Immigrant Legal Resource Center

QUICK REFERENCE CHART

For Determining Key Immigration Consequences of Selected California Offenses[1]

April 2021

For suggestions or questions about the Chart, write chart@ilrc.org and see **Endnote 1**. Also see "Notes" or short articles on crim/imm topics at www.ilrc.org/chart, and see updates and practice advisories at www.ilrc.org/crimes.

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DEFINITION OF TERMS

A. USC, LPR, Undocumented, Defense Goals.

In these materials, a United States citizen is referred to as a USC, a lawful permanent resident ("green card" holder) is referred to as an LPR, and a person with no current lawful immigration status is referred to as an undocumented person.

To identify a criminal defense goal for a noncitizen defendant, we need to make an individual analysis based on the person's current or hoped-for immigration status; all prior convictions; and a basic account of their immigration history. To gather this information, we can use an Immigrant Defendant Questionnaire.

Once we have the information, the easiest way for a defender to identify the defense goal is to get advice from an expert—either an in-house expert in your office or an outside expert who agrees to advise. They can tell you if the person needs to prioritize avoiding a deportable conviction, an inadmissible conviction, or some other conviction that would destroy eligibility to apply for some immigration relief (lawful status or defense against removal). Or, you can work on the analysis yourself. For an introduction to that process, see this endnote.[2]

B. Aggravated Felony (AF)

"Aggravated felony" (AF) is an immigration law term that refers to certain offenses that cause severe immigration damage. The AF definition at 8 USC § 1101(a)(43) includes twenty-one provisions that describe hundreds of offenses. Despite the name, the AF definition includes state offenses that are relatively minor misdemeanors. Some offenses only become an AF if a sentence of a year or more is imposed, such as a crime of violence, perjury, or theft. Other offenses are AFs regardless of sentence, such as drug trafficking, sexual abuse of a minor, or a crime of deceit where the loss to the victim/s exceeds $10,000. For an alphabetical list, see § N.6 Aggravated Felonies at www.ilrc.org/chart.

Do *not* simply go by the name of the California offense to make an AF determination. For example, under the federal "categorical approach" (see below), offenses like California theft (Pen C § 487) and burglary (Pen C §§ 459/460) are not "theft" or "burglary" for aggravated felony purposes, because the state and federal offenses have different elements. Instead, check this chart or do research to see if a California offense actually is an AF.

Conviction of an AF makes the person deportable, but even worse, it destroys eligibility for many types of relief from deportation, including asylum and cancellation of removal, and removes various due process protections. A few forms of relief remain available, especially if the conviction did not involve drugs. See chart of different forms of relief and their criminal bars in § N.17 Immigration Relief Toolkit at www.ilrc.org/chart.

C. Crime of Violence (COV)

A COV for immigration purposes is not the same as a "serious or violent" offense under California law. It is defined at 18 USC § 16(a) as an offense that has as an element the intent, threat, or attempt to use "force" (interpreted as intentional, aggressive, physical force) against person or property. It does not include an offense such as simple battery that can be committed by an offensive touching, but it does include an offense that requires *overcoming the resistance of the victim* by even a small amount of force, as is the case with some robbery and other offenses. It does not include negligent conduct, but the Supreme Court will decide whether it can committed by recklessness, in *Borden v. United States,* No. 19-5410 (replacing *Walker v. United States,* No. 19-373).

In 2018, the Supreme Court struck down a second part of the COV definition, 18 USC 16(b), as unconstitutionally vague. Section 16(b) included any felony that "by its nature" involves a risk of violence. The result is that some felonies that were COVs under 16(b) no longer are COVs. See offenses in the chart.

For further discussion of the definition of COV, see **Pen C § 207(a).**

A conviction of a COV has two potential immigration penalties. First, if a sentence of a year or more is imposed, a COV conviction is an aggravated felony. 8 USC § 1101(a)(43)(F). Second, regardless of sentence, if it was committed against a person protected under the state's domestic violence laws, a COV is a deportable "crime of domestic violence." See section below on Domestic Violence and Child Abuse.

D. Crimes Involving Moral Turpitude (CIMT).

Whether an offense involves moral turpitude is defined according to federal immigration case law, not state cases for purposes of impeachment. While the concept is vaguely defined, generally a CIMT must have as elements the intent to defraud, to cause great bodily injury or commit assault with a deadly weapon, or to commit theft with intent to deprive permanently or "substantially" (but not temporarily). An offense that requires reckless disregard of a known risk of death or serious injury may be a CIMT, but recklessness less than that, and criminal negligence, is not a

CIMT. Some offenses that require lewd intent, and occasionally malice, are CIMTs. This is defined by federal immigration cases, not state cases. See individual offenses in the chart.

The CIMT grounds of inadmissibility and deportability are unique in that a single CIMT conviction does not necessarily make the person deportable or inadmissible, or trigger the other possible penalties. For more information see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2020, update forthcoming) at https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

Here are the rules that govern when one or more convictions of a CIMT cause a person to become deportable or inadmissible.

Deportable for CIMT

Under 8 USC § 1227(a)(2)(A)(i), (ii), a noncitizen is deportable who either:

1) is convicted of at least two CIMT's that did not arise out of the very same incident (in a "single scheme"), at any time after being admitted to the U.S., *or*
2) is convicted of one CIMT that has a potential sentence of a year or more, but only if the offense was committed within five years of admission to the U.S. in any status (or if the person never was admitted, within five years of adjustment to LPR status).

✓ *Penal Code § 18.5(a).* A single California misdemeanor conviction from after January 1, 2015 cannot trigger this deportation ground, because under Pen C § 18.5(a) no misdemeanor has a *potential* sentence of more than 364 days. A felony reduced to a misdemeanor is treated the same way. But the Ninth Circuit and BIA have held that California misdemeanor convictions from before January 1, 2015 still have a one-year, rather than 364-day, maximum sentence..

Inadmissible for CIMT

Under 8 USC § 1182(a)(2)(A), a noncitizen is inadmissible if convicted of just one CIMT. But if either of the following exceptions applies, the person is *not* inadmissible.

1) Petty offense exception: Must have committed only one CIMT, which carries a potential sentence of not more than a year, and a sentence of not more than six months must have been imposed.
2) Youthful offender exception: Must have committed only one CIMT, while under age 18, and the conviction (in adult criminal court) or release from imprisonment occurred at least five years ago. If the case was held in juvenile delinquency proceedings, it is not a conviction and the person is not inadmissible.

E. Domestic Violence and Child Abuse

The next four categories trigger deportability under the "domestic violence" ground at 8 USC § 1227(a)(2)(E). For this deportation ground only, the conviction, or the conduct that violated the protective order, must have occurred after admission and after September 30, 1996. For further information on the below four categories, see ILRC, *Case Update: Domestic Violence Deportation Ground* (2019) at https://www.ilrc.org/2019-case-update-domestic-violence-deportation-ground

1. Deportable crime of domestic violence (DV). To be a deportable crime of DV, the offense (a) must be a crime of violence (COV) as defined at 18 USC § 16(a) (see discussion above) ***and*** (b) must be committed against a person protected from the defendant's acts under state domestic violence laws or similar standards set out at 8 USC § 1227(a)(2)(E)(i). See discussion of COV, above.

If the offense lacks either of these factors, it is not a deportable crime of DV. There are two strategies to avoid this ground. First, plead to an offense that is not a COV. This will not be a deportable crime of DV even if there is a protected relationship. See, e.g., Pen C § 243(e). Or second, plead to an offense that is a COV but is against property, or against a specific victim with whom the defendant does not share a protected domestic relationship, e.g., the police, a neighbor, the ex-girlfriend's new boyfriend. When pleading to a COV, do not take one year or more on a single count or it will be an aggravated felony. It is *not* a recommended defense to plead to a COV against a victim with a protected relationship, while creating a vague record of conviction that does not disclose the relationship. See further discussion of crime of domestic violence at **Pen C § 245**, below.

2. Civil or criminal court finding of any violation of a DV stay-away order or similar order. A noncitizen is deportable if a civil or criminal court finds that they violated the portion of a DV protective order that is meant to protect against threats, injury, or repeated harassment. This includes a finding of *any* violation a DV stay-away order, no matter how minor the conduct. Do not plead to any violation of a DV stay-away order. Instead, plead to a violation of a different part of the order, or to a new offense. See discussion at **Pen C §§ 166, 273.6**, below.

3. Deportable Crime of Child Abuse. Conviction of a "crime of child abuse, child neglect, or child abandonment" ("crime of child abuse") also causes deportability under this ground. It is sometimes difficult to predict which offenses will trigger this broadly defined ground; see individual offenses in the chart. Section 273a(b) is not a crime of child abuse, while § 273a(a) will be charged as one (although immigration advocates can argue against this). No age-neutral offense (an offense that does not have a minor victim as an element) should qualify as a crime of child abuse, but to provide immigrant defendants with extra protection, defenders should plead to an age-neutral offense and not permit any evidence of the victim's minor age to appear in the reviewable record of conviction. The BIA held that a crime of child abuse requires a child as the victim, not a police officer posing as child. *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 782, 794 (BIA 2020). For more information on crime of child abuse, see **Pen C § 243(a),** below.

4. Stalking. Conviction of a crime that meets the definition of "stalking," committed against any person (not just in a domestic situation), triggers this ground. Note, however, that the BIA found that conviction of California stalking, Pen C § 646.9, does not trigger this deportation ground. For further discussion of stalking, see **Pen C § 646.9.**

F. Controlled Substance Offense (CS)

Even minor drug convictions bring very harsh immigration penalties. A person is deportable and inadmissible if convicted of any offense "relating to" a federally-defined controlled substance. There is an exception to the deportation ground, and a *possible* discretionary waiver of inadmissibility, if the conviction/s relate to a single incident involving simple possession or possession of paraphernalia, or perhaps use, relating to 30 grams or less of marijuana or hashish. See 8 USC §§ 1227(a)(2)(B)(i) (deportability), 1182(a)(2)(A)(i)(II) (inadmissibility), 1182(h) (inadmissibility waiver).

Because a controlled substance is defined according to federal drug schedules, in some cases a "non-federal substance" defense may apply. Some California offenses include substances not on the federal lists. For example, §§ 11377-79 includes chorionic gonadotropin.

Under the "unspecified substance" defense, if the entire record of conviction were sanitized so that it refers only to a "controlled substance" (as opposed to, e.g., ecstasy), ICE would not be able to prove that the substance was *not* chorionic gonadotropin, and they could not prove that an LPR is deportable. There was a split in court rulings as to whether this defense also could help an immigrant who is applying for relief. The Ninth Circuit held that it could, in *Marinelarena v. Barr,* 930 F.3d 1039 (9th Cir. 2019) (*en banc*). Unfortunately, the Supreme Court overruled

Marinelarena and severely limited this defense in *Pereida v. Wilkinson*, 141 S.Ct. 754 (March 4, 2021). It held that an applicant for relief must prove that their conviction does *not* relate to a federally-defined drug. For example, they would need evidence to show that they pled guilty under 11377 to possession of chorionic gonadotropin. A vague record of conviction will not help them remain eligible for relief. A vague record still can help a permanent resident who is not otherwise deportable to defend against a charge of deportability. There ICE has the burden of proof, and creating a vague record of conviction is a long-established criminal defense strategy for immigrants. But *Pereida* may have weakened this defense, because the Court suggested in dicta that evidence from outside the record of conviction, perhaps even testimony, can be used. This was a bizarre statement that goes against years of uniform precedent (on an issue that was not presented, briefed, or argued in the case), but because the Supreme Court said it, there is a possibility that lower courts will decide to reverse themselves and adopt that position. While the Court suggested that the *applicant for relief* could use this "extra" evidence, it would be hard to keep ICE from not also being permitted. To see more about California drug offenses, *Pereida,* and the categorical approach, see ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at www.ilrc.org/crimes.

The other non-federal defense is to plead guilty to a *specific* non-federal substance (for example, to chorionic gonadotropin or perhaps khat for § 11377-79). If one can manage that, that is a sure-fire defense and it that would not be a drug conviction for any immigration purpose. See further discussion of non-federal substance defenses at **H&S C § 11377.**

Otherwise, current defenses for an immigrant charged with a controlled substance offense are to fight hard to plead to some non-CS offense (with drug counseling as a condition of probation, if that is helpful), or to get pre-trial diversion.

A "drug trafficking" aggravated felony, defined at 8 USC § 1101(a)(43)(B), includes trafficking offenses such as sale or possession for sale, as well as some other state non-trafficking offenses that are analogues to federal drug felonies, that relate to a federally-defined controlled substance. Significantly, in immigration proceedings in the Ninth Circuit only, "offering" to commit these offenses—for example, under H&S C § 11352 or § 11379—is not an aggravated felony. If one must plead to 11379, it always should be specifically to *offering to* distribute (or if necessary, sell). See discussion in the chart at **H&S C § 11379** and see individual offenses.

Even if there is no conviction, noncitizens are inadmissible if they formally admit to immigration officials that they committed a drug offense (8 USC 1182(a)(2)(A)(i)(II)) or if ICE has "reason to believe" they participated in drug trafficking (8 USC § 1182(a)(C)). Also, noncitizens can be deportable and inadmissible for being a drug addict or abuser (8 USC §§ 1182(a)(1), 1227(a)(2)(B)(ii)). See § N.8 Controlled Substance.

Some immigrant defendants who commit drug offenses—for example, who work in marijuana grow houses, or transport drugs—are actually victims of human trafficking working under different forms of duress. If you suspect this, consider beneficial provisions under federal immigration and California criminal law. See discussion at **H&S C § 11358.**

G. Firearms Offenses

A noncitizen is deportable under 8 USC § 1227(a)(2)(C) who at any time after admission is convicted of an offense relating to a firearm. Also, convictions for sale of firearms, or certain offenses such as being a felon in possession, are aggravated felonies. 8 USC § 1101(a)(43)(C). However, ***no*** California offense that exclusively uses the definition of firearm at Pen C § 16520(a) carries these consequences, because the California and federal definitions of firearm are different. This is true even if the conduct in the case did not involve an antique firearm. See further discussion at **Pen C § 246**.

H. The Categorical Approach: How to Analyze Whether a Conviction Triggers a Removal Ground

For further discussion, see ILRC, *How to Use the Categorical Approach Now* (Nov. 2019, update forthcoming) at https://www.ilrc.org/how-use-categorical-approach-now

A critical defense strategy requires us to understand how federal law will analyze a conviction for immigration purposes. This is referred to as the categorical approach. It applies to almost all inadmissibility and deportability grounds that require a conviction, including the definition of aggravated felonies. The U.S. Supreme Court has reaffirmed its strict approach in decisions such as *Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013), and *Moncrieffe v. Holder,* 569 U.S. 184 (2013), and its analysis has the effect of overturning a significant amount of past precedent. The BIA accepted the Court's analysis in *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) and the preceding *Chairez* cases. In March 2021, the Supreme Court issued a bad decision on the modified categorical approach, *Pereida v. Wilkinson*, 141 S.Ct. 754 (2021).

The California Supreme Court adopted using the categorical approach for some purposes. *People v Gallardo* (2017) 4 Cal 5th 120.

The categorical approach and overbroad statutes. Most criminal law terms that appear in removal grounds—such as crime of violence, firearm, perjury, controlled substance, or crime involving moral turpitude—must have a federal, "generic" definition. If a California offense is defined more broadly than the generic definition in the removal ground, with a few exceptions the conviction will not trigger removal under that ground. For example, the immigration definition of a "crime of violence" does not include an offensive touching, but Pen C § 243(e) does. Therefore, Pen C § 243(e) is *overbroad* compared to the definition of crime of violence. This first analysis is true even if the defendant's case did involve violence: the issue is not the conduct or guilty plea in a particular case, but a comparison of elements. Another way to state the test is: if some conduct that is punishable under the California statute would not also be punishable under the generic definition, the statute is overbroad.

These differences between federal and California offense definitions are what create many of the immigration-neutral pleas upon which we rely. Just a few examples are:

- Pen C § 487 is not the aggravated felony "theft" because it is broader than the federal definition of theft: it includes fraud.
- Pen C §§ 459/460(a) or (b) is not the aggravated felony "burglary" because it is broader than the federal definition: it includes a permissive entry, and entry of a vehicle.
- Pen C § 243(e) is not a deportable crime of domestic violence because it is broader than the federal definition of a crime of violence at 18 USC § 16(a): it includes an offensive touching.

For citations and further discussion, see each of the above offenses in the Chart.

If the California statute *is* overbroad, we go on to the next step to determine whether it is divisible.

If the California statute is *not* overbroad, because it is not more broadly defined than the removal ground, there is a categorical match. For example, Pen C § 422 is categorically a crime of violence. Every conviction, regardless of underlying facts, will be held a crime of violence for all immigration purposes.

Practice Tip: Create a Specific Good Record. In many cases it is not legally necessary for the defendant to actually plead to the fact that makes the offense different from the federal definition, because technically the statute is not divisible. However, *we urge criminal defenders to put "good" information (the information that shows it is not a match to the federal definition) in the record of conviction where possible*. Our clients

often are unrepresented in immigration proceedings, and in some cases the immigration judge may wrongly rely on facts in the record. The chart will indicate what facts are relevant for various offenses. For example, at Pen C § 243(e) the chart states that the best practice, where possible, is to plead specifically to an offensive touching. (Another reason to put good information in the record is that a small number of statutes are "divisible," so that review of the record actually is permitted. See next section.).

Divisible statutes. If the California statute is overbroad, we must conduct a second inquiry: we must see if the overbroad statute is "divisible." To be divisible, the statute must be phrased in the alternative (using "or"). The statutory alternatives must set out different *elements*, not mere means, meaning that in every case a jury would have to unanimously decide between the statutory alternatives in order to find guilt.

All authorities agree that "elements" "are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" In contrast, a list of "means" "merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item." Mathis v. United States, 136 S.Ct. 2243, 2248, 2249 (2016), cited in, e.g., *Matter of Dikhtyar*, 28 I&N Dec. 214, 271 (BIA 2021). In some cases it can be difficult to determine whether a statute phrased in the alternative is setting out elements (so it is divisible) or just means (so it is indivisible). *Mathis* provides some discussion; see 136 S.Ct. at 2256-57.

To summarize: a statute is not divisible, or "indivisible," if it either is not phrased in the alternative (e.g., it is a single phrase or term, such as "entry") or if it *is* phrased in the alternative but those alternatives are "means" rather than elements. A statute is "divisible" if it is phrased in the alternative and those alternatives are elements.

If an overbroad statute is indivisible, the immigrant wins it all: *no* conviction under the statute triggers the removal ground, for any immigration purpose, regardless of the record of conviction. For example, Pen C § 243(e) is overbroad compared to the definition of a "crime of violence," because it can be committed by an offensive touching. It is indivisible between an offensive touching and use of violent force. Therefore, *no* conviction of § 243(e) is a crime of violence or crime of domestic violence, for any immigration purpose, regardless of facts in the record (although we still would suggest a specific plea to "offensive touching" when possible; see Practice Tip above). If instead a statute is divisible, the inquiry moves to the next step, the "modified categorical approach," where the adjudicator can review the record of conviction to see of which of the multiple offenses in the divisible statute the person was convicted.

Fortunately, most California statutes are *not* divisible under this test. Either the offense is not phrased using statutory alternatives, or even if it is, the alternatives represent means rather than elements.

Unfortunately, the Ninth Circuit held that some key California drug statutes *are* divisible as to whether they involve a federally-defined controlled substance. This includes, for example, H&S C §§ 11350-52, 11377-79, 11364, 11550. Thus we go on to the third and last step: the modified categorical approach.

The modified categorical approach, the ROC, and Pereida. If an overbroad statute is divisible, an immigration judge or officer will go to a third step, called the modified categorical approach. The adjudicator can look at certain evidence to see whether it shows of which offense set out in the divisible statute the person was convicted. For example, the immigration judge can look evidence regarding the person's § 11377 conviction to see if the conviction was for ecstasy (which is bad for immigration purposes, because that is a federally-defined substance), chorionic gonadotropin (good for immigration purposes, because that is not one), or if the evidence is inconclusive, e.g., it refers only to an unspecified "controlled substance, or all records have been destroyed.

It is well-established that if the evidence is inconclusive, ICE cannot meet its burden of proving that the conviction makes a noncitizen deportable. Therefore, creating an inconclusive record of conviction has protected an LPR who is not deportable for other reasons. That, however, might change.

Courts were split on what effect an inconclusive evidence had on a noncitizen who is applying for some application or relief. Unfortunately, the Supreme Court decided the issue against noncitizens in *Pereida v. Wilkinson*, 141 S.Ct. 754 (March 4, 2021). *Pereida* held that the modified categorical approach is a factual rather than legal inquiry, and that an applicant for relief has the burden to present evidence showing that their conviction under a divisible statute is *not* a bar to relief. It brushed aside arguments that indigent, unrepresented, detained immigrants would find it very difficult to obtain evidence. *Pereida* overturned the better rule, expressed in opinions like *Marinelarena v. Barr,* 930 F.3d 1039 (9th Cir. 2019) (*en banc*), which was that an inconclusive record met the immigrants' burden to show eligibility for relief.

Further, in what is arguably dicta, *Pereida* called into question very well-established rules governing *what kind* of evidence the adjudicator can rely on, to determine which offense in the divisible statute was the subject of the conviction. Courts have long held that the adjudicator can use information from certain documents that make up the reviewable "record of conviction" (ROC), to determine of which offense the person was convicted. In conviction by plea, the ROC consists of the charge pled to, the plea colloquy and/or written plea agreement, the factual basis for the plea, if any, and the judgment. *Shepard v. United States*, 544 U.S. 13, 26 (2005). As if to help the immigrant, the *Pereida* majority suggested that the *Shepard* limits would not apply to an applicant for relief in immigration proceedings, and that they could use a variety of evidence, perhaps including testimony. The problem is that if courts agree to withdraw their precedent based on this statement, ICE will argue that it too is not limited by *Shepard*, and it can use a wide range of evidence to prove that a permanent resident is *deportable.* This might mean that, even for a permanent resident, an "inconclusive" record that does not identify the substance is no longer a secure defense. See further discussion at ILRC, *Pereida v. Wilkinson and California Offenses* (April 2021) at www.ilrc.org/crimes and see **Part F. Controlled Substance Offenses,** Above.

I. Sentences.

For more information on immigration penalties that depend upon sentence, and immigration strategies relating to imposed, potential, and served sentences, see § N.4 Sentence (Oct. 2020) at www.ilrc.org/chart.

1. Sentence Imposed ("Term of Imprisonment"). In some cases, the sentence that was *imposed* creates immigration consequences. Certain offenses become an aggravated felony only if a sentence of a year or more is imposed. Also, a first misdemeanor conviction of a crime involving moral turpitude (CIMT) can come within the "petty offense exception" to the CIMT inadmissibility ground only if a sentence of six months or less is imposed. See AF, CIMT, above. A person convicted of two or more offenses of any type during their lifetime, for which an aggregate of five years or more sentence was imposed, is inadmissible.

For immigration purposes, an imposed sentence includes any sentence to custody, even if execution is suspended. If imposition of sentence is suspended, it includes any period of custody ordered as a condition of probation. If additional custody is added to the original count due to a probation violation, it includes that time. For example, a person who was sentenced to eight months as a condition of felony probation and is sentenced to an additional four months due to a probation violation, has been sentenced to one year for the offense. *A probation violation hearing can be a critical moment* in defending immigrants. Counsel should plead to a new offense rather than take additional time on an offense that will become an aggravated felony if a year or more is imposed.

The sentence must be imposed as a result of a conviction. One strategy is to have the person spend time in custody before sentencing, then waive credit for the time served in exchange for a shorter sentence. The pre-sentencing custody will not count. Custody ordered for a delinquency disposition is not an imposed sentence, because delinquency is not a conviction for immigration purposes.

Regarding post-conviction relief, in 2019 the Attorney General reversed extensive precedent to hold that immigration authorities will not give effect to a criminal court order that reduces or eliminates an imposed sentence, unless the ruling was based on legal error. *Matter of Thomas, Matter of Thompson*, 27 I&N Dec. 674 (AG 2019). This means that vacaturs such as Pen C § 1473.7 should be used to reduce or vacate a sentence, rather than Pen C § 18.5(b). See practice advisory on *Matter of Thomas and Thompson* at https://www.ilrc.org/practice-advisory-ag-overturns-sentence-modification-rule-matter-thomas-matter-thompson, and see information on other vehicles to vacate a conviction or sentence at www.ilrc.org/immigrant-post-conviction-relief.

2. Potential Sentence, Crimes Involving Moral Turpitude, and Pen C § 18.5(a). In cases involving crimes involving moral turpitude (CIMT), the *potential* sentence, meaning maximum possible sentence, is important. Having a potential sentence of 364 days rather than one year on a CIMT is required to (1) maintain eligibility for non-LPR cancellation, or (2) avoid deportability based on one CIMT conviction committed within five years of admission. But to qualify for the petty offense exception to the CIMT inadmissibility ground, a potential sentence of up to one year is sufficient. See section on CIMTs above.

Under Pen C § 18.5(a), no California misdemeanor has a potential sentence of more than 364 days, regardless of the date of conviction. However, the BIA and a Ninth Circuit panel found that for immigration purposes, the 364-day maximum only applies to misdemeanor convictions received on or after January 1, 2015, while convictions from before that date still have a maximum possible sentence of a year. See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. Feb. 24, 2021), denying petitions for rehearing and amending *Velasquez-Rios v. Barr*, 979 F.3d 690 (9th Cir. 2020). If a client is at risk due to a pre-2015 CIMT that has a potential sentence of a year, they should try to vacate the conviction for cause under PC § 1473.7 or other vehicle, and replead to a different offense (preferably a non-CIMT).

3. Felony/Misdemeanor Designation and Challenges to Pen C § 17(b)(3) and Proposition 47. Conviction of a misdemeanor rather than a felony is critical in at least two immigration contexts. First, eligibility for some forms of immigration relief is barred by conviction of any felony. This is a bar to asylum under a 2020 regulation that applies to convictions received on or after November 20, 2020; Temporary Protected Status (TPS); and Deferred Action for Childhood Arrivals (DACA). Second, as discussed above, a California "one-year" misdemeanor has a potential sentence of 364 days (if the conviction was on or after 1/1/15) or 365 days (if before) for immigration purposes. In some cases, getting a CIMT to a misdemeanor with this potential sentence will avoid triggering a CIMT penalty.

Some ICE attorneys are asserting that California laws that can redesignate an offense as a misdemeanor, such as Pen C § 17(b)(3) and Proposition 47, no longer have effect in immigration proceedings. The Ninth Circuit has long upheld the effectiveness of § 17(b)(3), but ICE asserts the rule should be changed so that only a judicial order based on legal error can reduce the offense level for immigration purposes. While advocates have strong arguments against this, especially in the case of § 17(b)(3), defenders should act conservatively: for new charges, they should seek alternative defense strategies that do not rely on a later reduction to a misdemeanor, and instead focus on attempting to get a misdemeanor designation at sentence. For prior convictions that pose harm, it is safer to seek a vacatur such as Pen C § 1473.7 than to rely on the other relief. See further discussion and defense strategies in forthcoming *Note: Sentence* (Nov. 2020) at www.ilrc.org/chart.

4. Time actually served. How much time the person actually spent in custody due to a conviction is important in a few contexts. Significantly, it is a bar to establishing good moral character (GMC) to have actually served 180 days or more in custody during the period for which GMC must be shown. The period for which GMC must be shown varies depending on the relief. GMC is a requirement for cancellation of removal for non-permanent residents, which is critical to many undocumented people. There 180 days must not be served within the ten years before applying for the relief. GMC is a requirement for naturalization, critical to many permanent residents. There the 180 days must not be served within the five years, or in some cases three years or less, before applying. Like an imposed sentence, the served sentence only includes time *as a result of a conviction*. It does not include pre-hearing custody time if credit for time served is waived, and does not include time served in delinquency proceedings. But unlike the imposed sentence standard, time served does *not* include time the judge imposed but that the person did not serve, e.g., where execution was suspended, the person got early release, or other factors. If the person needs to establish GMC but has served over 180 days, those days could be erased if the underlying conviction is vacated for cause.

J. Adam Walsh Act: Crimes against a Minor that Block Family Visa Petitions

An LPR *or USC* who is convicted of certain crimes against a minor can be barred from obtaining lawful status for their immigrant spouse or child (from filing a "family visa petition.") The crimes include kidnapping, false imprisonment, offenses involving sexual conduct, or child pornography. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act and see 8 USC § 1154(a)(1)(A)(viii) (bar) and 30 USC § 20911(7) (specified offenses).

GIVE KEY PAPERS TO THE DEFENDANT. Many immigrants will have no representation in their removal proceeding. If a plea agreement will help your client in removal proceedings, give them a copy of it. If the defense is based upon an inconclusive record of conviction (see categorical approach, above), the immigrant might be required to produce the entire inconclusive record and will need a copy of that: the charge pled to, plea colloquy transcript and/or written plea form, judgment, and the factual basis for the plea, if any. If the plea is safe based on a particular legal argument, give the defendant a written summary of the argument. That can be taken from legal manuals, endnotes to this chart, or from *Selected Defenses to Selected California Crimes* (2018), available at www.ilrc.org/chart, which includes analysis and legal citations for many California defenses. Besides giving the document/s to the defendant, *try to give an additional copy to someone else*, such as a family member, immigration attorney if any, or friend. If the client is detained by ICE, ICE may confiscate these document/s.

ACKNOWLEDGMENTS. We want to thank the many talented and committed experts who have volunteered their time over the years to draft and review sections of the chart, and who are listed at n. 1.

DISCLAIMER. This chart does not constitute legal advice and is not a substitute for individual case consultation and research. The law governing the immigration consequences of crimes can be complex and volatile. Some of the below analyses are supported by on-point precedent (often cited in endnotes), while in other cases they represent the opinion of experts as to what is most likely to be held. Further, *the law is fast-changing.* An immigration case resolution that is the best option today might change for the worse (or become even better) in the future. Do research or consult experts for key updates in the law occurring after October 15, 2020. Advise defendants about these risks. The best protection for defendants is to see a qualified immigration expert as soon as they possibly can, so that they can apply for lawful immigration status or naturalization to U.S. citizenship as soon as they are advised that it is safe to do so, and/or get training on "Know Your Rights" when dealing with ICE.

Immigration advocates should note that the chart is written conservatively, to warn criminal defense counsel away from offenses that *might* be or become dangerous and toward those that are safer. Just because the chart identifies an offense as having a consequence, do not assume that it

actually does. Often there are strong immigration defenses or good precedent; these often are outlined in endnotes or in linked documents. The chart should be considered a starting, not an ending, point for investigating immigration defenses.

CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
Business & Prof C 4060	Possess a CS not properly prescribed	No, unless perhaps it is flunitrazepam	No	Assume that this is "divisible" as a controlled substance (CS) offense, like 11377. See discussion of 'non-federal substance" defenses at 11377.	While criminal defense counsel must conservatively assume 4060 will be treated as a divisible statute, immigration advocates can investigate arguments that the specific substance is not an element of 4060, and thus 4060 is different from 11350, 11377 and is not a divisible statute. See discussion of *Martinez-Lopez* at 11377.
B&P C 4141 (and former 4140)	Sell syringe without a license (formerly possess)	No	No, because they are regulatory offenses	Should not be a deportable or inadmissible CS offense	Because these offenses have no element pertaining to a controlled substance (CS), they should have no imm consequences. B&P C 4140 is a good substitute for possession of drug paraphernalia, H&S C 11364. B&P C 4141 is a good substitute for sale of drug paraphernalia, which is an aggravated felony.
B&P C 4324	(a) Forge prescription for any drug (b) Possess any drug obtained by forged prescription	AF CS: May be a good alternative to avoid an AF as CS. Avoid 1 year or more imposed on any single count. See Advice.	May be divisible as CIMT. Assume forgery (a) is CIMT, but possessing the drug (b) might not be because generally unlawful possession of a CS is not a CIMT.	Should not be held a deportable or inadmissible CS offense. The term "drug" is overbroad because it includes noncontrolled substances (CS), and is not a divisible term. See 11377.	**Drug AF**: Good alternative to H&S C 11173, 11368, as a non-CS offense and a non-AF. A state offense is a drug trafficking AF if it is analogous to certain federal drug felonies. This is not an analogue to 21 USC 843(a)(3) because it does not have a CS as an element (see column to the left). But where possible, best practice is to sanitize ROC of mention of a specific CS. **Forgery AF**: "Forgery" is an AF if 1 yr or more is imposed. Assume (a) meets the AF definition of forgery. Imm counsel can investigate arguments that (b) does not.[3] But crim defense counsel should act conservatively and obtain 364 days or less in all cases
B&P C 7028(a) (1)	Contractor without a license	Not AF	Should not be a CIMT because it's a regulatory offense	No	See endnote to § 25658 regarding regulatory offenses and CIMTs.
B&P C 25658(a)	Selling, giving liquor to a person under age 21	Not AF.	Not CIMT because regulatory offense.[4]	Cannot be deportable crime of child abuse because not "abuse" and V under 18 is not an element. See Advice.	Great alternative to providing CS to a minor, if obtainable. Not child abuse, which applies to V's under 18, not 21. Statute is not divisible as to age of V. But to prevent a mistaken charge, keep CS and V under 18 out of ROC.

AF = Aggravated Felony
COV = Crime of Violence
CIMT = Crime Involving Moral Turpitude
CS = Controlled Substance
DV = Domestic Violence
ROC = Record of Conviction

B&P C 25662	Possession, purchase, or use of liquor by a minor	Not AF.	Not CIMT	Not a removal ground per se, but see Advice re inadmissible for alcoholism	Multiple convictions might be evidence of alcoholism, which is medical inadmissibility ground (8 USC 1182(a)(1)) and a bar to "good moral character."
Health & Safety C 11173(a), (b), (c)	Obtain CS by fraud	AF CS. Assume it is an AF, but see Advice AF Forgery: Should not be AF as forgery unless false document is used and 1 yr imposed on a single count.	Yes CIMT, except that (d), affixing a false label, might not be.	Assume a deportable and inadmissible CS offense but see Advice.	**AF.** May be AF as analogue to 21 USC 843(a)(3) (obtain CS by deceit), although imm counsel may identify defense arguments. The "non-federal controlled substance" defenses may apply here. See Advice at 11350, and a more comprehensive discussion and instructions at 11377. If that is successful, the conviction is not an AF or CS offense. A much better plea is B&P C 4342. If that is not possible, possession H&S 11377 plus other distinct offense such as 529(a)(3), 530.5(a), PC 32, or if necessary forgery, fraud.
H&S C 11350 (a), (b)	Possess controlled substance	Generally not an AF, but see Advice.	Not a CIMT.	Deportable and inadmissible CS offense, except see Advice regarding non-federal substance defenses. Arguably California heroin is a non-federal substance, because it is defined differently than heroin on the federal schedule.[5]	See 11377 for a discussion of various defenses. **AF:** Possession of a CS is not an AF unless (a) it is possession of flunitrazepam or (b) it is a second offense, where the first possession was pled or proved for a recidivist sentence enhancement. **Non-federal substance defenses**. The Ninth Circuit has found that non-federal controlled substance defenses apply to 11350-52, but whenever possible, 11377-79 is a better vehicle than 11350-52 for this defense. See discussion of the defenses at 11377. See also § N.8 Controlled Substance.
H&S C 11351	Possess CS for sale	AF unless a non-federal substance defense applies. For immigration purposes, even a plea to offering to sell at 11352 is far better. See Advice and see 11378	CIMT, like any trafficking offense.	Deportable and inadmissible CS offense unless a non-federal substance defense applies. See Advice. Also inadmissible because gov't has "reason to believe" trafficking. See further discussion at 11378.	Very bad immigration plea. Pleading down to 11350 or up to 11352 (offering to distribute or even to sell) is far better. Recommending a plea to 11351 without advising about the advantage of pleading up to "offering" under 11352 is ineffective assistance of counsel.[6] The "non-federal substance" defenses, including the "unspecified controlled substance" defense, may apply here. Please see Advice at 11350, and a more comprehensive discussion and instructions at 11377. Whenever possible, 11377-79 is a better vehicle for this defense than 11350-11352. Even with that defense, plead to 11350 or 11352 (offering) rather than 11351. Consider post-conviction relief for priors.

					See further discussion at 11378 and see § N.8 Controlled Substance.
H&S C 11351.5	Possess cocaine base for sale	Yes AF	CIMT	Deportable, inadmissible for CS conviction and inadmissible because gov't has "reason to believe trafficking. See 11379.	Very bad immigration plea. 11351.5 is worse than 11351 in that there is no non-federal substance defense. Careful plea to 11352 is better. See discussion of those defenses at 11379.
H&S C 11352(a)	-Sell, give away, or transport for sale (1/1/14) or personal use (pre-1/1/14) -Offer to do the above	Divisible as AF. Pre-1/1/14 transport is never an AF. In Ninth Cir only, offering to commit an offense is not an AF. All other conduct is an AF. See 11379	CIMT, except for pre-1/1/14 transport. See 11379	Deportable and inadmissible for CS conviction, and in some cases inadmissible for reason to believe trafficking. See Advice for the non-federal substance defense.	If you must plead to 11352, prevent an AF for immigration proceedings in the Ninth Cir by pleading to "offer to" distribute (or offer to sell). If the ROC identifies a federally defined substance, the plea will be a drug conviction for immigration purposes, but not a drug *AF*, in proceedings held within the Ninth Cir only. The "non-federal controlled substance" defenses apply here. See Advice at 11350, and a more comprehensive discussion and instructions at 11377. Whenever possible, however, 11377-79 is a better vehicle for this defense than 11350-11352.
Current H&S C 11357(a)(2) This analyzes the current statute, amended by Prop 64. See below for pre-Prop 64 version of 11357.	Possess no more than 28.5 grams of cannabis or 8 grams of concentrated cannabis, while age 18-20 (infraction). **** **Caution:** While this conduct is lawful for age 21 or older, see Advice regarding danger of admitting adult conduct with marijuana to imm officials.	Not an AF, unless a prior possession is plead or proved. See Advice for argument that California cannabis is not a controlled substance for immigration purposes	Not a CIMT.	See Advice for argument that this is not a CS for immigration purposes. However, defenders must conservatively assume it is a CS, at this time. Immigration law provides less punishment for one or more convictions arising from a first drug incident involving possession for personal use of 30 grams or less of marijuana (including concentrated cannabis). This also includes possession of marijuana paraphernalia and, according to the Ninth Circuit but not the BIA, use of marijuana.[7] See Advice for argument that Cal cannabis is not a controlled substance. **Deportable.** *If* no drug priors, this is not a deportable CS conviction	**Infractions:** Although the BIA has held that some states' infractions do not rise to the level of "convictions" for immigration purposes, and there are good arguments that California's should be treated like that, in practice DHS is treating California infractions as convictions. A cannabis infraction is potentially a dangerous conviction of a controlled substance offense! See also 11358, a potential "aggravated felony infraction." Fight hard to avoid any CS conviction, even 28.5 grams of marijuana or less. Try instead for PC 32, other non-drug offense, or PC 1000 pre-trial diversion (for client who is likely to succeed). See Advice to 11377. Immigration advocates can argue that an infraction is not a conviction. See infraction advisory at www.ilrc.org/crimes. At the same time, seek post-conviction relief under PC 14743.7 or other vehicles. The person likely had no defender. **Argument that California cannabis is not a federally defined controlled substance.** Immigration advocates can argue that due to Prop 64 changes, California cannabis is overbroad and indivisible compared to the federal definition, and therefore California cannabis convictions on or after Nov. 9, 2016 (the effective date of

				due to a statutory exception for the 30 gram category. But any drug prior will destroy the exception and make this a deportable offense. **Inadmissible.** Yes, inadmissible CS conviction. But *if* no drug priors, an LPR or LPR applicant might be eligible to apply for discretionary waiver, 8 USC 1182(h). Also, conviction is not an automatic bar to showing good moral character (e.g., for naturalization to USC).	Prop 64) are not controlled substance convictions for immigration purposes. See endnote for further discussion and citations.[8] While pursuing this argument, at the same time investigate possible post-conviction relief. **Defenders** should try not to rely on these defenses and not to plead to a cannabis offense, but should know they exist when evaluating any conviction from on or after 11/9/16. If it is necessary to plead to a cannabis offense, try to plead specifically to conduct limited to "mature stalks" at the plea colloquy, and provide some written proof of this. While this is not legally necessary to support the possible defense, it may simplify things considerably in immigration court. If the best options are between a plea to cannabis or to some other substance, cannabis is best for immigration purposes due to this defense. **Post-conviction relief.** PC 1203.43 should eliminate prior DEJ pleas for imm purposes, but because ICE is fighting against these it may be better to obtain 1473.7. For a single minor drug conviction from on or before 7/14/11, see Advice at 11377 regarding the *Lujan* benefit. Consider other post-conviction relief, including PC 1473.7 to vacate. See Advice to 11377. Prop 64 provides sealing post-conviction relief at H&S C 11361.8(e)-(h),but we do not have precedent that DHS must accept it and do not recommend it. See more resources at https://www.ilrc.org/immigrant-post-conviction-relief **Concentrated cannabis**. See Advice at 11357(b)(2). **Admitting conduct relating to marijuana, working in the industry.** Warn immigrants not to discuss marijuana with any imm officials without first seeing an imm lawyer, and not to work in the mj industry. Although mj has been legalized in many states, it remains a federal CS offense to possess, grow, sell, or share it. Noncitizens who admit possession or industry employment to an imm official might be found inadmissible, even without a conviction and even for conduct permitted under California law. USCIS recently reaffirmed it would impose these penalties. See online legal advisory and community flyers in multiple languages.[9]

Current H&S C 11357(b)(2) This is the current statute. See below for pre-Prop 64 version of 11357	Possess more than 28.5 grams cannabis or 8 grams concen-trated cannabis Age 18 and older	Not an AF unless a prior possession is plead or proved. See Advice at 11357(a), above, for argument that Cal cannabis is not a CS for immigration purposes	Not a CIMT	See Advice. Yes, deportable and inadmissible (with no 212(h) waiver) CS offense—*unless* D can qualify for the 30 grams mj category. See description of the category and its advantages at (a)(2), above. The BIA held that the 30 grams amount is a factual issue.[10] Plead specifically to 29 or 30 gm or less. See Advice regarding concentrated cannabis. **Burden of proof**. ICE must prove conviction was for more than 30 grams cannabis, to prove an LPR is deportable. ICE can use evidence from outside the ROC to show the amount. To apply for the 212(h) waiver of inadmissibility, under current law D has burden to produce the same kind of evidence to show 30 grams or less.	Please read Advice for 11357(a), including argument that California cannabis is not a CS for immigration purposes. **Concentrated cannabis**.[11] Immigration authorities are likely to deny a 212(h) waiver of inadmissibility as a matter of discretion unless the concentrated cannabis amount is equivalent to 30 grams marijuana or less, meaning six grams or less of hashish (but not hash oil). Try to plead to this amount, or else just plead to marijuana ("cannabis" in California statute). Imm advocates can argue that this limit does not apply to the exception to the deportation ground. Under the language of the statute, 30 gm of "marijuana," which includes concentrated cannabis, is not a deportable offense. But best practice is to plead to six grams or less hashish, or else to marijuana, if possible. **Specific plea to 30 grams or less**. The BIA held the 30 grams or less issue is "circumstance specific" and can be proved by facts outside the record of conviction. There is strong authority that a plea bargain that specifically names the amount as 30 grams or less defines the conviction and trumps other evidence,[12] although ICE might try to contest this.
Current H&S C 11357(c) Current statute. See below for pre-Prop 64 version of 11357	Possess 28.5 grams cannabis or 8 grams concentrated cannabis on school grounds, if age 18 years or older	Not an AF, unless a prior possession is plead or proved See Advice at 11357(a), above, for argument that Cal cannabis is not a CS for immigration purposes	Should not be a CIMT	Assume this is a deportable and inadmissible CS offense with no 212(h) waiver. See Advice.	Section 11357(c) does not qualify for the 30 grams benefits discussed at 11357(a). Also see Advice at *current* 11357(a)(2), above, regarding the argument that mj as defined under California law is not a controlled substance for immigration purposes. The BIA held that added elements such as a drug-free zone or jail prevent an offense from qualifying for the 30 gm marijuana benefits discussed in 11357(a).[13] To get those benefits, try to plead to 11357(a) or (b).

Prior, Pre-Prop 64 H&S C 11357, **Prior version** Analysis of 11357 as written before Prop 64 took effect on 11/9/16 See article for more on Prop 64 and on marijuana and immigrants.[14]	Possess: (a) Concen-trated cannabis (b) Marijuana, 28.5 grams or less (c) Marijuana, more than 28.5 grams (d) Marijuana on or near school grounds, ranked by age of defendant	Not AF, unless a prior possession is plead or proved See Advice at current 11357(a), above, for argument that Cal cannabis is not a CS for immigration purposes	Not CIMT	Pre-Prop 64: Deportable and inadmissible CS offense, except that there is less punishment for conviction/s arising from a first incident involving possession of 30 gm or less of marijuana. See discussion at current 11357(a), above. **Deportability**. *If* no drug priors, conviction for possessing 30 gm or less of marijuana is not a deportable offense. This includes any conviction of (b). It includes conviction of (c) if ICE can't produce evidence, including from outside the ROC, proving that the amount exceeded 30 gm. See current 11357(b), above. **Inadmissibility**. All current and former 11357 offenses are inadmissible offenses. But if D has no drug priors, might be able to apply for 212(h) waiver for qualifying conviction of 30 gm or less. See current 11357(a), (b) above.	**Argument**: See Advice at *current 11*357(a)(2), above, for argument that cannabis as defined by California law is not a controlled substance for immigration purposes. Pre- and post-Prop 64 versions of 11357 have different subsections that prohibit different conduct. Please read the full discussion of marijuana at the analysis of the current, post-Prop 64 version of 11357, above. **Prop 64 Post-Conviction Relief.** Prop 64 provides a post-conviction relief mechanism that can dismiss and seal a conviction for conduct that no longer is unlawful because the conviction is "legally invalid." H&S C 11361.8(e)-(h). While this ought to be an effective vacatur for imm purposes, until we have precedent to that effect the best practice is to act conservatively and use post-conviction relief vehicles such as 1473.7, 1203.43 for former DEJ, and others. See more resources at https://www.ilrc.org/immigrant-post-conviction-relief **Concentrated cannabis:** See discussion in current 11357(b), Advice column, above, regarding conviction under former 11357(a). **Schools.** Conviction under former 11357(d) does not qualify for the 30 grams benefit. See current 11357(c), above.
H&S C 11358 (Analysis is not changed by Prop 64)	Plants, cultivates, harvests, dries, etc. cannabis plants Ranges from an infraction (age 18-20, six plants or less) to felony depending on	This is a bad plea but see Advice for options. Even growing for personal use has been held an AF as an analogue to a federal manufacturing felony.[15] See Advice and see § N.8 Controlled Substance.	Not CIMT because no intent to sell or distribute. (But if any of the included water offenses could be deemed theft, a plea to that might be a CIMT.)	Yes, deportable and inadmissible for CS conviction, but see Advice. **Inadmissible for reason to believe trafficking**. Warn D that if imm authorities find strong evidence of intent to sell, D could be charged with being inadmissible because they have "reason to believe" D participated in trafficking. This ground bars almost all relief and might extend to juvenile conduct. See 11379.	Avoid this plea as the offense – even as an infraction, for personal use -- is analogous to a federal "aggravated felony." There are arguments against this, below, but they are not guaranteed to win. **Argument.** See Advice at current 11357(a)(2) for an argument that California cannabis is not a controlled substance for any imm purpose, which would defeat the AF and CS charge. This would apply to convictions on or after 11/9/16. **Infraction.** Conservatively assume even a California infraction in adult (not juvenile) court is a "conviction" for imm purposes because some officers are treating it as such, arguably in error.[16] If it is held a conviction, this

	priors and conduct.				could have the absurd result that an 11358(b) infraction is an "aggravated felony." **AF**: Plead to a non-drug crime, e.g., PC 32 or 136.1(b)(1) with less than 1 yr, 460(a), (b), 594, water offense, disposing hazardous waste, or other offenses. (If necessary and if D's immigration case can survive it, plead to possession per 11357(b), or to 11377 with an unspecified substance. See 11377.) Or, take PC 1000 *if* D is a good candidate. Success will mean no conviction or admission of a controlled substance offense. See 11377. If D is a refugee, asylee, or potential applicant for asylum, see Advice about trafficking at 11360, below. **Victims of human trafficking.** Some people who work as laborers unlawfully growing mj, or in other unlawful work (mules, sex workers, etc.), are victims of human trafficking and working under duress. This could support a criminal defense; a vehicle to obtain post-conviction relief; and/or a pathway to lawful immigration status. They may be afraid to admit they are victims. See endnote for information and free resources to assist in representing possible victims of human trafficking.[17]
H&S C 11359 (Analysis is not changed by Prop 64)	Possess cannabis for sale	Yes AF, without exception, but see Advice	Yes CIMT.	Deportable and inadmissible CS offense but see Advice.	**Argument.** This plea should be avoided but see Advice at current 11357(a)(2) for an argument that California cannabis is not a controlled substance for imm purposes, which would defeat the AF and CS charge. This would apply to convictions on or after 11/9/16 and arguably to some earlier ones that are re-designated under Prop 64 provisions. Bad plea. Consider options, defenses, in Advice to 11358, 11360. Assuming arguendo that the substance matches the federal definition of marijuana, then 11359 is an automatic aggravated felony, while parts of 11360 are not aggravated felonies. Seek post-conviction relief for a prior conviction. Advising a noncitizen to plead to 11359 without advisal re 11360 is ineffective assistance of counsel.[18] See § N.8 Controlled Substance.
H&S C 11360	Unlawfully sell, import, give away,	Divisible. *Never AF*:	CIMT: Sale, transport for sale,	Yes, deportable and inadmissible CS offenses. To avoid, consider 11377 or	**Argument.** This plea should be avoided but see Advice at current 11357(a)(2) for an argument that California cannabis is not a controlled substance for imm purposes,

(Analysis is not changed by Prop 64)	administer, or (since 1/1/16) transport marijuana for sale *Or* Offer to do these things	Give away or offer to give away mj under (a) or (b). See Advice for (a). Pre-1/1/16 transport, because minimum conduct is personal use *Offering:* Offering to commit 11360 offense is not an AF, but *only* in imm proceedings arising in the Ninth Circuit. See 11379. Here, a prior conviction for, e.g., offering to sell is not an AF. *Yes AF*: Sell, post-1/1/16 transport	offering to do these is a CIMT. Conservatively assume giving away for free is a CIMT. Transport based on pre-1/1/16 conduct should not be a CIMT because the minimum conduct is transport for personal use	11379 with a non-federal substance defense, if possible. The best option is to plead to a non-drug offense.	which would defeat AF and CS charges. This would apply to convictions on or after 11/9/16 and arguably to some earlier ones that are re-designated under Prop 64 provisions **Giving away mj.** For discussion and citations, see endnote.[19] A *specific plea* to giving away or offering to give away (do not leave the ROC vague) has two advantages: 1. It is not an AF. Giving away under 11360(b) is best, but (a) also qualifies because the minimum conduct involves giving away 29 or 30 gm. In case imm authorities don't know to apply the minimum conduct test, the best practice under (a) is specific plea to 29 grams; but if this was not done in a prior, it still is not an AF under Supreme Court precedent. 2. A conviction from before 7/15/11 to giving away a small amount of mj may be eliminated for imm purposes by DEJ, Prop 36, or 1203.4, under *Lujan.* **Refugees, asylees, and trafficking:** Almost any drug trafficking conviction is a "particularly serious crime," bad for asylees, refugees. See § N.17 Immigration Relief Toolkit. Imm advocates will argue that sale of very small amount of mj may not fit this rule. Any sale also makes D inadmissible by giving gov't "reason to believe" D participated in trafficking—a very bad ground. See § N.8 Controlled Substance. Giving a small amount of mj away, pre-1/1/16 transportation (with no admission of intent to sell) or offering to commit those offenses may help avoid the above trafficking consequences—but possession is far safer. See 11379.
H&S C 11364	Possess drug paraphernalia	Not AF. (Sale of drug paraphernalia may be AF, however.)	Not CIMT	Deportable and inadmissible CS conviction. Consider B&P C 4140 instead. A non-federal controlled substance defense may help, but a better plea for that defense is to H&S C 11377. See discussion at 11377.	**1.Try hard to plead to a non-drug offense.** Even the most minor drug offense can have catastrophic immigration effect. See Advice to 11377 and see § N.8 Controlled Substance. See also B&P C 4140, possession of syringe. **2. Take PC 1000 pretrial diversion** if D can complete it. **3. Marijuana**. While 11364 technically might not apply to cannabis, it sometimes has been used. For past convictions, a first conviction for possessing paraphernalia relating to marijuana would qualify for the advantages of first possession of 30 grams[20] (although 11364 technically does not extend to mj.) See H&S C

					11357(a) (current) for information on that, as well as on an argument that California cannabis is not a controlled substance for imm purposes. **4. Consider post-conviction relief for prior cases.** This includes PC 1203.43 treatment for prior DEJ pleas; *Lujan-Armendariz* treatment for a minor conviction from before 7/15/11; PC 1473.7, and several other California vehicles. See 11377 and materials at www.ilrc.org/immigrant-post-conviction-relief
H&S C 11365	Aid/Abet use of CS (Presence where CS is used)	Not AF	Not CIMT	Deportable and inadmissible CS conviction unless non-federal substance defense.	See Advice at 11364. The non-federal substance defenses may be available for 11365, but 11377 is best choice for this defense; see 11377.
H&S C 11366, 11366.5 (a)	Open, maintain, manage place where drugs are sold, distributed, used	11366 is AF as a federal analogue.[21] Assume 11366.5 also is an AF but see Advice. 11379 is a far better plea to avoid an AF.	Yes CIMT, except managing a place where drugs are used might not be.	Inadmissible and deportable CS. See Advice and see 11377 regarding the unspecified controlled substance defense.	This is a bad plea. See H&S 11377, 11379 ("offering"), public nuisance offenses, e.g., PC 370, disposal of hazardous waste, instead. The "unspecified controlled substance defense" may apply to 11366.5, although 11377, 11379 is a better vehicle. Imm advocates may investigate whether this defense also applies to 11366. See instructions at 11377.
H&S C 11368	Forged prescription to obtain narcotic drug	Assume AF as federal drug analogue but see Advice re possession. See B&P C 4342 Get 364 days or less to avoid an AF as forgery. See Advice.	Assume CIMT, except maybe not if possession only.	Deportable and inadmissible CS offense, unless PC 1000/DEJ solution. See Advice.	**AF.** Obtain or acquire CS by fraud is an AF as analogue to 21 USC 843(a)(3). (If possessing a drug acquired by fraud is punishable under 11368 but not punishable under 843(a)(3), then 11368 may not be an AF.) Try to plead to B&P C 4342, which is not a CS offense. Or plead to simple possession plus another offense such as 529(a)(3), 530.5, PC 32, fraud, or (with 364 days or less imposed) forgery. **PC 1000/DEJ.** 11368 is eligible for current pretrial diversion and prior DEJ if drug was obtained by fictitious prescription for use only by D. *If* D can complete the program, consider pretrial diversion. If D completed or can complete prior DEJ, use PC 1203.43 to eliminate the DEJ "conviction." See 11377.

H&S C 11370.1	Possess CS while armed with firearm	Not AF (no federal analogue)	Arguably not a CIMT; see Advice	Yes, deportable and inadmissible CS offense. Not a deportable firearms offense. See Advice.	**CIMT**. Possessing either a CS or a firearm is not a CIMT, so together arguably they are not. **CS.** All substances listed in 11370.1 are on federal schedules. **Firearm**. Comes within antique firearm exception; see PC 29800(a). But it may be a bar to DACA. See PC 25400.

H&S C 11377 H&S C 11350 uses the same analysis Possess any of several controlled substances (CS) that are defined by California statute.	**AF:** Possession is not an AF unless: (a) a prior possession offense was pled or proved for recidivist enhancement, or (b) it is possession of flunitrazepam. **CIMT**: Possession is not a CIMT (but sale or distribution is) **Other Removal Grounds**: Deportable and inadmissible CS offense, unless a non-federal substance defense applies. (For that defense, 11377-79 is preferable to 11350-52.) **Advice and links to Practice Advisories** See this endnote[22] for links to Practice Advisories that cover the below topics in more detail. **1. Try to avoid a CS conviction—especially a first one!** Depending on the individual, a single possession conviction can be fatal to current or hoped-for immigration status. The most minor conviction can destroy lives and families, including permanently depriving children of a parent. Argue equities and try to plead to e.g., 32, 459, 136.1(b), trespass, 459, DUI, B&P C 4140, etc. Individual analysis is required, but often a plea to a theft or even a violent offense is better than a CS offense. See § N.8 Controlled Substance. **2. Take pretrial diversion such as PC 1000 (1/1/18) if D can complete it.** Because it has no guilty plea, this is not a conviction for immigration purposes. But if D is unlikely to complete the program, fight hard for a non-drug plea now rather than taking PC 1000, because in accepting PC 1000 the person must give up the right to jury trial if they should fail diversion and have to face the charges. Note that if D will be put in ICE custody, D will not be able to complete PC 1000—but at least will not have a guilty plea. See link to advisory in endnote above. Other forms of pretrial diversion, such as mental health diversion (PC 1001.36) and the new misdemeanor pretrial diversion (PC 1001.95), effective 1/1/2021, to the extent there is no guilty plea required. **3. Eliminate a prior CS conviction.** ***Former DEJ.*** People who pled guilty under former PC 1000/DEJ (1996-2917) and who obtain dismissal under former 1000.3 can submit a free, simple application to eliminate this "conviction" for immigration purposes, per PC 1203.43. See advisories in endnote above. ***Conviction on or before 7/14/11***. For a qualifying D, first conviction for possession of a CS or of paraphernalia (but not use), or for giving away a small amount of marijuana, from on or before 7/14/11 is eliminated for immigration purposes by rehabilitative statutes like 1203.4, withdrawal per Prop 36, former 1000.3, etc. D must not have violated probation or had a prior pretrial diversion (but these limitations might not apply if D was under age 21 at time of plea.) See H&S C 11360 and see *Lujan* advisory link at endnote above. The Ninth Cir found that a prior removal of a person who would have qualified for *Lujan* treatment was a gross miscarriage of justice.[23] ***Vacatur per PC 1473.7, 1016.5, habeas corpus, etc***. California has several other types of post-conviction relief that can help immigrants; see especially PC 1473.7. See advisories at endnote above or go to www.ilrc.org/immigrant-post-conviction-relief. **4. Consider using a non-federal substance defense**. To be a deportable or inadmissible CS offense or CS agg felony, a state conviction must involve a substance listed in *federal* drug schedules. California laws include a few *non*-federally listed substances. For example, 11377-79 includes chorionic gonadotropin, which is not a federal substance. and khat, which probably is not.[24]

	This gives rise to two "non-federal substance" defenses. In the "unspecified substance" defense, the record is sanitized to not reveal what substance was involved. See Part a, below. This defense has severe limits: it *only* helps a permanent resident to avoid a finding a deportability, and even this defense may be made less secure, due to *Pereida*. In the far stronger but more difficult to obtain "specific non-federal substance" defense, the record identifies one of the few substances listed in California but not federal drug schedules (e.g., "I possessed chorionic gonadotropin" or "possessed khat".) See Part b, below. Note that while the Ninth Circuit has upheld the non-federal substance defenses for 11550, 11350-52, and 11377-79, it is best to use 11377-79 for this defense. See also discussion of heroin which, unlike meth, might *not* be a federal controlled substance (see Part c) and of cannabis as defined under Prop 64, where there is a real argument that convictions on or after November 9, 2016 (after Prop 64) are not of a federal controlled substance (Part d). ***a. Unspecified controlled substance defense prevents a finding of deportability (although see below), but it does not help immigrants who need to apply for relief.*** Because H&S C 11350-52, 11377-79 contains substances that are not in the federal schedules, if a defendant's record of conviction does not reveal *which* substance was involved in their offense, there is no proof that it was a federally defined substance, and therefore no proof that it is a controlled substance conviction for immigration purposes. For that reason, one criminal defense strategy has been to create an inconclusive "record of conviction" that does not name a specific substance. The record of a conviction by plea, i.e., the documents that must be sanitized of mention of the specific substance, has long been limited to "*Shepard* documents": the charge pled to, as amended (not including dropped charges); the plea colloquy transcript and/or written plea agreement; the judgment; and any factual basis for the plea agreed to by the defendant. For example, a plea to a negotiated count that charged "offering to distribute a controlled substance in violation of 11379," where the plea agreement or a statement by counsel was the designated factual basis, would suffice. See next section for further discussion on how to create this record. If the record of conviction is inconclusive, then the result in immigration proceedings turns on factors such as who has the burden of proof and whether this is deemed a legal or factual inquiry. The Supreme Court issued a bad decision on this in *Pereida v. Wilkinson,* 141 S.Ct. 754 (March 4, 2021), which overturned the better view in the Ninth Circuit *Marinelarena* decision. The bottom line is: ✓ If your client is "removable" – which includes any undocumented person, or permanent resident who already is deportable -- they need to apply for some immigration "relief" in order to stay lawfully in the U.S. The inconclusive record defense will *not* help them do that. For example, under *Pereida* an applicant for relief with a conviction under 11377-79 would have to have pled specifically to chorionic gonadotropin or khat, and have evidence to prove that. (If that is possible, see Part b, below.). All that will help an applicant for relief who must avoid a controlled substance offense is a plea to a non-drug offense or to pre-trial diversion. ○ While an inconclusive record won't preserve eligibility for relief, it might help in another way. If the person is undocumented and was originally admitted to the U.S., it might enable them to avoid mandatory ICE detention without a bond hearing under 8 USC § 1226(c), because ICE could not prove they had a deportable offense. See Mandatory Detention Advisory (Nov. 2020) at www.ilrc.org/crimes. ✓ If instead your client is a permanent resident who is not already deportable, the unspecified record may prevent ICE from meeting its burden of proving that the conviction makes them deportable, because ICE will not be able to prove that the conviction involved a federally-defined substance. This has long been a secure defense against deportability, and if there is no other option, creating an inconclusive record is extremely worthwhile. The catch is that, based on dicta in *Pereida*, it is possible that courts will rule that ICE can submit other documents from outside the record of conviction, or even testimony, to prove the substance. We do not know if this will happen, but it means, at the least, that we must warn LPRs that this is no longer an entirely secure defense – and try hard for another disposition.

For further discussion of *Pereida,* drug offenses,and the modified categorical approach, see ILRC, *Practice Advisory: Pereida v. Wilkinson and California Offenses* (April 2021) at https://www.ilrc.org/pereida-v-wilkinson-and-california-offenses

How to create an "inconclusive" record of conviction for this defense. NOTE: As discussed above, the Supreme Court decision in *Pereida* included dicta that might weaken this defense, because it is possible courts with withdraw from precedent and permit ICE to use evidence from outside the record of conviction to prove the specific substance. See the *Pereida* Practice Advisory above. Therefore, while this may remain an effective defense and it is entirely worthwhile if there are no other options, we must advise clients that it is not completely secure. We should look for other options, namely pretrial diversion or a plea to a non-drug offense, including with drug counseling as a condition of probation. Here are instructions for how to create an inconclusive record, if that is the best available strategy.

The goal is to remove any reference to a specific substance from the defendant's reviewable record of conviction (ROC). In a conviction by plea, the ROC includes the charge pled to, as amended (not including dropped charges); the plea colloquy transcript and/or written plea agreement; the judgment; and any factual basis for the plea agreed to by the defendant. See *Shepard v. U.S.,* 544 U.S. 13, 16, 20 (2005). Counsel may need to bargain for a new, sanitized count, or create a record showing that a count was amended.

The ROC does not include other documents, such as the police report, pre-sentence report, or preliminary hearing transcript—*unless* the defendant stipulates that the document provides a factual basis for the plea. To avoid stipulating to any factual basis, see *People v. Palmer* (2013) 58 Cal.4th 110, *People v. French* (2008) 43 Cal.4th 36, 50-51. If you must stipulate, stipulate to a document that you identify or create that contains details except for the damaging information, such as a written plea agreement or sanitized charge. See *People v. Holmes* (2004) 32 Cal.4th 432. For example, "On the evening of June 15, 2019, on the corner of Webster and 21st Street in Oakland, California, I possessed a controlled substance in violation of H&S C 11377."

GIVE THE DEFENDANT AND THEIR FAMILY, FRIEND, OR IMMIGRATION COUNSEL A COPY OF THE INCONCLUSIVE ROC. Again, this is the charge pled to, with any amendments, plea agreement, factual basis for the plea if any, and judgment. Obtain, or advise defendant to obtain, a transcript of the plea colloquy. This is best practice because it is possible that courts will rule that an immigrant who applies for relief has the burden of producing the entire ROC to prove that it is inconclusive.

For more on creating a clean ROC and factual basis strategies, see N.8 Controlled Substances at www.ilrc.org/chart.

b. Specific non-federal substance defense. A second type of defense is to negotiate a plea to a specific substance that does not appear on federal drug schedules, such as chorionic gonadotropin and probably (see above) khat, for 11377-11379. This defense prevents a CS conviction or drug trafficking AF for any immigration purpose, whether deportability or eligibility for relief. The strong specific substance defense is given effect nationally. The problem is that this can be a difficult plea to negotiate—although California defenders have accomplished it. (Note that even with this defense, the person still might face some other penalties; see Part e.)

c. *Meth is a federally-defined controlled substance -- but is heroin?* Beginning in August 2018, the Ninth Circuit for some months held that California meth is not a federal controlled substance, because the chemical make-up of meth as defined under California schedules explicitly includes geometrical isomers, while the federal definition does not. That made California meth overbroad and indivisible compared to federal "generic" meth. There were multiple decisions in the *Lorenzo* and *Rodriguez-Gamboa* cases, until in August 2020 the Ninth Circuit held that meth as defined under California law *is* a federal controlled substance, because the meth geometrical isomer does not really exist.[25]

Now, advocates in removal proceedings can consider the argument that California *heroin* is a non-federal substance. Heroin, prohibited under 11350-52, appears to have the same textual overbreadth as meth did: the California statutory schedule specifically includes geometrical isomers of heroin, but the federal schedule does not. Further, it appears that a geometrical isomer of heroin—"isoheroin"--- does exist. ILRC will post an expert declaration on this if and when it becomes available. This is *not* an established defense, and criminal defense counsel should not consider this a safe plea; they should seek one of the other defense strategies described here. But if there is no other alternative, a plea to isoheroin appears to be better than a plea to some other substance in 11350-11352, and immigration advocates can raise it as a defense in removal proceedings.

	d. Cannabis as a non-federally-defined controlled substance. Defenders should conservatively assume that cannabis under California law, including post-Prop 64, is a federally-defined controlled substance. But advocates defending in removal proceedings can assert that Prop 64 changed the California definition of cannabis, so that a conviction relating to cannabis from on or after November 9, 2016 (the effective date of Prop 64) is overbroad and indivisible compared to the federal marijuana definition, and thus is not a controlled substance offense for immigration purposes. See discussion at H&S C 11357(a)(2) (current), above. ***e. Other immigration consequences occur even if these defenses prevail.*** A noncitizen can be found inadmissible if the government has "reason to believe" the person aided in trafficking (as opposed to giving away) a federally-defined controlled substance. This is based on facts, not a conviction, and therefore it is not controlled by the categorical approach. Even if you create a non-federal substance defense discussed above, which avoids a deportable and inadmissible drug *conviction,* the person still might be inadmissible—but not deportable—if the government can gather sufficient probative evidence that the person trafficked in a federal CS. You can do little to prevent this, except (a) try to keep the ROC clean of information that would prove this ground, and (b) warn the client that they may be inadmissible and they must not travel outside the U.S. or submit any papers to DHS without getting an expert opinion. Of course, this is a much greater risk if the conviction was for 11378-79, 11351-52, and similar trafficking offenses than for possession. Sale, possession for sale, and distribution of a CS has been held to be a CIMT, regardless of whether the substance appears on federal drug schedules.[26] Assume that any 11351-52 or 11378-79 will be a CIMT, even if you can avoid the (generally far worse) controlled substance penalties. Simple possession is not a CIMT. Arguably sharing or selling marijuana is not a CIMT, since in the U.S. this is a multi-billion dollar legitimate industry spread over 36 states.
H&S C 11378 H&S C 11351 use same analysis	Possess for sale any of several controlled substances (CS) that are defined by California statute. Very bad plea. **Yes, automatic AF,** except see 11377 regarding non-federal substance defenses. But even with such a defense, by far the best course is to plead down to 11377 or even up to 11379. If a non-drug offense or 11377 is not possible, a noncitizen likely will want to plead up to 11379 *offer to* give away (or if necessary, offer to sell), which is not an AF in immigration proceedings arising within the Ninth Circuit only. Pleading up is counter-intuitive but may be necessary for an immigrant D who wishes to remain in the U.S.—especially if the person is an LPR. It can be ineffective assistance of counsel to fail to advise and consider the 11352/11360/11379 option, rather than 11351/11358-11359/11378 for a noncitizen D.[27] **Yes CIMT**. Note that the non-federal substance defenses do not prevent a CIMT. See 11377, Part d. **Other removal grounds:** Yes, deportable and inadmissible CS offense, unless a non-federal substance defense applies. See 11377. But best option is to use the defense with a plea to 11377 or 11379, not 11378, or better yet, to plead to a non-drug offense. Yes, inadmissible for reason to believe. Because evidence from outside the ROC can be used, this may apply even to a conviction protected by a non-federal substance defense; see 11379. **Refugee and Asylees:** Trafficking is a 'particularly serious crime,' very bad for asylees and refugees. See 11379 and see § N.17 Immigration Relief Toolkit. **Victims of human trafficking**. If the defendant may be a victim who is working under duress, see discussion at Advice to H&S C 11358.
H&S C 11379 H&S C 11352	Sell, give away, transport for sale (1/1/14 statute), transport for personal use (pre-1/1/14 statute)—*OR*—offering to do such conduct, with any of several controlled substances (CS) that are defined by California statute

use same analysis	**AF:** Divisible. Note that 11352 and 11379 are divisible in two ways: the verb and the substance. Regarding the verb, *always* plead specifically to "offering" to commit the offense. This will avoid an aggravated felony for all immigration purposes, although *only* in imm proceedings arising within the Ninth Circuit. See further discussion of the verbs in Advice. Regarding the substance, try to negotiate a "non-federal substance" defense, discussed above. Note that in 2020, the Supreme Court will consider whether an inconclusive record of conviction will protect persons applying for relief. See discussion at 11377, parts a and b, above. **CIMT:** Sale, transport for sale, offering to do these is a CIMT. The BIA held that giving away for free is a CIMT, although imm counsel can investigate arguments against this. Transport based on pre-1/1/14 conduct should not be a CIMT because the minimum conduct is for personal use. Assume that the non-federal substance defenses (see 11377) do *not* prevent a CIMT. **Other removal grounds**. Yes, deportable and inadmissible CS, unless a non-federal substance defense applies to your client. See discussion at 11377. See Advice regarding reason to believe trafficking. [advice] **Verbs divisible as AF**.. This discussion assumes that a federal substance defense does not apply. *"Offering" as an AF depends on the jurisdiction:* Offering to commit an 11352/11379 offense is not an AF *only* in immigration proceedings arising in the Ninth Circuit. *U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc). Plead *specifically* to "offering" to give away (or if needed, to sell or transport); do not create a vague record on the verb, as this is a divisible statute per *US v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (*en banc*). If the person is in immigration proceedings outside the Ninth Circuit, offering *will* be an AF. *Yes AF:* Sell, give away, post-1/1/14 transport *Not AF:* Pre-1/1/14 transport is not an AF, because the minimum conduct is personal use. This should apply nationally. Again: An 11351-52 or 11378-79 conviction is not an AF or controlled substance offense to the extent that one of the non-federal substance defenses applies to your client. See discussion at 11377. **Inadmissible if gov't has "reason to believe" person participated in trafficking**. This is a fact-based removal ground that is not restricted to the ROC and does not require a conviction, so defenders can only do so much. Plea to unspecified CS may not prevent this if there is substantial evidence that federal CS was involved. A plea to offering to give away rather than sale is best. This inadmissibility ground is a bar to eligibility for almost all relief. An LPR who does not need to be admissible (e.g., who doesn't leave U.S.) can survive it, but it is very bad for undocumented people, for refugees and asylees, or for LPRs who then travel outside the U.S. See § N.8 Controlled Substance and see § N.17 Immigration Relief Toolkit. **Refugees, asylees**. Commercial trafficking (sale, post 1/1/14 transport, or offer to do these) is a particularly serious crime (PSC). Asylees and refugees are very likely to lose their status and be removed based on conviction, unless they have strong equities and the case has these factors: amount was very small, D was peripheral to scheme, no minors involved. Offer to give away is better than offer to sell for this purpose, although it is not safe. Best is to possession or a non-drug offense. The non-federal substance defenses don't work for this purpose. See "Representing Refugees and Asylees" in § N.17 Immigration Relief Toolkit.

			Alternative pleas: See also H&S C 11391, 25189.5, PC 32, 136.1(b)(1), 460, etc. See B&P C 4140, 4141 (possession, sale of syringe) **Victims of human trafficking**. If the defendant may be a victim who is working under duress, see discussion at Advice to 11358.		
H&S C 11379.5	Sell, Give away, Transport for sale (1/1/16 statute), Transport for personal use (pre-1/1/16 statute) PCP, etc. or Offer to do any of above	Divisible: *Offering:* Offering is not an AF, but only in imm proceedings arising in the Ninth Circuit. See Advice. *Yes AF*: Sell, give away, post-1/1/16 transport *Not AF*: Pre-1/1/16 transport	Sale, transport for sale, offering to do these is a CIMT. Conservatively assume giving away for free is a CIMT. Transport based on pre-1/1/16 conduct should not be a CIMT because the minimum conduct is for personal use	Yes, assume this is a deportable and inadmissible drug conviction.	**Plead to 11379** rather than 11379.5 in order to use non-federal substance defenses, especially if the defendant is an LPR who is not yet deportable. **Transportation**. Minimum conduct for transportation under 11379.5 includes for personal use, for offenses committed until 1/1/16. This is not an AF. As of 1/1/16 the transportation is for sale and is an AF. (Compare to 11357, 11379, which changed to transport for sale as of 1/1/14.)
H&S C 11390, 11391	Cultivate (11390) or Transport, sell, give away, or offer to do this (11391) Certain spores that produce mushrooms See Advice.	Offering is not an AF in the Ninth Circuit, and pre-1/1/16 transport is not an AF. See 11379. But arguably no offense is, because not a federally defined substance. See Advice.	Sale, transport for sale, offering to do these is CIMT. Conservatively assume giving away for free is a CIMT. Cultivation, and transport based on pre-1/1/16 conduct, should not be a CIMT because the minimum conduct is for personal use.	Might not be a CS offense as it appears not to involve a federally defined CS. If that is so, it is neither a deportable nor inadmissible CS conviction. See Advice.	**CS offense**: Involves "any spores or mycelium capable of producing mushrooms or other material which contain" e.g., psilocybin. While psilocybin is a federal CS, it appears that spores or mycelium are not on the federal list (or on almost any other state list). If that is so, this is not an AF or a deportable or inadmissible CS conviction. **Trafficking offense**. To avoid a particularly serious crime, bad for refugees and asylees, do not plead to any offense relating to sale. Offer to give away is best option, although a possession offense is much better. See 11379 and see Relief Toolkit.
H&S C 11550	Under the influence of a controlled substance (CS)	Not AF, even with a drug prior. See generally § N.8 Controlled Substance	Not CIMT	Deportable, inadmissible as CS, except see defenses in Advice. **Non-federal substance defenses may apply**. The Ninth Circuit found 11550 is divisible as to substance.[28] Often no specific substance is charged for 11550. But 11377 is a better vehicle for	See Advice for 11377. **Marijuana/hashish:** Ninth Cir held that conviction of being under the influence of marijuana or hashish qualifies for 30 grams marijuana benefits, but BIA disagrees. See 11377. It appears that 11550 does not include cannabis, but sometimes it is treated as though it does in immigration proceedings. **A plea to 11550 from on or before 7/14/2011 is *NOT* eliminated** for imm purposes by rehabilitative relief,

				this defense, where available. See discussion at 11377. **Firearms**. 11550(e) should not be held a deportable firearms offense due to the antique firearms rule. See PC 29800(a). But it may be a bar to DACA. See PC 25400.	under *Lujan*. 11550 does not get the same benefit as possession, possession of paraphernalia, or giving away marijuana.[29]
H&S C 13001	Negligently risking fire	Not AF	Not CIMT because negligence		Good alternative to arson, if possible to get.
H&S C 25189.5	Disposal of hazardous waste	Not AF	Should not be CIMT	Not CS, can include variety of hazardous waste	Possible substitute plea for drug production lab or other offense
PC 31	Aid and abet	Yes, AF if underlying offense is.	Yes, CIMT if underlying offense is	Yes, if underlying offense is a removable offense, aiding and abetting is	This provides no benefit above the principal offense for immigration purposes. But see PC 32, which can be a good alternative.
PC 32	Accessory after the fact	Try to get 364 days or less on any single count, to avoid a possible AF as obstruction of justice if D is taken outside the Ninth Circuit. See § N.4 Sentence for suggestions on how to avoid one year while accepting significant custody time.	Never a CIMT per Ninth Cir, but BIA holds it is a CIMT *if* principal's offense is a CIMT.[30] So best practice where possible is to name in the ROC a specific non-CIMT committed by the principal. See Advice for suggestions. Imm advocates should cite Ninth Cir law that PC 32 is never a CIMT, regardless of the principal's offense. See above endnote.	No other removal ground. **PC 32 is excellent plea to avoid many removal grounds,** e.g., a conviction relating to CS, DV, violence, firearms, AFs (other than maybe obstruction outside the Ninth Cir.) etc., because it does not take on the character of the principal's offense (except perhaps for CIMT purposes). For example, accessory to CS offense or a COV is not itself a CS offense or COV.[31] See also 136.1(b)(1). But try to get 364 days or less to avoid a possible AF.	**AF.** This analysis also is relevant to PC 69, 136.1(b)(1), 148, VC 10851, and any offense that could reach avoiding, or helping a perpetrator to avoid, an initial arrest. See endnote[32] for case citations and further discussion. Obstruction of justice is an AF if a year or more is imposed. 8 USC 1101(a)(43)(S). The Ninth Circuit hlds that the generic definition of obstruction requires interference with an *ongoing* proceeding or investigation; the BIA holds that it does not. After back and forth cases with the BIA, in *Valenzuela-Gallardo II* the Ninth Cir rejected the BIA's generic definition of obstruction as contrary to the language of the statute, and held that PC 32 never meets the AF definition of obstruction of justice because it can involve interfering in an initial arrest. A petition for rehearing en banc was rejected, so this is the Ninth Circuit rule now. However, outside the Ninth Circuit the BIA's rule might prevail, which is that PC 32 is an automatic AF as obstruction if a sentence of a year or more is imposed. Thus, try to obtain a sentence of 364 or less on any individual count, in case the person is detained and transferred, and warn the person not to leave Ninth Circuit states.

AF = Aggravated Felony
COV = Crime of Violence
CIMT = Crime Involving Moral Turpitude
CS = Controlled Substance
DV = Domestic Violence
ROC = Record of Conviction

					Defenders who cannot avoid 1 yr or more can consider safer pleas such as PC 487, 530.5, 459/460(a) or (b), 591, 594, or probably 69, 236/237, 207. See also § N.4 Sentence. **CIMT**: Within the Ninth Circuit PC 32 is not a CIMT. However, if the client is taken elsewhere, the BIA's test (that PC 32 is a CIMT if the principals' offense is) may prevail. So, best practice is to identify a principal's specific felony that is not a CIMT, such as 136.1(b)(1), 236/237, 459/460, or 594 for a violent offense, or 530.5, 496, 459, or 10851 for a theft or fraud offense. If that is not possible, an inconclusive (vague) ROC that does not ID the principal's offense might help protect a permanent resident contesting deportability, but will not help anyone applying for relief under *Pereida.* See discussion of *Pereida* and an inconclusive ROC at 11377, above. Again, if the person is in immigration proceedings within the Ninth Circuit, the offense automatically is not a CIMT. **SB 54.** This is one of a few wobblers that does not destroy SB 54 protections limiting jail cooperation with ICE. See SB 54 advisory at www.ilrc.org/crimes.
PC 69	Attempt to deter by threat or resist by force an executive officer in performing any duty	Always try to avoid 1 yr or more on any single count, to avoid an AF. But arguably this is not an AF as obstruction of justice; see Advice. Not an AF as a COV: minimum conduct is offensive touching.[33]	Not CIMT because minimum conduct is offensive touching.	No other removal ground.	**AF as Obstruction**. See case citations and further discussion here. [34] See also discussion at PC 32. Obstruction of justice is an AF if a year or more is imposed. After some litigation, in 2020 the Ninth Circuit held that the definition of obstruction requires interference with an *existing* proceeding or investigation; it rejected the BIA's definition that also included interference with a "reasonably foreseeable" proceeding or investigation. *Valenzuela-Gallardo II*; petition for rehearing denied. Thus while it is best to avoid it, in the Ninth Circuit a PC 69 with a year or more imposed is not an AF. But because the BIA has a different view, which might prevail in other jurisdictions, best practice is to get 364 days on any single count, in case the person ends up in another jurisdiction. However, even there the defendant might prevail and if some offense must take a sentence of a year or more, PC 69 is not a bad choice. See discussion in endnote, above. **COV / CIMT:** As always, although this is not required under the categorical approach, the best practice is to

					give D extra protection by pleading specifically to offensive touching.
PC 92	Bribery of a judge, juror, umpire, referee	Get 364 days or less on a single count if judge, juror; see Advice	Yes CIMT.	No other removal ground.	Specific plea to bribery of an umpire or referee should not be an AF even with 1 year.[35]
PC 112 (misd), 113 (felony)	Manufacture, sell false documents with intent to conceal immigration status of another	Obtain 364 days or less to avoid AF charge. Likely AF if loss to victim/s exceeds $10k See Advice	Likely charged as a CIMT, although imm advocates should explore arguments against this. There is no intent to defraud or harm.[36]	Document or visa fraud. If the documents are visas or other docs intended to obtain imm benefits, including an I-9, conviction could support a civil hearing under 8 USC 1324c to make a finding of deportable document fraud. Might also trigger visa fraud.	**AF.** Avoid a sentence imposed of 1 year or more on any single count, because ICE may charge this as an AF as document fraud, forgery, or counterfeiting. Immigration advocates may have arguments against this, but it is far better to avoid 1 year.[37] **AF** as crime of deceit with loss to victim/s exceeding $10,000, assuming there are "victims" to this offense.[38]
PC 114	Use false documents to conceal one's own immigration status	See PC 112, 113, and see Advice	See PC 112, 113.	See 112, 113.	**AF.** See 112, 113.
PC 115	Knowingly offers false or forged instrument to be registered	Try to get 364 days or less, and/or plead to "false," not forged, document. See Advice. AF if loss to victim/s exceeds $10k.	Likely charged as CIMT, but advocates should explore defenses: it does not require a material misstatement, or intent to defraud.[39]	See 112, 113.	**AF with 1 year.** Forgery with a sentence of 1 yr or more is an AF. But PC 115 also reaches a "false" instrument (not forged but containing false information) and there is a strong argument that this is not "forgery."[40] Immigration advocates can consider this defense, but defenders should try to get 364 days or less on each count.
PC 118	Perjury	Get 364 days or less on any one count to avoid an AF as perjury. If the perjury resulted in loss > $10k, it may be an AF as a crime of deceit. See Advice.	Ninth Circuit held that *written* perjury is not a CIMT, and that the statute is divisible. Plead specifically to written, but also see Advice. The Ninth Circuit did not rule on whether *oral* perjury is a CIMT, but BIA	No other removal ground.	**CIMT**. If it is critical to avoid a CIMT, consider other offenses, e.g., 529(a)(3), 530.5 (which can take a year) or 496 (which cannot), because the law on 118 may be volatile. The Ninth Circuit declined to defer to a BIA opinion finding that 118, *including* written, always is a CIMT, on the grounds that the BIA had failed to explain its reasoning.[41] In future, the BIA might issue a new opinion and the Ninth Circuit might decide to defer—so while the current rule is that 118 is not a CIMT could change and defenders should not rely on it. **AF.** The Ninth Circuit held that PC 118 meets the generic definition of perjury and thus any conviction of 118 is an

			held that it (as well as written perjury) is a CIMT.		AF if a year or more is imposed, regardless of whether perjury was written or oral.[42] If the loss to victim/s exceeds $10k, see instructions at PC 484, 470.
PC 135	Destroy or conceal evidence	Not AF as obstruction of justice (it has a 6-month maximum sentence)	Conservatively assume a CIMT, but see Advice	No other removal ground. Like PC 32, this should not take on the character of underlying offense, so it is a very good alternative for drug, DV, child abuse, etc.	**CIMT**: Immigration advocates can investigate whether PC 135 should be treated the same as PC 32. The Ninth Circuit has held PC 32 never is a CIMT, but the BIA disagrees. But if avoiding CIMT is a priority, see PC 136.1(b)(1) or even PC 32.
PC 136.1 (b)(1)	Nonviolently try to persuade a witness or victim not to file a police report	To securely avoid AF as obstruction, obtain 364 days or less imposed on each count, but see Advice. Not an AF as a COV.	Probably not a CIMT. Ninth Cir held it is overbroad as a CIMT. It appears not to be divisible. BIA held it is never a CIMT in at least one unpublished decision, but not in precedent opinion.[43] Therefore, while 136.1(b)(1) is a very reasonable plea to avoid a CIMT, it remains possible that in future the BIA will find this to be a CIMT, and Ninth Circuit might defer.	No other removal grounds. **Great substitute plea** for drug, DV, fraud, firearms, etc. because it does not take on those elements. See also PC 32. Because a felony is a strike with high exposure, it can substitute for more serious charges. But get 364 days or less, either with felony probation or as a consecutive prison sentence of eight months.	See further discussion and case citations in this endnote[44] and see PC 32. **AF:** Obstruction of justice is an AF if a year or more is imposed. The issue of whether 136.1(b)(1) is an AF as obstruction currently is pending before the Ninth Circuit. Therefore, best practice is to get 364 days or less on each count. The Ninth Circuit has held that an offense that includes interference in an initial arrest, as opposed to an existing investigation or proceeding, is not obstruction of justice, and 136.1(b)(1) meets that test. However, DHS is arguing that 136.1(b)(1) is obstruction under a different standard, as an offense analogous to a federal obstruction offense. See *Matter of Cordero-Garcia* (2019), currently pending on appeal at the Ninth Circuit, and discussion in endnote above. Therefore, defenders should continue to act conservatively and seek 364 days or less, in case the Ninth Circuit rules the wrong way on 136.1(b)(1), *or* the person ends up in removal proceedings outside the Ninth Circuit, where there also could be a bad standard. If 1 yr or more is required, consider, e.g., 459 (1st or 2nd degree), 487, 530.5, 591, 594, possess weapon, and probably 236/237, 207(a) as an alternative. If a prison sentence is required, 136.1(b)(1) can be a 'consecutive' offense with an 8-month sentence imposed. A felony is a strike. Imm advocates will cite *Valenzuela-Gallardo II,* and assert that *Matter of Cordero Garcia* cannot be applied to find 136.1(b)(1) to be obstruction. If that loses, they can argue that 136.1(b)(1) convictions from before 9/11/2018 (the date that the BIA set out a new definition) are not

					obstruction. That issue also is before the Ninth Circuit in *Cordero Garcia.*
PC 140	Use or threaten to use force or violence upon the person of, or take, damage, property of, a witness who provided info to authorities	Possible AF as obstruction, so obtain 364 days or less imposed on each count. See Advice if that was not done or is not possible. Probably not a COV	While arguably it is not a CIMT, there is no precedent. If it is important to avoid a CIMT, consider a different plea. But 140 can be violated by an offensive touching or any vandalism and lacks intent to influence any proceeding. See endnote at Advice.	Assuming it is not a COV, then it is not a deportable crime of DV. A plea to taking or damaging property ensures that it is not a DV offense. To ensure not wrongly charged as a deportable crime of child abuse, keep minor V's age out of the ROC. See discussion at 243(a).	For further discussion of PC 140 as a CIMT or AF, see endnote.[45] **AF as Obstruction**. Imm advocates can argue that 140 is not obstruction under BIA and Ninth Cir definitions, because it has no intent to impede an ongoing (or even past) process and is not a full match to a federal obstruction offense. But authorities may well decide that it is obstruction. If more than 1 year is required, consider offenses such as 236/237, 487, 459, 591, 594 and/or work with structuring the sentence. **AF as COV**. A COV is an AF if 1 yr or more is imposed. Taking, or threatening to take, property is not a COV. In addition, it appears that threat/use of force under 140 includes an offensive touching, and thus also is not a COV.
PC 148(a)-(d)	Resisting officer or EMT in discharge of duty (a) Additionally, taking the officer's weapon (b)-(d)	Because of possible charge that (b)-(d) is AF as obstruction of justice or a COV with a 1-year sentence, obtain 364 days or less on any single count. Or see Advice	(a) should not be CIMT: minimum conduct is, e.g., going limp. (b)-(c) should not be CIMT but try to plead to "reason-ably should have known" was officer, because negligence is not a CIMT and there is no requirement of specific intent. (d) involves taking with intent to permanently deprive, which is likely to be held a CIMT.	Assume conservatively that (c) and (d) are deportable firearms offenses, in case the antique firearm exception is held not to apply to police on duty.[46]	**AF**: See case citations and further discussion here.[47] See also discussion at PC 32. Obstruction of justice is an AF if a year or more is imposed. The Ninth Cir held that under the plain language of the statute, the definition of obstruction requires interference with an *existing* proceeding or investigation. It rejected the BIA's definition that also included interference with a "reasonably foreseeable" proceeding or investigation. See *Valenzuela-Gallardo II,* petition for rehearing en banc denied. PC 148 is not obstruction under *Valenzuela-Gallardo II* because it can involve an initial arrest with no pending investigation or proceeding.
PC 148.5	Knowingly making false report of crime	Not AF as obstruction because 6-month max	See Advice and see 148.9.	No other removal ground.	This does not appear to fit the definition of CIMT[48] and does not require intent to benefit, but no precedent; if avoiding CIMT is crucial, seek an alternative.

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PC 148.9	False ID to peace officer	Not AF	Not CIMT[49]	No other removal ground.	No specific intent to evade arrest or prosecution, or commit fraud
PC 166 (a)(1)–(4)	Contempt of court, including violation of any court order	Not AF because 6-month max.	Should not be CIMT. (a)(1)-(3) has no intent. This is a good imm plea (4) should not be held CIMT because minimum conduct is to violate any court order—but there is no imm case on point. However, (4) may be deportable DV offense.	**DV deportation ground**: A civil or criminal court finding of *any* violation of any DV stay-away order will make the person deportable. A plea to (a)(1)-(3) should be safe and a good imm plea. Nailing this down by creating a specific record showing conduct other than violation of a DV stay-away order, is a good idea. But creating a vague record under (a)(4) or (b)(1), when in fact the violation is of a DV stay-away order, is **not** safe. Instead: (1) Plead to specific conduct relating to non-deportable violations, e.g., re child support, visitation, failure to attend classes, probation mtg, etc., or (2) Plead to a new offense (with ROC sanitized of any mention of a PO) instead of any violation of any order. See Advice.	See endnote for further discussion and citations.[50] A person is deportable if a civil or criminal court judge finds they violated a part of a DV protective order that protects against threat, injury, or repeat harassment. In 2019 the Ninth Circuit withdrew from prior decisions and deferred to the BIA as to what evidence DHS can use to show that a judge's finding of violation of "an order" actually is a finding of violation of a DV stay-away order (or other portion of a DV order that is meant to protect against injury, threats, or repeat harassment). ICE can use evidence from *outside* the ROC to prove the violation the court found was of those portions of a DV stay away order, because the categorical approach does not apply to this prong of the domestic violence deportation ground. Best practice is plead to 166(a) with specific non-deportable conduct (see other column) or else to a new offense that is sanitized of any order violation. For best protection, new offense should be against a V not listed in the order or to a victimless crime; but if that is not possible, any non-deportable offense.
PC 166(c)	Violation of various protective or stay-away orders	Not an AF: Not a COV, plus maximum sentence is 364 days.	While there are no cases, it does not appear to be a CIMT as it can be committed by a small or technical violation	Not a good plea to avoid deportability, because a civil or criminal court finding of *any* violation of a DV stay-away order will make the person deportable. See discussion at 166(a), above. PC 166(c) is risky for this deportation ground, but see Advice.	**DV deportation ground**. To avoid this ground, consider a plea to 166(a), or to a new offense (if possible, not against the subject of the protective order) with no finding of violation of an order, as discussed at 166(a), above. If it is not possible to avoid a plea to 166(c), try to create a plea that identifies a *specific victim who does not have a domestic relationship* with D. Otherwise, know that ICE can use any relevant and probative evidence, including from outside the record of conviction, to prove that the order that the judge found was violated was actually a DV stay-away order. Section 166(c)(1)(A) prohibits violating an order by committing 136.2, which can include DV or non-DV victims. Section 166(c)(1)(C) prohibits violating

					an order by committing elder abuse, PC 368, which can involve an elder with no domestic relationship.
PC 182	Conspiracy	Yes, AF if principal offense is AF. See Advice if loss to victim/s exceeds $10k.	CIMT if principal offense is CIMT	Generally there is no advantage because conspiracy takes on the character of the principal offense, e.g. CS, firearm. But the exception *might* be for child abuse, stalking, crime of DV. See Advice.	**Conspiracy and DV deport grounds**. Counsel in removal proceedings may argue that by its own language, the DV deportation ground at 1227(a)(2)(E)(i) does not include conspiracy to commit child abuse, stalking, or a crime of DV. Neither does the definition of COV at 18 USC 16(a).[51] Imm counsel can argue that conspiracy to commit these offenses does not trigger the DV deport ground. But defenders should act conservatively and not regard these as safe pleas. **Deceit and $10k**. Conspiracy and attempt are bad pleas where an offense could be an AF as fraud/deceit where loss exceeds $10k. Plead to theft or see other strategies at PC 484.
PC 186.22(a)	Participates in gang, promotes felonious conduct	Not AF	This should not be a CIMT per se, although an immigration judge with an anti-gang stance might try to so hold. See good Ninth Circuit law on 186.22 (b), (d), below.	See Advice re possible security grounds. Otherwise this is not a *per se* basis for deportability or inadmissibility, although Congress might add it in the future.	This is a bad plea because gang-related activity is an extremely negative factor in every discretionary decision, including release on bond. Whenever possible, avoid a plea to 186.22 and take the extra time in some other manner. While there is no "gang" removal ground *per se*, gang membership sometimes is used to find inadmissibility under the "security and related grounds," which are not waivable. 8 USC 1182(a)(3)(A) (ii). Serves as a bar to **DACA**; see PC 25400.
PC 186.22 (b), (d)	Gang benefit enhancement	AF if underlying conduct is AF (e.g., a COV with 1-yr imposed)	Does not change a non-CIMT into a CIMT under current Ninth Cir law; see Advice.	See discussion at 186.22(a).	**CIMT**: Ninth Circuit held that this enhancement does not change a non-CIMT (possess weapon) into a CIMT. It declined to follow BIA precedent finding that 186.22(d) transforms PC 594 into a CIMT.[52] BIA will apply its own rule outside the Ninth Cir. See Advice for 186.22(a) regarding serious risks of gang provisions in general.
PC 187	Murder (first or second degree)	Divisible as the AF "murder" because California includes murder of fetus; see Advice.	Yes CIMT	Can be deportable crime of DV. To ensure not wrongly charged as child abuse, keep minor V's age out of the ROC. See 243(a).	See manslaughter as an alternative. **AF.** The Ninth Circuit found that 187(a) is divisible as murder because it is "the unlawful killing of a human being, or a fetus," while the federal generic definition of murder does not include a fetus. The judge or officer may look to the record of conviction to determine whether the victim was a fetus.[53]

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PC 192(a)	Voluntary manslaughter	Possible change in the law could make this an AF as COV if 1 year or more is imposed; see Advice.	Assume this is CIMT. To avoid CIMT see PC 192(b).	Because it is not a COV, it is not a deportable crime of DV. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**COV**: Courts have long held that a crime of violence requires more than reckless intent. Therefore, 192(a) has been held not an AF as a COV, even with a sentence of a year or more. But the Supreme Court is considering this issue in *Borden v. United States*.[54] Therefore, for now defenders should conservatively treat 192(a) as a COV. Better option is 192(b), (c). The Court is not considering whether gross negligence could amount to a COV.
PC 192(b), (c)(1), (2)	Involuntary or vehicular manslaughter	Not a COV. See 192(a) and see Advice	Should not be CIMT; best practice is plea to negligence, not conscious disregard.[55]	Because it is not a COV, it is not a crime of DV To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	These offenses are not COVs because they have a minimum conduct amounting to negligence.[56] Even if the Supreme Court were to decide to include recklessness in the definition of COV (see discussion of *Borden* case in Advice to 192(a)), that should not include gross negligence. Best practice is a specific plea to negligence.
PC 203	Mayhem	Yes, AF as COV[57] if 1-yr or more sentence imposed. Get 364 or less on any single count.	Yes CIMT	Deportable DV crime if proof of DV-type victim. See PC 245. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	To avoid a COV, and therefore a deportable crime of DV, see PC 69, 136.1(b), 148, 236/237, 243(a), (d), (e), 243.4, 459, 591, 594. Some of these offenses can take a sentence of a year or more. See PC 207 for more on crimes of violence. See § N.4 Sentence.
PC 207 (a), (d)	Kidnapping	PC 207(a) and (d) have been held not to be COVs under 18 USC 16(a). But see Advice re the risk posed by *Stokeling,* and conservatively try to get 364 days or less on each count until there is a precedent decision interpreting it. See Note: Sentence.	Ninth Cir held that 207(a) is not a CIMT.[58]	If it is not a COV, it is not a deportable crime of DV. But see Advice. If it is critical to avoid deportability, consider non-COV offenses such as e.g., PC 32, 243(e), 136.1(b)(1), 459/460(a) or (b), 487, probably 236/237, etc. Child abuse: Because 207(a), (e) can be committed by simply moving an unresisting minor in violation of law, without risking harm, it should not be held abuse.	**COV**. For citations and further discussion of *Dimaya, Stokeling, Borden,* and the definition of COV in general, see this endnote.[59] For citations and further discussion of PC 207 as a COV, see this endnote.[60] A COV is defined in 18 USC 16(a) only, because the Supreme Court struck down 16(b) in *Dimaya.* Under 16(a), a COV must have as an element the use, threat, or attempt to use force, interpreted as violent, intentional force. The Ninth Circuit held that PC 207(a) and (d) do not meet this definition. But in *Stokeling* (2019), the Supreme Court held that robbery is a COV if it has as an element the use of even minor force to "overcome the will of the victim," because that confrontation is inherently violent. ICE might charge 207(a) as a COV under *Stokeling*. Because 207(a) can be committed by the threat of arrest, which involves *no* use or threat of force, imm advocates have a strong argument that it is not a COV under *Stokeling*. But this has not yet been litigated, so the best practice is to avoid

					the risk by getting 364 days or less on each count. (Note that *Stokeling* stated it does not change the COV analysis of assault and battery, so the analysis of 243 and similar offenses should not change.) The Supreme Court will consider whether reckless conduct is a COV, in *Borden v. United States* (19-5410). That might make, e.g., PC 246, 192(a), or VC 23104, 23105, etc. an AF if a year or more is imposed. If one year or more on a single count can't be avoided, safer offenses include, e.g., 459 (res or commercial), 487, 591, 594, or a 364-day sentence on 243(e). 243(d) has been held a COV and cannot take a year. **Adam Walsh Act**. Conviction of kidnapping a minor other than by a parent triggers Adam Walsh Act, which can block an LPR or USC from immigrating family members. Assume gov't can use evidence of age from outside the ROC. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 211	Robbery by means of force or fear	Get 364 or less to avoid AF as theft and perhaps as a COV.[61] See Advice.	Defenders must assume it is a CIMT. Imm advocates can consider arguments that it is not a CIMT.[62]	If PC 211 is held to be a COV (see aggravated felony column), then it would be a deportable crime of DV if V and D share a protected relationship. Plead to a non-COV; see advice. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	To avoid an AF, avoid a one-year sentence imposed. Consider plea to 487 or 459/460 (can take more than a yr) and/or, e.g., 136.1(b)(1), 243(d), 245(a), or similar with *less* than a year. Note: if DA demands strike/s plus more than 1 year, one can offer 459/460 or 487 for over a year (which is not an AF) and felony 136.1(b)(1) as the subordinate (in order to get an 8-month sentence, because this might be held an AF with a year), or if needed see felony 236/237. This should permit prison, avoid an AF, and the only CIMT is the 487.
PC 215	Carjacking	Get 364 or less on each count to avoid AF as COV. See Advice.	Conservatively assume a CIMT, although imm advocates may argue that it is not.	Arguably this is not a COV for purposes of the DV deportation ground, but still best to avoid if V and D share a domestic relationship. See Advice.	See citations and further discussion of PC 215 as a COV for purposes of the aggravated felony definition, and the crime of domestic violence definition, here.[63] To avoid a one-year sentence, see § N.4 Sentence.
PC 220	Assault, with intent to commit rape, mayhem, etc.	Get 364 or less on each count to avoid AF as COV. Assault with intent to rape might be AF as attempted	Yes CIMT	Yes, DV if V has domestic relationship. To ensure not wrongly charged as child abuse, keep	Bad plea. Even without 1 year, assault with intent to rape might be treated as attempted rape, an AF regardless of sentence. If 1 yr or more is required, see 459/460(a) or (b) or 236/237; if that is not possible, see 243.4 or 207. If a

		rape regard-less of sentence. See Advice		minor V's age out of ROC. See 243(a).	strike is needed, one can plead to 136.1(b)(1) consecutive (with 8 months imposed) and avoid an AF.
PC 236, 237(a)	False imprisonment by violence, menace, fraud, or deceit (Felony)	Should not be an AF as COV and should not be held divisible (see Advice), but best practice is to try hard to get 364 days or less on each count. To avoid a possible wrongful charge as a COV, plead to false imprisonment by deceit, fraud, or menace. See Advice.	Should not be divisible and no conviction should be held a CIMT, but to most surely avoid a CIMT plead to menace, which Ninth Circuit held is not a CIMT, and do not plead to fraud. See Advice.	*If* it were held a COV, and V had domestic relationship, it would be deportable crime of DV. It should not be held a COV but see Advice. If 1 yr won't be imposed, consider PC 32, 243(e), 136.1(b)(2), and offenses in Advice. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). **Adam Walsh Act.** Conviction of false imprisonment of a minor can prevent a US or LPR from immigrating family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.	See citations and further discussion at this endnote.[64] Felony 236/237(a) is a good, non-strike alternative to violent offenses. Under Ninth Circuit precedent discussed in the above endnote, because the minimum conduct required for guilt is low and the California Supreme Court held that the statute is not divisible into different elements, *no* conviction should be a CIMT or COV for any purpose, regardless of info in the ROC—even under the recent *Stokeling* decision. But the disadvantage to 236/237 is that there is not yet BIA precedent or an on-point Ninth Cir decision on the offense as a whole, or interpretations of the definition of COV under *Stokeling.* To be safe, counsel should arrange a plea to deceit or menace, and keep violence out of the record, but a plea to force should not amount to a COV or CIMT because the statute is indivisible. See endnote. If 1 year must be imposed, see more secure offenses such as PC 460(a) or (b), 487, 594. If they are not possible, this is a reasonable choice for 1 year—but the person should get an imm lawyer.
PC 236, 237(a)	False imprisonment (misd)	Great plea. Not an AF as a COV, plus maximum exposure is 364 days	Not a CIMT[65]	Not a COV, and therefore not a deportable DV offense To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	This is a good substitute plea to avoid crime of violence in DV cases **Adam Walsh Act**. If V is a minor, this may trigger Adam Walsh Act. See discussion at felony 236/237, above.
PC 241(a)	Assault	Not an AF: Not a COV, plus maximum sentence is less than 1 year	Not CIMT[66] but see Advice regarding ROC	See 243(a)	Good immigration plea. (Although due to extensive case law on battery, battery might be better because imm authorities are more familiar with it.) See 243(a) Advice re ROC.

PC 243(a)	Battery, Simple	Not an AF: Not a COV, plus maximum sentence is less than 1-yr	Not CIMT, but see Advice regarding ROC	Not a COV so not a deportable DV offense but see Advice. **To ensure not wrongly charged as a crime of child abuse,** keep a minor V's age out of the ROC. Under the categorical approach, no age-neutral offense can correctly be held child abuse even if the minor age appears in the ROC,[67] but a sanitized ROC clean will protect D against error.	Good immigration plea. Because minimum conduct for 241(a), 243(a) is offensive touching and the statutes are not divisible, no conviction is a COV or CIMT for any purpose.[68] This also applies to 243(e). But in case imm authorities wrongly consult the ROC instead of using the minimum conduct test, best practice is to plead to offensive touching or at least keep violence out of ROC, if possible. But this is not legally necessary to prevent a COV or CIMT.
PC 243(b), (c)	Battery on a peace officer, fireman etc.	To avoid AF as COV get 364 days or less on each count of 243(c). See Advice and see § N.4 Sentence. 243(b) should not be a COV.	b) does not involve injury, not a CIMT. (c) should not be held a CIMT,[69] but might wrongly be charged; See Advice.	No other removal ground. Not DV because these victims not protected under DV laws.	Ninth Cir held that 243(c), battery causing injury, meets a federal sentencing standard that is identical to 18 USC 16(a) (a decision that appears to be in error).[70]
PC 243(d)	Battery with serious bodily injury	To avoid AF as COV get 364 days or less on each count. See § N.4 Sentence. But see Advice. If you must plead, try to *plead specifically to an offensive touching.*	Assume it will be held a CIMT due to the (arguably incorrect) holding in *Perez* that the minimum conduct involves use of violent force. But it should not be so held, and imm advocates can contest.[71] Try to plead specifically to an offensive touching causing injury. If it is critical to avoid a CIMT, plead to a different offense.	Assume this is a COV and thus a deportable DV offense if V is protected under state DV laws. See Advice. Pleas to avoid DV are 32, 136.1(b), 236/237, 243(e), 591, or 594. Or, plead to 243(d) against a non-protected V (neighbor, ex-wife's new boyfriend, etc.) with a sentence imposed of less than a year. See discussion at PC 245. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	Although extensive California case law establishes that 243(d) can be committed with an offensive touching, the Ninth Cir held that this is not true and that 243(d) is a COV because it requires force sufficient to directly cause injury. *US v Perez,* 932 F.3d 782 (9th Cir. 2019). Petition for rehearing and reconsideration was denied. Seek alternate plea where needed; consider misd or felony PC 32, 136.1(b)(1), 236/237, 243(a) or (e), 459/ 460(a) or (b), 591, 594, or even 207 or 243.4. Imm advocates should contest the *Perez* holding and preserve the issue on appeal, to bring it again before the Ninth Circuit. Critical evidence was not submitted in the original *Perez* case. Contact the ILRC for assistance. For arguments that *Perez* is wrongly decided; see endnote.[72] Defenders and advocates who are evaluating the effect of past 243(d) convictions should expect it to be held a COV but keep in mind that this could change.gs.

PC 243(e)(1)	Battery against spouse	Not a COV but see Advice re ROC.	Not a CIMT, but see Advice re ROC	Not a deportable crime of DV because not a COV. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	Excellent immigration plea: extensive case law holds that because minimum conduct is an offensive touching, it is never a COV or CIMT.[73] See also 236. Because this is not a COV, D can accept a stay-away order or similar probation conditions without 243(e) becoming a deportable DV offense. But if in the future a court finds D violates any DV stay-away order, this will make D deportable; see Advice at 273.6. Just in case imm authorities wrongly consult the ROC instead of using the minimum conduct test, best practice is to keep violence out of ROC and/or plead to offensive touching, when that is possible. But this is not legally necessary to prevent a COV or CIMT. This has been treated as a significant misd for **DACA**. See PC 25400.
PC 243.4(a) and (e)	Sexual battery	Try very hard to get 364 or less on each count in order to surely avoid an AF, but arguably this is not a COV. See Advice.	CIMT, although imm advocates may try to argue against this.[74]	This might be (wrongly) charged as a COV under *Stokeling,* so if possible get a different plea (e.g., 236.1(b)(1) or 136.1(b)(1), with less than a year, 459, 594) if the V and D share a protected relationship, in order to avoid a charge of a deportable crime of DV. Note that 243(d) has been held to be a COV. See Advice for alternate pleas and further discussion. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). Having to register as a sex offender is not itself a removal ground. However, a state conviction for failure to register could lead to deportability; see PC 290.	Good substitute plea to avoid the AFs of sexual abuse of a minor or rape, or deportable child abuse. See also PC 136.1(b)(1), 236/237(a), 243(a), (e), 261.5(c), 289(e), 273a(b). Ninth Cir in the past held 243.4 is not a COV under 18 USC 16(a) because the touch can be ephemeral and the restraint imposed by psychological means, including the threat of arrest. Immigration advocates have a strong argument that for this reason, it also is not a COV under the 2019 *Stokeling* decision.[75] However, because the issue has not yet been litigated, best practice is to try to get 364 or less on each count of 243.4 to be sure to avoid an AF. If 1 yr is required, offer, e.g., felony 459/460(a), 236/237, or even 207 with prison time plus misd 243.4. If a strike is needed, offer 136.1(b)(1) as a consecutive or subordinate offense, with an 8-month sentence. Misd is a "significant misdemeanor" for **DACA**. See PC 25400. **Adam Walsh Act**. If V is a minor, conviction can prevent a US or LPR from immigrating family members in the future. Assume gov't can use evidence of age from outside the ROC. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 243.9(a)	"Gassing" of a peace officer	Not an AF: Not a COV, and	The intent is more to offend and annoy rather than cause	No other removal ground	Gassing is defined at PC 243.9(b) as throwing feces, urine, or bodily fluids that touch another person's skin.

	or employee by a detainee	maximum 364 days punishment	serious injury, so arguably not a CIMT		
PC 245(a)(1)-(4) (Jan 1, 2012)	Assault with a deadly weapon (firearm or other) or with force likely to cause great bodily injury	Get 364 or less to avoid an AF as COV.[76] Assume all subsections are a COV.	Ninth Circuit held it is a CIMT.[77]	Can be deportable crime of DV; see Advice. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). Firearms. Because (a)(2) uses the definition of firearm at PC 16520(a), *no* conviction is a deportable firearms offense. See PC 246. But to avoid any error, a safer plea is to 245(a)(1) or keep ROC clear of evidence that offense was (a)(2), (3).	Crime of domestic violence. Because PC 245 is a COV, it is a deportable crime of DV if there is sufficient evidence that V and D shared a relationship protected under state DV laws. To avoid a deportable crime of DV: -Plead to a COV such as PC 245, 243(d), but against a V without protected status (e.g., neighbor, police, ex-wife's new boyfriend) or against property (e.g., PC 591, 594). Get 364 days or less imposed on each count. -Plead to a non-COV, e.g., PC 32, 136.1(b)(1), 243(e), 236/237, 459, 487, against a V with protected status. Some of these can take a sentence of a year. -Do not plead to a COV against a protected party and rely on the fact that a vague ROC does not ID the party as an immigration defense. The law is volatile in this regard. If that was done in a prior conviction, immigration counsel should see below endnote for defenses in removal cases. For further discussion and citations, see this endnote.[78] Misd is a "significant misdemeanor" for DACA if committed against DV-type victim, but PC 1203.4 might eliminate. See PC 25400.
PC 246	Willfully discharge firearm at inhabited building, etc.	Law might change. Try to get 364 days or less to avoid an AF as a COV. See Advice	Yes, assume CIMT.[79]	Not a deportable firearms offense because firearm uses the definition at PC 16520(a); see Advice. If the law changes and this is held a COV, it is a potential DV offense (if it can have a specific human "victim").	**Firearms deportation ground.** The Ninth Circuit held that no conviction of an offense that uses the definition of firearm at PC 16520(a) (formerly 12001(b)), triggers the firearms deportation ground or is a firearm aggravated felony, due to the antique firearms rule.[80] PC 246 uses that definition of firearm. **Recklessness and COV**. Courts have long held that a crime of violence requires more than reckless intent; thus the Ninth Cir held that 246 is not a COV. But the Supreme Court will decide the recklessness/COV issue in *Borden v. United States.*[81] Therefore, defenders should conservatively assume 246 could be a COV and be an aggravated felony if 1 year or more is imposed, and conceivably a DV offense. See endnote at Advice to Pen C 207 for discussion of COV. Consider PC 246.3. If a strike and/or prison is

					required, consider felony 594 with 136.1(b)(1) consecutive; 459/460(a) or (b) with prison sentence. Misd is a "significant misdemeanor" for **DACA** but 1203.4 might help; see note at PC 25400.
PC 246.3 (a), (b)	Willfully discharge firearm or BB device with gross negligence	Not an AF as COV, but best practice always is to get 364 days or less on any single count if possible.	Should not be CIMT due to gross negligence but might be so charged	Not a deportable firearms offense because (a) a BB gun is not a "firearm" and (b) firearm uses the definition at 16520(a); see PC 246. For further safety, plead to BB device. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	The Ninth Circuit held that 246.3, committed by gross negligence, is not a COV. This should not be affected by the pending Supreme Court case, *Borden* (see Advice to 246), which will decide if recklessness is a COV.[82] Still, as always, it is best to get a sentence of 364 or less. Misd is a "significant misdemeanor" for **DACA** but 1203.4 might help (or advocates can explore arguments relating to BB guns as opposed to other firearms). See note at PC 25400.
PC 261, 262, 286(i)	Rape	Yes AF, regardless of sentence.[83]	Yes CIMT	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). A plea to a COV such as PC 245, 243(d), will be a deportable crime of DV if the V and D had a dating or other relation-ship covered by DV laws.	See PC 136.1(b)(1), 236/237, 243.4, PC 460(a) or (b), and probably 243.4 or 207 can take a sentence of more than 1 year without becoming an AF. Adam Walsh Act. If V is a minor, conviction can prevent a USC or LPR from immigrating family members in the future. Assume gov't can use evidence of age from outside the ROC. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 261.5 (c)	Sex with minor under age 18, if D is at least 3 years older	261.5(c) is not an AF as sexual abuse of a minor (SAM) and is not a COV. See Advice for citations.	Not a CIMT. See Advice for citations.	While there have been reports are that this is *not* being charged as deportable child abuse crime, see Advice. Adam Walsh Act. When V is a minor, conviction may prevent a USC or LPR from immigrating family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.	See endnote for discussion and citations.[84] 261.5(c) is not a bad plea. Compare this to 261.5(d), which is more dangerous. The holdings that this is neither SAM, COV, nor CIMT are national and apply in all Circuits. Regarding crime of child abuse, in late 2019 AG Barr requested amicus briefing on the issue, so this is under consideration. At the least, this will make it more likely for ICE to charge it as such, pending an AG decision. To prevent that, consider a plea to PC 288.3, communicating with a child with intent to commit 289(h). See PC 288.3. This might be deemed a significant misd for **DACA**. See PC 25400.

PC 261.5 (d)	Sex with minor under age 16, if D is at least age 21	Defenders should assume 261.5(d) is an AF as SAM based on implication in SCOTUS *Esquivel* case. Immigration advocates can cite existing Ninth Circuit precedent to the contrary. See Advice.	Defenders assume 261.5(d) may be held CIMT in future and avoid it. It would be a CIMT under the BIA standard, and because of Esquivel discussion. But immigration advocates can cite existing Ninth Circuit precedent that it is not.	Assume deportable crime of child abuse. See discussion of Adam Walsh Act at 261.5(c), above.	Bad plea. See endnote for discussion and citations.[85] Instead, try hard to plead to felony 261.5(c), if necessary with an additional offense, e.g., 136.1(b)(1) or other. In *Esquivel-Quintana* (2017) the Supreme Court held that 261.5(c) is not SAM because consensual sexual intercourse with a minor age 16 or older is not inherently abusive. Courts may well draw the conclusion that intercourse with a minor under age 16 *is* abusive. Thus while current Ninth Circuit precedent holds 261.5(d) is not SAM or a CIMT, this could change and therefore defenders should avoid this plea. Consider 261.5(c) and/or an age-neutral offense such as 136.1(b)(1), 236/237, 243(a), (d), (e), 243.4, 245, 273a(b) or if necessary (a), 288(c), 314, 459/460(a) or (b), 647.6. D can take sex offender registration on these without the offense becoming SAM. Some but not all of the above offenses have other immigration consequences, or need to avoid a year or more sentence; check the chart for each offense. Immigration advocates in removal proceedings will cite current good Ninth Circuit precedent, but should seek other defense strategies as well. To ensure that age-neutral offenses listed above are not wrongly charged as deportable crimes of child abuse, do not let ROC indicate minor age. Re **DACA**, see 261.5(c)
PC 266	Pimping and pandering	Likely charged as AF. See Advice.	Yes CIMT	Deportable child abuse if ROC shows person under age 18; plead to the second clause that is not age specific. Adam Walsh Act. When V is a minor, conviction can prevent a USC or LPR from immigrating family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.	AF: This statute covers a range of conduct. To prevent an AF as sexual abuse of a minor, plead specifically to conduct with persons age 18 or over. To try to prevent AF as "owning or managing a prostitution business," plead to attempting to persuade one adult to engage in carnal relations, but this remains a very dangerous plea.[86]

PC 270	Failure to provide for child	Not AF.	Should not be held CIMT: no element of harm or destitution	Should not be deportable crime of child abuse; does not require likely risk of harm. See PC 273a(b).	While the minimum conduct does not appear to be CIMT or child abuse, where possible include in ROC that child was not at risk of being harmed or deprived.
PC 270.1	Failure to get child to school	Not AF.	Should not be held CIMT; see Advice.	Should not be deportable crime of child abuse; see PC 273a(b)	While an age-neutral offense is preferable, this ought not to be charged as child abuse, neglect, or abandonment as defined by BIA. There is no bad intent and can be committed by failure to "reasonably" encourage truant to go to school
PC 272	Contribute to the delinquency of a minor	Not AF, although as always try to keep ROC free of lewd acts	Not CIMT[87]	Should not be deportable child abuse because it includes mild conduct, but there is no precedent. See Advice.	Because PC 272 can involve exposing minor to only mild harm, it does not meet the BIA's definition of child abuse.[88] While this is a good alternative to more harmful offenses involving a minor, to be sure to avoid a crime of child abuse, plead to an age-neutral offense. Adam Walsh Act. If V is a minor and sex was involved, it's possible that a conviction can prevent a USC or LPR from immigrating family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 273a(a)	Child endangerment involving conduct likely to cause GBI or death (Wobbler)	No conviction of 273a(a) or (b) is a COV, because the minimum conduct is negligence and the statute is indivisible.[89] But as always, the best practice is to get 364 days or less on each count, when that is possible.	No conviction of 273a(a) or (b) should be held a CIMT because the minimum conduct is negligence and the statute is indivisible.[90]	**Crime of child abuse.** Defenders must assume that 273a(a) is a deportable crime of child abuse. See Advice for how to respond to a 273a(a) charge. But imm advocates can fight this categorization, and the Ninth Circuit may take up the issue.[91]	**Responding to 273a(a) charge.** Consider 273a(b) and/or an immigration-neutral felony or misdemeanor that will not cause deportability for child abuse, e.g., 460(a), 594, or, with sentence of 364 days or less, PC 32 or 136.1(b)(1) (trying to persuade another adult not to call police). Instead of 273a(a), consider age-neutral offense such as 243, 245 or other (but keep minor age out of the ROC to prevent mistaken charge of child abuse). See endnote at PC 243(a) regarding age-neutral offenses.[92] Emphasize to prosecution that even *misd* 273a(a) will be charged as a crime of child abuse, and thus can cause the child to permanently lose their LPR or undocumented parent.[93] If available, PC 1001 misdemeanor pretrial diversion is not a conviction. **Adam Walsh Act.** If ROC shows sexual conduct was involved, this might block a USC or LPR's ability to immigrate family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.

PC 273a(b)	Child endangerment involving conduct *not* likely to cause GBI or death (Misdemeanor)	No conviction of 273a(a) or (b) is a COV; see PC 273a(a), above.	No conviction should be held a CIMT; see PC 273a(a), above.	**Crime of child abuse.** The BIA stated 273a(b) never is a deportable crime of child abuse.[94] This should be an immigration-neutral offense.	This can be a good plea to avoid a deportable crime of child abuse, especially as a substitute for 273a(a). Also, while a DUI with an enhancement for having a child in the car (VC 23572) is likely a deportable crime of child abuse, separate convictions for DUI and for 273a(b) are not. See discussion at 23572. **Adam Walsh Act.** If ROC shows sexual conduct was involved, this might block a USC or LPR's ability to immigrate family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 273d	Child, Corporal Punishment	Get 364 days or less to avoid an AF as COV. See § N.4 Sentence.	Yes CIMT	Deportable crime of child abuse. See Advice.	To avoid child abuse, plead to age-neutral offense with no minor age in the ROC (although even if minor age appears in ROC, it still should not be a crime of child abuse; see endnote at PC 243(a)). Consider PC 32, 136.1(b)(1), 243, 236/237, 459, etc., with less than 1 yr if needed, and 273a(b).
PC 273.5	Spousal Injury	Get 364 days or less on any single count to avoid AF as a COV.[95] See § N.4 Sentence. Imm counsel may try to contest the COV designation, but has failed in the past.	Ninth Circuit held not CIMT if V is former co-habitant,[96] but see Advice for suggestions of better pleas for avoiding a CIMT.	Yes, deportable crime of DV (even if V is a former co-habitant).	To avoid COV and DV, see PC 32, 243(a), (e); 236/237; 136.1(b)(1); 459, 591, 594, and others; do not plead to 243(d). D can accept batterer's program, stay-away order, and other probation conditions on these. (But a subsequent judicial finding of violating a DV stay-away order will make D deportable; see 273.6.) CIMT. Ninth Cir held that this is not a CIMT where V is "cohabitant" but best practice is to not rely on this if it is necessary to avoid a CIMT, since the BIA has not yet spoken and the Ninth could withdraw.[97] More secure pleas to avoid a CIMT are, e.g., 136.1(b)(1), 236, 243(a), (d), (e), 460, 591, 594, etc. If pleading to 273.5, plead to co-habitant or dating or ideally former co-habitant. But in analyzing past 273.5 convictions, do *not* assume that it is a CIMT even if the plea stated that the spouse was the victim. Arguably 273.5 is not divisible between victim types, and therefore no conviction is a CIMT.[98] Misd conviction is a "significant misdemeanor" for **DACA**, but 1203.4 might erase it; see note at PC 25400.
PC 273.6	Violation of protective order	Not AF.	Should not be held CIMT because minimum conduct is not.	Deportable as a violation of a DV protection order if there is evidence, including from outside the ROC, showing that the violation was pursuant to Cal Fam C 6320, 6389 or otherwise violated a	**Deportable DV finding**. A finding of even a minor violation of a DV stay-away order (e.g., walking child up the driveway rather than leaving them at the curb after visitation) can trigger deportability. In 2019 the Ninth Cir withdrew prior opinions and deferred to the BIA to hold that ICE can use evidence

				DV stay-away or similar DV order. The categorical approach does not apply here, so ICE can use any evidence to show that the finding related to a violation of a DV stay away order.	from *outside* the ROC to prove that a court's finding of violation of an order pertained to a violation of a portion of a DV protective order meant to protect against threat, injury, or repeat harassment. Such a civil or criminal court finding causes deportability. Counsel should plead to a specific violation of an order that does not meet this definition, such as failure to pay child support, follow visitation times, attend counseling; or could plead to misconduct with a judge (see PC 166(a)(1)-(3)). Or, plead to a new offense that does not involve violation of any order (see pleas suggested at PC 273.5), where the ROC is sanitized of any mention of an order. For best protection, the new offense should be against a V not listed in the order or be a victimless crime, but if that is not possible, plead to any non-deportable offense. For further discussion and citations, see this endnote[99] and see ILRC, Case Update: Domestic Violence Deportation Ground (Nov. 2019) at www.ilrc.org/crimes
PC 281	Bigamy	Not AF	Should not be CIMT, but see Advice	No other removal ground.	Should not be a CIMT despite the availability of a defense of lack of guilty knowledge,[100] but counsel should assume it might be charged as one and seek another offense if avoiding CIMT is crucial.
PC 286(b), 287(b), 288a(b), 289(h), (i)	Sexual conduct with a minor	See 261.5(c), (d)	See 261.5(c), (d)	See 261.5(c), (d). To avoid conviction of a crime of child abuse, consider 288.3.	These offenses should have the same consequences as 261.5(c) or (d), based on the statutory age requirement for the minor that applies. Immigration penalties are far greater if the offense requires a minor under age 16 than if it requires a minor under age 18. Offenses such as 286(b)(1), 287(b)(1), and 289(h) require a minor under age 18 and are the better options.
PC 286(g), (h), (i)	Sodomy without consent due to disability, intoxication etc.	AF as rape for 286(i) and likely (g), (h), regardless of sentence	CIMT	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	Ninth Cir held that like other types of intercourse, sodomy without consent because V is intoxicated, PC 286(i), is rape.[101] Likely to also apply to lack of consent due to disability, awareness, per (f), (g).
PC 288(a)	Lewd act with minor under 14	Held AF as sexual abuse of a minor, regardless of sentence, although imm advocates at least can argue	Assume CIMT.	Deportable for crime of child abuse. To avoid, plead to age-neutral offense; see Advice.	Bad plea. See age-neutral offenses like PC 32, 136.1(b), 236/237, 243, 243.4, 245, 314, 647. Or see 273a(b), 647.6. See § N.10 Sex Offenses. Might not be *particularly serious crime* for a form of relief called withholding of removal, if D can demonstrate

		Ninth Cir should rehear *en banc*[102]			honest belief V was older[103] (but still a bar to asylum, as an aggravated felony). Assume bar to **DACA**; see note at PC 25400. **Adam Walsh Act**. This conviction can block a USC or LPR's ability to immigrate family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 288(c)(1)	Conduct with lewd intent with minor age 14-15 years and 10 years younger than D	SAM. Ninth Circuit held not AF as SAM. But if D ends up proceedings outside the Ninth Circuit, there could be a different outcome. Not a COV.	Unclear. Ninth Circuit held it is not a CIMT, although ICE could argue that it should be held a CIMT under BIA standards. See Advice.	Ninth Circuit held not a deportable crime of child abuse. See Advice. Adam Walsh Act. This conviction can block a USC or LPR's ability to immigrate family members in the future. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.	For citations and further discussion, see endnote.[104] The Ninth Circuit has held that 288(c) is not an AF as sexual abuse of a minor (SAM), and is not a CIMT, crime of child abuse, or crime of violence. ICE might assert in future that it is a CIMT and/or crime of child abuse and if so, it's possible the Ninth Cir would defer. See endnote above. Other options include PC 32, 136.1(b), 236/237, 243, 243.4, 273a(b), 314, 459, 647, 647.6, etc. For the above offenses that are age-neutral, provide extra protection by sanitizing the ROC of the V's age. Misd might be a significant misdemeanor for **DACA**, but 1203.4 may help; see note at PC 25400.
PC 288.3(a)	Communicating with a minor (D knew or had reason to believe minor age), with intent to commit certain offenses	Assume it is divisible: an AF if the intended offense is an AF. If intended offense is 207(a), 288(c)(1), or sexual conduct with a person under age 18, arguably it is not SAM or a COV, to the extent that these offenses continue not to be See Advice.	Ninth Cir held it is divisible as a CIMT, according to the intended offense combined with elements of 288.3: *Not* CIMT: -288.3 with intent to commit 207(a). -Arguably, 288.3 with intent to engage in sexual conduct with minor under age 18. *Yes* CIMT: -288.3 with intent to commit 288(c)(1). -Likely 273a and other intended offenses.	Deportable child abuse. Arguably no 288.3 is a crime of child abuse. The BIA held that a crime of child abuse requires an actual child victim, not a police officer posing as a child, whereas 288.3 can involve an officer posing as a child. Defenders should plead to communicating with the officer, or leave the record vague, but advocates have a strong argument that the offense is not divisible between officers and actual minors, and therefore that no 288.3 is a crime of child abuse.[105]	See case citations, list of intended offenses, and further discussion here.[106] The only immigration advantages to a plea to 288.3(a) are (1) it should avoid deportability for child abuse (due to posing police officer) and (2) it likely has a shorter potential sentence than the intended offense because the sentence is the same as attempt to commit that offense: The disadvantage is that while 288.3 takes on the character and immigration consequences of the intended offense, it also adds its own elements to that offense, which can increase the penalties. 288.3 adds the elements of: -Knowing or having reason to believe the victim is a minor. This is why the Ninth Circuit held that 288.3 / 288(c)(1) is a CIMT, although 288(c)(1) alone is not. Consider a plea to 288(c)(1) alone, or attempt, if avoiding a CIMT is critical; -Intentional conduct. That is why 288.3 / 273a is a likely CIMT, at least to the extent 273a avoids being a CIMT only because it is committed by negligence.

			See Advice.		*Sex with a person under the age of 18:* Because 261.5(c) is not an AF or CIMT, these similar 288.3 intended offenses also should not be: 286(b)(1), 287(b)(1), 289(h).
PC 289 (a)(1)(A),	Sexual penetration by force or duress	Assume AF as rape, regardless of sentence, but see Advice. Arguably not an AF as a COV. See Advice.	Yes CIMT	If it is a COV, it is a deportable crime of DV if V and D share a protected relationship. Not child abuse even if a minor V, because age is not an element. Still, do not let the reviewable record (charge, plea colloquy, factual basis, judgment) reflect the age of a minor victim	**Rape.** The BIA held that the generic definition of rape includes any penetration, including digital or mechanical, and that would include all of PC 289(a). Advocates in removal proceedings can investigate arguing to the Ninth Circuit that its generic definition of rape has included or should include only intercourse; that would make PC 289 overbroad. They should seek other defense strategies including post-conviction relief while pursuing this.[107] Consider 459/460(a) or (b), which can take a year or more, or 243.4, 236/237, which arguably can. **COV.** This should not be a COV because it can be committed by psychological duress not based on threat of force or violence.[108] But if it is AF as rape, this provides no advantage.
PC 289(e)	Sexual penetration if D knew or should have known that V was too intoxicated to consent	Assume it will be an AF as rape regardless of sentence, but see also discussion at 289(a)(1)(A), Advice.	Yes CIMT (imm advocates could investigate defense based on "should have known" standard but must pursue other defenses at the same time.)	*See* 289(a)(1)(A)	**Rape**. See 289(a)(1)(A) regarding definition of rape and penetration. Ninth Cir held that "should have known" that V was impaired meets the mental state requirement for rape; see PC 261. **COV.** This might be held not a COV under *Stokeling* because actual force, even minor, is not required. See discussion at PC 207 and 289(a). But if it is an AF as rape, this provides no advantage.
PC 290	Failure to register as a sex offender	Not AF	Although it should not be CIMT, assume it might be charged as one at least in some regions; see Advice	Conviction under state law for failing to register is a federal offense, 18 USC 2250, and the federal conviction is a basis for removal.[109]	**CIMT**: Despite the fact that 290 can be committed by negligence, and moral turpitude requires at least recklessness, the BIA held that PC 290 is a CIMT. The Ninth Cir declined to follow the BIA and remanded.[110] The BIA has not yet issued another opinion. Thus, in the Ninth Cir this should not be held a CIMT, but some risk remains that it would be so held outside the

					Ninth Cir, or conceivably that Ninth Circuit would change its rule in future.
PC 311.3(a)	Copy, exchange, etc. child pornography	Held not AF as child pornography See Advice.	Yes CIMT; see 311.11(a)	No other removal ground.	**AF:** Citing ruling that PC 311.11(a) is not an AF as child pornography (see 311.11), Ninth Cir held that PC 311.3 also is not, under federal statute.[111] But might be held AF outside of Ninth Circuit.
PC 311.11(a)	Possess child pornography	Ninth Cir held not an AF as child pornography. See Advice.	Yes CIMT.[112]	No other removal ground.	**AF:** See endnote for citations and discussion.[113] Ninth Cir declined to follow the BIA and found that 311.11(a) is never an AF as child pornography under the categorical approach because it is broader than the federal definition and not divisible. But best practice is (a) to plead specifically to porn that depicts non-explicit conduct or to "any lewd or lascivious sexual act as defined in Section 288," under 311.4(d), which should work in the Ninth Circuit, or (b) far better, to avoid this conviction if at all possible, because it might be held an AF as child pornography outside the Ninth Circuit.
PC 313.1	Distribute, exhibit, obscene materials to a known minor, or without reasonable care to ascertain true age	Not AF	Should not be CIMT: no element of intent to arouse and can be based on negligent failure to ascertain age or properly shield document.[114]	Should not be charged as crime of child abuse. While there is no case on point, the minimum conduct is not necessarily harmful and includes failing to properly shield parts of magazines in a store or vending machine.[115]	**Adam Walsh Act**. Conceivably the gov't would assert that this conviction can block a USC or LPR's ability to immigrate family members in the future under the Adam Walsh Act. While this seems incorrect given the minor harm and *mens rea* of negligence, there is little recourse if the government does so and they might rely on facts outside the record. See § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.
PC 314 (1)	Indecent exposure	Not AF as sexual abuse of a minor even if minor's age is in ROC,[116] but as always, the best practice is to keep minor age out if possible.	Yes CIMT. But see Advice for certain older convictions. To avoid CIMT, see disturbing the peace, trespassing, loitering, public nuisance.	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**AF:** Good alternative to charges that are sexual abuse of a minor AF such as 288(a), or deportable crime of child abuse. **CIMT**: A defendant who pled guilty to 314 between Feb. 17, 2010 and Jan. 8, 2013 may be able to avoid the conviction being classed as a CIMT. See endnote.[117] **Adam Walsh**: If V under 18, this might trigger Adam Walsh provisions; see Advice to PC 288(a).

PC 315	Keeping or residing in a place of prostitution or lewdness	Should be either divisible or not an AF but use caution and see Advice. If pleading to this offense, plead specifically to "residing."	BIA held it is a CIMT, but advocates may have strong argument against this. See Advice.	See Advice for discussion of inadmissible for engaging in prostitution. See also PC 370	**AF**: Owning or controlling a prostitution business is an AF per 8 USC 1101(a) (43)(K)(i), while being a prostitute is not. Because 315 punishes sex workers (as opposed to managers) and can involve mere residency by a non-sex worker, it should be held either divisible as, or never, an AF. But this cd be wrongly charged as an AF and an unrepresented D would not know how to defend.[118] **CIMT:** Old BIA decision held 315 is a CIMT, but it did not consider the fact that merely residing (which includes residency by a non-sex worker) should not be a CIMT.[119] But an unrepresented D may not be able to raise this. While 315 should not be divisible, best practice is a specific plea to residing. See also PC 370. **Inadmissible for engaging prostitution**: A person is inadmissible who engaged in or received proceeds from prostitution within the last 10 years or plans to now. Prostitution is defined as sexual intercourse (not merely a lewd act) for a fee. No conviction is required. See PC 647(b). Conviction under an overbroad statute like this *alone* does not prove inadmissibility for prostitution,[120] but gov't can present other evidence of conduct. **Victims of human trafficking**. If the defendant may be a victim, see discussion at Advice to H&S C 11358.
PC 368 (b), (c)	Elder abuse: Injure, Endanger	Should not be AF as COV because it is an indivisible statute that can be committed by negligence. Still, try to plead to 364 days or less. See Advice.	Should never be a CIMT because it is an indivisible statute that can be committed by negligence. But best practice is specific plea to negligence. See Advice.	Not deportable DV offense, unless elder is protected by DV laws and offense is held a COV (which arguably would be incorrect).	**AF, CIMT**. Other than type of victim, PC 368(b), (c) uses the very same statutory language as PC 273a(a), (b) (child abuse). The Ninth Cir found that 273a(a) and (b) can be committed by negligence and are not divisible statutes, and thus that no conviction is a COV.[121] No 273a conviction should be a CIMT, for the same reason. The same findings should apply to 368(b), (c). But to provide more protection, plead specifically to negligent, less egregious conduct, and try to obtain 364 or less.
PC 368(d)	Elder abuse: Theft, Fraud, Forgery	(d)(1) has potential AF risk if 1 yr or more is imposed or loss > $10k. See Advice. (d)(2) does not have this risk.	Assume CIMT unless theft can include intent to deprive temporarily.	No other removal ground.	**AF**: See Advice to PC 484. Plead to embezzlement, fraud, identity theft where loss to victim does not exceed $10,000. This can take a sentence of over a year. Plead to straight theft (taking by stealth) where loss to victim does exceed $10k. Avoid 1 yr or more on any one count. Forgery plea should not take either 1 yr or $10,000 loss.

PC 370	Public nuisance: offensive, obstructing etc.	Not AF	Should not be a CIMT; good alternative to lewd conduct	No other removal ground. An alternative plea for drug activity?	Maintaining or causing a public nuisance is a six-month misd. Vaguely defined conduct could include lewdness, diverting water from a stream, etc.
PC 381, 381b	Possess, use toluene (381), nitrous oxide (381b)	Not AF	Not CIMT	Appear to not be CS offenses because they do not appear on federal schedules	Possible drug charge alternative; six-month misdemeanor. Being under the influence under PC 381 is eligible for PC 1000 pre-trial diversion (and was for former DEJ) treatment. See discussion of those at H&S C 11377.
PC 403	Disturb public assembly	Not AF.	Not CIMT; see Advice	No other removal ground.	This does not have CIMT elements, but for extra protection keep ROC free of very bad conduct or violence.
PC 415	Disturbing the peace	Not AF.	Not CIMT	No other removal ground.	
PC 416	Failure to disperse	Not AF	Not CIMT	No other removal ground.	
PC 417(a) (1) Non-firearm (2) Firearm	Exhibit firearm (2) or deadly weapon not a firearm (1), in a rude, angry or threatening manner; or unlawfully use in fight	Not AF: maximum 364 days	Should not be a CIMT but some advocates fear it will be so charged.[122]	417(a)(2) is not a deportable firearms offense, but see Advice See Advice if V has domestic relationship or is a minor	**AF, crime of DV:** While no conviction should be held a COV, and therefore not a crime of DV, the best practice is a plea to rude rather than threatening conduct, especially if V is protected under DV laws. **Firearms**: 417(a)(2) is not a firearms offense under the antique firearms rule.[123] See PC 29800(a). But try to plead to 417(a)(1) in case D is unrepresented and cannot raise this defense. **Child abuse**. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). Misd firearms offense is a "significant misdemeanor" for **DACA**; see Advice at PC 25400.
PC 417.3, 417.8	Exhibit firearm in a threatening manner so V reasonably could fear, or to evade arrest	Get 364 days or less to avoid AF as COV for 417.3, but see advice for 417.8.[124] To avoid 1-yr sentence, see § N.4 Sentence	Assume CIMT	See PC 417(a)(2)	AF as COV. Arguably PC 417.8 is not a COV under 18 USC 16(a) because it includes violence to self, not only to "other," which is part of § 16(a). Misd firearms offense is a "significant misd" for **DACA**; see Advice at PC 25400. See PC 417, 240, for better plea.

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PC 417.4	Exhibit imitation firearm in threatening manner; V reasonably could fear	COV, but not AF because maximum less than one year	Assume a CIMT	Not deportable firearms offense; see Advice. DV offense if showing that V is DV-type V.	Imitation firearm is defined at PC 16700; this does not appear to be included in the 18 USC 921 federal definition. Federal offense prohibiting imitation guns without orange cap (15 USC 5001) is not listed in firearms AF definition at 8 USC 1101(a)(43)(E).
PC 417.26	Unlawful laser activity	Not a COV	Not categorically a CIMT; see Advice	No other removal ground.	**CIMT**: Ninth Cir held that violating 417.26 by using a laser pointer, at least, is not a CIMT.[125] To be sure to avoid a CIMT, plead to use of a laser pointer. For prior convictions where this was not done, immigration counsel may argue the statute is indivisible between laser pointers and other items.
PC 422	Criminal threats (formerly terrorist threats)	Get 364 days or less on any single count to avoid AF as COV.[126] See § N.4 Sentence. See Advice.	Yes CIMT[127]	Deportable DV crime if proof of DV-type victim. See PC 245. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	To avoid COV and a deportable crime of DV, see PC 32, 69, 136.1(b), 148(a), 236/237, 243(a), (e), 243.4(a), (e), 459/460(a) or (b). Do not plead to 243(d). Some of these can take a sentence of a year. See also *Case Update: Domestic Violence Deportation Ground* (2018) at www.ilrc.org/crimes
PC 451, 452	Arson by malice, PC 451 Unlawful burning by reckless disregard of known risk, PC 452	Assume 451, 452 are AFs as analogues to 18 USC 844(i), even without 1 yr imposed.[128] This is a bad plea. See Advice	Assume CIMT	No other removal ground.	**AF as arson.** To avoid this see: -- Felonies such as 591, 594, 459 (which may take 1 yr or more without being an AF), perhaps coupled with H&S C 13001 (negligence), PC 136.1(b)(1) consecutive, 370, or -- PC 453, not secure but better than 451, 452. -- Imm counsel can investigate argument that 452 recklessness is not equivalent to federal malice.[129] **AF as a COV if 1 yr imposed**. -- 452 has not been held a COV because it can involve recklessness, but the Supreme Court may change this rule in 2020. See discussion of *Borden v. U.S.* at PC 207. -- 451(d) includes burning one's own *personal* property if certain conditions present including intent to defraud; and by its terms should include burning one's own *real* property even without these conditions. These are not COVs because not against the property of others.[130] But 451 and 452 remain dangerous because they may be AFs as federal arson analogues, per above.

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PC 453	Possess flammable material with intent to burn	Specific plea to "flammable material," with less than 1 yr, may avoid AF; see Advice.	Yes CIMT	No other removal ground.	**AF**: Good alternative to 451, 452, assuming possession or disposal of flammable materials is not analogous to a relevant federal offense.[131] To avoid AF as COV, avoid 1 yr on any one count See § N.4 Sentence.
PC 459/ 460(a)	Burglary, first degree (residential)	Not a COV or AF under any category.[132] 460(a) and (b) can take a sentence of 1 yr or more if needed. While 364 is always preferable, this is one of the more secure offenses to take 1 yr on. See § N.4 Sentence.	Should not be a CIMT regardless of intended offense, under BIA and Ninth Circuit standards,[133] but see Advice about ways to try to prevent mistaken charges in immigration proceedings.	No other removal ground.	**CIMT**. PC 459 cannot properly be found a CIMT. Here are two ways to further protect D from a wrongful CIMT finding. In the Ninth Cir 459 is not a CIMT for any purpose regardless of info in the ROC, because it is a lawful entry and it is not divisible as to the intended offense. See CIMT endnote. But because immigration authorities might make a mistake and review the ROC, and D may be unrepresented, best practice if possible is to identify an intended offense that was not a CIMT, e.g., felony 236/237, 496, 594[134] or other felony non-CIMT, and/or state that it was a lawful entry. 460(a) does not meet the BIA's specific definition for when res burglary is a CIMT, because that requires an unlawful entry. However, in case the BIA someday changes its definition, if avoiding a CIMT is absolutely critical one could seek a plea other than 460(a). See CIMT endnote.
PC 459, 460(b)	Burglary, Second degree, (Commercial)	Never an AF under any category; see 460(a). But as always, best practice is to obtain 364 days or less on any single count if that is possible.	Never a CIMT regardless of intended offense; see 460(a). See Advice.	No other removal ground.	Very good immigration plea, regardless of record of conviction (ROC). Still, for extra protection against wrongly filed immigration charges, one can create a good ROC by identifying lawful entry or, especially, intent to commit a non-CIMT. **DACA**. Misd burglary is a "significant misdemeanor." See PC 25400. **Prop 47**: If offense was entering open business with intent to steal $950 or less, see 459.5. However, for CIMT purposes this may not be as secure as 459. Also immigration authorities may assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[135]
PC 459.5	Shoplifting	Not AF (6-month max)	Not CIMT per Ninth Circuit but plead to property "intended to be taken" if possible and also see Advice. PC 459	No other removal ground.	**CIMT**: Ninth Circuit held that a lawful entry with intent to commit theft is not a CIMT, so 459.5 should not be. While it should not be held divisible, do plead to property "*intended* to be taken" not property "taken."[136] But this may not be secure. CIMT law is volatile and 460(b) has a stronger CIMT case. If avoiding a CIMT is critical, consider other options for a new charge (460(b),

			is more secure for CIMT purposes.		496, 530.5), and consider whether to stay with a 460(b) prior rather than obtain Prop 47 relief. See PC 460(a) endnote on CIMT, above.
PC 466	Possess burglary tools, intend to enter building, etc.	Not AF (lacks the elements, and 6-month max misd).	Should not be CIMT. See Advice	No other removal ground.	**CIMT**: Intent to unlawfully enter any building, vehicle, etc., with no element regarding intent to commit a further crime is not a CIMT.[137]
PC 470	Forgery	Get 364 or less on each count to avoid AF as forgery or counterfeiting.[138] See § N.4 Sentence. Also, AF as deceit if loss to victim/s exceeds $10,000. See Advice and see PC 484.	Yes CIMT. To avoid a CIMT, see 529(a)(3), 530.5, 496	No other removal ground.	To surely avoid AF for 470, D must avoid 1 yr imposed on any single count *or* loss to victim/s exceeding $10,000.Either one will create an AF. If either one of these is present, try to plead to a different offense such as PC 487. See PC 484, below. Otherwise, consider these strategies. **AF with $10k loss**. A crime involving fraud or deceit is an AF if loss to victim/s exceeds $10k. To avoid this, plead to 487 grand theft, defined by PC 484. If that is not possible, plead to one count 470 and state in the plea agreement that the loss to the victim/s was, e.g., $9k. If restitution of more than $10k must be ordered at sentencing, include a *Harvey* waiver and a statement (for immigration judge's benefit) that the restitution is based on uncharged conduct or dropped counts. While there is no case on point, this follows Supreme Court statements.[139] **AF with 1 year**. To craft a disposition where a sentence of less than 1 yr is imposed for immigration purposes, but the person actually serves more than 1 year, see § N.4 Sentence. But if 1 yr imposed cannot be avoided, go to 484, 487, 475(c), 529(a)(3), 530.5, or other offenses involving fraud or deceit that do not involve a false instrument and that can take a year. For past convictions, imm counsel can investigate arguments that PC 470 is broader than generic forgery or counterfeiting. That will not work if there also is $10k loss. Prop 47: Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[140]
PC 471.5	Falsification of medical records	May be AF as crime of deceit if loss to V exceeds $10k.	CIMT because it involves fraud	No other removal ground.	If the loss may exceed $10k, see discussion at PC 470.

PC 475(c)	Possess "real or fictitious" check, etc. with intent to defraud	Can avoid AF as forgery; see Advice. Yes, AF as fraud if loss exceeds $10k; see Advice for PC 484.	CIMT because fraud	No other removal ground.	**AF as Forgery**. The best defense is to get 364 days or less on each count. But if 1 year was or must be imposed, note that Ninth Cir held 475(c) is broader than forgery because 475(c) includes use of "real" document.[141] In case 475(c) ever is held "divisible" (*see* Advisory) between real or fictitious documents, plead to use of "real" doc with intent to defraud. That is not an AF in the Ninth Cir even with 1 yr imposed. **AF if $10k loss**. If loss exceeds $10k see instructions at PC 484 and 470.
PC 476(a)	Forged check or monetary instrument	AF if loss to the victim/s exceeds $10,000; see Advice. AF as forgery if 1 yr or more; get 364 or less on each count.[142]	CIMT. See 529(a)(3), 530.5, to try to avoid CIMT.	No other removal ground.	To avoid an AF based on conviction of a fraud or deceit offense where loss to the victim > $10k, see PC 484. If that is not possible, follow Advice for PC 470. Prop 47: Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[143]
PC 476a(a)	Bad check with intent to defraud	AF if loss to the victim/s exceeds $10,000; see Advice.	CIMT. See 529(a)(3), 530.5, to try to avoid CIMT.	No other removal ground.	To avoid an AF based on conviction of a fraud or deceit offense where loss to the victim > $10k, see PC 484. If that is not possible, follow Advice for PC 470. Prop 47: Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[144]
PC 484, 487, 490, 666 Theft (petty or grand)			Section 484 provides the definition for PC 487, 490, and 666. This section will refer to a "PC 484" to mean any of these offenses. **AF**. PC 484 is extremely useful because it can take a year or more without becoming an AF as theft. It also can take a loss to the victim/s exceeding $10k without becoming an AF as fraud or deceit. But PC 484 *cannot* take both 1 yr *and* loss > $10k on a single count. Where both factors are present, get expert help to craft a plea, probably to multiple offenses, and see Advice. **CIMT**. A current plea to 484 is a CIMT. To avoid a CIMT, consider PC 459, 529(a)(3), 530.5 (which all can take 1 year without becoming an AF), or PC 496, VC 10851 (which cannot). For past convictions, there is a strong argument that a 484 conviction from before November 16, 2016 is *not* a CIMT, although unfortunately it will require an en banc decision to confirm this. See discussion of *Silva v. Barr*.[145] Because there is not yet precedent, advocates should act conservatively and not file affirmative applications based upon it, although they should assert the argument as a defense to removal proceedings. Defenders evaluating a client's priors can consider this possibility in the analysis. **Other removal grounds**: No.		

			Advice: A 484 conviction is not an AF if *either* a 1 yr sentence was imposed, *or* the loss to the victim/s exceeded $10k (but not both; see below). This plea is safe regardless of whether D specified theft, fraud, or neither one in the ROC. But to further protect D, who may be unrepresented in proceedings where immigration authorities are not familiar with the law on PC 484, the best practice is to try to create an ROC that shows the following: • If 1 yr will be imposed, but loss to victim/s does not exceed $10k, plead to a specific fraud offense in 484. • If loss to victim/s exceeds $10k, but 1 year will not be imposed, plead to a specific theft offense in 484. • If a specific plea is not possible, create a sanitized ROC that is vague as to whether theft or fraud was involved. But again, if all of the above failed, as a matter of law, under the categorical approach, D still does not have an aggravated felony because the statute is not divisible between theft and fraud. The goal of the above instructions is just to make things very clear to immigration authorities. Why does this work? Authorities recognize that fraud (taking by deceit, with consent) is an AF if loss to the victim/s exceeds $10k, but *not* if 1 yr is imposed. 8 USC 1101(a) (43)(M). Thus, embezzlement or other 484 deceit offense with a year imposed is not an AF, as long as there is no $10k loss. Theft (taking by stealth, without consent) is an AF if 1 yr or more is imposed on a single count, but *not* if loss to victim/s exceeds $10k. 8 USC 1101(a)(43)(G). Thus, stealing or other 484 theft can take a loss exceeding $10k, as long as sentence is less than 1 yr. However, a single count cannot take both loss exceeding $10k and sentence of 1 yr or more. See federal court and BIA cases.[146] Note on loss exceeding $10k: Officials are not limited by the categorical approach, and to some extent can use evidence from outside the ROC, to prove the $ amount of loss. If one must plead to an offense involving fraud or deceit where the loss actually exceeded $10k, and/or where restitution of more than $10k is ordered, see discussion at PC 470 for how to control the record. But the most secure way to avoid the $10k problem is the one described above: plead to PC 484-type theft offense, rather than fraud or deceit, so that the amount of loss is irrelevant.		
PC 485	Theft by misappropriation	Get 364 or less on each count, to avoid AF as theft. If that is not possible, see Advice	Arguably not a CIMT because includes intent to temporarily deprive; see discussion in unpublished Ninth Circuit case.[147] But see Advice.	No other removal ground.	**AF as theft:** Imm advocates can explore argument that this is not "theft" because it does not involve stealth, and thus should not be an AF even with 1 yr sentence. But defenders should not rely on this untested argument and should seek, e.g., 487, 459, 530.5 if more than 364 days will be imposed on a single count. **CIMT**: If avoiding CIMT is critical, see PC 529(a)(3), 530.5, 496, 10851.
PC 487	Grand theft See PC 484, above	Not an AF if *either* 1 year or more is imposed, *or* loss exceeds $10k; yes AF if *both* are present in the	Yes, CIMT for a new conviction, but arguably not a CIMT if conviction occurred before	No other removal ground	Because PC 487 uses the definition of theft in PC 484, see discussion there. This can be a valuable plea to avoid an agg felony, including when fraud is charged.

		same count. See PC 484	Nov. 16, 2016. See PC 484		
PC 490, 490.1	Petty theft (misd or infraction) See PC 484, above	Not AF.	Assume CIMT for a new conviction, but arguably not a CIMT if conviction occurred before Nov. 16, 2016. See Advice re infractions	No other removal ground.	**CIMT**. While a Calif infraction arguably is not a "conviction" for imm purposes, there is no ruling and defenders must conservatively assume that it will be treated as one. See 11358. If 490.1 is treated as a conviction, this is a CIMT. To avoid a CIMT, see PC 459, 496, VC 10851. Also see discussion at PC 484.
PC 496, 496a, 496d	Receiving stolen property, or receiving stolen vehicle	Get 364 or less on each count to avoid AF.[148] See Advice.	Never should be held CIMT, but best practice is a specific plea to receiving stolen property with intent to deprive temporarily. See Advice.	No other removal ground.	**Avoid 1 yr.** For a discussion of how to obtain a sentence of 364 days or less for immigration purposes, while spending more time in jail, see § N.4 Sentence. **If 1 yr will be imposed**: See offenses like 459, 529(a)(3), 530.5 (which also are not CIMTs) and 487 (which is a CIMT). If the loss to the victim/s exceeds $10,000, do not take 529(a)(3) or 530.5 and work carefully with 487. **CIMT**: Ninth Cir held that 496 includes intent to temporarily deprive the owner, which is not a CIMT. Under subsequent Supreme Court precedent, 496 should not be held divisible; thus no conviction is a CIMT.[149] However, for extra protection in case officials do not know the law, plead specifically to intent to deprive temporarily, if that is possible. **Prop 47**: Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[150]
PC 498(b), (d)	Obtaining utility services without intent to pay	Might be charged as an AF, so get 364 or less on each count and avoid if loss exceeds $10k but see Advice for defenses.	Assume a CIMT as an unlawful taking with intent to deprive permanently	No other removal ground	**AF as theft if 1 year imposed:** Arguably theft of utility services does not meet the generic definition of theft in the Ninth Circuit, which is a taking of property, not of services.[151] But try to avoid the issue by getting 364 or less on each count, or else see PC 487. **AF as deceit with loss exceeding $10k.** Arguably this is not deceit (a taking with consent) but is theft (a taking without consent, by stealth). But best practice if loss exceeds $10k is to avoid the risk and consider PC 487.
PC 499, 499b	Joyriding; Joyriding with Priors	Get 364 or less on each count to avoid AF as theft. See § N.4 Sentence.	Not CIMT because intent to temporarily deprive	No other removal ground.	If 1 yr will be imposed on a single count, consider PC 484 designating a fraud offense. See also VC 10851, but this is not as safe as PC 484.

PC 503	Embezzlement	AF if the loss to victim/s exceeds $10k	Yes CIMT because it involves fraud	No other removal ground	If loss exceeds $10k, plead to PC 487 and see discussion at PC 484. If this is not possible and one must plead to 503 with a loss > $10k, follow the instructions at PC 470.
PC 528.5	Impersonate by electronic means, to harm, intimidate, defraud	AF as fraud if loss exceeds $10k. Consider plea to 484/487, and see Advice to 470, above. Not a COV, plus it has a maximum 364-day sentence.	Intent to defraud is a CIMT, but intent to harm should not be. See Advice.	Not a COV because the harm need not be force. Therefore, it cannot be a deportable crime of DV. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	Possible substitute charge for ID theft or similar offense, but a better choice is 529(a)(3), 530.5. **CIMT**: Best practice is plea to "harm" (if possible, a specific mild harm). Offense can be committed by, e.g., impersonating a blogger, or sending an email purporting to be from another, to their embarrassment.[152] But even if a prior plea was to fraud, imm advocates should assert that 528.5 is not a CIMT for any imm purpose because it is not divisible between fraud and harm, as there appears to be no authority that a jury is required to decide unanimously between those alternatives to find guilt. See Advisory on the categorical approach, above.
PC 529(a)(3)	False personation	If the offense resulted in loss > $10k, see Advice for PC 470, and consider plea to 484/ 487 If felony, see Advice	Held not a CIMT because the minimum conduct to does not include intent to gain a benefit or cause liability.[153] Good alternative to a fraud offense	No other removal ground.	**1 yr sentence:** Counterfeiting and forgery are AFs if 1 year is imposed. PC 529(a)(3) does not have counterfeiting or forgery as elements, but to avoid possible wrong charges, try to get 364 days or less and keep ROC clear of such conduct on felonies (because 1 yr cd be imposed on PV). **SB 54.** This is one of a few wobblers that do not destroy SB 54 protections limiting jail cooperation with ICE. See SB 54 advisory, www.ilrc.org/crimes.
PC 529.5(c)	Possess document purporting to be gov't-issued ID or DL.	Not AF	Should not be a CIMT; no intent to defraud	No other removal ground.	Good alternative to more serious identity theft charge.
PC 530.5(a), (d)(2)	Obtain any personal identifying info and use for "any unlawful purpose, including "to obtain credit, goods,	Not AF based on 1 year imposed, but 364 is always best. See Advice. Assume AF if loss to victim/s exceeds $10,000. To avoid that, consider plea	Not a CIMT. Ninth Circuit held it is not, but in at least one case, USCIS wrongly asserted it is divisible. See Advice re best practice for ROC.	No other removal ground.	**AF with 1 yr.** Conviction of theft, forgery, or counterfeiting is an AF if 1 yr or more is imposed. These are not elements of 530.5 and it can't properly be held an AF under any of these categories regardless of underlying conduct.[154] But to avoid a possible wrongful AF charge, keep sentence under 1 yr for each count and/or keep conduct involving forgery, counterfeiting, or

	services, or medical information" (part (a)) or Transfer any such information, knowing transferee will use for unlawful purpose (part (d)(2))	to 484/487 and see Advice to 470, above.			obtaining goods out of the ROC. If D must take 1 yr or more, however, 530.5 is a reasonable choice. **CIMT**. The Ninth Circuit held that the minimum conduct to commit 530.5(a) or (d)(2) is not a CIMT because it involves using the info for "any unlawful purpose" with no requirement of harm, loss, or intent to defraud, for example, working under another person's name. Under the categorical approach, the sections cannot be held divisible as to the type of unlawful conduct.[155] But best practice is to avoid a plea to obtaining credit or goods, and try to plead to specific conduct that does not involve loss, harm, or fraud.
PC 530.5(c), (d)(1)	With intent to defraud, uses another's unlawfully obtained personal identifying information	AF if loss to victim/s exceed $10,000. Not AF by 1 yr imposed. See Advice.	Yes, CIMT because intent to defraud.	No other removal ground.	The discussion above of 530.5(a) as a potential AF based on a sentence of 1 yr or more applies to 530.5(c), (d). If the loss to the victim/s exceeds $10k, plead to PC 487, 459. If that is not possible, see discussion at PC 470 for how to create an ROC here to avoid an aggravated felony.
PC 532(a)	Fraudulently obtain money, credit, etc.	Yes, AF if more than $10k. See PC 487, 470. Try to get 364 or less, but see Advice if 1 yr or more was imposed	Yes, CIMT because fraudulent intent. Consider 529(a)(3), 530.5(a)	No other removal ground.	**AF and 1 year.** Forgery, counterfeiting, theft with 1 yr or more imposed is an AF. These are not elements of 532(a), so no 532(a) conviction should be held an AF based on a 1-yr sentence. But best practice is to try to keep such conduct out of the ROC and/or get 364 days or less on any single count, to further protect defendant. See § N.4 Sentence.
PC 532a(a)	False financial statements in writing	AF if more loss to victim's exceeds $10k. See 487 and discussion at 470.	Defenders assume CIMT per Ninth Circuit. Immigration advocates, see Advice.	No other removal ground.	**CIMT.** Ninth Cir held this is a CIMT as it amounts to fraud, so defenders must assume this is the case. Imm advocates may explore arguments against this, which were brought up in the panel's dissent.[156]
PC 550(a)	Insurance fraud	See §532a(1)	See § 532a(1)	No other removal ground.	See PC 532a(1)
PC 591	Tampering with or obstructing phone lines, malicious	Not AF because not COV: it need not involve force or threat. See endnote at CIMT.	Should not be CIMT but try to plead to mild acts and intent to annoy.[157]	Not COV so not deportable DV offense (but as always, keep ROC clear of threats, violence).	Can be good alternative to avoid deportable stalking or DV offense. While it always is best to get 364 days or less, this wobbler is not a COV and therefore is a good substitute plea to take 1 yr or more.

				To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	
PC 591.5	Tamper with cell phone to prevent contacting law enforcement	Not AF: Not a COV (and has 6month maximum sentence)	Conservatively assume CIMT, but immigration counsel may argue against that.	Not COV so not deportable DV offense (but as always, keep ROC clear of threats, violence). To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**CIMT:** There are no cases interpreting elements and defenders should conservatively assume it may be a CIMT. To more securely avoid that, consider 148(a), 243(e), 459, 591, 594. Immigration counsel may argue against this, as a similar offense to PC 32, 136.1(b)(1).[158]
PC 594	Vandalism, Malicious Mischief (b)(1) at least $400 damage (b)(2) less than $400 damage	None should be COV, but (a)(1) is safest.[159] Best practice is to avoid violence on ROC. Try to get 364 days, but if 1 yr cannot be avoided, this is a reasonable offense to take it on. See Advice. See § N.4 Sentence.	Not a CIMT, or conceivably divisible, but see Advice.	No other removal ground Even if it were held a COV (which it is not), a deportable crime of DV requires violence toward a person, not property.	**CIMT**. Ninth Cir held similar statute punishing damage over $250 (in 1995 dollars) is not CIMT.[160] Under that standard, 594(b)(2) is not CIMT, and (b)(1) also should not be b/c minimum conduct is $400 worth of damage. Still, best practice where possible is to plead to (b)(2), even if greater amount in restitution is paid before plea or in separate civil agreement. Plead to intent to annoy. **Gangs and vandalism**. The BIA held that 594 with a gang enhancement is a CIMT. The Ninth Cir reversed.[161] Still, *try hard to avoid any gang enhancement*, including for graffiti, because any gang connection is a terrible negative discretionary factor for immigrants—one that can be worse than a single CIMT. **Burglary**: PC 459 does not need to have a non-CIMT as the intended offense in order to avoid being a CIMT, but that is recommended just to provide extra protection. Felony vandalism is good intended offense because it is not a CIMT.[162] **SB 54.** This is one of a few wobblers that do not destroy SB 54 protections that limiting jailor's cooperation with ICE. See SB 54 Advisory at www.ilrc.org/crimes.
PC 597(a), (b)	Torturing, abusing, animals (a) Severely neglecting animals (b)	Appears not to be a COV, although as always it is best to get 364 or less. See Advice	597(a). Assume this is a CIMT.[163] 597(b). BIA states recklessness is a CIMT if it is a *conscious disregard of known risk* of imminent death or severe injury to	No other removal ground. In unpublished decision, Ninth Cir upheld BIA finding that applicant's 597(a) conviction was of a "particularly serious crime" and thus a bar to asylum, withholding.[165]	**COV**. 18 USC 16(a) includes force against "the person or property of another," but not one's own property. PC 597(a) is not divisible between animals that are one's own versus another's property. PC 597(b) involves neglect rather than recklessness, so that even if the Supreme Court holds a COV can involve recklessness in pending *Borden v. U.S.,* gross

			person. 597(b) can involve gross negligence, so it should not be held a CIMT.[164]		negligence ought not to qualify; see CIMT endnote. See further discussion of COV at 207.
PC 597.5	Participating in or being a spectator at dog fights	See PC 597	Assume 597.5(a)(1) is a CIMT, because BIA and 9th Cir. held similar federal offense is CIMT.[166] See advice for (a)(3), (b).	See PC 597.	**CIMT.** 597.5(a)(3), permitting, in a place under one's control, either dog fighting or *another person owning a dog who intends to fight it*, will be charged as a CIMT, but imm advocates can explore arguments that this requires less intent or has the goal of preventing a nuisance. PC 597.5(b) prohibits being a spectator at a dog fight. In 2018 the BIA noted that it has not yet addressed whether that conduct is a CIMT.[167]
PC 601	Trespass with credible threat	Get 364 days or less to avoid AF as COV	Assume CIMT	As a COV, it is a deportable crime of DV if V and D share a protected domestic relationship.	Very likely to be held a COV or CIMT because the elements [168]
PC 602	Trespass	Not AF (for one thing, 6month max sentence)	Should not be CIMT See Advice.	See PC 594. 602(l)(4) (discharging firearm) is not deportable firearm offense due to antique firearms exception (see PC 417), but still best to avoid.	See PC 602.5, below. Misd involving firearms is a "significant misdemeanor" and bar to DACA, but 1203.4 may work. See PC 25400.
PC 602.5	Trespass, residence	Not AF.	Not CIMT.	No other removal ground.	
PC 646.9	Stalking	Try to get 364 or less, but even with a year it should not be held an AF as COV. Plead to harassing rather than following. See Advice	The Ninth Circuit held it is a CIMT.[169]	BIA reversed itself to hold that 646.9 is *not* a deportable "stalking" offense under the DV ground but see Advice. If this were held a COV, and D and V shared a protected relationship, it could be a crime of DV. But it should not be held a COV.	See endnote for citations and further discussion of COV and stalking deportability ground.[170] Conviction of "stalking," whether or not a domestic relationship is involved, is a deportable offense. The BIA held that 646.9 is not "stalking." See endnote. But because the law might be volatile, defenders may wish to make another plea, e.g., PC 241. **CIMT:** To avoid a CIMT, look to, e.g., 136.1(b)(1), 236, 243(a), (e), 459, 591, 594, etc. for alternatives. **DACA:** If DV-type victim, a misd is "significant misdemeanor" for DACA. See PC 25400.
PC 647(a)	Disorderly: lewd or dissolute	Not AF even if ROC shows minor involved[171] (but	Yes, held CIMT, although imm counsel can argue	To ensure not wrongly charged as child abuse, keep	**AF:** Good alternative to sexual conduct near/with minor

	conduct in public	don't let ROC show this)	against this. Consider PC 370. See Advice.	any minor's age out of ROC. See 243(a).	**CIMT** Older BIA decisions finding CIMT were influenced by antigay bias. Imm attys will argue they should not be followed,[172] but until there is precedent this presents a CIMT risk. Instead see 647(c), (e), (h). **Adam Wash Act**. If V under 18, this might trigger Adam Walsh provisions that can block a USC or LPR from obtaining immigration status for family in the future. See PC 288(a).
PC 647(b)	Disorderly: Prostitution	Not AF	Always a CIMT, whether prostitute or customer.[173] To avoid, see 370, 647(a), (h) or "residing" under 315.	Inadmissible for "engaging in prostitution" if sufficient evidence the person engaged in an ongoing practice of offering sexual intercourse for a fee. Try to plead to a different offense; if that is not possible, plead to offering lewd act for a fee. See Advice. **Victims of human trafficking**. If the defendant might be a victim, see discussion at Advice to H&S C 11358.	For more information and citations on the prostitution inadmissibility ground, see endnote.[174] See also § N.10 Sex Offenses. Engaging in prostitution within the previous 10 years, or intending to do so now, is a ground of inadmissibility. It can be proved by conduct and does not require a conviction. The definition for purposes of the inadmissibility ground is offering sexual intercourse for a fee. Section 647(b) is broader because it includes lewd acts for a fee. For that reason, for an LPR returning from a trip abroad, a conviction of 647(b) does not *alone* conclusively prove the person is inadmissible for prostitution. Just one or two incidents might not prove the person is "engaging in" prostitution. Customers are not inadmissible under the engaging in prostitution ground. However, any 647(b) conviction is a CIMT, which carries its own consequences.
PC 647(c), (e), (h)	Disorderly: Begging, loitering	Not AF.	Not CIMT.	No other removal ground.	Good alternate plea. Do not include extraneous admissions re, e.g., drugs, prostitution, etc.
PC 647(f)	Disorderly: Under the influence of drug, CS, alcohol,	Not AF.	Not CIMT.	This should not be a CS offense, but best plea is to alcohol or "drug." See Advice.	647(f) should not be held divisible between alcohol, drug, and CS.[175] But to provide extra protection for D, plead specifically to alcohol or if needed to "drug" rather than CS.
PC 647(i)	Disorderly: "Peeping Tom"	Not AF	Should not be CIMT; See Advice	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**CIMT:** Should not be CIMT because offense is completed by peeking, with no intent to commit further crime[176] but there is not case on point.

PC 647.6 (a)	Annoy, molest "child," defined as underage 18	Not AF as sexual abuse of a minor (SAM) in Ninth Circuit. Unlikely, but possible, to be held SAM elsewhere. See Advice, and See § N.10 Sex Offenses.	Not CIMT in Ninth Circuit.	Does not appear to be being charged as child abuse, but no precedent. Imm counsel can argue against this due to no element of potential harm, Ninth Circuit rulings that it is not abuse, and fact that it includes persons up to age 17. But to avoid the problem, consider alternate plea. See Advice.	See citations and analysis.[177] **If pleading to 647.6:** Best practice is to ID nonexplicit, nonharmful conduct in the ROC, or keep ROC vague, in case authorities wrongly look to ROC to define the offense. **Age-neutral offense to prevent deportable child abuse, SAM**: The sure way to avoid any threat of SAM (outside the Ninth Circuit) or child abuse is a plea to age-neutral offense like 243, 236, 646.9, 647, 459, etc. In addition, while it should not be legally necessary, keep the ROC clear of reference to a minor V. See Advice to 243(a). Or, consider 273a(b), which does not have immigration consequences. Possibly a "significant misdemeanor" for DACA. See PC 25400.
PC 653f(a), (c)	Solicitation to commit variety of offenses	Not AF as COV. See Advice regarding other AFs.	Yes, if the conduct solicited is a CIMT.	Not COV so not a deportable DV offense.	The Ninth Cir held soliciting per 653f(a) (violent and theft offenses) and (c) (rape and other sex offenses) are COVs under 18 USC 16(b), but not under 16(a). Because the Supreme Court struck down 16(b) as void for vagueness, these offenses no longer are COVs.[178] Solicitation to commit rape ought not to be held an AF as rape because the AF definition includes attempt and conspiracy, but not solicitation, to commit an AF. See 8 USC 1101(a)(43)(U) and above endnote.
PC 653f(d)	Solicitation to commit drug offense such as 11352, 11379, 11391.	Solicitation to commit a drug offense is not a drug trafficking AF, in cases arising within the Ninth Circuit only. Outside the Ninth Circuit it can be an AF.	Solicitation will take on the CIMT quality of the offense solicited. The BIA has held that selling or giving away drugs is a CIMT.	See Advice regarding possible defenses against an inadmissible and deportable CS conviction.	**Deportable/ Inadmissible CS conviction**. Two possible defenses. First, this plea can use the unspecified or nonfederal substance defenses. See 11377. Also, there is an argument that 11391 is not a CS offense. If that is true, soliciting it is not a CS offense. See 11391. Second, imm counsel can argue that this is not a deportable CS offense because it is generic solicitation.[179] **Trafficking penalties**. Beyond being an AF, any offense that involves trafficking (commercial element) is a "particularly serious crime," bad for asylees and refugees. It also can make D inadmissible by giving gov't "reason to believe" D is involved in trafficking. See 11379.
PC 653k Repealed See PC 21510,	Possession of illegal knife	Not AF	Not CIMT	Not deportable offense	This is a good immigration plea.

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17235, 16965					
PC 653m (a), (b)	Electronic contact with (a) obscenity or threats of injury with intent to annoy; or (b) repeated annoying or harassing calls.	Not AF. (only a 6month maximum sentence.)	(a) should not be CIMT b/c minimum conduct (intent to annoy) is not CIMT.[180] For (b), to avoid possible CIMT charge plead to making calls with intent to annoy.	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a). See Advice for how to use this to avoid other DV deportation grounds.	Good plea in a DV context. **Deportable DV crime**: If DV-type victim, plead under (a) to obscene call with intent to annoy, or (b) two phone calls intent to annoy. State on the record that calls did not involve any threat of injury. Or if possible plead to nonprotected victim, e.g., repeat calls to the ex-girlfriend's new girlfriend (no threats; intent to annoy). **Deportable violation of DV protective order**. Do not admit to violating a stayaway order in this or any other manner. Plead to new 653m offense rather than violation of an order. See discussion at PC 237.6, above. **Deportable stalking**: Stalking requires a threat, although it does not require a DV relationship. Plead to conduct described above. See also 591 and 646.9, above.
PC 664	Attempt	AF if attempted crime is an AF. See Advice if offense involves deceit with potential loss >$10k	CIMT if attempted crime is CIMT	Carries consequences of the attempted offense	**AF.** Attempt and conspiracy are bad pleas where fraud or deceit results in loss to victim/s exceeding $10k.[181] Instead plead to straight theft, PC 487, w/ less than 1 yr, or see PC 470
PC 666	Petty theft with a prior	Theft as defined by 484 is not an AF even if 1 yr imposed but avoid getting *both* 1 yr and loss of $10k. See PC 484.	Yes CIMT. See Advice	No other removal ground.	**CIMT:** If there is a CIMT prior such as any 484 offense, this makes a dangerous two CIMT convictions. To avoid a CIMT, consider plea to PC 459, 496, or VC 10851. For rules governing when CIMTs trigger a removal ground, see n. 3. **Prop 47** can reduce a qualifying prior 666 to misdemeanor. However, immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor.[182]
PC 1320(a)	Failure to appear for misdemeanor	Not AF. See Advice	Does not appear to be a CIMT	No other removal ground.	Not AF as obstruction because that requires 1 year, and not AF as FTA, because that requires FTA for a felony.
PC 1320(b), 1320.5	Failure to appear for a felony	AF even with 364 or less, as "FTA for	Does not appear to be a CIMT	No other removal ground.	**AF regardless of sentence:** Even without a 1year sentence, a conviction for FTA to answer to a felony charge punishable by at least 2 years, or to serve a

		felony." See Advice. Get 364 or less on each count to avoid AF as obstruction of justice.[183]			sentence if the offense is punishable by at least 5 years, is an aggravated felony.[184] Do not plead to FTA for a felony; plead to another substantive offense. Get postconviction relief for a prior conviction.
PC 4532 (a), (b)	Escape Without force (a) With force, including simple battery (b)	Get 364 days or less on any single count, to avoid an AF as obstruction of justice.	Should not be a CIMT, arguably even 4532(b), under older decisions finding seeking escape is not depraved conduct. See Advice.	No other removal ground.	See citations and further discussion at this endnote, including for CIMT.[185] **AF as obstruction of justice.** Escape from court-ordered punishment almost surely meets the definition of obstruction, so counsel must avoid a 1 year sentence on any single count. **AF as a COV.** Arguably even 4532(b), escape by force, is not a COV because it can involve simple battery. But because a sentence of 1 year creates an AF as obstruction, this does not help.
PC 4573	Bring CS or paraphernalia into jail without permission	Appears not to be an AF because intent to distribute is not required, but 4573.5, .6 or .8. is far better.	Because the statute does not require intent to distribute, and permission could be granted, it ought not to be a CIMT. See 11377.	May be charged as deportable and inadmissible CS if federal CS is involved. While there are defenses, it appears that a plea to 4573.5, .6 or even .8 is far better.	**CS Conviction.** A much better plea is to 4573.5 or .6. If that is possible, there are arguments that 4573 is not a CS offense for immigration purposes, based on the *Graves* decision on 4573.6.[186] See Advice to 11377 regarding non-federally defined substances. See.
PC 4573.5	Brings alcohol, non-CS drug, or paraphernalia into jail	Not an AF	Should not be a CIMT	No other removal grounds; see advice.	**Not CS offense**. Good alternative to 4573 and other offenses involving a CS. Try to plead to alcohol for extra safety, although that should not be necessary: 4573.5 prohibits alcohol or "any drugs, other than controlled substances," where one court held "drugs" includes medicine such as antibiotics.[187] **CIMT**. As a regulatory offense that does not involve illegal substances, this should not be a CIMT.
PC 4573.6	Possess CS's in jail without permission	Not a CS offense, per Ninth Circuit. Even if it were, it should not be an AF.	Should not be a CIMT because it just involves possession without permission.	No other removal grounds, but see Advice.	**Not CS offense**. Ninth Circuit held PC 4573.6 is overbroad as a CS offense because it includes substances not listed in federal schedules, and it is indivisible, in *US v Graves* (May 2019).[188] Thus no conviction is a deportable and inadmissible CS, at least within Ninth Circuit. Still, where possible keep ROC clean of reference to specific CS that is on a federal list.
PC 4573.8	Possess drugs or alcohol or	Not AF	As a regulatory offense (possess without permission),	Should not be a deportable or inadmissible CS offense,	**CS.** The term "drugs" is not divisible, and read in conjunction with 4573.6, it should be interpreted to include medicine that is not a controlled substance similar

	instrument to use them in jail		should not be a CIMT	but for safety plead to alcohol or look at 4573.5, .6.	to 4573.5. But 4573.5 is safer, unless one can plead to alcohol.
Former PC 12020 *Repealed 1/1/12* See current 16590 for list of individual statutes, by weapon, previously prohibited by 12020	Possession manufacture, sale, of various prohibited weapons; carrying concealed dagger	Sale of a federally defined firearm would be an AF but see Advice. Possessing or carrying a weapon is not an AF (but is a deportable firearms offense.)	Weapon possession is not a CIMT.[189] Sale is unclear as a CIMT. Mere failure to comply with licensing requirement may not be CIMT.[190]	Possession of a firearm under this statute is a deportable firearm offense. See Advice.	**Firearms**. Trafficking in firearms is an AF, as well as a deportable firearms offense, if the state definition of firearm matches the federal definition. Here the definition of firearm appears to match: "firearm" defined in former 12020 and16590/17700 excludes antique firearms, just as the federal definition does. (Many California offenses do include antique firearms, and therefore do not have immigration consequences. See discussion at PC 29800.) However, former 12020 includes other conduct that does not have imm consequences, such as possessing a dagger, etc. In addition, even if the offense is held to be a firearm offense, 12020 included possession of a firearm, which at least would not be an aggravated felony. Immigration advocates can explore arguments that 12020 was indivisible as to weapon or conduct. See Advisory on the categorical approach. Or assuming it was divisible, see endnote for effect of information in the ROC.[191] Misd is a "significant misdemeanor" for DACA, DAPA, enforcement priorities if it is held to involve a firearm; see note at PC 25400.
Former PC 12021 (a) *Repealed 1/1/12* See also current PC 29800, 30305	Drug addict, misdemeanant, or felon who possesses or owns firearm, ammunition	Possession by felon or addict is not an AF due to the antique firearms rule.[192] See further discussion at PC 29800.	Arguably not CIMT because simply owning a weapon (even up to a sawed-off shotgun) is not a CIMT.	Not deportable under the firearms ground due to antique firearms rule; see discussion at PC 12020, 29800.	
PC 12022 (a), (b), (c)	Sentence enhancement for carrying a firearm during a felony. See Advice for detailed description:	(a)(1), (c) should not be held a COV unless underlying felony is, but no there is no case on point.[193]	Use of weapon likely to be held CIMT; armed w/ weapon might not be.	(a)(1), (c) are not deportable under the firearms ground due to antique firearms rule.[194]	PC 12022 is a sentence enhancement for carrying a firearm during the attempt or commission of a felony, including: (a)(1) Principal (includes accomplices) armed with firearm; (a)(2) Principal (includes accomplices) armed with machine gun, assault weapon, .50 BMG rifle;

		Assume that (b), with use of a firearm, is a COV. (a)(2) may be an AF as an analogue to 18 USC 922(o)			(b) Personal use of deadly/ dangerous weapon; (c) Personally armed w/ a firearm **AF**: To avoid a possible AF as a COV, try to plead to simply possessing a weapon (including most firearms) which can take more than a year without being a COV; if needed plead to an additional offense involving actual violence with less than a year's sentence. See § N.4 Sentence.
PC 12022.1	Enhancement for felony committed while released pending other felony charge	Does not appear to be an AF, but see Advice re increased sentence, which makes certain offenses become AFs.	Does not appear to be CIMT.	Does not trigger other removal grounds, but see Advice regarding sentence.	If sentence is imposed, this adds 2 years to sentence for underlying offense and requires all counts to be consecutive. Can cause problems due to: • Immigration offenses that become an AF if a year is imposed, and • Inadmissible based on having a lifetime total of 5 or more years for two or more convictions
PC 12022.7	Enhancement for inflicting GBI during commission of a felony	Not COV *per se*. But see Advice.	Not CIMT *per se*; does not turn a non-CIMT into a CIMT. See Advice	No other removal ground.	**COV.** The only intent required is intent to commit the underlying felony, or at most negligence. But in light of a (questionable) recent decision on PC 243(d), approach with caution. DUI with 12022.7 should not be a COV, but offenses that involve intentional conduct, such as 243.4, 207, 459, might be charged as COV with this enhancement.[195]
Former PC 12025(a), 12031(a) *Repealed 1/1/12.* *See also current* 25400, 25850	Carrying firearm (concealed or loaded in public place)	Not AF.	Not CIMT.	Not deportable under the firearms ground due to antique firearms rule; see discussion at PC 29800, and 25400, 25850	Misd involving firearms is a "significant misdemeanor" and thus an enforcement priority and bar to DACA and DAPA; see note at PC 25400.
PC 17500	Possession of deadly weapon with intent to assault another	Not AF because (a) 6-month max sentence, plus (b) arguably because minimum conduct involves offensive touching	While arguably it should not be CIMT, it might be charged as such and is not sure to avoid a CIMT. See Advice.	Not a deportable firearms offense, but best practice is a plea to a non-firearm or to leave ROC blank; see Advice. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**CIMT/COV**: To best avoid a CIMT or COV, consider PC 417, or 243(a) if necessary with PC 21310 or 25400. However, 17500 is preferable to PC 245 as a way to avoid a CIMT or COV. In that case, to provide extra security try to plead to intent to commit offensive touching, and possession of weapon but not intent to use or threaten.[196] **Firearms ground**: Not a deportable firearms offense due to antique firearms rule; see discussion at 29800. Also, statute should be held not divisible.

				To surely avoid deportable DV offense, best practice is to either identify a specific V with no domestic relationship (e.g., neighbor, police), or plead to a different offense; see Advice. 17500 should not be held a COV but there is no precedent.	Assume an ROC ID'ing a firearm will be a "significant misdemeanor" firearms offense for **DACA**. Keep ROC clean of firearm and see note at PC 25400.
PC 20010, 21310, 22210, 21710, 22620(a) etc.	Possession of weapon other than firearm; see Advice	Not COV[197] or AF. Can take more than 1 yr sentence. See Advice	Not CIMT[198]	No other removal ground. (Stun gun does not meet definition of firearm)[199]	Good alternate plea to avoid CIMT, firearm, or COV. Includes possession of blowgun, dirk, dagger, knuckles, blackjack, stun gun.
PC 25400(a)	Carrying concealed firearm	Not an AF, but as always try to get 364 or less on each count.	Not CIMT.	Not deportable firearms offense under antique firearms rule[200]; see discussion at PC 29800.	**DACA**. Some misdemeanors are "significant misdemeanors" and thus a bar to DACA.[201] These include a misd relating to firearms, burglary, DV, sexual abuse, drug trafficking, and DUI, as well as any misd with a sentence imposed (not including suspended) of over 90 days. Conservatively assume that the antique firearms exception will not prevent this, and that a crime of DV will be very broadly defined. Three misd convictions of any kind, arising from three separate incidents, have the same effect. Expungement under PC 1203.4 might eliminate the conviction/s for these purposes. A single felony conviction also is a bar to DACA, Reduction to a felony per PC 17 will eliminate this bar. In all cases, even if a conviction is not a bar, it can be a negative discretionary factor. See materials on DACA cited in above endnote.
PC 25850	Carrying loaded firearm in public	Not an AF, but as always try to get 364 or less on each count	Not a CIMT	Not deportable firearms offense under antique firearms rule. See discussion at 29800.	
PC 26350	Openly carrying unloaded handgun in public place	Not an AF, but as always try to get 364 or less on each count	Not CIMT	Assume it is deportable firearms offense because, like the federal definition, this excludes antiques—but imm advocates can seek arguments against this.[202]	Bad plea if avoiding deportation ground is the goal. Consider, instead a firearms offense that does not come within the firearms deportation ground because of the antique firearms exception, e.g., 25850 (carrying loaded firearm in public)

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					Misd is a "significant misdemeanor" for **DACA**; see Advice at PC 25400.
PC 27500	Sell, supply, deliver, give possession of firearm to persons whom seller (a) knows or (b) has cause to believe is a prohibited person	Sale is not AF as firearms trafficking due to antique firearms rule. Try to give added protection with plea to deliver or give, which lacks commercial element.	Unclear; might be CIMT. See Advice	Not deportable under firearms ground due to antique firearms rule. See discussion in PC 29800.	**CIMT**: Some courts have stated that unlicensed sale, as opposed to, e.g., gun-running for gangs, is a regulatory offense and not a CIMT.[203] 27500 does not require bad intent or even commercial gain but does include prohibited person. 27500(b) (having cause to believe buyer is a prohibited person) may be better than 27500(a) (knowing this). Misd is a "significant misdemeanor" and thus an enforcement priority and bar to **DACA**, but 1203.4 may work. See PC 25400.
PC 29800 Felon, addict, etc. who possesses or owns a firearm			**Not AF** due to antique firearms rule; see below and see also 29805, 29815(a), 29825. **Should not be CIMT** but no precedent. Possession of even a sawed-off shotgun is not a CIMT, so arguably possession by a particular person of a 'regular' firearm is not, as this is a regulatory offense. **Not deportable firearms offense** due to antique firearms rule. **Antique Firearms Rule**: A noncitizen who is convicted of a firearms offense (selling, carrying, using, possessing, etc.) is deportable.[204] In addition, the definition of aggravated felony (AF) includes state offenses that are analogous to certain federal firearms offenses (including felon in possession of a firearm), as well as trafficking in firearms.[205] However, the state definition of firearm must match the federal. The applicable federal definition specifically excludes antique firearms, while PC 16520(a) (formerly 12001(b)) does not exclude them, and has been used to prosecute antiques.[206] The Ninth Circuit held that no conviction of an offense that uses the definition at PC 16520(a) or former 12001(b) is a deportable firearms offense or a firearms AF. This is true even if the firearm involved in the particular case was not an antique.[207] Because PC 29800 uses the PC 16520(a) definition, it is neither an AF nor a deportable firearms offense. Note, however, that 16520(d) lists offenses that do not include "unloaded antique firearms" so the antique firearms rule might not apply to these offenses, and 16520(f) offenses explicitly use the federal firearms definition, and would fall outside the antique firearms rule. As with many crim/imm defenses, Congress could eliminate this defense by changing the federal statute, and conceivably could apply the change retroactively to past convictions. When a good option exists, it is best to avoid firearms convictions even though the law is currently favorable. But as long as the statute is not changed, this defense is approved by the Supreme Court and case law will not change it. As always, D's best defense against a future change in the law is to naturalize to U.S. citizenship, after obtaining expert advice from a crim/imm specialist that it is safe to apply. **Further AF protection**: In case the antique firearms rule ever is lost, another option is to give D possible further protection from an AF by pleading to being a felon who *owns* rather than possesses a firearm.[208] In addition, do not identify a specific firearm in ROC. **Particularly Serious Crime**: The Ninth Circuit held that a conviction for federal felon in possession potentially can be held a PSC (for purposes of CAT).[209]			

PC 29805 (formerly PC 12021 (c))	Possess, own, etc. firearm after conviction of certain misdemeanors	Not AF Possession by misdemeanant is not an AF	Should not be CIMT. Owning might be better than possessing	Not deportable firearms offense; see discussion in PC 29800.	*See discussion in 29800* **DACA**: Misd is a "significant misdemeanor"; see 25400 advice
PC 29815	Possess, etc. firearm in violation of probation condition	Not AF	Should not be a CIMT because this is a regulatory offense.	Should not be deportable firearms offense; see discussion in PC 29800	
PC 30305	Possession or ownership of ammunition by persons described in 29800	Divisible as AF; see Advice. To avoid AF, plead to 29800.	See 29800	Not deportable firearms offense; see Advice. Being an addict can cause deportability, inadmissibility. See § N.8 Controlled Substance.	**AF**: To surely avoid AF and deportable offense, plead to 29800. If the plea is to 30305: AF includes possession of ammunition by a felon, addict, etc. To avoid an AF, plead to misdemeanant in possession. It is possible but not guaranteed that a plea to owning rather than possessing ammo as a felon or drug addict is not an AF. See discussion of "owning" at the endnote at PC 29800, above. **Deportable firearms offense**. The firearms deportation ground does not include ammunition.[210] (Although the firearms AF definition does in some cases; see above.)
PC 33215	Possess, give, lend, keep for sale, a short-barreled shotgun or rifle	Sale is an AF as trafficking. Felony possession is not a COV but as always try to avoid 1 yr. See Advice	Possession is not a CIMT.[211] See Advice.	Yes, a deportable firearms offense; the antique firearm exception does not apply.[212]	**COV:** While older decisions held felony possession of these weapons is a COV under 18 USC 16(b), these decisions were abrogated by the Supreme Court's holding that 16(b) is void for vagueness.[213] See PC 207. **CIMT**: If possession is not a CIMT it should follow that lending or giving also is not, but there is no precedent on those, or the more dangerous offense of sale, so try hard to plead to possession. Misd is a "significant misdemeanor" and bar to DACA but 1203.4 may eliminate it. See PC 25400.
PC 32625, 33410	Possession of silencer; possession or sale of machinegun	See 33215	See 33215	Yes, deportable firearms offense	See 33215

VC 20	False statement to DMV	Not AF	Should not be a CIMT. See Advice	No other removal ground.	**CIMT**. This need not be a material false statement and there is no element of intent to gain a benefit. To avoid CIMT, plead to specific false fact (if possible, one that is not material). However, the offense appears to be indivisible. If it is, then no convictions should be a CIMT.
VC 31	False info to officer	Not AF	See VC 20	No other removal ground.	See VC 20
VC 2800(a)	Refusal to obey order by peace officer	Not AF as obstruction (and 6-month maximum)	Not CIMT; can be committed by minor conduct	No other removal ground	
VC 2800.1	Flight from peace officer	Not AF as COV; see 2800.2.	Not CIMT[214]	No other removal ground.	
VC 2800.2	Flight from peace officer with wanton disregard for safety; can be proved by 3 traffic violations	Should not be AF as COV, so it can take 1 yr but best practice always is 364 or less on any single count. Try to plead specifically to three traffic violations per 2800.2(b). See Advice. One reason to seek 364 days or less is that if the person is put into proceedings arising *outside* the Ninth Circuit, perhaps DHS would assert this is an obstruction of justice AF.	Ninth Circuit held not a CIMT due to three traffic violations alternative. If possible, plead specifically to three traffic violations per 2800.2(b) to help unrepresented immigrants, although legally this is not required. See Advice.	No other removal ground.	See endnote for discussion of COV and CIMT.[215] Wanton disregard for safety can be demonstrated by three traffic violations, per 2800.2(b). That conduct is neither a COV nor a CIMT under current law. The Ninth Cir held that 2800.2 is not divisible between three traffic offenses and other wanton disregard. This means that *all* 2800.2 convictions must be evaluated based on the 'three traffic violation' standard under the categorical approach. This is good, because the Supreme Court will consider whether recklessness can be a COV in *Borden v. U.S.* Even if it does, the three traffic violations should not qualify as a COV. See further discussion of COV at PC 207. The reason to try to have a specific plea to the three traffic offenses / 2800.2(b) is that, while it is not legally necessary, in practice many judges and officers will not know that the statute is not divisible, and they will rely on the person's record of conviction, and the person may be unrepresented. *If there is an immigration atty, or just a functional defendant or family member, try to provide them with the text of the endnote, above.*
VC 2800.4	Flight from peace officer while driving against traffic	Try to get 364 days or less, in case COV definition is	Yes CIMT[216]	No other removal ground	**AF as COV**. This is not a COV under the current definition, which requires intent to use or threaten force. But if the Supreme Court expands the COV definition to include recklessness, 2800.4 possibly would be held a

		changed to include recklessness			COV even though it involves willful as opposed to reckless intent.
VC 4462.5	Display improper registration w/ intent to avoid vehicle registration requirement	Not AF.	Not CIMT.	No other removal ground.	This might be a minor traffic offense and not count for purposes of the three-misdemeanor bar to **DACA**. See PC 25400.
VC10801-03	Operate Chop Shop; Traffic in vehicles with altered VINs (vehicle identity numbers)	Get 364 on each count to avoid AF. Also can be AF if loss to victim/s exceeds $10k. Consider alternate plea such as PC 487, which can take 1 year *or* $10k loss, or 459, which might be able to take both. See Advice.	Yes CIMT	No other removal ground.	**AF based on 1 year:** A few AF categories might apply if 1 yr or more is imposed, such as receipt of stolen property, trafficking in vehicles where VIN has been altered, or even counterfeiting or forgery. If 1 yr can't be avoided, try to plead to an offense such as 459, 487, or 594. If 1 yr was imposed on a prior, imm counsel may investigate arguments that 10801 is not an AF even with 1 yr. [217] **AF based on $10,000 loss**. If loss = the value of vehicles, this could amount to $10k loss to victim/s. Arguably 10801 is not a crime of fraud or deceit because it can involve theft[218]—but the act of altering the vehicle might be held to be deceit. By far the best practice is plea to theft with loss of $10k but not with 1 year, or burglary. See discussions at 487 and 470, and see § N.11 Burglary, Theft and Fraud.
VC 10851	Vehicle taking, temporarily or permanently	To surely avoid an AF as obstruction of justice or theft, get 364 days or less on each count, but see Advice. See § N.4 Sentence. If 1 yr cannot be avoided or could occur on a PV, see Advice and plead to 10851 "accessory after the fact" rather than a taking.	Never a CIMT regardless of info in the ROC.[219] To give D extra protection against an adjudicator's mistake, try to make a specific plea to intent to deprive temporarily. But if that is not possible, note that many adjudicators know that 10851 is not a CIMT.	No other removal ground.	**AF**. See citations and further discussion here.[220] Both theft and obstruction of justice are AFs if a year or more is imposed. 8 USC 1101(a)(43)(G), (S). **Best protection**. Avoid a year or more (which includes added time on a PV) on any single 10851 count. Then it cannot be an AF, in any jurisdiction. Felony probation: If the client gets felony probation with 364 or less on a 10851, plead to accessory. Write in the file -- and warn the client that in case of a PV, they must tell their defender to check the file -- that they must avoid a dispo that results in a year or more *total* on a single count of 10851. For example, they could take more time on a new offense to avoid more time added to the 10851. Avoiding a year will protect client in case they are taken outside the Ninth Circuit at some point.

					Next best protection: If a year will be imposed (or could be imposed in future with a PV): Plead specifically to 10851 accessory after the fact, not theft. This is critical. It is settled within the Ninth Circuit that accessory (PC 32) is not obstruction of justice and therefore is not an AF, even if a year or more is imposed. *Valenzuela Gallardo II*, petition for rehearing denied. 10851 accessory will be treated the same. (But see below for if client is taken outside the Ninth.) A specific plea ot accessory is needed because at this time the Ninth Circuit treats 10851 as "divisible" between theft and accessory. A vague plea *might* protect an LPR contesting deportability, but will *not* protect someone applying for relief. *Pereida.* However, immigration advocates should preserve the divisibility issue for appeal, and investigate PCR during the process. VC 10851 ought to be held indivisible between theft and accessory, but this will require a new en banc decision in order to overturn prior contrary precedent. See discussion in endnote. Warn client that *even with the accessory plea, with a year or more imposed they are at great risk if they travel outside the Ninth. If the client is removable for some other reason (undocumented, other conviction), ICE may detain them and transfer them outside the Ninth.* The BIA holds that accessory is an AF as obstruction if a year or more is imposed. The Ninth Circuit does not follow this, but other circuit courts of appeals may, and their rule will control if the person is in proceedings there.
VC 10852	Tampering with a vehicle	Not AF; and a misdemeanor	Should not be held a CIMT. See Advice.	No other removal ground.	**CIMT**. Never a CIMT because it involves minor interference with and no intent to deprive owner.[221]
VC 10853	Malicious mischief to a vehicle	Not AF	Should not be CIMT; try to plead to intent to annoy. See Advice	No other removal ground.	**CIMT**: While no conviction should be held CIMT, to avoid possible wrongful charge as CIMT plead to intent to manipulate a lever or other minor offense.[222]
VC 12500	Driving without license	Not AF.	Not CIMT.	No other removal ground.	**DACA:** This should be a minor traffic offense and not part of the three-misdemeanor bar.

VC 14601.1 14601.2 14601.5	Driving on suspended license with knowledge	Not AF	Not CIMT—but see Advice if DUI is involved and warn client it is conceivable that a CIMT could be wrongly charged.	No other removal ground	**CIMT**: A single Arizona offense that has as elements DUI while knowingly driving on a suspended license was held a CIMT.[223] No single CA offense combines DUI and driving on a suspended license, and it is well established that the gov't is not permitted to combine two offenses to try to make a CIMT.[224] But to avoid any mistaken charges, where possible plead to driving on a suspended license on a different date than the DUI.[225] **DACA**: This is a minor traffic offense and not a misd for purposes of three misd bar to DACA—but multiple convictions may be a basis for denial. See PC 25400.
VC 15620	Leaving child in vehicle (infraction)	Not AF.	Not CIMT.	Conceivable that ICE would charge this as a deportable crime of child abuse. See suggestions in Advice.. If D has a prior 15620 and did not have counsel (or had counsel who did not warn), use PC 1473.7 to vacate this.	**Child abuse**: Defenders must conservatively assume that a California infraction will be treated as a conviction for imm purposes. See 11358. Even if it is, arguably the elements of 15620 do not constitute deportable child abuse under BIA decisions. But because the child abuse deportation ground is broadly defined and widely charged, seek a different disposition. Explain to DA that this infraction could destroy this family. Put off hearing until D completes conditions such as parenting classes, then ask to drop charges. Or if necessary, consider pleading up to 273a(b). For a prior conviction, PC 1473.7 is post-conviction relief that is appropriate in many contexts. Where there was no counsel at all, as there may not be with a prior infraction, it should be granted nearly automatically.
Veh C. 16025	Failure to exchange info after accident (infraction)	Not AF	Not CIMT; see VC 20001	No other removal ground	Assume conservatively that gov't will treat an infraction as a conviction for imm purposes (see 11358), but this still has no immigration effect.
VC 20001, 20003, 2004	Hit and run (felony)	Not AF	Assume 20001(a)-(b) is divisible as a CIMT.[226] See Advice. Assume 20001 enhancement under 20001(c) is CIMT.	No other removal ground.	**CIMT**. To avoid CIMT, plead to "failure to provide registration information." Do not plead to failure to stop. Or, to prevent the offense from causing an LPR who is not already deportable to not have a CIMT for deportability purposes, plead to the language of the statute in the alternative.
VC 20002 (a)	Hit and run (misd)	Not AF.	Divisible as CIMT. Advice to 20001[227]	No other removal ground.	See VC 20001[228]

					Try for Veh C 16025 (infraction failure to exchange information)
VC 23103	Reckless driving	Not AF as COV because 23103 has less than 1 yr potential sentence	Should not be held a CIMT.[229] See Advice.	No other removal ground	**CIMT**: While 23103 and 23103.5 should not be held CIMTs under any circumstances, best practice is to plead to recklessness re property.[230] **COV.** Supreme Court will consider whether a COV can include reckless conduct. See discussion of *Borden v. US* at PC 207. But even if 23103 were held a COV, a sentence of 1 year or more cannot be imposed, so it cannot become a COV AF.
VC 23103.5	Reckless driving & use of alcohol or drugs "Wet reckless"	Not AF as COV because less than 1 yr sentence. See Advice to 23103.	Not CIMT; see 23103	Not CS offense because the offense is not divisible as to the substance; see 11377, above. But best practice is plea to alcohol or non-CS, e.g. sleeping or allergy pills.	**AF**: Not an AF; see discussion of COV, sentence, and *Borden* at 23103, above. **Discretion**. Generally a wet reckless is *not* treated as harshly as DUI, which is treated as a severe negative factor in discretionary decisions. See PC 23152. It often is a real benefit to get wet reckless rather than a DUI. **DACA**: This has not been treated as a DUI significant misdemeanor bar to DACA, but D should obtain 1203.4 expungement if possible. See PC 25400.
VC 23104, 23105	Reckless driving proximate cause of injury	Not a COV under current law, but this may change. Avoid 1 yr or more and see Advice.	Might be CIMT. See Advice.	No other ground	**CIMT**: Acting recklessly with wanton disregard of imminent risk to life or serious injury is a CIMT. Note voluntary intoxication is not a defense against a CIMT finding. **AF/COV**: Supreme Court will decide whether reckless behavior can be a COV. See discussion of *Borden v. U.S.* at PC 207, VC 23103. Since this could make 23104, 23105 a COV, plead to 364 days or less for any single count of these to avoid a possible AF as a COV.
VC 23110 (a), (b)	(a) Throw substance at parked or moving vehicle (b) Throw dangerous items at same with intent to cause great bodily injury	Part (a) is not a COV, and max penalty is 6 months. Assume (b) is a COV. To avoid an AF, get 364 or less on each count. See § N.4 Sentence.	(a) should not be CIMT[231] (b) is CIMT b/c requires intent to do GBI	(b) is a COV and could be a deportable DV offense if V has domestic relationship. To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	**CIMT**: Best plea to (a) is throwing something at a car parked on a street or similar mild conduct, in case IJ (wrongly) looks at record instead of evaluating the offense by the minimum conduct required for guilt.

AF = Aggravated Felony
COV = Crime of Violence
CIMT = Crime Involving Moral Turpitude
CS = Controlled Substance
DV = Domestic Violence
ROC = Record of Conviction

VC 23152 (a)	Driving under the influence of alcohol	Not AF (In the future Congress might make a third DUI with 1-yr imposed an AF. If possible, avoid 1 yr on a single DUI count in that situation. See § N.4 Sentence.	Not CIMT, including multiple offenses.[232]	Conviction is itself is not an inadmissibility ground but see Advice.	See 23103.5 as alternative plea. See Practice Advisory on DUI immigration consequences.[233] **Discretion in general**: While not a specific removal ground, a DUI conviction is a common basis for denying release on bond and discretionary applications for relief. **Good Moral Character.** The BIA held that two DUI convictions within the period for which GMC must be shown create a rebuttable presumption against the person having GMC. GMC is necessary for naturalization, non-LPR cancellation, VAWA, and some other relief.[234] **Release on bond from ICE detention**. Any DUI -- but especially more than one DUI, or a relatively recent DUI – is a serious factor against release on bond.[235] Wet reckless offers no guarantee but is better. **Inadmissibility.** A recent DUI arrest or conviction, or multiple past arrests or convictions, can trigger evaluation for being inadmissible due to alcoholism.[236] People with multiple DUI priors might have become inadmissible by amassing a lifetime of 5 years aggregate sentence imposed (including suspended sentences) for two or more convictions of any type of offense.[237] **Asylum**. Proposed imm regulations would make two DUI's, or one DUI with injury (see 23153), a bar to asylum. Check updates. **Revoke visas**. U.S. consulates may revoke a non-immigrant visa (e.g., student visa) in response to DUI arrest or conviction. If this happens, the person should *not* return home without first consulting with an imm attorney. **SB 54 and ICE Visits to the Home**. A misd DUI comes under SB 54 protections, which depending on the county may decrease the chance that ICE will arrest the person from jail. In that case, however, ICE may go to D's home, because ICE prioritizes DUI's. Give D "red cards" and refer for training.[238] **DACA**. A DUI is a bar to DACA, but PC 1203.4 may work. See PC 25400. See also 23153 regarding a **particularly serious crime**, affecting asylum applicants, asylees and refugees.

VC 23152 (f), (g)	Driving under the influence of a "drug," or of a drug and alcohol	See 23152(a)	See 23152(a)	Should never be a CS offense under the categorical approach,[239] but best practice is to plead to alcohol to or to a specific non-CS, e.g., allergy or sleeping medication. See Advice.	Generally, see 23152(a). **CS**. This is not a CS offense because "drug" is not a divisible term, and it includes substances that are not CS. However, it could prompt questioning by imm officials that would lead to the person formally admitting to using a CS, which can be a ground of inadmissibility, unless the person pleads to a specific non-CS.
VC 23153	DUI causing bodily injury	Not AF See VC 23152(a)	Not CIMT See VC 23152(a)	See VC 23152(a)	See VC 23152(a) **Refugees/asylees**. DUI with injury may be treated as a "particularly serious crime," which is bad for refugees, asylees, and applicants for asylum.[240] (DUI without injury should not be, but no guarantee.) See also Advice to 23152 re proposed asylum regs.
VC 23572	Enhancement for DUI: child under 14 in the car	Not an AF; see VC 23152	Unknown if it is a CIMT	Assume this is a deportable crime of child abuse	See VC 23152. Consider 273a(b) (but not 273a(a)) instead. Or if needed, plead to both 273a(b) and 23152(a) or wet reckless.
W & I 10980(c)	Welfare fraud	AF if loss to gov't exceeds $10,000. See § N.11 Burglary, Theft and Fraud and see Advice.	Yes CIMT. Consider PC 529(a)(3), 530.5.	No other removal ground.	**AF:** If loss > $10k, try hard to plead to offense that does not involve deceit (e.g., PC 484) along with this offense and put loss on the second offense. Or plead to one count (e.g., one month) with loss less than $10k, and make separate civil agreement to repay more. However, that might not work for 10980.[241] This offense is not theft and therefore OK to take 1 yr sentence, unless commission requires perjury.

ENDNOTES

[1] This annotated chart is written by Katherine Brady of the Immigrant Legal Resource Center (www.ilrc.org) and a team of committed experts. Many thanks to Amy Righter and earlier Su Yon Yi for their extensive work, as well as ILRC attorneys Ann Block, Rose Cahn, Angie Junck, Alison Kamhi, Erin Quinn, Grisel Ruiz, and Aruna Sury. Many thanks to colleagues Ann Benson, Albert Camacho, Beth Chance, Holly Cooper, Dan DeGriselles, Bernice Espinoza, Raha Jorjani, Dan Kesselbrenner, Kara Hartzler, Chris Gauger, Graciela Martinez, Michael Mehr, Jonathan Moore, Ali Saidi, Jayashri Srikantiah, Norton Tooby, Francisco Ugarte, Andrew Wachtenheim, and Sejal Zota for their invaluable work and support. Thanks especially to the California *Padilla* defenders group for their legal insight and inspiration. Finally, many thanks to Tim Sheehan of ILRC for his dedicated work on several versions of the California Chart, including this one.

For a more comprehensive discussion, see Brady, Tooby, Mehr and Junck, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2013) and see Tooby, Brady, *California Criminal Defense of Immigrants* (www.ceb.com 2018). See also the *California Notes,* which together with the chart make up a free on-line resource for criminal defenders and immigration advocates; go to www.ilrc.org/chart. See several crim/imm practice advisories and aides at www.ilrc.org/crimes. National ILRC publications such as *Removal Defense* (2020) and many others provide detailed and accessible discussion of relief; see www.ilrc.org/publications. See also Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (https://legalsolutions.thomsonreuters.com) and books by Norton Tooby at www.nortontooby.com.

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This chart does not constitute legal advice and is not a substitute for individual case consultation and research. Note that this area of law is highly complex and fast changing. This chart addresses only selected California offenses. The fact that the chart does not analyze an offense does not mean that the offense has no adverse immigration consequences.

[2] **Creating Criminal Defense Goals**. Each noncitizen client needs an individual analysis to form immigration goals. To do this we need all prior convictions, and a basic immigration history that can be captured using a questionnaire. See, e.g., *N.16 Defendant Questionnaire*.

LPR. Generally, a lawful permanent resident (LPR) can keep their green card unless they (1) become "deportable" or (2) become "inadmissible" based on crimes and then travel outside the United States. Once one of those things happens, LPRs are in trouble: they can be put in removal proceedings and deported, *unless* they can apply for and be granted some type of "relief" (any of several ways that a person can obtain lawful immigration status or get forgiveness for a deportable offense).

Therefore, the criminal defense goals for an LPR defendant are

1) If the LPR is not already deportable, try to avoid a conviction that makes them deportable (and if possible, avoid one that makes them inadmissible).
2) If the LPR is already deportable but might be eligible to apply for some relief, avoid a conviction that destroys that eligibility.

Undocumented person. An undocumented person is someone who either entered the U.S. illegally, or else whatever lawful status they had has now expired or been revoked. They can be deported unless they qualify for and are granted some relief. Just like an LPR who has become deportable, an undocumented person's criminal defense goal is to avoid a conviction that destroys eligibility for whatever application for lawful status or relief they might qualify for.

Other status. There are several other forms of immigration status or benefits, such as refugee or asylee status, having a student or work visa, Temporary Protected Status, DACA, etc. People in these categories may want to both protect their current status, and someday apply to become an LPR. For two-page summaries of many types of immigration status and their criminal record bars, see *§ N.17 Relief Toolkit* at www.ilrc.org/chart.

Grounds of Deportability and Inadmissibility. The Immigration and Nationality Act (INA) sets out statutory lists of the type offenses that can make a noncitizen deportable (8 USC § 1227(a)(2)) or inadmissible (8 USC § 1182(a)(2)). Together, the grounds of deportability and inadmissibility are called "removal grounds." One purpose of this chart is to warn if a California offense will trigger a particular removal ground. For each offense, you will see three columns with information about whether the offense is an aggravated felony (AF), a crime involving moral turpitude (CIMT), or comes within some other removal ground such as controlled substance, domestic violence, firearms, etc. The chart has a fourth column called Advice that tells more about the grounds and suggests alternate pleas.

Relief. In immigration parlance, "relief" refers to any of a variety of applications by which the person might gain lawful immigration status, forgiveness of a removal ground, or some other benefit. Examples of relief include asylum, family immigration, cancellation of removal, T or U visas, VAWA, DACA, and others. Undocumented people, permanent residents who have become deportable, and other vulnerable immigrants need to apply for some kind of relief if they want to stay in the United States. Each type of relief has its own requirements *and* its own criminal record bars. For example, a conviction that is a bar to asylum might not be a bar to family immigration, and vice versa.

How can we figure out which relief the defendant might be eligible for? An immigration questionnaire should indicate what relief *might* be possible. See sample at § N.16 ILRC Questionnaire (2020) at www.ilrc.org/chart. Then we use a resource like the free *Defender's Relief Toolkit*, found at www.ilrc.org/chart (§ N17. *Relief Toolkit*, 2018). This toolkit contains a questionnaire, charts, and a two-page summary of each form of immigration relief and the criminal convictions that would destroy eligibility. This gives us ballpark objectives in criminal defense. The easiest and most stress-free way to discover this, however, is to complete the questionnaire and hand it to a designated crim/imm expert, who can provide advice.

[3] An offense "relating to" forgery is an aggravated felony if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(R). Immigration counsel can investigate defenses to (b), possession of a drug obtained by a forged prescription, based on the fact that the Ninth Circuit has held that the "relating to" language cannot be over-extended and that forgery requires possession of a forged instrument. *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 876 (9th Cir 2008). Section (b) requires only possession of the drug obtained with a forged instrument, and not possession of the instrument itself. On its face, it does not require that the defendant knew that the drug had been obtained by forgery.

[4] This is a regulatory offense, and many state laws include exceptions permitting persons under age 21 to buy or use alcohol, for example with parents' permission or at a college event. "Violations of liquor laws do not involve moral turpitude, and we do not believe [convictions for selling liquor to a minor] would be deportable offenses." *Matter of P*, 2 I&N Dec. 117, 120-21 (BIA 1944) (*dictum*). In *Matter of V. T.*, 2 I&N Dec. 213, 216-17 (BIA 1944), the BIA, in viewing the California offense of contributing to the delinquency of a minor, listed various California convictions under that law which would not involve moral turpitude, including a conviction for selling or serving intoxicating liquor to a minor.

[5] This argument is similar to the *Lorenzo* line of cases that initially found that California methamphetamines are not a federal substance – except that the heroin argument appears to be stronger. It appears that heroin under California law has the same textual overbreadth as meth did: the California statutory schedule specifically includes geometrical isomers of heroin, but the federal schedule does not. The Ninth Circuit ultimately rejected this defense for meth after a district court held an evidentiary hearing and concluded that the meth geometric isomer does not exist. See *U.S. v. Rodriguez-Gamboa,* 972 F.3d 1148 (9th Cir. 2020), discussed at Advice to H&S 11377. However, it appears that a geometrical isomer of

heroin—"isoheroin"---does exist. ILRC will post an expert declaration on this when it becomes available. Many thanks to the Federal Defenders for spotting this issue.

[6] See *People v. Bautista*, (2004) 115 Cal.App.4th 229; see also *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005) (where defendant was a noncitizen, failure to advise and consider pleading up from § 11359 to § 11360 was ineffective assistance of counsel).

[7] A noncitizen with one or more convictions that arose from a single incident "involving possession for one's own use of 30 grams or less of marijuana" (according to the federal definition of that substance) is automatically not deportable under the controlled substance ground. 8 USC § 1227(a)(2)(B). The person is inadmissible under the controlled substance ground at 8 USC § 1182(a)(2)(A), but some LPRs and persons applying to become an LPR can apply for a discretionary "212(h)" waiver of inadmissibility. See 8 USC § 1182(h). In addition, it is not an automatic bar to establishing good moral character. 8 USC § 1101(f)(3).

Under federal law, the term marijuana includes all parts of the plant, including concentrated cannabis (hashish). 21 USC § 802(16). The 30 grams or less benefits extend to using paraphernalia relating to a small amount of marijuana. *Matter of Davy*, 26 I&N Dec. 37 (BIA 2012). The Ninth Circuit has held that the "30 grams" benefits also extend to being under the influence of marijuana (*Flores-Arellano v. INS*, 5 F.3d 360, 363 (9th Cir. 1993), *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005)), but the BIA indicated that they do not (*Matter of Davy, supra* at n. 3). See further discussion and defenses relating to the 30 grams exception at Zota, *Matter of Davy and the Categorical Approach* (NIPNLG January 15, 2013) at http://www.nipnlg.org/practice.html

[8]This argument was developed by the students of the Boston College Law School Ninth Circuit Appellate Program, and Associate Professor Kari Hong, as part of the case *Prado v. Barr*, 923 F.3d 1203 (9th Cir. 2019). In *Prado* the court denied relief, but did not reach all of the issues.. Many thanks to them for sharing the argument.

In sum, the new California definition of cannabis, created by Proposition 64, is overbroad and indivisible compared to the federal definition of marijuana, and thus is not a controlled substance for immigration purposes. Under this reasoning, no conviction involving California cannabis from on or after November 9, 2016 (the effective date of Proposition 64) is a controlled substance conviction. Here is a summary of the argument.

Under the categorical approach, every criminal law term that appears in removal grounds, including "controlled substance," has a federal "generic" definition. The federal generic definition of "marihuana" is 21 USC § 802(16)(B). It includes the entire cannabis plant, except for two parts: it has long excluded the "mature stalks" of the plant, and as of December 20, 2018, under the Hemp Farming Act, it excludes "hemp," which is defined at 7 USC § 1639o as any part of the plant that contains no more than 0.3% of THC. So, the federal law definition is a bit narrow because it does not reach any cannabis with 0.3% or less of THC, or any mature stalks at all, regardless of percent of THC.

Next we compare the generic definition to the relevant state definition. In *Matter of Guadarrama*, 27 I&N Dec. 560 (BIA 2019), the BIA considered a Florida conviction for possession of marijuana, as defined by Florida Statute §§ 893.02(2), (3). Florida had excluded mature stalks from its definition of marijuana (like the federal statute), until in 1978 it added them back in. The respondent argued that his conviction did not make him inadmissible under the controlled substance ground, because the Florida definition (which includes mature stalks) is broader than the federal definition (which does not). *The BIA acknowledged that under the plain language of the Florida statute, the Florida definition of marijuana is overbroad because it includes mature stalks.* Recall that since November 9, 2016, the California definition also has included mature stalks.

Still, the BIA denied Mr. Guadarrama's case. Under the categorical approach, along with showing that a state statute reaches conduct not covered by the generic definition (e.g., possessing mature stalks), one also must show a "realistic probability" that this conduct will be prosecuted, and it was not just invented as an exercise in "legal imagination." This can be done by producing an actual case where that conduct was prosecuted. In addition, in most but not all jurisdictions, the realistic probability of prosecution can be shown without cases as long as the conduct is clearly set out in the language of the statute. In *Guadarrama*, however, the BIA reaffirmed its (minority) stance that the clear language of a state statute alone is *not* enough to establish a "realistic probability" of persecution; the person must show actual prosecutions involving mature stalks. Mr. Guadarrama did not present this, and he lost.

Fortunately, most circuit courts of appeals, including the Ninth Circuit, disagree with the BIA. They permit clear statutory language to demonstrate a realistic probability of prosecution, and would have held for Mr. Guadarrama. For example, the Eighth Circuit held that the same Florida marijuana offense is *not* a controlled substance conviction for immigration purposes. Regarding the realistic probability of prosecution issue, the court acknowledged that case examples are required for this showing if a statute is ambiguous or vague. "But when the statute's reach is clear on its face, it takes no 'legal imagination' or 'improbable hypotheticals' to understand how it may be applied and to determine whether it covers conduct an analogous federal statute does not." *Gonzalez v. Wilkinson,* 990 F.3d 654, 660 (8th Cir. 2021). The court noted that the First, Second, Third, Fourth, Ninth, Tenth Circuits, the Sixth Circuit in unpublished cases, and at least some Eleventh Circuit cases have held that statutory language alone is sufficient to prove realistic probability of prosecution, and that Supreme Court cases, without discussion, have acted on that premise. The Fifth Circuit, like the BIA, accepts only case examples. See *Gonzalez* at 659-61 and n.3.

Under this reasoning, conviction of a California cannabis offense on or after November 9, 2016 should not be held a controlled substance offense within the Ninth Circuit (and most other jurisdictions). The Ninth Circuit holds that clear language in the statute is sufficient to show a realistic probability of prosecution, without cases as evidence. See *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), abrogated on other grounds).

Since November 9, 2016, the California statute clearly includes mature stalks with more than 0.3% THC, and these are not reached by the federal generic definition. Before Proposition 64, the California and federal statutory definitions of marijuana both excluded mature stalks. California H&S C § 11018 provided in part, "'Marijuana' means all parts of the plant Cannabis sativa L. … It does not include the mature stalks of the plant …" (November 8, 2016). That definition was changed by California Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. Proposition 64, § 4.1, amended § 11018 by ending the exclusion of mature plant stalks, and instead excluding the narrower category of "industrial hemp" (which is defined the same way as federal "hemp": any part of the plant that contains no more than 0.3% of THC.) California cannabis is more broadly defined than federal marijuana because federal law does not regulate any mature stalks, even if they have more than 0.3% THC, while California does regulate mature stalks as long as they have more than 0.3% THC. In fact, some mature stalks of marijuana do have a THC level that is higher than 0.3 percent, which is why California decided to regulate them. *See*, e.g., Small & Marcus, *Hemp: A New Crop with New Uses for North America*, *in* TRENDS IN NEW CROPS AND NEW USES 284, at 284, 293-94 (Jules Janick & Anna Whipkey eds., 2002) (noting how Canada was deliberating not cultivating certain strains of hemp because a "disturbingly high percentage of the collections have THC levels higher than 0.3%.").

The California definition of marijuana also is indivisible. The statute is not phrased in the alternative, with one section referring to mature stalks. Also, California law does not treat conduct involving different parts of the same substance as separate crimes. *See, e.g., People v. Goddard*, No.

A150479, 2018 WL 1755419, at *2 (Cal. Ct. App. Apr. 12, 2018). Because the California statute is overbroad and indivisible, no conviction relating to cannabis as defined by Prop 64 is a controlled substance offense, even if the particular offense did not involve mature stalks.

[9] See community flyers in English, Spanish, and Chinese warning immigrants about the dangers of even "lawful" marijuana conduct, and see legal discussion of risks and defenses at ILRC, *Practice Advisory: Immigration Risks of Legalized Marijuana* (2018), at https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

On April 19, 2019 USCIS published a *Policy Alert* that announced that they consider employment in the marijuana industry, and admitting to possessing marijuana, a bar to establishing good moral character ("GMC") for naturalization, even if it was legal under state law. It announced amendments to *Policy Manual* (Vol 12, Part F, Chapter 5) to reflect that.
See https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf

While USCIS did not discuss inadmissibility in these materials, being inadmissible is the underlying legal reason that this conduct would be a bar to the GMC required for naturalization. Being inadmissible under the crimes grounds during the period for which GMC must be proved constitutes a statutory bar to establishing GMC. See INA § 101(f)(3), 8 USC 1101(f)(3). In some areas USCIS has found people inadmissible on the grounds that USCIS has "reason to believe" the people participated in trafficking in marijuana, a controlled substance (this is a factual claim, based upon the fact that the person listed a cannabis company as an employer on the I-485 or N-400). Or, they charge the person with being is inadmissible for admitting to having committed a federal drug offense (this requires a qualifying admission of possession, sale, distribution, etc., of cannabis by the person). See INA 212(a)(2)(A)(i)(II), (C); 8 USC 1182(a)(2)(A)(i)(II, (C).

Until now, Washington, Colorado, and a few other jurisdictions have been known to ask naturalization or even adjustment applicants if they ever have used marijuana—which many people innocently admit, based on their understanding that it is legally permitted under state law. These jurisdictions also target people who have worked in any capacity in the cannabis industry. Before the Policy Alert came out, in California it appeared that authorities did not go through this inquiry, except at the border. Now this may change. Practitioners should research what is happening in their local USCIS office to try to determine the risk of sending in an applicant for adjustment, naturalization, or other relief. See further discussion of legal risks and defenses involving legalized marijuana at the *Practice Advisory* cited above.

[10] The BIA held that the amount of marijuana is not established under the regular categorical approach, which focuses on the minimum conduct required for guilt, but under the fact-based "circumstance specific" analysis where any "reliable and probative" evidence may be considered. *Matter of Davy*, 26 I&N Dec. 37 (BIA 2012); see also *Matter of Hernandez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014). For a discussion of both how to contest and how to best use this ruling, see Zota, *Matter of Davy and the Categorical Approach* (NIPNLG January 15, 2013) at https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_15Jan_davey-categor-apprch.pdf.

Under the circumstance specific approach, arguably a statement in the plea agreement that the amount was, e.g., 29 grams overcomes other factual evidence. See, e.g., *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (plea to loss to victim under $10,000 is controlling) and see *Nijhawan v. Holder,* 557 U.S. 29, 34-36 (2009), finding that under the circumstance specific approach the facts must be "tethered" to the count of conviction. See discussion in *Matter of Davy and the Categorical Approach*, above, and see *Nijhawan* practice advisories at www.ilrc.org/crimes and www.nipnlg.org.

The BIA held that ICE must prove deportability by establishing that the amount in the case was over 30 grams, while the immigrant must prove eligibility for a § 212(h) waiver by showing the amount was 30 grams or less. *Matter of Hernandez-Rodriguez*, *supra.*

[11] The removal grounds use the term "marijuana," which is defined at 21 USC § 802(16) to include all parts of the cannabis plant, including concentrated cannabis (hashish). Since the passage of Proposition 64 in November 2016, California statutes use the term "cannabis." See H&S C § 11018 and B&P C § 26001.

The advantages relating to possessing 30 grams or less of marijuana apply, at the least, to the equivalent amount of hashish (not hash oil), which is 6 grams or less. See USSG equivalency chart on page 167 of https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/CHAPTER_2_D.pdf. Immigration authorities (as the former INS) acknowledged that a conviction of 30 grams of concentrated cannabis comes within the automatic exception to the deportation ground and is amenable to a waiver of inadmissibility under INA § 212(h) [8 USC § 1182(h)]. But INS recommended that absent unusual circumstances, the § 212(h) waiver should be denied as a matter of discretion if the amount of concentrated cannabis is equivalent to more than 30 grams of marijuana, i.e., is more than a few grams of hashish. See INS General Counsel Legal Opinion 96-3 (April 23, 1996), withdrawing previous INS General Counsel Legal Opinion 92-47 (August 9, 1992). The immigrant must prove the amount, so counsel should be sure to put the amount on the record, for example written on the plea form and/or stated in the plea colloquy—or else plead to 30 grams or less of marijuana ("cannabis").

[12] See, e.g., *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (plea to loss to victim under $10,000 is controlling where $10k is subject to the circumstance specific test) and see *Nijhawan v. Holder,* 557 U.S. 29, 34-36 (2009), finding that under the circumstance specific approach the facts must be "tethered" to the count of conviction. See discussion in Advisory, *Matter of Davy and the Categorical Approach* at www.nipnlg.org and see *Nijhawan* practice advisories at www.ilrc.org/crimes and www.nipnlg.org.

[13] See *Matter of Moncado*, 24 I&N Dec. 62, 67 (BIA 2007) (small amount of marijuana in a prison); *Matter of Martinez-Zapata*, 24 I&N Dec. 424, 430 (BIA 2007) (drug-free zone).

[14] See analysis or Prop 64 at ILRC*, Immigration Impact: The Adult Use of Marijuana Act* (September 2016) at https://www.ilrc.org/immigration-impact-analysis-adult-use-marijuana-act.

Note that while California has legalized certain conduct relating to marijuana for adults, for noncitizens marijuana remains a federally defined controlled substance. Even without a conviction, the person could be held inadmissible if they formally admit to an immigration official that they have possessed marijuana—even if the conduct was permitted under California law. For community flyers in different languages warning immigrants not to discuss marijuana conduct with immigration officials, and for a legal Practice Advisory on marijuana and immigration, go to https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

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

[16] Immigration advocates may contest this. See, e.g., Yi, "Arguing that a California Infraction is not a Conviction" at www.ilrc.org/resources/arguing-that-a-california-infraction-is-not-a-conviction-test-for-non-misdemeanor-offenses. As always, advocates should pursue post-conviction relief at the same time in case the argument fails. However, there are reports that immigration officials have treated infractions as a conviction, and some unpublished Ninth Circuit decisions have held that it is a conviction. See, e.g., *Heredia v Sessions* (9th Cir 2017) 720 Fed Appx 376.

[17] **Victims of trafficking**. California has passed laws to protect criminal defendants who are victims of human trafficking and may have committed crimes under duress. These people might be eligible for immigration status as well. See resources at the end of this endnote.

Proving that the defendant is a trafficking victim is a defense to many types of charges, including drug offenses. See Pen C § 236.23. Even if one cannot win a full § 236.23 defense, one might be able to obtain an immigration-neutral plea. For example, a group of undocumented Chinese defendants who had worked in a marijuana grow house were charged with H&S C §§ 11358 and 11359, which are "aggravated felonies" even after Prop 64. By showing evidence that they were likely victims of trafficking, their public defenders were able to negotiate pleas to misdemeanor Pen C § 32, accessory after the fact, a far better plea for a noncitizen.

California also provides a vehicle to obtain post-conviction relief to erase a prior conviction if the conduct was due to being a trafficking victim. See Pen C § 236.14. To make sure that the post-conviction relief will be given effect in immigration proceedings, the Pen C § 236.14 order should set out a legal error in the case that goes beyond the elements of § 236.14, for example that the plea was in error because the person did not willfully commit the offense, or the client entered the plea under duress due to fear of the trafficker, or the defense did not offer complete advice because they were unaware of the trafficking. Draft the order for the judge and consult a post-conviction relief expert if needed. Or, consider Pen C § 1473.7.

In some cases, the defendant may be eligible for a "T" visa for trafficking victims. See 8 USC § 1101(a)(43)(T). In this process, one first applies for a temporary, non-immigrant visa called a T visa, and later for lawful permanent residence (a green card). It is possible that the person's spouse and children can obtain status as well. Some nonprofit agencies are expert in obtaining this and can offer free help to the defendant.

CAST (Coalition to Abolish Slavery and Trafficking) in Los Angeles is an excellent resource. See www.castla.org. They offer free technical assistance on cases to California criminal defenders, immigration advocates, and others, as well as free training. They may refer you to nonprofits in your area that could take the person's immigration case. For written information, see the brief summary of T visas in § N.17 Immigration Relief Toolkit and see materials at https://www.ilrc.org/u-visa-t-visa-vawa, which also has links to webinars and manuals.

[18] See *People v. Bautista*, (2004) 115 Cal.App.4th 229; see also *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005) (where defendant was a noncitizen, failure to advise and consider pleading up from § 11359 to § 11360 was ineffective assistance of counsel).

[19] ***Not an aggravated felony***. Generally, distributing a controlled substance is a felony under federal law and therefore is an aggravated felony under 8 USC § 1101(a)(43)(B). However, 21 USC § 841(b)(4) provides that "any person who violates [the statute] by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor. This means that the offense is a federal misdemeanor and therefore is not an aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013).

In *Moncrieffe* the Supreme Court held that the categorical approach applies to this category. Thus, where a Georgia statute punished a range of conduct including giving away a large or small amount of marijuana, the Court looked to the minimum conduct required for guilt. Because the minimum conduct included giving away a small amount of marijuana, and the statute was indivisible, *no* conviction under the statute was an aggravated felony as a matter of law, regardless of information in the record and regardless of whether the issue was deportability, inadmissibility, or eligibility for relief. The result was that the conviction made Mr. Moncrieffe deportable under the controlled substance ground, but it was not an aggravated felony that barred him from applying for LPR cancellation.

Defenders should be sure to plead specifically to giving away (or ideally to offering to give away), as opposed to sale or a vague record, as this offense held divisible between the types of conduct. See *U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (*en banc*) (H&S C § 11352 is divisible). "Offering to" provides an additional defense option within the Ninth Circuit, just in case ICE asserts that 11360(b) offense does not come within a "small amount."

The Supreme Court declined to rule on what a "small amount" is, but it noted that the BIA "has suggested that 30 grams 'serve[s] as a useful guidepost…'" *Moncrieffe,* 569 U.S. at 194, n. 7, citing *Matter of Castro-Rodriguez*, 25 I&N Dec. 698. 703 (BIA 2012). A conviction for giving away marijuana under the current § 11360 fits within this guidepost. The infraction at § 11360(b), giving away 28.5 grams, comes within the exception. The misdemeanor at § 11360(a), giving away another amount, also does, because it includes a minimum conduct of giving away 29 or 30 grams. Despite this clear law, we ask defenders where possible to plead to § 11360(a) specifically to 29 or 30 grams, or to otherwise note it in the record, because the defendant may be unrepresented and an immigration officer or judge might in error look to the record, in violation of the rule set out in *Moncrieffe.*

Lujan-Armendariz. Some older convictions for giving away a small amount of marijuana may qualify for a second key immigration benefit. A conviction for possession or possession of paraphernalia (but not use), or for giving away a small amount of marijuana, from on or before July 14, 2011 can be eliminated for immigration purposes by any "rehabilitative relief" (e.g., withdrawal of plea or dismissal of charges under Pen C § 1203.4, Prop 36, or the former DEJ even absent Pen C § 1203.43). This applies only in immigration proceedings held within the Ninth Circuit. The conviction can be from any jurisdiction, including another country. The person must not have violated probation imposed for the offense or received a prior pre-trial diversion (although these limits might not apply to defendants who committed the offense while under age 21).

> Example: In 2010, John was convicted of giving away marijuana under H&S C § 11360. He completed probation without problems, and he had not had a prior pre-trial diversion. In 2015, he expunged the conviction under Pen C § 1203.4. John does not have a CS conviction for any immigration purpose, as long as immigration proceedings are held in the Ninth Circuit.

See *Lujan-Armendariz v. INS,* 22 F.3d 728 (9th Cir. 2000) (if a state offense would have been amenable to the Federal First Offender Act, 18 USC § 3607, had the case been held in federal court, then state rehabilitative relief will eliminate the conviction) and *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*) (ending the *Lujan-Armendariz* benefit for state convictions received after July 14, 2011). For more information see "Practice Advisory: *Lujan and Nunez*" at www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011.

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

[21] Section 11366 was held an AF as a federal analogue to 21 USC § 1856 in *Salviejo-Fernandez v. Gonzales,* 455 F.3d 1063 (9th Cir. 2006), but see the dissent by Judge Pregerson. Note that the case did not discuss whether § 11366 reaches substances that are not on federal drug schedules. Immigration advocates can investigate this defense. See discussion of requirement of a federally defined controlled substance in *Mellouli v. Lynch,* 135 S. Ct. 1980 (2015).

[22] See generally ILRC, § N.8 Controlled Substance at www.ilrc.org/chart (2019) and see also:

- ILRC, *Practice Advisory: What Qualifies as a Conviction for Immigration Purposes* (April 2019) at https://www.ilrc.org/what-qualifies-conviction-immigration-purposes (all topics)

- ILRC, *Practice Advisory: New California Pretrial Diversion* (January 2018) at https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges (includes § 1203.43, but note that since ICE often contests the effect of § 1203.43, the most secure option would be for the person also to obtain relief under § 1473.7)
- ILRC, *Practice Advisory: § 1473.7 Motions to Vacate a Conviction or Sentence in California* (Oct. 2020) at https://www.ilrc.org/14737-motions-vacate-conviction-or-sentence-california and *Practice Advisory: Using and Defending California Penal Code 1473.7 in Immigration Proceedings* (April 2020) at https://www.ilrc.org/using-and-defending-california-penal-code-%C2%A7-14737-vacaturs-immigration-proceedings-sample-memorandum
- ILRC, *Practice Advisory on Lujan-Armendariz and Nunez-Reyes (Drug Convictions on or before July 14, 2011)* (July 2011) at https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011
- ILRC, *Infographic About Post-Conviction Relief Vehicles* (June 2017) at https://www.ilrc.org/infographic-about-california-post-conviction-relief-vehicles

[23] See *Vega-Anguiano v. Barr,* 942 F.3d 945, 946 (9th Cir. 2019) (preventing government from reinstating the 1998 removal order).

[24] Advocates can investigate this. The khat plant itself is not listed in federal drug schedules, but certain chemicals that are present in some but not all khat plants, and that come into being upon ingestion, are listed in federal schedules. Whether possession of khat itself is possession of a federal substance has been handled differently in various criminal and immigration cases. See, e.g., *Argaw v. Ashcroft*, 395 F.3d 521, 526 (4th Cir. 2005). The Ninth Circuit has not ruled on this issue.

[25] For the opinions on methamphetamines, see *Lorenzo v. Whitaker*, 913 F.3d 930 (9th Cir. Jan. 17, 2019), withdrawing *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. Aug. 29, 2018) and filing a memorandum decision that can be found at https://cdn.ca9.uscourts.gov/datastore/memoranda/2019/01/17/15-70814.pdf. See also *U.S. v. Rodriguez-Gamboa*, 946 F.3d 548 (remanding to district court for evidentiary hearing regarding the existence of the isomer) and *U.S. v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020) (accepting the district court's finding that the geometrical isomer in meth does not exist). Many thanks to the Federal Defenders for spotting the isomer issue both for meth and heroin.

[26] See, e.g., *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

[27] See discussion in *People v. Bautista*, (2004) 115 Cal.App.4th 229, *In re Bautista*, H026395 (Ct. App. 6th Dist. September 22, 2005) (if defendant is a noncitizen, failure to advise and consider pleading up from § 11378 to § 11379 is ineffective assistance of counsel). See discussion at § 11379 of benefits to pleading to that offense.

[28] See *Tejeda v. Barr*, 960 F.3d 1184 (9th Cir. 2020).

[29] *Nunez-Reyes v Holder,* 646 F.3d 684 (9th Cir. 2011) (*en banc*).

[30] **Pen C § 32 as a CIMT.** The Ninth Circuit held that Pen C § 32 is categorically *not* a CIMT (never is one), because it lacks the element of depravity required by the generic definition of moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(*en banc*). In a case arising outside of the Ninth Circuit, however, the Board of Immigration Appeals held that accessory after the fact is divisible: it is a CIMT only if the principal's offense is one. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) (regarding federal accessory, 18 USC § 3).

Because of this conflict between the BIA and the Ninth Circuit, criminal defenders should try to act conservatively and follow the BIA's rule: identify in the record a specific non-CIMT that the principal committed, or at least keep the record vague as to the principal's offense.

Immigration advocates will point out that the BIA's opinion in *Rivens* is not controlling in cases arising within the Ninth Circuit, and within the Ninth Circuit no conviction of Pen C § 32 is a CIMT regardless of the principal's offense. Note that in *Rivens* the BIA acknowledged that *Navarro-Lopez* holds that Pen C § 32 never is a CIMT, and specifically did not rule on how it would treat cases within the Ninth Circuit. *Id.* at 629. (Even if the BIA ever holds otherwise, the Ninth Circuit then will have to decide whether or not to defer to the BIA and withdraw *Navarro-Lopez*). In addition, immigration advocates can investigate arguments that § 32 is not "divisible" as to the principal's felony, on the grounds that a jury is not required to agree unanimously in every case as to which felony the principal committed. As always with unproved arguments, counsel should consider other defense strategies, including obtaining post-conviction relief, at the same time. Immigration advocates should also be aware of the discussion of the similar offense misprision of felony. See *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), holding that this is never a CIMT and declining to follow *Matter of Robles-Urrea,* 24 I&N Dec. 22 (BIA 2006), which held that misprision always is a CIMT. The BIA declined to apply the Ninth Circuit's *Robles-Urrea* decision outside of the Ninth Circuit, in *Matter of Mendez* 27 I&N Dec. 219 (BIA 2018).

(Note that *Navarro-Lopez, supra,* was overruled on other grounds (regarding the application of the categorical approach), but that decision was in turn overruled by the Supreme Court. See *Descamps v. United States,* 570 U.S. 254 (2013), overruling *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (*en banc*). *Navarro-Lopez* also was partially overruled along with several other cases, to the extent that they relied on prior precedent regarding Pen C § 245. See *Ceron v. Holder*, 747 F.3d 773, 782 (9th Cir. 2014) (*en banc*).)

[31] **Pen C § 32 and other removal grounds**. This is where Pen C § 32 is tremendously useful. Accessory and the similar offense misprision of felony are not drug convictions even where the principal offense involves drugs. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (federal accessory after the fact), *Matter of Velasco*, 16 I&N Dec. 281 (BIA 1977) (federal misprision of felony), following *Castaneda de Esper v. INS*, 557 F.2d 79 (6th Cir. 1977). See also *Matter of Carrillo*, 16 I&N Dec. 625, 626 (BIA 1978) (conviction of unlawful carrying of firearm during commission of a felony under a former federal statute was not a drug offense even where felony was identified as drug offense). The Ninth Circuit held that accessory after the fact is not a crime of violence under 18 USC § 16 even where the principal offense involved violence. *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993).

[32] **Pen § 32 as the AF Obstruction of Justice**. An offense that meets the generic definition of "an offense relating to obstruction of justice" is an AF if a sentence of one year or more is imposed on a single count. 8 USC § 1101(a)(43)(S). The Ninth Circuit and the BIA have set out conflicting generic definitions of obstruction of justice, which has led the BIA to find that PC 32 is obstruction and the Ninth Circuit to find that it is not. See history of the decisions in *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056-58 (9th Cir. 2020) ("*Valenzuela Gallardo II").* In August 2020, the Ninth Circuit published *Valenzuela Gallardo II* and definitively rejected the BIA's definition. The Ninth Circuit rejected a petition for rehearing in the case.

Counsel outside the Ninth Circuit, dealing with the BIA's definition of obstruction, can consider asserting that the BIA definition cannot be applied to convictions from before Sept. 11, 2018, which was the date the BIA set out this definition in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018). The BIA held that this definition can be applied retroactively, and that question also is pending on appeal to the Ninth Circuit. *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657-663 (BIA 2019) (in a decision holding that PC 136.1(b)(1) is obstruction because an investigation or proceeding is reasonably foreseeable, the BIA held that its definition applies retroactively to convictions from before 9/1/2018).

The substantive issue is whether the generic definition of obstruction requires interference with an *already existing* proceeding or investigation. If it does require this, as the Ninth Circuit asserts, then PC 32 is not obstruction because it includes, e.g., helping the person avoid an initial arrest before any proceeding or investigation has started. If it does not require an existing proceeding, but only a "reasonably foreseeable" one, as the BIA asserts, then PC 32 is obstruction and is an AF if a year or more is imposed.

The BIA's most recent generic definition of obstruction is "crimes involving (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere with an investigation or proceeding that is ongoing, pending, or *reasonably foreseeable* by the defendant." *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018) (emphasis altered and internal quotation marks omitted).

The Ninth Circuit rejected this definition. "The precise question at issue in this case is whether an offense relating to obstruction of justice under § 1101(a)(43)(S) requires a nexus to an ongoing or pending proceeding or investigation. We conclude that Congress has clearly answered this question in the affirmative." *Valenzuela Gallardo II* at 1062.

A larger issue in the case, which eventually must be addressed in an en banc decision, is whether federal courts in general should give *Chevron* deference to the BIA's generic definition of an aggravated felony, given that the aggravated felony category has "dual application" in both immigration and federal criminal proceedings (where it is a basis for sentence enhancement). *Valenzuela Gallardo II* noted that there are strong arguments that courts should not defer in a dual application context, under *Chevron* Step Zero. However, the court found that precedent required it to apply *Chevron* in this case. Therefore it applied *Chevron*, and rejected the BIA's definition under *Chevron* Step One, finding that there was no ambiguity in the statute, and Congress clearly intended the § 1101(S) definition to require "a nexus to an ongoing or pending proceeding or investigation." *Id.* at 1062, and see discussion at 1062-1069.

(For a basic introduction to *Chevron*, see ILRC, *Who Decides: Overview of Chevron, Brand X, and Mead Principles* (2011) at https://www.ilrc.org/who-decides-overview-chevron-brand-x-and-mead-principles.)

[33] See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (minimum conduct for Pen C § 69 is offensive touching, so felony is not categorically a COV); *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013) (after *Descamps, supra*, if minimum conduct of felony resisting arrest under Arizona law is not a COV, no conviction is a COV).

[34] An offense relating to "obstruction of justice" is an AF if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(S). PC 69(a) is a wobbler offense that punishes a person who commits either of two prongs: "who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty…" PC 69 should not be held obstruction under the Ninth Circuit decision *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) ("*Valenzuela Gallardo II").* That defines obstruction to require interference with an *ongoing proceeding or investigation*, whereas PC 69 includes interference in *any* duty and includes an initial arrest, with no already-pending investigation or proceeding. Petition for rehearing was denied in *Valenzuela Gallardo* and, pending the Supreme Court taking up the issue, this is a final ruling for the Ninth Circuit.

However, because the defendant might end up in some other jurisdiction that adopts the BIA definition of obstruction of justice, it is best to get a sentence of a 364 days or less. Note that the following discussion concerns what might happen to the defendant if they were placed in proceedings *outside* the Ninth Circuit. While the safest option is to get 364 days, if a sentence of a year or more is needed, PC § 69 is not a bad choice of

offense, although not as secure as, e.g., burglary. Even if the person were outside the Ninth Circuit and obstruction were held to include interfering with an initial arrest, PC 69 at least has other arguments. The BIA definition of obstruction includes interference in an ongoing *or* a "reasonably foreseeable" proceeding, which it held includes helping another person to avoid initial arrest under PC 32. See discussion of *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018) at PC 32. Unlike PC 32, PC 69 arguably is outside of the BIA's definition because it includes interference in *any* duty by the official. For example, it includes resistance to an officer who is trying to prevent a suicide. A person was convicted under the second prong (resisting by force) who had "threatened to jump off [a] railing and had to be physically restrained," so that he "forcibly resisted the officers in pulling him off the area he was trying to jump from" and "[i]n that process [an] officer was injured." *United States v. Fowles*, 225 F. App'x 713, 714 (9th Cir. 2007). Arguably in that case a proceeding or investigation is not necessarily foreseeable. It may be best to plead to the second prong (resisting by force) as this is a general intent crime. *People v. Rasmussen*, 189 Cal.App.4th 1411, 1420 (Ct.App.1st Dist. 2010). The BIA's current generic definition of obstruction is "crimes involving (1) an affirmative and intentional attempt (2) that is motivated by a specific intent (3) to interfere with an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant." *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 456 (emphasis altered and internal quotation marks omitted). The suicide case presents two possible defenses: an arrest was not reasonably foreseeable and there was no specific intent. Also, counsel can assert that the BIA's definition of obstruction cannot be applied to convictions from before Sept. 11, 2018, which was the date the BIA set out this definition in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018). The BIA itself held that this definition can be applied retroactively, but that decision is pending on appeal to the Ninth Circuit. *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657-663 (BIA 2019) (PC 136.1(b)(1) is obstruction because an investigation or proceeding is reasonably foreseeable, and the BIA definition applies retroactively to convictions from before 9/1/2018). Note that in this Ninth Circuit appeal, the BIA is asserting that § 136.1(b)(1) is distinguishable from PC § 32 for purposes of the obstruction analysis, and so is not governed by the Ninth Circuit's decision in *Valenzuela Gallardo*.

[35] Commercial bribery, bribery of a witness, and obstruction of justice are aggravated felonies if a year is imposed, but bribery of a referee or umpire are not. See 8 USC § 1101(a)(43)(R), (S).

[36] **Pen C §§ 112, 113 as a CIMT.** The BIA has found that "impairing or obstructing a function of the Government by deceit, graft, trickery, or dishonest means is a crime involving moral turpitude," even without an element of fraud. See, e g., *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013) (false statement to obtain a passport). However, advocates may argue that Pen C §§ 112, 113 does not require intent that the documents be used to make a false statement to government; it includes the intent to conceal immigration status for any purpose. See, e.g., *People v. Guzman*, H022726, 2003 Cal. App. Unpub. LEXIS 1199 (Feb. 3, 2003) (unpublished) (man used false document to try to get driver's license to be able to retrieve wife's towed car). In addition, the Ninth Circuit has required intent to defraud or cause harm for moral turpitude purposes. See, e.g., cases cited for offenses such as Pen C § 530.5. While advocates may assert this untried defense, defenders should not rely upon it succeeding.

[37] **Pen C §§ 112, 113 as an AF if a sentence of a year or more is imposed**. This offense might be held an aggravated felony as counterfeiting, or under some other category, if a year or more is imposed on a single count. See comments in the Overview of this document, and see Note: Sentences at www.ilrc.org/chart, for discussion of how to accept significant jail or prison time but avoid a one-year sentence for immigration purposes.

Pen C § 112 (misdemeanor) and § 113 (felony) punish a person "who manufactures or sells any false government document with the *intent to conceal* the true citizenship or resident alien status of another person…" It defines "government document" as "any document issued by the United

States government or any state or local government, including, but not limited to, any passport, immigration visa, employment authorization card, *birth certificate, driver's license, identification card, or social security card*." (Emphasis supplied.)

AF as document fraud. A state offense that is analogous to 8 USC § 1546(a) is an aggravated felony if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(P). Advocates have a strong argument that Pen C §§ 112, 113 are overbroad and indivisible compared to 8 USC § 1546. Therefore, even if a sentence of a year or more is imposed, the conviction should not be held an AF under this section. (But see counterfeiting and forgery, below.)

Sections 112, 113 punish a person who manufactures or sells a range of federal and state documents, including birth certificate and driver's license, with the intent to "conceal" immigration or citizenship status for any purpose. Section 114 punishes a person who uses a false document with that intent.

In contrast, 18 USC § 1546(a) punishes a person who forges, counterfeits, etc. any "immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States," or possesses, uses, receives, such a document, plus offenses related to those documents and that purpose.

Sections 112, 113 are broader than 18 USC 1546(a) because they include a broader range of documents, and with a broader intent. While § 1546 is limited to documents that are used for immigration purposes such as entry, authorized stay, and employment authorization, §§ 112, 113 include documents used simply to conceal immigration status for any purpose. Sections 112, 113 should be found indivisible because the only purpose is "to conceal" the true status of the person. This includes concealing immigration status for non-federal purposes. For example, a man was convicted of Pen C 114 ("use" one of these documents) when he attempted to use a fake green card to get a driver's license, which he needed so that he could retrieve his wife's towed car. *People v. Guzman*, H022726, 2003 Cal. App. Unpub. LEXIS 1199 (Feb. 3, 2003) (unpublished). The single word "conceal" cannot be found divisible between concealing for immigration purposes and concealing for other purposes. Second, there is no indication that a jury must unanimously agree as to the type of document in §§ 112, 113.

AF as forgery. A conviction of forgery is an AF if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(R). The Ninth Circuit held that the "generic, core definition of forgery … requires intent to defraud…" *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006). Immigration advocates can investigate defenses based on the fact that Pen C §§ 112-114 do not have an intent to defraud, or to gain at another's expense. See, e.g., *People v. Guzman*, H022726, 2003 Cal. App. Unpub. LEXIS 1199 (Feb. 3, 2003) (unpublished) (man obtained drivers' license using false green card because he needed a license to retrieve his wife's towed car.) The also could investigate the definition of a "false document" in §§ 112-114, to see if it requires a forged document as opposed to something else.

AF as counterfeiting. This may be the most difficult. A conviction of counterfeiting is an AF if a sentence of a year or more is imposed. 8 USC 1101(a)(43)(R). If the term "false document" in Pen C §§ 112-114 includes only counterfeit documents, this meets a key element of counterfeiting. The Ninth Circuit defined an offense "relating to counterfeiting" broadly for this purpose, for example, it includes possession with intent to defraud. *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000). However, if counterfeiting, like forgery, requires an intent to defraud, Pen C §§ 112-114 may be distinguishable.

[38] **AF as fraud and deceit**. A crime involving fraud or deceit is an AF if the loss to the victim/s exceeds $10,000. See 8 USC § 1101(a)(43)(M)(ii). Pen C §§ 112, 113 might be held an AF if there is such a loss. However, it is not clear that persons purchasing these objects, who know that the documents are not lawfully valid, can be termed "victims" of the offense.

[39] Advocates can explore arguments that Pen C § 115 is not a CIMT. It does not require an intent to defraud. See, e g., *People v. Geibel* (1949) 93 Cal. App. 2d 147, 169 and see CALCRIM 1945. Further, although some courts have stated without discussion that the false fact must be material, that does not appear to be accurate. See *People v. Feinberg* (1997) 51 Cal. App. 4th 1566, 1579 ("'The core purpose of Penal Code section 115 is to protect the integrity and reliability of public records.' This purpose is served by an interpretation that prohibits any knowing falsification of public records. Accordingly, we will not insert into section 115 a requirement of materiality that the Legislature did not see fit to include.") (citations omitted), and see CALCRIM 1945 and *People v. Murphy* (2011) 52 Cal. 4th 81, which do not cite materiality as an element. Section 115 extends to a wide range of offenses involving filing any document with any government agency, such as filing a false fishing report. *People v. Powers* (2004), 117 Cal. App. 4th 291.

[40] Conviction of an offense "relating to … forgery" is an aggravated felony if a sentence of a year or more was imposed. 8 USC 1101(a)(43)(R). Section 115 can be violated by filing a "false" instrument, which simply contains false information without any forgery. See *People v. Gangemi*, 13 Cal. App. 4th 1790 (1993) (Pen C § 115 conviction upheld where the filed government documents contained false information regarding financial assets); *Generes v. Justice Court*, 106 Cal. App. 3d 678, 682 (1980) (Pen C § 115 conviction upheld "even though [the document] does not bear a forged signature or otherwise meet the technical requirements of a forged instrument."). If it is not possible to avoid an imposed sentence of a year or more, defenders should at least plead to conduct involving a "false" rather than forged document.

At least in the Ninth Circuit, a document does not meet the generic definition of forgery based solely on the fact that it contains false information. The Ninth Circuit stated that "it is clear that an essential element of the generic offense of forgery is the false making or alteration of a document, *such that the document is not what it purports to be*." *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 875 (9th Cir. 2008) (holding that conviction for conduct involving a false document under Pen C § 475(c) is not forgery) (emphasis added). The generic definition of forgery does not include conduct "that does not fall within the generic definition of forgery; namely, possession or use of a genuine instrument with intent to defraud but not to forge." *Id.* at 876.

However, the Third Circuit appeared to find that a false statement in a document could be an aggravated felony with a year's sentence, by applying an expanded definition of the term "relating to" forgery. See *Williams v. Attorney Gen. United States*, 880 F.3d 100, 108 (3d Cir. 2018). The Ninth Circuit rejected that argument in *Vizcarra*, *above,* but the BIA and other circuits courts of appeals have not weighed in on it.

[41] **Pen C § 118 as a CIMT**. The Ninth Circuit found that Pen C § 118 is divisible between making a false statement under oath before a tribunal and making a false written statement under penalty of perjury (e.g., in a driver's license application). *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir 2016). The court found that *written* perjury is not a CIMT, because it includes "non-case related lying," does not exclude statements by incompetent defendants, and lacks the solemnity of an oral oath-taking. Defenders should plead specifically to written perjury.

The court did not rule on whether oral perjury under Pen C § 118 is a CIMT. Defenders should assume conservatively that it is, but immigration advocates can explore arguments that it is not. As with any argument that may not prevail, at the same time advocates should explore other defense strategies, including obtaining post-conviction relief.

While this is a good decision, be aware that the BIA might challenge the Ninth Circuit on the CIMT issue in the future and it is possible that the court would defer to the Board. In *Rivera,* the Ninth Circuit declined to defer to the BIA's holding in *Matter of Martinez-Recinos,* 23 I&N Dec. 175 (BIA 2001) that § 118 is categorically (always) a CIMT, on the grounds that the BIA had provided no explanation for its holding. *Rivera,* 816 F.3d at 1017-71. In a subsequent case that ruled only on aggravated felonies, the BIA acknowledged without comment the *Rivera* reasoning in refusing to defer. *Matter of Alvarado*, 26 I&N Dec 895, 902 at n. 12 (BIA 2016).

In *Rivera*, the Ninth Circuit noted that California has multiple other perjury statutes for different contexts (see, e.g., Financial Code § 460, Gov't Code § 1368). Because each of these has distinct elements, each requires a separate CIMT analysis.

[42] **Pen C § 118 as an AF**. The BIA and the Ninth Circuit have held that Pen C 118 is categorically (always) "perjury" and thus is an AF if a sentence of a year or more is imposed. See *Matter of Alvarado*, 26 I&N Dec 895 (BIA 2016) and *Yim v. Barr*, 972 F.3d 1069 (9th Cir. 2020), deferring to the BIA's definition. Compare this to the Ninth Circuit's ruling for Pen C 118 as a CIMT, discussed in *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir 2016) in above endnote.

[43] The Ninth Circuit held that the minimum conduct to commit § 136.1(a), "knowingly and maliciously" preventing or dissuading a witness or victim from participating in a trial, proceeding, or inquiry, is not a CIMT. *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017), citing cases like *People v. Wahidi* (2013) 222 Cal App 4th 802.

Section 136.1(b)(1) also is not a CIMT, but with an even stronger argument. Section 136.1(a) is not a CIMT despite the fact that it requires knowing and malicious action. Section 136.1(b)(1) has no requirement of knowing or malicious conduct, unless a provision of § 136.1(c) also applies. See, e.g., *People v. Usher* (2007) 144 Cal.App.4th 1311, 1321 and discussion at CALCRIM No. 2622. But even when malice does apply, § 136.1(b) uses the same definition as § 136.1(a) and so is not a CIMT.

The BIA has not held in a precedent opinion that § 136.1(b)(1) is not a CIMT, which means that there is always the chance that the Board would do this, and the Ninth Circuit would defer to that. That seems unlikely, however. See also, e.g., unpublished decision holding 136.1(b)(1) is categorically not a CIMT. *Matter of C-E-P-G-* (BIA Dec. 18, 2018).

[44] An offense that meets the generic definition of obstruction of justice is an aggravated felony under 8 USC § 1101(a)(43)(S), if a sentence of a year or more is imposed. The BIA held that Pen C § 136.1(b)(1) meets this definition. *Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019). In *Cordero-Garcia* at 657-663, the BIA also held that its definition can be applied retroactively to convictions from before Sept. 11, 2018, which was the date the BIA set out the definition in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018).

As of April 2021, *Cordero-Garcia* is pending on appeal before the Ninth Circuit. Immigration advocates have argued that *Cordero-Garcia* was wrongly decided, on both the substance (the BIA's generic definition of obstruction is invalid) and in the alternative on its holding that its definition can be applied retroactively to pre-9/11/2018 convictions.

The Ninth Circuit has held that the BIA's generic definition of obstruction is invalid to the extent it includes interference with a not yet existing but "reasonably foreseeable" proceeding. See *Valenzuela Gallardo v. Barr,* 968 F.3d 1053 (9th Cir. 2020) *("Valenzuela Gallardo II")*; petition for rehearing denied. That decision abrogates part of *Matter of Cordero-Garcia,* which held § 136.1(b)(1) to be obstruction on that very basis.

However, there is a second argument. The BIA's definition of obstruction also includes federal offenses at 18 U.S.C. §§ 1501-1521 and state analogues. The BIA pointed out that 18 USC § 1512 punishes persuading a witness not to provide evidence that a crime occurred. There are two

responses to this argument. First, the Ninth Circuit rejected it, pointing out that this aspect of § 1512 is "the exception that proves the rule" that the generic definition requires an existing proceeding. See *Valenzuela Gallardo II*, 968 F.3d at 1065-66. Second, even if 18 USC § 1512 were used as a generic definition, PC 136.1(b)(1) does not match it. 18 USC § 1512 it requires "knowing use of intimidation, physical force, threats, corrupt persuasion, or misleading conduct" and intentional harassment. See *Matter of Valenzuela Gallardo*, 27 I&N Dec. at 454. Section 136.1(b)(1) entirely lacks the elements of either "corrupt persuasion" or intentional harassment. It does not even require malice. Compare § 136.1(b)(1) with (a) and (c), which do require malice, and see, e.g., *People v. Brackins* (2019) 37 Cal.App.5th 56, 64-67; see also discussion in *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017) (holding that even 136.1(a) is not a CIMT). Thanks to Mike Mehr, counsel on *Cordero-Garcia*, for his insights.

[45] Pen C § 140 as COV. While there is no case on point, Pen C § 140 is a general intent crime with no requirement that the defendant intend to cause fear or to affect the victim's conduct in any way (*People v. McDaniel* (1994) 22 Cal.App.4th 278), and no requirement that the threat be conveyed to the victim in any manner (*People v. McLaughlin* (1996) 46 Cal. App.4th 836). See also CALCRIM 2624. The phrase "force or violence" used in § 140 is the same phrase used in simple battery statutes, which has been determined to include the minimal conduct of offensive touching that causes no pain; this is distinct from the violent physical force contemplated by 18 USC § 16(a) and COVs.

It appears to be indivisible, as there is no authority that a jury must unanimously decide whether the conduct was against a person or property in order to find guilty under § 140. CALCRIM 2624.

Pen C § 140 as obstruction of justice. See Pen C §§ 32 and 136.1(b)(1) for further discussion of obstruction of justice as an aggravated felony, which appears at 8 USC § 1101(a)(43)(S). There is no case on point for whether § 140 is considered an offense related to obstruction of justice as an aggravated felony. Immigration advocates can explore arguments that it is not, but defenders must try hard to avoid a sentence of a year or more on a single count and assume that authorities will be likely to hold that it is.

Using or threatening to use force or violence against, or taking, damaging or destroying the property of, a witness, victim, or other person who provided information or assistance to police or prosecution under § 140 is a general intent crime. There is no requirement that the defendant intended to cause fear to the victim or intended to affect the victim's conduct in any manner, e.g., preventing a witness from cooperating with an investigation or proceeding. *See People v. McDaniel*, 22 Cal.App.4th 278, 282-3 (Ct. App. 2nd Dist. 1994). Section 140 "defines only a description of the particular act of threatening to use force or violence, or taking, damaging, or destroying property, without reference to an intent to do a further act or achieve a future consequence." *Id.* at 284. The victim need not be aware of the threat. CALCRIM 2624; *People v. McLaughlin*, 46 Cal.App.4th 836, 841 (Ct App 6th 1996). Therefore, it does not meet the requirement of specific intent that the BIA consistently has set out, and recently reiterated in *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018) (*Valenzuela Gallardo II).*

But the government may argue that § 140 is obstruction regardless of specific intent, because it comes within the other part of the BIA's generic definition of obstruction: it is a state offense that matches a federal offense described in 18 USC §§ 1501-1521. *Ibid.* Section 140 is broader than 18 USC § 1513(b), which requires either bodily injury (as opposed to § 140 offensive touching) or damage to property (as opposed to § 140 taking or damaging) and includes a greater specific intent element. However, § 1513(e) provides, "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person" is guilty. Immigration counsel can investigate arguments distinguishing the statutes, including the fact that § 140 is a general intent crime, but at the same time should pursue other defense strategies including the possibility of post-conviction relief.

Pen C § 140 a CIMT: Section 140 should not be held a CIMT, but use caution as there is no precedent.

The federal generic definition of a CIMT is a crime involving conduct that is: "(1) vile, base, or depraved and (2) violates accepted moral standards." *Escobar v. Lynch*, 846 F.3d 1019, 1023 (9th Cir. 2017). There is no Ninth Circuit or BIA case on whether § 140 is a CIMT. The Ninth Circuit held that "criminal threats alone, without any attendant serious physical harm, do not necessarily implicate moral turpitude." *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012). A violation of § 140 does not require attendant serious physical harm. The underlying conduct threatened, "force or violence," is not a CIMT and can be distinguished by § 422, proscribing threats of "death or great bodily injury," which is categorically a CIMT. *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012). The threat of "force or violence" in § 140 are terms used in simple assault and battery statutes, which are not categorically CIMT because the required mens rea is the intent to "touch another offensively, not the 'evil' intent typically required for a CIMT." *Id.* at 1161. An assault statute is not a CIMT where it does not include a "specific intent to injure or a special trust relationship and *not* requiring that the assault cause death or even serious bodily injury." *Id.* Section 140 does not involve a specific intent to injure or a special trust relationship, or that if carried out causes serious bodily injury. § 140 does not require the threatened person to be in sustained fear like § 422, rather, the threatened person need not be aware of the threat. CALCRIM 2624. Further, § 140 does not require the intent to prevent the person from providing information to authorities, and even if there were, the Ninth Circuit held that an offense such as Pen C 136.1(a) is not a CIMT. There is no requirement that the prosecution was successful, or the statement was true. Therefore, § 140 should not be considered a CIMT. However, because there is no precedent and because the victim is someone who participated in a proceeding, it is possible that ICE would charge it that way.

[46] Pen C § 148 uses language from the definition of firearm found at § 16250(a) (see CALCRIM 2653) which includes antique firearms. But the government may argue that it is impossible that officers engaged in their duties would be using antique firearms.

[47] **Pen C § 148 as the aggravated felony "obstruction of justice."** An offense that meets the generic definition of obstruction of justice is an aggravated felony if a sentence of one year or more is imposed. 8 USC 1101(a)(43)(S). Getting a sentence of 364 days or less on each count will prevent an aggravated felony (AF) conviction.

Pen C 148(a) is not obstruction of justice under *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) ("*Valenzuela Gallardo II"),* petition for rehearing denied. The Ninth Circuit defines obstruction to require interference with an *ongoing proceeding or investigation*, whereas § 148 includes interference in an initial arrest or in any duty, with no pending investigation or proceeding. This should be the result in immigration proceedings arising within the Ninth Circuit. See further discussion at Pen C § 32.

It is preferable to get 364 days or less on each count, however, because of the risk that the person would end up in immigration proceedings outside the jurisdiction of the Ninth Circuit, either because the person traveled there or the person was detained by ICE and transferred. Some other circuit courts of appeals might adopt the BIA's definition, which is that obstruction can include interference when a proceeding is reasonably foreseeable by the defendant. *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018).

Sections (b)-(d) include additional conduct: taking an officer's weapon or gun. Completing the offense of taking or removing an officer's gun while resisting arrest arguably does not make the offense more likely to constitute obstruction. It is general intent crime. *People v. Matthews*, 70 Cal. App. 4th 164, 175 (Cal. Ct. App. 1999). CALCRIM 2654. *See also* 2 Witkin, Cal. Crim. Law 4th Crimes--Govt § 20 (2012). Removing or taking as used in Pen C § 148 includes conduct such as picking up a dropped gun, and corresponding to "grabbing, holding, seizing, pushing, lifting, picking up, or similar notions." *People v. Matthews*, at 174. This shows that the offense also is not a crime of violence.

[48] There are no cases on whether Pen C § 148.5 is categorically a CIMT. In *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008), the Ninth Circuit held that giving false identification to a peace officer under Pen C § 148.9(a) did not require fraudulent intent and was not categorically a CIMT. The court reasoned that giving false information to a police officer under § 148.9(a) requires a showing that the defendant knowingly misrepresented their identity to a peace officer but does not require that the individual thereby knowingly attempted to obtain anything of value, indicating that fraud was not implicit in the nature of the crime. *Id.* So, the motive for falsely reporting a criminal offense under § 148.5 may render it as a CIMT, especially where it may interfere with an ongoing investigation or proceeding.

In the context of Pen C § 32, the Ninth Circuit held that crimes where the benefit gained is the impediment of law enforcement and avoidance of arrest do not involve moral turpitude. *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007). The purpose of Pen C § 148.5 is to "deter false reports of crimes and *the resulting inconvenience and danger to other members of the public.*" *People v. Craig*, 21 Cal. App. 4th 1 (1993).

[49] *Blanco v. Mukasey,* 518 F.3d 714 (9th Cir. 2008).

[50] A person is deportable under 8 USC § 1227(a)(2)(E)(ii) if a civil or criminal court finds that they violated a portion of a DV order (probation condition, family court order, etc.) that protects against threats, injury, or repeat harassment. The violation must be after admission and after September 30, 1996.

Courts have held that a finding of this type of violation (which we'll refer to as a DV stay-away order) causes deportability even if it is based on very minor conduct, like walking a child up the driveway after visitation rather than leaving them at the curb. See *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009), *Matter of Strydom,* 25 I&N Dec. 507 (BIA 2011).

Immigration authorities can use any probative evidence, including from outside the record of conviction, to establish that a court's finding of violation of a court order is actually a finding of violation of a DV stay-away order, or other portion of a DV order that "involves protection against credible threats of violence, repeated harassment, or bodily injury." The Ninth Circuit earlier had held that the categorical approach applies to this inquiry and that Pen C § 273.6 was a divisible statute. In July 2019 it reversed itself in order to defer to the BIA's interpretation, which is that the categorical approach does not apply to this prong of the domestic violence deportation ground (8 USC 1227(a(2)(E)(ii), as opposed to (E)(i)), since this involves a finding of a violation by either a *civil or criminal* court. See *Diaz-Quirazco v. Barr* (9th Cir. July 23, 2019), deferring to *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399 (BIA 2018) and *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017) and withdrawing from *Alanis-Alvarado v. Holder,* 558 F.3d 833, 835, 839-40 (9th Cir. 2009).

Defense counsel already were advised not to rely on a vague record of conviction under Pen C §§ 166 or 273.6 to protect the defendant. Do not plead to any violation of a DV stay-away order. One can plead to violating a part of a DV order whose purpose is not to protect against threats, injury, or harassment, such, as e.g., conduct relating to child custody, visits, or support, or failure to attend classes. A plea to Pen C § 166(a)(1)-(3) should be safe, but specifically state that this was an event related to the court, as opposed to the DV victim. Or, plead to a new, non-deportable offense with an ROC sanitized of violation of any order. If pleading to a new offense, it is optimal to identify a specific victim who is not protected under DV laws or listed in the DV order (e.g., the ex-wife's new boyfriend, the neighbor, the officer), although this might not be necessary.

[51] 8 USC § 1227(a)(2)(E)(i) does not include the phrase "or conspiracy or attempt to commit the offense." Compare this to controlled substance, firearms, and other inadmissibility and deportability grounds, which do contain that language. Neither does 18 USC § 16(a), the definition of a crime of violence.

Note that the result is different for aggravated felonies. If a conviction of conspiracy to commit a COV has a sentence of more than a year imposed, it will be an aggravated felony, because the AF definition itself includes conspiracy to commit an AF. 8 USC § 1101(a)(43)(U). So, while conspiracy to commit a COV with a year or more imposed arguably cannot be a deportable crime of domestic violence (definition lacks "conspiracy"), assume that it will be an aggravated felony ("conspiracy" is included).

[52] See *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015) (9th Cir. 2015) (gang enhancement under § 186.22(b) does not turn a non-CIMT (possession of a billy club) into a CIMT), declining to follow in this circuit *Matter of E.E. Hernandez*, 26 I&N Dec. 397 (BIA 2015) (vandalism with enhancement, Pen C §§ 594(a), 186.22(d), is a CIMT).

[53] *Gomez Fernandez v. Barr*, 969 F.3d 1077 (9th Cir. 2020).

[54] *Quijada-Aguilar v. Lynch,* 799 F.3d 1303 (9th Cir. 2015) held that Pen C § 192(a) is not a COV because it can be committed by recklessness. The court reaffirmed *US v. Gomez-Leon*, 545 F.3d 777, 787 (9th Cir. 2008) and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (*en banc*), finding that in order to constitute a crime of violence under 18 USC § 16, "the underlying offense must require proof of an *intentional* use of force or a substantial risk that force will be *intentionally* used during its commission" *Quijada* at 306, citing *Gomez-Leon* at 787 (emphasis in original). (Note that the latter point, that a COV may exist if there is a substantial risk that force will be intentionally used during commission of the offense, is no longer applicable because it interpreted the definition of a COV at 18 USC § 16(b). The Supreme Court struck down that section in 2018 in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). See Pen C § 207.)

But in *Borden v. United States* (19-5410), the Supreme Court will decide whether the definition of a COV in the ACCA, which is basically identical to the immigration definition at 18 USC § 16(a), includes reckless conduct. Therefore defenders must conservatively assume that recklessness can amount to a COV, and that § 192(a) may become an aggravated felony as a COV if a year or more is imposed, and may be a deportable crime of DV if the victim and defendant had a protected relationship. (*Borden* takes up the issue presented in *Walker v. United States* (19-373), which was withdrawn when Mr. Walker died.)

[55] CIMT**:** While there is no case on point, Pen C § 192(b) should not be held a CIMT. *In Matter of Tavididishvili*, 27 I&N Dec. 3906 (BIA 2017), the BIA held that New York's offense of criminally negligent homicide is not a CIMT because it can be committed with criminal negligence, and not with the requisite "recklessness" that is the "hallmark" of a CIMT. The BIA noted that New York's criminal negligence standard was indistinguishable from Washington's criminal negligence standard that the BIA had previously held not to be a CIMT, because it occurs when a person merely "fails to be aware" of a substantial and unjustifiable risk, rather than with "a conscious disregard of a substantial and unjustifiable risk." In *People v Penny* (1955) 44 Cal.2d 861, the California Supreme Court in analyzing Pen C § 192 noted that the phrase "without due caution or circumspection" is the equivalent of criminal negligence, and that various cases have found that this standard is more than ordinary civil negligence but does not rise to "wanton or reckless" disregard for human life. Therefore, the California offense, like the New York and Washington offenses, is not a CIMT.

[56] Involuntary or vehicular manslaughter, Pen C § 192(b), (c)(1), (2), is not a COV because it has a *mens rea* of negligence: either "without due caution or circumspection" or "criminal negligence." See discussion in above endnote. The Ninth Circuit held that even voluntary manslaughter committed by recklessness (conscious disregard of a known risk), Pen C § 192(a), is not a COV. *Quijada-Aguilar v. Lynch,* 799 F.3d 1303 (9th

Cir. 2015). If at some point courts interpret the definition of a crime of violence at 18 USC § 16(a) to include recklessness (see discussion at Pen C § 207), that should not include § 192(b), (c).

[57] *Matter of Kim*, 26 I&N Dec. 912 (BIA 2017).

[58] The Ninth Circuit held that a conviction for kidnapping under Pen C § 207(a) is not categorically a crime involving moral turpitude because it can be committed with good or innocent intent when the defendant uses verbal orders to move a person, who obeys for fear of harm or injury if they don't comply. See *Castrijon-Garcia v. Holder,* 704 F.3d 1205 (9th Cir. 2013). Section 207(e) also includes very minor conduct.

[59] **Definition of a crime of violence**. For immigration purposes, a crime of violence (COV) is currently defined at 18 USC § 16(a), which provides: "The term 'crime of violence' means—(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." "Force" has been interpreted to mean violent, aggressive, physical force. It has been held to exclude offenses that can be violated by an offensive touching—for example, Pen C § 243(e)), negligent conduct (e.g., DUI or DUI with injury, absent a special intent requirement), and recklessness (although ICE might assert that recklessness now should be included; see *Voisine*, below). But in *Stokeling*, discussed below, the Court held that if overcoming the resistance of the victim is an element of the offense, as in some robbery statutes, even a minor use of force can qualify.

***Dimaya* and 18 USC § 16(b).** 18 USC § 16 has two parts: § 16(a) and § 16(b). In 2018, the Supreme Court held 18 USC § 16(b) is unconstitutionally vague and can no longer be used. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), upholding *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Section 16(b) states that a *felony* offense is a COV if "by its nature" it involves a "substantial risk" that violence could be used (often, based on what judges thought might happen in an "ordinary case"). With § 16(b) gone, some felony offenses that used to be classed as COVs no longer are. This includes offenses such as felony Pen C §§ 207(a), 243.4, 460(a), 33215 and others, and it bolsters existing arguments that offenses such as Pen C §§ 236/237(a) and 243(d) are not COVs. See also Pen C 136.1(b)(1), 243(e), 460(b), and see discussion of crimes of DV at Pen C § 245 in the chart.

For a more extensive discussion of how these and other California offenses are changed by *Dimaya,* see this advisory (written before *Dimaya,* but analyzing what would happen if § 16(b) were to be struck down): ILRC, *Practice Advisory: Some Felonies Should No Longer Be Crimes of Violence for Immigration Purposes under Johnson v. United States* (2015), available at www.ilrc.org/crimes.

For a discussion of the *Dimaya* decision, including how to assist people whose conviction no longer are classed as COVs, see NIPNLG and IDP, *Sessions v. Dimaya: Supreme Court strikes down 18 USC § 16(b) as void for vagueness* (2018), available at http://nipnlg.org/practice.html.

For a discussion of COVs and the domestic violence deportation grounds, see ILRC, *Case Update: Domestic Violence Deportation Ground* (2018) at www.ilrc.org/crimes.

***Stokeling* and overcoming the victim's will.** The Supreme Court revisited the definition of conviction in *Stokeling v. U.S.*, 139 S.Ct. 544 (2019). The 5/4 majority found that Florida robbery is a crime of violence (COV) under the ACCA, because "overcoming the resistance of the victim" in a robbery involves a confrontation that is inherently violent, even though it can be committed using a very small amount of force. "For example, a defendant who grabs the victim's fingers and peels them back to steal money commits robbery in Florida. But a defendant who merely snatches money from the victim's hand and runs away has not committed robbery." The majority found that the first example is a COV, due to the (minor) force used and the nature of the confrontation, while the second is not.

The majority specifically distinguished this type of "overcome the resistance of the victim" offense from offenses such as battery. It stated that *Stokeling* is consistent, and not in conflict, with *Johnson v. United States*, 559 U. S. 133 (2010), where the Court had held that battery committed with de minimus force is not a crime of violence. "The nominal contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the "unwanted" nature of the physical contact itself suffices to render it unlawful." *Stokeling* at 553.

Based on *Stokeling*, California robbery, Pen C § 211, will likely be charged as a COV. No conviction of Pen C § 236/237 ought to be a crime of violence: the minimum conduct required to commit felony false imprisonment *by force*, taken alone, might be found a crime of violence, but the offense is indivisible between force and the other means: menace (which can be committed by non-violent threat of arrest), deceit, and fraud. The latter three means are not crimes of violence. Likewise, kidnapping under Pen C § 207(a), felony false imprisonment under §§ 236/237, and sexual battery under § 243.4 can be committed by threat of arrest rather than threat of force. But until there is precedent holding that these offenses are not COVs under *Stokeling,* ICE might charge them as COVs, so best practice is to get 364 days or less where possible. See discussion at endnotes to each of these offenses. (Pen C § 207 is discussed in the next endnote.)

***Borden (formerly Walker), Voisine,* and Recklessness**. Courts have long held that an offense with an element of recklessness is not a crime of violence, but this could change as the Supreme Court takes up the issue in *Borden v. United States* (19-5410). (The issue had been presented in *Walker v. United States,* No. 19-373, but the case was withdrawn after Mr. Walker's death.) The Court will hear argument in November 2020. If it finds that reckless conduct can be a COV, then California offenses such as Pen C § 192(a) or § 246 could be affected. Earlier the Court held that recklessness could be an element of a different federal definition, for a federal crime of domestic violence, but it had specifically stated that this offense was not the same as 18 USC § 16. See discussion of *Voisine v. United States*, 136 S.Ct. 2272 (2016), in NIPNLG/IDP, *Practice Alert: Voisine v. United States* (2016), available at http://nipnlg.org/practice.html.

[60] **Pen C § 207 as a COV.** The Ninth Circuit held that Pen C § 207(a) is not a crime of violence (COV) under 18 USC § 16(a) because it lacks as an element the use of violent force and can be committed by "any means of instilling fear," including means other than force. *Delgado Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012). The court also cited precedent holding that kidnapping by fraud under § 207(d) does not meet the § 16(a) definition. See *United States v. Lonczak*, 993 F.2d 180, 183 (9th Cir. 1993), considering a federal standard identical to 18 USC § 16(a), cited at *Delgado-Hernandez,* 697 F.3d at 1128. The Supreme Court struck down the definition of a COV under 18 USC § 16(b). See discussion of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), in above endnote.

Arguably Pen C § 207(a) is not a COV under *Stokeling v. U.S.*, 139 S.Ct. 544 (2019), discussed in the above endnote. *Stokeling* held that, due to the nature of the confrontation, use of even minor force to overcome the will of the victim in a robbery is a COV. Kidnapping can involve overcoming the will of the victim, but California kidnapping can be committed by threat of conduct that involves *no* force or threat of force, for example the threat of arrest. See, e.g., *People v. Majors* (2004) 33 Cal.4th 321 (threat of arrest satisfies force or fear requirement for kidnapping). See further discussion of Pen C § 207(a) kidnapping and 18 USC § 16(a) (written before *Stokeling*) in ILRC, *Crimes of Violence and Johnson v. United States* (August 2016) at www.ilrc.org/crimes.

[61] Robbery under Pen C § 211 has been held an aggravated felony as theft if a sentence of a year or more is imposed. *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017); *United States v. Martinez-Hernandez*, 912 F.3d 1207 (9th Cir. 2019), regarding theft under 8 USC 1101(a)(43)(G).

Pen C § 211 also might be charged as an AF as a COV, under 8 USC 1101(a)(43)(F). The Ninth Circuit held that Pen C § 211 is not a COV under a definition identical to 18 USC § 16(a), because the use of force can be by accident. *U.S. v. Dixon,* 805 F.3d 1193, 1197 (9th Cir. 2015) (conviction of robbery upheld where thief accidentally hit the owner while driving the car away). However, the Supreme Court now is considering whether a reckless intent is sufficient for a crime of violence, and such a finding could overturn *Dixon*. See *Borden v. United States* (19-5410), decision pending. Note that while § 211 can be committed by *de minimus* force, which ordinarily is not sufficient for a crime of violence, the Supreme Court found that if an offense such as robbery requires even *de minimus* force to "overcome the resistance of the victim," it is a crime of violence. *Stokeling v. U.S.*, 139 S.Ct. 544 (2019). See discussion at Pen C § 207, above. The COV issue may not have much practical consequence for Pen C § 211, however, since a sentence of one year or more already makes it an AF as a theft offense.

[62] Immigration advocates can consider this untried defense: While traditionally robbery has been held a CIMT, and PC § 211 has been so held, the Ninth Circuit found that Oregon robbery is not a CIMT because it can involve a temporary taking and only a small amount of force. *Barbosa v. Barr,* 926 F.3d 1053 (9th Cir. 2019). Like Oregon robbery, PC § 211 requires only de minimus force. See, e.g., *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246 (robber tapped the victim on the shoulder to distract her and then took money from open cash register); *People v. Mullins* (2018) 19 Cal.App.5th 594 (robber pushed or nudged victim from in front of an ATM and took money). See finding in *U.S. v. Dixon,* 805 F.3d 1193, 1197 (9th Cir. 2015) that the use of force for Pen C § 211 can be by accident. However, while Oregon robbery explicitly includes intent to deprive temporarily, which is not a CIMT, California robbery has been held to require intent to deprive permanently, which is a CIMT. Advocates could investigate the possibility that robbery employs the definition of "theft" in PC 484 to describe the taking, and therefore under *Silva v. Barr,* 965 F.3d 724, 731 (9th Cir. 2020), robbery convictions from before Nov. 16, 2016 should not be held CIMTs as theft because the term intent to deprive permanently actually includes mere substantial erosion of property rights. See discussion of *Silva* at PC 484, below. As always, while litigating this untried argument, advocates should investigate other defense strategies including the possibility of post-conviction relief.

[63] **PC 215 as an AF as theft**. See Pen C § 211.

PC 215 as an AF as a COV. DHS might assert that in *U.S. v. Baldon,* 956 F.3d 1115, 1121 (9th Cir. 2020), the Ninth Circuit effectively held that PC 215 is a COV under 18 USC § 16(a) -- or in any event, will assert that that is the correct analysis. Their approach is very likely to win, but advocates can explore arguments against it, for example that the *Baldon* statements are *dicta* or should be reviewed *en banc*. As always, at the same time as pursuing such arguments advocates should investigate other defense strategies, including the possibility of post-conviction relief.

In sum: In 2018 the Ninth Circuit held that PC 215 is not a COV under 18 USC § 16(a), because 215 can be committed by using de minimus force. *Solorio-Ruiz v. Sessions* 881 F.3d 733, 737 (9th Cir. 2018). In 2019, the Supreme Court held that even de minimus force can be a COV, if the offense requires use of that force to overcome the resistance of the victim. *Stokeling v. U.S.,* 139 S.Ct. 544 (2019). In 2020, the Ninth Circuit in *U.S. v. Baldon, supra,* considered whether *Stokeling* required a finding that PC 215 actually is a COV because it requires overcoming resistance of the victim. *Baldon* concerned a definition of COV found at U.S. Sentencing Guideline 4B1.2(a)(1), which is an offense that "has as an element the use, attempted use, or threatened use of physical force against the *person* of another …." That language tracks the definition used for immigration purposes, at 18 USC 16(a), except that 16(a) includes use of force against person *or property*. *Baldon's* actual ruling looks good: it holds that PC 215 is *not* a COV under USSG 4B1.2(a)(1). However, it held that only because of the person versus property issue: the USSG section requires violence against a person, while PC 215 is overbroad and indivisible in that it includes violence against person *or property.* In the discussion in *Baldon,* the Ninth Circuit stated that PC 215 does meet the definition of "force" set out in *Stokeling,* and thus that *Stokeling* had overruled *Solorio-Ruiz*.

PC 215 as a crime of DV. For what it is worth, even if PC 215 is committed against a victim who has a domestic relationship with the defendant, a conviction should not be held a deportable "crime of domestic violence" under INA 237(a)(2)(E)(i). Advocates assert that under the plain language of the deportation ground, a crime of DV is a COV that is committed against a *person*, not against property. (INA 237(a)(2)(A)(i) provides in part: "the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18) against a person …" Arguably, just as *Baldon* held that PC 215 does not fit the full definition of USSG 4B1.2(a)(1), it should hold that it cannot fit the definition of a deportable "crime of domestic violence."

[64] **Felony Pen C § 237 is indivisible** (not divisible).

Section 237(a) makes false imprisonment "effected by violence, menace, fraud, or deceit" a felony rather than a misdemeanor. Section 237(a) should not be held divisible between these means of committing the offense, because a jury is not legally required to unanimously agree upon which of these was used. See CALCRIM 1240 and see *People v. Henderson* (1977) 19 Cal. 3d 86, 95 (Section 237(a) does not set out four separate crimes; there is "no basis for severing false imprisonment by violence or menace from the offense of felony false imprisonment; the Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit."), partially reversed on other grounds by *People v. Flood* (1998) 18 Cal 4th 470, 484. The Ninth Circuit suggested in dicta that § 237(a) is divisible, but it did not cite to any California analysis of the elements or undertake a federal divisibility analysis according to Supreme Court or Ninth Circuit precedent. *Turijan v. Holder,* 744 F.3d 617, n. 7 (9th Cir. 2014).

Pen C § 237(a) by force or menace carries the same or fewer immigration consequences as kidnapping, Pen C § 207(a). Felony false imprisonment is a lesser included offense of kidnapping by force or fear, Pen C § 207(a). See, e.g., *People v. Apo* (1972) 25 Cal.App.3d 790, 796). Because kidnapping has been held not to be a COV or CIMT, Pen C § 237 by force or menace is not either.

Pen C § 237(a) as a crime of violence (COV). The Ninth Circuit held that Pen C § 207(a) (of which § 237(a) is a lesser included offense) is not a COV under 18 USC § 16(a), because § 207(a) lacks as an element the use of violent force and can be committed by "any means of instilling fear," including means other than force, for example by threatening to arrest the person. *Delgado Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012). Kidnapping by fraud under § 207(d) also is not a COV under the § 16(a) definition. See *United States v. Lonczak*, 993 F.2d 180, 183 (9th Cir. 1993), considering a federal standard identical to 18 USC § 16(a), cited at *Delgado-Hernandez,* 697 F.3d at 1128. Because § 237(a) is a lesser included offense of 207(a), it also is not a COV.

Regarding Pen C § 237 itself, the term "violence" used for felony false imprisonment has a specific definition, which does not require actual violence but just that "the force used is greater than that reasonably necessary to effect the restraint." *People v. Castro* (2006) 138 Cal. App. 4th 137, 140. In *Castro,* the court found that evidence that the defendant took the victim by the arm and pulled her a few steps toward his car, as opposed to simply holding her still, before she ran away was sufficient to support a conviction for false imprisonment by violence. "In the present case, appellant grabbed the victim and turned her around. If that is all that had happened, we would agree with appellant that his conduct amounted only to misdemeanor false imprisonment. But appellant pulled her toward his car, an act more than what was required to stop her and keep her where she was located." *Id.* at 143-144. Generally, this level of *de minimus* force has been held not to be a COV under 18 USC § 16(a). However, the Supreme Court's decision in *Stokeling v. U.S.*, 139 S.Ct. 544 (2019) increases the risk that ICE may wrongly charge felony 236/237 as a COV. The Court held that Florida robbery is a COV under the ACCA definition (which is nearly identical to 18 USC 16(a)) because it requires sufficient force to "overcome the resistance of the victim"—even though that can involve a low level of force, such as the force required to grab something

while the victim briefly holds on. ICE might charge that under *Stokeling*, felony false imprisonment, Pen C §§ 236/237(a), is a COV if it is committed by "violence," on the grounds that this requires an application of force (no matter how minor) that is sufficient to overcome the will of the victim. Advocates should assert that even if that conduct were found to meet the definition of a COV, no conviction of §§ 236/237 can be a COV because the statute is indivisible between the four means, and the minimum conduct required for guilt is not a COV. But to further protect the defendant, who may be unrepresented and unable to present this argument, criminal defense counsel should plead specifically to menace or deceit rather than force in a felony case.

False imprisonment committed by fraud or deceit is not a COV even post-*Stokeling*. See, e.g., *U.S. v. Lonczak, supra,* holding that kidnapping effected by fraud under Pen C § 207 is not a COV. False imprisonment committed by menace also is not a COV because there is no requirement that the menace be threat of force. For example, it can include threat of arrest (*People v. Moore* (1961) 196 C.App.2d 91, 99); see also *People v. Majors* (2004) 33 Cal.4th 321 (threat of arrest satisfies force or fear requirement for kidnapping). See also discussion of *People v. Islas* (2012) 210 Cal.App.4th 116 in *Turijan v. Holder,* 744 F.3d 617, 621-622 (9th Cir. 2014), holding that Pen C § 237(a) by menace is not a CIMT, because it was accomplished when the defendants hid from the police in another's apartment but did not use weapons, did not make threats, did not touch the victims, and expressly stated they would not harm the victims).

Pen C § 237 as a CIMT. The Ninth Circuit held that a conviction for kidnapping under Pen C § 207(a) is not categorically a CIMT because it can be committed with good or innocent intent, and without the intent to instill fear in the victim, when the defendant uses verbal orders to move a person who obeys for fear of harm or injury if they don't comply. See *Castrijon-Garcia v. Holder,* 704 F.3d 1205, 1209 (9th Cir. 2013). Because § 237(a) by means of violence or menace is a lesser included offense of § 207(a), it also is not a CIMT.

Specifically concerning § 237(a), a conviction for felony false imprisonment committed by menace is not a CIMT. It is a general intent crime that does not require an evil purpose. It does not require the threat or use of violent force. The Ninth Circuit found that § 237(a) by menace is not a CIMT because it encompasses conduct such as hiding in another's apartment from the police where the defendants did not use weapons, did not make threats, did not touch the victims, and expressly stated they would not harm them. *Turijan v. Holder,* 744 F.3d 617, 621-622 (9th Cir. 2014).

As discussed in the crime of violence section above, false imprisonment by violence does not require actual violence, but requires only that "the force used is greater than that reasonably necessary to effect the restraint," including grabbing the victim's arm and moving her a few feet. See discussion above of *People v. Castro*, 138 Cal. App. 4th 137, 140 (Cal. App. 2d Dist. 2006). Pulling someone a few feet by the arm is similar to conduct required for a simple battery. Simple battery has been held not to rise to the level of a CIMT, even when the defendant and victim shared a position of trust such as being married. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).

While false imprisonment with intent to defraud might be a CIMT, intent to deceive is not necessarily a CIMT. It can be done in a misguided attempt to do good. See, e.g., *People v. Rios* (1986) 177 Cal.App.3d 445 (father convicted of felony false imprisonment by deceit for taking infant to Mexico because he believed mother was seriously neglectful).

The Ninth Circuit held that false imprisonment under Hawaiian law is a CIMT, but that offense is defined as "knowingly restrain[ing] another person under circumstances which expose the person to the risk of serious bodily injury." Haw. Rev. Stat. § 707-721(1). See *Fugow v. Barr*, 943 F.3d 456, 458 (9th Cir. 2019) (distinguishing Hawaii false imprisonment from California burglary, which is not a CIMT).

[65] *Saavedra-Figueroa v. Holder,* 625 F.3d 621 (9th Cir. 2010).

[66] See, e.g., *Matter of Perez-Contreras,* 20 I&N Dec. 615 (BIA 1992); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989).

[67] **Deportable crime of child abuse.** Conviction of a crime of child abuse, child neglect, or child abandonment is a ground of deportability under 8 USC § 1227(a)(2)(E)(i). The BIA interprets abuse, neglect, and abandonment as one category, which we will refer to as a "crime of child abuse." To be deportable, the person must have been convicted after admission to the United States and after September 30, 1996. For further discussion of crimes of child abuse see ILRC, *Case Update: Domestic Violence Deportation Ground* (2018) at www.ilrc.org/crimes.

Some but not all offenses with minor age as an element are held to be deportable crimes of child abuse. For example, Pen C § 273a(a) will be charged as a deportable crime of child abuse (but immigration advocates can contest this), while the BIA has stated that § 273a(b) is not. See *Matter of Mendoza Osorio*, 26 I&N Dec. 703, 710 (BIA 2016). Attorney General Barr has requested amicus briefing on the issue of whether an offense such as Pen C § 261.5(c) is a crime of child abuse; see https://www.justice.gov/eoir/page/file/1215241/download

Police posing as minors. The BIA held that the generic definition of a deportable crime of child abuse under 8 USC 1227(a)(2)(E)(i) requires a child as the victim, not a police officer posing as child. See *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 782, 794 (BIA 2020), citing *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008) (holding that a "crime of child abuse" is an offense that "constitutes maltreatment of a child").

Age-neutral offenses. Under the categorical approach, an *age-neutral offense*—e.g., battery under Pen C § 243(a)—never can be a deportable crime of child abuse. The problem is that immigration judges or officers may not know this, due to an older BIA decision that misapplied the categorical approach and held that if the record of conviction conclusively shows that the victim was under age 18, it can qualify. See *Matter of Velazquez-Herrera*, below. Immigration advocates should be prepared to explain the law, and criminal defenders should do their best to avoid the whole issue by keeping information about minor age out of the defendant's record of conviction (the charge pled to, plea colloquy and written plea agreement, judgment, and any factual basis for the plea admitted by the defendant).

The explanation is: The categorical approach governs whether an offense is a deportable crime of child abuse. See, e.g., *Velazquez-Herrera,* 24 I&N Dec.503 (BIA 2008); *Martinez-Cedillo v. Sessions*, 896 F.3d 979 (9th Cir. 2018). In *Velazquez-Herrera* the BIA held that a simple battery statute, which had no element relating to age, was "divisible" under the categorical approach. The BIA held that if information in the record of conviction establishes that the victim was under age 18, the conviction is a deportable crime of child abuse. However, this aspect of *Velazquez-Herrera* has been overruled by subsequent U.S. Supreme Court decisions that discuss when a statute is "truly" divisible—rulings that the BIA has adopted. These decisions make clear that a statute is divisible only if it sets out multiple statutory alternatives that are different offenses, and the elements of at least one of these offenses matches the generic definition at issue. See discussion of *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Matter of Chairez,* 27 I&N Dec. 21 (BIA 2017) at n.4, above, and see ILRC, *How to Use the Categorical Approach Now* (2018) at www.ilrc.org/crimes. Because an age-neutral statute has no element (or even statutory language) requiring minor age, it is not divisible and never can be a deportable crime of child abuse for any immigration purpose, regardless of information in the record.

Remember that to cause deportability under this ground, a conviction must be after September 30, 1996 and after the person was admitted into the United States. For further discussion of crime of child abuse see ILRC, *Case Update: Domestic Violence Deportation Ground* (2018) at www.ilrc.org/crimes.

[68] The minimum conduct to commit assault under Pen C § 240 and battery under Pen C § 242 is an offensive touching, which is not a crime of violence or crime involving moral turpitude. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Ortega-Mendez v. Gonzales*, 450 F.3d

1010, 1016 (9th Cir. 2006) (noting that the phrase "force or violence" is a term of art that does not set out alternative types of conduct; the words are synonymous and can be committed by an offensive touching).

These sections must be evaluated solely based on the minimum prosecuted conduct, because they are not divisible. Prior precedent holding such statutes to be divisible has been overturned by the Supreme Court. See Categorical Approach Advisory and see, e.g., discussion in *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013) (after *Descamps, supra*, the resisting arrest statute is no longer divisible because it is not phrased in the alternative: if minimum conduct is not a crime of violence, no conviction of the offense is a crime of violence); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). The phrase "force or violence" is a term of art that does not set out alternative types of conduct. See, e.g., *Ortega-Mendez, supra*.)

[69] A CIMT occurs if there is intent to cause great bodily harm. Section 243(c) is a general intent crime that can be caused by a harmful or offensive touching and does not require intent to harm, cause injury, or break the law. See CALCRIM 945. California battery with injury offenses focus on the resulting injury, even if the defendant caused it negligently. See, e.g., *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006) (defendant who kicked over large ashtray which hit officer is guilty of § 243(c)(2) even if he believed it would not hit the officer). For that reason, similar offenses such as Pen C § 243(d) have been held not to involve moral turpitude. But note that in *U.S. v. Perez* (9th Cir. July 1, 2019) the court (wrongly) held that the minimum conduct to commit 243(d) is violent force, and therefore the offense is a COV. See further discussion at Pen C § 243(d).

[70] Considering a federal sentencing provision that is identical to 8 USC § 16(a), the Ninth Circuit held that that because Pen C § 243(c)(2), battery with injury on a police officer, involves a battery that results in an injury requiring medical attention, it must require force sufficient to be a crime of violence. *U.S. v. Colon-Arreola*, 753 F.3d 841, 845 (9th Cir. 2014). However, the court did not acknowledge or discuss the fact that the minimum conduct to commit the offense is a mere *harmful or offensive* touching that causes injury, even if injury was neither likely nor intended to occur. CALCRIM 945. *Colon-Arreola* relied on *U.S. v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. Cal. 2010), which held that § 273.5 is a COV because it requires the direct application of force sufficient to cause injury. *Id.* at 845. However, *Laurico-Yeno* specifically noted that Pen C § 273.5 "does not penalize minimal, non-violent touchings." *Id.* at 822. *Colon-Arreola* did not consider *People v. Hayes*, 142 Cal. App. 4th 175, 180 (Cal. App. 2d Dist. 2006), discussed in endnote above, or the California cases that establish that § 243(d) (which appears to have the same force requirement as § 243(c)(2)) does penalize mere offensive touching. See § 243(d). However, in *U.S. v Perez,* 932 F.3d 782 (9th Cir. 2019), the Ninth Circuit relied on *Colon-Arreola* to make the same mistake with Pen C 243(d). See endnotes to § 243(d) and see Practice Advisory on *U.S. v. Perez* and § 243(d) and www.ilrc.org/crimes.

[71] Section 243(d) should not be held a CIMT because, although it is a battery resulting in serious injury, it can be committed by a touching that was neither intended nor likely to cause such an injury. However, the Ninth Circuit held (arguably incorrectly) that the minimum conduct involves actual violence and therefore it is a COV. See discussion of *US v. Perez,* 932 F.3d 782 (9th Cir. 2019) at next endnote. Because of *Perez*, ICE may assert that this is a CIMT. Immigration advocates should fight this, but criminal defenders may need to seek another offense, e.g., 136.1(b)(1) of 459/460(a) if a strike is needed. See also Practice Advisory on *U.S. v. Perez* and § 243(d) and www.ilrc.org/crimes.

CALCRIM 925 provides that § 243(d) requires a touching only in a "harmful or offensive manner…. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage." The statute's purpose is to punish based on the injury caused, not the level of force; it punishes even non-violent force that for some reason results in injury. For this reason, it was held not to be a CIMT for state purposes. *People v. Mansfield,* 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988) (not a CIMT because "the least adjudicated elements of battery resulting in serious

bodily injury do not necessarily involve force *likely* to cause serious injury" (emphasis in original)). See also *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) and discussion in above endnote.

The BIA recognized that § 243(d) is not a CIMT. See *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision. (BIA "Indexed" decisions are not precedent decisions but are intended to provide guidance to government. Formerly, Indexed decisions were available to the public on the BIA website). *Muceros* held that because the minimum conduct to commit Pen C § 243(d) is touching without intent, it is not a CIMT. *Muceros* was cited in *Uppal v. Holder*, 605 F.3d 712, 718-719, 718-719 (9th Cir. 2010), holding that a Canadian statute that did not require intent to harm similarly is not a CIMT.

[72] In *U.S. v. Perez,* 932 F.3d 782 (9th Cir. 2019) the court found that Pen C § 243(d) is categorically a COV, because the defendant did not demonstrate a "realistic probability" that 243(d) would be used to prosecute an offensive touching that caused injury, as opposed to use of violent force that caused injury. A petition for reconsideration and for rehearing *en banc* in *Perez* was denied.

This is a flawed decision that advocates will fight, but it is the law now. For further discussion, including preliminary suggestions for bases for appeal in immigration proceedings, see ILRC, *Practice Advisory: Fighting U.S. v. Perez-Ninth Circuit holds PC 243(d) is a COV* (Aug. 6, 2019) at www.ilrc.org/crimes. Defense counsel should obtain a plea other than § 243(d). Immigration advocates should contest the decision and preserve the issue on appeal, and contact ILRC if they would like assistance.

In sum, the definition of COV at 18 USC § 16(a) requires that the threat or use of force—meaning violent force—must be an element of the offense. See, e.g., *Johnson v. U.S.*, 559 U.S. 133 (2010); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006); *Matter of Guzman-Polanco*, 26 I&N Dec. 806, 807 (BIA 2016) where the BIA stated that under *Johnson,* "a statute that covers any application of physical force, however slight, that may cause physical injury" cannot be held a crime of violence.)

In *Perez* the panel disregarded analysis in multiple California precedent decisions finding that the minimum conduct for § 243(d) is minimal, non-violent force that nevertheless ends up causing an injury. See, e.g., *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978), where the court relied on the plain meaning of the statute and found that the legislature created Pen C § 243(d) to have this minimum conduct, in order to fill a gap in the law; *People v. Marshall* (1987) 196 Cal. App. 3d 1253, 1260, where the court refused to limit section 243(d) to use of violent force, and found that it reaches even an innocuous touching that ends up causing injury; and *People* v. *Mansfield* (1988) 200 Cal.App.3d 82, 88-89, which held that § 243(d) is not a crime involving moral turpitude under state law, based upon the fact that it can be committed by an offensive touching. "The average person walking down the street would not believe that someone who [merely] pushes another is a culprit guilty of moral laxity or 'general readiness to do evil,' even if the push was willful and results in serious injury." *People* v. *Mansfield* (1988) 200 Cal.App.3d 82, 88-89. See also CALCRIM 925.

The court disregarded these California decisions on the grounds that they did not themselves involve an instance of use of minimal force. It apparently was unaware of other cases where § 243(d) has been used to prosecute conduct involving minimal force that causes injury. See, e.g., *People v. Myers*, (1998) 61 Cal. App. 4th 328 (victim yelled and poked at defendant and defendant pushed victim away defensively; victim slipped and fell on wet pavement and was injured); *People v. Finta*, 2012 Cal. App. Unpub. LEXIS 7488 (Cal. App. 1st Dist. Oct. 17, 2012) (defendant "shoved" a man on his bicycle when he thought that the cyclist had stolen his personal property; cyclist fell and was injured). See also *People v.*

Hayes, 142 Cal. App. 4th 175 (Cal. App. 2d Dist. 2006) (defendant kicked a large ashtray, which fell over and hit an officer's leg causing a cut and bruising; guilty of Pen C 243(c)(2)).

The *Perez* team did not submit these critical cases to the court for the original decision, and the court denied petitions for rehearing. However, advocates can submit these cases in new decisions and courts must take notice of them.

The *Perez* panel also cited *Stokeling v. United States*, 139 S.Ct. 544 (2019), although *Stokeling* specifically provides that its standard does not apply to a battery by an offensive touching. See discussion of *Stokeling* in the practice advisory on *Perez* cited above, and see also ILRC, *Practice Advisory: Stokeling v. United States: Supreme Court Defines Crime of Violence* (January 2019) at www.ilrc.org/crimes.

[73] Section 243(e), battery against a spouse, is not a COV. It uses the same definition of battery as § 243(a), which is not a COV; see endnote on § 243(a), above. Multiple cases have found that Pen C § 243(e) can be committed by an offensive touching, which is neither a COV nor a CIMT. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) While *Matter of Sanudo* found that § 243(e) was divisible depending upon the level of violence shown in the record of conviction (*ibid.),* in fact the statute is not divisible under the standard set out by the Supreme Court in *Mathis* and *Descamps*, and must be evaluated solely based on the minimum conduct ever prosecuted. See, e.g., discussion in *U.S. v. Flores-Cordero,* 723 F.3d 1085 (9th Cir. 2013) (after *Descamps, supra*, the resisting arrest statute is no longer divisible because it is not phrased in the alternative; if the minimum conduct is not a crime of violence, no conviction of the offense is a crime of violence). Therefore, no conviction of 243(e) is a COV or CIMT, for purposes of deportability, inadmissibility, or eligibility for relief. See more on the categorical approach at n. 4, above.

[74] Pen C. § 243.4 has been held a CIMT. *Gonzalez Cervantes v. Holder*, 709 F.3d 1265 (9th Cir. 2013). In his dissent, Judge Tashima noted that 243.4(e) has been expanded to include cases in which the intent was to insult, and should be held to reach non-turpitudinous conduct, citing *In re Shannon T*., 50 Cal. Rptr. 3d 564 (Ct. App. 2006), *In re Carlos C*., 2012 WL 925029 (Cal. Ct. App. 2012).

[75] Pen C § 243.4 should not be held a COV. The Ninth Circuit held that the minimum prosecuted conduct to commit § 243.4 does not meet the definition of crime of violence under a federal definition identical to the one used in 18 USC § 16(a), because the touching can be ephemeral and not by force, and the restraint can be psychological and not threatening force—for example, by threat of arrest. See, e.g., *U.S. v. Lopez-Montanez*, 421 F.3d 926, 929 (9th Cir. 2005) ("[T] he restraint need not be physical and can be accomplished by words alone, including words that convey no threat of violence," citing *People v. Grant* (1992) 8 Cal. App. 4th 1105, 10 Cal. Rptr. 2d 828, 830-33 , where § 243.4 conviction was upheld when defendant restrained trespassing victim by saying he worked with the police and the owner of the property); see also *U.S. v. Espinoza-Morales*, 621 F.3d 1141 (9th Cir. 2010) (neither Pen C 243.4 nor 289(a)(1) are COVs under 18 USC § 16(a)). While *Lopez-Montanez* found that felony § 243.4 meets a different definition of COV at 18 USC § 16(b), the Supreme Court held that the § 16(b) definition is unconstitutionally vague and no longer can be applied. *Sessions v Dimaya*, 138 S Ct 1204 (2018).

The fact that the restraint can be accomplished with no use of force, including threat of arrest, should overcome a charge that this is a COV under *Stokeling v. U.S.*, 139 S.Ct. 544 (2019. There Supreme Court held that an offense that has as an element overcoming the resistance of a victim by use of force is a COV, even if the force can be quite minor. Arguably an offense that requires *no* physical force cannot be a COV under 18 USC 16(a), however. See discussion of *Stokeling* at Pen C 207, above.

[76] See, e.g., *U.S. v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018), *United States v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015).

[77] The Ninth Circuit *en banc* reversed past precedent and remanded to the BIA to decide in the first instance whether § 245(a)(1) is a crime involving moral turpitude, in light of changes in state and federal law. *Ceron v. Holder,* 747 F.3d 773 (9th Cir 2014) (*en banc*). The BIA reaffirmed its opinion that all subsections of § 245(a) are CIMTs. *Matter of Wu,* 27 I&N Dec. 8 (BIA 2017). Subsequently the court deferred to the BIA and held that essentially all of § 245(a) is a CIMT, when it deferred to the BIA's holding that a previous version of 245(a)(1), which had included what now is in 245(a)(1)-(4), was categorical a CIMT. *Safaryan v. Barr*, 975 F.3d 976 (9th Cir. 2020) (defers to BIA's holding that former Pen C § 245(a)(1) which prohibited "assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury" is categorically a CIMT).

[78] **Deportable crime of domestic violence**. To prove that an offense is a deportable "crime of domestic violence," ("crime of DV"), ICE must prove that the offense is a crime of violence (COV) under 18 USC § 16(a), *and* that the victim and defendant share a qualifying domestic relationship as set out in the deportation ground. That is defined as, among other things, any relationship protected under domestic violence laws of the state. See INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i). In California, this includes former dates or former co-habitants.

There is conflicting precedent about what evidence may be used to prove this relationship. Defenders should conservatively assume that ICE will be able to use any evidence, including testimony or other evidence from outside the record of conviction. This is the BIA's view. See *Matter of H. Estrada*, 26 I&N Dec 749 (BIA 2016). Defenders should *not* plead to a COV where the defendant and victim actually share a relationship, and trust that by keeping the record of conviction vague as to the victim the conviction will not be held a crime of DV. Instead they should either plead to a COV with a specific, non-protected victim (the neighbor, police officer, ex-wife's new boyfriend, etc.); to a COV against property; or if there is a protected relationship, plead to a non-COV (see suggestions below). If pleading to a COV, do not take a sentence of one year or more on a single count, or it will become an aggravated felony.

In dealing with a prior conviction where this was not done, removal defense advocates can cite current Ninth Circuit law holding that the protected relationship can be proved only with evidence from the reviewable record of conviction (charge pled to, plea colloquy or written agreement, judgment, and factual basis for the plea). See *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006). The risk here is that while this is good law now, in the future the Ninth Circuit may agree to adopt the BIA's rule in *Matter of Estrada*, as some other federal courts of appeals have.

There are many offenses—ranging from misdemeanors to strikes—that are appropriate substitutes in a DV situation and that are not COVs, and that therefore will not create a deportable crime of domestic violence. A defendant could plead to committing the following against her husband without it being a deportable crime of DV: felony or misdemeanor §§ 32, 136.1(b)(1), 243(e), 460(a), 594, and probably 236/237 and 207. The Ninth Circuit (wrongly) held that 243(d) is a COV; see that section. The misdemeanor/ felony/strike designation does not matter, but only some of these offenses can take a sentence imposed of a year or more. See individual offenses in the chart.

To cause deportability under this ground, the conviction must be from on or after September 30, 1996 and after the person was admitted into the United States. For further discussion see ILRC, *Case Update: Domestic Violence Deportation Ground* (2018) at www.ilrc.org/crimes.

[79] See *Matter of Muceros*, (BIA 2000), Indexed Decision, *supra.*

[80] Conviction of an offense involving a "firearm" as defined under federal law can trigger deportability under the firearms ground. 8 USC § 1227(a)(2)(C). In general, if the federal definition of firearm is met, some state firearms offenses are aggravated felonies, including trafficking in

firearms, and some state analogues to federal firearm offenses, such as being a felon in possession, also are. 8 USC § 1101(a)(43)(C). However, the federal definition of firearm specifically excludes an antique firearm, defined as a firearm made in 1898 or earlier plus certain replicas. 18 USC § 921(a)(3), (16). Under the categorical approach, conviction of a California firearms offense does *not* come within the firearms deportation ground, and is not a firearms aggravated felony, if antique firearms ever have been prosecuted under that statute—even if a non-antique firearm was used in the defendant's own case. *U.S. v. Aguilera-Rios,* 769 F.3d 626 (9th Cir. 2014). Significantly, the *Aguilera-Rios* rule applies to any conviction under any California statute that uses the definition of firearm at § 16520(a), formerly § 120001(b). *Medina-Lara v. Holder,* 771 F.3d 1106, 1116 (9th Cir. 2014) ("We hold that *Aguilera-Rios* applies to any California statute based on the definition of 'firearm' formerly appearing at § 120001(b)." Note that in 2012, the definition of firearms at § 12001(b) was moved to § 16520(a), with no change in meaning.

[81] In *Covarrubias-Teposte v. Holder,* 632 F.3d 1049, 1054-55 (9th Cir. 2011), the court held that because Pen C § 246 is committed by recklessness it is not a crime of violence. The opinion by Judge Gould (with Judges O'Scannlain and Ikuta) also criticized the precedent that precludes all reckless offenses from being a COV. The Supreme Court will consider whether recklessness can amount to a COV in *Borden v. United States* (19-5410) (formerly *Walker v. United States*.) The Court will hear argument in November 2020. It will decide whether the definition of a COV in the ACCA, which is basically identical to the immigration definition of COV at 18 USC § 16(a), includes reckless conduct. Pending this decision, defenders must conservatively assume that recklessness can amount to a COV. See further discussion of the COV definition at the endnote to Pen C § 207, above.

[82] See *U.S. v. Coronado*, 603 F.3d 706 (9th Cir. 2010) finding that Pen C § 246.3 is not a COV under 18 USC § 16(a) (or even under § 16(b), which has since been struck down; see Advice to Pen C § 207). In contrast to Pen C § 246, section 246.3 should not be controlled by the pending Supreme Court case, *Borden* (see endnote above), which has to do with whether recklessness is a COV. "Gross negligence" in § 246.3 does not require recklessness, a conscious disregard of a known risk. See, e.g., *People v. Overman* (2005) 126 Cal.App.4th. Thus, even if the Supreme Court decides that the definition of crime of violence at 18 USC § 16(a) includes recklessness, it appears that this won't affect § 246.3.

[83] See, e.g., *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000), finding that 261(a)(3) is the AF rape.

The BIA held that rape encompasses an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight. It requires that the underlying sexual act be committed without consent, which may be shown by a statutory requirement that the victim's ability to appraise the nature of the conduct was substantially impaired and the offender had a culpable mental state as to such impairment. *Matter of Keely*, 27 I&N Dec. 146 (BIA 2017).

[84] **Pen C § 261.5(c) as an AF**. The Supreme Court held that Pen C § 261.5(c) is not an AF as sexual abuse of a minor (SAM). It found that when a sex offense is based solely on the age of the participants, the generic definition of SAM does not include sex with a minor who is age 16 or older. Since the minimum conduct to commit § 261.5(c) includes sex with a 16- or 17-year old minor, and § 261.5(c) is not divisible as to age, no conviction of the offense is SAM. See *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), and see ILRC, *Practice Advisory: Supreme Court Rules on Sexual Abuse of a Minor* (June 2017) at https://www.ilrc.org/sites/default/files/resources/advisory_esquivel_quintana.pdf and NIPNLG/IDP, *Practice Advisory: Esquivel-Quintana v. Sessions* (June 8, 2017) at https://www.immigrantdefenseproject.org/wp-content/uploads/6-8-17-Esquivel-Quintana-practice-advisory-FINAL.pdf. (But see Pen C § 261.5(d), below.)

Section 261.5(c) also is not an AF as a COV. It does not come within the definition at 18 USC § 16(a), and 18 USC § 16(b) has been struck down as unconstitutional. See Pen C § 207 on the definition of COV. Further, the Ninth Circuit previously had held that statutory rape is not a COV even under 18 USC 16(b). *U.S. v. Christensen*, 558 F.3d 1092 (9th Cir. 2009), *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006).

Pen C § 261.5(c) as a CIMT. Section 261.5(c) is not a CIMT under either the BIA or the Ninth Circuit standards. The BIA held that sex with a minor is a CIMT if the minor is under the age of 14 or is under the age of 16 and there is a significant age difference. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017), reaffirmed in 27 I&N Dec. 1 (BIA 2020). The minimum conduct to violate § 261.5(c) involves sex with a minor age 17. The statute is not divisible with respect to the age of the minor, so no conviction under the statute can be a CIMT. (It is always best, however, to keep the age of the victim out of the record of conviction if you can, in case authorities mis-apply the rules.)

Using its own CIMT definition, the Ninth Circuit earlier found that the minimum conduct to commit even § 261.5(d) is not a CIMT because it is not necessarily harmful to a 15-year-old. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). (Note, however, that this decision as applied to 261.5(d) might change in future; see next note.)

Pen C § 261.5(c) as a crime of child abuse. While practitioners have reported that it is not being charged as such, in December 2019 the AG requested amicus briefings on this issue. See https://www.justice.gov/eoir/page/file/1215241/download

[85] **Pen C § 261.5(d) as an AF.** Counsel should try hard to avoid § 261.5(d), since the Ninth Circuit may reconsider its prior favorable treatment of it in light of *Esquivel-Quintana.* The Ninth Circuit held that § 261.5(d) is not an AF as sexual abuse of a minor (SAM), and advocates in removal proceedings should cite this. *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009). Defenders, however, must assume conservatively that at some point the Ninth Circuit may change its analysis based on the implication of the ruling in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). In *Esquivel-Quintana* the Supreme Court held that where a sex offense is based solely on the age of the participants, the generic definition of SAM does not include sex with a minor who is *age 16 or older.* It found that Pen C § 261.5(c), which includes minors age 16 or older, is not SAM. The Ninth Circuit might decide that because § 261.5(d) is limited to minors younger than age 16, it should reverse itself and find that 261.5(d) is SAM. See discussion in ILRC and NIPNLG/IDP practice advisories on *Esquivel*, cited in the § 261.5(c) endnote, above.

Pen C § 261.5(d) as a CIMT. This also is risky. The Ninth Circuit held that the minimum conduct to commit § 261.5(d) is not a CIMT because it is not necessarily harmful to a 15-year-old. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). But the court might reconsider this holding at some point, based on two decisions. First, the court might be influenced by the Supreme Court's decision in *Esquivel-Quintana,* above, which held that sex with a person at least age 16 or over is not the aggravated felony "sexual abuse of a minor," which is read as implying that it is SAM if the minor is younger. While the definition of sexual abuse of a minor and moral turpitude are not the same, the Ninth Circuit might decide that the implied characterization of sex with a person under the age as involving "abuse" means that it is reasonable to conclude that it is a CIMT.

Second, the BIA held that sex with a minor is a CIMT if the minor either is under the age of 14, or is under the age of 16 and the offense requires a significant age difference. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA April 6, 2017), reaffirmed on remand from the Fourth Circuit (*Jimenez-Cedillo v. Sessions*, 885 F.3d 292 (4th Cir. 2018)) at *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020). The BIA held that this is a CIMT even if the offense does not require knowledge that the victim was a minor. At least in the Fourth Circuit, the BIA will apply this aspect of the rule (the unusual lack of a knowledge requirement in a CIMT definition) prospectively only, which appears to mean to convictions that occurred on or after April 6, 2017. It stated that because the Fourth Circuit "specified that our decision represents a change in position and that our "prior policy may have 'engendered serious reliance interests' in aliens [such as the respondent,] who pled guilty to certain sexual offenses under the *Silva-*

Trevino regime," we will apply it prospectively in this circuit…. We will not decide the question of retroactivity in other circuits at this time." *Jimenez-Cedillo*, 27 I&N Dec. at 784. To the extent 261.5(d) does not require knowledge that the victim was under-age, advocates can argue that pre-April 6, 2017 convictions should not be held CIMTs.

Crime of Child Abuse. The Ninth Circuit held that a similar offense, Wash Rev Code § 9A.44.089, sexual contact (touching intimate parts for purpose of sexual gratification) with a person age 14 or 15 by someone at least two years older, is a crime of child abuse. *Jimenez-Juarez v. Holder*, 635 F.3d 1169 (9th Cir. 2011). Under that test, 261.5(d) also is. (But see discussion in *Quintero-Salazar v. Keisler, supra,* concluding that such conduct is not harmful to the minor.)

[86] Regarding the aggravated felony sexual abuse of a minor (SAM), if Pen C § 266 is found to be divisible among the types of conduct, a record of conviction that states that the person recruited was over the age of 18 will prevent the offense from being held an aggravated felony as SAM. If the statute is not divisible, no conviction is SAM, regardless of information in the record of conviction. See explanation of the categorical approach at n. 4, above.

An additional aggravated felony is 8 USC § 1101(a)(43)(K)(i), relating to the "owning, controlling, managing or supervising a prostitution business." More research is required to determine if Pen C § 266 would meet the definition. Immigration advocates may argue that § 266 is overbroad for this purpose, because it includes trying to encourage a single person to become a prostitute. *People v. Zambia* (2011) 51 Cal.4th 965. Arguably arranging or trying to arrange a single encounter (and with no element of financial benefit to the arranger) does not rise to the level of managing a prostitution business. Defenders should conservatively assume it is an aggravated felony. However, even if commercial benefit is not an element of Pen C 266, immigration officers can prove there was a commercial element using evidence from outside the record of conviction under the circumstance specific approach. See Categorical Approach Advisory for more information.

The defense that this offense is not an aggravated felony because it involves procuring persons for lewd acts, as opposed to solely for sexual intercourse, is not secure. For inadmissibility purposes, "prostitution" is defined as "engaging in promiscuous sexual intercourse for hire," not lewd conduct for hire. 22 C.F.R. § 40.24(b). See *Matter of Ding*, 27 I&N Dec. 295 (BIA 2018). Courts have applied the same requirement of sexual intercourse to the aggravated felony, 8 USC § 1101(a)(43)(K)(i), relating to the "owning, controlling, managing or supervising a prostitution business." See, e.g., *DePasquale v. Gonzales,* 196 Fed.Appx. 580, 582 (9th Cir. 2006) (unpublished) (prostitution under Hawaiian law); *Prus v. Holder,* 660 F.3d 144, 146-147 (2d Cir. 2011) (New York offense); see also *Familia Rosario v. Holder,* 655 F.3d 739, 745-46 (7th Cir. 2011) (government, IJ and BIA agree that importation of persons for purposes of prostitution is an aggravated felony under 8 USC § 1101(a)(43)(K)(i), while importation for other immoral purposes is not).

However, in *Ding*, above, the BIA distinguished the definition of prostitution for the purposes of the inadmissibility ground and the aggravated felony under 1101(a)(43)(K)(i). For the purposes of the aggravated felony, prostitution is defined as "sexual conduct in exchange for something of value." The Ninth Circuit might decide to accept this definition.

[87] See, e.g., *Matter of V. T.*, 2 I&N Dec. 213, 216-17 (BIA 1944), holding that the predecessor statute, Cal W&I C § 702, is not a CIMT because it includes a wide range of conduct that is not turpitudinous.

[88] In *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) the BIA did not provide a definition of child abuse, but it stated that a Colorado child endangerment statute is a crime of child abuse because the defendant must have recklessly, unreasonably, and without justifiable excuse placed a child where there was a "reasonable probability" that the child "will be" injured, meaning a threat to the child's life or health, even if the child was

not actually harmed. Conversely, the BIA has stated that Pen C § 273a(b) is *not* a deportable crime of child abuse because the minimum conduct to commit the offense does not require a sufficiently high likelihood that harm will result. *Matter of Mendoza Osorio*, 26 I&N Dec. 703, 710 (BIA 2016). Penal C § 272, like Pen C § 273a(b) does not require a likelihood that harm will result. See CALCRIM 2980. Penal Code § 272 has been used to, e.g., prosecute the sale of liquor to a minor without requiring ID. *People v. Laisne,* 163 Cal. App. 2d 554 (Cal. App. 3d Dist. 1958).

[89] The Ninth Circuit held that the minimum conduct to commit felony § 273a(a) is not a COV. *Ramirez v. Lynch,* 810 F.3d 1127, 1133-34 (9th Cir 2016) ("Although section 273a(a) requires a mens rea of 'willful[ness]' for the three prongs of the statute that criminalize indirect infliction of harm or passive conduct, the California Supreme Court has interpreted 'willful[ness]' in this context to require proof only of criminal negligence."). The BIA also has found that criminally negligent child abuse is not a crime of violence under 18 USC § 16(a), even where it results in the child's death, because it does not involve intentional conduct. See, e.g., *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (*en banc*) (negligence resulted in death by drowning of baby).

The Ninth Circuit held that § 273a(a) is not divisible between the various prongs. *Ramirez v. Lynch,* 810 F.3d at 1134-1138. Therefore, no conviction of § 273a(a) is a COV. The same ruling must apply to § 273a(b), a lesser included offense to § 273a(a) that is identical to § 273a(a) except that it causes a risk of less serious injury.

[90] Moral turpitude requires reprehensible conduct with a minimum of reckless intent, or moral depravity. Negligent conduct never is a CIMT.

Section 273a is not a CIMT because the minimum conduct requires only negligence, and the statute is indivisible. See above endnote for discussion of *Ramirez v. Lynch,* 810 F.3d 1127, 1133-34 (9th Cir 2016), which held that that because felony § 273a(a) is an indivisible statute that can be committed by negligence, no conviction can be held a COV. Section 273a can be violated by wholly passive conduct, or good faith but unreasonable belief that the conduct is in the child's best interest: "the statute does not necessarily imply a general readiness to do evil or any moral depravity." *People v. Sanders* (1992) 10 Cal.App. 4th 1268, 1272-1275 (as a state CIMT case finding that 273a is not a CIMT, not controlling but informative). See also, e.g., *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1131-1134 (macrobiotic diet resulting in severe malnutrition); and *Walker v. Superior Court* (1988) 47 Cal.3d 112, *People v. Rippenberger* (1991) 231 Cal.App.3d 1667 (273a includes failure to seek care for sincere religious reasons).

[91] Advocates should argue that 273a(a) is not a crime of child abuse. They can argue, among other things, that child *endangerment* is distinct from child abuse, neglect, or abandonment. See sample brief at www.ilrc.org/crimes. It is very possible that the Ninth Circuit will consider this en banc, as it voted to earlier before the case at issue was mooted out. In the *Martinez-Cedillo* case, the Ninth Circuit had held in a panel decision by Judge Bybee that § 273a(a) is a deportable crime of child abuse. The Ninth Circuit granted a petition for rehearing en banc, and designated the decision as non-precedential. Mr. Martinez-Cedillo died soon after that, and the court dismissed the appeal as moot and vacated the panel decision. See *Martinez-Cedillo v Sessions*, 869 F.3d 979 (9th Cir. 2018), rehearing en banc granted in *Martinez-Cedillo v. Barr* 918 F.3d 601 (9th Cir. March 18, 2019), appeal dismissed and panel decision vacated in *Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. May 16, 2019). The court may be willing to take up the issue again.

[92] The BIA and courts admit that the categorical approach applies to determining whether an offense is a deportable "crime of child abuse." Under that test, an age-neutral offense can't possibly be divisible because the statute does not set out alternative elements, one of which requires proof of

minor age. Because the statute is overbroad and indivisible, it is not a crime of child abuse for any immigration purpose, regardless of information in the ROC. See discussion at ILRC, *Case Update: Domestic Violence Deportation Ground* (August 2019) at www.ilrc.org/crimes.

[93] Even misdemeanor § 273a(a) can have terrible impact, depending on the case. The conviction will cause an LPR or refugee parent (and many others) to become deportable, so that they can be detained and held hundreds of miles away, and deported. A discretionary waiver of the deportation may or may not be available, depending on individual circumstances. The conviction will bar an undocumented parent from applying for non-LPR cancellation to stay to care for a USC or LPR child, *even if* it is clear that the parent's deportation will cause the child to suffer "exceptional and extremely unusual hardship." See 8 USC § 1229b(b)(1) and *Relief Toolkit*, "Cancellation for Non-Permanent Residents" at https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf.

[94] The BIA stated that § 273a(b) is not a deportable crime of child abuse. See *Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016), discussed in ILRC, *Practice Advisory: Cal Pen C 273a(b) is not a deportable crime of child abuse* (February 2016) and ILRC, *Case Update: Domestic Violence Deportation Ground* (August 2019), both at www.ilrc.org/crimes.

[95] See, e.g., *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055-56 (9th Cir. 2010); *U.S. v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010) holding that § 273.5 is a deportable crime of domestic violence. Advocates may investigate arguments that § 273.5 can be committed by an offensive touching and thus is not a COV, an uphill battle.

[96] *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009); *Cervantes v. Holder*, 772 F.3d 583, 588 (9th Cir. 2014) ("Our precedents make clear that although § 273.5(a) is not categorically a CIMT, it is a divisible statute for which a conviction under one portion of the statute (corporal injury against a spouse) will qualify as a CIMT, while conviction under other subsections (for example, corporal injury against a cohabitant) will not.")

[97] The Ninth Circuit states that it will defer to a "reasonable" precedent BIA decision as to what conduct constitutes a CIMT, including withdrawing its own prior precedent. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*). It is possible that in the future BIA might publish a decision finding that § 273.5 is a CIMT even if the victim is an ex-cohabitant, and the Ninth Circuit might defer. A California court held that § 273.5 always is a CIMT for state purposes, despite *Morales-Garcia,* but this is not binding for immigration purposes. See *People v. Burton* (2015) Cal. App. 4th Dist. Dec. 18.

[98] Section 273.5 is divisible only if, in order to find the defendant guilty, in every case a jury must unanimously agree as to the type of relationship. (See Categorical Approach Advisory for more information.) Immigration advocates can explore arguments that § 273.5 is not divisible as to the type of relationship. CALCRIM 840 does not require unanimity as to the type of relationship, and there do not appear to be state cases holding that this is required. A Ninth Circuit panel held that § 273.5 is divisible (*Cervantes v. Holder,* 772 F.3d 583, 588 (9th Cir. 2014)), but Judge Bybee did not undertake any divisibility analysis based upon elements and the requirement of jury unanimity. After *Cervantes* was published, the Supreme Court made it even more clear that this must be undertaken in order to establish whether a statute is truly divisible. See discussion of *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016) and the categorical approach at n. 4, above.

[99] Defenders should assume that a noncitizen is deportable under 8 USC § 1227(a)(2)(E)(ii) if a civil or criminal court finds that they violated *in any way* a portion of a DV order (probation requirement, family court order, etc.) that protects against threats, injury, or repeat harassment. The violation must be after admission and after 9/30/96.

Courts have held that a finding of violation of a DV "stay away" order based on minor conduct, including walking a child up the driveway after visitation rather than leaving him at the curb, will suffice to trigger deportability. See *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009), *Matter of*

Strydom, 25 I&N Dec. 507 (BIA 2011). They emphasize that the test is violating the portion of the order violated was intended to protect against threat, injury, or repeat harassment—not whether the conduct itself involved threat or harassment.

Immigration authorities can use any probative evidence, including from outside the record of conviction, to establish that a court's finding of violation of an order is actually a finding of a DV stay-away order or other portion of a DV order that "involves protection against credible threats of violence, repeated harassment, or bodily injury." The Ninth Circuit earlier had held that the categorical approach applies to this inquiry and that Pen C 273.6 was a divisible statute. In July 2019 it reversed itself in order to defer to the BIA's finding that the categorical approach does not apply to this part of the domestic violence deportation ground (8 USC 1227(a(2)(E)(ii), as opposed to (E)(i)), since this part of the ground involves a finding of a violation by either a civil or criminal court judge. See *Diaz-Quirazco v. Barr* (9th Cir. July 23, 2019), deferring to *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399 (BIA 2018) and *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017) and withdrawing from *Alanis-Alvarado v. Holder,* 558 F.3d 833, 835, 839-40 (9th Cir. 2009).

This makes mandatory the existing advice that defense counsel should not rely on a vague record of conviction under Pen C §§ 166 or 273.6 to protect the defendant. Do not plead to any DV stay-away violation. One can plead to violating a part of the DV order that would not cause deportability, such, as e.g., conduct relating to custody, visits, child support, or failure to attend classes. A plea to Pen C § 166(a)(1)-(3) should be safe. Or, plead to a new, non-deportable offense with an ROC sanitized of the PO. If pleading to a new offense, it is optimal to identify a victim not listed in the order (e.g., the new boyfriend, the neighbor), although this might not be necessary.

[100] As written, Pen C § 281 does not require the prosecution to prove any guilty knowledge or bad intent on the part of the defendant; it is a strict liability offense. Case law has added as an affirmative defense the defendant's reasonable belief that the first marriage had ended. *People v. Vogel* (1956) 46 Cal.2d 798, *Forbes v. Brownelle*, 149 F.Supp. 848 (D.D.C. 1957). However, the existence of an affirmative defense should not be held to add the element of guilty knowledge to the statute under the categorical approach, so no conviction for § 281 should be held a CIMT.

[101] *Elmakhzoumi v Sessions,* 883 F3d 1170 (9th Cir. 2018). See also *Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017) (nonconsensual vaginal, anal, or oral penetration, including by digital or mechanical means, is rape).

[102] Since publishing *U.S. v. Baron-Medina*, 187 F.3d 1144 (9th Cir. Cal. 1999), the Ninth Circuit repeatedly has held that Pen C § 288(a) is categorically SAM, despite the non-explicit, minor conduct that can form the basis for conviction. In an unpublished opinion, District Court Judge Orrick wrote that he would hold § 288(a) is not SAM, except that he must follow precedent to the contrary. If a client wishes to take the case to the Ninth Circuit *en banc*, advocates could consider his arguments. See *U.S. v. Hernandez-Lincon*a, Filed Case No. 3:18-cr-00268-WHO-1 (D.C. No.Cal April 22, 2019).

[103] *Blandino-Medina v. Holder*, 712 F.3d 1338 (9th Cir. 2013) (§ 288(a) is not PSC where there is an honest belief that the victim was older).

[104] **AF.** Section 288(c) is not a COV. The Ninth Circuit held that felony § 288(c) is a COV only under the "ordinary" case test and 18 USC § 16(b). *Rodriguez-Castellon v. Holder,* 733 F.3d 847 (9th Cir. 2013). This no longer applies because the Supreme Court struck down § 16(b) as void for vagueness in *Sessions v. Dimaya*. See *Dimaya* discussion at Pen C § 207, above.

In *United States v. Castro*, 607 F.3d 566 (9th Cir. 2010), the Ninth Circuit held that § 288(c) is not sexual abuse of a minor (SAM) because it is not necessarily physically or psychologically abusive. While *Castro* stated that a court could look to the record of conviction to evaluate this behavior, the U.S. Supreme Court since then has clarified that the standard is the minimum conduct to commit the offense. (See Categorical

Approach Advisory for more information.). See also *U.S. v. Martinez*, 786 F.3d 1227, 1229 (9th Cir. 2015) (Wash. Rev. Code § 9A.44.089 is not categorically sexual abuse of a minor).

In *Menendez v. Whitaker,* 908 F.3d 467 (9th Cir. 2018), the court held that 288(c) is categorically not a crime involving moral turpitude, a crime of child abuse, or a crime of violence.

ICE might assert that the Ninth Circuit should defer to the BIA's definition, which is that "a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young--that is, under 14 years of age--or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child." See *Matter of Jimenez-Cedillo,* 27 I&N Dec. 782, 784 (BIA 2020), reaffirming *Matter of Jimenez-Cedillo,* 27 I&N Dec. 1 (BIA April 6, 2017). The Ninth Circuit has committed to giving *Chevron* deference to reasonable BIA decisions that define what conduct is a CIMT. Two responses to the BIA's test are (1) that the sexual conduct at issue in *Jimenez-Cedillo* involved more explicit conduct than § 288(c); and (2) that in any event the BIA's rule, with its lack of requirement of culpable mental state, should not apply to convictions from before April 6, 2017, when the rule was first announced in the first *Jimenez-Cedillo* decision. The BIA agreed to this condition in the Fourth Circuit, stating that because the Fourth Circuit "specified that our decision represents a change in position and that our "prior policy may have 'engendered serious reliance interests' in aliens [such as the respondent,] who pled guilty to certain sexual offenses under the *Silva-Trevino* regime," we will apply it prospectively in this circuit…. We will not decide the question of retroactivity in other circuits at this time." *Jimenez-Cedillo*, 27 I&N Dec. at 784. Section 288(c)(2) has no defense for lack of knowledge of age.

[105] **Arguably PC 288.3 is not deportable child abuse.** The BIA held that the generic definition of a deportable crime of child abuse under 8 USC 1227(a)(2)(E)(i) requires a child as the victim, not a police officer posing as child. See *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 782, 794 (BIA 2020), citing *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008) (holding that a "crime of child abuse" is an offense that "constitutes maltreatment of a child"). Section 288.3(a) includes communication with a police officer posing as a minor. *People v. Korwin* (2019) 36 Cal. App. 5th 682. Therefore it is overbroad compared to the definition of child abuse. Section 288.3 should not be held to be divisible between an officer and a minor, because the statute is not phrased in the alternative in that manner, which is the first requirement for a divisible statute. (See Categorical Approach Advisory for more information.)

[106] **288.3 as a CIMT**. PC 288.3 punishes a person who communicates with someone the person knows, or reasonably should know, is a minor, with an intent to commit one of the following enumerated offenses: "Section 207, 209, 261, 264.1, 273a, 286, 287, 288, 288.2, 289, 311.1, 311.2, 311.4 or 311.11, or former section 288a." The 288.3 sentence is equal to the sentence for attempt to commit the intended offense.

In *Syed v. Barr*, 969 F.3d 1012, 1017-18 (9th Cir. 2020), the Ninth Circuit held that 288.3 is overbroad and divisible as a CIMT. Section 288.3 is a CIMT only if its elements, combined with the elements of the intended offense, amount to a CIMT. *Syed* found that because 288.3 itself requires that the person "knows, or reasonably should know" that the victim is a minor, it adds that element to the intended offense. This allowed the court to find that a conviction for PC 288.3 with intent to commit PC 288(c)(1) is a CIMT, even though PC 288(c)(1) itself was held not to be a CIMT in *Menendez v. Whitaker,* 908 F.3d 467 (9th Cir. 2018). *Syed* found that the basis for the *Menendez* holding that 288(c)(1) is not a CIMT was that 288(c)(1) lacks a requirement that the person knew or should have known that the victim was a minor. (Arguably this oversimplifies the *Menendez* decision, which based its ruling on various factors. See *Menendez* at 472-474.) *Syed* found that when 288(c)(1) is coupled with 288.3, this element of guilty knowledge of age is supplied. "Read together, §§ 288.3(a) and 288 necessarily involve an 'intent of arousing, appealing to, or gratifying

the lust, passions, or sexual desires' of the offender or the victim child—*knowing* (or having reason to believe) the child is aged 15 or younger." *Syed* at 1019.

Under this reasoning, 288.3 with intent to commit PC 273a is not necessarily safe. While alone 273a is not a CIMT, this is because it can involve negligence, and PC 288.3 would be held to add intent. Most other potential intended offenses already are CIMTs.

However, *Syed* found that if the intended offense were PC 207(a), then 288.3 would not be a CIMT because its elements plus those of 207(a) is not a CIMT. This also should apply to offenses that are similar to 261.5(c), consensual sex with a person under age 18, which is not a CIMT; such as 288.3 with intent to commit 286(b)(1), 287(b)(1), or 289(h). In fact the 288.3 plea would be better, because arguably the 288.3 could not be held a crime of child abuse (because it can include an officer posing as a child; see above endnote), while the BIA apparently has considered holding that 261.5(c) is child abuse.

Mr. Syed pled guilty to Count 2, which alleged that he violated 288.3 by communication with intent to commit PC "288," with no allegation of 288(a), (b), or (c). The charge tracks the language of 288.3, which also lists simply "288" as an enumerated offense. That is why *Syed* had to reach the consequences of 288(c)(1). *Syed* held that because Mr. Syed specifically pled guilty to Count 2, he was convicted of those elements, despite his vague statement at the plea hearing.

288.3 as an AF. There is no ruling on this, but based on the Ninth Circuit's finding that 288.3 is divisible as to the intended offense for CIMT purposes (in *Seyd,* discussed above), assume that its status as an AF will be determined by whether the intended offense, plus the added elements of intentional conduct and knowledge or reason to believe the victim is a minor, is an AF, as either SAM or as a COV with a year imposed. Of these, arguably 288.3 with intent to commit 207(a), 288(c)(1), probably 273a, 311.11, and listed offenses involving consensual sex with a person under the age of 18 (such as 286(b)(1), 287(b)(1), 289(h)) should not be an AF.

[107] Advocates can make this argument, but have no guarantee of winning. The BIA held that rape encompasses an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight. *Matter of Keely*, 27 I&N Dec. 146 (BIA 2017). The Ninth Circuit repeatedly has defined rape as involving "intercourse," beginning with the definition in *Black's Law Dictionary*, but it is not clear whether intercourse excludes digital or mechanical, as opposed to penile, penetration. See, e.g., *Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018) holding, that forcible sodomy under Pen C § 286(i) is rape because it is "intercourse," while also citing the Board's "comprehensive overview of the ordinary and contemporary definition of 'rape'" in *Matter of Keeley*, *supra* at 147–152 – an overview that includes digital and mechanical penetration in the definition of rape.

[108] The Ninth Circuit held that Pen C § 289(a) is not a COV under a standard nearly identical to 18 USC § 16(a), because it could be committed by "duress," which need not involve any force or the threat of force. *U.S. v. Espinoza-Morales*, 621 F.3d 1141, 1147-48 (9th Cir. 2010). To illustrate this, the court cited to *People v. Minsky*, 105 Cal. App. 4th 774, 129 Cal. Rptr. 2d 583, 584-85 (Cal. Ct. App. 2003), *review granted and then dismissed*, 23 Cal. Rptr. 3d 694, 105 P.3d 115 (2005), where the defendant "was convicted under section 289(a) for posing as a lawyer and tricking women into believing that a loved one had just been arrested and was facing mandatory jail time for a hit-and-run, and then posing as the hit-and-run victim or witness and offering to drop the charges or to refuse to testify if the woman submitted to sex acts." It also cited to *People v. Cardenas*, 21 Cal. App. 4th 927, 26 Cal. Rptr. 2d 567, 568 (Cal. Ct. App. 1994), where the defendant "was convicted under section 289(a) for inducing his victims to consent to sex acts by pretending to be a faith healer who could cure them.

Arguably this also means that § 289(a) is not a COV under the Supreme Court's decision in *Stokeling v. U.S.*, 139 S.Ct. 544 (2019). There the 5/4 majority found that Florida robbery is a COV, because "overcoming the resistance of the victim" in a robbery involves a confrontation that is inherently violent, even though it can be committed using a very small amount of force. Section 289(a) may involve overcoming the resistance of the victim, but it should not come within *Stokeling* if it involves no force at all, but rather psychological manipulation. However, because the *Stokeling* issue has not yet been litigated, counsel should conservatively assume it may be charged as a COV.

[109] See 8 USC § 1227(a)(2)(A)(v) and § N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act. See also *Defending Immigrants in the Ninth Circuit*, Chapter 6, § 6.22 (www.ilrc.org/crimes).

[110] In *Pannu v. Holder,* 639 F.3d 1225 (9th Cir. 2011) the court remanded to the BIA to re-consider its holding in *Matter of Tobar-Lobo,* 24 I&N Dec. (BIA 2007), which is in tension with the requirement that an intent of at least recklessness is required for a CIMT.

[111] *US v Reinhart*, 893 F3d 606 (9th Cir 2018).

[112] *Matter of Olquin-Rufino,* 23 I&N Dec. 896 (BIA 2006).

[113] The definition of child pornography is subject to the categorical approach. Pornography that does not have a minor as an element is not an aggravated felony as child pornography even if the ROC shows involvement by a minor. See *Aguilar-Turcios v. Holder,* 740 F.3d 1294 (9th Cir. 2014).

In *Chavez-Solis v. Lynch,* 803 F.3d 1004 (9th Cir. 2015) the Ninth Circuit found that Pen C § 311.11 is broader than the federal definition of child pornography, because the California offense includes depiction of "sexual conduct" that includes any conduct defined in Pen C § 288. See Pen C § 311.4(d), defining sexual conduct. The court noted that § 288 involves a wide range of conduct not limited to explicitly sexual conduct. *Chavez-Solis* further found that § 311.4(d) is not divisible between conduct in § 288 and the other listed conduct, because a jury is not required to unanimously decide between these alternatives, and therefore no conviction under § 311.11 is child pornography in the Ninth Circuit. However, the best practice is to plead specifically to non-explicit conduct and/or to conduct "as defined in" PC § 288. Note that the BIA held that § 311.11 is an AF as child pornography (*Matter of R-A-M-,* 25 I&N Dec. 657 (BIA 2012)), but the Ninth Circuit opinion controls.

[114] See, e.g., *People v. Nakai*, 183 Cal. App. 4th 499, 512 (Cal. App. 4th Dist. 2010).

[115] See discussion in *Berry v. City of Santa Barbara* (1995) 40 Cal. App. 4th 1075, 1080-82.

[116] See discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) and see § N.10 Sex Offenses.

[117] In *Ocegueda-Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) the court held that because § 314(1) can be used to prosecute exotic dance performances that the audience wishes to see, it is not necessarily a CIMT. In *Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013), the BIA countered that § 314 no longer can be used to prosecute such performances and for this and other reasons, it is a CIMT. In *Betansos v. Barr,* 928 F.3d 1133 (9th Cir. 2019), the Ninth Circuit decided to defer *Matter of Cortes Medina* and withdraw from its holding in *Ocegueda-Nunez*, under *Chevron* and *Brand X* principles. It held that § 314 is a CIMT.

Turning to Mr. Betansos' case, the court considered the issue of retroactive application of its decision under *Montgomery Ward* principles. The court noted that Mr. Betansos had pled guilty after the publication of *Ocegueda-Nunez* on February 17, 2010, but before the publication of *Matter of Cortes Medina* on January 8, 2013, and so might have relied on *Ocegueda-Nunez*. But because Mr. Betansos did not present evidence that he personally had relied on *Ocegueda-Nunez,* the court applied its new decision retroactively in his case and found his conviction was of a CIMT. "In

sum, although it would have been reasonable to rely on *Nunez* between February 2010 and January 2013 (under *Montgomery Ward* factor two), Betansos has not shown that he in fact relied on *Nunez* (under *Montgomery Ward* factor three)." *Betansos* at *26. But the court noted that "the reliance analysis is highly fact dependent and conducted on a case-by-case basis… Although Betansos has not identified a specific reliance interest that arose for him during the period that *Nunez* was well-settled law, another petitioner might do so." *Id.* at n. 6 (citation omitted). Defendants who pled guilty to § 314 between February 17, 2010 and January 8, 2013 who can present some evidence that they or their counsel in fact relied upon *Ocegueda-Nunez* may be able to avoid the conviction being a CIMT. Note that the *California Chart* editions from 2010 and 2011 cite *Ocegueda-Nunez,* but also include some warnings. See old copies of the *California Chart* at https://www.ilrc.org/old-outdated-charts-ca-crimes-and-their-immigration-consequences.

[118] The definition of aggravated felony "relating to prostitution" is defined as owning or controlling a prostitution business. 8 USC § 1101(a)(43)(K)(i). Merely working as a prostitute does not come within the definition. Section § 315 "keeping or residing in house of ill-fame," reaches the sex workers. See *People v. Pangelina* (1981) 117 Cal. App. 3d 414. It also reaches non-prostitutes who reside in the house. See *Cartwright v. Board of Chiropractic Examiners, supra.* This ought to distinguish this offense from a Wisconsin Statute, 944.34(1), that the BIA held is categorically an AF because it reached only persons who keep or grant use of a place of prostitution. *Matter of Ding*, 27 I&N Dec 295 (BIA 2018). Note that in *Ding* the BIA held that for purposes of § 1101(a)(43)(K)(i), prostitution is defined to include a lewd act in exchange for value and is not limited to sexual intercourse.

[119] In *Matter of P--,* 3 I&N Dec. 20 (BIA 1947), the BIA held that a conviction under Pen C § 315 for keeping a house of ill fame is a CIMT. However, it did not consider that § 315 covers simply renting living space in a house of ill fame, which arguably is not a CIMT. See *Cartwright v. Board of Chiropractic Examiners,* 16 Cal. 3d 762, 768 (Cal. 1976) ("Thus, conviction of violating section 315 does not necessarily require proof of personal or entrepreneurial participation in illicit sexual activities. Instead, the conviction can be based on circumstances of personal residence wholly unrelated to chiropractic practice and only peripherally related to prostitution. Such a conviction would not demonstrate professional unfitness on account of baseness, vileness or depravity.") As a state case this does not control as to the issue of whether the offense is a CIMT for moral turpitude purposes but does control in its characterization of the elements of the offense.

[120] The State Department defines prostitution for the inadmissibility ground as "engaging in promiscuous sexual intercourse for hire." 22 C.F.R. § 40.24(b), discussing 8 USC § 1182(a)(2)(D)(i). Courts have adopted that definition for the inadmissibility ground (see *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)). They also had applied it to the aggravated felonies that involve prostitution, e.g. 8 USC § 1101(a)(43)(K)(i). See, e.g., *DePasquale v. Gonzales,* 196 Fed.Appx. 580, 582 (9th Cir. 2006) (unpublished) (prostitution under Hawaiian law divisible because includes lewd acts); *Prus v. Holder,* 660 F.3d 144, 146-147 (2d Cir. 2011) (same for New York offense of promoting prostitution in the third degree); see also *Familia Rosario v. Holder,* 655 F.3d 739, 745-46 (government, IJ and BIA agreeing that under 8 USC § 1328 importation of persons for the purposes of prostitution is an aggravated felony while importation for other immoral purposes is not under 8 USC § 1101(a)(43)(K)(i)). California law broadly defines prostitution as engaging in sexual intercourse *or* any lewd acts with another person for money or other consideration. Lewd acts include touching of genitals, buttocks or female breast with the intent to sexually arouse or gratify. CALCRIM 1153.

[121] In considering Pen C § 368, see *Ramirez v. Lynch,* 810 F.3d 1127, 1133-34 (9th Cir 2016) on the nearly identically worded statute on child endangerment, Pen C § 273a. "Although section 273a(a) requires a mens rea of 'willful[ness]' for the three prongs of the statute that criminalize

indirect infliction of harm or passive conduct, the California Supreme Court has interpreted 'willful[ness]' in this context to require proof only of criminal negligence." See also CALCRIM 830, requiring negligence for Pen C § 368.

[122] *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946), citing *People v. Sylva*, 143 Cal. 62 (1904), comparing assault with a deadly weapon, which the BIA in this case stated requires specific intent to injure, resulting in the BIA finding that offense a "crime of moral turpitude," to brandishing a weapon, which is a "general intent" crime, and the BIA implied, not therefore a crime of moral turpitude." Section 417(a)(2) does not distinguish between "loaded" or "unloaded" firearm, and the BIA stated that "[p]ointing an unloaded gun at another, accompanied by a threat to discharge it without any attempt to use it, except by shooting, does not constitute an assault. There is in such case no present ability to commit a violent injury on the person."

[123] Section 417 is not a deportable firearms offense because it uses the definition of firearms at Pen C § 16520(a). See CALCRIM 980-983 and see *Medina-Lara v. Holder,* 771 F.3d 1106, 1116 (9th Cir. 2014), *U.S. v. Aguilera-Rios,* 769 F.3d 626 (9th Cir. 2014).

[124] *Bolanos v. Holder*, 734 F.3d 875 (9th Cir. 2013) (Pen C § 417.3 is a COV under 18 USC § 16(a)), distinguishing *Covarrubias Teposte v. Holder,* 632 F.3d 1049 (9th Cir.2011). The Ninth Circuit also held that § 417.8 is a COV in *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 941 (9th Cir. 2004). However, the court did not consider the argument that § 417.8 applies to a person who threatens to harm themselves, while the immigration definition of a COV, 18 USC 16(a), only covers force "against the person or property of another." See discussion, e.g., in *Herdocia v Garland,* No. 19-70266, 2021 WL 1345424 (9th Cir. Apr. 12, 2021).

[125] *Coquico v. Lynch,* 789 F.3d 1049, 1050 (9th Cir. 2015) (misdemeanor unlawful laser activity under Pen C § 417.26 is not a categorical crime involving moral turpitude because it can be violated by conduct that resembles non-turpitudinous simple assault and has little similarity to a terrorizing threat.

[126] *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

[127] *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012).

[128] See discussion of state analogues to this federal arson statute in *Luna Torres v. Lynch*, 136 S.Ct. 1619 (2016) and see NIPNLG, Practice Alert: *Luna-Torres v. Lynch* (May 2016) available at http://nipnlg.org/PDFs/practitioners/practice_advisories/crim/2016_20May_luna-torres-alert.pdf.

[129] Although 18 USC § 844(i) requires malice and Penal Code § 452 requires recklessness, ICE will argue that they are a categorical match. At least some federal courts define malice in the context of § 844(i) to include "willful disregard of the likelihood that damage or injury would result." *U.S. v. Gullett*, 75 F.3d 941, 947 (4th Cir. 1996). Cal. Penal Code § 450(f) defines reckless for purposes of § 452 as follows: "'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." Immigration counsel can investigate whether the state definition is broader, based on the inclusion of inebriated behavior or some other factor.

[130] A COV as defined at 18 USC § 16 requires violence against personal property of another, not oneself.

[131] See 8 USC § 1101(a)(43)(E)(i), listing federal offenses related to explosive devices.

[132] **Burglary as an AF.** A burglary conviction potentially can be an aggravated felony under any of three categories, but under the categorical approach California burglary (Pen C § 459) does not come within any of these categories and never is an AF, regardless of whether it is first degree (Pen C § 460(a), residential) or second degree (§ 460(b), commercial) burglary. (See Categorical Approach Advisory for more information.) Two key factors distinguish California burglary from some other burglary statutes and decisions holding that those offenses are aggravated felonies: California burglary includes a lawful entry and is not divisible between lawful and unlawful entry, and California burglary is not divisible as to the intended offense.

COV. California first degree burglary was held a COV under 18 USC § 16(b). When the Supreme Court struck down 18 USC § 16(b) as being unconstitutionally vague, it specifically held that Pen C § 460(a) is not a COV. See *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), affirming *Dimaya v. Lynch,* 803 F.3d 1110 (9th Cir. 2015), and see discussion at Pen C § 207, above. Burglary is not a COV under 18 USC § 16(a), because it has no element of use of force.

Burglary. Because the minimum conduct to commit § 459 includes a *lawful* entry, whereas the federal generic definition of burglary requires an *unlawful* entry, and because § 459 is not divisible between a lawful and unlawful entry, therefore no conviction of § 459 amounts to "burglary" for any purpose, regardless of information in the record of conviction. *Descamps v. U.S.,* 570 U.S. 254 (2013).

Attempted theft (or attempted other aggravated felony offense). Section 459 is never attempted theft, under two independent theories. First, the Ninth Circuit found that it is never an attempted theft because the minimum conduct to commit § 459 includes entry with intent to commit a non-theft offense, and § 459 is not divisible for that purpose because a jury is not required to decide unanimously as to the identity of the intended offense. Therefore, no conviction of § 459 amounts to attempted theft for any purpose, regardless of information in the record of conviction. *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014).

Second, attempt requires intent plus a "substantial step" toward committing the offense. The Ninth Circuit held that the minimum conduct for § 460(b)—a *lawful* entry into a commercial building with intent to commit larceny or any felony—does not constitute the required substantial step. See *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011). The court did opine in dicta that a plea to the statutory alternative of entry into a *locked* container or vehicle (see Pen C § 459) may constitute a substantial step. Note, however, that the court assumed this offense would involve a break-in rather than a permissive entry (with a key). Because the minimum conduct includes a permissive entry into a locked car, this also should not be an attempt. See, e.g., *Sareang Ye v. INS*, 214 F.3d 1128, 1134 (9th Cir. Cal. 2000) ("Moreover, because section 459 does not require an unprivileged or unlawful entry into the vehicle, *see Parker*, 5 F.3d at 1325, a person can commit vehicle burglary by borrowing the keys of another person's car and then stealing the car radio once inside.") Still, where possible plead to something other than a locked vehicle or at least to lawful entry.

[133] California burglary (Pen C § 459) is never a CIMT, regardless of whether it is first degree (Pen C § 460(a), residential) or second degree (Pen C § 460(b), commercial) burglary. Two key factors distinguish California burglary from some other burglary statutes and decisions holding that those burglary statutes are CIMTs: California burglary includes a lawful entry and is not divisible between a lawful and unlawful entry, and California burglary is not divisible as to the intended offense. (See Categorical Approach Advisory for more information.)

The BIA has long held that burglary involving an *unlawful* entry is a CIMT *if* the intended offense is a CIMT. *See, e.g., Matter of Z*, 5 I&N Dec. 383 (BIA 1953) and see, e.g., *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 (9th Cir. 2005), abrogated on other grounds by *Holder v. Martinez-Gutierrez,* 566 U.S. 583 (2012). California burglary does not meet this definition for two reasons. First, the Ninth Circuit held that

because § 460(b) can be committed merely by a lawful entry into a commercial building with bad intent, it is never a CIMT even if the intended offense is a CIMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011). The only threat to this ruling would be if the BIA were to publish a decision disagreeing with *Hernandez-Cruz,* and then the Ninth Circuit were to decide to defer to that decision.

Second, even if the traditional test were applied to burglary with a lawful entry, § 459 cannot be held a CIMT because it requires intent to commit larceny *or any felony*, and "any felony" includes non-CIMT offenses, e.g., receipt of stolen property, false imprisonment, vehicle taking, etc. The Ninth Circuit held that § 459 is not divisible for purposes of the intended offense, either between "larceny" and "any felony," or as to the specific felony. *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014) (§ 459 is not an AF as attempted theft because it is not divisible as to intended offense). Because the minimum conduct to commit § 459 includes intent to commit offenses that are not CIMTs and the statute is not divisible, no conviction of § 459 is a CIMT under the BIA's definition. (The BIA should defer to the Ninth Circuit as to when an offense is divisible.)

The BIA set out a second definition of CIMT that only applies to residential burglary, meaning that it could potentially affect § 460(a) but not § 460(b). It held that a burglary consisting of an *unlawful* entry into an occupied dwelling with intent to commit any crime is a CIMT, regardless of whether the intended crime is a CIMT. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). However, California burglary is overbroad because the minimum conduct to commit § 460(a) includes a lawful entry, and it is not divisible between a lawful and unlawful entry. *Descamps v. U.S.,* 570 U.S. 254 (2013). Because § 460(a) is overbroad and indivisible, no conviction of the statute is a CIMT under this definition for any immigration purpose, regardless of information in the record of conviction. Note that § 460(a) is not affected by the Board's decision in *Matter of J-G-D-F*, 27 I&N Dec. 82 (BIA 2017), which applied the same rule requiring an unlawful entry; that decision addressed only the definition of an occupied dwelling (including an intermittently occupied dwelling, under Oregon law).

However, while the BIA has emphasized the unlawful entry as a key factor in this definition, it has not specifically considered a statute like § 460(a) that includes a lawful entry into a residence. It is conceivable that someday it would revamp its definition and hold that § 460(a) is a CIMT. But even if the BIA were to make this change, the definition should not be applied retroactively. See, e.g., *Martinez-Garcia v. Sessions*, 886 F.3d 1291 (9th Cir. 2018) (declining to retroactively apply the expanded definition of theft as a CIMT set out in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016)). But because of that possibility, if avoiding a CIMT is absolutely critical it might be best to plead to a different offense.

Finally, even though the law is clear that no California burglary conviction is a CIMT for any purpose regardless of information in the record of conviction, defenders still should try to create a good record of conviction in case immigration authorities do not know the law and file erroneous charges against an unrepresented immigrant. Where possible, indicate on the record that the entry was lawful and/or that the intended offense was a non-CIMT.

[134] Felony vandalism can be the intended burglary offense. *People v. Farley* (2009, Cal) 46 Cal 4th 1053.

[135] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a), because federal law will not give retroactive effect to a state criminal reform statute that purports to change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[136] See discussion of *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) at § 460(a) CIMT endnote, above. *Hernandez-Cruz* specifically held that Pen C § 460(b) is not a CIMT even if the intended offense is larceny, because burglary includes a mere lawful entry into a commercial building with bad intent. Section 459.5 has the same elements, at least with intent to take property as opposed to having taken property. Further, § 459.5 should not be held divisible between intent to take and taking, as there is no evidence that a jury must decide unanimously between those two options in order to find guilt. See more on the categorical approach at n. 4, above.

However, if avoiding a CIMT is critical, immigrants with prior convictions of § 460(b) may consider not applying to change the offense to a § 459.5. Burglary as defined by § 459 has a second and unassailable argument against being a CIMT: the intended offense is indivisible between CIMTs and non-CIMTs. See CIMT endnote to § 460(a), above.

[137] See, e.g., *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946) (mere unlawful entry is not a CIMT; it must be unlawful entry with intent to commit a CIMT), and discussion of that case in *Matter of Louissaint*, 24 I&N Dec. 754, 755-56 (BIA 2009) (adding to that rule by holding that an offense with elements of unlawful entry into an occupied dwelling with intent to commit a crime also is a CIMT). Section 466 does not require intent to commit any crime, much less a CIMT, or to enter a particular place, much less an occupied dwelling.

[138] Conviction for forgery or for counterfeiting is an aggravated felony if a sentence of a year or more is imposed on any single count. See 8 USC § 1101(a)(43)(R), INA § 101(a)(43)(R) and see § N.6 Aggravated Felonies. Immigration counsel can investigate whether § 470 might be overbroad compared to the generic definition.

[139] Conviction of an offense that involves fraud or deceit is an aggravated felony if the loss to the victim/s exceeds $10,000. 8 USC 1101(a)(43)(M). The Supreme Court held that the amount of loss is a "circumstance specific" factor that does not come within the categorical approach, and that evidence from outside the reviewable record of conviction may be used to prove the amount. However, the loss amount must be tethered to the offense of conviction and cannot be based on acquitted or dismissed counts or general conduct. *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009). If possible, defenders should supply both a *Harvey* waiver and spell it out by stating that additional restitution is based on dropped charges or uncharged conduct, because immigration officials may not be familiar with *Harvey* waivers. See further discussion of these issues in state and national *Nijhawan* practice advisories, by searching for *Nijhawan* at www.ilrc.org/crimes and www.nipnlg.org.

[140] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a), because federal law will not give retroactive effect to a state criminal reform statute that purports to change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[141] *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 8767 (9th Cir 2008).

[142] *Morales-Alegría v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006).

[143] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a), because federal law will not give retroactive effect to a state criminal reform statute that purports to change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the

property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[144] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a), because federal law will not give retroactive effect to a state criminal reform statute that purports to change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[145] While PC 484/487 has long been held a CIMT, this might change for some past convictions. The panel in *Silva v. Barr,* 965 F.3d 724, 731 (9th Cir. 2020), withdrawn and superseded by *Silva v. Garland*, 993 F.3d 705 (9th Cir. 2021), stated that it would have held that convictions of PC 487 from before Nov. 16, 2016 are not CIMTs, except that it is bound by prior, incorrect Ninth Circuit precedent to the contrary. Mr. Silva has filed a petition for rehearing en banc, where the court could make this ruling.

The argument is strong although a bit convoluted. On November 16, 2016, the BIA expanded the definition of theft as a CIMT in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA Nov. 16, 2016); see also *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016). Before *Diaz-Lizarraga*, the BIA had held that theft is a CIMT only if the intent is to deprive the owner *permanently,* as opposed to temporarily as in joyriding. In 2016, *Diaz-Lizarraga* held that theft is a CIMT "if it involves an intent to deprive the owner of his property *either* permanently *or under circumstances where the owner's property rights are substantially eroded*." *Id.* at 853 (emphasis supplied). This expanded definition caused additional offenses to be defined as CIMTs. The Ninth Circuit held that the BIA's decision to *"*abandon the literally-permanent deprivation test" constituted an abrupt change in law that would impose "a new and severe burden" if applied to persons who were convicted while the "old rule was extant." Therefore, it held that for convictions that occurred before November 16, 2016, the date that *Matter of Diaz-Lizarraga* was published, an offense is a CIMT if only if it required intent to deprive permanently; it is not a CIMT if it required only the substantial erosion of property rights. See *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1295–96 (9th Cir. 2018), and see summary at *Silva,* 965 F.3d at 732-33.

Silva then looked at the definition of Pen C § 484/487 and found that it *did* and does include intent to substantially erode the owner's rights. This is reflected in California decisions beginning in 1998, culminating in a 2002 Supreme Court ruling, *People v. Avery*, 27 Cal. 4th 49, 55, 115 Cal.Rptr.2d 403, 38 P.3d 1 (2002). See *Silva*, pp. 733-34. Therefore, Pen § 484/487 convictions that occurred before Nov. 16, 2016 should not be held CIMTs: they did not meet the CIMT definition at the time (because the theft could be committed by intent to deprive substantially), and *Garcia-Martinez* found that the new CIMT definition could not fairly be applied retroactively to convictions before *Matter of Diaz-Lizarraga* set out the new rule.

The panel concluded that if they "were writing on a clean slate," they would find that Mr. Silva was not deportable for CIMTs – or at least for the two committed after 1998. *Silva*, pp. 733-34. However, they were bound by the prior precedent. "Only an en banc court has the power to fix these errors." *Id.* at 734, 735. Thank you and congratulations to Francisco Ugarte and San Francisco Office of the Public Defender, who brought the *Silva* case.

Note that offenses that involve true temporary intent, such as joyriding (which includes depriving the owner of property for a few hours or days), do not meet the new definition of CIMT. See *Matter of Diaz-Lizarraga* at 850-51 and n. 10. For example, Pen C 496 and Veh C 10851 include intent to commit joyriding and should not be held CIMTs regardless of the date of conviction.

[146] The Ninth Circuit held that no conviction of Pen C § 484/487 theft is an AF as "theft" even if a 1-year sentence is imposed, because the § 484 definition also includes fraud, which does not become an AF if 1 year is imposed, and § 484 is not divisible between theft and fraud. See *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015), and see Categorical Approach Advisory for more information on divisibility. Also, section 484/487 is not an AF as fraud even if loss to the victim/s exceeds $10,000.

However, do not permit *both* a sentence or a year or more *and* admission, order of restitution, or other evidence of loss to the victim/s exceeding $10,000 to settle on a single count of § 487, or the conviction will be deemed an AF. See *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020) and see IDP, ILRC, NIPNLG *Practice Alert: Matter of Reyes* (August 2020) at https://www.ilrc.org/practice-alert-matter-reyes-28-dec-52-ag-2020 .

The BIA similarly finds that theft and fraud are different offenses, and that they require different factors to become an aggravated felony (sentence of a year or more for theft, loss to victim/s exceeding $10,000 for fraud). See discussion of the distinction between theft and fraud in *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales,* 419 F.3d 276, 282-284 (4th Cir. 2005). The Ninth Circuit recognizes this distinction. See *Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 752 (9th Cir. 2009), and regarding Pen C § 484, *U.S. v. Rivera*, 658 F.3d 1073, 1077 (9th Cir. 2011) (noting that Pen C §§ 484(a) and 666 is not categorically a theft aggravated felony because it covers offenses that do not come within generic theft, such as theft of labor, false credit reporting, and theft by false pretenses) and *Garcia v. Lynch,* 786 F.3d 789, 794-795 (9th Cir. 2015) (if specific theory of theft under Pen C §§ 484, 487 is not identified, a sentence of one year or more does not make the offense an aggravated felony; court did not reach the issue of whether the statute is divisible between different theories of theft). For further explanation, see ILRC, *How to Use the Categorical Approach Now* (December 2019) at https://www.ilrc.org/how-use-categorical-approach-now.

[147] In *Sheikh v. Holder,* 379 Fed.Appx. 697, 2010 WL 2003567 (9th Cir. May 20, 2010) (unpublished), the panel found that Pen C § 485 is not a CIMT because it does not have intent to permanently deprive as an element.

[148] The BIA held that Pen C § 496 with a year or more imposed is an aggravated felony under 8 USC § 1101(a)(43)(G), which provides that "a theft offense (including receipt of stolen property)" is an aggravated felony if a year is imposed. The BIA said that even though § 496 does not require common law theft or larceny, it meets the definition of "receipt of stolen property." *Matter of Alday-Dominguez*, 27 I&N Dec. 48 (BIA 2017). The Ninth Circuit deferred to this decision in *United States v. Flores*, 901 F.3d 1150 (9th Cir. 2018).

[149] The Ninth Circuit held that the minimum conduct to commit §§ 496 or 496a involves intent to *temporarily* deprive the owner, which is not a CIMT. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (Pen C § 496(a)); *Alvarez-Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (Pen C § 496d(a)).

While those cases held that the statutes were divisible between temporary and permanent taking, the Supreme Court has clarified that the statutes are not divisible, so that the minimum conduct is the sole basis for evaluating the statute. Under the categorical approach, an offense must be evaluated solely according to the minimum conduct required for guilt, which here is a temporary taking. The only exception is if the statute is "truly" divisible. A statute is not divisible unless, at a minimum, it is phrased in the alternative. To meet this requirement, Pen C § 496 would have

to be phrased in the alternative, to prohibit intent to deprive "temporarily or permanently." Because 496 is not phrased in the alternative in this manner, it is not divisible. Because § 496 is both overbroad and indivisible compared to the CIMT generic definition, no conviction can be held a CIMT. (See Categorical Approach Advisory for more information.) However, to make sure there are no misunderstandings, best practice is to plead specifically to intent to temporarily deprive the owner.

[150] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a), because federal law will not give retroactive effect to a state criminal reform statute that purports to change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[151] The Ninth Circuit has long held that theft of labor or services does not meet the generic definition of "theft." Theft requires a taking of property. See, e.g., *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015) (noting that "a defendant may be convicted of 'theft' if six jurors believe that he committed larceny (which is a form of theft that meets the federal generic definition) and six jurors believe that he committed theft of labor (which is not).").

[152] See discussion *In re Rolando S.*, 197 Cal. App. 4th 936 (Cal. App. 5th Dist. 2011).

[153] See *People v. Rathert* (2000) 24 Cal.4th 200, 206 (Pen C § 529(a)(3) does not require specific intent to gain a benefit, noting that "the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen.… The impersonator's act, moreover, is criminal provided it might result in any such consequence; no higher degree of probability is required."). See also *Paulo v. Holder,* 669 F.3d 911 (9th Cir. 2011) (stating that Pen C § 529(a)(3) for false personation is not a crime involving moral turpitude); *Linares-Gonzalez v. Lynch,* 823 F3d 508 (9th Cir. 2016) (sections 530.5(a) and (d)(2) are not categorically CIMTs, because they are not fraud since they do not require the perpetrator to obtain anything tangible of value, and they are not vile, base or deprived crimes because they do not necessarily involve an intent to injure, actual injury, or a protected class of victim; they include only intent to annoy).

[154] If a sentence of a year or more is imposed, "theft" is an AF under 8 USC § 1101(a)(43)(G), and "forgery" and "counterfeiting" are AFs under § 1101(a)(43)(R). Under the categorical approach, § 530.5(a) lacks elements required for the generic definition of these offenses and thus cannot be an AF under any of these categories. (See Categorical Approach Advisory for more information.) "Theft" requires a taking by stealth, without consent. See discussion at Pen C § 484. "Forgery" and "counterfeiting" require, at a minimum, use of a written instrument.

[155] Section 530.5(a) is overbroad and indivisible as a CIMT, so that no conviction is a CIMT for any immigration purpose, regardless of information in the record of conviction.

The Ninth Circuit found that it is not a CIMT because the minimum conduct does not require fraud or harm. *Linares-Gonzalez v Lynch*, 823 F.3d 508 (9th Cir. 2016); see also *Tijani v. Holder*, 628 F.3d 1071, 1078 (9th Cir. 2010), distinguishing § 530.5(a), which does not have an element of fraud, from § 532(a)(1), which it found to have such an element. Section 530.5(a) criminalizes the willful use of another's personal identifying information, regardless of whether the user intends to defraud and regardless of whether any actual harm is caused. See *People v. Hagedorn* (2005)

127 Cal.App.4th 734, 818 (upheld conviction for working under another's name, and using the identifying information to cash the paycheck); *People v. Johnson,* (2012) 209 Cal.App.4th 800, 818.

Section 530.5(a) should be held indivisible under Supreme Court precedent on the categorical approach. (See Categorical Approach Advisory for more information.) The section provides, "(a) Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty…." The term "any unlawful purpose" is a single term, not set out in statutory alternatives, and therefore it is not divisible. See, e.g., *Descamps v. United States*, 570 U.S. 254 (2013).

The statutory list of purposes—"any unlawful purpose, including to obtain … credit, goods, services …"—are illustrative examples, described by the term "including." As such, the statute is not divisible between them, because they are mere "means" rather than "elements." In *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016) the Supreme Court stated:

> Conversely, if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission. *United States* v. *Howard*, 742 F. 3d 1334, 1348 (CA11 2014); see *United States* v. *Cabrera-Umanzor*, 728 F. 3d 347, 353 (CA4 2013)."

The use of the term "including" in § 530.5(a) shows that this is a quintessential list of illustrative examples. In the above quotation, the Court in *Mathis* approvingly cited two cases, *Howard* and *Cabrera-Umanzor*, that both found statutes to be indivisible because they employed the term "includes" or "including."

See also CALCRIM No. 2040. "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant willfully obtained someone else's personal identifying information; 2. The defendant willfully used that information for an unlawful purpose; AND 3. The defendant used the information without the consent of the person whose identifying information (he/she) was using."

[156] Although the statute does not mention fraud, the Ninth Circuit held that because 532a(a) requires a knowing false representation in order to gain something of value, fraud in fact is an element. *Tijani v. Holder*, 628 F.3d 1071, 1078 (9th Cir. 2010), distinguishing § 530.5(a), which does not have an element of fraud, from § 532(a)(1), which it found to have such an element.

Immigration advocates who want to contest this can see Judge Tashima's partial concurrence and dissent and consider whether it is bolstered by subsequent Supreme Court rulings on the categorical approach. As always, while making an argument not guaranteed to win, advocates should pursue other strategies including post-conviction relief at the same time.

[157] For purposes of § 591 malice is defined as follows: "… Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else." CALCRIM 2902. The requirement of malice "functions to ensure that the proscribed conduct was a 'deliberate and intentional act, as distinguished from an accidental or unintentional' one." *People v. Rodarte*, 223 Cal.App.4th 1158 at 1170 citing *People v. Atkins* (2001) 25 Cal.4th 76. Section 591 is not a specific intent crime; it requires the general intent to do the proscribed act. See *Kreiling v. Field*, 431 F.2d 502 (9th Cir. 1970) (upholding a § 591 conviction where a former telephone repairman moved two levers on the inside of a payphone so that he could make a free call, which then made it impossible for others to use). The disabling need not be permanent. See *People v. Tafoya,* 92 Cal. App. 4th 220 (Cal. App. 4th Dist. 2001) (conviction for removing battery from ex-wife's phone when she tried to call her mother during an argument; ex-wife called from a landline instead).

[158] No substantive cases define the offense. Immigration counsel may argue that this is analogous to Pen C § 32 for purposes of CIMT determination in the Ninth Circuit. It requires no violence or evil motive.

[159] See *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not COV); *In re Nicholas Y.* (2000) 85 Cal.App.4th 941 (writing on a glass window with a marker that could easily be erased constituted "defacing" under the statute).

[160] See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (malicious mischief, where malice involves wish or design to vex, annoy, or injure another person, was not a CIMT under Wash. Rev. Stat. 9A.48.080, which at the time required damage of at least $250 (now requires damage of $750)) and *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not COV). See also *People v. Kahanic* (1987) 196 Cal App 3d 461 (conviction upheld when damage was to property jointly owned by defendant and victim).

[161] The BIA held that Pen C §§ 594 with 186.22(d) enhancement is a CIMT. *Matter of E.E. Hernandez*, 26 I&N Dec. 397 (BIA 2015). But the Ninth Cir disapproved and declined to apply that case, holding that the gang enhancement does not transform a non-CIMT into a CIMT. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015) (possession of billy club with Pen C § 186.22(b) is not a CIMT).

[162] Felony vandalism can be the intended burglary offense. *People v. Farley* (2009, Cal) 46 Cal 4th 1053.

[163] See *Matter of Ortega Lopez*, 27 I&N Dec 382 (BIA 2018) The Board held that commercial dog fighting, causing animals to suffer and die for entertainment, in violation of 7 USC 2156, a federal dog-fighting law, is a CIMT because it causes animals to suffer and die for entertainment. The Ninth Circuit deferred. *Ortega-Lopez v. Barr*, 978 F.3d 680, 681 (9th Cir. 2020).

[164] Moral turpitude has been found to inhere in an offense if it has as an element a *conscious disregard of a known risk* that causes, or creates the "imminent risk" of causing, death or very serious bodily injury. See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 870-71 (BIA 1994) (conscious disregard resulting in manslaughter), *Matter of Leal*, 26 I&N Dec. 20, 24-26 (BIA 2012) (conscious disregard causing a "substantial risk of imminent death"). PC 597(b) involves criminal negligence. *People v. Speegle* (1997), 53 Cal. App. 4th 1405, 14111412. The test for this is whether a reasonable person would have been aware of the risk involved; it can be found even when a defendant acts with a sincere good faith belief that his or her actions pose no risk. *People v. Rippberger* (1991), 231 Cal. App. 3d 1667, 1682, cited in *Speegle* at 1412.

[165] See *Madrid v. Holder*, C.A.92013, 541 Fed.Appx. 789, 2013 WL 5530009.

[166] See *Matter of Ortega Lopez*, 27 I&N Dec 382 (BIA 2018); *Ortega-Lopez v. Barr*, 978 F.3d 680, 681 (9th Cir. 2020) (BIA held commercial dog fighting in violation of 7 USC 2156(a)(1), causing animals to suffer and die for entertainment, is a CIMT; Ninth Circuit deferred).

[167] In *Matter of Ortega Lopez, supra*, the BIA declined to address whether being a spectator at a dog fight, under § 2156(a)(2), also is a CIMT. *Matter of Ortega Lopez*, 27 I&N Dec 382, 389-98 (BIA 2018). It noted that dogfighting "desensitizes spectators to brutality and violence and teaches 'that inflicting pain is an acceptable form of amusement.'" *Id.* at 388.

[168] PC 601, trespass with credible threat, is likely to be held a COV (and thus an AF if a year or more is imposed, and/or a deportable DV offense if the victim has protected domestic relationship) and a CIMT. It has the following elements: (1) defendant made a credible threat to cause serious bodily injury; (2) defendant did so with the (specific) intent of placing that person in reasonable fear of their safety or the safety of their immediate family; and (3) defendant unlawfully entered the residence or workplace of the complaining witness with the (specific) intent to carry out the threat against the target of the threat. CALCRIM 2929.

The definition of a COV under 18 USC § 16(a) includes "an offense that has as an element the use, attempted use, or *threatened use of physical force* against the person or property of another." Other charges having the threatened use of physical force have been found to be COVs. See, e.g., *Rosales-Rosales v. Ashcroft* 347 F.3d 714 (9th Cir. 2003) ("On its face, § 422 is an offense "that has as an element the ... threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). Therefore § 422 meets the definition of a "crime of violence" as set forth in § 16(a).").

It likely will be held to meet the definition of a CIMT because it involves both a "threat to cause serious bodily injury" and a specific "intent to carry out the threat." See, e.g., *Latter-Singh v. Holder* (9th Cir. 2012) 668 F.3d 1156, 1163 (finding that PC §422 is a CIMT "because 422 criminalizes only the willful threatening of a crime that itself constitutes a crime of moral turpitude.") and see PC 273.5.

[169] *Orellana v. Barr*, 967 F.3d 927 (9th Cir. 2020)

[170] For further discussion of immigration consequences of Pen C § 646.9 and the "stalking" basis for deportability, see ILRC, *Case Update: Domestic Violence Ground of Deportation* (June 2018) at www.ilrc.org/crimes. In sum:

Deportable stalking offense. A conviction of "stalking" causes deportability under the domestic violence ground, 8 USC 1227(a)(2)(E). The stalking can be against anyone; it is not limited to domestic relationships. Reversing its own prior precedent, the BIA held that Pen C § 646.9 is *not* a deportable crime of stalking. It held that § 646.9 is overbroad and indivisible because it prohibits intent to cause fear for one's "safety," while the generic definition of stalking requires intent to cause fear of "death or bodily injury." Therefore, no conviction of § 646.9 is a deportable crime of stalking for any immigration purpose. *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018), overruling *Matter of Sanchez-Lopez,* 26 I&N Dec. 72 (BIA 2012).

Crime of violence. The Ninth Circuit held that at least § 646.9 harassing is not a COV under 18 USC § 16(a) or § 16(b). *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007). Furthermore, § 646.9 should not be held divisible between following and harassing, because a jury is not required to unanimously decide between them. See CALCRIM 1301. The BIA declined to apply the Ninth Circuit's decision in *Malta-Espinoza* outside the Ninth Circuit, and found that every § 646.9 conviction is a COV. *Matter of U. Singh*, 25 I&N Dec. 670, 676-677 (BIA 2012). However, this finding was based on the definition of COV at 18 USC § 16(b), which the Supreme Court has since struck down. See discussion of *Sessions v Dimaya*, 138 S Ct 1204 (2018) at Pen C § 207, endnote. Under the remaining definition, 18 USC § 16(a), no conviction of § 646.9 should be held a COV for any purpose nationally, regardless of information in the ROC. Still, to provide extra protection defenders should try to plead harassing rather than following.

[171] An age-neutral offense never is the aggravated felony sexual abuse of a minor. See, e.g., discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012), and see § N.10 Sex Offenses.

[172] However, *Nunez-Garcia*, 262 F. Supp. 2d 1073 (CD Cal 2003) re-affirmed these cases without comment; see cites in that opinion.

[173] *Rohit v. Holder,* 670 F.3d 1085 (9th Cir. 2012).

[174] The BIA has long defined prostitution for the inadmissibility ground as "engaging in promiscuous sexual intercourse for hire." See, e.g., *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553 (BIA 2008), citing 22 C.F.R. § 40.24(b), discussing the inadmissibility ground at 8 USC § 1182(a)(2)(D)(i). Section 647(b) punishes engaging in any lewd act with another person for money or other consideration, a broader definition. Lewd acts include touching of genitals, buttocks or female breast with the intent to sexually arouse or gratify. CALCRIM 1153. For this reason,

the Ninth Circuit found that conviction of offering a lewd act for a fee under a Hawaiian statute similar to § 647(b) did not *alone* prove that an LPR returning from a trip abroad was inadmissible for prostitution. *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006).

To "engage in" prostitution means that the person engaged in a regular pattern of behavior or conduct. One or two convictions for offering intercourse for a fee may not prove the person is inadmissible under the prostitution ground. *Matter of T*, 6 K&N Dec. 474 (BIA 1955).

In *Matter of Ding,* 27 I&N Dec. 295 (BIA 2018) the BIA considered the definition of prostitution for purposes of the aggravated felony at 8 USC 1101(a)(43)(K)(i), owning, managing, etc. a prostitution business. It held that for that purpose, prostitution includes sexual conduct in exchange for anything of value and is not limited to sexual intercourse. The BIA did not change the definition of prostitution for the inadmissibility The BIA acknowledged that Congress could have a reason to define prostitution differently in the AF than in the inadmissibility ground, and—significantly—that those grounds were added to the INA at different points in history when the definition envisioned by Congress was quite different.

[175] See discussion of divisible statutes at n. 4, above. See CALCRIM 2966, which does not require a jury to decide unanimously between alcohol, drugs, or controlled substances.

[176] *In re Joshua M.*, 91 Cal. App. 4th 743 (Cal. App. 4th Dist. 2001). The purpose of the law is "not to protect the property and safety of householders; it is designed to control 'peeping Toms' and other persons of that type." People v. Lopez (1967) 249 Cal.App.2d 93, 103.

[177] The Ninth Circuit held that the minimum conduct to commit Pen C § 647.6 is not an aggravated felony as sexual abuse of a minor. *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004). Neither is the minimum conduct a CIMT, because as non-explicit, annoying behavior, it does not necessarily harm the victim. *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9th Cir. 2008), partially overruled by *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (to the extent it and other decisions suggest that the BIA is not owed *Chevron* deference in moral turpitude cases)).

Section 647.6 is not a divisible statute, because the terms "annoy" and "molest" are synonymous. See *People v. Kongs*, 30 Cal. App. 4th 1741, 1749 (1994), cited in *Nicanor-Romero*, 523 F.3d 992 (9th Cir. 2008). Because § 647.6 is overbroad and indivisible, *no* conviction is SAM or a CIMT for any immigration purpose, regardless of information in the ROC, within the Ninth Circuit. See categorical approach at n. 4, above.

Because of the minor nature of the minimum conduct and the resulting findings of lack of harm to the minor, § 647.6 also should not be held a crime of child abuse under the BIA's guidelines. See discussion of BIA standard at ILRC, *Practice Advisory: California Penal Code § 273a(b) is not a Crime of Child Abuse* (February 2016) at https://www.ilrc.org/sites/default/files/resources/child_abuse_273ab_mendoza.pdf.

The Ninth Circuit went into useful detail about the type of minor conduct that has been found to violate § 647.6. In finding that it is not SAM, the court noted that defendants have been convicted of § 647.6 for conduct such as include urinating in public, offering minor females a ride home, driving in the opposite direction; repeatedly driving past a young girl, looking at her, and making hand and facial gestures at her (in that case, "although the conduct was not particularly lewd," the "behavior would place a normal person in a state of being unhesitatingly irritated, if not also fearful") and unsuccessfully soliciting a sex act. *U.S. v. Pallares-Galan*, 359 F.3d at 1101 (9th Cir. 2004). In finding that it is not a CIMT, the court noted that defendants have been convicted of § 647.6 for conduct such as brief touching of a child's shoulder, photographing children in public with no focus on sexual parts of the body so long as the manner of photographing is objectively "annoying," and hand and facial gestures or words alone*;* it found that 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, and it is not necessary that the acts or conduct actually disturb or irritate the child. *Nicanor-Romero,* 523 F.3d at 1000.

In considering whether § 647.6, which reaches irritating behavior toward a 17-year-old, constitutes a deportable crime of child abuse, it may be useful to note that having sexual intercourse with a minor age 16 or older is neither sexual abuse of a minor (*Esquivel-Quintana v. Sessions,* 137 S.Ct. 1562 (2017)) nor a crime involving moral turpitude (*Matter of Jimenez-Cedillo*, 27 I&N 1 (BIA 2017)), due to the lack of harm to the minor.

[178] *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009) (Pen C § 653f(a) is a COV under 18 USC § 16(b) but not under § 16(a)). The court acknowledged in dicta that the offense would not be an aggravated felony under 1101(a)(43)(U). *Prakash* at 1039.

[179] See *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009), stating in discussion that because § 653f is a generic solicitation statute that pertains to different types of offenses, as opposed to a statute passed primarily to restrict controlled substances, it is not an offense "relating to" a controlled substance. But see *Arriola-Carrillo v. Holder* (9th Cir. 2015) WL1346157 (unpublished) which assumed that § 653(f) is a CS conviction and found that *Lujan/Nunez* does not apply to § 653f because it is not a lesser included offense of possession. For information on *Lujan/Nunez*, see H&S C § 11377 in chart.

[180] Section 653m(a) should not be a CIMT because the minimum conduct to commit the offense is an intent to annoy, and may be committed by using obscene language, which has been defined as "offensive to one's feelings, or to prevailing notions of modesty or decency; lewd." *People v. Hernandez* (1991) 231 Cal.App.3d 1376. The statute should not be divisible as a CIMT because even if the offense involved a threat of injury, the *mens rea* required is an intent to annoy. *Id.* at 1381.

[181] One defense to fraud/deceit with a loss exceeding $10,000 is to plead to a single count where loss was less than $10k, and at sentencing agree to restitution order of more than $10k with a *Harvey* waiver. To make it crystal clear to immigration judges, if possible, state that the additional payment is due to dropped charges and uncharged conduct. Avoid a plea to attempt or conspiracy, which may give DHS more opening to include the whole amount.

[182] See discussion in *Velasquez-Rios v. Wilkinson,* 988 F.3d 1081 (9th Cir. 2021), declining to give effect to the retroactivity clause in Pen C § 18.5(a) because federal law will not give effect to a state criminal reform statute that purports to retroactively change a previously final conviction. It relied on *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016), which declined to give effect to a Prop 47 reduction. One can argue that if the property offense at issue also is a wobbler, the reduction should be given federal effect because from its inception the wobbler had the potential to be a misdemeanor. At the same time as pursuing that argument, seek PCR. See discussion in *Velasquez-Rios* at pp 1087-88 of *Garcia-Lopez v. Ashcroft,* 33 F.3d 334 F.3d 840, 846 (9th Cir. 2003), *overruled in part by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014).

[183] *Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. 2008) (holding that knowing failure to appear as ordered to face criminal charges under 18 USC § 1346 meets the generic definition of obstruction of justice and is an aggravated felony).

[184] See 8 USC § 1101(a)(43)(Q), (T) and *Renteria-Morales, supra,* regarding the aggravated felony "failure to appear."

[185] **Pen C § 4532 as an AF as Obstruction of Justice**. An offense that meets the generic definition of "obstruction of justice" is an AF if a sentence of one year or more is imposed on a single count. 8 USC § 1101(a)(43)(S). While some aspects of the definition of obstruction are contested (see, e.g., discussion of Pen C § 32, above), it is established that it includes intentional interference with an investigation or proceeding or in punishment resulting from a completed proceeding. See e.g., *Matter of Valenzuela Gallardo* , 27 I&N Dec. 449, 449 (BIA 2018).

Pen C § 4532 as an AF as a COV. Section 4532(a) penalizes escape without the use of force, and this should not be held a COV. Section 4532(b) penalizes escape with the use of force, but arguably this is not a COV either, since it includes force at the level of battery. *People v. Lozano,* 192 Cal. App. 3d 618, 627, 237 Cal. Rptr. 612, 617 (1987). But since 4532 will be held an AF as obstruction if a sentence of a year or more is imposed, the COV ruling would provide little benefit.

Pen C § 4532 as a CIMT. Escape without use of force is not a CIMT, and is treated as a kind of regulatory offense. Even escape with use of force – including the minor force against people or property that is sufficient for 4532(b) -- arguably is not a CIMT. See *Matter of B---*, 5 I&N Dec. 538, 541 (BIA 1953) (finding that a simple assault committed "knowingly" upon a prison guard as part of an attempted escape is not a CIMT), cited with approval in *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996), and see, e.g., *U.S. ex rel. Manzella v. Zimmerman,* 71 F.Supp. 534, 538 (E.D. Pa. 1947) (declining to find that "the action of an escaping prisoner involves that element of baseness, vileness or depravity which has been regarded as necessarily inherent in the concept of moral turpitude. On the contrary such action, while mistaken and wrong under these circumstances, does undoubtedly spring from the basic desire of the human being for liberty of action and freedom from restraint.")

[186] Sections 4573 (bringing in) and 4573.6 (possessing) both prohibit conduct involving California controlled substances within a jail or similar area. The Ninth Circuit held that *no* conviction under 4573.6 is an offense relating to a federally defined controlled substance (CS). *U.S. v. Graves,* 925 F.3d 1036 (9th Cir. 2019). Therefore *no* 4573.6 conviction is a CS offense for any immigration purpose. Some, but not all, of the *Graves* findings also apply to 4573. The following is an argument that 4573 also can benefit from *Graves*, but 4573.6 is far safer.

Section 4573 prohibits bringing or sending in without permission "any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 1100) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance…" Note that "controlled substance" is singular.

Section 4573.6 prohibits possessing without authorization "any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming controlled substances …." Note that "controlled substances" is plural.

Under the categorical approach, both 4573 and 3473.6 are overbroad as CS offenses because the California schedules include substances not on the federal list. The question is, are these statutes also divisible as to the substance. If they are divisible, an immigration (or federal criminal court) judge can look to the individual's record of conviction to see if it establishes the specific substance.

In *U.S. v. Graves, supra,* the Ninth Circuit held that PC 4573.6 is overbroad and also indivisible as to the substance. Therefore no conviction is a CS for immigration purposes, even if the person pled to a specific controlled substance (although that plea would be a very bad idea, since immigration judges may not know about any of these cases). So, section 4573.6 is the preferred plea.

Some but not all of the *Graves* rationales also apply to PC 4573. The court found that 4573.6 is indivisible because it prohibits possessing "substances" in the plural. "This suggests that contemporaneous possession of multiple controlled substances is only a single crime under section 4573.6, and the type of controlled substance is merely a means and not a list of alternative elements." Second, on the same point, it noted that "a California state court has explicitly held that contemporaneous possession of two or more discrete controlled substances at the same location constitutes one offense under section 4573.6. See *People v. Rouser*, 69 Cal. Rptr. 2d 563, 564 (Cal. Ct. App. 1997)." *Graves* at p. 1040.

ICE will argue that these rationales do not apply to PC 4573, which refers to a controlled "substance," not "substances." However, despite the difference in language, arguably it would make no sense for the legislature have intended PC 4573 to have the substances be different elements, while intending PC 4573.6 to have them be different means. But this use of the term "substances" is what makes 4573.6 the better plea.

The court's third rationale should apply to both statutes. In *Graves* at p. 1040-41, the court stated:

> Third, as discussed in *Rouser*, section 4573.6 is part of a completely different code and is aimed at different problems compared to sections of the Health and Safety Code. While "section 4573.6 appears to be aimed at problems of prison administration," sections of the Health and Safety Code are "designed to protect the health and safety of all persons within [the state's] borders … by regulating the traffic in narcotic drugs." Rouser, 69 Cal. Rptr. 2d at 566–67 (internal quotation marks omitted). Thus, our precedents holding certain California statutes within the Health and Safety Code divisible as to the controlled substance do not necessarily apply to section 4573.6. See Martinez-Lopez, 864 F.3d at 1036 (announcing "[w]e took this case *en banc* to revisit the divisibility of California drug statutes" and citing a section of the Health and Safety Code); United States v. Ocampo-Estrada, 873 F.3d 661, 668 (9th Cir. 2017) (noting that the principle from Martinez-Lopez "logically extends past section 11352 to other California drug laws").
>
> We conclude, therefore, that California Penal Code § 4573.6 is not a divisible statute ….

While *Graves* is a federal criminal case that examines whether 4573.6 is a "felony drug offense," the same rationale—that the purpose of a statute and even its placement in the code helps to define the statute—applies in immigration law. See, e.g., *Matter of Batista-Hernandez* , 21 I&N Dec. 955, 961 (BIA 1997) (accessory after the fact is not a CS offense even if the principal committed trafficking in controlled substance, because the purpose of the statute is not to regular drugs; "the nature of being an accessory after the fact lies essentially in obstructing justice and preventing the arrest of the offender.") *Graves* and *Rouser* indicate that this can be a factor in finding that a statute is not divisible for a particular purpose.

[187] See, e.g., *People v. Ortiz* (1962) 200 Cal. App. 2d 250, 254 ("The word 'drug' as used in the code section in question, inasmuch as the Legislature did not specifically define the word in the section itself, must be understood in its ordinary and normal meaning, that is to say, medicines or the components thereof for internal or external use." *Ortiz* found that unauthorized possession of Darvon (a sedative) *and* of Achromycin V (tetracycline, an antibiotic) met the definition of "drugs in any manner, shape, form," under the former language of Pen C 4573.6. Currently, Pen C 4573.5 uses that same language, but with the explicit exclusion of controlled substances: "drugs, other than controlled substances, in any manner, shape, form.…"

[188] The Ninth Circuit held that *no* conviction under 4573.6 is an offense relating to a federally defined controlled substance. *U.S. v. Graves,* 925 F.3d 1036 (9th Cir. 2019). See discussion of *Graves* in endnote to PC 4573, above.

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

[190] See, e.g. *Ali v. Mukasey,* 521 F.3d 737, 740 (7th Cir. 2008) (unlicensed trafficking of firearms should not be a CIMT if it is a mere failure to comply with licensing or documentation requirements); cited with approval in *Efagene v. Holder*, 642 F.3d 918, 923 (10th Cir. 2011).

[191] Conviction of former § 12020 for possession of a dirk, dagger, or other weapon that is not a firearm does not have immigration consequences, but a § 12020 conviction relating to a firearm is a deportable firearms offense and, if involved trafficking, is a firearms aggravated felony under 8 USC § 1101(a)(43)(C). This is true only if the statute is actually divisible as to the type of weapons and/or conduct.

If § 12020 is held to be "divisible" as to the weapon, then the immigration authority can review the person's record of conviction (ROC) to see if it establishes whether a firearm was the subject of their conviction. If the ROC identifies a specific *non-firearm* weapons (e.g., a dirk), then the conviction is not of a deportable firearms offense or an aggravated felony for any immigration purpose. If the ROC is vague as to the weapon (e.g., tracks the language of the statute, or the record was destroyed), then under the current rule in the Ninth Circuit, the conviction will *not* cause an LPR to become deportable based on a firearms offense because ICE cannot prove the weapon was a firearm, but it *will* be a firearms offense for the purpose of making an undocumented person, an already-deportable LPR, or other immigrant, ineligible to apply for relief because that person has the burden of proof and must prove the weapon was *not* a firearm. If the ROC specifically identifies a firearm, it will be a firearms offense for all immigration purposes.

If instead, former § 12020 were held to be "*in*divisible" as to the weapon, then no conviction would be a firearms offense for any immigration purpose as a matter of law, because the minimum conduct to commit the offense could involve a dagger or other non-firearm.

The same rules regarding the burden of proof would apply if § 12020 were to be held divisible for conduct, e.g., between possession and sale of a firearm, where possession is a deportable firearms offense but not an AF, and sale is both.

For more on the categorical approach and divisible statutes, see Categorical Approach Advisory, or get expert help.

[192] Conviction under § 12021 does not come within the firearms deportation ground because the statute reaches and has been used to prosecute antique firearms. *U.S. v. Aguilera-Rios, supra.*

[193] For example, in *Medina-Lara,* 771 F.3d 1106 (9th Cir. 2014), Mr. Medina-Lara was convicted of H&S C § 11351, possession with intent to sell, with an enhancement for carrying a gun during the felony, under Pen C § 12022(c). The offense was held not to be a drug trafficking aggravated felony for deportation purposes because the record did not prove a federally defined controlled substance. The Ninth Circuit did not discuss whether the offense was a crime of violence, because apparently the government never charged this. But arguably since possession for sale is not a crime of violence, doing so while having a weapon available but not using it is not.

[194] *Medina-Lara v. Holder,* 771 F.3d 1106, 1116 (9th Cir. 2014) (the definition of "firearm" at § 12001(b) (now moved to § 16520(a)) that is used in § 12022(c) is overbroad because it includes antique firearms). Note that the definitions of "assault weapon" and ".50 BMG rifle" expressly exclude antique firearms.

[195] See, e.g., discussion at *People v. Poroj* (2010)190 Cal. App. 4th 165, 166 (holding no *mens rea* requirement, distinguishing other cases holding general intent requirement). See also *U.S. v. Ramos-Perez*, 572 Fed.Appx. 465 (9th Cir. 2013)(unpublished), distinguishing *prior* version of 12022.7, which requires specific intent with current version, which does not. However, in *U.S. v. Perez*, -F.3d- (9th Cir. July 11, July 25, 2019), a panel found that 243(d), battery that results in injury, could not be committed with an offensive touching, because only violent force can cause injury. See discussion at § 243(d). While this opinion appears to be in error, it may encourage ICE to charge that a burglary or other offense is a COV if combined with this enhancement.

[196] Defenders warn that PC 17500 may be held a CIMT because it is a specific intent crime; the language of PC § 17500 includes "with intent to" and the relevant jury instruction (CALCRIM No. 2503) requires the jury to find intent to assault beyond a reasonable doubt. In contrast, PC § 417 is a general intent crime.

[197] *United States v. Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003).

[198] Even possessing a sawed-off shotgun is not a CIMT. *Matter of Hernandez-Casillas,* 20 I&N Dec. 262, 278 (BIA 1990). Possession of concealed non-firearms weapons offenses are general intent crimes. *People v. Rubalcava,* (2000) 23 Cal.4th 3221 (interpreting former Pen C § 12020, which encompassed a variety of weapons and now is renumbered into separate offense statutes; see Pen C § 16590 for list).

[199] A stun gun does not meet the definition of firearm, which must be explosive-powered. A stun gun is defined as a weapon with an electrical charge. Pen C § 17230.

[200] This is not a deportable firearms offense because it uses the definition of firearms at Pen C § 16520. See CALCRIM 2520 and see *Medina-Lara v. Holder,* 771 F.3d 1106, 1116 (9th Cir. 2014), *U.S. v. Aguilera-Rios,* 769 F.3d 626 (9th Cir. 2014).

[201] As of this writing in August 2018, persons who have received DACA are permitted to apply for renewal, but many other decisions are tied up in lawsuits. For updates go www.ilrc.org/daca and www.unitedwedream.org. For a description of DACA eligibility and crimes bars, see the section on DACA in § *N.17 Relief Toolkit* (August 2018) at www.ilrc.org/chart.

[202] Pen C § 26350 specifically excludes unloaded antique firearms. See Pen C § 16520(d)(5). The definition of unloaded firearm may be a categorical match with the federal definition of firearms in 18 USC § 921(a). Defenders or immigration counsel can investigate whether the definition of antique firearm in this statute does not entirely match the federal definition (for example, the federal definition includes replicas), and if it does not, they can investigate whether there ever has been a prosecution of an unloaded antique replica.

[203] See, e.g. *Ali v. Mukasey,* 521 F.3d 737, 740 (7th Cir. 2008) (unlicensed trafficking of firearms should not be CIMT if is mere failure to comply with licensing or documentation requirements); cited with approval in *Efagene v. Holder*, 642 F.3d 918, 923 (10th Cir. 2011).

[204] See 8 USC § 1227(a)(2)(C).

[205] See 8 USC § 1101(a)(43)(C).

[206] An antique is defined as a firearm made in 1898 or earlier, plus certain replicas. 18 USC § 921(a)(3), (16).

[207] Conviction of an offense involving a federally defined "firearm" can trigger deportability under 8 USC § 1227(a)(2)(C). Some state firearms offenses are aggravated felonies, including trafficking in firearms and analogues to federal firearm offenses such as being a felon in possession, as long as the offense involves a federally defined firearm. 8 USC § 1101(a)(43)(C). The federal definition of firearm specifically excludes an antique firearm, defined as a firearm made in 1898 or earlier, plus certain replicas. 18 USC § 921(a)(3), (16). In *U.S. v. Aguilera-Rios,* 769 F.3d 626 (9th Cir. 2014), the court held that conviction of a California firearms offense does *not* come within the firearms deportation ground, and is not a firearms aggravated felony, if antique firearms ever have been prosecuted under that statute—even if the defendant used a non-antique firearm. Further, this rule applies to any conviction under any California statute that uses the definition of firearm at Pen C § 16520(a), formerly § 12001(b). *Medina-Lara v. Holder,* 771 F.3d 1106, 1116 (9th Cir. 2014) ("We hold that *Aguilera-Rios* applies to any California statute based on the definition of 'firearm' formerly appearing at § 12001(b).") Since 2012, the definition of firearms at § 12001(b) was moved to § 16520(a), with no change in meaning.

[208] See *U.S. v. Pargas-Gonzalez,* 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former Pen C § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because § 12021 is broader in that it covers mere

ownership of guns by felons), citing *U.S. v. Casterline,* 103 F.3d 76, 78 (9th Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits owning a firearm.

[209] *Bare v. Barr*, 975 F.3d 952, 963 (9th Cir. 2020) (IJ was correct that the elements of felon in possession "*potentially* bring the offense within the ambit of a particularly serious crime.")

[210] The deportation ground at 8 USC § 1227(a)(2)(C) includes possessing, carrying, selling etc., "firearms or destructive devices" as defined at 18 USC § 921(c), (d). Those sections do not include ammunition in the definition. In contrast, some offenses are aggravated felonies because they are analogous to certain federal felonies, some of which do include ammunition. That is why being a felon in possession of ammunition is an aggravated felony, although it would not be a deportable firearms offense.

[211] *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) and see *Matter of Granados*, 16 I&N Dec. 726, 728-9 (BIA 1979) (holding that possession of sawed-off shotgun is not a crime involving moral turpitude), *abrogated on other grounds by Matter of Wadud,* 19 I.&N. Dec. 182, 185 (BIA 1984).

[212] "Short-barreled shotgun as described in 33215" is listed in Pen C § 16590, defining prohibited weapons. Section 16590 expressly excludes antique firearms; see Pen C § 17700.

[213] *Sessions v Dimaya*, 138 S Ct 1204 (2018). See discussion at Pen C § 207, above.

[214] A conviction under Veh C § 2800.1 is not a CIMT. The Ninth Circuit held that Veh C § 2800.2, which requires the same conduct but with the addition of recklessness, is not a CIMT. See discussion of *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9th Cir 2017), below. See also *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), where the BIA found that the offense of driving a vehicle while eluding a police officer under Wash. Rev. Code § 46.61.024 was a CIMT because it had as an aggravating factor wanton or willful disregard for lives or property. Section 2800.1 does not have those elements.

[215] **Veh C § 2800.2**(a) punishes a person who "flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property …" Section 2800.2(b) provides "For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

The definition of "willful or wanton disregard" is the determining factor in whether 2800.2 is a CIMT. And if the Supreme Court decides that a COV includes recklessness, in the pending *Borden* case, this also will determine whether it is a COV, and thus an aggravated felony if a year is imposed. As discussed below, because 2800.2 is not "divisible" between the different kinds of willful or wanton disregard – "regular" recklessness versus violating three traffic offenses – every 2800.2 conviction must be evaluated as if committed by three traffic violations. Under that test, *no* conviction is a CIMT or, regardless of the outcome of *Borden*, a COV.

Overbroad and Indivisible; CIMT. The Ninth Circuit held that VC 2800.2 is overbroad and indivisible compared to the definition of a CIMT, so that no conviction of the offense is a CIMT. *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1305–06 (9th Cir. 2017).

First the court found that VC 2800.2 is broader than the definition of a CIMT ("overbroad"), because VC 2800.2(b) includes fleeing a police officer while committing three traffic violations – something that distinguishes it from similar statutes that have been held to be a CIMT. "Viewing the least of the acts criminalized, we see in subsection (b) that an individual can be convicted of violating § 2800.2 on the basis of eluding police while committing three traffic violations that cannot be characterized as "vile or depraved." We must therefore conclude that the conduct criminalized does not necessarily create the risk of harm that characterizes crimes of moral turpitude, even though subsection (a) standing alone would appear to contain elements of a dangerous crime." *Ramirez-Contreras*, 858 F.3d at 1305–06. Note that it is possible that the BIA later could come out with a published decision that found that even 2800.2(b) is a CIMT, and the Ninth Circuit could decide to defer to it. While that appears unlikely, there is no permanent guarantee.)

Next it found that 2800.2 is "indivisible" in terms of its definition of recklessness. It found that violating three traffic offenses and the more traditional definition of wanton disregard are different means of committing a single offense, rather than elements of different offenses.

> In this case we do not apply the modified categorical approach because the elements of § 2800.2 are clearly indivisible. One must (1) be pursued by a police officer; (2) willfully flee from the pursuit; and (3) do so in a manner evidencing willful or wanton disregard for the safety of others. Subsection (b) provides the means of meeting one element, but does not establish an additional, divisible element. We test our analysis of the statutory elements by looking to California jury instructions. *See Almanza–Arenas*, 815 F.3d at 479 (verifying interpretation of elements by whether it is consistent with California jury instruction as to offense). California jury instructions for this offense require the state to prove (1) pursuit by a police officer; (2) the defendant was driving the vehicle with the intent to flee, elude, or evade the officer; and (3) the defendant drove willfully or wantonly in disregard for the safety of persons or property. Judicial Council of Cal. Criminal Jury Instruction 2181. Our analysis is fully consistent with the instruction. Because § 2800.2 has a "single, indivisible set of elements with different means of committing one crime, ... it is indivisible and we end our inquiry." *See Almanza–Arenas*, 815 F.3d at 476 (internal quotations omitted).
>
> *Ramirez-Contreras*, 858 F.3d at 1306–07

Note also that the phrase in 2800.2(b), "includes but is not limited to" is indicative of it being a means, or list of illustrative examples. See *Mathis v. United States*, 136 S.Ct. 2243, 2256 (2016).

The fact that the statute is indivisible means that *every* conviction of 2800.2 must be evaluated by the minimum (least adjudicable) conduct of the three traffic offenses, regardless of the underlying facts or information in the record of conviction. Therefore, no 2800.2 conviction is of a CIMT.

COV. At this writing, the Supreme Court is considering whether recklessness should be included in a definition of COV that is identical to the immigration definition at 18 USC 16(a), in the pending *Borden v. United States* case. Even if the Court does add recklessness, however, that is likely to be defined as a conscious disregard of a known risk or similar definition that "three traffic offenses" does not match.

There were twists and turns to prior findings of whether 2800.2 is a COV, but the result is that it is not a COV under current law. After some litigation, the Ninth Circuit held that VC 2800.2 is not a COV because that requires intentional conduct and excludes reckless conduct. *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir 2008). The Supreme Court later held that this flight generally is a COV under a vaguely defined statutory section identical to 18 USC § 16(b), but a subsequent Supreme Court opinion struck down that section as void for vagueness, and then finally struck down

18 USC § 16(b). See *Sykes v. United States,* 564 U.S. 1 (2011), overruled by *Johnson v. United States*, 576 U.S. 591 (2015) and see *Sessions v Dimaya*, 138 S Ct 1204 (2018).

So, if the statute is indivisible, why we still want a specific plea to 2800.2(b)/three traffic violations? The majority of immigrants are unrepresented in removal proceedings, and immigration judges may not be aware of *Ramirez-Contreras* or, in some cases, of the full workings of the categorical approach. They may well look to the person's record of conviction to see what happened. So while a specific plea is *not* legally necessary, it may help quite a bit in practice. To provide more direct help, photograph or photocopy the above legal summary and give a copy to the defendant, a responsible friend or family member, and their immigration advocate, if any.

[216] In finding that Veh C § 2800.4 is a CIMT, the Ninth Circuit noted, "Qualifying non-fraudulent crimes 'almost always involve an intent to injure someone, an actual injury, or a protected class of victims.' But the non-fraudulent category also includes some crimes that seriously endanger others, even if no actual injury occurs." Giving Skidmore deference to an unpublished BIA opinion, the court held that "willfully driving in the wrong direction while willfully fleeing a pursuing police officer inherently creates a risk of harm to others that is substantial enough for the statute categorically to meet the definition of a crime involving moral turpitude." *Moran v. Barr*, 960 F.3d 1158, 1160, 1161–62 (9th Cir. 2020). It distinguished § 2800.4 from the less serious offense § 2800.2, which can be committed by violating three traffic laws while in flight, and which has been held not to be a CIMT.

[217] Trafficking in vehicles with altered vehicle identification numbers (VIN) is an aggravated felony if a sentence of a year or more is imposed. So is theft, including receipt of stolen property. See 8 USC § 1101(a)(43)(R), (G), respectively. While arguably this offense is not an AF under the VIN category, defenders should assume conservatively that it will be held an AF as receipt of stolen property if a sentence of a year is imposed.

Section 10801 should be held overbroad compared to the definition of the VIN aggravated felony. Section 10801 includes intent to "alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, *including* an identification number, of the vehicle or part, in order to misrepresent its identity or prevent its identification." CALCRIM 1752 (emphasis added). The minimum conduct could include something other than altering the VIN. Further, the statute does not appear to be divisible, and if that is true, no conviction is an AF.

A "theft offense (including receipt of stolen property)" is an aggravated felony if a sentence of a year or more is imposed. 8 USC § 1101(a)(43)(F). Section 10801 is not categorically (necessarily) a theft offense, because it can be committed by fraud. *Carrillo-Jaime v. Holder*, 572 F.3d 747 (9th Cir. 2009). The more difficult question is whether it is an aggravated felony as receipt of stolen property, which the BIA has held can be property obtained by theft or fraud. Immigration counsel may identify arguments against this, but criminal defense counsel should assume conservatively that 10801 is an AF as receipt of stolen property if a year or more is imposed.

[218] A crime of fraud or deceit is an aggravated felony if the loss to the victim/s exceeded $10,000. 8 USC § 1101(a)(43)(M)(ii). Section 10801 can involve a vehicle taken by either fraud or theft. Because the statute appears not to be divisible (because there is no requirement that a jury decide whether theft or fraud was the conduct), it should be judged according to the minimum conduct, which need not include fraud. Still, make every effort to avoid the $10k loss. See Pen C §§ 484 and 470 in chart. (See Categorical Approach Advisory for more information.)

[219] CIMT: The minimum conduct to commit § 10851 is a taking with intent to temporarily deprive, and that conduct is not a CIMT. Because § 10851 is not divisible under the categorical approach, no conviction of 10851 is a CIMT for any immigration purpose, regardless of information in the record. *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (*en banc*).

This is not changed by BIA precedent that expands the definition of theft as a CIMT to include not only permanently, but "substantially" depriving the person of ownership benefits, by depriving the owner for a long time. The BIA acknowledges that joyriding (which includes depriving property for a few hours or days and is covered by § 10851) does not meet that new definition. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 850-51and n. 10 (BIA 2016); *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016). (Note that the new standard articulated in *Diaz-Lizarraga* and *Obeya* does not apply retroactively to convictions received before their publication date, which was November 16, 2016. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1292 (9th Cir. 2018).)

[220] **10851 as an AF**. This section provides citations and further discussion, and will be of most use to advocates who need to make the argument that a § 10851 conviction with a year imposed is not an AF under any definition, or who just want to understand the underlying issues. Some of these issues involve the categorical approach, which is discussed further at n. 4, above.

***Bottom line**:* The definition of AF includes "theft" (taking property without consent) and "obstruction of justice" (interference with certain kinds of government action), in each case only if a sentence of a year or more is imposed. See 8 USC § 1101(a)(43)(G), (S). A taking under § 10851 would meet the definition of "theft" and be an AF with a sentence of a year or more. (Remember that this is regardless of whether the intent is to deprive temporarily or permanently; temporary intent only is relevant to CIMT determinations, not to an AF.)

However, § 10851 also criminalizes accessory after the fact to the theft. Accessory after the fact is not "theft," and the Ninth Circuit further held that accessory after the fact under Pen C 32 is not "obstruction of justice." See *Valenzuela Gallardo v. Barr,* 968 F.3d 1053 (9th Cir. 2020) (petition for rehearing denied) *("Valenzuela Gallardo II"),* discussed below. Barring a Supreme Court opinion, this appears to be as secure a ruling as we get within the Ninth Circuit. So, a specific plea to accessory after the fact is not an AF in the Ninth Circuit, even if a sentence of a year or more was imposed. There still are two risks with 10851 and a sentence of a year or more:

- First, within the Ninth Circuit, while § 10851 ought to be found indivisible between theft and accessory, it appears that an en banc decision will be required to make that holding. Until then, § 10851 will be considered divisible between theft and accessory in the Ninth Circuit. To avoid an aggravated felony in the Ninth Circuit if a sentence of a year or more is imposed, it is imperative to *plead specifically to accessory*. Immigration advocates should preserve the divisibility issue for appeal (to the Ninth Circuit en banc) and at the same time investigate other defenses, including possible post-conviction relief. See next section discussing theft versus accessory.
- Second, if the client travels, or is detained and transferred, out of the Ninth Circuit and immigration proceedings arise there, any conviction of 10851 with a year or more imposed, including a specific plea to accessory, might be held an AF. The BIA asserts that accessory after the fact *does* meet the definition of obstruction, and some circuit courts of appeals may decide to adopt the same view.

Section 10851 includes accessory after the fact; divisibility issue. This discussion addresses what happens within the Ninth Circuit if a § 10851 conviction has a sentence of a year or more imposed. In 2007 the Ninth Circuit en banc decided *United States v. Vidal,* 504 F.3d 1072, (9th Cir. 2007) (en banc), on remand after *Duenas-Alvarez. Vidal* involved a conviction of § 10851 where a year or more had been imposed. In a split decision, the Ninth Circuit en banc found that the term "an accessory" in § 10851 refers to an accessory after the fact, like Pen C § 32. *Id.* at 1077-86, The court found that the inclusion of "accessory" in the text of § 10851 fulfills the "realistic probability of prosecution" requirement set out in *Duenas-Alvarez. Id.* at 1082. The court held that accessory under § 10851 does not come within the definition of "theft," which was the only AF category that the government had charged (i.e., it had not charged that 10851 also is an AF as obstruction of justice). It reviewed the record of

conviction under the modified categorical approach (i.e., treated § 10851 as a divisible offense) and found that the record was inconclusive. *Id.* at 1086-90.

Ten years later, in *United States v Arriaga-Pinon*, 852 F.3d 1195 (9th Cir 2017) the court considered a very similar case: a § 10851 conviction with a sentence of a year or more, that was charged as an AF only as theft, and that involved a record of conviction similar to the one in *Vidal.* The court followed *Vidal* and held that 10851 is divisible between theft and accessory, and that the record in the case was inconclusive. But it noted that, based on Supreme Court precedent subsequent to *Vidal*, such as *Mathis*, § 10851 ought to be found *in*divisible between theft and accessory. ,. However, the majority of the three-judge panel concluded they did not have authority to overrule *Vidal* and find that § 10851 is indivisible. See *Arriaga-Pinon*, concurrence by Chief Judge Thomas. Therefore, it appears that it will take an *en banc* or a Supreme Court ruling to get a finding that §10851 is indivisible (not divisible) between theft and accessory. If sometime in the future an en banc panel finds that § 10851 is indivisible between theft and accessory, then *no* conviction of § 10851 will be an AF in the Ninth Circuit, even if a year or more is imposed, and even if the specific plea was to theft. However, getting an en banc opinion could take a long time, and for now anything other than a specific plea to accessory is dangerous. At this time:

1) Any person who pled specifically to 10851 accessory and got a year or more does not have an aggravated felony within the Ninth Circuit. See *Valenzuela Gallardo II* (accessory under PC 32 is not obstruction); *Arriaga Pinon* (same for VC 10851).
2) Any person who pled specifically to theft and got a year or more has an aggravated felony within the Ninth Circuit (although immigration advocates should appeal this on the grounds that 10851 actually is indivisible, so that no conviction is an AF in the Ninth Circuit.). See *Arriaga-Pinon, Vidal.*
3) Any person convicted of a divisible statute who has an inconclusive record of conviction is subject to the rules in *Pereida v. Wilkinson,* 141 S.Ct. 754 (2021) (although immigration advocates should appeal any adverse hearing, on the grounds that 10851 is indivisible.) An example of an inconclusive record would be that the person pled to a charge tracking the language of 10851, including both theft and accessory, and no other permissible evidence shows of which conduct the person was convicted. Or, if the court lost or destroyed the conviction records, this is an inconclusive record. *Pereida* held that if a record under a divisible statute is inconclusive, then an applicant for relief cannot meet their burden of proving they are eligible and they will be denied the relief. Likewise, ICE cannot meet its burden of proving that a conviction under a divisible statute makes a person deportable. Note that *Pereida* also suggested that applicants for relief (and one assumes ICE) can use evidence from *outside* the record of conviction to prove the offense of conviction. See discussion of *Pereida* at H&S C § 11377, above, and *Pereida* Advisory at www.ilrc.org/crimes.

[221] "An accepted definition of 'tamper' is to 'interfere with.'" *People v. Anderson* (1975) 15 Cal.3d 806. Opening a door of an unlocked vehicle without the owner's consent is tampering. *People v. Mooney* (1983) 145 Cal.App. 3d 502. This is a lesser-included offense of Veh C § 10851 and requires no intent to deprive the owner.

[222] The minimum conduct to commit Veh C § 10853 includes non-CIMT conduct such as merely moving levers or climbing onto or into vehicle, and the specific intent can be to commit a crime not involving moral turpitude. See § 10853 and *Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (*en banc*).

[223] *Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (*en banc*).

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

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

[226] *See Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (finding that VC § 20001(a) is not categorically a crime involving moral turpitude). Assume this is divisible, because a jury must unanimously decide which duty defendant failed to perform. CALCRIM 2140, 2141, 2150, 2151.

[227] *See, e.g., Serrano-Castillo v. Mukasey*, 263 Fed.Appx. 625 (9th Cir. 2008) ("Put simply, the rationale for our holding in *Cerezo* applies with equal force to § 20002. Violations of Cal. Vehicle Code § 20002 do not categorically involve moral turpitude"); *[Redacted] AAO decision*, 2010 WL 5805336 (Mar. 5, 2010) ("The AAO finds that the Ninth Circuit's determination that Cal. Vehicle Code § 20001(a) is not categorically a crime involving moral turpitude applies with equal weight to a violation of Cal. Vehicle Code § 20002(a).").

[228] In finding that Veh C § 20002(a)(2) was not a CIMT, the Ninth Circuit reasoned, in an unpublished case, that § 20002(a)(2) could be violated by a person who, "after hitting a parked car, leaves his name and address in a conspicuous place on the parked vehicle but fails to report the incident to the local police department." *Serrano-Castillo v. Mukasey*, 263 Fed.Appx. 625 (9th Cir. 2008).

[229] Recklessness that might damage property or harm persons generally is not held a CIMT. For example, the Foreign Affairs Manual, which guides issuance of immigrant visas, states that reckless driving is not a crime involving moral turpitude. See 9 FAM 40.21(a) N2.3-2.

[230] This discussion considers the definition of recklessness that applies to Veh C § 23103, which is a conscious disregard of a known risk. Sections 23103 and 23103.5 should not be held CIMTs because they require only recklessness causing a risk to the safety of persons or property, not an imminent risk of death or very serious bodily injury. Recklessness that might damage property or harm persons generally is not held a CIMT. For example, the Foreign Affairs Manual, which guides issuance of immigrant visas, states that reckless driving is not a crime involving moral turpitude. See 9 FAM 40.21(a) N2.3-2. Recklessly causing bodily injury is not a CIMT. *Matter of Fualaau,* 21 I&N Dec. 475 (BIA 1996).

Moral turpitude has been found to inhere in an offense if it has as an element a conscious disregard of a known risk that causes, or creates the "imminent risk" of causing, death or very serious bodily injury. See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 870-71 (BIA 1994) (conscious disregard resulting in manslaughter), *Matter of Leal*, 26 I&N Dec. 20, 24-26 (BIA 2012) (conscious disregard causing a "substantial risk of imminent death"). Sections 23103, 23103.5 lack that element.

[231] Subsection (a) has no requirement of bad intent and can reach minor conduct. It "merely bars the throwing of any substance at a vehicle while it is moving along or is parked on a highway or a street, which could distract the driver, or result in his injury or in an injury to any occupant, or do some mischief to the vehicle itself." *Findley v. Justice Court* (1976) 62 Cal. App. 3d 566, 572.

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

[233] See ILRC, *Immigration Consequences of Driving under the Influence* (August 2017) at https://www.ilrc.org/immigration-consequences-driving-under-influence.

[234] See *Matter of Castillo-Perez,* 27 I&N Dec. 664 (AG 2019) and see forthcoming practice advisory at www.ilrc.org/crimes. For more on the good moral character requirement, see section 17.26 of ILRC, *N.17 Relief Toolkit* (2018) at www.ilrc.org/chart.

[235] In the case of a long-time permanent resident charged with a felony DUI, with two prior DUI convictions from ten years earlier at least one of which included an accident, the BIA held that the combination of events meant that the person was not eligible for release on any bond because he was a danger to the community. *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018). However, a federal district court held that an immigration judge could *not* deny bond based on a finding that the person was a danger to the community, when the finding was based solely on two misdemeanor DUI convictions from a few years earlier, when the person did not serve custody time and did complete probation conditions. The finding that these DUI convictions demonstrated that the person was a danger to the community was "clearly erroneous." *Ramos v. Sessions,* 293 F.Supp.3d 1021 (N.D. Cal. 2018).

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

[237] 8 USC § 1182(a)(2), INA § 212(a)(2).

[238] SB 54 and the California Values Act provides some limits on how local law enforcement can interact with ICE, unless the immigrant defendant was convicted of certain offenses. A misdemeanor (as opposed to felony) DUI does not destroy SB 54 protection. For more on SB 54, see ILRC, *§ N.4. SB 54 and the California Values Act* (2018) at www.ilrc.org/chart.

If the client is removable, the DUI is likely to make them a priority for ICE, so that ICE may come to their home if ICE doesn't arrest them from jail. You can help your client by providing red cards and referring the person to a local nonprofit for advice and training. "Red cards" are red laminated cards distributed by ILRC that explain immigrants' rights on one side (in any of several different languages) and on the other side, state in English that they do not wish to speak to the officer. To get more information, order red cards in bulk in various languages (for free, for California public defender and nonprofit organizations, and otherwise at low cost), or download any of the text for free, go to www.ilrc.org/red-cards.

[239] A conviction comes within the controlled substance ground of inadmissibility or deportability only if, under the categorical approach, it involves a federally identified CS. See *Mellouli v. Lynch*, 135 S. Ct. 1980, and discussion at H&S C § 11377. Sections 23152(e) does not meet that test. It is overbroad because the minimum conduct may involve a drug that is not a CS (e.g., over-the-counter sleeping or allergy pills). It is indivisible because the single term "drugs" does not set out statutory alternatives, at least one of which is limited to controlled substances. See, e.g., *Descamps v. United States*, 570 U.S. 254 (2013) (the single term "entry" is not divisible between permitted and non-permitted entries). Because the statute is overbroad and indivisible, no conviction can be a controlled substance offense for any immigration purpose. Authorities may not consult the record of conviction to determine what "drug" was involved. See further discussion of the categorical approach at n. 4, above. However, because authorities do not always correctly apply the categorical approach, the best practice is to avoid naming a federally defined CS in the ROC. Also, warn the client not to talk with any immigration authorities about the event or any controlled substance that was involved, without first getting immigration help. The government might try to assert that even though the person was not convicted of a CS offense, the person is inadmissible for "admitting" a CS offense.

[240] See *Avendano-Hernandez v. Lynch,* 800 F.3d 1072 (9th Cir. 2015) (depending upon individual circumstances, the BIA can properly find that a conviction of Veh Code § 23153(b) is a particularly serious crime).

[241] Cal. Welf. & Inst. Code § 10980(c) provides that in setting restitution to the state agency, the agency's "loss" should be calculated as the amount the government overpaid. This factor makes welfare fraud potentially riskier than even the regular fraud/deceit case. See discussion in

Ferreira v. Ashcroft, 390 F.3d 1091, 1098 (9th Cir. 2004), although note that there the defendant *stated in the guilty plea* that restitution exceeded $10,000. If it is possible to plead to theft, or to perjury, forgery, etc. without a one-year sentence, counsel should do so. If a plea must be taken to welfare fraud, counsel should write a written plea agreement to one count of fraud where the government lost less than $10,000 (or more than one count where the aggregate is less than $10,000). At sentencing, accept restitution of more than $10,000 with a *Harvey* waiver and, for the immigration judge's benefit, a statement that the rest of the funds are being repaid based on dropped charges or uncharged conduct. See *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002). Note that both *Chang* and *Ferreira, supra,* were published before *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009), which further defined the aggravated felony. For further discussion see Pen C § 470, above.