

# QUICK REFERENCE CHART

## For Determining Key Immigration Consequences of Selected California Offenses<sup>1</sup>

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For suggestions or questions about the Chart, write [chart@ilrc.org](mailto:chart@ilrc.org) and see **Endnote 1**. Also see “Notes” or short articles on crim/imm topics at [www.ilrc.org/chart](http://www.ilrc.org/chart), and see updates and practice advisories at [www.ilrc.org/crimes](http://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](#). See also ILRC, [How to Analyze a Crim/Imm Case: Four Questions to Identify Case Goals](#) (March 2023).

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.<sup>2</sup>

## **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](http://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 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](http://www.ilrc.org/chart).

## **C. Crime of Violence (COV)**

A conviction of a “crime of violence” (COV) has two potential immigration penalties. First, if a sentence of a year or more is imposed, a COV conviction is an aggravated felony. INA § 101(a)(43)(F). Second, regardless of sentence, if the COV was committed against a person protected under state or other domestic violence laws, a COV is a deportable “crime of domestic violence.” See INA § 237(a)(2)(E)(i) and discussion in **Part E**, below.

Immigration law uses a federal definition of COV, which is not the same as a “serious or violent” offense under California law. Under [18 USC § 16\(a\)](#), a COV is “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” The term “physical force” has been held to mean intentional, oppositional, violent physical force. The definition of COV does not include an offense such as simple battery, including spousal simple battery, that can be committed by a mere “offensive touching.” Thus, Pen C § 243(a) and (e) never are held crimes of violence or a deportable crime of domestic violence, whereas Pen C §§ 245(a), 273.5(a), and 422(a) are.

However, an offensive touching *is* deemed a COV if the offense requires *overcoming the resistance of the victim* by even that small amount of force, as is the case with some robbery and similar offenses. *Stokeling v. United States*, 139 S. Ct. 544 (2019). The Court made clear that *Stokeling* does *not* change the rule on offenses such as simple battery, which do not have “overcoming the resistance of the victim” as an element; these still are not COVs. See also *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022) (simple battery against a spouse is not a COV under *Stokeling*).

It has long been established that an offense that requires either negligence or no *mens rea* is never a COV. *Leocal v. Ashcroft*, 543 U.S. 1 (2003) (a Florida DUI is not a COV). The Supreme Court held that reckless conduct is not a COV, at least when recklessness is defined as conscious disregard of “a substantial and unjustifiable risk” in “gross deviation” from accepted standards. *Borden v. United States*, 593 U.S. 420, 427, 429 (2021). The Court in *Borden* declined to reach whether an offense with a higher *mens rea* of

“depraved heart” or “extreme recklessness” is a COV (*Ibid.* at 429, n. 4) Subsequently the Ninth Circuit held that federal voluntary manslaughter committed with that *mens rea* is a COV under *Borden*, and stated in dicta that California voluntary manslaughter also is. See *U.S. v. Draper*, 84 F.4th 797 (9th Cir. 2023).

Note that 18 USC § 16 sets out two subsections: sections 16(a) and 16(b). The Supreme Court struck down 18 USC § 16(b) as unconstitutionally vague, so that only § 16(a) can be used now. *Sessions v. Dimaya*, 584 U.S. 148 (2018). (Section 16(b) included any felony that “by its nature” involves a risk of violence.) The result is that precedent based solely on § 16(b) is overturned: some felonies that were held COVs under § 16(b) are no longer COVs. Note also that 18 USC § 16(a) is nearly identical to part of the definition of a crime of violence under the Armed Career Criminal Act (ACCA), at 18 USC [§ 924\(e\)\(2\)\(B\)](#). Federal decisions interpreting that part of the ACCA definition also are used to interpret a COV under immigration law, and vice versa.

#### **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. 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 such as being a bar to various kinds of relief, subjecting the person to mandatory detention, etc. Different rules govern when a CIMT incurs each penalty. For more information, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2021) 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 of criminal misconduct”), 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 on or 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 should be treated the same way. But California misdemeanor convictions from before January 1, 2015 still can 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 they formally admit to, or are 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* (2022) at <https://www.ilrc.org/2022-case-update-domestic-violence-deportation-ground>.

Note that as of January 1, 2022, California statutes provide some protection for survivors of DV, similar to what is provided for survivors of human trafficking. Under PC § 236.24, “it is a defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a victim of intimate partner violence or sexual violence at the time of the offense and had a reasonable fear of harm.” Under PC § 236.15, the person may petition the court to vacate a prior conviction if they can “establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of intimate partner violence or sexual violence.” (Compare to similar PC §§ 236.14, 236.23 for human trafficking victims.) Under PC § 1016.7, the district attorney should consider as mitigating factors that the defendant was a victim of trauma, a youth (under 26 years as of date of commission of offense), or a victim of human trafficking or domestic violence. Effective January 1, 2023, the vacatur for domestic violence and human trafficking under PC § 236.14, 236.15 were amended to clarify that the vacatur is based on error (and thus are effective for immigration purposes). See further discussion at ILRC, *New Options for Survivors of Trafficking and Domestic Violence* (2022) <https://www.ilrc.org/resources/new-options-survivors-trafficking-and-domestic-violence> and at Advice to 11358, below.

**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 at **Part C**, 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).

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 either 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 become 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 or probation condition. Instead, plead to a violation of a different part of the order (e.g., failure to attend probation meeting), or to a new offense rather than a probation violation. 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. Section PC 273a(a) is a deportable crime of child abuse, but 273a(b) is not. 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). Offenses with lewd intent involving a minor may be held child abuse, and based on a recent BIA decision, ICE might charge § 261.5(c) as a child abuse. 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. This section will discuss the immigration penalties that apply to drug convictions, admissions, and conduct, and the possible defenses in criminal proceedings.

### **1. Immigration penalties involving controlled substances**

Controlled Substance offenses can have several immigration penalties. In each case, the “generic” definition of a controlled substance is one that appears on federal drug schedules. For more information, see [§ N.8 Controlled Substance](#) (2019), [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

**Conviction of an aggravated felony.** 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, including growing marijuana, H&S C 11358. The offense must involve 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 11352 or 11379, it always should be specifically to *offering to distribute* (or if necessary, sell). This avoids the aggravated felony in the Ninth Circuit, but not the controlled substance grounds of deportability and inadmissibility. See discussion of possible defenses, below.



**Inadmissible or deportable for a conviction of a controlled substance offense.** Conviction of any offense “relating to” a federal controlled substance is a ground of inadmissibility and deportability. 8 USC §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i). There are limited exceptions or waivers for convictions arising from a single incident involving simple possession of 30 grams or less of marijuana. See discussion at ILRC, [Immigrants and Marijuana](#) (May 2021), [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

**Inadmissible for admitting having committed a controlled substance offense.** A person is inadmissible, but not deportable, if they make a qualifying admission that they committed an offense “relating to” a federal controlled substance. 8 USC § 1182(a)(2)(A)(i)(II). This is problematic for immigrants who must apply for some relief, which includes all undocumented people, all deportable LPRs, and many others. Immigration authorities may pressure the person to make an admission, or deny relief if the person refuses to do so. There are some defenses to this. Notably, if conduct was brought before a criminal court judge and the result was less than a conviction (e.g., dropped charges, pre-trial diversion, a conviction followed by PCR), then admission of that same conduct will not make the person inadmissible. See discussion of admissions in [Immigrants and Marijuana](#).

**Inadmissible because authorities have “reason to believe” the person ever has participated in drug trafficking.** This is a fact-based ground of inadmissibility (but not deportability). If immigration authorities amass sufficiently substantial and probative “reason to believe” that the person ever has participated or assisted in trafficking in a federal controlled substance, the person is inadmissible. 8 USC § 1182(a)(2)(C). There are almost no waivers for this ground. It also penalizes some family members.

**Inadmissible (and deportable) for being a current “drug abuser or addict.”** This “health” ground of inadmissibility especially comes up as people apply for lawful permanent residency, and especially in consular processing in another country. See ILRC, *Immigrants and Substance Use Disorders* (2023), [www.ilrc.org/crimes](http://www.ilrc.org/crimes). There is also a deportation ground based on having been an addict or abuser at any time after admission, but it is very rarely charged. 8 USC §§ 1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii).

**Bars to relief.** Controlled substances serve as bars to many forms of relief. In particular, a drug trafficking conviction is extremely dangerous, including for a refugee, asylee, or person applying for asylum. See discussion of crimes bars to relief at *N.17 Immigration Relief Toolkit* (2018), [www.ilrc.org/chart](http://www.ilrc.org/chart).

## 2. Defending Immigrants Charged with Drug Offenses

Controlled substance cases are extremely challenging for immigrants, but there are some effective defense strategies. These are discussed in more detail at **H&S C 11377**, below, and at ILRC advisories such as [How to Defend Immigrants Accused of Drug Offenses, Including New Penal Code 372.5](#) (2023). Here is a brief summary of possible options:

- Other than having all charges dropped, the most effective crim/imm defense strategy is to arrange for the drug charges to be dropped in exchange for pleading to a non-drug offense that is immigration-neutral, or at least less damaging than drugs. Depending on the individual situation, it may be worth it to plead to a fairly serious non-drug offense and several felony offenses do not have immigration consequences. As with all these defenses, consult with a crim/imm expert early in the case.
- Bargain for pre-trial diversion under Penal Code § 1000 (2018), if the defendant is likely to complete it. (If the defendant does not complete it, they will have to return to face the original charges and without the right to trial by jury. Penal Code § 1000.1(a)(3).)

- A plea to an offense that involves a specific substance that is *not* found on federal drug schedules, and so is not a controlled substance for immigration purposes, such as chorionic gonadotropin (H&S C §§ 11377-79). This is a well-recognized, automatic defense to controlled substance immigration penalties.

Immigration advocates can argue that, as defined under California law, cannabis (convictions on or after November 9, 2016) and heroin do not meet the definition of a federal controlled substance. But because there is no precedent yet on those substances, defenders should not rely on this. A federal court held that meth as defined under California law does not meet the definition of a federal controlled substance. [\*United States v. Verdugo\*](#), \_\_ F. Supp. 3d \_\_ (S.D. Cal. July 17, 2023). (This is under a different theory than the one that was used in the prior *Lorenzo* case and then overruled.) See discussion of these principles at ILRC, [How to Use the Categorical Approach Now](#) (Nov. 2021), [www.ilrc.org/chart](http://www.ilrc.org/chart) and ILRC, [Immigrants and Marijuana](#) (2021), [www.ilrc.org/crimes](http://www.ilrc.org/crimes). See discussion of specific substances at H&S C 11377, below.

- Consider whether the defendant might be a victim of human trafficking or domestic violence, who committed the drug (or any other) offense due to coercion. Coercion can mean under direct orders (e.g., to sell drugs, do sex work) or coercion arising from the experience of victimization, without orders (e.g., taking drugs as a response to despair). California law provides that this could be a defense to a current charge or a vacatur for a prior conviction. It also might provide a possible path to legal immigration status. See ILRC, [New Options for Survivors of Trafficking and Domestic Violence](#) (Nov. 2022), [www.ilrc.org/crimes](http://www.ilrc.org/crimes).
- Plead to Penal Code § 372.5 or, with a sentence of 364 days or less, Penal Code § 32. Beginning in 2023, § 372.5 is an alternative plea to California drug charges, the prosecutor can permit a plea to public nuisance in lieu of a controlled substance offense - including for sales cases. In a procedure similar to negotiating a “wet reckless” rather than a DUI offense, the defendant can ask to plead to “being a public nuisance” as an infraction, misdemeanor, or felony offense, rather than the drug offense. See new PC § 372.5. Section 372.5 is a great alternative for an LPR who is facing a deportable controlled substance offense. However, this likely will be less advantageous for undocumented people and others who must apply for relief. See discussion at **PC § 372.5** in the chart and see ILRC, [How to Defend Immigrants Charged with a Drug Offense, Including Penal Code § 372.5](#) (2023), <https://www.ilrc.org/how-defend-immigrants-charged-drug-offenses-including-new-penal-code-§-3725>
- Inconclusive record for LPRs: For nearly 60 years, a key crim/imm defense has been to create a record of conviction that does not name a specific, federally-defined controlled substance, e.g., that refers to “a controlled substance” rather than “cocaine.” See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). Since the 2021 Supreme Court decision in *Pereida v. Wilkinson*, however, this only helps LPRs to contest deportability, and even that is insecure. Any of the other defense options are better, but if they are not available this one is worthwhile for LPRs. See ILRC, [Pereida v. Wilkinson and California Offenses](#) (April 2021), [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

It may be very possible to obtain post-conviction relief to eliminate a prior drug conviction. California has some special procedures for minor drug offenses. See ILRC, [Overview of California Post-Conviction Relief for Immigrants](#) (2023), <https://www.ilrc.org/resources/overview-california-post-conviction-relief-immigrants>

## 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. That means that California felon in possession and several other offenses can be immigration neutral. See further discussion at **Pen C § 246** and individual firearms offenses.

## 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](http://www.ilrc.org/crimes) (Nov. 2021) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

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*, 579 U.S. 500 (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*, 579 U.S. 500, 504, 506 (2016); see also *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 579 U.S. at 517-19.

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 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](http://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](http://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 vacatur 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](http://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 Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) is barred by conviction of any felony, so reduction to a misdemeanor can cure

that. 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](http://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 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](http://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
B&P C 2052	Unlicensed practice of medicine	Not AF	Should not be a CIMT because it's a regulatory offense. See B&P C 25658.	No Should not be a conviction of a controlled substance (CS) offense, but see other defense options at H&S C 11377. See Advice.	<a href="#">B&amp;P C 2052</a> . See also <a href="#">B&amp;P C 2051</a> .  This wobbler might be accepted as a substitute for a drug charge. (For example, it was extended to an owner of a medical practice who did not themselves practice <sup>3</sup> ). Because it has no element relating to specific substances it never should be held a CS offense, but best practice is to remove mention of specific CS in all documents in record of conviction.
BP C 4080	Dangerous Drugs, Devices must be open to inspection	No	No	Should not be a conviction of a CS offense but see other defense options at H&S C 11377. See Advice.	<a href="#">B&amp;P C 4080</a>  The statute uses the word “drug” and “device” which are overbroad and indivisible as a CS offense. While not legally required, best practice is to remove mention of specific CS in all documents in record of conviction. See BP 4022 (drug defined); BP 4023 (device defined)
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 conviction of a CS offense but see other defense options at H&S C 11377	<a href="#">B&amp;P C 4141</a>  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

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					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 a conviction of a CS offense. The term "drug" is overbroad because it includes noncontrolled substances (CS), and is not a divisible term. See discussion and other options at 11377.	<a href="#">B&amp;P C 4324</a>  <b>Drug AF:</b> 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.  <b>Forgery AF:</b> "Forgery" is an AF if 1 year or more is imposed. Assume (a) meets the AF definition of forgery. Imm counsel can investigate arguments that (b) does not. <sup>4</sup> 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. See B&P C 25658.	No	<a href="#">B&amp;P C 7028(a)(1)</a>
B&P C 25658(a)	Selling, giving liquor to a person under age 21	Not AF.	Not CIMT because regulatory offense. <sup>5</sup>	Cannot be deportable crime of child abuse because not "abuse" and V under 18 is not an element. See Advice.	<a href="#">B&amp;P C 25658(a)</a>  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.
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	<a href="#">B&amp;P C 25662</a>  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	<u>AF CS.</u> Assume it is an AF, but see Advice  <u>AF Forgery:</u> Should not be AF as forgery unless false	Yes CIMT, except that (d), affixing a false label, might not be.	Assume a deportable and inadmissible CS offense but see Advice.	<a href="#">Health &amp; Safety C 11173(a), (b), (c)</a>  <b>AF.</b> 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

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		document is used and 1 yr imposed on a single count.			that is successful, the conviction is not an AF or CS offense.  A much better plea is B&P C 4324 (with less than 1 year sentence). If that is not possible, see PC 372.5, 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	Not an AF, except for the below exceptions.  Possession of a CS is an AF if (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.  See 11377.	Not a CIMT.	Deportable and inadmissible CS offense. But see Advice regarding PC 372.5 and other defenses, which are set out at 11377.  There is an argument but no precedent that a California conviction involving heroin is not a conviction of a CS offense. See Advice.	<u>H&amp;S C 11350(a), (b).</u>  <b><u>Information for all charges, 11350-11352.</u></b>  <u>See also ILRC, How to Defend Immigrants Charged with Drug Offenses (2023).</u>  See Advice to 11377, below, for further discussion of the following defenses:  1. Plead to any immigration-neutral (or at least less bad) non-drug offense.  2. Take pre-trial diversion, PC 1000, if D is likely to complete it  3. Plead to a specific non-federal substance, e.g., chorionic gonadotropin (11377-79). Immigration advocates can argue that heroin (11350-52) and marijuana as defined under California law are not a federal CS, but defenders should not rely on this as there is not yet a precedent decision. A federal district court held that California meth (11377-11379, 11364, 11370.1, 11550) is not a federal CS. See discussion of <u>United States v. Verdugo</u> , __ F. Supp. 3d __ (S.D. Cal. July 17, 2023). at 11377, below.  4. Plead to PC 372.5 (2023) or, with less than a year imposed, PC 32. These should not be convictions of a CS offense, an AF, or CIMT. But these are better for LPRs contesting deportability, as ICE may pressure the person to admit the underlying conduct, which potentially could trigger inadmissibility and ineligibility for relief (but not deportability). See Advice to PC 372.5.  5. Less secure defense for LPRs: An older defense was to create a record of conviction that does not name any CS, referring throughout to "a controlled substance" rather than, e.g., "morphine." Since the 2021 decision in

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					<p><i>Pereida</i>, however, this only helps LPRs to contest deportability, and even that is not secure. Any of the other options are better, but if they are not available this one is worthwhile for LPRs.</p> <p>6. Potential defense: Might D be a victim of human trafficking or domestic violence who is committing a drug offense under coercion? Coercion can mean under direct orders (e.g., to sell drugs) or coercion arising from the victimization, without orders (e.g., taking drugs in response to pain or despair). This could be a defense to a current charge; a vacatur for a prior conviction; and/or a possible path to legal status. Even if this is unlikely to succeed as a full defense to a charge, good evidence and a potential defense may improve plea bargaining.</p> <p>7. Eliminate a prior drug conviction with PCR. Additional PCR exists for minor drug offenses.</p>
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.	<p><a href="#">H&amp;S C 11351</a></p> <p>See further discussion at 11378 and see ILRC, <a href="#">How to Defend Immigrants Charged with a Drug Offense</a> (2023).</p> <p><b>Avoid an AF:</b> Do not plead to 11351. Instead, try any of the defenses listed at Advice for 11350, above which are further discussed at Advice for 11377, below.</p> <p>If no other defense is possible, plead up to 11352, <i>offering</i> to distribute. This is a deportable and inadmissible CS offense, but at least it is not an AF in immigration proceedings held within the Ninth Circuit only. In fact, recommending a plea to 11351 without advising about the advantage of pleading up to "offering" under 11352 has been held ineffective assistance of counsel.<sup>6</sup> Based on this, <i>consider post-conviction relief</i> to eliminate any prior 11351 conviction.</p>
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.	<p><a href="#">H&amp;S C 11351.5</a></p> <p>Very bad immigration plea. 11351.5 is even worse than 11351 in that there is no non-federal substance defense.</p>

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H&S 11352.1(b)	Unlicensed furnishing or dispensing prescription drug, CS, or “dangerous” drug or device. <sup>7</sup>	Not an AF.	Should not be a CIMT because it appears to be a regulatory offense, but no case precedent. <sup>8</sup>	Should not be controlled substance offense.	<a href="#">H&amp;S 11352.1(b)</a> Should not be held divisible between drug, CS, and device. <sup>9</sup> Best practice is to plead to “dangerous device” and sanitize all documents in record of conviction.
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 alternatives.	<a href="#">H&amp;S C 11352(a)</a> See further discussion at 11379 and see ILRC, <a href="#">How to Defend Immigrants Charged with Drug Offenses (2023)</a> . See advice for 11350.  Better alternatives are listed at Advice to 11350, above, and discussed further at Advice to 11377, below. Please review these before accepting a plea to 11352.  If you must plead to 11352, a plea to “offering to” distribute (or offering to sell) will be a CS and a CIMT - but in immigration proceedings held within the Ninth Circuit only, it will not be an AF. <sup>10</sup>
<b>Current</b> 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). **** <b>Caution:</b> While this conduct is lawful for age 21 or older, see Advice regarding danger of <u>admitting</u> 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.  <b><u>Single incident possessing 30 grams or less mj.</u></b> 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. <sup>11</sup> Advantages include not deportable for	<a href="#">Current H&amp;S C 11357(a)(2)</a> . See also ILRC, <a href="#">Immigrants and Marijuana (2021)</a> .  Fight hard to avoid any CS conviction, even 28.5 grams of marijuana or less. Try instead for an immigration-neutral non-drug offense or for PC 32, PC 370, 372.5, etc., or for PC 1000 pre-trial diversion (for a client likely to succeed). See Advice to 11377.  <b>Infractions:</b> DHS is treating California infractions as convictions. A cannabis infraction is potentially an extremely dangerous conviction of a controlled substance offense! See also 11358(b), a potential “aggravated felony infraction.” For prior infractions, seek post-conviction relief under PC 1473.7 or other vehicles (but 1016.5 does not apply). The person likely had no defender.  <b>Argument that California cannabis is not a federally defined controlled substance.</b> 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

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				<p>CS; inadmissible for CS but a 212(h) waiver might be available; not a bar to establishing good moral character, and others.</p> <p>See Advice for argument that Cal cannabis is not a controlled substance.</p> <p><b>Deportable.</b> If no drug priors, this is not a deportable CS conviction due to a statutory exception for the 30-gram category. But any drug prior will destroy the exception and make this a deportable offense.</p> <p><b>Inadmissible.</b> Yes, inadmissible CS conviction. But if no drug priors, an LPR or LPR applicant might be eligible to apply for discretionary waiver, INA 212(h), 8 USC 1182(h). Also, conviction is not an automatic bar to showing good moral character (e.g., for naturalization to USC).</p>	<p>convictions on or after Nov. 9, 2016 (the effective date of Prop 64) are not controlled substance convictions for immigration purposes. See endnote for further discussion and citations.<sup>12</sup> While pursuing this argument, at the same time investigate possible post-conviction relief.</p> <p>Defenders should know that this defense exists, but because there is no precedent yet they must not rely on it and plead to a cannabis offense as a 'safe' immigration disposition. 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.</p> <p><b>Post-conviction relief.</b> PC 1203.43 should eliminate prior DEJ pleas for imm purposes, but because ICE is challenging its immigration effect, it is better to obtain 1473.7. For a single minor drug conviction from on or before 7/14/11, see Advice at 11377 regarding the <i>Lujan</i> 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&amp;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 <a href="https://www.ilrc.org/immigrant-post-conviction-relief">https://www.ilrc.org/immigrant-post-conviction-relief</a></p> <p><b>Concentrated cannabis.</b> See Advice at 11357(b)(2).</p> <p><b>Admitting conduct relating to marijuana, working in the industry.</b> 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.<sup>13</sup></p>



CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
<b>Current</b> 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 concentrated 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, plus inadmissible with no 212(h) waiver, CS offense— <i>unless</i> 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. <sup>14</sup> Plead specifically to 29 or 30 gm or less. See Advice regarding concentrated cannabis.  <b>Burden of proof.</b> 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.	<a href="#">H&amp;S C 11357(b)</a> (2)  Please read Advice for 11357(a), including argument that California cannabis is not a CS for immigration purposes.  <b>Concentrated cannabis.</b> <sup>15</sup> 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 “marihuana,” which includes concentrated cannabis, is not a deportable offense. But best practice is to plead to six grams or less of hashish, or else to marijuana, if possible.  <b>Specific plea to 30 grams or less.</b> 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, <sup>16</sup> although ICE might try to contest this.
<b>Current</b> 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	Should not be a CIMT	Assume this is a deportable and inadmissible CS offense with no 212(h) waiver. See Advice.	<a href="#">Current H&amp;S C 11357(c)</a>  Section 11357(c) does not qualify for the 30 grams benefits discussed at 11357(a). Also see Advice at <i>current</i> 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

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		is not a CS for immigration purposes			gm marijuana benefits discussed in 11357(a). <sup>17</sup> To get those benefits, try to plead to 11357(a) or (b).
<b>Prior, Pre-Prop 64 H&amp;S C 11357, <u>Prior version</u></b>  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. <sup>18</sup>	Possess: (a) Concentrated 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.  <u><b>Deportability.</b></u> 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.  <u><b>Inadmissibility.</b></u> 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.	<b>Argument:</b> See Advice at <i>current</i> 11357(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.  <u><b>Prop 64 Post-Conviction Relief.</b></u> 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 <a href="https://www.ilrc.org/immigrant-post-conviction-relief">https://www.ilrc.org/immigrant-post-conviction-relief</a>  <u><b>Concentrated cannabis:</b></u> See discussion in current 11357(b), Advice column, above, regarding conviction under former 11357(a).  <u><b>Schools.</b></u> 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	This is a bad plea-- but see Advice for options and for the argument that the California definition of	Not CIMT because no intent to sell or distribute	Assume deportable and inadmissible for CS conviction, although see Advice. Consider alternatives such as PC 32, 592, etc. at Advice.  <u><b>Inadmissible for reason to believe trafficking.</b></u> Warn D	<u><b>H&amp;S C 11358</b></u>  Avoid this plea because the offense— even for personal use – has been held to be analogous to a federal "aggravated felony." There are arguments against this, below, but they are not guaranteed to win.  <b>Argument.</b> Arguably no California cannabis conviction from on or after November 9, 2016 is a controlled

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	less) to felony depending on priors and conduct.	<p>cannabis is broader than the federal definition of marijuana.</p> <p>Even growing for personal use has been held an AF as an analogue to a federal manufacturing felony.<sup>19</sup></p> <p>See Advice and see <a href="#">§ N.8 Controlled Substance</a>.</p>		<p>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.</p>	<p>substance offense or drug trafficking aggravated felony for immigration purposes, because as of that date Prop 64 defined California “cannabis” more broadly than the federal definition of “marijuana.” See discussion at Advice at current 11357(a)(2). Under that argument, 11358 is not a controlled substance or aggravated felony conviction.</p> <p><b>Infraction.</b> 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. If it is held a conviction, this could have the absurd result that an 11358(b) infraction is an “aggravated felony.”</p> <p><b>AF:</b> Plead to a non-drug crime, e.g., PC 32 or 136.1(b)(1) with less than 1 yr, 460(a), (b), 592 theft of water by fraud (wobbler), 594, 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.)</p> <p>Or, take PC 1000 if D is a good candidate. Success will mean no conviction or admission of a controlled substance offense. See 11377.</p> <p>If D is a refugee, asylee, or potential applicant for asylum, see Advice about trafficking at 11360, below.</p> <p><b>Victims of human trafficking or domestic or sexual violence.</b> Some people who work as laborers unlawfully growing mj, or in any other unlawful work (mules, drug dealers, sex workers, etc.), are victims of human trafficking and are committing crimes under duress – coerced either by the trafficker or as a direct result of their victimization (e.g., taking drugs due to despair). This could support a criminal defense to charges and/or a vehicle to obtain post-conviction relief for a prior conviction.</p> <p>In 2022, the trafficking defense and vacatur were extended to survivors of intimate partner violence or sexual violence who were coerced to commit crimes. This creates possibilities for the large population of defendants who are victims of domestic violence.</p>

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					D also might be eligible to apply for lawful immigration status, with a T visa, a U visa, or relief under VAWA.  If a defendant might benefit from one of these options, see further discussion at ILRC, <a href="#">New Options for Survivors of Trafficking and Domestic Violence</a> (Nov. 2022), and see this endnote for basic information and free resources to assist in representation. <sup>20</sup>
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.	<a href="#">H&amp;S C 11359</a>  <b>Argument.</b> 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.  <u>Bad plea.</u> 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. <sup>21</sup>  See <a href="#">§ N.8 Controlled Substance</a> .
H&S C 11360  (Analysis is not changed by Prop 64)	Unlawfully sell, import, give away, administer, or (since 1/1/16) transport marijuana for sale  Or  Offer to do these things	Divisible. <u>Never AF.</u> 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	CIMT: 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	Yes, deportable and inadmissible CS offenses. To avoid, consider 11377 or 11379 with a non-federal substance defense, if possible. The best option is to plead to a non-drug offense.	<a href="#">H&amp;S C 11360</a>  <b>Argument.</b> 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 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  <u>Giving away mj.</u> For discussion and citations, see endnote. <sup>22</sup> A <i>specific plea</i> to giving away or offering to give away (do not leave the ROC vague) has two advantages:

CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
		<p><u>Offering:</u> Offering to commit 11360 offense is not an AF, but <i>only</i> in imm proceedings arising in the Ninth Circuit. See 11379. Here, a prior conviction for, e.g., offering to sell is not an AF.</p> <p><u>Yes AF:</u> Sell, post-1/1/16 transport</p>	transport for personal use		<p>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.</p> <p>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 <i>Lujan</i>.</p> <p><b>Refugees, asylees, and trafficking:</b> Almost any drug trafficking conviction is a "particularly serious crime," bad for asylees, refugees. See <a href="#">§ N.17 Immigration Relief Toolkit</a>. 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 <a href="#">§ N.8 Controlled Substance</a>.</p> <p>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.</p>
H&S C 11361(b)	(b) Unlawfully gives or offers to give cannabis to a minor age 14 or older.	<p><u>Offering</u> to give should not be an AF, but in the Ninth Circuit only.</p> <p>Assume that <i>giving</i> any amount is an AF and that defenders must avoid this. See Advice for alternatives.</p>	Conservatively assume it is a CIMT, although this can be contested.	<p>Controlled substance offense (but see Advice for argument that California cannabis is not a federal controlled substance)</p> <p>Assume it is a deportable crime of child abuse (but see Advice)</p>	<p><a href="#">H&amp;S C 11361(b)</a></p> <p>Defenders should try hard to avoid this and any drug offense. Consider trying for a charge that can take pre-trial diversion at PC 1000, 1001.95, or other, or a plea to 272, 273a(b), 370, 372.5, 415, etc. For felonies or strikes, PC 32 or 136.1(b)(1) - but sentence must be under 1 yr - or maybe 459 1<sup>st</sup> or 2<sup>nd</sup> degree, etc.</p> <p><b>Argument that California cannabis is not a federal CS</b> because the definition of cannabis is overbroad and indivisible, under the categorical approach. See Advice at 11357(a)(2). If that argument prevails, no conviction from on or after 11/9/16 of a cannabis offense will be a drug trafficking AF or a CS offense for immigration purposes. Defenders should not rely on this, but advocates in removal proceedings can raise the defense.</p>



CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
		Removal defense advocates should see Advice for arguments, including that California cannabis is not a federal CS.			<p><b>AF.</b> See citations in this endnote.<sup>23</sup> The best ways to avoid a drug AF here, in order of preference, are to win at trial or negotiate to (a) a non-drug offense, see above; (b) 11357 possession, or if possible diversion; (c) 11360 <i>offering</i> to give away a small amount, or just giving away a small amount, if possible to a specific person who is age 21 or older; and (d) 11361(b) <i>offering</i> to give away, which should not be an AF in proceedings within the Ninth Circuit. Removal defense advocates can investigate an argument that 11360(b) offering to give away, or giving away, “less than 5 gm” of cannabis is not an AF, but this is not predicted to win at this time.</p> <p>Why these? First, <i>offering</i> to give (or sell) a CS is not an AF, in the Ninth Circuit only. See 11379. Second, nationally, while giving away a CS generally is a drug trafficking AF, giving away a “small amount of marijuana” is not an AF; thus 11360 is not an AF. But giving away a small amount of mj to a minor, 11361(b), is not secure. It’s also possible that the circumstance specific analysis could be used here, so that even conviction of an 11360 offense, which does not have a minor recipient as an element, could be held an aggravated felony if the facts show that the recipient in fact was under age 21, under the circumstance specific approach. That is why we recommend that in the case of 11360 as a substitute plea, one should identify a specific person 21 years or older if possible.</p> <p><b>CMT.</b> The BIA has held that giving a CS away for free is a CMT. But because two thirds of U.S. states permit sale of medical or recreational mj, arguably giving away (or selling) mj now is a “regulatory” offense and not a CMT. Arguably this applies to giving it to a 17-year-old, like the non-CMT of giving or selling liquor to a minor. Defenders should not rely on this, but removal advocates should raise it.</p> <p><b>Child abuse.</b> The issue may turn on whether, under the categorical approach, mj is sufficiently “harmful” to a 17-year-old. Defenders should not rely on this, but removal defense advocates can argue that, like selling or giving alcohol to a 17-year-old, this does not rise to the level of child abuse.</p>

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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.	<a href="#">H&amp;S C 11364</a> <b>See</b> Advice to 11377 and see <a href="#">§ N.8 Controlled Substance</a> . <b>1. Try hard to plead to a non-drug offense.</b> Even the most minor drug offense can have catastrophic immigration effect. Consider B&P C 4140, possession of syringe. <b>2. Take PC 1000 pretrial diversion</b> if D can complete it. <b>3. Consider PC 32 or 372.5</b> , alternatives to drug pleas. <b>4. Marijuana.</b> 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. <sup>24</sup> 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. <b>5. Consider post-conviction relief for prior cases.</b> This includes PC 1203.43 treatment for prior DEJ pleas; <i>Lujan-Armendariz</i> treatment for a minor conviction from before 7/15/11; PC 1473.7, and several other California vehicles. See 11377 and materials at <a href="http://www.ilrc.org/immigrant-post-conviction-relief">www.ilrc.org/immigrant-post-conviction-relief</a>
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.	<a href="#">H&amp;S C 11365</a> See Advice at 11364.  The non-federal substance defenses may be available for 11365, but 11377 is best choice for this defense; see 11377.

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H&S C 11366, 11366.5(a)	Open, maintain, manage place where drugs are sold, distributed, used	11366 is AF as a federal analogue. <sup>25</sup> Assume 11366.5 also is an AF but see Advice. 11379 is a far better plea to avoid an AF.	Yes CMT, 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.	H&S C <a href="#">11366</a> , <a href="#">11366.5(a)</a>  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 CMT, except maybe not if possession only.	Deportable and inadmissible CS offense, unless PC 1000/DEJ solution. See Advice.	<a href="#">H&amp;S C 11368</a>  <b>AF.</b> 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.  <b>PC 1000/DEJ.</b> 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 CMT; see Advice	Yes, deportable and inadmissible CS offense unless one can plead to a non-federal substance. See discussion of the possible advantage of pleading to meth at Advice.  Not a deportable firearms offense. See Advice.	<a href="#">H&amp;S C 11370.1</a>  <b>CMT.</b> Possessing either a CS or a firearm is not a CMT, so together arguably they are not.  <b>CS.</b> All substances listed in 11370.1 are on federal schedules. Note, however, that in 2023 a federal district court held that meth as defined under California law does not meet the definition of a federal CS. See discussion of <i>U.S. v. Verdugo</i> at 11377, below. Unless <i>Verdugo</i> is overturned, if D cannot avoid pleading to 11370.1 the best option is to designate meth.  <b>Firearm.</b> Comes within antique firearm exception; see PC 29800(a). But it may be a bar to DACA. See PC 25400.

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H&S C 11377 H&S C 11350(a) uses the same analysis  Possess any of several controlled substances (CS) that are defined by California statute.	<p><a href="#">H&amp;S C 11377</a>. <a href="#">H&amp;S C 11350</a> uses the same analysis.</p> <p><b>A. Information Specific to CS Possession and Other Minor Drug Offenses</b></p> <p><b>AF:</b> 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.</p> <p><b>CMT:</b> Possession is not a CMT (but sale or distribution is)</p> <p><b>Other Removal Grounds:</b> Conviction is a deportable and inadmissible CS offense, unless a non-federal substance defense applies. Formally admitting that one committed a CS offense, even without a conviction, makes one inadmissible (but not deportable).</p> <p>See discussion at <b>Part B</b>, below, regarding alternative dispositions, such as a plea to a non-drug offense; PC § 1000 diversion (if the person is likely to successfully complete it; see Part B.2, below); and an alternative plea such as PC §§ 32 (with a sentence of 364 days or less) or 372.5, although those alternatives are safer for LPRs than for undocumented people.</p> <p><b>Post-Conviction Relief:</b> Minor drug offenses may be eligible for special PCR, including if the person completed the former DEJ (PC § 1000, 1979-2017) or current Prop 36, and <i>Lujan-Armendariz</i> relief for certain minor convictions from on or before July 14, 2011. See below.</p> <p><b>B. General CS Advice and Links to Practice Advisories</b></p> <p>See this endnote<sup>26</sup> for links to Practice Advisories that cover the below topics in more detail. In particular, see ILRC, <a href="#">How to Defend Immigrants Charged with Drug Offenses, Including New PC § 372.5</a> (Jan. 2023).</p> <p><b>1. Try to avoid a CS conviction—especially a first one! See options.</b> Depending on the individual, a single possession conviction involving a federally-defined substance 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. A drug <i>trafficking</i> conviction is fatal to almost all immigrants who cannot prove a likelihood that they will be tortured in the home country.</p> <p>The best option is usually to bargain to drop the drug charge/s and instead plead to an immigration-neutral non-drug offense. Argue equities and try to plead to e.g., 32, 370/372.5 459, 136.1(b), trespass, 459, DUI, B&amp;P C 4140, etc. Individual analysis is required, but often a plea to a property or even a violent offense is better than a CS offense.</p> <p>There are good options after that, but their effectiveness differs depending on the individual defendant's immigration needs, so be sure to discuss this with an expert. For example, an asylum applicant might do better with an 11350 than with a more serious but still immigration-neutral non-drug offense, while an LPR or person seeking other status could be the opposite. Common defense options are set out below, roughly in order of preference. Each is discussed in more detail in this section.</p> <ol style="list-style-type: none"> <li>1. Plead to any immigration-neutral (or at least less bad) non-drug offense.</li> <li>2. Take pre-trial diversion, PC 1000, if D is likely to complete it.</li> <li>3. Plead to a specific non-federal substance, e.g., chorionic gonadotropin. Immigration advocates can argue that marijuana, heroin, and meth as defined under California law are not a federal CS, but defenders should not rely on this.</li> <li>4. HR/DV defense: Might D be a victim of human trafficking or domestic violence, who is committing a drug (or any other) offense due to coercion? Coercion can mean under direct orders (e.g., to sell drugs) or coercion arising from the victimization,</li> </ol>				

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					<p>without orders (e.g., taking drugs as a response to despair). This could be a defense to a current charge; a vacatur for a prior conviction; and/or a possible path to legal status.</p> <ol style="list-style-type: none"> <li>Plead to PC 372.5 (2023) or, with less than a year imposed, 32. These should not be convictions of a CS offense, an AF, or CMT. However, ICE may pressure the person to admit the underlying conduct, which potentially could trigger inadmissibility and ineligibility for relief (but not deportability).</li> <li>Weakened Defense for LPRs: Now weakened, an older defense was to create a record of conviction that does not name the CS, referring throughout to “a controlled substance” rather than, e.g., “cocaine.” Since the 2021 decision in <i>Pereida</i>, however, this only helps LPRs to contest deportability, and even that is not secure. Any of the above options are better, but if they are not available this one is worthwhile for LPRs.</li> <li>Eliminate a prior drug conviction with PCR. Additional PCR exists for minor drug offenses.</li> </ol> <p><b>2. Take pretrial diversion such as PC 1000 (1/1/18) if D can complete it.</b> 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. PC 1000.1(a)(3). 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.</p> <p><b>3. Plead to a specific non-federal controlled substance,</b> e.g., chorionic gonadotropin. To be a deportable or inadmissible CS offense or CS aggravated felony, a state conviction must involve a substance listed in federal drug schedules. California laws include a few that are not listed there. For example, 11377-79 includes chorionic gonadotropin, which is not a federal substance, and khat, which probably is not.<sup>27</sup> If the record specifically identifies one of these (e.g., “I sold chorionic gonadotropin”), it is not a conviction of a CS offense or drug trafficking AF for any immigration purpose, whether deportability or eligibility for relief. The defense has effect nationally. The problem is that it can be a difficult plea to negotiate—although California defenders have been able to plead guilty to 11377-79 offenses and state “chorionic gonadotropin” on the record, which is all that is required. Note that even with this defense, the person still might face some other penalties; see Part c, below.</p> <p>There is a related but distinct defense: the “unspecified substance” defense, where the record is sanitized to not reveal what substance was involved (e.g., “I sold a controlled substance”). This defense was weakened considerably in 2021. See Part 6, below.</p> <p>Here are key points about the specific CS defense.</p> <p><b>a. Chorionic gonadotropin, H&amp;S C 11377-79, is the safest non-federal CS in California.</b> That substance is not on federal schedules as of this writing. Until the time it is placed on federal schedules, a conviction is not an immigration CS offense or CS AF.</p> <p><b>b. Arguably California heroin is not a federally defined CS – but still not a safe plea.</b> Because the California statutory drug schedule defines heroin more broadly than the federal statutory drug schedule does, there is a very strong argument that California heroin is not a federal CS under Ninth Circuit precedent.<sup>28</sup> But there is no Ninth Circuit case yet, and getting one could take years. Therefore defense counsel cannot rely on heroin as a safe plea. But if a plea to 11350-52 cannot be avoided, do try to designate the substance as heroin or isoheroin. This will permit advocates defending the person in removal proceedings to make the argument.</p> <p><b>c. Arguably California cannabis under Prop 64 is not a federally defined CS - but still not a safe plea.</b> Defenders should conservatively assume that cannabis under California law, including post-Prop 64, is a federally defined CS. But advocates in removal proceedings can assert that Prop 64 changed the California definition of cannabis, so that a conviction 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</p>



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					<p>substance offense for immigration purposes. See discussion at H&amp;S C 11357(a)(2) (current), above and at ILRC, <a href="#">Immigrants and Marijuana</a> (May 2021).</p> <p><b>d. Recent district court decision finds that California methamphetamine is not a federally defined CS.</b> In July 2023 a federal district court held that meth as defined under California law is not a federal CS. <a href="#">United States v. Verdugo</a>, __ F. Supp. 3d __ (S.D. Cal. July 17, 2023). As <i>Verdugo</i> explains, this is based on the fact that California defines meth analogs more broadly than federal law does, so under the categorical approach, California meth is overbroad and indivisible. (Note that this is different from a previous argument that California meth is not a federal CS, based on meth "geometric isomers." While that argument ultimately lost, this argument appears stronger. See discussion of the law and chemistry in <i>Verdugo</i>.)</p> <p>Removal defense advocates should assert this defense now. For criminal defense counsel, if the client has a few possible defense options – for example, considering PC 372.5 versus a plea meth -- it may not be clear which is the safest in every case because <i>Verdugo</i> could be overruled or some other change could happen. <i>Delete this sentence</i>: [However, if an undocumented client is forced to plead to 11377-79, and cannot plead to chorionic gonadotropin, a specific plea to meth is the best option.] Get expert help on individual cases, and see forthcoming ILRC advisory on <i>Verdugo</i> and California meth. Meth also is a potential plea in charges of 11364, 11370.1, and 11550.</p> <p><b>e. Other immigration penalties can occur even with this defense.</b> This defense prevents a conviction of an offense relating to a federal CS. But other immigration consequences do not require a conviction of a CS, and they are a risk. These include:</p> <ul style="list-style-type: none"> <li>- Inadmissible as a drug trafficker. If ICE has the motivation and ability to find evidence that the person aided in trafficking (as opposed to giving away) a federally defined CS, the person can be found inadmissible without a qualifying conviction, because the government has "reason to believe" they ever participated in trafficking. INA 212(a)(2)(C). This is a factual questions and you can do little to prevent it, 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 itself was for a trafficking offense than for possession.</li> <li>- While there are some defenses, immigration authorities might pressure the person into admitting the "real" substance and thereby making themselves inadmissible and barred from some relief (but not deportable)</li> <li>- Sale, possession for sale, distribution of a CS, or offering to do this, is a CIMT,<sup>29</sup> probably regardless of whether the substance appears on federal drug schedules. Assume that any 11351-52 or 11378-79 will be a CIMT. Arguably sharing or selling marijuana is not a CIMT, since that conduct is normalized as a multi-billion dollar industry where such conduct is legal in some form in the majority of states.</li> </ul> <p><b>4. Might D be a victim of human trafficking or domestic violence?</b></p> <p>Does evidence suggest that D may be a victim of human trafficking or domestic violence and is committing the drug offense under coercion? Coercion can mean under direct orders (e.g., to produce or sell drugs) or coercion <i>arising from the victimization</i>, without orders (taking drugs in response to despair). This could be a defense to a drug charge; a vacatur for a prior conviction; and/or a possible path to legal status. For example, San Francisco PDs have won at trial on behalf of Hondurans charged with drug sale but who were trafficked and coerced. See discussion of options at ILRC, <a href="#">New Options for Survivors of Trafficking and Domestic Violence</a> (Nov. 2022) and at Advice to H&amp;S C 11358, above.</p> <p><b>5. Plead to new PC 372.5 or (with less than a year imposed) PC 32.</b></p> <p>See further discussion at Advice to PC 372.5. This should not be a conviction of a CS offense, an AF, or CIMT. However, ICE may try to pressure the person to admit the underlying conduct, which could trigger inadmissibility and ineligibility for relief (but not deportability).</p>

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					<p><b>What it does.</b> <a href="#">PC 372.5</a> became an option in 2023. It operates similarly to a “wet reckless” but for drug charges, giving D the option to accept the criminal penalties for the charge but avoid some immigration or other civil (e.g., housing, employment) penalties. A defendant charged with drug offense/s can ask for charge/s to be dismissed and to plead instead to being a public nuisance (PC 370) at the same offense level. Under PC 372.5(a)-(c), for this purpose 370 is punishable as an infraction, a misd/wobblette, or a 16-2-3 wobbler. It provides that a condition of the plea was that “drug” charges (not limited to CS) were dismissed. Similar to wet reckless, the DA cannot affirmatively charge 372.5, but if defense requests it the DA will decide whether to agree.</p> <p>D is convicted of being a public nuisance, <a href="#">PC 370</a>. Under the categorical approach, 370 is not a CS offense, CIMT, or other removable conviction. But the plea protects some immigrants more than others; see below.</p> <p><b>Compare to PC 32.</b> Felony or misd PC 32 has long been used as an informal substitute immigration plea for a drug charge, to avoid a CS conviction. PC 372.5 has similar effect, except (1) 372.5 can take a year or more without being an AF, while PC 32 cannot and (2) for better and worse, PC 372.5 directly refers to a dismissed drug charge. The upside is that some DA’s have refused to take a PC 32 plea on the grounds it is an inappropriate legal fiction, whereas 372.5 is a sanctioned alternative to a drug charge. The downside is that because immigration authorities may focus on pressuring the person to admit the underlying drug charge that PC 372.5 states was dismissed.</p> <p><b>Which clients this best helps.</b> It is best for LPRs trying to avoid becoming deportable, because a CS <i>conviction</i> is required for deportability and this is not one. It can help LPRs in other contexts (including, although this is not recommended, travel outside the U.S.) where they do not have the burden to prove they are admissible. But an LPR who applies for adjustment as a defense to removal would be in a similar state as undocumented clients, as described below. See endnote<sup>30</sup> and get expert advice if a situation is not clear.</p> <p>This is less good for applicants for relief, which includes all undocumented people, deportable LPRs, etc. They may need to prove that they are admissible or merit a positive discretionary ruling. Immigration authorities may pressure them to admit they committed the original drug charge, which might make them inadmissible or be a negative discretionary factor. They might threaten to deny the application if the persons refuses to speak. See further discussion at Advice to PC 372.5. Immigration advocates may be able to work around this.</p> <p><b>6. For LPRs: Keep the record clear of any specific controlled substance.</b></p> <p>This long-time defense was significantly weakened in 2021 and a plea to PC 372.5 (or, with a year or less, PC 32) is much safer. But if defenses 1-5, above, are not available, this may help LPRs avoid deportability charge and is worth seeking. It will not help immigrants who must apply for relief.</p> <p><b>Defense:</b> Defender bargains to remove any mention of a specific federal CS, e.g., “morphine” from D’s record of conviction and substitute “a controlled substance.” Because H&amp;S C 11350-52, 11377-79 contain some substances not in the federal schedules (see #3, above), the vague record fails to prove that the offense involved a federal CS. In a plea context, the documents that must be sanitized are referred to as the “record of conviction” or <i>Shepard</i> documents; they are the charge pled to; the plea colloquy transcript and/or written plea agreement; the judgment; and any factual basis for the plea agreed to by the defendant. After some back and forth, the Ninth Circuit held that the defense protects all immigrants, including those applying for relief, in <i>Marinelarena</i>.</p> <p><b>Effect of <i>Pereida</i>.</b> In <i>Pereida v. Wilkinson</i>, 141 S.Ct. 754 (March 4, 2021), the Supreme court weakened the defense in two ways. First, it rejected <i>Marinelarena</i> and held that the inconclusive record defense does <i>not</i> help an immigrant applying for relief, e.g., all undocumented people, deportable LPRs, etc. In the drug context, those people must prove that the substance was chorionic gonadotropin. But the defense <i>does</i> help an LPR who is contesting deportability. ICE must prove that the offense was a federal CS.</p> <p>Second, in <i>dicta</i> the Court stated that <i>Shepard</i> likely never applied to immigration proceedings so that evidence from outside the record of conviction can be used to prove the specific substance. The Ninth Circuit seems to be adopting this. Going forward, this means that sanitizing the record of conviction documents may help an LPR to avoid deportability - but this is not guaranteed. LPRs who created a vague record of conviction before March 4, 2021 should have a good argument that this <i>dicta</i> cannot be applied retroactively.</p>

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					<p>For further discussion see ILRC, <a href="#">Pereida v. Wilkinson and California offenses</a> (April 2021). For how to create an inconclusive record of conviction, see endnote.<sup>31</sup></p> <p><b>7. Eliminate a prior CS conviction</b></p> <p><b>Vacatur per PC 1473.7, 1016.5, habeas corpus, etc.</b> California has several types of post-conviction relief that can help immigrants; see especially PC 1473.7. See advisories at the endnote at the start of this section, in particular ILRC, <a href="#">Overview of California Post-Conviction Relief for Immigrants</a> (July 2022), and see the new ILRC book, <a href="#">California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes</a> (January 2023) and materials at <a href="http://www.ilrc.org/immigrant-post-conviction-relief">www.ilrc.org/immigrant-post-conviction-relief</a>.</p> <p>Other PCR is specific to minor drug offenses:</p> <p><b>Former DEJ.</b> People who pled guilty under former PC 1000, Deferred Entry of Judgment (1996-2017) and who ever obtain dismissal under former 1000.3 can submit a free, simple application under PC 1203.43 to eliminate this “conviction” for immigration purposes. But because of ICE pushback in removal proceedings on its effectiveness, one should either (a) make it clear to the criminal court judge or at least to immigration authorities that the person believed that the DEJ promise of “no conviction” included for immigration purposes, and/or see PC 1473.2(e)(2), next.</p> <p><b>Former DEJ or Prop 36.</b> A PD might be able obtain a vacatur under PC 1473.7(e)(2), easily and without conflict of interest. Section (e)(2) creates a presumption of legal invalidity of the plea if there was a representation that completion of the diversion program would mean that there was no conviction or arrest record, which in fact is stated in Prop 36 and the former DEJ. To help in immigration proceedings, it would be best if the defendant files a declaration stating (honestly) that they understood this to include no conviction for immigration purposes, and relied on that in deciding to plead. See PCR advisory in endnote above.</p> <p><b>Conviction on or before 7/14/11.</b> For a qualifying D, first conviction for possession of a CS or of paraphernalia (but <i>not</i> 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&amp;S C 11360 and see <a href="#">Lujan</a> advisory link at endnote above. The Ninth Circuit found that a prior removal of a person who would have qualified for <i>Lujan</i> treatment was a gross miscarriage of justice.<sup>32</sup></p>
H&S C 11378					<p><a href="#">H&amp;S C 11378</a>. Note that <a href="#">H&amp;S C 11351</a> uses same analysis</p>
H&S C 11351					<p>Possess for sale any of several controlled substances (CS) that are defined by California statute. Very bad plea.</p> <p><b>Yes, automatic AF</b>, except see 11377 regarding the non-federal substance defenses. But even with such a defense, the best course is to pursue strategies discussed at 11377, including: pleading instead to a non-drug offense, even a serious one; pleading to PC 372.5 (or PC 32 with a sentence of 364 days or less), if the client can survive that (it is easier for an LPR than an undocumented person to use 372.5 or 32); plead to a specific non-federally defined substance; plead down to 11377 if the client can survive that, or seek diversion.</p> <p>If none of this is possible, D should consider pleading up to 11379 <i>offer to give away</i> (or if necessary, <i>offer to sell</i>). This <i>is</i> a deportable and inadmissible CS conviction, but at least it is not an AF in immigration proceedings arising within the Ninth Circuit only. (If D ends up in immigration proceedings outside the Ninth Circuit, this will be an AF.) 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 has been held ineffective assistance of</p>

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					<p>counsel to fail to advise and consider the 11352/11360/11379 option, rather than 11351/11358-11359/11378 for a noncitizen D.<sup>33</sup> (For that reason, it may not be that difficult to vacate a prior 11351/11358-11359/11378 conviction.)</p> <p><b>Yes CIMT.</b> Note that the non-federal substance defenses do not appear prevent a CIMT. See 11377, Part 3.</p> <p><b>Other removal grounds:</b> 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/offering, not 11378, or better yet, to plead to a non-drug offense.</p> <p>Yes, inadmissible for reason to believe trafficking. Because this is a fact-based inquiry that can use evidence from outside the ROC, this ground may apply even to a conviction protected by a non-federal substance defense, or if the conviction has been vacated. If the facts of the offense show offering to give a CS away for free, it is not necessarily reason to believe “trafficking.”</p> <p><b>Defense strategies:</b> As with other drug offenses, counsel should try hard to plead to a non-drug offense (or, if D is likely able to complete it, to PC 1000 pretrial diversion); to simple possession if D can survive that; or to PC 372.5 or PC 32 (with a sentence of 364 days or less – but see PC 32 advice on CIMT risks); or to a specific non-federal CS, although this may still be a CIMT. See discussion at 11377 and at ILRC, <a href="#">How to Defend Immigrants Charged with Drug Offenses, including New PC 372.5</a> (Jan 2023). Also consider alternative pleas such as H&amp;S C 11391, 25189.5, 459, or B&amp;P C 4141 (sale of syringe). If none of these are possible, plead up specifically to “offering to” distribute (or sell), 11351 or 11379, which at least is not an AF in immigration proceedings within the Ninth Circuit; see above.</p> <p><b>Refugee and Asylees:</b> Conviction of a trafficking offense like possession for sale is a ‘particularly serious crime,’ extremely bad for asylees, refugees, and applicants for asylum. See 11379 and see <a href="#">§ N.17 Immigration Relief Toolkit</a>.</p>
H&S C 11379					<p><a href="#">H&amp;S C 11379</a> Note that <a href="#">H&amp;S C 11352(a)</a> uses same analysis</p> <p>Includes sell, give away, transport for sale (1/1/14 statute), transport for personal use (pre-1/1/14 statute)—<i>OR</i>—<i>or offering</i> to do such conduct, with any of several controlled substances (CS) that are defined by California statute</p> <p>Review the several possible defenses to a CS charge at Advice to 11377, above, before pleading to this charge. If there is no alternative, consider the following.</p> <p><b>AF:</b> Divisible. Sections 11352 and 11379 are divisible in two ways: the verb and the substance.</p> <p>Regarding the verb, if you cannot avoid this offense, <i>always</i> plead specifically to “offering” to give away (or if needed, to sell or transport). Specify “offering” rather than leaving the record vague, because the statute is divisible in this regard. Offering is not an aggravated felony for any immigration purpose, although only in immigration proceedings arising within the Ninth Circuit.<sup>34</sup> (Meaning, if the person ends up in immigration proceedings outside the Ninth Circuit, offering <i>will</i> be an AF.) Even within the Ninth Circuit, offering is a deportable and inadmissible drug offense; its only value is to avoid an AF. Plead to “willfully and unlawfully offering to give away a controlled substance.”</p>
	H&S C 11352(a)				uses same analysis

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			<p>Regarding the substance, see discussion at 11377, Parts 3 and 6, of the non-federal substance defenses. The fact that 11377-79 and 11350-52 include a few substances that are not on federal schedules gives rise to some defenses against having a CS offense for any immigration purposes.</p> <p>Yes AF: Sell, give away, post-1/1/14 transport</p> <p>Not AF: Pre-1/1/14 transport is not an AF, because the minimum conduct is personal use. This should apply nationally. In the Ninth Circuit only, “offering to” commit one of the offenses is not an AF.</p> <p><b>Deportable and inadmissible CS conviction.</b> Yes, unless a non-federal substance defense applies. See 11377, Parts 3, 6.</p> <p><b>CIMT:</b> Sale, transport for sale, offering to do these is a CIMT. The BIA held that giving away for free is a CIMT, although immigration 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 <i>not</i> prevent a CIMT.</p> <p><b>Inadmissible if gov’t has “reason to believe” person participated in trafficking.</b> This is a fact-based removal ground that does not require a conviction, so defenders can only do so much. A plea to unspecified CS may not prevent this finding, if ICE has the motivation and competence to locate substantial evidence that federal CS was involved. A plea to offering to give away rather than offering to sell is best.</p> <p>The “reason to believe trafficking” 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 <a href="#">§ N.8 Controlled Substance</a> and see <a href="#">§ N.17 Immigration Relief Toolkit</a>.</p> <p><b>Refugees, asylees.</b> 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 <a href="#">§ N.17 Immigration Relief Toolkit</a>.</p> <p><b>Defenses and alternative pleas:</b> As with other drug offenses, counsel should try hard to plead to a non-drug offense, and review other possible defense options at <b>11377</b>. If the defendant has equities such as a pending asylum case, family issues, etc., try to persuade the prosecution. If forced to plead to this offense, do plead specifically to “offering to distribute” to avoid an aggravated felony. Also consider alternative pleas such as H&amp;S C 11391, 25189.5, 459, or B&amp;P C 4141.</p> <p><b>Victims of human trafficking or intimate partner violence.</b> If the defendant may be a victim who is working under duress, see discussion at Advice to 11377.</p>		
H&S C 11379.5	Sell, Give away, Transport for sale (1/1/16 statute), Transport for	Divisible: <u>Offering:</u> Offering to	Sale, transport for sale, offering to do these is a CIMT.	Yes, assume this is a deportable and inadmissible drug conviction.	<a href="#">H&amp;S C 11379.5</a>

AF = Aggravated Felony  
COV = Crime of Violence  
CIMT = Crime Involving Moral Turpitude

CS = Controlled Substance  
DV = Domestic Violence  
ROC = Record of Conviction



CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
	personal use (pre-1/1/16 statute) PCP, etc.  or  Offer to do any of above	sell, give away, etc. is not an AF, but only in imm proceedings arising in the Ninth Circuit. See Advice.  <u>Yes AF:</u> Sell, give away, post-1/1/16 transport  <u>Not AF:</u> Pre-1/1/16 transport	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		<b><u>Plead to 11379</u></b> rather than 11379.5 in order to use non-federal substance defenses, especially if the defendant is an LPR who is not yet deportable.  <b><u>Transportation.</u></b> 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.)  <b><u>Consider defenses at 11377:</u></b> instead plead to a non-drug offense, to 372.5, etc., if that is possible.
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.	<a href="#">H&amp;S C 11390, 11391</a>  <b><u>CS offense:</u></b> 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.  <b><u>Trafficking offense.</u></b> 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.  <b><u>Consider defenses at 11377:</u></b> Instead plead to a non-drug offense, to 372.5, etc., if that is possible.
H&S C 11550	Under the influence of a controlled substance (CS)	Not AF, even with a drug prior.  See generally <a href="#">N.8 Controlled Substance</a>	Not CIMT	Deportable, inadmissible as CS, except see defenses in Advice.  <b><u>Non-federal substance defenses may apply.</u></b> The Ninth Circuit found 11550 is divisible as to substance. <sup>35</sup> Often no specific substance is charged for 11550. But 11377 is a better vehicle for this defense, where	<a href="#">H&amp;S C 11550</a>  See Advice for 11377.  <b><u>Marijuana/hashish:</u></b> 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.  <b><u>A plea to 11550 from on or before 7/14/2011 is NOT eliminated</u></b> for imm purposes by rehabilitative relief,

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				available. Note that 11550 includes meth, and in 2023 a federal district court held that meth is not a federally defined CS. See discussion of <i>U.S. v. Verdugo</i> at 11377, above.  <b>Firearms.</b> 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 <i>Lujan</i> . 11550 does not get the same benefit as possession, possession of paraphernalia, or giving away marijuana. <sup>36</sup>  <b>Consider defenses at 11377</b> before pleading to this offense.
H&S C 13001	Negligently risking fire	Not AF	Not CIMT because negligence		<a href="#">H&amp;S C 13001</a> 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	<a href="#">H&amp;S C 25189.5</a> Possible substitute plea for drug production lab or other offense  <b>SB54:</b> This is one of the few wobblers that is protected under SB54, so that the sheriff cannot facilitate transfer to ICE or notify ICE of the defendant's release date based on this offense.
H&S 111440	Manufacture, sell, deliver, hold, or offer for sale any misbranded drug or device <sup>37</sup>	Not an AF.	Should not be a CIMT because it appears to be a regulatory offense, but there is no case precedent.	Should not be CS offense, as the term "drug" is overbroad and indivisible.	<a href="#">H&amp;S C 111440</a> This might not be divisible between drug and device, and the term "drug" is not divisible. Still, while this is not legally necessary, best practice is to plead to "device" and sanitize all documents in the record of reference to a federal CS.  Consider defenses at 11377 before pleading to this 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	<a href="#">PC 31</a> This provides no benefit above the principal offense for immigration purposes. But see PC 32, which can be a good alternative.

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PC 32	Accessory after the fact	Yes, AF as obstruction of justice if a year or more is imposed  See <a href="#">§ N.4 Sentence</a> for suggestions on how to avoid one year while accepting significant custody time.	Never a CIMT per Ninth Cir.  But because BIA holds it is a CIMT <i>if</i> principal's offense is a CIMT, <sup>38</sup> the 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.  <b><u>PC 32 is excellent plea to avoid many removal grounds</u></b> , 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. <sup>39</sup> See also 136.1(b)(1).  But get 364 days or less to avoid an AF.	<a href="#">PC 32</a>  <b>AF.</b> See further discussion at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023). For history leading to <i>Pugin</i> and additional resources, see endnote. <sup>40</sup>  An offense "relating to obstruction of justice" is an AF if a year or more is imposed. 8 USC 1101(a)(43)(S).  In <i>Pugin v. Garland</i> , 22-23 (June 22, 2023) the Supreme Court held that accessory after the fact (a Virginia statute) is obstruction of justice. It specifically rejected the Ninth Circuit's definition that limited obstruction to an offense that interferes with a <i>pending</i> (already existing) investigation or proceeding. The Ninth Circuit had found PC 32 is not obstruction, because the conduct can occur before an investigation has begun. It is highly likely that the Ninth Circuit will find that PC 32 is obstruction.  The Supreme Court did not provide a clear definition of obstruction. It rejected the Ninth Circuit's limit, and stated that that 'corruption' or intent to interfere with legal proceedings is obstruction.  Based on the majority's vague definition, ICE may overcharge offenses as obstruction. Removal defense advocates may contest this for various offenses, but in criminal proceedings we should act conservatively and assume that PC 32, as well as PC 69, several offenses between PC 92-183 including 136.1, 140, 148, 167; VC 10851; and perhaps offenses such as PC 4532, VC 2800.2, or even VC 20001 maybe charged as an AF as obstruction – <i>if</i> a sentence of a year or more is imposed. Without that sentence, several of these offenses, including PC 32, are immigration-neutral and can be valuable alternative pleas.  <b>Alternative pleas.</b> If a year or more is needed, consider safer pleas such as PC 236/237, 487, 530.5, 459/460(a) or (b), 591, 594, and probably 207. See also ways to structure sentences to avoid a year or more for immigration purposes, at <a href="#">§ N.4 Sentence</a> .  If a client has a prior conviction of one of the above offenses with a year or more imposed, try to vacate the conviction. On remand, the Ninth Circuit will consider whether the adverse <i>Pugin</i> obstruction definition will

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					<p>apply retroactively to convictions from before Sept. 11, 2018. But advocates should assume conservatively that the argument will not prevail, and attempt to vacate risky convictions from before that date.</p> <p><b>CIMT:</b> Within the Ninth Circuit PC 32 is not a CIMT.</p> <p>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 <i>Pereida</i>. See discussion of <i>Pereida</i> 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.</p> <p><b>SB 54.</b> This is one of a few wobblers that does not destroy SB 54 protections limiting jail cooperation with ICE. See SB 54 advisory at <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a>.</p>
PC 69	Attempt to deter by threat or resist by force an executive officer in performing any duty	<p>Get 364 days or less on any single count to avoid an AF as obstruction of justice.</p> <p>Not an AF as a COV: minimum conduct is offensive touching.<sup>41</sup></p>	Not CIMT because minimum conduct is offensive touching. <sup>42</sup>	No other removal ground.	<p><b>PC 69</b></p> <p><b>AF as Obstruction.</b> Obstruction of justice is an AF if a year or more sentence is imposed. INA 101(a)(43)(S).</p> <p>Defenders must assume conservatively that PC 69 will be held obstruction under <i>Pugin v. Garland</i>, 22-23, 2023 WL 4110232 (June 22, 2023). There the Supreme Court rejected the Ninth Circuit's definition of obstruction, which required interference in a <i>pending</i> (already existing) investigation or proceeding. Because PC 69 includes resisting an initial arrest, it did not come within that definition. Now defenders must assume that any PC 69 conviction will be an AF, if a sentence of a year or more is imposed. See alternative pleas below.</p> <p>Immigration advocates can investigate arguments that PC 69 is not obstruction under <i>Pugin</i> – for example, because it reaches interfering with officers' duties that are</p>

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					<p>related to public safety and not to a crime of potential legal proceedings.<sup>43</sup></p> <p>- For further discussion see ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).</p> <p><b>Alternatives.</b> If a year or more is needed on a plea, consider safer alternatives such as PC 236/237, 459/460(a) or (b), 530.5. If a lot of time is required, PC 69 can be the subordinate felony with a sentence of 8 months. See other ways to structure sentences for immigration purposes at <a href="#">§ N.4 Sentence</a>. § N.4 Sentence.</p> <p>Try to vacate prior convictions of PC 69 with a year imposed. Advocates will argue that the <i>Pugin</i> definition should not apply to convictions from before Sept. 11, 2018, but we must assume this will not prevail.</p> <p><b>COV / CIMT:</b> 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.</p>
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.	<p><a href="#">PC 92</a></p> <p>Specific plea to bribery of an umpire or referee arguably is not commercial bribery and should not be an AF even with 1 year; more research may be needed.<sup>44</sup></p>
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. <sup>45</sup>	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.	<p><a href="#">PC 112</a> (misd), <a href="#">113</a> (felony)</p> <p><b>AF.</b> 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, counterfeiting, or perhaps obstruction of justice. Immigration advocates may have arguments against this, but it is far better to avoid 1 year.<sup>46</sup></p> <p><b>AF</b> as crime of deceit with loss to victim/s exceeding \$10,000, assuming there are “victims” to this offense.<sup>47</sup></p>
PC 114	Use false documents to conceal one’s immigration status	See PC 112, 113, and see Advice. Obtain 364 days or less	See PC 112, 113.	See 112, 113.	<p><a href="#">PC 114</a></p> <p><b>AF.</b> See 112, 113.</p>



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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. <sup>48</sup>	See 112, 113.	<a href="#">PC 115</a> <b>AF with 1 year.</b> 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.” <sup>49</sup> 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 <i>written</i> 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 <i>oral</i> perjury is a CIMT, but BIA held that it (as well as written perjury) is a CIMT.	No other removal ground.	<a href="#">PC 118</a> <b>CIMT.</b> 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, <i>including</i> written, always is a CIMT, on the grounds that the BIA had failed to explain its reasoning. <sup>50</sup> 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. <b>AF.</b> The Ninth Circuit held that PC 118 meets the generic definition of perjury and thus any conviction of 118 is an AF if a year or more is imposed, regardless of whether perjury was written or oral. <sup>51</sup> If the loss to victim/s exceeds \$10k, see instructions at PC 484, 470. <b>SB54:</b> This is one of the few wobblers that is protected by SB54 and thus the sheriff is not permitted to transfer to ICE.
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.	<a href="#">PC 135</a> <b>CIMT:</b> 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.

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PC 136.1 (b)(1)	Nonviolently try to persuade a witness or victim not to file a police report	Get 364 days or less to avoid an AF as obstruction of justice. See Advice.  Not an AF as a COV.	Probably not a CIMT. Ninth Cir held it is overbroad as a CIMT. BIA held it is never a CIMT in at least one unpublished decision, but not in precedent opinion. <sup>52</sup>  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.  <b>Great substitute plea</b> for drug, violence, 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.	<a href="#">PC 136.1</a> (b)(1)  <b>AF:</b> Defenders must assume that PC 136.1(b)(1) is an AF as obstruction of justice, <i>if</i> a sentence of a year or more is imposed. The Ninth Circuit will address this issue on remand from the Supreme Court. See discussion of <i>Pugin</i> and <i>Cordero-Garcia</i> , below.  If a year or more sentence is needed, consider safer pleas such as PC 236/237, 459/460(a) or (b), 487, 591, , possession of a weapon, or probably 207.  If a lot of time and a strike is required, consider making 136.1(b)(1) the subordinate felony with a sentence of 8 months. See other ways to structure sentences for immigration purposes at <a href="#">§ N.4 Sentence</a> .  Regarding the cases, the Ninth Circuit held that 136.1(b)(1) does not meet the definition of obstruction of justice because it does not require interference with a pending (already existing) investigation or proceeding. <i>Cordero-Garcia v. Garland</i> , 44 F.4th 1181 (9th Cir. 2022). The Supreme Court accepted cert on the issue of the definition of obstruction, considering <i>Cordero-Garcia</i> and a Fourth Circuit case, <i>Pugin v. Garland</i> , that had upheld a finding that Virginia accessory after the fact is obstruction. In <i>Pugin v. Garland</i> , 22-23, 2023 WL 4110232 (June 22, 2023), the Court affirmed that the accessory after the fact offense is obstruction, and specifically rejected the Ninth Circuit's requirement that obstruction involve interference with a pending proceeding. It remanded <i>Cordero-Garcia</i> to the Ninth Circuit for decision on 136.1(b)(1) as obstruction, in light of its ruling in <i>Pugin</i> .  On remand experts will argue that even in light of <i>Pugin</i> , 136.1(b)(1) should not be held obstruction. ILRC will publish briefs when available. <sup>53</sup> They also will argue that the <i>Pugin</i> definition does not apply to convictions from before Sept. 11, 2018. Removal defense advocates will assert these arguments, but criminal defense counsel must assume conservatively that they will not prevail and avoid a conviction with a year or more.  See further discussion of <i>Pugin</i> at Advice to PC 32, above, and at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).

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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	Get 364 days or less to avoid an AF as obstruction of justice.  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).	<a href="#">PC 140</a>  <b>AF as Obstruction.</b> Assume that this is an AF as obstruction of justice if a year or more is imposed, under the Supreme Court's definition in <i>Pugin v. Garland</i> , No. 22-23 (June 22, 2023). For further discussion of <i>Pugin</i> see Advice to PC 32, above, and see ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).  If a year or more sentence is required, consider offenses such as 236/237, 487, 459/460(a) or (b), 591, , or possession of a weapon.  For information on how to structure a sentence to avoid a year for immigration purposes, see <a href="#">§ N.4 Sentence</a> .  For possible arguments in removal defense that PC 140 is not an AF as obstruction or a COV, and is not a CIMT, see endnote. <sup>54</sup>  <b>AF as COV.</b> 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)	Obtain 364 days or less on any single count of 148(b)-(d) to avoid possible AF as obstruction of justice.  PC148(a) is a misdemeanor with maximum 364 days as of January 1, 2015, so it cannot be an AF. But pre-2015 148(a) misd	See citations on CIMT. <sup>55</sup>  148(a) should not be CIMT: minimum conduct is, e.g., going limp in a peaceful demonstration.  Also, an element of 148(a)-(d) is that D knew or <i>reasonably should have known</i> the other was an officer. Arguably this negligence is not a CIMT. Try to plead specifically to should have known.	Assume conservatively that (c) and (d) are deportable firearms offenses, as courts might hold that the police on duty are not likely to be holding antique weapons, in case the antique firearm exception is held not to apply to weapons taken from police on duty. <sup>56</sup>	<a href="#">PC 148(a)-(d)</a> .  <b>AF.</b> Obstruction of justice is an AF if a year or more is imposed. 8 USC 1101(a)(43)(S). Counsel must assume that PC 148 is an AF as obstruction if a year or more is imposed, because it involves some intent to interfere in a legal investigation or proceeding.  Pen C 148 was not obstruction under the Ninth Circuit's definition set out in <i>Valenzuela Gallardo</i> , which required interference with a pending (already existing) proceeding or investigation. However, the Supreme Court rejected that definition in <i>Pugin v. Garland</i> , No. 22-23 (June 22, 2023). See further discussion of <i>Pugin</i> in Advice to PC 32, above and at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).  If a year or more sentence is required, consider safer offenses such as 236/237, 487, 459/460(a) or (b), 591, , or possession of a weapon. Also, PC 69 appears to have a stronger argument that it is not obstruction than 148

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		convictions with a year imposed might be an AF. See Advice.			does and it could be an alternative – although not as safe as the preceding options.  For information on how to structure a sentence to avoid a year for immigration purposes, see <a href="#">§ N.4 Sentence</a> .
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.	<a href="#">PC 148.5</a>  This does not appear to fit the definition of CIMT <sup>57</sup> and does not require intent to benefit, but no precedent; if avoiding CIMT is crucial, seek an alternative.
PC 148.9	False ID to peace officer	Not AF because 6-month max	Ninth Circuit held not a CIMT <sup>58</sup>	No other removal ground.	<a href="#">PC 148.9</a>  No specific intent to evade arrest or prosecution, or commit fraud
PC 148.10	Causing serious bodily injury or death while resisting arrest	Yes assume AF as obstruction of justice if a year or more is imposed. See Advice.  Shd not be a COV.	Arguably not a CIMT. See Advice.  This means that if a sentence of a year or more can be avoided, this is not a removable offense.	No other removal ground.	<b>AF.</b> Obstruction of justice is an AF, <i>if</i> a year or more is imposed. Counsel must assume conservatively that PC 148.10 meets the definition of obstruction. See discussion of the Supreme Court decision on obstruction, <i>Pugin v. Garland</i> , No. 22-23 (June 22, 2023), at Advice to PC 32, above, and at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).  If a year or more sentence is required, consider safer offenses such as 236/237, 487, 459/460(a) or (b), 591, , or possession of a weapon.  For information on how to structure a sentence to avoid a year for immigration purposes, see <a href="#">§ N.4 Sentence</a> .  <b>CIMT, COV.</b> Arguably 148.10 is not a COV or CIMT because it can be committed with no contact, no recklessness, and no intent beyond escape. For example, conviction was upheld when a suspect ran away from officers and the officers fell and injured themselves while pursuing the suspect in the dark. <sup>59</sup>
PC 166 (a)(1)–(4), (b)	Contempt of court, or violation of any court order	Not a potential AF because 6-month max.	Should not be CIMT. (a)(1)-(3) has no intent. (a)(4) should not be held CIMT because minimum conduct is	<b>DV deportation ground:</b> A civil or criminal court finding of <i>any</i> violation of any DV “stay-away” order or condition will make the person deportable.  Best practice is plead to 166(a)(1)-(3) with specific	<a href="#">PC 166(a)</a>  See endnote for further discussion and citations <sup>60</sup> and see ILRC, <a href="#">Case Update: Domestic Violence Deportation Ground</a> (March 2022). Note that the deportation ground at <a href="#">8 USC 1227(a)(2)(E)(ii)</a> describes the provision in detail.

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			to violate any court order—but there is no imm case on point.  (But (4) might be a deportable DV offense; see next column).	non-deportable conduct. See Advice.  Pleading to (a)(4) or (b) when the violation was of a DV protective order is very risky. Try to:  -Plead to a violation of a non-DV order, or to violating a different portion of a DV order, e.g., regarding child support, attending classes.  -Or plead to a new (immigration-neutral) offense, with no finding of violation of any order.  See Advice.	<b>DV Deportation Ground Definitions.</b> A non-USC is deportable if a civil or criminal court judge finds they violated a <i>part of a DV protective order that protects against threat, injury, or repeat harassment</i> . We'll refer to this as any type of DV "stay-away" provision, e.g., restricting phone calls, social media, physical distance.  A DV " <b>protective order</b> " is broadly defined as "any type of civil or criminal injunction issued for the purpose of preventing violent or threatening acts of domestic violence." Assume any family court orders, probation conditions, delinquency orders, etc.  <b>Any conduct</b> that violates the order can count, even if it was non-threatening or casual. The Ninth Circuit held that a criminal court judge's finding that D violated an order by walking a child halfway up the driveway after visitation, when they were supposed to drop them at the curb, was a basis for deportability.  The required " <b>domestic relationship</b> " includes, among others, any person protected under the state DV laws. For California this includes spouses, dating relationships, co-parents, co-habitants, as well as relationships with second degree of consanguinity: parents, grandparents, children, grandchildren, siblings. <sup>61</sup>  <b>166(a)(1)-(3).</b> A plea to 166(a)(1)-(3) should not be deportable because the sections specify court disturbances, not violation of a protective order. (If the subject of a protective order is in court, ensure that the judge's finding is for specific conduct not directed at that person.)  <b>166(a)(4), (b).</b> A plea to (a)(4) or (b) is dangerous if in fact the violation involved a DV protective order. One option is to plead to violating a specific, different type of order (or different portion of a DV protective order). Here, do <i>not</i> rely on creating a vague court finding that does not specify the provision that was violated: on this issue, ICE can use any probative and substantial evidence from any source to show that a judge's finding of violation of "an order" actually was a finding of violation of a DV stay-away order or other portion of a DV order meant to protect against injury, threats, or repeat harassment.

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					<p>If you must plead to (a)(4) or (b) involving a DV order, plead to violating a part of the order whose purpose is not to protect against threats, harassment, etc., e.g., to problems relating to child custody, visits, or support, or failure to attend classes or probation meetings.</p> <p>Another option is to plead to a new, immigration-neutral offense rather than to violating any order. Consider PC 370, 415, trespass, 243(a) (or even (e)), 459, 591, 594, or others. It is optimal, but probably not necessary, to get these extra protections: (a) plead to a victimless crime or identify a specific victim not listed in the DV order (e.g., the ex-wife's new boyfriend, the neighbor, the officer), and/or (b) where possible, have the record sanitized of charges of violation of any order. But most important is to keep to the new offense, with no finding by the judge of violation of an order.</p> <p>Removal defense advocates may note that ICE might not obtain information about the basis for a finding of <i>probation violation</i>, much less a family court finding of violation, and ICE has the burden to prove deportability. In contrast, rap sheet will show a conviction of 166 or 273.6, although it may not show more.</p> <p><b>Defenders: Warn clients not to violate a stay-away order.</b> When a non-USC client gets any kind of DV stay-away order or condition, warn them that it is critical not to violate this in the smallest way. If they are charged with violating an order, tell your PD that you need immigration advice before resolving the case, including VOP.</p>
PC 166(c)(1) – (4)	Violation of a protective or stay-away court order protecting various subjects	<p>PC 166(c)(1)-(3) Not a potential AF because the maximum sentence for a conviction after 1/1/15 is 364 days.</p> <p>PC 166(c)(4) is an AF as a COV if a year</p>	<p>While there are no cases, at least 166(c)(1) and (3) should not be held a CIMT as they can be committed by a small or technical violation. Try to avoid (c)(2) (causing injury).</p> <p>Assume that (c)(4) will be treated as a CIMT because it involves use or</p>	<p><b>DV deportation ground:</b> A civil or criminal court finding of any violation of any DV “stay-away” or protective order or provision will make the person deportable. See 166(a), above.</p> <p>Any conviction under 166(c)(1)-(4) is a deportable offense if D and V share a protected domestic relationship. See discussion at 166(a), above. To protect D from this, identify a specific</p>	<p><a href="#">PC 166(c)</a></p> <p><b>DV deportation ground.</b> To avoid deportability, consider a plea to 166(a)(1)-(3), 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.</p> <p>If one must plea to 166(c), try to create a plea that identifies a <i>specific</i> victim who does not have a domestic relationship with D. For example, 166(c)(1)(A) prohibits violating an order issued pursuant to 136.2, which can include DV or non-DV victims. Section 166(c)(1)(C) prohibits violating an order by committing elder abuse,</p>

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		or more is imposed. <sup>62</sup> Get 364 days or less.	credible threat of violence.	victim who does not have a protected relationship with D, or plead to a different offense. See Advice.	PC 368, which can involve an elder with no domestic relationship (including no parent, grandparent, or sibling).  Do not rely on creating a vague order that does not reveal the victim. 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.
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 <i>might</i> be for child abuse, stalking, crime of DV. See Advice.	<a href="#">PC 182</a> <b>Conspiracy and DV deport grounds.</b> 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). <sup>63</sup> 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.  <b>Deceit and \$10k.</b> 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 <i>per se</i> basis for deportability or inadmissibility, although Congress might add it in the future.	<a href="#">PC 186.22(a)</a>  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 <i>per se</i> , 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 <b>DACA</b> ; see PC 25400.
PC 186.22 (b), (d)	Gang benefit enhancement	AF if underlying conduct is AF (e.g., a COV	Does not change a non-CIMT into a CIMT under current	See discussion at 186.22(a).	<a href="#">PC 186.22</a> (b), (d)  <b>CIMT:</b> Ninth Circuit held that this enhancement does not change a non-CIMT (possess weapon) into a CIMT. It

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		with 1-yr imposed)	Ninth Cir law; see Advice.		declined to follow BIA precedent finding that 186.22(d) transforms PC 594 into a CIMT. <sup>64</sup> 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).	<a href="#">PC 187</a>  See manslaughter as an alternative.  <b>AF.</b> 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. <sup>65</sup>
PC 191.5(a), (b)	Vehicular Manslaughter while Intoxicated	Not an AF even with a year, because gross negligence is not a COV.	Arguably 191.5(a) is not a CIMT, but ICE might charge it as one and the law is unsettled. If it is critical to avoid a CIMT, try hard for 191.5(b) or another offense.  PC 191.5(b) should not be held a CIMT as it does not require gross negligence.	Not deportable.	<a href="#">PC 191.5(a), (b)</a>  <b>COV.</b> An offense must be committed intentionally or with "depraved heart or extreme recklessness" to be a COV. See discussion of <i>U.S. v. Draper</i> at PC 192(a), below. Because 191.5 is committed with gross negligence, it is not a COV and thus is not an AF even with a year.  <b>CIMT.</b> While there is no case on point, removal defense advocates may have a strong argument that PC 191.5(a) is not a CIMT. <sup>66</sup> But defenders still should avoid it when possible if a CIMT will be fatal to client, because ICE might choose to litigate the issue.  PC 191.5(b) does not require gross negligence and is not a CIMT.
PC 192(a)	Voluntary manslaughter	AF as a COV if a year or more is imposed.  To avoid an AF, obtain 364 days or less, or plead to 192(b) or other alternative.	Yes CIMT, <sup>67</sup> as is attempt.  To avoid CIMT see PC 192(b).	<b>DV deportation ground.</b>  As a COV (see Advice), PC 192(a) is a deportable "crime of DV" if the victim has a protected DV relationship, regardless of sentence. To avoid this outcome, plead to a non-COV such as 192(b).  To ensure not wrongly charged as a deportable "crime of child abuse," keep	<a href="#">PC 192(a)</a>  <b>COV:</b> Defenders must assume that PC 192(a) is an AF as a COV if a sentence of a year or more is imposed. In <i>US v. Draper</i> (2023), the Ninth Circuit held that <i>federal</i> voluntary manslaughter is a COV because the minimum conduct requires a <i>mens rea</i> of extreme recklessness or depraved heart. (It distinguished that <i>mens rea</i> from other degrees of recklessness such as a conscious disregard of a known risk, from the COV definition.)  After finding that federal voluntary manslaughter is a COV, the panel in <i>Draper</i> stated in dicta that because PC 192(a) has the same <i>mens rea</i> , it too is a COV. It stated

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				minor V's age out of ROC. See 243(a).	that older Ninth Circuit precedent holding that 192(a) is not a COV is inconsistent with the subsequent en banc Ninth Circuit decision in <i>Begay</i> (2022), which interpreted the Supreme Court decision in <i>Borden</i> (2021). In <i>Borden</i> the Supreme Court affirmed that recklessness generally is not a COV, but left open whether a <i>mens rea</i> of extreme recklessness or depraved heart is a COV. Begay held that it is a COV. See citations and further discussion in endnote. <sup>68</sup>  Removal defense advocates can investigate possible defenses against applying this ruling to 192(a), especially if the 192(a) conviction occurred at least before the date of <i>Draper</i> 's publication, Oct. 17, 2023. At the same time they must investigate the possibility of PCR to vacate the conviction. See discussion at endnote. <sup>69</sup>  <i>Attempt</i> to commit voluntary manslaughter, CA PC 664/192(a), is a COV. <sup>70</sup>
PC 192(b), (c)(1), (2)	Involuntary or vehicular manslaughter	No because not a COV. See Advice	Should not be CIMT; best practice is plea to negligence, not conscious disregard. <sup>71</sup>	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).	<a href="#">PC 192</a> (b), (c)(1), (2)  These offenses are not COVs because the minimum conduct required for guilt amounts to gross negligence, which is not a COV.  Gross negligence does not arise to the definition of recklessness as a <i>conscious disregard</i> of a substantial known risk. <sup>72</sup> Further, even that definition is not enough for a COV. A COV requires intentional conduct or, according to the Ninth Circuit, a specific higher degree of recklessness (depraved heart or extreme recklessness). See discussion at 192(a), which the Ninth Circuit stated is a COV because it requires that intent.
PC 203	Mayhem	Yes, AF as COV <sup>73</sup> 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).	<a href="#">PC 203</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 <a href="#">§ N.4 Sentence</a> .

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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 <i>Stokeling</i> poses to 207(a) (not (d)), and conservatively try to get 364 days or less on 207(a) count until there is a precedent decision interpreting it.  See Note: Sentence.	Ninth Circuit held that 207(a) is not a CMT. <sup>74</sup>	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, 136.1(b)(1) (avoid a year on each), felony 236/237 (although no precedent), 243(e), 459/460(a) or (b), 487, 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.	<a href="#">PC 207</a> (a), (d)  <b>COV.</b> For citations and further discussion of <i>Dimaya</i> , <i>Stokeling</i> , <i>Borden</i> , and the definition of COV in general, see this endnote. <sup>75</sup>  For citations and further discussion of PC 207 as a COV, see this endnote. <sup>76</sup>  A COV is defined in 18 USC 16(a) only, because the Supreme Court struck down 16(b) in <i>Dimaya</i> . Under 16(a), a COV must have as an element the use, threat, or attempt to use force, interpreted as violent, intentional force, not including <i>de minimis</i> force. The Ninth Circuit held that PC 207(a) and (d) do not meet this definition.  But in <i>Stokeling</i> (2019), the Supreme Court held that robbery is a COV if it has as an element the use of even <i>de minimis</i> force to “overcome the will of the victim,” because the nature of the confrontation is inherently violent. ICE might charge 207(a) as a COV under <i>Stokeling</i> . Because 207(a) can be committed by the threat of arrest, which involves <i>no</i> use or threat of force, imm advocates have a strong argument that it is not a COV under <i>Stokeling</i> . 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 <i>Stokeling</i> does not change the COV analysis of assault and battery, so the analysis of 243 and similar offenses should not change.)  The Supreme Court held that reckless conduct is not a COV, in <i>Borden v. United States</i> , 141 S.Ct. 1817 (2021). Thus, PC 246, , or VC 23104, 23105, etc. should not be an AF even if a year or more is imposed.  If one year or more on a single count can't be avoided, the safest 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.  <b>Adam Walsh Act.</b> 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 <a href="#">§ N.13 Convictions that Bar the Defendant</a>

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					<a href="#">from Petitioning for Family Members: the Adam Walsh Act.</a>
PC 211	Robbery by means of force or fear	Get 364 or less to avoid AF as theft and perhaps as a COV. <sup>77</sup> See Advice.	Defenders must assume it is a CIMT.  Imm advocates can consider arguments that it is not a CIMT. <sup>78</sup>	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).	<a href="#">PC 211</a>  To avoid an AF, avoid a one-year sentence imposed. Consider plea to 487, 459/460 (can take more than a year), felony 236/237 (should be able to take more than a year), and/or, e.g., 136.1(b)(1), 243(a), (d), 245(a), or similar with <i>less</i> 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). 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 (because that deportation ground does not include crimes against property). Still, try hard to avoid this if V and D share a domestic relationship. See Advice.	<a href="#">PC 215</a>  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. <sup>79</sup> But note that it also is likely an AF as theft if a year is imposed.  To avoid a one-year sentence, see <a href="#">§ N.4 Sentence.</a>
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 rape regardless of sentence.  See Advice	Yes CIMT	Yes, DV if V has domestic relationship.  To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	<a href="#">PC 220</a>  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 strike is needed, one can plead to 136.1(b)(1) consecutive (with 8 months imposed) and avoid an AF.



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PC 236, 237(a)	False imprisonment by violence, menace, fraud, or deceit (Felony)	Should not be held an AF as a COV.  But because there is no immigration case on point, try to get 364 days or less.  However, if you must take a year this is a reasonable plea option because the law is clear. See Advice	The Ninth Circuit held 237 by menace is not a CIMT, and other subsections such as by deceit also should not be. Because the statute is indivisible, no 237 felony conviction should be a CIMT.  But to avoid possible wrongful CIMT charge, plead to menace or deceit.  For further discussion and citations, see Advice.	This should not be held a COV and thus should not 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).  <b>Adam Walsh Act.</b> Conviction of false imprisonment of a minor can prevent a USC or LPR from immigrating family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a>	<a href="#">PC 236, 237(a)</a>  See this endnote <sup>80</sup> for citations and further discussion of felony 236/237 as a COV and CIMT.  Significantly, the California Supreme Court held that felony PC 237 is not divisible between violence, menace, fraud, and deceit. That means that the minimum conduct to commit the offense by any means (e.g., by deceit) is the standard for deciding COV and CIMT. However, because there is no immigration case on point this may be hard for unrepresented immigrants.  <b>More on COV.</b> Felony 236/237 is a good alternative to a COV such as 245, 273.5, 422. Because the minimum conduct required for guilt is low and the California Supreme Court held that the statute is not divisible, <i>no</i> 236/237 conviction should be a COV for any purpose, regardless of info in the ROC—including under the <i>Stokeling</i> decision. See discussion in above endnote.  Still, because there is not yet a BIA or Ninth Cir decision on point, immigrants could be wrongly charged with a COV. To be safer, plead specifically to deceit and keep violence out of the record. Or give the defendant, imm attorney, and/or friend a photo of the COV analysis in the above endnote.  To more surely avoid an AF if a year is imposed, consider 460(a) or (b), 487 (a CIMT) or 530.5, or probably 594 (defacing).
PC 236, 237(a)	False imprisonment (misd)	Great plea.  Not an AF as a COV, plus maximum exposure is 364 days	Not a CIMT <sup>81</sup>	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).	<a href="#">PC 236, 237(a)</a>  This is a very good substitute plea to avoid crime of violence in DV cases.  <b>Adam Walsh Act.</b> 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	Not CIMT <sup>82</sup> but see Advice regarding ROC	See 243(a)	<a href="#">PC 241(a)</a>  Good immigration plea. (Although due to extensive case law on battery, battery might be better because imm

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		less than 1 year			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.  <b><u>To ensure not wrongly charged as a crime of child abuse</u></b> , 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, <sup>83</sup> but a sanitized ROC clean will protect D against error.	<a href="#">PC 243(a)</a>  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. <sup>84</sup> 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 <a href="#">§ N.4 Sentence</a> .  243(b) should not be a COV.	b) does not involve injury, not a CIMT.  (c) should not be held a CIMT, <sup>85</sup> but might wrongly be charged; See Advice.	No other removal ground. Not DV because these victims not protected under DV laws.	<a href="#">PC 243</a>  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). <sup>86</sup>
PC 243(d)	Battery with serious bodily injury	To avoid AF as COV get 364 days or less on each count. See <a href="#">§ N.4 Sentence</a> .  But see Advice.  If you must plead, try to <i>plead</i>	Assume it will be held a CIMT due to the (arguably incorrect) holding in <i>Perez</i> that the minimum conduct involves use of violent force.  But it should not be so held, and imm	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	<a href="#">PC 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. <i>US v Perez</i> , 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. For PC 32

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		<i>specifically to an offensive touching.</i>	advocates can contest. <sup>87</sup>  Try to plead specifically to an offensive touching causing injury. If it is critical to avoid a CIMT, plead to a different offense.	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).	and 136.1(b)(1), do not plead to over 364 days to avoid a potential AF finding.  Imm advocates should contest the <i>Perez</i> holding and preserve the issue on appeal, to bring it again before the Ninth Circuit. Critical evidence was not submitted in the original <i>Perez</i> case. Contact the ILRC for assistance. For arguments that <i>Perez</i> is wrongly decided; see endnote. <sup>88</sup>  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).	<a href="#">PC 243</a>  Excellent immigration plea: extensive case law holds that because minimum conduct is an offensive touching, it is never a COV or CIMT. <sup>89</sup> 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 <b>DACA</b> . 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. <sup>90</sup>	This might be (wrongly) charged as a COV under <i>Stokeling</i> , so if possible get a different plea (e.g., 236.1(b)(1) or 136.1(b)(1), with less than a year, 459 or 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	<a href="#">PC 243.4(a) and (e)</a>  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 <i>Stokeling</i> decision. <sup>91</sup> 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

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				<p>alternate pleas and further discussion.</p> <p>To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).</p> <p>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.</p>	<p>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.</p> <p>Misd is a "significant misdemeanor" for <b>DACA</b>. See PC 25400.</p> <p><b>Adam Walsh Act.</b> 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 <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act</a>.</p>
PC 243.9(a)	"Gassing" of a peace officer or employee by a detainee	Probably not COV; includes "placing" excrement on someone	The intent is more to offend and annoy rather than cause serious injury, so arguably not a CIMT	No other removal ground	<p><a href="#">PC 243.9(a)</a></p> <p>Gassing is defined at PC 243.9(b) as placing or throwing feces, urine, or bodily fluids that touch another person's skin.</p>
PC 245(a)(1)-(4) and (c)	Assault with a deadly weapon (firearm or other) or with force likely to cause great bodily injury; (c) is when V is a peace officer or fireman at work	Get 364 or less to avoid an AF as COV. <sup>92</sup> Assume all subsections are a COV.	Ninth Circuit held 245(a) is a CIMT. <sup>93</sup>	<p>Can be deportable crime of DV; see Advice.</p> <p>To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).</p> <p><u>Firearms.</u> Because (a)(2) uses the definition of firearm at PC 16520(a), <i>no</i> conviction for (a)(2) is a deportable firearms offense. But (a)(3) is specifically for machineguns and assault weapons and thus has no antique firearm defense. See PC 246.</p> <p>To avoid any error, a safer plea is to 245(a)(1) or keep ROC clear of evidence that</p>	<p><a href="#">PC 245</a></p> <p><u>Crime of domestic violence.</u> 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.</p> <p>To avoid a deportable crime of DV:</p> <ul style="list-style-type: none"> <li>-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.</li> <li>-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.</li> <li>-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.</li> </ul> <p>For further discussion and citations, see this endnote.<sup>94</sup></p>

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				offense was (a)(2) or esp. (3).	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.	Recklessness is not a COV, so PC 246 is not an AF even if a year or more is imposed. Still, best practice always is to try to get 364 days or less. See Advice	Yes, assume CIMT. <sup>95</sup>	Not a deportable firearms offense because firearm uses the definition at PC 16520(a); see Advice.  Because it is not a COV, it cannot be held a crime of DV	<a href="#">PC 246</a>  <b>Firearms deportation ground.</b> 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. <sup>96</sup> PC 246 uses that definition of firearm.  <b>Recklessness and COV.</b> Courts of appeals have long held that a crime of violence requires more than reckless intent; thus the Ninth Cir held that 246 is not a COV. <sup>97</sup> The Supreme Court affirmed that recklessness is not a COV in <i>Borden v. United States</i> . <sup>98</sup> Therefore, while 364 days always is preferable, this is not a COV or an aggravated felony if 1 year or more is imposed, or 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 <b>DACA</b> as a firearms offense, 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).	<a href="#">PC 246.3</a>  The Ninth Circuit held that 246.3, committed by gross negligence, is not a COV. <sup>99</sup> Still, as always, it is best to get a sentence of 364 or less.  Misd is a "significant misdemeanor" for <b>DACA</b> 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, 286(i)	Rape	Yes AF, regardless of sentence. <sup>100</sup>	Yes CIMT	To ensure not wrongly charged as child abuse, keep	<a href="#">PC 261, 286(i)</a>

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(Not 261(a)(4))				minor V's age out of ROC. See 243(a).	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.  <u>Adam Walsh Act.</u> 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 <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a>
PC 261(a)(4)  This also applies to PC 286(f), 289(d)	Rape by fraud	Might not be an AF as rape. See Advice  Section 286(f), 289(d) should have the same analysis	Yes CIMT	No other removal ground, since this is not a crime of violence and does not have minor age as an element.	<a href="#">PC 261(a)(4)</a>  See Advice on other pleas at PC 261, above  <b>AF.</b> The Ninth Circuit remanded to the BIA the question of whether rape by fraudulent representation, PC 261(a)(4)(D), meets the generic definition of rape. If it does not, then no conviction under 261(a)(4) is rape, because (4) is not divisible between the subsections (A) – (D). <sup>101</sup> The same language appears in 286(f) and 289(d).  Because the BIA could hold that this is rape and the Ninth Circuit could defer, defense counsel should not rely on this defense - but if 261 is inevitable, a plea to (a)(4) is best. Removal defense advocates should raise and preserve the argument pending a BIA and then Ninth Circuit opinion.
PC 261.5(b), (c)	Sex with minor under age 18, if D is at least 3 years older (c) or with no requirement of age difference (b)	261.5(c) is not an AF as sexual abuse of a minor (SAM) and is not a COV. See Advice for citations.  The same would be true of 261.5(b).	Not a CIMT. Ninth Circuit held (c) is not a CIMT. BIA's standard is that it is not a CIMT.  Still, ICE could conceivably charge it as such. 261.5(b) is less serious and may be more secure.  See Advice for citations.	ICE will charge 261.5(c) as a deportable crime of child abuse, citing <i>Matter of Aguilar-Barajas</i> . Defenders must avoid even misd 261.5(c), or (b), if deportability is important. If that's not possible, a plea to (b) is better.  Removal advocates can argue that this is not deportable child abuse. See Advice.  <u>Adam Walsh Act.</u> When V is a minor, conviction may	<a href="#">PC 261.5</a>  See endnote for discussion and citations. <sup>102</sup>  <b>Crime of child abuse.</b> The disadvantage of 261.5(c) is that it will be held a deportable crime of child abuse under <i>Matter of Aguilar-Barajas</i> (BIA 2021), which can be interpreted to mean that any consensual sexual conduct between a person over 18 and one under 18 is child abuse. If D needs to avoid becoming deportable (e.g., is an LPR or is an undocumented person who may apply for cancellation of removal or VAWA), defenders must avoid this plea. See alternative plea suggestions, below.  Removal defense advocates should assert that Aguilar-Barajas (a) is wrong and (b) does not apply to 261.5(c) (or even better for purposes of argument, 261.5(b)). See

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				prevent a USC or LPR from immigrating family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act</a> .	<p>endnote above. Use this time to investigate post-conviction relief, as there is no guarantee this will prevail.</p> <p>Still, 261.5(c) is far better than 261.5(d). It is likely the Ninth Circuit will withdraw from its own precedent on 261.5(d) and find it is an AF as sexual abuse of a minor, a CIMT, and a crime of child abuse. See 261.5(d), below.</p> <p><b>Alternatives.</b> To avoid a deportable crime of child abuse, consider a plea to felony or misd PC 32 or 136.1(b)(1) with less than a year's sentence, 243(a), 243(e), 236/237, 272, 273a(b), 415, 459 (1st or 2nd degree). Currently 647.6 and 288(c) are safe pleas, but it is possible they would be treated differently outside the Ninth Circuit, or the Ninth would change.</p> <p>A good alternative may be PC 288.3 with intent to commit 287(b)(1) (oral sex) or 289(h) (penetration) with a minor under age 18, no age difference requirement. The 288.3 should <i>not</i> be a crime of child abuse because it can involve a police officer posing as a child, while the BIA says the harm must be to an actual child. It also is not an AF or a CIMT. See 287, 288.3.</p> <p>All of these alternatives are safer than 261.5(b). But if none of them are possible, a plea to 261.5(b) rather than (c) might help defeat a charge of child abuse or CIMT.</p> <p><b>DACA.</b> 261.5(b), (c) might be held a bar to DACA as a significant misdemeanor. See DACA discussion at PC 25400.</p>
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 <i>Esquivel</i> case. Immigration advocates can cite existing Ninth Circuit precedent to	Defenders assume 261.5(d) may be held CIMT in future and avoid it. It would be a CIMT under the BIA standard, and based on the <i>Esquivel</i> 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.	<p><a href="#">PC 261.5</a></p> <p>Bad plea. See endnote for discussion and citations.<sup>103</sup> Instead, try hard to plead to alternatives discussed at 261.5(c), if necessary with an additional offense, e.g., 136.1(b)(1) or other.</p> <p>In <i>Esquivel-Quintana</i> (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 <i>is</i> 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.</p>

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		the contrary. See Advice.			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.  This is likely a significant misdemeanor for <b>DACA</b> . See DACA discussion at PC 25400.
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.  <u>Adam Walsh Act</u> . When V is a minor, conviction can prevent a USC or LPR from immigrating family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act</a> .	<a href="#">PC 266</a> <u>AF</u> : This statute covers a range of conduct.  To prevent an AF as sexual abuse of a minor, plead specifically to conduct with persons aged 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. <sup>104</sup>
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).	<a href="#">PC 270</a>  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)	<a href="#">PC 270.1</a>  While an age-neutral offense is preferable, this ought not to be charged as child abuse, neglect, or abandonment

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					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 <sup>105</sup>	Should not be deportable child abuse because it includes mild conduct, but there is no precedent. See Advice.	<p><a href="#">PC 272</a></p> <p>Because PC 272 can involve exposing minor to only mild harm, it does not meet the BIA's definition of child abuse.<sup>106</sup></p> <p>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.</p> <p><u>Adam Walsh Act.</u> 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 <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a></p>
PC 273a(a)	Child endangerment involving conduct likely to cause GBI or death (Wobbler)	<p>No conviction of 273a(a) is a COV, because the minimum conduct is negligence and the statute is indivisible.<sup>107</sup></p> <p>Arguably attempt to commit 273a(a) is not a COV. There is intent, but physical force is not required. Still, try to get 364 days or less.</p>	<p>No conviction of 273a(a) or (b) should be held a CIMT because the minimum conduct is negligence and the statute is indivisible.<sup>108</sup></p> <p>Do not plead to <i>attempt</i> to commit 273a(a) or (b), because it involves intent rather than negligence and is likely a CIMT.</p>	<p>Deportable crime of child abuse. The Ninth Circuit held that 273a(a) is a deportable crime of child abuse.<sup>109</sup></p>	<p><a href="#">PC 273a(a)</a></p> <p><b><u>Responding to 273a(a) charge.</u></b> Consider 273a(b) and/or an immigration-neutral, age-neutral felony or misdemeanor, e.g., 236/237, 459 1st or 2nd, 594, VC 23103, or, with less than a year imposed, PC 32, 136.1(b)(1), 459. If necessary, consider 245 or 422 (CIMTs) with less than a year, or 23152. Or PC 1001.95 pretrial diversion is not a conviction for immigration purposes.</p> <p>An offense must have minor age as an element in order to be a crime of child abuse – so an age-neutral offense can never qualify.<sup>110</sup> But to prevent a mistaken charge in immigration proceedings, do try to keep age out of the record to prevent. See endnote at PC 243(a) regarding age-neutral offenses.</p> <p>Emphasize to prosecution that even <i>misdemeanor</i> 273a(a) with no custody imposed is a deportable crime of child abuse, and thus can cause the child to permanently lose their LPR or undocumented parent.<sup>111</sup></p> <p><u>Adam Walsh Act.</u> If ROC shows sexual conduct was involved, this might block a USC or LPR's ability to immigrate family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a></p>

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PC 273a(b)	Child endangerment involving conduct <i>not</i> likely to cause GBI or death (Misdemeanor)	No conviction of 273a(a) or (b) is a COV because they involve negligence; see PC 273a(a), above.	No conviction should be held a CIMT; see PC 273a(a), above.  Do not plead to <i>attempt</i> to commit 273a(a) or (b), because it involves intent rather than negligence and is likely a CIMT.	Not a deportable crime of child abuse.  The BIA stated 273a(b) never is a deportable crime of child abuse. <sup>112</sup> This should be an immigration-neutral offense.	<a href="#">PC 273a</a>  273a(b) 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.  <b>Adam Walsh Act.</b> If ROC shows sexual conduct was involved, this might block a USC or LPR's ability to immigrate family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a>
PC 273d	Child, Corporal Punishment	Get 364 days or less to avoid an AF as COV. <sup>113</sup>  <a href="#">See § N.4 Sentence.</a>	Yes CIMT	Deportable crime of child abuse. See Advice	<a href="#">PC 273d</a>  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	Inflict Spousal Injury	Get 364 days or less on any single count to avoid AF as a COV. <sup>114</sup> See <a href="#">§ N.4 Sentence.</a>  Imm counsel may try to contest the COV designation, but this has failed in the past.	Ninth Circuit held not CIMT if V is former co-habitant, <sup>115</sup> 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).	<a href="#">PC 273.5</a>  <u>To avoid COV and DV</u> , see PC 32 or 136.1(b)(1) (with 364 days or less); 236/237, 243(a), 243(e), 459 1st or 2nd, 591, 594, and others; do not plead to 243(d), 245, or 422. 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.)  <u>CIMT.</u> 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. <sup>116</sup> 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 <i>not</i> assume that it is a CIMT even if the plea stated that the spouse

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					was the victim. Arguably 273.5 is not divisible between victim types, and therefore no conviction is a CIMT. <sup>117</sup>  Misd conviction is a "significant misdemeanor" for <b>DACA</b> , but 1203.4 might erase it; see note at PC 25400.
	Violation of protective order				
PC 273.6 (a) - (c)	Violation of a Protection Order (misdemeanor)	273.6(a), (b), (c) are not AFs as COV. Among other reasons, a misdo has a maximum 180 or 364 day sentence	273.6(a) and (c) should not be held CIMTs because they can be committed by minor, technical violations without threat or harassment (altho they may cause deportability under the DV ground; see next column). <sup>118</sup>  Authorities might hold 273.6(b) a CIMT because it requires injury. Counsel should try to avoid it or at least create a careful record of conviction. See Advice.	<b>DV deportation ground.</b> 273.6(a)-(c) is a deportable judicial finding of a violation of a DV protection order, <b>if</b> the order was pursuant to Cal Fam C 6320, 6389 or otherwise a stay-away or similar order protecting against threats, injury, or repeat harassment of a DV relation.  To prevent this admit violation of a specific order or portion of an order that is <i>not</i> a DV stay-away provision. A vaguely phrased order will not protect the person. The categorical approach does not apply here, so ICE can use any evidence to show that the finding of violation of an order related to a violation of a DV stay away order.  See Advice for alternatives such as PC 166(a)(1)-(3), plea to a new offense, or plea to violation not related to a DV stay-away order.	<a href="#">PC 273.6(a)-(c)</a> . See further discussion at PC 166 <b>PC 273.6(b) as a CIMT.</b> Defense should avoid (b) if avoiding a CIMT is important. While there is no precedent, immigration authorities may hold 273.6(b) a CIMT because it requires intentional conduct (violating the order in any way) that results in injury. If (b) can't be avoided, try to create a record showing that the injury was not intended and was accidental or caused by negligence or recklessness, which is not a CIMT. <sup>119</sup> Or, if possible, given the record, identify the victim as a co-habitant. The Ninth Circuit held that 273.5 is not a CIMT if V is a cohabitant, <sup>120</sup> and arguably that applies to 273.6(b).  <b>Deportable DV finding.</b> For further discussion see PC 166, this endnote <sup>121</sup> , and ILRC, <a href="#">Case Update: Domestic Violence Deportation Ground</a> (March 2022) at <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a> .  A finding of even a technical 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 under <a href="#">INA 237(a)(2)(E)(ii)</a> . See PC 166 for further discussion.  If you must plead to 273.6 involving a DV relationship, some options are:  -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 classes; miss probation meeting; or

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					-Plead to misconduct with a judge, 166(a)(1)-(3); or -Plead to a new offense that does not involve violation of any order, e.g., PC 415, 370, trespass, 236/237, 243(a) or (e), 136.1(b)(1), 459, 594, etc. While it's optimal to sanitize the record of a charge of violating an order, and/or identify a V not listed in the order or a victimless crime, if that is not possible, still plead to any non-deportable offense.
PC 273.6(d)	Second violation of a protective order within 7 years, where the violation includes violence or a credible threat of violence.	273.6(d) is a COV and thus an AF if a year or more is imposed. <sup>122</sup> Obtain 364 days or less	Assume that 273.6(d) will be held a CIMT because it requires an act or a credible threat of violence.	<b>DV deportation ground.</b> If D and V share a protected domestic relationship:  Conviction is a COV and thus a deportable crime of DV, See <a href="#">INA 237(a)(2)(E)(i)</a> .  It also is a deportable judicial finding of a violation of a DV stay-away order. See <a href="#">INA 237(a)(2)(E)(ii)</a> .	<a href="#">PC 273.6(d)</a> For possible alternatives, see PC 273.6(a)-(c).  For further discussion of this prong of the DV deportation ground, and of 273.6(d), see discussion at PC 166(a). Note that 273.6(d) and 166(c)(4) are nearly identical and have the same immigration analysis.
PC 281	Bigamy	Not AF	Should not be CIMT, but see Advice	No other removal ground.	<a href="#">PC 281</a>  Should not be a CIMT despite the availability of a defense of lack of guilty knowledge, <sup>123</sup> but counsel should assume it might be charged as one and seek another offense if avoiding CIMT is crucial.
PC 286(b), 287(b), 289(h), (i)  For analysis of PC 286(f), 289(d), see PC 261(a)(4)	Sexual conduct with a minor:  286(b)(1), 287(b)(1), 289(h) prohibit respectively sodomy, oral sex, and penetration with a person under age 18.  PC 286(b)(2), 287(b)(2), 289(i) prohibit this with a person under age	Appears that some sections are AFs and some are not. <sup>124</sup>  PC 286(b)(1), 287(b)(1), 289(h) are not AFs as SAM because a minor is under age of 18, based on Supreme Court ruling	Appears that some sections are CIMTs and some are not. <sup>125</sup>  PC 286(b)(1), 287(b)(1), 289(h) should not be held CIMTs under BIA standard because they only require a minor under age 18.  Conservatively assume 286(b)(2), 287(b)(2), 289(i) will	<b>Advice: crime of child abuse.</b> Even PC 286(b)(1), 287(b)(1), 289(h) (minor under age 18) will be charged as a deportable crime of child abuse, in light of <i>Matter of Aguilar-Barajas</i> . See discussion at PC 261.5(c).  To avoid this consider alternative pleas. If this offense cannot be avoided, consider a plea to PC 288.3 with intent to commit 287(b)(1), 286(b)(1), or	PC <a href="#">286(b)</a> , <a href="#">287(b)</a> , <a href="#">289(h)</a> , (i)  These offenses likely have the same immigration consequences as 261.5(b)/(c) (intercourse with a minor under age 18) or 261.5(d) (intercourse with a minor under age 16, if perpetrator was age 21 or older), depending on whether the offense requires cut-off of age 18 or 16. We compare these statutes to 261.5(c), (d) because there is extensive case law on the immigration consequences of PC 261.5 and the offenses share similar elements.  Note that 286(b)(1), 287(b)(1) and 289(h) are even less serious than 261.5(c), because 261.5(c) requires the perpetrator to be at least three years older than the minor, while these statutes have no requirement of age difference. Under the categorical approach, these

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	16, where D was at least age 21.  No element of coercion	on the similar 261.5(c).  Assume 286(b)(2), 287(b)(2), 289(i) will be held AFs as SAM under S.Ct decision because they require a minor under age 16 and perpetrator age 21 or older (although an older Ninth Cir. decision held otherwise).  See endnote above and see PC 261.5(c), (d)	be held CMTs under BIA standard because minor must be under age 16 and perpetrator age 21 or older. Removal defense: note older Ninth Circuit decision holds the opposite.  See endnote above and see PC 261.5(c), (d)	289(h). PC 288.3 includes an officer posing as a minor, and the BIA held that that is not a crime of child abuse. See discussion of <i>Matter of Jimenez-Cedillo</i> at PC 288.3.  Assume that PC 286(b)(2), 287(b)(2), 298(i) will be held crimes of child abuse.	statutes should be evaluated as if the perpetrator had just turned 18 and the minor was a few days away from their 18 <sup>th</sup> birthday.  Under the categorical approach, all statutes discussed in this section are evaluated as if conduct is consensual.  <b>Alternative pleas.</b> Rather than 286(b)(2), 287(b)(2), 289(i), consider 286(b)(1), 287(b)(1), 289(h), or 288.3 to commit those less serious offenses, or consider: 459 first or second degree, 243(a), (e), 236/237; or 136.1(b)(1) or PC 32, with sentence of less than a year; or 207(a) or 243.4, trying for a sentence of less than a year (but 243.4 is a CMT). Or consider offenses like 288(c) or 647.6 which the Ninth Circuit has held not to be SAM or a CMT, although other circuits might differ.  <b>Child abuse.</b> Even 286(b)(1), 287(b)(1) and 289(h) <i>might</i> be charged as deportable child abuse, due to the confusing <i>Matter of Aguilar-Barajas</i> (BIA 2022). Consider PC 288.3. See further discussion at 261.5(c).
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	CMT	To ensure not wrongly charged as child abuse, keep minor V's age out of ROC. See 243(a).	<a href="#">PC 286</a>  Ninth Cir held that like other types of intercourse, sodomy without consent because V is intoxicated, PC 286(i), is rape. <sup>126</sup> 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 Ninth Cir should	Assume CMT.	Deportable for crime of child abuse. To avoid, plead to age-neutral offense; see Advice.	<a href="#">PC 288</a>  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 <a href="#">§ N.10 Sex Offenses</a> .  Might not be <i>particularly serious crime</i> for a form of relief called withholding of removal, if D can demonstrate honest belief V was older <sup>128</sup> (but still a bar to asylum, as an aggravated felony).  Assume bar to <b>DACA</b> ; see note at PC 25400.

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		rehear <i>en banc</i> <sup>127</sup>			<b>Adam Walsh Act.</b> This conviction can block a USC or LPR's ability to immigrate family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a>
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.  <u>Adam Walsh Act.</u> This conviction can block a USC or LPR's ability to immigrate family members in the future. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act.</a>	<a href="#">PC 288</a>  For citations and further discussion, see endnote. <sup>129</sup>  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 <b>DACA</b> , but 1203.4 may help; see note at PC 25400.
PC 288.3(a)	Communicating with a minor or person D knew or had reason to believe was a minor, with intent to commit certain offenses	Assume 288.3 is divisible as an AF: it is an AF only if the intended offense, <i>plus</i> 288.3 elements of intent and knowledge, is an AF.  Not AF: Supreme Court held that sexual conduct with a person under age 18 is not an AF as SAM; see 261.5(c).	Ninth Circuit held 288.3 is divisible as a CIMT, based on the elements of the intended offense <i>plus</i> 288.3 elements: <u>Not a CIMT:</u> -Court stated that 288.3 with intent to commit 207(a) is not a CIMT -Same should apply to 288.3 with intent to engage in sexual conduct with minor under age 18, per <a href="#">286(b)(1)</a> , <a href="#">287(b)(1)</a> , <a href="#">289(h)</a> . Section 261.5(c) is	<b>Should avoid a deportable crime of child abuse.</b> See discussion here. <sup>130</sup> The BIA held that a crime of child abuse requires an actual victim, not a police officer posing as a child. Because 288.3, which includes attempt, can involve communicating with an officer posing as a child, no 288.3 should be held a deportable crime of child abuse.  Try to plead to attempt (under 288.3, not under PC 664), or better yet, specifically to communication with an officer, to make this distinction clear to an uninformed immigration	<a href="#">PC 288.3</a>  It appears that 288.3 can range from an immigration-neutral offense to an AF. See case citations, list of enumerated intended offenses, and further discussion here. <sup>131</sup>  Some advantages to a plea to 288.3(a) are (1) it should avoid deportability for child abuse (because a posing police officer can be the 'victim'), and so may be safer than a direct plea to, e.g., 261.5(c) or 287(b)(1) (oral sex with a person under age 18), and (2) the sentence may be shorter; it is the same as attempt to commit the intended offense  <b>Plead to intent to commit sexual conduct with a minor under age 18:</b> A plea to 288.3 with intent to engage in sexual conduct with a minor under the age of 18, under PC <a href="#">286(b)(1)</a> (sodomy), <a href="#">287(b)(1)</a> (oral sex), or <a href="#">289(h)</a> (penetration), should not be an AF or CIMT, because those target offenses are not AFs or CIMTs and the addition of 288.3 elements does not change this.

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		<p>Therefore 288.3 with intent to commit 286(b)(1); 287(b)(1); 289(h) should not be. Good plea.</p> <p>288.3 with intent to commit 207(a) (at least without a year imposed) should not be an AF. Arguably 288.3 and 288(c)(1), and 273a at least with less than a year, are not AFs in Ninth Cir.</p> <p>If the intended offense is an AF, 288.3 is one. For example, intent to commit 209(b) or 261. See Advice.</p>	<p>not a CIMT, so these should not be. See Advice.</p> <p><u>Yes a CIMT:</u></p> <p>-Court held 288.3 with intent to commit 288(c)(1) is a CIMT (because 288.3 adds knowledge of age element, which according to the court makes 288(c)(1) a CIMT).</p> <p>-Likely 288.3 with intent to commit 273a (because 288.3 will add intentionality and subtract negligence)</p> <p>- any intended offenses that are CIMTs, e.g., 261 See Advice.</p>	<p>judge or official. Or leave the record vague. But even if the record specifically shows a minor rather than an officer, removal defense advocates can establish that the statute is not divisible because it is not phrased in the alternative between an officer and an actual minor. The concern is for unrepresented immigrants.</p>	<p>The 288.3 plea might offer an advantage: while ICE might charge those offenses by themselves as crimes of child abuse under <i>Matter of Aguilar-Barajas</i>, a 288.3 conviction should not be held child abuse because the 'victim' can be a police officer posing as a child. See column on child abuse, to the left.</p> <p><b><i>Plead to intent to kidnap, with a sentence of less than a year.</i></b> The Ninth Circuit held that 288.3 with intent to commit 207(a) is not a CIMT. A kidnapping offense arguably never is a COV, but even if it were held a COV (under the <i>Stokeling</i> decision), it would not be an AF without a sentence imposed of a year or more.</p> <p><b><i>Beware of 288.3 with 288(c)(1), 273a.</i></b> When elements of 288.3 are added to target offenses like these, they are no longer immigration neutral.</p> <p>-288.3 adds knowing or having reason to believe the victim is a minor. This is why the Ninth Circuit held that 288.3 with intent to commit 288(c)(1) is a CIMT, although 288(c)(1) alone is not a CIMT, partly due to possible mistake of age. Instead, consider a plea directly to 288(c)(1) or attempt.</p> <p>-288.3 adds intentional conduct. That is why 288.3 with intent to commit 273a is a likely CIMT, just as attempted 273a would be. Section 273a itself is not a CIMT because it can be committed by negligence. But with attempted 273a, or 288.3 trying to arrange for 273a, the conduct is no longer negligent; it is intentional. It is better to plead directly to 273a(b) or other option.</p>
<p>PC 289 (a)(1)(A)</p> <p>For analysis of PC 289(d), go</p>	Sexual penetration by force or duress	<p>Assume AF as rape, regardless of sentence, but see Advice.</p> <p>Arguably not an AF as a</p>	Yes CIMT	<p>If it is a COV, it is a deportable crime of DV if V and D share a protected relationship.</p> <p>Not child abuse even if a minor V, because age is not an element. Still, do not let</p>	<p><a href="#">PC 289</a></p> <p><b><u>Rape.</u></b> 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</p>

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to PC 261(a)(4)		COV. See Advice.		the reviewable record (charge, plea colloquy, factual basis, judgment) reflect the age of a minor victim	overbroad. They should seek other defense strategies including post-conviction relief while pursuing this. <sup>132</sup>  Consider 459/460(a) or (b), which can take a year or more, or 243.4, 236/237, which arguably can.  Arguably, 289(d) is not “rape” for immigration purposes. See 261(a)(4).  <b>COV.</b> This should not be a COV because it can be committed by psychological duress not based on threat of force or violence. <sup>133</sup> 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)	<a href="#">PC 289</a>  <b>Rape.</b> 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.  <b>COV.</b> This might be held not a COV under <i>Stokeling</i> 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. <sup>134</sup>	<a href="#">PC 290</a>  <b>CIMT:</b> 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. <sup>135</sup> 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.	<a href="#">PC 311.3</a>  <b>AF:</b> 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. <sup>136</sup> But might be held AF outside of Ninth Circuit.

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PC 311.11(a)	Possess child pornography	Ninth Cir held not an AF as child pornography. See Advice.	Yes CIMT. <sup>137</sup>	No other removal ground.	<a href="#">PC 311.11</a> <b>AF:</b> See endnote for citations and discussion. <sup>138</sup> 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. <sup>139</sup>	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. <sup>140</sup>	<a href="#">PC 313.1</a> <b>Adam Walsh Act.</b> 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 <i>mens rea</i> of negligence, there is little recourse if the government does so and they might rely on facts outside the record. See <a href="#">§ N.13 Convictions that Bar the Defendant from Petitioning for Family Members: the Adam Walsh Act</a> .
PC 314 (1)	Indecent exposure	Not AF as sexual abuse of a minor even if minor's age is in ROC, <sup>141</sup> 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).	<a href="#">PC 314</a> <b>AF:</b> Good alternative to charges that are sexual abuse of a minor AF such as 288(a), or deportable crime of child abuse. <b>CIMT:</b> 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. <sup>142</sup> <b>Adam Walsh:</b> 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	BIA held it is a CIMT, but advocates may have strong	See Advice for discussion of inadmissible for engaging in prostitution. See also PC 370	<a href="#">PC 315</a> <b>AF:</b> 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

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		caution and see Advice.  If pleading to this offense, plead specifically to "residing."	argument against this. See Advice.		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. <sup>143</sup>  <b>CIMT:</b> 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. <sup>144</sup> 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.  <b>Inadmissible for engaging prostitution:</b> A person is inadmissible who engaged in or received proceeds from prostitution within the last 10 years or plans to do so. 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 <i>alone</i> does not prove inadmissibility for prostitution, <sup>145</sup> but gov't can present other evidence of conduct.  <b>Victims of human trafficking.</b> If the defendant may be a victim, see discussion at Advice to H&S C 11358.
PC 350(a)	Counterfeit mark on goods: create, possess for sale, sell	AF if a year or more is imposed  AF if loss > \$10k, under 350(a)(2). See Advice.	Assume it is a CIMT	No other removal ground	<a href="#">PC 350(a)</a>  <b>AF:</b> PC 350(a) must avoid both a sentence of a year or more (to avoid AF as "counterfeit") <i>and</i> a loss > \$10k (to avoid AF as fraud) on any single count. <sup>146</sup> A plea to 350(a)(1) should accomplish both, because it is a misdemeanor (364-day max) where loss is not > grand theft, which is \$950. Or consider PC 484/487, which can take <i>either</i> a year sentence or a loss > \$10k, but not both.
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	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).	<a href="#">PC 368(b), (c)</a>  <b>AF, CIMT.</b> 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. <sup>147</sup> 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.

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		days or less. See Advice.			
PC 368(d)	Elder abuse: Theft, Fraud, Forgery, 530.5 by D who knows or should know V is an elder	368(d)(1) risks being an AF if 1 yr or more is imposed and/or loss > \$10k. See Advice.  (d)(2) does not have this risk because the top is 364 days and loss of \$950 or less	Assume CIMT, except: See PC 530.5(a), which generally is not a CIMT because it does not require any loss. If 368(d) can be committed without causing any loss to V, arguably 368(b)/530.5(a) is not a CIMT.	No other removal ground.	<a href="#">PC 368(d)</a>  <b>AF:</b> See Advice to PC 484. In sum, fraud/deceit is an AF if loss to the V exceeds \$10k. Theft is an AF if a year or more is imposed. Try to take a specific plea to the option that avoids an AF, although arguably the statute is not divisible.  Plead to deceit (embezzlement, fraud, identity theft) only where loss to victim does <i>not</i> exceed \$10,000. This can take a sentence of over a year.  If loss > \$10k, plead to straight theft (taking by stealth). Avoid 1 yr or more on any one count. Theft can take either 1 yr or loss > \$10k, but not both on a single count.  Forgery plea should not take <i>either</i> 1 yr or \$10k loss. Plead to a specific offense other than forgery.
PC 368(e)	Elder abuse: Theft, Fraud, Forgery, 530.5 by caretaker	See 368(d), including Advice.  368(e)(1) is not an AF because the top is 364 days and \$950 loss, while (e)(2) could become an AF if 1 yr or more is imposed and/or loss > \$10k.	See 368(d) re the possibility that 368 by 530.5(a) is not a CIMT. But in 368(e), an additional negative factor for CIMT is that D knows V is elder and has a caretaker relationship.	No other removal ground	<a href="#">PC 368(e)</a>  <b>AF.</b> Same analysis as 368(d).
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?	<a href="#">PC 370</a>  Maintaining or causing a public nuisance is a six-month misd. Vaguely defined conduct could include lewdness, diverting water from a stream, etc.
PC 372.5	Public nuisance under PC 370	Not AF	Not CIMT	Not a CSO conviction.	<a href="#">PC 372.5</a>

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(effective 01/01/2023)	includes anything injurious to health, etc.  Punishable under PC 372.5  (a) infraction; (b) misdo or infraction; or  (c) 16-2-3 felony or misdo	Not an AF as "drug trafficking" b/c PC 370 is overbroad and indivisible.  But better option is to plead to an immigration-neutral non-drug offense, especially for persons who must apply for relief.  See Advice	Public nuisance is not a CIMT.	Under the categorical approach, 370/372.5 cannot be a federally defined CS conviction because it has no element relating to CS. PC 372.5 does not admit to a CS offense, and "drug" in the statute is overbroad and indivisible compared to definition of CS. See 372.5(d).  Inadmissible if "admits" CS offense?  Immigration authorities may pressure the person to formally admit to the original CS offense, in an effort to make the person inadmissible, or they may deny relief as a matter of discretion. Immigration advocates should resist this.  Might be inadmissible for "reason to believe" trafficking if there is sufficient evidence.  See Advice.	For more information, see discussion at H&S C 11377 and see ILRC, <a href="#">How to Defend Immigrants Charged with Drug Offenses, including PC 372.5</a> (2023). See also ILRC, <a href="#">Fact Sheet on PC 372.5</a> which, e.g., can be provided to prosecutors.  <b>What it does.</b> PC 372.5 allows the parties to agree to plead to public nuisance in lieu of the drug charges (much like a "wet reckless" in lieu of DUI charges). Similar to a wet, the DA cannot affirmatively charge 372.5, but if defense request it DA will decide whether to agree. D can plead to public nuisance as felony, misdemeanor or infraction under PC 372.5(a)-(c) and the drug charges will be dismissed.  D pleads to being a public nuisance, PC 370. Under the categorical approach, 370 is not a <i>conviction</i> of a CS offense, CIMT, or AF. But the plea still helps some clients more than others, because some inadmissibility grounds do not require a conviction; see below.  <b>Compare to PC 32.</b> Felony or misd PC 32 has long been used as an informal substitute immigration plea for a drug charge to avoid a CS conviction. PC 372.5 has similar effect, except (1) 372.5 can take a year or more without being an AF, while PC 32 cannot and (2) PC 372.5 directly refers to dismissed drug charge. While this reference may make some DA's more willing to accept the plea, it also make immigration authorities more likely to try to punish the person by seeking to find them inadmissible without a conviction (if the person actually has to prove they are admissible).  <b>Which clients this best helps.</b> Conviction of 372.5 should not make a non-USC <i>deportable</i> . That would require conviction of an AF, CS offense, or CIMT. But 372.5 does not entirely protect the person from being inadmissible under grounds that do not require a conviction.  <b>LPRs.</b> Conviction of 372.5 will not make an LPR deportable.  It may help LPRs who travel outside the US. (although this is NOT recommended) or who have become deportable but can apply for relief where they do not have

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					<p>the burden to prove they are admissible. But an LPR who applies for adjustment of status as a defense to removal must show they are admissible. They face the same problem as undocumented clients, described below.</p> <p>See endnote on LPRs<sup>148</sup> and get expert advice if a situation is not clear.</p> <p><b>Undocumented people; inadmissibility without a CS conviction.</b> All undocumented clients must apply for immigration relief in order to remain lawfully in the U.S. Most but not all forms of relief require them to prove they are admissible, as well as deserving of a positive exercise of discretion.</p> <p>Two grounds of inadmissibility linked to CS do not require a conviction and thus are not entirely protected by 372.5.</p> <p>First, a person who makes a qualifying <i>admission</i> that they committed a CS offense is inadmissible. Immigration authorities may pressure the person to “admit” to a federal-CS offense, to make themselves inadmissible (although BIA case law indicates that if conduct was brought to court and charges dropped, admission of that same conduct should not trigger inadmissibility.<sup>149</sup>) Even without a formal admission, information about the underlying conduct, or just their refusal to discuss it, might be a basis for a discretionary denial. If instead they had pled to a different, non-CS related offense, there likely would be less pressure.</p> <p>Second, if immigration authorities have probative and substantial evidence to support “<i>reason to believe</i>” the person ever assisted or participated in trafficking in a federal CS, they are inadmissible. The 372.5 in response to trafficking charge may inspire ICE to seek that. This is a fact-based removal ground and evidence is not limited to the record or the person’s own admissions. Evidence of sale, possession or cultivation for sale, may be sufficient for this ground (although dropped charges alleging sale should not), so defenders can only do so much. See discussion in HSC 11379</p> <p>Still, removal defense counsel may be able to prevail despite this.</p> <p>Note that in every case, <b>372.5 or 32 are far better than conviction</b> of an offense relating to a federal CS. (The</p>

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					<p>only exception might be for a non-USC who would not be destroyed by a possession conviction, e.g., an asylee or refugee, and who thinks a plea to possession will help prevent inquiries into whether there is “reason to believe” they trafficked.)</p> <p>In sum, the best resolutions for a drug charge in order are</p> <ol style="list-style-type: none"> <li>1. No conviction (e.g. dismissal or pretrial diversion)</li> <li>2. Conviction of a substitute immigration-neutral offense that does not relate to drugs, or conviction of an offense relating to specific non-federal substance.</li> <li>3. Plea to misdo PC 32, PC 372.5 or (with less than a year) felony PC 32</li> </ol> <p>See discussion of defense strategies at 11377, above.</p> <p><b>Factual basis for the plea:</b> Best practice is to avoid a record that describes drug conduct. If possible, state as a factual basis conduct that is charged under 370 (loud noise, etc.). Or decline to state specific facts under <a href="#">People v. Palmer</a>, 58 Cal.4th 110 (2013). See Advisory, above.</p>
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	<p><a href="#">PC 381, 381b</a></p> <p>Possible drug charge alternative; six-month misdemeanor.</p> <p>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&amp;S C 11377.</p>
PC 403	Disturb public assembly	Not AF.	Not CIMT; see Advice	No other removal ground.	<p><a href="#">PC 403</a></p> <p>This does not have CIMT elements, but for extra protection keep ROC free of very bad conduct or violence.</p>
PC 415	Disturbing the peace	Not AF.	Not CIMT	No other removal ground.	<a href="#">PC 415</a>
PC 416	Failure to disperse	Not AF	Not CIMT	No other removal ground.	<a href="#">PC 416</a>

CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
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  (b) exhibit loaded firearm at a childcare center; (c) in presence of peace officer	(a) is Not AF: maximum 364 days  (b) and (c) could be COVs – plead to less than 1 yr <sup>150</sup>	Should not be a CMT but some advocates fear it will be so charged, especially 417(b). <sup>151</sup>	417(a)(2) is not a deportable firearms offense, but see Advice  See Advice if V has domestic relationship or is a minor	<a href="#">PC 417(a)</a> <b>AF, crime of DV:</b> While no conviction for subsection (a) 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.  <b>Firearms:</b> 417(a)(2) is not a firearms offense under the antique firearms rule. <sup>152</sup> See PC 29800(a). But try to plead to 417(a)(1) in case D is unrepresented and cannot raise this defense.  <b>Child abuse.</b> 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 <b>DACA</b> ; 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. <sup>153</sup> To avoid 1-yr sentence, see § N.4 Sentence	Assume CMT	See PC 417(a)(2)	<a href="#">PC 417.3, 417.8</a> <b>AF as COV.</b> 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 <b>DACA</b> ; see Advice at PC 25400.  See PC 417, 240, for better plea.
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 CMT	Not deportable firearms offense; see Advice.  DV offense if showing that V is DV-type V.	<a href="#">PC 417.4</a>  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 CMT; see Advice	No other removal ground.	<a href="#">PC 417.26</a> <b>CMT:</b> Ninth Cir held that violating 417.26 by using a laser pointer, at least, is not a CMT. <sup>154</sup> To be sure to avoid a CMT, 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.

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PC 422	Criminal threats (formerly terrorist threats)	Get 364 days or less on any single count to avoid AF as COV. <sup>155</sup> See § N.4 Sentence. See Advice.	Yes CIMT <sup>156</sup>	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).	<a href="#">PC 422</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 <i>Case Update: Domestic Violence Deportation Ground</i> (2018) at <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a>
PC 451, 452	Arson by malice, PC 451  Unlawful burning by recklessness, PC 452	Ninth Circuit held PC 451 is not an AF as arson, but see Advice  PC 452 should not be arson but see Advice  Neither should be a COV under 18 USC 16(a)	PC 451, 452 will be charged as CIMTs, but there are arguments against this. See Advice.	No other removal ground.	<a href="#">PC 451, 452</a>  See endnote for citations and further discussion. <sup>157</sup>  <b>PC 451 as arson.</b> 18 USC 844(i) supplies a generic definition of arson, per 8 USC 1101(a)(43)(E)(i). The Ninth Circuit held that PC 451(b) is not arson because the <i>mens rea</i> does not match 844(i), in <i>Togonon v. Garland</i> (2022). Because PC 451(a)-(e) all have the same <i>mens rea</i> , no conviction under 451 should be an AF under <i>Togonon</i> .  18 USC 844(i) prohibits “maliciously” damaging property etc. by fire or explosive. In <i>Togonon</i> the Ninth found that “maliciously” here means damaging the property either intentionally, or with conscious disregard of a known risk, i.e., recklessly. The court found that in PC 451 requires a willful act, but does not require a conscious disregard of a known risk of damage (despite the term ‘malicious’ in the statute). Instead the court found that PC 451 requires awareness of circumstances where a reasonable person would have known that the natural and probable consequence would cause damage to property. Therefore 451(b) is not an AF as arson.  <b>PC 452 as arson.</b> Federal arson requires <i>maliciously causing damage</i> , meaning either an intentional causation of damage, or a subjective awareness and conscious disregard of the known risk of causing damage. See definition of arson above. PC 452, however, requires recklessly <i>causing a fire</i> , but does not require a subjective awareness of the risk of <i>damage</i> from the fire. Thus, PC 452 is overbroad and should never be arson. However, ICE could contest this, and



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					<p>PC 452 could use additional analysis to strengthen the defense. See endnote.</p> <p><b>PC 451, 452 as a COV.</b> A COV, defined at 18 USC 16(a) to include using force against person or property of another, is an AF if a year or more is imposed. 8 USC § 1101(a)(43)(F). PC 451, 452 were considered COVs under 18 USC 16(b), but 18 USC 16(b) has been held unconstitutional. Now only 18 USC 16(a) defines a COV.</p> <p>There is no precedent on 451, 452 as a COV under 16(a). Because they involve a mens rea less than recklessness when it comes to the risk of causing damage, and recklessness itself is not a COV, arguably neither offense has the required use of intentional, aggressive force against person or property. See above endnote and see discussion of COV at PC 207.</p> <p>Both 451 and 452 can include burning the person's own property. That is not a COV under 18 USC 16, which only covers the "property of another."</p> <p><b>Alternatives:</b> To more surely avoid an AF as arson, see felonies such as PC 459 1<sup>st</sup> or 2<sup>nd</sup> degree, or 594, which may take 1 year or more without being an AF. If needed couple with H&amp;S C 13001 (negligence), PC 136.1(b)(1) consecutive (8 months sentence), 370. Also consider Pub. Res. Code §§ 4421, 4422, 4427, 4435.</p> <p><b>PC 451, 452 as CIMT.</b> An offense is a CIMT if it has as an element either evil intent, or recklessness defined as conscious disregard of an imminent risk of causing death or serious injury. <i>Matter of Leal</i> (BIA 2012). Because courts generally have held that arson is a CIMT, defenders should conservatively assume 451 and 452 will be CIMTs, but removal defense advocates have arguments.</p> <p>While PC 451 requires the person to "maliciously" cause a fire, here maliciously means merely to knowingly and unlawfully ignite a fire, without evil intent (even intent to vex or annoy) or desire to cause harm or gain benefit, but under circumstances where a reasonable person would have known of the risk that it could cause harm, i.e., a standard like criminal negligence. For example, teenagers who started a fire when they set off a cherry bomb near a dry hillside were guilty of PC 451, when they</p>

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					<p>did not know that this risked a damaging fire, but a reasonable person would have known.</p> <p>PC 452 prohibits setting the fire “recklessly,” which here means accidentally, but with a conscious disregard of a substantial risk in a gross deviation from a reasonable person standard. P.C. § 450(f). This is not a CIMT under <i>Leal</i> because it does not involve conscious disregard of a subjectively known risk of harm (as opposed to igniting a fire), or if it does, because the harm risked is not imminent death or serious injury. But this may be contested. See above endnote.</p>
PC 453	Possess flammable material with intent to burn	Should not be an AF, but try to get less than 365. See Advice.	Assume a CIMT	No other removal ground.	<p><a href="#">PC 453</a></p> <p><b>AF:</b> It appears that possession or disposal of flammable materials is not analogous to an offense at 8 USC 1101(a)(43)(E)(i) and thus is not an AF as arson.</p> <p>It should not be an AF as a COV because, among other reasons, possession with intention is not equivalent to attempt,<sup>158</sup> use, or threat of force, which is required in 18 USC 16(a). But to surely avoid an AF as a COV, get 364 days or less on each count. See § N.4 Sentence. See also PC 451, as well as alternatives such as, e.g., PC 32, 459, 594, which could be coupled with H&amp;S C 13001.</p>
PC 459/460(a)	Burglary, first degree (residential)	Not a COV or AF under any category. <sup>159</sup> 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.	Should not be a CIMT regardless of intended offense, under BIA and Ninth Circuit standards, <sup>160</sup> but see Advice about ways to try to prevent mistaken charges in immigration proceedings.	No other removal ground.	<p><a href="#">PC 459</a>, <a href="#">460(a)</a></p> <p><b>CIMT.</b> PC 459 cannot properly be found a CIMT. Here are two ways to further protect D from a wrongful CIMT finding.</p> <p>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<sup>161</sup> or other felony non-CIMT, and/or state that it was a lawful entry.</p> <p>460(a) does not meet the BIA’s specific definition for when res burglary is a CIMT, because that requires an</p>

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		See <a href="#">§ N.4 Sentence</a> .			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.	<a href="#">PC 459, 460(b)</a> 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. <b>DACA.</b> Misd burglary is a "significant misdemeanor." See PC 25400. <b>Prop 47:</b> 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. <sup>162</sup>
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 is more secure for CIMT purposes.	No other removal ground.	<a href="#">PC 459.5</a> <b>CIMT:</b> 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." <sup>163</sup> 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), 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.	<a href="#">PC 466</a> <b>CIMT:</b> Intent to unlawfully enter any building, vehicle, etc., with no element regarding intent to commit a further crime is not a CIMT. <sup>164</sup>
PC 470, 470a	Forgery	Get 364 or less on each count to avoid AF as forgery or counterfeiting.	Yes CIMT. To avoid a CIMT, see 529(a)(3), 530.5, 496	No other removal ground.	<a href="#">PC 470, 470a</a> To surely avoid AF for 470 or 470a, 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

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		<sup>165</sup> See § N.4 Sentence Also, AF as deceit if loss to victim/s exceeds \$10,000. See Advice and see PC 484.			as PC 487. See PC 484, below. Otherwise, consider these strategies. <b>AF with \$10k loss.</b> 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 <i>Harvey</i> 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. <sup>166</sup> <b>AF with 1 year.</b> 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 <a href="#">§ N.4 Sentence</a> . 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. <b>Prop 47:</b> Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor. <sup>167</sup>
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.	<a href="#">PC 471.5</a> 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;	CIMT because fraud	No other removal ground.	<a href="#">PC 475(c)</a> <b>AF as Forgery.</b> 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. <sup>168</sup> In case 475(c) ever is held divisible between real or fictitious documents, plead to use of

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		see Advice for PC 484.			“real” doc with intent to defraud. That is not an AF in the Ninth Cir even with 1 yr imposed. <b>AF if \$10k loss.</b> 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. <sup>169</sup>	CMT. See 529(a)(3), 530.5, to try to avoid CMT.	No other removal ground.	<a href="#">PC 476(a)</a> 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. <u>Prop 47</u> : Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor. <sup>170</sup>
PC 476a(a)	Bad check with intent to defraud	AF if loss to the victim/s exceeds \$10,000; see Advice.	CMT. See 529(a)(3), 530.5, to try to avoid CMT.	No other removal ground.	<a href="#">PC 476a(a)</a> 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. <u>Prop 47</u> : Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor. <sup>171</sup>
PC 484, 487, 490, 666 Theft (petty or grand)			<a href="#">PC 484, 487, 490, 666</a> 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. <b>AF.</b> 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 <i>cannot</i> take both 1 yr <i>and</i> 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. <b>CMT.</b> A current plea to 484 is a CMT. To avoid a CMT, 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 <i>not</i> a CMT, although unfortunately it will require an en banc decision to confirm this. See discussion of <i>Silva v. Barr</i> . <sup>172</sup> 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. <b>Other removal grounds:</b> No.		

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			<p><b>Advice:</b> A 484 conviction is not an AF if <i>either</i> a 1 yr sentence was imposed, <i>or</i> the loss to the victim/s exceeded \$10k (but not both; see below).</p> <p>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 a ROC that shows the following:</p> <ul style="list-style-type: none"> <li>• If 1 yr will be imposed, but loss to victim/s does not exceed \$10k, plead to a specific fraud offense in 484.</li> <li>• If loss to victim/s exceeds \$10k, but 1 year will not be imposed, plead to a specific theft offense in 484.</li> <li>• If a specific plea is not possible, create a sanitized ROC that is vague as to whether theft or fraud was involved.</li> </ul> <p>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.</p> <p>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 <i>not</i> 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 <i>not</i> 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.<sup>173</sup></p> <p>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.</p>		
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. <sup>174</sup> But see Advice.	No other removal ground.	<p><a href="#">PC 485</a></p> <p><b>AF as theft:</b> 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., 459, 487, 530.5 if more than 364 days will be imposed on a single count. Note that 487 is a CIMT, while 530.5 will be an AF if the loss to victim/s exceeds \$10,000.</p>



CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIME)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
					<b>CIME:</b> If avoiding CIME is critical, see PC 529(a)(3), 530.5, 496, 10851.
PC 487	Grand theft See PC 484, above	Not an AF if <i>either</i> 1 year or more is imposed, <i>or</i> loss exceeds \$10k; yes AF if <i>both</i> are present in the same count. See PC 484	Yes, CIME for a new conviction, but arguably not a CIME if conviction occurred before Nov. 16, 2016. See PC 484 notes.	No other removal ground	<a href="#">PC 487</a>  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.
PC 490, 490.1	Petty theft (misd or infraction) See PC 484, above	Not AF.	Assume CIME for a new conviction, but arguably not a CIME if conviction occurred before Nov. 16, 2016 – see PC 484 notes.  See Advice re infractions	No other removal ground.	<a href="#">PC 490</a> , <a href="#">490.1</a>  <b>CIME.</b> 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 CIME.  To avoid a CIME, 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. <sup>175</sup> See Advice.	Never should be held CIME, but best practice is a specific plea to receiving stolen property with intent to deprive temporarily. See Advice.	No other removal ground.	<a href="#">PC 496</a> , <a href="#">496a</a> , <a href="#">496d</a>  <b>Avoid 1 yr.</b> For a discussion of how to obtain a sentence of 364 days or less for immigration purposes, while spending more time in jail, see <a href="#">§ N.4 Sentence</a> .  <b>If 1 yr will be imposed:</b> See offenses like 459, 529(a)(3), 530.5 (which also are not CIMEs) and 487 (which is a CIME). If the loss to the victim/s exceeds \$10,000, do not take 529(a)(3) or 530.5 and work carefully with 487.  <b>CIME:</b> Ninth Cir held that 496 includes intent to temporarily deprive the owner, which is not a CIME. Under subsequent Supreme Court precedent, 496 should not be held divisible; thus no conviction is a CIME. <sup>176</sup> However, for extra protection in case officials do not know the law, plead specifically to intent to deprive temporarily, if that is possible.  <b>Prop 47:</b> Note that immigration authorities will assert they cannot give effect to a Prop 47 redesignation as a misdemeanor. <sup>177</sup>

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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	<a href="#">PC 498</a> (b), (d) <b>AF as theft if 1 year imposed:</b> 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. <sup>178</sup> But try to avoid the issue by getting 364 or less on each count, or else see PC 487. <b>AF as deceit with loss exceeding \$10k.</b> 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 <a href="#">§ N.4 Sentence</a> .	Not CIMT because intent to temporarily deprive	No other removal ground.	<a href="#">PC 499</a> , <a href="#">499b</a> 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	<a href="#">PC 503</a> 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).	<a href="#">PC 528.5</a> Possible substitute charge for ID theft or similar offense, but a better choice is 529(a)(3), 530.5. <b>CIMT:</b> 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. <sup>179</sup>  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 ILRC, <a href="#">How to Use the Categorical Approach Now</a> (2021)

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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. <sup>180</sup> Good alternative to a fraud offense	No other removal ground.	<a href="#">PC 529(a)(3)</a> <b>1 yr sentence:</b> 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). <b>SB 54.</b> This is one of a few wobblers that do not destroy SB 54 protections limiting jail cooperation with ICE. See SB 54 advisory, <a href="http://www.ilrc.org/crimes">www.ilrc.org/crimes</a> .
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.	<a href="#">PC 529.5(c)</a> 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, services, or medical information" (part (a)) or Transfer any such information, knowing transferee will use for unlawful purpose (part (d)(2))	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 to 484/487 and see Advice to 470, above.	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.	<a href="#">PC 530.5(a), (d)(2)</a> <b>AF with 1 yr.</b> 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. <sup>181</sup> But to avoid a possible wrongful AF charge, keep sentence under 1 yr for each count and/or keep conduct involving forgery, counterfeiting, or obtaining goods out of the ROC. If D must take 1 yr or more, however, 530.5 is a reasonable choice. <b>CIMT.</b> 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. <sup>182</sup> 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	AF if loss to victim/s exceed \$10,000.	Yes, CIMT because intent to defraud.	No other removal ground.	<a href="#">PC 530.5(c), (d)(1)</a> 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).

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	identifying information	Not AF by 1 yr imposed. See Advice.			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.	<a href="#">PC 532(a)</a> <b>AF and 1 year.</b> 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 <a href="#">§ N.4 Sentence</a> .
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.	<a href="#">PC 532a(a)</a> <b>CIMT.</b> 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. <sup>183</sup>
PC 550(a)	Insurance fraud	See §532a(1)	See § 532a(1)	No other removal ground.	<a href="#">PC 550(a)</a> 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. <sup>184</sup>	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).	<a href="#">PC 591</a>  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.
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	<a href="#">PC 591.5</a> <b>CIMT:</b> 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.

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				minor V's age out of ROC. See 243(a).	Immigration counsel may argue against this, as a similar offense to PC 32, 136.1(b)(1). <sup>185</sup>
PC 592	Fraudulently stealing water for agricultural, etc., uses	May be an AF if value of water exceeds \$10k, or possibly if sentence of one year or more. See Advice.  Possible alternative to H&S C 11358	Because fraud is an element, it appears to be a CIMT	Appears not to trigger any other removal ground. But if this is pled to in response to a charge of 11358, gov't will be on alert to seek evidence to prove the person is inadmissible because they have "reason to believe" the person engaged in drug trafficking.	<a href="#">PC 592</a>  Possible alternative to a plea to 11358, which is at risk of being a drug trafficking "aggravated felony" even if the offense itself is an infraction. Section 592 is not a drug offense, although it appears to be a CIMT.  PC 592 is a 6-month misd. unless the value of the water exceeds \$950 or there is a prior offense, in which case it is a wobbler.  <b>AF:</b> The statute identifies the offense as involving fraud, but possibly ICE would argue that it involves theft because water is "property." To avoid that issue, avoid a sentence of a year or more imposed on any given count.  Because it involves fraud, if the amount of water taken exceeds \$10,000 in value, consider a plea to PC 487 rather than 592 or get expert help on setting out the plea.
PC 594	Vandalism, Malicious Mischief (b)(1) at least \$400 damage (b)(2) less than \$400 damage	No conviction should be held a COV, but plead to (a)(1) (graffiti) if possible. See Advice.  Try to get 364 days, but if 1 yr cannot be avoided, PC 594 is a reasonable offense to take it. See Advice.  See <a href="#">§ N.4 Sentence</a> .	Not a CIMT, but see Advice.	No other removal ground  Not a deportable crime of DV because even if it were held to be a COV (which it is not), a deportable crime of DV requires violence toward a person, not property.  Avoid a gang-based sentence enhancement if at all possible. This is critical if the client is not an LPR. See Advice.	<a href="#">PC 594</a>  While there is no holding directly on point, there are strong arguments that PC 594 is not a COV or a CIMT. <b>COV.</b> Under PC 594(a), a person commits vandalism who "(1) defaces with graffiti... (2) damages, or (3) destroys" property they don't own. Because courts have held and the Ninth Circuit has opined that graffiti is not a property crimes of violence, <sup>186</sup> a plea specifically to 594(a)(1), with intent to vex or annoy, is best. But if (a)(1) is not possible, PC 594 still is a reasonably good plea: PC 594 appears to be indivisible between (a)(1)-(3), so that no conviction should be a COV regardless of how the person pled; or even if it were divisible, one can seek case examples of, e.g., damage without using violent force. <sup>187</sup>  <b>CIMT.</b> Ninth Circuit held that a Washington vandalism statute with nearly identical elements of maliciously (intent to vex or annoy) causing damage (including graffiti) was not a CIMT, when the damage was any amount over \$250 (in 1995 dollars). <sup>188</sup> Under that

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					<p>standard, 594(b)(2) is not CIMT, and (b)(1) also should not be; its minimum conduct is damage of \$400 (in 2024 dollars). 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 (part of the definition of “malice”).</p> <p><b>Gangs and vandalism, CIMT.</b> <i>Try hard to avoid any gang enhancement</i>, including for graffiti - just because any gang connection is a terrible negative factor in discretion for any immigrant factors for immigrant.</p> <p>Regarding CIMT and gangs, the BIA held that PC 594 with a gang enhancement is a CIMT. In a case involving a weapon and gang enhancement, however, the Ninth Circuit declined to follow the BIA’s holding that a California gang enhancement will turn a non-CIMT into a CIMT.<sup>189</sup></p> <p><b>SB 54.</b> This is one of a few wobblers that do not destroy SB 54 protections that limit jailor’s cooperation with ICE. See SB 54 Advisory at <a href="https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf">https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf</a>.</p>
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. <sup>190</sup>  597(b). BIA states recklessness is a CIMT if it is a <i>conscious disregard of known risk</i> of imminent death or severe injury to person. 597(b) can involve gross negligence, so it should not be held a CIMT. <sup>191</sup>	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. <sup>192</sup>	<p><b>PC 597</b></p> <p><b>COV.</b> 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.</p> <p>PC 597(b) is not a COV because it involves neglect, and the Supreme Court in Borden held that even reckless conduct is not a COV. See endnote on 597(b) as a CIMT and see further discussion of COV at 207.</p>
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.	See PC 597.	<p><b>PC 597.5</b></p> <p><b>CIMT.</b> 597.5(a)(3), permitting, in a place under one’s control, either dog fighting or <i>another person owning a dog who intends to fight it</i>, will be charged as a CIMT, but</p>

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			held similar federal offense is CIMT. <sup>193</sup>  See advice for (a)(3), (b).		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. <sup>194</sup>
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.	<a href="#">PC 601</a>  Very likely to be held a COV or CIMT because the elements <sup>195</sup>
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.	<a href="#">PC 602</a>  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.	<a href="#">PC 602.5</a>
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. <sup>196</sup>	BIA reversed itself to hold that 646.9 is <i>not</i> 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.	<a href="#">PC 646.9</a>  See endnote for citations and further discussion of COV and stalking deportability ground. <sup>197</sup>  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.  <b>CIMT:</b> To avoid a CIMT, look to, e.g., 136.1(b)(1), 236, 243(a), (e), 459, 591, 594, etc. for alternatives.  <b>DACA:</b> If DV-type victim, a misd is “significant misdemeanor” for DACA. See PC 25400.
PC 647(a)	Disorderly: lewd or dissolute conduct in public	Not AF even if ROC shows minor involved <sup>198</sup> (but don’t let	Yes, held CIMT, although imm counsel can argue against this. Consider PC 370. See Advice.	To ensure not wrongly charged as child abuse, keep any minor’s age out of ROC. See 243(a).	<a href="#">PC 647(a)</a>  <b>AF:</b> Good alternative to sexual conduct near/with minor  <b>CIMT</b> Older BIA decisions finding CIMT were influenced by antigay bias. Imm attys will argue they should not be

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		ROC show this)			followed, <sup>199</sup> but until there is precedent this presents a CIMT risk. Instead see 647(c), (e), (h).  <b>Adam Wash Act.</b> 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. <sup>200</sup> 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.  <b>Victims of human trafficking.</b> If the defendant might be a victim, see discussion at Advice to H&S C 11358.	<a href="#">PC 647(b)</a>  For more information and citations on the prostitution inadmissibility ground, see endnote. <sup>201</sup> See also <a href="#">§ N.10 Sex Offenses</a> .  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 <i>alone</i> 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.	<a href="#">PC 647(c), (e), (h)</a>  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.	<a href="#">PC 647(f)</a> should not be held divisible between alcohol, drug, and CS. <sup>202</sup> But to provide extra protection for D, plead specifically to alcohol or if needed to "drug" rather than CS.

CODE SECTION	OFFENSE	Aggravated Felony (AF)	Crime Involving Moral Turpitude (CIMT)	OTHER REMOVAL GROUNDS	ADVICE AND COMMENTS
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).	<a href="#">PC 647(i)</a> <b>CIMT:</b> Should not be CIMT because offense is completed by peeking, with no intent to commit further crime <sup>203</sup> 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 <a href="#">§ N.10 Sex Offenses</a> .	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.	<a href="#">PC 647.6(a)</a> . See citations and analysis. <sup>204</sup> <b>If pleading to 647.6:</b> 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. <b>Age-neutral offense to prevent deportable child abuse, SAM:</b> 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.	<a href="#">PC 653f(a), (c)</a>  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. <sup>205</sup>  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.	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.	<a href="#">PC 653f(d)</a> <b>Deportable/ Inadmissible CS conviction.</b> 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. <sup>206</sup>

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		Outside the Ninth Circuit it can be an AF.			<b>Trafficking penalties.</b> 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, 17235	Possession of illegal knife	Not AF	Not CIMT	Not deportable offense	<a href="#">PC 21510, 17235</a> This is a good immigration plea.
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. <sup>207</sup>  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.	<a href="#">PC 653m(a), (b)</a> Good plea in a DV context. <b>Deportable DV crime:</b> 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). <b>Deportable violation of DV protective order.</b> 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. <b>Deportable stalking:</b> 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	CIMT if attempted crime is CIMT	Carries consequences of the attempted offense	<a href="#">PC 664</a> <b>AF.</b> Attempt and conspiracy are bad pleas where fraud or deceit results in loss to victim/s exceeding \$10k. <sup>208</sup> Instead plead to straight theft, PC 487, w/ less than 1 yr, or see PC 470

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		potential loss >\$10k			
PC 666	Petty theft with a prior	Theft as defined by 484 is not an AF even if 1 yr imposed, or loss exceeds \$10k, but avoid getting <i>both</i> 1 yr and loss > \$10k. See PC 484.	Yes CIMT. See Advice	No other removal ground.	<a href="#">PC 666</a> <b>CIMT:</b> If there is a CIMT prior, such as any 484 offense, this will be the dangerous second CIMT conviction. To avoid that, consider plea to PC 459, 496, or VC 10851. For rules governing when CIMTs trigger a removal ground, see ILRC, <a href="#">All Those Rules About Crimes Involving Moral Turpitude</a> (2021). <b>Prop 47</b> 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. <sup>209</sup>
PC 836.6	Escape or attempted escape from (a) sheriff custody or (b) officer custody after arrest Misdemeanor or Wobbler if forcible escape causes officer injury	Misdemeanor: Never AF as obstruction because maximum sentence is 364 days. (But pre-2015 misdoses that have sentence of 1 year may be so held)  Wobbler: Get 364 or less to avoid AF as a COV or obstruction	Misdemeanor: Should not be CIMT. See PC 4532(a)  Wobbler: Likely CIMT, but a plea to "offensive touching" might prevent this. <sup>210</sup> See Pen C 243(d) and see Advice.	No other removal grounds. See PC 4532(a).	<a href="#">PC 836.6</a> <b>AF.</b> Defenders should conservatively assume that PC 836.6 as a wobbler is a potential AF as obstruction of justice or as a COV, <i>if</i> a year or more is imposed. <sup>211</sup>  For strategies to avoid a year for immigration purposes, see <a href="#">N.4 Sentence</a> .  Alternatives: To avoid an AF if a year is required, consider PC 236/237, 459, 591, 594, or even 207 (but this is less sure). To avoid a CIMT, consider misd 836.6 or, with a sentence of less than a year, misd or felony 32, 69, 148(a), 136.1(b)(1).  Misdo is SB54-safe, unlike PC 4532.
PC 1320(a)	Failure to appear for misdemeanor	Not AF. See Advice	Does not appear to be a CIMT	No other removal ground.	<a href="#">PC 1320(a)</a> 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	Does not appear to be a CIMT	No other removal ground.	<a href="#">PC 1320(b)</a> , <a href="#">1320.5</a>

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		“FTA for felony.” See Advice.  Get 364 or less on each count to avoid AF as obstruction of justice. <sup>212</sup>			<b>AF regardless of sentence:</b> Even without a 1 year sentence, a conviction for FTA to answer to a felony charge punishable by at least 2 years, or to serve a sentence if the offense is punishable by at least 5 years, is an aggravated felony. <sup>213</sup>  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 potential 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.	<a href="#">PC 4532</a> (a), (b)  See citations and further discussion at this endnote, including for CIMT. <sup>214</sup>  <b>AF as obstruction of justice.</b> Escape from court-ordered punishment almost surely meets the definition of obstruction, so counsel must avoid a 1 year sentence on any single count.  <b>AF as a COV.</b> 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.	<a href="#">PC 4573</a>  <b>CS Conviction.</b> 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 <i>Graves</i> decision on 4573.6. <sup>215</sup>  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.	<a href="#">PC 4573.5</a>  <b>Not CS offense.</b> 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. <sup>216</sup>  <b>CIMT.</b> As a regulatory offense that does not involve illegal substances, this should not be a CIMT.

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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.	<a href="#">PC 4573.6</a> <b>Not CS offense.</b> 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 <i>US v Graves</i> (May 2019). <sup>217</sup> 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 instrument to use them in jail	Not AF	As a regulatory offense (possess without permission), should not be a CIMT	Should not be a deportable or inadmissible CS offense, but for safety plead to alcohol or look at 4573.5, .6.	<a href="#">PC 4573.8</a> <b>CS.</b> 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 to 4573.5. But 4573.5 is safer, unless one can plead to alcohol.
Former PC 12020 <i>Repealed 1/1/12</i> 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 COV (but is a deportable firearms offense.)	Weapon possession is not a CIMT. <sup>218</sup>  Sale is unclear as a CIMT. Mere failure to comply with licensing requirement may not be CIMT. <sup>219</sup>	Possession of a firearm under this statute is a deportable firearm offense. See Advice.	<b>Firearms.</b> 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 and 16590/17700 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 ILRC, <a href="#">How to Use the Categorical Approach Now</a> (2021). Or assuming it was divisible, see endnote for effect of information in the ROC. <sup>220</sup>  Misd is a “significant misdemeanor” for DACA, and enforcement priorities if it is held to involve a firearm; see note at PC 25400.

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Former PC 12021 (a) <i>Repealed 1/1/12</i> See also current PC 29800, 30305	Drug addict, misdemeanor, or felon who possesses or owns firearm, ammunition	Possession by felon or addict is not an AF due to the antique firearms rule. <sup>221</sup> 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. <sup>222</sup>  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)	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. <sup>223</sup>	<a href="#">PC 12022</a> 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; (b) Personal use of deadly/ dangerous weapon; (c) Personally armed w/ a firearm  <b>AF:</b> 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 <a href="#">§ N.4 Sentence</a> .
PC 12022.1	Enhancement for felony committed while released pending other felony charge	Does not appear to add an AF-type element, 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.	<a href="#">PC 12022.1</a>  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: <ul style="list-style-type: none"> <li>• Immigration offenses that become an AF if a year is imposed, and</li> <li>• Inadmissible based on having a lifetime total of 5 or more years for two or more convictions</li> </ul>

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PC 12022.7	Enhancement for inflicting GBI during commission of a felony	Not COV <i>per se</i> . But see Advice.	Not CIMT <i>per se</i> ; does not turn a non-CIMT into a CIMT. See Advice	No other removal ground.	<a href="#">PC 12022.7</a> <b>COV.</b> 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. <sup>224</sup>
Former PC 12025(a), 12031(a) <i>Repealed 1/1/12.</i> <i>See also current 25400, 25850</i>	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, 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).  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.	<a href="#">PC 17500</a> <b>CIMT/COV:</b> 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. <sup>225</sup>  <b>Firearms ground:</b> Not a deportable firearms offense due to antique firearms rule; see discussion at 29800. Also, statute should be held not divisible.  Assume an ROC identifying a firearm will be a "significant misdemeanor" firearms offense for <b>DACA</b> . Keep ROC clean of firearm and see note at PC 25400.

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PC 20010, 21310, 22210, 21710, etc.	Possession of weapon other than firearm; see Advice	Not COV <sup>226</sup> or AF. Can take more than 1 yr sentence. See Advice	Not CIMT <sup>227</sup>	No other removal ground. (Stun gun does not meet definition of firearm) <sup>228</sup>	<a href="#">PC 20010</a> , <a href="#">21310</a> , <a href="#">22210</a> , <a href="#">21710</a> 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 <sup>229</sup> ; see discussion at PC 29800.	<a href="#">PC 25400(a)</a> <b>DACA.</b> Some misdemeanors are “significant misdemeanors” and thus a bar to DACA. <sup>230</sup> 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.	<a href="#">PC 25850</a>
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. <sup>231</sup>	<a href="#">PC 26350</a> 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)  Misd is a “significant misdemeanor” for <b>DACA</b> ; see Advice at PC 25400.

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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.	<a href="#">PC 27500</a>  <b>CIMT:</b> Some courts have stated that unlicensed sale, as opposed to, e.g., gunrunning for gangs, is a regulatory offense and not a CIMT. <sup>232</sup> 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 <b>DACA</b> , but 1203.4 may work. See PC 25400.
PC 29800	Felon, addict, etc. who possesses or owns a firearm		<a href="#">PC 29800</a> <b>Not AF</b> due to antique firearms rule; see below and see also 29805, 29815(a), 29825. <b>Should not be CIMT</b> 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. <b>Not deportable firearms offense</b> due to antique firearms rule. <b>Antique Firearms Rule:</b> A noncitizen who is convicted of a firearms offense (selling, carrying, using, possessing, etc.) is deportable. <sup>233</sup> 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. <sup>234</sup> 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. <sup>235</sup> 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. <sup>236</sup> 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. <b>Further AF protection:</b> 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 <i>owns</i> rather than possesses a firearm. <sup>237</sup> In addition, do not identify a specific firearm in ROC.		

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			<b>Particularly Serious Crime:</b> The Ninth Circuit held that a conviction for federal felon in possession potentially can be held a PSC (for purposes of CAT). <sup>238</sup>		
PC 29805 (formerly PC 12021 (c))	Possess, own, etc. firearm after conviction of certain misdemeanors	Not AF Possession by misdemeanor is not an AF	Should not be CIMT. Owning might be better than possessing	Not deportable firearms offense; see discussion in PC 29800.	<a href="#">PC 29805</a>  <i>See discussion in 29800</i>  <b>DACA:</b> 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	<a href="#">PC 29815</a>
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 <a href="#">§ N.8 Controlled Substance</a> .	<a href="#">PC 30305</a>  <b>AF:</b> 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 misdemeanor 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.  <b>Deportable firearms offense.</b> The firearms deportation ground does not include ammunition. <sup>239</sup> (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	Possession is not a CIMT. <sup>240</sup> See Advice.	Yes, a deportable firearms offense; the antique firearm exception does not apply. <sup>241</sup>	<a href="#">PC 33215</a>  <b>COV:</b> 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. <sup>242</sup> See PC 207.  <b>CIMT:</b> If possession is not a CIMT it should follow that lending or giving also is not, but there is no precedent on

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		to avoid 1 yr. See Advice			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	<a href="#">PC 32625</a> , <a href="#">33410</a> See 33215
VC 20	False statement to DMV	Not AF	Should not be a CIMT. See Advice	No other removal ground.	<a href="#">VC 20</a> <b>CIMT.</b> This need not be a material false statement and there is no element of intent to gain a benefit. To avoid CIMT, plead to a specific false fact 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.	<a href="#">VC 31</a> 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	<a href="#">VC 2800(a)</a>
VC 2800.1	Flight from peace officer	Not AF as obstruction of justice (364-day maximum). Not AF as COV; see 2800.2.	Not CIMT <sup>243</sup>	No other removal ground.	<a href="#">VC 2800.1</a>
VC 2800.2	Flight from peace officer with wanton disregard for safety; can be proved by 3 traffic violations	Seek 364 days or less in case it is charged as an AF as obstruction of justice. See Advice.	Ninth Circuit held not a CIMT due to three traffic violations alternative. If possible, plead specifically to three traffic violations per 2800.2(b), although	No other removal ground.	<a href="#">VC 2800.2</a>  See endnote for discussion of COV and CIMT. <sup>244</sup> <b>AF.</b> Obstruction of justice is an AF, <i>if</i> a year or more is imposed. Counsel should assume conservatively that VC 2800.2 meets the definition of obstruction. See discussion of the Supreme Court decision on obstruction, <i>Pugin v. Garland</i> , No. 22-23 (June 22, 2023), at Advice to

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		Not an AF as COV because it involves recklessness.	legally this is not required. See Advice.		<p>PC 32, above, and at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).</p> <p>For information on how to structure a sentence to avoid a year for immigration purposes, see <a href="#">§ N.4 Sentence</a>.</p> <p>CIMT: Wanton disregard for safety can be demonstrated by three traffic violations, per 2800.2(b). That conduct is not 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 <i>all</i> 2800.2 convictions must be evaluated based on the 'three traffic violation' standard under the categorical approach.</p> <p>2800.2 is also not a COV because it can be committed by recklessness. See <i>Borden v. U.S</i> See further discussion of COV at PC 207.</p> <p>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.</p> <p><i>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.</i></p>
VC 2800.4	Flight from peace officer while driving against traffic	<p>Seek 364 days or less in case it would be charged as an AF as obstruction of justice. See Advice.</p> <p>Not an AF as COV because it includes recklessness.</p>	Yes CIMT <sup>245</sup>	No other removal ground	<p><a href="#">VC 2800.4</a></p> <p><b>AF as COV.</b> Supreme Court affirmed that reckless conduct cannot amount to a COV. See discussion of <i>Borden v. United States</i> (2021) at PC 207.</p> <p><b>AF as obstruction:</b> Obstruction of justice is an AF, <i>if</i> a year or more is imposed. Counsel should assume conservatively that VC 2800.4 could meet the definition of obstruction. See discussion of the Supreme Court decision on obstruction, <i>Pugin v. Garland</i>, No. 22-23 (June 22, 2023), at Advice to PC 32, above, and at ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).</p>

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					For information on how to structure a sentence to avoid a year for immigration purposes, see <a href="#">§ N.4 Sentence</a> .
VC 4462.5	Display improper registration w/ intent to avoid vehicle registration requirement	Not AF.	Not CIMT.	No other removal ground.	<a href="#">VC 4462.5</a>  This might be a minor traffic offense and not count for purposes of the three-misdemeanor bar to <b>DACA</b> . 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.	<a href="#">VC10801-03</a>  <b>AF based on 1 year:</b> 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. <sup>246</sup>  <b>AF based on \$10,000 loss.</b> 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 <sup>247</sup> —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 <a href="#">§ N.11 Burglary, Theft and Fraud</a> .
VC 10851	Vehicle taking, temporarily or permanently	Always an AF if a year or more is imposed. Get 364 days or less.  This is a change based on the 2023 <i>Pugin</i> decision. See Advice.	Never a CIMT regardless of info in the ROC. <sup>248</sup>  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	No other removal ground.	<a href="#">VC 10851(a)</a>  <b>AF.</b> See citations and further discussion here. <sup>249</sup>  Offenses that meet the generic definition of theft or obstruction of justice offenses are AFs if a year or more is imposed. 8 USC 1101(a)(43)(G), (S).  VC 10851 includes auto taking, which meets the definition of "theft," and being an accessory after the fact to the taking, which we must assume meets the definition of "obstruction of justice" under <a href="#">Pugin v. Garland, No. 22-23 (June 22, 2023)</a> . Defenders must assume that any conviction of 10851 is an AF if a sentence of a year or more is imposed.

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			that 10851 is not a CIMT.		<p>Immigration advocates should try to vacate the conviction. Advocates will argue that Pugin should not apply retroactively to convictions from before September 11, 2018, but we cannot rely on that. For further discussion of <i>Pugin</i> and arguments, see Advice to PC 32, above, and see ILRC, <a href="#">Obstruction of Justice: Pugin and California Offenses</a> (July 2023).</p> <p>For information on how to structure a sentence to avoid a year or more for immigration purposes, see <a href="#">§ N.4 Sentence</a>.</p> <p><b>Alternatives.</b> If a year will be imposed, or might if there is a VOP, plead to PC 459, 1<sup>st</sup> or 2<sup>nd</sup> degree. This is immigration neutral (except it is a to DACA).</p> <p>Note that a plea to grand theft, PC 487, may not be safe. While 487 can take a sentence of a year or more without being an AF, it <i>will</i> be an AF if on the same count there is a sentence of a year or more, <i>and</i> the loss to the victim/s exceeds \$10,000. See Advice to PC 484, above. If the car at issue might be worth more than \$10,000, ICE might charge 487 with a year as an AF.</p> <p><b>SB54:</b> This is one of the few wobblers that is not an exception under SB54 and so should not be transferred to ICE.</p>
VC 10852	Tampering with a vehicle	Not AF; and a misdemeanor	Should not be held a CIMT. See Advice.	No other removal ground.	<p><a href="#">VC 10852</a></p> <p><b>CIMT.</b> Never a CIMT because it involves minor interference with and no intent to deprive owner.<sup>250</sup></p>
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.	<p><a href="#">VC 10853</a></p> <p><b>CIMT:</b> 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.<sup>251</sup></p>
VC 12500	Driving without license	Not AF.	Not CIMT.	No other removal ground.	<p><a href="#">VC 12500</a></p> <p><b>DACA:</b> This should be a minor traffic offense and not part of the three-misdemeanor bar.</p>

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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	<a href="#">VC 14601.1</a> , <a href="#">14601.2</a> , <a href="#">14601.5</a> <b>CIMT:</b> A single Arizona offense that has as elements DUI while knowingly driving on a suspended license was held a CIMT. <sup>252</sup> 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. <sup>253</sup>  But to avoid any mistaken charges, where possible plead to driving on a suspended license on a different date than the DUI. <sup>254</sup>  <b>DACA:</b> 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.	<a href="#">VC 15620</a> <b>Child abuse:</b> 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, 20004	Hit and run (felony)	Try to get 364 days or less to avoid possible AF charge as obstruction of justice,	Divisible as a CIMT. See Advice. Assume 20001 enhancement under 20001(c) is CIMT.	No other removal ground.	VC <a href="#">20001</a> , <a href="#">20003</a> , <a href="#">20004</a> <b>AF as Obstruction.</b> Obstruction of justice is an AF if a year or more sentence is imposed. INA 101(a)(43)(S). Defenders should act conservatively and try to avoid a sentence of a year on any single count, in case ICE charges this as obstruction of justice under <a href="#">Pugin v.</a>

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		although immigration advocates would have very strong arguments against this. See Advice			<p><a href="#">Garland</a>, 599 U.S. 600 (2023). See discussion of obstruction and <i>Pugin</i> at PC 32 Advice. There are strong arguments that hit and run, which does not include intent to avoid a legal process, is not obstruction -- but given the vague definition set out in <i>Pugin</i>, ICE might charge it.</p> <p>If a year or more is needed consider a plea to felony vandalism, which could be coupled with reckless driving. If lot of time is required, VC 20001 can be the subordinate felony with a sentence of 8 months. See other ways to structure sentences for immigration purposes at <a href="#">§ N.4 Sentence</a></p> <p><b>CIMT.</b> See endnote for citations and further discussion.<sup>255</sup> To avoid a CIMT, assume it is necessary to plead to "failure to provide registration information" and further to <i>state affirmatively that the person did not fail to stop</i> (i.e., state that they did stop). Assume that this is necessary for any person who must apply for relief, and highly advisable for an LPR who is defending against a charge of being deportable, who needs to avoid a CIMT. Consider the following: "I plead guilty to failure to provide registration information. I do not plead guilty to failure to stop" (or if possible, "I plead not guilty to failure to stop")</p> <p>To avoid a CIMT, consider VC 23103 misd or PC 594, or a combination.</p>
VC 20002 (a)	Hit and run (misd)	Not AF because 364-day limit.	Dangerous as a CIMT; see Advice to 20001 <sup>256</sup>	No other removal ground.	<p><a href="#">VC 20002(a)</a></p> <p>See VC 20001 and notes for advice about divisibility and specific pleadings to avoid CIMT.</p> <p>Try for Veh C 16025 (infraction failure to exchange information)</p>
VC 23103	Reckless driving	Not AF as COV plus potential sentence of less than a year	Should not be held a CIMT. <sup>257</sup> See Advice.	No other removal ground	<p><a href="#">VC 23103</a></p> <p><b>CIMT:</b> While 23103 and 23103.5 should not be held CIMTs under any circumstances, best practice is to plead to recklessness re property.<sup>258</sup></p> <p><b>COV.</b> Supreme Court affirmed that reckless conduct cannot amount to a COV. See discussion of <i>Borden v. United States</i> (2021) at PC 207.</p>

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VC 23103.5	Reckless driving & use of alcohol or drugs "Wet reckless"	Not AF as COV (plus, less than 1 yr potential 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.	<a href="#">VC 23103.5</a> <b>AF:</b> Not an AF; see discussion of COV, sentence, and <i>Borden</i> at 23103, above. <b>Discretion.</b> Generally a wet reckless is <i>not</i> 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. <b>DACA:</b> 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, but as always try to obtain 364 or less.	Assume that 23105 is a CIMT, but 23104 might not be. See Advice.	No other ground	<a href="#">VC 23104</a> , <a href="#">23105</a> <b>CIMT:</b> Acting recklessly with wanton disregard of imminent risk to life or <i>serious</i> injury is a CIMT. Because 23104 requires only "bodily injury" while 23105 sets out various more serious injuries, we would argue that 23104 is not a CIMT. Note voluntary intoxication is not a defense against a CIMT finding. <b>AF/COV:</b> Supreme Court held that reckless conduct is not a COV for this purpose, so a conviction should not be an AF even if a year or more is imposed.
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 <a href="#">§ N.4 Sentence</a> .	(a) should not be CIMT <sup>259</sup> (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).	<a href="#">VC 23110(a), (b)</a> <b>CIMT:</b> 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.
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	Not CIMT, including multiple offenses. <sup>260</sup>	Conviction is itself is not a per se inadmissible offense. However: A recent DUI arrest or conviction, or multiple past arrests or convictions, can trigger evaluation for being	<a href="#">VC 23152(a)</a> See 23103.5 as alternative plea. See Practice Advisory on DUI immigration consequences. <sup>263</sup>

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		possible, avoid 1 yr on a single DUI count in that situation. See <a href="#">§ N.4 Sentence.</a>		<p>inadmissible under the health grounds due to alcoholism.<sup>261</sup></p> <p>People with multiple DUI (and other) 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.<sup>262</sup></p> <p>See Advice for other consequences.</p>	<p><b>Pretrial Diversion.</b> Two California courts of appeals have found that DUI is not eligible for PC 1001.95 diversion.<sup>264</sup></p> <p><b>Reckless, wet reckless.</b> While 23103.5 is not a good immigration plea, it is far better than a DUI for purposes of discretion in all cases, and often is the identified case goal. It is critical for DACA. See negotiating resources here.<sup>265</sup></p> <p><b>DACA.</b> A DUI is a bar to DACA (the relief for Dreamers), but PC 1203.4 may work to eliminate it. VC 23103.5 is not a bar to DACA. See resources at endnote above.</p> <p><b>Good Moral Character.</b> 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.<sup>266</sup></p> <p><b>Discretion in general:</b> While not a specific removal ground, a DUI conviction is a common basis for denying release on bond and discretionary applications for relief.</p> <p><b>Release on bond from ICE detention.</b> Any DUI -- but especially more than one DUI, or a relatively recent DUI -- is a serious factor against release on bond.<sup>267</sup> Wet reckless offers no guarantee but is better.</p> <p><b>Asylum/Refugees.</b> A DUI with injury could be held a "particularly serious crime" affecting asylum applicants, asylees and refugees. See 23153.</p> <p><b>Revokes visas; travel warning.</b> U.S. consulates likely will revoke a non-immigrant visa (e.g., student visa) in response to DUI conviction <i>or arrest</i>. If this happens, the person should <i>not</i> return to the home country or travel outside the U.S. without first consulting with an immigration attorney. (The consulate does not have the ability to revoke the person's permitted period of stay that was granted upon admission, but that can change if the person leaves the U.S.)</p> <p><b>SB 54 and ICE Visits to the Home.</b> A misd DUI comes under SB 54 protections, which depending on the county may decrease the chance that ICE will arrest the person</p>

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					from jail. ICE may go to D's home, if it decides to prioritize DUI's. (At this writing ICE is not, but this has changed frequently.) Give D "red cards" and refer to a nonprofit for training. <sup>268</sup>
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, <sup>269</sup> but best practice is to plead to alcohol or to a specific non-CS drug, e.g., allergy or sleeping medication. See Advice.	<a href="#">VC 23152</a> (f), (g) Generally, see 23152(a). <b>CS.</b> 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)	<a href="#">VC 23153</a> See VC 23152(a) <b>Refugees/asylees.</b> DUI with injury may be treated as a "particularly serious crime," which is bad for refugees, asylees, and applicants for asylum. <sup>270</sup> (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	<a href="#">VC 23572</a> 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 <a href="#">§ N.11 Burglary, Theft and Fraud</a> and see Advice.	Yes CIMT. Consider PC 529(a)(3), 530.5.	No other removal ground.	<a href="#">W&amp;I C 10980(c)</a> <b>AF:</b> 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. <sup>271</sup>  This offense is not theft and therefore OK to take 1 yr sentence, unless commission requires perjury.

## ENDNOTES

<sup>1</sup> This annotated chart is written by Katherine Brady of the Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org)) and a team of committed experts. Many thanks to Amy Righter and Su Yon Yi for their past extensive work, and to ILRC attorneys Ann Block, Rose Cahn, Carla Gomez, Lena Graber, Angie Junck, Merle Kahn, 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, Andrea Garcia, Raha Jorjani, Dan Kesselbrenner, Kara Hartzler, Chris Gauger, Graciela Martinez, Michael Mehr, Jonathan Moore, Ali Saidi, Jayashri Srikantiah, Onyx Starrett, 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, and to Amber McChesney-Young and Juan Prieto for picking up the baton.

For a more comprehensive discussion, see Brady, Tooby, Mehr and Junck, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013) and see Tooby, Brady, *California Criminal Defense of Immigrants* ([www.ceb.com](http://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](http://www.ilrc.org/chart). See several crim/imm practice advisories and aides at [www.ilrc.org/crimes](http://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](http://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](http://www.nortontooby.com).

Copyright ILRC 2023. Immigration advocates and criminal defenders have permission to use and distribute this chart, for defense purposes only. They have permission to use the chart in trainings; if you do, please send name of training, date, number expected, host agency to [chart@ilrc.org](mailto:chart@ilrc.org). 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.

<sup>2</sup> **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 *Immigrant Defendant Questionnaire* at [www.ilrc.org/chart](http://www.ilrc.org/chart) and see ILRC, *How to Analyze a Crim/Imm Case: Four Questions to Identify Case Goals* (March 2023).

**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, an LPR 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](http://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 provides more information 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](http://www.ilrc.org/chart). Then we use a resource like the free *Defender's Relief Toolkit* (§ N.17, *Relief Toolkit*, 2018) and/or updated *Defender's Relief Chart* (§ N.17A *Relief Chart*, 2021). both of which are found at [www.ilrc.org/chart](http://www.ilrc.org/chart). The toolkit contains a two-page summary of each form of immigration relief and the criminal convictions that would destroy eligibility, while the Chart provides information in chart-form. 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.

<sup>3</sup> See, e.g., *People v. Perry*, No. D054821, (Cal. Ct. App. Jul. 29, 2010) (unpublished) (upholding conviction of owner of medical marijuana practice despite the fact that the person didn't treat patients himself, because “the statute makes no distinction between the practice of medicine and the business side of managing a medical practice”).

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> A “dangerous drug” or “dangerous device” is defined generally as a drug or (medical) device unsafe for self-use. (B&P 4022, 4023.) These cannot ordinarily be furnished without a prescription. (See B&P 4059 et seq.). A “drug” is defined at H&S C § 11014 to include more substances than those included under the federal Controlled Substance Act; it is overbroad and indivisible as a controlled substance offense for immigration purposes.

<sup>8</sup> See, e.g., *Dodd v. State of California Veterinary Med. Bd.*, No. A124052, 2009 WL 4643931, at \*1 (Cal. Ct. App. Dec. 8, 2009) (unpublished) (licensed veterinarian offering alternative medicine).

<sup>9</sup> See CALCRIM 2966, which does not require a jury to decide unanimously between alcohol, drugs, or controlled substances.

<sup>10</sup> See, e.g., *U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (*en banc*) and see *US v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (*en banc*), holding that §§ 11350-52, 11377, are divisible between the offense (an AF) and “offering to” commit the offense (not an AF).

<sup>11</sup> 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>

<sup>12</sup>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.

<sup>13</sup> 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* (2021), 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 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.

<sup>14</sup> The BIA held and the Ninth Circuit agreed that the amount of marijuana is not determined using the categorical approach, which focuses on the minimum conduct required for guilt; it is determined using 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); *Matter of Hernandez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014); *Bogle*

*v. Garland*, 21 F.4th 637 (9th Cir. 2021). For further discussion, 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](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_15Jan_davey-categor-apprch.pdf).

Even 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](http://www.ilrc.org/crimes) and [www.nipnlg.org](http://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*.

<sup>15</sup> 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](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”).

<sup>16</sup> 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](http://www.nipnlg.org) and see *Nijhawan* practice advisories at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) and [www.nipnlg.org](http://www.nipnlg.org).

<sup>17</sup> 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).

<sup>18</sup> 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>.

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<sup>19</sup> See *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008).

<sup>20</sup> **Survivors of trafficking, or of intimate partner or sexual violence.** California has passed laws to protect criminal defendants who are survivors of human trafficking (HR) or, as of 2022, of intimate partner or sexual violence (DV), if they are found to have committed the crime/s as a direct result of their victimization. These defendants might be eligible for immigration status as well, either for a “T visa” as victims of trafficking or a “U visa” or VAWA relief as victims of domestic violence. See resources at the end of this endnote.

This section will provide basic information and resources. For further discussion see ILRC, *New Options for Survivors of Trafficking and Domestic Violence* (Nov. 2022), <https://www.ilrc.org/resources/new-options-survivors-trafficking-and-domestic-violence>.

**Definitions:** “Human trafficking” does not refer to taking people across national borders. It is broadly defined for this purpose as labor or services obtained by overcoming the will of the victim. “Coercion” does not require direct coercion by the trafficker or attacker; one only must be “coerced to commit the offense as a direct result” of the victimization. For example, a trafficked juvenile who illegally carried a knife with the idea of preventing the trafficker from putting him into a car was potentially eligible for the defense, because he was “coerced to commit the offense as a direct result of being a human trafficking victim.” See *In re D.C.*, 60 Cal. App. 5th 915, 919 (2021).

**Defense to a criminal charge.** See PC §§ [236.23](#), [236.24](#). This is a potential defense to any charged offense/s other than “violent felonies” as defined at PC § 667.5(c). Defendants must show that they were “coerced to commit the offense as a direct result of being a victim of [HR or DV] at the time of the offense and had a reasonable fear of harm.” For example, San Francisco public defenders have won jury trials on behalf of Hondurans charged with drug sales, by showing the Hondurans were trafficked and coerced to sell fentanyl. Also, even if one cannot win a complete defense, availability of the defense may help to bargain for a plea that is immigration-neutral or otherwise beneficial. 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 immigration “aggravated felonies” even after Prop 64. By demonstrating that defendants fit the profile and were likely victims of human trafficking, Sacramento public defenders were able to negotiate pleas to misdemeanor PC § 32, a far better plea for a noncitizen. This was accomplished even though the defense itself could not go forward because the survivors were afraid to testify against their traffickers.

**Post-conviction relief.** California provides a vehicle to obtain post-conviction relief (PCR) to erase a prior conviction if the conduct was due to being a victim of HR or, as of 2022, of DV. See PC §§ [236.14](#), [236.15](#). In some cases, this PCR vehicle may be more acceptable to the prosecution than, e.g., a PC § 1473.7.

To have effect in immigration proceedings, any PCR must be based on a legal error in the original case. Effective 2023, §§ 236.14 and 235.15 were amended to clarify that the vacatur is based on error, which was that the defendant did not have the *mens rea* required to commit the offense, due to the coercion. As always with PCR for immigrants, it is critical to draft a proposed order for the judge that clearly identifies legal error as the basis. Consult with a PCR expert if needed, and see PCR resources at the end of this note.

**Immigration remedies.** In some cases, the defendant may be eligible for a “T” visa for trafficking victims or a U visa for victims of certain crimes including violent or sexual assault. See 8 USC §§ 1101(a)(43)(T), (U). In this process, one first applies for a temporary, non-immigrant T or U visa and later for lawful permanent residence (a green card). It is possible that the person’s children and (innocent) spouse can obtain status as well. Victims of intimate partner violence also may qualify for relief under VAWA, if the abuser was their USC or LPR spouse. Some nonprofit agencies are expert in these applications and can offer free help to the defendant.



**Resources:** For the criminal case, CAST (Coalition to Abolish Slavery and Trafficking) in Los Angeles is an excellent resource. See [www.castla.org](http://www.castla.org). They offer free technical assistance 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 information on relief, see CAST materials as well as the brief summary of requirements for, and criminal record bars to, T visas, U visas, and VAWA in § N.17 *Immigration Relief Toolkit*, and see a variety of materials at <https://www.ilrc.org/u-visa-t-visa-awa>, which also has links to webinars and manuals.

For information on post-conviction relief, see ILRC Practice Advisory, [Overview of California Post-Conviction Relief](#) (July 2022) and see the ILRC manual, *California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (Jan. 2023), <https://store.ilrc.org/publications/california-post-conviction-relief-immigrants-how-use-criminal-courts-erase-immigration>.

<sup>21</sup> 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).

<sup>22</sup> **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 marijuana 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 is 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](http://www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011).

<sup>23</sup> **H&S C § 11361(b) as an AF.** *Offering* to give or sell a CS (controlled substance) is not an AF (aggravated felony), in the Ninth Circuit only. See, e.g., *U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (*en banc*) (H&S C § 11352 is divisible between types of conduct, because offering is not an AF) and discussion at 11379.

Apart from the Ninth Circuit rule on offering, the general rule is that a state CS offense that does not involve commercial trafficking, such as giving a CS away for free, also is an AF if the state offense is analogous to a *federal drug felony*. Giving away a CS generally is a federal felony and thus a drug trafficking AF, but giving away a “small amount of marihuana” is a federal misdemeanor, with a potential sentence of up to one year. See 21 USC § 841(b)(4) and *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013), discussed in endnote above. This is why giving away cannabis in violation of § 11360(a) is not an AF. But does the added element of giving cannabis to a minor age 14-17 raise the offense to a federal felony? It appears so, because it appears that this is analogous to a federal felony under 21 USC § 859(a). That section provides that an adult who gives a CS to a person under age 21 is

subject to (1) twice the maximum punishment authorized by [section 841\(b\)](#) of this title, and (2) at least twice any term of supervised release authorized by [section 841\(b\)](#) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by [section 841\(b\)](#) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this subsection shall not apply to offenses involving 5 grams or less of marihuana.

If the potential one-year sentence is doubled to a potential two years, that could make the offense a federal felony and thus an AF.

(A possible argument for removal defense advocates concerns the last sentence, the 5 grams of marijuana exception for “mandatory minimum sentencing provisions”. Immigration advocates might argue that that sentence means that the potential sentence is not doubled, if the CS was just 5 grams of marijuana. If that were the case, then a 11361(b) would remain analogous to a federal misdemeanor if the record shows 5 grams or less of marijuana. But the Ninth Circuit did not read it that way in *United States v. Durham*, 464 F.3d 976, 987 (9th Cir. 2006). There the court held that under 859(a), a mother who had her baby breathe in marijuana was subject to a potential sentence of two years – double the one-year potential sentence for giving away a small amount of marijuana under 21 USC 841(b)(4). Without discussion, the court appeared to read the last sentence’s 5-gram exception that applies to “mandatory minimum sentencing provisions” to apply to the requirement of a minimum term of imprisonment of one year, not to the doubling of the potential sentence. That means that even 5 grams of marijuana would have a potential two-year sentence and



be a felony. Arguing otherwise is likely to lose, although it may not be frivolous (partly because the last sentence on the exception discusses the “mandatory minimum sentencing provisions” in the plural, while there appears to be just one provision). As always, while pursuing an untried argument, immigration advocates should investigate the possibility of obtaining post-conviction relief to vacate the conviction.

<sup>24</sup> *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

<sup>25</sup> Section 11366 was held an AF as a federal analogue to 21 USC § 1856 in *Salvieto-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).

<sup>26</sup> See generally ILRC, [§ N.8 Controlled Substance](http://www.ilrc.org/chart) at [www.ilrc.org/chart](http://www.ilrc.org/chart) (2019). For California post-conviction relief generally, see ILRC Practice Advisory, [Overview of California Post-Conviction Relief](http://www.ilrc.org/chart) (July 2022) and see the ILRC manual, *California Post-Conviction Relief for Immigrants: How to Use Criminal Courts to Erase the Immigration Consequences of Crimes* (Jan. 2023), <https://store.ilrc.org/publications/california-post-conviction-relief-immigrants-how-use-criminal-courts-erase-immigration>. 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-vacatur-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>

<sup>27</sup> 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.

<sup>28</sup> **Argument that heroin is not a federal controlled substance.** The argument begins with the Ninth Circuit’s *prior* treatment of methamphetamine in the *Lorenzo* and *Rodriguez-Gamboa* cases, based on geometric isomers. See case citations below. In 2018, the Ninth Circuit held that California meth (H&S 11377-79) is not a federal CS because the chemical definition of meth set out in California drug schedules includes geometric isomers, while the federal schedule definition of meth does not. The court found that this made California meth overbroad and

indivisible compared to federal “generic” meth, so that a California meth conviction was not of a federal CS for immigration purposes. But the Ninth Circuit later determined, based on un rebutted expert testimony, “that there is no such thing as a geometric isomer of methamphetamine.” Therefore the court held that meth *is* a federal controlled substance. *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1150 (9th Cir. 2020). The Ninth Circuit did not abandon its basic reasoning or application of the categorical approach, however; it just found that the claim was factually incorrect.

The California definition of heroin has the same overbreadth as California meth does: the statutory schedule specifically includes geometric isomers of heroin, while the federal definition of heroin does not. But this time it appears that a geometric isomer of heroin—“isoheroin”—*does* exist. ILRC will post an expert declaration on this when it becomes available. Meanwhile, although this should be a strong case, until there is a precedent decision criminal defense counsel should not consider this a safe plea and should seek alternatives. But if there is no other alternative, in criminal court a specific plea to heroin or isoheroin in response to a criminal charge under H&S §§ 11350-11352 appears to be better than a plea to some other substance or to no specific substance. Immigration advocates can raise this as a defense in removal proceedings.

For the opinions on methamphetamines and isomers, 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. Note that *Lorenzo* and *Rodriguez-Gamboa* decisions addressing meth and geometric isomers are distinct from a 2023 federal decision finding that a California meth conviction is not a federal CS, because the California meth definition of “analog” is broader than the federal definition. See discussion of *United States v. Verdugo*, \_\_ F. Supp. 3d \_\_ (S.D. Cal. July 17, 2023) in the text.

<sup>29</sup> See, e.g., *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

<sup>30</sup> **When a plea to PC 372.5 is not necessarily dangerous to an LPR.** No LPR will be found *deportable* for a plea to PC § 372.6, because deportability requires a conviction of a federal controlled substance.

For further discussion of being *inadmissible* based on a formal admission of a CS offense, see ILRC, [Immigrants and Marijuana](#) (May 2021). A defense exists based on several older BIA decisions holding that if a person’s conduct was brought to criminal court and the result was less than a conviction, e.g., because charges were being dropped, pre-trial diversion, or a conviction was vacated for cause, the person cannot be found inadmissible for “admitting” that same conduct. See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). While that ought to protect an admission to immigration authorities that one did commit the original drug charge in a § 372.5 situation, we cannot be sure that authorities would apply the defense because – well, it’s immigration proceedings.

**Regarding LPR cancellation:** An LPR must have accrued seven years of residence in the United States after admission in any status in order to qualify. Under INA § 240A(d)(1), as interpreted by the Supreme Court, a person who becomes inadmissible by making a qualifying admission that they committed a controlled substance offense thereby “stops the clock” on the accrual of their required seven years of residence, as of the date of the admitted conduct. Therefore, an LPR convicted of § 372.5 should decline to make a formal admission to immigration authorities of the

originally charged drug conduct, especially if that conduct occurred before they accrued the seven years. If they already admitted the conduct to immigration authorities, they can assert that the admission is not “qualifying.” As discussed above, one reason it should not qualify is that the conduct was brought to criminal court and the result was less than a conviction. See further discussion at ILRC, [Eligibility for Relief: Cancellation of Removal for Permanent Residents](#) (Dec. 2022) and ILRC, *Immigrants and Marijuana*, *supra*.

**Regarding travel outside the United States:** Generally, an LPR who travels outside the United States is deemed not to be making a new “admission,” and does not have to show that they are admissible, upon their return. However, they can lose this privilege and be deemed to be making a new “admission” to the country if they come within an exception set out at INA § 101(a)(13)(C). One of those exceptions is if authorities can prove that the LPR has “committed” an inadmissible offense. See INA 101(a)(13)(C)(v), discussed at *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). It is best for LPRs charged with any drug offense not to travel outside the U.S. until they naturalize. But if an LPR convicted of PC § 372.5 does travel, that conviction alone is not sufficient for border authorities to prove that the LPR actually committed an inadmissible offense. *If the LPR can just decline to answer any questions*, eventually they should be permitted to enter, either because the government failed to prove that they committed a CS offense so that they did not come within INA § 101(a)(13)(C), or because they did come within § 101(a)(13)(C) but they were not in fact inadmissible, because they neither were convicted of, nor formally admitted, a CS offense. See discussion at ILRC, [Immigrants and Marijuana](#) (May 2021).

**Regarding application for adjustment of status.** Here the LPR has the burden to show that they are inadmissible, and adjustment as a remedy can be denied as a matter of discretion. This puts the LPR applicant in a position similar to an undocumented person applying for relief.

<sup>31</sup> **How to create an “inconclusive” record of conviction.** NOTE: As discussed in the text, under *Pereida* an inconclusive record will only help an LPR to avoid a charge of deportability. It will not help any applicant for relief. Plus, *Pereida* included dicta that might weaken this defense, because it encourages courts to withdraw from precedent and permit ICE to use evidence from outside the record of conviction to prove the specific substance. But if this is the best strategy available for an LPR, here are instructions for how to create an inconclusive record.

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 this 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 several details *other than* the damaging information, such as the substance. See *People v. Holmes* (2004) 32 Cal.4th 432. For example, the document could be a written plea agreement stating, “On the evening of June 15, 2022, 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. See also N.8 Controlled Substances at [www.ilrc.org/chart](http://www.ilrc.org/chart).

<sup>32</sup> See *Vega-Anguiano v. Barr*, 942 F.3d 945, 946 (9th Cir. 2019) (preventing government from reinstating the 1998 removal order).

<sup>33</sup> See discussion in *People v. Bautista*, (2004) 115 Cal.App.4<sup>th</sup> 229, *In re Bautista*, H026395 (Ct. App. 6<sup>th</sup> 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.

<sup>34</sup> See *U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (*en banc*) and see *US v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (*en banc*) (holding that the California statutes are divisible between the offense and “offering to” commit the offense).

<sup>35</sup> See *Tejeda v. Barr*, 960 F.3d 1184 (9th Cir. 2020).

<sup>36</sup> *Nunez-Reyes v Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*).

<sup>37</sup> A “device” is an instrument, apparatus, machine, implant, in vitro reagent, or contrivance, including its components, byproducts, or accessories, used in the diagnosis or treatment of a human or other animal or “[t]o affect the structure or any function of the body of a human or any other animal.” B&P 4023. “[D]evice” does not include contact lenses or prosthetic or orthopedic device not requiring prescription. *Id.* A “drug” is defined at H&S C 11014 to include more substances than those included under the federal Controlled Substance Act, and thus is overbroad as compared to a “controlled substance.”

<sup>38</sup> **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*).)

<sup>39</sup> **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. Innis*, 7 F.3d 840 (9th Cir. 1993).

<sup>40</sup> **Pen § 32 as the AF Obstruction of Justice.** The Supreme Court addressed the definition of obstruction of justice in *Pugin v. Garland*, 22-23 (June 22, 2023). For more in-depth discussion of *Pugin*, see, e.g., Merle D. Kahn, “Obstruction of Justice and ‘Obstruction-Adjacent’ Offenses” (July 9, 2023) in Top of the Ninth: A Review of Ninth Circuit and BIA Decisions at <https://topoftheninth.com/>, and the SCOTUSBlog analysis at <https://www.scotusblog.com/case-files/cases/pugin-v-garland/>. Check for a forthcoming Advisory by the National Immigration Project at <https://nipnlg.org/work/resources>.

The rest of this endnote discusses Ninth Circuit and BIA history leading up to the Supreme Court’s decision in *Pugin*, and what issues still exist.

Before *Pugin*, the Ninth Circuit and the BIA set out conflicting generic definitions of obstruction of justice, which led the BIA to find that California 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*”). The main issue was whether the generic definition of obstruction requires interference with a pending (already existing) proceeding or investigation. The Ninth Circuit asserted that the definition of obstruction does require this. It found PC § 32 not to be obstruction because it includes, e.g., helping a person avoid an initial arrest before any investigation has started. The BIA found that obstruction does not require an existing proceeding but only a “reasonably foreseeable” one. It held that PC § 32 is obstruction.

In *Pugin*, the Supreme Court rejected the Ninth Circuit’s requirement of a “pending” investigation or proceeding, and did not even appear to adopt the BIA’s definition of a “foreseeable” one. It affirmed the Fourth Circuit’s ruling in the *Pugin* case that accessory after the fact under Virginia law is obstruction. In a companion case, Supreme Court considered the Ninth Circuit’s obstruction definition as applied to California PC § 136.1(b)(1), witness dissuasion. See *Cordero-Garcia v. Garland*, 44 F.4th 1181 (9th Cir. 2022). The Supreme Court remanded *Cordero-Garcia* to the Ninth Circuit to be decided in accord with its decision in *Pugin*.

One issue on remand of 136.1(b)(1) to the Ninth Circuit will be whether the adverse definition of obstruction (that does not require a pending investigation or proceeding) applies retroactively 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 has held that its definition in *Valenzuela Gallardo* does apply retroactively (*Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657-663 (BIA 2019)), but the Ninth Circuit ultimately will decide that. Defenders and advocates must act conservatively and assume that the non-retroactivity argument will fail; they should attempt to vacate any prior conviction with a sentence of a year or more, including convictions from before September 11, 2018, if they are likely to be held an AF as obstruction under *Pugin*.

*Cordero-Garcia* and *Pugin* presented a more general issue, which was whether federal courts 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). The Ninth Circuit in *Valenzuela Gallardo II* noted that there are strong arguments that

courts should not defer to the BIA in a dual application context, under *Chevron* Step Zero. But the Supreme Court did not address the *Chevron* issue in *Pugin*. 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>.

<sup>41</sup> **PC 69 as an AF and a COV.** Note that while PC § 69 is not an AF as a crime of violence, it likely will be charged as an AF under a different category, as obstruction of justice, if a sentence of a year or more is imposed. See below endnote and see Advice to PC § 32.

Section 69 should not be held a COV under 18 USC § 16(a). 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). This should not be a COV under *Stokeling*, because the person is resisting an action by the officer, not trying to overcome the will of the officer.

<sup>42</sup> **PC 69 as a CIMT.** There is no direct holding, but PC 69 reaches conduct that should be held not to involve moral turpitude. It includes an offensive touching. See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (finding that the minimum conduct for Pen C § 69 is offensive touching; therefore, it is not a COV under 18 USC 16(a)). It also includes resisting an officer who is trying to prevent you from committing suicide. See *United States v. Fowles*, 225 F. App'x 713, 714 (9th Cir. 2007), discussed below.

<sup>43</sup> **PC 69 as obstruction.** An offense relating to “obstruction of justice” is an AF if a sentence of a year or more is imposed. INA § 101(a)(43)(S). Section 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...” Section 69 did not come within the Ninth Circuit’s definition of obstruction set out in *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020) (“*Valenzuela Gallardo II*). That definition required interference with a *pending* proceeding or investigation, whereas PC § 69 includes interference in any duty and includes an initial arrest. However, the Supreme Court rejected the “pending investigation or proceeding” definition in *Pugin v. Garland*, No. 22-23 (June 22, 2023). Defenders must assume conservatively that PC § 69 will be held to be obstruction under *Pugin*, and should avoid a sentence of a year. Defenders and advocates should try to vacate a prior conviction with that sentence.

Removal defense advocates can explore arguments that PC § 69 is not an AF as obstruction, despite *Pugin*. One argument is that the PC 69 reaches interference in *any* action by an officer. The BIA’s definition of obstruction includes interference in an ongoing or a “reasonably foreseeable” civil or criminal legal proceeding. *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 456 (BIA 2018). While the Supreme Court in *Pugin* did not explicitly adopt the “foreseeable” test, it is clear that it requires corrupting or interfering with some proceeding. Section 69 includes interference in any lawful duty of the officer, even if there is no likelihood of civil or criminal proceedings. It includes resisting an officer who is trying to protect the person from self-harm. 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). In this case, no corruption, obstruction, or escape from punishment is at stake. For this reason, 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.4<sup>th</sup> 1411, 1420 (Ct.App.1<sup>st</sup> Dist. 2010).

Counsel also can assert that *Pugin* cannot be applied to convictions from before Sept. 11, 2018, which is the date that the BIA opinion that rejected the requirement of a pending proceeding was published. See *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA Sept. 11, 2018). The BIA later



held that its definition can be applied retroactively to convictions from before that date. *Matter of Cordero-Garcia*, 27 I&N Dec. 652, 657-663 (BIA 2019). However, in *Pugin* the Supreme Court remanded the Ninth Circuit's *Cordero-Garcia* decision, which was the *Pugin* companion case and the Ninth Circuit will address the retroactivity issue there. Advocates should not rely on that argument winning, but it is another valid point to raise that also may provide time to investigate post-conviction relief.

<sup>44</sup> 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 should not be. See 8 USC § 1101(a)(43)(R), (S). Advocates could investigate whether the statute is indivisible between bribery of a witness and an umpire.

<sup>45</sup> **Pen C §§ 112, 113 as a CIMIT.** 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.

<sup>46</sup> **Pen C §§ 112, 113 as an AF if a sentence of a year or more is imposed.** This offense might be charged as 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](http://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.

**AF as obstruction of justice.** Conceivably it would be charged as obstruction of justice, under the vague definition set out in *Pugin v. Garland*, No. 22-23 (June 22, 2023). See Advice to PC § 32 for further information.

<sup>47</sup> **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.

<sup>48</sup> 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.

<sup>49</sup> 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.

<sup>50</sup> **Pen C § 118 as a CIMIT.** 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 CIMIT, 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 CIMIT. 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 CIMIT 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 CIMIT, 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 CIMIT analysis.

<sup>51</sup> **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 CIMIT, discussed in *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir 2016) in above endnote.

<sup>52</sup> **PC 136.1(b)(1) as a CIMIT.** 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 CIMIT. *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 CIMIT, but with an even stronger argument. Section 136.1(a) is not a CIMIT 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 the BIA. 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).

<sup>53</sup> **PC § 136.1(b)(1) as AF as obstruction.** As stated in the *Chart* text, at this writing this issue is on remand to the Ninth Circuit in *Cordero-Garcia*, and defenders must assume conservatively that it will be found to be obstruction. Removal defense advocates arguing against that can point out that PC § 136.1(b)(1) lacks 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), a more serious offense, is not a CIMT). Compare this to the federal definition of persuading a witness not to provide evidence that a crime occurred, 18 USC § 1512. Section 1512 requires "knowing use of intimidation, physical force, threats, corrupt persuasion, or misleading conduct" and intentional harassment. It is true that the *Pugin* majority did not require a match to elements of federal obstruction offenses. But it also true that the *Pugin* majority did not provide a cogent definition of obstruction, and in her concurrence Justice Jackson argued that the relevant federal offenses should be the generic definition of obstruction.

<sup>54</sup> **Pen C § 140 as obstruction of justice.** See Advice to Pen C § 32 for further discussion of obstruction of justice as an aggravated felony, 8 USC § 1101(a)(43)(S). Under the Supreme Court's vague definition in *Pugin*, this is extremely likely to be held to be obstruction.

Advocates can investigate non-frivolous arguments. Section 140 appears to match a federal offense described in 18 USC §§ 1501-1521. 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. Still, 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*).

**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 a CIMIT:** Section 140 should not be held a CIMIT, but use caution as there is no precedent.

The federal generic definition of a CIMIT 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 CIMIT. 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 CIMIT and can be distinguished by § 422, proscribing threats of “death or great bodily injury,” which is categorically a CIMIT. *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 CIMIT because the required mens rea is the intent to “touch another offensively, not the ‘evil’ intent typically required for a CIMIT.” *Id.* at 1161. An assault statute is not a CIMIT 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 CIMIT. There is no requirement that the prosecution was successful, or the statement was true. Therefore, § 140 should not be considered a CIMIT. 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.

<sup>55</sup> **Pen C 148 as CIMIT.** PC 148(a) should not be held a CIMIT because it can be committed nonviolently and as a principled action, for example by using passive resistance in support of a nonviolent political demonstration. *In re Bacon* (1966) 240 Cal. App. 2d 34, 53, (“We hold, therefore, that a person who goes limp and thereby requires the arresting officer to drag or bodily lift and carry him in order to effect his arrest” violates PC § 148.), disapproved of on other grounds by *In re Brown* (1973) 9 Cal. 3d 612.

Courts have held that an element of all sections of PC 148 is that the defendant “must know, or through the exercise of reasonable care should have known, that the person attempting to make the arrest is an officer.” See *People v. Lopez* (1986) 188 Cal. App. 3d 592, 599-600, cited in CALCRIM 2656. This is a negligence standard, and negligence generally is held not to be a CIMIT. While the statute does not appear to be divisible between know or should have known, best practice is to plead specifically to “should have known.” Note that “should have known” is not in the text of the statute, but was clarified in case law such as *Lopez*.

<sup>56</sup> 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.

<sup>57</sup> There are no cases on whether Pen C § 148.5 is categorically a CIMIT. 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 CIMIT. 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 CIMIT, 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).

<sup>58</sup> *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008).

<sup>59</sup> Pen C 148.10 covers injury an officer sustains while they chase an individual who has fled from police but has not used or risked force. *People v. Superior Ct. (Ferguson)*, 132 Cal. App. 4th 1525, 1535 (2005) (running away from officer constitutes resisting arrest, and when officers injured themselves while pursuing the person on foot at night, this was sufficient for guilt under PC § 148.10). See also *United States v. Medina-Fructuoso*, 472 F. App'x 758, 759 (9th Cir. 2012), an unpublished decision where parties agreed that PC § 148.10 is not a crime of violence.

Unlike PC § 243(d), which involves de minimis force (and which the Ninth Circuit, arguably incorrectly, held is a crime of violence), § 148.10 does not require any force at all used against another person. Accordingly, it should be more analogous to the precedent preceding *US v. Perez*. Before *Perez*, 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.

<sup>60</sup> **PC § 166 as a deportable finding.** A person is deportable under the “domestic violence” deportation ground, INA § 237(a)(2)(E)(ii), 8 USC § 1227(a)(2)(E)(ii), if a civil or criminal court finds that they violated certain portions of a DV protective order. The violation must be after admission and after September 30, 1996. The provision reads:

INA 237(a)(2)(E)(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

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.

<sup>61</sup> See, e.g., chart at <http://www2.courtinfo.ca.gov/rulesofconduct/files/tableofconsanguinity.pdf>

<sup>62</sup> **PC 166(c)(4) (as well as PC 273.6(d)) as a COV.** As discussed above, these convictions may cause deportability as a judicial finding of a violation of a DV stay-away order, under INA § 237(a)(2)(E)(ii). This section is about a different issue: whether these offenses are a crime of violence (COV), and therefore an immigration “aggravated felony” if a sentence of a year or more is imposed. See INA § 101(a)(43)(F)

Sections 166(c)(4) and 273.6(d) are nearly identical, and this analysis applies to both. They punish as a wobbler a “second or subsequent conviction for a violation of an order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders *and involving an act of violence or ‘a credible threat’ of violence...*” (emphasis supplied). In *U.S. v. Acevedo-De la Cruz*, 844 F.3d 1147 (9th Cir. 2017), the Ninth Circuit held that PC § 273.6(d) is a COV under a definition that is identical to 18 USC § 16(a). This holding would apply to § 166(c)(4) as well. The court stated, “[w]hen interpreting other state statutes, California courts have adopted this common understanding of the word ‘violence’ in concluding that force can occur without violence, but violence cannot occur without force.” *Id.* at 1151. See also CALCRIM 2703, cited for both PC §§ 166(c)(4) and 273.6(d).

Removal defense advocates representing a client who already has this conviction could try to challenge *Acevedo-De la Cruz* by finding a case example of §§ 166(a)(4) or 273.6(d) that involves an offensive touching or other conduct that is not a COV. The defendant in *Acevedo-De la Cruz* did not do this, and so did not demonstrate a “realistic probability” that the statute would be applied to conduct outside the COV definition. As always, advocates pursuing an untried argument also should investigate the possibility of obtaining post-conviction relief, while the immigration case is pending.

<sup>63</sup> 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).

<sup>64</sup> 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).

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<sup>65</sup> *Gomez Fernandez v. Barr*, 969 F.3d 1077 (9th Cir. 2020).

<sup>66</sup> **Pen C § 191.5(a) as a CIMT.** While there is no case on point, removal defense advocates can argue that PC § 191.5(a) is not a CIMT. The BIA has held that the definition of CIMT includes an offense with an element of recklessness when the risk is serious, such as imminent risk of death or injury. Recklessness is defined as a *conscious disregard* of a known risk, i.e., the person must subjectively know the risk and ignore it. But in a case involving an Arizona reckless endangerment statute, the BIA adopted Arizona’s expanded definition of recklessness that includes “a person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication...” Thus, it found that A.R.S. 13-1201(A), “recklessly endangering another person with a substantial risk of imminent death,” which included that expanded definition of recklessness, was a CIMT. *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012).

Could Pen C § 191.5(a) be construed to come within that definition? It prohibits killing a human with a vehicle where the driver was in violation of Veh C § 23140, 23152, or 23153 “and” the killing was the result of certain acts taken with “gross negligence.” ICE might assert that case law on 191.5(a) requires the voluntary intoxication to *cause* the gross negligence (or to reduce what would have been recklessness to gross negligence, by blocking consciousness of the risk). Or ICE might assert that while the causality was set out in Arizona law, that is not required. Experts can consider criminal cases on § 191.5(a) to contest such assertions and can argue that the definition requires proof that voluntary intoxication *caused* the inability to be conscious of the risk. As always, while making an untried argument advocates also should investigate the possibility of post-conviction relief.

<sup>67</sup> *Ortiz v. Garland*, 25 F.4th 1223 (9th Cir. 2022) (PC 192(a) is a CIMT).

<sup>68</sup> This endnote briefly summarizes the cases that led to the Ninth Circuit’s statement in dicta that, despite prior precedent to the contrary, PC § 192(a) is a COV. See *United States v. Draper*, 84 F.4th 797, 805, N.3 (9th Cir. 2023).

In 2021 the Supreme Court affirmed what most courts of appeals had long held, which was that an offense with a *mens rea* of recklessness is not a COV. *Borden v. United States*, 593 U.S. 420 (2021). The Court stated that reckless conduct occurs when a person “‘consciously disregards a substantial and unjustifiable risk’ attached to his conduct, in ‘gross deviation’ from accepted standards.” *Borden* at 427. In a footnote, the court stated that it did not decide whether a different *mens rea*, depraved heart or extreme recklessness, is a COV. *Borden* at n.4. (For further discussion of *Borden* see NILA, NIPNLG, IDP, *Practice Advisory: Overview of Borden v. United States for Immigration Counsel* (June 2021), <https://nipnlg.org/work/resources>).

In *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (*en banc*), the Ninth Circuit addressed the issue *Borden* had left open. It held that federal second degree murder, which has a *mens rea* of depraved heart and extreme recklessness and disregard for human life, is a COV. The *en banc* panel held that while its ruling conflicted with prior precedent stating that a COV requires intentional conduct, “the reasoning of *Borden* sufficiently undermines our prior authority” and the “distinction between degrees of recklessness is critical to our conclusion.” *Begay* at p. 1094. Degrees of recklessness refers to depraved heart/extreme recklessness, which is a COV, versus conscious disregard or a substantial and unjustifiable risk, which is not.

In *United States v. Draper*, 84 F.4th 797 (9th Cir. 2023), the panel relied on *Begay* to hold that *federal* voluntary manslaughter is categorically a COV, because the minimum conduct includes a *mens rea* of depraved heart or extreme recklessness. In *dicta*, the court stated that because California voluntary manslaughter, PC § 192(a) requires the same *mens rea*, it also is a COV. *Draper* at p. 805, n.3.

For this reason, criminal defenders must assume that PC § 192(a) will be held a COV. Removal defense advocates representing someone with this conviction must investigate any defense arguments, as well as the possibility of vacating the conviction with PCR. See next endnote.

<sup>69</sup> Please read endnote 68 for a brief summary of the *Borden*, *Begay*, and *Draper* decisions.

This endnote will briefly discuss (1) possible argument that PC § 192(a) should not be held a COV, at least for older convictions, despite the statement in *Draper*, and (2) possible bases for PCR.

In *United States v. Draper*, 84 F.4th 797, 805, N.3 (9th Cir. 2023), footnote 3 regarding PC 192(a) reads as follows:

*Ortiz* involved section 192(a) of the California Penal Code, which is worded identically and interpreted similarly to the federal statute [federal voluntary manslaughter, 18 USC § 1112; see also 18 USC 924(c)]. See *United States v. Rivera-Muniz*, 854 F.3d 1047, 1053 (9th Cir. 2017) (“California Penal Code section 192(a) does not stray from the generic definition of voluntary manslaughter ....”). In *Quijada-Aguilar v. Lynch*, we held that section 192(a) is not a crime of violence under 18 U.S.C. § 16, see 799 F.3d 1303, 1306–07 (9th Cir. 2015), a holding that presumably would apply to § 924(c) as well. But our reasoning, that “the underlying offense must require proof of an intentional use of force,” *id.* at 1306 (quoting *United States v. Gomez-Leon*, 545 F.3d 777, 787 (9th Cir. 2008)), is no longer tenable. See *Begay*, 33 F.4th at 1094 (“*Borden* sufficiently undermines [*Gomez-Leon* and other Ninth Circuit] authority suggesting that anything less than intentional conduct does not qualify as a crime of violence.”).

**Argue that at least older convictions of PC § 192(a) are not COVs.** Removal defense advocates can investigate a possible defense against a charge that PC 192(a) is a COV. The dicta in *U.S. v. Draper*, 84 F.4th 797, N.4 (9th Cir. 2023), stating that § 192(a) is a COV, should not be applied retroactively to convictions from before *Draper*’s date of publication (October 17, 2023), because *Draper* sets out a new rule that reverses applicable prior precedent, that imposes new adverse consequences on immigrants and others who may have relied on the established rule when conducting the criminal case.

If the 192(a) conviction also occurred before the May 5, 2022 publication of *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), or the June 5, 2021 publication of *United States v. Borden*, 593 U.S. 420 (2021), that may open additional arguments.

The Ninth Circuit held that a COV requires intentional conduct, which PC 192(a) does not. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court held that negligence is not sufficient *mens rea* for a COV under 18 USC § 16, because that definition requires force “against” another. Based on *Leocal*, the Ninth Circuit has long held that a COV requires intentional conduct and not recklessness. See, e.g., *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc), *United States v. Gomez-Leon*, 545 F.3d 777, 787 (9th Cir. 2008) (citing *Leocal* and *Fernandez-Ruiz* and stating “in order to be a predicate offense under ... 18 U.S.C. § 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” (emphasis in original)). Then in *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015), the court reaffirmed *Fernandez-Ruiz* and *Gomez-Leon* and specifically held that Pen C § 192(a) is not a COV, because it does not require intentional force. *Quijada-Aguilar* at 1306, citing *Gomez-Leon* at 787.

In *Draper*, the three judge panel held that federal voluntary manslaughter is a COV. In a footnote, it acknowledged that *Quijada-Aguilar* had held that PC §192(a), which it found to be “worded identically and interpreted similarly to the federal statute,” was not a COV. “But our reasoning, that ‘the underlying offense must require proof of an intentional use of force,’ *id.* at 1306 (quoting *United States v. Gomez-Leon*, 545 F.3d 777, 787 (9th Cir. 2008)), is no longer tenable. See *Begay*, 33 F.4th at 1094 (‘*Borden* sufficiently undermines [*Gomez-Leon* and other Ninth Circuit] authority suggesting that anything less than intentional conduct does not qualify as a crime of violence.’)” *Draper*, 84 F.4th at 805, N.3 (9th Cir.

2023). For an example of a court declining to retroactively apply a change in its rulings, see *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

Counsel also can investigate other non-frivolous arguments that may be identified by comparing California and federal voluntary manslaughter, and can argue that *Quijada-Aguilar* was not reversed and still applies. During all of these arguments, counsel should pursue PCR.

**Obtain PCR to vacate prior PC 192(a) convictions with a sentence of a year or more.** If the 192(a) conviction has a sentence of a year or more it will be charged as a COV aggravated felony. It also is a CIMT, and is a deportable crime of DV if the victim and defendant share a protected domestic relationship. It can be challenging to obtain PCR based on a change in the law, so consider the below options and get expert help. See resources such as ILRC Practice Advisories, *How to Analyze a Crim-Imm Case* and *Overview of California Post-Conviction Relief* at [www.ilrc.org/chart](http://www.ilrc.org/chart) and see the ILRC manual, *California Post-Conviction Relief for Immigrants* at [www.ilrc.org/publications](http://www.ilrc.org/publications). One can investigate post-conviction relief that does not require an error in immigration advice by the defense, such as 1016.5, 236.14, 236.15, and others. See *Practice Advisory: Overview of California PCR* cited above. Try to obtain PCR based on the actual or potential consequences of PC 192(a) as a crime involving moral turpitude (CIMT). It has long been clear that voluntary manslaughter is a CIMT, so counsel's failure to adequately advise (or for § 1473.7, D's failure to understand) about the CIMT issues can be a basis for PCR. This is arguable, for example, in a case where the client wants to adjust status as a defense to removal but is inadmissible under the CIMT ground. If the only basis for PCR is not knowing about the change in law on PC 192(a), such that counsel did behave competently and defendant understood sufficiently given the law at the time, consider citing this Chart as misadvice for convictions that occurred at least on or after the June 5, 2021 publication of *United States v. Borden*, 593 U.S. 420 (2021). For more information or assistance, write [chart@ilrc.org](mailto:chart@ilrc.org).

<sup>70</sup> *Matter of Cervantes Nunez*, 27 I&N Dec. 238 (BIA 2018).

<sup>71</sup> **Pen C § 192(b) as a CIMT.** If a client has strong representation in removal proceedings, they should be able to prove that 192(b) is not a CIMT. But because so many immigrants lack any representation, and there is no case directly on point, defenders should consider this a risky plea for a noncitizen who must avoid a CIMT.

The BIA has long held that reckless conduct is a CIMT only under certain circumstances. See *Matter of Tavdidishvili*, 27 I&N Dec. 142, 143–44 (BIA 2017):

We have held that moral turpitude inheres in crimes involving serious misconduct committed with at least a culpable mental state of recklessness-- that is, “a *conscious disregard* of a substantial and unjustifiable risk.” *Matter of Franklin*, 20 I&N Dec. 867, 870 (BIA 1994) (emphasis added) (holding that recklessly causing the death of another person was a crime involving moral turpitude), *aff'd Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). In *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977), we concluded that a person acting with this mental state could be convicted of a crime involving moral turpitude because “recklessness requires an *actual awareness* of the risk created by the criminal violator's action”--in other words, a “violator must show a willingness to commit the act in disregard of the *perceived* risk.”

In contrast, the BIA repeatedly has held that “crimes committed with “criminal negligence” are generally not morally turpitudinous, because neither ‘intent’ nor a “*conscious disregard* of a substantial and unjustifiable risk” is required for conviction--that is, no sufficiently culpable mental



state is necessary to commit such an offense.” *Matter of Tavididishvili*, 27 I&N at 144 (eventually holding that NY involuntary manslaughter is not a CIMT), citing *Matter of Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992) (Washington involuntary manslaughter is not a CIMT).

In *Matter of Tavididishvili*, *supra*, 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.” Immigration advocates should point out that California’s definition of gross negligence is the same as in New York and Washington. In *People v Penny*, 44 Cal.2d 861(1955), the California Supreme Court in analyzing Pen C § 192(b) 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, should not be held a CIMT.

<sup>72</sup> 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 regarding required intent of 192(b) under *People v. Penny*, 44 Cal.2d 861(1955), in the endnote discussing 192(b) as a CIMT, above. For further discussion of the intent required for a COV, including “depraved heart or extreme recklessness,” see Pen C 192(a) and its discussion of *U.S. v. Draper*, 84 F.4th 797, N.4 (9th Cir. 2023), *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), and *United States v. Borden*, 593 U.S. 420 (2021).

<sup>73</sup> *Matter of Kim*, 26 I&N Dec. 912 (BIA 2017).

<sup>74</sup> 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, 1217-18 (9th Cir. 2013), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 782 n.2 (9th Cir. 2014) (en banc). This holding was reaffirmed in *Syed v. Barr*, 969 F.3d 1012, 1018 (9th Cir. 2020) (holding that communicating with a minor under PC 288.3 is divisible as a CIMT because it includes 207(a), which is not a CIMT, as an intended offense, citing *Castrijon-Garcia*). Section 207(e) also includes very minor conduct.

<sup>75</sup> **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. 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](http://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* (2022) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

**Stokeling and overcoming the victim's will.** The Supreme Court revisited the definition of a crime of violence 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 minimis force is not a crime of violence. *Stokeling* at 553. The BIA reaffirmed this distinction, holding that a Louisiana spousal battery statute similar to Pen C § 243(e) does not come within *Stokeling* and is not a crime of violence. *Matter of Dang*, 28 I&N Dec. 541, 548-49 (BIA 2022).

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: Reckless conduct is not a crime of violence.** In 2021 the Supreme Court held that an offense with an element of recklessness is not a crime of violence, under a definition identical to 18 USC § 16(a). *Borden v. United States*, 141 S.Ct. 1817 (2021). This was the long-held view of many circuit courts of appeals. Earlier the Court had held that recklessness could be an element of a different federal definition of a crime of domestic violence (*U.S. v. Castleman*, 572 U.S. 157 (2014)), but the Court specifically stated that the ruling did not apply to 18 USC § 16. See discussion in *Matter of Dang*, 28 I&N Dec. at 547-548 (holding that *Castleman* does not apply to 18 USC § 16(a)).



<sup>76</sup> **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](http://www.ilrc.org/crimes).

<sup>77</sup> 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). This could be contested – but since § 211 already is an aggravated felony as theft if a year is imposed, winning on the COV issue would not avoid an aggravated felony. 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). Later the Supreme Court held that a COV does not include reckless conduct. *Borden v. United States*, 141 S.Ct. 1817 (2021). In a different case, however, the Supreme Court found that if an offense such as robbery requires even *de minimis* 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.

<sup>78</sup> 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 minimis* 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 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 v. Barr* at PC 484, below. As always, while litigating this untried argument, advocates should investigate other defense strategies including the possibility of post-conviction relief.

<sup>79</sup> **PC 215 as an AF as theft.** Assume that PC 215 is an AF as theft if a sentence of a year or more is imposed.

**PC 215 as an AF as a COV.** The BIA found that PC 215 is a crime of violence under *Stokeling*. *Matter of A. Valenzuela*, 28 I&N Dec. 418 (BIA 2021). Advocates could contest this, while at the same time exploring post-conviction relief. 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 minimis force. *Solorio-Ruiz v. Sessions* 881 F.3d 733, 737 (9th Cir. 2018). In 2019, the Supreme Court held that even de minimis 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.** 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.”

<sup>80</sup> **Felony Pen C § 237 is overbroad and indivisible as a COV and as a CIME.**

Section 237(a) makes false imprisonment “effected by violence, menace, fraud, or deceit” a felony. This appears to be a separate felony offense with its own elements, so that 236/237 is not a wobbler.

Based on state law definitions of these elements, compared with federal definitions of COV and CIME, felony 236/237 is not a COV or CIME. But because there is little federal immigration precedent analyzing 236/237, counsel should consider providing the below text (e.g., in phone photos or an email) to the defendant, their family or friend, or an immigration attorney if any. The danger is that an unrepresented person could be wrongly charged with and found to have been convicted of a COV or CIME.

**Indivisible between violence, menace, fraud, and deceit.** The definition of felony false imprisonment at PC 237(a) is not divisible. The California Supreme Court found that “violence, menace, deceit, and fraud” are means, not elements, of felony 237(a). The court rejected the government’s argument that the felony definition at 237 “proscribes not one, but four separate felonies depending upon the means by which false imprisonment is effected... [W]e find 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.” *People v. Henderson* (1977) 19 Cal. 3d 86, 95,

partially reversed on other grounds by *People v. Flood* (1998) 18 Cal 4th 470, 484. That analysis by the state Supreme Court means that the statute is not divisible. “When a ruling of that kind exists, a [ ] judge need only follow what it says.” *Mathis v. United States*, 579 U.S. 500, 518 (2016).

The fact that 237(a) is not divisible means that the adjudicator may not go on to review the record of conviction for purposes of the modified categorical approach. *Id.* If any one of the four means of committing the offense is overbroad as a COV, then no conviction of felony 236/237 is a COV. Similarly, if any of the four means is overbroad as a CIMIT, no 236/237 conviction is a CIMIT.

**Overbroad as a COV.** The minimum conduct required for guilt under felony 236/237 is not a COV. Note also that felony 236/237 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. To the extent that kidnapping is not a COV, felony 236/237 is not either, because it is defined even more narrowly than kidnapping.

- “Fraud” or “deceit” is not a COV, because it does not require any force, including *de minimis* force. See, e.g., *People v. Rios* (1986) 177 Cal. App. 3d 445, 449 (father was guilty of felony 236/237 when he told his ex-wife that their baby had been kidnapped, when in fact he had taken her to live with relatives in Mexico because he believed the ex-wife endangered the child through severe neglect). Further, kidnapping by fraud under § 207(d) is not a COV. *United States v. Lonczak*, 993 F.2d 180, 183 (9th Cir. 1993).
- “Menace” under 236/237 does not require the threat or use of any force, including *de minimis* force. It can include mere threat of arrest without probable cause. See, e.g., *People v. Henderson* (1977) 19 Cal. 3d 86, 95, 94 (“The conduct may involve merely the simple act of announcing without probable cause the making of a citizen's arrest”), citing *People v. Agnew*, 16 Cal. 2d 655, 659 (announcement of citizen’s arrest in presence of police officers was menace under 236/237). Kidnapping under PC 207(a) also reaches the threat of arrest. *People v. Majors* (2004) 33 Cal.4th 321.
- “Violence” under 236/237 has a specific definition that 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 (pulling someone a few steps toward a car before she ran away is false imprisonment by “violence” under 236/237). While this level of *de minimis* force has been held not to be a COV in the past, it is possible that this would change under *Stokeling v. United States*, 139 S.Ct. 544 (2019) (*de minimis* force can be a crime of violence in an offense that has overcoming the will of the victim as an element). However, even if “violence” under 236/237 were held a COV under *Stokeling*, and the plea was specifically to false imprisonment by violence, the conviction cannot be held a COV because 236/237 is not divisible between violence, menace, fraud, or deceit.

But to further protect the defendant, who may be unrepresented and unable to present these citations, criminal defense counsel should plead specifically to menace, fraud, or deceit rather than to violence.

**Overbroad as a CIMIT.** Felony 236/237 by “violence or menace” is a lesser included offense of kidnapping by force or fear, Pen C § 207(a). *People v. Apo* (1972) 25 Cal.App.3d 790, 796). The Ninth Circuit held that a conviction for kidnapping under Pen C § 207(a) is not categorically a CIMIT 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 CIMIT. *Turijan v. Holder*, 744 F.3d 617, 622 (9th Cir. 2014).

The Ninth Circuit held that false imprisonment under Hawaiian law is a CIMIT because it requires “knowingly restrain[ing] another person under circumstances which expose the person to the risk of serious bodily injury.” Haw. Rev. Stat. § 707-721(1) (emphasis supplied). The court

specifically distinguished that offense from California kidnapping, which it reaffirmed is not a CIMT. *Fugow v. Barr*, 943 F.3d 456, 458 (9th Cir. 2019), citing *Castrijon-Garcia v. Holder*. Because felony 236/237 is a lesser included offense of PC 207(a) kidnapping, 236/237 also is not a CIMT.

Similarly, false imprisonment with intent to deceive is not necessarily a CIMT. The offense can be committed with the intent to do good, whether misguided or not. See, e.g., *People v. Rios* (1986) 177 Cal. App. 3d 445, 449 (father was guilty of felony 236/237 when he told his ex-wife that their baby had been kidnapped, when in fact he had taken her to live with relatives in Mexico because he believed ex-wife endangered her through severe neglect).

Felony 236/237 committed by “menace” is not a CIMT. It is a general intent crime that does not require an evil purpose, or 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 the victims. *Turijan v. Holder*, 744 F.3d 617, 621-622 (9th Cir. 2014) (citing *People v. Islas*, 210 Cal. App.4th 116, 147 (2012)).

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), above. 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).

<sup>81</sup> *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

<sup>82</sup> 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).

<sup>83</sup> **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, *2022 Case Update: Domestic Violence Deportation Ground* (March 2022), <https://www.ilrc.org/resources/2022-case-update-domestic-violence-deportation-ground>.

Some, but not all, offenses with minor age as an element are held to be deportable crimes of child abuse.

**Child endangerment.** Most states have child endangerment statutes that prohibit negligently placing or leaving children in a situation where they are or could be harmed. The BIA has taken a “state by state” approach to analyzing each state’s child endangerment statute, depending on the BIA’s evaluation of the level of harm and degree of risk involved. This has made it difficult to predict whether an endangerment statute is a crime of child abuse.

In California, there finally is a clear answer (unless the issue goes to the Supreme Court). In a fractured en banc decision, the Ninth Circuit held that PC § 273a(a), child endangerment punishable as a wobbler, is a deportable crime of child abuse. *Diaz-Rodriguez v. Garland*, 55 F.4th 697 (9th Cir. 2022) (en banc). The BIA has stated that § 273a(b), child endangerment with a risk of less harm, a misdemeanor, is *not* a crime of child abuse. *Matter of Mendoza Osorio*, 26 I&N Dec. 703, 711 (BIA 2016). Therefore, 273a(b) is a relatively safe plea, while § 273a(a) is not.



As an alternative to a 273a(a) charge, consider 273a(b) and/or another offense, e.g., felony or misdemeanor 459, 594, if necessary DUI..

**Consensual sex with a minor.** ICE may charge that PC § 261.5(c) (intercourse with a minor under age 18 and at least three years younger than the defendant) is a crime of child abuse, by asserting that the BIA in *Matter of Aguilar-Barajas*, 28 I&N Dec. 354 (BIA 2021) held that intercourse with a minor under age 18 is categorically child abuse. While it is possible that the BIA *en banc*, the Attorney General, or the Ninth Circuit will either reverse *Aguilar-Barajas* or hold that it does not apply to an offense like 261.5(c), defenders still should avoid this plea if it is important to avoid a deportable offense. Advocates in removal proceedings can argue that (1) *Aguilar-Barajas* does not apply to PC 261.5(c), and/or (2) it was wrongly decided. See arguments that it was wrongly decided in the dissent to *Aguilar-Barajas*. See further discussion at PC 261.5(c) and at ILRC, . As always with untested arguments, advocates at the same time should investigate the possibility of post-conviction relief. Assume that 261.5(d) is a deportable crime of child abuse, as well as an aggravated felony.

**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), or any other offense that does not have age of the victim as an element—never can be a deportable crime of child abuse. The problem is that some immigration judges or officers might not understand this. For one thing, an older BIA decision incorrectly held that an age-neutral offense can be a crime of child abuse if the record of conviction conclusively shows that the victim was under age 18. See *Matter of Velazquez-Herrera*, discussed below. Immigration advocates should be prepared to explain the law, and criminal defenders should do their best to avoid the whole issue by pleading to an age-neutral offense and, if possible, 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 (9<sup>th</sup> 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*, 579 U.S. 500 (2016) and *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017). 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, [2022 Case Update: Domestic Violence Deportation Ground](#), *supra*.

<sup>84</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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*.) See also *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022), reaffirming that a battery statute (in this case, spousal battery) that reaches offensive touching is not a crime of violence.

<sup>85</sup> 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).

<sup>86</sup> 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](http://www.ilrc.org/crimes).

<sup>87</sup> 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](http://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.

<sup>88</sup> 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](http://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](http://www.ilrc.org/crimes).

<sup>89</sup> 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). See generally *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022) (a spousal battery offense that reaches an offensive touching is categorically not a crime of violence under 18 USC § 16(a), including under *Stokeling*). 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.

<sup>90</sup> 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).

<sup>91</sup> 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.

<sup>92</sup> 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).

<sup>93</sup> 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); see also *Matter of Aguilar-Mendez*, 28 I&N Dec. 262 (BIA 2021) (Pen C § 245(a)(4), assault with force likely to produce great bodily injury, is categorically a CIMT).

<sup>94</sup> **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* (2019) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>95</sup> See *Matter of Muceros*, (BIA 2000), Indexed Decision, *supra*.

<sup>96</sup> 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.

<sup>97</sup>In *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1053-56 (9th Cir. 2011), the Ninth Circuit held that because PC 246 can be committed with “purely reckless conduct,” it is not a crime of violence under 18 USC § 16(b)). The court noted that the offense can be committed by shooting very close to a building but not at the building, and the building did not need to be occupied.

Note that 18 USC § 16(b) subsequently was held to be unconstitutionally vague. The current definition is the narrower 18 USC 16(a). However, the authors of the *Covarrubias Teposte* at the time noted in a footnote that they decided it was not a COV under 18 USC 16(b) only “under compulsion of our prior precedent.” *Id.* at p. 1056, n. 2.

<sup>98</sup> The Supreme Court affirmed the longstanding rule that recklessness, defined as a conscious disregard of a substantial and unjustifiable known risk, is not a sufficient *mens rea* to be a crime of violence. *Borden v. United States* 593 U.S. 420 (2021). The criminal case interpreted the definition of a COV in the ACCA, which is identical to the immigration definition of COV at 18 USC § 16(a). Because PC 246 can be committed by recklessness, it is not a COV. See *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011), discussed in above endnote.

Note that the Ninth Circuit in *United States v. Draper*, 84 F.4th 797 (9th Cir. 2023) found that a conviction for voluntary manslaughter, committed with a *mens rea* of “extreme recklessness or depraved heart,” is a COV. Because PC 246 is viewed as a dangerous offense, it is conceivable that ICE would assert that *Draper* also applies to PC 246. That argument would be incorrect. The minimum conduct for PC 246 only requires a *mens rea* of recklessness, defined the same as in *Borden*, and does not require “extreme recklessness or depraved heart.” Also PC 246 does not include oppositional force as required by the Supreme Court’s decision on recklessness in *Borden*.

<sup>99</sup> 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). “Gross negligence” in § 246.3 does not even require recklessness, a conscious disregard of a known risk. See, e.g., *People v. Overman* (2005) 126 Cal.App 4th 1344.

<sup>100</sup> 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).

<sup>101</sup> **Pen C § 261(a)(4) might not be an aggravated felony as rape.** To be an aggravated felony as rape (INA § 101(a)(43)(A)), the elements of an offense must meet the federal generic definition of rape. PC 261(a)(4) is defined as sexual intercourse accomplished at the time the V is unconscious of the nature of the act due to various conditions, including intoxication, inability to understand, and, in 261(a)(4)(D), “due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose” (e.g., a doctor fraudulently represents that the conduct serves a medical purpose). The question is, does that come within the definition of “generic” rape? In *Valdez v. Garland*, 28 F.4th 72, 81–82 (9th Cir. 2022), the Ninth Circuit found that 261(a)(4) is not divisible between its (A)–(D) subsections. Under the categorical approach, that means that if 261(a)(4)(D) or any other 261(a)(4) subsection of reaches conduct that is outside the generic definition of rape, then no conviction of 261(a)(4) is an AF as rape. The court noted that in 2012 the BIA had held that 261(a)(4)(D) does *not* meet the generic definition of rape. However, because of subsequent changes in California law and clarification of the categorical approach, the Ninth Circuit decided to remand the case to the BIA so that the BIA could newly address the question, “Does the generic federal definition of rape include consensual intercourse obtained through fraud?” *Valdez* at 81.

The BIA could go in either direction. The panel indicated that it would owe *Chevron* deference to the BIA’s holding. For this reason, defenders should advise clients there is *no* guarantee that 261(a)(4) (or (a)(4)(D)) will not be held to be the AF rape. However, if a plea to 261 can’t be avoided, then 261(a)(4) is the best choice. Removal defense advocates should preserve the argument that no conviction of 261(a)(4) is an aggravated felony.

Section 261(a)(4) should not be held a crime of violence, because it has no element of use or threat of physical force. Therefore, it would not be an AF as a crime of violence even if a year is imposed, and it would not be a deportable crime of domestic violence. It is a CIMT, and of course in any discretionary application it would be considered a very severe negative factor.

<sup>102</sup> **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 because it is not abuse. 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*, 581 U.S. 385 (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](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.** It is unlikely but perhaps not impossible that ICE would charge § 261.5(c) as a CIMT, despite Ninth Circuit and BIA decisions. (ICE will charge it as a deportable crime of child abuse; see below.)

The minimum conduct to violate § 261.5(c) involves sex with a minor age 17 who is three years younger than the perpetrator. The statute is not divisible with respect to the age of the minor, so the question is whether consensual sex between a person a day short of their 18<sup>th</sup> birthday and a person on their 21st birthday is categorically a CIMIT.

The Ninth Circuit has held that the *more serious* PC § 261.5(d) is not a CIMIT. In *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007), the court found that the minimum conduct to commit § 261.5(d), which is sex between a person under the age of 16 and an adult at least 21 years old, is not a CIMIT because it is not necessarily harmful to a 15-year-old. The less serious 261.5(c) also is not a CIMIT under that ruling. (Note, however, that *Quintero-Salazar* as applied to § 261.5(d) may well change in future; see next endnote.). The Ninth Circuit has agreed to give Chevron deference to “reasonable” published BIA decisions on CIMIT, however.

Significantly, 261.5(c) also does not come within the BIA’s standard. The BIA held that sex with a minor is a CIMIT 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 corollary should be that § 261.5(c), which reaches 16- and 17-year olds, with persons just three years older, is not a CIMIT. That conclusion seems further supported by the Supreme Court’s in *Esquivel-Quintana* that § 261.5(c) is not the AF sexual abuse of be a CIMIT a minor. The Court noted, among other things, the majority of states do not even criminalize this conduct, and the generic age of consent is 16. See *Esquivel-Quintana*, 137 S. Ct. at 1569. This makes it hard to assert that community mores find consensual sex with a 17-year-old “depraved,” which is a definition of CIMIT.

The only problems are that (a) sometimes ICE or the BIA make bizarre decisions, and in *Jimenez-Cedillo* the BIA did not literally state that sex with a minor aged 16 or 17 is *not* a CIMIT, and (b) recently the BIA held that, despite *Esquivel-Quintana*, sex between a 17-year-old and a person 10 years older can be a deportable “crime of child abuse.” See discussion of *Matter of Aguilar-Barajas*, below. Based on that, ICE conceivably could assert that § 261.5(c) is both child abuse and a CIMIT, the BIA might so hold, and the Ninth Circuit might defer and withdraw *Quintero-Salazar*. This offense will be more or less secure as we see reactions by federal courts to *Aguilar-Barajas* and any further rulings by the BIA.

**Pen C § 261.5(c) as a crime of child abuse.** ICE will charge that under *Matter of Aguilar-Barajas*, 28 I&N Dec. 354 (BIA 2021), 261.5(c) is a deportable crime of child abuse because it reaches intercourse with a “child” under the age of 18. Defenders should avoid 261.5(b) or (c), if D needs to avoid a deportable offense. See possible alternatives listed in the chart, including PC 288.3. Advocates in removal proceedings can argue that (1) *Aguila Barajas* was wrongly decided in general, and/or (2) Section 261.5(b) and (c) are not crimes of child abuse even under the *Aguilar Barajas* decision, because they are distinguishable from the statute at issue in that case. As always with untried arguments, advocates at the same time should investigate the possibility of post-conviction relief.

In *Aguilar-Barajas*, the majority of a three-person BIA panel held that a Tennessee statute that prohibits sexual conduct between a minor who is between 13 and 18 years of age, and an adult *at least ten years older*, is a deportable crime of child abuse. ICE will argue that the finding of child abuse was not based upon the ten-year age difference between the adult and minor, and that it was instead based on the BIA finding that sexual intercourse between an adult and a minor under age 18 is *per se* child abuse, even if the ages are close. Immigration advocates can point out that the BIA majority did not address the situation where the ages were closer, and that the reason that the decision emphasizes the age 18 cut-off rather than the ten-year age difference is that the BIA’s focus was to justify the fact that the result of the decision was to name a different age cut-off for when intercourse is “abuse” than the Supreme Court did in *Esquivel-Quintana*, discussed above. The BIA states that certain sexual conduct



with a minor *under age 18* is a “crime of child abuse,” while the Supreme Court held that for purposes of the AF sexual abuse of a minor, sexual intercourse is not abusive unless the minor is *under age 16*. See *Esquivel-Quintana*, discussed above.

Advocates arguing that *Aguilar-Barajas* was wrongly decided or does not apply to 261.5(c) should carefully read the opinion and the dissent, especially the discussion of *Esquivel-Quintana*. Because this decision is so problematic, advocates can ask for an en banc hearing at the BIA as well as appeal to the Ninth Circuit. The Ninth Circuit will defer to a “reasonable” published BIA decision defining “crime of child abuse,” so this definition must be found unreasonable.

Along with the dissent arguments, and the critical claim that “abuse” has one definition by the Supreme Court and another by the BIA, one can bring up reality. If the BIA did mean to state that any consensual intercourse with a 17-year old, even if the other party is an 18-year-old (or, in the case of § 261.5(c), a 20-year -old), is inherently abusive or harmful to the minor, it failed to present any evidence to support that. It only cited to its own vague definition (or “guideline”) of child abuse from *Velasquez*. The lack of evidence about harm and abuse stands in contrast to the reality in the United States, where now, as in the time when the child abuse ground was added, the majority of states do not even criminalize consensual intercourse with a 17 year-old, and where over half of 17-year-olds in the U.S. report that they have had sexual intercourse (see, e.g., CDC, *Over Half of U.S. Teens Have Had Sexual Intercourse by Age 18, New Report Shows* (June 22, 2017), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2017/201706\\_NSFG.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2017/201706_NSFG.htm)). The BIA, as well as state and federal laws, has found that the presence of a significant age difference is a more serious offense and makes abuse more likely. See, e.g., *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017), affirmed 27 I&N Dec. 782 (BIA 2020) (sexual intercourse 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*).

See, however, *Garcia v. Barr*, 969 F.3d 129, 135 (5th Cir. 2020), cited with approval in *Aguilar-Barajas*, where the Fifth Circuit deferred to the unpublished BIA decision to find that Texas PC 22.011(a)(2) is a crime of child abuse. The Texas statute is similar to but somewhat more serious than PC 261.5(c) in that it prohibits sexual contact with a minor under age 17 by someone more than three years older, while the cut-off for 261.5(c) is under age 18.

<sup>103</sup> **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*, 581 U.S. 385 (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.

**Pen C § 261.5(d) as a crime of child abuse.** Assume it is. See discussion at § 261.5(c), above, of *Matter of Aguilar-Barajas*, 28 I&N Dec. 354 (BIA 2021), where a BIA panel held that a Tennessee statute that prohibits sexual conduct between a minor between 13 and 18 years of age and an adult at least ten years older is a deportable crime of child abuse. That is a less serious offense than 261.5(d), which is limited to minors under age 16. Also, the Ninth Circuit held that Wash Rev Code § 9A.44.089, sexual contact (touching intimate parts for purpose of sexual gratification) with a person aged 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.

<sup>104</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021).

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.4<sup>th</sup> 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.

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 (7<sup>th</sup>

Cir. 2011) (government, IJ and BIA agree that importation of persons for purposes of prostitution is an aggravated felony under 8 USC § 1101(a)(43)(K)(i), while importation for other immoral purposes is not).

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.

<sup>105</sup> 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.

<sup>106</sup> 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).

<sup>107</sup> 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.

<sup>108</sup> 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. 4<sup>th</sup> 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).

<sup>109</sup> See *Diaz-Rodriguez v. Garland*, 55 F.4th 697 (2022), (deferring to the BIA’s interpretation of the generic definition of child abuse and finding that PC 273a(a) is a categorical match).

<sup>110</sup> The BIA and courts hold 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 PC 243(a), above, and ILRC, *Case Update: Domestic Violence Deportation Ground* (2022) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>111</sup> 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](https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf).

<sup>112</sup> 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, *2022 Case Update: Domestic Violence Deportation Ground* (March 2022), both at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>113</sup> See *Olea-Serafina v. Garland*, No. 20-72231 (9th Cir. 2022) (holding that 273d(a) is categorically a crime of violence).

<sup>114</sup> 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.

<sup>115</sup> *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.”)

<sup>116</sup> 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.

<sup>117</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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*, 579 U.S. 500, 518 (2016) and the categorical approach at ILRC, [How to Use the Categorical Approach Now](#) (2021).



<sup>118</sup> As an example of a minor violation that should not be held a CIMIT, see *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009) (violation of a DV “stay away” order based on walking a child halfway up the driveway after visitation rather than leaving him at the curb as agreed). While that should not be a CIMIT, it was held a deportable judicial finding of a violation of a DV protective order.

<sup>119</sup> Negligent conduct never is a CIMIT, and reckless conduct is a CIMIT only if the offense has as an element conscious disregard of a known risk of imminent death or serious injury. *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012). Section 273.6(b) does not require that *mens rea*.

<sup>120</sup> See *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009) and discussion at PC § 273.5.

<sup>121</sup> 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.) intended to protect 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). The test is whether the conduct violated the portion of the order that 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 a violation of an order was in fact 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.” While the Ninth Circuit first had held that the categorical approach applies to this inquiry and that Pen C 273.6 is a divisible statute, it reversed itself in 2019 in deference 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)) even if it involves a criminal conviction, since this part of the ground also includes a finding of a violation by a civil court judge. See *Diaz-Quirazco v. Barr*, 931 F.3d 830, 841 (9th Cir. 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 should not rely on a vague record of conviction under Pen C §§ 166(a)(4), (b) or 273.6 to protect the defendant. Do not plead to any DV stay-away violation. One can plead to violating a specific part of the DV order or conditions of probation that would not cause deportability, such as e.g., conduct relating to custody, visits, child support, probation appointments, 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.

<sup>122</sup> **PC 273.6(d) (as well as PC 166(c)(4)) as a COV.** This and other sections of PC 273.6 and 166 conviction can cause deportability as a judicial finding of a violation of a DV stay-away order, under INA § 237(a)(2)(E)(ii). But a separate penalty applies to 273.6(d) and 166(c)(4), because these also are crimes of violence (COV). If a year or more is imposed, conviction will be an aggravated felony. See INA § 101(a)(43)(F).

Sections 166(c)(4) and 273.6(d) are nearly identical, and this analysis applies to both. They punish as a wobbler a “second or subsequent conviction for a violation of an order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders *and involving an act of violence or ‘a credible threat’ of violence...*” (emphasis supplied). In *U.S. v. Acevedo-De la Cruz*, 844 F.3d 1147 (9th Cir. 2017), the Ninth Circuit held that PC § 273.6(d) is a COV under a definition that is identical to 18 USC § 16(a). The court’s holding will apply to § 166(c)(4) as well. The court stated, “When interpreting other state statutes, California courts have adopted this common understanding

of the word ‘violence’ in concluding that force can occur without violence, but violence cannot occur without force.” *Id.* at 1151. See also CALCRIM 2703, cited for both PC 166(c)(4) and 273.6(d).

If a client in removal proceedings already has this conviction with a sentence of a year or more, advocates can try to challenge *Acevedo-De la Cruz* by finding a case example of 166(a)(4) or 273.6(d) that involves an offensive touching or other conduct that is not a COV. The defendant in *Acevedo-De la Cruz* did not do this, and so did not demonstrate a “realistic probability” that the statute would be applied to conduct outside the COV definition. But this is a long shot and advocates at the same time should investigate the possibility for post-conviction relief.

<sup>123</sup> 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 CIMIT.

<sup>124</sup> **SAM and PC 286, 287, 289.** The aggravated felony sexual abuse of a minor (SAM) is evaluated under the categorical approach, based on the minimum conduct required for guilt under the statute. To determine the consequences of PC §§ 286, 287, 289 with a minor (respectively sodomy, oral sex, and penetration), we consider PC § 261.5 (sexual intercourse with a minor), because the elements are similar and there is extensive precedent on immigration consequences of PC § 261.5.

The Supreme Court held that § 261.5(c), sexual intercourse with a minor who is under age 18 and three years younger than the perpetrator, is not an AF as SAM because it does not require the minor to be under the age of 16. *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017). Sections 286(b)(1), 287(b)(1), and 289(h) also should not be held to be SAM. In fact, they are even less serious than § 261.5(c) because they involve sexual conduct with a minor under the age of 18, but with no requirement a three-year age difference.

Section 286(b)(2), 287(b)(2), and 289(i) involve sexual conduct with a person under the age of 16. In *Esquivel-Quintana*, the Court stated that in the case of sexual intercourse, “the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.” *Id.* at 390-391. While advocates may argue that this does not require such a finding for these statutes, and while the Ninth Circuit earlier held that the corresponding statute, PC 261.5(d), is not SAM, defenders must not take this chance; assume this is SAM.

<sup>125</sup> **CIMIT.** Sections 286(b)(1), 287(b)(1), and 289(h) should not be held to be a CIMIT because they involve sexual conduct (sodomy, oral sex, penetration) with a person under age 18. The BIA held that sexual intercourse with a minor is a CIMIT if the minor (a) is under the age of 14, or (b) 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). These offenses are not CIMITs under that standard because the minor is under age 18, not age 16, and there is no requirement of any age difference.

In contrast, sections 286(b)(2), 287(b)(2), and 289(i), are at great risk of being held CIMITs, despite Ninth Circuit precedent to the contrary, because the BIA asserts that the conduct is a CIMIT. These sections prohibit sexual conduct with a minor under age 16, where the perpetrator is at least 21 years old. In *Matter of Jimenez-Cedillo*, *supra*, the BIA held that soliciting such an act under a Maryland statute (MCL 3-307(a)(4), (5)) was a CIMIT. Years earlier, the Ninth Circuit had held the opposite. It had found that California PC § 261.5(d), sexual intercourse with a minor under age 16 where the perpetrator is at least age 21, is *not* a CIMIT, because it does not necessarily harm the minor. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). However, the Ninth Circuit also has held that it owes *Chevron* deference to a reasonable, on-point, published BIA



decision. See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc). So if a case involving 261.5(d) or one of the above statutes ever goes to the Ninth Circuit, the court may well withdraw *Quintero-Salazar* and adopt the BIA's rule in *Jimenez-Cedillo*.

<sup>126</sup> *Elmakhzoumi v Sessions*, 883 F.3d 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).

<sup>127</sup> 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-Lincona*, Filed Case No. 3:18-cr-00268-WHO-1 (D.C. No. Cal April 22, 2019).

<sup>128</sup> *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).

<sup>129</sup> **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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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).

**Other removal grounds.** 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.

<sup>130</sup> **PC 288.3 should not be held a deportable crime of child abuse.** The BIA held that the generic definition of a deportable crime of child abuse 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) (“The

Department of Homeland Security has argued that the respondent is ineligible for cancellation of removal as one convicted of a crime of child abuse under section 237(a)(2)(E)(i) of the Act, but because no actual child was ever involved in this case, we cannot make such a finding. See generally *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, because it includes attempt. *People v. Korwin* (2019) 36 Cal. App. 5th 682. Therefore it is overbroad compared to the definition of child abuse in that way.

Section 288.3 also should be held indivisible. While we recommend a specific plea to conduct involving a police officer, or attempt, under the categorical approach no conviction of 288.3 should be held child abuse, even if the record identifies a minor. It should not be held divisible between an officer and a minor because the statute is not phrased in the alternative in that manner (it does not mention police officer), and that is a basic requirement for finding a statute divisible. See *Mathis v. United States*, 579 U.S. 500, 505 (2016) (“A single statute may list elements in the alternative, and thereby define multiple crimes”) and see generally ILRC, [How to Use the Categorical Approach Now](#) (Oct. 2021). (It is true that the statute is phrased in the alternative for “attempt,” punishing any person “who contacts or communicates with a minor, or attempts to contact or communicate with a minor....” However, to be divisible the statute must be phrased in the alternative including the fact at issue – a police officer versus a minor – not just between attempt and actual communication. Further, attempt and actual communication are not themselves different elements in a divisible statute. See statement of elements at *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020) (discussed in next endnote) and at CALCRIM 1124. Finally, all violations of PC 288.3(a) are punishable “by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.”<sup>131</sup> **288.3 as a CIMIT.** PC 288.3 provides that any person “who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in 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, involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an 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 CIMIT. Section 288.3 is a CIMIT only if its elements, *combined* with the elements of the intended offense, together amount to a CIMIT. *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 CIMIT, even though PC 288(c)(1) itself was held not to be a CIMIT 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 CIMIT 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.

Section 288.3 with intent to commit child endangerment under PC § 273a also is likely to become a CIMIT. The reason that 273a is not a CIMIT is that it can be committed by negligence. Section 288.3 adds the element of intentional conduct, which likely will make the offense a CIMIT.

But other 288.3 offenses are *not* CIMITs. *Syed* found that if the intended offense is PC 207(a), then 288.3 is not a CIMIT because adding its elements (knowledge of minor age, or intent to commit the offense) to those of 207(a) does not create a CIMIT.

Similarly, 288.3 with intent to commit the enumerated offenses that involve consensual sexual conduct with a person under age 18, with no required age difference for the perpetrator, should not be a CIMT. See Penal Code §§ 286(b)(1), 287(b)(1), and 289(h) (respectively, consensual anal sex, oral sex, and sexual penetration with person under age 18; no age difference is required). These should not be CIMTs on their own because they do not cause sufficient harm. For example, PC § 261.5(c), which requires consensual intercourse with a minor under age 18 and also requires a three-year age difference, is not a CIMT. The elements added to these offenses by PC 288.3, such as intent or knowledge of age, do not make them a CIMT.

Note that pleading to, e.g., PC 288.3 with intent to commit 287(b)(1) (oral sex with a person under 18) has one advantage over pleading to 287(b)(1) alone: section 288.3 should not be held a deportable crime of child abuse (because it can include an officer posing as a child; see above endnote), whereas ICE may argue that 287(b)(1) alone is a crime of child abuse, on the theory that any offense involving sexual conduct with a person under age of 18 is, under *Matter of Aguilar Barajas*. See discussion at PC § 286(b)(1), above. It also is possible, however, that immigration authorities would view the § 288.3 as a more serious “premeditated” offense for purposes of discretion. See other alternatives.

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), the least serious offense. 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 Syed, discussed above), we will 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, either as SAM or as a COV with a year imposed. Of these, arguably 288.3 with intent to commit 207(a), the offenses involving consensual sex with a person under the age of 18 (286(b)(1), 287(b)(1), 289(h)), and probably 288(c)(1), 273a, and 311.11 should not be an AF.

<sup>132</sup> 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., *Elmakhoumi 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.

<sup>133</sup> 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.

<sup>134</sup> 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](http://www.ilrc.org/crimes)).

<sup>135</sup> 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.

<sup>136</sup> *US v Reinhart*, 893 F3d 606 (9th Cir 2018).

<sup>137</sup> *Matter of Olquin-Rufino*, 23 I&N Dec. 896 (BIA 2006).

<sup>138</sup> 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.

<sup>139</sup> See, e.g., *People v. Nakai*, 183 Cal. App. 4th 499, 512 (Cal. App. 4th Dist. 2010).

<sup>140</sup> See discussion in *Berry v. City of Santa Barbara* (1995) 40 Cal. App. 4th 1075, 1080-82.

<sup>141</sup> See discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) and see [§ N.10 Sex Offenses](#).

<sup>142</sup> 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>.

<sup>143</sup> 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.

<sup>144</sup> 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.

<sup>145</sup> The State Department defines prostitution for the inadmissibility ground as “engaging in promiscuous sexual intercourse for hire.” 22 C.F.R. § 40.24(b), discussing 8 USC § 1182(a)(2)(D)(i). Courts have adopted that definition for the inadmissibility ground (see *Kepilino v. Gonzales*, 454 F.3d 1057 (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.

<sup>146</sup> Section 350 is a “counterfeiting” offense that becomes an AF if a year or more is imposed, under INA § 101(a)(43)(R). *Rodriguez-Valencia v. Holder*, 652 F.3d 1157, 1158 (9th Cir. 2011). It also will be held to be an offense of deceit that becomes an AF if loss to the victim/s exceeds \$10,000, under § 101(a)(43)(M).

<sup>147</sup> 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.

<sup>148</sup> **When a plea to PC 372.5 is not necessarily dangerous to an LPR.** No LPR will be found *deportable* for a plea to PC § 372.6, because deportability requires a conviction of a federal controlled substance.

For further discussion of being *inadmissible* based on a formal admission of a CS offense, see ILRC, [Immigrants and Marijuana](#) (May 2021). A defense exists based on several older BIA decisions. The BIA has held that if a person’s conduct was brought to criminal court and the result was less than a conviction, e.g., due to charges being dropped, the person cannot be found inadmissible for “admitting” that same conduct. See, e.g., *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). While that ought to protect an admission to immigration authorities that one did commit the original drug charge in a § 372.5 situation, we cannot be sure that authorities would apply the defense because – it’s immigration proceedings.

**Regarding LPR cancellation:** An LPR must have accrued seven years of residence in the U.S. after admission in any status in order to qualify. Under INA § 240A(d)(1), as interpreted by the Supreme Court, a person who becomes inadmissible by making a qualifying admission that they committed a controlled substance offense thereby “stops the clock” on the accrual of their required seven years of residence, as of the date of the admitted conduct. Therefore, an LPR convicted of § 372.5 should decline to make a formal admission of the originally charged drug conduct, especially if that conduct occurred before they accrued the seven years. If they already admitted the conduct to immigration authorities, they can assert that the admission is not “qualifying.” As discussed above, one reason it should not qualify is that the conduct was brought to criminal court and the result was less than a conviction. See further discussion at ILRC, [Eligibility for Relief: Cancellation of Removal for Permanent Residents](#) (Dec. 2022).

**Regarding travel outside the United States:** An LPR who travels outside the United States is deemed not to be making a new “admission,” and not to have to face the grounds of inadmissibility, upon their return. However, they can lose this status and be deemed to be making a new “admission” to the country, *if* they come within an exception at INA 101(a)(13)(C). One of those exceptions is if authorities can prove that the LPR has “committed” an inadmissible offense. See INA 101(a)(13)(C)(v), discussed at *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). It is best for LPRs charged with any drug offense not to travel outside the U.S. until they naturalize. But if an LPR convicted of PC 372.5 does travel, that conviction alone is not sufficient for border authorities to prove that the LPR actually committed an inadmissible offense. *If the LPR declines to answer any questions*, eventually they should be permitted to enter, either because the government failed to prove that they committed a CS offense and thus came within INA § 101(a)(13)(C), or because they did become subject to admissibility but they were not in fact inadmissible because they neither were convicted of, nor formally admitted, a CS offense. See discussion at ILRC, [Immigrants and Marijuana](#) (May 2021).

**Regarding application for adjustment of status.** Here the LPR has the burden to show that they are inadmissible, and adjustment as a remedy can be denied as a matter of discretion. This puts the LPR applicant in a position similar to an undocumented person applying for relief.

<sup>149</sup> Several older BIA decisions have found that one is not inadmissible for admitting a CIMT or CS offense, if that conduct was brought to criminal court and the result was less than a conviction, e.g., due to charges being dropped. See discussion in the above endnote of this principle



and see *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

<sup>150</sup> See *Matter of Pougatchev* (BIA 2023) 28 I&N Dec. 719 (holding that NY second-degree burglary while displaying a gun, NYPL 140.25(1)(d), necessarily involved the threatened use of force).

<sup>151</sup> **PC 417 as CIMT.** Arguably it is not a CIMT. See *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 and is a CIMT, 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.” Exhibition or use of a loaded firearm at a daycare under PC 417(b), could be held a CIMT because of the vulnerable population at issue.

<sup>152</sup> 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).

<sup>153</sup> *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).

<sup>154</sup> *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).

<sup>155</sup> *Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003).

<sup>156</sup> *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012).

<sup>157</sup> **PC 451 as arson.** An offense “described in” 18 USC 844(i) is an AF as arson. 8 USC 1101(a)(43)(E)(i). In other words, 8 USC 844(i) is a generic definition of arson for purposes of the categorical approach. In *Togonon v. Garland*, 23 F.4th 876 (9th Cir. 2022), the Ninth Circuit held that PC 451(b) is not arson because it has a broader *mens rea* than 844(i). Because 451(a)-(e) all share the same *mens rea*, no conviction under 451 can be an AF under *Togonon*.

The generic definition at 18 USC 844(i) punishes one who “maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property ...” In *Togonon*, the Ninth joined other circuits to find that “maliciously” here means the person “either intentionally damages or destroys property covered by § 844(i) or acts ‘with willful disregard of the likelihood that damage or injury would result from his or her acts.’ To act with ‘willful disregard,’ the defendant must be *subjectively aware* of the risk that his actions will damage or destroy property and take the actions nonetheless.” 23 F.4th at 878 (emphasis supplied).

PC 451 punishes a person who “willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.” “Willfully” in PC 451 employs the general definition of “simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.”

PC 7(1), cited in *People v. Atkins*, 25 Cal. 4th 76, 85 (2001). The key is the definition of maliciously. The Ninth Circuit recognized that “maliciously” for PC 451 has been held *not* to require a conscious disregard of a known risk, but rather to require failing a reasonable person standard. In other words, 844(i) requires a subjective awareness of the known risk while 451 does not.

The case most relevant for our analysis is the California Supreme Court's decision in *In re V.V.*, 51 Cal.4th 1020, 125 Cal.Rptr.3d 421, 252 P.3d 979 (2011). There, two teenagers ignited a firecracker and threw it onto a brush-covered hillside, starting a fire that burned five acres of forest land. *Id.*, 125 Cal.Rptr.3d 421, 252 P.3d at 980–81. The evidence established that the defendants intentionally ignited the firecracker and threw it onto the hillside, but they had not intended to burn forest land. *Id.*, 125 Cal.Rptr.3d 421, 252 P.3d at 985. The California Supreme Court upheld their juvenile adjudications under California Penal Code § 451. The court concluded that malice under § 451 requires only “a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property.” *Id.*, 125 Cal.Rptr.3d 421, 252 P.3d at 984. The defendants in *V.V.* did not need to “know *or be subjectively aware* that the fire [on the forest property] would be the probable consequence of their acts.” *Id.*, 125 Cal.Rptr.3d 421, 252 P.3d at 985 (emphasis added). Instead, they could be convicted so long as they were aware of facts that “would lead a reasonable person to realize that the direct, natural, and highly probable consequence of igniting and throwing a firecracker into dry brush would be the burning of the hillside.” *Id.*

*Togonon*, 23 F.4th at 879.

Accordingly, the Ninth Circuit held that PC 451 is not a categorical match to 18 USC 844(i) and is not an AF as arson. See also *Mason v. Superior Ct.* (2015) 242 Cal. App. 4th 773, 784 (lighting firecracker and throwing it into the water of a swimming hole, where sparks still started a fire, is arson under PC 451).

**PC 452 as arson.** This is a preliminary analysis, and one that ICE might or might not contest.

As discussed above, 18 USC 844(i) serves as a generic definition of the aggravated felony arson. In *Togonon v. Garland*, 23 F.4th 876 (9th Cir. 2022), the court found that 18 USC 844(i) prohibits “maliciously” damaging certain property with fire or explosives, where maliciously means damaging the property intentionally or recklessly (conscious disregard of a known risk of damage). PC 452 punishes one who “recklessly sets fire to or burns or causes to be burned, any structure, forest land or property.” Under PC 450(f), recklessly here “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 a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a *reasonable person* would observe in the situation.” PC 452 offense of “unlawfully causing a fire covers reckless accidents or unintentional fires....For example, such reckless accidents or unintentional fires may include those caused by a person who recklessly lights a match near highly combustible materials.” *People v. Atkins*, 25 Cal.4th at 89. Furthermore, PC 452 is a general intent crime where the reckless act is satisfied when (1) the person does the act that presents the risk of causing the fire, and (2) the person is unaware of the risk due to voluntary intoxication. Thus, because PC 452 employs a reasonable person standard and does not require the person to be subjectively aware of the risk, PC 452 should not be a match to the generic arson. See CALCRIM 1530, 1531, 1532 and PC 450(f) defining reckless is include those who are unaware of the risk due to voluntary intoxication.

“Recklessly” should be held the *mens rea* for causing a fire at all, so that PC 452 prohibits recklessly/unintentionally *lighting a fire*. That is broader than 18 USC 844(i), which prohibits intentionally or recklessly *damaging property* with a fire. The plain language of 452 and its subsections indicate that PC 452 prohibits recklessly causing the fire, without intending to. Section 452 punishes one who recklessly “causes to be burned ... any structure, forest land, or property.” This language is identical to PC 451. Interpreting the same phrase in PC 451, the California Supreme Court stated, “The statute does not require an additional specific intent to burn a ‘structure, forest land, or property,’ but rather requires only an intent to do the act that causes the harm. This interpretation is manifest from the fact that the statute is implicated if a person ‘causes to be burned ... any structure, forest land, or property.’” *People v. Atkins* (2001) 25 Cal. 4th 76, 86. The Court noted that specific intent to destroy property was included in arson statutes in 1872 but this was dropped in 1929. *Id.* See also *People v. Morse* (2004) 116 Cal. App. 4th 1160, 1163. See also, e.g., *People v. Hooper* (1986) 181 Cal. App. 3d 1174, 1183 (where the defense asserted that the fire was started recklessly and without intention, because a cigarette or burning paper blew out of the car window, it was error (although for other reasons, not reversible error) to fail to give instruction for PC 452) and see *People v. Atkins*, 25 Cal. 4th at 88 (“[T]he lesser offense [PC 452] requires mere recklessness; arson [PC 451] requires the general intent to perform the criminal act.”).

On a more foundational note, the Supreme Court held that state arson statutes can be held aggravated felonies as analogues to 18 USC 844(i), despite lacking the federal jurisdictional element in that statute. *Luna Torres v. Lynch*, 578 U.S. 452 (2016).

**PC 451, 452 as a COV.** A COV is an AF if a year or more is imposed. 8 USC § 1101(a)(43)(F). Crime of violence is defined for immigration purposes at 18 USC 16 as: “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The Supreme Court in *Dimaya* found 18 USC 16(b) to be unconstitutional, so that only 16(a) defines a COV now. See discussion at PC 207.

Before 18 USC 16(b) was struck down, PC 451, 452 were considered COVs as causing a “substantial risk” of force under 16(b), as long as the fire damaged another’s property rather than the person’s own. See, e.g., *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007) (PC 452 is divisible as a COV to the extent it includes one’s own property), *Cabrera-Arucha v. Holder*, 378 F. App’x 662, 664 (9th Cir. 2010) (PC 451 is divisible on same basis). Those decisions are struck down by *Dimaya*.

There is no precedent discussing whether 451 or 452 (involving property that is not one’s own) is a COV under 18 USC 16(a). Because PC 451 and 452 involve a mens rea of recklessness or lesser mens rea as to starting the fire neither offense should be found to have the required element of use of intentional, aggressive force against person or property. (In fact, some circuits found that recklessly causing a dangerous fire was not a COV under 18 USC 16(b). See, e.g., *Tran v. Gonzales*, 414 F.3d 464, 472–73 (3d Cir. 2005).) If they were to be held a COV, that still would not apply to burning one’s own property.

**PC 451, 452 as CIMTs.** Regarding PC 451, it has long been held that intentional arson is a CIMT. See *Rodriguez-Rodriguez v. INS*, 52 F.3d 238, 239 (9th Cir. 1995) (noting, “That arson necessarily involves moral turpitude is undisputed.”); *Matter of S-*, 3 I&N Dec. 617 (BIA 1949) (attempted arson is a CIMT) (distinguishing reckless conduct from intentionally setting a fire). However, arson of one’s own property may not be a CIMT. See, e.g., discussion in *Rosa Pena v. Sessions*, 882 F.3d 284 (1st Cir. 2018).

But advocates have a strong argument that “willfully and maliciously” causing a fire under PC 451 is not a CIMT. In finding that PC 451 is a general intent crime, the California Supreme Court stated that willfully under California law “implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.”

The terms ‘willful’ or ‘willfully,’ when applied in a penal statute, require only that the illegal act or omission occur ‘intentionally,’ without regard to motive or ignorance of the act's prohibited character.” “Willfully implies no evil intent; ‘it implies that the person knows what he is doing, intends to do what he is doing and is a free agent.’” The use of the word “willfully” in a penal statute usually defines a general criminal intent, absent other statutory language that requires “an intent to do a further act or achieve a future consequence.”

*People v. Atkins* (2001) 25 Cal. 4th 76, 85 (citations omitted)

Regarding “maliciously,” as discussed above, in *Togonon v. Garland*, 23 F.4th 876 (9th Cir. 2022) the Ninth Circuit held that “maliciously” in PC 451 includes an act that a reasonable person would have known would have the natural and probable consequence of causing property to burn. Negligence is not a CIMT. Therefore PC 251 intent is overbroad and indivisible and should not be held a CIMT. See also *J-A-M-B-*, XXXX XXX 662 (BIA July 12, 2018) (unpublished) (arson under Cal. Penal Code section 451(d) is not divisible and categorically not a CIMT because it is a general intent crime that does not require an intent to cause injury or damage) (Grant, Kendall Clark, Guendelsberger).

Section 452 involves reckless conduct. Under PC 450(f), for this purpose recklessness also employs the “reasonable person standard,” and should not be a CIMT.

<sup>158</sup> PC 453, possession of flammable material with intent to burn structure or property, is not attempted arson. See *People v. Morse*, 116 Cal. App. 4th 1160, 1165–66 (2004). Likewise it could not be an attempted crime of violence. See also PC 455, attempted arson.

<sup>159</sup> **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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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.

<sup>160</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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 CIMA. 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 CIMA set out in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016)). But because of that possibility, if avoiding a CIMA 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 CIMA 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-CIMA.

<sup>161</sup> Felony vandalism can be the intended burglary offense. *People v. Farley* (2009, Cal) 46 Cal 4th 1053.

<sup>162</sup> 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).

<sup>163</sup> See discussion of *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) at § 460(a) CIMA endnote, above. *Hernandez-Cruz* specifically held that Pen C § 460(b) is not a CIMA 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 ILRC, [How to Use the Categorical Approach Now](#) (2021).

However, if avoiding a CIMA 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 CIMA: the intended offense is indivisible between CIMAs and non-CIMAs. See CIMA endnote to § 460(a), above.

<sup>164</sup> See, e.g., *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946) (mere unlawful entry is not a CIMA; it must be unlawful entry with intent to commit a CIMA), 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 CIMA). Section 466 does not require intent to commit any crime, much less a CIMA, or to enter a particular place, much less an occupied dwelling.

<sup>165</sup> Conviction for forgery or for counterfeiting is an aggravated felony if a sentence of a year or more is imposed on any single count. See 8 USC § 1101(a)(43)(R), INA § 101(a)(43)(R) and see [§ N.6 Aggravated Felonies](#). Immigration counsel can investigate whether § 470 might be



overbroad compared to the generic definition. However, in a split opinion the Ninth Circuit held that § 470a is an aggravated felony as “forgery” if a year or more is imposed, including if the offense involves photocopying a drivers’ license with intent to commit forgery. See *Escobar Santos v. Garland*, 4 F.4th 762 (9th Cir. 2021).

<sup>166</sup> 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](http://www.ilrc.org/crimes) and [www.nipnlg.org](http://www.nipnlg.org).

<sup>167</sup> 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).

<sup>168</sup> *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 8767 (9th Cir 2008).

<sup>169</sup> *Morales-Alegría v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006).

<sup>170</sup> 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).

<sup>171</sup> 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).

<sup>172</sup> 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. The court stated, “But we are nevertheless bound by our precedent... Only an en banc court has the power to fix these errors.” *Id.* at 717. However, Mr. Silva’s petition for rehearing en banc was denied, so the legal issue is left in limbo.

The argument is: 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*, 993 F.3d at 714-716.

*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 it did not have the power to correct the errors; an *en banc* decision is required. Immigration advocates should continue to raise the issue.

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.

<sup>173</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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).

<sup>174</sup> 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.

<sup>175</sup> 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).

<sup>176</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) for more information.) However, to make sure there are no misunderstandings, best practice is to plead specifically to intent to temporarily deprive the owner.

<sup>177</sup> 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).

<sup>178</sup> 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).”).

<sup>179</sup> See discussion *In re Rolando S.*, 197 Cal. App. 4th 936 (Cal. App. 5th Dist. 2011).

<sup>180</sup> 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 F.3d 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).

<sup>181</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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.

<sup>182</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) 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*, 579 U.S. 500, 518 (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.”

<sup>183</sup> 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.

<sup>184</sup> 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).

<sup>185</sup> 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.

<sup>186</sup> See, e.g., *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti is not a COV). Section 594 can be committed with minimal graffiti or defacing. See, e.g., *In re Nicholas Y.*, 85 Cal.App.4th 941 (2000) (writing on a glass window with a marker that could easily be erased constituted “defacing”). See also *In re Brittany L.*, 99 Cal. App. 4th 1381 (Ct. App. 2022) (throwing eggs at a house is vandalism).

The Ninth Circuit considered the definition of a COV when committed against property, in a case involving Washington law. In *Rodriguez-Hernandez v. Garland*, 89 F.4th 742 (9th Cir. 2023) the court held that a Washington harassment statute that includes making a “true” (intimidating, credible) “threat” to physically damage property (RCW § 9A.46.020) is a COV. In a pertinent discussion, the court distinguished that harassment offense, which is a COV, from Washington “malicious mischief” (RCW §§ 9A.48.070 - 9A.48.090), which it indicated is not a COV because it can be committed “maliciously” (with intent to vex or annoy, not threaten) defacing or using graffiti on the property. The court stated that this characterization of graffiti “is not inconsistent” with *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019) and *Landeros, supra*.

“In *Bowen*, the Tenth Circuit held that the defendant’s convictions for witness retaliation in violation of [18 U.S.C. § 1513\(b\)\(2\)](#) were not crimes of violence. See [936 F.3d at 1101](#). The Tenth Circuit explained that “[t]he Supreme Court has held that the term ‘physical force’ requires more than offensive touching; it means ‘violent force—that is, force capable of causing physical pain or injury to another person.’” *Id.* (citations and emphasis omitted). The Tenth Circuit opined that “property crimes of violence ... are those that require violent force, not merely the force required to damage property.” *Id. at 1103-04* (emphasis omitted). Critically, the defendant in *Bowen* provided precisely what is missing from the present appeal—a citation to a case in which a defendant was actually convicted under the challenged statute “for spray-painting a witness’s car.” [936 F.3d](#)



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[at 1104](#). The government did not “argue otherwise.” *Id.* On these facts, the Tenth Circuit “easily conclude[d] that the act of spray-painting another’s car d[id] not entail the use of violent force.” *Id.* (citations omitted).” *Rodriguez-Hernandez v. Garland*, 89 F.4th at 752.

While it may not be possible to cite *Rodriguez-Hernandez* as *holding* that Washington malicious mischief is not a COV, since that was not the offense at issue, its opinion and analysis are clear and are consistent with other courts. California PC 594 contains the same key elements as Washington malicious mischief, and also is not a COV. Both offenses prohibit acting maliciously, which includes intent to vex or annoy and are different from making a credible violent threat. Both can be committed by graffiti, defacing, etc., which does not require “violent” force.

Neither does PC § 594 require that the “damage” or “destruction” be accomplished by violence, although it would be important to obtain case examples showing this accomplished by nonviolent means. Note that another example of destroying property without violence that was cited by *Rodriguez-Hernandez* is altering or eliminating data or records held by computer. *Id.* at 751. See next endnote for more on damage, destroy.

<sup>187</sup> There are two reasons that *no* conviction under Pen C § 594 should be held a COV. First, defacing and graffiti is not considered a COV. See discussion in above endnote. Section 594(a) appears to be *indivisible* between (1) defacing, (2) damaging, and (3) destroying property. While there is no case precedent, a review of several California charging documents shows that in counts charging PC § 594(a), all three subsections are listed in the same paragraph. The Supreme Court held that where subsections are listed without distinction and “reiterating all the terms” in a charging document section, that “is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.” *Mathis v. United States*, 579 U.S. 500, 519 (2016); see also ILRC, [How to Use the Categorical Approach Now](#) (2021). Therefore, all convictions of the indivisible § 594(a) must be evaluated by the minimum conduct required for guilt, which is graffiti or defacing.

Second, if 594(a) were held to be divisible, advocates could seek to identify cases where the minimum conduct to “damage” or “destroy” property was done without the use of violent force.

<sup>188</sup> See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (malicious mischief, where malice involves wish or design to vex, annoy, or injure another person), was not a CIMT under Wash. Rev. Stat. 9A.48.080, which at the time required damage of at least \$250 (now requires damage of \$750)). As discussed above, PC § 594 contains the same key elements as this Washington statute: malicious intent to deface, damage, or destroy. See also the discussion of PC 594 as a COV, above, and see *People v. Kahanic* (1987) 196 Cal App 3d 461 (conviction upheld when damage was to property jointly owned by defendant and victim). Accordingly, this conviction is not a CIMT.

<sup>189</sup> 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 Circuit 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).

<sup>190</sup> 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).

<sup>191</sup> 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.

<sup>192</sup> See *Madrid v. Holder*, C.A.92013, 541 Fed.Appx. 789, 2013 WL 5530009.

<sup>193</sup> 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).

<sup>194</sup> 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.

<sup>195</sup> 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.

<sup>196</sup> *Orellana v. Barr*, 967 F.3d 927 (9th Cir. 2020)

<sup>197</sup> 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](http://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.

<sup>198</sup> An age-neutral offense never is the aggravated felony sexual abuse of a minor. See, e.g., discussion in *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012), and see [§ N.10 Sex Offenses](#).

<sup>199</sup> However, *Nunez-Garcia*, 262 F. Supp. 2d 1073 (CD Cal 2003) re-affirmed these cases without comment; see cites in that opinion.

<sup>200</sup> *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

<sup>201</sup> 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.

<sup>202</sup> See discussion of divisible statutes at ILRC, [How to Use the Categorical Approach Now](#) (2021). See CALCRIM 2966, which does not require a jury to decide unanimously between alcohol, drugs, or controlled substances.

<sup>203</sup> *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.

<sup>204</sup> 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) (en banc) (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 information at ILRC, [How to Use the Categorical Approach Now](#) (2021)..

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](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*, 581 U.S. 385 (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.

<sup>205</sup> *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.

<sup>206</sup> See *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009), stating in discussion that because § 653f is a generic solicitation statute that pertains to different types of offenses, as opposed to a statute passed primarily to restrict controlled substances, it is not an offense “relating to” a controlled substance. 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.

<sup>207</sup> 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.

<sup>208</sup> 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.

<sup>209</sup> 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).

<sup>210</sup> **Pen C 836.6 as a CIMT.** Like Pen C § 243(d), “force or violence” in 836.6 can be committed by a mere offensive touching that somehow causes serious bodily injury. (See Cal Crim Jury Instructions 2763). But ICE may assert that 836.6 is categorically a CIMT, because that level of injury must mean that real violence was used and harm was intended. Defenders should conservatively assume it will be so held, but immigration advocates can see discussion of Pen C § 243(d) and *United States v. Perez*, 932 F.3d 782 (9th Cir. 2019). There the Ninth Circuit (arguably incorrectly) held that 243(d) is a COV; however, PC 243(d) has been held not to be a CIMT. See also ILRC Practice Advisory, *Ninth Circuit Holds California Penal Code 243(d) is a Crime of Violence in U.S. v. Perez* (2019), <https://www.ilrc.org/resources/practice-advisory-ninth-circuit-holds-calif-pen-c-243d-crime-violence-us-v-perez>.

<sup>211</sup> **Pen C § 836.6 as an AF.** As a wobbler, PC 836.6, escape or attempted escape, is a potential AF if a year or more is imposed as either obstruction of justice or a crime of violence (COV).

Obstruction of justice is an AF if a year or more is imposed. 8 USC § 1101(a)(43)(S). While obstruction is vaguely defined (see, *Pugin v. Garland* in discussion of Pen C § 32, above), defenders should assume that it includes intentional interference with an investigation or proceeding or *punishment* resulting from a completed proceeding. *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449, 449 (BIA 2018).

A COV is an AF if a year or more is imposed on a single count. 8 USC § 1101(a)(43)(F). Section 836.6 criminalizes escape by “force or violence” that proximately causes “serious bodily injury” of an officer. Under *United States v. Perez*, 932 F.3d 782 (9th Cir. 2019), these two additional elements are likely to cause immigration authorities to find this also constitutes a crime of violence, even though the offense does not have use of force beyond a mere offensive touching, or intent to cause the injury, as an element. (See Cal Crim Jury Instructions 2763). See discussion of *Perez* at Pen C 243(d) and see critique at ILRC, *Ninth Circuit Holds California Penal Code 243(d) is a Crime of Violence in U.S. v. Perez* (2019), <https://www.ilrc.org/resources/practice-advisory-ninth-circuit-holds-calif-pen-c-243d-crime-violence-us-v-perez>. It is possible that a specific plea to an offensive touching would prevent a COV finding, although that still would leave the obstruction risk.

<sup>212</sup> *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).

<sup>213</sup> See 8 USC § 1101(a)(43)(Q), (T) and *Renteria-Morales*, *supra*, regarding the aggravated felony “failure to appear.”

<sup>214</sup> **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 CIMIT.** Escape without use of force is not a CIMIT, 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 CIMIT. 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 CIMIT), 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.”)

<sup>215</sup> 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 4573.6 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.

<sup>216</sup> 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....”

<sup>217</sup> 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.

<sup>218</sup> 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).

<sup>219</sup> See, e.g. *Ali v. Mukasey*, 521 F.3d 737, 740 (7<sup>th</sup> 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).

<sup>220</sup> 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 “*indivisible*” 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) or get expert help.

<sup>221</sup> 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*.

<sup>222</sup> 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.

<sup>223</sup> *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.

<sup>224</sup> 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.

<sup>225</sup> 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.

<sup>226</sup> *United States v. Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003).

<sup>227</sup> 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).

<sup>228</sup> 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.

<sup>229</sup> 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).

<sup>230</sup> 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](http://www.ilrc.org/daca) and [www.unitedwedream.org](http://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](http://www.ilrc.org/chart).

<sup>231</sup> 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.

<sup>232</sup> See, e.g. *Ali v. Mukasey*, 521 F.3d 737, 740 (7<sup>th</sup> 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 (10<sup>th</sup> Cir. 2011).

<sup>233</sup> See 8 USC § 1227(a)(2)(C).

<sup>234</sup> See 8 USC § 1101(a)(43)(C).

<sup>235</sup> An antique is defined as a firearm made in 1898 or earlier, plus certain replicas. 18 USC § 921(a)(3), (16).

<sup>236</sup> 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.

<sup>237</sup> 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.

<sup>238</sup> *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.”)

<sup>239</sup> 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.

<sup>240</sup> *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).

<sup>241</sup> “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.

<sup>242</sup> *Sessions v Dimaya*, 138 S Ct 1204 (2018). See discussion at Pen C § 207, above.

<sup>243</sup> 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.

<sup>244</sup> **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.”

**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*, 579 U.S. 500, 518 (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.

<sup>245</sup> 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 CIMIT.

<sup>246</sup> 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.

<sup>247</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021) for more information.)

<sup>248</sup> CIMIT: The minimum conduct to commit § 10851 is a taking with intent to temporarily deprive, and that conduct is not a CIMIT. Because § 10851 is not divisible under the categorical approach, no conviction of 10851 is a CIMIT 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 CIMIT 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, 850–51 and 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).)

<sup>249</sup> **10851 as an AF.** Before June 2023, in the Ninth Circuit no conviction of VC §10851 was an AF, even if a year or more was imposed. Under 8 USC 1101(a)(43)(G), (S), both a “theft” offense and an “obstruction of justice” offense are AFs with a year or more. The Ninth Circuit had found that auto-taking under § 10851 met the generic definition of “theft,” but that accessory after the fact under § 10851 did not meet the generic definition of obstruction as defined in *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1056–58 (9th Cir. 2020). The Ninth Circuit further found that

under the categorical approach, § 10851 was not divisible between auto-taking and accessory. Because § 10851 was overbroad and indivisible, no conviction could be found an AF. *Lopez-Marroquin v. Barr*, 955 F.3d 759, 760 (9th Cir. 2020)

Now we must assume that every conviction of § 10851 is an AF. In [\*Pugin v. Garland\*, No. 22-23 \(June 22, 2023\)](#), the Supreme Court rejected the Ninth Circuit’s definition of obstruction of justice and held that accessory after the fact (under a Virginia statute) is obstruction. It is extremely likely that the Ninth Circuit will find that California accessory after the fact also is obstruction, and that *Pugin* overturned both *Valenzuela Gallardo* and *Lopez-Marroquin*. This means that any violation of § 10851 comes within either theft or obstruction, so if a year or more is imposed the conviction is an AF.

<sup>250</sup> “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.

<sup>251</sup> 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*).

<sup>252</sup> *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*).

<sup>253</sup> See, e.g., *Matter of Short*, 20 I&N Dec.136, 139 (BIA 1989) (“Moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude.”)

<sup>254</sup> The Ninth Circuit has held that the factual basis for one offense cannot be used to characterize a separate and distinct offense. See *Aguilar-Turcios v. Holder*, 691 F.3d 1025 (9th Cir. 2012), substituted for 582 F.3d 1093 (9th Cir. 2009).

<sup>255</sup> See *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (finding that VC § 20001(a) is not categorically a crime involving moral turpitude because it could include acts without evil intent, e.g., stopping and providing contact and insurance information but failing to provide vehicle registration number). The statute is divisible because a jury must unanimously decide which duty defendant failed to perform. CALCRIM 2140, 2141, 2150, 2151. See also *Conejo-Bravo v. Sessions*, 875 F.3d 890 (2017) (agreeing with BIA and IJ that 20001(a) is divisible and finding under the modified categorical approach that respondent’s conviction was a CIMT because he pled to failure to stop).

Is a guilty plea stating that D failed to provide registration information, with no statement regarding whether they also failed to stop, sufficient to prevent a finding that the conviction is a CIMT? It may not be where the person is applying for relief – for example, if D is an undocumented person or a deportable LPR who must apply for cancellation, a family visa, or other relief. In *Pereida v. Wilkinson*, 141 S.Ct. 754 (2021), the Supreme Court held that an applicant for relief has the burden to prove that a conviction under a divisible statute is not a bar to relief. This may be interpreted to mean that silence on the failure to stop issue will be insufficient to prove the person was *not* convicted of that. For that reason, the safe plea for an undocumented person is to state specifically that they did stop. When the issue is deportability, the burden of proof shifts: ICE has the burden to prove that a conviction under a divisible statute *is* a deportable offense. Thus, if an LPR is charged with being deportable based on a CIMT conviction, and the record of conviction is silent as to whether they stopped, ICE would not be able to meet its burden to prove that the hit and run was a CIMT. However, in *Pereida* the Court suggested that evidence from outside the record of conviction can be considered in this inquiry, and that *Shepard* does not apply in removal proceedings. This may mean that ICE could produce other records to try to prove that the LPR

did not stop. The really safe course would be a specific plea to having stopped but having failed to provide registration information. In many cases, this will not be possible.

In the alternative, consider pleading to offenses other than hit and run that are not CIMTs but that fit the facts, e.g., lower-level reckless driving plus vandalism.

<sup>256</sup> 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).”). In finding that Veh C § 20002(a)(2) was not categorically 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).

<sup>257</sup> 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.

<sup>258</sup> 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.

<sup>259</sup> 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.

<sup>260</sup> *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

<sup>261</sup> Having a physical or mental disorder (including alcoholism) that poses a current risk to self or others is a basis for inadmissibility under the health grounds. 8 USC § 1182(a)(1)(A)(iii).

<sup>262</sup> 8 USC § 1182(a)(2), INA § 212(a)(2).

<sup>263</sup> See ILRC, *Immigration Consequences of Driving under the Influence* (August 2017) at <https://www.ilrc.org/immigration-consequences-driving-under-influence>.

<sup>264</sup> See *Grassi v. Superior Court* (2021) 73 Cal.App.5th 283; *Tan v. Superior Ct. of San Mateo Cty* (2022) 76 Cal. App. 5th 130 (review filed).

<sup>265</sup> **DACA, DUI's, and Wet Reckless.** In many crim/imm cases, the immigrant does not need to seek a less serious offense; in fact, they may even “plead up” to an offense that carries more severe criminal consequences but is immigration-neutral. But this is not the case with DUI's, and especially not with DACA. A DUI is an absolute bar to DACA, but VC 23103.5 is not. Absent some other serious negative factor, applicants with a 23103.5 conviction are routinely granted. In other kinds of cases, while it is best not to have a 23103.5, it often is treated with far more leniency than a DUI and can make the difference between winning and losing. In all cases, of course, a 23103 is even better.

Here are two resources for negotiating these cases. First, regarding the DA's duty to consider avoiding immigration consequences in general, and especially in the context of DUI's and DACA, see ILRC, *DACA and California Penal Code § 1016.3* (2019), [https://www.ilrc.org/sites/default/files/resources/ilrc\\_memo\\_re\\_ducasesand1016.2and1016.3final.pdf](https://www.ilrc.org/sites/default/files/resources/ilrc_memo_re_ducasesand1016.2and1016.3final.pdf).

Second, here is a sample letter explaining the DACA issue to a DA or other party.

Because Mr. XYZ was brought to the U.S. as a child and before 2006, he is eligible to apply for Deferred Action for Childhood Arrivals, or DACA, the special relief for Dreamers. That makes this case critical, because a misdemeanor conviction for driving under the influence (DUI) is an absolute bar to DACA. A person who is convicted of a “significant misdemeanor” is barred from DACA eligibility, and a misdemeanor DUI conviction is a significant misdemeanor and will act as a bar. See U.S. Citizenship and Immigration Service, *DACA Frequently Asked Questions*, Question # 63, listing DUI as a significant misdemeanor, [https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal\\_convictions](https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal_convictions).

If instead he can plead to a wet reckless, Mr. XYZ will remain eligible for employment authorization and temporary protection from removal under DACA. In our universal experience, a misdemeanor conviction for VC § 23103.5 is not counted as a DUI for DACA purposes because it lacks the element of incapacity. As you know, VC § 23103.5 can carry the same criminal/driving penalties as a DUI and is equally priorable. My understanding is that the defendant shows great remorse for his action and is determined to make amends and prove that he will do better. [If applicable: Because Mr. XYZ already registered for DACA and voluntarily provided information about his immigration status, he is potentially subject to removal if he is disqualified from DACA.] Given that [list equities], I hope that the People will consider a wet reckless plea as a means ‘to reach a just resolution’ in this case, pursuant to [Penal Code 1016.3\(b\).](#)”

<sup>266</sup> See *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG 2019). For more on the good moral character requirement, see section 17.26 of ILRC, *N.17 Relief Toolkit* (2018) at [www.ilrc.org/chart](http://www.ilrc.org/chart).

<sup>267</sup> 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).



<sup>268</sup> 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](http://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](http://www.ilrc.org/red-cards).

<sup>269</sup> 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 ILRC, [How to Use the Categorical Approach Now](#) (2021). 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.

<sup>270</sup> 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).

<sup>271</sup> 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.