminal case. *Safe Havens*, *Aggravated Felonies* and *Crimes Involving Moral Turpitude* provide general discussion of these areas, and also discuss and digest in chart form all federal and administrative immigration opinions relating to these categories. Other books include studies of means of obtaining post-conviction relief under California law, and nationally. Go to www.criminalandimmigrationlaw.com or call 510/601-1300, fax 510/601-7976.

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

Websites

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

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

The national Defending Immigrants Partnership is a national effort to assist criminal defense counsel who defend indigent immigrants. See the website at www.defendingimmigrants.org,

which among other resources provides links to charts similar to this one that show immigration consequences of offenses under many other states' laws. The principal partners are the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild; the Immigrant Defense Project of the New York State Defender Association; and the National Legal Aid and Defender Organization. Each of these partners maintains their own websites which include materials beyond those found at www.defendingimmigrants.org. The Immigration Advocates' Network (IAN) is a collaboration of immigration non-profits throughout the country whose goal is to provide on-line immigration resources to pro bono immigration practitioners. The Immigrant Legal Resource Center heads the Immigration and Crimes resource library, which provides resources such as overviews, practitioner guides, and sample pleadings for those representing noncitizens with criminal records, as well as copies of the state and federal charts on immigration consequences. This library is appropriate for defenders looking for more in-depth resources on the immigration consequences of crimes. Go to www.immigrationadvocates.org.

The website of the Immigrant Legal Resource Center offers material on a range of immigration issues, including a free downloadable manual on immigration law affecting children in delinquency, dependency and family court, and information about immigration applications for persons abused by U.S. citizen parent or spouse under the Violence Against Women Act (VAWA). Go to www.ilrc.org

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

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

The National Legal Aid and Defender Association provides seminars and many services to its thousands of members. Go to www.nlada.org.

Seminars

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

Consultation

The Immigration Clinic at King Hall School of Law at U.C. Davis offers free consultation on immigration consequences of crimes to defenders in the greater Sacramento area.

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

Staff of the Los Angeles Public Defender office can consult with Graciela Martinez of the appellate division by contacting her at gmartinez@pubdef.lacounty.gov.

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